## OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-530

TITLE DENNIS M. O'CONNOR, ET AL., Petitioners V. MAGNO J. ORTEGA

PLACE Washington, D. C.

**DATE** October 15, 1986

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1	IN THE SUPREME COURT OF THE UNITED STATES
2	x
3	DENNIS M. O'CONNOR, ET AL., :
4	Petitioners, :
5	V. : No. 85-530
6	MAGNO J. ORTEGA :
7	x
8	Washington, D.C.
9	Wednesday, October 15, 1986
10	The above-entitled matter came on for oral
11	argument before the Supreme Court of the United States
12	at 12:59 p.m.
13	APPEARANCES:
14	JEFFREY T. MILLER, ESQ., Deputy Attorney General of
15	California, San Diego, California; on behalf of the
16	petitioners.
17	JOEL I. KLEIN, ESQ., Washington, D.C.; by invitation
18	of the Court, as amicus curiae, in support judgment
19	below.
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21	
22	

## CONIENIS

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4	on behalf of the petitioners	3
5	JOEL I. KLEIN, ESQ.,	
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7	as amicus curiae,	
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## PROCEEDINGS

CHIEF JUSTICE REHNQUIST: We will hear argument first this afternoon in No. 85-530, Dennis M. O'Connor, et al., versus Magno J. Ortega.

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

ON BEHALF OF THE PETITIONERS

MR. MILLER: Mr. Chief Justice, and may it please the Court, this is a Federal Civil Rights action for damages under 42 USC Section 1983 brought by respondent Ortega against petitioners herein. The suit seeks \$250,000 in compensatory damages and \$500,000 in punitive damages.

when this case arose in 1981, petitioners were hospital administrators at Napa State Hospital in California. Respondent was a full-time state employed psychiatrist who was chief of professional education at that institution. He had training and supervision responsibilities over all psychiatric residents of the hospital.

In the course of an administrative investigation into charges of work-related wrongdoing on his part, two of the petitioners authorized the entry of respondent's government-assigned office and an inventory

of its contents. Thereafter this suit was filed in United States District Court for the Northern District of California alleging that the activity constituted an unreasonable search and seizure in violation of respondent's Fourth Amendment rights.

Cross-motions for summary judgment were filed by all parties. The District Court ruled in favor of petitioners, holding the activity did not constitute an unreasonable search and seizure. The District Court concluded that there was a public necessity to secure the office, that the search was efficacious, and that the degree of intrusion was minimal.

Respondent appealed to the Ninth Circuit Court of Appeals thereafter, which reversed the judgment of the lower court. The Ninth Circuit held that respondent had a subjective expectation of privacy which society was prepared to recognize as reasonable. The matter was thereafter remanded on the issue of damages only.

This Court granted petitioner's petition for writ of certiorari on the single issue --

QUESTION: Did the petitioners remove anything from the offices?

MR. MILLER: Yes, they did, Justice Brennan.

In the course of the inventory they removed three

personal items. And I will get to that --

yes.

QUESTION: That belonged to the respondent?

MR. MILLER: That belonged to the respondent,

QUESTION: Did they take any government property at all?

MR. MILLER: The record is somewhat unclear as to whether or not any government property was taken from the office. There was government property in the office. Mr. Friday, who is the hospital administrator, testified that shortly after the entry and inventory was made he went in himself to see how the progress was going. In the process he saw boxes of materials, personal items boxed and on the floor at that point, and he indicated that he opened up the right file drawer.

In the record itself it doesn't say whether it was a file drawer to a desk or to a filing cabinet, for the purpose of securing residents' files. In fact, there were residents' files there, and in addition to that there may have been other state material there. The secretary to Dr. Ortega, Ms. Sirallo, testified or gave a declaration to the effect that the respondent often took residents' files into his office --

QUESTION: Would residents' files have been government files?

MR. MILLER: Yes, they were government files,

Your Honor, and he kept correspondence there, too, that on occasion she had to go into the office and remove correspondence.

The Court granted the petition for certiorari on the single Issue of whether or not it is a violation of a public employee's Fourth Amendment rights for the employer to make an inventory of government papers in the course of an investigation into work-related wrongdoing. In terms of the factual context, this case comes before the Court on the basis of cross-motions for summary judgment and the record is not extended, and the basic facts are not in dispute. Dr. O'Connor --

QUESTION: Excuse me. With respect to the issue that we agreed to take cert on, what if we found that there was an ability to take an inventory in such an office, but that this activity went too far, that you can take an inventory but not take away personal property?

MR. MILLER: Justice Scalia --

QUESTION: Not rummage through some materials that on their face upon initial examination are immediately seen to be personal.

MR. MILLER: well, certainly the Court would have the power to do that. If the question is whether or not there is a separate seizure element here,

however, that the Court should address itself to, we would submit that there was no reasonable expectation of privacy in connection with the types of repositories that were searched in this particular case, and that a seizure within the Fourth Amendment term must implicate an unreasonable invasion of some privacy interest that is recognized under the Fourth Amendment, and we submit that that is not the case here.

QUESTION: Because a desk is a desk, and anything in the desk is open to the employer?

MR. MILLER: A desk is a desk. It is a common repository. It is foreseeable that a number of different people working for government, from clerical staff to supervisors to colleagues, will move into an office, that is, enter an office, open a desk for a variety of reasons.

QUESTION: Right, but what if I have a file in here that says "Personal, photographs of last summer's family trip"? It says that right on the surface of it.

MR. MILLER: And the file is where, now, in the desk?

QUESTION: It is in the desk.

MR. MILLER: well, it would depend. In the abstract it is very, very difficult for me to answer that question. I think it would depend upon the

necessity to access the desk to begin with. If it is a -- for example, if we are dealing with a --

QUESTION: Same kind of investigation, but in the course of doing it they encounter a file in the desk that is labeled personal --

MR. MILLER: That is certainly -QUESTION: -- and then they look into the

file. Would that be a violation?

MR. MILLER: It comes closer to the line, Justice Scalla.

QUESTION: In this case the office was locked, wasn't it? Wasn't it usually locked in his absence?

MR. MILLER: It was usually locked in his absence. He had a key to the office, Justice Marshall.

QUESTION: And who else had a key to that office?

MR. MILLER: The hospital administrator had a key to the office.

QUESTION: Is that in the record?

MR. MILLER: Yes, it's in the record.

QUESTION: So that the only thing in the record was that he had the key and he assumed no one else had a key.

MR. MILLER: He assumed no one else had a key. He had a subjective --

QUESTION: All right. Well, is that an expectation of privacy?

MR. MILLER: It is a subjective expectation of privacy, Your Honor.

MR. MILLER: Well, the two pronged test of Katz holds that in order for the Fourth Amendment to apply you must deal with a subjective expectation of privacy which society is prepared to recognize as reasonable or legitimate, and that is a separate inquiry. The reasonableness of an expectation of privacy is a separate inquiry, obviously, from the subjective expectation, and in this case there is evidence in the record that there was a subjective expectation of privacy, but that begs the issue as to whether or not the expectation of privacy was reasonable in this case.

QUESTION: Mr. Miller, do you agree that in some circumstances employees in the private sector might have a reasonable expectation of privacy in their office or their desk?

MR. MILLER: Justice O'Connor, we are talking about two different things right now. We are talking about an office and a desk. In the office context there may be repositories in the office to which a reasonable

expectation of privacy would attach in the private sector. However, that doesn't involve, obviously, a constitutional issue, because once again we are in the private sector and the Fourth Amendment doesn't apply to that kind of activity.

QUESTION: Do you think that if there are such that there can be circumstances in the public sector when there is a reasonable expectation of privacy? What about the desks of a Supreme Court Justice?

MR. MILLER: Obviously, Your Honor, if we are dealing with a desk of a Supreme Court Justice, we have to put that in context, and although I am not, certainly not privy to the practices of Your Honors in maintaining the security of your office and any expectations you may have vis-a-vis your colleagues -- certainly you don't have any supervisors.

QUESTION: We won't debate the subjective element. Objectively, are there public officers or employees who in your view can ever have a reasonable expectation of privacy in their desk or their office?

QUESTION: (Inaudible.) Don't try my desk.
(General laughter.)

MR. MILLER: In their desk per se we submit not. In the office, once again, Justice O'Connor, it depends upon the types of repositories that we are

talking about. If it is a repository that is clearly personal in nature, for example, if we have a jacket hanging behind a door, if we have a knapsack that is situated somewhere in the office, we feel under those circumstances, once again in the abstract, without specific details attaching, that a reasonable expectation of privacy would attach.

QUESTION: What does privacy mean? Coes it mean a reasonable expectation of privacy against the whole world?

MR. MILLER: No, Your Honor, we don't feel it does. We feel that a reasonable expectation of privacy is determined upon many things, the scope of the search, the purpose of the search. For example --

QUESTION: No, I am just talking about the persons against whom you expect you have a right of privacy.

MR. MILLER: That is what I am trying to address myself to. For example, if we have a public employee who has an office, I think that public employee has a reasonable expectation of privacy vis-a-vis a search by officers, police officers in the traditional context of the Fourth Amendment, but does not have a reasonable expectation of privacy, for example, that a supervisor or a colleague or a secretary will never walk

into that office and open up a desk drawer or a file cabinet or any other common repository in the office for any one of a number of reasons, legitimate reasons such as to retrieve property, to inventory property, to check on work performance.

QUESTION: Is there any reason, Mr. Miller, in such circumstances why the supervisor can't give the employee notice of what he plans to do?

MR. MILLER: well, there are many cases, Your Honor, where we would submit that the notice requirement may clearly frustrate the need to inspect. For example, if we are talking about the context of --

QUESTION: You are looking for a computer, for example, as you were in this case, as I understand it.

Couldn't you say we want to look through your office and see if you've got the computer?

MR. MILLER: That was one purpose of one of the petitioners. Actually, the individual, Justice Stevens, in charge of the inventory in this case was Mr. Friday, and his purpose or purposes were to enter the office, see what was there in terms of government property, secure the government property —

QUESTION: Couldn't he ask the doctor, say, I would like to see what you've got in your office that belongs to the government? Go through your papers with

me, and we will identify what is yours and what is ours.

MR. MILLER: He chose not to.

QUESTION: But is there any reason why -would it have frustrated the purpose of the search at
all to give him adequate notice?

MR. MILLER: It may very well have. I don't think we will ever know the answer to that question. Notice presupposes participation. Notice in and of itself doesn't really protect any expectation of privacy. Notice is only relevant or useful if participation or some involvement is concerned, and the petitioners in this case, I submit, have their —

QUESTION: Well, I suppose in this case if you had given them notice you would have said the computer is in the next office, and you would walk in and get it.

MR. MILLER: Your Honor, there were several purposes for entering that office and inventorying the contents.

QUESTION: But the computer was one of them, was it not?

MR. MILLER: The computer was an element of concern for petitioner O'Connor only, and not -QUESTION: Well, at least as to petitioner

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O Connor, wouldn't his purpose have been served if he had given them notice and the doctor had said you get it in the next office?

MR. MILLER: If that had been the only purpose of entering and inventorying in the office that could have been an alternative, but as this Court has said, the question is not what might have been, whether or not there was a less intrusive alternative available to the actor at the time.

The question is, what was done --

QUESTION: Well, but isn't your ultimate inquiry whether this is a reasonable way to handle the problem?

MR. MILLER: I'm sorry, Your Honor?

QUESTION: Isn't your ultimate inquiry one of reasonableness, and aren't there a lot of factors that might affect that?

MR. MILLER: Gur ultimate inquiry or our initial inquiry at this point, we submit, is whether or not the Fourth Amendment even applies to this kind of an activity, and we submit that at the threshold it does not apply.

QUESTION: Well, this is -- this case was decided on summary judgment, and I thought you conceded that there are some circumstances when a public employee

office. I thought you conceded that. Now, if that is the case, how do you decide this on summary judgment?

MR. MILLER: I didn't concede that, Justice O'Connor. I meant to say that in some cases there can be a reasonable expectation of privacy given the context of what the search is, who is doing the search, and what the purpose of the search is. In this kind of a context we submit that the Fourth Amendment does not apply, and in response to your question the facts are fairly clear as to what the motivation was in this case and what was done. I will grant you it is a short record, but the facts are basically undisputed.

Amendment doesn't apply, Mr. Miller? I take it you are saying not just what the Court said in TLO, that the Fourth Amendment does apply to schools, but in a much reduced form, but you are saying it doesn't apply at all. It seems to me there is certainly language in TLO that is against you on that point.

MR. MILLER: That's correct, there is language against us in TLO on that point, but at least TLO, Mr. Chief Justice, made the initial inquiry into whether or not the Fourth Amendment was applicable, and in Wyman versus James and Hudson versus Palmer this Court held

Now, it is not our intention to equate a prison cell with a place of government employment.

search is not — that an investigation or whatever you want to call it is not a search within the terms of the Fourth Amendment but it is another thing to say that the Fourth Amendment doesn't apply. I thought from your statement you meant that the Fourth Amendment just has no application to relations between superiors and inferiors and government employment.

You are not saying that?

MR. MILLER: No, the Fourth Amendment in the abstract applies everywhere. It applies to the world. But our initial submission is that the activity that took place in this case did not constitute a search within Fourth Amendment jurisprudence, and we base that on several different factors. As we have already indicated, the purpose of this action. Secondly, the social —

QUESTION: I don't know that I have ever heard

MR. MILLER: Finding the computer was not -QUESTION: It was a general investigatory
search?

MR. MILLER: Finding the computer was not per se a purpose of the search, Justice O'Connor. The executive director of the hospital, Dr. O'Connor, testified that after he learned on August 17, 1981, the start time of the -- of placing respondent Ortega on administrative leave, that the computer had been removed by Dr. Ortega. That was an additional concern in his mind.

However, he commissioned Mr. Friday, the business manager of the hospital, to do the entry and the inventory, and Mr. Friday testified in his deposition that his purposes were to inventory the property, to see what was there by way of state property, to secure that, to remove all property from the office, and to make it available for further use while still making Dr. Grtega's property available to him for pickup, which in fact they did.

QUESTION: Mr. Miller, the Court of Appeals said the investigation that gave rise to this concern, the propriety of the acquisition of a computer, that was

MR. MILLER: Yes, Justice Stevens. There had been a claim that the respondent had mismanaged his department, that he had coerced other medical residents into making contributions for the computer, that he had misrepresented to the executive director of the hospital circumstances surrounding the computer, and that he had improperly placed another medical resident on administrative leave in violation of the rules and regulations of the State of California.

undisputed, and I am sure you are stating them accurately, but the Court of Appeals didn't recite those, and the District Court made no findings, so how do we get -- aren't the key facts -- is the Court of Appeals opinion adequate to give us the key facts, or is it not?

MR. MILLER: No, the Court of Appeals opinion in this case is not adequate to give you the facts in the sense that the Court of Appeals stated that the prime motivation for the search appeared to be, in conclusionary language, a motivation to secure evidence for the ongoing personnel investigation when in fact the

District Court had concluded that the purpose of the search was to inventory property and to secure the office, and that was --

QUESTION: Which do you say it was? Or all of the above?

MR. MILLER: Well, we would submit, Justice
Scalia, that the District Court made its findings on the
evidence that was presented to the Court. That is at
Page 23, Justice Stevens, of the joint appendix, the
findings of the District Court.

QUESTION: Is there any reason why this couldn't have been done in this man's presence?

MR. MILLER: That we don't know at this point, Justice Marshall.

QUESTION: Did it say anything -- did it say why they couldn't have done it in his presence?

MR. MILLER: No, there is nothing in the record indicating why they could not have done it in his presence.

QUESTION: Well, why aid they do it in his absence?

MR. MILLER: There is nothing in the record indicating why they did it in his absence. We can only speculate at this point.

Finally, we submit that --

QUESTION: Excuse me, because I am still not clear on your -
QUESTION: If they have a right, the

QUESTION: If they have a right, the government has a right, wouldn't that right be limited to time and place restrictions?

MR. MILLER: No, Your Honor, we don't feel it is.

QUESTION: It would have been all right to go in there in the middle of the night?

MR. MILLER: Yes, the timing of the day doesn't make any difference. If we are --

QUESTION: Isn't it suspicious?

MR. MILLER: It may not look good, but once again that is not a constitutional requirement in this particular context. We are looking to determine whether or not there is a reasonable expectation of privacy, what the purpose of the search --

QUESTION: Is there a reasonable expectation that you won't go into his office when he is not there?

MR. MILLER: No, Your Honor, I don't feel there is a reasonable expectation of privacy that supervisors or colleagues or clerical people will not be going into that office for any purpose.

QUESTION: What is he going to do, destroy the

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MR. MILLER: That is very possible. I am not saying in this particular case Dr. Ortega would have destroyed --

QUESTION: Well, how were you going to find -- what evidence would you find of "sexual harassment"?

MR. MILLER: I am at a loss at this point to indicate to you any evidence that may have existed in that office relating to charges of sexual harassment.

QUESTION: Tell me, what could you possibly find that would bear on sexual harassment?

MR. MILLER: There could be all kinds of possible --

QUESTION: Like what?

MR. MILLER: Some kind of a document, for example, containing a statement that in fact sexual harassing statements had been made. In the abstract there is a multitude of possibilities, but I would stress, Justice Marshall, that --

QUESTION: We are dealing with the abstract, then, aren't we?

MR. MILLER: No, we are not, really, because in this case the stated purpose of entering the office was to inventory the office to secure state property --

of Mr. Friday.

MR. MILLER: The computer was not relevant to

QUESTION: I am still not clear on how you want us to judge this case. Your contention is that we should judge the validity or the invalidity of the search on the assumption which the District Court found that the purpose of it was to inventory and secure the office, right, and all this investigation stuff is irrelevant as far as you are concerned.

MR. MILLER: Justice Scalia, I would be happy to have the Court decide the case on the basis of the record before the District Court. No facts.

QUESTION: You have no contentions with regard to that record.

MR. MILLER: We have contentions with regard to the record.

QUESTION: What is your contention? Do you assert that the purpose was both an investigation and an inventory, or Just an inventory, or what?

MR. MILLER: The purpose of the investigation was to inventory. That was the primary purpose of the investigation, as per the testimony of Mr. Friday. At one point in the testimony of Dr. O'Connor he states

that he felt it would be appropriate for these people to look around the office to see if they can find any evidence relevant to the ongoing work-related charges of wrongdoing.

Now, he was surmising at that point. There is no indication in the record that he ever communicated that to Mr. Friday or that was ever communicated to the people who did the inventory.

QUESTION: So, in determining the validity of this entry we should assume that the purpose was to make an inventory and secure the office.

MR. MILLER: Yes.

QUESTION: Okay.

QUESTION: Well, Mr. Miller, when you say to make an inventory there are all sorts of different kinds of inventory. I mean, you may make one in a hardware store every six months without any thought that there has been anything missing or misplaced, but just to keep track of goods.

Now, I gather something more was meant by inventory here.

MR. MILLER: A sorting through of the property.

QUESTION: For what purpose?

MR. MILLER: For the purpose of discriminating

which was personal property and which was state property. That was the charge given by Mr. Friday to Mr. Stratton, the hospital security officer who was actually doing the inventory. He was told to inventory the property at inception. That proved to be a practical impossibility. There is testimony that after an hour or two it turned out to be a hopeless task for Mr. Stratton, who thereafter gave up and went back to Mr. Friday and indicated what his finding was in that regard.

At that point, Mr. Friday told Mr. Stratton to go ahead and box up the materials as best he could, sort through the property, identify what was state, maintain that, secure that, put the personal property in boxes, and put that in a stored secured area some place, and that is what was done.

QUESTION: There wasn't any notion that they might find something that implicated them in wrongdoing?

MR. MILLER: Notion on the part of whom, Justice Brennan?

QUESTION: They were sent in there to make this inventory. And was that for any purpose other than to see if there was something there that might implicate him in the wrongdoing he was charged?

MR. MILLER: Specifically, no. If we are looking at the testimony of Mr. Friday, whose responsibility it was to oversee the entry and inventory, and Mr. Stratton, who actually did the inventory, the only individual who ever voiced any concern about removing property or looking at property in terms of securing evidence for the ongoing personnel investigation was Dr. O'Connor, but there was no chain of communication from Dr. O'Connor to either Mr. Friday or Mr. Stratton in that case, so we are left, I think, with the clear inference that the purpose of the entry and the inventory was to do just as I indicated to the Chief Justice, and that was to sort out the property, identify which was personal, identify which was state, and to secure the state —

QUESTION: Mr. Miller, the District Court doesn't say that either. Neither the Court of Appeals nor the District Court. The District Court just says they wanted to secure the property because he had apparently taken something out and they didn't want it to happen again. That is the only reason — as I read the page you just called my attention to, it doesn't even use the word "inventory."

MR. MILLER: No, the District Court did not use the word "inventory." It uses the word "to secure

state property." Coviously that comes after the --

QUESTION: Because one -- they thought one -- apparently the computer had been taken out.

MR. MILLER: No, there is nothing --

QUESTION: I infer computer but they do say particularly when something already has been removed. What was it that they thought had been removed, apart from the computer?

MR. MILLER: well, the computer had been removed. That was a concern of Dr. O'Connor.

QUESTION: And that is the only concern the District Judge mentions except the fact they might put somebody else in after he got fired.

MR. MILLER: It appears as though that is an afterthought of the District Court in that regard, Your Honor, because --

QUESTION: Well, it isn't an afterthought because he says the strength of the public necessity is the major thing he has got to look at, and this is the only public necessity factor he mentions. If that is an afterthought, I don't know what the primary thought was.

MR. MILLER: The Court indicated that the purpose was to secure the office and to make it available for further use, I believe, at some point.

QUESTION: The doctor hadn't been discharged,

employee who isn't on leave, he is working. They just go around and they have an Inspector General who just every now and then drops in on offices to see if employees have their own things in their office.

MR. MILLER: That wouldn't be a violation of the Fourth Amendment, if in fact --

QUESTION: That Is your position.

MR. MILLER: -- those were the circumstances.

QUESTION: Yes.

MR. MILLER: Yes, because when we are talking about the kinds of repositories that were inventoried in this case, a desk, a file cabinet, I believe a bookcase.

QUESTION: So any time the public employer should be able to come in and say, the employee is sitting at his desk, and they say, please get up and leave, we want to search your desk, any time, day or night.

MR. MILLER: In a constitutional sense -QUESTION: Yes.

MR. MILLER: -- that would not violate the Fourth Amendment. It may give rise to work grievances, to state and common law tort remedies, Justice White, but it would not violate the Fourth Amendment in our view.

We also submit that if in fact a Fourth

Amendment interest is going to be found by the Court in

this context, that the appropriate stancard of

protection should be a reasonableness under all the

circumstances standard utilized by the Court in New

Jersey versus TLO.

We feel that a warrant requirement would be unsuited to this kind of a context.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Miller.

We will hear next from you, Mr. Klein.

ORAL ARGUMENT OF JOEL I. KLEIN, ESQ.,

BY INVITATION OF THE COURT, AS AMICUS CURIAE,

IN SUPPORT OF JUDGMENT BELOW

MR. KLEIN: Mr. Chief Justice, and may it please the Court, our argument rests on three propositions: first, that it is both customary and reasonable for a public employee to keep personal papers and effects in his work office and to expect that the privacy of such materials will be protected against arbitrary searches or seizures by his employer; second, that the application of the Fourth Amendment to office searches is not incompatible with the government's responsibilities as an employer. An employer rarely

QUESTION: Mr. Klein, let's assume this is a true story. I am working on a case, and I need a piece of paper or file or something like that, as frequently happens, and my law clerk has it, who is a government employee. It is on his desk. He has gone home for the evening or something. I go to his desk and look around the top of the desk and I see it, and I take it back and work on it.

Now, have I conducted a Fourth Amendment search and seizure, and I am only immune from a 1983 suit because it was reasonable? Is that your analysis of it?

MR. KLEIN: I think not, Your Honor, no, and I think — the reason is, I think those facts are different from this case, but I do think that in many employment circumstances, including the one you just described, Justice Scalia, that the expectation is that employers will enter the office, and that they will indeed, If the employee has gone home, be able to look for a file.

That is not the facts of this case. That, I

submit to you, is the routine employment situation. One of the differences in this case, of course, is that it was a locked door, which I think tells you something, and second of all, that in 17 years that never occurred.

QUESTION: Why does a locked door make any difference, Mr. Klein?

MR. KLEIN: It makes a difference in the following sense, that I think it confers an expectation and tells the employee something. This employee, Justice Rehnquist, was a psychiatrist. He was also a professor. And I think in that capacity there was a recognized need for the confidentiality of his office. They didn't want people wandering in. Indeed, in a way, when Justice O'Connor raised the question about a Supreme Court Justice's office.

Now, I am not suggesting that this was analogous, but there are different needs for confidentiality.

QUESTION: What if we have an employee who was neither a psychiatrist nor a Supreme Court Justice, and he has a key to his door, and locks it at night when he goes home. Can his government superior — this is an office in a government building — not enter that office by using their key to look for government property?

MR. KLEIN: I think in those circumstances, if the situation is that there is an expectation that over the years that hasn't occurred, that other employees with locked offices, it doesn't occur, then I think the government can still enter. The question is whether it is reasonable.

QUESTION: Well, but then all we need to change your conclusion, I take it, is if the government does in fact enter a couple of times, and then the expectation is destroyed because the government has entered?

MR. KLEIN: Not necessarily a couple of times. I think that is a fact question, yes, and at some point I think an individual's expectation changes. Now, I don't think that applies to his desk or other items in the office. I think that in other words it is possible to me, it seems to me that an office generally, as Justice Scalia describes, our expectation is, in the evenings, when pecple go home, others may on the basis of need enter. And I think that is perfectly reasonable, whether you view that as part of the common understanding, just as when we are in a hotel room we understand that there will be charge services provided, but the Court uniformly in its cases —

QUESTION: Right through locked doors.

	That's exactly right. But that doesn't destroy one's
2	That's exactly right. But that doesn't destroy one's
3	expectation of privacy, as this Court has uniformly hel
4	in various cases.
5	QUESTION: How do the cleaning people get in?
6	QUESTION: If it is a locked door, how do the
7	get in?
8	MR. KLEIN: They have a key.
9	QUESTION: I am talking about in this case.
10	MR. KLEIN: In this case the claim is that
11	there was a key. Now, mind you, in 17 years they don't
12	claim they ever previously
13	QUESTION: It must have been cleaned some time
14	in 17 years.
15	MR. KLEIN: Was his office cleaned in 17
16	years?
17	QUESTION: Yes.
18	MR. KLEIN: Actually, I assume it was cleaned
19	in 17 years.
20	QUESTION: who did he think had cleaned it?
21	MR. KLEIN: Who did he think had cleaned it?
22	It is not clear when it was cleaned.
23	QUESTION: It is a very strange fact of the
24	case. It really is.
25	MR. KLEIN: It is not clear when it was

MR. KLEIN: Right through locked doors.

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QUESTION: Maybe it was cleaned during -- the cleaning crew came in during his business hours maybe.

MR. KLEIN: Apparently -- the record is absolutely silent, so we are speculating, but for whatever it is worth he did spend many, many hours in the office, and so it is possible, but more important than that, that is very different from saying his employer came in and searched his desk even for a file.

QUESTION: (Inaudible) clean his office and gave them a key to get in.

MR. KLEIN: That is perfectly plausible, although the record doesn't --

QUESTION: Well, that is probably very likely, isn't it?

MR. KLEIN: I think that's right, but that would say nothing about what the legitimacy of his expectation was inside of his desk and file cabinets. He certainly didn't expect that the cleaning people were going to go inside his desk, look for books of poetry —

QUESTION: You put aside the desk. I thought the desk you said was a different matter from the locked door.

MR. KLEIN: I think his expectation vis-a-vis --

QUESTION: Is there more of an expectation in the desk than in the locked door?

MR. KLEIN: I do believe the desk is a greater expectation, yes, sir, and I think in this case it is critical to point out that even if there is this common understanding that people may enter from time to time, I think a desk is a very different matter, and this desk was thoroughly and comprehensively searched.

QUESTION: And if one of the cleaning crew went into the desk and that cleaning person was an employee of the United States, that would have been a fourth amendment violation?

MR. KLEIN: If they went into the desk?

QUESTION: Right.

MR. KLEIN: The question of whether that is a state actor, I am not sure about the answer to that. I don't think they would be exercising government authority in that situation. I think cleaning crews are instructed not to presumably enter desks, open files, so I think it would not rise to a Fourth Amendment violation. Nevertheless, it would be an intrusion on privacy, Justice Scalia.

QUESTION: Mr. Klein, is it reasonable for a supervisor to enter an employee's desk to discover whatever might be appropriate for work-related

wrongdoing of some kind? Suppose there is a deadline to get out certain work, and the supervisor is charged with making sure that employees get the work out, and it is wrongdoing on the part of the employee not to meet that schedule and get the work out, and when the employee goes home the supervisor goes in and checks the desk to see how the work has progressed.

I think that is different from this case, Justice

O'Connor. They go in -- in other words, you have an employee who has a deadline to do a product a week from now and you want to see how they are progressing. I assume the normal way that is done is, we ask the employee, we ask to see a draft, or a whole host of very reasonable ways to address that concern. I don't think it is reasonable to wait until the employee goes home, take a passkey, go into his office and check his desk.

No, I don't think that is reasonable. In any case, I do think that is very different from what happened here because what they went on to do here is search at length personal property and materials, so I would say that under any view of it the facts of this case are much, much stronger and more intrusive. Now, that leads me to the basic questions. It seems to me the way this case --

QUESTION: Mr. Klein, let me ask you one question in light of your comment there. What did they do with the personal materials that they came across?

MR. KLEIN: There are two things that happened, Justice Rehnquist. They took several pieces of personal material and actually investigated and used it. Some of it they introduced at his employment termination hearing, and that was used as evidence against him. One piece regarding the billing of a private psychiatric patient, not a hospital patient, the record says they investigated that and took no further action on it.

The other material, and this is important, personal material, according to the testimony, they boxed it up. It took them approximately — there's about a two-month period here before they even made that available, so this respondent was denied his personal material for this two-month period.

QUESTION: That is more or less of a seizure,

I take it, rather than a search.

MR. KLEIN: I think that's right, although the seizing of the book of poetry and the other things, I think there is also a search issue that Justice Scalia touched on, and that is, I think if their purpose, which it seems to me to be so implausible as not to need

really a factual hearing, if their purpose was to separate state and private property, the first question is, why were they doing it for somebody who is not about to leave? This is somebody simply under investigation. Second, when you do that, if you pick up a book of poetry you don't have to open that book to find out who sent it to him. The answer to that is apparent on the face of the book.

QUESTION: Well, certainly one could agree with you and still feel that in a search like this or inventory, whatever you want to call it, you are going to come across things that you realize are personal at some stage or another. There is no way of just automatically staying six feet away from them. It seems to me that one can certainly make an argument that the law would require no more than when you realize something is personal you set it aside and return it.

MR. KLEIN: Well, if that is what the law required, then this case, there was a constitutional violation. That's right. Now, I think the law requires somewhat more than that because of the legitimate expectations of privacy that employees have in this situation, and I think those are important. That is, I think it is just like in the TLG case. Now, employees are at work all day long. And we are saying that their

desk in particular is an area that is right in their immediate dominion. It is an area where we all know and understand people put personal papers, and --

QUESTION: (Inaudible) items like the book of poetry?

MR. KLEIN: The other items they took -- now, mind you, they took everything for a couple of months, Justice Brennan, but the items they used and investigated on this record were a picture of a former psychiatric resident, that is, a doctor in study with Dr. Ortega, some poetry that this resident had sent to him, as well as a book of poems.

Then they took the file of a psychiatric patient of his that was a private patient, and they have evidently investigated that, although it is not clear for what purpose, because they subsequently did not use it, and that is what the record shows on those matters.

QUESTION: Did they take -- in Paragraph 8 of the complaint, is that the list?

MR. KLEIN: Those are the materials that the respondent alleges were in his office and seized for some period of time. They are still there.

QUESTION: Are those the ones -- is that the

MR. KLEIN: Those are the materials that were

MR. KLEIN: He had a former resident of his who had sent him this material, and when she testified for him at the hearing, they tried to impeach her showing, I guess, that she was infatuated. In other words, it went to her motive, I assume, Justice white.

QUESTION: Weren't those personal records his?

MR. KLEIN: Absolutely, and they acknowledge that.

QUESTION: Well, you didn't say so.

MR. KLEIN: If I didn't, let me correct myself. Those were his papers, personal papers that they acknowledge were his. There is no dispute, and respondents have repeatedly — petitioners have repeatedly conceded that.

Now, I want to, if I might, go back, because I think it is important in analyzing the case to realize that we do have expectations with respect to our office, and they are expectations that extend to our employers, and those are not different, nor indeed are they any less important than the expectations that school children have in the case of TLO, and I think it is a common understanding and a common practice that all of us share that when we go home a night, that our

QUESTION: You keep shifting back and forth.

I thought we went around this before and you said the distinctive feature of this case was that it was a locked office that he had the key to, he thought he had the only key to, right?

MR. KLEIN: I think that's correct, but I also think it goes beyond that.

QUESTION: Even if those factors didn't exist you think there --

MR. KLEIN: At least with respect to his desk, yes, sir. That is correct. And in other words I think — I am arguing in the alternative here, Justice Scalla, because I think it is important that the more common understanding which are not the facts of this case, is that there will be some kind of entries when employees are not around, but I think even those are appropriately limited, and I think we understand that and have a shared perception.

QUESTION: Well, then, if that is the approach you take, that where there is not an expectation of privacy, you know that there will be some intrusions. The Fourth Amendment still applies with regard to any intrusions beyond that. Then is there any area where the Fourth Amendment doesn't apply? I had thought that

but I think, that is, I think you have to analyze it stepwise. My view is that the Fourth Amendment does not apply in most situations to a routine office entry.

That is, if an employer or co-worker walks into your office looking for a paperclip, I don't think that is a Fourth Amendment issue. Now --

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QUESTION: I am not talking about an entry. I am talking about an office. Is an office -- does that question make any sense to you --

MR. KLEIN: It does if you are talking about a search.

QUESTION: -- whether an office has any Fourth

Amendment protections.

MR. KLEIN: Yes, it does. Yes, it coes.

QUESTION: All right.

MR. KLEIN: And I think that has been held by

this Court in numerous cases that an office is one of those areas that are within the protection of the Fourth Amendment. Yes, sir. And I think when they search an office, which I define to be the kind of activity they did here, that is, comprehensive, going through the desk, the file drawers, its contents, when they do that, that raises a Fourth Amendment issue and the question is under the Constitution whether it was reasonable.

My view is, here it was unreasonable under any plausible standard. I take the view that given the facts here, his expectations, and the purpose of the search, which was to secure evidence, personal evidence, private evidence to use against him, that the appropriate constitutional standard is a warrant, and I say that because this is somebody who was singled out, was under investigation, and had his personal material being selzed to use against him, and I think that is an appropriate time to require a warrant.

office situation if it is an office of public -- a public office, public employee, public employer, can the supervisor not enter that office in most instances any time and see what is in plain view? Do you take the position that a given public office could give rise to a Fourth Amendment violation if a supervisor enters it but

not if the government-paid janitor enters it and sees what is in plain view?

MR. KLEIN: No, I agree with you, Justice O'Connor. The point as I understand it is that a supervisor can walk in and if there is contraband or other items in plain view, that that would not be a Fourth Amendment violation. I am absolutely in agreement with that.

QUESTION: Well, suppose the supervisor walks in and in his or her heart hopes to find some obvious evidence of wrongdoing that is work-related?

MR. KLEIN: I think if it is in plain view, so to speak, yes. Now, if the supervisor goes in and conducts a search, then no, I think that is a Fourth Amendment violation, and if he wants that authority in this situation where he goes in after somebody has been sent home, enters through a passkey, and wants the authority to search the contents in order to find evidence knowing full well that people keep personal items there, then my argument is, he needs a warrant, because the individual interests are very great in that situation.

People have expected that they will be allowed to keep private items in their desks, and they rely on that. Indeed, one option in an appropriate

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circumstance, if the government has a need for routine entries and detailed searches, it can pass a regulation. The Mint has that. The National Security Agency has that. There is none of that here.

QUESTION: Well, if the government had a universal regulation saying to all of its employees, when you work for the government you have to understand that we have a right to make an inventory search at any time. Then is it all right?

MR. KLEIN: I don't think that a universal regulation that like that would hold up, much as I don't think that you could reverse the Court's decision in TLO by simply saying anybody who comes into a school can have their purse searched. No, I think there are standards, and I think they grow out of the Court's inventory cases, that the government has to show a reasonable need for such a regulation, and there are instances. I mean, the Mint is an obvious one, the Post Office, National Security, but I don't think that is generally the case, and one of the facts that I think is important is, it is very, very rare for employers to conduct this kind of general search that really goes through everything, and their needs are very, very diminished. Virtually everything they need to accomplish to determine whether people are doing their

work, to get back their property, they can do fully consistent with the interests of the Fourth Amendment and respect the privacy of their people.

Indeed, if there is a concern about whether or not people should search desks because they are going to come in after hours, one thing the government can certainly do is say, don't keep business files in a desk, that the desk is, it is your dominion, you need a certain area for privacy, keep your private materials in that desk, but business files keep some place else.

But what has happened here, and that is what is so troubling, is the expectation for 17 years was one way, and then all of a sudden when this person was out, for reasons that even today we can't be told, everything was gone through, studied, detailed in the most personal —

QUESTION: Was there a personnel investigation going on when the search was made?

MR. KLEIN: Yes, sir.

QUESTION: And that is the personnel investigation that ultimately resulted in his discharge?

MR. KLEIN: That led to his termination.

That's correct.

QUESTION: And you don't think this particular

MR. KLEIN: My view is, it had a lot to do with that investigation, that indeed it was intended to further the investigation, that they had singled him out and were searching for evidence against him, and that is precisely, Justice white, why I think we ought to have a warrant in this case.

QUESTION: You think if it is that work-related, all that means is that you should have a warrant?

MR. KLEIN: I think on those facts, yes, sir, because they are claiming the right to search for personal information, but let me conclude on this point that even if the warrant standard, and I think on the facts here that is the right approach, because let me just say that I think that they were looking for information to use against him to take his job away from him. He had been singled out. This was not a stop case like in Prowse or an administrative search where people routinely were told their offices would be looked at. He had been singled out, but even if you take the TLO standard, it is inconceivable that we could have a lower standard at the work place than we have at the school given the interests of employees and their adult age.

Under TLO there has to be reasonable suspicion

when you go in to do the search that you will uncover evidence.

QUESTION: And of course the evidence you may uncover, I take it, may be personal material. There is nothing in the Fourth Amendment that prevents a seizure of personal material if it is relevant to some government purpose.

MR. KLEIN: I agree with that, Justice -QUESTION: So that to say these people took
personal material from the desk is not a complete
putdown of the state's case here. If the state were
able to show that the material they took was relevant to
the personnel investigation.

MR. KLEIN: Well, I think if they had a warrant or if they satisfied the Fourth Amendment standard.

QUESTION: That would go to relevancy.

MR. KLEIN: No, it doesn't -- I am saying under -- I am not -- I haven't here disputed that under an appropriate standard they couldn't seize that material.

QUESTION: Even though it was material that you classify as personal and other people would, too.

MR. KLEIN: Much as the same point I would make, by the way. Employees often take materials, work

materials home. That is something that people know about all the time. Just because it is the -
QUESTION: Well, here this man used to take

the computer home, didn't he?

MR. KLEIN: He evidently did. Yes, sir.

QUESTION: (Inaudible) you are talking about.

He used to take it home on Saturday, regularly.

MR. KLEIN: That is what the Ninth Circuit found. Yes, sir. But the point being there, too, of course, the mere fact that even if it is work materials involved, employees take those home, that obviously doesn't give an employer the right to go search.

QUESTION: What was searched in TLO?

MR. KLEIN: What was -- excused me?

QUESTION: In TLO.

MR. KLEIN: What was searched?

QUESTION: Yes, what was the --

MR. KLEIN: The purse.

QUESTION: The purse. Are you equating a purse to a desk as far as the expectation of privacy is concerned?

MR. KLEIN: Yes, sir, I am. I think for Fourth Amendment purposes I think that is absolutely clear. Indeed, I do think that if --

QUESTION: Do you think a student would have

MR. KLEIN: I think a student's desk is different from an employee's desk. And I really haven't analyzed the facts, but I think it is probably less of an expectation for a student's desk than an employee's desk.

QUESTION: I think personally a purse is more different from a desk than a student's desk is different from an employee's desk.

MR. KLEIN: Well, I mean, I guess that is sort of — I have thought about this in these terms. What would it be worth to me if they took away the privacy of my desk, and I think that is a very significant loss. Now, I don't carry a purse so I haven't been able to make the comparison, but nevertheless — with the holes in my pocket a desk is an easy case for me, but the point being here is, even under the analysis is, one, whether there is an expectation, and I think that is clear on the facts, and second of all, even under TLO, when asked why they went in there, what they were looking for, even today the state is not clear what evidence they were looking for, and second of all — so

they had no reasonable suspicion, and they never argued they did, and second of all, and this seems to me the unanswerable question remains unanswered, is if everything else fails, this scope exceeded its purpose. The scope of this search exceeded its purpose.

QUESTION: The purpose was?

MR. KLEIN: The purpose that they allege,

Justice Rehnquist, was to separate state and personal

property. That is what they have written in their

brief. If that is the purpose, then it seems to me

clear that when you get to a book of poetry it is very

easy to tell what pile that book goes in, so the scope

had to be excessive.

If it was an investigative search I agree with you that it is possible that they would have had a basis for retrieving that evidence, but they had no suspicion that that evidence would be there.

QUESTION: (Inaudible) they might have looked at it to see what it is, but then they should have put it aside?

MR. KLEIN: Yes.

QUESTION: But they shouldn't have seized it.

MR. KLEIN: They shouldn't have seized it, and they shouldn't have gone so far as to read it to find out who sent it to them. You pick up a book of poetry.

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On the cover it says by Walt Whitman, Leaves of Grass. At that point you know that it is his. You put it in a box. What did they do? They opened it up, found out who sent it to him. Then they seized it --QUESTION: Maybe he reads poetry to his

patients.

MR. KLEIN: It is possible that he --QUESTION: Read poetry to his patients.

MR. KLEIN: Even if he does, it is his personal papers, and much of what he uses --

QUESTION: Well, it could be work-related is what I am suggesting.

MR. KLEIN: The book of poetry could be work related. No, the question -- they are not saying whether it was worked related. They said they were separating personal and business property.

QUESTION: I see.

MR. KLEIN: And they have made no claim that they issue poetry in California to psychiatrists.

Thank you.

QUESTION: Mr. Klein, you have got a couple of minutes.

(General laughter.)

QUESTION: It is not invariable, but often when you have a right of privacy against the government

in a particular territory or area such as a desk or purse or what not, you would also have rights against private individuals. Do you know of any civil cases, civil suits against private employers for trespassing upon the desk or invasion of desk privacy or anything of that sort?

MR. KLEIN: I don't know of any such case. I do know of one case in the Third Circuit, Justice Scalla, about an employee, a private employer who opened a — a private employer opened an employee's mail at the office. In that case it was a tort action. In this case, of course, respondent did allege privacy violations under state law which, if he had proved up would have been equally true to a private employer as well.

QUESTION: Thank you.

QUESTION: I suppose it wouldn't be strange if a private employer went into a desk and seized some private property and refused to give it back that he might get sued for it.

MR. KLEIN: Oh, I think if he did what was done in this case, I think there would clearly be a tort action available for retrieving the property. I thought the question was simply whether he had gone into the desk, not whether he had seized the property.

QUESTION: Right, it was.

MR. KLEIN: Okay.

CHIEF JUSTICE REHNQUIST: Thank you, Mr.

Klein. The case is submitted.

(Whereupon, at 1:56 p.m., the case in the above-entitled matter was submitted.)

## CERTIFICATION

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#85-530 - DENNIS M. O'CONNOR, ET AL., Petitioners

V. MAGNO J. ORTEGA

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. BY Paul A. Richardon

(REPORTER)