ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
WILLIAM H. WEBSTER, DIRECTOR OF CENTRAL INTELLIGENCE ,	)	
	)	
Petitioner,	)	No. 86-1294
v.	)	
	)	
JOHN DOE	)	
	)	

Pages: 1 through 42

Place: Washington, D.C.

Date: January 12, 1988

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Petitioner,

V. : No. 86-1294

JOHN DOE

Washington, D.C.

Tuesday, January 12, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:08 a.m.

APPEARANCES:

CHARLES FRIED, ESQ., Solicitor General, U.S. Department of Justice, Washington,D.C.; on behalf of the Petitioner.

MARK H. LYNCH, ESQ., Washington, D.C., on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument now in Number 86-1294, William H. Webster v. John Doe. General Fried, you may proceed whenever you are ready.

ORAL ARGUMENT OF CHARLES FRIED, ESQUIRE

ON BEHALF OF PETITIONER

MR. FRIED: Thank you, Mr. Chief Justice, and may it please the Court:

In this case, the Director of the Central Intelligence Agency dismissed from his employment Doe, who had been employed in the Agency for some nine years. At the time he was dismissed, he held a covert position as an electronics technician.

In January of the year in which he was dismissed, he voluntarily informed security officials that he was a homosexual; and after considerable inquiry, negotiation and discussion, in May of that year he was informed that the Director of Central Intelligence had decided to terminate his employment pursuant to Section 102(C) of the Act, which speaks of termination with the Director deems that such action is necessary or advisable in the interests of the United States.

Doe brought suit, seeking reinstatement or reconsideration of the decision.

The Court of Appeals held that there were no procedural defects in the procedures below, but did state that

there was unclarity about the basis for the Director's action.

It was possible, in the Court of Appeals' view, that Doe had been dismissed pursuant to a general policy of dismissing all homosexual employees. Again, they found further unclarity there.

To the extent that such a policy dealt with employees who had engaged in homosexual activities, which Doe had stated he had since the year 1976, the Court of Appeals felt that the matter was foreclosed by Circuit precedent in the case of Dronenburg v. Zech.

However, the Court of Appeals thought it possible that Doe had been dismissed on the basis of a general policy for dismissing all employees with a homosexual orientation.

And in that event, it became incumbent upon the Agency to explain, in the Court's words, "at the very least," why such a policy was necessary and advisable in the interest of the United States.

The Court of Appeals concluded, of course, that, to the extent that these questions must be pursued in the District Court, that review was not precluded under the Administrative Procedure Act by Section 102(C).

It has been our position in all courts and it is our position today that Section 102(C) of the National Security Act of 1947, which sets up the Central Intelligence Agency,

precludes judicial review, under the APA, of this question.

It is important at the outset I think to have a sense of the structure of the 1947 Act as a whole. It is quite a short statute. It is a statute which establishes the Agency.

The first provision says there shall be a Central Intelligence Agency and a director and a deputy director, and then goes on to say what will happen if the director is a member of the military.

The next section, which is Subsection (C), the one in question here, which is the very first substantive section of the Act, states that, notwithstanding the provisions of Section 751, or the provisions of any other law, the Director of Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States.

That is the first substantive section of the Act setting up the Agency.

The next section, the very next section, sets out the powers and duties of the director and the Agency, and that section contains the provision which was the subject of this Court's recent decision in CIA v. Sims.

It is that section which states that the Director of Central Intelligence shall be responsible for protecting intelligent sources and methods from unauthorized disclosure.

In our view, these two sections are really flip sides of each other, that the general injunction upon the Director to protect the intelligence sources and methods of the United States implies, and then that it has set out the specific duty to protect the integrity and security of the CIA work force.

It seems to us, further, that the decision of this Court in CIA v. Sims, which dealt with the latter provision, sets the tone and sets the context for the consideration of the case here.

In the Sims case, the Court of Appeals, the same Court of Appeals as decided this case, while recognizing the very special and delicate position of the Agency, went on to give that provision what this Court described as a "crabbed interpretation," an interpretation which would allow a considerable amount of what I would call rummaging around in the business of the Agency in litigation, through deposition, through discovery, through testimony, document production, and the like.

QUESTION: Mr. Fried, I am not sure that I know exactly how to interpret the majority opinion of the Court of Appeals in this case.

Do you think that Court opened it up for courts to determine in each instance under 102 whether the decision was in the interest of the United States?

MR. FRIED: I think it certainly did.

What the Court said was that there was a possibility that the firing was on the basis of a general policy relating to employees with a homosexual orientation.

Therefore, it was open for District Court to inquire what the policy is.

And, Justice O'Connor, it is not sufficient, I suppose, once you get into litigation, for the Agency simply to say well, we have no such policy. Because the litigant can say, yes, you do, and let's have a lawsuit about that.

QUESTION: Is it open to the Director to protect himself from judicial inquiry by saying in effect that he intends to give no reason?

MR. FRIED: The Court of Appeals, in one of the more mysterious aspects of its decision, said that if the Director intended to terminate the employment without giving a reason, that that would be all right.

But if, however, he was terminating the employment on the basis of this policy, that would trigger the responsibility of the Director to explain at the very least why his decision and that policy was necessary and advisable.

Therefore, it would seem to me that it is open to a persistent litigant in every case to say you, Director, did not intend to give reasons, but it seems to us that nonetheless, you acted under a general policy and now we think that policy

is unconstitutional and you must at the very least explain why it is advisable.

QUESTION: If it is correct that the Director intended to give no reason, do you support that aspect of the Court's opinion?

MR. FRIED: I would be very happy to rest content with that, except I don't know what it gives me.

I am afraid that I am buying an empty bag there, because the Court of Appeals, while it acknowledge that possibility, I don't think would have been content with a simple statement that that is what we intend.

Indeed, it is a little hard to know how the Director could have more clearly indicated that he was not putting forward reasons, and inviting inquiry into the basis of his action, because what he stated was that he is terminating the employment because he deems it necessary and advisable.

Now, that seems to me to be about as good a way as any to say I don't want to give any further reasons. And yet, the Court of appeals said well, let's rummage around a little bit more to see what we come up with. And that is what I think is intolerable.

QUESTION: Do you think that the Congress intended to preclude litigation of even Constitutional claims with 102?

MR. FRIED: Yes, I do. that has been our position right along and that is certainly our position here today.

QUESTION: Even if were for example a policy not to hire a black or a woman or something of that kind?

QUESTION: Justice O'Connor, if the policy related to hiring or promotion, Congress has subjected the CIA, in 72, to Title VII, so that we would not that.

I think what we are talking about is termination of employment. And termination of employment is a very special matter, because if you are an employee of the Central Intelligence Agency, you have access to the most sensitive intelligence information which this country possesses. And the only way to remove that access is to terminate the employment.

I think that is why such a special emphasis is given to the issue of termination of employment and why it, in the Congressional scheme, this is a Congressional scheme, it stands on a different footing from the initial employment decision or even promotion decisions.

The Central Intelligence Agency is subject to Title VII and in fact welcomes the procedures that are involved because it considers that those procedures in their invocation which involve a considerable amount of internal review, maintains the kind of morale inside the Agency which they are very anxious to have.

But there does come a point where the Agency simply must be able, without giving reasons and without triggering the kind of inquiry, narrow as the Court said it was, but wide as

we think it is, without triggering the kind of inquiry in open court.

QUESTION: Why would a Title VII promotion suit involve any less rummaging around? I mean, one agent says I've done a better job on my covert assignments, and I can prove it.

MR. FRIED: There are a number of very important reasons. There is confession and there is avoidance, Justice Scalia.

Certainly what is involved in Title VII is a requirement to go to the Agency and to pursue internal remedies there. And the fact that there have been a handful, literally a handful -- well, seven; I suppose that's a hand and part of a second hand -- of those cases filed, since 1972, indicates that the internal procedures take care of the matter.

Now, you can have the lawsuit. The important thing is that that lawsuit itself might be trumped by 102(C). And it is important to keep that possibility open.

QUESTION: I thought you were rejecting that possibility. I thought you were saying 102(C) does not prevent the Title VII lawsuits for promotion but it does prevent this.

MR. FRIED: Well, there would be the promotion and perhaps there might be damages paid, but if it was determined that this person no longer is somebody with whom the Agency is comfortable as somebody with access, then they could terminate that employee.

QUESTION: No, they have not terminated him. They just have not promoted him. He says he is entitled to a promotion. And you say that a lawsuit will lie.

MR. FRIED: It will lie. There is no question that it will lie.

QUESTION: And I say I do not see why that doesn't open up the CIA to the same kind of probing that you are objecting to here.

MR. FRIED: Well, it does, but that is Congress' decision.

We are saying that Congress made quite a different decision as to the termination of employment. And I think that is a rational line to draw.

QUESTION: It seems to me irrational. I would think that you would want to give the individual more protection for dismissal than you would for promotion.

MR. FRIED: The person who is interested in pursuing a promotion claim is a person who is interested in working within the Agency and who the Agency it interested in keeping on in some capacity or another.

That person, on both sides of the transaction, is still as it were, part of the family.

When you have a termination matter, you have a person who at least one side of the relationship wishes to sever entirely.

That is just a balance which was struck by the Congress.

It is also worth noting that Title VII lawsuits involve particularly serious and traditionally particularly important Constitutional rights.

If Congress decided, which it has, that discrimination on the basis of age, sex, race, are forms of discrimination which are simply intolerable, then that is a conclusion which we must bow to. This is not a Constitutional argument we are making.

QUESTION: All of that goes, it seems to me, though, not to -- you have been objecting to rummaging around. It seems to me the rummaging around is going to be the same in both cases.

Now, I can see a distinction between the two, based not on the rummaging, but on the fact that the Courts absolutely have no power to require the Director to hire somebody he does not want in his office.

That is a different point from rummaging.

I could see drawing the distinction between Title VII non-firing cases and other Title VII case on that basis.

That is, the Court has the power to prevent him from promoting someone, or from not promoting someone, but he has absolutely no power to prevent him from telling somebody to be gone.

But that is not what you seem to be arguing.

MR. FRIED: If the Courts have the power, as the Circuit Court here asserted, to tell the Director, you may not tell someone to be gone, then what follows is the mischievous rummaging which concerns us.

Now, there is no doubt, the Agency is going to be subject to lawsuits in a variety of areas. Congress did not say everything the Agency does, whatever it might be, and to whomever it may do it, is absolutely precluded from review.

And my argument should not be taken as asserting that. What I am asserting is that Congress drew a line. Perhaps the line should have been drawn somewhere else, as a matter of policy.

But Congress drew the line where it drew it. And we are saying that where it has drawn that line, it should be respected. And the Court of Appeals, while it gave a tip of the that to the important policies there, in effect authorized the most extensive kind of inquiries.

And that, we think, is what Congress intended to preclude in 102(C), though, to be sure, they did not intend to preclude it in respect to Title VII actions. So be it. That is Congress' decision.

But here we have the Executive and the Congress lined up together, rather firmly, for the proposition --

QUESTION: Mr. Fried, I am a little puzzled. They

did not intend to preclude it in Title VII actions, but then you say only Title VII actions involving promotions, but not Title VII actions involving discharge?

MR. FRIED: That is correct. That is correct.

QUESTION: But is that question presented in your certiorari petition? You just asked about review pursuant to the APA, I thought.

MR. FRIED: Yes, that is correct.

QUESTION: So we don't have a question presented as to whether there can be a Title VII action or a Federal Question action.

MR. FRIED: No. We do not, in this case. I was endeavoring to answer Justice Scalia's question.

QUESTION: What you are saying though is your broad position is that even if the Agency had a policy of just hiring born again Christians and for religious reasons they thought they were the only appropriate agents to hire, that could not be reviewed?

MR. FRIED: No, that is not my position. 102(C) refers to termination.

QUESTION: Well, they terminated everybody who wasn't a born again Christian.

MR. FRIED: They would have to hire them first.

QUESTION: Sure, they hired them.

MR. FRIED: That would strike me as very peculiar.

QUESTION: Suppose they did it?

MR. FRIED: If they did it, I think they would be in very hot water of all sorts.

QUESTION: But would it be judicially reviewable? That is what I am asking.

MR. FRIED: It is my position that it would not.

QUESTION: It would not.

MR. FRIED: But there is no doubt that this Court would be pressed, and I think might very well be tempted, to reach a different conclusion in that case, because we have here not one, but two questions.

We have, first of all, the statutory question: does 102(C) preclude judicial review?

And I am quite clear that 102(C) would preclude judicial review even if the claim were made that they first hire and then terminate all employees who are not born again Christians.

This Court might nonetheless conclude that 102(C), as applied to that circumstance, is unconstitutional, as applied. They might so conclude.

But I do not think that that extreme, but perhaps useful, ability to keep the door unlocked though closed applies in this case with these claims.

QUESTION: Assuming, and I am not suggesting that it is, but assuming a policy of denying employment to homosexuals

was unconstitutional, why would the review issue be different than denying employment to anyone who is not a born again Christian?

MR. FRIED: Once again, it is not a question of denying. It is a question of terminating.

QUESTION: Terminating. Sure. You have a change of administration. The prior administration hired all these people.

The new administration comes in and says we just don't think we want anybody except born again Christians and no homosexuals.

If it is unconstitutional to do that, you seem to concede it would be reviewable on the religious issue but not on the other issue.

MR. FRIED: I do not say --

QUESTION: We might be pressed to find it was.

MR. FRIED: I am quite clear that 102(C) expresses a Congressional intention to preclude review.

I cannot predict what this Court would say if that claim -- religious discrimination -- were brought to it and the question was whether 102(C) was Constitutional as applied to that claim.

QUESTION: I am puzzled by the footnote that your opponents have on Page 16 of their brief about the quotes from the District Court where the Government lawyers seem to say

that they were not asserting that the Director protected them, insulated them from the Constitution. But you seem to say they are.

MR. FRIED: Absolutely we are saying that. And in our reply brief we thought it important to deal with that point by reprinting portions of the colloquy.

Our position is that we have been asserting, from the outset, that review is precluded, and, of course, that such review is Constitutional.

Now, at different times, pressed with different questions, Government lawyers have struggled with different aspects of that very difficult point.

But our position right along has been 102(C) precludes APA review of this question and, as applied in this case, it is perfectly Constitutional.

We have never receded from that point and we certainly press it here.

QUESTION: I thought Justice Stevens asked whether you asserted that you were insulated from the Constitution. Was that how you put the question? And to that question, as I understood you brief, you are not saying you are insulated from the Constitution.

MR. FRIED: One is not insulated from the Constitution, in the sense that this Court is going to have to decide whether the review preclusion as applied to a particular

claim is Constitutional.

We say that it is. And if we are correct, then to that extent, the matter is insulated from the Constitution if that is how one wishes to put it.

But you are never insulated --

QUESTION: One can be insulated from our review without being insulated from the Constitution, I take it.

The President, in deciding whether this policy should be adopted, about homosexual firing in the CIA certainly has to sit down and think, does the Constitution permit this, doesn't he?

He could not do it if the Constitution in his view prohibited it, could he?

I thought your brief said you are bound by the Constitution, but your judgment in this narrow area of the CIA is final, as opposed to our judgment being final, where it normally is.

MR. FRIED: There is no doubt that the Director of the Central Intelligence Agency takes an oath to support the Constitution and that 102(C) is a review preclusion statute, not something which says that the Director of the Central Intelligence Agency is somehow not subject to the Constitution he takes an oath to uphold.

QUESTION: General Fried, you say that 102(C) prevents review by the Courts of a claim that the termination

was accomplished unconstitutionally.

MR. FRIED: That is correct.

QUESTION: That is discriminated, or no hearing, something like that.

MR. FRIED: that is correct. That is correct.

QUESTION: I have trouble with this "insulate" word. Who else in the United States is insulated from the Constitution, other than the Director of the CIA?f

MR. FRIED: I think many persons are insulated from judicial review of their actions. No one is insulated from the Constitution.

QUESTION: You said he was.

MR. FRIED: If I did, I misspoke, Justice Marshall.

QUESTION: I am quibbling with your language. That is what I am quibbling with.

MR. FRIED: I beg your pardon?

QUESTION: I am quibbling with your language, that he is insulated from the Constitution.

MR. FRIED: I welcome the correction, because I would not want to make that assertion. He is not insulated from the Constitution. He is insulated in a very narrow area from judicial review of his decisions, but he is not insulated from the Constitution.

QUESTION: Who else has that insulation?

MR. FRIED: I suppose the President. If the

President should terminate my appointment --

QUESTION: We have had some opinions here that said that the President was not insulated from the Constitution.

MR. FRIED: In some of his decisions he is and in some of his decisions -- not insulated from the Constitution, insulated from Court review of his decisions.

QUESTION: You are back on the same thing. Why do you keep saying insulated from the Constitution?

MR. FRIED: It is a bad habit, and I should be broken of it, Justice Marshall. Thank you.

QUESTION: Mr. Solicitor General, in all fairness, I do not believe you first used that phrase here.

MR. FRIED: Well, I hope I don't.

QUESTION: I think it was used first from the Bench.

MR. FRIED: I would like to say a little bit about the statutory interpretation point, whether indeed 102(C) intends the very categorical insulation from judicial review, though not from the Constitution, which we assert.

Our point is really quite a simple one, that at different times, different language is used to accomplish this.

In 1978, the Congress said that the President may detain or remove hostile aliens. And in the first case under the APA the Ludecke case, this Court said that was sufficient to preclude APA review.

In 1947, the language was "...in his discretion." In 1964, in the Act setting up the National Security Agency, the language is "...in his discretion, and it is final."

In 1984, in the statute setting up the Defense Intelligence Agency, the language was "...final and shall not be appealed outside the Department of Defense."

To our minds, the language changes. The thought is the same. The boilerplate gets thicker, but it seems quite clear that in 1798, in 1947, in 1964, in 1984, Congress was seeking to accomplish the same result.

If that is not so, then we have the anomaly, an anomaly which Congress clearly stated in various reports, it did not imagine it was facing, that the Secretary of Defense, in respect to the Defense Intelligence Agency, or the National Security Agency, has this unreviewable power, but the Director of the Central Intelligence Agency does not.

It seems to us that that is not a sensible scheme, and it is not the scheme which Congress imagined it was enacting. If I may save the remainder of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, General Fried. We will hear now from you, Mr. Lynch.

ORAL ARGUMENT OF MARK H. LYNCH, ESQUIRE

ON BEHALF OF RESPONDENT

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

The only claim that Mr. Doe has that survives the Court of Appeals Opinion is the decisions of the Court of Appeals that he has an arguable Constitutional claim, if in fact the Agency has a policy of discharging people on the basis of homosexual orientation.

So the question then is whether Section 102(C) of the National Security Act of 1947 precludes judicial review of that Constitutional claim.

Now, whether or not the Government conceded that there could be review of Constitutional claims, I think they did in the District Court. It is less clear in the Court of Appeals.

But whether they conceded it or not, it is absolutely clear that that issue was not litigated, because as the case progressed to the District Court, and in the Court of Appeals, the question was whether the Agency had followed its regulations, not whether it had violated a substantive Constitutional prohibition.

So consequently, the question of whether the statute precludes judicial review of a Constitutional claim was not litigated below.

At the least, we think the Court ought to remand the case. If it thinks that the statute does preclude review, at the least it ought to remand the case for ventilation of the question of whether Congress can constitutionally preclude

review.

However, we also submit that the statute does not preclude review of Constitutional claims.

The statute on its face says nothing about judicial review. The legislative history says nothing about judicial review.

What the statute does say is that notwithstanding the provisions of the Lloyd-LaFollette Act or any other statute, the Director, in his discretion, may terminate Agency employees when he deems it necessary and advisable for the United States to do so.

Now given the fact that there was not judicial review of termination decisions in 1947, the most plausible explanation of that language was that Congress was intending to keep CIA employees who had been terminated out of the Civil Service Commission, where they were entitled to go under the Veterans Preference Act which had been passed in 1944.

That seems to be a very plausible, rational Congressional expectation. The CIA, after all, in the beginning, in 1947, was going to be heavily populated with Veterans in the Office of Strategic Services. They were Veterans.

Without this statute they would be able to go to the Civil Service Commission to contest the Director's termination decisions. And it is quite plausible that Congress would have

wanted to prevent that.

But, since there was not judicial review of any termination decisions at that point, it seems to me impossible to say that Congress intended to preclude review in 1947.

QUESTION: Was there not some review under the Back Pay Act, over a period of years?

MR. LYNCH: I do not believe so Your Honor. Not that early. I think the Back Pay Act came along a little later.

I do not know the precise year but my understanding is that there was no review at all in 1947.

QUESTION: But that theory, that they just used it to keep it out of the Civil Service Commission review, that would not just apply to Constitutional claims.

Why does that lead to a conclusion at least that only Constitutional claims can be --

MR. LYNCH: There is also the question whether the statute precludes review of Agency regulations.

QUESTION: Non-Constitutional claims.

MR. LYNCH: Non-Constitutional claims.

QUESTION: What is your position on that?

MR. LYNCH: Our position is that it does not.

In fact, the Government's position, stated at Page 18 of their reply brief in the Court of Appeals, is that the statute does not preclude review of actions alleging that the Agency has failed to follow its regulations.

They accept the rule of Service v. Dulles and Vitarelli v. Seaton, that they have to follow their own regulations.

They also accept the fact that you get review of personnel decisions under Title VII, short of termination.

Mr. Fried does not really concede it but he suspects that if there were certain kinds of Constitutional claims, this Court would also grant review.

I might also say that another provision of the National Security Act of 1947 which Mr. Fried neglected to discus is the CIA Information Act of 1984, which is an amendment to the National Security Act of 1947.

That statute, which was passed after the Sims decision, makes it very clear that the Agency is subject to judicial review under the Freedom of Information Act.

So in many respects, the Agency is subject to judicial review.

Now, in view of the lack of any textual support for preclusion, any legislative history support, what the Government is really arguing is that the Congress must have insulated this very sensitive Agency from judicial review.

But as I have just pointed out, in a number of other significant respects, the Agency clearly is subject to judicial review.

So this "rummaging around" argument does not, with

respect, hold water.

QUESTION: Mr. Lynch, as I understand the Government's argument, it is not so much that 102(C) in so many words insulates from judicial review but when you apply it through the APA, by reading the APA in the context of 102(C), you find that there is no judicial review.

MR. LYNCH: That is why it is so important to focus on the solitary Constitutional issue that is at stake here.

Even if Section 102(C) met the standards of either Section 701(A)(1) or (A)(2), for preclusion, even if it did, and I do not think it did, but even if it did, that would not preclude, that would not resolve the question of whether a Constitutional claim is precluded.

Because quite apart from the Administrative Procedure Act and the exemptions to the Administrative Procedure Act, people who are directly injured by the unconstitutional action of an Executive Agency officer can get review of that claim in the Courts.

You need a statute that very clearly, and very, very clearly sets forth an intent to preclude review of a Constitutional claim.

QUESTION: I thought the question presented here, and maybe it is a broader question, but I thought the question presented was whether judicial review is available under the Administrative Procedure Act, 5 U.S.C. Section 701?

MR. LYNCH: I understand that is the question they have written. But given the posture of the case --

QUESTION: I thought that is the question we accepted certiorari on?

MR. LYNCH: Yes, but you cannot change the posture of the case, Judge.

The only issue that is left in this case is a Constitutional claim.

Now, whether Section 702 meets the standards of Section 701, you still have that Constitutional claim.

I think the way the Government justifies its phrasing of the --

QUESTION: I thought one of the nice things about being on this Court was we only had to answer the questions we decided to answer.

MR. LYNCH: That is true, but you still have to deal with the cases as they come up here.

I think the way the Government justifies the way it has phrased the petition is that they seem to argue that the APA can withdraw jurisdiction to review Constitutional claims.

That again is another issue that was never litigated below. And it seems to me that proposition is plainly incorrect.

Congress cannot in the APA, or it did not in the APA, affect the jurisdiction of the Courts to hear claims by

individuals that their Constitutional rights were violated.

QUESTION: Mr. Lynch, let me just read you two sentences from Page 32A of the Government's Appendix to the petition,, which is the first two sentences of the conclusion of the Court of Appeals Majority Opinion.

Section 102(C) terminations are subject to judicial review. Because the statute leaves the decision of whether an individual's employment should be terminated as necessary or advisable in the interest of the United States largely to the discretion of the Director of the Central Intelligence Agency, judicial review must be deferential.

Now, they are not saying there that it is just Constitutional claims, it seems to me. They are saying that terminations under 102(C) are subject to judicial review. They say it in one sentence.

MR. LYNCH: Yes, but you have to go back. If you go back to Page 47A, which is Section C-2 of the opinion, there the Court sets out the only claim that Doe has left.

And that is whether a policy to discharge people on the basis of homosexual orientation would violate the Constitution.

Then, at the bottom of that section, the Court says at the very least, CIA would have to justify why such a ban on employment of all homosexuals was necessary or advisable in the interest of the United States.

QUESTION: What page?

MR. LYNCH: 27A.

QUESTION: 27A.

MR. LYNCH: So what Judge Edwards did, in writing the Opinion, was say that to satisfy -- if there is this policy, based on homosexual orientation, in order for the Director to justify the burden on an arguably protected Constitutional interest, the CIA would have to demonstrate that it was necessary or advisable in the interest of the United States to have that policy.

But his invocation of those words from the statute is directly in the context of setting out the Constitutional claim.

QUESTION: Mr. Lynch, can I ask you a question. I don't find in your papers any square allegation that there is such a policy or that you ever challenged it.

Basically, you seem to be challenging the procedures that were applied in your client's case.

MR. LYNCH: We do have such an allegation in our complaint, Justice Stevens.

But what happened was --

QUESTION: Where is it?

MR. LYNCH: In the section called "Legal Claims" in the Complaint, Page 12 and 13.

QUESTION: Yes.

MR. LYNCH: There we say that termination on the basis of homosexuality violates the Constitution. You are going directly to the question of whether there is a policy.

QUESTION: Whether the issue that Judge Edwards says is the only thing you can litigate was ever raised by you in the District Court. I don't think it was.

MR. LYNCH: We don't know.

QUESTION: In fact, a lot of your allegations, your stipulation of uncontested facts, bring out the fact that your client was never advised that there was any requirement about homosexuality.

They did not ask him, they did not have any regulations prohibiting it, all sorts of things that seemed to indicate there was no such policy.

MR. LYNCH: The record is in conflict and that is why Judge Edwards sent it back for further development of the facts.

When Doe told the security officer the very first day that he was homosexual --

QUESTION: The Deputy General Counsel said we don't have any such per se rule.

MR. LYNCH: First the security officer said there apparently was a per se rule and then the Deputy General Counsel said no.

The question is simply in dispute and that is the

reason for Judge Edwards reading.

QUESTION: You say it is in dispute, but I don't really understand how you raise that particular dispute. That is what I haven't been able to find.

I may be missing something. It seems to me that Judge Edwards raised that dispute.

MR. LYNCH: There is a lot of merit in what you say, Judge. We were going on substantially different grounds.

QUESTION: It would seem to me that on the grounds you were going on, you lost.

MR. LYNCH: We did. But the Court of Appeals did pull out of the fire this one Constitutional claim that we can go back and litigate.

We did not do very well in the Court of Appeals. That is for sure. We pulled our chestnuts out of the fire, so to speak.

QUESTION: In fact, if I remember some of the facts you have, you think that about 9 percent of the people employed in the Agency are probably homosexuals.

MR. LYNCH: That is a reasonable extrapolation of the statistics on the population at large.

QUESTION: And you are going to contend that there is a total policy of banning them all.

I don't understand this case. I would have thought the Government would have been happy with its victory, would

have gone back to the District Court and filed an affidavit saying we do not have any such policy and that would have been the end of the lawsuit.

I just don't understand this case.

MR. LYNCH: I would have thought that the Court would have declined certiorari on that ground as well.

QUESTION: I did, too.

MR. LYNCH: It still could. And I wish you would.

Let me address the question of whether despite the lack of statutory or textual preclusion, you can draw from the structure and purposes of the statute an intent to preclude review.

First of all, the cases of this Court that apply that doctrine, that you can look at the details of a legislative scheme to infer an intent to preclude review are as in Block v. Community Nutrition Institute, something like the Milk Marketing Order Program, or in the Commercial Food Workers Union Case decided last month, the very scheme of the National Labor Relations Board providing for when review of certain orders can be taken, and it also provides that certain orders cannot be reviewed.

QUESTION: I am sorry to interrupt. May I ask you one other question?

A claim that they had such a policy and so forth and it was unconstitutional, would you say that was a claim for

review under the APA?

MR. LYNCH: That there was an unconstitutional policy?

QUESTION: Yes?

MR. LYNCH: No.

QUESTION: So the issue that is left in the case is not one embraced within the question presented by the certiorari petition?

MR. LYNCH: That is my position.

Let me be more subtle about it. The APA provides for review of Agency actions that are unconstitutional, but, if for any reason review of that question under the APA is not available, you still can get review because the APA does not preclude, and in this case no other statute does as well, preclude review of the Constitutional claim.

QUESTION: What was the claim here? Was it brought under the APA only or under other statutes as well?

MR. LYNCH: We have three kinds of claims. First we said that the Agency failed to follow its own regulations. The District Judge agreed with us, the Court of Appeals disagreed.

QUESTION: That is an APA claim, right?

MR. LYNCH: I would think so. But the Government concedes that we get review of that question.

Page 18 of their reply brief in the Court of Appeals, they say we concede this Court has jurisdiction.

QUESTION: That is right. Because they concede that you are entitled to review of the procedures of the decision on national interest in dismissing the issue.

MR. LYNCH: But if that is an APA claim, Justice Scalia, I do not see how that concession squares with their position that review is precluded through Section 701.

It is another one of the inconsistencies in the Government's position.

QUESTION: I understood their position to be review of the substance of it, not review of whether the procedures to which the individual is entitled have been complied with.

That is what I thought their brief was saying. But I guess the Solicitor General can tell us.

MR. LYNCH: But the point is, if review is precluded under the APA, review is precluded. I don't think you can split up your claim sunder the APA.

QUESTION: Review of what is precluded? Review of one thing may be precluded and review of something else not.

What I am trying to find out is, what in this Court of Appeals Opinion -- I thought that this whole Court of Appeals Opinion was an APA opinion.

It discusses the committed to Agency discretion by law the other sections of the APA. I thought we were just dealing with an APA case and that whether there is a right to review under some other provision of the United States Code for

a Constitutional violation or any other violation, we can leave for another day.

MR. LYNCH: I am the first one to agree that this Opinion is written rather strangely. I think Mr. Fried and I are at least in agreement on that.

You see, my point is, if the Court of Appeals had come out the other way on the question of the APA preclusion, we would still have review of the regulations, although that was decided adversely to us by the Court of Appeals. And we would still have review of the Constitutional claim.

So I agree a lot of that --

QUESTION: You get review of the Constitutional claim under the APA.

What else do you get it under? What had you asserted as the bases for jurisdiction in the case?

MR. LYNCH: Our position is subject matter jurisdiction is provided by Section 1331; and under Davis v. Passman, when you have a violation of Constitutional rights, you can proceed directly under Section 1331 even if there is no other statute specifically providing for a cause of action.

QUESTION: So you do not need the APA to get review of your Constitutional question.

MR. LYNCH: Precisely. Precisely.

QUESTION: Unless you have a specific provision.

MR. LYNCH: Unless you have the kind of statute that

this Court has not yet propounded, which is so clear in its intent to preclude review of a Constitutional claim that --

QUESTION: We have had some cases where that kind of an action is barred by the structure of some other remedies like that.

MR. LYNCH: I do not believe a Constitutional claim by an individual directly injured by the unconstitutional action, allegedly unconstitutional action of an Executive officer.

QUESTION: Well, at least we have held that the procedures that are provided by a statute preclude the kind of an action you have brought.

MR. LYNCH: I do not think so.

QUESTION: Against the United States, it seems to me we are getting into the question of sovereign immunity. You doubtless have an action against the individual officer.

MR. LYNCH: Yes.

QUESTION: So long as the sovereign immunity of the United States is not invoked. But there are many who think that the sovereign immunity of the United States is invoked when you require the United States to hire somebody. Especially, I would think, in the CIA.

But that is not like a suit against an individual officer.

And if that is the case, that sovereign immunity is

involved, then you have to invoke the Administrative Procedure Act in order to get the waiver of sovereign immunity.

So you are back in the APA.

QUESTION: Yes. After the amendment to Section 702, there clearly is a waiver of sovereign immunity.

This is an action, we proceeded in the traditional manner with an action against the Agency official. But even if we had named the United States as a defendant, under the 9176 amendment to Section 702, sovereign immunity would be waived.

QUESTION: In a suit under the APA, though. That is an APA suit, where sovereign immunity is waived.

That is what I am trying to find out, is this an APA case or not? It smells to me like it is.

MR. LYNCH: It is both an APA case and it is a non-APA case. Because even if review is precluded under the APA, we can still bring the Constitutional claim.

QUESTION: Even if there is sovereign immunity.

MR. LYNCH: Even if there is sovereign immunity. Sovereign immunity does not bar claims against an individual agency official that he violated the Constitution.

QUESTION: But Mr. Gates, the Acting Director, or the current Director, can't hire this person on behalf of the United States.

The relief you are requesting is not relief that this individual can provide, unless you invoke the United States.

MR. LYNCH: Basically, Justice Scalia, I think the position that you are putting forward is in amending Section 702, Congress resurrected obstacles of sovereign immunity that this Court had removed in cases against individual officers.

You were deeply involved in that statute. I can't believe that that was what Congress was intending.

I was talking about the difference between this statute and the kinds of statutes that have been found in their structure to infer, where an intent can be inferred from the structure of the statute, that review is precluded.

And I was making the point that Milk Marketing Orders, the complex scheme for which decisions of the NLRB can be reviewed, are entirely different from this generic statute.

The National Security Act of 1947 did a lot more than what Mr. Fried pointed out. It not only created the CIA, it created the Department of Defense.

It combined the War Department and the Navy Department. It took the Air Force out of the Army and set up the Department of the Air Force. It set up the National Security Council. It is generic legislation of the broadest kind, dealing with organization of Government agencies.

It is not a detailed regulatory scheme providing for review of some kinds of actions but not other kinds of actions. And for that reason, that whole line of cases, the Community Nutrition Institute and the Commercial Food Workers Union case

last week, is inapplicable in this context.

Again, the Government's argument, it seems to me, in the end, is a policy argument, that the CIA ought to be immune from judicial review.

There may be merit in that policy. It may even be that in an up and down vote in the Congress they could prevail on that policy.

But there is no support, through any conventional means of interpretation, that Congress made that decision in 1947.

Therefore, this Court should find this is a statute which does not preclude review, and certainly not review of Constitutional claims.

Unless there are any other questions, I think the Court has my points.

QUESTION: Mr. Lynch, if this had been a case against the National Security Agency or the CIA by an employee there, I take it you concede that judicial review would be precluded?

MR. LYNCH: Of non-Constitutional claims. I certainly do not concede that those statutes have a strong enough indication of an intent to preclude review of Constitutional claims.

But I do concede that they seem to preclude non-Constitutional claims.

The Government makes a lot of the fact that there is

a glaring inconsistency between the Secretary of Defense and the Director of Central Intelligence.

Well, that is another one of their "Congress must have meant...", but "must have meant" is not enough in this context. There has to be clear intention that Congress intended in 1947 to preclude review.

And while there may be an anomaly between the extent to which the Secretary of Defense is immune from judicial review and the extent to which the Director of Central Intelligence is immune from judicial review, that is an anomaly to be resolved by Congress and not by this Court, with all respect.

Thank you.

QUESTION: Thank you, Mr. Lynch.

General Fried, you have one minute remaining.

ORAL ARGUMENT OF CHARLES FRIED, ESQUIRE

ON BEHALF OF PETITIONER - REBUTTAL

MR. FRIED: Just very briefly, it is quite clear the Court of Appeals did make this decision under the APA. It is quite clear that they made a decision which was both statutory as well as Constitutional, because they said it was arbitrary and capricious and required the Director to explain why his action was advisable.

That is a statutory claim. And of course, the difference between statutory and Constitutional claims is

thereby pointed out because the Constitutional claim is simply the statutory claim with the addition of a citation.

There really is no difference. And I think we are not arguing about anything very much if we pretend that ends up making a large point.

The reason we did not simply accept the remand is because we would have been required to do more than file a letter. That letter would have been the beginning of the litigation, and not its end.

We would say there is no such policy.

QUESTION: General Fried, is anything in the record suggesting there is such a policy?

MR. FRIED: There is the allegation that a security officer so stated. The Deputy General Counsel stated the contrary. And I would have thought that is more authoritative.

CHIEF JUSTICE REHNQUIST: Thank you, General Fried. The case is submitted.

(Whereupon, at 11:01 O'clock a.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-1294

CASE TITLE: Webster v. Doe

HEARING DATE: 1-12-88

LOCATION: Supreme Court, Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the

Date: 1-19-88

Margaret Daly

Official Reporter

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