

# TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, )  
 )  
 Petitioners, )  
 )  
 v. ) No. 86-595  
 )  
 JOSEPH A. FAUSTO. )

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WASHINGTON, D.C. 20543

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UNITED STATES, :

Petitioners :

v. :

No. 86-595

JOSEPH A. FAUSTO :

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Washington, D.C.

Wednesday, October 7, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

CHRISTOPHER J. WRIGHT, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JOHN M. NANNES, Washington, D.C.; as amicus curiae, supporting Respondent.

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1 remedy for this basis of dismissal? But it also did not  
2 provide for this basis of dismissal? That the basis of  
3 dismissal was a basis outside the CSRA?

4 MR. WRIGHT: Well, this employee was dismissed for  
5 misconduct. The CSRA deals with misconduct. It defines  
6 employees not to include this employee.

7 QUESTION: Therefore, this employee's misconduct, or  
8 the dismissal of this employee for misconduct is not the  
9 dismissal of this employee under the CSRA.

10 MR. WRIGHT: That's right. Another way of looking  
11 at that is that the CSRA hasn't provided him with any remedies.  
12 That's our point.

13 The provision of the CSRA --

14 QUESTION: Well, not only has it not provided him any  
15 remedies, it also hasn't provided the government any basis for  
16 dismissal.

17 MR. WRIGHT: This is an excepted service employee for  
18 whom it is assumed that there need be no basis for dismissal.  
19 This employee has no form of tenure. He is not a competitive  
20 service employee, and he is not a veteran.

21 QUESTION: Then why was he dismissed for violation of  
22 another statute outside of the Civil Service Reform Act. Why  
23 wasn't he just told to be gone?

24 MR. WRIGHT: He was given a list of reasons. He was  
25 also allowed to file a grievance, but he was dismissed for use

1 of a government vehicle. A statute, a statute provides that  
2 federal employees may be dismissed for that. It also provides  
3 that there is a mandatory 30-day suspension.

4 QUESTION: It seems to me it's one thing to say that  
5 where you have a comprehensive scheme like the Civil Service  
6 Reform Act that provides for the basis of dismissal of a  
7 particular employee, and does not provide any remedy, or  
8 provides remedy only in certain instances and leaves out other  
9 ones.

10 It's one thing to say that in that situation implicit  
11 is that he has no remedy for the ones not listed, but it's  
12 quite a different situation when the basis of dismissal itself  
13 is not -- is not the CSRA, but rather, this other statute upon  
14 which the government relied.

15 MR. WRIGHT: That's true, but that other statute  
16 gives him no remedies, and this statute is the comprehensive  
17 statute covering adverse actions against federal employees.

18 If it simply neglected to deal with this employee,  
19 that would be one thing. But the whole scheme of the statute  
20 shows that Congress dealt advertently with this class of  
21 employee in this situation, and has provided, as we have  
22 stated, that the Office of Personnel Management could provide  
23 that he was covered and had the rights in Chapter 75. It  
24 hasn't.

25 In this situation where Congress dealt with him, gave

1 him no rights at all under the comprehensive scheme that it set  
2 up, and provided that OPM could decide to extend those rights  
3 to him. What we think that the proper result to draw, the  
4 conclusion to draw is that Congress didn't want him to be able  
5 to go to court to complain about a suspension for misuse of a  
6 government vehicle unless OPM said that he could.

7 And OPM has said that some employees, excepted  
8 service employees may go to court to do that, but it did not  
9 grant that right to short-term employees like the Respondent  
10 here.

11 And so under that scheme where Congress hasn't  
12 forgotten about him at all, it is just like the Carducci  
13 decision where Congress had provided no remedies in the case of  
14 reassignments, but had dealt in great detail with all sorts of  
15 adverse actions, and it was clear that it had deliberately  
16 decided that federal employees can't go to court to complain  
17 about reassignments.

18 QUESTION: But the difference in Carducci was that  
19 the basis for dismissal in Carducci was a basis set forth in  
20 the Civil Service Reform Act itself, or the basis action taken  
21 was a basis set forth in the Civil Service Reform Act,  
22 unacceptable performance.

23 And as I understand it, that is not what's being  
24 relied on here, any basis that's set forth in the act itself.

25 MR. WRIGHT: No, that's right. The government has

1 inherent authority to dismiss or suspend excepted service  
2 employees because it -- except to the extent that it has  
3 granted them rights in the Civil Service Reform Act, which it  
4 has in many case, I might add, but not this one.

5 QUESTION: Let me ask you, Mr. Wright. What is your  
6 position in this court on the question whether prior to the  
7 enactment of CSRA there would have been a remedy for this man?

8 MR. WRIGHT: Well, we think that's a close question.  
9 We think that the Testan decision is the one most closely on  
10 point. That was a classification decision.

11 QUESTION: I know you argued it in the second go  
12 around in the court below, and they said it was perfectly --  
13 but I don't think see you are not arguing --

14 MR. WRIGHT: No, we are not pursuing that.

15 QUESTION: So we start from the premise that prior to  
16 CSRA he had a remedy, and that CSRA really impliedly took it  
17 away from him.

18 MR. WRIGHT: In 1963, the Court of Claims held in the  
19 Greenway decision that a probationary excepted service employee  
20 could go to court in certain situations. And the court below  
21 has described that as giving him a right to challenge an  
22 arbitrary dismissal.

23 And, no, we're not -- I thought you were asking the  
24 question sort of in the abstract whether Greenway was correctly  
25 decided under the law at that time. We think that's a close

1 question, but is no longer relevant after enactment of the CSRA  
2 which we think precludes this cause of action.

3 QUESTION: I gather your principal reliance is that  
4 this is a very comprehensive scheme.

5 MR. WRIGHT: Yes.

6 QUESTION: And yet, you say while it doesn't in terms  
7 protect this man --

8 MR. WRIGHT: Not in this case.

9 QUESTION: Not in this case. Nevertheless there's  
10 inherent authority?

11 MR. WRIGHT: To fire excepted service employees.  
12 This employee is not a competitive service employee. The vast  
13 majority of federal employees are in the competitive service.

14 QUESTION: Well, I don't understand why -- why  
15 doesn't the comprehensive statute preempt this so-called  
16 inherent authority?

17 MR. WRIGHT: Well, the comprehensive statute gives  
18 this person no rights in this situation. There is a very  
19 specific statute dealing with misuse of government vehicles,  
20 and that was what was -- this employee committed five breaches,  
21 but it was the misuse of the government vehicle that was  
22 ultimately the basis for the adverse action here.

23 QUESTION: And what's the source of this inherent  
24 authority?

25 MR. WRIGHT: We quoted a number of cases in our

1 brief. It has long been assumed that excepted employees,  
2 employees who are excepted from the competitive service serve  
3 at will and have no property interest in their jobs, and may be  
4 terminated without any process at all.

5 QUESTION: And assumed.

6 MR. WRIGHT: And a number of courts have so held.

7 Competitive service employees are, of course, much  
8 different. Competitive service employees have long held a host  
9 of rights.

10 In enacting the CSRA, Congress complained to some  
11 extent that it was assumed by many people that it was  
12 impossible to fire a federal employee because they had so many  
13 rights. But Congress was thinking of competitive service  
14 employees there. Excepted service employees have never had  
15 rights anything like the rights granted to competitive service  
16 employees.

17 QUESTION: If you are right here, then the government  
18 didn't need to rely on a statute that provided for a 30-day  
19 suspension if you misused a car. It just could have fired him.

20 MR. WRIGHT: Yes, it could have, and I think that's  
21 undisputed.

22 QUESTION: Well, is it the same thing to be fired for  
23 no reason at all as to be fired for stealing a car, or for  
24 misusing a car?

25 Wouldn't he have some constitutional right to a

1 name-clearing hearing if he is fired for that sort of a reason  
2 anyway?

3 MR. WRIGHT: He certainly never argued that he had  
4 any sort of liberty interest here. I suppose in some  
5 circumstances, he might. I don't think in the normal instance  
6 he would.

7 QUESTION: I don't think so.

8 QUESTION: Doesn't his claim rest on some kind of  
9 regulation? I'm a little fuzzy on the facts? Didn't he --

10 MR. WRIGHT: The Department of the Interior allowed  
11 him to file a grievance. It provided that in a whole host of  
12 situations employees could challenge employment decisions by  
13 filing a grievance.

14 OPM, in 1980, set forth some regulations which  
15 basically require agencies to set up grievance procedures, and  
16 it has also provided that except for those excepted service  
17 employees who hold policy making decisions, that those  
18 grievance procedures should generally be available to other  
19 excepted service personnel so that they can file grievances.

20 QUESTION: And your position, as I understand, is  
21 even if they just go ahead and violate those regulations, don't  
22 give him a hearing, don't do what the regulation provide, there  
23 is just still no provision for any judicial review.

24 MR. WRIGHT: That is basically our argument.

25 QUESTION: If you had a regulation that when there is

1 a lot of snow in Washington, everybody can go home at 3:00 and  
2 still get a full day's pay, and the excepted service people,  
3 they just didn't pay them, they would have no remedy.

4 MR. WRIGHT: Well, that's not an adverse action.

5 QUESTION: That's not paying them?

6 MR. WRIGHT: No. By adverse action, we're talking  
7 about dismissals, suspensions, demotions. In some cases, it  
8 may cover failures --

9 QUESTION: Then they demoted him for not showing up  
10 on a day he was told he could go home, because the regulation  
11 says you don't have to work past 3:00. He didn't and the boss  
12 says, I don't like that; you're fired. There would be review  
13 of that with an excepted service employee.

14 MR. WRIGHT: And excepted service employee who wasn't  
15 a veteran, we don't think there would be review there.

16 Now we have held open the possibility --

17 QUESTION: Even if there was a flagrant violation of  
18 a regulation.

19 MR. WRIGHT: Well, we have held open the possibility  
20 not presented here that in an appropriate case mandamus might  
21 be warranted --

22 QUESTION: Well.

23 MR. WRIGHT: -- if an agency just flatly refuses to  
24 follow its regulation.

25 QUESTION: Your response is that that's okay, that

1 anyway they should have just fired him for no reason at all  
2 instead of for not coming in on a day when he didn't have to  
3 come in.

4 MR. WRIGHT: No, no, but that's not our response, and  
5 an agency certainly should follow the regulations. And we  
6 think that in the vast majority of cases they do.

7 But in cases involving relatively small group of  
8 federal employees which includes only nonveterans in the  
9 excepted service, I might add veterans, also known as  
10 preference eligibles, have basically the same rights that  
11 competitive service employees do. But that nonveterans in the  
12 excepted service do serve at will, and except possibly for a  
13 mandamus action, no, they can't complain about adverse actions.

14 Congress, in our view, quite clearly intended that  
15 they not be able to go to court to do this.

16 I might add --

17 QUESTION: -- he said, if he were a competitive  
18 service employee and was charged with this offense, no adverse  
19 action against him as a competitive service employee except  
20 pursuant to Chapter 75 with all its procedural guarantees; is  
21 that right?

22 MR. WRIGHT: Yes, if he were a competitive service  
23 employee, he would have all sorts of rights.

24 QUESTION: He'd have all kinds of hearings and all  
25 the rest of it, wouldn't he?

1 MR. WRIGHT: Ultimately go to the Merit Systems  
2 Protection Board.

3 QUESTION: But here he gets nothing.

4 MR. WRIGHT: And from there to the federal circuit.  
5 Here he gets to file a grievance, which he did, and  
6 which he was awarded seven months back pay as a result of the  
7 grievance.

8 The question is whether he should get 30 days more  
9 back pay, and be able to go to court and claim 30 days more  
10 back pay.

11 QUESTION: What lets him file a grievance?

12 MR. WRIGHT: The Interior regulation.

13 QUESTION: And that could have been disregarded also  
14 and there would have been no relief except for mandamus.

15 MR. WRIGHT: That's right.

16 We recognize that that hypothetical -- we don't think  
17 it's very likely. We recognize that hypothetical. And in a  
18 case like that where an employee would have no right to relief  
19 under our view, he probably could file a mandamus action.

20 This comes up in the classification cases following  
21 enactment of the CSRA, I might add, and it is -- the courts  
22 have divided on this, but some courts have held that you can't  
23 even file a mandamus action because you can go to the special  
24 counsel.

25 Now it is open to this employee to go to the special

1 counsel of the MSPB if he alleged that he had been subject to  
2 what's know as a prohibited personnel practice, which are 11  
3 particularly troublesome practices like nepotism. The act  
4 specifically deals with excepted service personnel, and  
5 provides that except for policy making excepted service  
6 personnel you can go to the special counsel to complain about a  
7 prohibited personnel practice.

8 This Respondent does not allege that he was subjected  
9 to a prohibited personnel practice. So that --

10 QUESTION: Was he a long -- a long-time employee of  
11 the government, or a temporary employee, or what?

12 MR. WRIGHT: He was a temporary employee. He had  
13 worked I think for the FDA. He took a position with the  
14 Interior Department. He signed a piece of paper at the time he  
15 took it acknowledging -- it's a very brief three-paragraph  
16 acknowledgement that's in the record that says, I understand  
17 that I'm becoming an excepted service employee, and I have no  
18 rights to any future job after this. And that's the way he  
19 took the job.

20 Also as a condition, which is on the form he filled  
21 out when he took the job is that he understood that he would  
22 serve until the Young Adult Conservation Corps Camp at which he  
23 worked closed, or until a certain date in 1980, whichever was  
24 earlier, and that was about a year and a half after he was  
25 hired.

1           So he was hired as a short-term employee. His  
2 position was placed in what's known as Schedule A in the  
3 regulations that list all the excepted service positions,  
4 because it was a short-term position.

5           QUESTION: May I ask you one other question?

6           This case just deals with this class of employees who  
7 are nonveteran excepted service employees, or it will,  
8 basically patronage or at will -- I don't know.

9           But in any event, how big a segment of the federal  
10 work force is it?

11          MR. WRIGHT: It's about 20 percent. The excepted  
12 service includes --

13          QUESTION: That's a lot of people then, isn't it?

14          MR. WRIGHT: There are quite a few. It includes  
15 certain employees whose agencies are removed from the  
16 competitive service. That includes such things as the CIA, the  
17 Defense Intelligence Agency. It includes the Judicial Branch,  
18 I'm told.

19          QUESTION: It includes all lawyers in the Executive  
20 Branch, doesn't it?

21          MR. WRIGHT: That's right. That's Schedule A.

22          Schedule A, the regulations list about 60 groups.

23 There are policy making employees were all in Schedule C.

24          QUESTION: If it includes all lawyers, you must have  
25 a conflict of interest.

1 (Laughter.)

2 MR. WRIGHT: Justice Stevens, the Office of Legal  
3 Counsel has considered that question, and has decided that it's  
4 unlikely I'll be subjected to an adverse action so I --

5 (Laughter.)

6 MR. WRIGHT: Schedule B, working backwards, includes  
7 a lot of student positions. There are lots of student  
8 positions in the federal government. And Schedule A includes  
9 many short-term jobs, and a variety of other jobs that are in  
10 some ways difficult to categorize: chaplains, attorneys,  
11 Japanese interpreters, employees of federal mental institutions  
12 who were previously patients at the institutions, et cetera.

13 But short-term employees actually are, I'm told, more  
14 than half of the employees in the excepted service and Schedule  
15 A, and policy making employees are all of Schedule C.

16 I would like to point out one distinction that I  
17 haven't made that I think is very important, is the distinction  
18 between Chapter 43 of the Civil Service Reform Act, and Chapter  
19 75.

20 Chapter 43 governs adverse actions based on  
21 unacceptable job performance. Whereas, Chapter 75 governs  
22 adverse actions based on misconduct.

23 It's undisputed that if this employee had been  
24 dismissed for unacceptable job performance under Chapter 43,  
25 that he would have no right to challenge that action. Chapter

1 43 is parallel to Chapter 75 in many ways. It explicitly deals  
2 with each of the classes of federal employees. It says under  
3 that chapter that excepted service nonveterans have certain  
4 procedural rights. But it also explicitly states that only  
5 competitive service employees and veterans, those with  
6 preference eligibility, can go to the MSPB and then to the  
7 federal circuit.

8 The D.C. Circuit recently decided in the Harrison  
9 case, a case that no one disputes, that an excepted service  
10 employee dismissed for unacceptable behavior -- unacceptable  
11 job performance, excuse me -- has no right to go to court to  
12 complain about it.

13 We think that Congress intended the same in Chapter  
14 75. The difference is that in Chapter 75 it has authorized OPM  
15 to list certain excepted service positions as having rights,  
16 including the right to judicial review.

17 So to some extent, excepted service employees have  
18 greater rights under Chapter 75 in misconduct cases. They do  
19 if OPM decides that they have those rights. But OPM hasn't  
20 included this group, Respondent's group of excepted service  
21 employees within the -- it has not given them the rights in  
22 Chapter 75.

23 QUESTION: Is it that the Respondent's group can only  
24 use mandamus?

25 MR. WRIGHT: They can file grievance procedures and

1 it's not presented here, but one would think that in an  
2 appropriate case mandamus might be warranted.

3 They could also go to the special counsel of the  
4 MSPB.

5 QUESTION: -- in mandamus, do you know of any one  
6 mandamus that's been granted?

7 MR. WRIGHT: We cited one in our brief in a  
8 classification case.

9 QUESTION: Any more?

10 MR. WRIGHT: Well, if that isn't the case, it must be  
11 because agencies are following their regulations. I would be  
12 surprised if there were many cases involving federal agencies  
13 where mandamus was granted.

14 QUESTION: Is it not true, you say that he would have  
15 these procedural rights if he had been included by -- who puts  
16 him in there?

17 MR. WRIGHT: OPM.

18 QUESTION: By OPM with Chapter 75.

19 MR. WRIGHT: OPM in Chapter 75.11(c). It's as clear  
20 as day--

21 QUESTION: All right.

22 MR. WRIGHT: -- that OPM can do this.

23 QUESTION: But isn't it true that OPM has to  
24 affirmatively include him not only in order that he have those  
25 remedies, but in order that he be included within that chapter

1 at all? So the chapter simply doesn't apply to him unless OPM  
2 says so, including the dismissal provisions and the adverse  
3 actions provisions of the chapter. He just is not an employee  
4 for purposes of that chapter.

5 MR. WRIGHT: I think all that chapter does is grant  
6 rights. I don't know that it does much else. But I suppose it  
7 says that you can only be fired for cause, but that's a right.  
8 So he is granted no rights under the chapter, because the  
9 relevant definitional provision, which is 75.11(a) says that  
10 for the purpose of this subchapter employee means an individual  
11 competitive service who is not serving a probationary or trial  
12 period.

13 QUESTION: Well, now wait a minute. This is Section  
14 7503, cause and procedure.

15 MR. WRIGHT: That's for minor adverse actions.  
16 That's not the relevant one here. It's the --

17 QUESTION: Well, whatever. It says under regulations  
18 prescribed by OPM, an employee may be suspended for 14 days or  
19 less for such cause as will promote the efficiency of the  
20 service. I don't consider that the granting of a right, the  
21 right to be fired or suspended?

22 It seems to me that that's the authority for the  
23 agency to do the suspension, no?

24 MR. WRIGHT: Well, that's the short-term -- I assume  
25 you would make an analogous argument under 75.12.

1           QUESTION: Right, right. I just happen to see 3  
2 first. But 75 not only gives rights, it also is a source of  
3 authority for disciplinary action, isn't it?

4           MR. WRIGHT: Well, in the case of an excepted service  
5 employee, you don't need any authority. So if you were covered  
6 here, then it would give him a right only to be suspended under  
7 regulations that will promote the efficiency of the service.

8           In the absence of that, he doesn't even have that  
9 right.

10          QUESTION: I'm puzzled. I thought they define the  
11 term "employee" in Chapter 75, it would just be from the  
12 competitive service.

13          MR. WRIGHT: 75.11(a) says employee means an  
14 individual in the competitive service who is not serving a  
15 probationary or trial period.

16          (b) says a preference eligible in an executive agency  
17 in the excepted service --

18          QUESTION: Oh, I see. That's in 75.11.

19          MR. WRIGHT: And then part (c) -- which is the  
20 subsection governing major adverse actions, suspensions for  
21 more than 14 days or dismissals.

22          And (c) says, the Office of Personnel Management may  
23 provide for the application of this subchapter to any position  
24 or group of positions excepted from the competitive service.

25          So it is true that this employee isn't in this

1 chapter, but that's because OPM hasn't chosen to put him there.  
2 And in the absence of OPM putting him there, he has no rights  
3 in a case of this sort.

4           It seems strange that he would have more rights under  
5 Chapter 75 because he's out completely than under Chapter 43  
6 where he is in to the extent that he gets certain procedural  
7 rights which are quite analogous to the grievance rights that  
8 OPM has granted excepted service employees under Chapter 75  
9 and --

10           QUESTION: When you use the term Chapter 75, you  
11 really mean Subchapter 2 of Chapter 75.

12           MR. WRIGHT: That's the major adverse action part.

13           QUESTION: Because in Subchapter 1 they don't have  
14 that same definition.

15           MR. WRIGHT: No. Subchapter 1 is minor adverse  
16 actions. No one gets a right to judicial review under  
17 Subchapter 1, and it has been argued in a number of cases,  
18 analogous to the argument here, that because minor adverse  
19 actions aren't covered there, that that employees, they are not  
20 excluded in any way; that employees can go to court under the  
21 Tucker Act to complain about minor adverse actions just as they  
22 can't -- we argue analogously that they can't here.

23           One last point I'd like to make is that besides being  
24 undisputed that under Chapter 43 employees cannot go to court,  
25 it is undisputed that probationary employees who are excluded

1 from Chapter 75, in the same sentence that I just read of  
2 75.11(a), cannot complain about adverse actions either. And  
3 that's even though the Greenway decision, which is the basis  
4 for the implied cause of action here, held that a probationary  
5 excepted service employee was entitled to go to the old Court  
6 of Claims.

7 We don't think any distinction can be drawn between  
8 probationary and excepted service employees in the way they are  
9 treated in Chapter 75, and we think it's plain, as we state in  
10 our briefs, that Congress didn't want to make a federal case  
11 out of adverse actions taken against these sorts of employees.

12 If there are no questions, I would like to reserve  
13 the remainder of my time.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wright.

15 Mr. Nannes, we will hear now from you.

16 ORAL ARGUMENT BY JOHN M. NANNES

17 ON BEHALF OF THE RESPONDENT

18 MR. NANNES: Mr. Chief Justice, and may it please the  
19 Court.

20 The judgment of the Court of Appeals below rests upon  
21 three propositions, all of which are important and two of which  
22 the government does not contest.

23 First, Mr. Fausto was discharged in violation of  
24 agency regulations. The Department of Interior regulations  
25 provided that a career-type, nonpreference excepted service

1 employee who was discharged had a right to receive notice in a  
2 discharge decision of his right to pursue the agency grievance  
3 mechanism.

4 And the regulations of the Department of Interior  
5 further provide for the small universe of employees that they  
6 had a right to a full evidentiary hearing if they were being  
7 discharged for cause.

8 It is undisputed that Mr. Fausto was not provided  
9 these rights at the time that he was discharged, and I do not  
10 understand the government to contest that the agency fulfilled  
11 its obligation under the regulations.

12 Thus, this case comes to the court with the  
13 concession by the government that the agency violated its  
14 regulations.

15 Second, Mr. Fausto would have been entitled to  
16 judicial review if he had been discharged prior to passage of  
17 the Civil Service Reform Act of 1978. The government endeavors  
18 in its reply brief, and it has made the point once more here  
19 today that that is somehow an implied right or a judicially  
20 implied right. But I would submit to the court that prior  
21 decisions of this court and of the old Court of Claims support  
22 the proposition that that was a statutory right of judicial  
23 review.

24 The combination of the Tucker Act, which provides for  
25 a cause of action when there has been a violation of an agency

1 regulation, in conjunction with the Back Pay Act, which is a  
2 money mandating remedy, and the violation by the agency in this  
3 instance of his procedural regulations, provided Mr. Fausto  
4 with a statutory cause of action.

5           The Greenway decision, which happens to be one of the  
6 cases that the court below cited, is by no means the only case  
7 holdings in that manner. Indeed, if the court goes back and  
8 looks in the aftermath of its decision almost 30 years ago in  
9 *Vitarelli v. Seaton*, it will find that the employee who was  
10 there wrongfully discharged was then reinstated by his agency.  
11 He contended that the back pay that the agency had awarded him  
12 was insufficient, and he filed a cause of action in the old  
13 Court of Claims, and that cause of action was sustained. It is  
14 very much a statutory cause of action, and it preceded the  
15 enactment of the Civil Service Reform Act.

16           Third, the Court of Appeals below found that there  
17 was no evidence that Congress intended when it enacted the  
18 Civil Service Reform Act of 1978, to repeal rights of judicial  
19 review that previously would have been available to employees  
20 such as Mr. Fausto.

21           This is certainly a proposition that the government  
22 does contest, and thus, the issue presented for this court is  
23 whether it is fairly discernable that when Congress enacted the  
24 Civil Service Reform Act, that it intended to extinguish or  
25 repeal statutory right that otherwise would have continued to

1 be available to nonpreference excepted service employees such  
2 as Mr. Fausto.

3 Notably, Your Honors, the government does not rely  
4 upon any specific preclusion language in the Civil Service  
5 Reform Act itself. There is indeed no provision in that act,  
6 Chapter 75 or elsewhere, that specifies that prior remedies  
7 that had been available to other types of employees were  
8 intended to be extinguished by the Congress.

9 Thus, under the holding of this court almost 30 years  
10 ago in Vitarelli v. Seaton, Mr. Fausto has a right of judicial  
11 review to obtain review of his discharge in violation of agency  
12 regulations.

13 The government seeks to distinguish Vitarelli on the  
14 proposition that Congress had not specifically indicated with  
15 respect to the statute there involved an intention to preclude  
16 judicial review. But I would note for the court that the  
17 statute pursuant to which Mr. Vitarelli was discharged provided  
18 the Secretary of Interior with a right to discharge him that  
19 would be "final and conclusive" in the language of the statute.  
20 And there is certainly nothing of an analogous preclusionary  
21 sort in the Civil Service Reform Act. And yet, in Vitarelli a  
22 right of judicial review was upheld.

23 Instead, the government relies upon broad arguments  
24 drawn from a so-called statutory scheme. It is certainly true  
25 that in other provisions of the Civil Service Reform Act, such

1 as Chapter 23, which deals with prohibitive personnel  
2 practices, and Chapter 43, that deals with performance  
3 appraisal standards, that various rights are accorded to  
4 nonpreference excepted service employees.

5 But the inclusion of references to those employees in  
6 Chapter 23 and Chapter 43 simply provide no guidance to the  
7 court as to what the congressional intention was underlying  
8 enactment of Chapter 75. It is notable that the government  
9 ignores the legislative history underlying that chapter, but it  
10 nevertheless tries to draw broad conclusions based on the  
11 statutory scheme.

12 The legislative history demonstrates quite  
13 conclusively that when Congress enacted Chapter 75 it had a far  
14 more limited objective in mind. Part of the purpose underlying  
15 Chapter 75 was to transfer the adjudicatory jurisdiction over  
16 employee appeals that had formerly resided in the old Civil  
17 Service Commission, and instead, to transfer that to the new  
18 agency, the Merit Systems Protection Board, and that Congress  
19 also intended thereby to consolidate judicial review of such  
20 decision in what has now become the Federal Circuit, rather  
21 than to permit actions to be initiated in district courts  
22 throughout the country under the Administrative Procedure Act.

23 There is simply no indication in the legislative  
24 history underlying Chapter 75 that Congress was intending  
25 thereby to change the rules that had previously been available

1 to nonpreference excepted service employees.

2 What Congress did --

3 QUESTION: What about to other employees?

4 MR. NANNES: I'm sorry?

5 QUESTION: Would other employees continue to have  
6 their pre-existing rights to get into federal court --

7 MR. NANNES: No, Your Honor.

8 QUESTION: -- apart from the scheme set forth in  
9 Chapter 75 of getting there after going through the MSPB?

10 MR. NANNES: No, Your Honor.

11 We would take the position that with respect to  
12 employees who are defined as covered by Chapter 75, that the  
13 Chapter 75 rights do provide an exclusive enumeration of the  
14 rights to which they are entitled.

15 So that, for example, in the numerous Courts of  
16 Appeal cases where employees who are covered by Chapter 75 have  
17 endeavored to assert rights either as an implied cause of  
18 action or under the Administrative Procedure Act, those rights  
19 have -- those efforts have been rebuffed and rejected.

20 QUESTION: Isn't there a certain irony there then  
21 that the people not covered by Chapter 75 can go directly to  
22 court, whereas those who are covered have to work their way up  
23 through the administrative procedure?

24 MR. NANNES: Your Honor, I think there certainly  
25 would be if that were the fact applicable to Mr. Fausto, and

1 the government endeavors to characterize Mr. Fausto's rights as  
2 I think more powerful engines of enforcement, for example, than  
3 are available to competitive service employees.

4 In point of fact, a nonpreference excepted service  
5 employee such as Mr. Fausto was required to exhaust his  
6 administrative grievance system. In this case, that was a  
7 three-tier system of administrative review, and it took him  
8 from January 1981 until February 1985 to get a full  
9 determination of --

10 QUESTION: What was the source of the authority  
11 requiring him to exhaust the administrative remedies?

12 MR. NANNES: Your Honor, I don't believe that there  
13 was a specific exhaustion requirement. But I think either as a  
14 doctrine of primary jurisdiction, or some analogue, had he gone  
15 right from his discharge decision into the Claims Court, the  
16 Claims Court either would have dismissed or would have stayed  
17 and required him to exhaust.

18 But the notable feature here, I would suggest to the  
19 court, is that an employee who is defined within the coverage  
20 of Chapter 75 is not required, and indeed is prohibited from  
21 pursuing the agency grievance system.

22 QUESTION: Unless the agency establishes a grievance  
23 system for this category of employee, which it is under no  
24 obligation to do, the situation would be that he could go  
25 directly to federal court, whereas those employees of a

1 supposedly more protected status would have to go to the MSPB.

2 MR. NANNES: Your Honor, I think there are two  
3 responses to that. First --

4 QUESTION: And indeed, in some cases would not even  
5 be able to go to the MSPB; would have no relief, depending upon  
6 what the level of the sanction was, except asking the counsel  
7 to consider their grievance, whereas he would be able to go  
8 federal court no matter what.

9 MR. NANNES: Your Honor, in the first instance, the  
10 Office of Personnel Management has promulgated regulations that  
11 do require all agencies to promulgate and adopt an agency  
12 grievance mechanism.

13 QUESTION: Well, that's a fortunate happenstance, but  
14 that doesn't speak to the rationality of the legislative scheme  
15 that does not require such a regulation to be issued. And the  
16 fact is that in the absence of such regulation, he would come  
17 directly to federal court, whereas the more protected employees  
18 would have to go through the MSPB, and in some cases wouldn't  
19 even have that available. They would have to go to the General  
20 Counsel with a discretionary authority on his part to press  
21 their grievance.

22 MR. NANNES: If an employee such as Mr. Fausto were  
23 to endeavor to do so, he would be met I think with a more  
24 formidable problem, because he would have no agency regulation  
25 that had been violated to predicate his claim under the Tucker

1 Act.

2 It's only the agency's disregard of its grievance  
3 right and its right to a hearing that is conferred upon Mr.  
4 Fausto that provide the regulation basis for his Tucker Act  
5 claim.

6 So it may be true that he would have an opportunity  
7 to file his complaint, but it's unlikely to be one that would  
8 be of substantive import.

9 QUESTION: Well, that's the case with his particular  
10 grievance, but you can have another grievance that doesn't  
11 consist of the lack of a promised hearing.

12 MR. NANNES: Well, to the extent, Your Honor --

13 QUESTION: Something else that went wrong in the  
14 adverse action.

15 MR. NANNES: Well, I think there might be some  
16 difficulty if an employee were endeavoring to try to get a  
17 court to review the merits of the claim. So we are simply  
18 confining the argument to a situation where an employee was  
19 denied procedural rights to which he was entitled under the  
20 grievance system.

21 QUESTION: But do you agree that absent some  
22 regulation giving a person in the excepted service some both  
23 either substantive right or procedural right, that person is  
24 subject to termination at will?

25 MR. NANNES: Yes, Your Honor. If there is no

1 regulation that constrains the ability of the agency to  
2 discharge, then the -- or any statute that does so, then the  
3 employee would be subject to discharge.

4 QUESTION: Doesn't Chapter 43 include the employees  
5 in the excepted service?

6 MR. NANNES: Yes, Your Honor, it does.

7 QUESTION: And deals with people like Fausto.

8 MR. NANNES: Yes, Your Honor, it does.

9 QUESTION: And says that -- and sets up some required  
10 procedures for personnel actions?

11 MR. NANNES: Formal actions. Yes, Your Honor, it  
12 does. And employee in Mr. Fausto's --

13 QUESTION: So the statute at least in some respects  
14 does deal with the excepted service --

15 MR. NANNES: Absolutely, Your Honor, and I would  
16 concede that.

17 The difficulty that the government has, though, with  
18 extrapolating from that proposition to the conclusion it tries  
19 to reach is that it wants to ignore the legislative history  
20 underlying the specific provisions.

21 Chapter 23 and 43 and 75 may have been enacted as  
22 part of a single statute, but the origin and evolution of those  
23 provisions are really quite distinct and quite different.  
24 There was no predecessor to Chapter 43, for example, and thus,  
25 everything that Congress did there was writing on a new slate.

1 Whereas if you look at the practice prior to --

2 QUESTION: At least on the face of the statute, the  
3 statute deals with the excepted service in Chapter 43, and just  
4 doesn't provide for the same kinds of remedies as the  
5 nonexcepted employees.

6 MR. NANNES: Yes, Your Honor, that's absolutely  
7 correct. The argument that we would make is that --

8 QUESTION: Well, it must be that Congress was  
9 probably aware of the statute it was passing regardless of the  
10 origin of the various chapter.

11 MR. NANNES: Oh, I'm sure it was aware of it, Your  
12 Honor. I guess the objective I -- or the point I would simply  
13 urge upon the court is that prior to enactment of the 1978 act,  
14 competitive service employees had the right to appeal to the  
15 old Civil Service Commission. That was by executive order.  
16 And veterans had the right to appeal established by statute to  
17 the old Civil Service Commission.

18 And what we maintain is simply that when Congress  
19 endeavored to abolish the old Civil Service Commission and to  
20 substitute the Merit Systems Protection Board, it simply  
21 brought forward and transferred over to that appellate process  
22 the same employees who had formerly enjoyed those rights prior  
23 to the act.

24 Since, of course, Mr. Fausto prior to 1978 would have  
25 had a right to pursue his claim under the Tucker Act, we argue

1 that the mere transfer of those responsibilities by Congress in  
2 1978 cannot be read so broadly as to extinguish rights that he  
3 otherwise would have enjoyed.

4 QUESTION: mr. Nannes, if I understand it, you are  
5 not relying at all on the fact that the dismissal in this case  
6 invoked the unauthorized use of the government vehicle statute.  
7 You would be here even if the dismissal had just been for no  
8 cause at all. You would say that even on that basis if the  
9 agency didn't comply with its regulation, you would be entitled  
10 to go to court.

11 MR. NANNES: It might be -- it might have been  
12 exceptionally more difficult for Mr. Fausto to so proceed  
13 because he was relying upon the rights established for him by  
14 regulation. And if we define out those regulatory violations,  
15 then he might have no predicate basis upon which to file in the  
16 Claims Court.

17 QUESTION: The regulatory violations being what now?

18 MR. NANNES: In this instance it was the failure to  
19 notify him of his right to grieve, and the failure to accord  
20 him a formal hearing --

21 QUESTION: Wouldn't he have a right to grieve if he  
22 had been fired for no reason at all? Or let's say he was fired  
23 for inefficiency.

24 MR. NANNES: If he had been fired for inefficiency  
25 such that it would be regarded as a Chapter 43 dismissal,

1 adverse action based on nonperformance, or misperformance, he  
2 would then be governed by Chapter 43 procedures and he would  
3 not have had a right to judicial review, although he would have  
4 had certain administrative rights to notice.

5 QUESTION: Would he have had to have notice?

6 MR. NANNES: He would have had to have notice, I  
7 think an opportunity to answer and a written decision.

8 QUESTION: Mr. Nannes, do you think the decision  
9 below is consistent with the Carducci case?

10 MR. NANNES: It's certainly consistent, Your Honor,  
11 with respect to the result reached, because it --

12 QUESTION: What about employees subject to very short  
13 suspensions, can they go to the Claims Court, do you suppose?

14 MR. NANNES: Let's see, I guess if we were --

15 QUESTION: Under your view.

16 MR. NANNES: If we were speaking certainly of  
17 employees who were in the competitive service, or preference  
18 eligible employees, employees who are covered within the scope  
19 of Chapter 75 --

20 QUESTION: Well, if an employee is suspended for 14  
21 days or less, there is no right to judicial review under the  
22 CSRA, is there?

23 MR. NANNES: That's correct, Your Honor.

24 QUESTION: But under your view of the decision below  
25 if we were to affirm, they might have a Claims Court remedy?

1           MR. NANNES: I think that result would certainly not  
2 follow with respect to competitive service and preference  
3 eligible employees, because under the reasoning of the Carducci  
4 decision and the legislative history underlying Chapter 75, it  
5 was intended to be exclusive for employees within the reach.

6           QUESTION: So the result would be that civil service  
7 employees subjected to short-term suspensions would have no  
8 right to go to the Claims Court if your view prevails.

9           MR. NANNES: I think that's correct, Your Honor. I  
10 suppose --

11          QUESTION: But these --

12          MR. NANNES: Excuse me.

13          QUESTION: But these excepted service employees would  
14 even for the 14-day suspension or less.

15          MR. NANNES: Well, I'm not sure that that conclusion  
16 automatically follows. I have some difficulty offering up a  
17 distinction.

18          QUESTION: It just seems so inconsistent and ironic.

19          MR. NANNES: I understand that, Your Honor.

20                 I think as a practical matter Mr. Fausto did not seek  
21 judicial review in this instance, nor if we hypothesize a 13-  
22 day suspension, is he likely to be able to obtain judicial  
23 review of the merits of the agency determination.

24                 All that would be left, I think, is the possibility  
25 that he might be able to complain of an agency disregard of his

1 procedural violations, and then it starts to get very close to  
2 what Mr. Wright referred to his opening argument as a proper  
3 case for possible mandamus.

4 But by and large, I do not think that affirmance of  
5 the decision below would have the practical consequence of  
6 opening up the Claims Court or any other court to efforts to  
7 obtain judicial review with respect to --

8 QUESTION: Although it might. I mean they just  
9 don't fit.

10 MR. NANNES: I don't think they fit 100 percent, Your  
11 Honor. But I think that the area that's left as a gap is a  
12 relatively small one, and one that presumably could be  
13 corrected by either administrative regulation, or certainly a  
14 congressional act.

15 In the absence of broad language either of a specific  
16 preclusive sort or of a statutory scheme that supports its  
17 broad characterization of the effort by Congress to preclude  
18 judicial review, the government does make certain illusions to  
19 the possibility of anomalous or illogical results by virtue of  
20 the fact that an excepted service employee such as Mr. Fausto  
21 might be able to get into court more quickly than might a  
22 competitive service or a preference eligible employee.

23 I think the fact that the competitive service  
24 employee enjoys the rights that are conferred by Chapter 75 is  
25 indeed a very substantial advantage and was intended

1 specifically by Congress to confer additional rights on those  
2 employees.

3 An employee who is entitled to Chapter 75 rights has  
4 an opportunity to appeal directly from the initial agency  
5 decision to the Merit Systems Protection Board, is accorded a  
6 statutory right to an expeditious decision in a proceeding in  
7 which the agency bears the burden of proof, and thereafter can  
8 go directly to the federal circuit.

9 QUESTION: Is Mr. Fausto entitled not just to  
10 judicial review of whether the agency had violated its  
11 regulation in failing to give him notice, but also review of  
12 whether in fact he had been guilty of unauthorized use of a  
13 government vehicle as the agency asserted?

14 MR. NANNES: Your Honor, I think a distinction could  
15 be drawn between the two. The record in this case --

16 QUESTION: I know that. Do you draw it?

17 MR. NANNES: I draw the distinction at least insofar  
18 as to say that the manner in which this case comes to this  
19 court is only in the former situation. Because when Mr. Fausto  
20 filed suit in the Claims Court, there had already been an  
21 administrative determination that his discharge had been  
22 unwarranted and unjustified. And the question left for  
23 judicial review is whether he had been made whole under the  
24 terms of the Back Pay Act.

25 It would have been a far different matter, and I

1 think no great concession to say that it would have been far  
2 more difficult for him to maintain that he had an opportunity  
3 for the court to review the merits of the determination of  
4 the --

5 QUESTION: Why? Wouldn't the old law have given him  
6 that?

7 MR. NANNES: Well, with respect to an excepted  
8 service employee, Your Honor, I think he has to look, since he  
9 does not have a right by statute to discharge by cause, to  
10 whether the regulation provides him with such a right.

11 In the absence of a regulation that provided him with  
12 a right to be discharged only for cause, it's hard for me to  
13 understand how there would be a record or an evidentiary basis  
14 for him to seek a merit's based determination.

15 QUESTION: Don't you think this could be termed a  
16 discharge for unsatisfactory performance?

17 MR. NANNES: I do not think so, Your Honor. The  
18 effort that I think Congress had in mind with respect to  
19 dividing --

20 QUESTION: Well, did he misuse government vehicles in  
21 the course of his job?

22 MR. NANNES: No, Your Honor.

23 The allegation in the complaint -- I'm sorry. The  
24 allegation on the administrative record as to what the misuse  
25 involved was a circumstance in which over a weekend he

1 endeavored to drive a ill child from his base -- his detail  
2 duty spot in New York to the family home in Virginia.

3 Mr. Fausto was under the impression that since he had  
4 been detailed and his detail included authorization to use a  
5 governmental vehicle, that he had the discretion to utilize the  
6 vehicle.

7 QUESTION: Well, his claim was then that it was  
8 within the proper performance of his job.

9 MR. NANNES: Yes, Your Honor, except as you and I  
10 understand the term, I think we would characterize if you drive  
11 your family, it's personal use. But there are elements in the  
12 regulations that indicate that it may not be unofficial use if  
13 you use a car within the scope of the detail and the  
14 authorization that you have been provided for that car.

15 But as I say, that's not an issue that was presented  
16 to the Claims Court in terms of a merit's based determination.  
17 It simply went to the propriety of the back hold remedy.

18 For a period of time not substantially less than 30  
19 years, this court has stressed the necessity that employing  
20 agencies adhere to their regulations, and has upheld the  
21 ability of employees to obtain judicial review when the  
22 agencies do not, at least in the absence of a clear expression  
23 by Congress of an intention to preclude such review.

24 The Supreme Court in Vitarelli, for example, was  
25 unanimous in this respect, with all of the justices indicating

1 that they subscribe to this basic proposition.

2 Thus, we return once again to the issue that I --

3 QUESTION: -- have a determination that the agency  
4 violated its regulations.

5 MR. NANNES: I'm not sure I understand your --

6 QUESTION: Well, it's been determined already that  
7 his discharge was unwarranted.

8 MR. NANNES: Yes, Your Honor.

9 In this particular instance, the narrow issue  
10 presented is whether he was made whole.

11 QUESTION: Well, he doesn't need -- he doesn't need  
12 any court review to establish that.

13 MR. NANNES: In this instance, that's is correct.

14 QUESTION: Just a question of the scope of his  
15 remedy.

16 MR. NANNES: Yes, Your Honor, that's correct. Mr.  
17 Fausto's claim as it reached the Claims Court is whether he had  
18 been made whole within the meaning of the Back Pay Act, because  
19 if he had not been wrongfully discharged, he would have been on  
20 site and had other opportunities to compete for other  
21 government jobs at a time when his position was otherwise  
22 abolished.

23 We submit to the Court, Your Honors, there simply is  
24 not a basis upon which the court can fairly discern that  
25 Congress intended to repeal rights that this man would have

1 otherwise had to obtain judicial review of the completeness of  
2 the remedy that he was awarded by the agency for his wrongful  
3 discharge.

4 The government has not dispelled the substantial  
5 doubt that this was Congress' intent. And the government's  
6 argument based on statutory scheme makes sense only if the  
7 court disregards the legislative history underlying Chapter 75  
8 itself.

9 If the court looks at the legislative history  
10 underlying Chapter 75, we submit that it must reach the  
11 conclusion that Congress did not have an intention to address  
12 the availability of judicial review of nonpreference excepted  
13 service employees.

14 QUESTION: Well, I guess they argue that we should  
15 look at the entire structure of Chapter 43 and 75, and the  
16 whole picture; not just isolate 75.

17 MR. NANNES: Yes, Your Honor.

18 I mean, I certainly would not suggest to the court  
19 that the court should not look at Chapter 23 and 43. But I  
20 think there is a limit as to the conclusions one can draw from  
21 a review of all the statutory provisions. They have very  
22 different legislative histories and backgrounds, and they  
23 simply, I would submit, are unhelpful in educating the court as  
24 to what Congress may have intended with respect to Mr. Fausto  
25 at a time that it enacted Chapter 75 which merely codified

1 existing practice and transferred judicial review to the Merit  
2 Systems Protection Board, and thereafter to the federal  
3 circuit.

4 If the court has no further questions, thank you.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nannes.

6 Mr. Wright, you have four minutes remaining.

7 ORAL ARGUMENT BY CHRISTOPHER J. WRIGHT

8 ON BEHALF OF THE PETITIONER - REBUTTAL

9 MR. WRIGHT: I would like to very briefly address the  
10 nature of what actually happened.

11 Mr. Fausto was notified that the agency intended to  
12 discharge him, and he was allowed to respond to that before he  
13 was discharged. The error that was committed, and the only  
14 error that was committed was that the agency did not then tell  
15 him that he had a right to file a grievance.

16 A year later, after the camp at which he closed -- at  
17 which he worked had closed, the agency realized that it had  
18 made a mistake. It then told him he could file a grievance.

19 He did file a grievance. He was awarded seven months  
20 back pay; back pay from the date the mandatory 30-day  
21 suspension would have ended, until the camp closed.

22 What was subsequently held by the federal circuit was  
23 that even though it had done that and granted him his grievance  
24 rights, and even though a 30-day suspension was mandatory, that  
25 somehow the agency lost its right to suspend him for 30 days as

1 a result of failing to notify him of the right to filing a  
2 grievance such that the grievance proceeding occurred late in  
3 the day.

4 QUESTION: -- goes to whether they should have  
5 decided anything? I mean is the --

6 MR. WRIGHT: No, I -- but I just wanted to set --

7 QUESTION: Yes.

8 MR. WRIGHT -- clear that the only mistake here was  
9 failing to notify him that he had a right to a grievance.

10 One point that's worth noting is that one area that  
11 Congress wanted employees, including nonveterans and the  
12 excepted service to still be able to file claims in court, was  
13 in discrimination cases. And as we have pointed out, Congress  
14 in Section 7707 and 7702 has very carefully integrated the  
15 procedures in discrimination cases with the procedures it set  
16 up in Chapters 43 and 75.

17 So in that area Congress wanted to preserve a right.  
18 It preserved it.

19 The final point I'd like to make is that there are  
20 indeed anomalous results flowing from the court's decision  
21 below. The amicus has told us that even though it's undisputed  
22 that a veteran competitive service employee cannot go to court  
23 to challenge a 10-day suspension, he thinks that an excepted  
24 service employee could.

25 There is anomaly in Section -- Chapter 43 versus

1 Chapter 75 that we have discussed. And finally, there is a  
2 short of reverse anomaly even though probationary employees are  
3 excluded from Chapter 75 in the same sentence of the same  
4 subsection as excepted service employees. It is thought that  
5 they, of course, have no right of action, whereas this employee  
6 does. We don't think that's right. We think Congress clearly  
7 meant to exclude nonveterans excepted service personnel and  
8 probationary employees from going to court except in  
9 discrimination cases.

10 Thank you.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wright.

12 The case is submitted.

13 (Whereupon, at 1:49 o'clock p.m., the case in the  
14 above-entitled matter was submitted.)

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REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-595

CASE TITLE: United States v. Joseph A. Fausto

HEARING DATE: October 7, 1987

LOCATION: 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 United States Supreme Court.

Date: October 14, 1987

*Margaret Daery*  
\_\_\_\_\_  
Official Reporter

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