

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: DEPARTMENT OF THE TREASURY, INTERNAL  
REVENUE SERVICE. Petitioner V. FEDERAL  
LABOR RELATIONS AUTHORITY, ET AL.

CASE NO. 88-21<sup>2</sup>3

PLACE: Washington, D.C.

DATE: January 8, 1990

PAGES: 1 thru 48

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY  
SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

1                   IN THE SUPREME COURT OF THE UNITED STATES

2 -----X  
3 DEPARTMENT OF THE TREASURY,                   :  
4     INTERNAL REVENUE SERVICE,                   :  
5                                    Petitioner                   :  
6                    v.                                    :     No. 88-2123  
7 FEDERAL LABOR RELATIONS                    :  
8     AUTHORITY, ET AL.                            :  
9 -----X

10   Washington, D.C.

11   Monday, January 8, 1990

12                   The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 10:01 a.m.

15 APPEARANCES:

16 DAVID L. SHAPIRO, ESQ., Deputy Solicitor General,  
17     Department of Justice, Washington, D.C.; on behalf of  
18     the Petitioner.

19 ROBERT J. ENGLEHART, ESQ., Washington, D.C.; on behalf of  
20     the Respondent Federal Labor Relations Authority.

21 GREGORY O'DUDEN, ESQ., Washington, D.C.; on behalf of the  
22     Respondent National Treasury Employees Union.

C O N T E N T S

1		
2	<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
3	DAVID L. SHAPIRO, ESQ.	
4	On behalf of the Petitioner	3
5	ROBERT J. ENGLEHART, ESQ.	
6	On behalf of the Respondent Federal	
7	Labor Relations Authority	16
8	GREGORY O'DUDEN, ESQ.	
9	On behalf of the Respondent National	
10	Treasury Employees Union	33
11	<u>REBUTTAL ARGUMENT OF</u>	
12	DAVID L. SHAPIRO, ESQ.	
13	On behalf of the Petitioner	40
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		



1 President. Circular A-76 was originally issued in the  
2 early -- in the 1950s and has been amended a number of  
3 times ever since. It is a statement of executive policy  
4 on the important matter of Federal procurement. It deals  
5 in some detail with the circumstances under which the  
6 particular work shall be done inside the agency or shall  
7 be contracted out.

8 The Circular specifically states not only that  
9 it is designed to give administrative direction to heads  
10 of agencies, but, and I quote, that it "shall not  
11 establish and shall not be construed to create any  
12 substantive or procedural basis for anyone to challenge  
13 any agency action or inaction on the basis that it was not  
14 in accordance with the Circular, except as specifically  
15 provided in the Circular itself." The Circular then goes  
16 on --

17 QUESTION: Excuse me. That last point is really  
18 not essential to your principal argument here, though, is  
19 it? Even if it had -- even if it had not included that  
20 provision, even if you were allowed to imply that there  
21 might be some binding effect in the courts, your main  
22 argument would be unaffected, wouldn't it?

23 MR. SHAPIRO: Well, the core of our argument,  
24 Your Honor, is that Circular A-76 is not an applicable law  
25 within the meaning of the management rights provision. So

1 that if Circular A-76 did confer third-party rights that  
2 would be enforceable in court, then that threshold aspect  
3 of our argument would be crossed, and you would come to  
4 the latter part of our argument that the subject matter of  
5 the Circular is excluded from bargaining by Section 7117 -

6 -

7 QUESTION: (Inaudible) to be the principal part  
8 of your argument.

9 MR. SHAPIRO: No, it's really -- I believe it's  
10 a subsidiary part. We reach it really only at the latter  
11 point of our brief. The focus of our argument is really  
12 that Circular A-76 is not an applicable law. We do make  
13 both arguments.

14 QUESTION: Well, Mr. Shapiro, I guess you come  
15 close to conceding that the Circular is a governmentwide  
16 rule or regulation for purpose of Section 7117.

17 MR. SHAPIRO: Yes, we do, Your Honor, although  
18 we think that question need be reached only if the Court  
19 determines that it is an applicable law under 7106. We do  
20 believe, however, that there is a considerable difference  
21 between the scope, purpose and language of 7117 on the one  
22 hand and the scope and language of 7106 on the other.

23 QUESTION: Well, it strikes one as a little odd  
24 that Congress intended a different meaning for purposes of  
25 7103 than it did in 7117.

1 MR. SHAPIRO: There are three relevant  
2 provisions of this statute, Your Honor. There is the  
3 definition of a grievance, in Section 7103, which refers  
4 very broadly to any complaint of any violation of a law,  
5 rule or regulation. There is Section 7117, which excludes  
6 from the scope of bargaining any proposal that is  
7 inconsistent with any governmentwide rule or regulation.

8 Now, it may be that the concept of a rule in  
9 those two provisions is the same. We content in our brief  
10 that it is not. But it may be that it is. Congress has  
11 indicated in the legislative history that it regards a  
12 government policy statement as within the scope of 7117.

13 But the third provision of the act, and the one  
14 in which we place our central reliance, is the management  
15 rights provision of 7106. That section does not use the  
16 words rule or regulation. It speaks only of applicable  
17 laws. And in our view the scope and purpose of that  
18 section is very different.

19 Now, there is, as I say, a reference in Circular  
20 A-76 to an internal appeals procedure within the agency  
21 itself that agencies are required to create. But that  
22 internal appeals procedure, as spelled out in the  
23 Circular, is not to authorize an appeal outside the agency  
24 or judicial review, and it is provided that it may not be  
25 subject to negotiation, arbitration or agreement.

1 QUESTION: Well, Mr. Shapiro, where does the  
2 Treasury authority -- get the authority to contract out to  
3 begin with? Does it get it from the Circular?

4 MR. SHAPIRO: No, I think it is -- I think it is  
5 inherent in the agency's appropriations that certain kinds  
6 of functions may be performed either in-house or by  
7 contracting out. But I don't believe the authority to  
8 contract out comes from the Circular.

9 The Circular is a statement of policy about how  
10 existing authority is to be exercised. The Circular does  
11 in fact purport to preclude contracting out of certain  
12 kinds of governmental functions. But the Circular, I  
13 don't believe, is the source of authority. I think the  
14 government's authority to contract out predates the  
15 Circular, which goes back only to the 1950s.

16 QUESTION: Well then, how can negotiating over  
17 what is in the Circular affect the authority of the  
18 agency, if the authority doesn't get -- if the authority  
19 doesn't derive from the Circular?

20 MR. SHAPIRO: I think the authority of the  
21 agency exists even if there were no Circular. The  
22 Circular is defined -- designed to give the agency  
23 direction with respect to the exercise of that authority.  
24 And so, when the agency follows A-76, it is making  
25 determinations with respect to contracting out. The

1 agency isn't -- I'm sorry, the Circular is a direction to  
2 Federal agencies. I think I was only trying to suggest  
3 that the authority to contact out predates the publication  
4 of the Circular, and I believe would exist even if there  
5 were no Circular. But the Circular is designed to direct  
6 the exercise of that authority.

7 The union proposal in this case was a proposal,  
8 and I quote it at this point, that the "internal appeals  
9 procedure of the Circular shall be the grievance and  
10 arbitration provisions of the collective bargaining  
11 agreement."

12 The agency refused to bargain over that, holding  
13 that bargaining was precluded by the management rights  
14 provision. The Federal Labor Relations Authority upheld  
15 the union's claim that the proposal was subject to  
16 bargaining. The matter was taken to the D.C. Circuit  
17 Court of Appeals, which held two to one that the agency  
18 was correct. In that decision, the D.C. Circuit was  
19 coming down with a result that was diametrically opposed  
20 to the en banc decision of the Fourth Circuit, as well as  
21 to the rationale of a decision of the Ninth Circuit, and  
22 so that decision was brought here for review.

23 QUESTION: Mr. Shapiro, while you are pausing  
24 for liquid refreshment, why -- why doesn't the government  
25 rely on Section (a)(1) of 7117, which simply says that the

1 duty to bargain in good faith doesn't extend to matters  
2 which are the subject of a rule or regulation, if the rule  
3 or regulation is a governmentwide rule or regulation,  
4 which this is?

5 MR. SHAPIRO: Your Honor, we do rely on that  
6 provision, but --

7 QUESTION: Very subtly.

8 MR. SHAPIRO: Well no, quite explicitly in our  
9 brief on page 38. It is not the core of our argument.  
10 The FLRA has an answer to that argument which we believe  
11 is not correct. I don't want to make it for them, but to  
12 summarize it very briefly it is that since Circular A-76  
13 is a rule or regulation, the authority to subject  
14 decisions under it to the grievance procedure and  
15 arbitration exists under the Federal Labor Management  
16 Relations statute. 7117, they say, only operates to  
17 preclude certain matters from negotiation, but not from  
18 the operation of the grievance procedure or the  
19 arbitration provision. We contend that that position is  
20 incorrect.

21 QUESTION: Well, that argument would mean it's  
22 in the arbitration provision automatically, but you don't  
23 have to bargain to put it in here (inaudible).

24 MR. SHAPIRO: That's right, and indeed that is  
25 their argument. Their argument here is that the union

1 proposal is superfluous, that the authority to go to the  
2 grievance procedure and arbitration would exist even  
3 without it. In fact, the FLRA's position here is that  
4 this case essentially is resolved by the definition of a  
5 grievance in Section 7103. They say that because the  
6 concept of a grievance has such a broad definition, any  
7 matter relating to subcontracting, in effect, can be taken  
8 to arbitration without regard to the management rights  
9 provision.

10 Indeed, as I read their argument, they are  
11 saying that the definition of a grievance overrides the  
12 management rights provision. That the management rights  
13 provision, they say, comes into play only insofar as it  
14 may exercise a constraint on the arbitrator's decision.  
15 That the arbitrator may not substitute his judgment for  
16 that of a Federal agency in matters of discretion.

17 Now, on this score, that is, reading the  
18 grievance procedure in effect to override the threshold  
19 provisions of the management rights provision, there is a  
20 very fundamental disagreement between the FLRA and the  
21 Federal agency employer in this case that goes to the  
22 heart of the construction and purpose of the statute. We  
23 believe the FLRA is incorrect for two essential reasons.

24 First of all, the definition of a grievance is  
25 very broad. It covers not only any complaint involving

1 the violation of a rule or regulation, but also, as the  
2 union quite happily points out, covers any complaint  
3 involving any matter relating to employment. So that if  
4 the definition of a grievance overrode the management  
5 rights provision, it would be not only that any complaint  
6 of violation of Circular A-76 could be taken to  
7 arbitration, but any complaint about subcontracting, even  
8 if there were no Circular A-76, because, as we concede, a  
9 complaint about subcontracting is a complaint about a  
10 matter relating to employment. We do not believe that the  
11 grievance definition can override the management rights  
12 provision in that way.

13 Indeed, the management rights provision itself  
14 makes it clear that that cannot be so. The management  
15 rights provision, Section 7106, which is an essential part  
16 of this statute in terms of the very special needs of the  
17 government, states that subject to Subsection (b) of this  
18 section, nothing in this chapter, and that includes the  
19 definition of a grievance, nothing in this chapter shall  
20 affect the authority of any management official of any  
21 agency in accordance with applicable law to make  
22 determinations with respect to contracting out.

23 Now, in our view, that means that determinations  
24 with respect to contracting out, which is what we have in  
25 this case, can be subject to the act despite the

1 management rights provision only in two circumstances.  
2 One is if it falls within Subsection (b) of the management  
3 rights provision. No such contention is made here by the  
4 FLRA or the union. The other is --

5 QUESTION: (Inaudible) subsection (b) of the  
6 management rights provision being --

7 MR. SHAPIRO: Subsection (b), 7106 (b). Nothing  
8 in this section shall preclude any agency from  
9 negotiating. Subsection (1) deals with matters that the  
10 election of the agency --

11 QUESTION: Okay.

12 MR. SHAPIRO: -- is not applicable here.

13 QUESTION: Right, right, right.

14 MR. SHAPIRO: Subsection (2) deals with  
15 procedures, and it has never been contended that that is  
16 what's involved here. Subsection (3) deals with the  
17 impact or effect of a determination but not with the  
18 determination itself.

19 The other ground on which a matter might be  
20 excluded from the coverage of the management rights  
21 provision is if the question is one of conformity with an  
22 applicable law. If it is, then, Justice Scalia, we come  
23 to the argument that we have made under 7117. But we  
24 contend, in accordance with every lower court judge who  
25 has discussed this issue, that Circular A-76 is not an

1 applicable law within the meaning of the management rights  
2 provision. And we contend that for several reasons, which  
3 we think are evident from the face of the document itself,  
4 from its source, from its purpose and from its  
5 application.

6 To begin with, as I indicated earlier, the  
7 document itself makes it clear that it is intended as a  
8 directive from a superior to a subordinate for the  
9 guidance of that subordinate, and that it is not designed  
10 to create any third-party rights or enforceable duties.  
11 It says specifically that it shall not be construed to  
12 create any basis for anyone to challenge any agency  
13 action.

14 Now, it is not simply the evident purpose of the  
15 document that we believe leads to that conclusion, it is  
16 the nature of the document. It is the fact that the  
17 document is issued as a policy directive on a matter of  
18 procurement policy by a branch of the Executive Office of  
19 the President, which is the President's principal arm for  
20 the exercise of his managerial functions.

21 It is a document that necessarily contains in it  
22 a great deal of delegated discretion, that is -- is  
23 essential for the effective operation of this document  
24 that agency heads bring their expert judgment to bear on  
25 these decisions. And it is a document which it's clear

1 purpose and effect is designed essentially as any order  
2 from a superior to a subordinate would be designed. It  
3 is, in other words, in our view, the exercise of the very  
4 kind of managerial prerogative that Section 7106 is  
5 designed to preserve.

6 QUESTION: Mr. Shapiro, does the government  
7 concede that applicable laws can include regulations? I  
8 mean, I -- that's essentially what your argument seems to  
9 concede.

10 MR. SHAPIRO: No, we do -- we do concede that,  
11 Your Honor, that regulations having the force of law would  
12 be applicable laws. We don't believe that this is such a  
13 regulation. We believe it is a policy statement which has  
14 always been viewed by the courts, which views itself,  
15 which is designed simply as an instruction from a superior  
16 to a subordinate. We do not believe that Congress  
17 intended, in using the phrase applicable law, to permit  
18 the vehicle of the exercise of managerial discretion to  
19 become the instrument for eliminating managerial  
20 discretion. And for that reason we ask that the judgment  
21 below be reversed.

22 If I may, I would like to reserve the rest of my  
23 time for rebuttal.

24 QUESTION: May I ask a question before you sit  
25 down, Mr. Shapiro? Is there anything in the legislative

1 history to indicate that the management rights provision  
2 was not intended to limit the sphere of what is grievable  
3 under the grievance provisions?

4 MR. SHAPIRO: Specifically, Your Honor --

5 QUESTION: Does the legislative history give us  
6 any indications about that?

7 MR. SHAPIRO: Specifically, Your Honor, I am not  
8 aware that a particular statement that says that the  
9 management rights provision itself limits the scope of  
10 what is grievable or subject to arbitration. Indeed,  
11 there are some ambiguous statements that are very heavily  
12 relied on by the union and the FLRA, by Representatives  
13 Udall and Ford, that might be read the other way. I may  
14 address those for a minute.

15 In the first place, we don't believe that these  
16 ambiguous statements could possibly override the very  
17 clear language of the chapter on the provision that says  
18 nothing in this chapter, including the definition of a  
19 grievance. In the second place, the statement by  
20 Representative Ford was made after the enactment of the  
21 statute, and this Court has recognized that post-enactment  
22 statements are not -- do not throw any light on the intent  
23 or purpose of the statute.

24 And finally, we think the statements can fairly  
25 be read simply as saying that if a question of conformity

1 with applicable law does arise, that then the grievance  
2 and arbitration provisions of the statute may come into  
3 play.

4 Thank you.

5 QUESTION: Thank you, Mr. Shapiro.

6 Mr. Englehart.

7 ORAL ARGUMENT OF ROBERT J. ENGLEHART

8 ON BEHALF OF THE RESPONDENT

9 FEDERAL LABOR RELATIONS AUTHORITY

10 MR. ENGLEHART: Mr. Chief Justice, and may it  
11 please the Court:

12 When Congress enacted the Federal Service Labor  
13 Management Relations statute, it required that every  
14 collective bargaining agreement have a grievance procedure  
15 ending in binding arbitration. Congress also specified  
16 the kinds of disputes that can be brought under that  
17 grievance procedure. A dispute over whether IRS violated  
18 OMB Circular A-76 when IRS contracts out the jobs of  
19 bargaining unit employees comes within that authorized  
20 scope that Congress specified for a negotiated grievance  
21 procedure.

22 QUESTION: Under what provision?

23 MR. ENGLEHART: Under the provision of  
24 7103(a)(9)(C)(ii), the definition of grievance, any  
25 claimed violation, misinterpretation or misapplication of

1 law, rule or regulation.

2 At the outset, it is important to emphasize what  
3 this holding by the Federal Labor Relations Authority does  
4 not do. It does not authorize the statute's grievance  
5 procedure to prevail over the statute's managements right  
6 provision. Management has no right to make determinations  
7 that violation law, rule or regulation affecting  
8 conditions of employment --

9 QUESTION: Well, what would be your -- what  
10 would be your position if there weren't any Circular, and  
11 the agency went ahead and contracted out?

12 MR. ENGLEHART: Then there would be no binding  
13 limits on management's discretion, and that's an important  
14 feature of the Authority's position in this case.

15 QUESTION: And then any proposals to bargain  
16 over any aspect of contracting out wouldn't be negotiable?

17 MR. ENGLEHART: Proposals that could qualify for  
18 the special bargaining status under 7106(b)(2) and (b)(3),  
19 yes. But the discretion generally that the management  
20 rights provision preserves to management is non-  
21 bargainable, and this proposal doesn't seek to bargain  
22 over that discretion. It seeks to hold --

23 QUESTION: And so the -- so you -- the issuance  
24 of the regulation really then makes bargainable something  
25 that wouldn't have been bargainable before?

1 MR. ENGLEHART: It makes grievable something  
2 that wouldn't other --

3 QUESTION: I mean grievable, yes.

4 MR. ENGLEHART: Grievable; And this provision --

5 QUESTION: Well, and then hence bargainable.

6 MR. ENGLEHART: To the extent of stipulating the  
7 scope of the grievance procedure, yes. But not the  
8 substantive exercise or in any way narrowing the scope of  
9 the exercise. It doesn't change that at all.

10 QUESTION: Mr. Englehart, what's your answer to  
11 the Solicitor General's argument that when the Section  
12 7106(a) defines management rights it says nothing in this  
13 chapter shall detract from it, and that the definition of  
14 grievance is in this chapter?

15 MR. ENGLEHART: Yes, the Authority does not see  
16 a conflict between the command of Section 7106 and the  
17 grievance procedure. 7106 begins "Nothing in this  
18 chapter." The next words are "shall affect the  
19 authority." The Authority's position is that the  
20 management authority, protected from other aspects of the  
21 chapter, is the authority to make determinations in  
22 accordance with law, rule and regulation affecting  
23 conditions of employment. That it does not give extra  
24 protection or different protection -- separate protection  
25 for illegal exercise of management rights.

1           QUESTION: But it doesn't say law, rule or  
2 regulation. That is your position, that they have no  
3 right, except in accordance with applicable law, rules and  
4 regulations, to do these things. But all the statute says  
5 is that it shall not affect the right of the management  
6 official in accordance with applicable laws to assign  
7 work.

8           MR. ENGLEHART: Justice Scalia, we read  
9 applicable laws in 7106 as we would Section -- Subsection  
10 (b)(2) and (b)(3). Those are exceptions when you have a  
11 conflict. We do not read a conflict between the authority  
12 reserved to management in Section 7106 and the right to  
13 grieve when there has been an alleged violation of law,  
14 rule or regulation.

15           QUESTION: But surely -- you keep saying law,  
16 rule or regulation, but surely the statute means  
17 something, when in some sections it very explicitly says  
18 laws, rules and regulations, as it does in -- in  
19 7103(a)(9)(C)(ii), for example, another one of the  
20 important provisions here, and a second one of the  
21 important provisions here, 7117, does. But here it very  
22 explicitly only says laws. You think there is just no  
23 rhyme nor reason to its just using laws in that provision?

24           MR. ENGLEHART: Well, we note that IRS does not  
25 contend that laws is limited to congressional enactments,

1 that it includes laws, rules and regulations. IRS, until  
2 its reply brief, did not contend that there was any  
3 difference between the laws, rules and regulations  
4 encompassed within that phrase from the law, rule and  
5 regulation referred to in the definition of grievance.  
6 Only now, in the reply brief, do we see the suggestion  
7 that the applicable laws reference would be more narrow.  
8 We're not told why the Circular cannot qualify as a rule  
9 or regulation for applicable law purposes, if it can  
10 qualify for rule or regulation for the definition of  
11 grievance.

12 And in the absence of legislative history either  
13 defining applicable laws or determining how it should be  
14 construed, there seems to be no basis to compel a  
15 construction of applicable laws that is more narrow.

16 QUESTION: In the absence of legislative history  
17 laws means the same thing as laws, rules or regulations.  
18 That's the way you want to interpret the statute?

19 MR. ENGLEHART: IRS does not dispute the fact  
20 that applicable laws includes laws, rules and regulations.

21 QUESTION: Includes some regulations.

22 QUESTION: But we're not bound by a party's view  
23 of the thing.

24 MR. ENGLEHART: I understand, Your Honor. But  
25 the fundamental difference why the Authority does not find

1 applicable law as a question that is controlling in the  
2 case, is because the Authority does not see a reason to  
3 have an escape clause from Section 7106, if you will.  
4 There is no conflict when grievance determinations are  
5 only allowed to affect management action that violates  
6 law, rule or regulation affecting conditions of  
7 employment.

8 A critical point in the case is that management  
9 does not contend it has the authority to arrive at  
10 determinations that violate law, rule or regulation  
11 affecting conditions of employment. IRS does not contend  
12 that it has this authority. Therefore, determinations,  
13 and the Authority reviews these determinations for  
14 compliance with law, rule and regulation -- that is part  
15 of the Authority's job -- determinations which are limited  
16 to stopping that exercise of management right don't affect  
17 the Authority.

18 I would emphasize for this Court that in no  
19 other case, dealing with no other management right, has a  
20 court ever been urged to find that grievances are  
21 prohibited over the exercise of a management right, other  
22 than in the area of contracting out. We have this  
23 argument in this case that -- by IRS -- that asks that we  
24 find that Congress put two provisions of the statute in  
25 collision. They need not be in collision.

1 QUESTION: Yes, but the -- it is contended by  
2 the government that this Circular just isn't a law, rule  
3 or regulation, never was intended to be.

4 MR. ENGLEHART: The government, as I understand  
5 their position in the reply, is that there is an interest  
6 in having it not be an applicable law, even if it is a  
7 law, rule or regulation affecting conditions of  
8 employment.

9 QUESTION: Well, however you put it, that's its  
10 characterization of its own Circular.

11 MR. ENGLEHART: The OMB is the issuing agency,  
12 and the OMB, we submitted in our brief on pages 34 to 45,  
13 an examination will reveal that OMB does consider the  
14 Circular a regulation --

15 QUESTION: You concede that OMB had the  
16 authority to issue this Circular?

17 MR. ENGLEHART: Yes, we do. And we also argue  
18 that --

19 QUESTION: And is the -- and you understand the  
20 government to concede that the agencies must, must follow  
21 the Circular?

22 MR. ENGLEHART: I don't know that there is a dispute over  
23 that. I believe the dispute is over where they can be  
24 held accountable, and that is really the fundamental  
25 difference in the case. The Comptroller General is

1 involved in reviewing these cases for compliance with the  
2 Circular. But the IRS would argue the Comptroller General  
3 is not hampered by --

4 QUESTION: You must -- you must be arguing that  
5 there is something inconsistent between the Circular and  
6 the law, and the statutes on which you rely.

7 MR. ENGLEHART: I am not sure I understand Your  
8 Honor's question.

9 QUESTION: Well, the Circular says there is only  
10 one way to review these actions of the agency under the  
11 Circular.

12 MR. ENGLEHART: Right.

13 QUESTION: And you say that that Circular cannot  
14 be --

15 MR. ENGLEHART: It is our position --

16 QUESTION: -- to that extent.

17 MR. ENGLEHART: It is our position that that  
18 aspect of the Circular can't override Congress' command in  
19 the statute.

20 QUESTION: But that -- that Circular, with that  
21 provision in it, amounts to an OMB construction of its own  
22 authority and of the statute's, I guess.

23 MR. ENGLEHART: We would argue that, for  
24 purposes of whether it is a law, rule or regulation under  
25 our statute, one looks at the overall effect of the

1 regulation. That certainly is to be taken into account,  
2 but it shouldn't be controlling --

3 QUESTION: You are really just picking and  
4 choosing what you want out of the Circular, aren't you?

5 MR. ENGLEHART: Well, the grievance procedure is  
6 not an aspect that management uses in exercising its  
7 determination to contract out. The grievance procedure is  
8 something under the Circular that has afforded directly  
9 affected parties to challenge compliance with what the  
10 Circular would appear to concede are mandatory and non-  
11 discretionary aspects. All that the statute does is latch  
12 onto binding rules and regulations in the Federal  
13 Government, regulations, provided that they affect  
14 conditions of employment. And that is a very narrowing  
15 term.

16 This grievance procedure is not about to latch  
17 onto rules and regulations and laws that have no  
18 relationship to the conditions of employment. And we  
19 don't see that IRS is contesting that aspect of the case.  
20 This would appear to be a law, rule or regulation  
21 affecting conditions of employment.

22 I would like to emphasize one important point  
23 that is being raised by IRS, latter in the case, is a  
24 suspicion about the intent behind the grievance procedure,  
25 that because it is in a definitional provision of the

1 statute it perhaps is an inadvertent or unintended  
2 reference. The legislative history of the statute shows  
3 the Congress was very well aware that it was defining the  
4 scope of the grievance procedure by use of this  
5 definitional provision.

6 The House committee report references the fact  
7 that the definition of grievance is broad, but that  
8 Section 7121(c) of the statute is a limiting term on the  
9 scope of the grievance procedure. And, if you'll notice  
10 in Section 7121(c), a small portion of management rights  
11 do appear there, so that management didn't think that just  
12 by making something a management -- I am sorry, so that  
13 Congress didn't think that just by making something a  
14 management right it also made it non-grievable.

15 The conference committee report also stated that  
16 unless the parties agree otherwise, and obviously IRS is  
17 perfectly well equipped to do so, to bargain at the table  
18 for a narrower scope, the intended scope of the grievance  
19 procedure was a broad one. The suggestion that the  
20 grievance definition is not to be trusted, I believe  
21 underlies a basic unfamiliarity that IRS has with this  
22 statute.

23 The other cornerstone is the collective  
24 bargaining obligation. In Section 7114 of the statute  
25 just says under our law have a collective bargaining

1 agreement. One has to go to three separate definitional  
2 provisions, collective bargaining agreement and then  
3 collective bargaining and then conditions of employment,  
4 before the contours of that bargaining obligation even  
5 begin to surface.

6 QUESTION: Mr. Englehart, could -- I assume that  
7 the position the Authority takes with regard to (2)(B) it  
8 also has to take with respect -- with respect to (2)(D) of  
9 Section 7106(a). And that is to say you would also -- you  
10 would also take the position, I assume, that if the agency  
11 has an internal memorandum as to how its personnel are to  
12 behave in emergency situations, and it says this is --  
13 this confers no private rights and it will not be  
14 bargainable, that nonetheless the taking of actions during  
15 -- to carry out the agency mission during emergencies  
16 would be bargainable?

17 MR. ENGLEHART: Your Honor --

18 QUESTION: Would be grievable.

19 MR. ENGLEHART: Each case would turn upon analysis of  
20 whether the regulation involved was one that affected  
21 conditions of employment. And I think you could  
22 anticipate by your question regulations that may well be  
23 valid rules and regulations and indeed laws that wouldn't  
24 by their nature and effect primarily be directed at  
25 conditions of employment. That is not this case.

1 QUESTION: But if it involved conditions of  
2 employment, even emergency actions taken by agencies would  
3 be subject to the grievance procedure.

4 MR. ENGLEHART: Involved, Your Honor, I submit  
5 based upon Authority analysis, wouldn't be enough. It  
6 would be a direct and -- direct effect on the conditions  
7 of employment --

8 QUESTION: Direct effect --

9 MR. ENGLEHART: -- and intended --

10 QUESTION: Whatever you want. Direct effect on  
11 conditions of employment would be grievable.

12 MR. ENGLEHART: And an intent to affect  
13 conditions of employment, that is an aspect of why the  
14 regulation was initiated. That would be, obviously, the  
15 test.

16 In the example that you gave, I think that there  
17 would also be competing considerations, the kind of  
18 considerations that you see in Authority case law in the  
19 contracting out area, that would be -- that would  
20 recognize that the scope of review that arbitrators are  
21 allowed to entertain, and the remedies that arbitrators  
22 are allowed to fashion are very limited, given the nature  
23 of the right.

24 In this case it is important to recognize that  
25 we no longer have any legitimate complaint from IRS over

1 what the grievance procedure does in these cases. We've  
2 enumerated the Authority's decision.

3 QUESTION: What is at issue here is whether or  
4 not the agency must bargain over the proposal you  
5 submitted.

6 MR. ENGLEHART: That is correct.

7 QUESTION: It isn't a question of a grievance.

8 MR. ENGLEHART: Well, the proposal --

9 QUESTION: Well, it isn't -- there is nothing --  
10 you, you want to bargain so that you will have included  
11 in the collective bargaining agreement the procedure for  
12 contracting out. Isn't that right?

13 MR. ENGLEHART: Your Honor, the proposal merely  
14 specifies the scope of the grievance procedure with  
15 respect to the contracting-out determination. It does not  
16 in any other way change management's discretion in the  
17 area, in the traditional way --

18 QUESTION: What is the provision you rely on,  
19 then, to say that this issue is bargainable, is  
20 negotiable, that this proposal must be, must be acceded to  
21 by the agency? Is it --

22 MR. ENGLEHART: Not must be acceded but must be  
23 on the bargaining table. It is the rights that flow from  
24 Section 7121 of the statute that command that every  
25 collective bargaining agreement have a grievance

1 procedure. And grievance procedure is defined in  
2 7103(a)(9) --

3 QUESTION: So you don't rely on -- you don't  
4 rely at all on 7106(2) -- (b)(2)?

5 MR. ENGLEHART: Your Honor, we believe that  
6 Congress intended the grievance procedure to exist even if  
7 there weren't a (b)(2). This may well be analyzed as a  
8 (b)(2) procedure. But if there were no (b)(2) in the  
9 statute, Congress made its intent clear with respect to  
10 the ability to grieve alleged violations of law, rule and  
11 regulation affecting conditions of employment.

12 QUESTION: Well, you don't really need the  
13 contracted, the contractual provision at all. I mean, I -  
14 - the hardest part of this case, I think, is why -- why  
15 you need this in the contract. If you are right about  
16 everything you say, you don't even need a contractual  
17 provision. Isn't that right?

18 MR. ENGLEHART: That shouldn't be the hardest  
19 part of this case, though, I submit, in that it --

20 QUESTION: Well, it's the easiest part of the  
21 case to see that it is hard.

22 (Laughter.)

23 QUESTION: Is -- isn't it true that if  
24 everything you say is right, you don't, you don't need  
25 anything in the contract?

1 MR. ENGLEHART: If the grievance procedure were  
2 undefined except to entertain the statutory command of  
3 law, rule and regulation violations affecting conditions  
4 of employment, the Authority's position is that would  
5 bring this within the scope. That is correct. And that  
6 this makes specific so as to obviate delay and confusion  
7 at some point on when there is an actual --

8 QUESTION: It seems to me if you are right that  
9 all you have to -- the management is subject to bargaining  
10 to establish a grievance procedure about any exercise of  
11 its management rights.

12 MR. ENGLEHART: Not about any exercise of its  
13 management rights. The grievance procedure does not  
14 exempt management's rights from scrutiny for the limited  
15 purpose of compliance with law, rule and regulation. That  
16 is so important to this case. The Authority has made  
17 clear that any determination by management that is within  
18 the bounds of law --

19 QUESTION: So you have to rely -- to win, you  
20 have to rely on the Circular?

21 MR. ENGLEHART: To win we rely on two points.  
22 The scope of the grievance procedure is commanded by the  
23 language and the specific intent of Congress, and that the  
24 Circular is a law, rule and regulation affecting  
25 conditions of employment. Just those two points.

1 QUESTION: But don't you have to persuade us too  
2 that 7106(a)(2), in accordance with applicable laws, means  
3 laws, rules and regulations?

4 MR. ENGLEHART: I don't believe we do, Your  
5 Honor, because we don't attach the significance to that  
6 phrase as defining the scope of the grievance procedure.  
7 We believe the grievance procedure defines that scope.

8 Let me give you this hypothetical. If  
9 applicable laws were used to define grievances that would  
10 suggest that you could never grieve the exercise of a  
11 management right that appears in (a)(1), there are a  
12 number of rights there, or that appear in (b)(1). Or that  
13 you couldn't have a provision in your contract that  
14 required compliance with any kind of law for an (a)(1)  
15 right or a (b)(1) right.

16 The Authority case law is to the contrary, and  
17 we would note that Judge, now Justice, Kennedy's decision  
18 in U.S. Marshall Service, decided -- cited at page 29 of  
19 our brief, suggests just the assertion of a 7106(b) right  
20 does not preclude a grievance. Grievance is a specific  
21 intent and specifically defined by Congress.

22 QUESTION: Yet this case isn't about grieving.  
23 It's about what can be bargained, isn't it?

24 MR. ENGLEHART: Only -- it is directly about  
25 grievance.

1           QUESTION: But I thought the issue -- the issue  
2 raised -- I thought the issue decided by the court of  
3 appeals was whether the Treasury can be required to  
4 bargain about this.

5           MR. ENGLEHART: Bargain about a provision that  
6 stipulates the scope of the grievance procedure. So it is  
7 involving --

8           QUESTION: You weren't going through some  
9 useless procedure, were you, in submitting this proposal?  
10 Justice Scalia said well, why did you even have -- ask --  
11 why did you even submit this proposal if you could grieve  
12 over -- over this?

13          MR. ENGLEHART: The Federal Labor Relations  
14 Authority didn't submit a proposal. A union submitted a  
15 proposal, in this case National Treasury Employees Union,  
16 which an employer declared non-negotiable, and it came to  
17 the Authority in its capacity to adjudicate negotiability  
18 issues. And the Authority issued an order that has been  
19 appealed.

20          QUESTION: Well, I know, but why do you -- you  
21 don't, I don't suppose the Authority goes around deciding  
22 issues that are wholly unnecessary to decide.

23          MR. ENGLEHART: The Authority is required to  
24 decide any negotiability dispute that is properly  
25 presented to it. And in this case IRS declared this

1 proposal non-negotiable.

2 QUESTION: Well, why would you -- why do you  
3 think the union presented this proposal?

4 MR. ENGLEHART: My understanding --

5 QUESTION: Just for fun or do you think they  
6 thought that they had to have it or they couldn't grieve?

7 MR. ENGLEHART: Your Honor, I don't think that  
8 the union thought they had to have it. I think the union  
9 wanted to get this kind of litigation out of the way so  
10 that when a contracting-out determination came down the  
11 pipe --

12 QUESTION: Make sort of make-work --

13 MR. ENGLEHART: -- they would be ready. Well,  
14 the make-work has come because it is challenged by IRS,  
15 not because the union submitted it. Indeed, the --

16 QUESTION: Your time has expired, Mr. Englehart.

17 MR. ENGLEHART: Thank you.

18 QUESTION: Mr. O'Duden.

19 ORAL ARGUMENT OF GREGORY O'DUDEN

20 ON BEHALF OF THE RESPONDENT

21 NATIONAL TREASURY EMPLOYEES UNION

22 MR. O'DUDEN: Mr. Chief Justice, and may it  
23 please the Court:

24 QUESTION: What's your answer to my question?

25 MR. O'DUDEN: The question why we want the

1 proposal in the contract? There are very sound, practical  
2 reasons for why we need this kind of proposal in the  
3 contract.

4 QUESTION: Oh, you need it? You need it.  
5 Without the proposal you couldn't grieve over this --

6 MR. O'DUDEN: No, we certainly could. Let me  
7 explain to you why -- why we would want to make such a  
8 proposal. It is common practice in the Federal sector to  
9 incorporate important regulatory provisions right into the  
10 contract. That -- that's just the way things are done.  
11 So much of the employment relationship in the Federal  
12 sector, after all, is determined by laws, rules and  
13 regulations. The contracts are largely enforced and  
14 administered by lay people. It helps them to a great  
15 extent to have these very important laws, rules and  
16 regulations in the contract so that they can see what the  
17 relevant provisions are, so that they can be guided by  
18 them.

19 Furthermore, it helps employees because it puts  
20 the employer agency on notice that this is a rule -- this  
21 is a regulation that you are going to have to follow. And  
22 we hope that it thereby encourages compliance with these  
23 kinds of rules and regulations.

24 And furthermore, as my friend with the FLRA has  
25 already pointed out, it helps avoid future disputes about

1 whether something is arbitrable. So there are very sound  
2 practical reasons why we would make such a proposal, and  
3 indeed it is every day practice in the Federal sector.

4 Next, let me address the IRS' contention that  
5 the applicable laws language in 7106 should be read to  
6 have a narrower scope than laws, rules and regulations.  
7 We have heard them concede today that the A-76 Circular is  
8 indeed a rule within the meaning of the grievance  
9 procedure, but they say that is not good enough. They  
10 suggest that we have to show something more than that.  
11 And we would submit that that is untenable.

12 There are many rules, many rules in the Federal  
13 sector, for example those in the Federal Personnel Manual,  
14 that have always been routinely grievable, but under the  
15 IRS' construction of the statute, they would read  
16 applicable laws to cancel out the express statutory right  
17 to file grievances over those rules. To put it a somewhat  
18 different way, under the IRS' construction of the statute,  
19 and we believe it is a rather strange one, it would mean  
20 that the agency actually has a right to violate rules and  
21 regulations that do not meet its definition of applicable  
22 law. And we would say that that is an untenable -- an  
23 untenable view of the statute, indeed.

24 Finally, let me add that even if the government,  
25 the IRS, were somehow correct here, that we had to

1 demonstrate that the Circular was a regulation with the  
2 force of law, that is, a substantive rule or a legislative  
3 rule, and we would emphasize that we do not believe that  
4 that is our burden here, but even if that were correct we  
5 would strongly suggest that we meet even that most  
6 stringent test. And let me explain why.

7 First of all, what we have here is a Circular  
8 that was issued pursuant to statutory authority. It is  
9 unquestionably binding on executive agencies. They gave  
10 notice, they asked for comment, they held hearings and,  
11 perhaps most important, they incorporated the provisions  
12 of A-76 right into the code of Federal regulations within  
13 the subpart that describes the Federal acquisition  
14 regulations. If that isn't a substantive rule or  
15 regulation, I suppose I am not sure what is.

16 So, for these reasons we would say that by any  
17 stretch of the imagination the A-76 Circular is indeed a  
18 law, rule or regulation within the meaning of the  
19 grievance procedure, which we would submit controls here,  
20 or it is an applicable law even under the IRS' most  
21 stringent definition.

22 QUESTION: Mr. O'Duden, do we -- do we owe any  
23 deference to anybody here?

24 MR. O'DUDEN: I would say you do, Your Honor. I  
25 would say --

1 QUESTION: To who? To who?

2 MR. O'DUDEN: -- that the FLRA --

3 QUESTION: The FLRA --

4 MR. O'DUDEN: -- is entitled to great deference  
5 here, as Your Honor well knows.

6 QUESTION: Have we said that in any of our  
7 cases?

8 MR. O'DUDEN: Excuse me, Your Honor?

9 QUESTION: Have we said that in any of our  
10 cases?

11 MR. O'DUDEN: You have said that in the BATF  
12 case, Your Honor. It is a well established principle of  
13 course that the administrative agency charged with  
14 interpreting the statute is entitled to deference, unless  
15 its views are clearly unreasonable. And that clearly is  
16 not the case here.

17 Perhaps it would help me to spend just a moment  
18 to talk a bit about the relationship of the management  
19 rights clause and the grievance procedure, because I think  
20 that perhaps there is some uncertainty as to how these two  
21 provisions fit together.

22 The management rights clause is there to protect  
23 management's authority to make substantive decisions. It  
24 insulates management from having to bargain about  
25 substantive rules.

1           The grievance arbitration procedure has an  
2 entirely different scope. It says that to the extent that  
3 management is already bound by rules and regulations, even  
4 those that you couldn't bargain about, it is bound to  
5 follow them. And it gives employees the right to file  
6 grievances whenever --

7           QUESTION: So the --

8           MR. O'DUDEN: -- management steps out of line.

9           QUESTION: So the Circular, in effect, does make  
10 grievable, you say, things that might not be grievable in  
11 the absence of the Circular?

12          MR. O'DUDEN: It is not the -- it is not the  
13 Circular that makes anything grievable, Your Honor. It is  
14 the statute that does that.

15          QUESTION: Well, I know, but without the  
16 Circular, then what would be grievable?

17          MR. O'DUDEN: Oh, I agree that it is necessary  
18 for us to have the Circular here in order to pursue a  
19 successful grievance, because without the Circular there  
20 would be no binding requirements on the agencies. So the  
21 Circular is important --

22          QUESTION: It's kind of odd that it's just a  
23 mistake by OMB then to think that it had the authority to  
24 exclude the grievance procedure under its regulation.  
25 That is just inconsistent with the statute, you are

1 saying?

2 MR. O'DUDEN: The Circular itself says that it  
3 does not apply if it is inconsistent with law. So OMB is  
4 indeed --

5 QUESTION: So -- so its provision that -- its  
6 provision purporting to establish an exclusive appeals  
7 procedure is inconsistent with the statute.

8 MR. O'DUDEN: It is inconsistent with the  
9 statute. It cannot override a determination --

10 QUESTION: Well, wait. It's effective -- it's  
11 effective with respect to the Administrative Procedure  
12 Act, presumably. It may well be effective to exclude  
13 judicial review --

14 MR. O'DUDEN: Well --

15 QUESTION: -- of these determinations.

16 MR. O'DUDEN: It might, I suppose --

17 QUESTION: You don't want to give that away,  
18 either?

19 MR. O'DUDEN: No, I don't want to give it away.  
20 Certainly not, Your Honor. I suppose that would enter  
21 into the calculation of whether it is a binding rule with  
22 the force of law.

23 QUESTION: It's at least conceivable that it  
24 would have that effect, even though it doesn't have -- it  
25 is conceivable that it could have that effect without

1 having the effect of preventing grieving.

2 MR. O'DUDEN: It is conceivable, of course. But  
3 in the end, of course, a determination as to whether  
4 something is a binding rule for purposes of the APA does  
5 not turn alone on the agency's characterization of the  
6 rule or regulation.

7 Unless there are further questions, I have  
8 nothing more to add. Thank you very much.

9 QUESTION: Thank you, Mr. O'Duden.

10 Mr. Shapiro, do you have rebuttal?

11 REBUTTAL ARGUMENT OF DAVID L. SHAPIRO

12 ON BEHALF OF THE PETITIONER

13 MR. SHAPIRO: Yes. Thank you, Mr. Chief  
14 Justice. Just a few points.

15 First of all, if the FLRA's position in this  
16 case is correct, the union's bargaining proposal is not  
17 simply superfluous, it is far narrower than the actual  
18 matters that can be grieved and taken to arbitration,  
19 because it is not limited to matters covered by the  
20 internal appeals procedure. It would embrace all matters  
21 within the Circular, and indeed any decision with respect  
22 to subcontracting.

23 Second, we have been, I think, accused of making  
24 several concessions that we have never made. We do not  
25 concede that the term "applicable laws" is to be given the

1 same meaning as the term "law, rule or regulation"  
2 elsewhere in the statute. We believe that the FLRA's  
3 reading of the grievance definition is too broad, but we  
4 contend quite vigorously that, whatever the proper reading  
5 of that definition, the phrase applicable laws is  
6 considerably narrower in its purpose and scope. Finally,  
7 I --

8 QUESTION: Precisely how? I -- that is what I  
9 really don't understand, Mr. Shapiro. What kind of rules  
10 and regulations are under applicable laws?

11 MR. SHAPIRO: Your Honor, if we start with the  
12 use of the phrase laws, rules or regulations in 7117,  
13 Congress indicated there that they regarded the phrase to  
14 be broad enough to include governmentwide policy  
15 directives. They did not want the parties bargaining in  
16 matters inconsistent with governmentwide policy directives  
17 on any subject.

18 But when they use the phrase applicable laws in  
19 7106, we contend that they meant only statutes and  
20 regulations having the force of law in the sense that they  
21 conferred enforceable rights and duties. We do not  
22 believe that phrase embraces policy statements of the kind  
23 involved here.

24 Now, I think perhaps the critical difference  
25 between the IRS and the Authority here is with respect to

1 the role the management rights provision plays. As I  
2 understand the Authority's position, it is that all that  
3 the management rights provision does is to exercise  
4 constraint on arbitrators when they are deciding cases.  
5 They should not interfere with managerial discretion.

6 We contend that the management rights provision,  
7 when it is fully applicable, must go to the threshold  
8 question of grievability, arbitrability, as well as  
9 negotiability. That the management rights provision means  
10 that managerial decisions, whether they are discretionary  
11 or not, should not be turned over to a third-party  
12 decision maker.

13 And the -- what happened in the Blytheville  
14 case, which is an example of the consequences of that kind  
15 of authorization, we believe strongly supports our  
16 position. And indeed, Major Ketler, who discusses the  
17 Blytheville case in detail in the only study I know of  
18 this problem, agrees with us that there was in that case a  
19 significant arbitral interference which was upheld by the  
20 FLRA with the exercise of managerial authority.

21 In other words, the key to this case for us is  
22 that the management rights provision, when it is fully  
23 applicable, as it is here because none of the exceptions  
24 in the provision apply, that provision excludes not only  
25 negotiability but grievability and arbitrability.

1 QUESTION: (Inaudible) if you just repeal the  
2 Circular, just withdrew the Circular.

3 MR. SHAPIRO: Well, but that would be a painful  
4 act, Your Honor, because this is a very important  
5 directive by the President to the heads of agencies about  
6 how procurement policy is to be conducted. So it might  
7 get us out of this case, but it would get us into --

8 QUESTION: Well, is there some -- as long as it  
9 -- it's a directive they have to follow, but you say it's  
10 -- really shouldn't be considered a rule or regulation.

11 MR. SHAPIRO: Not an applicable law, Your Honor.  
12 I think it's a directive that has to be followed, as any  
13 order from a superior to a subordinate must be followed,  
14 not in the sense of creating externally enforceable rights  
15 or duties.

16 QUESTION: What happens if the agency says well,  
17 I heard this argument up in court and I know this isn't a  
18 -- law or regulation, so I just won't obey it.

19 MR. SHAPIRO: As I understand --

20 QUESTION: What does that President have to do?  
21 Or what can he do? Anything?

22 MR. SHAPIRO: As I understand it, the only thing  
23 the President can do is to exercise the authority that any  
24 superior can exercise over subordinate, which is to see to  
25 it that the insubordinate person is somehow disciplined

1 for insubordination.

2 QUESTION: You mean like the member of an agent  
3 -- independent agency?

4 MR. SHAPIRO: This applies to executive  
5 agencies, as I understand it.

6 QUESTION: It doesn't -- it doesn't apply to  
7 independent agencies?

8 MR. SHAPIRO: It applies to agencies that are  
9 within the jurisdiction of the executive branch.

10 QUESTION: I take it it follows the President  
11 could excuse compliance anytime he wishes?

12 MR. SHAPIRO: In the sense, I suppose, that a  
13 superior can overlook insubordination by a subordinate, if  
14 it chooses.

15 QUESTION: Well, he could give advance approval,  
16 I take it --

17 MR. SHAPIRO: Yes.

18 QUESTION: -- to depart from the Circular?

19 MR. SHAPIRO: Yes.

20 QUESTION: Well, the agency itself, as I  
21 understand under 75 -- 7106, could elect to bargain over  
22 some of its management rights.

23 MR. SHAPIRO: I don't it could allow -- I think  
24 bargaining over this is fairly precluded, in our view.  
25 There are certain elections --

1 QUESTION: Well, Section (b), 7106(b) says at  
2 the election of the agency some of the management rights  
3 could be --

4 MR. SHAPIRO: Yes, but I don't think contracting  
5 out is included.

6 QUESTION: Well, --

7 MR. SHAPIRO: And in any event, I don't think an  
8 agency -- that is, if an agency were to choose to bargain  
9 over some --

10 QUESTION: Well, it says nothing in this section  
11 shall preclude any agency and any labor organization from  
12 negotiating about procedures which management officials  
13 will observe in exercising any authority under this  
14 section. So they may bargain about it if they want to.  
15 Isn't that right?

16 MR. SHAPIRO: I don't think that the decision to  
17 turn over management authority to a third-party arbitrator  
18 would be bargaining over procedure. Indeed, the FLRA has  
19 never suggested that (b)(2) is broad enough to cover this  
20 case. If an agency were to decide that its election to  
21 bargain in violation of A-76, that might well be an act of  
22 insubordination with respect to the direction of the  
23 Circular itself.

24 If there are no more --

25 QUESTION: May I ask -- yes, may I just ask one

1 question, Mr. Shapiro?

2 We have been talking all about 7106(a)(2)(B),  
3 and what if we talked about 7106(a)(2)(A), to hire,  
4 assign, direct, lay off and so forth -- that provision.  
5 And supposing instead of 70 -- Circular 7 -- Circular 76  
6 we had a circular general personnel policies about hiring  
7 and the like. Would your same argument apply that that  
8 would also not be an applicable law?

9 MR. SHAPIRO: I think it would depend on a close  
10 analysis of the circular to determine whether it was an  
11 applicable law.

12 QUESTION: And the circular that is in effect,  
13 what about the one --

14 MR. SHAPIRO: Well, what is in effect is the --  
15 Federal Personnel Manual, which covers a whole wall on  
16 people's bookshelves.

17 QUESTION: Is that an applicable law? That is  
18 my question.

19 MR. SHAPIRO: As a whole, Your Honor, I don't  
20 think I could answer that question. I think that there is  
21 one critical difference between the Manual and this  
22 Circular, and that is that there is no general statement  
23 at the outset that it is not intended to or designed to  
24 create any enforceable rights. Particular questions about  
25 the Federal Personnel Manual have arisen in the FLRA, but

1 to my knowledge so far have not been resolved in the  
2 courts of appeals. I think it would turn on the extent to  
3 which those provisions were applicable laws. They are, of  
4 course, --

5 QUESTION: Is that the same question, Mr.  
6 Shapiro, as whether you, a private party, could bring an  
7 APA suit with regard to them?

8 MR. SHAPIRO: I think --

9 QUESTION: I mean, I would like to have some  
10 body of law that, you know, that the lower courts are  
11 looking at. Just to say well, it depends on whether it's  
12 an applicable law. Don't we have any body --MR. SHAPIRO:  
13 I think if --

14 QUESTION: -- of law we can refer to on these  
15 questions?

16 MR. SHAPIRO: I think if a private party could  
17 bring an APA action, that that would be very strong, if  
18 not conclusive, evidence that the -- you are dealing with  
19 an applicable law. It might be that you have procedures  
20 that can fairly be considered to confer enforceable rights  
21 and duties and ways that do not include judicial review.  
22 There may be such cases, and I don't want to exclude them  
23 from possibility.

24 Thank you, Your Honor.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

1 Shapiro.

2 The case is submitted.

3 (Whereupon, at 10:57 a.m., the case in the  
4 above-entitled matter was submitted.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

#88-2133 - DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Petitioner

---

V. FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

---

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Leona M. May*  
(SIGNATURE OF REPORTER)

LEONA M. MAY  
(NAME OF REPORTER - TYPED)

RECEIVED  
SOUTH WEST  
MA

'90 JUN 17 P4:11