

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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WASHINGTON, D.C. 20543

CAPTION: WILLIAM "SKY" KING, Petitioner V.

ST. VINCENT'S HOSPITAL

CASE NO: 90-889

PLACE: Washington, D.C.

DATE: October 16, 1991

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WILLIAM "SKY" KING, :

4 Petitioner :

5 v. : No. 90-889

6 ST. VINCENT'S HOSPITAL :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, October 16, 1991

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:03 a.m.

13 APPEARANCES:

14 AMY L. WAX, ESQ., Assistant to the Solicitor General,
15 Department of Justice, Washington, D.C.; on behalf of
16 the Petitioner.

17 HARRY L. HOPKINS, ESQ., Birmingham, Alabama; on behalf of
18 the Respondent.

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1 PROCEEDINGS

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We will now here
4 argument in Case No. 90-889, William Sky King v. St.
5 Vincent's Hospital.

6 Ms. Wax, you may proceed whenever you're ready.

7 ORAL ARGUMENT OF AMY L. WAX

8 ON BEHALF OF THE PETITIONER

9 MS. WAX: Mr. Chief Justice, and my it please
10 the Court:

11 This case concerns the application of the
12 Veteran's Reemployment Rights Act, which provides job
13 protection for members of the armed forces. The question
14 at issue which arise under Section 2024(d) of the act, is
15 whether the right to a leave of absence upon request to
16 perform active duty for training is conditioned on the
17 reasonableness of the request, or more specifically, on
18 the length of the leave requested.

19 In 1987, petitioner, Mr. William King, who was
20 employed as head of security at respondent hospital,
21 requested a leave of absence to serve a 3-year tour of
22 full-time duty in the Alabama National Guard, as a member
23 of the Active Guard Reserve program, which provides
24 full-time support personnel for armed forces Reserve
25 units. This request was denied by the hospital, which

1 filed this action for a declaratory judgment that they
2 were not required to grant the leave.

3 The courts below held that a request for leave
4 under Section 2024(d) is subject to a three-factor test of
5 reasonableness. In applying that test, the court of
6 appeals focused on the length of a leave, and ruled that a
7 3-year leave was, per se, unreasonable. In any event,
8 they held, petitioner's request was unreasonable under the
9 circumstances, mainly because it was too long.

10 The Government petitioned for certiorari to
11 resolve a circuit split on the issue of the interpretation
12 of Section 2024(d). It is our position that the Eleventh
13 Circuit's reasonableness test has no basis whatsoever in
14 the statute. There simply is not requirement that a
15 request for leave be reasonable. Once it is established,
16 and no one contests in this case, that Section 2024(d)
17 covers petitioner's duty, and that if he enjoys any re-
18 employment rights at all, it is under this section. The
19 Government submits that the language of 2024(d) answers
20 this case.

21 Now on the question of coverage, the district
22 court made the finding that petitioner received orders
23 under Section 502 of 32 U.S.C. to perform full-time
24 National Guard duty. And Section 2024(f) of the
25 Reemployment Rights provision states that full-time

1 National Guard duty under Section 502 is considered active
2 duty for training for purposes of 2024(d), the provision
3 at issue.

4 That provision states in pertinent part that an
5 employee shall, upon request, be granted a leave of
6 absence by such person's employer for the period required
7 to perform active duty for training. The provision says
8 that the employee shall be granted leave. There is no
9 option for the employer to refuse. The only condition
10 placed on the grant of leave is that of a request, a
11 condition that was complied with here.

12 It's obvious, it's plain, that the word
13 "reasonable" no where appears in this section. And as for
14 the factor of which the court made so much, that of the
15 duration of leave, the provision obviously places no fixed
16 limitation on how long an individual can be away from
17 their job. And to the extent that it can be said to
18 address duration at all, it states that the employee is to
19 be granted a leave for the period required to perform the
20 pertinent duty.

21 That language makes clear that the period of the
22 leave is just the period required to complete the training
23 program in which the reservist is enrolled. That
24 requirement, it is assumed, will be fixed by statute or by
25 the military, whose job it is, after all, to determine

1 these sorts of requirements, and which is traditionally
2 accorded a great deal of deference in fixing training
3 requirements in the military.

4 Now in this case, Army regulations require 3
5 years of service in the AGR program. And it follows that
6 petitioner retains his leave of absence status and his
7 right to return to his position for the full 3 years.

8 To summarize then, Section 2024(d) creates a
9 flexible, elastic protection that expands and contracts to
10 fit the requirements of a particular tour of training
11 duty.

12 QUESTION: No limit? There's no time limit
13 whatever?

14 MS. WAX: No, Your Honor, none. The open-ended
15 language --

16 QUESTION: You think -- so you say -- and he has
17 to be permitted to return? I mean it could be as long as
18 12 years, I assume, if he takes two tours of duty under
19 some of these things. And he has to be permitted to
20 return with the same seniority he would have had if he had
21 stayed, even though he's been away for 12 years.

22 MS. WAX: The longest tour of duty that is
23 covered by this section at this time is the 3-year AGR
24 program. In order to be away 12 years, he'd have to
25 re-enroll four times. We are -- the Government is aware

1 of no cases in which someone has sought to return to his
2 job after re-enrolling in AGR four times.

3 What generally happens as a practical matter,
4 Your Honor, in the very rare cases in which people
5 re-enroll in AGR, is that the individuals choose to give
6 up their jobs and make a career of this program. So the
7 theoretical possibility, which we concede exists, because
8 it is possible to re-enroll in the AGR, although it's
9 totally at the discretion of the military -- an individual
10 can't do it on their own motion -- that theoretical
11 possibility hasn't really been a problem.

12 QUESTION: What if the employer has abolished
13 the position when the person wants to come back, he just
14 no longer has that?

15 MS. WAX: Right. The individual will not have
16 the right to come back to his job if the employer
17 abolishes the position. And that flows from several
18 aspects of the statute. Number one --

19 QUESTION: I'd like you to tell me what that
20 flows from because I no more see that in the text of this
21 provision than I see any time limit, and I wonder why
22 you're willing to imply the one but not imply the other?

23 MS. WAX: Well, it says that the employee shall
24 be permitted to return to such employee's position. And
25 it is the Department of Labor's view that the condition

1 precedent to returning to your position is that the
2 position still exists.

3 Furthermore, this flows from --

4 QUESTION: By implication.

5 MS. WAX: Yes, we think it's a tenable reading
6 of that language. And the reason that it's more tenable
7 than perhaps the alternative, is because 2024(d), and also
8 other sections contain what this Court has called the
9 escalator clause, which says that he shall -- an
10 individual shall return with such status and such
11 seniority as he would have had had he remained on the job.

12 Now, it's truism that if someone's position is
13 abolished, they would not have had such a job even if they
14 had stayed on the job. And we think that this section
15 manifests Congress' intent not to make returning trainees
16 better off than they would have been if they'd stayed. So
17 the combination of those two sections, we think, answers
18 that question.

19 QUESTION: Ms. Wax, do you think we owe
20 deference to the most recent Veterans' Reemployment Rights
21 Handbook regulations in this area in light of the very
22 dramatic shifts by the Department of Labor in their view
23 of this statute and its requirements over the years?

24 MS. WAX: Well, Your Honor, this Court has
25 stated in *Monroe v. Standard Oil*, that the Veterans'

1 Reemployment Handbook is an authoritative source of the
2 interpretation of the act. We do think that deference is
3 owed, but I think what we would say is that deference
4 isn't needed here because this is not an issue in the
5 statute where there's any ambiguity.

6 There are other issues in this statute where
7 there is some question about how it is to be applied, and
8 this Court has dealt with them in a long line of cases,
9 cases that deal with the terms and conditions upon which
10 an individual returns to their job on which the statute
11 may not be crystal clear. But the issue of whether the
12 person gets their job back, we think that's crystal clear,
13 and there need be no recourse to the Veterans' Handbook on
14 that question.

15 The open-ended language --

16 QUESTION: What -- can you explain it to me why
17 is it that the Government says this is not an initial
18 period of active duty for training? This is something
19 else?

20 MS. WAX: Yes.

21 QUESTION: What is it?

22 MS. WAX: It is active duty for training.

23 Active duty for training is a term of art, Your Honor.

24 QUESTION: And that's different from an initial
25 period of active duty for training?

1 MS. WAX: Yes, Your Honor, initial active-duty
2 training, which by statute and regulation lasts 90 days or
3 less -- 30 to 90 days, that's covered by Section 2024(c),
4 a separate provision of the act which provide reemployment
5 rights for initial active-duty training. This is
6 something else entirely.

7 QUESTION: I don't understand that because that
8 says for not less than 12 consecutive weeks.

9 MS. WAX: Excuse me, right, 90 days --

10 QUESTION: It has to be more than 90 --

11 MS. WAX: Excuse me, 3 to 6 months. That's my
12 mistake. Initial active-duty training is training that
13 all reservists are required to perform that runs from 3 to
14 6 months. So 2024(c) is structured to apply, and is
15 intended to apply to that initial intensive period of
16 training that all ready reservists are required to
17 perform. All other training duty is covered by
18 Section 2024(d).

19 QUESTION: This is a new job. It is not clear
20 to me why this wasn't an initial period of active duty.
21 It was an entirely new position for him.

22 MS. WAX: Right.

23 QUESTION: And it was longer than 12 weeks, so
24 he's not covered by (c), so (d) clicks in.

25 MS. WAX: Right. Well, the reason that this

1 individual is covered by 2024(d), Your Honor, is to be
2 found is 2024(f), which specifically addresses the
3 question of the reemployment rights of members of the
4 National Guard who serve on full-time duty under section
5 502 of 32 U.S.C. That's how they get their orders.

6 Now, he received his orders under Section 502 of
7 32 U.S.C. Individuals who are serving so-called initial
8 active-duty training, which is another term of art,
9 receive their orders under another section of Title X,
10 actually, I believe. And that is the kind of training
11 that 2024(c) was meant to apply to.

12 You're right that this is an initial tour of
13 duty for him of AGR duty, but it was decided in the courts
14 below and all parties agree that 2024(d) is the provision
15 that applies, by virtue of the orders that he got -- the
16 orders that he got, which are under Section 502, which is
17 AGR duty.

18 The open-ended language of Section 2024(d) is to
19 be contrasted with the fixed temporal limits to be found
20 in other subsections of 2024, which apply to reservists
21 and others who perform active duty in the armed forces.
22 Section 2024(a), for example, which governs those who
23 enlist on active duty, provides at least 4 years of job
24 protection, and in some cases, 5. The same applies to
25 subsection (b).

1 QUESTION: Yes, but under that one, I guess it's
2 under (b) (2), he's got to reapply, doesn't he, for a job?

3 MS. WAX: Yes, Your Honor.

4 QUESTION: And here he just shows up and says I
5 want to go to work.

6 MS. WAX: Correct, Your Honor.

7 QUESTION: And also, isn't there a difference in
8 their protection from discharge after they get back?

9 MS. WAX: Correct.

10 QUESTION: How does it make sense to say you're
11 protected from discharge under (a) and (b) and you get no
12 protection under (d), when you might be away even longer,
13 as you say?

14 MS. WAX: Right. Well, the answer is that the
15 reason for this disparity in features for active duty, for
16 training on the one hand and active duty on the other, can
17 be explained without reference at all to differences in
18 duration. Individuals who are on active duty see combat,
19 they're in harms way. They are subjected to -- they are
20 essentially members of the fighting force. Very often
21 they are. And therefore, Congress could have made the
22 judgment that those individuals need more protection in
23 the form of a period to readjust to civilian life.

24 QUESTION: Yeah, but why should they have to
25 reapply instead of just showing up like these people do?

1 MS. WAX: Well --

2 QUESTION: That cuts the other way on that part
3 of it.

4 MS. WAX: On the other hand, probably in
5 exchange for these greater protections, a
6 post-discharge -- a post-return discharge protection, a
7 longer period to reapply, the Government -- Congress
8 decided to give employers a sort of quid pro quo of leeway
9 to put the person in their old job or in another job, for
10 example. And the reapplication process is a way of
11 letting the employer decide whether he's going to return
12 them to their old job or an equivalent job, which is what
13 employers are committed to do for individuals returning
14 from active duty.

15 QUESTION: I thought you were going to answer by
16 saying when it was originally drafted, (d) really did just
17 apply to short leaves for training, like not over about 3
18 months, or so. And then there was an amendment later on
19 that picked up this AGR duty.

20 MS. WAX: Your Honor, that's another answer to
21 the question. I think the answer has two parts. One is
22 that duration is not necessarily the explanation. The
23 other is that Congress may have geared --

24 QUESTION: As originally drafted, isn't it fair
25 to assume that Congress thought these were all short-

1 durational training leaves?

2 MS. WAX: Well, at the time it was drafted, the
3 only leaves were the short leaves which are listed in the
4 legislative history, Your Honor. That is correct. But
5 Congress drafted the statute in an open-ended way. It
6 didn't put the fixed limits on the statute that it could
7 have put, and in fact, put in other sections like 2024(a),
8 (b), and (g). So our position is that the fact that
9 certain short training duties -- tours were the only ones
10 that existed at the time this statute was enacted, doesn't
11 really prove anything because Congress did not do what it
12 could have done, which is simply to limit the reach of
13 2024(d) and make it an inflexible statute, and make it an
14 inflexible provision that put a ceiling on the leaves,
15 essentially.

16 QUESTION: Were any of those short training
17 leaves at the time the statute was first enacted wholly
18 voluntary in the sense that this one was not? I mean, as
19 I understand it, this particular individual applied for
20 this 3-year duty. I mean, he put himself in a position of
21 being ordered to be away 3 years. Were the short-term
22 trainees to whom you referred in a different position
23 whereby they would be subjected to it willy-nilly?

24 MS. WAX: No, Your Honor. The provision that
25 was enacted in 1960 was intended to cover reservists, and

1 the Reserve forces were manned by volunteers. They always
2 have been manned by volunteers. So one has to volunteer
3 to be a member of the Reserve. The short training duty
4 that applied to the reservists, the 1 weekend a month and
5 2 weeks a year training that existed in 1960, that was
6 something that you had to do if you wanted to be a member
7 of the Reserve.

8 So the fact that this is voluntary --

9 QUESTION: That was kind of essential to the
10 status of being a reservist, whereas this particular
11 training assignment is not. Isn't that fair to say?

12 MS. WAX: Well, it's not required of you in
13 order to be in the Reserve, but Your Honor, we don't think
14 anything turns on that. First of all, for what it's
15 worth, no court of appeals that has looked at this, and
16 some of them have actually looked at this particular
17 issue, has ever found it relevant on the text of the
18 statute, whether an individual volunteers or not. Because
19 there's just no basis for distinguishing between the two.

20 But beyond that, we would take the position that
21 this sort of duty or other training duty that might be
22 encompassed by this provision is in its own way just as
23 vital to the proper performance of the Reserve forces as
24 the standard required training duty. I mean, if neither
25 of them existed, or if either of them didn't exist, the

1 reservists simply would not be a ready fighting force.
2 The training that is now required is just a result of the
3 Reserve forces being a far more technical complicated
4 fighting force.

5 Now, the Eleventh Circuit's ruling is not just
6 an untenable reading of the statute's terms, but it also
7 has untenable consequences. Usually when a party comes
8 before this Court and asks it to disregard the plain
9 language of the statute, it suggests or its reason is that
10 departing from the plain language would better serve the
11 underlying purposes of this statute. But of course here,
12 the very opposite is the case.

13 First of all, the Eleventh Circuit's test, with
14 its emphasis on duration and a per se rule, would in
15 effect deprive all 35,000 members of the National Guard
16 who serve in Active Guard Reserve status of any protection
17 whatsoever. They would have no reemployment rights
18 because they are required to serve for 3 years. And this
19 is particularly anomalous in light of the protections
20 afforded to members of the Federal Reserve components who
21 server in AGR, those individuals are considered to be on
22 active duty under Title X, and they are entitled to
23 protection under the provisions that apply to active duty,
24 which give at least 4 years of protection.

25 So one would have a situation in which members

1 of the National Guard who perform exactly the same
2 functions as Federal reservists would have nothing, and
3 the Federal reservists would have full protection.

4 QUESTION: Ms. Wax, I know it's irrelevant to
5 our decision in the case, but are there any pending
6 efforts in Congress to sort of make these statutes a
7 little more compatible than they are now in the fashion
8 they ask they be interpreted?

9 MS. WAX: Your Honor, to my knowledge, the
10 Department of Labor and the Department of Defense in the
11 wake of Operation Desert Shield and Storm has attempted to
12 draft a new statute that would rationalize this scheme to
13 some extent. The -- as far as I know --

14 QUESTION: Because it just doesn't fit together
15 the way you would think it would if somebody were looking
16 at the whole problem and trying to draft legislation.

17 MS. WAX: Well, Your Honor, we don't really
18 agree with that. We think that it actually works quite
19 well. It certainly allows the military the flexibility
20 that it needs and that time has shown it needs to respond
21 to changing times, the demise of the draft, the ascending
22 importance of the Reserve forces, and the concomitant
23 technological complications of modern warfare. So we
24 think that the provision really is quite well drafted to
25 comport with changing times, so to speak.

1 Now the features that respondent tries to point
2 to, which somehow are supposed to show that this provision
3 just can't be applied to long-term duty, we don't think
4 show anything of the sort. For example, that these people
5 are entitled to a leave of absence, a leave of absence for
6 a term of years. Well, the fact is that it's possible to
7 take a leave of absence that lasts years. There are
8 individuals in our office who have taken a year's long
9 leaves of absence to serve the Solicitor General. It's
10 possible to return to your job at the next regularly
11 scheduled working period.

12 I know people, I've done it myself, who finish
13 one job on Friday, travel to a far city, and start another
14 job on Monday. I mean, these things certainly can be
15 done.

16 We agree that Congress may have geared the
17 provision overall to shorter periods, but that doesn't
18 mean that they can't be applied to longer periods. One
19 doesn't follow from the other.

20 QUESTION: Ms. Wax, what you said earlier about
21 how accepting the respondent's position would cause
22 National Guard members to be at a disadvantage compared
23 with Federal Reserve members, what provision governing
24 members of the Federal Reserve did you have in mind?

25 MS. WAX: Federal reservists who serve in the

1 Active Guard Reserve are called under 10 U.S.C. 672(d),
2 which governs active duty on a voluntary basis. That is
3 cited in our brief, Your Honor, footnote 25. And those
4 individuals receive -- because they are considered to be
5 on active duty -- that's the classification that applies
6 to them, under 10 U.S.C. in Federal status, they are
7 covered by Section 2024(b), which gives reemployment
8 rights to reservists who serve on active duty.

9 The reason why these two different
10 classifications exist is mainly because AGR personnel in
11 the National Guard serve in State status. In order to
12 serve in State status, they have to receive orders under
13 Section 502. They're attached to their State National
14 Guard unit. It's really just a classification scheme that
15 the military has come up with, but it does have a
16 rationale.

17 QUESTION: But is (b) that covers them.

18 MS. WAX: Correct. The Federal.

19 QUESTION: Yes, the Federal.

20 MS. WAX: Yes.

21 QUESTION: Which is what I suspected, although I
22 didn't know how you got there. But (b) does at least have
23 some limitation period, does it not?

24 MS. WAX: Four years, Your Honor.

25 QUESTION: Yes.

1 MS. WAX: But --

2 QUESTION: And you're arguing -- I mean, so you
3 argue, gee, the -- you know, if you accept the
4 respondent's position, Federal reservists will be treated
5 enormously more favorable than National Guard people. But
6 he can make just the -- a similar argument. He says, if
7 he accepts your position, National Guard will be treated
8 more favorable than the Federal Reserve, which seems even
9 more absurd. There's no way to make it work.

10 MS. WAX: Well, actually, they won't in
11 practice, Your Honor. Because Congress created an AGR
12 tour knowing that the AGR tour was supposed to replace
13 civilian military technicians who serve for 3 years. And
14 this 4-year ceiling existed in the provision for Federal
15 Reservists, so Congress knew it didn't have to worry.
16 These people were protected for a full tour.

17 But they also know that the National Guards
18 people didn't have to worry either because 2024(d) didn't
19 have any limitation. Now if at some future point they
20 create a 6-year tour of duty, obviously the Federal
21 Reservists have a problem, and Congress may have to fix
22 it. But given the tours that existed, there was no
23 problem to fix.

24 I'd like to reserve the rest of my time.

25 QUESTION: Let me ask one quick question, just

1 to help me out. In your long footnote toward the end of
2 your brief where you say -- it ends up the section would
3 provide same reemployment rights as current law provides
4 following duty under sections 503 through 505. And I
5 could look that -- what do 503 and 505 -- do they refer to
6 active duty or do they refer to training?

7 MS. WAX: No, they're training -- provisions
8 that govern training duty by National Guards people, I
9 think, as far as I recall, Your Honor,.

10 QUESTION: Very well, Ms. Wax.

11 Mr. Hopkins, we'll hear next from you.

12 ORAL ARGUMENT OF HARRY L. HOPKINS

13 ON BEHALF OF THE RESPONDENT

14 MR. HOPKINS: Mr. Chief Justice, and may it
15 please the Court:

16 I would like to emphasize one particular point
17 in reply, and that's regard to the claim that Congress
18 enacted the AGR tour. And I have brought to Court today
19 Army regulation, a 16-page document that governs the AGR.
20 It's an Army regulation. And I find no where that it has
21 been adopted by Congress, except perhaps in an
22 appropriations act. I would like to share with the Court
23 a few of the provisions in interpreting this statute.

24 QUESTION: Is this somewhere in your brief or in
25 the record?

1 MR. HOPKINS: It is in the Government's brief.

2 QUESTION: In the Government's brief.

3 MR. HOPKINS: It's cited as Army Regulation No.
4 135-18. It says, and I'm going to be brief, a program
5 that offers career development and upward mobility that
6 encourages retention. And I recite that to the Court
7 because I'm expected to send my person on a mandatory
8 leave of absence under a program that encourages retention
9 by the new employer?

10 QUESTION: Good point.

11 MR. HOPKINS: I also point this out to you, that
12 AGR personnel will be ordered to active duty or full-time
13 duty for 3 year periods. Now, that's what we've stated
14 the issue to be here, and I'm the one that drafted the
15 letter denying the 3 years. But the program goes on to
16 say personnel may be extended at their current duty
17 station or reassigned at the conclusion of each 3-year
18 period, if ordered to a subsequent tour. And they are
19 stabilized, which basically means they can't be moved
20 during the first period, but they can during the
21 subsequent periods.

22 I will move on quickly to say that it says that
23 there are provisions for retention up to 20 years, and it
24 specifies the program -- the pension program that would be
25 eligible. Now I submit, Your Honor, and I take issue with

1 the Government, and I think the Government misconceives my
2 argument and misunderstands it when I say that a leave of
3 absence of 3 years is unheard of. And I am not talking
4 about the military. What I am talking about a labor
5 council for 30 years, that would approve or negotiate a
6 contract that would say my employee in my factory would be
7 entitled to a 3-year leave of absence. And I say no,
8 unequivocally.

9 Now I look to be able to bring something to the
10 Court on that issue. Leave of absence agreements are
11 primarily private agreements, primarily negotiated,
12 primarily in a labor contract, or in at-will employee
13 policies.

14 QUESTION: Well, you'd have to do it, like it or
15 not, under some of the other provisions of Section 2024.

16 MR. HOPKINS: Precisely. Precisely. And we
17 have to do it, Your Honor, also, as happened in Desert
18 Storm. This person has no connection whatsoever with
19 Desert Storm. But I had to do it this time under the
20 other provisions for the other people as well, including
21 the senior vice president of the hospital went away
22 because he was called away, ordered pursuant to this
23 statute.

24 And I suppose that another point that would be
25 important to the Court in interpreting this difficult

1 statute, and I'm afraid, Justice Scalia, I must understand
2 in the prior case when you say words don't mean anything
3 anymore. And I'm afraid I'm asking that they oftentimes
4 don't mean anything.

5 QUESTION: Or maybe have a different meaning.

6 MR. HOPKINS: Different meaning, yes, Justice
7 Kennedy.

8 What I'm trying to say is that in 1960, when
9 this law was passed, someone -- able, I suppose,
10 legislator -- sat down and they wrote out provisions for
11 the sections that were involved and very carefully gave
12 the inductees unlimited rights. And I hope no one claims
13 that they should not be given virtually unlimited rights
14 in terms of duration. They gave volunteer persons a
15 4-year limit.

16 And they worked down the statute with what they
17 had to work with until they got to the bottom of the
18 statute, and in accordance with the Universal Military
19 Training Act that gives birth to 2024(d), it provided
20 initial duty -- initial period. And that's when a person
21 went off, a civilian for the first time, and went off and
22 took a 3- to 6-month training program. No question but
23 what Sky King did that long before this event occurred.

24 Once a civilian went off and took that initial
25 training period, that person had a Reserve obligation.

1 And Justice Souter, I'll answer your question. If you
2 stay in the Reserves, you must satisfy the Reserve
3 obligation. And usually the Reserve obligation is to go
4 to drills, weekend drills once a month, and also summer
5 camp. And I would submit that those are required. But I
6 also agree with the Government that the voluntary nature
7 of these programs in the cases that have been decided,
8 have said that that's not a proper point to distinguish
9 these cases.

10 If someone interpreted leave of absence and
11 return in terms of the Perpich case, I pulled a quotation
12 from that, that the Court decided in 1990. It doesn't
13 have any bearing on this case except the hat analogy. And
14 it says basically these people have three hats, they have
15 a State militia hat, and they have a Federal National
16 Guard hat, and a civilian hat. But Justice Stevens, I
17 believe, authored those remarks. I would submit to say
18 that someone under the AGR program, the civilian hat would
19 get mighty dusty if they had a 3-year leave of absence,
20 perhaps extended to 10 to 15 to 20.

21 A common person writing this statute and
22 interpreting it pursuant to 1960 standards, would
23 automatically conjure up the idea that a Reservist or a
24 National Guard is a part-time person. And if I grant a
25 leave to part-time person, that's one thing for part-time

1 object or policy.

2 Where I draw support, quite frankly, for the
3 90-day limitation, and the way I would interpret the
4 statute -- and I'm afraid it's gotten beyond my ability to
5 suggest an interpretation, but I would suggest that at no
6 time did Congress intend that the 2024(d) durational
7 rights or limits would exceed those of 2024(c), a minimum
8 of 90 days, a maximum usually of 6 months. Legislative
9 intent is clear. And I'll answer that question in terms
10 of the reference to 502, 503, 504, and 505, those are
11 National Guard Authorization statutes that define training
12 of short duration.

13 In 1960, 90 days would have probably have been
14 the limitation. It covers everything from a 2-hour drill
15 period to a weekend drill period to a school that
16 ordinarily would last a month or two. And that's the way
17 the statute is structured. You look at 2024(d), it talks
18 about these unusual programs -- they call them active duty
19 for training. And then you look at 2024(f) and it says,
20 oh, by the way, if you want a definition of that, you have
21 to look at 502.

22 I would also say in response to a comment that
23 was made about a later amendment from the 1960 enactment,
24 and I certainly speak not of the 1974 -- recodification,
25 which didn't change anything. I would encourage the Court

1 to carefully look, and hope they'll find support for my
2 position that it has not been amended.

3 There was an amendment in 1980, in 1980. The
4 most curious amendment I think I could possibly see in the
5 case. We have two different classes. You've got active
6 duty for training and inactive duty for training, both
7 referenced in 2024(d). Prior to the amendment, the
8 Congress says you must look at 502, 503, 504, and 505 to
9 find out what that is. And at the same time they're
10 saying that they're saying these are short-term programs.

11 And then in 1980, they simply moved 502(f)
12 from -- they didn't move it from inactive, they moved it
13 to active duty, but left it in inactive. Did not tell us
14 anything about durational limitations or frequency, but
15 simply a recognition, in my humble opinion, that there was
16 some active duty for training or other duties under
17 502(f).

18 And if the Court would please go back to the
19 enacting legislation, you will see there is a reference in
20 that history to summer camps. And the Senate referred to
21 summer camps as active duty for training.

22 QUESTION: May I interrupt, Mr. Hopkins, this is
23 kind of a critical part of the whole problem, as I see it.
24 Your opponent argues that this was -- you started your
25 argument pointing out the AGR program had been created by

1 regulations of the Army or the Department of Defense.
2 And -- which I take had developed this concept of
3 full-time service which is now a form of training for 2 or
4 3 years, like this man.

5 And they say that this 1980 amendment was
6 intended to give protection to those people who would
7 otherwise been totally unprotected as I understand because
8 they weren't on active duty within the meanings of the
9 earlier subsection, and they weren't covered by (d)
10 because that was a short-term limitation.

11 In other words, that this section the 1980
12 amendment was specifically intended to pick up people in
13 this rather small category. Is -- what's the response to
14 that?

15 MR. HOPKINS: Your Honor, I respectfully
16 disagree. Now, Justice Scalia, if words don't mean
17 anything, the intent of Congress probably doesn't mean
18 anything in this context because it comes in so many
19 different direction. It comes in authorization acts, in
20 an appropriations acts. I'm talking about --

21 QUESTION: Well, this is not an appropriation
22 today.

23 MR. HOPKINS: That's right. I'm talking about
24 it does not say anything in 1980, about doing anything
25 other than recognizing that there is active duty for

1 training under 502(f).

2 QUESTION: Well, it says for the purposes of
3 subsection (c) and (d) of this section, full-time training
4 or other full-time duty performed by a member of the
5 National Guard under section -- several sections,
6 including 502 -- is considered active duty for training.
7 And that seems to bring it within 502(d). I mean, I still
8 don't quite understand why -- or you're just saying well,
9 this is a mistake. That if you read it literally it would
10 cover it, but it was not intended.

11 MR. HOPKINS: I'm saying, Your Honor, that
12 certainly there was a recognition when 502, or when this
13 1980 amendment was made, that there was active duty for
14 training under 502(f), and also under these other
15 statutes.

16 QUESTION: Let me ask this question a little
17 differently. Prior to 1980, if this amendment had not
18 been adopted, and this man had gone on this 3-year
19 program. Would he have had any reemployment rights at all
20 under the statute in your view?

21 MR. HOPKINS: Yes.

22 QUESTION: Under what section?

23 MR. HOPKINS: Well, certainly under 2024(d), and
24 then the way I interpret that, he would have been entitled
25 to a leave to attend to summer camps, got to drills --

1 QUESTION: No, no, no. That's not my question.
2 My question is a person like this man who accepts a 3-year
3 assignment like this, prior to 1980 amendment, would he
4 have had any -- and it was purely a training assignment as
5 I understand it -- would he have had any reemployment
6 rights at all under any provision of the act? I don't
7 think he would have.

8 MR. HOPKINS: Justice Stevens, I think I
9 understand that. There is a question in these cases about
10 whether or not this was training or other duty. And in
11 1964, Congress added the other duty part to 502(f). And I
12 put in my brief the congressional intent surrounding that
13 enactment. And what I say quoting from the Senate reports
14 in the history, is that that was designed to, for benefit
15 purposes, in case someone had to go on another very
16 short-term session to attend another drill that same week.

17 So I suppose to get back, I don't know that I
18 can answer the question that you propose because I don't
19 believe today this person is entitled to this kind
20 of leave -- and certainly I don't believe he was then.
21 Quite frankly, I see no difference in this person working
22 for the Federal Deposit Insurance Corporation or the State
23 of Alabama in the Attorney General office.

24 QUESTION: Then what was the purpose of the
25 amendment that Justice Stevens has been talking about if

1 it was not that?

2 MR. HOPKINS: The purpose of the amendment was
3 to recognize that there was some active duty for training
4 under 502(f). Now, I maintain that since there is not a
5 definition or description of that, that it could just as
6 easily be 2 weeks' summer camp, a recognition of a 2-week
7 summer camp, as it could be for drill training which is
8 comparably required under 503, or some other very minimal
9 short-term school.

10 QUESTION: Is it possible to argue, because that
11 -- the 1980 amendment refers to both subsection (c) and
12 (d), did they really intend that he have the rights that
13 were provided for under subsection (c), which would then
14 have a duration limit on it, active duty -- and refers to
15 active duty.

16 Oh, that's if less than 12 months. I see. I'm
17 sorry.

18 MR. HOPKINS: I think there some durational
19 limitations, and that's where I draw the source of my
20 argument from is the fact that a 2024(c) does in fact
21 include those durational limitations.

22 QUESTION: Mr. Hopkins, I guess the only, for
23 those of us who, you know, believe in words, what you're
24 trying to invite us to hang the difference on, I guess, I
25 think, is the phrase "leave" -- "leave of absence." Is

1 that included in any of the other provisions here? None
2 of these other provisions use that term.

3 MR. HOPKINS: No. Le

4 QUESTION: They just say he must be rehired.

5 And your argument is when they say leave of absence there,
6 they're talking about something that you say must be --
7 shall be -- shall upon request be granted a leave of
8 absence, they obviously mean, what in your view, a leave
9 of absence always means -- that is, a relatively brief
10 permission for departure.

11 MR. HOPKINS: Yes.

12 QUESTION: Because you never -- a leave of
13 absence, you never leave the employment status, do you?
14 You just return to work.

15 MR. HOPKINS: That's my opinion. That's
16 correct. And I would say this in further amplification,
17 the return provision -- the statute was written for some
18 person in a factory and in a law office, hanging up his
19 apron, going to summer camp or going to summer drill,
20 someone filling in temporarily, while this person was
21 gone, and coming back and taking his apron off of that
22 hook, putting it on and resuming work. And the reason I
23 argue that it won't fit in this case is 3 years is simply
24 too long to let the apron hang there.

25 QUESTION: He doesn't even have to give notice

1 before he comes back, right? He just shows up the day
2 after the release -- after he's released from the Army.
3 There's a new supervisor, it's 12 years later, and he
4 says, well, here I am. The supervisor says who are you.

5 MR. HOPKINS: And I say that's a clear signal of
6 the intent that you must interpret this statute with the
7 background of the common meaning that Reserves are
8 part-time soldiers and they're full-time workers. And we
9 need to strike that accommodation.

10 Now, when we -- I have covered in brief certain
11 other amendments, authorization and appropriation and
12 definitional changes, and I would submit to the Court that
13 they don't make any difference. They don't amend or
14 modify or tell me or this Court that someone under an AGR
15 program is entitled to any leave of absence, much less 3
16 years. It's just the implications are that the
17 Congress --

18 QUESTION: Well, I understand all that about the
19 leave of absence. But I must confess now, Mr. Hopkins,
20 having read the statute again, I'm not sure why this man
21 might not have rights under subsection (c). And they
22 would then -- he would have to follow the re-employment
23 procedure, and he would be a person rather than an
24 employee. All the language that you emphasize in your
25 brief wouldn't apply.

1 MR. HOPKINS: Your Honor, in my opinion, to
2 answer that you would need to read the structure of
3 intendment of the Universal Military Training Act, where
4 the idea was so that we could return employees to the work
5 place to create a system whereby we would allow civilians
6 to have an initial period of training, and then we would
7 ask that they participate in these short-term programs
8 after that.

9 So I simply say that it's clear in my mind --

10 QUESTION: Well, that relates to (d), but (c)
11 contemplates longer periods of service.

12 MR. HOPKINS: Contemplates a minimum of 12
13 weeks.

14 QUESTION: Right. And this person satisfies
15 that. He has 3 years.

16 MR. HOPKINS: I would respectfully say -- and I
17 don't have the citation here not anticipating that
18 question -- but I would respectfully say that that
19 concerns a person who initially joins the Reserves who is
20 initially involved in the Reserve program. And that
21 person goes away for training that lasts a minimum of 12
22 weeks. Ordinarily not over 6 months. And that's the
23 intendment, in my opinion, of (c).

24 QUESTION: Well, I don't know, maybe I'm reading
25 these wrong. Is there a difference between being ordered

1 to an initial period of active duty and volunteering? I
2 mean, (c) applies to any member of Reserve component who
3 is ordered to an initial period of active duty for
4 training of not less than 12 consecutive weeks, whereas
5 this fellow really said take me.

6 MR. HOPKINS: In my opinion, this person
7 volunteers, but he's then ordered. He receives orders.

8 QUESTION: That doesn't make the difference?

9 MR. HOPKINS: That's --

10 QUESTION: Well, then I don't see why he's not
11 covered by (c) either.

12 QUESTION: But you seem to concede he's not
13 covered by (c)?

14 MR. HOPKINS: Yes. I do not see any basis at
15 all. Having been involved, and we have you know, I'm not
16 going to say he couldn't be, but --

17 QUESTION: But under (c), you wouldn't have to
18 give any duty to give him a leave of absence, so your
19 opinion would have been absolutely right. He's not
20 entitled to a leave of absence. But he might have a right
21 to reemployment at the end of the 3-year period if (c)
22 applies.

23 MR. HOPKINS: Yes.

24 QUESTION: And then all your language problems
25 in your brief seem to me would be sound. Or maybe there's

1 an answer to them. Ms. Wax will tell us, but --

2 MR. HOPKINS: Your Honor, we have toyed the
3 issue questions 2024(d), and I'm here to say that it
4 may -- I would not be troubled nearly as much if it were
5 2024(c) as it is 2024(d). But quite honestly, it doesn't
6 cover that and the universal --

7 QUESTION: Well, Mr. Hopkins, didn't Ms. Wax
8 tell us that the term "initial active-duty training," or
9 "initial active duty for training," as used in subsection
10 (c) is a term of art and doesn't cover this person?

11 MR. HOPKINS: Yes.

12 QUESTION: Now, I don't enough about Army
13 regulations to know, but was that her explanation?

14 MR. HOPKINS: Yes. And I don't mean to say that
15 I know anything about Army regulations, but I think the
16 answer --

17 QUESTION: Well, you sound like it.

18 (Laughter.)

19 MR. HOPKINS: Quite honestly, the last time I
20 saw any orders was when I was in the Korean conflict, and
21 I hoped then that I never saw another one. And then I
22 picked this one up, and still don't understand it.

23 But in my opinion, 2024(c) would typically
24 involve a high school graduate that goes to the Reserve
25 office and signs up and goes off on an initial period of

1 active duty for training. And when that person,
2 ordinarily and usually a young person, finishes that
3 initial period, that person then comes back to the work
4 place and then begins the drills and the summer camps.

5 QUESTION: How long is that initial period
6 typically for the young person you're referring to?

7 MR. HOPKINS: It's typically, based on my
8 reading, 6 months. The statute protects down to at least
9 12 weeks, but it's ordinarily from 12 weeks to 6 months in
10 duration. And I think that ambiguity will be resolved
11 upon a study of the Universal Military Training Act,
12 because that's the scheme of things that put all of this
13 together. And the scheme was let's send these people,
14 require them initially, to take this training.

15 QUESTION: And they wouldn't be covered if
16 they'd been on a weekly program, or one of the regular
17 programs of once a month weekend duty and two weeks, so
18 forth. And then the following year took a longer period,
19 they would be excluded because of the word "initial."

20 MR. HOPKINS: Yes. In my judgment, and as I
21 report to you, the word --

22 QUESTION: It is initial in the sense it's their
23 first period of duty of longer than 12 weeks. So it may
24 not be their first period of duty, but it's the first
25 period of that duration. So you can handle the word

1 "initial" if that's the only problem. At least I think
2 you can.

3 MR. HOPKINS: Well, I would simply say that I
4 read "initial" in the sense that I think it was intended.
5 And I would not be troubled under my situation if it were
6 applicable, because I would not have to hold this job for
7 this person. I would not have to insist that he come back
8 at the next shift and take his apron after such an
9 extended period of time.

10 QUESTION: Well, we will see what we can do, but
11 Ms. Wax tells us that that's not permissible.

12 MR. HOPKINS: I would also like to speak to the
13 guidance that the Government claims should come from the
14 handbook. And I would like to cite to the Court, Justice
15 O'Connor has already alluded to the change in the
16 handbook, and the Government has cited another case. I
17 would like to cite what I think are the principal case of
18 Skidmore.

19 And the Skidmore case says that -- certainly
20 use it as guidance if it is guidance -- the reviewing
21 courts should not blindly defer to agency interpretation,
22 and the amount of deference warranted in a particular case
23 will depend upon a thoroughness evident in it's
24 consideration, the validity of its reading -- reasoning,
25 its consistency with earlier and later pronouncements, and

1 all those factors which give it power to persuade if
2 lacking power to control.

3 And I would say that one of the arguments in
4 this case has to do with a compromise agreement. I
5 suppose that at some point -- well, I know at some point
6 in the history of the development there were some
7 statutes, or it's court decisions that suggested that
8 perhaps there is a 90-day limitation on this point. So in
9 Montgomery, Congressman Montgomery passed a House bill
10 that says instead of -- he doesn't allude to the AGR and
11 all this expansive period, he says let's give a Reserve
12 person, or a National Guard person a total of 1 year out
13 of 3. And that did not pass the Senate.

14 QUESTION: Thank you, Mr. Hopkins.

15 Ms. Wax, do you have rebuttal? You have 4
16 minutes remaining.

17 REBUTTAL ARGUMENT OF AMY L. WAX

18 ON BEHALF OF THE PETITIONER

19 MS. WAX: Yes, thank you. On this issue of
20 2024(c) versus 2024(d), it is true that initial
21 active-duty training is a term of art and it's a term of
22 art on an historical basis. On page 5 of our brief, we
23 say that in 1955 Congress enacted the predecessor to
24 2024(c), which has really not substantially changed since
25 that time, to protect reemployment rights for a period of

1 full-time, intensive, initial active-duty training.

2 QUESTION: But it was changed in 1980, and you
3 rely on the 1980 amendment. That amended 502(c) as well
4 as (d).

5 MS. WAX: That's correct, Your Honor. And to
6 that extent, we are willing to have this Court find that
7 this gentleman's reemployment rights are conferred by
8 2024(c). I mean, if this Court wants to interpret the
9 term "initial" that way, we certainly have no objection to
10 it from our point of view. Because it would give Mr. King
11 the coverage he needs.

12 QUESTION: What way? What way? Interpreted
13 what way? As though it did not exist?

14 MS. WAX: No. To be covered by 2024(c) as
15 opposed to (d). It has been our --

16 QUESTION: No, no. How do you interpret the
17 word "initial" that it would cover this situation?

18 MS. WAX: Your Honor, we adhere to our position
19 that "initial" is a term of art that refers to a
20 prescribed period of training that everyone has to do.

21 QUESTION: So what you're saying is if we choose
22 to ignore the word "initial" you don't mind.

23 MS. WAX: If you choose to give another meaning
24 to the word "initial" we don't mind.

25 (Laughter.)

1 QUESTION: No, it's neither of those. If you
2 choose to read the amendment in 1980 when it says for
3 those purposes full-time duty performed as a member
4 pursuant to these things shall be considered active duty
5 for training, a concept that concludes initial active duty
6 for training as well as subsequent to initial active duty.
7 It's a question of interpreting the language in the 1980
8 amendment which changes the meaning of the two earlier
9 statutes.

10 MS. WAX: I take it that you think that in fact
11 2024(f) amended both (c) and (d) essentially.

12 QUESTION: Well, it says so. For the purposes
13 of subsection (c) and (d) and to treat them equally. It
14 didn't say anything separate about (d). Your brief only
15 talked about (d), and I didn't realize it until I looked
16 at it this morning, that it applies equally to both.

17 MS. WAX: Your Honor, we think that's one
18 plausible interpretation.

19 QUESTION: The whole statute fits together very
20 nicely if you do it that way, because then (d) refers to
21 training of periods less than that specified year, and (c)
22 refers to those longer. And therefore, the longer ones,
23 the man has to reapply. The shorter periods, he just
24 shows up for work and says give me my job back.

25 MS. WAX: Your Honor, that's one plausible

1 interpretation. We don't want to undercut our own
2 position by pointing out that (d) doesn't say anything
3 about periods less than 90 days, but --

4 QUESTION: But it was clearly interpreted
5 as -- I mean, it was understood obviously from the text
6 and the difference in language, the original draftsmen
7 were dealing with the problem of shorter periods.

8 MS. WAX: That's all that existed at the time,
9 yes.

10 QUESTION: Well, if you cover -- if he's got
11 some relief under (c), you don't even need to consider
12 (d).

13 MS. WAX: True. Well, we think under Justice
14 Stevens' --

15 QUESTION: Because (d) says if no relief under
16 (c), you get it here.

17 MS. WAX: Your Honor, under Justice Stevens'
18 theory, he'd have relief under (c) or (d). As to what
19 happened in 1980, we think that even if the statute before
20 that didn't cover anything but shorter tours, the
21 amendment in 1980 surely not only expanded the category of
22 individuals covered by (d) or (c) or both, but also the
23 duration. There's no question about that because it's for
24 the period required to perform duty.

25 Now, I want to say one thing about respondent's

1 position. I confess to being totally confused as to what
2 respondent's position is. On the one hand, he ties his
3 viewpoint to the legislative history, the fact that only
4 certain prescribed periods of duty existed at the time the
5 statute was enacted, up to 90 days. On the other hand, he
6 endorses a free-wheeling reasonableness test, which has
7 been applied by the court of appeals to permit leaves of
8 absence for far longer than 90 days.

9 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Wax.

10 The case is submitted.

11 (Whereupon, at 12:03 p.m., the case in the
12 above-entitled matter was submitted.)
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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:

NO. 90-889 - WILLIAM "SKY" KING, Petitioner V.

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