

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: JAMES E. GILBERT, PRESIDENT, EAST  
STROUDSBURG UNIVERSITY, ET AL., Petitioners v.  
RICHARD HOMAR

CASE NO: 96-651

PLACE: Washington, D.C.

DATE: Monday, March 24, 1997

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   JAMES E. GILBERT, PRESIDENT,       :

4       EAST STROUDSBURG UNIVERSITY,   :

5       ET AL.,                           :

6                   Petitioners               :

7               v.                               :   No. 96-651

8   RICHARD HOMAR                         :

9   - - - - -X

10                                           Washington, D.C.

11                                           Monday, March 24, 1997

12               The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 10:02 a.m.

15   APPEARANCES:

16   GWENDOLYN T. MOSLEY, ESQ., Senior Deputy Attorney General  
17       of Pennsylvania, Harrisburg, Pennsylvania; on behalf  
18       of the Petitioners.

19   ANN HUBBARD, ESQ., Assistant to the Solicitor  
20       General, Department of Justice, Washington, D.C.; on  
21       behalf of the United States, as amicus curiae,  
22       supporting the Petitioners.

23   JAMES V. FARERI, ESQ., Stroudsburg, Pennsylvania; on  
24       behalf of the Respondents.

1 APPEARANCES:

2 GREGORY O'DUDEN, ESQ., Washington, D.C.; on behalf of the  
3 National Treasury Employees Union, as amicus curiae,  
4 supporting the Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 96-651, James E. Gilbert v.  
5 Richard Homar.

6 Ms. Mosley.

7 ORAL ARGUMENT OF GWENDOLYN T. MOSLEY

8 ON BEHALF OF THE PETITIONERS

9 MS. MOSLEY: Mr. Chief Justice and may it please  
10 the Court:

11 The issue presented in this case is whether due  
12 process requires a public employer to provide a hearing in  
13 every instance before suspending one of its employees  
14 without pay.

15 The Third Circuit held that a Loudermill-type  
16 hearing providing for hearing and a notice to be heard  
17 must be given to an employee in every case before  
18 suspending him without pay, regardless of the reasons for  
19 the suspension, regardless of the governmental interests  
20 involved, regardless of the purpose to be served, no  
21 matter -- regarding the substantial assurance of  
22 reliability, regardless of the duration of the suspension.

23 We think this is wrong. We think that the  
24 better rule is that which was announced in Mallen. In  
25 Mallen, the Court said an important governmental interest

1 accompanied by substantial assurance that the deprivation  
2 is not without basis may, in limited circumstances,  
3 justify the postponement of a hearing until after the  
4 deprivation.

5 What we are asking for here is for the Court to  
6 make explicit what was suggested in Mallen, that the  
7 university's interest in the prompt removal of a police  
8 officer arrested for drug-related charges justified Mr.  
9 Homar's suspension without a hearing and without pay.

10 QUESTION: So you would --

11 QUESTION: Ms. Mosley --

12 QUESTION: Excuse me.

13 QUESTION: -- it was my understanding that the  
14 Third Circuit wasn't saying you must have a full dress  
15 hearing, just give the officer an opportunity to say why  
16 he shouldn't be payless during the suspension period, just  
17 an opportunity, I think the words were, to tell his side  
18 of the story.

19 MS. MOSLEY: Yes, Your Honor. In this case,  
20 we're suggesting that such an opportunity would be  
21 useless.

22 In this particular case, we have -- in this  
23 particular case, we have a police officer who was arrested  
24 on very serious charges, and that particular arrest itself  
25 required prompt action, just as in Mallen the Court said

1 that the mere fact of the arrest is enough to undermine  
2 the public confidence and the public trust.

3 QUESTION: Well, the problem, Ms. Mosley, is not  
4 apparently on whether the suspension can occur. I don't  
5 see either side disagreeing that under these circumstances  
6 the officer can be suspended.

7 I guess it really turns on whether there should  
8 have been some opportunity promptly to discuss the pay  
9 situation during the suspension, right? I mean, that's  
10 what we're really talking about, not whether there can be  
11 a suspension, because I guess your opponents agree there  
12 could be.

13 MS. MOSLEY: Yes. In our case, however --

14 QUESTION: And in this case, we've never had a  
15 determination on the facts. I guess it turned out that  
16 the charges were dismissed very promptly, but there was no  
17 opportunity to discuss the pay situation for a while.

18 MS. MOSLEY: That's right. What we're saying is  
19 that there are important interests furthered by his prompt  
20 suspension and his prompt suspension without pay.

21 The government had important interests at stake  
22 here, not just the interest in promptly removing a police  
23 officer following his arrest on drug-related charges, but  
24 there was the interest in maintaining the public's  
25 confidence in the integrity of the police force and the

1 police officers' confidence in the integrity of the police  
2 force.

3 QUESTION: So you do not apply this to every  
4 State employee.

5 MS. MOSLEY: With respect to the arrest on a  
6 felony charge, we're saying that the arrest, or that the  
7 suspension would be without pay, but we're suggesting --

8 QUESTION: So it's with respect to all  
9 employees, or just police officers?

10 MS. MOSLEY: With all Commonwealth employees.

11 QUESTION: Well, is the suspension automatic? I  
12 mean, it seems to me that one of the things I think we're  
13 arguing about in this case is whether you're really  
14 applying this regulation, and the regulation that you set  
15 out on page 3 of your brief makes the suspension automatic  
16 on arrest.

17 There doesn't seem to be a substantive objection  
18 to the regulation as such, so if it's this regulation  
19 which is being applied, then the only real issue of fact  
20 would be, was the person arrested or charged or not?

21 MS. MOSLEY: Correct.

22 QUESTION: And yet if I understand what the  
23 other side is saying, they're saying that really isn't the  
24 standard that they apply, that in fact it's -- number 1,  
25 it's not consistently applied.



1           Number 2, if it had been alone what was being  
2 applied the individual would have been reinstated when the  
3 charges were dropped, and he wasn't, and so they're saying  
4 that the real issue in the case is -- or in the case of a  
5 suspension is not whether there was an arrest or charge,  
6 but something to do with the merits of the arrest or  
7 charge, and if the latter point is true, then there really  
8 is a lot more to talk about at a hearing than the mere  
9 fact of the arrest or not.

10           Could you comment on that issue?

11           MS. MOSLEY: Yes, Your Honor. What we're saying  
12 is at the point of time when the suspension was made,  
13 there was only one issue, and that issue was, was there an  
14 arrest, and was the nature of the charge a felony, and --

15           QUESTION: And you apply the regulation to  
16 everybody, and so far as you know, are there any  
17 exceptions in the sense that the inquiry might have been  
18 more far-ranging, or there might have been a -- an  
19 exercise of discretion on the part of the suspending  
20 authority? Do you know of any such instances?

21           MS. MOSLEY: As far as I know, Your Honor, there  
22 is no discretion, and that this particular regulation is  
23 applied in every instance involving an arrest of a  
24 Commonwealth employee for a felony.

25           QUESTION: All right. Now, if -- I'm sorry. Go

1 ahead.

2 MS. MOSLEY: Well, the only issue then is, does  
3 the employee's charge or arrest fall within that  
4 regulation, and --

5 QUESTION: All right, but if that is so, and  
6 that is the standard, why wasn't he simply reinstated when  
7 the charges were dropped?

8 MS. MOSLEY: Your Honor, that particular issue  
9 simply doesn't appear to have been addressed. It was not  
10 addressed by Mr. Homar. It was not addressed by the  
11 district court, and it wasn't addressed by the Third  
12 Circuit.

13 QUESTION: But neither was this regulation that  
14 you're relying on. That sort of comes in -- it's barely  
15 there until your brief in this Court, and the deposition  
16 of, what was his -- Mr. Levanowitz?

17 MS. MOSLEY: Yes.

18 QUESTION: -- said that he used it not as a law  
19 but as a guide among other guides, so it doesn't sound  
20 like it follows like the night the day. At least that  
21 wasn't how the personnel supervisor conceived it. He  
22 thought it was just one of the guides he had.

23 MS. MOSLEY: Well, we understand that Mr.  
24 Levanowitz from his deposition testimony certainly should  
25 be understood as saying that that was one of the things

1 that he considered. However, insofar as he's suggesting  
2 that he has discretion, he was merely wrong.

3 And also, we're saying that although we did not  
4 place a great deal of emphasis on the existence of the  
5 Governor's code, that is certainly referred to, and that  
6 particular aspect relates only to the issue of the value  
7 of additional process. That is the point of having that  
8 particular code of reference, or a code of conduct in the  
9 case.

10 What we're suggesting is, in the balance, when  
11 you talk about the various factors that you're  
12 considering, one of those factors is, what is the value of  
13 having any additional process? What is the value of  
14 having the employee come in and say anything --

15 QUESTION: Well, but you don't have a balance,  
16 because you began by telling us that this was a police  
17 officer and that that's important, and I can understand  
18 that.

19 MS. MOSLEY: Right.

20 QUESTION: But you say it applies across the  
21 board to all employees. That's the rule you're defending.

22 MS. MOSLEY: Well, no. What I'm suggesting is  
23 that we have a rule, and there's no discretion, so as to  
24 that element of the balance --

25 QUESTION: May I just make it clear? You are

1 saying that the rule you want us to adopt is that there is  
2 an across-the-board rule that is -- that meets  
3 constitutional requirements for a State to suspend any  
4 employee who is charged with a felony without a hearing  
5 and without pay. Isn't that your submission?

6 MS. MOSLEY: What I'm suggesting, Your Honor, is  
7 that where there's an important interest, and there's some  
8 assurance that the reason for the action taken is not  
9 without basis, and there's a need for prompt action, then  
10 the court may, in those instances, suspend without --

11 QUESTION: You mean the State may.

12 MS. MOSLEY: The State may suspend without pay.

13 QUESTION: So then you're not arguing for the  
14 broad rule that I suggested at the outset of my question.

15 MS. MOSLEY: No.

16 QUESTION: You don't need to defend a rule  
17 across the board, I take it. Your position here could  
18 simply be limited to police officers.

19 MS. MOSLEY: It could be, because clearly the  
20 removal of a police officer on charges such as were  
21 involved here is a very important issue. However, we're  
22 not suggesting that the interests implicated by some other  
23 employee might not also raise very fundamental, compelling  
24 interests to warrant his or her suspension without pay as  
25 well.

1           What we're suggesting is that there -- we're not  
2 really arguing for a new rule, or the announcement of any  
3 new kind of approach in these types of cases. What we're  
4 saying is that the rules that have been in force, such as  
5 the Mathews balancing test, and the rule that was  
6 announced in Mallen, are adequate to deal with this  
7 particular situation.

8           QUESTION: Well, if you're going to have a case-  
9 by-case rule for every employee, depending on who he or  
10 she is, you might as well have a hearing.

11          MS. MOSLEY: Well, Your Honor, one of the  
12 reasons that we're suggesting that there would not have  
13 been a need, or there would be no value, is that it really  
14 does depend on what the purpose or the function of the  
15 action is.

16          We're saying that there's nothing new with  
17 respect to saying that due process is a flexible concept.  
18 There is no rule that fits every single situation, and  
19 that in fact the Court has suggested in Mallen, or in  
20 Mathews and other cases that there is a balancing. There  
21 is a balancing in every single situation.

22          QUESTION: What we want to -- I mean, what we  
23 want to know is whether in this case there should have  
24 been a hearing or not.

25          MS. MOSLEY: Right.



1           QUESTION: And let me suggest an argument to you  
2 and get your response to it. The argument would be this.  
3 If you had a regulation that provided every employee shall  
4 be suspended upon arrest, suspended without pay upon  
5 arrest, and you applied that across the board, and that  
6 regulation as such was not attacked as somehow being  
7 unconstitutional, then you would have an argument to the  
8 effect that look, the only issue is whether there was an  
9 arrest or not, and there's not likely to be a mistake  
10 about that.

11           Or if you had a regulation that said, every  
12 police officer shall be suspended upon arrest, you could  
13 make the same argument. The only question is whether  
14 there's an arrest.

15           But if, in fact, this regulation, which seems to  
16 cover everybody, does not in fact cover everybody, then,  
17 at least, it seems to me there -- or the argument would  
18 run that in any given case an employee could say, look, it  
19 shouldn't apply to me.

20           You apply it to some, you don't apply it to  
21 others, regardless of what it says on its face, and it  
22 shouldn't apply to me, and that's a much -- I suppose a  
23 much more complicated issue than whether there was an  
24 arrest or not. If that's the issue, there would be a good  
25 reason for having a pre-suspension hearing.

1           What is your response to that?

2           MS. MOSLEY: My response, Your Honor, is that  
3 there are no facts in the record, or there are no facts of  
4 which I am aware, that suggest this particular regulation  
5 does not apply in every instance when there's been an  
6 arrest of a Commonwealth employee and a charge of a  
7 felony. In that particular case, the inquiry is the same.  
8 It is whether --

9           QUESTION: So you are going to defend it on the  
10 grounds that it does apply to everybody.

11          MS. MOSLEY: It does apply to everyone. It does  
12 apply to everyone, so the inquiry at the point of  
13 consideration of what to do once you receive that  
14 information is, you know, is this a Commonwealth employee,  
15 has there been a formal charge, and is that charge a  
16 felony?

17          QUESTION: Had there been no Governor's code,  
18 you would lose. Is that -- then you're relying on the  
19 Governor's code as the reason why there should be no  
20 opportunity to tell his side of the story?

21          MS. MOSLEY: No, we're not, Your Honor. What  
22 we're suggesting is, as I've stated, is there is a  
23 balancing. There has to be an important governmental  
24 interest which we do have here. We do have reliable  
25 information which would be supported by the State police

1 arrest of this person, so there's no suggestion that the  
2 action taken is baseless.

3 QUESTION: Then what use is the Government code?  
4 I'm really -- I'm having a hard time understanding what  
5 use you're making of that.

6 Is it your position that the Government -- that  
7 the Governor's code makes it unnecessary to have a  
8 hearing, because it applies universally, however, you  
9 concede that in some cases that may be unconstitutional?  
10 Is that your position?

11 MS. MOSLEY: No, I don't think that I'm  
12 conceding that in some cases it could be unconstitutional.

13 QUESTION: So you're --

14 MS. MOSLEY: What I'm suggesting is that the  
15 value or the purpose of our reliance on the Governor's  
16 code is to suggest there is no discretion, so there's no  
17 need for any hearing. Any -- there's no point in dispute  
18 at that time.

19 QUESTION: So you are defending the proposition  
20 that it is constitutional to fire, or to suspend without  
21 pay, any State employee upon his or her arrest for a  
22 felony?

23 MS. MOSLEY: What I'm --

24 QUESTION: Because that's what the Governor's  
25 code says. If you're arrested for a felony, you're

1 suspended without pay.

2 MS. MOSLEY: What I'm suggesting --

3 QUESTION: And you say that is constitutional  
4 with regard to all State employees?

5 MS. MOSLEY: What I'm suggesting is, that  
6 regulation relates to all employees, but there are other  
7 factors in the Mathews balance that must be considered --

8 QUESTION: Okay, so --

9 MS. MOSLEY: -- in addition to whether or not --

10 QUESTION: That comes back to my original  
11 question.

12 MS. MOSLEY: Right.

13 QUESTION: It applies to all employees, but you  
14 say it may not be constitutional as to some of them. Is  
15 that what you're saying?

16 MS. MOSLEY: That's correct. What I'm  
17 suggesting is that element, that factor, that -- the  
18 factor on which that particular regulation bears some  
19 interest may not require the same result, given that the  
20 governmental interest involved, the need for prompt  
21 action, for instance --

22 QUESTION: So why shouldn't he have the  
23 opportunity to argue that this is one of those cases in  
24 which it would be unconstitutional to apply the Governor's  
25 code?

1 MS. MOSLEY: Well, we've stated that the  
2 interest of the Government in getting this person off the  
3 campus cannot be challenged, it's very important, and that  
4 we don't see that there's a dispute to that.

5 QUESTION: Is it so important that he shouldn't  
6 have an opportunity just to say, it was the wrong place,  
7 the wrong time. I was totally innocent. I was visiting a  
8 friend. And then they could make a determination based on  
9 the police chief's experience with this man, but here he  
10 was just told, you will be payless.

11 MS. MOSLEY: Well, there are two aspects to  
12 that. The one is, what is the value? If the triggering  
13 event is his arrest, and his arrest on a felony charge,  
14 there's no dispute to that, and Mr. Homar has never  
15 disputed that.

16 QUESTION: But the value is, he could say to his  
17 immediate boss at the university, look, I was visiting a  
18 friend. I had no idea of this. There was no warrant for  
19 my arrest. There was no judicial officer who found  
20 probable cause. It was the wrong time, wrong place  
21 situation.

22 Then he could be believed or disbelieved, but at  
23 least he would have had a chance to tell his story.

24 MS. MOSLEY: We're suggesting that it's not even  
25 the credibility of this police officer that's important at



1 this point. The governmental interest in having his  
2 prompt removal is in protecting the public's confidence in  
3 the integrity of the police force.

4 QUESTION: May I --

5 MS. MOSLEY: We're suggesting that is what  
6 requires the promptness of the action.

7 QUESTION: May I ask a question --

8 MS. MOSLEY: Yes.

9 QUESTION: -- about the meaning of the  
10 regulation on which you rely?

11 Do you read that as requiring that the  
12 suspension continue as long as the charges remain  
13 outstanding, or would it be within the superior's  
14 authority to interview him, find out the facts, and say  
15 this is obviously a mistake, I'm going to put you back on  
16 the payroll?

17 Would the regulation have permitted that?

18 MS. MOSLEY: We're suggesting that insofar as  
19 the suspension was based or triggered by the arrest, and  
20 on a felony charge, that it would be of no value to have a  
21 hearing prior --

22 QUESTION: I understand that. My question --

23 MS. MOSLEY: Prior --

24 QUESTION: My question is, what does the  
25 regulation mean with regard to the authority of the

1 supervisor to reinstate the man before the criminal  
2 charges are dismissed? Would the supervisor have that  
3 authority?

4 MS. MOSLEY: The regulation does not speak to  
5 that and does not preclude that.

6 QUESTION: It does not preclude that.

7 MS. MOSLEY: It does not preclude that.

8 However --

9 QUESTION: So that a hearing might have been  
10 valuable.

11 MS. MOSLEY: It -- we don't think that the  
12 hearing would have been valuable on the question -- in  
13 this particular case, the criminal charges were dismissed,  
14 so at that point we must concede, and there is nothing in  
15 the record to suggest why this was not done, that there  
16 may have been some value in having a hearing once those  
17 criminal charges were dismissed. But on the issue that we  
18 are here --

19 QUESTION: But I don't understand why it might  
20 not have been valuable even before they were dismissed if  
21 the supervisor would have had authority to reinstate him  
22 knowing the full story.

23 MS. MOSLEY: The -- we're not suggesting that  
24 the supervisor would have had full authority to reinstate  
25 prior to the resolution of the criminal charges, and if

1 that was your question --

2 QUESTION: You told me a moment ago he did.

3 MS. MOSLEY: And if that's -- if -- I --

4 QUESTION: Which do you think is the better view  
5 of the regulation, he did or did not have the authority?

6 MS. MOSLEY: I do not believe that the  
7 regulation gave him the authority to have a hearing and  
8 reinstate prior to the resolution of the criminal charges.  
9 If the purpose and the reason for the suspension was his  
10 arrest on criminal charges and a felony.

11 QUESTION: Even if the charges remain pending  
12 for 3 or 4 weeks, and even though the supervisor was  
13 convinced that they were going to be dismissed, he still  
14 had to keep him off the payroll. That's your view of the  
15 regulation.

16 MS. MOSLEY: That's my view of the regulation  
17 regarding the whole point of the hearing, or the inquiry  
18 at that time.

19 As we have stated Mallen, in -- the Court in  
20 Mallen suggests just the mere fact that there's been an  
21 arrest itself is sufficient to threaten the public's  
22 confidence in the police force. What we're saying here is  
23 that --

24 QUESTION: Thank you, Ms. Mosley.

25 Ms. Hubbard, we'll hear from you now.

1 ORAL ARGUMENT OF ANN HUBBARD

2 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

3 SUPPORTING THE PETITIONERS

4 MS. HUBBARD: Mr. Chief Justice, and may it  
5 please the Court:

6 Under the Third Circuit's per se rule, any  
7 public employee who is suspended without pay in advance of  
8 a hearing is entitled to seek money damages for a  
9 constitutional violation. This is contrary to the Court's  
10 precedents, and could impair the Federal Government's  
11 interest in needed flexibility in employment matters.

12 Because of deficiencies in the record, however,  
13 we believe the Court should reject the Third Circuit's  
14 rules, vacate its judgment, and remand the case for  
15 further proceedings.

16 I'd like to focus first on why Mallen and Barchi  
17 tell us that a government may, in appropriate  
18 circumstances, suspend an employee without pay and in  
19 advance of the hearing.

20 QUESTION: I take it, then, the rule you're  
21 going to submit to us is that it depends on the nature of  
22 the employee and the work that the employee does.

23 MS. HUBBARD: Under Mallen and Barchi, and as  
24 well under Mathews, you have to identify the government  
25 interest in prompt action.

1 QUESTION: So does the government -- the  
2 government does not have an interest in suspending any  
3 employee who's been arrested and charged with a felony  
4 without a hearing and suspending without pay?

5 MS. HUBBARD: We think it's an easier case to  
6 say that you could do it with a law enforcement officer.

7 QUESTION: I know that. That's why I'm asking.

8 (Laughter.)

9 MS. HUBBARD: It's unclear. I'm not sure why  
10 the -- that would be defensible.

11 QUESTION: And is there a difference between the  
12 suspension of duty, performance of duty and the  
13 deprivation of pay?

14 MS. HUBBARD: Generally --

15 QUESTION: Might there be a different balance  
16 between the two?

17 MS. HUBBARD: Yes, Justice O'Connor. Generally,  
18 if the government suspends an employee with pay it does  
19 not implicate a protected property interest, so you would  
20 not have to go through this balancing test.

21 We think Mallen and Barchi are properly  
22 understood --

23 QUESTION: Why does the government have to give  
24 somebody a paid vacation if they've been charged with a  
25 felony?



1 MS. HUBBARD: It doesn't if it can satisfy the  
2 Mallen and Barchi test that it had a compelling interest  
3 or adequate interest to suspend them.

4 QUESTION: How does the government show this  
5 compelling interest, other than if it's not a policeman,  
6 if it's a groundskeeper?

7 MS. HUBBARD: I think it would be harder with a  
8 groundskeeper. I mean, this Court has already identified  
9 other circumstances -- if it's a bank director accused of  
10 fraud. If there's a public safety concern.

11 QUESTION: That was a private individual. I  
12 mean, it's different when the government as regulator is  
13 knocking a private individual out of his private job.

14 Can't the government have a policy and, indeed,  
15 don't many governments have such a policy, we do not  
16 employ felons, and if there's any suspicion of somebody  
17 being a felon, you're off the payroll until that suspicion  
18 is eliminated?

19 Why isn't that a reasonable rule? I don't care  
20 if you're a police officer or not.

21 MS. HUBBARD: It may well be, Justice Scalia.  
22 I'm not here to defend the Governor's code in all of its  
23 applications. What I'd like --

24 QUESTION: Of course, if you continue paying the  
25 charged felon, can the government get the money back?

1 What do you do bring a lawsuit to get back the money  
2 you've been paying after the person is finally convicted  
3 if you continue paying the salary?

4 How much would it cost you to bring a lawsuit to  
5 get back the pay that you -- I mean, it seems to me  
6 there's a substantial government interest there, isn't  
7 there?

8 MS. HUBBARD: Justice Scalia, you have  
9 identified one of the primary problems with the Third  
10 Circuit rule. The effect of the rule is that even if the  
11 Government constitutionally can suspend you, it  
12 constitutionally is required to pay you in all instances,  
13 and we think this is not compatible with the Court's  
14 precedents or, indeed, with our basic understanding of the  
15 employment relationship.

16 QUESTION: One of the benefits of the Third  
17 Circuit's rule, and one of the benefits of the contrary  
18 rule -- either you can suspend without pay, or -- is that  
19 it avoids all the kind of building castles in the air and  
20 factual analyses that you don't know when the supervisor  
21 first confronts a situation -- if he has to go through  
22 some Mathews balancing test every time, it's not very  
23 workable in the real world.

24 MS. HUBBARD: That's correct, Mr. Chief Justice,  
25 and we believe that where there's any doubt about which

1 way the balance would tip, the prudent employer can  
2 protect itself by suspending the person with pay for the  
3 time necessary to decide whether or not further action is  
4 warranted.

5 QUESTION: By suspending the person with pay.  
6 So you're saying that the presumption should be that you  
7 can only suspend with pay, unless there's no -- unless the  
8 Mathews balance is undoubtedly in favor of the State.  
9 That's the rule you propose?

10 MS. HUBBARD: No, Justice Kennedy. We're saying  
11 that the employer always has the option to dispel any  
12 constitutional doubt by suspending the employee with pay,  
13 but if the employer concludes that this is one of those  
14 cases that falls within Mallen and Barchi and it is  
15 permissible to suspend the employee without pay, then if  
16 that determination is correct, it should not be liable for  
17 damages.

18 QUESTION: Well, if you can't tell us whether  
19 the cases are easy or hard, how is the employee's  
20 supervisor to do it? I mean, it's --

21 MS. HUBBARD: We think there -- it is the nature  
22 of a balancing test that there will be hard cases, and --

23 QUESTION: May I just interrupt -- I don't mean  
24 to interrupt you. I guess I have, but --

25 (Laughter.)

1           QUESTION: But just pursuing the Chief Justice's  
2 point for a moment, if you took the Third Circuit's rule  
3 and said that's the law, you can't take his pay away until  
4 you at least give him an opportunity to give his side of  
5 the story, he can -- you can do that in a day or two, so  
6 it may be that only a day or two's pay is at stake in this  
7 huge constitutional fight, because if you called him up  
8 and said, hey, Joe, what happened, and he tells you his  
9 story, he says, I'm sorry, that's not enough, you're  
10 arrested, you're off the payroll.

11           MS. HUBBARD: That's very often the case,  
12 Justice Stevens. This is the minimal Loudermill hearing,  
13 and it would not in most cases be so burdensome to call  
14 the employer in.

15           QUESTION: So we're not talking about indefinite  
16 pay. We're talking about pay for the 2 or 3 days that's  
17 necessary in order to give the fellow a chance to tell his  
18 side of the story.

19           MS. HUBBARD: That's absolutely correct, but we  
20 do believe that if this is a Mallen-Barchi case and the  
21 government was justified in suspending him without a  
22 hearing, even during that period between the suspension  
23 and the hearing, if the suspension was lawful in that he  
24 was given all the process he was due, the employer is not  
25 constitutionally required to pay him. The nature of the

1 property right at issue here is the right to continue to  
2 work and to earn a living.

3 QUESTION: Ms. Hubbard, you went through a lot  
4 of ifs, and I -- following up Justice Stevens' question,  
5 if the employee is arguing all I want is a chance to tell  
6 my side of the story, all that's involved -- all that's at  
7 stake for the government is a couple of days, at most, of  
8 my pay, why doesn't any balance work in favor of the  
9 employee?

10 The government can take him out of the job, and  
11 the only question is the pay for a couple of days. Why  
12 doesn't the employee win on that kind of balance?

13 MS. HUBBARD: It might well, but in the balance  
14 that you're proposing, you're positing 1 or 2 days' pay.  
15 In other cases it may take longer to resolve the issue, as  
16 in Mallen or Barchi, for instance.

17 QUESTION: But if you say the only process  
18 that's due is a chance to tell his side of the story,  
19 period, no full evidentiary hearing. That can come later.

20 MS. HUBBARD: Right, but there may be government  
21 justifications for having to postpone even a Loudermill-  
22 style hearing for a week or two, and we're just saying  
23 that the Court needs to use its framework for balancing  
24 those questions.

25 QUESTION: Have you come across anywhere -- I'd



1 be quite curious. The last time the Court said that kind  
2 of thing was I think in Goss v. Lopez, wasn't it, where  
3 they said, all it is you just give the student a chance to  
4 tell his side of the story before you suspend him. Well,  
5 how is it worked out? I mean, it seems to me --

6 MS. HUBBARD: From the Federal Government's  
7 perspective --

8 QUESTION: Yes.

9 MS. HUBBARD: -- it's worked out very well.

10 QUESTION: And so basically school districts  
11 don't feel inhibited in suspending children? Have  
12 there -- have you come across anything --

13 MS. HUBBARD: Oh, I'm sorry, Justice Breyer, I  
14 can't --

15 QUESTION: -- that says whether school districts  
16 do or do not --

17 MS. HUBBARD: -- I can't speak for the school  
18 district.

19 QUESTION: You haven't found it. Have you found  
20 anything -- in working on this, it's such a close analogy  
21 that I'd be awfully curious if you found something, and  
22 the answer is you haven't. You don't know.

23 MS. HUBBARD: No, sir, I haven't.

24 QUESTION: You have a closer analogy that you  
25 were just about to bring up, how the Federal Government

1 works. It has these hearings within a week, right?

2 MS. HUBBARD: Right, and the general practice  
3 with the Federal Government is to suspend employees with  
4 pay. The one -- assuming that the employee is a  
5 nonprobationary employee, and unless there are national  
6 security issues at stake, we do suspend with pay.

7 QUESTION: It's only money for the Federal  
8 Government, and the Federal Government can print more.

9 (Laughter.)

10 QUESTION: States and municipalities can't.  
11 They have --

12 MS. HUBBARD: I -- that is one factor. There  
13 could be --

14 QUESTION: They have an automatic budget-  
15 balancing requirement.

16 (Laughter.)

17 MS. HUBBARD: I prefer to say that the Federal  
18 Government is just --

19 QUESTION: You think that's a factor, that  
20 there's a difference in the Federal Government and the  
21 State?

22 MS. HUBBARD: It could be if there were a  
23 circumstance that --

24 QUESTION: The fact that the Federal Government  
25 has more money, that's a factor that we tell the Third

1 Circuit it has to start weighing?

2 MS. HUBBARD: If I may, Justice Kennedy, one  
3 factor could be fiscal constraints. For instance, if a  
4 university could demonstrate here that it could not both  
5 pay Mr. Homar's salary and pay a substitute during that  
6 interim, there could be a public safety concern.

7 QUESTION: You know that it's not going to be  
8 able to show that for a 3-day suspension.

9 MS. HUBBARD: I think that's the exceptional  
10 case, but there may be room for fiscal constraints --

11 QUESTION: And it might be a 2-week situation  
12 rather than a 3-day situation.

13 MS. HUBBARD: That's correct.

14 With my time remaining -- oh.

15 QUESTION: You can say goodbye.

16 QUESTION: Thank you, Ms. Hubbard.

17 (Laughter.)

18 QUESTION: Mr. Fareri.

19 ORAL ARGUMENT OF JAMES V. FARERI

20 ON BEHALF OF THE RESPONDENT

21 MR. FARERI: Mr. Chief Justice, and may it  
22 please the Court:

23 I'd like to begin by speaking about this  
24 Governor's code of conduct that is so heavily relied upon  
25 by the Commonwealth in this case.

1           It was not brought up or even raised until this  
2 case got to the Supreme Court. If you look in the joint  
3 appendix, Mr. Levanowitz testified that he did not even  
4 feel that he was obliged to follow the Governor's code of  
5 conduct. I would submit to you that the Governor's code  
6 of conduct is not even relevant for the determination as  
7 to what quantum of due process should have been afforded  
8 Mr. Homar under these facts.

9           QUESTION: Well, maybe we should leave that  
10 issue for the circuit or the district court on remand. If  
11 we were to do that, let me ask you what your answer to  
12 this question would be.

13           If we assume that the Governor's code of conduct  
14 requiring the automatic suspension at least applies to all  
15 law enforcement officers and should be, by its terms,  
16 enforced, then the only issue would be in a given case  
17 whether, in fact, there had been an arrest or a charge.

18           Under those circumstances, do you believe that a  
19 pre-suspension hearing is necessary if pay is not to be  
20 continued during the suspension?

21           MR. FARERI: If pay is not to be continued, yes,  
22 Your Honor, because that would be an issue, as to whether  
23 or not the individual can continue to receive his pay.

24           QUESTION: Well, but the issue would turn solely  
25 on the question whether there had been an arrest or a

1 charge, and is that the kind of issue upon which there is  
2 a sufficient risk of error to require the pre-termination,  
3 the pre-suspension hearing?

4 I mean, there's a pretty good argument that that  
5 issue is so simple, it's so unlikely that there is going  
6 to be a mistake about that, that it really would be  
7 justified to say no, the hearing could take place  
8 afterwards.

9 MR. FARERI: I would concede that if the  
10 Governor's code of conduct is in the case and it is  
11 supportable and it is constitutional, then I would agree  
12 with you, Justice Souter, on that point.

13 It is our position in this case that the general  
14 rule crafted by the court of appeals below is  
15 fundamentally correct. However, the Court need not reach  
16 that. It need not reach the issue of the propriety of  
17 such a rule in order to affirm the holding below. Rather,  
18 the result reached below may be obtained by applying the  
19 three Mathews factors to the facts of the case, and I'd  
20 like to go over those with the Court now.

21 The first Mathews factor is an assessment of the  
22 private interest that would be affected. In this  
23 particular case, I would submit that there is a very  
24 strong private interest that Mr. Homar had of continuing  
25 his employment. The Court has recognized in many cases in



1 the past such as the Loudermill case, then the Mallen  
2 case, that an employee has a great private interest in  
3 continuing with their employment and continuing to receive  
4 their wages.

5 QUESTION: Well, I suppose how significant that  
6 interest is would depend certainly upon, you know, how  
7 many other funds the individual has.

8 I mean, if this individual is independently  
9 wealthy and is just being a police officer for fun, I  
10 suppose it wouldn't be very important, would it?

11 MR. FARERI: That's correct, Your Honor. I --

12 QUESTION: Do we know how much money he had in  
13 the bank? Is that the kind of factor we ought to take  
14 into account?

15 MR. FARERI: I don't think so, Your Honor,  
16 because a wage earner, I think you can make certain  
17 presumptions about somebody who is earning a wage. I  
18 think it's a fair presumption --

19 QUESTION: He doesn't have any money in the  
20 bank?

21 MR. FARERI: I don't know whether he had --

22 QUESTION: No, I mean, is that the presumption  
23 you can make? I know --

24 MR. FARERI: I think the presumption --

25 QUESTION: I know a significant number of wage

1 earners who could, you know, support themselves for quite  
2 a while.

3 MR. FARERI: I think in one of the amicus  
4 briefs, Your Honor, there's a study that indicates that  
5 approximately a third of all wage earners in this country  
6 now live essentially from paycheck to paycheck.

7 QUESTION: Well, isn't there something to be  
8 said for a rule that's more or less automatic, rather than  
9 requiring the supervisor to sit down in each case and read  
10 a study like this that says a third of these people -- and  
11 trying to figure out whether this employee was in that  
12 third or not, for either saying that with respect to a  
13 police officer you can suspend upon arrest without pay or  
14 perhaps, as the Third Circuit says, you can't suspend.  
15 There are just a great deal of transactional costs in this  
16 balancing test.

17 MR. FARERI: Mr. Chief Justice, I couldn't agree  
18 with you more. That's why we think that the rule crafted  
19 by the Third Circuit is correct. You cannot engage in a  
20 Mathews balance in each and every case. As you indicated,  
21 that is completely unworkable in the real world.

22 QUESTION: Mr. Fareri, the -- that rule, the  
23 automatic rule that there must be some opportunity to tell  
24 his side of the story, it isn't entirely clear to me what  
25 is entailed, how much it costs the State. So for example,

1 if the position is, the State says, you've been arrested.  
2 You've been charged. Does the State have to do anything  
3 more at that point?

4 They could say, now tell us your reason, but you  
5 told us that there has to be a notice. He did have  
6 notice. A reason -- is the reason -- is it an adequate  
7 reason for the employer simply to say, you've been  
8 charged, and then, okay, you have a justification. Tell  
9 us.

10 Is there anything more -- is there any more  
11 process that's due the employee than what I just  
12 described?

13 MR. FARERI: I think what you're describing,  
14 Justice Ginsburg, is a Loudermill-type process, and we are  
15 not arguing that the employee is entitled to anything more  
16 than that.

17 What we're talking about in this case is  
18 something -- it couldn't be any more simple. Notice --  
19 notice of the problem, and an opportunity to say, I'm  
20 innocent. This gentleman did not have even that simple  
21 process in this case.

22 QUESTION: No, but I thought the question was  
23 not whether he's innocent, but whether he's been charged.  
24 Suppose you have a State that simply adopted that rule.  
25 If you were charged with a felony, you will be suspended

1 without pay, period.

2 So the only issue before the supervisor is, have  
3 you been charged with a felony? Do you need a hearing for  
4 that? That's a matter of public record, it seems to me.

5 MR. FARERI: Given -- if you take the Court's  
6 premise that that rule is valid --

7 QUESTION: Right.

8 MR. FARERI: Then --

9 QUESTION: Then you wouldn't need a hearing.

10 MR. FARERI: Then you wouldn't need a hearing.

11 QUESTION: So you are arguing it is invalid to  
12 have a blanket rule that if you're a State employee  
13 charged with a felony you will be suspended. You cannot  
14 do that.

15 MR. FARERI: I think that's invalid, and  
16 additionally I don't think that's applicable in this case,  
17 for the reasons I indicated previously.

18 QUESTION: Well, that's a separate question, for  
19 which we might have to remand, but assuming that that is  
20 the State rule, you say you're suspended without pay when  
21 you're charged with a felony, that rule would be  
22 unconstitutional.

23 MR. FARERI: That's my position, yes.

24 QUESTION: Well, Mr. Fareri, you do acknowledge,  
25 do you, that the State can have a blanket rule for law

1 enforcement officers, that if the law enforcement officer  
2 himself or herself is arrested for or charged with a  
3 felony, that the duties of that officer can be immediately  
4 suspended subject to a prompt post suspension hearing.

5 You agree with that. I'm not talking about pay.

6 MR. FARERI: I would agree with that, Your  
7 Honor.

8 QUESTION: Just the duties. But you want a  
9 different rule invoked if the suspension is without pay.

10 MR. FARERI: That's correct, Your Honor.

11 QUESTION: Subject to a prompt post --

12 MR. FARERI: Absolutely correct.

13 QUESTION: I thought you gave me a different  
14 answer. I thought in the simple case that I put, in which  
15 the only issue is whether a law enforcement officer had  
16 been arrested or charged with a felony, that in that case,  
17 even though there would be a suspension without pay, the  
18 issue was so simple that there was no -- and the risk of  
19 error so slight that there was no need for a pre-  
20 suspension hearing. Did I misunderstand you?

21 MR. FARERI: I think, Justice Souter, that my  
22 answer was given assuming that that rule was valid --

23 QUESTION: Right. Right.

24 MR. FARERI: That if you're arrested then you  
25 would be suspended.



1 QUESTION: Okay.

2 QUESTION: But you just answered that you say  
3 that would be unconstitutional. In your colloquy with  
4 Justice Scalia --

5 MR. FARERI: I believe so.

6 QUESTION: -- I believe you said that it would  
7 be unconstitutional, that that would be the rule, but in  
8 response to Justice Souter's question as well I suppose  
9 you'd have to say, no, it's not enough. It would satisfy  
10 the rule, but it wouldn't satisfy the Constitution.

11 MR. FARERI: That's correct, Your Honor.

12 QUESTION: Did you ever charge, or did your side  
13 ever charge in this case that the rule was substantively  
14 unconstitutional?

15 MR. FARERI: Well, we didn't, Your Honor,  
16 because the rule was never raised until I'm standing here  
17 right now.

18 QUESTION: I see. You just didn't know that  
19 that was --

20 MR. FARERI: The rule has not been raised in any  
21 past pleadings, in any past briefs. The first time that  
22 it was raised was in the brief to this Court.

23 QUESTION: Well, how about your brief, your red  
24 brief in this Court? Did you challenge the rule as  
25 unconstitutional there? I had not understood the brief to

1 take that position.

2 MR. FARERI: We didn't, Mr. Chief Justice, the  
3 reason being, again, we feel strongly that the rule is not  
4 in the case, because the personnel director himself  
5 testified that he did not rely on the rule.

6 And additionally, as one of the members of the  
7 Court indicated when they were asking counsel for the  
8 State a question, after the -- all charges were dismissed,  
9 and all charges were dismissed 6 days after his arrest for  
10 insufficient evidence after a preliminary hearing, the  
11 human resources director continued on with his suspension  
12 for a period of 23 days, during which Mr. Homar did not  
13 receive his pay.

14 Now, if they're going to rely on that rule, why  
15 didn't they lift that suspension and reinstate him after  
16 all charges were dismissed? They did not do that.

17 QUESTION: He did eventually get pay. Was that  
18 prompted by anything other than the goodness of the  
19 university's heart? Was there any union involvement in  
20 getting him that pay?

21 MR. FARERI: The union was involved, Your Honor.

22 QUESTION: Is this a bargainable subject, the --  
23 what will happen to an employee when there's a charge of  
24 misconduct?

25 MR. FARERI: There's -- the collective

1 bargaining agreement is not in the record, but I can tell  
2 the Court that that does provide for a grievance process.

3 QUESTION: Can I go back to the -- what I think  
4 is your main argument? I take it Judge Serokin wrote, a  
5 governmental employer may not suspend an employee without  
6 pay unless the suspension is preceded by some kind of pre-  
7 suspension hearing. He means never, all right?

8 MR. FARERI: Yes, Your Honor.

9 QUESTION: Okay. So I would like to know  
10 whether there aren't some circumstances where you could  
11 suspend him without a preceding hearing.

12 A bank guard at Fort Knox robs Fort Knox and is  
13 charged. We're not sure, but he's charged formally.

14 A teacher, State university, sexually assaults a  
15 student and is charged.

16 A policeman is a major drug dealer and is  
17 charged.

18 The authorities say, there's a charge. We  
19 therefore have probable cause to think he did it. We will  
20 give him a prompt post suspension hearing where he can say  
21 everything within one pay period and give him his money  
22 back unless we think that he really is guilty. Okay?

23 Now, what's wrong with that? The reason they  
24 want to do it is because they think it's impossible to run  
25 a police force, a university, or Fort Knox with people

1 like that having been charged on the payroll doing their  
2 job.

3 MR. FARERI: The --

4 QUESTION: And if you say, oh, just don't pay  
5 them, they laugh at that and say, what do you mean? If we  
6 send him a paycheck it's a paid vacation. Of course the  
7 taxpayers want to have people who are paid at work doing  
8 something.

9 Now, that's the argument, and I want to hear  
10 your response.

11 QUESTION: Your Honor, I think even in those  
12 circumstances where it's absolutely clear that there's  
13 been some wrongdoing on the part of the employee that  
14 there is always a value to the pre-suspension process.

15 And I think the reason there should be pre-  
16 suspension process is because the wage earner's interest  
17 in his employment is so critical and so important, and  
18 sometimes a matter of being able to support himself and  
19 his family, and the skin off the nose of the government,  
20 so to speak, is so slight, because what we're talking  
21 about is a Loudermill process, that I would argue that you  
22 should have a pre-suspension process even in those types  
23 of cases that the Court --

24 QUESTION: Suppose the employee doesn't ask for  
25 one?

1           Suppose in one of Justice Breyer's hypotheticals  
2 that the employee does -- who has the burden -- I take it  
3 that you're saying that in every case the employer must  
4 take the initiative, even if the employee didn't ask to  
5 have any kind of pre-deprivation hearing. Is that so?

6           MR. FARERI: I would say yes, Justice Ginsburg,  
7 because I think there are some employees who probably  
8 aren't sophisticated enough to ask for one, and I think  
9 because the governmental employer is in the position of  
10 running the workforce, that that should be their  
11 obligation to provide one.

12           QUESTION: And that was this case, wasn't it?  
13 This -- Homar did not ask -- he said, am I suspended, but  
14 he didn't ask if he could have a hearing.

15           MR. FARERI: That's correct, and that  
16 exemplifies what I'm saying. I don't think he had the  
17 knowledge to know that he was even entitled to that, and  
18 he didn't understand what his rights were until after he  
19 consulted counsel, which was sometime after that.

20           QUESTION: Could I follow up my question with --

21           QUESTION: Mr. Fareri, I guess there are two  
22 really separate questions here. One is whether you need a  
23 pre-deprivation hearing, and the second one, and I'm not  
24 sure what your answer to this is, whether you can continue  
25 the deprivation until the charge is dropped or resolved.



1           In other words, it's no big deal I suppose if  
2 you say you can suspend without pay but you have to  
3 provide a prompt post-deprivation hearing, which means in  
4 2 or 3 days he gets a hearing. That's not the State's  
5 position.

6           As I understand the State, the State's position  
7 is, we don't have to provide a hearing until the felony  
8 charge is resolved either up or down, which is really not  
9 a prompt -- I mean, depending upon how promptly the felony  
10 is disposed of. What is your position on the latter  
11 question?

12           MR. FARERI: On whether or not the post  
13 suspension process would satisfy in lieu of --

14           QUESTION: Yes. Yes.

15           MR. FARERI: -- the pre-suspension process?

16           QUESTION: Yes. You're arguing, I take it, that  
17 you need a prompt -- not only do you need a prompt post  
18 deprivation hearing, even if you provide the hearing 2  
19 days after the suspension, you would still say the  
20 suspension is bad. You cannot suspend at all without pay  
21 until you have a hearing first.

22           MR. FARERI: That's correct, Your Honor.

23           QUESTION: And you wouldn't be satisfied with  
24 saying you need a prompt hearing afterwards, so you'll  
25 only be docked for 2 days.

1 MR. FARERI: That's correct, Your Honor, and the  
2 reason is --

3 QUESTION: Two days isn't that much.

4 MR. FARERI: Well, but it's --

5 QUESTION: This guy's in the wrong job if he  
6 can't live for 2 days without -- you know. Don't you  
7 think?

8 MR. FARERI: Your Honor, the cost to the  
9 government is so slight, and again, the interest of the  
10 employee is so great.

11 QUESTION: But I thought this Court reached that  
12 decision in Mallen. I mean, we upheld an immediate  
13 suspension and permit post deprivation hearing.

14 MR. FARERI: There are some different facts in  
15 Mallen, Your Honor.

16 For instance, in Mallen there was a grand jury  
17 indictment. In this case what you have is a search  
18 incident to an arrest. My client happened to be --

19 QUESTION: Well, you want us to draw a different  
20 line between somebody who has -- is indicted by a grand  
21 jury as opposed to somebody who's arrested based on  
22 probable cause?

23 MR. FARERI: No, Your Honor. I think that a  
24 bright line -- a bright line rule should be drawn.  
25 However, that -- I'm just bringing that factor up over --

1 QUESTION: Where would the rule leave the Mallen  
2 situation in your view?

3 MR. FARERI: I think, Your Honor, that the rule  
4 takes -- the rule would take into account the very  
5 important interests of the employee in continuing with his  
6 wages as recognized by --

7 QUESTION: Well, but I -- how would your rule  
8 deal with the Mallen situation? I mean, which we have  
9 said was permissible? I take it your rule would allow it  
10 to be permissible.

11 MR. FARERI: Well, Mallen does not -- again,  
12 Mallen does not deal with the governmental employer  
13 either, as in this case. Mallen is a Federal  
14 regulation --

15 QUESTION: Well, wouldn't it be a fortiori? If  
16 the government can require someone to step aside who is in  
17 a -- simply in a regulated business, ought it not to be a  
18 fortiori with a government employee?

19 MR. FARERI: Well, with -- the issue with the  
20 government -- governmental employer that you don't have  
21 where there is a regulation of private business is the  
22 issue of the pay. The government does not have an  
23 interest in whether or not the employee would continue to  
24 be paid where there's private regulation.

25 QUESTION: Are you saying -- it was the bank

1 that decided not to pay him. The only thing that the  
2 Government required was the suspension.

3 MR. FARERI: The regulation --

4 QUESTION: All right. That's --

5 MR. FARERI: -- didn't speak one way or another  
6 to the pay, and I think the decision may even indicate  
7 that that was left to the bank, and there's nothing in the  
8 case that indicates whether or not the suspension was with  
9 or without pay.

10 QUESTION: That's exactly the -- what I was  
11 trying -- I'm quite -- I'm trying to focus on something  
12 with my question, which is, you responded with the answer  
13 it's a slight governmental interest, and that's the point  
14 that I'm uncertain about, and would like you to follow up  
15 on.

16 The contrary, I take it, would be, what are you  
17 talking about, slight?

18 If we have to keep people on the payroll who  
19 have done and been charged with serious crimes such as  
20 I've mentioned, we can't do that as a practical matter.  
21 People will think we're giving them paid vacations.  
22 That's A.

23 B is, slight? Let's look at what happened after  
24 Goss. People get mixed up in applying these things and  
25 they think they have to give students tremendous full

1 hearings with lawyers before they can even kick them out  
2 of class.

3 Now, I don't know if what I've just said is  
4 accurate. It may be false, but that's why I want your  
5 response --

6 MR. FARERI: Well, Your Honor, I think --

7 QUESTION: -- to those two separate things, one,  
8 in administering complicated things like separating pay  
9 from suspension, everything gets mixed up and before you  
10 know it they cannot -- they feel, the school districts,  
11 that they can't really suspend a child without a  
12 tremendous full-blown hearing, even though that's not what  
13 the Court said.

14 That's A, and B is what you'd call confidence in  
15 the public service in not giving people paid vacations for  
16 a month when they've been charged by grand juries, or  
17 arrests for serious crimes.

18 Those are the two things, that what you said  
19 slight, so I'm trying to say, is it slight?

20 MR. FARERI: Your Honor, it is slight, because  
21 we're not talking about keeping somebody in pay status for  
22 a period of a month. You're talking about at most a week,  
23 maybe even less than that, until they would get a  
24 Loudermill-type process.

25 On the second point, to the extent that there's



1 confusion --

2 QUESTION: Well, excuse me. That's not what the  
3 State says. I mean, the State says they're entitled to  
4 keep him off the rolls until the charge is resolved. I  
5 mean, that may be more -- you're saying the whole thing  
6 comes to an end as soon as the hearing's provided.

7 The State says no, not only don't I think I have  
8 to provide a hearing promptly, I don't have to provide it  
9 during the whole period that the person is still under  
10 charge. That's a long time.

11 MR. FARERI: I think the State is wrong, Your  
12 Honor.

13 I think that the individual has a constitutional  
14 right to be heard sooner than the period of time it may  
15 take for that criminal charge to be adjudicated.

16 Thank you.

17 QUESTION: Thank you, Mr. Fareri. Mr. O'Duden,  
18 we'll hear from you.

19 ORAL ARGUMENT OF GREGORY O'DUDEN

20 ON BEHALF OF THE NATIONAL TREASURY EMPLOYEES UNION,

21 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

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

24 Let me begin if I may by discussing the issue of  
25 what governmental interests are at stake in the situation

1 that we face in this case.

2 We think that the Court's cases are quite clear  
3 that in order to satisfy its burden of denying somebody a  
4 pre-deprivation hearing the government has to show that  
5 there is a significant administrative burden, and the  
6 argument that we hear today is really a general argument  
7 that suggests that, as Justice Breyer put it, we can't do  
8 this because if we do the public will be outraged.

9 We don't denigrate or trivialize the argument  
10 that's made by the State, but we think that the long  
11 experience of the Federal Government's practice defeats  
12 the argument, because the fact of the matter is, the rule  
13 that we advocate here today has been the routine practice  
14 for many, many years, and there has been no suggestion at  
15 any point that the public has in any way been outraged.

16 Justice Scalia, are you --

17 QUESTION: No. I was just going to say, how's  
18 the Federal budget doing?

19 (Laughter.)

20 MR. O'DUDEN: The Federal budget isn't doing  
21 well, Your Honor, but I can assure you it's not because  
22 people are being given Loudermill-type hearings, and I  
23 think it's also important --

24 QUESTION: A million dollars here, a million  
25 dollars there --

1 MR. O'DUDEN: No, I don't think it translates  
2 into that at all, and I think there's one other important  
3 thing to be kept in mind here. If an erroneous decision  
4 is avoided, what does that do?

5 That saves the government money, because it  
6 means that in that situation the employer doesn't have to  
7 go out and hire a substitute, and it doesn't have to  
8 expend the resources to train that substitute and, of  
9 course, it also means that it avoids what could be the  
10 very significant cost of having to pay that employee back  
11 pay.

12 QUESTION: If it is in fact in the government's  
13 best interest to do that, presumably the government will  
14 do that without being told that the Constitution requires  
15 it.

16 MR. O'DUDEN: Well, I wish the world were that  
17 simple, Your Honor. I think that the Court recognized in  
18 *Goss v. Lopez* that notwithstanding the good intentions of  
19 those who are in a position to impose discipline, it often  
20 doesn't work out that way, and that's why we have the  
21 Constitution, to defend citizens, to defend employees from  
22 deprivations of their property.

23 QUESTION: It's not a -- I don't think it's a  
24 good constitutional argument to say this is really not  
25 only in the employee's best interest but in the employer's

1 best interest, too.

2 MR. O'DUDEN: Well, Your Honor --

3 QUESTION: The employer presumably can look out  
4 for his own best interest.

5 MR. O'DUDEN: The reason that we're talking  
6 about the employer's interest at all is, of course, we're  
7 faced with having to deal with the Mathews test, and  
8 therefore we're having to respond to the government's  
9 assertion that their interests are somehow compromised by  
10 giving somebody a pre-deprivation hearing.

11 I think it's important in looking at this case  
12 for all of us to keep in mind what the due process  
13 framework here is.

14 QUESTION: Well, what -- let's keep in mind what  
15 the suspended person here would argue at the hearing.  
16 What would you expect him to argue at the hearing?

17 MR. O'DUDEN: In this situation, I'm putting  
18 aside the issue --

19 QUESTION: I was not indicted?

20 MR. O'DUDEN: I'm putting aside the issue --  
21 well, he wasn't indicted. I'm putting aside here the  
22 issue of the Governor's code. He could say that he was at  
23 the wrong place at the wrong time, that he wasn't guilty,  
24 that he was innocent.

25 QUESTION: No, but the response to that is, we

1 have a policy that all State employees, or at least police  
2 officers, will be suspended if they're under indictment.  
3 We do not want indicted police officers walking around  
4 enforcing the law, and since they're not going to be  
5 walking around enforcing the law, we're not going to pay  
6 them. That seems pretty reasonable to me.

7 MR. O'DUDEN: Well, of course, that's not the  
8 policy that we're talking about in this case, Your Honor.  
9 What we're talking about here is a code, as my --

10 QUESTION: All right, but's assume it is. I  
11 mean, that --

12 MR. O'DUDEN: Okay. You're moving now to a  
13 hypothetical situation.

14 QUESTION: Right -- well, maybe, maybe not, but  
15 we can let the lower court resolve it. Assuming it's a  
16 policy that at least police officers will be suspended  
17 without pay if they are under indictment, what would the  
18 hearing have consisted -- you know, what good would the  
19 hearing have done here?

20 MR. O'DUDEN: If -- assuming that were the  
21 policy, that your hypothetical is true, one of the things  
22 that he could have argued is that the policy was  
23 unconstitutional. He could have made that argument to the  
24 decisonmaker.

25 QUESTION: Let's assume it's constitutional.



1 Does he have any other argument?

2 MR. O'DUDEN: Well, in essence what your  
3 hypothetical sets up is a situation where there is no  
4 point to the hearing.

5 QUESTION: Right. Well, I'm --

6 MR. O'DUDEN: Okay, and you're assuming that  
7 it's constitutional --

8 (Laughter.)

9 MR. O'DUDEN: So you're talking all of the  
10 arguments out of the employee's hands. In that case,  
11 obviously, there is no --

12 QUESTION: Well, Mathews v. Eldridge hearings  
13 are not to determine what's constitutional or not.  
14 They're to determine what the facts are under a balancing  
15 test.

16 MR. O'DUDEN: That's right, Your Honor.

17 QUESTION: And if we hypothesize that it's an  
18 adequate and defensible interest for the government not to  
19 have police officers who are under criminal charges  
20 enforcing the law then it is constitutional, so I think  
21 you're avoiding the question when you say what the hearing  
22 is going to establish.

23 MR. O'DUDEN: No. I think I said that if those  
24 were the facts, then there would be little point to the  
25 hearing at all. In fact, there would be no point to the

1 hearing.

2 But I do want to emphasize that those are not --

3 QUESTION: Well, so then you have to say that  
4 it's unlawful for the State to have the policy of  
5 suspending officers that are under criminal charges.

6 MR. O'DUDEN: Ultimately he would be reduced to  
7 making that kind of argument.

8 QUESTION: No, you mean suspending without  
9 pay -- without pay.

10 MR. O'DUDEN: Suspending without pay, yes.

11 QUESTION: It's an argument you're perfectly  
12 willing to make. I mean, you think that that's the case,  
13 that it is unconstitutional to suspend --

14 MR. O'DUDEN: Yes, given the fact -- given what  
15 this Court has said about the significance of the fact of  
16 an arrest.

17 QUESTION: Certainly a supervisor isn't in a  
18 position to make any intelligent, informed decision about  
19 whether a policy is constitutional or not. I mean, we're  
20 talking about this very quick telephone call and the guy  
21 at the other end says, of the telephone says, your  
22 policy's unconstitutional.

23 (Laughter.)

24 MR. O'DUDEN: Well, in this situation, where the  
25 code calls for a suspension to the extent practical that

1 may well give the supervisor pause before he goes ahead  
2 and imposes that action.

3 QUESTION: Well, you're -- I take it that -- I  
4 don't want to put words in your mouth -- that you're  
5 saying there's no circumstance in which simply phoning the  
6 person before suspending him without pay and to say, is  
7 there some exceptional circumstance, is there something to  
8 your side of the story, you're saying that that's always  
9 required.

10 MR. O'DUDEN: I'm sorry --

11 QUESTION: It could be very simple. It could be  
12 very simple, a telephone call, what's your point -- what's  
13 your point of view. Is that --

14 MR. O'DUDEN: That's right.

15 QUESTION: That's basically what you're arguing.

16 MR. O'DUDEN: Yes, Your Honor, that is.

17 With respect to the Mallen case, since that has  
18 come up here, I do want to emphasize in my remaining  
19 moments that Mallen does not reach the issue that is  
20 presented here.

21 Mallen obviously turned on the Court's very real  
22 concern about there being an actual government interest  
23 that was going to be jeopardized, namely, public  
24 confidence in the banks, the concern about protecting bank  
25 depositors. There was a congressional finding on --

1 QUESTION: Well, there's a much greater  
2 interest, of course, in assuring the public that their  
3 police officers are not indicted for felonies.

4 MR. O'DUDEN: There is a public interest --

5 QUESTION: I think the policy is at least as  
6 great, if not significantly greater than in Mallen.

7 MR. O'DUDEN: Your Honor, as the Solicitor  
8 General points out, that interest is addressed by removing  
9 the employee from his duties. It does not follow from  
10 that, however, that the State has established an adequate  
11 justification to deprive that employee of his pay. That  
12 is a separate matter, and those justifications that are  
13 asserted here by the government do not justify its summary  
14 deprivation of the employee's pay.

15 QUESTION: Mr. O'Duden, is this something that a  
16 union could bargain about with the public employer, say,  
17 now we want to have a code. You can suspend people, of  
18 course, but you have to have some kind of hearing before  
19 you take away their pay.

20 MR. O'DUDEN: Yes, and in fact the record here  
21 does show that the employee here did in fact grieve under  
22 the collective bargaining procedures his suspension, and  
23 that is yet another fact that belies the petitioner's  
24 last-minute argument here that this code is actually  
25 binding.

1           We think it's very clear, based on the  
2 undisputed record in this case, that this Governor's code  
3 was in no way binding on the petitioners. It obviously  
4 wasn't binding on the decisionmakers, and the university's  
5 own rules of conduct, if I may make one final point, they  
6 provide that before a person is to be suspended, he is to  
7 be given an opportunity to be heard in his defense. That  
8 again is in the record of this case, Your Honor.

9           QUESTION: But if this is a bargainable subject,  
10 then I take it what you're asking for here is to say the  
11 Constitution takes care of it, the union doesn't have to  
12 bargain for it, so the union can bargain for other things,  
13 because the Constitution will require in every case some  
14 kind of hearing before pay is removed.

15           MR. O'DUDEN: I'm sorry, I'm not sure that I  
16 follow --

17           QUESTION: You answered my question --

18           MR. O'DUDEN: Okay.

19           QUESTION: -- earlier that a union could bargain  
20 with a public employer not to take away people's pay  
21 without some kind of hearing. Now, what I'm saying to you  
22 is, if the Due Process Clause does that job, then the  
23 union doesn't have to bargain for it. It can bargain for  
24 something else.

25           MR. O'DUDEN: That's quite right. It puts it in



1 the position of being able to focus on whatever post-  
2 deprivation procedures may be warranted. It would mean  
3 that it would not have to bargain for those pre-  
4 deprivation rights. That is quite correct, Your Honor.

5 Unless there are further questions --

6 CHIEF JUSTICE REHNQUIST: Thank you,  
7 Mr. O'Duden. The case is submitted.

8 (Whereupon, at 11:03 a.m., the case in the  
9 above-entitled matter was submitted.)

## 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:*

*JAMES E. GILBERT, PRESIDENT, EAST STROUDSBURG UNIVERSITY, ET AL.,*  
*Petitioners v. RICHARD HOMAR*  
*CASE NO. 96-651*

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

BY Don Mari Fedilo

(REPORTER)