

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: JANICE R. LACHANCE, ACTING DIRECTOR, OFFICE  
OF PERSONNEL MANAGEMENT Petitioner v. LESTER  
E. ERICKSON, JR., ET AL.

CASE NO: 96-1395 c.f

PLACE: Washington, D.C.

DATE: Tuesday, December 2, 1997

PAGES: 1-38

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JANICE R. LACHANCE, ACTING :  
4 DIRECTOR, OFFICE OF PERSONNEL :  
5 MANAGEMENT :

6 Petitioner : No. 96-1395

7 v. :

8 LESTER E. ERICKSON, JR., ET AL. :

9 - - - - - X

10 Washington, D.C.

11 Tuesday, December 2, 1997

12 The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States at  
14 11:10 a.m.

15 APPEARANCES:

16 SETH P. WAXMAN, ESQ., Solicitor General, Department of  
17 Justice, Washington, D.C.; on  
18 behalf of the Petitioner.

19 PAUL E. MARTH, ESQ., Greensboro, North Carolina; on behalf  
20 of the Respondents.

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

2 (11:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 96-1395, Janice LaChance v. Lester  
5 Erickson.

6 General Waxman.

7 ORAL ARGUMENT OF SETH P. WAXMAN

8 ON BEHALF OF THE PETITIONER

9 GENERAL WAXMAN: Mr. Chief Justice, and may it  
10 please the Court:

11 Each of the six Federal employees in this case  
12 engaged in sanctionable employment-related misconduct and  
13 then knowingly and intentionally falsely denied the  
14 misconduct when questioned by agency investigators.

15 The court below held, however, that as a matter  
16 of constitutional due process the Government, as employer,  
17 may not charge these employees with both misconduct and  
18 lying about the misconduct. Indeed, the court went beyond  
19 that to hold that an employee's deliberate falsification  
20 may not even be considered in determining the penalty for  
21 the separate underlying misconduct.

22 There is nothing whatsoever in the Due Process  
23 Clause or anywhere else in the Constitution, for that  
24 matter, that prevents a Government agency from sanctioning  
25 an employee who deliberately lies in response to questions

1 about employment misconduct, whether or not the employee  
2 is also sanctioned for the misconduct itself.

3 When the Government acts as an employer, it has  
4 the right to demand that its employees respond honestly to  
5 work-related questions and to sanction them if they do  
6 not, just as all other employers do. Indeed, the  
7 Government has more reason to demand honesty from its  
8 employees, as they employ -- as they enjoy a public trust.  
9 As this Court held in *Lefkowitz v. Cunningham*, the  
10 Government has a compelling interest in honest civil  
11 service.

12 The holding of the Federal Circuit in this case  
13 imposes profound anomalies and perverse incentives.  
14 Wrongdoers who tell the truth are required under this  
15 holding to be punished just as severely as wrongdoers who  
16 then knowingly and intentionally lie about their  
17 misconduct when questioned by an investigator or a  
18 tribunal.

19 An employee who is questioned about wrongdoing  
20 can be punished for lying about it if he didn't do any  
21 wrong, but if he did do wrong and lies about it, he can't  
22 be separately punished for lying about it.

23 Under the Federal Circuit rule, a rational  
24 employee questioned about wrongdoing will always lie,  
25 since it's cost-free and perhaps he will fool or dissuade

1 the agency. He would be irrational to 'fess up and,  
2 indeed, I think it's fair to say that the consequences,  
3 that the rationale of the Federal Circuit's decision in  
4 this case goes beyond just what the individual agency can  
5 do and presumably would also prevent the Government in its  
6 sovereign capacity from making the false statements  
7 "costly" by prosecuting them either under 1001 or, if  
8 their statements were under oath, for perjury.

9 So we submit that the decision of the Federal  
10 Circuit in this case, which doesn't follow any decisions  
11 by this Court or any decisions by any other Federal court,  
12 is simply wrong as a matter of constitutional law.

13 QUESTION: General Waxman, just for purposes of  
14 discussion and not to indicate my view on what the Court's  
15 likely to do in the preceding case, but let's assume we  
16 recognize an exculpatory no doctrine, does that have any  
17 spillover effect in this situation?

18 GENERAL WAXMAN: Boy, the only spillover effect  
19 it could have, Justice O'Connor, would be if you found an  
20 exculpatory no doctrine required as a matter of  
21 constitutional law, because the argument in favor of the  
22 exculpatory no doctrine in every court that has adopted  
23 some form of it has done so as a matter of statutory  
24 construction, trying to define what Congress could have  
25 intended. There's no statute at issue in this case that

1 that could be read into.

2 QUESTION: I guess as a practical matter the  
3 consequences of lying about the situation, if you're  
4 correct in this case, are often more severe than the  
5 underlying malfeasance.

6 GENERAL WAXMAN: It may --

7 QUESTION: I would assume that could often be  
8 the case.

9 GENERAL WAXMAN: That could often be the case,  
10 and --

11 QUESTION: I suppose the moral of that is don't  
12 lie.

13 GENERAL WAXMAN: That's the moral that we hope  
14 people will derive from the long line of cases in which  
15 this Court has held that even where there are important  
16 constitutional guarantees at issue, for example, in --  
17 under the self-incrimination clause, there is never a  
18 license to lie.

19 Here, of course, the self-incrimination clause  
20 is not even in play.

21 QUESTION: Is there any concern about the  
22 conduct on the part of the agent, because most of these  
23 interviews are on a one-to-one basis, so is that perhaps  
24 what's reflected in this, that if you had a written record  
25 or -- and the person, the employee when confronted lies,

1 that's one thing, but if it's just an oral translation,  
2 how can you be sure that the one who's doing the interview  
3 isn't dissembling?

4 GENERAL WAXMAN: Well, a couple of answers.  
5 First of all, in a number of the cases that are collected  
6 in this -- before this Court, the false statements were  
7 written. That is, the employee was given a list of  
8 questions, or a series of questions and provided written  
9 answers.

10 In other instances, the employees either  
11 repeated or made their lies after they were put under  
12 oath, so you can't characterize the Federal Circuit's  
13 decision in this case as somehow limited to an informal  
14 oral question by an investigator.

15 But even if you could, that might go to the  
16 question of whether the agency could establish by a  
17 preponderance of the evidence that the individual employee  
18 had knowingly and with intent to deceive given a false  
19 statement. That is, it may make it more difficult for the  
20 agency to establish that the misconduct had occurred, but  
21 as a constitutional matter, I wouldn't think that any a  
22 priori rule would be appropriate.

23 QUESTION: Was the -- did the Federal Circuit in  
24 this case rest its holding on any statutory ground, or was  
25 it a purely constitutional holding?

1           GENERAL WAXMAN: It is a purely constitutional  
2 holding. The only statute that's really -- it's not even  
3 at issue in this case. I don't even think that the  
4 Federal Circuit cited the statute, although I may be  
5 mistaken -- is 5 U.S.C. section 7513, which provides that  
6 an agency may take action against an employee for  
7 misconduct "only for such cause as will promote the  
8 efficiency of the service."

9           And one of the things that the agency has to  
10 establish by a preponderance of the evidence is not only,  
11 of course, that the misconduct occurred, but that there is  
12 a nexus between the sanction that the agency has imposed  
13 and "the promotion of the efficiency of this -- of the  
14 service." That's required both in the statute and by a  
15 decision of law.

16           QUESTION: As I understand this panel of the  
17 Federal Circuit, they were following a precedent already  
18 set, and all these MSPB cases nowadays do go to that one  
19 circuit. Was there any procedure that might have been  
20 used to get the court to sit en banc and perhaps  
21 reconsider the precedent that was relied on in this case?

22           GENERAL WAXMAN: I -- sure. We can ask that --  
23 the Federal Circuit to reconsider any panel decision en  
24 banc. The earlier precedent that you're referring to, a  
25 case called Grubka --

1 QUESTION: Yes.

2 GENERAL WAXMAN: -- I must say that although  
3 several panels of the MSPB itself in several instances in  
4 these cases felt that the result that was ultimately  
5 reached by the Federal Circuit was dictated by Grubka, but  
6 there are other -- there were other MSPB decisions that  
7 basically distinguish Grubka.

8 I'm not certain, but I believe that we did ask  
9 the Federal Circuit at least in this case to reconsider  
10 this panel decision en banc. I don't know whether we did  
11 in Grubka or not.

12 Frankly, I think it's reading a lot into Grubka  
13 to conclude that Grubka dictates the result that was  
14 reached by the board and the Federal Circuit in this case.  
15 That was a highly unusual case which is and was  
16 distinguished by the MSPB subsequently on what I think are  
17 reasonable grounds.

18 QUESTION: There was one curiosity in the  
19 Federal Circuit's opinion. That is, they seemed to draw a  
20 line between -- they said if it's at the investigative  
21 stage then the employee could be punished. Was the --

22 GENERAL WAXMAN: They did say that, but it's a  
23 little bit curious because all six of the employees in  
24 this case were alleged and proven to have made -- to have  
25 lied during the investigative stage.

1 Now, some of them also lied during the  
2 "administrative stage," but one of the curious things  
3 about the Federal Circuit's decision is that in dicta it  
4 does say, well, of course due process wouldn't in any way  
5 protect lying at the investigative stage, but that's  
6 exactly what happened in each one of these cases.

7 If there are no further questions, I'd like to  
8 reserve 10 minutes for rebuttal, if I may.

9 QUESTION: Very well, General Waxman.

10 Mr. Marth, we'll hear from you.

11 ORAL ARGUMENT OF PAUL E. MARTH

12 ON BEHALF OF THE RESPONDENTS

13 MR. MARTH: Thank you, Mr. Chief Justice, and  
14 may it please the Court:

15 If the Court accepts the Government position in  
16 this case that the Federal Circuit created a broad  
17 constitutional right to lie, then the respondents lose,  
18 because there is no such right, this Court has adamantly  
19 over the years asserted that there is no such right, and  
20 the respondents are not advocating that right in this  
21 case.

22 If, on the other hand, this Court finds that the  
23 Federal Circuit narrowly tailored a right to protect the  
24 employee's meaningful right to respond to the charges,  
25 then the respondents should prevail.

1 QUESTION: Did you tell us that the question  
2 presented was not presented in your opposition to the  
3 petition, because the question presented surely says what  
4 you say is not at issue here, whether the Due Process  
5 Clause precludes a Federal -- the Due Process Clause  
6 precludes a Federal agency from sanctioning an employee  
7 for making false statements to the agency regarding  
8 allegations that the employee had engaged in employment-  
9 related conduct.

10 I mean, that's what I thought we were here to  
11 talk about, and you're saying it is not.

12 MR. MARTH: No, Your Honor, I'm not saying that.  
13 I'm saying that --

14 QUESTION: Oh. I thought that's what you said.

15 MR. MARTH: -- that the Government in its brief  
16 and in its argument has characterized this as a broad  
17 constitutional right to lie, whereas it's the respondents'  
18 position that the Federal Circuit said, in a very narrowly  
19 tailored situation, to protect an employee's meaningful  
20 right to respond, an employee can deny misconduct and put  
21 the Government to its proof.

22 QUESTION: Okay. I see. You're --

23 QUESTION: -- the Constitution required that.

24 MR. MARTH: Your Honor, I disagree with General  
25 Waxman with regard to that issue. The court of appeals

1     relied on and quoted 5 U.S. Code 7513(b), which is the  
2     provision which gives -- and I believe that's on page 11a  
3     of the appendix -- which gives the employees certain  
4     rights when charges are brought against them, and that  
5     includes the right to counsel, the right to a detailed  
6     statement of the charges, a right to have a period of time  
7     of a minimum of 7 days to respond to those --

8             QUESTION: And was that denied to these  
9     respondents?

10            MR. MARTH: That was not denied, but what the  
11     court of appeals was saying, Your Honor, was that the  
12     meaningful right to respond and the meaningful right to  
13     have those rights was denied because early on before those  
14     rights were ever given, they were -- in effect could be --  
15     if an employee was forced to respond affirmatively to the  
16     Government charges of misconduct, that that subsequent  
17     meaningful right was denied.

18            QUESTION: Well, if it was simply an  
19     interpretation of the statute, why did the court of  
20     appeals refer to the Due Process Clause?

21            MR. MARTH: Well, the Due Process Clause comes  
22     in because the court of appeals found that there was a  
23     risk of erroneous deprivation in this case of those  
24     subsequent rights if an employee was forced to respond  
25     without a -- an opportunity to deny the misconduct at the

1 early stage.

2 QUESTION: Let me ask my question again, then.  
3 I thought I had an answer, but then -- then you go back  
4 and said the same thing again.

5 Do you agree that the question presented here is  
6 whether the Due Process Clause requires the outcome?

7 MR. MARTH: Certainly, but the Due Process  
8 Clause, Your Honor, is based on property rights, and the  
9 property rights come from the statute.

10 QUESTION: Well -- okay.

11 QUESTION: And what in your opinion, Mr. Marth,  
12 is the case from this Court that most closely supports the  
13 result, the constitutional result reached by the court of  
14 appeals here?

15 MR. MARTH: Well, Your Honor, this Court has  
16 never, to my knowledge, dealt with this issue in a Federal  
17 employment context, where they have looked at the issues  
18 in the context of Federal employment. I'm not aware of  
19 any case where this precise issue has certainly come  
20 before the Court in the past.

21 QUESTION: Well, even if the precise issue  
22 hasn't, what is the constitutional decision from this  
23 Court that most closely supports your position?

24 MR. MARTH: Well, in *Garrity v. State of New*  
25 *Jersey* this Court said that officers who are given the

1 choice of either answering questions or losing their jobs  
2 had their Fourteenth Amendment rights violated, and the  
3 statements they gave were not voluntary and could not be  
4 used against them. That's probably the closest case,  
5 although certainly that is --

6 QUESTION: There's no question of using the  
7 statements here against these people in some other  
8 proceeding, is there?

9 MR. MARTH: You mean, whether or not these  
10 statements could be used in another proceeding?

11 QUESTION: Yes.

12 MR. MARTH: Your Honor, I would -- or, Chief  
13 Justice, I would say that there is no prohibition against  
14 using those statements in another context, but --

15 QUESTION: The Government isn't trying to use  
16 them -- the Government isn't trying to obtain a criminal  
17 conviction by using these statements in some sort of a  
18 criminal proceeding, is it? The statements were just used  
19 in the proceeding in which they were given.

20 MR. MARTH: That's correct, Your Honor, but the  
21 employees certainly did not know that, and there are  
22 several employees in this case, Barrett and Roberts, for  
23 example, who could have been charged with taking  
24 Government property, misappropriation of Government  
25 property, Ms. Kye in this case, who could have been

1 charged with some kind of credit card fraud or abuse, and  
2 these employees, when they're brought into the  
3 investigation stage, are not told by the Government  
4 whether or not criminal consequences are contemplated.

5 QUESTION: But no criminal consequences resulted  
6 in these cases.

7 MR. MARTH: That's correct, Your Honor.

8 QUESTION: Now --

9 QUESTION: Mr. Marth, you're drawing a large  
10 distinction between the public and private sector, and as  
11 I was reading your arguments I was thinking, in the case  
12 that we just heard, it's something that can only be  
13 between a Government and its citizens, but here we have an  
14 employment setting.

15 Employees lie to private employers like they do  
16 to public employers, so it seems to me you're extracting  
17 from due process a right for a public employee that surely  
18 does not exist in a private employer. If that employer is  
19 lied to he can say, I don't want dissembling employees on  
20 my staff, goodbye.

21 MR. MARTH: Well, Justice Ginsburg, you've  
22 pointed out a real distinction between the Federal and the  
23 private sector, and that is that in the Federal sector an  
24 employee has absolutely no right to refuse to answer.

25 In the private sector there's no compulsion upon

1 an employee to have to answer the question, but the  
2 Federal Circuit and the Merit Systems Protection Board  
3 have held that in any type of investigation an employee  
4 does not have a right to refuse to cooperate, so --

5 QUESTION: Oh, but that simply means that if the  
6 employee refuses there will be consequences for refusal.  
7 In each instance, they're -- it seems to me, they're in  
8 the same position, aren't they --

9 MR. MARTH: That's correct, Your Honor --

10 QUESTION: -- public and private?

11 MR. MARTH: -- Your Honor, and even this case,  
12 Ms. Kye, one of the charges against her was that  
13 supposedly she failed to cooperate in the investigation,  
14 so you're correct that an employee is put to a dilemma.

15 QUESTION: And that's a separate charge from --

16 MR. MARTH: That's a separate charge.

17 QUESTION: -- the charge that she in fact lied.

18 MR. MARTH: That's separate from that charge,  
19 yes, Your Honor.

20 QUESTION: That's right, yes.

21 QUESTION: Now, the Federal Circuit seemed to  
22 try to draw some line between the types of statements that  
23 it's doctrine would apply to.

24 MR. MARTH: That's correct, Justice O'Connor.  
25 They made it very --

1 QUESTION: It's a line I don't understand, but  
2 is it one you espouse?

3 MR. MARTH: It is one we espouse, and the Merit  
4 Systems Protection Board has had no difficulty applying  
5 that line, and we contend that that line is no more  
6 difficult --

7 QUESTION: What is the line?

8 MR. MARTH: The line is that -- the difference  
9 between denying the charges, a simple denial of the  
10 charges versus telling false tales or creating a story to  
11 cover yourself.

12 QUESTION: Well, in the case of the employee,  
13 Ms. Kye, she asserted that she had lost or torn up her  
14 Government credit cards, and yet that is not treated as a  
15 false statement. How do you draw the line there?

16 MR. MARTH: Your Honor, basically the elements  
17 of what the Government had to prove in her case was that  
18 she had misused her credit card. The denials in effect  
19 were, no I did not misuse my credit card, so that's where  
20 the court of appeals came down. They said that when you  
21 look at the material facts that are elements of the  
22 charge, in this case, did you misuse your Government  
23 credit card, she denied it.

24 QUESTION: Yes, but she said -- she went beyond  
25 that. She said, I lost it. I tore it up.

1 MR. MARTH: And she also attempted, Your Honor,  
2 to correct that later on, and when she attempted to  
3 correct it, and that's one of the risks here, that when  
4 that employee attempted to correct it she was charged with  
5 falsifying evidence and her entire credibility --

6 QUESTION: Which, indeed, she had been doing.

7 QUESTION: That's a risk that she --

8 (Laughter.)

9 QUESTION: A risk that materialized because of  
10 her own conduct.

11 MR. MARTH: Yes, Your Honor.

12 QUESTION: So what's wrong with that?

13 MR. MARTH: Well, the danger here that if an  
14 employee -- for example, in a couple of these cases they  
15 were asking questions, in Ms. Walsh's case about some  
16 conduct that occurred 3 years before, and in the Barrett  
17 and Roberts case they were asking them how were they  
18 spending a 2-hour period 14 months before.

19 So if an employee who answers, and blurts out an  
20 answer -- when the Government asks, for example, in  
21 Barrett and Roberts, were you working on Government  
22 business on June 8, 14 months ago, between the hours of  
23 1:30 and 3:30, they say, yes, we were.

24 Well, you know, the risk is that then when they  
25 check their records, or have other opportunities to look

1 back, they may find that indeed that that was not what  
2 they were doing 14 months before.

3 QUESTION: Well, doesn't there have to be  
4 intentional misrepresentation? Doesn't the Government  
5 have to show it's intentional?

6 MR. MARTH: Well, yes, Your Honor.

7 QUESTION: Well, doesn't that solve that  
8 problem?

9 MR. MARTH: Well, the problem is the chilling  
10 effect on an employee of denying --

11 QUESTION: Chilling effect on lying.

12 MR. MARTH: Chilling effect on denying  
13 misconduct. As both Justice Kennedy and Justice O'Connor  
14 have pointed out in the former argument, what you have  
15 here is, for examples, if somebody comes up, an  
16 investigator says, were you 5 minutes late to work, and  
17 you say, no, I wasn't 5 minutes late to work, well,  
18 suddenly what was a 5-minutes-late-to-work charge, which  
19 may involve a slap on the wrist, maybe even a written  
20 reprimand, now becomes a removable offense.

21 QUESTION: Yes, but that's because it's a more  
22 serious thing to do. It's just -- a cover-up is almost  
23 always more serious than the underlying offense.

24 QUESTION: Look at the Alger Hiss case. They  
25 asked him in 1951 or '50, whenever the trial was, about

1 things that happened in 1937. The statute of limitations  
2 on the substantive offense had run, so he was just found  
3 guilty of perjury, so lying can produce an offense where  
4 there was none before. That's what Congress has said.

5 MR. MARTH: Your Honor, but here Congress has  
6 said that employees, when they're going to be disciplined,  
7 have certain rights, and the issue is, are those rights to  
8 a meaningful opportunity to defend affected when -- before  
9 those rights are ever given, and here you have -- I think  
10 it's important to understand the context.

11 For example, in Mr. Erickson's case, the initial  
12 decision indicated that he was put into a room and  
13 questioned and told to fill out certain answers to  
14 questions. He asked for counsel. He was denied it. He  
15 asked to leave the interview room. He was denied it.

16 He put down that he felt that he was under  
17 duress and loss of his job if he responded, so what  
18 meaningful opportunities does he have subsequently to  
19 respond when he has been under all this pressure and  
20 coercion early on to respond to the Government's  
21 investigation?

22 QUESTION: But even this case, how does it fit  
23 with what the Federal Circuit said its narrow holding was,  
24 that as it said, that false statements made during agency  
25 investigations may properly be subject to falsification or

1 similar charges?

2 Why wasn't what went on part of an  
3 investigation? Why doesn't -- shouldn't we read what the  
4 Federal Circuit says the law is, apply it to that fact,  
5 and doesn't -- that person doesn't come within this  
6 decision.

7 MR. MARTH: Your Honor, that's the one point I  
8 agree with General Waxman on. I don't know how the court  
9 of appeals could say that in light of these facts, unless  
10 the court of appeals was saying, when you begin to focus  
11 an investigation on a particular respondent similar to a  
12 criminal context, certain rights attach.

13 QUESTION: Well, but this seems to say just the  
14 opposite. It says, of course, when they -- during the  
15 investigation they may be subject to --

16 MR. MARTH: Well, I mean, there's no question  
17 that these questions were given during the investigation,  
18 but what is evident is that the investigation had focused  
19 on the individual respondents in this case.

20 For example, in Ms. Walsh's case, the  
21 investigator came and said, we have talked to 10 people,  
22 and we have statements showing that basically you've lied  
23 to us, or that you are guilty of this misconduct, and you  
24 better get your answers right, because if you don't get  
25 your answers right, we've got other penalties that we can

1 institute.

2 So you're right, Your Honor, that the court of  
3 appeals used that phrase about an investigation, and the  
4 only way that I can reconcile that phrase is in terms of  
5 the fact that the investigation had now focused to the  
6 point on these respondents that they were in effect the  
7 persons that were going to be put to the charges on.

8 QUESTION: Mr. Marth, can I -- let me express  
9 what -- the trouble I have with your presentation. You're  
10 relying on the Due Process Clause which prevents the  
11 deprivation of life, liberty, or property without due  
12 process, and your claim here is that the property of this  
13 job, this Federal job is unfairly taken away unless the  
14 individual is allowed to make misstatements during the  
15 administrative proceeding that would result in taking it  
16 away.

17 MR. MARTH: Not exactly, Your Honor. In terms  
18 of the administrative proceeding I'm not taking the  
19 position that anyone at a Merit Systems Protection Board  
20 hearing has a right to lie. In fact, we're saying  
21 specifically to the contrary.

22 QUESTION: Just in the investigation.

23 MR. MARTH: Just in the investigation prior to  
24 the meaningful rights that Congress has given in 5 U.S.  
25 Code section 7513.

1           In other words, when these persons were all  
2       questioned they had not been told that they had a right to  
3       a lawyer, they had not been told that they had a right to  
4       see the charges against them, they were not given any  
5       adequate time to respond to the charges. They were  
6       basically put in a room and said, respond now.

7           QUESTION: Once the proceeding starts, however,  
8       you agree that there's no such --

9           MR. MARTH: I agree, Your Honor.

10          QUESTION: No such right.

11          QUESTION: But were they told that what you're  
12       about to say is important, and if you lie you are subject  
13       to criminal liability, or the equivalent?

14          MR. MARTH: I don't think the record is clear on  
15       that, Your Honor, Justice Breyer. As far as I can tell,  
16       the employees were not told anything about that.

17          QUESTION: I mean, what I -- the difference  
18       between this case and Alger Hiss illustrates the point  
19       that when a person commits perjury he is put under oath.  
20       It is made clear to that person how important what he's  
21       about to say is, and what will happen to him if he lies.

22          People when they're not under oath say all kinds  
23       of things. I do. You may. I mean, I try not to lie.

24          (Laughter.)

25          QUESTION: I wouldn't like to call my wife in to

1 say, in minor matters I -- you know, you say -- well, my  
2 goodness.

3 So there is a problem, but I don't -- I see a  
4 problem, and to that extent I understand your point. But  
5 what I don't see is how to solve that problem within the  
6 context of the law that we're arguing about, and if you  
7 can find a way to do that, I would be interested.

8 MR. MARTH: Well, Your Honor, one thing, of  
9 course, that would solve the problem would be that there  
10 would be no investigation questions to a given employee  
11 who's under charges until they're given --

12 QUESTION: Yes, yes --

13 MR. MARTH: Until they're given their rights.

14 QUESTION: I mean a legal route within the  
15 framework of the law we are discussing.

16 MR. MARTH: Well, the legal framework, Your  
17 Honor, as I understand the court of appeals decision and  
18 what we're advocating here is that for the meaningful  
19 rights to apply, an employee has to be able to deny the  
20 misconduct, similar to a not guilty plea, and put the  
21 Government to its proof.

22 QUESTION: Well, but we're not dealing here, are  
23 we, with criminal charges as such. They may have done  
24 things that could result in criminal charges, but that's  
25 not what happened. We're talking about whether there

1 should be some employee sanction imposed for what they  
2 did. Isn't that right?

3 MR. MARTH: Well, not only an employee sanction,  
4 but a --

5 QUESTION: Isn't that what we're talking about?

6 MR. MARTH: We are talking about a double  
7 sanction, yes, ma'am.

8 QUESTION: And this Court has never imposed some  
9 kind of Miranda rights scheme in the context of looking  
10 into employee malfeasance or misfeasance, have we?

11 MR. MARTH: No. No, Your Honor, you have not.

12 QUESTION: But you would want us to impose  
13 something like that.

14 MR. MARTH: No, Your Honor. What we're ask --  
15 we're not asking necessarily that employees be told  
16 anything, I think as Justice Breyer indicated, perhaps  
17 maybe give employees some kind of warning before they  
18 could be questioned.

19 QUESTION: A Miranda-type scheme for --

20 MR. MARTH: Right.

21 QUESTION: -- employees. Well, I think you  
22 might have a hard time persuading us that we ought to  
23 extend that --

24 MR. MARTH: No, I'm not advocating that. I  
25 understood Justice Breyer might be --

1 (Laughter.)

2 QUESTION: But that's not this case.

3 QUESTION: Mr. Marth, maybe you agreed too  
4 quickly that Justice Breyer had a problem. I mean,  
5 Justice Breyer said he tries not to lie. Were your  
6 clients trying not to lie?

7 MR. MARTH: Well --

8 QUESTION: I thought if they were trying not to  
9 lie, nothing could happen to them.

10 MR. MARTH: Well, the risk is that something  
11 could happen to them, Your Honor, and -- Justice Scalia.

12 QUESTION: The risk is that something could  
13 happen to them if it were proven that they were not trying  
14 not to lie.

15 MR. MARTH: Well, for example, in Ms. Walsh's  
16 case --

17 QUESTION: I mean, life is tough. We all have  
18 to, you know, live in some risk, but --

19 MR. MARTH: In Mrs. Walsh --

20 QUESTION: -- that can't be eliminated.

21 MR. MARTH: I'm sorry. Excuse me, Your Honor.

22 In Mrs. Walsh's case the administrative judge  
23 that heard the case found that she did not lie, and when  
24 it got to the MSPB they found that she did lie, so there's  
25 the risk of credibility determinations here becoming --

1 raising what is a simple minor offense up to a removable  
2 offense.

3 QUESTION: But the MSPB ruled in favor of these  
4 employees, as I understand it, right?

5 MR. MARTH: That's correct.

6 QUESTION: And was affirmed. So wouldn't that  
7 same MSPB, as policer of this, be able to make  
8 distinctions between the employee who came across as  
9 terribly nervous and just tripped up a little, and say,  
10 that one, firing is too much for that, and then take the  
11 one who's deliberately trying to put the investigators off  
12 the track and say -- make the penalty fit the crime.

13 You do have a policer in here independent of the  
14 agency, and that is the MSPB.

15 MR. MARTH: We do have a policer for some  
16 Federal employees, Your Honor, but not for all. Postal  
17 employees, for example, unless they're in management, or  
18 unless they're veterans --

19 QUESTION: We're dealing with a case that comes  
20 to us through the MSPB.

21 MR. MARTH: Right, but I think it's important,  
22 though, if we're looking at due process rights available  
23 to the entire Federal workforce, that the Court  
24 understand that not all employees have a right to get that  
25 independent decisionmaker. For many employees that final

1 decisionmaker is the agency official that decides the  
2 case.

3 QUESTION: I take it under your scheme if  
4 there's suspicion that a credit card has been misused and  
5 the supervisor said, I'd like to talk to you about this  
6 credit card problem, the employee has a right to say, I  
7 decline to make any statements on that unless you want to  
8 bring charges.

9 MR. MARTH: An employee can certainly do that,  
10 and the agency has the right to bring charges.

11 QUESTION: Can the agency separately charge for  
12 noncooperation --

13 MR. MARTH: Yes.

14 QUESTION: -- and failure to answer?

15 MR. MARTH: Yes. They did in this case.

16 QUESTION: Well, but not under your scheme.  
17 Under your scheme, the employer -- the employee has a  
18 right to in effect be silent.

19 MR. MARTH: I don't believe I was ever  
20 advocating that, Your Honor.

21 QUESTION: Oh, you would never give them a right  
22 to be silent, only to lie.

23 (Laughter.)

24 QUESTION: I mean -- but that will be the scheme  
25 you come up with. He can be prosecuted if he says, I'm

1     sorry, I don't want to answer, and then he can be removed  
2     for failing to cooperate. If he had only lied, he would  
3     have been okay.

4             (Laughter.)

5             QUESTION: Isn't that what we end up with?

6             QUESTION: Isn't that the logical position  
7     you're arguing, or are you saying they should also have a  
8     right to be silent? You have a choice, to lie or be  
9     silent, either one.

10            MR. MARTH: Well, either one, they're subject to  
11     potential penalties.

12            QUESTION: Is the penalty the same for simply  
13     saying, I don't care to discuss it, as it is for lying?

14            MR. MARTH: I am not sure on the table of  
15     penalties, Your Honor, whether or not the refusal to  
16     cooperate in an investigation is a removable offense or  
17     not, so I cannot answer that question.

18            QUESTION: But you're not denying that it's  
19     permissible to remove the employee for failure to  
20     cooperate? You don't deny -- you don't assert that  
21     there's a constitutional --

22            MR. MARTH: No, but that --

23            QUESTION: -- prohibition, do you?

24            MR. MARTH: No, but that puts the employee in  
25     the difficult situation where they're -- where they're

1 questioned, again, before they're given those meaningful  
2 rights that Congress has given them, that the issue is, at  
3 that point, what do they do? Do they lie, do they do a  
4 simple no, which is what the Court found happened in this  
5 case.

6 Again, I mean, it's important to -- for this  
7 Court to understand that King v. Erickson specifically  
8 said, there's no right to lie or to affirmatively mislead  
9 an agency engaged in investigation. They said, merely  
10 they had a simple right to deny the charge, and that they  
11 did not have a right to tell tall tales, to tamper with  
12 evidence, to falsify records -- they came down with a --

13 QUESTION: Well, certainly it would mislead, if  
14 you're asked a question, did you misuse the credit card,  
15 and you say no, I didn't, when in fact you did. That  
16 surely misleads if anything does.

17 MR. MARTH: Well, I guess there is that issue of  
18 whether or not a simple denial is misleading, or whether  
19 to mislead or to deceive the Government requires some kind  
20 of more affirmative misconduct.

21 QUESTION: Well, it's hard for me to see how  
22 the -- you know, you could say perhaps a spinner of tall  
23 tales would dig their own grave by making extravagant  
24 statements that were easily refutable, whereas perhaps a  
25 simple no would be less easy to identify as perjurious.

1 MR. MARTH: Your Honors, we would contend that  
2 the due process concerns in this case with regard to risk  
3 of erroneous deprivation, basically that there are six  
4 potential risks to the employees in these -- in this case.

5 First, there is the chilling effect stemming  
6 from the seriousness of the charge, which we've already  
7 talked about.

8 Secondly, an employee who is not represented  
9 during this process risks being coerced when questioned.

10 QUESTION: Mr. Marth, may I just ask you one  
11 question about the relationship of the prior  
12 decisionmakers? Did the MSPB get this rule from the  
13 Federal Circuit's prior decision, or did it originate with  
14 the MSPB?

15 MR. MARTH: The Federal Circuit in Grubka came  
16 up with the proposition to begin with that a person always  
17 has the right to deny a charge and put the Government to  
18 its proof.

19 QUESTION: So it wasn't MSPB as -- MSPB was not  
20 the originator.

21 MR. MARTH: That's correct.

22 QUESTION: I didn't understand that your theory  
23 was risk of erroneous deprivation. I thought what you  
24 were concerned with was a very sound and justified  
25 deprivation, and that's why the person would be allowed to

1 lie a little bit of the way at the beginning so that he  
2 would be able to make a more effective defense later on  
3 without having given things away.

4 MR. MARTH: Well, Your Honor --

5 QUESTION: Isn't that your theory?

6 MR. MARTH: Yes, Your Honor, but the risk comes  
7 from requiring an employee at that early stage in effect  
8 to give up or minimize his later meaningful rights.

9 QUESTION: Yes, but it's not a risk of erroneous  
10 deprivation.

11 MR. MARTH: Well, if he is required to respond  
12 with more than an exculpatory no in effect at that time,  
13 then there is that risk that his later rights would be  
14 deprived of him, deprived of him from a meaningful point  
15 of view.

16 QUESTION: Well, it's a risk that his later  
17 rights will not protect him from a justified deprivation.  
18 Isn't that it? You're saying if he can't lie, and he  
19 doesn't remain silent, and he had to tell the truth, he  
20 wouldn't have much of a case later on. That's your  
21 concern, isn't it?

22 MR. MARTH: No. My concern is that before a  
23 person has a right to see an attorney, before they have a  
24 right to review their own records, before they have a  
25 right to look at the Government charges, it risks the

1 deprivation of those rights if the agency can come in and  
2 question the employees and the employee does not have a  
3 right simply to deny the misconduct until he gets those  
4 rights.

5 At that point, any right to deny the misconduct  
6 stops, but it's only after he gets the meaningful rights  
7 protected to that employee by the Government would his  
8 rights continue.

9 Thank you.

10 QUESTION: Thank you, Mr. Marth.

11 Mr. Waxman.

12 REBUTTAL ARGUMENT OF SETH P. WAXMAN

13 ON BEHALF OF THE PETITIONER

14 GENERAL WAXMAN: Mr. Chief Justice, and may it  
15 please the Court:

16 Mr. Marth may be simply have misunderstood or  
17 not know what the facts are with respect to the other five  
18 employees before this case, but he surely knows what the  
19 facts are with respect to his client, Sergeant Erickson,  
20 who was not put in a room and told he had to answer a  
21 series of rapid-fire questions.

22 The record in this case reflects that Mr. --  
23 that Sergeant Williamson at 7:20 in the morning signed a  
24 Kalkind statement acknowledging that he has -- may be  
25 asked to provide answers to questions: I've been advised

1 that I have a right to remain silent, but that I may be  
2 subject to disciplinary action for failure to answer  
3 material and relevant questions. I've been further  
4 advised that the answers I give to these questions, or any  
5 evidence gained by reason of my answers --

6 QUESTION: But Mr. Waxman, that -- none of that  
7 was necessary.

8 GENERAL WAXMAN: It was absolutely not  
9 necessary. I just don't want this Court to be under the  
10 misimpression that this man was somehow treated unfairly,  
11 3 hours later --

12 QUESTION: But even if he was put in a room and  
13 asked a bunch of rapid-fire questions, it seems to me  
14 we've got the same answer under --

15 GENERAL WAXMAN: That's -- that's right. He  
16 could simply have said, I don't remember, or I'd like to  
17 take time to think about it, or he could have confessed,  
18 and that was the case with respect to all --

19 QUESTION: Which is I suppose what he should  
20 have done, right?

21 GENERAL WAXMAN: We have as an -- the Government  
22 as an employer has the right to ask that they do that,  
23 even if we had been "unreasonable" and put him on the spot  
24 and said, look, we're investigating this Mad Laughter  
25 incident, and were you -- do you or do you not know

1 anything about that, but none of the cases before this  
2 Court are anything approaching that.

3 Ms. Walsh, who supposedly was asked on the spot  
4 to talk about events that happened 3 years before, was  
5 accompanied by an attorney, made a long, discursive  
6 statement in response to questions, and there was a  
7 transcript. She could easily have said, I don't remember.  
8 It was a long time ago. She gave a whole false story  
9 about a long relationship she had.

10 You are right. It does not matter as a  
11 constitutional matter. I just wanted the record to be  
12 clear with respect to this case.

13 QUESTION: In fact, I don't suppose she could  
14 even say I don't remember, if she really did.

15 GENERAL WAXMAN: That's -- that's right, and the  
16 problem that Justice Breyer was suggesting that some  
17 people may have with the potential for abuse I think is  
18 dealt with very adequately by Congress and by the Office  
19 of Personnel Management in the relevant stat -- provisions  
20 of the Civil Service Protection Act and the implementing  
21 regulations.

22 In 5 U.S.C. section 2301, that is the statutory  
23 provision that enunciates the merit systems principles, it  
24 states, among other things, that as a matter of statutory  
25 law all employees and applicants for employee --

1 employment should receive fair and equitable treatment in  
2 all instances of personnel management, and it goes on.

3 QUESTION: Is this -- this is a minor -- but I  
4 mean, it -- point, but it's crucial, I guess not  
5 necessarily to whether you win or lose, but I'm still  
6 worried about whether this is a constitutional or a  
7 statutory case, and the language on 12a, you see, they  
8 say, the question before us is whether doubling up a  
9 misconduct charge, et cetera, deprives the employee of the  
10 due process that the statute intends, and then they talk  
11 about Federal law throughout the rest of it, and they've  
12 got the Constitution in there quite a lot, but I -- maybe  
13 it's the same answer. I don't know.

14 But is this -- what do you think about that  
15 language?

16 GENERAL WAXMAN: There is simply no doubt that  
17 the Federal Circuit was ruling as a matter of  
18 constitutional due process. It says so over and over and  
19 over again. When you get to the --

20 QUESTION: Mr. Waxman, you would not be happy, I  
21 don't suppose, with a decision that says we find no  
22 constitutional basis for this decision, but we leave open  
23 the question whether it's commanded by the statute.

24 GENERAL WAXMAN: I don't think there would be  
25 any basis whatsoever -- that would be the most muscular

1 interpretation of the statute imaginable. I don't think  
2 there would be any basis for it, but --

3 QUESTION: You think it's more muscular than the  
4 interpretation of the Due Process Clause?

5 GENERAL WAXMAN: Well, that's -- you mean by the  
6 court below?

7 QUESTION: Yes.

8 GENERAL WAXMAN: That's rather --

9 QUESTION: We've muscled that around before,  
10 right?

11 (Laughter.)

12 GENERAL WAXMAN: That's rather muscular. We'll  
13 take it, whatever this Court's judgment is.

14 The question presented is a constitutional one.  
15 I think the reason that there's no statutory question in  
16 this case is that there simply is no statutory provision  
17 to which this claim could be attached.

18 QUESTION: Well, he -- they've attached 7513 and  
19 to the list in 7511 and they say, for the efficiency of  
20 the service, and then they list all these rights and they  
21 say, well, obviously, this means that you have a right to  
22 say no, and certainly during the hearing, and since you  
23 must have a right to exculpatory no during the hearing  
24 itself you have this reading. Yes, it's muscular.

25 (Laughter.)

1           GENERAL WAXMAN:  It's -- look, it's not how --  
2   it isn't how the Government has read the opinion, but it  
3   would be wonderful if the Court could so read the opinion  
4   and then hold that even as a matter of statutory  
5   construction it simply cannot be that as an a priori  
6   matter it doesn't promote the efficiency of the service to  
7   sanction employees who deliberately and intentionally lie  
8   to their employers.  We haven't read it that way, but if  
9   the Court feels that it could, we'd embrace it.

10           If there are no further questions, we'll submit.  
11   Thank you.

12           CHIEF JUSTICE REHNQUIST:  Thank you, Mr. Waxman.  
13   The case is submitted.

14           (Whereupon, at 11:52 a.m., the case in the  
15   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:

JANICE R. LACHANCE, ACTING DIRECTOR, OFFICE OF PERSONNEL  
MANAGEMENT Petitioner v. LESTER E. ERICKSON, JR., ET AL.  
CASE NO: 96-1395

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

BY Donna Marie Fedele-----

(REPORTER)