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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: OFFICE OF PERSONNEL MANAGEMENT, Petitioner

V. CHARLES RICHMOND

CASE NO: 88-1943

PLACE: Washington, D.C.

DATE: February 21, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 OFFICE OF PERSONNEL MANAGEMENT, :

4 Petitioner :

5 V. : No. 88-1943

6 CHARLES RICHMOND :

7 - - - - - x

8 Washington, D.C.

9 Wednesday, February 21, 1990

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:49 a.m.

13 APPEARANCES:

14 KENNETH W. STARR, ESQ., Solicitor General, Department of
15 Justice, Washington, D.C.; on behalf of the
16 Petitioner.

17 GILL DEFORD, ESQ., Los Angeles, California; on behalf of
18 the Respondent.

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1 clear and emphatic that the government, acting as it must
2 through its employees and agents, cannot be estopped from
3 asserting its rights and executing the law, subject always
4 to the overriding demands of the Constitution.

5 Across the judicial generations beginning with
6 Chief Justice Marshall's Court in 1813 in Lee against
7 Monroe and Thornton; in the wake of the Civil War in 1868
8 in the Floyd Acceptances case; the turn of the century in
9 Pine River Logging Company; at the close of World War I in
10 Utah Power and Light; and in more modern times, Justice
11 Douglas' opinion for the Court in United States against
12 Stewart; and Justice Frankfurter's opinion in what has
13 become viewed as the seminal case in this area, Federal
14 Crop Insurance Corporation against Merrill.

15 Through all these generations, the Court was
16 clear and it was consistent that in the execution of
17 public law the government, in contrast to a private party,
18 cannot be estopped. And in our view there are powerful
19 reasons, both legal and practical, why this historic
20 principle is sound.

21 The legal reasons are found in basic principles
22 of democratic theory, and the very nature of our system of
23 divided powers among co-equal branches. As this Court
24 held in INS against Hibi, and then reiterated less than
25 two years ago in INS v. Pangilinan, estoppel, a venerable

1 judge-made doctrine, cannot override a public policy
2 established by Congress.

3 That is our first point and it's our most
4 fundamental. That it is the primacy of the elected
5 branches in our representative democracy in establishing
6 the law that renders estoppel against the government
7 inappropriate.

8 This basic principle of our government of the
9 responsibility of Congress, consistent with the
10 Presentment Clause, to enact laws that bind the people --

11 QUESTION: May I ask a question about your
12 theory? I suppose it might be possible for the Executive
13 Branch to deliberately try to thwart the policies set by
14 Congress, for example, in a benefit program, if the
15 Executive thought that program was unwise and unfortunate
16 and, therefore, in their policy they would just make it a
17 policy not to tell people about deadlines, or do anything
18 they could to discourage people from taking advantage of
19 the program Congress has set up.

20 Now, under your theory, no estoppel is possible.
21 And yet under those circumstances the Executive would be
22 thwarting the will of Congress.

23 MR. STARR: Under those circumstance I would
24 quite agree that the Executive would be actively seeking
25 to subvert the will of Congress. That was the view of

1 several --

2 QUESTION: But there would still be no estoppel.

3 MR. STARR: Yes. In our view there would still
4 be no estoppel. In fact, that was the view of several
5 members of this Court in the Hibi case. That the
6 Executive was deliberately not carrying out the will of
7 Congress. And yet this Court determined that estoppel
8 should not lie.

9 And there is a reason for that. If, in contrast
10 to the run-of-the-mill case -- and we believe this is,
11 while very unfortunate for Mr. Richmond, a run-of-the-
12 mill case of error -- of what Justice Frankfurter in
13 Merrill called "ignorant innocence." There was no
14 malevolent motive on the part of the civilian personnel in
15 San Diego animus directed at Mr. Richmond for any reason
16 whatever. There was a mistake. That is the run-of-the-
17 mill case.

18 If, in fact, there were at higher levels of the
19 Executive an effort to thwart the law, then it seems to
20 us, and we submit to the Court, that the appropriate place
21 for redressing that kind of grievance is in the Congress.
22 That Congress itself knows full well how to step in,
23 either through public law, passing a public law to address
24 what Congress perceives as a subversion of its will --

25 QUESTION: And would this -- the result be the

1 same if there were an active intentional
2 misrepresentation?

3 MR. STARR: Under our theory, that is correct.
4 Even if it is knowing and intentional. That is not the
5 run-of-the-mill case, I hasten to add. But our theory of
6 the case is quite right. In fact, it is all the more odd
7 where there is active subversion for that -- for that --
8 to be given effect by the courts.

9 It seems to us that the appropriate province of
10 Congress is to address that sort of situation. I do
11 hasten to add that in none of the cases, save for Hibi,
12 has that extreme example even been suggested, although
13 there have been actions by very senior officials of the
14 government that have been called into question, such as in
15 the Floyd Acceptances case. The action of the Secretary
16 of War himself was said to give rise to an estoppel.

17 QUESTION: Well, at some point acts -- acts of
18 government officials can deprive someone of a
19 constitutional right then?

20 MR. STARR: We certainly would agree with that,
21 Justice White. That in --

22 QUESTION: Well, what do you do? Is that -- was
23 that the situation in PICCO or the Pennsylvania case?

24 MR. STARR: That's our reading of that case.
25 That is a criminal case and our argument is in fact going

1 to civil liability that is sought to be imposed upon the
2 government in contravention. And that is clear, that in
3 this instance the law would in fact be violated by
4 enforcement of the court of appeals' order to direct
5 against --

6 QUESTION: Well, what if that had been just a
7 civil case that you were trying to recover from -- from
8 that -- from that particular party the costs of removing
9 some obstruction and yet the -- and yet the party had been
10 affirmatively misled by that regulation? Do you think the
11 result would have been different if that would have been a
12 civil case?

13 MR. STARR: Not in a civil case. If in fact the
14 regulation were unlawful under governing statute, I think
15 that would be -- that would be the key question.

16 QUESTION: Well, it was, wasn't it?

17 MR. STARR: It was. Or the interpretation --
18 there was --

19 QUESTION: Yes?

20 MR. STARR: -- in fact unlawful --

21 QUESTION: So, the --

22 MR. STARR: I quite agree that in that
23 instance --

24 QUESTION: Would the -- would the result have
25 been the same in a civil case as in a criminal?

1 MR. STARR: No. I'm sorry. The result would
2 not in fact be the same in our judgment. In our judgment,
3 in fact the court --

4 QUESTION: You couldn't -- you couldn't fine him
5 on the criminal case but you could make him -- you could
6 recover a large sum of money from him in a civil case?

7 MR. STARR: I think that's right. And the
8 reason is PICCO itself made clear that the criminal
9 justice system carries with it fundamental notions of
10 elementary fairness and entrapment, and that an individual
11 should not earn entity in that case, should not be
12 summoned to answer criminally and then convicted for a
13 crime if the law was not in fact clear.

14 There are any number of doctrinal protections
15 that the law must be clear before --

16 QUESTION: But then are you saying --

17 MR. STARR: -- someone is held criminally
18 liable.

19 QUESTION: -- if in this case there had been a
20 misdemeanor to earn more money than the -- instead of a
21 forfeiture of the remaining pension, you couldn't have --
22 the government would have been estopped from enforcing the
23 criminal prohibition?

24 MR. STARR: I don't think so under this
25 circumstance because I don't think the formality of the

1 government's representations in this instance rose nearly
2 to the level as the formality of formal interpretations
3 that were before the Court in PICCO.

4 That is to say, no, I don't think that a low-
5 level -- with all respect to the Navy civilian personnel
6 -- I don't think that a low-level civilian employee of the
7 Navy in San Diego has the power, has the authority, to
8 override the law. And I don't think it is reasonable.

9 We presume in our system of a rule of law that
10 individuals inform themselves of what the law is. We also
11 make it quite clear that individuals rely, by virtue of
12 the venerable principle of no estoppel against the
13 government -- rely upon advise, either informal advise
14 orally or even when it takes a written form, as happened
15 in any number of cases.

16 QUESTION: We'll resume there at 1:00, General
17 Starr.

18 (Whereupon, at 12:00 noon, the case in the
19 above-entitled matter was recessed, to reconvene at 1:00
20 p.m. this same day.)
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1 AFTERNOON SESSION

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll resume our
4 argument in Office of Personnel Management v. Charles
5 Richmond.

6 General Starr.

7 MR. STARR: May it please the Court, Mr. Chief
8 Justice:

9 This case, as Judge Mayer put it aptly in
10 dissent, is strikingly similar to this Court's case in
11 Schweiker against Hansen. And we believe that that case
12 controls this case in terms of erroneous advise by the
13 government, simply cannot, as a matter of law, work or
14 constitute the grounds for an estoppel.

15 And in this case it is quite clear that the
16 court of appeals order in this case to the MSPB will
17 require ultimately OPM to violate the law.

18 At page 23 of our brief we set forth the
19 reformulated statute, the rewritten statute that now
20 embodies the judgment of the court of appeals for the
21 federal circuit. Section 8377(d) it should be completely
22 clear has been rewritten. Beginning with the "unless"
23 language, the law applies unless the annuitant is informed
24 otherwise by a government official or agency.

25 Mr. Richmond, by virtue of his earnings in

1 calendar year 1986, was not entitled to disability annuity
2 payments during the six-month period -- that is ultimately
3 what is at issue, a six-month period -- of payments that
4 are in question.

5 And this, then, in our mind, represents one of
6 the most intrusive forms of estoppel against the
7 government. And that is, an order that is corrosive of
8 Congress' powers under the Appropriations Clause to
9 control the appropriation and expenditure of public funds.

10 QUESTION: General Starr, the advise in this
11 case was obtained from the Navy Employee Relations
12 Specialists?

13 MR. STARR: That's correct.

14 QUESTION: I -- I suppose the typical employee
15 figures that these people probably will know what they're
16 talking about.

17 MR. STARR: There's no question. The typical
18 employee would think that a Navy personnel officer would
19 know what he or she is talking about. We don't
20 question --

21 QUESTION: And they should know.

22 MR. STARR: -- the -- and should know. We don't
23 question that, Justice Blackmun. The Navy should have
24 known in this instance.

25 I do note by way of mitigation that Mr. Richmond

1 certainly was on notice that he was dealing ultimately in
2 terms of his entitlement to disability benefits with the
3 Office of Personnel Management.

4 QUESTION: Did he lose any money?

5 MR. STARR: He lost in effect -- yes, he did,
6 Justice White. He lost in effect six --

7 QUESTION: Well, but if he earned more than he
8 should have before the disability.

9 MR. STARR: In 1986 he earned more than he
10 should have. But that resulted in his losing in calendar
11 year 1987 six months --

12 QUESTION: Yeah.

13 MR. STARR: -- of his disability payment. He
14 was then restored by virtue of his level of earnings
15 during calendar year 1987. His disability annuity was
16 restored then, effective January 1, 1988.

17 We believe that there are practical reasons
18 quite in addition to fundamental legal issues of reasons
19 of separation of powers and sovereign immunity, as we set
20 forth more fully in our brief.

21 And the basic point in this respect was made
22 over 150 years ago by Justice Story in the Kirkpatrick
23 case, and we cite this at page 35 of our brief. That the
24 government acts, as here, and as it always does, through
25 its numerous employees -- over 3 million civilian

1 employees. There are over 100 Navy civilian personnel
2 offices across the country and the globe.

3 Justice Story's words, written in obviously a
4 decided quieter time, have even more force today. That
5 the government's fiscal operations are so various and its
6 agencies so numerous and so scattered that the utmost
7 vigilance would not save the public fisc from the most
8 serious losses.

9 And that's our point. That by --

10 QUESTION: But General Starr maybe that -- maybe
11 that could be your point. Justice Story is talking about
12 the public fisc, and this case involves the public fisc.
13 And the Constitution specifically says that no money shall
14 be drawn from the Treasury, no funds shall be drawn from
15 the Treasury except by appropriation.

16 Why isn't it enough for us to decide this case
17 to simply hold that -- that provision of the Constitution
18 at least cannot be overcome by estoppel? And we don't
19 have to worry about criminal cases or criminal penalties
20 or civil penalties or anything else.

21 MR. STARR: It is enough to decide this case. I
22 would urge the Court before it decided, to decide the case
23 on a narrower ground. That for 30 years it has sought to
24 decide these cases in a restrained way on narrow grounds,
25 leaving open various possible exceptions.

1 The result is, as two members of this Court
2 noted in 1981, that there is not much guidance that has
3 been provided by this Court, with all respect, to the
4 lower courts. And the federal courts, as we set forth
5 particularly in our petition for certiorari, are frankly
6 all over the law.

7 QUESTION: But that wouldn't be very narrow. I
8 mean, I think that's a -- that's a sizeable principle.

9 MR. STARR: That is --

10 QUESTION: That if you're mislead in any -- in
11 any respect that causes you to claim entitlement to some
12 money from the Treasury, you're out of court if your only
13 basis is the estoppel.

14 MR. STARR: I will not --

15 QUESTION: That's not terribly narrowing.

16 MR. STARR: -- quarrel that that is now narrow.

17 QUESTION: -- to be greedy.

18 MR. STARR: I beg your pardon? No, I would not
19 resist such a ruling by the Court.

20 QUESTION: Well, but it's --

21 QUESTION: What would be the basis --

22 QUESTION: -- it's also a --

23 QUESTION: What would be the basis for -- for
24 that ruling if you're saying those cases are different
25 than other kinds of cases?

1 MR. STARR: Because the Appropriations Clause,
2 as this Court has noted in Schweiker against Hansen and in
3 -- in Heckler against Community Health Services, raises a
4 specific power by Congress, a power under the
5 Appropriations Clause. And a number of cases of this
6 Court hold that it's simply unlawful for the Executive
7 Branch to expend a penny that has not been appropriated by
8 Congress.

9 QUESTION: But would the -- would the carrying
10 out of the federal circuit's judgment here really require
11 the expenditure of any money that hadn't been appropriated
12 by Congress? Doesn't Congress appropriate kind of en bloc
13 for these various programs?

14 MR. STARR: In that sense there are federal
15 monies, but not in a accordance with law. That is to say,
16 Congress has specified the conditions under which money
17 can be expended. And that condition in this case has to
18 do with his eligibility, the eligibility requirements of
19 Civil Service disability annuitants. And he fails to live
20 up, or to satisfy, those conditions that Congress has
21 imposed on the expenditure of funds.

22 QUESTION: Then you can make the argument then
23 about some of these -- about a lot of these programs would
24 be -- could be put up in constitutional terms. Just --
25 you're making a -- you're making a claim here that's just

1 wrong and if -- you're making a claim for money that's
2 never been appropriated.

3 MR. STARR: That is the effect. That is exactly
4 right, and we think that the courts -- the lower courts --

5 QUESTION: So the argument --

6 MR. STARR: -- are at fault in this --

7 QUESTION: -- isn't that the money isn't
8 appropriated really. The argument is that they're just --
9 that --

10 QUESTION: It wasn't properly --

11 QUESTION: Well, the money's been appropriated
12 for a specific purpose and if they pay it out, why, that's
13 out for that purpose.

14 MR. STARR: I accept that formulation, that it's
15 the purpose that's involved and the purpose is identified
16 by the specific provisions of law. And here, the specific
17 provisions of law are such that he, Mr. Richmond, did not
18 satisfy those conditions or provisions.

19 QUESTION: But -- but that's always the case
20 whenever we're challenging the applicability of a
21 regulation under Health and Human Services, say. It's
22 never phrased in constitutional terms.

23 MR. STARR: That's correct. What -- our basic
24 position is that it is inappropriate for courts to order
25 Executive Branch officials to violate the law in order to

1 achieve what the court believes is a just result. And
2 that may be in the form of regulation that is promulgated
3 pursuant to delegated power, or it may be, as here, the
4 violation -- and I want to be clear about this -- this
5 order would require OPM to violate this statute by paying
6 monies to an individual who is not entitled to them under
7 the statute.

8 QUESTION: Is that your broad theory that you
9 just enunciated or the narrow one that you would settle
10 for?

11 (Laughter.)

12 MR. STARR: It -- it -- it portends of both
13 actually. All of our arguments lead ultimately to the
14 point that in our government it's up to Congress,
15 consistent with the Presentment Clause, to determine what
16 the law is. And when, as here, the law is clear, it is
17 inappropriate for courts to invoke equitable principles to
18 prevent the execution of a law. But more than that, to
19 actually order the carrying out of a violation of that
20 statute. And this --

21 QUESTION: But that -- that presentation does
22 not answer the question that I raised before lunch where
23 the Executive is in effect violating the policy set by
24 Congress.

25 MR. STARR: Where there is in fact an effort --

1 and let me -- let me accept that the agency, as opposed to
2 an employee -- I don't want to concede the point that any
3 employee's action constitutes agency action because it may
4 be completely unauthorized.

5 Let us assume, as I am taking for purposes of
6 this argument, in your hypothetical that it's the agency
7 at a policy-making level, at a high level, it still seems
8 to us, Justice O'Connor, that the remedy lies with
9 Congress, ultimately with impeachment, if there is in fact
10 a dereliction of duty by the Executive actively to subvert
11 the law because that Executive Branch agency, through
12 policy-making officials, is no longer faithfully executing
13 the law.

14 That is exactly what our system contemplates.
15 It contemplates obedience to law. It doesn't contemplate
16 a further violation of law in order to overcome or to
17 remedy the problem of erroneous advise being provided.

18 QUESTION: I -- I thought you were going to say
19 that -- that recognizing estoppel against the government
20 not only doesn't solve Justice O'Connor's problem but
21 perhaps aggravates it because it enables the President not
22 only to frustrate a federal program by deceiving people
23 into believing it doesn't exist, but to create federal
24 programs where there are none, which couldn't be done
25 without an estoppel theory.

1 That is, he couldn't tell somebody, you're
2 entitled to money, and the person would be entitled to it.
3 The most he could do is tell him, you're not entitled to
4 money, and cause a person not to -- not to apply.

5 MR. STARR: That is correct. I -- I accept the
6 point, that there could in fact be, under those
7 circumstances, a new program that is Executive Branch
8 formulated that would then be given Judicial sanction.

9 QUESTION: Of course, the only reason this case
10 comes up is that the -- is that the -- well, I guess
11 there's plenty of reasons, but one reason that would
12 eliminate a case like this is if the Federal Tort Claims
13 Act covered negligent misrepresentation.

14 MR. STARR: That's exactly right. Under
15 principles of sovereign immunity the sovereign is immune
16 from suit, but Congress saw fit in 1946 to remedy that by
17 providing -- this does in fact sound in the nature of a
18 tort of negligent misrepresentation --

19 QUESTION: And so you --

20 MR. STARR: -- but Congress did not --

21 QUESTION: -- think that Congress could solve
22 this kind of a problem by saying if there's a negligent
23 misrepresentation, you can pay out money that we've never
24 authorized?

25 MR. STARR: If Congress saw fit, yes, they could

1 correct it immediately by amending the FCCA, and the
2 Congress very frequently acts in any number of respects,
3 as we have set forth in our brief. Not just the private
4 bill mechanism, which we do want to urge upon the Court as
5 a significant device to remedy -- to remedy single
6 examples.

7 As opposed to Justice O'Connor's example --
8 hypothetical -- this is a situation where something went
9 wrong in part of the operations of government at a fairly
10 low level. That is precisely --

11 QUESTION: Yeah, but why is this -- why is this
12 different in terms of the absolute power of no
13 appropriations and all the rest -- different from the --
14 as an equitable matter, tolling the statute of limitations
15 against the government for inequitable conduct? Why --
16 why isn't that also flatly prohibited by the requirement
17 that you can't spend money the government didn't
18 authorize?

19 MR. STARR: That depends upon Congress' intent,
20 and this Court has held typically that a statute of
21 limitations against the government must be strictly
22 enforced.

23 It may be, however, that the Court in analyzing
24 a particular statute will determine that Congress intended
25 for equitable tolling principles to apply. That was the

1 case in the City of New York v. Bowen case, that Congress
2 in fact contemplated there that --

3 QUESTION: Well, why couldn't the Court do the
4 same thing with this statute and say of course they can't
5 pay unless they're misled into having -- having -- you
6 know, earned a little more money than they thought was
7 appropriate? Can you just -- the same -- the same sort of
8 approach, just construe the statute to say it makes an
9 exception for this kind of situation?

10 MR. STARR: I don't know the basis, Justice
11 Stevens, of construing the statute. The language doesn't
12 admit of it. There's no legislative history to which
13 we've --

14 QUESTION: But I suppose Congress has rejected
15 the notion that they -- that there should be some recovery
16 for negligent misrepresentation. Affirmatively it said
17 so.

18 MR. STARR: By virtue of the Federal Tort Claims
19 Act. And then, in addition to that, I think it's
20 important for me to note that Congress legislates against
21 the backdrop of the law. And the law has been very clear,
22 as I tried to say before lunch, that there is no estoppel
23 against the government --

24 QUESTION: But then you're -- you're asking us
25 to overrule the Moser case, aren't you?

1 MR. STARR: I beg your pardon?

2 QUESTION: You're asking us to overrule the
3 Moser case, aren't you?

4 MR. STARR: Oh, not at all. We accept the Moser
5 case. Moser, as we read the case, is a statutory
6 interpretation case by virtue of the regulations that were
7 in effect there requiring a waiver by the individual
8 seeking citizenship of his right to citizenship.

9 We also think that the Court was speaking in due
10 process language. That is to say, its reading of the
11 statutory regime and regulatory regime there was informed
12 by due process considerations. Its use of elementary
13 fairness, its use of entrapment language. We think that
14 is a statutory interpretation guided by due process
15 considerations.

16 That has not been asserted here and I don't
17 think it reasonably can be asserted here.

18 QUESTION: And it didn't say estoppel?

19 MR. STARR: It specifically foreswore the use or
20 invocation of the estoppel principle.

21 I would like to reserve the remainder of my
22 time, if I may.

23 QUESTION: Very well, General Starr.

24 Mr. Deford -- is that how you pronounce your
25 name?

1 MR. DEFORD: Deford.

2 QUESTION: Deford. Mr. Deford.

3 ORAL ARGUMENT OF GILL DEFORD

4 ON BEHALF OF THE RESPONDENT

5 MR. DEFORD: Mr. Chief Justice, and may it
6 please the Court:

7 This is not a routine, run-of-the-mill case, as
8 the government has described it in its briefs and before
9 this Court.

10 Charles Richmond lost his vested right to a
11 retirement annuity as a consequence of consistently
12 inaccurate information given to him by his former
13 employer, the Federal Government. He made specific
14 inquiries as to his rights and obligations under the
15 federal retirement law and received in response the
16 official written -- written statement of the law as
17 prepared by the federal agency responsible for
18 administering that law, the Office of Personnel
19 Management.

20 OPM's written statement, however, was over three
21 years out of date. And as a consequence of relying on
22 that blatantly erroneous information, he was divested of
23 his -- of his already existing entitlement.

24 QUESTION: Mr. Deford, I must say, even if --
25 even if the equitable doctrine of estoppel were

1 applicable, I'm -- it's not clear to me how the equities
2 are in this case. It seems to me what your client is
3 complaining about is -- is that in fact his earning -- his
4 earning capacity had been restored. He went out and was
5 able to make as much money as the statute said would
6 demonstrate that his earning capacity had been restored.

7 I don't view it to be the purpose of this
8 statute that even though you may earn enough money to get
9 off of the public welfare, which this statute provides,
10 you may continue to sit at home and earn right up to the
11 dollar next to that even though you still have the working
12 capacity. Do you think that that's --

13 MR. DEFORD: Justice Scalia, I think --

14 QUESTION: -- and equitable case for your
15 client?

16 MR. DEFORD: Absolutely.

17 QUESTION: That -- that he mistakenly used the
18 -- the working capacity that he had instead of sitting at
19 home and -- and collecting his -- his benefits?

20 MR. DEFORD: Justice Scalia, I don't think what
21 Mr. Richmond was doing was anything different than what
22 anybody else does when they try to find out what the rules
23 are.

24 QUESTION: You don't sue in court claiming the
25 benefits of equity --

1 MR. DEFORD: I think --

2 QUESTION: -- as your client --

3 MR. DEFORD: -- that something is missing.

4 QUESTION: They -- they are adhering to the
5 letter of the law. You're coming in and saying, give us
6 equity, and I don't -- I don't see a very strong equitable
7 case on the part of your client. He can earn enough
8 money, demonstrably, to not be entitled to -- to these
9 funds.

10 MR. DEFORD: He had the one-time opportunity in
11 that year, 1986, to earn a little extra money. He had
12 significant debts and he knew that his income would go
13 down again in 1987. He went into the Navy Personnel
14 Office to find out what exactly he could earn. He assumed
15 that there were some limitations on what he could earn and
16 still be eligible for a disability annuity.

17 And he received information which led him to
18 believe, and which said, you can earn such and such amount
19 of money for two years straight.

20 QUESTION: The only complaint is -- is that had
21 he known that the law was the way it was, he would have
22 sat at home instead of earned as much money as he could
23 have. That's the whole basis for the estoppel.

24 MR. DEFORD: He would have not earned -- he
25 probably would not have earned as much as he did.

1 QUESTION: That's right.

2 MR. DEFORD: He was only three percent over the
3 rule as it was.

4 QUESTION: Well, I don't --

5 MR. DEFORD: Congress --

6 QUESTION: -- just don't consider that a strong
7 equitable --

8 MR. DEFORD: Just one more point, Justice
9 Scalia. Congress has set an 80 percent limit on how much
10 the individual can earn. So Congress obviously
11 contemplates that most people will be earning some money.
12 They didn't set a five or ten percent limit, they set an
13 80 percent limit. So, people can earn up to that limit
14 and there's no suggestion that earning up to that limit is
15 improper or inequitable.

16 QUESTION: It's phrased in the terms of he will
17 be deemed to have had his earning capacity restored. The
18 object of the statute is that when the person's earning
19 capacity is restored, he gets off the program. And
20 there's one way that he's clearly deemed to have had it
21 restored, and that is if he's earning this much money.

22 But I'm not sure that it's in accord with the
23 spirit of the statute to carefully calculate how much you
24 earn each year so that you -- even though your earning
25 capacity is restored, it will not be deemed to have been

1 restored.

2 I agree as a matter of strict law your client
3 was -- would have been entitled to the money if he had
4 played it that way. But he's coming into -- into court
5 now and saying, forget the letter of the law, give me
6 equity. If he wants equity, I'm not sure he wins.

7 MR. DEFORD: With all due respect, Your Honor, I
8 think your interpretation of the law's purpose is
9 inaccurate. The law is structured in such a way that
10 people will get off for a time being and then they may get
11 right back on again.

12 What happened to Mr. Richmond in that respect is
13 not unusual. He was only off benefits for six months.
14 And then, because his income went down again, as he had
15 anticipated, significantly, he was able to get back on
16 again. There was never any suggestion that he was not
17 disabled. His disability has continued up to now.

18 His earnings went up for a very short period of
19 time, and it happened to go over the limit by a few
20 percent.

21 QUESTION: How was he misled then? The only
22 basis for claiming he was misled is that had I known, I
23 wouldn't have taken the job. That's the only basis for
24 claiming an estoppel.

25 MR. DEFORD: No, Your Honor --

1 QUESTION: That he would voluntarily have
2 refrained from earning money.

3 MR. DEFORD: He was misled because he was led to
4 believe that the old law was in effect, and the old law
5 allowed him to earn 80 percent for two years in a row.
6 The new law said 80 percent in one year.

7 He earned 83 percent and then all of the sudden
8 finds out he's subject to a law which he had not been told
9 about. And so he went back off --

10 QUESTION: Then, if I had known that, I would
11 have sat at home and been idle --

12 MR. DEFORD: No, Your Honor.

13 QUESTION: -- instead of getting off of this
14 program.

15 MR. DEFORD: He would have earned money anyhow.
16 He had an opportunity for temporary overtime, which he
17 took. He took some of it, but he probably would not have
18 taken all of it had he known that there was a one-year 80
19 percent rule. So, he would not have sat at home in any
20 event.

21 QUESTION: Sounds like he had a bad lawyer.

22 MR. DEFORD: Well, Justice White, I think that's
23 not a bad point, because I think that's absolutely one of
24 the practical consequences of the government's position,
25 that no one, including a Social Security recipient, would

1 take any action now, vis-a-vis the government, without
2 contacting a lawyer. And I find that a very unusual
3 public policy for this government to encourage.

4 In fact, even getting your own lawyer wouldn't
5 do you any good other than it would give you somebody to
6 sue if the information the lawyer gave you turned out to
7 be wrong, because you still could not trust the
8 information the government had given you.

9 The essence of the government's position is --

10 QUESTION: The lawyer probably would have asked
11 the Navy anyway, wouldn't he?

12 (Laughter.)

13 MR. DEFORD: Maybe, but I hope the lawyer would
14 have looked it up in the statute books.

15 QUESTION: Yeah, you don't need a lawyer just to
16 call the same person that you would have called if you
17 hadn't hired a lawyer.

18 QUESTION: Do you accept the explanation that
19 the Solicitor General's Office gave of how the error
20 occurred?

21 MR. DEFORD: Only in the sense that it -- it
22 briefly details the facts. In fact, here, Justice
23 O'Connor, the information which Mr. Richmond received was
24 in a written statement from the Office of Personnel
25 Management. It was not from some low-level Navy employee.

1 The low-level Navy employees were simply reading
2 the information which they had been given by the Office of
3 Personnel Management and which no one --

4 QUESTION: Well, just out of -- just out of
5 date.

6 MR. DEFORD: It was, at the time Mr. Richmond
7 received it, approximately four and a half years out of
8 date, and I believe it remained out of date in that
9 particular office until 1987 when finally Mr. Richmond, at
10 their request, brought in the notice informing him that he
11 had been taken off the disability annuity because he had
12 violated the one-year rule. So, it was out of date in
13 that office for at least six years.

14 He did obtain relief here, as we've noted, from
15 the court of appeals --

16 QUESTION: Maybe this should have been a class
17 action.

18 (Laughter.)

19 MR. DEFORD: -- which -- which applied the
20 traditional common law doctrine of equitable estoppel to
21 require the government to apply the law as it was formerly
22 in effect. That was the result of the estoppel in this
23 case. To apply -- to require the government to apply the
24 law as it had been in effect and as it had been repeatedly
25 explained to Mr. Richmond.

1 The government contends, however, that estoppel
2 is precluded by another common law doctrine. By sovereign
3 immunity and also by separation of powers principles.

4 But estoppel has historically been recognized as
5 an exception to sovereign immunity and Congress has shown
6 no interest in altering that relationship.

7 QUESTION: Well, has the court -- has this Court
8 ever held that the government is estopped in a situation
9 like this?

10 MR. DEFORD: I think it's -- it's held at least
11 twice that the government should be estopped, although it
12 did not use that language, Your Honor. In the Moser and
13 PICCO cases. And in six decisions since 1960, it has
14 implied that the government could be estopped without
15 actually --

16 QUESTION: Well, it's -- it's left the question
17 open, has it not?

18 MR. DEFORD: I would say that it has left the
19 question open but it has strongly hinted that estoppel
20 might be appropriate if certain circumstances existed.

21 In fact, I would note that in the government's
22 presentation the history of estoppel stops at 1947 at the
23 so-called seminal case of Merrill, Federal Crop Insurance
24 Corporation v. Merrill.

25 There has been, as I've just suggested,

1 significant developments in the estoppel area since 1947.
2 I think most commentators and many lower courts assume
3 that the Merrill case, which was a five to four decision,
4 has since been rejected or at least seriously undermined.

5 QUESTION: By what case?

6 MR. DEFORD: I think the Moser case in 1951,
7 just four years later.

8 QUESTION: Which didn't even use the word
9 estoppel?

10 MR. DEFORD: It declined to use the word
11 estoppel, Your Honor, but all of the language in that case
12 is estoppel-like language. And I think more important, it
13 has exactly the same structure as this case.

14 QUESTION: But it didn't even -- Moser doesn't
15 even cite Federal Crop Insurance.

16 MR. DEFORD: No, it doesn't, and I think that
17 might be a hint that perhaps the Moser court had decided
18 to reject the strict analysis in Merrill.

19 QUESTION: Or didn't know about it perhaps.

20 (Laughter.)

21 MR. DEFORD: Well, six members of the Merrill
22 majority were still -- were on the Moser court at that
23 time.

24 I would like to direct my --

25 QUESTION: What about -- what about PICCO?

1 MR. DEFORD: The PICCO case was a criminal case,
2 but there's been no indication, other than the statement
3 today in open Court, that that should make any difference.
4 PICCO involved a for-profit sophisticated corporation
5 which followed exactly what Mr. Merrill -- Mr. Richmond
6 followed -- followed what the agency said was the law,
7 whereas in fact the law was otherwise.

8 QUESTION: Well, at least the agency had said it
9 in a regulation.

10 MR. DEFORD: I don't think that should make any
11 difference, Justice White, based on the government's
12 decision.

13 QUESTION: But -- but that was the case, wasn't
14 it?

15 MR. DEFORD: It was a regulation and the
16 agency's regulation was wrong, as this Court determined.
17 And, therefore, the Court held that the -- that the
18 corporation was not bound by what the law actually said.
19 It was only bound by what the agency had said the law was,
20 which directly contradicts the extreme holding in Merrill.

21 This court in Merrill had held that we are
22 always presumed to know the law and, therefore, it didn't
23 matter what you heard from the government because it's
24 what you are presumed to know which counts. And PICCO
25 directly contradicts that because in PICCO they followed

1 the regulations and not the statute. But despite that --

2 QUESTION: I guess the government has never
3 claimed in this case that the person that gave the advise
4 wasn't seemingly authorized to give such advise?

5 MR. DEFORD: Well, I don't think there's any
6 doubt about authorization. This information came from the
7 Office of Personnel Management.

8 QUESTION: And it was a written --

9 MR. DEFORD: A written document. I believe it
10 appears in the appendix. There's no dispute about where
11 the information came from. There's never been any real
12 factual dispute in this case at all, as to what happened
13 and why it happened.

14 QUESTION: Mr. Deford, how does -- how does your
15 theory work in a case such as this? Let's assume that
16 this statute was passed and there's a limitation on
17 earnings for beneficiaries of \$10,000 a year, the statute
18 is presented to the President and he vetoes it. He thinks
19 there shouldn't be any earnings limitations, let people
20 earn as much as they want and still draw benefits.

21 That veto is overridden so the statute is enacted
22 with a \$10,000 limitation. The President then issues a
23 regulation that says there is no limitation on the amount
24 of -- on the amount you may earn and still draw benefits.
25 What happens?

1 MR. DEFORD: The veto -- the President's of the
2 law was overridden?

3 QUESTION: The -- the -- the President tried to
4 eliminate the earnings provision. He was unsuccessful.
5 But he writes a regulation eliminating it.

6 MR. DEFORD: I think in that instance you'd have
7 some major separations of powers problems between Congress
8 and the Executive.

9 QUESTION: Well, I'm -- I'm asking what happens
10 in a lawsuit. The -- the people who rely on his statement
11 would win, I assume. Right?

12 MR. DEFORD: I think if they had vested rights
13 to those benefits they should win. And that's the crucial
14 distinction here between this and numerous other cases --

15 QUESTION: Doesn't it strike you as odd that he
16 can achieve by estoppel what he couldn't achieve by veto?

17 MR. DEFORD: I would not think that -- that
18 Congress would allow that kind of regulation to remain
19 available for very long. You're talking about a very
20 public event. This was something which was going on
21 behind the scenes here.

22 QUESTION: You're talking about the theory of --
23 of what you're urging upon the Court, the theory that
24 somehow the Executive can contradict what the Congress has
25 said and make it stick.

1 MR. DEFORD: Your Honor, you're talking about
2 the Executive acting intentionally to violate the will of
3 Congress. That's not what happened here. This was a
4 mistake, a serious mistake, by the Executive agency,
5 helped by the Judiciary in order to effectuate the
6 ultimate will of Congress.

7 QUESTION: I had always thought estoppel was
8 even worse if it was intentional. You're telling me it's
9 not as bad if it's intentional?

10 MR. DEFORD: No. Your Honor, I'm simply
11 saying --

12 QUESTION: It turns everything upside down.

13 MR. DEFORD: -- in the intentional situation
14 there would be much more publicity about what -- about
15 what had happened.

16 Estoppel is a case-by-case individualistic kind
17 of situation. It only arises on a case-by-case basis.
18 That's the very nature of it. It's an equitable concept.

19 I think if the President were to violate
20 directly the will of Congress, you'd have a somewhat
21 different situation. But I agree that ultimately people
22 who relied on what the President did could achieve some
23 sort of remedy if they had a vested right in those
24 benefits.

25 QUESTION: What do you mean by a vested right?

1 MR. DEFORD: I would distinguish a vested right,
2 Your Honor, by pointing to the Hansen case, which was a
3 decision of this Court in 1971 involving someone who
4 sought Social Security benefits and was told that she
5 wasn't eligible and she shouldn't bother to apply. She
6 didn't apply, and as a consequence, she was deprived of a
7 year more of Social Security benefits.

8 She had no vested right to those benefits until
9 she applied. She was not entitled to them. That's what
10 this Court held in effect. That she had no substantive
11 vested right to those benefits.

12 Mr. Richmond was entitled at all times. From
13 1981 on, he had a vested right to the benefits.

14 QUESTION: Well, how about -- how about the
15 hypothetical that Justice Scalia put to you where the
16 President says by regulation that there's no earnings
17 limitation?

18 MR. DEFORD: If it involved people who had a
19 vested right at that time --

20 QUESTION: How would they -- how would they have
21 gotten the vested right?

22 MR. DEFORD: Well, I -- the hypothetical wasn't
23 -- I did not understand the hypothetical to be explained
24 in such detail as to involve or not involve vested rights.

25 QUESTION: Well, Congress says that --

1 MR. DEFORD: But somebody who was already
2 entitled and receiving those benefits would definitely
3 have a vested right, as did Mr. Richmond.

4 QUESTION: But are you -- are you saying that
5 conceivably by the President's regulation, contrary to
6 what Congress provided, saying there are no earnings
7 limitations, people could get money payments from a court?

8 MR. DEFORD: I would say that if they had a
9 vested right, if they had relied --

10 QUESTION: Well, don't use the term vested.
11 Just answer the question without it, if you can.

12 MR. DEFORD: I think those people who relied,
13 yes, would be able to achieve an estoppel in that respect.

14 QUESTION: How did this case get started? Did
15 he apply for --

16 MR. DEFORD: He was already eligible, Justice
17 White.

18 QUESTION: Well, I know, but how did it get to
19 the merit -- the Merits Board? What did he do? Did he --

20 MR. DEFORD: Well, he -- he -- when the Office
21 of Personnel Management --

22 QUESTION: This got started in an administrative
23 proceeding?

24 MR. DEFORD: Yes. It was an administrative
25 proceeding. The Office of Personnel Management said, we

1 are depriving you of your annuity for six months. He
2 appealed that to the Merit Systems Protection Board. A
3 judge there turned him down. The Board turned him down.
4 He then went to the federal circuit on direct appeal from
5 the Merit Systems Protection Board.

6 QUESTION: Well, I suppose that -- that -- they
7 just notified him that they were stopping his --

8 MR. DEFORD: That's correct. They sent him a
9 letter which said, you earned more than 80 percent in one
10 year, under the law you lose your annuity for the next six
11 months or until you no longer have that earnings record.

12 I think it's important to understand why in this
13 case the traditional elements of estoppel are applicable.
14 In the last four or five cases that this Court has dealt
15 with in the estoppel area, it has declined to reach the
16 issue of whether the government could be estopped because
17 it found that traditional elements for estoppel were not
18 there or, also, the element of affirmative misconduct,
19 which this Court has discussed.

20 In this case, all the traditional elements are
21 there and affirmative misconduct is there. So, this case
22 is different than the estoppel cases which the Court has
23 dealt with over the last 20 years.

24 QUESTION: How did the facts of your case differ
25 in legal significance from the Schweiker facts?

1 MR. DEFORD: In the Schweiker v. Hansen case?

2 QUESTION: Yeah.

3 MR. DEFORD: One, that involved a low-level
4 employee giving information -- giving oral -- giving one
5 oral response to an individual who was not vested in
6 benefits. In this case, the information came from the
7 agency itself.

8 QUESTION: Well, that would ordinarily go to the
9 reasonableness of the reliance, I would think. There was
10 no contention in Schweiker that the -- the agent couldn't
11 speak for the agency, was there?

12 MR. DEFORD: Well, there has been a dispute here
13 about -- about reasonable reliance. But if you're
14 speaking of affirmative misconduct, which is the other
15 element that this Court has suggested must be shown for
16 estoppel against the government, the affirmative
17 misconduct here, as opposed to in the Schweiker v. Hansen
18 case, is that it came from the agency. It was the agency
19 who gave out the wrong information, not the low-level
20 employee.

21 QUESTION: But I would think if -- if it's
22 affirmative misconduct to give out bad information, in one
23 case the agency was guilty of affirmative misconduct, in
24 the other case an employee of the agency was guilty of it.

25 MR. DEFORD: I think the distinction, Your

1 Honor, is that in Hansen it was one person coming in
2 asking a question, there was some confusion as to the
3 nature of the question, as to the issues. The individual
4 employee gave out an answer, the individual was not
5 following the policy of the agency.

6 Affirmative misconduct has generally been
7 interpreted by the lower courts as requiring something
8 more than mere negligence. And I think what took place in
9 the Hansen case was mere negligence by one employee. What
10 took place in this case was something greater. In
11 fact, --

12 QUESTION: Well, why do you say -- are you --
13 are you suggesting it was intentional misconduct here?

14 MR. DEFORD: No. I'm saying that reckless -- it
15 was not intentional misconduct in this case, as far as we
16 know. But it at least rose to the level of recklessness
17 behavior. It was --

18 QUESTION: Well, how can you --

19 MR. DEFORD: -- greater than negligence.

20 QUESTION: How can you tell that?

21 MR. DEFORD: I think the distinction is that
22 here it was the agency which misbehaved, which sent out
23 the wrong information and which left it out there for very
24 many years. In Hansen, it was a one time only mistake
25 responding to one question from one individual.

1 I do want to speak to the traditional elements
2 of estoppel because that has often proven to be a problem
3 in obtaining an estoppel from this Court.

4 The government admits that most of the elements
5 of traditional estoppel are met here. There was reliance,
6 there was a misrepresentation, and there was detriment to
7 the person who relied on that misrepresentation.

8 The only dispute here on the traditional
9 elements is whether or not the behavior was reasonable,
10 whether Mr. Richmond was reasonable in relying on what the
11 OPM letter told him.

12 The government, in fact, does not dispute that
13 as a matter of fact the reliance was reasonable. Their
14 entire argument is based on a legal fiction. It's based
15 on the legal fiction that everyone is presumed to know the
16 law.

17 And I think even more important, it's based on a
18 corollary to that legal fiction which is that reliance on
19 what the government tells you is always unreasonable. And
20 the government as much as says that in its briefs. That
21 since we are all presumed to know the law, therefore, you
22 can never rely on what the government tells you. And that
23 is the basis for the government's argument in this case
24 that Mr. Richmond --

25 QUESTION: Well, if -- if estoppel is available

1 at all, that's their argument.

2 MR. DEFORD: That's correct, Your Honor. I'm --
3 I'm speaking to that now because that has proven to be a
4 problem in past cases before this Court.

5 Now, as I indicated earlier, in the Merrill case
6 this Court did use a very strict interpretation of that
7 presumed to know maxim. It received a fairly sarcastic
8 dissent from Justice Jackson, but that was the decision of
9 the Merrill case, we are all presumed to know the law.

10 But since then, that has been severely undercut
11 in several decisions by this Court. By the Moser case, by
12 the PICCO case -- in both of those instances the law was
13 out there, it was available to the individuals, and they
14 were not presumed to know the law. The Court in effect
15 found estoppel and found that they had reasonably relied
16 even though theoretically they could have found out what
17 the law was.

18 I think more important is this Court's 1984
19 decision in Community Health Services. In that decision,
20 the Court found that the institution involved had not
21 reasonably relied, but it did not simply say, well, you
22 should have known what the law is and, therefore, your
23 reliance was unreasonable. The Court thoroughly went
24 through the four or five factors which demonstrated in
25 that case that that institution had not reasonably relied.

1 It was a totality of circumstances type of
2 analysis. And I think that's the appropriate type of
3 analysis that should be used whenever we're determining
4 whether there was reasonable reliance on a
5 misrepresentation by the government.

6 I suggested earlier one problem of using the
7 strict presumed to know rule would be that we could all be
8 required to have lawyers every time we call up any
9 government agency.

10 I think perhaps an even more important
11 consequence of applying that strict rule would be to erode
12 further the confidence in government. If every citizen
13 knew that the legal fiction is that we are all presumed to
14 know the law and that it's always unreasonable to rely on
15 the government, then I think confidence in government
16 would go down somewhat.

17 So I think this Court has indicated since the
18 Merrill decision that reasonable reliance is determined
19 based on the facts on the totality of circumstances and
20 not merely on some maxim which no longer has any validity.

21 In this case there should be no doubt that Mr.
22 Richmond did reasonably rely. He went to his former
23 employer, he went to the division of the Navy which had
24 always handled his retirement, which had dealt with the
25 issue in the past. He asked specific questions. He asked

1 them what -- I've got this opportunity for short-term
2 work, will it have any effect on my continued annuity?

3 He asked specific questions and he received a
4 specific written explanation in response to those
5 questions. It was an unambiguous statement saying, "You
6 may earn over 80 percent for one year as long as you do
7 not earn over 80 percent in the next year." And he
8 received that from the responsible Agency, from the Office
9 of Personnel Management.

10 Again, I can only emphasize enough, this was not
11 the statement of a low-level Navy employee. This was the
12 written explanation of the Navy -- I -- of the -- of the
13 Office of Personnel Management.

14 I think if you put all these factors together,
15 there should not be much doubt that Mr. Richmond was
16 reasonable in relying on the information which he was
17 given.

18 Now, the other factor which has also in the past
19 caused this Court not to reach the ultimate issue of
20 whether there could be estoppel against the government is
21 what is known as affirmative misconduct. It's not part of
22 the traditional estoppel issues. This Court has suggested
23 that if there can be estoppel, there must also be
24 affirmative misconduct. And I think there's good logic in
25 that.

1 There is some tension, as obviously this
2 discussion has indicated, between sovereign immunity,
3 separation of powers, and the concept of equitable
4 estoppel. And by adding this additional level that an
5 individual must demonstrate, I think this Court has made
6 it very clear that it's possible for that tension to be
7 worked out.

8 People who might be able to demonstrate just the
9 traditional elements of estoppel will not necessarily be
10 able to show affirmative misconduct. But those who can
11 show affirmative misconduct, will have demonstrated that
12 they're entitled to estoppel against the government.

13 Unfortunately, like many equitable terms,
14 affirmative misconduct has not been clearly defined. But
15 I think that is the nature of equity in general and that
16 is the nature of estoppel. It's a balancing test to
17 determine when you have affirmative misconduct. At a
18 minimum, as I suggested, it does require more than
19 negligence. The lower courts are in pretty much agreement
20 on that.

21 The court below and many commentators have
22 suggested the level of reckless -- reckless behavior. And
23 I think that's an appropriate level.

24 QUESTION: Does the Tort Claims Act just bar any
25 claim of recklessness?

1 MR. DEFORD: The Tort Claims Act I believe bars
2 claims for misrepresentation and deceit.

3 QUESTION: I know, but negligent
4 misrepresentation or just --

5 MR. DEFORD: It would include both negligent and
6 intentional misrepresentation. And if I could speak to
7 that, Justice White.

8 The Tort Claims Act would cover if it did apply
9 to deceit or negligent misrepresentation -- would apply to
10 much broader kinds of cases than are applicable here. For
11 instance, the Hansen case would be --

12 QUESTION: Well, I understand that.

13 MR. DEFORD: -- would be covered by that. So I
14 think that's a good reason why we should continue to use
15 this narrow remedy of estoppel and not compare it to the
16 -- to the tort misrepresentation.

17 Again, let me emphasize on the affirmative
18 misconduct issue. The Agency here, Office of Personnel
19 Management, had a special obligation and that's why their
20 behavior is -- is especially disturbing.

21 There was a change in law here. It was a change
22 in 1982. Mr. Richmond and others had retired before that,
23 in 1981. They knew what the law when they retired. They
24 knew what they could -- they knew what they had to do to
25 continue to be eligible. They had vested rights.

1 They needed information when the law changed to
2 be able to conform their conduct in the future if they had
3 an opportunity to gain more work. They needed to know
4 what the law required.

5 So, it's our position that OPM had a special
6 obligation to these people to notify them that the law had
7 changed and there was a very easy way for them to do it.

8 The government in its reply brief in note 12
9 points out that every year the Office of Personnel
10 Management sends out forms to all its disability
11 annuitants asking for information on their prior year's
12 earnings. All that OPM would have had to do was attach to
13 that form or stuff in that envelope a little note saying
14 the law has changed from a two year earning capacity
15 record rule to a one year earning capacity rule.

16 QUESTION: Well, you don't have to go that far
17 to win your case.

18 MR. DEFORD: No.

19 QUESTION: I mean, OPM didn't have --

20 MR. DEFORD: No.

21 QUESTION: -- to do anything.

22 MR. DEFORD: They didn't have -- they did not
23 have to do that. I'm suggesting they could have done that
24 and it would have resolved things. There are lots of
25 other things they could have done.

1 What they didn't do, though, was to make any
2 affirmative effort whatsoever to get the information out
3 to people. In fact --

4 QUESTION: Well, they didn't -- are you saying
5 that OPM had a duty to -- an affirmative duty to get
6 information out to people?

7 MR. DEFORD: I'm saying at a minimum they had a
8 duty to make sure that the right information was available
9 to anybody who sought it.

10 QUESTION: Well, but now you're -- I think
11 you've just made two inconsistent statements. I thought a
12 moment ago you were saying that the OPM has an affirmative
13 duty to notify these people of the change in the law. Is
14 that your position or is it not?

15 MR. DEFORD: No. I will -- I will -- if I said
16 that, that's going too far. They had an affirmative
17 obligation to make sure people knew what the law was,
18 especially people who had --

19 QUESTION: But now you've just said it over
20 again. They had an affirmative obligation to make sure
21 that people knew what the law was.

22 MR. DEFORD: And that could have been satisfied,
23 Your Honor, simply by putting the information in an
24 envelope that they were sending out anyhow. But it could
25 also have been satisfied by making sure that the right

1 information was available in offices --

2 QUESTION: So, it -- it wouldn't be enough for
3 the Navy to say, we just aren't -- we're cutting our
4 personnel department because it makes so many
5 misrepresentations, from now on go to the statutes at
6 large?

7 MR. DEFORD: I don't think the Navy -- I'm not
8 sure --

9 QUESTION: Well, what if -- what if the Navy had
10 done that?

11 MR. DEFORD: Well, then Mr. Richmond presumably
12 would have gone somewhere else.

13 QUESTION: And what would have been the result
14 in this case? He wouldn't have been misrepresented?

15 MR. DEFORD: He would have been misrepresented
16 because the same inaccurate information was all over the
17 country. That's the problem we have.

18 QUESTION: Well, so he goes to another Navy
19 personnel office. But that's disbanded too.

20 MR. DEFORD: It's not -- it's not necessarily
21 the Navy we're talking about here. OPM had that bad
22 information out all over the country at all times and the
23 corrected information which we've just found out about
24 this week in the government's reply brief -- that
25 corrected information did not pull back the wrong

1 information.

2 QUESTION: But isn't the real gist of your
3 complaint that OPM had misinformation out?

4 MR. DEFORD: Yes.

5 QUESTION: Not that it had a duty to advise them
6 of -- of a change in the law.

7 MR. DEFORD: I'm suggesting that had they
8 advised them, this whole problem would have been -- would
9 have been avoided. And that would have been one simple
10 solution.

11 I'm not suggesting for purposes of this case
12 that they had to advise each person individually, although
13 that would have been an easy way to resolve this.

14 QUESTION: It really didn't have misinformation
15 out. It had out a circular dated 1976 which said what the
16 law was in 1976. That was accurate.

17 MR. DEFORD: I --

18 QUESTION: What you're complaining about is that
19 it didn't have out a circular that said what the law was
20 in 1986 or --

21 MR. DEFORD: Well, I believe it was 1981 --

22 QUESTION: I don't know what the dates are.

23 MR. DEFORD: -- circular brief --

24 QUESTION: Whatever the dates are. But it was
25 accurate --

1 MR. DEFORD: But they didn't have anything
2 out --

3 QUESTION: -- as far as it went.

4 MR. DEFORD: They didn't have anything out to
5 explain that that law was no longer in effect.

6 QUESTION: Thank you, Mr. Deford.

7 Mr. Starr, you have four -- General Starr, you
8 have four minutes remaining.

9 REBUTTAL ARGUMENT OF KENNETH W. STARR

10 ON BEHALF OF THE PETITIONER

11 MR. STARR: Thank you, Mr. Chief Justice.

12 With respect factually to what OPM did, in our
13 reply brief at pages 10 and 11, including footnote 11, we
14 set forth in brief fashion what happened here.

15 OPM did, promptly after OBRA was passed in
16 September of 1982, circulate information to the effect
17 that the law had changed to the various civilian employers
18 of the federal government. Those -- that information was
19 in fact received by the Department of the Navy.

20 OPM, for its part, no longer has responsibility
21 or control. This was a Navy problem. So, just to clarify
22 the record in terms of OPM.

23 Now, we've heard a lot about the OPM form and
24 the information that -- quote -- OPM is giving out. OPM
25 wasn't giving out this form, this was from the Navy. Yet,

1 Mr. Richmond knew full well he was ultimately dealing with
2 OPM. Every year he sent in to OPM on an OPM form a
3 statement with respect to his eligibility.

4 If you look at the -- if the Court looks at the
5 Appendix, the document that has received so much attention
6 today in the argument, the document on its face --

7 QUESTION: Where are you --

8 MR. STARR: -- Attachment 4, page 1(a) of our
9 opening brief, does not, to my reading of it, apply to Mr.
10 Richmond. He was given this form.

11 We don't quarrel with that. We don't contest
12 that. He was given this form. But this form, on its
13 face, doesn't apply to him. It says, "Information to
14 applicants for disability retirement." He was not that.
15 He was already on disability retirement.

16 The first sentence doesn't apply to him. "Your
17 agency's review of your employment record shows that
18 you're eligible for regular -- regular voluntary
19 retirement." That's not so. He wasn't eligible for
20 voluntary retirement.

21 We're not quarreling with the fact that Mr.
22 Richmond received information that was in error. But we
23 do want to be clear that OPM, for its part, was in fact
24 seeking in a responsible way to furnish information to the
25 employing agency and agencies across the country with

1 which the employees dealt.

2 With respect to the law, we have heard
3 essentially an assault on Merrill. Merrill is good law.
4 This Court has cited Merrill as recently as Heckler
5 against Community Health Services, quoted extensively from
6 it, and in Schweiker against Hansen.

7 We continue to believe that this case is on
8 practically -- not entirely -- all fours with Schweiker
9 against Hansen. The principal distinction is this piece
10 of paper that this individual, Mr. Richmond received.

11 This Court has previously rejected estoppel
12 claims where writings, including specifically tailored
13 writings advising individuals or entities about their
14 particular circumstances. I cite United States v.
15 Stewart, Justice Douglas' opinion. I cite in addition,
16 the Automobile Club case, and there are a variety of cases
17 set forth in our brief where the government's erroneous
18 information has been in writing.

19 My final point is that Congress has identified
20 the situations about which Mr. Richmond complains in a
21 variety of statutes. At page 24 of our brief we identify
22 a goodly number of statutes in which Congress has taken
23 the step to identify situations in which it intends good
24 faith reliance on administrative rulings or advise and the
25 like to constitute a defense.

1 It also has provided, as we set forth in page
2 25, a number of statutes in which governmental recoupment
3 of funds is not permitted if it would offend equity and
4 good conscience.

5 I thank the Court.

6 CHIEF JUSTICE REHNQUIST: Thank you, General
7 Starr.

8 The case is submitted.

9 (Whereupon, at 1:49 p.m., the case in the above-
10 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:

#88-1943 - OFFICE OF PERSONNEL MANAGEMENT, Petitioner V. CHARLES RICHMOND

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BY Alan Friedman

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