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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL B. ELGIN, ET AL., :

Petitioners : No. 11-45

v. :

DEPARTMENT OF THE TREASURY, ET AL.:

- - - - - x

Washington, D.C.

Monday, February 27, 2012

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

APPEARANCES:

HARVEY A. SCHWARTZ, ESQ., Boston, Massachusetts; for
Petitioners.

ERIC J. FEIGIN, ESQ., Assistant to the Solicitor
General, Department of Justice, Washington, D.C.; for
Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 11-45, Elgin v. Department of the Treasury.

Mr. Schwartz.

ORAL ARGUMENT OF HARVEY A. SCHWARTZ

ON BEHALF OF THE PETITIONERS

MR. SCHWARTZ: Mr. Chief Justice, and may it please the Court:

The question in this case is whether it is fairly discernible from the Civil Service Reform Act that Congress revoked the district court jurisdiction to declare acts of Congress unconstitutional in actions brought by Federal employees. The answer is no, for several reasons.

First, the Civil Service Reform Act doesn't say that it precludes section 1331 jurisdiction. Congress could have said so. Congress didn't say so. And there's no inference of preclusion of the Petitioners' claims that's fairly discernible from the scheme itself. And that's because challenges to constitutionality of statutes are just not the type of claims that are reviewed through the CSRA scheme.

Because of this, the Merit Systems

1 Protection Board dismisses challenge -- challenges to
2 constitutionality of a statute routinely as outside of
3 its authority.

4 JUSTICE KAGAN: Mr. Schwartz --

5 MR. SCHWARTZ: Yes.

6 JUSTICE KAGAN: -- suppose an employee is
7 fired and he has a variety of different kinds of claims,
8 constitutional and statutory. What would you think
9 happens then? Does he bring the constitutional claims
10 in one court but the statutory claims in another
11 court -- excuse me -- in the -- in the commission?

12 MR. SCHWARTZ: No, Your Honor. I believe
13 that, because of normal rules against splitting of
14 claims, the employee would have to make a decision.

15 JUSTICE KAGAN: Well, that seems just as
16 bad. In other words, that then, you -- it's not
17 inefficient necessarily, but your scheme would force the
18 employee to choose between her constitutional claims and
19 her statutory claims.

20 MR. SCHWARTZ: That is correct.

21 JUSTICE KAGAN: Why would we do that?

22 MR. SCHWARTZ: Because of the importance of
23 making the constitutional claims available in -- in a --
24 for judicial review. That is -- that's just one of the
25 options that the employee would have to weigh.

1 JUSTICE ALITO: Why would you make
2 that concession? Why wouldn't it be possible in that --
3 for an employee to choose? If the employee had both
4 constitutional and nonconstitutional claims, perhaps
5 that employee could take advantage of the review scheme
6 that's outlined by the Government. But in the situation
7 where there's purely a challenge to a statute, the
8 employee would have the option of bringing the claim in
9 one of the district courts.

10 MR. SCHWARTZ: That -- that certainly is a
11 possibility, Your Honor. And -- and it is a possibility
12 that the employee could bring his constitutional claim
13 in the district court and still pursue his statutory
14 claim before the Merit Systems Protection Board.
15 However, I'd like to point out that, while this is an
16 interesting hypothetical, we don't have to look at
17 hypotheticals in this situation because we have in the
18 Third Circuit since 1986 and in the District of Columbia
19 Circuit since 1995 -- those two circuits permit Federal
20 employees to bring their constitutional claims in the
21 circuit court.

22 We were unable to find a single instance in
23 which there has been one of these mixed claims of a -- a
24 constitutional claim and a statutory claim brought in
25 those circuits.

1 JUSTICE SCALIA: In -- in those cases, did
2 the -- did the plaintiffs also have nonconstitutional
3 claims which they were pursuing in the Federal Circuit?

4 MR. SCHWARTZ: We -- we were unable to -- to
5 find any example of -- of that happening.

6 JUSTICE SCALIA: Yes, well, that's -- that's
7 the problem here. I mean, yes, if all you have is a
8 constitutional claim, I suppose the system you propose
9 would work. You go to the district court. But where --
10 where you have both, it's a problem.

11 MR. SCHWARTZ: I -- and I -- I agree that
12 that is a more difficult situation. But it's not the
13 situation presented by the facts of this case at least.

14 JUSTICE KAGAN: You suggested that it's a
15 situation that doesn't often arise, and I guess that
16 puzzles me. Why wouldn't it often arise?

17 MR. SCHWARTZ: I don't know why it doesn't
18 often arise. It -- it might be that -- that people
19 prefer to leave their claims in the Merit Systems
20 Protection Board. And --

21 JUSTICE KENNEDY: What --

22 JUSTICE SOTOMAYOR: Counsel, do you --

23 JUSTICE KENNEDY: -- what would happen if --
24 if the employee is fired because of his or her religion
25 and he goes to MSPB?

1 MR. SCHWARTZ: Yes.

2 JUSTICE KENNEDY: And this is a First
3 Amendment claim. MSPB has to say, well, this is not
4 adequate cause, and -- and then they find something else
5 in the statute? It can't look at the constitutional
6 aspect of the claim?

7 MR. SCHWARTZ: Your Honor, if -- if an
8 employee is fired because of his religion, there's --
9 there's a -- a separate procedure for discrimination
10 claims such as could be brought under Title VII -- and,
11 in fact, those claims do go directly to the district
12 court.

13 JUSTICE KENNEDY: Well, because -- well,
14 let's -- then I have to do a new hypothetical.

15 (Laughter.)

16 JUSTICE KENNEDY: Because he gave a -- a
17 speech --

18 MR. SCHWARTZ: Yes.

19 JUSTICE KENNEDY: -- saying there's no
20 global warming or something.

21 MR. SCHWARTZ: Yes. That claim now could be
22 brought before the Merit Systems Protection Board, and I
23 agree that -- that it can be brought before the Merit
24 Systems Protection Board, and I'm not urging this Court
25 to say that that --

1 JUSTICE KENNEDY: But the MSPB says we can't
2 look at the First Amendment?

3 MR. SCHWARTZ: No. No.

4 JUSTICE GINSBURG: Are you -- you're
5 talking --

6 CHIEF JUSTICE ROBERTS: I'm sorry, just to
7 clarify: No, they wouldn't say that? Or -- I'm -- I
8 lost this, which way your "no" was going.

9 MR. SCHWARTZ: Okay. I'll -- I'll retract
10 my "no" then.

11 JUSTICE GINSBURG: Mr. Schwartz, I thought
12 you're talking about the constitutionality of a statute.

13 MR. SCHWARTZ: That's it exactly, Your
14 Honor.

15 JUSTICE GINSBURG: Not any constitutional
16 claim that there has been unconstitutional action by an
17 official. I thought that your point was when you're
18 challenging the constitutionality of a statute, then you
19 have a right to go to the district court.

20 MR. SCHWARTZ: That is my point exactly,
21 Your Honor.

22 CHIEF JUSTICE ROBERTS: But could I --

23 JUSTICE KENNEDY: What I'm asking --

24 CHIEF JUSTICE ROBERTS: Could I please
25 verify your answer to Justice Kennedy before you move

1 on?

2 MR. SCHWARTZ: Yes. I am drawing a
3 distinction between a challenge to the constitutionality
4 of a statute, as the Petitioners are doing here, and
5 that is beyond the -- the authority of the Merit
6 Systems --

7 JUSTICE SOTOMAYOR: Are you talking about a
8 facial challenge to the statute as -- and am I
9 understanding you right? A facial challenge goes to the
10 district court and a constitutional as-applied challenge
11 goes to the commission?

12 MR. SCHWARTZ: Yes. And -- and that --
13 that's the procedure. The as-applied challenge -- those
14 cases are bread-and-butter cases at the Merit Systems
15 Protection Board now. If somebody says I was fired
16 because I wrote a letter to the editor that my boss
17 didn't like, he's not challenging the constitutional --

18 JUSTICE KENNEDY: But I -- I was leading up
19 to the fact, why should there be a difference? If the
20 MSPB has this expertise in as-applied, why doesn't it
21 have it for facial? I mean, the expertise question
22 is -- it can't be a matter of expertise; or am I wrong
23 about that?

24 MR. SCHWARTZ: Well, I would -- with due
25 respect, I -- I disagree with you, Your Honor. The

1 expertise required to decide the present Petitioners'
2 claim and the letter to the editor claim is totally
3 different. In the letter to the editor claim, the facts
4 concern the facts of the workplace, what was my boss's
5 motivation, what were his actual reasons for firing me.

6 JUSTICE SCALIA: Well, and whether that
7 reason was justifiable. And isn't it the case that
8 whenever the reason is an unconstitutional reason, you
9 would have an as-applied challenge, right?

10 MR. SCHWARTZ: Yes.

11 JUSTICE SCALIA: So, why do you need a
12 facial challenge in addition? I thought that we always
13 try to do as-applied first and facial second. So, why
14 isn't it enough that you can go to the Merit Systems
15 Protection Board and then to the Federal Circuit saying
16 that this action was wrong and not allowed under the
17 statute? And -- and if -- if the reason it was wrong
18 was that it was unconstitutional, what's -- what's the
19 problem?

20 MR. SCHWARTZ: Justice Scalia, I -- I agree
21 that in the as-applied challenge where somebody says my
22 rights were violated, that case now goes and should go
23 to the Merit Systems Protection Board. In the present
24 case, there's no challenge to the application of a
25 statute. There's no challenge to any decision that was

1 made by -- by managers. The challenge is to the
2 decision made by Congress --

3 CHIEF JUSTICE ROBERTS: So, that is the
4 rule --

5 MR. SCHWARTZ: -- in enacting the Civil --

6 CHIEF JUSTICE ROBERTS: That's the rule that
7 you would apply across the board so long -- only in the
8 case of a facial challenge do you get to go to the
9 district court? If it's an as-applied -- this law was
10 unconstitutional as applied to me -- that's still before
11 the MSPB?

12 MR. SCHWARTZ: Yes. And -- and --

13 JUSTICE SOTOMAYOR: Could you tell me how --

14 MR. SCHWARTZ: And --

15 JUSTICE SOTOMAYOR: -- how -- how this is
16 any different than the administrative system and review
17 system that was reviewed in Thunder Basin and Illinois
18 Long-Term Care? In both those statutes, the agencies
19 weren't permitted to consider facial challenges,
20 constitutional challenges; and we said that's okay, they
21 can't, but the reviewing court can. So, how's that any
22 different from the situation you're proposing here?

23 MR. SCHWARTZ: Yes. There are several
24 significant differences. I'd like to -- I'd like to go
25 through them.

1 First of all, in the Thunder Basin case,
2 the -- the constitutional challenge was -- was to the
3 procedures that were being applied. The agency, the
4 Mine Safety Commission, was -- was an expert in those
5 procedures. The facts that were involved in making that
6 determination were the very facts that this Mine Safety
7 Commission had expertise in.

8 In the present case, the challenge is to the
9 Selective Service laws. The Merit Systems Protection
10 Board --

11 JUSTICE SOTOMAYOR: But please deal with the
12 language of both cases. Both cases said even if the
13 agency can't review a constitutional challenge, there's
14 still review within the Federal Circuit -- within the --
15 within the circuit courts, and that's okay.

16 MR. SCHWARTZ: Yes.

17 JUSTICE SOTOMAYOR: So, why isn't that okay
18 here? I think that was Justice Scalia's question to
19 you. I know that you say, well, the Federal Circuit
20 won't have a record. But the Government says if it
21 wants a record, it can remand and ask the agency to
22 develop it. So, what's wrong with that procedure?

23 MR. SCHWARTZ: The first thing that's
24 wrong -- that's wrong with that procedure as it would be
25 applied to this case is that it's -- it's a vast

1 departure from the Civil Service Reform Act scheme as it
2 was created by Congress; and -- and -- because that
3 scheme involves the Merit Systems Protection Board
4 acting as a trial court; and -- and giving the first
5 level of review and in effect substituting for the --
6 for a district court. And then --

7 JUSTICE SOTOMAYOR: Isn't one of the
8 challenges here by one of the Petitioners that he was
9 constructively discharged? Isn't that an issue that the
10 board is better suited to determine in the first
11 instance, whether there was at all a constructive
12 discharge?

13 MR. SCHWARTZ: Well, in fact, it's -- it's
14 just the reverse of that, where that one Petitioner
15 would be taking the position that he was not
16 constructively discharged. If he was constructively
17 discharged, the Merit Systems Protection Board arguably
18 would have jurisdiction. If he voluntarily resigned,
19 under the Government's theory, he would be among the
20 class of Federal employees -- constitutes about a third
21 of Federal employees -- who have no appellate rights to
22 the Merit Systems Protection Board.

23 JUSTICE GINSBURG: I thought your position
24 was that the Merit Systems Protection Board has said we
25 have no authority to adjudicate constitutional

1 questions, period.

2 MR. SCHWARTZ: Yes.

3 JUSTICE GINSBURG: So, I thought that the
4 court was saying this claim is dismissed because we
5 don't have jurisdiction to deal with that kind of
6 question. And then your next -- the Federal Circuit --
7 well, how can the Federal Circuit exercise jurisdiction
8 over a claim where the first-instance decisionmaker said
9 it didn't have authority to render the decision?

10 MR. SCHWARTZ: Yes.

11 JUSTICE GINSBURG: I thought that that's
12 what your position was.

13 MR. SCHWARTZ: That is what our position is,
14 and -- and it leaves open the question of just what the
15 Federal Circuit is going to do after the Merit Systems
16 Protection Board has dismissed for lack of jurisdiction.

17 CHIEF JUSTICE ROBERTS: But that's not your
18 position, as I understood it, in your response to my
19 earlier question. You said that the -- it is all right
20 to have as-applied constitutional challenges presented
21 to the MSPB or not presented but then reviewed in the
22 Federal Circuit.

23 MR. SCHWARTZ: My position is that if the
24 MSPB has jurisdiction to find a statute -- that since
25 the MSPB does not have jurisdiction to find a statute

1 unconstitutional, any claim in which the employee is
2 asking for them to find a statute unconstitutional is
3 one that is outside of the CSRA scheme.

4 CHIEF JUSTICE ROBERTS: Okay, but -- but
5 within the statutory scheme, are you saying that a claim
6 that this statute is, while not facially
7 unconstitutional, unconstitutional as applied to me --
8 Where does that go?

9 MR. SCHWARTZ: Well, Mr. Chief Justice, I
10 apologize for my confusion about --

11 CHIEF JUSTICE ROBERTS: I think it's
12 probably mine.

13 MR. SCHWARTZ: Well, I would defer to you,
14 Your Honor.

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: Where does -- where
17 does -- where does that claim go?

18 MR. SCHWARTZ: My confusion is about the use
19 of the term "as applied." And I -- rather than using
20 terms such as "facial" or "as applied" where the
21 dividing line can be somewhat blurry, I propose drawing
22 the dividing line between a case where the employee is
23 saying this statute is unconstitutional; I'm saying
24 Congress made a mistake --

25 JUSTICE KAGAN: Well, why wouldn't the

1 dividing line be -- and I think that this is consistent
2 with your argument. The dividing line should be where
3 the MSPB itself could decide the claim.

4 MR. SCHWARTZ: Yes.

5 JUSTICE KAGAN: If the MSPB can decide the
6 claim, then it goes to the MSPB. If the MSPB can't
7 decide the claim, I think is what you're saying, then
8 it has to go to the district court.

9 MR. SCHWARTZ: Yes.

10 JUSTICE KAGAN: And you're saying that the
11 MSPB has said that, although it can decide, can decide,
12 cases where he says, you know, my -- my supervisor fired
13 me for a discriminatory reason, that that's within the
14 scope of the MSPB's authority, a claim like this, which
15 is that the Selective Service Act is unconstitutional
16 full stop, is not within the scope of the MSPB's
17 authority. Is that right?

18 MR. SCHWARTZ: Yes, that's absolutely
19 correct. And -- and the cases that would not be within
20 the MSPB's authority would include cases where the
21 employee says the statute is unconstitutional and would
22 also include the million or so Federal employees who, as
23 the Government says, have no appellate rights to the
24 MSPB, all -- all of those persons, career -- those
25 persons would include summer interns, FBI employees.

1 CHIEF JUSTICE ROBERTS: Yes, what type --
2 summer interns and FBI employees?

3 MR. SCHWARTZ: Yes. The --

4 CHIEF JUSTICE ROBERTS: I assume that's for
5 very different reasons -- one because they are summer
6 interns, and, you know, if they are impermissibly
7 treated, it's kind of -- they're summer interns.
8 There's no reason to get --

9 (Laughter.)

10 CHIEF JUSTICE ROBERTS: I don't -- I
11 don't mean that facetiously. I mean, what they're
12 saying is that there's some level of de minimis
13 personnel actions when you're talking about the vast
14 Federal bureaucracy that we don't have to really give,
15 you know, the whole panoply of rights. And FBI agents,
16 I assume, because it's the sensitive nature of what they
17 deal with.

18 So, I guess what I'm saying is, do you want
19 us to focus on the millions of employees who would now
20 be going to district court or do you want us to focus on
21 the small number that have facial constitutional
22 challenges?

23 MR. SCHWARTZ: Well, actually, Your Honor,
24 it's the Government that is taking the position that the
25 summer interns, the FBI agents, all the government

1 attorneys, Federal Government chaplains, who have no
2 right to appeal to the MSPB -- all of those persons, the
3 Government says. Can bring their constitutional claims
4 to the district court.

5 JUSTICE SCALIA: And why is that wrong? It
6 seems to me that's what the -- what the Administrative
7 Procedure Act says, that if there is no other effective
8 means of judicial review, you get judicial review under
9 the APA.

10 MR. SCHWARTZ: Well --

11 JUSTICE SCALIA: These people have no
12 effective right because they can't go to the MSPB and
13 can't go to the Federal Circuit. So, they have -- they
14 have rights in the district court. That's not a
15 problem.

16 The problem is the people who do have rights
17 to go to the Merit Systems Protection Board, right, who
18 have constitutional claims based on -- on the
19 unconstitutionality of a statute?

20 MR. SCHWARTZ: Well, I -- I disagree with
21 that, Justice Scalia.

22 JUSTICE SCALIA: Why?

23 MR. SCHWARTZ: Because the -- the summer
24 intern, the FBI agent, the nonpreference employee, the
25 excepted service employees, unless they -- they have a

1 claim that they can take to the Merit Systems Protection
2 Board, they're precluded from going to any other court.
3 They're precluded under the Administrative Procedures
4 Act. That's this Court's Fausto decision. And in this
5 Court's Fausto decision, a Federal employee who could
6 not bring a case -- his appeal to the Merit Systems
7 Protection Board tried to bring a Back Pay Act claim in
8 the Court of Claims and this court said, no, that is
9 precluded.

10 And what the Government is doing is saying
11 you got a right in Fausto, but for constitutional
12 claims, Mr. Fausto had it right.

13 JUSTICE SCALIA: Yes, but that's -- that's
14 entirely logical. Fausto in effect said that the
15 statutory structure simply provides no cause of action
16 for these people, okay?

17 MR. SCHWARTZ: Yes.

18 JUSTICE SCALIA: They're not entitled to
19 anything. But I don't think that there's anything in
20 the -- in the civil service laws that say these people
21 are not entitled to constitutional protections. So, I
22 don't think that -- that Fausto rules this out.

23 MR. SCHWARTZ: Well, and I -- I agree with you
24 completely that -- that constitutional claims are
25 different from statutory claims --

1 JUSTICE SCALIA: Exactly.

2 MR. SCHWARTZ: -- or damages.

3 JUSTICE SCALIA: And it's those that I say
4 that people not covered by appeals to the Merit Systems
5 Protection Board -- they can bring those constitutional
6 claims, even though they can't bring statutory claims.

7 MR. SCHWARTZ: Yes. And that's -- that's
8 the position I'm taking. I'm taking it a step beyond
9 the Government, however.

10 JUSTICE SCALIA: Yes. You're taking -- I'm
11 saying that's true only with respect to those people who
12 have no right to appeal to the Merit Systems Protection
13 Board. You're going further.

14 MR. SCHWARTZ: Yes.

15 JUSTICE SCALIA: And you're saying even the
16 people who can appeal to the Merit Systems Protection
17 Board, right, can go directly to the district court?
18 That's a different question.

19 MR. SCHWARTZ: But I -- I'm limiting that to
20 those people who can appeal to the Merit Systems
21 Protection Board, but the Merit Systems Protection Board
22 has no authority to grant them relief.

23 JUSTICE ALITO: There are at least -- at
24 least three different kinds of constitutional claims,
25 and I'm not sure where you're drawing the line with

1 respect to your argument. There's a claim that -- that
2 the agency acted in an unconstitutional manner, not that
3 any statute is unconstitutional --

4 MR. SCHWARTZ: Yes.

5 JUSTICE ALITO: -- but there's
6 unconstitutional executive action. There's an as-
7 applied claim. Let's say that a plaintiff says that the
8 registration requirement is unconstitutional as applied
9 to me, not to other people, but to me because I'm a
10 conscientious objector or I have religious objections to
11 military action that the United States is taking at this
12 particular time. And then there's this -- there's a
13 claim that this statute is unconstitutional on its face.

14 Now, where do you -- which of those can the
15 Merit Systems Protection Review Board decide? Just the
16 first category?

17 MR. SCHWARTZ: Just the first category.

18 JUSTICE ALITO: So, it's not a distinction
19 between as-applied and facial?

20 MR. SCHWARTZ: No. No, no. And that's --
21 that's -- that's why -- that's why I'm specifically not
22 trying to say where the line is between as-applied and
23 facial.

24 JUSTICE GINSBURG: I thought your position
25 was that whatever the MSPB cannot hear, then you can go

1 to the district court.

2 MR. SCHWARTZ: That is absolutely correct.

3 And --

4 JUSTICE KAGAN: Now, in your original briefs,
5 Mr. Schwartz, you suggested that if the MSPB can't hear
6 a claim, neither can the Federal Circuit. And as I
7 understood the Government's brief, the Government comes
8 back and said that's not the case. Even when the MSPB
9 can't hear a claim, the Federal Circuit could hear it.
10 Now, then there's a question of, if there's a necessity
11 for a record, how does the record get developed?

12 But do you now concede that the Federal
13 Circuit could hear the claim as a matter -- you know, on
14 the -- at the -- at the first level?

15 MR. SCHWARTZ: I agree that a system can be
16 proposed to get these claims to the Federal Circuit.
17 However, it's not the system of the -- that Congress
18 created in the Civil Service Reform Act. And the
19 significance of the contortions that have to be gone
20 through to get these claims to the Federal Circuit
21 demonstrates that it's not fairly discernible from the
22 Civil Service Reform Act as written by Congress that --

23 JUSTICE GINSBURG: Do you take the position
24 that the MSPB, having no jurisdiction and saying it has
25 no jurisdiction, it can't adjudicate this matter, well,

1 then, a reviewing court has no jurisdiction to -- to
2 review? There's nothing to review because the MSPB said
3 we have no jurisdiction.

4 MR. SCHWARTZ: That's how it would work in
5 the real world. I mean, what is -- what is the Federal
6 Circuit supposed to do? It has an order from the MSPB
7 that says we dismiss for lack of jurisdiction. The
8 Federal Circuit -- and the Government doesn't say that
9 that is wrong. The Federal Circuit says we affirm your
10 dismissal, and now we'll move on to the merits. That --
11 it's possible we could have a system like that, but that
12 isn't the system of the Civil Service Reform Act, and
13 that's not the way that appellate courts normally
14 function.

15 CHIEF JUSTICE ROBERTS: Is it really a
16 question of jurisdiction of the MSPB?

17 MR. SCHWARTZ: Well --

18 CHIEF JUSTICE ROBERTS: "Jurisdiction" is a
19 word with many meanings.

20 MR. SCHWARTZ: Yes. And -- and -- and
21 there's a general rule with that -- there have been
22 exceptions to -- that administrative agencies do not
23 have authority to rule on constitutionality of statutes.

24 JUSTICE BREYER: So, what's the problem? He
25 says -- the employee says I was dismissed. MSPB says

1 that's right, you were, and it's lawful. The employee
2 says but you didn't consider my argument that the
3 relevant statute was unconstitutional. MSPB says, no,
4 we can't. The Federal Circuit says but we can; so, make
5 your argument. What's the problem? And then I'll
6 decide it. And if they decide it's unconstitutional,
7 then the action of the MSPB is wrong.

8 MR. SCHWARTZ: That's a system that -- that
9 could come up. It's not the system of the Civil Service
10 Reform Act in -- because --

11 JUSTICE BREYER: I don't know -- I'm just
12 saying, is there any practical problem with that?

13 MR. SCHWARTZ: Oh, it presents immense
14 practical problems.

15 JUSTICE BREYER: Which is?

16 MR. SCHWARTZ: Which is that the Merit
17 Systems Protection Board is not going to say we affirm
18 your dismissal or that -- it's not going to reach the
19 merits. It's going to -- it's going to get the
20 paperwork. The government is going to --

21 JUSTICE BREYER: Fine, fine. What they say
22 is you have one argument here, that the statute that led
23 to your dismissal was unconstitutional.

24 MR. SCHWARTZ: Yes.

25 JUSTICE BREYER: We do not have jurisdiction

1 over that; therefore, we say you were rightly dismissed.

2 MR. SCHWARTZ: Yes.

3 JUSTICE BREYER: Now, they appeal that, and
4 they say they're right that they didn't, but you do; so,
5 will you please decide that this statute is
6 unconstitutional? What's the problem?

7 MR. SCHWARTZ: Well, that's -- that's an
8 unusual form of --

9 JUSTICE BREYER: Ah. It may be unusual. I
10 just want to know what's the problem. I'm not saying
11 there isn't one. I want to know what's the problem with
12 that.

13 MR. SCHWARTZ: Okay. The problem, if that
14 is the system that's going to be in place, is that it's
15 not quite that straightforward. It's -- at first, the
16 employee has to file his claim in the MSPB with
17 everybody knowing it's going to be dismissed. He then
18 appeals that dismissal to the Federal Circuit, which
19 affirms the dismissal, says, yes, MSPB has no
20 jurisdiction.

21 JUSTICE BREYER: No, it doesn't affirm the
22 dismissal. It says the dismissal was unconstitutional;
23 go reinstate him.

24 MR. SCHWARTZ: And then, in a case such as
25 this one, where -- the raison d'être of this challenge

1 to Rostker is that the facts have changed. There was
2 extensive factual discovery in Rostker. So --

3 JUSTICE GINSBURG: I thought that your point was
4 and hasn't the Federal Circuit said that the MSPB has no
5 jurisdiction to decide we have no jurisdiction to
6 review.

7 MR. SCHWARTZ: That's what the Federal
8 Circuit had said.

9 JUSTICE GINSBURG: And that an appellate
10 court is reviewing a court of first instance. The
11 scheme that has been proposed would turn the Federal
12 Circuit into a court of first instance, rather than an
13 appellate court.

14 MR. SCHWARTZ: And that is why what's
15 proposed by the Government is such a departure from the
16 CSRA scheme as written by Congress, in which MSPB has
17 first-instance jurisdiction; the Federal Circuit has
18 appellate jurisdiction.

19 JUSTICE KAGAN: Well, isn't your basic
20 answer to Justice Breyer -- I mean, correct me if I'm
21 wrong -- you think that the problem is that there's no
22 record that the Federal Circuit can use to evaluate this
23 constitutional claim?

24 MR. SCHWARTZ: That is correct.

25 JUSTICE BREYER: Well, every day of the week

1 we get constitutional claims, and people submit all
2 their arguments in the briefs. Now, occasionally,
3 there's one you have to have factual development, and I
4 grant you on that one maybe they could appoint a special
5 master or, if not, send it back. But they have plenty
6 of authority to get them to argue the facts. But I
7 doubt -- I don't know if there are such claims. But I
8 don't see why that would be a problem. Now, I'm not --
9 again, I'm not giving you an answer. I'm giving you a
10 question.

11 MR. SCHWARTZ: The problem is that that's
12 not the scheme written by Congress --

13 JUSTICE BREYER: That's your conclusion, and
14 I want to know what -- what is the practical reason that
15 that wouldn't work or why is that such a big problem to
16 have it work that way? I'm asking for your answer on
17 that.

18 MR. SCHWARTZ: Okay. I mean, that's -- that
19 system could work in some cases. I agree with that.

20 JUSTICE BREYER: Give me one where it
21 wouldn't.

22 MR. SCHWARTZ: Excuse me?

23 JUSTICE BREYER: Give me one where it
24 wouldn't. But I don't want to cut into your time. Your
25 time is up.

1 MR. SCHWARTZ: Yes.

2 JUSTICE BREYER: So, you have to be thinking
3 about it if you want to respond.

4 MR. SCHWARTZ: Okay.

5 JUSTICE GINSBURG: I thought you said this
6 one.

7 MR. SCHWARTZ: Yes.

8 JUSTICE GINSBURG: This one, because you
9 want to make a record of all the changes that have
10 occurred in the service, and you need much more than
11 briefs. You need to have maybe testimony from people
12 who have -- who have been working with the changes in
13 the -- in the opportunities for women in service.

14 MR. SCHWARTZ: Yes. That's correct.

15 JUSTICE GINSBURG: I thought your whole
16 point was --

17 MR. SCHWARTZ: This -- this case would be
18 the example.

19 If there are no further questions, I'd like
20 to reserve the balance of my time.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Feigin.

23 ORAL ARGUMENT OF ERIC J. FEIGIN

24 ON BEHALF OF THE RESPONDENTS

25 MR. FEIGIN: Thank you, Mr. Chief Justice,

1 and may it please the Court:

2 I'd like to begin if I could by addressing the
3 question asked by Justice Kagan, which is why shouldn't
4 the scope of the MSPB's authority be the test for
5 determining whether a claim can be filed in district
6 court?

7 And I think using that as the test would
8 lead to unclear and easily manipulated jurisdictional
9 rules. Among other things, it often won't be clear up
10 front whether the MSPB can resolve an employee's claim
11 or not. A claim that appears at first blush to
12 challenge a statute's constitutionality might be
13 resolved, for instance, by interpreting the statute to
14 avoid the constitutional question, which is something
15 that the MSPB could do.

16 JUSTICE KAGAN: We could just ask the
17 MSPB, Mr. Feigin. If you bring the claim to the MSPB,
18 and then the MSPB says, no, we have no authority to
19 adjudicate this claim, then you know that you're in a
20 world in which the MSPB doesn't have authority, so that
21 you can go to the district court.

22 MR. FEIGIN: Well, I don't think that's
23 consistent with the CSRA, Your Honor, because the way
24 the CSRA works is that you go to the MSPB first, and
25 then you go to the Federal Circuit. And I think

1 everyone agrees that the Federal --

2 JUSTICE KAGAN: Well, but the CSRA is
3 presuming that the MSPB actually can decide something.

4 MR. FEIGIN: I don't think it's presuming
5 that any more than 42 U.S.C. 405(g) was presuming that
6 in Illinois Council or the Mine Act was presuming that
7 in Thunder Basin Coal. That is, that it's often useful
8 to have constitutional claims presented to an agency in
9 the first instance, even if the agency can't resolve
10 those claims, because it allows the agency to figure
11 out -- for example, in the case that this Court was
12 discussing with Mr. Schwartz about circumstances where
13 there might be nonconstitutional claims and
14 constitutional claims, the agency might be able to moot
15 out the case on nonconstitutional grounds. The
16 constitutional --

17 JUSTICE GINSBURG: Mr. Feigin, those --
18 those statutes to which you refer said that no action on
19 the claim -- well, this was Social Security benefits --
20 no action shall be brought under 1331. There is no such
21 provision here.

22 MR. FEIGIN: That was true in Illinois
23 Council and some of the other cases we cite. But in --
24 in Thunder Basin, the Court was very clear that the
25 statute was facially silent as to the preclusion of

1 pre-enforcement claims like the sort that were at issue
2 in Thunder Basin. The Court nevertheless held that the
3 claim in Thunder Basin was precluded, and it held that
4 even though it acknowledged that it might be possible
5 that the constitutional claim that was raised by the
6 plaintiff in that case couldn't be addressed in first
7 instance by the Mine Commission.

8 Now, the MSPB here is very analogous to the
9 Mine Commission.

10 JUSTICE KAGAN: Well, could you help me with
11 something? Because I agree with you, Thunder Basin is a
12 very strong case for you, but McNary is a very strong
13 case for Mr. Schwartz. And I read those two opinions,
14 and, frankly, I have a tough time reconciling them. So,
15 could you tell me how you do?

16 MR. FEIGIN: We prefer Thunder Basin, Your
17 Honor.

18 (Laughter.)

19 JUSTICE KAGAN: Yes, I imagine so.

20 MR. FEIGIN: Your Honor, I think, as we
21 suggest in our brief, McNary actually presented a very
22 specialized circumstance in several respects. First of
23 all, there was a special statutory provision in that
24 case that limited judicial review of -- in that case, to
25 the record that had already been developed, and that's

1 not true here.

2 Second, the Court was very concerned in
3 McNary that if the plaintiffs weren't allowed to bring
4 their claims in district court, they wouldn't be able to
5 receive any meaningful judicial review at all.

6 Now, here, the plaintiffs in this case can
7 get meaningful judicial review from the Federal Circuit,
8 which everyone agrees has the authority to resolve a
9 constitutional challenge to a statute.

10 Now, if I could, I'd like to address I think
11 some confusion, as the Chief Justice was noting, over
12 the meaning of the term "jurisdiction" and exactly what
13 would happen if the Petitioners had brought this case in
14 the first instance to the MSPB.

15 Now, before getting into this, I'd like to
16 acknowledge that when Petitioner Elgin did bring this
17 case to the MSPB, the government argued that the MSPB
18 had no jurisdiction. We have conceded below and we
19 concede here that we were wrong about that. We do not
20 think Elgin should be prejudiced by the government's
21 position. If he were to file a motion now to reopen his
22 case with the MSPB, the Government would support that.

23 Here's how it should have worked if the
24 government --

25 JUSTICE SOTOMAYOR: Is that your -- is that

1 your answer for that's why it's an out for their failure
2 to have gone to the Federal Circuit?

3 MR. FEIGIN: Our answer -- our answer --

4 JUSTICE SOTOMAYOR: Will they be able -- if
5 the -- if the commission says, no, we won't reopen, do
6 they have any avenue now to go to the Federal Circuit?

7 MR. FEIGIN: Well, they can appeal that
8 decision to the Federal Circuit, and the Government will
9 again support the fact that the case ought to be
10 reopened.

11 JUSTICE SOTOMAYOR: Please finish with your
12 answer.

13 MR. FEIGIN: And let me now address what
14 should have happened when the case went to the MSPB.
15 The MSPB would have had jurisdiction over the case in
16 the sense that the challenge to the adverse action is
17 properly before the MSPB. I think that's very clear
18 under 5 U.S.C. 7513(d) and 5 U.S.C. 7701(a), which grant
19 the MSPB jurisdiction over adverse actions under the
20 CSRA.

21 Now, the MSPB would not be able to
22 adjudicate the constitutionality, would not be able to
23 issue an order striking down a Federal statute. And to
24 determine that that would be what would be necessary
25 here in order to grant the plaintiffs relief, what it

1 would have done is, first of all, it could have accepted
2 any evidence that the plaintiffs or the government
3 wished to submit on the constitutional issue in order to
4 build up the administrative record for review --

5 CHIEF JUSTICE ROBERTS: Could I ask you to
6 pause --

7 MR. FEIGIN: Yes.

8 CHIEF JUSTICE ROBERTS: -- briefly on that
9 question? So, the government -- if Mr. Schwartz comes
10 in before the MSPB and says we have three witnesses who
11 are going to testify only on the constitutional issue; I
12 have this volume of evidence about what's happening in
13 the military; it's only relevant in the constitutional
14 issue; and, you know, it's going to take us 2 days to
15 present this -- the government is going to say it's okay
16 with us, right?

17 MR. FEIGIN: Well, Your Honor --

18 CHIEF JUSTICE ROBERTS: They're not going to
19 object that that's beyond the jurisdiction of the agency
20 to decide.

21 MR. FEIGIN: We will not object that it's
22 not beyond the jurisdiction of the agency to decide --

23 JUSTICE SCALIA: Well, I will object. What
24 is the agency -- taking evidence on an issue that it has
25 no jurisdiction to decide? That is absolutely weird.

1 (Laughter.)

2 MR. FEIGIN: Well, Your Honor, I think this
3 is fairly analogous, although not perfectly analogous,
4 to the fairly common circumstance where, for example, a
5 district court reserves to itself a decision on the
6 merits of an action and then delegates to a magistrate
7 judge decisions on discovery. Now, the only
8 limitation --

9 JUSTICE KAGAN: But they're very different
10 because the magistrate can come back to the district
11 court judge and say we have a tough one, Your Honor; why
12 don't you decide it?

13 I mean, here you're stipulating that the
14 board has no power to decide this question. Call it
15 jurisdiction; call it something else. The board cannot
16 decide the question, but the board is going to now
17 become the arbiter of discovery disputes? The
18 factfinder? I mean, "weird" is a good word for it.

19 MR. FEIGIN: Well, first of all, Your Honor,
20 the only thing that we think the MSPB lacks authority to
21 do, the only thing, is to issue an order on the merits
22 declaring a Federal statute unconstitutional. It is
23 competent to resolve discovery disputes --

24 JUSTICE ALITO: How can it -- how can it
25 deal with discovery without knowing -- without going

1 into the merits of the constitutional claim? In other
2 words, the parties can just put in any evidence they
3 want?

4 MR. FEIGIN: Well --

5 JUSTICE ALITO: Any evidence they think
6 might be possibly be relevant to the case, they can put
7 that in. It can be discovery of anything.

8 MR. FEIGIN: Well, there may be disputes as
9 to the scope of discovery. And those -- resolution of
10 those disputes may touch on the merits. We think the
11 MSPB can do all of that. The only thing the MSPB lacks
12 authority to do, according to the MSPB, is to issue an
13 order striking down a Federal statute as
14 unconstitutional.

15 JUSTICE KAGAN: Do you think the MSPB should
16 find facts with regard to this claim?

17 MR. FEIGIN: Well, first of all, Your Honor,
18 I think this case isn't going to require any factfinding
19 because I think it's worth noting that both judges that
20 have addressed Petitioners' arguments on the merits, the
21 district court judge and the concurring judge in the
22 court of appeals --

23 JUSTICE KAGAN: Well, maybe it will and
24 maybe it won't.

25 MR. FEIGIN: -- were able to resolve the

1 claim without factfinding.

2 JUSTICE KAGAN: I would think, Mr. Feigin,
3 it would depend on how it's litigated. But in a case in
4 which there is some factfinding to be made, would the
5 MSPB have authority to find facts?

6 MR. FEIGIN: Yes, it would, Your Honor.
7 Now, I'd like to add that in many cases --

8 JUSTICE GINSBURG: Can you go back and tell
9 me when the government changed its position? It was my
10 understanding that up until, well, certainly this case
11 was litigated, the government was taking the position
12 MSPB has no jurisdiction to pass on the
13 constitutionality of a statute.

14 When did the government back away from that
15 position? When did it say, no, we were wrong; they do
16 have jurisdiction?

17 MR. FEIGIN: Well, Your Honor, I need to
18 separate out two things. First, it is still our
19 position that the MSPB has no authority to declare a
20 Federal statute unconstitutional. Now, the government
21 was taking the position that in cases where an employee
22 had been removed pursuant to a statutory bar, that the
23 MSPB lacked jurisdiction to hear an appeal of -- of a
24 case like that.

25 And the reason the government argued was not

1 because the MSPB lacked authority to decide the
2 constitutionality of a statute, although we believe
3 that, too, but because the government was arguing
4 erroneously that an employee who is removed based on a
5 statutory bar that should have prevented his hiring in
6 the first place wasn't an employee within the meaning of
7 5 U.S.C. 7511. Now the government no longer takes that
8 5 U.S.C. 7511 position. We've been consistent on that
9 in the court of appeals and in this Court, and,
10 therefore, we believe that the MSPB did properly have
11 jurisdiction over the action in this case.

12 Now, when it goes up to the MSPB, the MS --
13 and after -- the MSPB would then deny relief on the
14 merits because it would lack the authority to declare a
15 Federal statute unconstitutional.

16 JUSTICE BREYER: I don't want to delay you;
17 so, don't pause too long. But I've just been curious --
18 where did this rule -- is there a statute or something
19 that says an agency can't say that this action would be
20 unconstitutional? Where does that idea come from?

21 MR. FEIGIN: So, there is not a statute,
22 Your Honor. This Court has said in several cases that
23 administrative agencies generally lack the authority to
24 declare a statute unconstitutional. It's clear from
25 Thunder Basin that that isn't a constitutional

1 limitation on the authority of Federal agencies. That
2 is to say, if Congress wanted to give an agency the
3 authority to adjudicate the constitutionality of a
4 statute, it could. And the Court noted that the Mine
5 Commission in Thunder Basin believed it did have the
6 authority to adjudicate the constitutionality of
7 statutes, although the Court didn't reach whether the
8 Mine Commission was correct about that.

9 And in this case, the MSPB believes,
10 consistent with this Court's repeated statements, that
11 it lacks authority to adjudicate the constitutionality
12 of statutes.

13 Now, if the Court decides that the best way
14 to reconcile this scheme would simply be to say that the
15 MSPB does have the authority to adjudicate the
16 constitutionality of statutes, I think that would make
17 much more sense than the position the Petitioners are
18 urging. And here's an example, I think, that
19 illustrates why the position the Petitioners are urging
20 will lead to confusion of jurisdictional rules and
21 manipulation of jurisdictional rules.

22 So, if you imagine two employees who were
23 fired by an employing agency for leaking information to
24 the press, confidential information to the press, they
25 both challenge their removals, but they raise slightly

1 different arguments. The first one says, well, I don't
2 think the employment statute should be construed to
3 allow me to be fired for this reason because I think the
4 employment statute should be construed with First
5 Amendment principles in mind and shouldn't reach this
6 case.

7 The second one says I concede that the
8 employment statutes allow my firing for this reason, but
9 I think those -- I think that statute is
10 unconstitutional as applied.

11 Now, those are really the same claim and --

12 JUSTICE KAGAN: Well, Mr. Feigin, they might
13 well be the same claim, but if the MSPB can decide the
14 one and cannot decide the other, that's a relevant
15 distinction. Now, you might be right in what you said.
16 Well, maybe one answer is that the MSPB can decide both.
17 But as long as the MSPB can decide the one or the other,
18 it seems -- I mean, that's -- it seems like a sensible
19 dividing line.

20 MR. FEIGIN: Well, Your Honor, even if the
21 MSPB lacks the authority to strike down a Federal
22 statute, I still think it might be able to adjudicate
23 the claim of the employee, the second employee, who
24 brings it as an as-applied challenge because the Court
25 would -- I'm sorry; not the Court -- the MSPB could

1 decide that case on the same constitutional avoidance
2 grounds that are -- that are urged by the first
3 employee.

4 That is, they really are the same case.
5 Before striking down a statute as constitutional, this
6 Court all the time, it instructs lower courts, and this
7 would be true of agencies, too, should interpret the
8 statute to avoid any significant constitutional
9 question.

10 JUSTICE ALITO: But they're not at all the
11 same claim. They're related, but one says the statute
12 means something; and insofar as it's applied to a
13 particular situation, it's unconstitutional. The other
14 one says it doesn't mean that.

15 MR. FEIGIN: Well, Your Honor, I think they
16 are the same in the respect that, as I was just saying
17 to Justice Kagan, if the MSPB --

18 JUSTICE ALITO: When we -- just let me rephrase
19 that. If -- if this Court adopts a certain
20 interpretation based on the principle of constitutional
21 avoidance, do you think the Court is rewriting the
22 statute?

23 MR. FEIGIN: No, Your Honor, but there may
24 be ambiguity in a statute that the Court interprets to
25 avoid a significant constitutional question. So, maybe

1 I can give another example that might flesh this out a
2 little bit.

3 There's a statute, 5 U.S.C. 7311, that bars
4 from Federal employment people who have participated in
5 strikes. Now, it's easy to think of an employee who
6 raises a factual or statutory challenge to that claim.
7 He says that what he did wasn't participating in a
8 strike, either factually or shouldn't be considered
9 participating in a strike within the scope of the
10 statute. And he also challenges the statute on
11 constitutional grounds.

12 And the most common case brought to the
13 MSPB, in our experience, that raises a constitutional
14 claim also raises the sort of factual and statutory
15 claims I was just suggesting. Now, the MSPB might
16 resolve that first question -- those first set of
17 questions in such a way as to avoid the constitutional
18 question by saying that the statute doesn't reach the
19 conduct that the particular employee engaged in.

20 And if we imagine instead that the employee
21 had only brought the constitutional claim, which would
22 be kind of a strange way to litigate because he'd be
23 giving up arguments on which he might win, I still think
24 that the MSPB could decide, look, before we send this
25 off to the Federal Circuit and decide that the only way

1 we can grant you relief is to say that a Federal statute
2 is unconstitutional, which is something we don't think
3 we can do, we should at least take a look at the statute
4 to see whether these somewhat ambiguous terms,
5 "participate" and "strike," actually do apply to your
6 conduct.

7 And by failing to give the MSPB the first
8 crack at doing that, what --

9 JUSTICE GINSBURG: Is there any such
10 possibility in this case? I mean, the statute says men
11 must register for the draft. There's no way to avoid --
12 to reread that statute to say anything other than that.
13 So, I don't -- I don't see any constitutional avoidance.

14 MR. FEIGIN: I agree with that, Justice
15 Ginsburg. In this case, we don't think the
16 constitutional question can be avoided, and we don't
17 think the MSPB could have granted relief. But I don't
18 think the Court should essentially throw everything out
19 just because of this case. Their position is going to
20 make for unclear jurisdictional rules, and employees
21 aren't going to know where they're entitled to go or
22 where they're supposed to go, because --

23 JUSTICE SOTOMAYOR: To go back to your
24 interesting suggestion that the board should decide the
25 constitutional issue, I've just been spending a little

1 bit of time going through the Act, and you're
2 certainly -- it doesn't appear that there's anything in
3 the Act that precludes them from granting any
4 appropriate relief with respect to an unlawful
5 discharge. Am I correct?

6 MR. FEIGIN: That's correct, Your Honor.
7 The statute does not, as we explain in our brief, draw
8 any distinction between the types of arguments that
9 would be made in seeking to set aside an unlawful
10 discharge --

11 JUSTICE KAGAN: Although, that's weird in
12 another way, isn't it, Mr. Feigin, because, can we
13 really imagine in the real world the MSPB deciding that
14 the Selective Service Act is unconstitutional? I mean,
15 what do they know about that question?

16 MR. FEIGIN: Well, as everyone agrees and as
17 Mr. Schwartz was discussing with the Court, the MSPB
18 does have expertise on -- in constitutional claims. The
19 MSPB are a set of -- a set of persons that are appointed
20 by the President and confirmed by the Senate.

21 JUSTICE KAGAN: Well, but this is a
22 question, and -- and you can -- I take the point that
23 I'm just talking about this case. But this is a
24 question about whether women should have to register for
25 the draft in the same way as men should. That goes to

1 defense policy. It goes to equal protection law. It
2 doesn't seem to have anything to do with -- with
3 workplace issues of the kind that the MSPB is expert on.

4 MR. FEIGIN: Well, I think that's right,
5 Justice Kagan, but the CSRA doesn't draw distinctions
6 between the types of arguments that are being made. It
7 draws distinctions, as Justice Sotomayor was just
8 suggesting, about what sorts of personnel actions it
9 covers. And I think --

10 JUSTICE ALITO: Congress is -- Congress is
11 unhappy when this Court holds a statute
12 unconstitutional.

13 (Laughter.)

14 JUSTICE ALITO: Do you think it's -- it's
15 really likely that they intended for the MS -- MSPRB to
16 have the authority to declare its acts unconstitutional?

17 MR. FEIGIN: I don't, Your Honor. And
18 that's why our primary position is that the MSPB does
19 not have that authority. However --

20 JUSTICE BREYER: Why? I mean, it sounds --
21 really what the argument boils down to is -- is if we
22 accept your position, there's a kind of procedural
23 complexity and anomaly. And your argument is that his
24 position's worse. And, yours is also fairly bad.

25 (Laughter.)

1 JUSTICE BREYER: So, that's his point. So,
2 I mean, that's -- but that's why I wondered. I mean,
3 U.S. magistrates, all -- tax courts, all kinds of people
4 as a preliminary matter have jobs where they say we
5 think a statute is unconstitutional. I suppose
6 millions. I don't know how many. So, is this coming
7 that they can't do it from some kind of lore from
8 Kenneth Davis or something or -- what's -- what's the
9 basis of this? And wouldn't it be simpler if you just
10 said it says they can take appropriate relief? They can
11 take appropriate relief, period. End of the matter.

12 MR. FEIGIN: It's coming from statements by
13 this Court and also statements by Kenneth Davis --

14 JUSTICE BREYER: Are there --

15 MR. FEIGIN: -- in 1958 his administrative
16 law treatise.

17 JUSTICE BREYER: So, somebody quoted Kenneth
18 Davis in 1958 and wrote it into an opinion in a holding?

19 MR. FEIGIN: No. The Court usually just
20 sort of says this in passing. And the Court made very
21 clear --

22 JUSTICE BREYER: So, Kenneth Davis said this
23 in 1958?

24 MR. FEIGIN: The Court made very clear in
25 Thunder Basin this is just a general presumption --

1 JUSTICE BREYER: Okay.

2 MR. FEIGIN: -- about the authority of
3 administrative agencies. It doesn't have to be --

4 JUSTICE GINSBURG: Johnson v. Robison is one
5 such case. I don't recall in that case anybody
6 referring to any administrative law treatise.

7 MR. FEIGIN: Well, that treatise is cited,
8 for example, by -- the Court cites the Mine Commission
9 cases that themselves cite the treatise. But the point
10 is, Justice Breyer, even if our rule does have a couple
11 of hiccups with it, we do think it is much superior to
12 the rule that Petitioners are urging because there are
13 clear jurisdictional rules.

14 If I could follow up --

15 CHIEF JUSTICE ROBERTS: If I could just
16 focus there. In your brief, you're quite careful, and
17 you have been today, to talk to even if the MSPB lacked
18 this authority. It's your position that the MSPB does
19 lack this authority in fact; right? It's not just the
20 MSPB's position.

21 MR. FEIGIN: Yes, we agree with the MSPB's
22 position that it lacks the authority to strike down a
23 statute as constitutional. However, if it is a
24 difference between adopting Petitioners' position or
25 holding that the MSPB has the authority to declare a

1 statute unconstitutional, we think Congress would have
2 greatly preferred the latter because that preserves
3 the -- the basic idea of the CSRA, which was to
4 consolidate and streamline judicial review.

5 As this Court recognized in *Fausto*, Congress
6 specifically did not want challenges to adverse actions
7 to go through district court into the court of appeals
8 and get a duplicative and wasteful two-layer judicial
9 review. Instead --

10 JUSTICE ALITO: If anybody who drafted or
11 voted for the Civil Service Reform Act had thought about
12 a case like this, where it's a pure question of law, a
13 facial challenge to the constitutionality of a statute,
14 do you think they would have said, well, the way we
15 think that this should be handled is this scheme that
16 you have proposed?

17 MR. FEIGIN: I think they would have
18 preferred it to a scheme where, first of all, the claims
19 go to district court, which is precisely what the CSRA
20 was trying to eliminate; and, second of all, to a scheme
21 where it becomes confusing and dependent on precisely
22 how a plaintiff frames his argument which court winds up
23 entertaining the claim.

24 Now --

25 JUSTICE GINSBURG: Do you know of any

1 other -- any other case where an appellate court has
2 authority to decide a question that the court of first
3 instance lacked authority to decide? I mean, you say
4 MSPB says it has no authority, and you agree with that.

5 I couldn't think of another case where a
6 court of appeals, which is a court of review, not first
7 view, substitutes itself for an incompetent court of
8 first instance.

9 MR. FEIGIN: Well, Your Honor, first of all,
10 we cite several examples of courts of appeals deciding
11 constitutional questions in the first instance, at pages
12 37 to 38 in our brief. Another example would be this
13 Court's decision in *INS v. Chadha*, the legislative veto
14 case, which came up from the Board of Immigration
15 Appeals. The Board of Immigration Appeals said it
16 didn't have authority to adjudicate the separation of
17 powers question. It was reviewed by the Ninth Circuit
18 and then reviewed by this Court.

19 JUSTICE KAGAN: Mr. Feigin, could I go back
20 to the Chief Justice's question about what actually
21 would happen in the MSPB? Presumably in this case, what
22 the plaintiffs seek to do is to develop an extensive
23 factual record showing how much has changed in the
24 military in terms of the -- the -- the role that women
25 play in the military. And that it's almost impossible

1 to litigate this kind of claim without having such a
2 record. That's the entire basis for -- for arguing that
3 Rostker is outmoded, given current military operations.
4 So, how could the -- the plaintiff develop that record
5 that is needed to litigate this claim?

6 MR. FEIGIN: You would develop it in the
7 MSPB, either in the first instance on the initial
8 appeal, or the MSPB could let it go to the Federal
9 Circuit without having developed an administrative
10 record. And the Federal Circuit if, unlike either of
11 the judges to address the merits in this case, believed
12 that a factual record was necessary, it could remand to
13 the MSPB with instructions that the MSPB take evidence
14 and develop an administrative record.

15 JUSTICE SCALIA: I don't like that at all.
16 That's ridiculous. Send it back to an agency that has
17 no jurisdiction over the question, you know, make
18 factfindings on this -- on this question over which you
19 have no jurisdiction.

20 Can you give any example where -- where that
21 occurs elsewhere? Why wouldn't the -- the preferable
22 course be to appoint a master, have the Federal Circuit
23 appoint a master to do it?

24 MR. FEIGIN: Your Honor, if the Court
25 believes that that is a better way to reconcile the

1 scheme, we wouldn't oppose that either, but --

2 CHIEF JUSTICE ROBERTS: Well, I don't like
3 that.

4 (Laughter.)

5 CHIEF JUSTICE ROBERTS: I mean, the idea
6 of -- the special masters floating around freely every
7 time you get one of these cases -- I mean, what --
8 inevitably what's going to happen is that you're going
9 to have a more or less permanent special master who gets
10 all these things. You're not going to appoint 85
11 special masters if there are 85 of these sorts of
12 claims. It seems to me you've got an agency there
13 that's expert in the interrelation between the different
14 provisions in the statute. And, you know, why don't --
15 why don't -- they make factfindings all the time in
16 areas within their authority to decide. It seems to me
17 it's ready-made for sending these things back.

18 MR. FEIGIN: That was our position, Your
19 Honor --

20 JUSTICE SCALIA: Yes, but -- but this is not
21 an area that's within their expertise to decide. What
22 do they know about -- about the military? And when is
23 that ever -- ever relevant to anything that they decide?
24 It's utterly irrelevant to their work. And you're
25 telling them to take --

1 MR. FEIGIN: Well, first of all, Your Honor,
2 I think it's actually going to be a fairly rare case in
3 which a challenge to a legislative act of passing a
4 statute is really going to turn on some sort of factual
5 finding -- like a credibility --

6 JUSTICE KAGAN: Well, but this is that case.

7 MR. FEIGIN: -- like a credibility
8 determination or something that's uniquely within the
9 competence of a trial court or an agency with trial
10 court-like powers.

11 I think what might be more common, Justice
12 Kagan, is that you might need to develop some sort of
13 administrative record. But once the evidence is
14 submitted, the conclusions one would draw from that
15 evidence will be fairly obvious. For example, in
16 *Rostker v. Goldberg*, there was discovery, there was
17 evidence submitted, and then the parties were able to
18 stipulate to the facts that would set forth review.

19 So, in this case, for example, I don't think
20 there's really going to be a dispute that the MSPB is
21 going to have to resolve about what sorts of positions
22 women can serve in, in the military. I think the
23 government is going to be willing to stipulate to that.

24 JUSTICE ALITO: I suspect that if this were
25 litigated in district court, the government would move

1 to dismiss and would take the position that it doesn't
2 matter; even if women can now do 99 percent of the --
3 the things that are done in the military, the
4 Registration Act is still constitutional. Wouldn't you
5 take that position?

6 MR. FEIGIN: Your Honor, I don't --

7 JUSTICE ALITO: Would you say that if -- if
8 it can be proven that they've -- that women are now --
9 that the percentage is now high enough, the statute may
10 be unconstitutional?

11 Anyway, assuming that you might take that
12 position, then -- and you might win on that -- then what
13 would be the point of having all of this discovery that
14 you're talking about?

15 MR. FEIGIN: Well --

16 JUSTICE ALITO: All of this -- all of this
17 development of the factual record? What -- what sense
18 does it make to develop a big factual record before you
19 know whether it's even -- whether it even makes any
20 difference?

21 MR. FEIGIN: Well, Your Honor, the way to
22 deal with that would be to just have a very quick stop
23 in the MSPB which assures itself, yes, this is a
24 constitutional challenge to a statute. As the Court
25 recognized in *Weinberger v. Salfi*, for example, it is

1 useful to have -- at least exhaust the claim with the
2 agency for that purpose. Yes --

3 JUSTICE SOTOMAYOR: Is there any rule of the
4 board that stops a litigant from making a proffer -- an
5 offer of proof?

6 MR. FEIGIN: There is not, Your Honor, and,
7 in fact, it would be --

8 JUSTICE SOTOMAYOR: Wouldn't that be the
9 proper way of doing it, if you're going to go up on a
10 constitutional claim? Make your offer of proof, and
11 then the Federal Circuit can decide if it needs more
12 evidence or not.

13 MR. FEIGIN: That's where I was going with
14 this, Your Honor. In fact, the MSPB has a special
15 rule -- I believe it's 5 C.S.R. 1201.61; it's cited in
16 our brief -- where even if the MSPB decided not to
17 accept evidence for some reason, a description of the
18 evidence would go in the record and, therefore, be
19 available for the Federal Circuit.

20 CHIEF JUSTICE ROBERTS: What if -- I guess
21 that the party doesn't -- doesn't even have to raise its
22 constitutional claim before the MSPB, does it?

23 MR. FEIGIN: Well, the Federal --

24 CHIEF JUSTICE ROBERTS: I mean, it's pretty
25 odd to say that you've somehow waived a claim you

1 couldn't pursue.

2 MR. FEIGIN: Well, the Federal Circuit has
3 in analogous cases decided constitutional claims that
4 weren't raised in front of an agency when the agency
5 couldn't decide them. In the Government's view, it
6 would make sense to exhaust, for the reasons I was
7 explaining earlier and to Justice Ginsburg, which is
8 that it may be that the MSPB finds that the statute
9 doesn't really cover the situation. Now, I acknowledge
10 that's not going to happen in this case; it is clear
11 that section 3328 required these people's removals.

12 JUSTICE SCALIA: Wait. You're -- you're
13 actually proposing that you have to exhaust questions
14 that the agency has no authority to decide?

15 MR. FEIGIN: Yes, Your Honor. I think the
16 Court has recognized --

17 JUSTICE SCALIA: Curiouser and curiouser.

18 (Laughter.)

19 JUSTICE SCALIA: If you don't bring before
20 the agency a question that the agency says it has no
21 authority to decide, you have forfeited your ability?

22 MR. FEIGIN: Well, Your Honor, I don't think
23 what should happen in this -- in a case like this is
24 that the employee appeals to the MSPB and says nothing
25 at all. The employee should appeal to the MSPB and at

1 least say what his constitutional claim is. And the
2 benefit of that, as the Court has recognized in, for
3 example, *Weinberger v. Salfi*, is that the agency can
4 assure itself, yes, it's a constitutional claim that is
5 beyond my authority to resolve, and there's no other way
6 for me to resolve it.

7 Another benefit of presenting these claims
8 to the agency is the MSPB hasn't been crystal clear
9 about exactly where its authority begins and ends; and
10 neither the Federal Circuit nor this Court has addressed
11 that question at all. And allowing the agency in the
12 first instance to determine whether it has the authority
13 to grant the plaintiff the relief he is seeking has a
14 great benefit of clarifying what the scope of the MSPB's
15 authority is. It makes a lot more sense for the MSPB
16 and the Federal Circuit to be deciding what the scope of
17 the MSPB's authority is than it is to file a claim in
18 the District of Massachusetts and have that district
19 court and then the First Circuit debating about what the
20 proper scope of the MSPB's authority is.

21 I think the CSRA expresses a clear
22 preference that appeals of adverse actions like this go
23 through the MSPB and to the Federal Circuit, so that
24 they can decide those kinds of questions. Again --

25 JUSTICE GINSBURG: Where did -- where did

1 Salfi go? The agency couldn't decide the constitutional
2 question. So, what's the next stop? Was it a court of
3 appeals or the district court?

4 MR. FEIGIN: In Salfi, Your Honor?

5 JUSTICE GINSBURG: Yes.

6 MR. FEIGIN: That would have been in
7 district court. However, under 42 U.S.C. 405(g), which
8 was at issue in Salfi and Illinois Council, the district
9 court is performing essentially appellate-style review
10 of the agency's findings. That is, any -- the preferred
11 course is that any additional factfindings that would be
12 necessary would be made on remand and not taken by the
13 district court.

14 JUSTICE GINSBURG: Not on the constitutional
15 question.

16 MR. FEIGIN: I think it would still be the
17 preferred course that the agency would do any further
18 factfinding that would be necessary in the first
19 instance.

20 JUSTICE GINSBURG: Why? The district court
21 is -- that's what it's equipped to do. That's what it
22 does all the time. And --

23 MR. FEIGIN: Well, under 405(g), rather than
24 1331, the preferred form of factfinding is in the agency
25 and remands to the agency for further factfinding,

1 rather than development of the facts in the district
2 court in the first instance.

3 In any event, the Court has recognized that
4 in Thunder Basin, for example, where review in the first
5 instance was in the court of appeals, that the court of
6 appeals had adequate authority to give meaningful
7 judicial review to a constitutional claim that an
8 agency, in that case the Mine Commission, by hypothesis
9 could not decide.

10 Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Mr. Feigin.

13 Mr. Schwartz, you have 2 minutes remaining.

14 REBUTTAL ARGUMENT OF HARVEY A. SCHWARTZ

15 ON BEHALF OF THE PETITIONERS

16 MR. SCHWARTZ: Thank you. We're not here
17 for an exercise in which side can best rewrite the Civil
18 Service Reform Act so that the Petitioners' claims can
19 fit in it. What we're here for is to determine whether
20 the background rule that Federal courts have Federal
21 question jurisdiction, under the common law and under
22 section 1331, to rule on claims challenging the
23 constitutionality of an act of Congress.

24 Now, the fall-back position is that that
25 jurisdiction remains. What this Court is -- is tasked

1 to do is to see whether it's fairly discernible from the
2 Civil Service Reform Act as it was written by Congress,
3 not as it's twisted or amended or bent to fit these
4 claims in it, but whether the Civil Service Reform Act
5 as written by Congress revokes that background Federal
6 court jurisdiction.

7 And I suggest that the gyrations that have
8 been discussed about, well, we could do this, we could
9 go up, we could go down, we could do these odd
10 procedures, show that it is not fairly discernible that
11 Congress intended to somehow try to shoehorn these
12 claims within the CSRA framework. And for that reason,
13 not because the Government's system is better, not
14 because the system that I'm proposing works better or is
15 faster, but because there is no fairly discernible
16 evidence from the Civil Service Reform Act, as written
17 by Congress, that Congress intended to revoke this very
18 fundamental jurisdiction of the district courts.

19 This is a Marbury case, not a Bivens case.
20 This is fundamental jurisdiction, the power of the
21 Federal court to say that Congress, not some Federal
22 agency, but that Congress acted in violation of the
23 Constitution. And I suggest that it -- the Court should
24 act carefully before deciding that Congress took that
25 fundamental jurisdiction away from the district courts,

1 and that is not fairly discernible that Congress did
2 that through the wording of the Civil Service Reform
3 Act.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 MR. SCHWARTZ: Thank you.

6 CHIEF JUSTICE ROBERTS: The case is
7 submitted.

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

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