

ORIGINAL

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PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: EDWARD CHRISTENSEN, ET AL., Petitioners v.

HARRIS COUNTY, ET AL.

CASE NO: 98-1167 c.1

PLACE: Washington, D.C.

DATE: Wednesday, February 23, 2000

PAGES: 1-55

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UNITED STATES

CAPTION: EDWARD CHRISTENSEN, ET AL., Petitioners v.

HARRIS COUNTY, ET AL., Respondents

CASE NO.: 98-1165-91

PLAQUE: Washington, D.C.

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 EDWARD CHRISTENSEN, ET AL., :
3

4 Petitioners :
5

6 v. : No. 98-1167
7

8 HARRIS COUNTY, ET AL. :
9

10 Washington, D.C.
11

12 Wednesday, February 23, 2000
13

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States at
16 11:21 a.m.
17

18 APPEARANCES:
19

20 MICHAEL T. LEIBIG, ESQ., Fairfax, Virginia; on behalf of
21 the Petitioners.
22

23 MATTHEW D. ROBERTS, ESQ., Assistant to the Solicitor
24 General, Department of Justice, Washington, D.C.; on
25 behalf of the United States, as amicus curiae,
 supporting the Petitioners.
26

27 MICHAEL P. FLEMING, ESQ., County Attorney, Houston, Texas;
28 on behalf of the Respondents.
29

30

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7	On behalf of the United States, as amicus curiae,	
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P R O C E E D I N G S

2

(11:21 a.m.)

3

CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 98-1167, Edward Christensen v. Harris
5 County.

6

Spectators are admonished do not talk until you

7 get out of the courtroom. The Court remains in session.

8

Mr. Leibig.

9

ORAL ARGUMENT OF MICHAEL T. LEIBIG

10

ON BEHALF OF THE PETITIONERS

11

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

13

In July 1992 the county council, attorney for
14 Harris County, Texas wrote to the Department of Labor and
15 asked, while it is clear that the -- I'm quoting from
16 their letter to the county manager, to the Department of
17 Labor, and they asked whether -- while it was clear that
18 the sheriff may authorize an employee to use comp time
19 when he requests to use it, that the regulations and the
20 statute did not make clear whether an employer could
21 compel an employee to use compensatory time under the Fair
22 Labor Standards Act when the employee did not want to use
23 it, and they asked for an opinion from the Department of
24 Labor as to whether, under the regulations and the
25 statute, that would be allowed, and the Department of

1 Labor answered that on September 14, 1992 that absent an
2 agreement that was willingly accepted by the employees, an
3 employer could not compel the use of comp time under the
4 Fair Labor --

5 QUESTION: Agreement or understanding, is that
6 it?

7 MR. LEIBIG: I'm sorry -- agree -- yes.

8 Agreement --

9 QUESTION: Or understanding, in terms of our
10 understanding come in there?

11 MR. LEIBIG: It says agreement or understanding,
12 and also --

13 QUESTION: And do we know whether this is the
14 case? How many of these people were hired after this
15 policy was already in effect?

16 MR. LEIBIG: Well, there's -- in the record in
17 this case it's not clear when the parties came in effect.
18 It came into effect sometime between 1992 and 1993. Most
19 of the plaintiffs were working then.

20 QUESTION: But certainly, as to any plaintiffs
21 who were hired after 1992 or '93, if the Department said
22 this is going to be our program, and they took the job,
23 would that qualify as an agreement or understanding?

24 MR. LEIBIG: It might, and I'll explain how, but
25 it depends on whether or not that was a -- clearly

1 communicated to the employees and the employees accepted
2 it when it was communicated.

3 QUESTION: Well, if they --

4 MR. LEIBIG: In this case --

5 QUESTION: All it has to be is --

6 MR. LEIBIG: In this case the facts are --

7 QUESTION: -- clearly communicated when they
8 accepted the job.

9 MR. LEIBIG: Excuse me. In this case the facts
10 are that there was a county regulation saying that comp
11 time would be used, but it did not include an agreement
12 with regard to compelled use.

13 QUESTION: Well, so far as an employee
14 accepting -- if you come to me looking for work and I say,
15 you know, you work 40 hours a week, and you'll be paid at
16 \$10 an hour, and you go to work, you've accepted my deal,
17 have you not?

18 MR. LEIBIG: Yes.

19 QUESTION: I mean, you don't have to say -- it's
20 not a question of voluntary confession or something like
21 that.

22 MR. LEIBIG: Right, but under the regulations
23 and the statute, and this is in section 207(o) itself, it
24 says the -- and in the regulation, it says that
25 compensatory time off in lieu of cash may be used, and may

1 be a condition of employment. There's a specific
2 reference to the regulations that could make it a
3 condition of employment, which I think is the question,
4 but it says so long as the comp time agreement is
5 pursuant -- is with the individual employees and pursuant
6 to their knowing and under -- knowing and voluntary
7 acceptance of it.

8 So, for example, in your accept -- in your
9 example, I could come -- you could say, I want you to come
10 to work with me for \$10, which you unilaterally decided,
11 and I could accept that, and I would be knowingly,
12 voluntarily accepting it.

13 On the other hand, you could offer me the job
14 and I could say, no, I want \$15, and you could say, well
15 then, you're not hired, but you could also say, then you
16 are hired, and then we'd have a bilaterally determined
17 condition of employment, and I think if you look at the
18 regulations, while the regulations are clear that it could
19 be a condition of employment, they're also clear that it
20 can only be a condition of employment so long as it is
21 accepted by the employees knowing in advance what the
22 rules on preservation --

23 QUESTION: You're not suggesting there has to be
24 some sort of a written acceptance.

25 MR. LEIBIG: No, but at least there has to be --

1 which there's not in this case -- a clear enunciation
2 first how the comp time will be preserved and used, and
3 that the employer would have the authority to compel it,
4 which didn't exist in this case. There would be comp
5 time, but there was no -- nothing in the record, and there
6 wasn't anything that said, we can compel use.

7 They adopted a -- they -- it says a practice in
8 the stipulation, but it means a policy of compelling use,
9 but that wasn't in the regulation that estopped --

10 QUESTION: What are we supposed to do about
11 that, because I thought that everybody agrees if the
12 employee knowingly and voluntarily agreed to the
13 understanding --

14 MR. LEIBIG: I think --

15 QUESTION: -- at issue, then everybody agrees
16 that then the county would win, and I think everybody --
17 then the issue is here, though, on the assumption that
18 they didn't knowingly and voluntarily agree, and is there
19 now a question in the case about that so that we should
20 send it back, or --

21 MR. LEIBIG: Well, the suggestion of Judge
22 Dennis in the dissent --

23 QUESTION: Yes.

24 MR. LEIBIG: -- in the Fifth Circuit was exactly
25 that.

1 QUESTION: All right, so what are we supposed to
2 do about that?

3 MR. LEIBIG: What we ask the Court to do is send
4 the case back for reconsideration in --

5 QUESTION: Of that point.

6 MR. LEIBIG: -- consistent with the Department
7 of Labor rules. That's what we've asked for in the
8 complaint.

9 Obviously, we could have asked for, to overturn
10 the court of appeals and uphold the trial court, but the
11 trial court did not make findings with regard to whether
12 or not an agreement existed and what the agreement was,
13 therefore that's not in the record, and if you want to
14 make it a condition of employment, first of all you have
15 to have exactly what the agreement was and, secondly, that
16 the employees knowingly and willingly accepted it.

17 QUESTION: Was there any allegation by the
18 employer that there was anything other than an agreement
19 that there would be comp time? There wasn't any
20 allegation that any of this was fleshed out.

21 MR. LEIBIG: No. In fact, the employer, both in
22 the answer to the amended complaint and the stipulation,
23 it's clear, and in their brief, they don't claim that
24 there was a specific provision on compelled use, and there
25 wasn't. I mean, in fact there wasn't, but -- and neither

1 the district court nor the court of appeals, nor the
2 stipulation, includes that important factor --

3 QUESTION: Then why would it --

4 MR. LEIBIG: -- which is why Judge Dennis
5 suggested that the trial court would have to make such a
6 determination in order to allow any court to apply the
7 applicable regulations.

8 QUESTION: Well, why would a trial court have to
9 make such a determination if the employer is not alleging
10 anything more than we had an understanding, they knew when
11 they took the job that it was going to be comp time
12 instead of overtime pay, and we didn't -- we're not
13 alleging that we spelled out the details of it. We're not
14 alleging that they specifically consented to this --

15 MR. LEIBIG: Compelled use.

16 QUESTION: Compelled use.

17 MR. LEIBIG: Well, I think the problem is in the
18 record the way the district -- the trial court did that,
19 they didn't get to the second point where they actually
20 said we're not alleging, the county is not -- that's why I
21 would --

22 QUESTION: In any event, you --

23 QUESTION: Even if they didn't, do you think it
24 is a reasonable interpretation -- when the employer says,
25 you're not going to get overtime, you're going to get comp

1 time, do you think a reasonable interpretation of that is
2 that I can sit on my comp time, refuse to use it until I
3 finally retire, and then cash it in --

4 MR. LEIBIG: Yes.

5 QUESTION: -- at time and a half? You think
6 that's a reasonable interpretation --

7 MR. LEIBIG: Well --

8 QUESTION: -- when the employer says, what
9 you're going to get is comp time, and my follow-up
10 question is, do you think it's a reasonable interpretation
11 of a statute --

12 MR. LEIBIG: Yes.

13 QUESTION: -- which says you can give an
14 employee comp time instead of overtime, that it means the
15 employee can sit on the comp time until he retires and
16 then cash it in for overtime pay?

17 MR. LEIBIG: Yes, I do, because the statue also
18 says -- first of all, yes, I think it's reasonable.
19 Second of all, the statute itself also says that there's
20 a -- expressly in the statute there's a 480-hour cap on
21 comp time banks, and that after the employees reach that
22 cap, they then can use the comp time, and it has -- it
23 deals with how to use it, by making requests and so forth,
24 and therefore it -- the statute doesn't give an employer a
25 permanent right to use compensatory time.

1 QUESTION: Well, as I understood the statute, it
2 was enacted in response to the complaint of the States
3 that now that you're applying the Fair Labor Standards Act
4 to us we're going to go bankrupt. We cannot pay time and
5 a half to firemen, policemen and so forth. So Congress
6 said, well, okay, if you want you can give them comp time
7 instead of time and a half.

8 But what you're urging here, to wit, that the
9 policemen and firemen can simply refuse to use the comp
10 time.

11 MR. LEIBIG: Right. That's because --

12 QUESTION: And then get it in cash. It just
13 makes -- it just makes nothing of the concession that
14 Congress made to the States.

15 MR. LEIBIG: Justice Scalia, I would argue that
16 the Congress didn't quite make as broad a concession as
17 you indicated, because --

18 QUESTION: No, I --

19 MR. LEIBIG: -- first of all the statute itself
20 says that an employer may use comp time only pursuant to
21 an agreement with the employees, and only pursuant to a
22 number of other conditions. The statute also says,
23 delegates to the Department of Labor to make regulations
24 about what that means, and the Department of Labor has
25 made regulations that make precisely clear what those are.

1 In addition, while the legislative history
2 indicates that Congress was trying to respond to Garcia
3 and allow employers to operate more efficiently, the
4 legislative history is also clear that the comp time
5 provisions were meant to accommodate preexisting
6 arrangements between employers and employees, and that
7 they weren't the major part of the cost saving.

8 They gave greater flexibility to the employer,
9 but the statute and the legislative history repeatedly is
10 also clear they gave a right to the employees to use it to
11 control the comp time in the legislation.

12 QUESTION: Mr. Leibig --

13 QUESTION: Within reason.

14 QUESTION: Mr. Leibig, let me get the procedural
15 history of this case straight. The district court granted
16 summary judgment for your client. It went to the Fifth
17 Circuit, the Fifth Circuit granted summary judgment for
18 the county and Judge Dennis said, really neither side
19 should get summary judgment, and your position here is
20 that Judge Dennis was correct?

21 MR. LEIBIG: Our position, and what we asked for
22 in both of our briefs, is that the case should be remanded
23 for further hearing in terms of the Department of Labor
24 regulations, which required the investigation of the
25 extent and meaning of the agreement and how the agreement

1 fit into the rules. That's basically correct, Your Honor,
2 and the -- I would --

3 QUESTION: Could I ask you what Department
4 regulation covers this exactly, and where we might find it
5 in the material with this case?

6 MR. LEIBIG: Yes, Your Honor. Basically, that
7 the -- covers compels use exactly?

8 QUESTION: Yes.

9 MR. LEIBIG: Yes, Your Honor. The regulation
10 that deals with it is 553.23, and the --

11 QUESTION: Where do I find that --

12 MR. LEIBIG: Yes --

13 QUESTION: -- in these materials?

14 MR. LEIBIG: In the appendix, the original
15 appendix to the petition, which contained most of the
16 appendix, at page 46 --

17 QUESTION: Just a minute. I would look at the
18 petition for --

19 MR. LEIBIG: It's the white -- the white
20 large --

21 QUESTION: This?

22 MR. LEIBIG: Yes, Your Honor.

23 QUESTION: And where would I --

24 MR. LEIBIG: It's 46a. There's a couple of
25 things, but the first is 46a, and that is -- 553.23(a)(1)

1 describes how you get an agreement, and then (2) says
2 the -- it deals with the agreements, and this is a
3 discussion of the kind of things that would be in an
4 agreement, and --

5 QUESTION: Where does -- where do I find
6 language here, on page 46a, that tells me the employee
7 does not have to use it?

8 MR. LEIBIG: No, you don't. I mean, I was -- as
9 I say, I have to go to a couple of places. What it says
10 there is that the agreements for comp time may include
11 provisions governing preservation, use, and cashing out of
12 comp time.

13 QUESTION: Yes.

14 MR. LEIBIG: And then in addition to that it
15 says in -- back on page 45, it says agreements of
16 understanding may provide comp time off. In addition to
17 the agreement an understanding may be a combination -- it
18 goes through the various things that would be in a comp
19 time agreement.

20 QUESTION: Well, I think everyone agrees that
21 there can be an agreement covering it. Where do I find in
22 the regulation a directive about what happens absent an
23 agreement?

24 MR. LEIBIG: As the letter that I cited from the
25 county, in the regulations themselves there's no express

1 treatment of the compelled use question.

2 QUESTION: That's what I thought.

3 MR. LEIBIG: Yes.

4 QUESTION: So to what do we defer, then, in
5 terms of the Labor Department?

6 MR. LEIBIG: The Department of Labor's
7 interpretation of their own regulations, which is
8 expressed -- well, first of all, there's three of them.
9 First of all, it's expressed specifically in the letter --
10 the specific letter, which in this case was actually a
11 letter to Harris County saying compelled use, they
12 interpret this regulation to prevent compelled use, and
13 that relies on their interpretation of this regulation,
14 plus I think it's important --

15 QUESTION: Who is that letter from? Who did
16 that letter come from?

17 MR. LEIBIG: It came from Harris County's --
18 specifically asking about the facts of this case.

19 QUESTION: To the Labor Department?

20 MR. LEIBIG: Went to the Labor Department. It
21 was by the Administrator of the Wage & Hour Division.

22 QUESTION: The administrator --

23 MR. LEIBIG: Right, and that was September, I
24 think 14, 1992.

25 QUESTION: And where is that?

1 MR. LEIBIG: Of the letters -- the letter itself
2 is not reprinted in the record, but it's cited in all the
3 briefs in this --

4 QUESTION: So that's all we have, really.

5 MR. LEIBIG: No. Well, I wanted to -- no. And
6 then in support of that, the question is, how did the
7 Department of Labor get from the regulations to the thing,
8 and there's two things in support of it. First of all,
9 the legislative history itself, of the -- the
10 congressional legislative, both the House and the Senate
11 report, refer to the right of employees to use comp time
12 10 times and they refer to, 14 times, that it's a benefit
13 of the employees, and that the employees can cash out comp
14 time.

15 QUESTION: Well, these are all statutory
16 provisions. Let me ask you this. There's no collective
17 bargaining agreement here --

18 MR. LEIBIG: No.

19 QUESTION: -- covering this --

20 MR. LEIBIG: There's an earlier case before the
21 State. In Texas and Harris County, collective bargaining
22 is illegal.

23 QUESTION: There is no collective bargaining
24 agreement that we worry about here?

25 MR. LEIBIG: No, that's correct.

1 QUESTION: Can the employer say, well, maybe it
2 wasn't clear in the past, but I want to make it clear from
3 this date forward, if you want to continue to work here,
4 you're going to have to use your comp time, so if you want
5 to stay a county employee, that's the rule? Can they do
6 that?

7 MR. LEIBIG: Under the statute and regulations
8 they can do that, and then the employees have the option
9 of then either accepting it and continuing to work --

10 QUESTION: Or leaving.

11 MR. LEIBIG: Or -- and by the way, under the
12 regulations they not only could -- the regulations both
13 provide a condition of employment with those conditions.
14 They also provide, in 553.23(c)(1) at the bottom that you
15 could just give notice, which -- there may be -- I'm not
16 sure there's a debate, but there may be a condition
17 between making a condition of employment and giving
18 notice, but it also says if they give notice that we will
19 have compelled rules, and if the employee then works a day
20 after that, it can be presumed that he accepted it, but
21 then if --

22 QUESTION: Well, has the county give notice
23 here --

24 MR. LEIBIG: No.

25 QUESTION: -- do you think?

1 MR. LEIBIG: No, because it also says that if
2 the employee --

3 QUESTION: No. These employees don't know that
4 the county thinks they have to use --

5 MR. LEIBIG: Well, the regulation also says if
6 the employees fail to express an unwillingness to accept
7 it, it will be presumed, but in this case the employees
8 did express an unwillingness to accept it, and therefore
9 the opposite presumption I think would occur, and again
10 you have to read the last two sentences of the section I
11 cited, so that in this case, first of all --

12 QUESTION: You mean, if the employee says
13 nothing, then the county has to either fire them or assume
14 that the deal's off?

15 MR. LEIBIG: No. I think the rule is if an
16 adequate notice is given and the employee says nothing and
17 works, the presumption is that he accepted it, but if he
18 expresses an unwillingness to accept it, then the
19 presumption is that he did not accept it.

20 QUESTION: But then --

21 MR. LEIBIG: Then if the employer lets him
22 continue to work, he doesn't -- can't compel him to use
23 comp time, but he would have the option to terminate. I
24 mean, if they think it's that serious a thing to do, why,
25 that would happen.

1 In this specific case all those cases, facts
2 haven't been developed, but I think that's the way it
3 would go.

4 QUESTION: I presume they would also have the
5 option to say, we're not going to fire you, but if you
6 won't use the comp time, we're simply going to reduce your
7 weekly hours to 35 a week.

8 MR. LEIBIG: Well, I think they could, 1) say
9 we're not going to let you work any more overtime.
10 Whether they could reduce their hours to a low, or below
11 the statute --

12 QUESTION: Why not? Why not?

13 MR. LEIBIG: Well --

14 QUESTION: They're saying, look, we're doing it
15 because we've got this great overhanging liability out
16 there, and the only way we're going to be able to fund it
17 is to save money in some other way.

18 MR. LEIBIG: Well, first of all --

19 QUESTION: And the wage and hour law doesn't
20 tell us how many hours we have to let you work.

21 MR. LEIBIG: The regulations say that the
22 employee's decision to accept comp time has to be made
23 free of coercion or pressure, and that's clear in the
24 regulations and the legislative history.

25 QUESTION: But firing is not coercion?

1 MR. LEIBIG: No, because --

2 QUESTION: You say you can fire him, but I can't
3 reduce your hours to 35?

4 MR. LEIBIG: Well, the regulations say you can
5 make it a condition of employment, so if you make it a
6 condition of employment, the person is free whether to
7 accept the job or not, but if they do accept the job, then
8 it is the system covered by the regulations, and part of
9 this is to make sense out of all the regulations and the
10 legislative history.

11 If the legislative history, which is trying
12 to --

13 QUESTION: If possible. If it says that, I
14 don't call that making sense out of it. You can fire him,
15 but you can't reduce his hours --

16 MR. LEIBIG: No, no. I think you can reduce his
17 hours unless you've expressed to him the intent of your
18 reducing his hours is in order to pressure him into
19 accepting comp time.

20 QUESTION: No, I'm not --

21 MR. LEIBIG: But other than that --

22 QUESTION: No, I'm not pressuring him. He can
23 keep his saved up time in the bank. I'm not telling him
24 he's got to draw that down.

25 MR. LEIBIG: Yes, Your Honor.

1 QUESTION: And he'll get -- if he keeps it till
2 the end he'll get paid time and a half. I'm simply
3 saying, I've got to provide for my liability, and
4 therefore I've got to employ people less hours in order to
5 put the money aside for a rainy day. Is that coercion?

6 MR. LEIBIG: No, I don't think it is --

7 QUESTION: Okay.

8 MR. LEIBIG: -- in that context. If the
9 employee could demonstrate actual coercion they may have
10 an argument in the case, but absent that --

11 QUESTION: But the example that I just gave you
12 would not, as a matter of law, be coercion, you concede?

13 MR. LEIBIG: I don't think so.

14 QUESTION: Yes.

15 MR. LEIBIG: Also I think that, along the same
16 lines because I want to make it clear, the odd thing about
17 this case is the burden between the employer imposing this
18 without an agreement with the employees, and what he would
19 have to do to get an agreement, is not a long road. The
20 facts in this case are, they imposed compelled use without
21 either the notice, the condition of employment, or --

22 QUESTION: In fact, the road isn't any longer
23 than my hypothetical, is it?

24 MR. LEIBIG: No.

25 QUESTION: We know it's going to happen.

1 MR. LEIBIG: Right. In addition to that,
2 though, one thing in your hypothetical, that you assumed
3 that the county would save money by paying people in comp
4 time rather than cash, and I don't think Congress assumed
5 that. There's a slight additional flexibility. In
6 fact --

7 QUESTION: I was assuming some fat there.

8 MR. LEIBIG: Yes.

9 QUESTION: I must be --

10 MR. LEIBIG: Comp time in fact would cost more
11 than --

12 QUESTION: You have to -- I may have to --

13 MR. LEIBIG: -- so they may want to avoid it by
14 paying it out later, but they --

15 QUESTION: Enlighten me about what you mean by
16 saying paying in comp time instead of cash. If they take
17 comp time, don't they get paid in cash for the time they
18 don't work?

19 MR. LEIBIG: Yes, Your Honor. That's what I was
20 trying to explain, but they do, but hypothetically there's
21 a slight way they can -- it can cost the employer more,
22 because if the employee is making \$10 an hour in 1992,
23 works for comp time and then banks it as Justice Scalia
24 suggested, and then cashes it in 5 years later, probably
25 he'll be making \$12, so that could cost -- over the long

1 haul that could cost the employer a little bit more money.

2 Now, the --

3 QUESTION: Yes, but that's --

4 MR. LEIBIG: In fact, you have a defense against
5 that, because the employer is free at any time to cash out
6 the comp time, so they could avoid that, not only by
7 cashing out the comp time, but I suggested in my brief
8 three or four other ways that an employer can protect
9 themselves from that happening, but in theory that's the
10 additional cost of comp time if it's stored, and so --

11 QUESTION: But if he -- of course, as the
12 employer used his comp time a year later and the wage
13 rate's gone up, the time he uses the comp time he will
14 stay home and get paid at the rate -- then current rate,
15 will he not?

16 MR. LEIBIG: Yes, Your Honor.

17 QUESTION: Yes.

18 MR. LEIBIG: If he waits till he retires,
19 there's another rule. He either gets the regular rate or
20 the higher --

21 QUESTION: Of course, in the meantime the
22 employer's had the use of the money, too.

23 MR. LEIBIG: Yes, and inflation's -- but I'm
24 just saying, other than that, and Congress is clear about
25 this both in the regulations and the legislative history,

1 Congress' view was that you're not supposed to use comp
2 time -- they meant comp time to be an equivalent of being
3 paid in cash, because eventually you have to pay the
4 money, and in fact in the real world it works out there
5 would be areas I've described, and as we've described in
6 our brief, there are methods by which the employer can
7 save it.

8 QUESTION: Thank you, Mr. Leibig.

9 MR. LEIBIG: Thank you.

10 QUESTION: Mr. Roberts, we'll hear from you.

11 ORAL ARGUMENT OF MATTHEW D. ROBERTS

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

13 SUPPORTING THE PETITIONERS

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

16 An employer may not require an employee to use
17 his comp time against his wishes unless the employee has
18 agreed to that arrangement in advance. That conclusion
19 follows from two features of the act. First, the act
20 gives the employee the absolute right to overtime pay in
21 cash. An employer cannot substitute comp time for
22 overtime pay in cash unless he first secures the
23 employees' agreement.

24 Second, the act makes clear that comp time is a
25 substitute for cash pay. An employee has the absolute

1 right to use that cash pay as he pleases. The employer
2 can't tell the employee when or how it may be spent. Just
3 as the control over cash is a central aspect of its value,
4 control over the use of comp time is central to its value,
5 and therefore the Secretary has reasonably construed the
6 act to permit the employee to use the comp time he has
7 earned as he wishes, except to the extent he's otherwise
8 agreed --

9 QUESTION: Now, where do we find some
10 departmental regulation that spells out what happens --

11 MR. ROBERTS: Well, the Secretary has construed
12 its -- her regulations to provide that in reliance on
13 three provisions in the regulations. First, section
14 553.23(a)(1), which is on page 45a of the joint appendix,
15 which provides, just as I explained that the statute did,
16 that comp time is a substitute for overtime payment in
17 cash, and that there must be an agreement with the
18 employee.

19 QUESTION: Well, that doesn't get you there.
20 That just says there has to be an agreement before you can
21 use comp time. It doesn't say what the consequence of
22 using comp time is. I mean, it just says there has to be
23 an agreement before you can use comp time.

24 MR. ROBERTS: Yes, Your Honor, and the Secretary
25 is also relying on the provision in (a)(2) that says that

1 the agreement may include provisions governing the use of
2 comp time. That's on page 46a --

3 QUESTION: Right.

4 MR. ROBERTS: -- the first sentence, and also
5 relying on (c) (1), which is on page 47.

6 QUESTION: Well, let's do (a) (2) first. An
7 agreement may contain other things. It doesn't say it
8 must contain other things.

9 MR. ROBERTS: That's correct.

10 QUESTION: I mean, the regulation could have
11 said that. Any other things -- you know, any other
12 conditions on comp time must be included in an agreement.
13 It doesn't say that.

14 MR. ROBERTS: The regulation doesn't require
15 that it address that, but the Secretary has construed the
16 regulation as a whole to mean that if it doesn't address
17 that, then the employee retains the right to use comp
18 time --

19 QUESTION: Well, why on earth doesn't the
20 Secretary say that in a regulation, rather than having to
21 construe something that's ambiguous.

22 MR. ROBERTS: Well, the Secretary didn't address
23 it in the regulation, but did address it in the opinion
24 letter, which provides clarification of the regulation --

25 QUESTION: Well, it still --

1 MR. ROBERTS: -- and the Secretary's
2 interpretations.

3 QUESTION: I just want to -- I may be
4 misremembering this, but I can't -- let's just ask you
5 that even if it's not a formal interpretation of the
6 regulation, which I could see how it would be, what it
7 means to say you can put extra conditions there, in terms
8 of the -- a background rule where nobody says anything.

9 I could understand that, but even if not, isn't
10 there a famous administrative law case, Skidmore, which
11 talks about this Court paying deference to a wage and hour
12 administrator on the ground that even if he lacks -- he
13 possesses the power to persuade even though he lacks the
14 power to control?

15 MR. ROBERTS: Yes, Your Honor. We contend that
16 the interpretation of the regulation is entitled to
17 stronger deference than Skidmore. Skidmore was decided --

18 QUESTION: I never knew there was a difference
19 of deference. I never was able to measure it.

20 MR. ROBERTS: Well, the courts of appeals, and I
21 think this Court as well, recognized a difference between
22 Chevron-type deference or the kind of deference in our,
23 and what might be called Skidmore-type deference, which is
24 that the -- reasoned judgment is entitled to respect for
25 its power to persuade and --

1 QUESTION: I mean, all we're talking about is,
2 what is the background rule if, in fact, nobody puts a
3 condition in the agreement? Now, they're free to put it
4 in or not, but what's the background rule, which is a
5 pretty sort of interstitial minor point, isn't it?

6 MR. ROBERTS: Yes, Your Honor. It imposes very
7 little burden on the employer. The employer is well-
8 situated to obtain the employee's agreement to that
9 condition, and --

10 QUESTION: May I ask, Mr. Roberts, what's the
11 opposite rule? If the employer can't decide when it's
12 used, does the employee have the right to say, well, I've
13 decided to take it whenever I choose?

14 MR. ROBERTS: The employee has the right to use
15 comp time within a reasonable period when the employee
16 requests it, unless it would unduly disrupt the employer's
17 operation.

18 QUESTION: No, excuse me. I thought he doesn't
19 have to use it within a reasonable time. I thought the
20 position here is that he can sit on it and choose not to
21 use it as he wishes, and cash it in at the end of his
22 career?

23 MR. ROBERTS: The employee can accrue the comp
24 time so that the employee can use it on request, as
25 provided by 207(o)(5). The employee also could accrue it

1 up to the maximum provided by the statute.

2 QUESTION: He has no obligation to be reasonable
3 in his use of it at all, isn't that right? I thought
4 that's what we're arguing about here.

5 MR. ROBERTS: He has an obligation to not --
6 he's unable to use it on request if it would unduly
7 disrupt the employer's operation, but --

8 QUESTION: Doesn't that cut against -- I'm just
9 trying to think it through. Doesn't that in a way cut
10 against you, in the sense that there is a restraint on the
11 ability of the employee to use it whenever he wants to.
12 He can't just say on Friday I'm going to take off next
13 Monday and Tuesday. He must consider the employer's
14 wishes, but there's no restraint on the employer's
15 imposing, under the regulation, his desires on how it
16 should be used, no express restraint.

17 MR. ROBERTS: Because Congress did not expressly
18 address the situation when the -- if the employer could
19 require the employee to use comp time. I submit that
20 that's because Congress didn't conceive that the employer
21 would assert that authority, because Congress understood
22 that the comp time belongs to the employee, and that the
23 employee would ask when to use it and not be told when to
24 use it, and that follows, as I said, from the features of
25 the act that I described earlier, so Congress didn't have

1 a need --

2 QUESTION: But the Congress did impose a ceiling
3 on how much comp time that could be accumulated.

4 MR. ROBERTS: Yes, but once that ceiling is
5 reached, Congress specified that the employee would have
6 to be paid in cash, which returns the employee to getting
7 his basic rate under the act.

8 QUESTION: But what I don't understand,
9 Mr. Roberts, is what good it does for Congress to say, you
10 don't have to pay these people cash. You can let them
11 have comp time instead. I don't see what good that does
12 if Congress also says, oh, and by the way, the employees
13 don't have to use this comp time. They can just sit on it
14 and bank it, and cash it in at the end of their careers.
15 What has Congress accomplished?

16 MR. ROBERTS: Congress doesn't say you can pay
17 these employees comp time. It says, the employees have
18 the right to overtime pay in cash, and the employees may
19 agree with you when it's mutually beneficial to get comp
20 time, and those mutually beneficial arrangements may save
21 the employer money, but Congress was very clear, the
22 statute is absolutely clear, the employee has the right to
23 overtime pay in cash.

24 QUESTION: If they decide to bank it and never
25 spend it, and the employer would like them to, and

1 eventually get cash for it, when do they get the cash,
2 when they retire?

3 MR. ROBERTS: If they bank it, they get -- they
4 can accumulate up to the 240 or 480 hours, and on
5 termination of employment they have to --

6 QUESTION: On termination of employment, so it's
7 quite possible that -- it would be an unusual case where
8 they'd want to bank it. I mean, if you refuse it you get
9 paid time and a half next month, and if you decide to take
10 the comp time and save it, you're going to be paid when
11 you retire. Do you get paid more when you retire?

12 MR. ROBERTS: You get paid -- you might get paid
13 more, but I don't think it would be worth more 20 years
14 down the road. You would get paid at the rate then. It's
15 unlikely --

16 QUESTION: Well, at the rate for your rank then,
17 to.

18 MR. ROBERTS: At the rate for your rank then, or
19 the last 3 years.

20 QUESTION: If you're a captain then you'd get a
21 captain's 240 hours, right?

22 MR. ROBERTS: Yes, Your Honor but --

23 QUESTION: They must not make decisions based on
24 these prospective calculation of what it's worth years
25 down the road, or maybe they do, do they?

1 MR. ROBERTS: I don't know whether they do.
2 There's no indication in this case that these employees
3 wanted to do that. Another feature of their complaint,
4 which wasn't pursued on appeal, was that they were not
5 being allowed to use comp time when they requested to do
6 so, so it suggests that they did request to use comp time.

7 QUESTION: Mr. Roberts, does it come down to
8 whether the default rule is, you get overtime, or the
9 default is, as Judge Hickinbotham said, the employer sets
10 the work rules?

11 MR. ROBERTS: Yes. You could look at it that
12 way. The reason that the default isn't that the employer
13 sets the work rules is that Congress has displaced that
14 principle that the employer can set the rules in the act
15 by making -- by giving the employee the right to overtime
16 and by providing that the employer can only have a comp
17 time arrangement pursuant to the employee's consent.

18 QUESTION: The question is, how detailed the
19 consent must be.

20 MR. ROBERTS: Right.

21 QUESTION: Just the comp time, or the working
22 out of it.

23 MR. ROBERTS: Yes. That's the issue, and it is
24 simply a default rule. The parties -- everyone agrees the
25 parties can contract out of that principle, so it's not

1 imposing an onerous burden on the employer, and what it is
2 doing is furthering the underlying scheme in the act.

3 QUESTION: Thank you, Mr. Roberts.

4 Mr. Fleming, we'll hear from you.

5 ORAL ARGUMENT OF MICHAEL P. FLEMING

6 ON BEHALF OF THE RESPONDENTS

7 MR. FLEMING: Mr. Chief Justice, and may it
8 please the Court:

9 One reason, or the main reason on why there
10 aren't any regulations that address this issue, and there
11 really aren't, is because of the -- what's really taking
12 place in this, what's been termed a forced use of
13 compensatory time.

14 The Fair Labor Standards Act basically provides
15 for a minimum wage rate and maximum number of hours.
16 There's no provision in there that guarantees a 40-hour
17 week, work week. An employer is always free to cut the
18 work week short, to have an employee work 30 hours, 20
19 hours, 10 hours, 1 hour, and in the Fair Labor Standards
20 Act there's a very specific provision that allows
21 employers to cash out accrued compensatory time at any
22 time. It's in the statute and more specifically in the
23 regulations.

24 Now, if they could do each of those two
25 separately, there's nothing that prevents a public

1 employer from doing so simultaneously to achieve the
2 objectives which were set out in the amendments following
3 the Garcia decision, that is, to protect the county's
4 resources and budgets and really, in this situation, to
5 protect against employees that do bank their comp time and
6 hold it to the maximum.

7 QUESTION: You mean, the employee normally has a
8 40-hour week, say, you just come in 35 hours this week,
9 I'll pay you for 40, right, and the other 5 will be paying
10 down your comp time, right?

11 MR. FLEMING: Yes, Justice Scalia, and in
12 fact --

13 QUESTION: So what's the big deal, then? Why do
14 we have this case in front of us? Why don't they just do
15 that?

16 MR. FLEMING: That's what we do. What happens
17 is that they'll -- after the supervisor tries to reach an
18 agreeable time for the employee to start taking time off
19 and getting paid in cash from their compensatory time
20 that's been accumulated, if the employee doesn't do it,
21 then he meets with him and orders him to do it, and still
22 tries to get a reasonable period of time when they can do
23 it, and if not, then issues an order for the employee to
24 do it.

25 And what will happen is, for instance, if it's a

1 week the employee is going to take off, the employee
2 doesn't come in to work that week but he still gets his
3 paycheck, 40 hours of pay, and mind you, that pay has been
4 accumulated at time and a half, so they're still getting
5 the benefit of the time-and-a-half provisions of the Fair
6 Labor Standards Act. That's what the practice is, and
7 that's what happens.

8 QUESTION: Well, why don't you put it in an
9 agreement? I mean, you know -- that's what I don't
10 understand, is why is this case such a big deal, since
11 everybody agrees you should be able to do that, but you
12 have to get your employees' agreement to it, just as you'd
13 have to get his agreement to comp time in the first
14 place, and so you have to get that agreement anyway.

15 What's the big deal?

16 MR. FLEMING: I think --

17 QUESTION: And if there are good arguments on
18 both sides, which there are, you could have a background
19 rule either way. The reg, I agree with you, doesn't say
20 much about it.

21 MR. FLEMING: Sure.

22 QUESTION: And so why not just go with the
23 agency? I mean, that's a -- why -- you know, trivial
24 matter, interstitial, background agreement, they have the
25 experience, et cetera, et cetera.

1 MR. FLEMING: Well --

2 QUESTION: So that's sort of where I -- what I'm
3 thinking about it.

4 MR. FLEMING: Well --

5 QUESTION: What is your response?

6 MR. FLEMING: That's a good question, and in
7 addition to the default rule, which Judge Hickinbotham of
8 the Fifth Circuit said, where he sort of filled in the
9 gaps of what he perceived the agreement would be, in
10 addition to the fact that under the statute we don't have
11 to have an agreement, is our position, really how the case
12 evolved, though, is up until we got to this Court the
13 petitioner was saying that it's completely prohibited by
14 the act, agreement or no agreement, and it was our
15 position that it's -- we're allowed to do it by the act,
16 and that's still our position.

17 QUESTION: Well, and now in this Court everybody
18 agreed that there can be an understanding. We're talking
19 about what notice the employees have to be given, so
20 there's no question that from now on Harris County can
21 say, this is the deal, employees. The only question is
22 when they didn't say that, when all they said was comp
23 time, what should be the consequences?

24 MR. FLEMING: Well, we agreed that we could do
25 it by agreement, but it's our position we don't have to do

1 it by agreement, and whether we want to go back and issue
2 a new --

3 QUESTION: Well, what's the it? I mean,
4 certainly you can't substitute comp time for overtime pay
5 except by agreement or understanding.

6 MR. FLEMING: Yes.

7 QUESTION: Right?

8 MR. FLEMING: That's --

9 QUESTION: So you must have an agreement to comp
10 time.

11 MR. FLEMING: Which we have.

12 QUESTION: And the question is, what are the
13 terms and conditions of that comp time? One we know from
14 the statute, that the employee can request it, and the
15 employer has to accommodate unless the time that is being
16 sought would unduly disrupt --

17 MR. FLEMING: Yes.

18 QUESTION: -- operations.

19 MR. FLEMING: Yes.

20 QUESTION: So we have that one condition on it
21 directly out of the statute.

22 MR. FLEMING: Yes, Your Honor.

23 QUESTION: But why, if Congress is trying to
24 say, employees, it's your option, or at least you have to
25 be given notice, why shouldn't that notice be, here it is,

1 and at a certain point you're going to have to take it?
2 Why shouldn't that be spelled out, instead of the employee
3 thinking, well, this is fine. If I need it, I'll use it,
4 and if I don't need it, I'll bank it, and the statute says
5 after X number of hours I get paid in cash.

6 MR. FLEMING: Justice Ginsburg, I agree that it
7 can be in an agreement, certainly. But just as the Fifth
8 Circuit said, that there are workplace rules which the
9 employee governs, in this case, this is something that is
10 outside of the act. They could be -- setting the number
11 of hours below 40 is not covered by the Fair Labor
12 Standards Act, and the employer is not required to enter
13 negotiations with the employees on when they're going to
14 set those hours or cut them back.

15 QUESTION: Is that what you did here? I am in
16 some perplexity. I thought your opponent had acknowledged
17 that it would be okay for the employer just to say, next
18 week only come in 35 hours, and for the employer to take
19 the money that it saves, the 5 hours, add a little bit
20 more to it for the time and a half, and voluntarily, as
21 it's entitled to do, buy out 5 hours worth of the comp
22 time.

23 Now, is it common ground that that is okay?

24 MR. FLEMING: I don't know if -- I don't think
25 that's what the petitioners are maintaining. That's our

1 position. We're telling them, don't come in next week,
2 or, you know, in a couple of weeks --

3 QUESTION: No, you're doing something a little
4 different. You're saying, don't come in next week, take
5 your comp time instead.

6 MR. FLEMING: Yes.

7 QUESTION: Right?

8 MR. FLEMING: That's what -- as we have
9 maintained, we're doing two things, and they --

10 QUESTION: That's a little different from
11 saying -- you're directing them to take their comp time.

12 MR. FLEMING: Yes.

13 QUESTION: Which means, you know, they won't get
14 any -- well, they'll get their regular pay, and they'll
15 have time and a half off, I guess, right? Is that how it
16 comes?

17 MR. FLEMING: Yes. I mean, they've accrued the
18 comp time for time and a half, and --

19 QUESTION: Well, that -- it seems to me that's a
20 bit different from simply saying, look at -- God, you've
21 got 240 hours here. I can't afford that. Don't come in
22 for 5 hours next week. Say nothing else about the comp
23 time, and then the employer just buys off 5 hours worth of
24 comp time. That's a little different, and I'm not sure
25 that the other side says that that's bad.

1 That's not what you've done here, though.
2 You've instructed them to take their comp time. Isn't
3 that the facts of the case?

4 MR. FLEMING: Yes, but by doing it, it's in two
5 phases. I agree that it's a forced use, but as far as
6 finding a statutory authority for doing it, it's the way I
7 explained. There's nothing that can stop us from
8 shortening the work week, and we can cash out the comp
9 time at any time without any restrictions.

10 QUESTION: Why don't you do it the other way,
11 and save us all this trouble?

12 (Laughter.)

13 QUESTION: But I think that was the answer to my
14 hypothetical. I said, what if they -- if they do nothing
15 but say, we've got to make up some money somehow to pay
16 for this overhanging liability, so we're only going to
17 employ you 35 hours a week, and I understood your friend
18 on the other side to say that would not be coercive, and
19 that would be okay.

20 In practical terms, that would get you exactly
21 where you want to go.

22 MR. FLEMING: You mean -- if I understand your
23 question --

24 QUESTION: Because -- excepting in one case. If
25 the employee says, all right, by Godfrey, I'll work 35

1 hours a week, but nothing is going to induce me to touch
2 my accrued comp time. That nest egg is going to stay
3 there until the day I retire. The employee could do that.
4 In the real world, I presume that would not happen.

5 QUESTION: He can't do that, can he? Doesn't
6 the employer have a right to buy out the comp time?

7 MR. FLEMING: The employer has a right to buy
8 out the comp time.

9 QUESTION: That's right. That's right. That's
10 right.

11 QUESTION: That's the issue. That's the issue.
12 You can make him work 30 hours a week, but the question
13 is, can he refuse to be paid for 40?

14 MR. FLEMING: No, because we can cash it out.

15 QUESTION: That's your position.

16 MR. FLEMING: That's --

17 QUESTION: His position is, he can say I don't
18 want to take the 10 hours in cash, I want to keep it in
19 the bank.

20 MR. FLEMING: I don't think that they're saying
21 that they can refuse to take the payment, because the
22 statute and the regulations are very clear about that,
23 cash them out at any time, and so if we can do either of
24 those separately, we can do them simultaneously.

25 QUESTION: And that's what protects the employer

1 against excessive accumulations. The employer can always
2 say, well, the main rule is time-and-a-half pay. Here's
3 your pay.

4 MR. FLEMING: Yes. We can cash them out.

5 QUESTION: That --

6 MR. FLEMING: The employer can cash out at any
7 time.

8 QUESTION: But then, if you look at it as the
9 comp time being an exception to the overtime pay, then it
10 would be logical to say the employer can go back to what
11 is the main rule, what is the rule in workplaces that are
12 not public. There's no comp time option in the private
13 sector, is there?

14 MR. FLEMING: No.

15 QUESTION: So the underlying premise of the Fair
16 Labor Standards Act is, you pay time and a half. Then
17 there's an exception that operates only in the public
18 sector, but Congress has provided that the employer can
19 always do what employers all over the country must do.
20 That is, pay time and a half.

21 MR. FLEMING: Pay time and a half, or we can
22 cash them out.

23 QUESTION: Well, that's what I mean by cashing
24 them out, by -- instead of letting them accumulate the
25 time, giving them the money.

1 MR. FLEMING: Yes, as they -- as they're
2 accumulating it, if we -- when they reach the 240 hours,
3 if they do, if we don't cash them out they're going to get
4 time and a half.

5 QUESTION: May I confess to total stupidity
6 here, because if you've got your 30-hour-a-week example,
7 you say you have an absolute right, and they don't contest
8 the fact you can pay them for the extra 10 hours if you
9 want to.

10 MR. FLEMING: That's right.

11 QUESTION: Well, what exactly does --

12 QUESTION: Then why aren't you doing that? I
13 don't understand why that isn't -- what you're fighting
14 about, if everybody agrees you can do that. Isn't that
15 just making them take 10 hours of comp time each week?

16 MR. FLEMING: If we did it each week, we could.
17 We don't do it each week, though. I mean, they wait till
18 it gets up to near the maximum of 240 hours in our case,
19 and then they try and get it to come down a little bit, so
20 they're not cutting back their time every week.

21 QUESTION: Give me a specific example of what
22 cashing out means.

23 MR. FLEMING: Cashing out is if an employee has
24 some accrued compensatory hours, whether it's 1 hour or
25 240 hours, that the employer can pay for those hours in --

1 at the -- whatever rate the employee has at that time,
2 or -- and they can also do it when the employee leaves or
3 is terminated, and they pay it out dollar for dollar based
4 on the number of hours.

5 Now, the hours have been accumulated at time and
6 a half.

7 QUESTION: Yes. There is no such thing as comp
8 time for regular -- for not overtime, is there?

9 MR. FLEMING: No, there's not.

10 QUESTION: I want to go back to your answer to
11 Justice Stevens' question. If I understand it correctly,
12 what this case boils down to is this.

13 If you reduce hours on a regular basis, and you
14 also choose to cash out a portion of the accumulated time
15 every week, no problem, no argument, but if you do it on
16 an irregular basis, if you make a judgment that the fire
17 department, sheriff's department says, gee whiz, next week
18 we haven't got much process to serve, so I think we'll
19 make so-and-so take Wednesday afternoon off, not a
20 regularly scheduled thing every week, an irregular
21 judgment from time to time, that's what we're fighting
22 about?

23 MR. FLEMING: I don't want to state the
24 petitioner's position, but --

25 QUESTION: That's what you think we're fighting

1 about?

2 MR. FLEMING: Yes. Well --

3 QUESTION: It's not even as substantial as that.

4 You could, on an irregular basis, say we have so many --
5 so few processes to serve next week, you know, Jones, take
6 next Wednesday off.

7 MR. FLEMING: Yes.

8 QUESTION: Right? And then make the decision to
9 pay Jones -- pay Jones' comp time down.

10 MR. FLEMING: If Jones didn't have any accrued
11 compensatory hours we could do that. He gets nothing.

12 QUESTION: So you don't -- it really doesn't --
13 it doesn't make any difference, and that leaves me in
14 something of a quandary, whether the fact that it doesn't
15 make any difference means that we should find for your
16 opponent, because you can do what you want to do anyway
17 very easily, or the fact that it doesn't make any
18 difference should make me wonder why it should be
19 prohibited to do it the more honest way by the Fair Labor
20 Standards Act, why --

21 MR. FLEMING: Well --

22 QUESTION: I don't know which resolution that
23 leaves you with.

24 MR. FLEMING: See, Justice Scalia, in looking at
25 the Fair Labor Standards Act, there's nothing in there

1 that prohibits us from doing this.

2 QUESTION: But it's symmetry.

3 MR. FLEMING: Well, it's symmetry --

4 QUESTION: You see, basically the statute says,
5 we prefer money. You work overtime, we'll give you money.
6 Now, you work overtime, you get the money. Now, if you
7 agree to take the comp time, that's fine, and that kind of
8 idea, that it's money or you get their agreement -- it
9 says its money and they get their agreement, they get the
10 comp time. It says it's money, or you get the agreement
11 if you want to force them to take the comp time rather
12 than wait till the end and get the cash, all right. I
13 mean, it's symmetry.

14 MR. FLEMING: It's symmetry, but if you go back
15 to what Justice Scalia said at the very beginning of the
16 argument, was that the purpose of these amendments in the
17 first place was to help out the governmental entities so
18 they can manage their budgets and wouldn't have to pay
19 this overtime in cash, and it was expected that the
20 employees would use the compensatory time, and not
21 expected that they would bank it --

22 QUESTION: I don't see why most of them don't,
23 to tell you the truth. I mean, why are they going to wait
24 around for 20 years and cashing it out, instead of --
25 don't most of them?

1 MR. FLEMING: Well, if they don't do it --

2 QUESTION: Yes.

3 MR. FLEMING: -- okay, and we get to the
4 position where they're reaching the maximum level and the
5 Government's going to have to start paying time and a half
6 in cash, then a fair reading of the --

7 QUESTION: Do we know any facts here, by the
8 way, what actually happens?

9 MR. FLEMING: There's nothing in the
10 stipulation, which is basically the record, as to exactly
11 how many this occurred would amount to the --

12 QUESTION: It is not an unknown phenomenon in
13 the Federal service for some people to save up sick time,
14 which they're entitled to be compensated for at the end of
15 their service, and it was not an unheard-of practice for
16 people to save up vacation time, which is why some
17 employers require you to take your vacation, because
18 people would work the whole year and then, you know, save
19 up all their vacation time, retire a year earlier. I
20 don't think it's at all fanciful to think that people
21 would bank this stuff.

22 QUESTION: What about the other -- sorry. Did
23 you want to answer that? Go ahead.

24 MR. FLEMING: Oh, I agree that -- I mean, it's
25 easy to see that people will do it, but under the act and

1 the '85 amendments it was expected that people were going
2 to use it, and that was their concern, is that the
3 employees have the time, and the Fair Labor Standards Act
4 makes sure that people aren't overworked, without getting
5 paid time and a half for it. It's not to make sure they
6 get to work 40 hours.

7 QUESTION: Could you explain something else to
8 me? I think we understand now the 30-hour -- you can make
9 them work 30 hours a week, and pay them the extra 10 even
10 if they don't want that. How is it that you are in fact
11 compelling them to use their comp time if it's not by that
12 example? What do you do to them when they get 220 hours,
13 and they're getting close to 240?

14 MR. FLEMING: That --

15 QUESTION: How do you -- what is the arrangement
16 which makes the expend their comp time?

17 MR. FLEMING: They're told to do it.

18 QUESTION: They're told --

19 MR. FLEMING: That is how we're doing it.

20 QUESTION: Pardon me?

21 MR. FLEMING: That is how we were doing it.

22 QUESTION: You make them work 30 hours a week
23 instead of 40?

24 MR. FLEMING: And 30's just an example, but
25 it's, they're going to take the time off --

1 QUESTION: Short week.

2 MR. FLEMING: And then we're going to cash you
3 out under the act, some of your hours, to make sure you
4 get a full paycheck.

5 QUESTION: I see.

6 QUESTION: So they get the same paycheck that
7 they would if they had worked the regular hours?

8 MR. FLEMING: They get the same paycheck, but
9 they haven't had -- they've got -- the hours that are
10 cashed out they accumulated at time and a half anyway, so
11 that it's for a less amount of work, so they do get the
12 same pay.

13 QUESTION: But you require -- I mean, you
14 require them to give you a slip of paper saying, I choose
15 to take my comp time, or something like that? No? You
16 just say, you are taking your comp time?

17 MR. FLEMING: They are asked to start reducing
18 it voluntarily.

19 QUESTION: Right.

20 MR. FLEMING: Just under the stipulation. If
21 they -- and within a reasonable time. If they don't do
22 it --

23 QUESTION: If they don't do it, then what?

24 MR. FLEMING: Then the supervisor can order them
25 to do it, and try and -- and still work with them to try

1 to reach mutually agreeable times, but the effect is an
2 order to do it.

3 QUESTION: Well, to the extent you're talking
4 now beyond the stipulation the record simply isn't
5 developed, I suppose. Do you feel you can speak for every
6 division of the county government on this, that this is
7 exactly how they do it?

8 MR. FLEMING: No, just as to the Sheriff's
9 Department, which is the defendant in the case.

10 QUESTION: The Sheriff's Department is the only
11 defendant in the case?

12 MR. FLEMING: The county is a defendant as a
13 result of the Sheriff's Department.

14 QUESTION: All that's being challenged are the
15 practices in the Sheriff's Department?

16 MR. FLEMING: Yes.

17 QUESTION: If it's proper for you to do what we
18 have been assuming in these hypotheticals you could do,
19 why does the statute place a cap on the amount of comp
20 time that can be accumulated? There's absolutely no need
21 to do that. You and other employees can -- employers can
22 protect yourselves. The cap implies to me that you don't
23 have the autonomy that we have been assuming here.

24 MR. FLEMING: The cap, I believe, is for those
25 employers that just don't -- can't or won't let the

1 employees take the time off, and I think the concerns when
2 these enactments of '85 went into effect was that the
3 employees are able to use the time, are able to take the
4 time off. On the other side --

5 QUESTION: So they're protective devices so that
6 we do not build -- the employee does not build up so much
7 comp time that the employer in effect is not, at the end
8 of the road, going to be able to pay it. It's for the
9 protection of the employee, you're saying.

10 MR. FLEMING: It's a balancing. An employee's
11 protection is this, is that in the statute, as was
12 mentioned, the employee is allowed to use it within a
13 reasonable time if there isn't an undue disruption, and so
14 the focus there is on the employee's ability to use the
15 time.

16 On the other side, the employer's controls over
17 this, since it is a balance, is the employer's ability to
18 cash them out.

19 And I might add that on the ability of the
20 employers to cash them out, it's an important distinction,
21 because it is -- that division gives the employers
22 control, and the petitioners have maintained well, this
23 comp time accumulation is under the sole control of the
24 employees, and there certainly would be circumstances
25 where the employers would choose to cash out the comp

1 time, and it would be contrary to what the employees
2 wished to do, such as if they wanted to stop them from
3 using it at a certain time of the year, or if there had
4 been an increase, county-wide budget increase in pay, the
5 employer, the Department could cash them out before that
6 goes into effect.

7 That hasn't been done in this case, but in --
8 that certainly reflects that the act provides the employer
9 with a certain degree of control over these comp time
10 hours, and it's not within the sole discretion of --

11 QUESTION: Well, why doesn't that just
12 underscore that the default rule should be, you pay them,
13 not, you set the work rules any way you like? I mean, the
14 statute says, there's an exception, but the main rule is
15 time and a half. If the main rule is time and a half,
16 then it's perfectly logical for the statute to say, you
17 can -- employer, you can always pay time and a half. You
18 can do the other if the employees agree to it, but you can
19 always go down to the bedrock rule under the Fair Labor
20 Standards Act, which is time and a half.

21 MR. FLEMING: Yes, they could, once they go over
22 the 240. Yes, Justice Ginsburg, that's correct, you could
23 do that.

24 QUESTION: But you could cash out the credits at
25 any time, right?

1 MR. FLEMING: Yes, that's correct.

2 QUESTION: And so it does suggest to me that
3 this is a statute where the main rule is time and a half,
4 but you have an exception. Usually we construe exceptions
5 narrowly, not broadly, and if Congress' idea is, let the
6 workers know what you're doing, then it's just a question
7 of notice, and you didn't give them notice of anything
8 other than you were going to install comp time.

9 You didn't give them any notice that, quite
10 contrary to what the statute indicates, that is, they may
11 request it and the employer has to give it to them if it
12 won't unduly disrupt. It just doesn't seem -- the statute
13 doesn't seem to have space for a rule that says, and
14 without prior notice you can require them to take it.

15 MR. FLEMING: It doesn't, but I don't think it's
16 necessary, because I don't think that scheduling less than
17 40 hours a week is within the purview of the Fair Labor
18 Standards Act. Cashing them out at any time is,
19 specifically, and so when we have the comp time agreement,
20 which we have with the employees, it's to use the comp
21 time, and then it's in accordance with the Fair Labor
22 Standards Act, which it says, and so if we do that,
23 though, within the Fair Labor Standards Act we can cash
24 them out.

25 QUESTION: Now, Mr. Fleming, your opponent says

1 he agrees with Judge Dennis' view that neither side was
2 entitled to summary judgment, and that you go back to the
3 district court for development of a factual record. Do
4 you disagree with that?

5 MR. FLEMING: No, I -- yes, I disagree with
6 that, Mr. Chief Justice.

7 QUESTION: You think that your side was entitled
8 to summary -- that the county was entitled to summary
9 judgment, as the Fifth Circuit said?

10 MR. FLEMING: Absolutely.

11 On the deference issue, which was raised briefly
12 by the opposing counsel, I would just say this. The main
13 case, of course, is Chevron, and the standard is if
14 Congress has not directly spoke on the precise question --
15 excuse me. If the intent of Congress is clear, it's the
16 end of the matter, and I think the intent is clear, if you
17 look at what we're doing. Shortening the work week is not
18 within the Fair Labor Standards Act. Cashing them out is.
19 Clearly, we can do it.

20 And as far as whether you use Chevron or you use
21 Skidmore, Skidmore certainly is a lesser standard, but you
22 can see in the regulations promulgated by the Secretary it
23 cites Skidmore as to -- that the regulation --

24 QUESTION: Wouldn't it be complicated -- I
25 understand you don't have that, but supposing your

1 employees all had a contract that we'll work 40 hours a
2 week. Then what would you do?

3 MR. FLEMING: Then I think that they would be
4 bound by contract law for that.

5 QUESTION: So they couldn't -- then you could
6 not compel them to take the contract --

7 MR. FLEMING: But their right would not arise
8 from the Fair Labor Standards Act. It would be under the
9 contract.

10 QUESTION: It would be based on the contract,
11 okay.

12 MR. FLEMING: Yes, Your Honor.

13 Well --

14 QUESTION: You don't have to use all your time.

15 (Laughter.)

16 MR. FLEMING: I was going to invite some more
17 questions, but I will -- if there aren't any more
18 questions, Mr. Chief Justice, I'll just stop there. Thank
19 you.

20 CHIEF JUSTICE REHNQUIST: Thank you,
21 Mr. Fleming. The case is submitted.

22 (Whereupon, at 12:15 p.m., the case in the
23 above-entitled matter was submitted.)

24

25