

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X
UNITED STATES, :
Petitioner :
v. : No. 01-463
FIOR D'ITALIA, INC. :
- - - - -X

Washington, D.C.
Monday, April 22, 2002

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

APPEARANCES:
EILEEN J. O'CONNOR, ESQ., Assistant Attorney General,
Department of Justice, Washington, D.C.; on behalf of
the Petitioner.
TRACY J. POWER, ESQ., Washington, D.C.; on behalf of the
Respondent.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

	PAGE
ORAL ARGUMENT OF EILEEN J. O'CONNOR, ESQ. On behalf of the Petitioner	3
ORAL ARGUMENT OF TRACY J. POWER, ESQ. On behalf of the Respondent	27
REBUTTAL ARGUMENT OF EILEEN J. O'CONNOR, ESQ. On behalf of the Petitioner	51

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

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 01-463, United States v. Fior
5 D'Italia. Ms. O'Connor..

6 ORAL ARGUMENT OF EILEEN J. O'CONNOR

7 ON BEHALF OF THE PETITIONER

8 MS. O'CONNOR: Mr. Chief Justice, and may it
9 please the Court:

10 This case is about the authority of the
11 Commissioner of Internal Revenue to assess FICA taxes that
12 Congress has imposed on employers. It also involves the
13 well-established principle of tax litigation. It involves
14 two key sections of the Internal Revenue Code and how they
15 relate to each other, and it involves the evidentiary
16 value of assessment in tax litigation.

17 The first of the key sections is section 6201.
18 It appears at page 62a of the appendix to our petition.
19 It authorizes and requires the Secretary of the Treasury
20 to make inquiries, determinations, and assessments of all
21 taxes imposed by the Internal Revenue Code. The second
22 key section is 3111. It appears at page 55a of the
23 appendix to our petition. This section imposes a tax on
24 employers. The tax is measured by the wages they pay or
25 are deemed to have paid their employees.

1 QUESTION: Which section is this, Ms. O'Connor?

2 I'm --

3 MS. O'CONNOR: Section 3111 at page 55a of our
4 appendix to the petition.

5 QUESTION: Thank you.

6 MS. O'CONNOR: This is the tax that imposes --
7 this is the provision that imposes a tax on the wages
8 employers pay or are deemed to have paid their employees.

9 The question this case presents is how the
10 commissioner carries out his obligation under 6201 to
11 assess the tax that is imposed by section 3111. The tax
12 is --

13 QUESTION: Ms. O'Connor, let me tell you what
14 troubles me a little about the Government's position in
15 the case, and I hope you will address this. How can an
16 employer ever challenge effectively an assessment made
17 under the position that you approach, because the normal
18 burden of proof in a tax refund case normally requires the
19 employer to show exactly how much money was owed, and I
20 don't see how that would work in this context.

21 MS. O'CONNOR: Exactly, Your Honor. The
22 Congress has recognized the difficulty that employers have
23 in this regard, and that is the reason there are several
24 of the other sections that we will discussing this
25 morning. Section 6205, for example, is mentioned in your

1 materials. That is a provision that permits employers on
2 their own, if they discover an error, to correct it later
3 and have no interest assessed. That's a very unusual
4 provision, and it relates specifically to the complexity
5 of employment taxes and their administration.

6 QUESTION: Well, would that error ever be
7 anything more than a disparity between what the employee
8 reported and what the employer reported?

9 MS. O'CONNOR: Would what, Your Honor?

10 QUESTION: How -- I mean, the error that that
11 section -- I'm wondering what the error is that that
12 section contemplates, and I can see it's application,
13 let's say, if the employer simply added up the employee's
14 reports wrong and got the wrong figure. Under what other
15 circumstances would it apply short of the moment at which
16 the Government makes the assessment which is in question
17 here?

18 MS. O'CONNOR: It could also apply just -- and
19 6205 is not specific to restaurants or food or beverage
20 establishments or tips at all, because another common
21 error that employers can sometimes make is
22 mischaracterizing a worker as an independent contractor,
23 for example, and upon determining later that the person is
24 actually an employee and they should be withholding
25 FICA --

1 QUESTION: Well, let me ask the question in
2 another way. How would it -- how could it apply in this
3 situation? In other words, as I understand it -- I mean,
4 this is -- I didn't mean to side-track you from Justice
5 O'Connor's question, but I'll raise the thing that bothers
6 me. As I understand it, what the employer is obligated to
7 report is the sum total of all the reports that the
8 employees give to the employer of tip income.

9 MS. O'CONNOR: That's right, Your Honor.

10 QUESTION: And I'll assume for the sake of the
11 question that a given employer has done that.

12 MS. O'CONNOR: Mm-hmm.

13 QUESTION: I also assume that if you are
14 correct, that employer has this possibility hanging over
15 it that the IRS is going to make this kind of an
16 assessment.

17 MS. O'CONNOR: That --

18 QUESTION: Is there any -- my question is, is
19 there any way that the employer can anticipate this kind
20 of an assessment in order at least to avoid the interest
21 running under this section?

22 MS. O'CONNOR: Absolutely. There are many
23 different ways, Your Honor, and this case provides a very
24 good example. Employees are required to report on a
25 monthly basis to employers. You can see from the forms

1 8027, which are at pages 38 and 39 of the joint appendix,
2 those are the forms that this restaurant filed for 1991
3 and 1992.

4 QUESTION: And they were all correct, I take it.

5 MS. O'CONNOR: Right, those forms were
6 absolutely correct.

7 You will also note at the top of the page it
8 says that it is an information report, because this is
9 information that Congress has required food and beverage
10 establishments to provide to the Internal Revenue Service
11 exactly for a purpose such as this.

12 Now, the annual -- the information report at
13 pages 38 and 39 is an annual report that the food and
14 beverage establishment provides to the Internal Revenue
15 Service, but employees provide reports to employers at
16 least monthly. You will see on the forms 8027 that 90
17 percent of the sales of this restaurant were paid for by
18 credit card, so every single month this restaurant could
19 have compared the tips that employees were reporting with
20 the tips that they saw were being charged on credit cards,
21 and as any business owner would do when faced with a
22 liability that could occur down the road, you're going to
23 set up a reserve for it.

24 You know you have got your annual insurance
25 premium due next January. You start setting aside for it.

1 QUESTION: He may set up -- the employer may set
2 up a reserve, but as I understand it the employer is not
3 obligated, in effect, to withhold upon himself, is not
4 obligated to pay the tax on it until the assessment comes,
5 because under the IRS' instructions the employer pays the
6 tax on the amounts reported to the employer even if he
7 knows they're wrong.

8 MS. O'CONNOR: That's exactly right, and that's
9 another indication of the fact that Congress realized that
10 this was going to be a difficult provision for employers
11 to enact.

12 QUESTION: Well, what would he do --

13 MS. O'CONNOR: 31 --

14 QUESTION: What would he do to anticipate it?
15 Would he say, I'm paying you another \$10,000, I don't
16 happen to owe you that in tax now, I paid what the law
17 requires me to pay, and you haven't assessed anything
18 else, but here's another \$10,000? I mean, is that what
19 you're anticipating?

20 MS. O'CONNOR: Absolutely not, Your Honor. In
21 fact, it is the rare taxpayer who seeks to pay his tax
22 before it's called for.

23 (Laughter.)

24 QUESTION: All right, then how does the taxpayer
25 take advantage of the provision that allows him to make a

1 correction and avoid the interest in this case?

2 MS. O'CONNOR: Well, one of the things that is
3 somewhat troublesome about some of the briefs in front of
4 you from the other side is that the other side is looking
5 at this as though it was a penalty, and it's not a
6 penalty, it's merely a tax. In fact, there specifically
7 are no penalties. Let me point out --

8 QUESTION: I will assume -- no, I will assume
9 it's no penalty. I just want to know how it works in this
10 situation. He doesn't owe any tax --

11 MS. O'CONNOR: Right.

12 QUESTION: -- based on what he has to report to
13 you.

14 MS. O'CONNOR: Right.

15 QUESTION: You haven't assessed anything yet.
16 How can he possibly take advantage of the provision that
17 allows him to make a correction, to pay in accordance with
18 that correction, and to avoid any interest that he would
19 otherwise be liable for? How can he take advantage of it?

20 MS. O'CONNOR: Well, let me point out a couple
21 of things from your question, Justice Souter. First, let
22 me direct you to 3121(q). Provisions of the Internal
23 Revenue Code provide a couple of things. They provide
24 what is tax, how is the tax measured, when is it
25 measured --

1 QUESTION: Where is 2131(q)?

2 MS. O'CONNOR: 3121(q) is in our joint appendix
3 here -- oh, no, no, it's in the petition. Thank you.
4 3121(q) is at 58(a). Thank you very much.

5 QUESTION: General O'Connor, it might help if
6 you answered specifically whether interest does run on the
7 period between the employer paying what the employee's
8 reports call for and the assessment at a higher amount.

9 MS. O'CONNOR: Thank you, Justice Ginsburg. No,
10 there is no interest that runs, and that's why I wanted
11 you to look at 3121(q) in particular.

12 QUESTION: Then how does this section have an
13 application here? You say, well, this mitigates it,
14 and --

15 MS. O'CONNOR: No, I'm sorry --

16 QUESTION: -- it seems to me that about all the
17 employer can do is pay immediately at the moment of your
18 assessment and therefore no interest will run.

19 MS. O'CONNOR: No, I did not mean to suggest
20 that 6205 applied to this assessment, and in fact it
21 doesn't. 6205 applies when the employer himself discovers
22 an error and corrects it at the next available
23 opportunity.

24 QUESTION: So it wouldn't apply in these
25 circumstances.

1 MS. O'CONNOR: It doesn't need to, because under
2 3121(q) -- it's a very interesting provision. 3121
3 provides definitions, that's all. It resides in the
4 subchapter of the Internal Revenue Code that provides for
5 these employment taxes, and (q) is the definitional
6 provision that says that tips are wages. It also tells
7 you when the tips are wages.

8 For the purposes of the employer FICA 3121(q)
9 tells you that the wages are deemed to have been paid when
10 the employee reports them or if the employer -- employee
11 doesn't report them, they are wages deemed to be paid when
12 the IRS issues notice of demand, so until the IRS notifies
13 the restaurant that there is an additional FICA tax due,
14 there is no interest or penalty.

15 QUESTION: Right, but at that point there is,
16 and if you would come back to Justice O'Connor's question,
17 which was, how could the employer ever know that there was
18 a mistake in the assessment, and you said, well, as soon
19 as he knows it, he can come forward with the additional
20 amount and there won't be any penalty, but how does he
21 know it? That's the problem.

22 MS. O'CONNOR: He knows it because the employees
23 are reporting on a monthly basis, and in this case there
24 was clearly -- we have \$120,000 of unreported credit card
25 tips in each of the 2 years involved here, \$120,000 in

1 unreported credit card tips. Those reports were coming in
2 every month. The restaurant has clear notice --

3 QUESTION: But your assessment is for more than
4 that. Your assessment assumed a certain unreported amount
5 of cash tips as well. Now, how is the reporter -- how is
6 the employer going to know whether that's erroneous or
7 not?

8 MS. O'CONNOR: The same method that he would use
9 to make any other determination. For example, he knows by
10 the basis of the report that all credit card tips are not
11 being reported.

12 QUESTION: But the burden is on him. The burden
13 is on him to show what the proper amount was. I mean, IRS
14 comes up with a guess based on, well, we assume that the
15 same amount weren't reported for cash tips as weren't
16 reported for credit card tips, pay up.

17 Now, how is he going to prove that there was a
18 different amount for --

19 MS. O'CONNOR: You're exactly right, Justice
20 Scalia, the burden is on the taxpayer, and in this case
21 the taxpayer conceded the entire amount of the judgment.
22 Page 35 of the joint appendix --

23 QUESTION: But the burden is on the taxpayer to
24 give information as to which the taxpayer is not in the
25 best position to know, and --

1 MS. O'CONNOR: That's true, Justice Kennedy.

2 QUESTION: -- Justice O'Connor's original
3 question was, how is the employer supposed to know, and
4 you say, well, if he doesn't know he can amend later.

5 The whole question is, and the gravamen of the
6 argument put forth by the taxpayer here is that the
7 assessment should be on the person, or on the entity that
8 has the information, and here your information is as good
9 as the employer's, and you have the ability to do what the
10 employer can't, i.e., subpoena the individual records of
11 the employees.

12 MS. O'CONNOR: Actually, not all of that is
13 true, Justice Kennedy. The employer, if there were a
14 dispute between the employer and the employee the employer
15 certainly could subpoena records of the employee in a
16 matter such as that, and respondent, as you say, does --

17 QUESTION: How does he do that, sue the
18 employee?

19 MS. O'CONNOR: Oh, if -- yes, if there were a
20 dispute between the two over any matter the employer
21 certainly could.

22 QUESTION: You're talking about a tax court or a
23 district court, or --

24 MS. O'CONNOR: No, just as a general
25 proposition. Just as a general proposition. In this

1 case --

2 QUESTION: Well, as a general proposition I
3 don't think the employer can subpoena the employee. I
4 mean, you have to have a legal proceeding, don't you?

5 MS. O'CONNOR: Oh, exactly. That's what I mean,
6 Your Honor. If there were some other legal proceeding --

7 QUESTION: Well, but I mean, that's not going to
8 work. You're suggesting that he ought to fire the
9 employee and then be subjected to a wrongful discharge
10 suit and then subpoena the information so that he can give
11 it to you. Why don't you just ask for it?

12 MS. O'CONNOR: Well, actually, there is no
13 evidence in the record on whether the individual employees
14 were audited or not. I saw that in the Ninth Circuit
15 opinion, TRAC is asserted on that point.

16 QUESTION: But the point is, you have the
17 capacity to do it and the employee doesn't.

18 MS. O'CONNOR: That's true, Justice Kennedy.
19 The amount of assessment, though, I think it's very
20 important to focus on the fact that in this case, as you
21 can see at page 35 of the joint appendix, the taxpayer
22 here conceded the reasonableness of the assessment,
23 conceded it.

24 QUESTION: Then that's just luck, because I
25 thought Justice O'Connor's original question was, look, we

1 can all do this, it's so simple. You multiply 14.3
2 percent times the gross receipts of every restaurant in
3 the country, all right. Now, I thought her question was,
4 what is the restaurant owner supposed to do to show that
5 that's inaccurate, what can he do, and so far my own
6 conclusion listening to you is, he can write the check.

7 MS. O'CONNOR: I'm sorry, I didn't mean to --

8 QUESTION: Now, is there anything else -- is
9 there anything else that this restaurant owner has it in
10 his power to do, other than write the check, and not some
11 theoretical thing. What I'm interested in is the
12 practicality of it.

13 MS. O'CONNOR: Absolutely, Your Honor --

14 QUESTION: What is that?

15 MS. O'CONNOR: -- and I don't mean to be
16 avoiding the question. Let me point to another line on
17 the form, 8027. You'll notice there is a line that refers
18 to 8 percent, and then there's a blank and it says, or
19 lower percentage. The reason for that is that if a
20 restaurant employees are reporting tips that are less than
21 8 percent of gross sales, that could raise a red flag that
22 maybe the restaurant worker --

23 QUESTION: It's not about 8 percent. Everybody
24 knows all these minimums. This is about people who are
25 earning more than the \$20 in tips per year.

1 MS. O'CONNOR: Right, per month.

2 QUESTION: It is about people -- per month, or
3 whatever.

4 MS. O'CONNOR: Right.

5 QUESTION: It is about people who satisfy all
6 these other minimums. It is not about people -- they can
7 even get a tax credit for this.

8 MS. O'CONNOR: Right.

9 QUESTION: I'll save that question.

10 MS. O'CONNOR: Right.

11 QUESTION: I'm interested in the answer to
12 Justice O'Connor's question in what I'd call the mind run,
13 mainstream, basic, typical situation, and that is, what is
14 that answer? So far I'm concluding he can do nothing.

15 MS. O'CONNOR: No.

16 QUESTION: Tell me the answer.

17 MS. O'CONNOR: What the restaurant can do is
18 show evidence that would tend to determine, or help
19 determine the amount of the tip, how many -- what kind of
20 a restaurant you have, how upscale it is, where it's
21 located, the kind of meals you serve -- in fact, the IRS
22 has a procedure where restaurants can show all that
23 information, a sample menu to get below the 8 percent.

24 QUESTION: And then I'm not being clear.

25 MS. O'CONNOR: Right.

1 QUESTION: I think in typical cases like this
2 one, the restaurant will have paid more -- they will have
3 assumed that it is more than 8 percent. They wrote a
4 check for -- they assumed it was \$200,000. That's going
5 to be more than 8 percent of gross receipts.

6 MS. O'CONNOR: Right.

7 QUESTION: All right. Now, we're only talking
8 about an area that's well above that, and in respect to
9 the area well above that. Here it happened to be between
10 \$200,000 and about \$350,000. In respect to that extra
11 \$150,000, you come in and say, we're sure that it was
12 earned in tips, and now here's what you did. You
13 multiplied gross receipts by 14.3 percent, and you
14 subtracted the \$200,000, okay. I'm saying anyone can do
15 that, and I thought Justice O'Connor's question was, you
16 are a restaurant owner. You are faced with this. How do
17 you show that it isn't so?

18 MS. O'CONNOR: The taxpayer here had the
19 opportunity to do that. One of the things that you --

20 QUESTION: Well, but will you acknowledge at
21 least that it's virtually impossible for the taxpayer to
22 get that information? I mean, the taxpayer has the
23 reports from the employees, and they're false.

24 MS. O'CONNOR: What --

25 QUESTION: How, as a practical matter, is the

1 taxpayer going to establish there's something different?
2 I mean, we know in terms of generalities, we're told that
3 there are less tips paid, or bills paid in cash than by
4 credit card.

5 MS. O'CONNOR: That has been an insertion that
6 is unproven in the record.

7 QUESTION: So you don't accept that as proof.

8 MS. O'CONNOR: It may or may not be true.

9 QUESTION: So what's the employer going to do,
10 then?

11 MS. O'CONNOR: It may or may not be true.

12 QUESTION: Let me ask you one other thing.

13 There's a so-called TRAC system, right, that Congress
14 passed to address this very problem. What percentage of
15 restaurants have used TRAC? Does the record tell us that?

16 MS. O'CONNOR: No, the record doesn't tell us.
17 I understand from news reports that increasing numbers of
18 employers are entering into the tip rate alternative
19 commitment, and that is an alternative to justifying or
20 trying to establish -- in this case, though, let me point
21 out that at any point during the IRS' examination the
22 taxpayer could have shown, could have produced information
23 that would have reduced the number that you see on Exhibit
24 A. They never did that --

25 QUESTION: But where would he get --

1 MS. O'CONNOR: -- and they didn't do it in the
2 district court, either.

3 QUESTION: Where would the taxpayer get the
4 information? The only thing the taxpayer has got are the
5 employee's returns to the taxpayer and your assessment.
6 Where is the taxpayer going to get the information that
7 would allow it to do what you say in theory it could do?

8 MS. O'CONNOR: Well, magically, since its
9 concession in the district court, at the appellate level
10 and again in its briefs before this Court, the respondent
11 has come up with all sorts of ideas that might challenge
12 the amount of the assessment. Even if the --

13 QUESTION: But there is a stipulation in this
14 case -- whatever may be in the next case, there is a
15 stipulation in this case that they are not contesting the
16 method. I have a question that I think Justice Breyer has
17 said he was reserving, and that is, I don't understand
18 what's in this for the revenue, because of the -- the
19 provision you haven't mentioned, 45B gives the restaurant
20 a credit against income tax, dollar for dollar, for the
21 FICA tax, and let's assume we have employers, most of them
22 are paying at least the minimum wage, what gain is there
23 to the revenue whichever way this comes out?

24 MS. O'CONNOR: We don't know whether the
25 taxpayer here was paying the minimum wage, because none of

1 that was in the record, because the assessment amount was
2 conceded. The 45B credit, as you point out, is available
3 only for tips that are not used by the employer to satisfy
4 his minimum wage obligations, yet it's not a complete wash
5 to the Treasury, however, because you still have the FICA
6 tax being paid in and an income tax credit being given, so
7 it's the trust fund accounting that would have a problem
8 if you look at it as a complete offset. From the
9 Government side it's not a complete offset at all.

10 Let me emphasize that the concession in this
11 case --

12 QUESTION: Excuse me, I didn't understand that.

13 MS. O'CONNOR: Yes.

14 QUESTION: Go over that again. What trust fund?

15 MS. O'CONNOR: The social security trust fund,
16 so to speak.

17 QUESTION: So to speak, yes.

18 (Laughter.)

19 MS. O'CONNOR: Well, it is a matter of
20 Government accounting. As a matter of Government
21 accounting.

22 QUESTION: It's a fantasy, isn't it? I mean, it
23 all goes into one pot, doesn't it?

24 MS. O'CONNOR: As a matter of Government
25 accounting, there are funds that are --

1 QUESTION: Purely as an accounting matter it
2 makes a difference, is that it?

3 MS. O'CONNOR: As a Government funding matter.
4 As a Government funding matter.

5 QUESTION: From the point of view of the
6 taxpayer it makes no difference, I take it?

7 MS. O'CONNOR: From the point of view of the
8 taxpayer, it will make a difference if they use tips to
9 satisfy their minimum wage requirement, and on this record
10 we don't know.

11 QUESTION: And if they don't, it won't make
12 that -- a difference.

13 MS. O'CONNOR: It will -- well, no, that's not
14 entirely true, but it's an optional credit. The employer
15 can prove his eligibility for the credit and claim it, or
16 rather than claiming the deduction, they can claim a tax
17 deduction, which they might prefer to do.

18 QUESTION: What happens if the employer doesn't
19 have enough, I guess, gross income to offset? Then he has
20 to be stuck with the difference, right?

21 MS. O'CONNOR: Well, it is a nonrefundable
22 credit, and that means you can either use the credit as an
23 offset to your income tax, and what you're suggesting is
24 they don't have any income tax. That kind of employer
25 might prefer to take it as a deduction, which would create

1 a net operating loss which could carry forward and benefit
2 a future year.

3 QUESTION: But the question -- and to overstate
4 the point -- I'm not buying into this argument at the
5 moment, but I do want to hear your response. From their
6 briefs I have the impression that it doesn't make a lot of
7 difference to the Government in this case. It would make
8 a lot of difference to the Government in the case of
9 restaurants that are losing money, in the case of
10 taxicabs, hairdressers, newspaper boys, and anyone else
11 who is in a business where people receive tips, and in
12 respect to those kinds of cases it gives the Government a
13 weapon.

14 In this case, it's being used to force them into
15 a TRAC program that they don't want to enter. In some
16 other case, to have a kind of threat that you could make
17 to people because, of course, a lot of income is
18 underreported through tips, and you'd always be able to go
19 out and assess more.

20 Now, you're asking us to interpret some very
21 broad language as saying Congress has given you authority
22 to do a particular thing. They're saying, don't give them
23 that authority. Congress would never have intended the
24 IRS to do what I've just described.

25 Now, I want to be sure you have a clear

1 opportunity to answer that, because I want to hear what
2 the answer is.

3 MS. O'CONNOR: Congress had the opportunity to
4 say that no, the IRS does not have the authority to do
5 what has been referred to here as aggregate assessment,
6 and I might just point out here that rather than aggregate
7 assessments, which is what the respondent calls what has
8 happened here, respondent would prefer the individual
9 audits and aggregating the estimates, because certainly
10 they would be estimates if they were done on the basis of
11 the individual waiter's reports also.

12 But in 1998, when Congress said that the IRS
13 cannot use a threat of an assessment like this to force
14 restaurants into a TRAC, it clearly had the opportunity to
15 say, and besides, you don't have the authority to do these
16 estimates anyway, these assessments anyway. The authority
17 is very clear, and the only thing that the respondent has
18 ever argued here is that the amount might be wrong, and
19 they can't tell you exactly what it is, but there is no
20 rule that an assessment has to be entirely accurate or
21 precise. The assessment authority requires inquiries and
22 determinations, and that's what's happened here.

23 QUESTION: The assessment is presumptively
24 correct, isn't it, under the statute?

25 MS. O'CONNOR: Not under the statute, Justice

1 Rehnquist, Chief Justice Rehnquist, but rather under the
2 laws that this Court has observed. In United States v.
3 Janis, this Court commented on the presumed correctness of
4 assessments and their evidentiary value in tax litigation.

5 QUESTION: Well, you take the position it is
6 presumed to be correct, don't you?

7 MS. O'CONNOR: It is -- United States v. Janis
8 stands for the proposition that an assessment is valid
9 unless it is without any foundation. Clearly, here, when
10 the assessment is based on the respondent's own report,
11 and more than three-quarters of the assessment is on the
12 amounts that are clearly known to be true, clearly this
13 foundation, this assessment has a foundation. Thereafter,
14 once you've established that the assessment is not
15 invalid, that it has a foundation at all, then you start
16 talking about the amount.

17 QUESTION: Well, I wonder --

18 QUESTION: No, please, go ahead.

19 QUESTION: Well, it has a foundation if three-
20 quarters of it is true?

21 MS. O'CONNOR: Pardon me?

22 QUESTION: It has a foundation if three-quarters
23 of it is true?

24 MS. O'CONNOR: Oh, no.

25 QUESTION: Is that what having a foundation

1 means?

2 MS. O'CONNOR: The test under Janis I think is
3 much, much lower than that. It's -- an assessment is
4 valid if it has any foundation at all --

5 QUESTION: So if --

6 MS. O'CONNOR: -- and clearly, this one has a
7 foundation.

8 QUESTION: -- 1 penny on the dollar is accurate,
9 that -- it has a foundation? Is that what it means? It
10 couldn't mean that.

11 MS. O'CONNOR: Oh, I think that would be pushing
12 it a little far, Your Honor, and that's not what United
13 States v. Janis requires.

14 QUESTION: I would think it would mean that
15 there's some reason to believe the full amount is
16 accurate, not that three-quarters of it is accurate.

17 MS. O'CONNOR: That's not what this Court has
18 held, particularly United States v. Janis, where in fact
19 the assessment there was based on an estimate of wage-
20 earning practice. By looking at 5 days' worth of wages
21 the commission assessed on 77 days worth of wages.

22 QUESTION: Sure, but doesn't the Janis rule
23 assume that the taxpayer is, in fact, in a position to
24 prove the correct figure if the assessment is wrong?

25 MS. O'CONNOR: Not necessarily, Your Honor, and

1 it is incumbent upon any taxpayer upon whom a tax is
2 imposed to maintain whatever books and records they can.

3 QUESTION: Exactly, and that comes back to the
4 question I've asked before. What can this taxpayer do?

5 MS. O'CONNOR: Well, the taxpayer is in a
6 business that requires a lot of things. There health,
7 safety, and sanitation regulations. There are also tax-
8 reporting regulations. You hire reliable people, you tell
9 them what the rules are, you remind them what the rules
10 are, and you facilitate their compliance, and that's what
11 the restaurant here needed to have done, and may even have
12 done. Since they didn't challenge the assessment or
13 amount of the assessment, I think we can assume that --

14 QUESTION: Well, short of the restaurant's
15 hiring someone to bird dog every single waiter and
16 waitress to see what, in fact, the tip was, I don't see
17 how the employer here could collect the information.

18 The gambler, sure, he can write it down in his
19 little book, but I don't see where the employer here is in
20 a position to get the figure to write down in a little
21 book, short of having a third person follow every --

22 MS. O'CONNOR: The waiter can also write down
23 his tips in a little book, and there are --

24 QUESTION: Sure, and the whole premise of the
25 problem is that the waiter is in fact not telling the

1 whole truth.

2 MS. O'CONNOR: That is why restaurants --

3 QUESTION: I mean, that's just really
4 impractical.

5 MS. O'CONNOR: -- every employer should hire
6 reliable people who they can trust to follow the rules.

7 (Laughter.)

8 MS. O'CONNOR: I'd like to reserve the balance
9 of my time for rebuttal.

10 QUESTION: Very well, Ms. O'Connor.

11 Ms. Power, we'll hear from you.

12 ORAL ARGUMENT OF TRACY J. POWER

13 ON BEHALF OF THE RESPONDENT

14 MS. POWER: May it please the Court, Your Honor:

15 Congress did not saddle the employer with a tax
16 while depriving him of any way to defend against it.

17 Congress did not require the employer to do what for 30
18 years it told him it was not required to do. This tax is
19 not authorized. Because it's not authorized, that affects
20 the burden of proof and the presumption of correctness.

21 I'd like to suggest an analogy. If Congress had
22 passed a tax on my chickens and the IRS came along and
23 said, we're imposing a tax on you, on your neighbor's
24 cows, and I said, but I don't owe a tax on my neighbor's
25 cows, and they in turn said, yes, well, what we did was,

1 we figured your neighbor had X number of acres and
2 therefore the average number of cows per acre is Y, and
3 you owe the tax on the cows, and I said, well, I'm not
4 going to fight that because I don't have any way to know
5 how many cows my neighbor had.

6 QUESTION: But can I just ask one question that
7 really puzzles me in this case?

8 (Laughter.)

9 QUESTION: I can't follow the cows and all --

10 (Laughter.)

11 MS. POWER: I understand.

12 QUESTION: But you did have records, written
13 records that showed that the actual amount of tips paid by
14 credit card and so forth to the people in question here
15 was substantially larger than you reported. Why shouldn't
16 that put you on notice that you owed a little money to the
17 Government?

18 MS. POWER: We do not know to what extent, if
19 any, those credit card tip amounts, or the amount on the
20 credit card tip slot on a credit card, was in fact
21 received by an employee, a tip received by an employee
22 that is wages subject to the act. We do not know what --

23 QUESTION: Well, but after those credit cards go
24 to the restaurant, doesn't the restaurant turn the cash
25 over to the employee?

1 MS. POWER: The restaurants handle it in a
2 variety of different ways. It could be as simple as an
3 employee at the end of the night starting to turn over all
4 the money he's collected during the night, first to
5 satisfy all the credit card bills, then to satisfy all of
6 the dupes for the food that he had with the balance
7 remaining in his pocket, which he then turns around and
8 kicks out to a whole host of other employees. We do --

9 QUESTION: But don't you know what the practice
10 is in your own restaurants?

11 MS. POWER: We would know what -- each
12 individual restaurant would know what is done in basic
13 practice in their restaurant, but how much, if any, of
14 that credit card amount was retained by any individual, we
15 do not know.

16 QUESTION: No, but what may -- I understand the
17 waiter may have split the tips with the busboy and so
18 forth and so on, but the total amount of tip on the credit
19 card slip was paid to some employee, was it not?

20 MS. POWER: Well, we don't even know whether
21 it's a tip. There are many reasons why it might not be a
22 tip.

23 QUESTION: But this is a particular restaurant.
24 I mean, it 's not as if we're talking about the world of
25 restaurants. Surely this particular restaurant knows.

1 MS. POWER: Would know whether that credit card
2 amount was, in fact, a tip? No. You could have well had
3 a circumstance --

4 QUESTION: You mean if it's shown on the credit
5 card --

6 QUESTION: As a tip --

7 QUESTION: -- as a tip -- I seem to recall
8 seeing a space --

9 QUESTION: Yes.

10 QUESTION: -- on restaurant charges --

11 (Laughter.)

12 MS. POWER: That's correct.

13 QUESTION: -- that says, tip, X amount. You
14 fill it in.

15 MS. POWER: And that's correct, and if I went in
16 and I didn't have any cash in my pocket and I said to the
17 waiter, you know, I'm going to leave some extra tip on
18 here, I need to pay for the valet when I leave, I'm going
19 to put \$5 extra on here, can you give me the cash -- yes,
20 it's possible that there's tips on there.

21 QUESTION: The question isn't possible. The
22 question is what's normal, and normal tip is tip, and I
23 don't understand the chickens and the cows exactly --

24 (Laughter.)

25 QUESTION: In my copy of the code here it

1 says -- it doesn't say -- it says the employer, there is
2 imposed on the employer an excise tax equal to 6.2 percent
3 of wages, and it says, including tips, so I don't see
4 how -- what your argument is that the tax isn't
5 authorized. Of course it's authorized.

6 MS. POWER: But it's wages of an individual
7 employee.

8 QUESTION: Yes, that's right, and the employer
9 has to --

10 MS. POWER: It's wages -- and they have, what
11 their assessment stands for is a tax on my gross tip
12 payroll. There has been no -- that is not a tax --

13 QUESTION: No, no, but I -- I understand that
14 basic point. I'm trying to get you to focus on what I
15 think would be, despite the rights and wrongs of it, their
16 very strong legal position, which is very simple.
17 Number 1, that there is assessed here a tax on the
18 employer equal to 6.2 percent of the total, including tip
19 wages of the employee, all right, and they say, we have
20 the power under the statute to assess the amount, and
21 moreover, we think your client didn't pay, and therefore
22 we took what we think was a very reasonable way of
23 figuring that out.

24 We looked at the credit cards and we saw it
25 said, tips, and we saw 14.2 percent is the typical amount,

1 and we assume that's it for credit and for cash, and if
2 you don't like that, you prove to the contrary. We don't
3 think you can prove it, not because it just isn't
4 possible, that probably, in all likelihood, it isn't true,
5 okay. Now, that's their point.

6 Now, you reply to that. I would like to hear
7 your argument.

8 MS. POWER: My reply to that is, we started out
9 by saying it's wages, including the tips of the employee,
10 and they did not give us a bill for wages which are the
11 tips of the employee. They gave us a bill for the total
12 gross tips of all employees collectively, and this Court
13 has already held that FICA taxes are divisible taxes under
14 *Flora v. United States*, that it is a tax imposed upon the
15 individual wage earnings. This Court has already
16 interpreted 3111 to be a tax on individual wage earnings,
17 and they did not give us a bill for that tax.

18 QUESTION: Well, but that's a different argument
19 from the one that we've been wrestling with, which is
20 whether or not you have within your authority and control
21 an ability to calculate the basis for challenging the
22 assessment.

23 MS. POWER: We do not.

24 QUESTION: And you began by saying, well, they
25 differ and, frankly, I don't give much force to that

1 argument. The employer knows how the employer distributes
2 credit card receipts. That's the employer's job, so I'm
3 not particularly persuaded by that argument. If you want
4 to go ahead and say, well, the cash portion of the tips
5 don't relate to the -- in the same ratio that the credit
6 card tips, I would understand that.

7 MS. POWER: The employer does not know how the
8 tips, the credit card tips are distributed. It's not as
9 if --

10 QUESTION: Doesn't the employer get the credit
11 card receipt?

12 MS. POWER: At the end of the --

13 QUESTION: And doesn't the -- the employer can
14 st up any system the employer wants.

15 MS. POWER: At the end of the evening the
16 employer would cash out all the employees and would turn
17 over credit card tips to employees who might have received
18 credit card receipts, and those employees would then
19 decide among themselves to whom in what amount they are
20 going to share those tips that they have received, along
21 with any cash tips that they may have --

22 QUESTION: But the employer at least has an
23 aggregate at that point, some that appears from the credit
24 cards to have been paid out in tips, no matter how it's
25 shared.

1 QUESTION: In addition, he has the ability -- in
2 addition, he has the ability to tell his employees that he
3 wants to know the ratio in which they're shared. He can
4 make that a condition of employment, so I'm not persuaded
5 by that argument.

6 MS. POWER: I don't really think he can make
7 that a condition of employment. I think that employers
8 have to be very careful what happens in the context of
9 wage and hour laws and tip-pooling regulations and so on
10 and so forth.

11 QUESTION: Well, that seems to me all the more
12 reason why the employer should have a strong interest in
13 knowing how the division is being made.

14 MS. POWER: Well, I think that there are many
15 employees who do not want the employer to have anything to
16 do -- to know -- to do with the tip-sharing arrangements.
17 It is -- tips are the property of the employee. Not only
18 that, you have --

19 QUESTION: But the employer, Ms. Power, has an
20 obligation to pay FICA tax, and has an obligation to pay
21 it on the total earnings, and it isn't -- your cow analogy
22 didn't just pass me by, because the tax on the employer is
23 independent of the tax on the employee. Suppose these
24 employees never paid a cent in FICA tax, and they went off
25 to beach-comb some place, the FICA tax would be owed by

1 the employer just the same.

2 MS. POWER: That's correct.

3 QUESTION: So it's the employer's cow. The FICA
4 tax belongs to the employer.

5 MS. POWER: The -- there is no question that the
6 employer owes a FICA tax. He owes the FICA tax regardless
7 of whether the employee is ever audited. He owes the FICA
8 taxes regardless of whether the employee is ever assessed
9 or the employee ever pays his taxes. It can be assessed
10 against the employer at a completely different time from
11 when it can be assessed against the employee.

12 The employer does not dispute that he owes a FICA
13 tax. What the employer disputes is, I can't know what I
14 owe that FICA tax on until you make some determination of
15 what the individual earnings are, because until that time,
16 I am denied all defenses employees have that they can
17 raise, and there's a whole list of long --

18 QUESTION: But you know what -- in fact, you
19 stipulated that you don't dispute the facts, the
20 estimates, or determinations used by the IRS as a basis
21 for its calculation of an amount of aggregated unreported
22 tip income by all directly and indirectly tipped
23 employees, which is your -- is on page 35 of the joint
24 appendix. You agreed that you are in this case, for
25 purposes of this case not disputing any of that.

1 MS. POWER: I do not -- we do not dispute the
2 amount of the IRS' aggregate assessments because -- of all
3 employees collectively, because we simply do not have the
4 information to dispute that. Congress has prohibited us
5 from having that information. We do not have that
6 information. We have never had that information.
7 Congress for 30 years has told us we do not have to
8 concern ourselves with that information, and we do not
9 have the wherewithal to dispute it.

10 So in this case, do I dispute that? No, because
11 it is not worth disputing that or attempting to even
12 whittle down that assessment in this case.

13 QUESTION: But your position is, we know that
14 there is a disparity between what is reported and what is
15 actually paid in tips. We know that both the employee and
16 the employer independently owe a tax on that total amount,
17 and we know about the shortfall, but there is nothing the
18 Government can do. It's just stuck by what the servers
19 put down on the monthly form that they file.

20 MS. POWER: There's plenty that the Government
21 can do. The Government has the wherewithal to do
22 everything, and that's exactly what Congress says should
23 be done.

24 QUESTION: Well, the only thing that you've
25 proposed, and tell me if I'm wrong about this, is that the

1 Government go one by one after the employees, and am I
2 correct in saying that the same method would be used by
3 the Government if it went against an individual server,
4 that it -- you are resisting the Government using against
5 the restaurant. That is, let's take a waiter in this
6 establishment. The Government says, you've underreported
7 your tip income, and the way we figured out that you've
8 underreported it is the same formula. Isn't that what
9 goes on when --

10 MS. POWER: No, it's entirely different,
11 because -- and as the McQuatters case that's cited in the
12 briefs by both parties illustrates, in that circumstance,
13 the individual waiter has an opportunity to bring any
14 defenses that he has to the Government's assessment
15 forward, and we are denied every possible defense by that
16 scenario.

17 QUESTION: Well, take -- make that specific,
18 please. Here is a waiter, and the Government says, you
19 have unreported income, and this is how we've estimated
20 it. We've estimated it based on our formula, and then
21 specifically what does that employee do when the
22 Government says, we've made an estimate based on this 14
23 percent, or whatever it is?

24 MS. POWER: The employee disputes the estimate.
25 Whether he does it at an administrative level or whether

1 he goes to the tax court and disputes it, he goes in and
2 he disputes it, and he raises the issues, and I think a
3 number of them were identified in the waitresses' amicus
4 brief. For instance, they say, well, I didn't work as
5 long. I don't have the same experience as the other guy
6 had. They was stiffing, a tremendous amount of stiffing.
7 We had a European clientele, the tips weren't as great as
8 you think.

9 QUESTION: What is stiffing?

10 MS. POWER: No tip whatsoever.

11 (Laughter.)

12 MS. POWER: I'm sorry.

13 QUESTION: I just don't understand how any of
14 that can get you below the amount that shows up on the
15 credit cards, because for example, say one employee got
16 \$2,000 in tips, and he could have a defense that I passed
17 out \$600 to the busboys, and maybe his liability is less,
18 but it still seems to me the employer would have to at
19 least pay the aggregate amount on the credit card.

20 MS. POWER: No, because --

21 QUESTION: I just don't understand how you get
22 around that.

23 MS. POWER: -- there's a situation where you
24 could have many employees. There's a very high turnover
25 rate, especially with those who are in the categories that

1 receive the least amount of tips. Somebody who comes in,
2 and he's a busboy and he's there for the afternoon, and he
3 says, boy, forget this job, I'm leaving, and he takes the
4 tips that he gets that day, and that happens at a much
5 higher percentage --

6 QUESTION: Well, that would explain why
7 assessments might be wrong as to individual employees, but
8 it still doesn't reduce the gross amount in the tip column
9 on the credit card.

10 MS. POWER: It does reduce the gross amounts --

11 QUESTION: How?

12 MS. POWER: -- that the employer would have to
13 owe, because if any of that credit card tips that you're
14 assuming isn't in fact a tip was received by somebody who
15 made less than \$20 a month, the employer doesn't owe any
16 tax on that.

17 QUESTION: Okay. That's a possibility, but
18 wouldn't it suffice on any rule of probability if the
19 Government did just what Justice Stevens described? It's
20 quite true, yes, there might have been an extraordinary
21 turnover, if there is, the employer can come in and say
22 so. But if the Government made its claim simply based on
23 what the credit card reports showed, wouldn't the
24 Government have made an assessment which enjoyed at least
25 a probability of accuracy?

1 MS. POWER: No, because you go back to 3111 and
2 Congress did not impose a tax on the aggregate earnings of
3 all employees collectively.

4 QUESTION: So your argument there is that even
5 if you had the perfect evidence, even if there was a memo
6 beyond dispute, written by the accountant and signed by
7 all the employers that said, after the most thorough
8 investigation of this restaurant I'm telling you
9 privately, and you agree, that the total tips earned that
10 are eligible for social security are \$350,000, so it's
11 signed by 15 bishops, you know, absolute, dead right,
12 we're saying that even if that's so, he still doesn't owe
13 it because in the memo it doesn't say which employees.

14 MS. POWER: I think that it needs to say which
15 employees learned which amount, and that's what the tax
16 was imposed upon, and if on the other hand you had all of
17 the employees say yes, I earned this, yes, I earned this,
18 yes, I earned this, then you would have that individual
19 determination.

20 QUESTION: But there's never been anything held,
21 is there, that where an employer clearly owes a tax to the
22 Government, based because of the earnings of the employee,
23 and there can be different contexts where that comes up,
24 the evidence that he owes that has to name or pick out
25 which employee? I assume if there were a case that ever

1 said that you would have cited it, and I doubt that there
2 is.

3 MS. POWER: I don't think that there is.

4 QUESTION: All right. If there isn't, then
5 that's my problem. If you're talking about the quality of
6 the evidence, you run into the problem that Justices
7 Stevens and Souter mentioned. If you're talking about the
8 need for the precision identification of a single
9 employee, I don't see in the law any requirement for such
10 a principle.

11 MS. POWER: I think that it's in 3111. I think
12 that this Court has already held that the tax is imposed
13 upon --

14 QUESTION: But whereabouts in 3111? If it's
15 just two sentences, tell us what sentence or what clause
16 you --

17 MS. POWER: Well, 3111, it says wages or -- 3111
18 says wages -- I'm sorry, Your Honor.

19 Equal to the following percentage of wages as
20 defined in section 3121(a), the tax imposed on something
21 called wages, that is defined in 3121(a). You cannot read
22 3121(a) as anything but --

23 QUESTION: Where do we find 3121(a) in your
24 brief?

25 MS. POWER: It's on the next page, page 56 of

1 the Government's appendix to the petition, and it says,
2 the term wages means all remuneration for employment, and
3 it goes on -- they only have one of the individual terms
4 listed. There are 21 specific --

5 QUESTION: But you're telling us this shows your
6 point, and you -- point to the language that you think it
7 does.

8 MS. POWER: 3111 imposes a tax on wages --

9 QUESTION: On wages. It doesn't say
10 individual -- wages paid to each individual. It says
11 wages.

12 MS. POWER: It says wages as defined in 3121(a).

13 QUESTION: Then we turn to 3121, and where is it
14 in there that it makes your point?

15 MS. POWER: When you go through each one of the
16 21 --

17 QUESTION: Well, that's what we're here for, to
18 go through something.

19 MS. POWER: Okay, well, the 21 exceptions to
20 2131(a) lists individual things like whether an employee
21 participates in a health insurance plan, whether an
22 employee has a 401(k) plan, the extent to which an
23 employee's wages go above or below the social security
24 wage base.

25 QUESTION: But that goes to the accuracy of the

1 figure, perhaps, which you said really is not your point.
2 That -- none of those exceptions say anywhere,
3 collectively or in specific terms, that under 3111 you
4 can't add them all up.

5 MS. POWER: Well, this Court has already held
6 that --

7 QUESTION: And that's what we're saying.

8 MS. POWER: -- that's not the way the tax works.
9 This Court has already held in *Flora v. United States* and
10 as quoted in *Steele v. United States* that it isn't a tax
11 on the aggregate earnings. It is -- the assessment is an
12 accumulation of separate, divisible taxes on each
13 transaction. What is subject to the tax is each
14 individual payment --

15 QUESTION: There are two *Flora* cases, neither of
16 which are cited in your brief. Which *Flora* -- there was a
17 rehearing grant. Which one are you --

18 MS. POWER: *Flora v. United States*, and I
19 believe it's footnote 37 in *Flora v. United States*.

20 QUESTION: Yes, but there are two *Flora v.*
21 *United States* that a rehearing was granted, one's 357,
22 one's 362, and your brief doesn't seem to mention either
23 of them.

24 MS. POWER: Well, we referenced them in our
25 complaint, Your Honor. I think it's paragraph 14 of our

1 complaint.

2 QUESTION: Does it give a citation there?

3 MS. POWER: Yes, Your Honor. 362 U.S. 145.

4 QUESTION: But that was just about whether or
5 not the tax court had jurisdiction if the assessment
6 wasn't completely paid beforehand, wasn't it?

7 MS. POWER: Yes, but I believe that footnote 37
8 in that brief, in that opinion said that the Court agreed
9 that the excise tax, like a FICA tax, is a divisible tax.
10 That's the whole basis upon which we're here. We only
11 paid \$18 of the total tax, and we paid it on the basis of
12 our estimate, although we cannot prove it one way or the
13 other, of one employee who would have made less than \$20 a
14 month over a period of time. If this wasn't a divisible
15 tax, or one that was imposed upon each transaction of
16 wages, then we would have had to pay the entire \$23,000.
17 This hold that it is a tax on an accumulation of all wages
18 of all employees is to change that 40-year history of --

19 QUESTION: Now, Congress passed something called
20 the TRAC law in 1998 to deal with this very problem of
21 tips and the FICA tax, did it not?

22 MS. POWER: Not technically, Your Honor. TRAC
23 is not something that Congress passed. TRAC is something
24 that is an agreement between the industry and the IRS. It
25 was -- I was the first person who approached the IRS on

1 coming up with some type of an agreement with the IRS to
2 solve this problem, and the TRAC agreement was a contract
3 that was written between --

4 QUESTION: I thought there was a section in 1998
5 passed by Congress, section 3414 of the Internal Revenue
6 Service Restructuring and Reform Act providing that IRS
7 would not threaten a taxpayer audit to coerce the taxpayer
8 into entering a tip-reporting alternative commitment
9 agreement, so at least Congress acknowledged --

10 MS. POWER: Congress acknowledged --

11 QUESTION: -- the agreement, did it not?

12 MS. POWER: It acknowledged that the agreement
13 existed, but Congress --

14 QUESTION: Do you think Congress was assuming
15 there were assessments going on of employers for this
16 liability?

17 MS. POWER: Not at that time, because there are
18 two documents at the very end of the joint appendix that
19 are Government documents, and they indicate that they were
20 not doing the employer-only assessments at that time. In
21 fact, they indicate that they were not doing the employer-
22 only assessments at that time. In fact, they indicate
23 that they -- they assured Congress that they were not
24 doing assessments at that time.

25 QUESTION: When did the IRS start doing these

1 aggregate assessments? Do you know when they started?

2 MS. POWER: I would say that they started doing
3 them about 1992, 1993, and you had asked the question
4 earlier, how many TRAC agreements are there that have been
5 signed. There are about 25-to-30,000 TRAC agreements that
6 have been signed. There are about 200,000 --

7 QUESTION: Well, this congressional provision
8 that I asked you about was made in 1998, so that was well
9 after the beginning of aggregate assessments.

10 MS. POWER: And long after the IRS had announced
11 that they were not doing aggregate assessments.

12 QUESTION: The gravamen of your brief is that as
13 a principle an assessment shouldn't be imposed on the
14 taxpayer unless the taxpayer has the information to
15 contradict the assessment, which certainly makes a lot of
16 common sense. Is there a provision in the code, or
17 something that we've said in the cases that sustains that
18 overarching principle?

19 MS. POWER: Well, I think that --

20 QUESTION: Or is it just kind of a due process
21 fairness thing?

22 MS. POWER: Well --

23 QUESTION: Is there a specific principle you can
24 point to to show the correctness of that assumption?

25 MS. POWER: Well, I think that there's 30 years

1 of congressional history that clearly shows that Congress
2 does not intend for the employer to be put in this
3 position, that Congress did not intend for the employer to
4 be required to police and monitor the reporting of
5 employees, and ostensibly that's what the IRS'
6 interpretation does.

7 QUESTION: But you have no specific authority or
8 precedent for the proposition that an assessment should
9 not be imposed on a taxpayer unless the taxpayer is in a
10 good or perhaps best position to contradict the
11 assessment?

12 MS. POWER: I think that we have plenty of
13 authority for the proposition that the assessment in this
14 case is unauthorized because it's on the collective wage-
15 earning on 31 --

16 QUESTION: But that wasn't what I asked you. I
17 asked you about the general proposition.

18 MS. POWER: That a tax cannot be imposed upon --

19 QUESTION: An assessment cannot be imposed on
20 the taxpayer unless the taxpayer has the capacity or the
21 ability to contradict it. I mean, that's -- it seems to
22 me that's the principle argument in your brief. It makes
23 a lot of sense, but I want to know if I'm -- if the
24 Court's writing an opinion for that, what do they cite for
25 that proposition?

1 MS. POWER: The best I can tell you --

2 QUESTION: Other than the fact that this is
3 something everybody should know, but that doesn't usually
4 work.

5 (Laughter.)

6 MS. POWER: I think that the burden of
7 presumption and the burden of proof that they have put
8 forth is premised upon the understanding that the person
9 with that burden has the records and is in the best
10 position to respond, and that does not characterize this
11 situation, so those policy considerations behind that are
12 not existing here.

13 QUESTION: Are there other situations in the tax
14 law where the Government knows that income has been
15 underreported? Aren't estimates made in many different
16 contexts where the taxpayer doesn't keep reliable records,
17 and so the Government has to find some way of measuring
18 what the tax should be, so it does an estimate? Isn't
19 that common?

20 MS. POWER: In each one of those cases it's --
21 the person responsible for keeping the records is the one
22 taxed. We have no problem with the IRS attempting to
23 determine the earnings of the individual employees and
24 coming back and --

25 QUESTION: Well, you did before, because when I

1 asked you, are they making an estimate in that case, and
2 you started to say no, because the taxpayer, the
3 individual servers have all these --

4 MS. POWER: Excuses --

5 QUESTION: Yes.

6 MS. POWER: -- or defenses?

7 QUESTION: Yes. But I thought that they
8 could -- I thought that was a given, that if they go after
9 a single waiter, that they can have an estimate.

10 MS. POWER: They can.

11 QUESTION: They do make an estimate.

12 MS. POWER: They can.

13 QUESTION: And the very estimate that you are
14 resisting when it applies to the employer.

15 MS. POWER: Because we are -- we don't have the
16 same defenses that the waiter and the waitress does. The
17 waiter and the waitress can say, you know, all kinds of
18 things in response, that no, I didn't earn that, here are
19 my records, here are my individual records of exactly what
20 I earned.

21 The IRS sends them a bill based on the same
22 types of estimates, takes it one step further and says,
23 okay, well, you worked X number of hours out of the total
24 number of hours in this restaurant, so of this total share
25 we think your share is this amount. The waiter or

1 waitress can come in and say no, here's my individual
2 record, and this is exactly what I earned, or no, you're
3 wrong in assuming this, or you're wrong in assuming that,
4 and then a determination can be made of what that
5 individual waiter or waitress made, and then turn around
6 and give it to us.

7 That's exactly what one of the documents in our
8 joint appendix on page 92, that's exactly what the IRS did
9 do before they came up with this aggregate assessment
10 method, because that is precisely what Congress envisioned
11 that the IRS would be doing with the 8027 Form data, is
12 taking that information, using that information to make
13 examinations of individual employees, and then turning
14 around --

15 QUESTION: Now, practically can the IRS -- are
16 you suggesting that they go after the employees, and then
17 when they know the amount based on the extra tax the
18 employee will have to pay, then say, okay, employer, you
19 pay the same amount, but practically can the IRS -- does
20 it have the facilities to go audit every waiter and busboy
21 and --

22 MS. POWER: There's no requirement that they
23 audit every waiter or busboy. In the first place, that
24 letter that I just pointed out didn't require any audit at
25 all, and not only that, in the context of what's happening

1 here, they still have an audit problem. They've only
2 collected, or are attempting to collect 25 cents out of
3 every single dollar. They're leaving three -- 75 cents on
4 the table here. They come in here and they say that
5 they've got this huge, astronomical problem, and we can't
6 do anything about it.

7 QUESTION: Well, the reason is, maybe it isn't
8 cost-effective to go after the individual employees.

9 MS. POWER: Well, I don't think it's very cost-
10 effective to do this one, when the employer is --

11 QUESTION: The employer tax is owed
12 independently, which is what I started to ask you about
13 when you gave your cow example. The taxes on an employer,
14 that's a discrete tax. There's a tax on the employee.
15 That's a discrete tax. Why, because the Government is
16 going to have a hard time collecting the tax on the
17 employee, is it disabled from collecting the tax on the
18 employer?

19 MS. POWER: Because that's what Congress said --

20 QUESTION: Thank you, Ms. Power.

21 MS. POWER: -- that the IRS should do.

22 QUESTION: Ms. O'Connor, you have 3 minutes
23 remaining.

24 REBUTTAL ARGUMENT OF EILEEN J. O'CONNOR

25 ON BEHALF OF THE PETITIONER

1 QUESTION: Ms. O'Connor, at the very outset you
2 said that 311 imposed a tax on wages paid or deemed to
3 have been paid. Is the word deemed in the statute?

4 MS. O'CONNOR: Is the word deemed in the
5 statute?

6 QUESTION: Yes.

7 MS. O'CONNOR: I believe so. I believe it's in
8 3121(q), Your Honor, which I keep losing.

9 QUESTION: Well, I'll find it.

10 MS. O'CONNOR: Yes, it's on page 58a, is where
11 3121(q) appears, and remember that is a section that
12 provides definitions. 3121 tells you that wages include
13 tips which are paid or deemed to have been paid, and
14 3121(q) also tells you the time.

15 As we have said, this is a tax on an aggregate
16 amount. Form 941 in your joint appendix show how the
17 employer reports the tax, and shows that it is a tax on
18 the wages paid.

19 QUESTION: Well, except I think the deeming
20 refers to the time of payment, not to the fact of payment,
21 but I'll look at that.

22 MS. O'CONNOR: I think you're right about that,
23 Your Honor. Nonetheless, they are deemed to be paid at
24 the time, right. 3121(q) tells you that tips are
25 included, and then the deemed part is -- the tips are

1 wages, and the deemed part is when they are deemed to have
2 been paid. They're deemed to have been paid by the
3 employer, and then it goes on and tells you when. It does
4 say tips are deemed to have been paid by the employer.
5 That's the very first sentence. It's at page 85a.

6 QUESTION: How long has IRS been making these
7 assessments, please, Ms. O'Connor?

8 MS. O'CONNOR: I believe, Justice O'Connor, that
9 it did start around 1992 and 1993, and the information
10 that the IRS is gathering on the forms 8027 demonstrated
11 the extent of the problem that Congress suspected did
12 exist about substantial underreporting of tip income.

13 QUESTION: In view of all the questions about
14 the proper computation, why has the Government resisted
15 notice and comment rulemaking to come up with a fair
16 formula, because the contention is that the Government's
17 formula exaggerates the income, exaggerates the tip
18 income.

19 MS. O'CONNOR: That is certainly the contention,
20 and there have been, however, no facts to show whether
21 that's true or not, because in each of the cases, not only
22 the Ninth Circuit below, but in each of the three cases
23 that we cite in our briefs decided by the Seventh,
24 Eleventh, and the Federal Circuits, no evidence was ever
25 submitted to show that the tips were overstated in any

1 way.

2 QUESTION: But why not -- why not employ that
3 fair procedure of going through the notice and comment,
4 and then -- I think that's what Judge Kozinski said to do.

5 MS. O'CONNOR: Yes, he did. Judge Kozinski's
6 opinion entirely excludes section --

7 CHIEF JUSTICE REHNQUIST: I think you've
8 answered the question. Judge Kozinski did say that, so
9 the case is submitted.

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

12

13

14

15

16

17

18

19

20

21

22

23

24

25

A		
<p>ability 13:9 32:21 34:1,2 47:21 able 22:18 about 3:10 4:14 9:3 10:16 13:22 15:23 15:24 16:2,5,6 17:8,10 24:16 29:24 36:17,25 41:5,7 44:4 46:3,5,6,8 47:17 51:6,12 52:22 53:12,13 above 17:8,9 42:23 above-entitled 1:10 54:11 absolute 40:11 absolutely 6:22 7:6 8:20 15:13 accept 18:7 accordance 9:17 accountant 40:6 accounting 20:7,20,21,25 21:1 accumulation 43:12 44:17 accuracy 39:25 42:25 accurate 23:20 25:8,16,16 acknowledge 17:20 acknowledged 45:9,10,12 acre 28:2 acres 28:1 act 28:22 45:6 actual 28:13 actually 5:24 13:12 14:12 36:15 add 43:4 added 5:13 addition 34:1,2 additional 11:13,19 address 4:15 18:14 administration 5:5 administrative 37:25 advantage 8:25 9:16,19 affects 27:19 after 28:23 37:1 40:7 46:9,10 49:8 50:16 51:8 afternoon 39:2 again 19:10 20:14 against 19:20 27:16 35:10,11 37:3,4 aggregate 23:5,6 33:23 36:2 38:19 40:2 43:11 46:1,9,11 50:9 52:15 aggregated 35:21 aggregating 23:9 agree 40:9 agreed 35:24 44:8 agreement 44:24 45:1,2,9,11,12 agreements 46:4,5 ahead 24:18 33:4 allow 19:7 allows 8:25 9:17 along 27:22 33:20 already 32:13,15 41:12 43:5,9 alternative 18:18,19 45:8 although 44:12 always 22:18 amend 13:4</p>	<p>amicus 38:3 among 33:19 amount 10:8 11:20 12:4,13,15,18,21 14:19 16:19 19:12 20:1 23:18 24:16 25:15 26:13 28:13,19 29:14,18 30:2 30:13 31:20,25 33:19 35:21 36:2,16 38:6,14,19 39:1,8 40:15 49:25 50:17 50:19 52:16 amounts 8:6 24:12 28:19 39:10 analogy 27:21 34:21 announced 46:10 annual 7:12,13,24 another 5:20 6:2 8:9,15,18 15:16 answer 16:11,14,16 23:1,2 answered 10:6 54:8 anticipate 6:19 8:14 anticipating 8:19 anyone 17:14 22:10 anything 5:7 8:17 9:15 15:8,9 34:15 40:20 41:22 51:6 anyway 23:16,16 anywhere 43:2 APPEARANCES 1:13 appears 3:18,22 33:23 52:11 appellate 19:9 appendix 3:18,23 4:4 7:1 10:2 12:22 14:21 35:24 42:1 45:18 50:8 52:16 application 5:12 10:13 applied 10:20 applies 10:21 49:14 apply 5:15,18 6:2 10:24 approach 4:17 approached 44:25 April 1:9 area 17:8,9 argued 23:18 argument 1:11 2:2,5,8 3:3,6 13:6 22:4 27:12 31:4 32:7,18 33:1,3 34:5 40:4 47:22 51:24 around 29:7 38:22 50:5,14 53:9 arrangements 34:16 aside 7:25 asked 26:4 46:3,8 47:16,17 49:1 asking 22:20 asserted 14:15 assess 3:11 4:11 22:19 31:20 assessed 5:3 8:17 9:15 25:21 31:17 35:8,9,11 assessment 3:16 4:16 5:16 6:16,20 8:4 10:8,18,20 11:18 12:3,4 13:7 14:19,22 19:5,12 20:1 23:5,13,20,21 23:23 24:8,10,11,13,14 25:3,19,24 26:12,13 31:11 32:22 36:12 37:14 39:24 43:11 44:5 46:13,15 47:8,11 47:13,19 50:9 assessments 3:20 23:7,16 24:4 36:2 39:7 45:15,20,22,24 46:1,9,11 53:7</p>	<p>Assistant 1:14 assume 6:10,13 9:8,8 12:14 19:21 25:23 26:13 32:1 40:25 assumed 12:4 17:3,4 assuming 39:14 45:14 50:3,3 assumption 46:24 assured 45:23 astronomical 51:5 attempting 36:11 48:22 51:2 Attorney 1:14 audit 45:7 50:20,23,24 51:1 audited 14:14 35:7 audits 23:9 authority 3:10 22:21,23 23:4,15,16 23:21 32:20 47:7,13 authorized 27:19,19 31:5,5 authorizes 3:19 available 10:22 20:2 average 28:2 avoid 6:20 9:1,18 avoiding 15:16 a.m 1:12 3:2 54:10</p>
		B
		<p>back 11:16 26:3 40:1 48:24 balance 27:8 29:6 base 42:24 based 9:12 12:14 24:10 25:19 37:20 37:22 39:22 40:22 49:21 50:17 basic 16:13 29:12 31:14 basis 6:25 11:23 12:10 23:10 32:21 35:20 44:10,11 beach-comb 34:25 before 1:11 8:22 19:10 26:4 48:25 50:9 beforehand 44:6 began 32:24 beginning 46:9 behalf 1:15,17 2:4,7,10 3:7 27:13 51:25 behind 48:11 being 7:20 12:11 16:24 20:6,6 22:14 34:13 believe 25:15 43:19 44:7 52:7,7 53:8 belongs 35:4 below 16:23 38:14 42:23 53:22 benefit 22:1 besides 23:15 best 12:25 47:10 48:1,9 between 5:7 10:7 13:14,20 17:9 36:14 44:24 45:3 beverage 5:19 7:9,14 beyond 40:6 bill 32:10,11,17 49:21 bills 18:3 29:5 bird 26:15 bishops 40:11</p>

<p>blank 15:18 book 26:19,21,23 books 26:2 both 36:15 37:12 bothers 6:5 boy 39:3 boys 22:10 Breyer 19:16 brief 38:4 41:24 43:16,22 44:8 46:12 47:22 briefs 9:3 19:10 22:6 37:12 53:23 bring 37:13 broad 22:21 burden 4:18 12:12,12,20,23 27:20 48:6,7,9 busboy 29:17 39:2 50:20,23 busboys 38:17 business 7:21 22:11 26:6 buying 22:4</p>	<p>chickens 27:22 30:23 Chief 3:3,8 24:1 54:7 Circuit 14:14 53:22 Circuits 53:24 circumstance 30:3 37:12 circumstances 5:15 10:25 citation 44:2 cite 47:24 53:23 cited 37:11 41:1 43:16 claim 21:15,16 39:22 claiming 21:16 clause 41:15 clear 12:2 16:24 22:25 23:17 clearly 11:24 23:14 24:9,12,12 25:6 40:21 47:1 client 31:21 clientele 38:7 code 3:14,21 9:23 11:4 30:25 46:16 coerce 45:7 collect 26:17 51:2 collected 29:4 51:2 collecting 51:16,17 collective 47:14 collectively 32:12 36:3 40:3 43:3 column 39:8 come 11:16,19 17:11 19:11 39:21 50:1 51:4 53:15 comes 8:4 12:14 19:23 26:3 39:1 40:23 coming 12:1 45:1 48:24 comment 53:15 54:3 commented 24:3 commission 25:21 commissioner 3:11 4:10 commitment 18:19 45:8 common 5:20 46:16 48:19 compared 7:19 complaint 43:25 44:1 complete 20:4,8,9 completely 35:10 44:6 complexity 5:4 compliance 26:10 computation 53:14 conceded 12:21 14:22,23 20:2 concern 36:8 concession 19:9 20:10 concluding 16:14 conclusion 15:6 condition 34:4,7 Congress 3:12 4:22 7:9 8:9 18:13 22:21,23 23:3,12 27:15,17,21 36:4,7 36:22 40:2 44:19,23 45:5,9,10,13,14 45:23 47:1,3 50:10 51:19 53:11 congressional 46:7 47:1 considerations 48:11 contemplates 5:12 contention 53:16,19</p>	<p>contesting 19:15 context 4:20 34:8 50:25 contexts 40:23 48:16 contract 45:2 contractor 5:22 contradict 46:15 47:10,21 contrary 32:2 control 32:20 copy 30:25 correct 5:2 6:14 7:4,6 23:24 24:6 25:24 30:12,15 35:2 37:2 correction 9:1,17,18 correctness 24:3 27:20 46:24 corrects 10:22 cost 51:9 cost-effective 51:8 country 15:3 couple 9:20,23 course 22:17 31:5 court 1:1,11 3:9 13:22,23 19:2,9,10 24:2,3 25:17 27:14 32:12,15 38:1 41:12 43:5,9 44:5,8 Court's 47:24 cow 34:21 35:3 51:13 cows 27:24,25 28:2,3,5,9 30:23 create 21:25 credit 7:18,20 11:24 12:1,10,16 16:7 18:4 19:20 20:2,6 21:14,15,22,22 28:14,19,20,20,23 29:5,14,18 30:1,4 31:24 32:1 33:2,5,8,10,17,18,23 38:15,19 39:9,13,23</p>
C		
<p>C 2:1 3:1 calculate 32:21 calculation 35:21 call 10:8 16:12 called 8:22 41:21 44:19 calls 23:7 came 1:10 27:22 50:9 capacity 14:17 47:20 card 7:18 11:24 12:1,10,16 18:4 28:14,19,20,20 29:5,14,19 30:1,5 33:2,6,8,11,17,18 38:19 39:9,13,23 cards 7:20 28:23 31:24 33:24 38:15 careful 34:8 carries 4:10 carry 22:1 case 3:10 4:9,15,18 6:23 9:1 11:23 12:20 14:1,20 18:20 19:14,14,15 20:11 22:7,8,9,14,16 28:7 35:24,25 36:10,12 37:11 40:25 47:14 49:1 54:9,10 cases 17:1 22:12 43:15 46:17 48:20 53:21,22 cash 12:5,15 18:3 28:24 30:16,19 32:1 33:4,16,21 categories 38:25 cent 34:24 cents 51:2,3 certain 12:4 certainly 13:15,21 23:9 46:15 53:19 challenge 4:16 19:11 26:12 challenging 32:21 change 44:18 characterize 48:10 charged 7:20 charges 30:10 check 15:6,10 17:4</p>	<p>collect 26:17 51:2 collected 29:4 51:2 collecting 51:16,17 collective 47:14 collectively 32:12 36:3 40:3 43:3 column 39:8 come 11:16,19 17:11 19:11 39:21 50:1 51:4 53:15 comes 8:4 12:14 19:23 26:3 39:1 40:23 coming 12:1 45:1 48:24 comment 53:15 54:3 commented 24:3 commission 25:21 commissioner 3:11 4:10 commitment 18:19 45:8 common 5:20 46:16 48:19 compared 7:19 complaint 43:25 44:1 complete 20:4,8,9 completely 35:10 44:6 complexity 5:4 compliance 26:10 computation 53:14 conceded 12:21 14:22,23 20:2 concern 36:8 concession 19:9 20:10 concluding 16:14 conclusion 15:6 condition 34:4,7 Congress 3:12 4:22 7:9 8:9 18:13 22:21,23 23:3,12 27:15,17,21 36:4,7 36:22 40:2 44:19,23 45:5,9,10,13,14 45:23 47:1,3 50:10 51:19 53:11 congressional 46:7 47:1 considerations 48:11 contemplates 5:12 contention 53:16,19</p>	<p>contesting 19:15 context 4:20 34:8 50:25 contexts 40:23 48:16 contract 45:2 contractor 5:22 contradict 46:15 47:10,21 contrary 32:2 control 32:20 copy 30:25 correct 5:2 6:14 7:4,6 23:24 24:6 25:24 30:12,15 35:2 37:2 correction 9:1,17,18 correctness 24:3 27:20 46:24 corrects 10:22 cost 51:9 cost-effective 51:8 country 15:3 couple 9:20,23 course 22:17 31:5 court 1:1,11 3:9 13:22,23 19:2,9,10 24:2,3 25:17 27:14 32:12,15 38:1 41:12 43:5,9 44:5,8 Court's 47:24 cow 34:21 35:3 51:13 cows 27:24,25 28:2,3,5,9 30:23 create 21:25 credit 7:18,20 11:24 12:1,10,16 16:7 18:4 19:20 20:2,6 21:14,15,22,22 28:14,19,20,20,23 29:5,14,18 30:1,4 31:24 32:1 33:2,5,8,10,17,18,23 38:15,19 39:9,13,23</p>
D		
		<p>D 3:1 data 50:11 day 39:4 days 25:20,21 dead 40:11 deal 44:20 decide 33:19 decided 53:23 deduction 21:16,17,25 deemed 3:25 4:8 11:9,11 52:2,3,4,13 52:23,25 53:1,1,2,4 deeming 52:19 defend 27:16 defense 37:15 38:16 defenses 35:16 37:14 49:6,16 defined 41:20,21 42:12 definitional 11:5 definitions 11:3 52:12 demand 11:12 demonstrated 53:10 denied 35:16 37:15 Department 1:15 depriving 27:16 described 22:24 39:19</p>

<p>despite 31:15 determination 12:9 35:14 40:19 50:4 determinations 3:20 23:22 35:20 determine 16:18,19 48:23 determining 5:23 differ 32:25 difference 21:2,6,8,12,20 22:7,8 different 6:23 12:18 18:1 29:2 32:18 35:10 37:10 40:23 48:15 difficult 8:10 difficulty 4:22 direct 9:22 directly 35:22 disabled 51:17 discharge 14:9 discover 5:2 discovers 10:21 discrete 51:14,15 discussing 4:24 disparity 5:7 36:14 dispute 13:14,20 35:12,19 36:1,4,9,10 40:6 disputes 35:13 37:24 38:1,2 disputing 35:25 36:11 distributed 33:8 distributes 33:1 district 13:23 19:2,9 divisible 32:13 43:12 44:9,14 division 34:13 documents 45:18,19 50:7 dog 26:15 doing 45:20,21,24,25 46:2,11 50:11 dollar 19:20,20 25:8 51:3 done 6:11 23:10 26:11,12 29:12 36:23 doubt 41:1 down 7:22 26:18,20,22 36:12,19 due 7:25 11:13 46:20 dupes 29:6 during 18:21 29:4 D'Italia 1:6 3:5 D.C 1:8,15,17</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>E 2:1 3:1,1 each 3:15 11:25 29:11 42:10,15 43:12 43:13 44:15 48:20 53:21,22 earlier 46:4 earn 49:18 earned 17:12 40:9,17,17,18 49:20 50:2 earning 15:25 25:20 47:15 earnings 32:15,16 34:21 35:15 40:2 40:22 43:11 48:23 effect 8:3 effective 51:10 effectively 4:16 EILEEN 1:14 2:3,9 3:6 51:24</p>	<p>either 19:2 21:22 43:22 Eleventh 53:24 eligibility 21:15 eligible 40:10 emphasize 20:10 employ 54:2 employee 5:7,24 11:10,10 13:14,15 13:18 14:3,9,17 28:21,21,25 29:3,19 31:7,19 32:9,11 34:17,23 35:7,8,9 35:11 36:15 37:21,24 38:15 40:22 40:25 41:9 42:20,22 44:13 50:18 51:14,17 employees 3:25 4:8 6:8,24 7:15,19 11:22 13:11 14:13 15:20 17:23 29:8 32:12 33:16,17,18 34:2,15,24 35:16 35:23 36:3 37:1 38:24 39:7 40:3,13 40:15,17 44:18 47:5 48:23 50:13,16 51:8 employee's 5:13 10:7 19:5 42:23 employer 4:16,19 5:8,13 6:6,8,11,14 6:19 8:1,2,5,6 10:7,17,21 11:8,10,17 12:6 13:3,10,13,14,14,20 14:3 18:9 20:3 21:14,18,24 26:17,19 27:5,15 27:17 31:1,2,8,18 33:1,1,7,10,13,14 33:16,22 34:12,15,19,22 35:1,4,6,10 35:12,13 36:16 38:18 39:12,15,21 40:21 45:21 47:2,3 49:14 50:18 51:10,11,13,18 52:17 53:3,4 employers 3:12,24 4:8,22 5:1,21 6:25, 7:15 8:10 18:18 19:21 34:7 40:7 45:15 employer's 13:9 33:2 35:3 employer-only 45:20 employment 5:5 11:5 34:4,7 42:2 enact 8:11 end 29:3 33:12,15 45:18 enjoyed 39:24 enough 21:19 enter 22:15 entering 18:18 45:8 entire 12:21 44:16 entirely 21:14 23:20 37:10 54:6 entity 13:7 envisioned 50:10 equal 31:2,18 41:19 erroneous 12:6 error 5:2,6,10,11,21 10:22 especially 38:25 ESQ 1:14,17 2:3,6,9 establish 18:1,20 established 24:14 establishment 7:14 37:6 establishments 5:20 7:10 estimate 25:19 37:22,24 44:12 48:18 49:1,9,11,13 estimated 37:19,20 estimates 23:9,10,16 35:20 48:15</p>	<p>49:22 European 38:7 even 8:6 16:7 19:12 26:11 29:20 36:11 40:4,5,12 evening 33:15 ever 4:16 5:6 11:17 23:18 35:7,8,9 40:25 53:24 every 7:18 12:2 15:2 26:15,21 27:5 37:15 50:20,23 51:3 everybody 15:23 48:3 everything 36:22 evidence 14:13 16:18 40:5,24 41:6 53:24 evidentiary 3:15 24:4 exactly 4:19,21 7:11 8:8 12:19 14:5 23:19 26:3 30:23 36:22 49:19 50:2,7 50:8 exaggerates 53:17,17 examination 18:21 examinations 50:13 example 4:25 5:23 6:24 12:9 38:15 51:13 except 52:19 exceptions 42:19 43:2 excise 31:2 44:9 excludes 54:6 Excuse 20:12 Excuses 49:4 Exhibit 18:23 exist 53:12 existed 45:13 existing 48:12 experience 38:5 explain 39:6 extent 28:18 42:22 53:11 extra 17:10 30:17,19 50:17 extraordinary 39:20</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>faced 7:21 17:16 facilitate 26:10 facilities 50:20 fact 8:9,21 9:6 10:20 14:20 16:21 25:18,23 26:16,25 28:20 30:2 35:18 39:14 45:21,22 48:2 52:20 facts 35:19 53:20 fair 53:15 54:3 fairness 46:21 false 17:23 fantasy 20:22 far 15:5 16:14 25:12 Federal 53:24 FICA 3:11 5:25 11:8,13 19:21 20:5 32:13 34:20,24,25 35:3,6,6,7,12,14 44:9,21 fight 28:4 figure 5:14 25:24 26:20 43:1</p>
--	--	---

<p>figured 28:1 37:7 figuring 31:23 file 36:19 filed 7:2 fill 30:14 find 41:23 48:17 52:9 Fior 1:6 3:4 fire 14:8 first 3:4,17 9:21 29:4 44:25 50:23 53:5 flag 15:21 Flora 32:14 43:9,15,16,18,19,20 focus 14:20 31:14 follow 26:21 27:6 28:9 following 41:19 food 5:19 7:9,13 29:6 footnote 43:19 44:7 force 22:14 23:13 32:25 forget 39:3 form 15:17 36:19 50:11 52:16 forms 6:25 7:2,5,16 53:10 formula 37:8,20 53:16,17 forth 13:6 28:14 29:18 34:10 48:8 forward 11:19 22:1 37:15 foundation 24:9,13,13,15,19,22,25 25:4,7,9 frankly 32:25 from 6:4,25 9:4,21 17:23 18:17 20:8 21:5,7 22:5 27:11 32:19 33:23 35:10 36:5 51:17 front 9:3 full 25:15 fund 20:7,14,15 funding 21:3,4 funds 20:25 further 49:22 future 22:2</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 3:1 gain 19:22 gambler 26:18 gathering 53:10 gave 32:11 51:13 general 1:14 10:5 13:24,25 14:2 47:17 generalities 18:2 gets 39:4 Ginsburg 10:9 give 6:8 12:24 14:10 22:22 30:19 32:10,17,25 44:2 50:6 given 6:11 20:6 22:21 49:8 gives 19:19 22:12 go 20:14 22:18 24:18 28:23 33:4 37:1 40:1 42:15,18,23 49:8 50:16,20 51:8 goes 20:23 37:9 38:1,1 42:3,25 53:3 going 6:15 7:22 8:10 12:6,17 14:7</p>	<p>17:4 18:1,9 19:6 28:4 30:17,18 33:20 45:15 51:16 54:3 good 6:24 13:8 47:10 Government 5:16 20:9,20,20,24 21:3 21:4 22:7,8,12 28:17 36:18,20,21 37:1,3,4,6,18,22 39:19,22,24 40:22 45:19 48:14,17 51:15 53:14 Government's 4:14 37:14 42:1 53:16 grant 43:17 granted 43:21 gravamen 13:5 46:12 great 38:7 gross 15:2,21 17:5,13 21:19 31:11 32:12 39:8,10 guess 12:14 21:19 guy 38:5</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>hairdressers 22:10 hand 40:16 handle 29:1 hanging 6:14 happen 8:16 happened 17:9 23:8,22 happening 50:25 happens 21:18 34:8 39:4 hard 51:16 having 24:25 26:21 36:5 health 26:6 42:21 hear 3:3 22:5 23:1 27:11 32:6 held 25:18 32:13 40:20 41:12 43:5,9 help 10:5 16:18 her 15:3 high 38:24 higher 10:8 39:5 him 8:25 9:17 12:12,13 27:16,18 himself 8:3 10:21 hire 26:8 27:5 hiring 26:15 history 44:18 47:1 hold 44:17 Honor 4:21 5:9 6:9,23 8:20 14:6 15:13 25:12,25 27:14 41:18 43:25 44:3,22 52:8,23 hope 4:15 host 29:8 hour 34:9 hours 49:23,24 huge 51:5</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>ideas 19:11 identification 41:8 identified 38:3 illustrates 37:12 immediately 10:17 important 14:20</p>	<p>impose 40:2 imposed 3:12,21 4:11 26:2 31:2 32:14 40:16 41:12,20 44:15 46:13 47:9,18 47:19 52:2 imposes 3:23 4:6,7 42:8 imposing 27:23 impossible 17:21 impractical 27:4 impression 22:6 inaccurate 15:5 INC 1:6 include 52:12 included 52:25 including 31:3,18 32:9 income 6:8 19:20 20:6 21:19,23,24 22:17 35:22 37:7,19 48:14 53:12,17 53:18 increasing 18:17 incumbent 26:1 independent 5:22 34:23 independently 36:16 51:12 indicate 45:19,21,22 indication 8:9 indirectly 35:22 individual 13:10 14:13 23:8,11 29:12 29:14 31:6 32:15,16 35:15 37:3,13 39:7 40:18 42:3,10,10,20 43:14 48:23 49:3,19 50:1,5,13 51:8 industry 44:24 information 7:8,9,12 12:24 13:8,8 14:10 16:23 17:22 18:22 19:4,6 26:17 36:4,5,6,6,8 46:14 50:12,12 53:9 inquiries 3:20 23:21 insertion 18:5 instance 38:4 instructions 8:5 insurance 7:24 42:21 intend 47:2,3 intended 22:23 interest 5:3 6:20 9:1,18 10:6,10,18 11:14 34:12 interested 15:11 16:11 interesting 11:2 Internal 3:11,14,21 7:10,14 9:22 11:4 45:5 interpret 22:20 interpretation 47:6 interpreted 32:16 invalid 24:15 investigation 40:8 involved 11:25 involves 3:12,13,15 IRS 6:15 8:5 11:12,12 12:13 16:21 18:21 22:24 23:4,12 27:22 35:20 36:2 44:24,25 45:1,6,25 46:10 47:5 48:22 49:21 50:8,11,15,19 51:21</p>
---	---	---

53:6,10 issues 11:12 38:2 i.e 13:10	leave 30:17,18 leaving 39:3 51:3 legal 14:4,6 31:16 less 15:20 18:3 38:17 39:15 44:13 let 4:13 6:1 9:7,20,21 15:16 18:12,20 20:10 letter 50:24 let's 5:13 19:21 37:5 level 19:9 37:25 liability 7:22 38:17 45:16 liable 9:19 like 17:1 23:13 27:8,21 32:2,6 42:20 44:9 likelihood 32:4 line 15:16,17 list 35:17 listed 42:4 listening 15:6 lists 42:20 litigation 3:13,16 24:4 little 4:14 25:12 26:19,20,23 28:16 located 16:21 long 35:17 38:5 46:10 53:6 look 10:11 14:25 20:8 52:21 looked 31:24 looking 9:4 25:20 losing 22:9 52:8 loss 22:1 lot 22:6,8,17 26:6 46:15 47:23 lower 15:19 25:3 luck 14:24	measured 3:24 9:24,25 measuring 48:17 memo 40:5,13 mention 43:22 mentioned 4:25 19:19 41:7 menu 16:23 merely 9:6 method 12:8 19:16 37:2 50:10 might 10:5 19:11 21:17,25 23:6,18 29:21 33:17 39:7,20 mind 16:12 minimum 19:22,25 20:4 21:9 minimums 15:24 16:6 minutes 51:22 mischaracterizing 5:22 mistake 11:18 mitigates 10:13 Mm-hmm 6:12 moment 5:15 10:10 17 22:5 Monday 1:9 money 4:19 22:9 28:16 29:4 monitor 47:4 month 7:18 12:2 16:1,2 39:15 44:14 monthly 6:25 7:16 11:23 36:19 more 5:7 12:3 15:25 17:2,3,5 22:19 24:11 34:11 moreover 31:21 morning 3:4 4:25 most 19:21 40:7 much 4:19 10:4 25:3,3 29:13 32:25 39:4 multiplied 17:13 multiply 15:1
<hr/> J <hr/> J 1:14,17 2:3,6,9 3:6 27:12 51:24 Janis 24:3,7 25:2,13,18,22 January 7:25 job 33:2 39:3 joint 7:1 10:2 12:22 14:21 35:23 45:18 50:8 52:16 Judge 54:4,5,8 judgment 12:21 jurisdiction 44:5 just 5:18 9:9 13:24,25 14:11,24 22:24 23:6 27:3 28:6 32:3 34:22 35:1 36:18 38:13,21 39:19 41:15 44:4 46:20 50:24 Justice 1:15 3:3,8 6:4 9:21 10:9 11:16 12:19 13:1,2,13 14:18,25 16:12 17:15 19:16 23:25 24:1 39:19 53:8 54:7 Justices 41:6 justifying 18:19	<hr/> K <hr/> keep 48:16 52:8 keeping 48:21 Kennedy 13:1,13 14:18 key 3:14,17,22 kicks 29:8 kind 6:15,19 16:19,21 21:24 22:16 46:20 kinds 22:12 49:17 know 7:24 9:9 11:17,21 12:6,25 13:3 13:4 18:2 19:24 21:10 28:4,18,22 29:9,11,12,15,20 30:1,17 33:7 34:3 34:16 35:13,18 36:13,15,17 40:11 46:1 47:23 48:3 49:17 50:17 knowing 34:13 known 24:12 knows 8:7 11:19,22 12:9 15:24 29:25 33:1 48:14 Kozinski 54:4,8 Kozinski's 54:5	<hr/> N <hr/> N 2:1,1 3:1 name 40:24 necessarily 25:25 need 11:1 30:18 41:8 needed 26:11 needs 40:14 neighbor 28:1,5 neighbor's 27:23,24 neither 43:15 net 22:1 never 18:24 22:23 34:24 36:6 40:20 news 18:17 newspaper 22:10 next 7:25 10:22 19:14 41:25 night 29:3,4 Ninth 14:14 53:22 none 19:25 43:2 Nonetheless 52:23 nonrefundable 21:21 normal 4:17 30:22,22 normally 4:18 note 7:7
<hr/> L <hr/> language 22:21 42:6 larger 28:15 later 5:2,23 13:4 Laughter 8:23 20:18 27:7 28:8,10 30:11,24 38:11 48:5 law 8:16 41:9 44:20 48:14 laws 24:2 34:9 learned 40:15 least 6:20 7:16 17:21 19:22 33:22 38:19 39:1,24 45:9	<hr/> M <hr/> made 4:16 34:13 37:22 39:15,22,24 44:13 46:8 48:15 50:4,5 magically 19:8 mainstream 16:13 maintain 26:2 make 3:20 5:21 6:15 8:25 9:17 12:9 21:8,11 22:6,7,16 34:4,6 35:14 37:17 49:11 50:12 makes 5:16 21:2,6 42:14 46:15 47:22 making 49:1 53:6 many 6:22 16:19 28:5 29:21 34:14 38:24 46:4 48:15 materials 5:1 matter 1:10 13:16,20 17:25 20:19,20 20:24 21:1,3,4 33:24 54:11 may 3:8 8:1,1 18:8,8,11,11 19:14 26:11 27:14 29:16,17 33:21 maybe 15:22 38:17 51:7 McQuatters 37:11 meals 16:21 mean 5:10 6:3,4 8:18 10:19 12:13 14:4,5,7 15:7,15 17:22 18:2 20:22 25:10,14 27:3 29:24 30:4 47:21 means 21:22 25:1,9 42:2	

<p>nothing 16:14 36:17 notice 11:12 12:2 15:17 28:16 53:15 54:3 notifies 11:12 number 3:4 18:23 28:1,2 31:17 38:3 49:23,24 numbers 18:17</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 obligated 6:6 8:3,4 obligation 4:10 34:20,20 obligations 20:4 observed 24:2 occur 7:22 off 34:24 offset 20:8,9 21:19,23 oh 10:3 13:19 14:5 24:24 25:11 okay 17:14 32:5 39:17 42:19 49:23 50:18 once 24:14 one 9:2 17:2,19 18:12 20:23 25:6 28:6 32:19 37:1,1 38:15 42:3,15 43:17 44:12,13,15 48:20,21 49:22 50:7 51:10 one's 43:21,22 only 17:7 19:4 20:3 23:17 34:17 36:24 42:3 44:10 45:22 50:25 51:1 53:21 operating 22:1 opinion 14:15 44:8 47:24 54:6 opportunity 10:23 17:19 23:1,3,14 37:13 optional 21:14 oral 1:10 2:2,5 3:6 27:12 order 6:20 original 13:2 14:25 ostensibly 47:5 other 3:15 4:24 5:14 6:3 9:4,4 12:9 14:6 15:10 16:6 18:12 22:16 29:8 38:5 40:16 44:13 48:2,13 otherwise 9:19 ought 14:8 ourselves 36:8 out 4:10 9:7,20 18:21 19:23 20:2 22:19 23:6 29:8 31:23 32:8 33:16,24 37:7 38:17 40:24 49:23 50:24 51:2 outset 52:1 over 6:14 13:20 20:14 28:25 29:3 33:17 44:14 overarching 46:18 overstate 22:3 overstated 53:25 owe 8:16 9:10 27:24 28:3 35:14 36:16 39:13,15 40:12 owed 4:19 28:16 34:25 51:11 owes 35:6,6,7,12 40:21,24 own 5:2 15:5 24:10 29:10</p>	<p>owner 7:21 15:4,9 17:16 O'Connor 1:14 2:3,9 3:5,6,8 4:1,3,6 4:13,21 5:9,18 6:9,12,17,22 7:5 8:8 8:13,20 9:2,11,14,20 10:2,5,9,15,19 11:1,22 12:8,19 13:1,12,19,24 14:5 14:12,18 15:7,13,15 16:1,4,8,10,15 16:17,25 17:6,18,24 18:5,8,11,16 19:1,8,24 20:13,15,19,24 21:3,7,13 21:21 23:3,25 24:7,21,24 25:2,6,11 25:17,25 26:5,22 27:2,5,8,10 51:22 51:24 52:1,4,7,10,22 53:7,8,8,19 54:5 O'Connor's 6:5 11:16 13:2 14:25 16:12 17:15</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 page 2:2 3:18,22 4:3 7:7 12:22 14:21 35:23 41:25,25 50:8 52:10 53:5 pages 7:1,13 paid 3:25 4:8 7:17 8:16 11:9,11 17:2 18:3,3 20:6 28:13 29:19 33:24 34:24 36:15 42:10 44:6,11,11 52:2,3,13,13 52:18,23 53:2,2,4 paragraph 43:25 Pardon 24:21 part 52:25 53:1 participates 42:21 particular 10:11 22:22 29:23,25 particularly 25:18 33:3 parties 37:12 pass 34:22 passed 18:14 27:22 38:16 44:19,23 45:5 pay 3:24 4:8 8:4,17,21 9:17 10:17 12:16 30:18 31:21 34:20,20 38:19 44:16 50:18,19 paying 8:15 10:7 19:22,25 payment 43:14 52:20,20 payroll 31:12 pays 8:5 35:9 penalties 9:7 penalty 9:5,6,9 11:14,20 penny 25:8 people 15:24 16:2,5,6 22:11,17 26:8 27:6 28:14 per 15:25 16:1,2 28:2 percent 7:17 15:2,18,21,23 16:23 17:3,5,13 31:2,18,25 37:23 percentage 15:19 18:14 39:5 41:19 perfect 40:5 perhaps 43:1 47:10 period 10:7 44:14 permits 5:1 person 5:23 13:7 26:21 44:25 48:8,21 persuaded 33:3 34:4 petition 3:18,23 4:4 10:3 42:1</p>	<p>Petitioner 1:4,16 2:4,10 3:7 51:25 pick 40:24 place 34:25 50:23 plan 42:21,22 please 3:9 24:18 27:14 37:18 53:7 plenty 36:20 47:12 pocket 29:7 30:16 point 9:7,20 11:15 14:15,16 15:16 18:20,21 20:2 21:5,7 22:4 23:6 31:14 32:5 33:23 42:6,6,14 43:1 46:24 pointed 50:24 police 47:4 policy 48:11 portion 33:4 position 4:14,17 12:25 24:5 25:23 26:20 31:16 36:13 47:3,10 48:10 possibility 6:14 39:17 possible 30:20,21 32:4 37:15 possibly 9:16 pot 20:23 power 1:17 2:6 15:10 27:11,12,14 28:11,18 29:1,11,20 30:1,12,15 31:6 31:10,20 32:8,23 33:7,12,15 34:6,14 34:19 35:2,5 36:1,20 37:10,24 38:10 38:12,20,23 39:10,12 40:1,14 41:3 41:11,17,25 42:8,12,15,19 43:5,8,18 43:24 44:3,7,22 45:10,12,17 46:2,10 46:19,22,25 47:12,18 48:1,6,20 49:4 49:6,10,12,15 50:22 51:9,19,20,21 practical 17:25 practicality 15:12 practically 50:15,19 practice 25:20 29:9,13 precedent 47:8 precise 23:21 precisely 50:10 precision 41:8 prefer 21:17,25 23:8 premise 26:24 premised 48:8 premium 7:25 presents 4:9 presumed 24:3,6 presumption 27:20 48:7 presumptively 23:23 principle 3:13 41:10 46:13,18,23 47:22 privately 40:9 probability 39:18,25 probably 32:4 problem 11:21 18:14 20:7 26:25 41:5 41:6 44:20 45:2 48:22 51:1,5 53:11 procedure 16:22 54:3 proceeding 14:4,6 process 46:20 produced 18:22</p>
--	---	---

<p>program 22:15 prohibited 36:4 proof 4:18 18:7 27:20 48:7 proper 12:13 53:14 property 34:17 proposed 36:25 proposition 13:25,25 14:2 24:8 47:8 47:13,17,25 prove 12:17 21:15 25:24 32:2,3 44:12 provide 7:10,15 9:23,23 provides 6:23 7:14 11:3,4 52:12 providing 45:6 provision 4:7 5:1,4 8:10,25 9:16 11:2 11:6 19:19 46:7,16 Provisions 9:22 Purely 21:1 purpose 7:11 purposes 11:8 35:25 pushing 25:11 put 13:6 28:16 30:19 36:19 47:2 48:7 puzzles 28:7</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>quality 41:5 quarters 24:20 question 4:1,5,9,13 5:6,10,16 6:1,1,5 6:10,11,13,18,18 7:4 8:1,12,14,24 9:8,12,15,21 10:1,5,12,16,24 11:15 11:16 12:3,12,23 13:2,3,5,17,22 14:2,7,16,24,25 15:3,8,14,16,23 16:2,5,9,11,12,16,24 17:1,7,15,20 17:25 18:7,9,12,25 19:3,13,16 20:12 20:14,17,22 21:1,5,11,18 22:3,3 23:23 24:5,17,18,19,22,25 25:5,8,14 25:22 26:3,4,14,24 27:3,10 28:6,6,9 28:12,14,23 29:9,16,23 30:4,6,7,9 30:10,13,21,21,22,25 31:8,13 32:18 32:24 33:10,13,22 34:1,11,19 35:3,5 35:18 36:13,24 37:17 38:9,13,21 39:6,11,17 40:4,20 41:4,14,23 42:5 42:9,13,17,25 43:7,15,20 44:2,4,19 45:4,11,14,25 46:3,7,12,20,23 47:7 47:16,19 48:2,13,25 49:5,7,11,13 50:15 51:7,11,20,22 52:1,6,9,19 53:6,13 54:2,8 questions 53:13 quite 39:20 quoted 43:10</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>R 3:1 raise 6:5 15:21 35:17 raises 38:2 rare 8:21 rate 18:18 38:25 rather 21:16 23:6 24:1 ratio 33:5 34:3</p>	<p>read 41:21 realized 8:9 really 27:3 28:7 34:6 43:1 reason 4:23 15:19 25:15 34:12 51:7 reasonable 31:22 reasonableness 14:22 reasons 29:21 rebuttal 2:8 27:9 51:24 recall 30:7 receipt 33:11 receipts 15:2 17:5,13 33:2,18 receive 22:11 39:1 received 28:21,21 33:17,20 39:14 recognized 4:22 record 14:13 18:6,15,16 20:1 21:9 50:2 records 13:10,15 26:2 28:12,13 48:9 48:16,21 49:19,19 red 15:21 reduce 39:8,10 reduced 18:23 referenced 43:24 referred 23:5 refers 15:17 52:20 Reform 45:6 refund 4:18 regard 4:23 regardless 35:6,8 regulations 26:7,8 34:9 rehearing 43:17,21 Rehnquist 3:3 24:1,1 54:7 relate 3:15 33:5 relates 5:4 reliable 26:8 27:6 48:16 remaining 29:7 51:23 remember 52:11 remind 26:9 remuneration 42:2 reply 32:6,8 report 6:7,24 7:8,12,13 9:12 11:11 12:10 24:10 reported 5:8,8 8:6 12:11,15,16 28:15 36:14 reporter 12:5 reporting 7:19 11:23 15:20 26:8 47:4 reports 5:14 6:7 7:15 10:8 11:10 12:1 17:23 18:17 23:11 39:23 52:17 require 27:17 50:24 required 6:24 7:9 27:18 47:4 requirement 21:9 41:9 50:22 requires 3:19 4:18 8:17 23:21 25:13 26:6 reserve 7:23 8:2 27:8 reserving 19:17 resides 11:3 resisted 53:14 resisting 37:4 49:14</p>	<p>respect 17:8,10 22:12 respond 48:10 respondent 1:18 2:7 13:16 19:10 23:7 23:8,17 27:13 respondent's 24:10 response 22:5 49:18 responsible 48:21 restaurant 7:2,17,18 11:13 12:2 15:2 15:4,9,20,22 16:17,20 17:2,16 19:19 26:11 28:24,24 29:12,13,23,25 30:10 37:5 40:8 49:24 restaurants 5:19 16:22 18:15 22:9 23:14 27:2 29:1,10,25 restaurant's 26:14 Restructuring 45:6 retained 29:14 returns 19:5 revenue 3:11,14,21 7:10,14 9:23 11:4 19:18,23 45:5 right 6:9 7:5 8:8,24 9:11,14 11:15 12:19 15:3 16:1,4,8,10,25 17:6,7 18:13 21:20 31:8,19 40:11 41:4 52:22,24 rights 31:15 road 7:22 rule 23:20 25:22 39:18 rulemaking 53:15 rules 26:9,9 27:6 run 10:6,18 16:12 41:6 running 6:21 runs 10:10</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>s 2:1 3:1 29:24 saddle 27:15 safety 26:7 sake 6:10 sales 7:17 15:21 same 12:8,15 33:5 35:1 37:2,8 38:5 49:16,21 50:19 sample 16:23 sanitation 26:7 satisfy 16:5 20:3 21:9 29:5,5 save 16:9 saw 7:20 14:14 31:24,25 saying 17:14 22:21,22 32:9,24 37:2 40:12 43:7 says 7:8 11:6 15:18 30:13 31:1,1,3 36:22 37:6,18,22 39:3 41:17,18 42:1 42:10,12 49:22 Scalia 12:20 scenario 37:16 second 3:21 Secretary 3:19 section 3:17,22,23 4:1,3,11,25 5:11 5:12 6:21 10:12 41:20 45:4,5 52:11 54:6</p>
---	---	---

<p>sections 3:14,17 4:24 security 20:15 40:10 42:23 see 4:20 5:12 6:25 7:16 14:21 18:23 26:16,16,19 31:3 41:9 seeing 30:8 seeks 8:21 seem 30:7 43:22 seems 10:16 34:11 38:18 47:21 sends 49:21 sense 46:16 47:23 sentence 41:15 53:5 sentences 41:15 separate 43:12 serve 16:21 server 37:3 servers 36:18 49:3 Service 7:10,15 45:6 set 7:23 8:1,1 setting 7:25 Seventh 53:23 several 4:23 share 33:20 49:24,25 shared 33:25 34:3 short 5:15 26:14,21 shortfall 36:17 show 4:19 12:13 15:4 16:18,22 17:17 46:24 52:16 53:20,25 showed 28:13 39:23 shown 18:22 30:4 shows 38:14 42:5 47:1 52:17 side 9:4,4 20:9 side-track 6:4 signed 40:6,11 46:5,6 simple 15:1 29:2 31:16 simply 5:13 36:3 39:22 since 19:8 26:12 single 7:18 26:15 41:8 49:9 51:3 situation 6:3 9:10 16:13 38:23 48:11 situations 48:13 slip 29:19 slot 28:20 social 20:15 40:10 42:23 solve 45:2 some 9:3 14:6 15:10 22:15,20 25:15 29:19 30:17 33:23 34:25 35:14 45:1 48:17 somebody 39:1,14 someone 26:15 something 18:1 41:20 42:18 44:19,23 44:23 46:17 48:3 sometimes 5:21 somewhat 9:3 soon 11:18 sorry 10:15 15:7 38:12 41:18 sorts 19:11 Souter 9:21 41:7 so-called 18:13</p>	<p>space 30:8 speak 20:16,17 specific 5:19 37:17 42:4 43:3 46:23 47:7 specifically 5:4 9:6 10:6 37:21 split 29:17 st 33:14 stands 24:8 31:11 start 7:25 24:15 45:25 53:9 started 32:8 46:1,2 49:2 51:12 starting 29:3 States 1:1,3,11 3:4 24:2,7 25:13,18 32:14 43:9,10,18,19,21 statute 23:24,25 31:20 52:3,5 Steele 43:10 step 49:22 Stevens 39:19 41:7 stiffing 38:6,6,9 still 20:5 38:18 39:8 40:12 51:1 stipulated 35:19 stipulation 19:13,15 strong 31:16 34:12 stuck 21:20 36:18 subchapter 11:4 subject 28:22 43:13 subjected 14:9 submitted 53:25 54:9,11 subpoena 13:10,15 14:3,10 substantial 53:12 substantially 28:15 subtracted 17:14 sue 13:17 suffice 39:18 suggest 10:19 27:21 suggesting 14:8 21:23 50:16 suit 14:10 sum 6:7 Suppose 34:23 supposed 13:3 15:4 Supreme 1:1,11 sure 17:11 22:25 25:22 26:18,24 Surely 29:25 suspected 53:11 sustains 46:17 system 18:13 33:14</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 2:1,1 table 51:4 take 7:4 8:25 9:16,19 21:6,25 24:5 37:5,17 takes 39:3 49:22 taking 50:12 talking 13:22 17:7 24:16 29:24 41:5,7 tax 3:13,16,23,24 4:6,7,11,11,18 8:4,6 8:16,21 9:6,10,24,24 11:13 13:22 16:7 19:20,21 20:6,6 21:16,23,24</p>	<p>24:4 26:1,7 27:15,18,22,23,24 28:3 31:2,4,11,12,17 32:14,16,17 34:20 34:22,23,24,25 35:4,6,6,13,14 36:16 38:1 39:16 40:2,15,21 41:12,20 42:8 43:8,10,13 44:5,9,9,11,15,17,21 47:18 48:13,18 50:17 51:11,14,14 51:15,16,17 52:2,15,17,17 taxed 48:22 taxes 3:11,21 5:5 11:5 32:13,13 35:8,9 43:12 51:13 taxicabs 22:10 taxpayer 8:21,24 12:20,21,23,24 13:6 14:21 17:18,21,22 18:1,22 19:3,4,5 19:6,25 21:6,8 25:23 26:1,4,5 45:7,7 46:14,14 47:9,9,20,20 48:16 49:2 technically 44:22 tell 4:13 16:16 18:15,16 23:19 26:8 34:2 36:25 41:15 48:1 telling 26:25 40:8 42:5 tells 11:6,9 52:12,14,24 53:3 tend 16:18 term 42:2 terms 18:2 42:3 43:3 test 25:2 Thank 4:5 10:3,4,9 51:20 their 3:25 4:8 5:2,5 21:9 22:5 24:4 26:10 29:13 31:11,15 32:5 themselves 33:19 theoretical 15:11 theory 19:7 thing 6:5 15:11 18:12 19:4 22:22 23:17 36:24 46:21 things 9:2,21,23 17:19 26:6 42:20 49:18 think 14:3,19 17:1 19:16 25:2,11,14 26:13 31:15,21,22 32:3 34:6,7,14 38:2,8 40:14 41:3,11,11 42:6 43:25 45:14 46:19,25 47:12 48:6 49:25 51:9 52:19,22 54:4,7 third 26:21 thorough 40:7 though 9:5 14:19 18:20 thought 14:25 15:3 17:15 45:4 49:7,8 threat 22:16 23:13 threaten 45:7 three 24:19 51:3 53:22 three-quarters 24:11,22 25:16 through 22:18 42:15,18 54:3 time 27:9 35:10,15 44:14 45:17,20,22 45:24 51:16 52:14,20,24 times 15:2 tip 6:8 16:19 18:18 26:16 28:19,20,21 29:18,21,22 30:2,6,7,13,17,22,22 31:11,18 35:22 37:7 38:10 39:8,14 53:12,17 tipped 35:22 tips 5:20 7:19,20 11:6,7,25 12:1,5,10</p>
--	--	---

<p>12:15,16 15:20,25 17:12 18:3 20:3 21:8 22:11,18 26:23 28:13 29:17 30:20 31:3,25 32:9,11,12 33:4,6,8,8 33:17,20,21,24 34:17 36:15 38:7,16 39:1,4,13 40:9 44:21 52:13,24,25 53:4,25</p> <p>tip-pooling 34:9 tip-reporting 45:8 tip-sharing 34:16 told 18:2 27:18 36:7 top 7:7 total 6:7 29:18 31:18 32:11 34:21 36:16 40:9 44:11 49:23,24 TRAC 14:15 18:13,15 22:15 23:14 44:20,22,23 45:2 46:4,5 TRACY 1:17 2:6 27:12 transaction 43:13 44:15 Treasury 3:19 20:5 tremendous 38:6 troubles 4:14 troublesome 9:3 true 13:1,13 14:18 18:8,11 21:14 24:12,20,23 32:4 39:20 53:21 trust 20:7,14,15 27:6 truth 27:1 trying 18:20 31:14 turn 27:25 28:24 29:3 33:16 42:13 50:5 turning 50:13 turnover 38:24 39:21 turns 29:7 two 3:14 13:20 41:15 43:15,20 45:18 type 45:1 types 49:22 typical 16:13 17:1 31:25</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>unauthorized 47:14 under 4:10,17 5:14 6:21 8:5 11:1 23:24,25 24:1 25:2 31:20 32:13 43:3 underreported 22:18 37:6,8 48:15 underreporting 53:12 understand 6:3,6 8:2 18:17 19:17 20:12 28:11 29:16 30:23 31:13 33:6 38:13,21 understanding 48:8 United 1:1,3,11 3:4 24:2,7 25:12,18 32:14 43:9,10,18,19,21 unless 24:9 46:14 47:9,20 unproven 18:6 unreported 11:24 12:1,4 35:21 37:19 until 8:4 11:12 35:14,15 unusual 5:3 upscale 16:20 use 12:8 21:8,22 23:13 used 18:15 20:3 22:14 35:20 37:2 using 37:4 50:12</p>	<p>usually 48:3 U.S. 44:3</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>v 1:5 3:4 24:2,7 25:13,18 32:14 43:9 43:10,18,19,20 valet 30:18 valid 24:8 25:4 value 3:16 24:4 variety 29:2 very 5:3 6:23 10:4 11:2 14:19 18:14 22:20 23:17 27:10 31:16,16,22 34:8 38:24 44:20 45:18 49:13 51:9 52:1 53:5 view 21:5,7 53:13 virtually 17:21</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>wage 19:22,25 20:4 21:9 25:19 32:15 32:16 34:9 42:24 47:14 wages 3:24 4:7 11:6,7,9,11 25:20,21 28:22 31:3,6,10,19 32:9,10 41:17,18 41:19,21 42:2,8,9,10,11,12,23 44:16 44:17 52:2,12,18 53:1 waiter 26:15,22,25 29:17 30:17 37:5 37:13,18 49:9,16,17,25 50:5,20,23 waiter's 23:11 waitress 26:16 49:16,17 50:1,5 waitresses 38:3 want 9:9 22:5,15,25 23:1 33:3 34:15 47:23 wanted 10:10 wants 33:14 34:3 wash 20:4 Washington 1:8,15,17 wasn't 44:6,6,14 47:16 way 6:2,19 19:23 27:16 28:4 31:22 37:7 43:8 44:12 48:17 54:1 ways 6:23 29:2 weapon 22:13 well 5:6 6:1 8:12 9:2,20 10:13 11:18 12:5,14 13:4 14:2,7,12 17:8,9,20 19:8 20:19 21:13,21 24:5,17,19 26:5 26:14 27:10,25 28:3,23 29:20 30:2 32:18,24 33:4 34:11,14 36:24 37:17 38:4 39:6 41:17 42:17,19 43:5,24 46:7,8,19,22,25 48:25 49:23 51:7,9 52:9,19 well-established 3:13 went 30:15 34:24 37:3 were 7:4,5,17,19,20 12:1 13:13,19 14:6,14 23:10 38:3 40:25 45:15,19 45:21,23 46:11 53:25 weren't 12:15,15 38:7 we'll 3:3 27:11 we're 17:7,11 18:2 27:23 29:24 40:12 42:17 43:7 44:10</p>	<p>we've 32:19 37:19,20,22 46:17 whatsoever 38:10 whereabouts 41:14 wherewithal 36:9,21 whichever 19:23 while 27:16 whittle 36:12 whole 13:5 26:24 27:1 29:8 35:17 44:10 withhold 8:3 withholding 5:24 wonder 24:17 wondering 5:11 word 52:3,4 words 6:3 work 4:20 14:8 38:4 48:4 worked 49:23 worker 5:22 15:22 works 9:9 43:8 world 29:24 worth 25:20,21 36:11 wouldn't 10:24 39:18,23 wrestling 32:19 write 15:6,10 26:18,20,22 writing 47:24 written 28:12 40:6 45:3 wrong 5:14,14 8:7 23:18 25:24 36:25 39:7 50:3,3 wrongful 14:9 wrongs 31:15 wrote 17:3</p> <hr/> <p style="text-align: center;">X</p> <hr/> <p>X 1:2,7 28:1 30:13 49:23</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Y 28:2 year 15:25 22:2 years 11:25 27:18 36:7 46:25</p> <hr/> <p style="text-align: center;">\$</p> <hr/> <p>\$10,000 8:15,18 \$120,000 11:24,25 \$150,000 17:11 \$18 44:11 \$2,000 38:16 \$20 15:25 39:15 44:13 \$200,000 17:4,10,14 \$23,000 44:16 \$350,000 17:10 40:10 \$5 30:19 \$600 38:17</p> <hr/> <p style="text-align: center;">0</p> <hr/> <p>01-463 1:5 3:4</p> <hr/> <p style="text-align: center;">1</p> <hr/>
---	--	--

<p>1 25:8 31:17 10:03 1:12 3:2 11:03 54:10 14 37:22 43:25 14.2 31:25 14.3 15:1 17:13 145 44:3 15 40:11 1991 7:2 1992 7:3 46:3 53:9 1993 46:3 53:9 1998 23:12 44:20 45:4 46:8</p>	<p style="text-align: center;">6</p> <hr/> <p>6.2 31:2,18 62a 3:18 6201 3:17 4:10 6205 4:25 5:19 10:20,21</p>	
<p style="text-align: center;">2</p> <hr/> <p>2 11:25 200,000 46:6 2002 1:9 21 42:4,16,19 2131(a) 42:20 2131(q) 10:1 22 1:9 25 51:2 25-to-30,000 46:5 27 2:7</p>	<p style="text-align: center;">7</p> <hr/> <p>75 51:3 77 25:21</p>	
<p style="text-align: center;">3</p> <hr/> <p>3 2:4 51:22 30 27:17 36:7 46:25 31 8:13 47:15 311 52:2 3111 3:22 4:3,11 32:16 40:1 41:11,14 41:17,17 42:8 43:3 3121 11:2 42:13 52:12 3121(a) 41:20,21,22,23 42:12 3121(q) 9:22 10:2,4,11 11:2,8 52:8,11 52:14,24 3414 45:5 35 12:22 14:21 35:23 357 43:21 362 43:22 44:3 37 43:19 44:7 38 7:1,13 39 7:1,13</p>	<p style="text-align: center;">8</p> <hr/> <p>8 15:18,21,23 16:23 17:3,5 8027 7:1,16 15:17 50:11 53:10 85a 53:5</p>	
<p style="text-align: center;">4</p> <hr/> <p>40-year 44:18 401(k) 42:22 45B 19:19 20:2</p>	<p style="text-align: center;">9</p> <hr/> <p>90 7:16 92 50:8 941 52:16</p>	
<p style="text-align: center;">5</p> <hr/> <p>5 25:20 51 2:10 55a 3:22 4:3 56 41:25 58a 52:10 58(a) 10:4</p>		