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IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X
UNITED STATES, :
Petitioner :
v. : No. 00-203
CLEVELAND INDIANS BASEBALL :
COMPANY :
- - - - -X

Washington, D.C.
Tuesday, February 27, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:17 a.m.

APPEARANCES:

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the Respondent.

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CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 00-203, United States v. The Cleveland Indians Baseball Company.

Mr. Feldman.

ORAL ARGUMENT OF JAMES A. FELDMAN

ON BEHALF OF THE PETITIONER

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

The question presented in this case is whether back pay for purposes of the Federal Insurance Contribution Act, known as FICA, and the Federal Unemployment Tax Act, known as FUTA, whether back pay under those statutes is taxed in the amounts applicable to the year in which it was paid, or the year in which it should have been paid.

In our view, the plain language of the statute provides a clear answer to that question. All five of the statutory provisions that are directly applicable to this case base the tax on, quote, the wages paid during the calendar year, not the wages that should have been paid, or would have been paid, or could have been paid if events had been other than they were.

QUESTION: You know, I have just one big problem

1 with your case, and that is the case from this Court
2 dealing not with the taxability, but with the calculation
3 of benefits under statutes using the very same language,
4 where we look back at the year when it should have been
5 paid in calculating benefits, and your opponent is going
6 to say, and has said in the brief, that it will cause lots
7 of disruption if we were to adopt your view in that area.
8 Can you have these statutes using the very same language
9 and have a different interpretation for calculating
10 benefits than you do for taxing --

11 MR. FELDMAN: Let me just --

12 QUESTION: -- the wages?

13 MR. FELDMAN: I have one caveat before I answer
14 the question, which is, actually the language in nobody's
15 view, I think, is the same. The statutes that are at
16 issue here were not at issue in Nierotko. If any
17 particular language was being interpreted in Nierotko, and
18 I'm not sure it was, they talk about --

19 QUESTION: Well, but they both have language
20 referring to wages paid.

21 MR. FELDMAN: Right, that's true, but they --
22 it's slightly different. They say calendar quarters in
23 which it was paid, so it is slightly different, even the
24 provision that might have been applicable there, but
25 beyond that, the Court in Nierotko based its decision on

1 the purposes of the Social Security Act in providing
2 security for people as they reach older age and as they
3 retire. The Court referred to that, and I think construed
4 the particular statutes it had there in terms of the
5 statutory scheme in which it was found, which was a
6 security scheme of that sort.

7 QUESTION: Okay, but in answer to my question,
8 are you taking the view that we can leave that the way it
9 is and calculate benefits --

10 MR. FELDMAN: Yes.

11 QUESTION: -- the way Nierotko suggests and not
12 be disturbed by the fact that it's a different view here?

13 MR. FELDMAN: I actually think that there's no
14 problem at all. In the first place I'd point out that
15 that's the way it's been -- the Internal Revenue Service
16 since the time of Nierotko has taken the position that the
17 wages-paid rule is a statutory test for taxes. On the
18 other hand, the Social Security Administration has taken
19 the view that at least for statutory back pay, which
20 wouldn't apply to this case, but at least for statutory
21 back pay they will allocate it back, and that's been going
22 on for 60 years, and it hasn't caused an enormous problem.
23 In fact, it's caused no problem at all.

24 As far as the specific -- I mean, I could go
25 through some of the specific examples of problems that

1 respondents say would be caused in the statute by their
2 view. For example, there is a -- an exclusion from wages
3 for money that's paid to somebody more than six -- on
4 disability, for disability more than 6 months after the
5 person -- the employee stopped working for the employer.

6 Well, I don't see any problem that is created by
7 applying the wages paid for taxes to that payment. In
8 fact, the problem would be created quite the contrary.
9 Under the wages-paid rule, you look, you count 6 months
10 after the employee stopped working, which is what Congress
11 wanted to do. Payments made after that date are not
12 taxed. Payments made before that date are taxed.

13 Under respondent's view, you'd have to take all
14 the payments that were made after that date and try to
15 figure out whether they should have been paid, should they
16 have been paid earlier or should they have been paid
17 later.

18 QUESTION: Don't those records have to be kept
19 for social security allocation purposes, so the
20 employer -- to determine quarters of coverage, would have
21 to supply those records to the Social Security
22 Administration.

23 MR. FELDMAN: Well, not quite. The Social
24 Security -- the issue arises, I would say, with less
25 intensity and frequency in Social Security for a number of

1 reasons. One is that as a Social Security -- under the
2 Social Security scheme, they essentially permit you
3 either -- your choice, option of either going back or
4 using the wages-paid rule, and therefore a lot of cases,
5 since you have a choice a lot of cases don't even arise,
6 because they just use the wages-paid rule.

7 Secondly, under the Social Security scheme,
8 because of the way that works, it's a lot less
9 significant, the allocation decision. Under Social
10 Security, all you need is 40 quarters of coverage in order
11 to be a fully-insured individual, and most people already
12 have that, and it doesn't really matter whether it's in
13 the quarter that it would be paid or the quarter, or some
14 other quarter it's allocated to.

15 In addition, under the Social Security scheme,
16 your benefits are based essentially on your average annual
17 earnings. That's the way they're currently calculated.
18 It's just an average annual earnings. It doesn't really
19 matter where you allocate the wages, it won't make much
20 difference for most people's Social Security, because
21 you're taking an average anyhow over some many-year period
22 of time, usually.

23 Now, I'm not saying it will never make a
24 difference, but the issue arises much less sharply and
25 with much less frequency in the Social Security context,

1 but in any event --

2 QUESTION: But my question really is, are you
3 taking a position that the provisions, the FICA and FUTA,
4 however you pronounce it, that those provisions dictate
5 the position that the Government is taking, or are you
6 saying, yeah, they could have gone for symmetry with
7 Nierotko, but this statute could go either way, and our
8 consistent interpretation, the service's consistent
9 interpretation has been when it's paid is when it's
10 income?

11 MR. FELDMAN: No, I think the wages-paid
12 language in FICA and FUTU -- FUTA is entirely unambiguous.
13 It says, wages paid during the particular year, and I
14 think that that ends the question as far as FICA and FUTA
15 goes.

16 The Court in Nierotko adopted a different
17 construction of somewhat different language in the Social
18 Security Act. I think the fairest reading of Nierotko is
19 probably that the Court felt that this was not -- didn't
20 tie it to any particular -- the allocation question --
21 didn't tie to any particular language, but just decided
22 that an exception of this sort was necessary to accomplish
23 the purposes of the Social Security Act.

24 QUESTION: Do you think Nierotko was wrongly
25 decided? You don't ask us to change it.

1 MR. FELDMAN: No, we don't. It was a statutory
2 decision, and I don't think that there's any basis to
3 overrule it.

4 I think that they -- the Court didn't give any
5 explanation of how it arrived at the conclusion that you
6 have to allocate back based on any particular language of
7 the statute, and that's one reason why I think the best
8 reading of Nierotko is that the Court was just adopting a
9 kind of extrastatutory exception, and saying, given the
10 purposes of the Social Security Act and providing security
11 for people so that they'll know they'll get the funds and
12 won't descend into poverty as they get older, given those
13 purposes, this is really the only way to do it for those
14 purposes.

15 The Court did not look at the specific language
16 of the statutes here, or the specific changes that those
17 statutes had gone through to arrive at that language.
18 Originally in 1935, in the 1935 Act, the FICA, what became
19 FICA and FUTA -- it was actually all part of the Social
20 Security Act -- those taxes were based on wages paid for
21 employment during a year. That meant, and everybody
22 agreed at that time, you had to look at when the
23 employment occurred, not when the wages were paid.

24 That scheme was in effect for a few years and
25 the 1939 Congress saw that it caused confusion and

1 difficulties and said, we have to change this, because we
2 don't want to have to -- it's easy to figure out when
3 somebody was paid. Indeed, in this case they stipulated
4 that they were paid in March of 1994 and usually that's a
5 question that doesn't cause any problem, so we're going to
6 base the taxes in 1939 on the wages paid.

7 Now, in 1946, Congress extended that to the
8 wage-base provision, so by 1946 everything was in line to
9 avoid the kind of confusions and uncertainty that were
10 caused by having to look and see when the employment was
11 performed.

12 QUESTION: But none of the statutory changes
13 address this point specifically.

14 MR. FELDMAN: I think, quite to the contrary, I
15 think they do. I think changing -- because I think
16 changes to wages paid was an unambiguous change that
17 required that the tax be based on whether --

18 QUESTION: It is certainly unambiguous with
19 respect to the normal payment of wages in accordance with
20 whatever the wage contract is, but if we take the
21 position, and I will confess that I -- I'm inclined to,
22 and that's what I want you to address.

23 If we take the position that the statute simply
24 does not address the problem that we've got here -- it
25 addressed the problem of accrual versus cash methods when

1 you're doing your taxing in the normal course, but it
2 doesn't address the, in effect the back-wage problem, if
3 we take that position, why isn't it sensible for us to say
4 the normal, bedrock philosophy of remedial orders is to
5 put the wronged party in the position that the wronged
6 party would have been in if, in fact, the defendant has
7 acted as the defendant should have, and if we take that
8 position, then we're going to, in effect, find the wages
9 payable for these various tax purposes when they should
10 have been paid.

11 MR. FELDMAN: I don't think that that's the --
12 that is the philosophy when you have litigation between
13 the wrongdoer and the wronged party. I don't think that
14 that's a part of the philosophy of the tax code. The
15 Government is not the wrong -- the party that committed
16 any wrong in this case or in any of the other cases --

17 QUESTION: Right. The Government is a neutral
18 party so far as that's concerned.

19 MR. FELDMAN: -- this question --

20 QUESTION: But why should a neutral party, in
21 effect, have a -- in effect a different rule for its
22 taxation from the rule which in effect determines the
23 relationships of the two parties to the litigation? Why
24 should we have disparate rules?

25 MR. FELDMAN: Because we know -- because what

1 Congress was looking for was an administrable rule to
2 apply for the tax system here.

3 QUESTION: Well --

4 MR. FELDMAN: Under respondent's rule --

5 QUESTION: But what is -- I -- we don't have the
6 same problem of administration when we look back with back
7 pay and say when it should have -- when should it have
8 been paid that we have when Congress was addressing the
9 problem in 1939, which was an accrual kind of problem in
10 which the taxes are due on wages before the wages are
11 actually paid. I mean, those are entirely different
12 administrative problems. I guess I don't really see what
13 the administrative problem is in the back pay context.

14 MR. FELDMAN: Well, I think the administrative
15 problem is that under the should-have-been-paid rule that
16 respondent advocates there's two distinct areas of
17 controversy that don't arise under the wages-paid rule
18 that's in the statute. First, in our society people are
19 ordinarily paid for services paid during a certain period,
20 so in order to figure out when wages should be paid, you
21 have to figure out when the services were performed, or
22 for what period they're being paid. That's exactly the
23 inquiry that was required under the 1935 statute --

24 QUESTION: Yes, but the --

25 MR. FELDMAN: -- and that would be reinstituted

1 under this statute.

2 QUESTION: Take this case. Take this case.
3 What is the problem in this case? These people weren't
4 being paid for doing piecework. They were being paid a
5 salary under a contract which, at least so far as the
6 briefs indicated, would call for regular wage payments, so
7 I don't see any administrative problem in applying the
8 respondent's rule in this case.

9 MR. FELDMAN: Well, in every case, there may not
10 be a problem in every case, although I would add, I'm not
11 sure in this case whether it's been developed when the
12 wages should have been paid. It hasn't been stipulated
13 to --

14 QUESTION: Well, do you have any reason to
15 believe it would be difficult to develop that?

16 MR. FELDMAN: I don't know what kinds of
17 arrangements they had, but some times employers pay things
18 early, sometimes they pay late. There are many, many
19 kinds of employment in this country. There's casual and
20 part-time workers, there's commissioned workers, royalty-
21 based workers, there's employers who decide to pay early
22 against a later commission. In all of those cases, what
23 you'd have to do is look back and say, when was the work
24 performed, and when should have been in the ordinary
25 course the wages paid, and it offers an opportunity --

1 QUESTION: But isn't that --

2 MR. FELDMAN: -- a further opportunity --

3 QUESTION: But isn't that what is determined in
4 effect in the contract actions that result in the
5 judgments of back pay? In other words, don't -- at the
6 time, as it were, the parties in the Government confront
7 the problem that you raise, haven't they in the normal
8 course already confronted that problem in the lawsuit
9 which results in the back-pay award?

10 MR. FELDMAN: I don't think that that's
11 necessarily so. I mean, I think one question that
12 frequently, especially when cases are settled, and are not
13 resolved by a final judgment, one question that nobody has
14 to decide is when should the services -- when were the
15 services performed, and when the money should have been
16 paid. You're just paying somebody some money.

17 You can tell the date that the money was paid.
18 It's very easy. But there's numerous opportunities for,
19 both for collusion between parties to say that it should
20 have been paid on whatever date is going to work out best
21 for them. There's opportunities for disputes between
22 employers and employees about when the work was performed,
23 when the wages should have been paid for that work,
24 because they -- employers and employees may themselves
25 have different interests. There's the same -- it's the

1 same confusion and difficulty that Congress wanted to move
2 away from. Under the --

3 QUESTION: On the income tax side, the back-pay
4 award itself --

5 MR. FELDMAN: Yes.

6 QUESTION: Back pay was attributable to '86,
7 '87, but it's paid in '94. For income tax purposes,
8 nowadays it's '94 income, is that right?

9 MR. FELDMAN: That's correct. For almost all --
10 at least on the individual side, for almost all individual
11 taxpayers they pay on a cash basis, and --

12 QUESTION: Well, what about for the employer's
13 deduction, I wanted to ask.

14 MR. FELDMAN: You know, for the employer's
15 deduction, it's not in the record here, and I'm not sure
16 on what basis the employer is working, but since the
17 employers and employees have to be on the same year, it
18 really makes sense to look at the individuals, because we
19 do know that the individuals' taxes are going to be on a
20 cash basis.

21 QUESTION: I take it the employer gets a
22 deduction for the FICA and the FUTA.

23 MR. FELDMAN: Yes, that's correct. That's
24 correct, and keeping this -- keeping the FICA and FUTA
25 taxes on the same basis as the income tax also avoids some

1 further confusion in these schemes. When Congress enacted
2 the FICA and FUTA schemes, and when they changed it in
3 1939 and 1946, these schemes were supposed to be simple
4 and easy to administer.

5 It actually, it follows, in fact, a fortiori
6 from the fact that individuals do this under the income
7 tax and nobody disputed that so far, that it should be
8 treated the same way under FICA and FUTA. Those taxes
9 apply usually to almost all wages. There's a few -- there
10 are some exceptions, but very few people actually come
11 within them.

12 QUESTION: It seems to me we have three
13 arguments. We have the plain language of the statute, as
14 to which you have the slight edge. You have thee
15 Nierotko, which obviously the respondents do, and in the
16 middle ground you have the ease of administration, and I
17 can't quite tell from the briefs, I think there's
18 something to be said on each side for that.

19 MR. FELDMAN: Well, I don't really see anything
20 to be said, frankly, on the other side for ease of
21 administration. They argue that there are a bunch of
22 statutory -- there are a bunch of statutory provisions
23 defining wages and so on that would be -- would come up
24 with results that they say Congress wouldn't have wanted,
25 but all of those provisions are precisely-worded

1 provisions that tie something to payments made during a
2 certain period of time, and Congress advisedly, I think,
3 in adopting those provisions, they didn't say, well, the
4 employer -- they're not wages, if the employer was really
5 just giving a gratuitous payment, and so you have to look
6 and see whether it was a gratuitous payment. They said, 6
7 months after the employee ceased working, if it comes
8 after, more than 6 months it's not taxed, if it's less
9 than 6 months it is taxed.

10 Their -- and really that's very consistent with
11 the whole FICA and FUTA schemes, where these taxes are not
12 generally as high as the income tax, and the FUTA tax is
13 rather low. The whole scheme was, you apply it from
14 dollar number 1. You try to have a simple rule that's
15 easily administrable.

16 QUESTION: Mr. Feldman --

17 QUESTION: What happens, say, if it's a small
18 employer, and he's just late on paying the wage? He pays
19 it in January instead of December. What's the standard
20 rule for allocating? Do you just --

21 MR. FELDMAN: You look at the time it was paid,
22 it says in the regulations. It say when it was actually
23 paid. The only exception is constructive payment, which
24 comes in very few cases, and that's where it's actually
25 available to the employee but the employee didn't pick up

1 the check or something.

2 QUESTION: Mr. Feldman, can I just ask, you may
3 have covered this, but in the red brief, toward the end of
4 the brief, there were a lot of anomalous examples. If you
5 follow one rule for benefit purposes, another rule for tax
6 purposes, you get a bunch of anomalies they suggest, and
7 your response to all of that is, as I understand it,
8 that's been true for 40 or 50 years, and it really isn't
9 all that serious. Is that your answer?

10 MR. FELDMAN: I think, two answers. One is it
11 has been true for 40 or 50 years, and it hasn't caused any
12 major problems, but second is, I just don't think that
13 there are anomalies, the anomalies would be created.

14 Let me take another example. There's the
15 example of a case where payments that are made to the
16 estate of someone who's deceased in the year after they
17 died, are not taxed under FICA and FUTA, but if the
18 payment is made during the year -- in the same year that
19 they died, they are taxed under FICA and FUTA. That
20 provides a bright line. It's easy to administer. You go,
21 you look, you see when the payment was made, and you
22 decide whether you have to pay the FICA and FUTA taxes,
23 which is very consistent with how Congress wanted this
24 scheme to work.

25 Under respondent's scheme, you have to look at

1 all the payments that were made after the year that the
2 person died and try to see, well, was there some reason
3 why they really should have been made earlier, were they
4 late, were they delayed, did the employer not make the
5 payment on time, was there a dispute, whatever, and you
6 have to sort all that out.

7 I think under the logic of respondent's
8 position, which is, you're trying to put people, the
9 Federal Government in the FICA and FUTA system is trying
10 to put people in the same position they would have been if
11 the taxes had been paid when they should have been, you
12 have exactly the reverse problem, too.

13 All the payments that were made during the year
14 that the person died, you have to look, well, were those
15 advance payments, should they really have been made in the
16 next year, why shouldn't they be made in the next year,
17 then they're not taxable, and I don't really see any way
18 to distinguish between any of those cases.

19 I think Congress enacted a precisely drawn
20 statute here with carefully drawn provisions that drew
21 sharp lines and were easy to administer, and the
22 wages-paid rule is the classic example of that, because
23 it's -- there's very few disputes about when wages are
24 actually paid, and if it's applied in accordance with its
25 terms, then the result is that you were able to do it, and

1 I don't think any --

2 QUESTION: Of course, their position only
3 applies to back-pay awards, which usually are -- you do
4 determine the period when the wages should have been paid
5 in that kind of a context. It's not just like the
6 year-end bonus, or something like that.

7 MR. FELDMAN: Well, back pay covers -- may cover
8 a lot of different situations. I mean, I guess back pay,
9 as I understand the way they would use the word, which is
10 not the way Social Security Administration views it, is
11 any time when somebody doesn't get -- gets paid later than
12 when they should have been, which it could be due to
13 someone's fault, it could be due to no one's fault, and it
14 could be just a brief delay, it could be a long delay, and
15 when those cases are then -- a dispute does arise, a
16 significant dispute, and you come to settlement, the
17 parties can just then characterize whenever the wages were
18 paid, if they could agree on that, and the IRS would have
19 a very difficult time disputing any of that, whereas --

20 QUESTION: It could be part of the settlement
21 deal. You know, you say this date, and I'll settle for a
22 little less.

23 MR. FELDMAN: Right, and that's exactly the
24 problem, and in our view what Congress did was, enacted a
25 wages-paid rule, and they -- although -- and they were, in

1 1939 and then when they completed the job in 1946,
2 directly addressing the need to avoid the kind of
3 confusion and uncertainty and opportunity for manipulation
4 that might arise under a should-have-been-paid rule.

5 The -- I would add that the provisions at issue
6 in Nierotko at most -- the Court in Nierotko did not
7 discuss or cite any of the tax provisions at issue here.
8 At the very most, they referred to section 209(g) of the
9 1939 Act, which had slightly different language from the
10 tax provisions that are in issue here, although I wouldn't
11 make a big deal out of that.

12 It talked about quarters in which wages were
13 paid, rather than wages paid during a year, but it had
14 slightly different language, and I think the Court's whole
15 approach in Nierotko was driven by its impression of the
16 purposes, the need for security in an old age security
17 system, which is what the Social Security system was.

18 It would be anomalous to take that approach,
19 that was driven by the purposes of that system and was,
20 insofar as the Court was looking at language at all was
21 driven by language of different provisions that are in a
22 context that's talking about benefits determinations and
23 who's a fully-qualified individual, and apply it to the
24 statutes that are at issue here, which talk about rates of
25 taxation, and are quite clear in speaking in terms of

1 wages paid during a particular year.

2 I'd just -- finally I'd add that the Treasury
3 Department by regulation has for a very long time, since
4 the time of Nierotko, and in fact even before that,
5 looking at some of the wages, the rate provisions of the
6 19 -- when they were changed in 1939 has had a wages-paid
7 rule. It's firmly adhered to that position.

8 The Treasury regulations give examples of, right
9 in the regulations of cases where some one is paid one
10 year for services in the prior year, and they say no, you
11 go, you look at when the wages were paid, and that answers
12 all questions. It doesn't say, you then look and see
13 well, when should they really have been paid, or why were
14 they paid late, or should they have been paid later than
15 they were, or any of those questions that could arise.

16 The IRS, the Treasury regulations also speak
17 specifically in terms of wages actually paid. That's the
18 basis of the statute. I don't think that could be
19 clearer, although I think actually the language of the
20 statute is equally clear and consistent with that.

21 QUESTION: Have we given deference to those regs
22 in the past?

23 MR. FELDMAN: The Treasury regulations, the
24 Court has always given deference to Treasury regulations
25 construing the tax code, and these are formal regulations

1 that are in CFR.

2 Now, in addition, they've been -- those
3 regulations have consistently been applied in a series of
4 revenue rulings, including one in 1989, that specifically
5 applied those regulations to this kind of a case, to a
6 back-pay case, and said the wages-paid rule is the one
7 that applied. That -- the Court has generally given
8 deference to revenue rulings. In the Correll case the
9 Court said that those rulings are entitled to deference,
10 especially in a case like this, where the revenue ruling
11 is a direct interpretation of the Treasury regulation.

12 QUESTION: Any distinction between the extent of
13 deference to the Treasury regulations and the revenue
14 ruling, or is it the same?

15 MR. FELDMAN: I think it's the same. The -- I
16 mean, there's a long story that's actually in our brief
17 about the history of revenue rulings. Before 1961 they
18 were not, did not have precedential value, even within the
19 Treasury Department, and therefore there was no reason to
20 give them deference, and they weren't accorded deference,
21 and there's a couple of decisions of this Court saying
22 that they don't get it.

23 After 1961, authority to issue those
24 regulations, which had been vested in the Secretary of the
25 Treasury, was delegated to the head of the IRS, and since

1 that time -- and then this Court in the Correll case,
2 dealing with one of the -- with some of those revenue
3 rulings that came up at that stage said yes, we give
4 deference to the IRS revenue rulings because they're the
5 masters of the subject. They have to deal with the --
6 deal with these kinds of problems on a daily basis.

7 QUESTION: But it didn't say we give them the
8 same deference that we give a regulation?

9 MR. FELDMAN: It was a -- Correll was a
10 pre-Chevron case, and so they didn't talk specifically in
11 the language of Chevron, but given the history of the
12 delegation by the Secretary of Treasury to the head of the
13 IRS, I don't see why they wouldn't get the same deference.

14 The IRS, when they publish revenue rulings, says
15 these don't have the full breadth of scope, because they
16 generally deal with just a narrow issue, and they don't
17 intend that they apply broadly to items beyond
18 specifically the problem that they're addressing, but
19 within that scope, they should get exactly the same
20 deference.

21 But in any event, our position is consistent
22 with, and really is -- our position is the position that's
23 been in the Treasury Department regulations since 19 --
24 the early 1940's, and if there were any doubt about what
25 these provisions mean, those regulations should be

1 given effect --

2 QUESTION: Treasury regs adopted by -- how,
3 notice and comment rulemaking?

4 MR. FELDMAN: Yes, I'm almost certain. I mean,
5 these regulations go back way, way far.

6 QUESTION: Well, if it's the early 1940's, it's
7 before the Administrative Procedure Act, and they probably
8 weren't adopted by notice of --

9 MR. FELDMAN: Right, but they've been
10 repromulgated since, and I'm certain -- I haven't looked
11 at the Federal Register, but I'm certain they were adopted
12 that way.

13 QUESTION: Thank you, Mr. -- you're reserving,
14 Mr. Feldman?

15 Mr. Phillips.

16 ORAL ARGUMENT OF CARTER G. PHILLIPS

17 ON BEHALF OF THE RESPONDENT

18 MR. PHILLIPS: Thank you, Mr. Chief Justice, and
19 may it please the Court:

20 I'd like to essentially focus on three basic
21 points, what the Court held in Nierotko, the importance of
22 the 1946 amendments to the Social Security Act on both the
23 benefits and the tax side, and then finally try to discuss
24 and balance the relative positions with respect to the
25 administrative convenience or inconvenience of the various

1 positions taken here today.

2 With respect to Nierotko, I think I understand
3 the United States to have finally conceded that the
4 pivotal language in the Nierotko decision is the
5 wages-paid language, and that there is no meaningful
6 distinction between the wages-paid language that was the
7 basis for the interpretation in that case and the
8 wages-paid language that we have inherited now that is the
9 subject of the provisions that are at issue in this
10 particular case.

11 But to the extent that there is any question on
12 that, I would ask the Court to recognize first of all it's
13 clear that the Court was interpreting the 1939 amendments,
14 which contains that language. The first paragraph of the
15 opinion refers to quarters of coverage, which was a
16 concept that did not exist prior to 1939, so it clearly
17 had '39 in mind at that point.

18 And then if you look at the penultimate and the
19 ultimate paragraph of the Supreme Court -- of this Court's
20 opinions, it also discusses quite specifically that -- the
21 provision that's at stake here and it says, you know, the
22 petitioner argues, to put it into context, the amendments
23 of 1939 use quarters as the basis for eligibility as well
24 as the measure of benefits, and require wages to be paid
25 in certain quarters, and this Court then, in rejecting

1 essentially that argument said, we have no doubt that it,
2 referring to back pay, should be allocated to the periods
3 when the regular wages were not paid as usual.

4 I think there's no other way to interpret
5 Nierotko except for saying that language of wages paid in
6 the benefits context, certainly, means that you allocate
7 it back to when those wages should have been paid under
8 the -- under that particular scheme. It's a special rule
9 for back pay. Obviously, it doesn't deal with the general
10 accrual problems. It doesn't resurrect any of the accrual
11 problems. It doesn't ask you to try to make those kinds
12 of decisions. It asks you to say, when would they have
13 been paid if the employer --

14 QUESTION: And it's dealing, Mr. Phillips, with
15 the receipt of benefits by a -- it was a beneficiary
16 suing.

17 MR. PHILLIPS: That's correct.

18 QUESTION: It wasn't a tax case at all.

19 MR. PHILLIPS: Right, it was a benefits case,
20 Mr. Chief Justice, which is why it then becomes pivotal to
21 turn to 1946.

22 QUESTION: Well, just on this point --

23 MR. PHILLIPS: Yes, Your Honor.

24 QUESTION: -- in other words, the concept of
25 back pay is different here than if the employer is just

1 late?

2 MR. PHILLIPS: Yes, I think that's correct. I
3 mean, it might turn out if the employer --

4 QUESTION: And we get --

5 MR. PHILLIPS: -- is late and there's some fault
6 attributed to it, that might be a different issue, but if
7 he just paid at a different time and there's no issue
8 about it, it's not back pay within the meaning of the
9 Federal scheme, so you know --

10 QUESTION: So we --

11 MR. PHILLIPS: -- and obviously, a dispute as to
12 whether this was back pay for purposes of this rule.

13 QUESTION: So we look to Nierotko to determine
14 the origins of this phrase, of this concept of back pay,
15 or --

16 MR. PHILLIPS: Well, there is --

17 QUESTION: -- it depends on litigation, or --

18 MR. PHILLIPS: Right. There are regulations
19 that define back pay, and do it in terms of payments that
20 would have been made by the employer, you know, but for
21 the employer's wrongdoing, but I don't -- and I don't
22 understand the Government to either, at any point in this
23 litigation to have raised any question as to whether this
24 is fairly describable as back pay. As I understand the
25 question they've asked the Court to decide is, assuming

1 it's back pay, what's the appropriate allocation rule for
2 that kind of an approach.

3 QUESTION: Why, if I pay in January for
4 something I should have paid in December because I'm just
5 late, why isn't that back pay?

6 MR. PHILLIPS: It may well be back pay,
7 depending on the circumstances. If the reason I didn't
8 pay is because I've breached the contract, and I have an
9 obligation to pay it under those circumstances, it might
10 well be back pay under those circumstances.

11 QUESTION: I'm just late. I'm -- my bank
12 account was too small to cut --

13 MR. PHILLIPS: I'm sorry?

14 QUESTION: We just didn't have the money.

15 MR. PHILLIPS: Right. I mean -- but I mean, I
16 don't think you're entitled to hold off paying because you
17 don't have the money.

18 QUESTION: I understand that, but my
19 understanding of the Government tells me that in that case
20 it is attributable to the month in which it was paid, and
21 I'm trying to find out what --

22 MR. PHILLIPS: Yes.

23 QUESTION: -- how employers are going to tell
24 the difference if we hold for you.

25 MR. PHILLIPS: Right. Well, the back-pay

1 definition in the regulations is, pay received in one
2 period of time which would have been paid in a prior
3 period of time except for a wrongful or improper action
4 taken by an employer, under that circumstance I suspect
5 that would fall within back pay, as the Federal Government
6 itself deals with it, but --

7 QUESTION: And for income tax purposes of the
8 employees, it would be -- we're talking back pay. It
9 would be the year received?

10 MR. PHILLIPS: It is in the year received, as it
11 turns out today, but recall, Justice O'Connor, back when
12 this was all enacted in both 1939 and 1946 it would not
13 have been paid under those circumstances. There was a
14 whole different regime with respect to income taxes that
15 existed at that time, and against which Congress was
16 acting with respect to the taxing part and the benefits
17 part of the Social Security Act.

18 QUESTION: Well, but under your view, any late
19 pay is wrongful, if it was due.

20 MR. PHILLIPS: Well, it might be. I don't have
21 a view on that actually, Justice Kennedy. All I'm doing
22 is reading the reg and saying that they attribute to --
23 you know, the question is whether it's wrongful. There
24 may be issues --

25 QUESTION: It isn't just wrongful. It says

1 improper.

2 MR. PHILLIPS: Right, and --

3 QUESTION: Wrongful or improper --

4 MR. PHILLIPS: And my guess is there would be a
5 basis for which you could make a claim of back pay, but
6 that's obviously not what Congress was concerned about
7 when it modified the rule to make it simpler.

8 QUESTION: Yes --

9 MR. PHILLIPS: It was dealing with the
10 traditional accrual problem of payments that you expect in
11 the ordinary course to be paid at times that are different
12 from when the services arise, and then what do you do in
13 that situation, which is a pretty common problem. It's
14 one I face every year.

15 QUESTION: Well, but the point would be that the
16 Congress did want to make it simpler.

17 MR. PHILLIPS: I'm sorry?

18 QUESTION: Congress did change this because it
19 wanted to make it simple for people.

20 MR. PHILLIPS: Absolutely, Justice Breyer.

21 QUESTION: And making it simple for people you
22 just look to the -- the quarter or the year in which the
23 money was received, and that's when the tax is due.

24 Now, if we adopt your position, I think I would
25 agree with Justice Kennedy's implication. Suddenly, it's

1 not going to be so simple any more, and it isn't just an
2 allocation question, it's also a question of what is it
3 you allocate, and sometimes you're going to allocate these
4 payments, and sometimes you won't allocate the payments.
5 It sounds like a mess.

6 MR. PHILLIPS: Well --

7 QUESTION: That's the --

8 MR. PHILLIPS: You know, the Court addressed
9 exactly the same quote, mess, in Nierotko itself.

10 QUESTION: No, they thought -- Nierotko was very
11 simple, really. It was just a question of whether or not
12 people are covered for Social Security purposes.

13 MR. PHILLIPS: But it addressed --

14 QUESTION: It would be terrible if you said
15 they're not covered for Social Security purposes simply
16 because the employer never paid them their wages and they
17 got it all in one lump sum after they were 50 years old.
18 That would be terrible.

19 MR. PHILLIPS: Right, but --

20 QUESTION: So of course you allocate it back.

21 MR. PHILLIPS: But Justice Breyer, the point is,
22 is that there are still the same accounting questions that
23 will arise under that scheme, that will arise under our
24 interpretation today, and this Court -- and the Government
25 argued, don't go that route, because there will be

1 accounting problems.

2 QUESTION: Assuming that they are the same.
3 Assuming they're the same. I'm not positive, but I'll
4 assume that, all right --

5 MR. PHILLIPS: Well, they are very, very
6 similar, Justice Breyer.

7 QUESTION: Okay. All right. Assuming they are
8 the same --

9 MR. PHILLIPS: And the Court dismissed those as
10 not insuperable.

11 QUESTION: All right. What about the other
12 difference implicit in what I asked? Obviously, where you
13 have a Social Security statute, and people are supposed to
14 be covered, you're going to make a big effort to allocate
15 this backwards, because if you didn't, it would mean that
16 the statute wouldn't serve its basic purpose.

17 MR. PHILLIPS: Right.

18 QUESTION: Here, however, what we have is not
19 only a desire for administrative simplicity, but we also
20 have, who knows where the chips will fall? I mean, let
21 them fall where they may. Sometimes some employees will
22 be helped, sometimes others will be hurt, sometimes -- you
23 know, who knows, and therefore you don't have this
24 overriding statutory goal to get the backwards allocation.

25 MR. PHILLIPS: There are two answers to that.

1 One is, in the 1946 amendments, Congress was very clear
2 when it said, what we want here is conformity on the
3 benefits side and on the tax side, and therefore the
4 ultimate question about administrative convenience isn't
5 the answer.

6 What Congress wanted was for the two schemes to
7 be the same, so to the extent that the benefits tends to
8 take you back in time, as I think the Government has
9 conceded today it continues to do, in order to comply or
10 to further the overall objective of Congress in 1946, you
11 have to do the same thing on the tax side, otherwise
12 conformity is completely impossible to achieve, and that's
13 the overriding congressional purpose, it seems to me.

14 QUESTION: Who cares? What's so important about
15 having the coverage question of what quarters are covered
16 for beneficiaries and the tax question of where you pay
17 the FICAs, who cares whether they conform or not? Why
18 does it matter?

19 MR. PHILLIPS: Well --

20 QUESTION: The three examples you came up with,
21 their response to that is, each of them involves, if
22 you're right, the Government collecting less money, and we
23 don't care.

24 MR. PHILLIPS: Well, I mean, there are two
25 answers to that. One is the overall purpose of the

1 Court's mission here is presumably to implement Congress'
2 intent, and if Congress says to you, by adopting exactly
3 the same words for two separate provisions that deal with
4 two different schemes --

5 QUESTION: May I ask you a question on that?

6 MR. PHILLIPS: -- then it seems to me the answer
7 is, adopt Congress' -- and tells you we want conformity
8 between the two --

9 QUESTION: Mr. Phillips --

10 MR. PHILLIPS: -- then the only -- I'm sorry,
11 Justice --

12 QUESTION: Let's assume Congress said that and
13 meant that completely. Is it -- is Mr. Feldman correct in
14 telling us that despite that clear statement from
15 Congress, for the last 50 years they've been doing just
16 the opposite, and following one rule for benefits and
17 another rule for taxes?

18 MR. PHILLIPS: Yes. For the last 50 years the
19 Social Security Administration --

20 QUESTION: So at least we are -- what is called
21 into question is a uniform, consistently followed practice
22 for five or six decades.

23 MR. PHILLIPS: Yes, on both sides, though.
24 Remember, Social Security Administration --

25 QUESTION: I understand.

1 MR. PHILLIPS: -- has had an equally uniform
2 rule that it has applied since the very day Nierotko was
3 decided, and when the 1946 amendments went into place, and
4 if you look at the lodging that we filed that
5 identifies --

6 QUESTION: No --

7 MR. PHILLIPS: -- a description of this analysis
8 by the Social Security Administration, from day one they
9 said, the Court said in Nierotko, for back pay you have to
10 allocate it back, and that's the way we're going to apply
11 it, and that sort of makes the --

12 QUESTION: You disagree with the -- Mr. Feldman
13 told us that on the benefits side of the allocation it was
14 really up to the wage-earner, could do it either way. I
15 can't imagine why -- well, in my -- in -- I think he told
16 us first of all in most cases it means nothing at all.

17 MR. PHILLIPS: Right, but that's clearly wrong,
18 because when you're dealing -- I mean, it may be one thing
19 for quarters of coverage, which is what he identified, but
20 when you're talking about the maximum benefits of \$50,000,
21 and you're talking about incomes that well exceed that,
22 how you treat that money is a big, big difference in terms
23 of how it applies out in a particular situation.

24 QUESTION: But there's -- if you would create a
25 symmetry between benefits and the tax, you would be

1 creating an asymmetry between the income taxation of the
2 back pay and the taxes that go with that --

3 MR. PHILLIPS: But that's an asymmetry that has
4 existed for all time. There's never been consistency
5 between income taxes and Social Security taxes. What I'm
6 trying to do is say, when you talk about, quote, Social
7 Security taxes, which defines what kinds of benefits
8 you're going to get and whether you're entitled to
9 benefits in any event, as opposed to Social Security taxes
10 as to how much has to be contributed by the employer, that
11 it ought to be the same. It should not be that John
12 Butcher, for instance --

13 QUESTION: Well, I -- in the case of Social
14 Security and that allocation, the employee benefits every
15 time by doing it the way Nierotko -- the employee can only
16 be helped. On the other side, sometimes the employees are
17 helped --

18 MR. PHILLIPS: Well --

19 QUESTION: -- sometimes they're not.

20 MR. PHILLIPS: Well, I don't know that they'll
21 always be helped. There are certainly certain
22 circumstances where -- it depends on how much income they
23 had, under what -- at what point in time.

24 QUESTION: But then Mr. Feldman tells us they
25 have an option, if it wouldn't work out for them, to

1 spread it back over --

2 MR. PHILLIPS: Well, I don't read Nierotko as
3 having given them that option. I read Nierotko as saying
4 that, you know, you must allocate back. That's the answer
5 for back pay, in order to do it.

6 But you know, if there's some mechanism in there
7 for waiving their rights, I suppose that may be true, but
8 I don't think you can analyze the same language in the
9 same statute adopted at the same time with a command the
10 two ought to be in conformity to each other, and then
11 interpret them as allowing fundamentally different
12 approaches, and that goes to the core of the question of
13 administrative ease.

14 Let's be clear about this, there is an entire
15 set of accounting rules for Social Security that exist
16 today, and a complete set of accounting rules that apply
17 under the IRS, and as I understand the Government's
18 position, Social Security is absolutely right in its
19 interpretation of what's required here, so if you're going
20 to have consistency in this approach, the only way you can
21 have consistency is by moving the IRS over to the Social
22 Security side.

23 QUESTION: Well, what language, Mr. Phillips,
24 precisely is it in the 1946 amendments that you say insist
25 that there be symmetry?

1 MR. PHILLIPS: The Senate report that we --

2 QUESTION: I mean the language in the Act
3 itself.

4 MR. PHILLIPS: Oh, well, the language in the Act
5 itself is wages paid. It's exactly identical in both the
6 Social Security benefits language and the Social
7 Security -- excuse me, under the tax provision itself.
8 Wages paid is the operative language and, as I understand
9 the Government today, they concede that's the key term
10 that we're focusing on, and that language was used, you
11 know, with the express statement in the legislative
12 history, that it was done for conformity, which just
13 reinforces what I think common sense would tell us.

14 QUESTION: Is that -- is the Senate report cited
15 in your brief?

16 MR. PHILLIPS: Yes, Justice -- Mr. Chief
17 Justice.

18 QUESTION: Well, I can find it.

19 MR. PHILLIPS: It's on page 21 of our brief.

20 QUESTION: Thank you.

21 MR. PHILLIPS: It seems to me that --

22 QUESTION: Apparently the Internal Revenue
23 Service didn't read that, or didn't think that everybody
24 paid attention to it, or what? I --

25 MR. PHILLIPS: Well, I hesitate to speculate

1 about what the Internal Revenue Service's motive was here,
2 other than -- I do think it's important to put in context,
3 remember, the Internal Revenue -- the Government's
4 position here is, this doesn't promote fairness, this
5 doesn't promote revenue enhancement.

6 The sole purpose that they try to promote is
7 some notion of administrative simplicity, and so they have
8 a somewhat simpler method of dealing with it. It just
9 happens to do violence to core notions of statutory
10 interpretation, creates two different schemes of
11 accounting that every employer and employee has to deal
12 with, and creates the kinds of disruptions in the scheme
13 that we spent some time talking about under the exceptions
14 under the Social Security --

15 QUESTION: If you want to talk about violence to
16 the statute, Nierotko, it seems to me, does a fair amount
17 of violence to the statute, and I suppose the question is
18 whether you're going to -- whether it's worse to extend
19 that violence to both half of -- both halves of the
20 statute, or to leave Nierotko where it is as a case that,
21 where a hard case made bad law, taking the word paid not
22 to mean paid in order to prevent Social Security
23 recipients from being read out of the system. I'm frankly
24 attracted to the latter approach.

25 MR. PHILLIPS: And that would -- and that might

1 be a colorable argument but for the fact that Congress,
2 before the ink was dried on Nierotko, looked at exactly
3 that language, adopted exactly that language, and
4 engrafted it into the statute on a going-forward basis,
5 and so the notion that the Court might revisit Nierotko,
6 you know, today -- I mean, 1) the Government doesn't ask
7 you to, and 2) it doesn't make sense to do that, and
8 second, I don't even understand the Government to be
9 asking you to reconsider it on the benefits side.

10 What it says is, you can have a tax rule that
11 goes in one direction, a benefits rule that goes in
12 another direction, when the language is exactly identical.

13 QUESTION: Mr. Phillips, this dichotomy that's
14 gone on since 1946, has anybody in Congress tried to
15 straighten this out, do you know? Has there ever been any
16 motion to clarify this terrible inconsistency?

17 MR. PHILLIPS: Well, you know, it's an
18 interesting question, because both sides of the -- you
19 know, the Federal Government is obviously of two minds on
20 this score. I'm not sure who would have generated enough
21 momentum in order to try to get it changed under those
22 circumstances, so as far as I know there haven't been any
23 legislative efforts.

24 QUESTION: Does the general policy that
25 underlies their doctrine of stare decisis have any bearing

1 on what we should do with this case, do you think?

2 MR. PHILLIPS: Well, I would hope that the Court
3 would rigorously enforce the ruling in Nierotko and -- but
4 beyond that, I think you get more mileage in this
5 particular context, because Congress in 1946 ratified
6 Nierotko and implemented it on a going-forward basis, so,
7 I mean, I don't think there's a -- I don't understand the
8 Government to be arguing that we ought to revisit Nierotko
9 at this particular --

10 QUESTION: Will you make a -- like a quick
11 summary -- I'm asking you repeat yourself, in a sense, but
12 I -- Nierotko's a famous case, and Nierotko --

13 MR. PHILLIPS: I don't think I appreciated that
14 till today.

15 QUESTION: Yes -- but no, it's the other part.
16 It's a famous case. It says that -- Nierotko is about
17 back pay being covered by the Social Security Act and,
18 more importantly, the Court says that even though the
19 administrators think it shouldn't fall within it --

20 MR. PHILLIPS: Right.

21 QUESTION: -- Congress wanted to, so it's
22 opposite Chevron. It's the --

23 MR. PHILLIPS: Predated Chevron, too.

24 QUESTION: It's always been interesting for that
25 reason, so I just thought, well, gee, that's what this

1 case is about. They're saying this word, you know, this
2 word wages here, covers back pay. Now, once they make
3 that decision, they sweep away the little subsidiary
4 argument which is that it couldn't mean that because
5 otherwise you'd have to allocate, and they say, oh, no, go
6 allocate.

7 All right. So I think of it, where Congress
8 said that wages include back pay, you allocate, and now I
9 think, this isn't that, and Congress didn't even say that.
10 Congress wasn't talking about taxes. The Court never
11 thought Congress was talking about taxes. They weren't
12 talking about some general allocation rule. They were
13 talking about the allocation of the back pay which counts
14 as wages for purposes of the Social Security Act. You see
15 why I kept thinking it was different?

16 MR. PHILLIPS: Sure.

17 QUESTION: And you're going to tell me no, it's
18 not different.

19 MR. PHILLIPS: Because of the 1946 amendments,
20 and for exactly the reason you identified. Nierotko is a
21 famous case. Congress, seven months after the 1946 famous
22 Nierotko decision --

23 (Laughter.)

24 MR. PHILLIPS: -- comes back to this same tax-
25 benefits position, uses exactly that language. What could

1 Congress have meant? It clearly didn't mean to overrule
2 Nierotko on the benefits side, and it says it wants the
3 tax side to conform to it.

4 So in 1946, Congress told us the right answer,
5 and hopefully, 55 years, this Court will tell the IRS
6 that's the right answer, get in line with the Social
7 Security Administration, and affirm the judgment below.
8 If they need a change, let them take it to Congress.

9 If there are no other questions, I'll --

10 QUESTION: Thank you, Mr. Phillips.

11 Mr. Feldman, you have 4 minutes remaining.

12 REBUTTAL ARGUMENT OF JAMES A. FELDMAN

13 ON BEHALF OF THE PETITIONER

14 MR. FELDMAN: I just have a couple of brief
15 points. One is --

16 QUESTION: Do you agree that it's a famous case?

17 (Laughter.)

18 MR. FELDMAN: It is for me now, moderately.

19 I think one of the points actually I wanted to
20 make is that, to look carefully at what happened in 1946.
21 This Court decided Nierotko. There's not a trace of any
22 indication in the legislative history of the 1946
23 amendments that Congress had any idea that Nierotko had
24 been decided. They certainly did not say, we are trying
25 to conform anything to Nierotko, so that's the first

1 point.

2 The second point is, what they did do there is,
3 they also did not change the specific provision that was
4 at issue in Nierotko, which was a benefits provision. It
5 was a definition of who is a fully qualified individual.
6 They didn't change that at all, and so they didn't discuss
7 it.

8 What they did change was the tax provision for
9 the wage base, and that provision they changed to move it
10 to the wages-paid rule, which they had started to bring in
11 in 1939, and they had said why they did that, to avoid the
12 confusion and difficulties that the other rule had caused.

13 Finally, then, they changed the wage base in the
14 Social Security Act, which was not at issue in Nierotko,
15 because that had nothing to do with wage bases. It had to
16 do with who was a fully qualified -- they changed that,
17 and they said, well, we're doing this just to conform with
18 what we've done with the tax provisions.

19 I think if you put it all together, what the
20 clear intent was, was to keep the taxes easily
21 collectible, and to pursue the ease of administration that
22 they had started in 1939, and then just to bring the
23 Social Security wage base definition in line with that,
24 but I don't think saying that meant in any way, or there's
25 no reason to think that Congress thought that what -- if

1 they were aware at all of Nierotko, that it had anything
2 to do with taxes.

3 As far as the Social Security -- just two other
4 very brief points. One is that the Social Security
5 Publication 957 discusses what they -- their method is,
6 and they do give an option, because they say you can --
7 you report the back pay on your W-2, and then if you file
8 another filing allocating it back, we'll look at that. If
9 you don't, you can just leave it allocated on the W-2 for
10 the year it was paid.

11 And finally, just one other point that I thought
12 was interesting is that the 19 -- Mr. Phillips referred to
13 the 1943 income tax provision that did allow some
14 attributing back pay to prior years. That was limited to
15 where it was 15 percent or more of your wages, but this
16 was a statute which they enacted, and it's called Section
17 119, Back Pay Attributable to Prior Years, and it starts
18 off, if the amount of back pay received or accrued by an
19 individual, and so on.

20 So when Congress wanted to address the back pay
21 problem in the income tax context, right around this time,
22 they did it, they did it in express language, they kept
23 that into effect, in effect for a certain number of years,
24 they limited it to where it's more than 15 percent of the
25 income, and then they got rid of it when they found that

1 that was too difficult to work, in, I think, 1961 or so.

2 None of those things happened with respect to,
3 in 1946 with respect to the Nierotko decision, or the FICA
4 and FUTA taxes at issue here.

5 Thank you.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
7 Feldman. The case is submitted.

8 (Whereupon, at 12:01 p.m., the case in the
9 above-entitled matter was submitted.)

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