

Supreme Court of the United States

OCTOBER TERM, 1968

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FILED
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JOHN F. DAVIS, CLERK

In the Matter of:

Docket No. 200

BEN H. FRANK,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

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Place Washington, D. C.

Date December 12, 1968

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C O N T E N T S

ORAL ARGUMENTS OF:

P A G E

John B. Ogden, Esq., on behalf of the Petitioner

2

Peter L. Strauss, on behalf of the Respondent

11

REBUTTAL ARGUMENT:

P A G E

John B. Ogden, on behalf of the Petitioner

34

* * * * *

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 -----x
 4 BEN H. FRANK, :
 5 Petitioner, :
 6 vs. : No. 200
 7 UNITED STATES OF AMERICA, :
 8 Respondent. :
 9 -----x

10 Washington, D. C.

11 Thursday, December 12, 1968

12 The above-entitled matter came on for argument at
13 11:25 a.m.

14 BEFORE:

15 EARL WARREN, Chief Justice
 16 HUGO L. BLACK, Associate Justice
 17 WILLIAM O. DOUGLAS, Associate Justice
 18 JOHN M. HARLAN, Associate Justice
 19 WILLIAM J. BRENNAN, JR., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 ABE FORTAS, Associate Justice
 THURGOOD MARSHALL, Associate Justice

20 APPEARANCES:

21 JOHN B. OGDEN, Esq.
 22 1412 Liberty Bank Building
 Oklahoma City, Oklahoma
 Counsel for Petitioner

23 PETER L. STRAUSS
 24 United States Department of Justice
 Washington, D. C.
 25 Counsel for Respondent

1 wasn't one of these cases where somebody would go out and make
2 a lot of money and leave everybody sitting there. I don't
3 think he ever owned a car that was paid for. I know he didn't
4 own a home.

5 He was one of those kinds of people. They couldn't
6 do anything against him, so they filed a suit against him.
7 He didn't appear, so they issued a judgment against him.

8 After that he just kept on, he didn't pay much
9 attention to it. So they got an indictment against him. I
10 went up there and defended him in the Federal Court for two
11 or three days. The jury convicted him and he got 18 months.
12 He appealed to the Court of Appeals in Denver in the Tenth
13 Circuit and it was reversed.

14 After it was reversed and came back, Judge Volt, whose
15 son at that time was my law partner -- Judge Volt was an
16 awful nice person -- suggested this case took so long to try,
17 just to let him enter a plea of no contention and get some kind
18 of little sentence and that would save the Government and
19 everybody else a lot of time. He finally did.

20 That case was disposed of in that manner.

21 Then this case came along. I wasn't employed in
22 it. Mr. Frank had moved to Tulsa. That is where the act
23 actually occurred. So he had another law firm. They did
24 an excellent job.

25 When they presented it, the district attorney said

1 he was relying on a section of the statute which he read to
2 the court and convinced Judge Bohannon of the fact that he
3 wasn't entitled to a jury.

4 The Judge, however, was not too much satisfied on
5 that because he made a remark and I might read it. I don't
6 know that it will make any difference, however, what remark
7 he made but he did make a remark that he wasn't too satisfied
8 about the question of whether he was entitled to a jury
9 trial.

10 So, the Judge said, "Well, I am quite concerned
11 about the defendant's right for a jury trial." Then the
12 district attorney read Title 18, Section 3691, USCA, and
13 from that the first part of it, that section, there couldn't
14 be any question about it but the last part confused the Judge,
15 apparently, because the first part of that section of the Code
16 says, "Whenever a contempt charge shall consist of willful
17 disobedience of any law, writ, process, order, rule or
18 decree, or command of any District Court of the U.S. by
19 doing or committing any act or thing in violation thereof, and
20 the act done or committed also constitutes a criminal offense
21 under any act of Congress or under the laws of any State in
22 which the act was done or committed, the accused upon demand
23 therefore shall be entitled to a trial by jury."

24 Now that is the Code. Now if we had stopped there,
25 nobody would have been confused and the case would not have

1 been here. But the district attorney argued and he claimed
2 by virtue of the last part of that same section he was not
3 entitled to a jury.

4 I would like to read the last part for the reason
5 that that is the reason that the trial judge I think denied him
6 a jury trial.

7 "This section shall not apply to contempt committed
8 in the presence of the court." Of course everybody knows
9 that.

10 Here is the part, "nor contempt committed in dis-
11 obedience of any lawful writ, process, order, rule, decree
12 or command entered in any suit or action brought or prosecuted
13 in the name of or on behalf of the United States."

14 Now that last part there is what caused this man to
15 be denied trial by jury. The trial judge said, "Well, this
16 was an act originally where the Securities and Exchange
17 Commission sued Mr. Frank and got that judgment. That is
18 what he is charged with violating."

19 Since he was charged with violating that act the
20 trial judge thought that was the order of the Government,
21 which I guess it is because that is, of course, a part of the
22 U. S. Government, the Securities and Exchange Commission, but
23 regardless of that it is my contention and thought -- I don't
24 think that had any application whatever to that but it is my
25 contention and thought that this wouldn't be any way to start

1 out.

2 If Congress would pass a law today and say, "Well,
3 you can try this man, give him as much as five years but he
4 is not entitled to jury trial," in other words, Congress
5 wouldn't take away a man's constitutional right to a jury
6 trial.

7 I don't think that act does but I can't find any
8 construction of it and I can't tell you what it has been
9 construed to mean. But, at any rate, and regardless of all
10 that we all know, at least I think I do, that the Congress
11 couldn't pass a law and say, "Well, under the Sixth Amendment
12 it says in all criminal offenses. Well, this is a criminal
13 offense and if you will pardon me for being personal, in 1937,
14 I used to be State District Judge for 12 years in Ardmore.
15 When a contempt of court was cited in that case the court
16 said that contempt was a criminal offense.

17 Then our court, the Court of Criminal Appeals,
18 Oklahoma City -- we don't appeal directly to the Supreme Court,
19 we just have one court for criminal appeals, one for civil --
20 well, the Oklahoma Court of Criminal Appeals ever since State-
21 hood has held consistently and every time that a man is entitled
22 to a jury in any casewhere he is charged with violating any
23 order of any court.

24 Then the Constitution of Oklahoma so provides. The
25 Constitution of the U.S., it would seem to me, is just as clear,

1 the Sixth Amendment, that means all, it doesn't say part of
2 it.

3 How do you classify this? They want to classify it
4 apparently -- I say they, I mean the Solicitor General wants
5 to classify it as a petty offense. He got three years.

6 Well, a petty offense is defined by the statute.
7 It is Title 18, Article I, and it is defined and it says
8 a petty offense cannot be more than \$500 or six months in
9 jail. Now that is set out in my brief. Yet that is defined
10 by the statute itself. This can't be a petty offense.

11 Then that same section also defines a felony. It
12 says any offense, now this is that same section I referred
13 to, defining a petty offense.

14 It also says that now we will see what a felony is.
15 If a man can get death or if he gets more than one year it is
16 a felony under the act of Congress.

17 Q Do you think that that is an act of Congress
18 that the judge is permitted to put on probation, may defer
19 sentencing and just put him on probation?

20 A I can't see any difference and I will show you
21 why.

22 Q The act says there is a difference between
23 sentencing and imposition of the sentence. There is no
24 difference.

25 A None whatever. This man is a good example. He

1 is over at Tulsa now. Every Monday morning he has to go up
2 there and report to the probation officer. If he changes jobs
3 he has to report to him. If he is stopped by an officer, he
4 has to report to him.

5 He can't leave the district without getting permission
6 from the judge. In other words, he is in prison but outside.

7 When you read the restrictions that the judge put
8 on there you would see that this man could go right ahead
9 here until the last day, he could go two years and 11 months
10 and 29 days and still the three years had not run out and on
11 the last day he could go out here and violate every one of
12 those and they could make him serve the entire three years.

13 He would say, "I didn't have a jury trial."

14 "It makes no difference. I put you on probation."

15 If Your Honor please, may I just say this the way
16 I look at it.

17 I think just logically now you could say because
18 you put him on probation he wasn't entitled to jury trial, but
19 he got three years on probation.

20 Q You did not know how long the prison term would
21 be if the gentleman violated his probation and then had come
22 before the judge, do you?

23 A I don't have anyway of knowing. There is bound
24 to be some reason to put the three years.

25 Q As a prior judge, if you never said what the

1 jail term was going to be, the man is on probation and he
2 comes back before you for a probation violation, you would
3 then have to make up your mind how much of a jail term you
4 are going to impose?

5 A If Your Honor please, I have always considered
6 that you put somebody on probation for three years or five
7 years and any time during that period of time if they
8 violate the probation they just had to go serve the three
9 years. That is my conception of it. I might be wrong.

10 But I want to call this to your attention. In this
11 case just look how foolish it would be if you put a con-
12 stitutional provision in here that a man is entitled to a jury
13 trial in a criminal case.

14 Is this a criminal case? That is the way it looks
15 to me. Now say put on probation; you can't complain about
16 it. You say wait just a minute.

17 Under the Solicitor General's opinion, say you are
18 a Federal District Judge, you come up here and the man is
19 going to be tried. You say, "Just a minute, you want a jury
20 trial but I can't tell whether I can give you a jury trial
21 or not until I try your case and see whether I put you on
22 probation.

23 "I may decide to put you on probation so if I do you
24 wouldn't be entitled to a jury trial.

25 "So I will have to try you first to see if I give you

1 probation then we will call a jury."

2 That is what that action means in a case like that.

3 Now this man to start out with -- it is a lot more
4 serious, I guess -- I have never been tried in a criminal case
5 or any other kind but I do believe this, that a man either has
6 a right to a jury trial in this kind of case or he doesn't have
7 it. I don't know whether he does or not. He is charged with
8 criminal contempt.

9 The punishment might have been three years and his
10 having to serve the five -- it could go up to five, I think.
11 Anyway, when he walked up there and said, "Judge, I want a
12 jury trial," I don't think -- of course, I want to tell you
13 this frankly -- I wouldn't even claim I had any knowledge
14 whatever of what a jury would or wouldn't do because no one
15 does, but at the same time I think the jury might turn him
16 loose. But they might not.

17 Regardless of that he had that right and he had a right
18 to say, "I want 12 men to say by unanimous verdict that I am
19 guilty of a crime or I am not guilty of a crime." Here is a
20 man, of course, to whom it doesn't make any difference.

21 That poor man is I guess 80-some odd years old, I
22 don't know, but I know one thing, that there wouldn't be a man
23 in this courtroom any more sincere in what he did and he
24 thought he was doing right. Whether he did or didn't, he was
25 entitled to a jury trial and in my opinion should have had

1 it. Now, there is one other thing.

2 Now there is a case cited here in that opinion of
3 the Court of Appeals. This man here is something like that.
4 Some of those people get baptized and believe they can find some
5 kind of doodle-bug or something, you would have to kill them not
6 to make them believe it.

7 This man lived near me in Ardmore. He could not
8 even pay his grocery bill. He went out and discovered the
9 Texas field. He is one of the doodle-bug people. That is all
10 there is to it.

11 He went out, this time he didn't think he was
12 violating the law and had nothing to do with it. He didn't
13 even know he was doing it but he would go out and borrow money
14 and give people a note for 10 years and then claim when he hit
15 oil he would pay them back.

16 I thank the Court for listening to my argument.

17 MR. CHIEF JUSTICE WARREN: Mr. Strauss.

18 ORAL ARGUMENT OF PETER L. STRAUSS

19 ON BEHALF OF THE RESPONDENT

20 MR. STRAUSS: At the indictment which was brought
21 against Petitioner in 1953 or 1954 and, on which he was originally
22 convicted, specified as the period of the offenses for which
23 he was convicted, the broad offense for which he was convicted,
24 the same period on which this injunction and this contempt
25 violation is based.

1 So as far as we know there is not a contention of
2 having continued beyond 1952 when this injunction was ended.

3 There is some indication in the record at page 231,
4 I believe, that was not reproduced in the appendix, that in
5 the 37 months preceding the contempt violation or the
6 adjudication of contempt in this case, the Petitioner was
7 able to turn or obtain something in the order of \$37,000
8 from various people from whom he had solicited funds. He did
9 that principally through advertisements in the Tulsa, Oklahoma,
10 Daily World.

11 These advertisements promised a high level of
12 earnings in a rather short period of time. It is true that
13 the transaction was couched in terms of a note but the trial
14 court found, and there is no contest, it appeared, of course,
15 that this was really a thin disguise -- the Petitioner had
16 no intention of replaying the note he gave and consequently
17 the transaction should be viewed as in fact a violation of
18 the injunction which the SEC had obtained against him in
19 1952.

20 While the injunction was obtained by default there
21 is no question that the Petitioner was not in the first place
22 served, of course, before the injunction proceedings and in
23 the second place, personally served with a copy of the
24 injunction after the injunction was entered.

25 I should also say or it should be quite clear that

1 Petitioner is not and never has been subjected either to a
2 three-year jail term or to the threat of such a term.

3 The judgment of the District Court used the following
4 words: "It is adjudged that imposition of sentence be
5 suspended and the defendant is hereby placed on probation for
6 a period of three years from this date." That is in the
7 appendix at page 24.

8 You can find language to the same effect in the court
9 order at page 25 and 27 of the appendix.

10 The court's reference to the suspension of the
11 imposition of sentence indicates that it was acting according
12 to Section 3651 of Title 18 and therefore, that it had imposed
13 no sentence.

14 It is the Government's view of this case, particularly
15 since it arose after this court's decision in Cheff v.
16 Schnackenberg -- this court's decision came down June 6, the
17 order to show cause was issued June 16, both in 1966, the
18 hearing on the jury demand was held on July 22 and the final
19 order of sentence came on September 1st -- so that the
20 Government position is that once that case had been decided,
21 in fact, any time a jury demand was refused by Federal Court in
22 a contempt case the court was thereby ruling that it would
23 try the case as a petty offense.

24 So that from the moment the jury demand was refused
25 we take the position and we have conceded all along the

1 possible penalties which could be imposed in this case were
2 limited to those which could be imposed under this court's
3 decision in Cheff, that is to say, any punishment which would
4 be possible for a petty offense under the U. S. Code and the
5 Constitution.

6 So that the Government's position can be stated very
7 briefly. Under this Court's case there does exist a class of
8 petty offenses which do not require a jury trial although they
9 may be criminal in nature.

10 While in general the court has investigated the
11 nature of the offense as well as the penalty, I provided for
12 it in determining whether to classify any particular offenses
13 studied in this constitutional sense it determined in Cheff
14 that the nature of criminal contempt was not such as to require
15 jury trial in this case.

16 Criminal contempt might be in some cases a petty
17 offense. Therefore, the court said as recently as last year
18 in Bloom that it would treat criminal contempt as a petty
19 offense unless the punishment imposed makes it a serious
20 offense.

21 We assume that this frames the issue in this case,
22 whether three years of probation is such a serious punishment
23 as to have required a trial by jury, a punishment which could
24 not be authorized for a petty offense.

25 Our position is that the punishment is both a

1 statutory punishment for petty offenses and constitutional
2 punishment for petty offenses and, therefore, no jury trial
3 is required.

4 Q Why do you say that?

5 A In the statutory sense, first the Federal
6 Probation statute which is Section 3651 of Title 18, states
7 without any qualification that any offense which is not
8 punishable by life imprisonment or the death penalty may instead
9 be treated by a sentence of probation, and then states that
10 that term of probation shall not exceed five years. It states
11 this without qualification.

12 Of course a petty offense, since that is defined as
13 an offense by Section 1 of Title 18 --

14 Q That is five years, isn't it?

15 A The statute does authorize the imposition of
16 a probation of five years in petty offenses. That is
17 correct. That is our position.

18 Q Suppose he wasn't on probation, what would you
19 say then?

20 A If he were in jail?

21 Q Yes.

22 A Quite plainly it would be improper. There is
23 no statutory authorization for five years.

24 Q Between probation and a sentence that has to
25 be served?

1 A We do draw that distinction. More importantly,
2 we believe Congress has drawn that distinction.

3 Q On the question of appeal of a sentence on
4 probation where we reject the very argument you made about
5 the rights of people?

6 A I think you are referring to Jones v.
7 Cunningham. The issue there was whether there was any
8 constraint or not.

9 Q What did we hold?

10 A You held there was constraint. We do not
11 deny there is constraint in this case.

12 However, Your Honor, the Court last term indicated
13 that it would view not only, it seems to me, the fact of
14 constraint itself but the seriousness of the constraint.

15 Q It is pretty serious, isn't it, to be under
16 constraint for three years?

17 A I think one has to take into account the sort
18 of constraints that are involved.

19 Q What about reporting every Monday and have to
20 tell everything you do, you are subjected to be called by the
21 judge at any time if he thinks you violated?

22 A I think most of us would prefer that than to
23 have to report every morning at six o'clock in the cell
24 block.

25 Q It might be a little less.

1 A I agree that is the question in this case, how
2 much less is it. It is our position that it is sufficiently
3 less.

4 Q What if he were on probation for 10 years?

5 A Thankfully, we don't have to argue that case.

6 Q It is a logical descendant of this one, isn't
7 it?

8 A No, Your Honor, it is not, for this reason:
9 In the Bloom case, last term the majority opinion which you
10 joined indicated that the Court's first reference in cases
11 such as these would be the practice of the Nation as a
12 whole, would be an objective record.

13 This really is quite consistent with what has been
14 historically its approach. As far back as District of Columbia
15 v. Clawans the Court said in judging the question of the
16 seriousness of the penalty and I quote, this is page 628,
17 "Doubt be resolved not subjectively by recourse of the judge
18 to his own sympathy and emotions but by objective standards
19 such as may be observed in the laws and practices of the
20 community taken as a gauge of its social and ethical
21 judgment."

22 If we look at Section 3401 of the United States
23 Code, for example, we find that it is quite clear that
24 Congress has made the provisions of the Federal Probation
25 Act applicable to petty offenses.

1 Q And to others?

2 A And to others as well, but to petty offenses in
3 particular, which is the question here.

4 I think it is a question whether this is too serious
5 a punishment.

6 Q Suppose the punishment at any time is over
7 three years, would that be considered serious?

8 A I am not sure I understand the question.

9 Q Say he has a five-year sentence.

10 A To probation or jail?

11 Q I am not talking about probation. A five-
12 year sentence.

13 A Any sentence to jail in excess of six months
14 under the contempt case under this Court's ruling in Cheff
15 would be improper.

16 Let me put it another way if I may. Let us suppose
17 that Mr. Frank in this case had been sentenced not to three
18 years on probation but had been sentenced to six months at
19 hard labor on the rock pile of a maximum security prison
20 with solitary confinement and a diet of a disciplinary standard.

21 I don't suppose that we would be in a very good
22 position coming in here to argue to this Court that that
23 sentence fit within the six-month standard which this Court
24 had announced in Cheff.

25 It is not only the duration of the sentence which

1 may indicate what its seriousness is. Again I think the main
2 point is that this Court has indicated and quite properly so,
3 that it will make up its mind on these issues by referring
4 to national practice rather than to its own feelings about
5 the issue.

6 And national practice in the first instance, the
7 Federal Probation Act in the second instance, the survey of
8 State law which we have made in our brief, it seems to us
9 indicate that a three-year term of probation for a minor
10 offense is not at all out of the ordinary.

11 Q I understand that until the judge actually
12 sentences, imposes the jail sentence, you don't know how
13 serious he considered the sentence to be?

14 A I wouldn't take that position at this point.

15 Q And if he had imposed a sentence for contempt
16 of two years in jail and then suspended it you would say under
17 Cheff that is improper?

18 A I would say under Cheff that is improper.

19 I also say under Cheff that once a judge has denied
20 jury trial, if he then at least goes on without giving any
21 indication that he did not understand that opinion, once he
22 has denied a jury trial he has limited himself to six months.

23 Q The trouble I have is two years later he
24 violates his parole, the judge gives him six months.

25 A That is a possibility.

1 Q Isn't that violation of Cheff, because I under-
2 stand Cheff says you can't give anything more than six months.
3 So here you have given six months plus two years or
4 probation. That is the problem I have.

5 A I agree that that is the problem. I am not
6 sure that the Court's opinion resolved that problem.

7 I did have the chance to look at some statistics
8 on that question which may be relevant in this same report
9 of the Administrative Offices of U. S. Courts regarding persons
10 under supervision in the Federal Probation System which we cite
11 with respect to practice.

12 It gives some indication of the removal from
13 probation. It shows, generally speaking, only one out of every
14 seven probationers is ever removed.

15 Q The judge would not have to give six months.

16 A He would not have to.

17 Q He could give less?

18 A He could give less.

19 While we agree that is the possibility that ought
20 to be taken into account in assessing the seriousness, I don't
21 think it should be made conclusive.

22 Q Mr. Strauss, is there explicit authority for
23 suspending the imposition of sentence? Explicit authority.
24 I know it is done.

25 A Yes, I believe there is. I believe it is found

1 in the Federal Probation Act in Section 3651 of that Act.

2 Q For suspending the imposition of sentence?

3 A Yes, upon entering a judgment of conviction
4 of any offense not punishable by life or death. Any court
5 which has jurisdiction to try offenses against the U.S. --
6 of course, that includes petty offenses -- may suspend the
7 imposition or execution of sentence.

8 I think this Court, for example, in the case of
9 Roberts v. United States, which I believe is in 342 US, drew
10 that distinction.

11 Q Let us suppose that this Petitioner violated
12 probation, then I suppose he could come in and one of two
13 things could happen. Either the sentence could be imposed
14 at that time under the reserve power or he could be punished
15 for violation of probation.

16 Is that right?

17 A I am not sure I follow you.

18 Q Suppose the Petitioner violated probation,
19 he just didn't report when he was supposed to report or he
20 went out and robbed a bank in violation of the terms of his
21 probation. He is brought in before the judge.

22 Now what can the judge do?

23 A The judge in this particular circumstance may
24 revoke probation although he is not required to do so.

25 Q What is the consequence of revoking probation

1 right here?

2 A He then proceeds to sentence him, which he had
3 previously suspended.

4 Q No, he suspended the imposition of sentence.
5 Now, can he also punish him for violating the probation?

6 A No. I take it that if it were a penal offense
7 that would require a criminal trial in itself.

8 Q So, the only thing he can do at that time is
9 to impose sentence for the initial offense?

10 A That is right.

11 Q It is your theory then that the most he could
12 impose then would be six months in jail?

13 A That is right.

14 Q I think Justice Brennan asked you this, but
15 if he used a different form of judgment and imposed the
16 sentence of three years and then suspended it, you say the
17 consequences would be different and that then he would have
18 to retry him?

19 A We think that would affirmatively show that
20 he had misunderstood this Court's ruling in Cheff.

21 Q Or that he had decided this was more than a petty
22 offense and deserved more punishment than six months?

23 A I take it, Your Honor, if that should ever
24 occur to a judge in the course of a trial for contempt, what
25 he would probably do is declare a mistrial at this point and

1 convene a jury.

2 MR. CHIEF JUSTICE WARREN: What is that section
3 you read us about suspending judgments?

4 MR. STRAUSS: That is Section 3651 of Title 18.

5 MR. CHIEF JUSTICE WARREN: We will recess now
6 until 12:30.

7 (Whereupon, at 12 o'clock noon the oral argument
8 in the above-entitled matter recessed, to reconvene at
9 12:30 p.m. the same day.)

1 (Whereupon, at 12:30 p.m. the oral argument in the
2 above-entitled matter reconvened.)

3 MR. CHIEF JUSTICE WARREN: Mr. Strauss.

4 ORAL ARGUMENT OF PETER L. STRAUSS

5 ON BEHALF OF THE RESPONDENT (RESUMED)

6 MR. STRAUSS: May it please the Court, I should
7 perhaps for a minute discuss Section 3691 of Title 18 since
8 counsel raised the question.

9 This was one of the principal grounds for argument in
10 the Court below although it was not raised in the Certiorari
11 petition.

12 Basically the question there, as I think the counsel
13 recognizes, is whether this was an action brought by or on
14 behalf of the U.S. or not.

15 If it was not brought on behalf of the U.S., the jury
16 trial was required under that Section.

17 If it was brought on behalf of the U.S., the jury
18 trial was not required.

19 In fact, the civil action was brought in the name
20 of the Securities and Exchange Commission, an independent
21 agency of the United States Government. So that the argument
22 would be that an action brought by that agency was not one
23 brought on behalf of the United States.

24 Very briefly, I think the legislative history of
25 the provision which has been before the Court before makes it

1 plain that none of the sponsors thought they were
2 distinguishing between actions involving the U.S. and actions
3 involving one of its agencies.

4 The principal concern of the statute was with the
5 use of injunctions in labor cases between private parties
6 to press one side of the dispute and remarks were made to the
7 effect that the enactment left all powers that exist in the
8 Government at present undisturbed by its passage.

9 There is no extensive case law on the subject
10 principally because I think all courts to which the question
11 has been presented have treated it as summarily as did the
12 Tenth Circuit below, simply stating that of course an action
13 brought by an agency of the United States was one brought on
14 behalf of the United States.

15 Q Who else could it be brought on behalf of?

16 A No one else. But I thought that should be made
17 clear.

18 Q The caption here is Frank against the U.S.
19 How did the caption get changed?

20 A The contempt action was brought by an attorney
21 for the Securities and Exchange Commission and the United
22 States Attorney acting together.

23 As it was a criminal action I suppose it would be
24 under the caption U.S. v. Frank. But the original injunction,
25 which is what would be relevant to 3691, was brought in the

1 name of the Securities and Exchange Commission.

2 As I was saying before at lunch hour, we feel that
3 the basic mode of decision as to the comparative seriousness
4 of the probation in this case was set out by this Court last
5 term in Bloom and earlier than that in Clawan, that is
6 the consultation of the laws and practices of the Nation to
7 see what comparisons had been drawn.

8 In general, and as we set out in our brief, we did
9 attempt such a study. It was a study complicated by sub-
10 stantial variance which this Court noted last term and State
11 practice regarding the affording of jury trials with the sorts
12 of offenses that concern us here.

13 Q Does that mean in every one of these cases that
14 are similar on their facts that we must examine the records to
15 see what the severity of the probation conditions is?

16 A No, Your Honor, I don't think so. Our point is
17 that the question of equivalency is primarily a legislative
18 judgment and that if we can show that the judgment made by one
19 legislature, in this case the Congress, is within the general
20 scope of the laws and practices of the Nation as a whole,
21 then that is sufficient to defend the judgment.

22 In fact, it seems to me that it might be the converse.
23 If you asked about the particular probation imposed in the
24 particular case you might get into just the problem which
25 concerns you.

1 Q I understood you to answer Justice Black to
2 the effect that these particular conditions were not onerous
3 and that it might be different if they had been.

4 A No, I think I was trying to make a slightly
5 different point.

6 Q I see. All right.

7 A From this perspective, of looking at the
8 National scheme as a whole, we think the results are quite
9 striking. There are only 12 jurisdictions which limit the
10 probation term to the same extent as penal terms.

11 On the other hand, 15 provide, as does the Federal
12 statute, for a maximum period of probation of five years
13 without regard to the offense committed.

14 There are nine jurisdictions in which the question
15 is left to the Court's discretion and the remainder provide for
16 a maximum between one and three years with the great majority
17 in the upper half of that range.

18 While we were able to supply the Court with figures
19 regarding the practice of U.S. Commissioners in probation cases
20 which indicates that they regularly impose probation sentences,
21 probation terms I should say, in excess of six months, which,
22 of course, is the limit of their authority as far as jail
23 sentences are concerned under the Code, we have been unable to
24 obtain such figures for the Nation as a whole.

25 Q Do I understand you, Mr. Strauss, to say in

1 response to a question by Mr. Justice Black that if the
2 probation period here had been five years you might regard it
3 differently?

4 A I believe his question was whether I would regard
5 it differently if the probation period was 10 years.

6 Q Would you?

7 A Yes. There is no statutory authorization
8 that I am aware of for such a term.

9 Q Forget that. Let us suppose that there were no
10 limitation whatever on the length of time of the probation.

11 Would you regard 10 years as different for purposes of
12 our problem?

13 A Yes, I would.

14 Q How about five years?

15 A No, I do not regard five years.

16 Q Eight years?

17 A I would regard eight years as different.

18 Q Six?

19 A I would regard six years as different.

20 Q Then I don't get you.

21 A The point is that this Court admonished last
22 term in the Bloom case that we are to look to the Nation's law
23 and practices; looking to the Nation's law and practices, we
24 find the regular legislative practice of authorizing probation
25 terms up to five years.

1 Q That doesn't answer the question.

2 The question is whether a three-year probation period
3 should be assimilated to the six-month petty offense concept
4 in Cheff against Schnackenberg.

5 Would you agree that that is the question before
6 us?

7 A Yes.

8 Q Now if I correctly understand you, you said that
9 you would assimilate five years to it, for whatever reason,
10 you would assimilate five years to it but you would not
11 assimilate six years to it.

12 A I think the reason is important, Your Honor.

13 What I have been trying to do is to apply those
14 tests which the Court set out last term.

15 Q I know, but those are not tests of what is and
16 what is not to be regarded as a petty offense for purposes of
17 contempt.

18 What you are calling our attention to is nothing more
19 than the maximum period for a probation order.

20 Now that assumes what may be a question that we
21 have to decide, whether a probation order, provided it is
22 for a permissible period, is to be regarded as in effect a
23 sentence that is no more deserving of jury consideration than
24 a petty offense.

25 It seems to me that reference to the maximum permitted

1 time upon which a person may be placed on probation does not
2 provide us with a guide for this purpose which is, shall the
3 three-year probation here be assimilated to the six months'
4 sentence, six months' imprisonment, called petty offense for
5 purpose of Cheff against Schnackenberg.

6 A It is true, Your Honor, I have assumed that the
7 constitutional questions which were decided last term in
8 Bloom and Duncan were the questions which principally would
9 be decided in connection with what I agree is strictly speaking
10 a question of Cheff v. Schnackenberg which was not as stated
11 a constitutional decision.

12 What I have been trying to do is to present the case
13 in terms of the criteria that the Court stated it would look
14 to in deciding the constitutional question.

15 Those criteria were in the words of the Court
16 objective criteria, chiefly the existing laws and practices
17 in the State.

18 Q I know, but your adversary points out that
19 this man during the period of his probation is required to
20 report every Monday, he is required to notify the authorities
21 when he changes jobs.

22 I suppose if he is arrested for whatever offense,
23 then his whole probation is in danger. He has to be careful
24 not to spit on the sidewalk or things of that sort.

25 Isn't that right?

1 A Yes, that is right.

2 Q The question is whether that is or is not to
3 be regarded as in the same light as a petty offense, as
4 defined in Cheff against Schnackenberg and in the statutes
5 for purposes of jury trial in a contempt case.

6 Even if the States all permitted probation without
7 limit I don't think that would settle it, just as if it
8 would not settle it in my mind if the State said that two
9 years is the maximum.

10 A There may be several ways in which I can answer
11 that. One is that there is a basic statutory authorization
12 involved here, Section 3401 of Title 18, which, as we have
13 indicated, is an authorization which is frequently used by
14 United States Commissioners.

15 Q For petty offenses?

16 A For petty offenses necessarily.

17 Over 50 percent of the petty offense probation
18 terms are in excess of six months, over 25 percent are in
19 excess of one year. In fact, in practice there is statutory,
20 practical authorization for this practice.

21 The second argument is a policy argument, if that
22 makes any difference, has to do with the nature of probation,
23 itself. While it is backed up by the threat of punishment
24 to be sure probation is not a punitive device, I do not believe
25 that anyone subjected to probation views it as such.

1 If he has his choice he takes the probation and in
2 effect, as I think the Court appreciates, any defendant
3 preferring to go to jail for six months would be able to do
4 so.

5 Even if the law did not authorize him to refuse
6 the conditions of probation he could announce it to the court
7 and say, "I am going out and the first thing I am going to
8 do is disobey them."

9 So in practice terms one is talking about an alter-
10 native which is somewhat within the defendant's control.

11 As this Court has recognized in the past, probation
12 is a rehabilitative device. Really the decision as to how
13 long it should be is made on the basis of rehabilitative
14 considerations.

15 Q That is said about prison, too. It may be
16 kind of whimsical but it is the theory of why we put people
17 in jail. It is a deterrent to them and others and for what
18 is called purposes of rehabilitation.

19 A If I may respond to that, Your Honor -- I see
20 my time is up -- that is a theory but it is only part of the
21 theory as to imprisonment.

22 Legislatures frankly vary the amount of imprisonment
23 they provide for crimes in direct relationship to their view
24 of the seriousness of the crime involved.

25 That is not done in general with respect to probation.

1 So that we submit that the probation in this case was
2 authorized by statute. It meets the test which the Court set
3 out last term in Duncan and Bloom. It was an appropriate
4 disposition for this case and consequently the judgment below
5 should be affirmed.

6 Q Mr. Strauss, if you are going to count probation
7 as equivalent to a sentence or prison term, I suppose if you
8 suspended imposition of sentence and were going to put a man
9 on probation you could only put him on probation for six
10 months if you were going to count probation as equivalent to a
11 prison term.

12 A I suppose it would have to be less than that,
13 Your Honor.

14 Q It would have to be less than that, either that
15 or if at the end of five months he violated his probation and
16 he came in for a sentence he would only be sentenced for a
17 month.

18 A You would have a sort of declining --

19 Q That is right. If you sentenced him to six
20 months, imposed a six months' sentence and then if you wanted
21 to suspend execution --

22 A You couldn't do that.

23 Q You couldn't do that?

24 A No, you couldn't.

25

1 REBUTTAL ARGUMENT OF JOHN B. OGDEN

2 ON BEHALF OF THE PETITIONER

3 MR. OGDEN: If the Court please, I will be very
4 brief because I have said all I think I care to say or should
5 say in connection with this matter, but here is a man, for
6 example, who has already been under probation roughly two
7 years.

8 Then suppose he violates that and they bring him
9 back to Oklahoma City and they say, "You have violated your
10 probation. I am going to sentence you to six months."

11 That would be six months plus two years on probation.
12 Whatever effect probation has or not, I am going to call this
13 to your attention.

14 I think, and I say this as a thought which actually
15 means nothing but it is just my opinion, that when a person
16 is put on probation for three years, if he makes a good citizen,
17 doesn't violate any of the terms until two years, 11 months, 29
18 days, then they can take him and make him serve three years.

19 I think a lot of times maybe I get off the actual
20 point involved as I view it on that question, but all there is
21 to it as I see it, and it probably isn't that simple, here is
22 a man charged with the crime.

23 You say why was he charged with a crime? You say
24 the statute makes it a crime and that is what the Court said
25 here, they found him guilty of the crime. So the Court said

1 I convict you.

2 I want to read here from this appendix and then I am
3 through on that part of it, "It is adjudged that the defendant
4 is guilty as charged and convicted." That is what the judge
5 said. Now, he was convicted.

6 Now, can you try a man and convict him of a crime and
7 if you will notice everything in here, the complaint, the
8 charge, everything, and the case criminal so and so, the
9 number of the case in the U. S. District Court was number so
10 and so criminal, criminal charge, the whole thing has been
11 treated as, and of course it is, a crimine, there is no question
12 about that.

13 Now then, I want to call to the Court's attention
14 for emphasis' sake and I hope it is not burdensome to you, but
15 the statute itself should take care of this case.

16 The reason I say it should is because Title 18,
17 Article I, states: "Offenses classified any offense punish-
18 able by death or imprisonment for a term exceeding one year
19 is a felony."

20 Now you try a man for a felony. You say why do
21 you say that? Because the punishment exceeds a year and when
22 it exceeds a year, death or punishment exceeding a year, then
23 it is a felony under the statute.

24 So a man has been tried here for a felony.

25 Now the very next section says, "Any other offense

1 is a misdemeanor."

2 Now the last one, about this petty offense, this is
3 statutory, "Any misdemeanor, the penalty for which does not
4 exceed imprisonment for a period of six months" -- if you
5 could imprison a man for six months and one day it is not a
6 petty offense -- "or a fine not to exceed \$500" -- he could
7 fine him \$501, it would not be -- "or both, is a petty
8 offense."

9 That is what the law says is a petty offense.

10 Then the Constitution says in all criminal
11 prosecutions the accused shall enjoy the right of trial by
12 an impartial jury.

13 Now the question is: Is this a criminal prosecution?
14 It certainly is not a civil action.

15 May I read what the judge said to this man. I want
16 to call your attention to one other thing and that is it says
17 in the brief of the Solicitor General and it is in the
18 appendix, and here it is, it sets out in here the conditions
19 under which Mr. Frank had to serve for these three years.

20 Now I won't read them all.

21 "You shall refrain from violation of any law
22 (Federal, State or local).

23 "You shall get in touch immediately with your
24 probation officer if arrested or questioned by a law enforce-
25 ment officer.

1 "You shall associate only with law abiding persons and
2 maintain reasonable hours.

3 "You shall work regularly at your occupation and
4 support your legal dependents, if any, to the best of your
5 ability. When out of work you shall notify your probation
6 officer at once and you shall consult him prior to changing
7 jobs.

8 "You shall not leave the judicial district without
9 permission of the probation officer."

10 Oklahoma is divided in three districts, Northern,
11 Western and the Eastern Districts. The State is divided in
12 those three Districts.

13 He is in the Eastern District, up in Tulsa. He
14 can't even leave that District without permission.

15 "You shall follow the probation officer's
16 instructions and advice.

17 "You shall report to the probation officer as
18 directed."

19 Then he has to report at Oklahoma City the first
20 day of each month beginning October 1966 for three years and
21 fill out a report and send it by mail or bring the same to
22 the probation officer in Oklahoma City, Oklahoma.

23 "Your failure to comply with the instruction of
24 the court as outlined herein will be cause for the revocation
25 of your probation."

