

ORIGINAL

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 82-729

**TITLE** DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.  
Appellants v. TIME, INC.

**PLACE** Washington, D. C.

**DATE** November 9, 1983

**PAGES** 1 thru 52



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1                   IN THE SUPREME COURT OF THE UNITED STATES  
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3   DONALD T. REGAN, SECRETARY OF                   :  
4   THE TREASURY, ET AL.,                   :  
5   STUART W. GOLD, ESQ.   Appellants,                   :  
6                   v.                   :   No. 82-729  
7   TIME, INC.,                   :  
8                   Appellee                   :  
9   - - - - -x

10   Washington, D.C.  
11   Wednesday, November 9, 1983

12                   The above-entitled matter came on for oral  
13 argument before the Supreme Court of the United States  
14 at 1:06 p.m.

15 APPEARANCES:

16 ELLIOTT SCHULDER, ESQ., Office of the Solicitor General,  
17 Department of Justice, Washington, D.C.; on behalf of  
18 the Appellants.  
19 STUART W. GOLD, ESQ., New York, New York; on behalf of  
20 the Appellee.

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23  
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1                                    P R O C E E D I N G S

2                    CHIEF JUSTICE BURGER: We will hear arguments  
3 next in Donald T. Regan against Time Magazine.

4                    Mr. Schulder, you may proceed whenever you are  
5 ready.

6                    ORAL ARGUMENT OF ELLIOTT SCHULDER, ESQ.,

7                    ON BEHALF OF THE APPELLANTS

8                    MR. SCHULDER: Thank you. Mr. Chief Justice,  
9 and may it please the Court, the basic question in this  
10 case is whether a statute that prohibits a publisher  
11 from printing an illustration of U.S. currency in color  
12 rather than in black and white, or in dimensions  
13 approximating the size of genuine currency, violates the  
14 First Amendment protection of freedom of speech or of  
15 the press.

16                   There are two statutes at issue in this case,  
17 and they must be viewed in tandem. The first one, 18  
18 USC 474, Paragraph 6, prohibits the printing,  
19 photographing, or otherwise making or executing any  
20 engraving, photograph, print, or impression in the  
21 likeness of any obligation or security of the United  
22 States. The term "obligation or security of the United  
23 States" is also defined by statute in 18 USC 8, which we  
24 have reproduced on Page 5 of our brief, Footnote 2.

25                   The second statute involved in this case is 18



1 USC 504.1. That statute creates an exception to the ban  
2 in Section 474. Section 504 permits the printing or  
3 publishing of illustrations of U.S. securities and  
4 obligations for philatelic, numismatic, educational,  
5 historical, or newsworthy purposes in articles, books,  
6 journals, newspapers, or albums, provided that three  
7 conditions are met.

8 First, the illustrations must be in black and  
9 white. Second, the illustrations must be either over or  
10 undersized. In other words, they must be at least one  
11 and a half times the size or less than three-quarters  
12 the size of actual currency. And three, the materials,  
13 the negatives and the plates used in the making of these  
14 illustrations, must be destroyed after their final use.

15 This case began when appellee Time,  
16 Incorporated, brought suit for declaratory and  
17 injunctive relief in the United States District Court  
18 for the Southern District of New York. Time claimed  
19 that the statutory scheme amounted to government  
20 censorship of the press, and effected a massive  
21 infringement of the First Amendment rights of Time's  
22 editors and publishers.

23 The basis for the lawsuit was that over  
24 approximately a ten-year period Secret Service agents  
25 had brought to the attention of Time's management the

1 fact that a number of illustrations of currency in  
2 Time's magazines violated the color and size  
3 requirements of the statutory scheme.

4           The district court entered summary judgment  
5 for Time and held Sections 474, Paragraph 6, and 504.1  
6 unconstitutional on their face and as applied to Time.  
7 The district court concluded that Section 474, Paragraph  
8 6, was overbroad because it prohibits all reproductions  
9 of currency without regard to whether the reproduction  
10 has a capacity to deceive.

11           Turning to Section 504.1, the court focused on  
12 the purpose and forum provisions of the statute, and  
13 held that the statute is an impermissible regulation of  
14 the manner of depicting currency because, first of all,  
15 it is a content based statute that requires an inquiry  
16 into whether an illustration is undertaken or produced  
17 for one of the purposes specified in the statute, and  
18 two, the court concluded that there was no nexus between  
19 the statutory goal of preventing counterfeiting and the  
20 newsworthiness or educational value of an illustration  
21 or the type of forum in which the illustration appears.

22           The court also held Section 504 void for  
23 vagueness, because it concluded that it is difficult to  
24 determine what is a philatelic, numismatic, educational,  
25 historical, or newsworthy purpose, and what is a

1 journal, newspaper, or album.

2           The government's basic submission in this case  
3 is that the statutory scheme at issue here serves what  
4 is a concededly compelling governmental interest in a  
5 manner that does not impose a substantial burden on  
6 First Amendment rights, and that leaves open ample  
7 alternative channels of communication.

8           First of all, the interest, government  
9 interest in this case is that of protecting against  
10 counterfeiting. This is an interest that has a specific  
11 constitutional authority. Congress enacted a  
12 counterfeiting statute, the first Congress enacting a  
13 counterfeiting statute in reliance upon the explicit  
14 authority of the Constitution to coin money and protect  
15 against counterfeiting.

16           Time recognizes in this case that it is  
17 essential to its facial challenge to attempt to portray  
18 the case as involving a substantial infringement of  
19 First Amendment interests, but Time has grossly  
20 overstated the impact of the statutory scheme.

21           Time's brief contains numerous examples of  
22 hyperbolic rhetoric. For example, Time states that the  
23 law purports to control the editorial content of Time's  
24 magazines, and that the statute prohibits, prevents, or  
25 suppresses the use of the symbol of money.

1 QUESTION: Mr. Schulder, may I ask --  
2 MR. SCHULDER: Certainly.  
3 QUESTION: -- are these the three  
4 illustrations that are involved in this case, Page 37?  
5 MR. SCHULDER: The illustrations begin on Page  
6 13 of the Joint Appendix, Your Honor.  
7 QUESTION: But the ones actually at issue here  
8 are the --  
9 MR. SCHULDER: No, the ones actually at issue  
10 here are 13 through --  
11 QUESTION: Thank you.  
12 MR. SCHULDER: -- 23.  
13 QUESTION: Thank you.  
14 MR. SCHULDER: The problem with Time's  
15 exaggerated portrayal of its First Amendment interest in  
16 this case is that Time's editors and publishers in fact  
17 may use pictures of currency symbolically. The  
18 statutory scheme does not prohibit such use. The  
19 statutes merely impose reasonable restrictions on the  
20 manner in which a person may print or photograph U.S.  
21 currency. Thus, Time's argument really is that it has a  
22 substantial First Amendment in publishing pictures of  
23 currency in color, or in a size approximating the size  
24 of actual currency.  
25 It is our contention that this position



1 trivializes the First Amendment. While Time may have  
2 legitimate reasons for printing color pictures of  
3 currency or pictures that approximate the size of  
4 genuine currency, we submit that it demeans the  
5 Constitution to say that there is a substantial First  
6 Amendment interest to publish pictures of currency in  
7 color rather than in black and white.

8           QUESTION: Mr. Schulder, I guess there is more  
9 involved here than simply the size and color limitation,  
10 though. If you look at Section 504, you still have the  
11 restrictions on the purpose of the publication, do you  
12 not, to contend with? And the government in its brief  
13 has apparently conceded that at least some aspects of  
14 that might be invalid, and it is suggested we should  
15 narrow the construction of the statute or something.

16           MR. SCHULDER: Well, we would --

17           QUESTION: I would be very interested in  
18 hearing you focus on that and tell us exactly how you  
19 would suggest the Court narrow the statute precisely.

20           MR. SCHULDER: Certainly. First of all, Your  
21 Honor, I would like to point out that in none of the  
22 instances that are involved in this case did the Secret  
23 Service agents question in any way whether Time, any of  
24 Time's publications were journals, newspapers, articles,  
25 or books, or in any way suggested that the use of the

1 pictures here was not for a newsworthy or other purpose  
2 covered in the statute.

3 QUESTION: Well, I suppose there is an  
4 overbreadth challenge that we have to deal with?

5 MR. SCHULDER: That's correct.

6 QUESTION: So we need to talk about it, do we  
7 not?

8 MR. SCHULDER: Certainly. Focusing on the  
9 statute itself, and in order to understand the statute,  
10 it is also important to understand the legislative  
11 history behind it. The statute, as you can see, on  
12 Pages 2 and 3 of the government's opening brief,  
13 provides that certain pictures of currency are permitted  
14 for a list of enumerated purposes in a list of  
15 enumerated forums, but not for advertising purposes, et  
16 cetera, et cetera. And then the statute sets out the  
17 specific conditions under which these illustrations may  
18 be published or printed.

19 Now, it is our -- if you look at the  
20 legislative history, it seems clear that what Congress  
21 was getting at here was, Congress was attempting to  
22 carve out an exception to the broad prohibition on the  
23 use of currency for expressive purposes that was  
24 established in Section 474. Congress was aware of the  
25 fact that over the years the Secretary of the Treasury

1 had created administrative exceptions to the broad ban  
2 in 474, and in fact had permitted the use of  
3 illustrations of currency for certain of these  
4 purposes.

5 Congress essentially codified this  
6 administrative practice in the statute, but we submit  
7 that Congress did not intend in enacting this statute to  
8 require Secret Service agents to pore over every single  
9 publication that might contain an illustration of  
10 currency in order to determine whether --

11 QUESTION: Well, for example, you agree, don't  
12 you, that it is very difficult to support the  
13 requirement that it be determined whether something is  
14 newsworthy.

15 MR. SCHULDER: That's correct.

16 QUESTION: Okay. So what I want to know is  
17 specifically what it is you are suggesting this Court do  
18 with this statute.

19 MR. SCHULDER: Okay. We suggest that the  
20 Court look at the statute and look at the legislative  
21 history. Both the Senate and House reports, which are  
22 identical in their language --

23 QUESTION: You are telling me why we should do  
24 something, or background, but why don't you tell us what  
25 it is you think we should do specifically? What --

1 MR. SCHULDER: We suggest --

2 QUESTION: How should it be interpreted? What  
3 narrowly?

4 MR. SCHULDER: We suggest that the Court  
5 construe the statute narrowly, so that the statute would  
6 permit the printing of illustrations of obligations or  
7 securities of the United States in publications so long  
8 as those illustrations comply with the three conditions  
9 set out in the statute.

10 QUESTION: Any kind of publication for any  
11 purpose.

12 MR. SCHULDER: That's correct. We believe  
13 that the purposes and forums that are provided in the  
14 statute are basically illustrative. Congress did not  
15 intend to establish a narrow list of requirements that a  
16 publication had to meet in order to be able to print  
17 illustrations of currency.

18 QUESTION: At one point you suggested that we  
19 might strike down that section altogether and leave only  
20 474 in place.

21 MR. SCHULDER: Well, we didn't suggest that,  
22 Your Honor. We suggest that the two statutes be read  
23 together. However, if the Court decides that under our  
24 narrowing construction there still is a problem with  
25 Section 504 in terms of the lines that are drawn, I will



1 try to explain why the lines that are drawn in this  
2 statute are valid, but if the Court still finds a  
3 problem with the statute, then we submit that Section  
4 474 should still remain as a restriction on the printing  
5 of U.S. currency.

6 QUESTION: Aren't we always in a sensitive  
7 area when you have a statute authorizing some government  
8 official to decide what is or what is not newsworthy?

9 MR. SCHULDER: That's correct, Your Honor, and  
10 that is why we have proposed this narrowing construction  
11 of the statute, which we feel is fully consistent with  
12 Congress's intent --

13 QUESTION: Well, how do you narrow that  
14 construction?

15 MR. SCHULDER: Excuse me?

16 QUESTION: How do you narrow the phrase in the  
17 exception, "newsworthy purposes, including newspapers,  
18 journals, articles?"

19 MR. SCHULDER: Well, the way we have suggested  
20 that it be construed is that these various purposes and  
21 forums be looked at as illustrative. In other words,  
22 Congress was setting out groups of illustrations of the  
23 types of forums and purposes that were permissible. The  
24 only purpose here that is mentioned as being  
25 impermissible is advertising purposes, but we would

1 submit that this list of purposes and forums was simply  
2 illustrative, and that Congress did not intend to have  
3 Secret Service agents decide in enforcing the statute  
4 whether --

5 QUESTION: Mr. Schulder, even if we didn't  
6 agree, even if we said that we couldn't agree with you  
7 based on the legislative history, and certainly not the  
8 language of the statute, that that is what Congress  
9 intended. Since this is a federal statute and a federal  
10 court, we could just get rid of the overbreadth and  
11 declare that illegal. We wouldn't have to make it a  
12 statutory construction problem. We could say it is --  
13 we just clip off the overbreadth.

14 MR. SCHULDER: I believe that's correct, Your  
15 Honor.

16 QUESTION: We have done it before. So whether  
17 it is construing it narrowly or not, you would concede  
18 that there is part of the statute that must be dispensed  
19 with somehow.

20 MR. SCHULDER: That's correct.

21 QUESTION: May I inquire? The three things  
22 you want to retain are the size limitation, the black  
23 and white versus color, and the destruction after use.  
24 As long as those three things are met, that is all you  
25 ask us to save?

1 MR. SCHULDER: Well, also the requirement that  
2 the illustration be included in a publication of some  
3 sort.

4 QUESTION: I see. In other words, that's what  
5 the -- illustrative of all publications.

6 MR. SCHULDER: That's correct.

7 QUESTION: And it could be for any kind of  
8 story, not just about the item.

9 MR. SCHULDER: That's correct. We submit that  
10 the statutory scheme is an example of reasonable line  
11 drawing here. It is very similar, we submit, to valid  
12 statutes that regulate the size and placement of outdoor  
13 advertising signs or the decibel level of loudspeakers  
14 or the hours in which loudspeakers can be used, or the  
15 time and place for parades.

16 Clearly, there is a nexus here between the  
17 color and size requirements and the statutory goal of  
18 protecting against counterfeiting. Congress  
19 specifically relied on the advice of the Department of  
20 Treasury in fashioning these provisions of the statute  
21 here.

22 QUESTION: Mr. Schulder, what if the  
23 illustrations in the appendix failed to comply with  
24 other than color?

25 MR. SCHULDER: Certain illustrations failed to

1 comply with the size provisions of the statute, Your  
2 Honor. Now, it certainly is possible to think of  
3 examples where the statute might proscribe protected  
4 conduct, but we submit that that could probably be done  
5 with almost any statute. Our submission here is that  
6 Congress meant to address what is a real problem in  
7 enacting this statute.

8 QUESTION: Mr. Schulder, may I ask, does this  
9 -- do either of these statutes reach one of these things  
10 on a television screen?

11 MR. SCHULDER: No, the statute does not --  
12 504, Subsection 2, specifically excludes any prohibition  
13 on motion picture films, microfilms, or slides that are  
14 used for --

15 QUESTION: So what Time did here could be done  
16 on a television screen or in a motion picture?

17 MR. SCHULDER: That's correct.

18 QUESTION: But not in a journal or magazine.  
19 Is that right?

20 MR. SCHULDER: And the reason for that is that  
21 the Treasury Department advised Congress that motion  
22 pictures or TV use could not be used for counterfeiting  
23 purposes, but there is a restriction in the statute that  
24 all of the materials that are used to prepare motion  
25 pictures or these other uses be destroyed after their



1 use.

2 Now, the problem --

3 QUESTION: What is the purpose of the size  
4 limitation? Just to make sure that no one would mistake  
5 it for the actual thing?

6 MR. SCHULDER: That's correct, Your Honor.

7 QUESTION: Well, it would seem to me that  
8 something in color, if it were large enough or small  
9 enough, no one would ever mistake it for the real  
10 thing.

11 MR. SCHULDER: Well, the problem --

12 QUESTION: I mean, it doesn't make any  
13 difference how large or small it is. If it is in color,  
14 it violates the statute.

15 MR. SCHULDER: That's correct. Now, let me  
16 explain that the statute -- there are basically two  
17 problems that the statute is directed at. One is the  
18 finished product, and both the color and size  
19 limitations would go to that, because a full color, full  
20 size reproduction certainly could be passed as --

21 QUESTION: Sure, but --

22 MR. SCHULDER: Now, even in the case of a  
23 color reproduction that is overblown or blown up, the  
24 main problem there is in the process of producing it.  
25 The four color process of producing a color print is --

1           QUESTION: So the United States submits that  
2 it is dangerous to the currency to publish an oversized  
3 or undersized --

4           MR. SCHULDER: Color illustration.

5           QUESTION: -- photograph if it is in color.

6           MR. SCHULDER: That's correct.

7           QUESTION: Even if anybody would know  
8 automatically, just at a glance, that that is not the  
9 real thing.

10          MR. SCHULDER: That's correct, because the  
11 process that is used to create that photograph is  
12 identical to the process that is used by a vast majority  
13 of counterfeiters.

14          QUESTION: I know, but if it is the process,  
15 if it is the process, what do you care about the results  
16 of the process being circulated? It is the process, and  
17 that doesn't go on on the magazine. That goes on when  
18 you print it or photograph it, and you are requiring  
19 that all this machinery or whatever, the plates or  
20 whatever you call them are to be destroyed.

21          MR. SCHULDER: Well, but by limiting the use  
22 of -- by restricting or prohibiting the making of color  
23 photographs, the statute narrows the universe of  
24 publishers who are going to have materials that are  
25 capable of printing currency in color. It will give the

1 Secret Service and law enforcement agencies a smaller  
2 universe of people to have to deal with in investigating  
3 and detecting counterfeiting.

4 QUESTION: I see.

5 MR. SCHULDER: Now --

6 QUESTION: I must confess, I don't really  
7 follow that. I thought any photo offset printer, any  
8 qualified printer could actually do this. You don't  
9 have to be taking pictures of dollar bills in order to  
10 have the capacity to take pictures of dollar bills, do  
11 you, if you can take pictures of other things that have  
12 the same general characteristics.

13 MR. SCHULDER: I'm not sure I understand.

14 QUESTION: Well, as I understand it, you are  
15 suggesting that in order to have the expertise, in order  
16 to take pictures of money, you have to actually take  
17 pictures of money. You can't get the expertise by --

18 MR. SCHULDER: Oh, no. Oh, no, no.

19 QUESTION: -- your general ability as a photo  
20 offsetter.

21 MR. SCHULDER: No. That's not what I was  
22 suggesting at all. I was suggesting that the statute is  
23 narrowing the universe of people who are going to have  
24 possession --

25 QUESTION: Well, it really isn't. You don't

1 -- This law wouldn't prevent Time Magazine from  
2 publishing a color photograph of a pound note.

3 MR. SCHULDER: Well, there may be another  
4 statute that prohibits --

5 QUESTION: Well, I know, but -

6 MR. SCHULDER: -- publication of foreign  
7 currency.

8 QUESTION: -- but I can't believe, like  
9 Justice Stevens, that your just prohibiting  
10 photographing, publishing photographs of currency in  
11 color would make any dent in the process, because there  
12 would be hundreds of other things that they would be  
13 using the same process --

14 MR. SCHULDER: It is not a question of making  
15 a dent in the process. It is a question of narrowing the  
16 number of publishers, or eliminating the possibility  
17 that publishers will have a legitimate basis or a  
18 legitimate excuse for having possession of negatives,  
19 the four-color negatives of currency.

20 QUESTION: Then wouldn't you have to get rid  
21 of all photo offset people?

22 MR. SCHULDER: No, you would just have to --  
23 no, the problem is not with the photo offset --

24 QUESTION: Isn't that the only way you could  
25 be sure?



1           MR. SCHULDER: The photo offset process is not  
2 the problem. It is simply --

3           QUESTION: What is the problem?

4           MR. SCHULDER: The problem is the potential  
5 use of that process to create color negatives of  
6 currency, which is precisely the same method that  
7 counterfeiters use to produce counterfeit currency.

8           QUESTION: Yes, but, Mr. Schulder, if I may,  
9 they argue their best case is the particular things in  
10 the record, so we perhaps don't even need hypothetical  
11 examples. Take this example of the cover where a man is  
12 holding a bunch of bills in his hand, the one on the --  
13 holding your pocketbook. What possible use could the  
14 plates for that picture be to a counterfeiter? I mean,  
15 if you made a million pictures of that, you could never  
16 pass that.

17          MR. SCHULDER: No, the plate of that  
18 particular photograph would not necessarily be of use to  
19 a counterfeiter, although --

20          QUESTION: Is there any government interest,  
21 legitimate government interest in preventing this  
22 particular picture?

23          MR. SCHULDER: I would submit that there is,  
24 there is, that actually the final product here on Page  
25 19 of the Joint Appendix does pose a possible

1 counterfeiting problem, and I would also refer the  
2 Court --

3 QUESTION: Well, what is the problem?

4 MR. SCHULDER: Well, I would like to refer the  
5 Court to the preceding page also, Page 17. The problem  
6 is that --

7 QUESTION: I see it on 17. You've got a flat  
8 bill. I see that.

9 MR. SCHULDER: Okay. But one of the -- one of  
10 the most common methods of counterfeiting currency is to  
11 cut the corners of a higher denomination bill and paste  
12 those onto a lower denomination bill. I have seen  
13 examples where someone, counterfeiters have taken one  
14 dollar bills and have left the picture of George  
15 Washington and one dollar on the currency, and simply  
16 pasted twenties or tens in the corners, and those have  
17 been passed, believe it or not.

18 (General laughter.)

19 QUESTION: I see.

20 QUESTION: Well, how would this hurt or help  
21 that?

22 MR. SCHULDER: Well, it would seem to me that  
23 someone --

24 QUESTION: How would this hurt or help that?

25 MR. SCHULDER: This would prevent someone from

1 being able to cut out the number ten --

2 QUESTION: Well, instead of cutting out this,

3 why not cut a dollar bill, which is rather available?

4 MR. SCHULDER: No, the problem isn't cutting a

5 dollar bill. The problem is cutting a ten dollar bill.

6 QUESTION: They are pretty available now.

7 MR. SCHULDER: But no one is going to --

8 QUESTION: I even have one.

9 (General laughter.)

10 MR. SCHULDER: No one is going to destroy a

11 ten dollar bill in order to pass counterfeit. What they

12 want --

13 QUESTION: I thought you said they did. I

14 thought you said they cut one bill and put the other one

15 on.

16 MR. SCHULDER: Well, they cut an illustration

17 of a bill.

18 QUESTION: All this does is, it saves the

19 counterfeiter ten bucks?

20 MR. SCHULDER: That's correct.

21 QUESTION: It hasn't run them out of business.

22 QUESTION: Well, now, let me be sure I

23 understand. You point is that even on this one, they

24 could cut the corner out of the magazine cover and paste

25 that corner, which would cost them less than ten

1 dollars --

2 MR. SCHULDER: Certainly.

3 QUESTION: -- onto a one dollar bill.

4 MR. SCHULDER: Certainly.

5 QUESTION: I understand.

6 MR. SCHULDER: And I think the example is even

7 more graphically illustrated in the one on Page 11,

8 where the size is almost identical to the size of real

9 currency, and you are dealing here with a thousand

10 dollar bill, which are rarer -- they are not really in

11 circulation, general circulation.

12 QUESTION: If these had been oversized, or

13 sufficiently oversized or sufficiently undersized, it

14 still would violate the law if it were in color.

15 MR. SCHULDER: If it were in color. That's

16 correct. That's because of the problem --

17 QUESTION: That is still not at all -- I'm not

18 sure I understand your color --

19 MR. SCHULDER: Well, the problem is -- the

20 problem that Congress was trying to get at was to

21 eliminate the possibility that there would be multiple

22 plates and negatives of currency. Those are the same

23 negatives and plates that counterfeiters use, and --

24 QUESTION: We just couldn't rely on them to

25 destroy them, I take it. Is that the problem?



1 MR. SCHULDER: That's correct.

2 QUESTION: Is that the worry?

3 MR. SCHULDER: That's correct.

4 QUESTION: So it isn't the process, it is the

5 fact that there are plates and negatives that they would

6 be using.

7 MR. SCHULDER: That's right.

8 QUESTION: Because if they are taking a

9 picture of an actual bill, what would they do? Would

10 they -- would the plate be the same size? I would think

11 they would just take a picture and it would come out

12 either large or small.

13 MR. SCHULDER: Well, the plate could be

14 different sizes. I mean --

15 QUESTION: Well, I know, but if it were

16 sufficiently large, no counterfeiter could use it.

17 MR. SCHULDER: That may be.

18 QUESTION: Well, still, then, I don't

19 understand the --

20 MR. SCHULDER: Well --

21 QUESTION: First you say it is the process,

22 which doesn't make a whole lot of sense. Now you say

23 it's the plate, the negative.

24 MR. SCHULDER: Well, by the process, I mean

25 the materials that are used in the process of producing

1 the final product.

2 QUESTION: Are you using plate in the sense  
3 that the plate is the process, part of the process?

4 MR. SCHULDER: That's correct.

5 QUESTION: Well, do you think at some point in  
6 reproducing a color photograph there is some plate that  
7 is exactly the same -- a negative that is exactly the  
8 same size as a --

9 MR. SCHULDER: Yes. As I think I have made  
10 clear, it is difficult to draw precise lines in this  
11 area. There are situations, as I pointed out, where  
12 there are clearly problems in permitting reproduction of  
13 pictures of currency, and there is a continuum between  
14 those cases, the case of the full color, full size  
15 illustration and other cases that move away from that.

16 But the alternatives that might be available,  
17 we submit, would create problems of their own. They  
18 would be difficult to administer. They would leave  
19 broad discretion in the hands of law enforcement  
20 officers, and would create the possibility that the law  
21 enforcement officers would enforce the law on the basis  
22 of the content of the communication.

23 We would submit, finally, that the First  
24 Amendment interest in publishing color rather than black  
25 and white pictures of currency is quite minimal. The

1 color and size limitations of the statute serve the  
2 concededly compelling governmental interest in  
3 protecting against counterfeiting, and that the statute  
4 leaves open ample alternative means of communication,  
5 such as black and white illustrations that comply with  
6 the size requirements.

7           Accordingly, we submit that the judgment of  
8 the district court should be reversed.

9           I would like to reserve the remainder of my  
10 time for rebuttal.

11           CHIEF JUSTICE BURGER: Very well.

12           Mr. Gold, you may proceed whenever you are  
13 ready.

14           ORAL ARGUMENT OF STUART W. GOLD, ESQ.,

15           ON BEHALF OF THE APPELLEE

16           MR. GOLD: Mr. Chief Justice, and may it  
17 please the Court, the central issue in this case is the  
18 right of Time or anyone to make or publish pictures that  
19 pose no substantial risk to any legitimate government  
20 concern. I think the case is reducible when I think of  
21 it to basically three words, three or four words on the  
22 one hand. That is, pictures, where I thought this case  
23 was about when we brought it, and color plates and  
24 negatives, which is where the government has taken it,  
25 although today for the first time I get the feeling we

1 are going back to the pictures, what the case was  
2 originally about, because we are now told that people  
3 will clip the edge of the Lockheed cover, paste it, that  
4 thousand dollar, that thousand figure, on a one dollar  
5 bill and be able to pass it.

6 QUESTION: But you have heard this before?

7 MR. GOLD: I have heard that that happens?

8 QUESTION: Earlier in this case?

9 MR. GOLD: No, earlier in this case I have  
10 never heard it before. As a matter of fact, the  
11 government never submitted any facts.

12 QUESTION: How was it just a picture case to  
13 begin with?

14 MR. GOLD: We brought this case because the  
15 statute as written and indeed as interpreted by the  
16 government prevents us from printing this picture of  
17 George Washington, and our basic thesis was that there  
18 is no danger in this picture to the currency and there  
19 is no danger in the plate that was used to make this  
20 picture. The plate used to make this picture has all  
21 the distortions that are on this. It also prevented us  
22 from presenting -- it didn't prevent us, but the  
23 government --

24 QUESTION: Is there a distortion there except  
25 the size?

1 MR. GOLD: There is a distortion there in  
2 the --

3 QUESTION: No, on the George Washington.

4 MR. GOLD: Yes, there is distortions in the  
5 overlays, just as in the Lockheed cover, which was a  
6 thousand dollar bill, you have overlays.

7 QUESTION: Yes, sir, I was wondering which --  
8 when you cut off the thousand dollar figure and paste it  
9 on a one dollar bill, what do you do with Washington's  
10 picture?

11 MR. GOLD: Well, you probably --

12 QUESTION: I mean, he was talking about that.

13 MR. GOLD: I don't know, and I submit that  
14 when you pass a thousand dollar bill, while perhaps  
15 people don't look very closely when they get handed a  
16 one dollar bill, although --

17 QUESTION: You can starve to death when a  
18 thousand dollar bill is going to give you cash.

19 (General laughter.)

20 MR. GOLD: I do not think that that is a  
21 significant danger. So this really was a picture case  
22 in the sense that we brought it because we think we  
23 should be able to make pictures just like Gail Wagner  
24 should be able to make his three-foot thirty dollar bill  
25 with Nixon's picture in it. That, too --



1 QUESTION: Wasn't Wagner a woman?  
2 MR. GOLD: Excuse me?  
3 QUESTION: Wasn't Wagner a woman?  
4 MR. GOLD: Yes, sir. I apologize. To allow  
5 Gail Wagner to make her representation. When the  
6 government -- which raises another point.  
7 QUESTION: It happens to be an Eighth Circuit  
8 case. That's why I know.  
9 QUESTION: While you are stopped there, what  
10 picture appears on a thousand dollar bill, whose  
11 picture?  
12 (General laughter.)  
13 MR. GOLD: That's a good question.  
14 QUESTION: I think it is Mr. Cleveland, isn't  
15 it?  
16 MR. GOLD: Grover Cleveland. Yes, it is, Your  
17 Honor.  
18 QUESTION: But I suppose perhaps the  
19 suggestion is that so few people, including some present  
20 here, are familiar with thousand dollar bills that a  
21 person could be deceived. Is that part of the  
22 government's claim?  
23 MR. GOLD: Well, if that is part of the  
24 government's claim, the one thing I would know is that  
25 if I was handed a thousand dollar bill with Washington,

1 Jackson, Hamilton, Franklin, or Grant on it, I would be  
2 very suspicious.

3           The government also -- another point that was  
4 made today was this notion that we are now gravitating  
5 towards a case that only involves really color and  
6 size. I just want to remind the Court that as written  
7 and as enforced before this case was brought, the  
8 purpose, the purpose element was enforced against us.  
9 In fact --

10           QUESTION: Well, what if it were narrowed, as  
11 the government is arguing, so that all that is left is a  
12 color and size limitation?

13           MR. GOLD: And I believe the government is now  
14 also still claiming that there would be a publication  
15 limitation, which we might be covered in in terms of an  
16 exemption, but it raises several problems for both Gail  
17 Wagner and people who might want to tear out the cover  
18 of Time Magazine and place it on their wall. Does it  
19 become contraband then?

20           But putting that to one side, addressing the  
21 color and the size, which seem to be the major concerns  
22 here, the problem with the color restriction is  
23 twofold. One is, the government says it is trivial, our  
24 interest in printing in color is trivial. I don't know  
25 why they picked the word "trivial" unless perhaps it is

1 something lower than what Shad says, which is, anything  
2 that puts even an incidental burden has to be looked at  
3 and examined, but again, putting that to one side, as to  
4 why they used "trivial," it is not trivial. There is,  
5 A, a marketing reason why color is important to us. We  
6 don't do it. It is very expensive. We do it because we  
7 think we have to in order to get people to buy our  
8 magazine. It is very important. This picture in black  
9 and white would not be, I submit, as effective as it is  
10 in color. So it is not a trivial interest, one, in  
11 terms of the market power, that we must print in color  
12 to compete, and to attract readers to our message, and  
13 two, color has tremendous impact.

14 QUESTION: Well, but you can put on a thousand  
15 other covers in color without putting this one on.

16 MR. GOLD: Excuse me?

17 QUESTION: I say, you can -- if you want a  
18 colored cover, you can pick a thousand other subjects to  
19 do with money without printing a picture of George  
20 Washington --

21 MR. GOLD: That is true, but I did not think  
22 that unless the government can demonstrate in the first  
23 instance that there is a substantial interest as being  
24 furthered of theirs that they have the right to tell me,  
25 go write and illustrate some other story, or put your

1 story about the economy, but don't use this symbol.

2 QUESTION: They say that the interest that is  
3 being furthered is the danger of helping  
4 counterfeiters.

5 MR. GOLD: But there is no danger.

6 QUESTION: Well, if the Congress has said  
7 that, why should you or I try to second guess that?

8 MR. GOLD: Because Congress, when they are  
9 passing laws that restrict speech, are supposed to make  
10 an effort to draw lines that are reasonable. There are  
11 reasonable lines here. In order to prevent what I think  
12 the government is really getting at -- And there is a  
13 footnote in their brief about a magazine that published  
14 a full color actual size hundred dollar bill.

15 If that is what the danger is, and I can  
16 conceive that there is a danger of that, then let's have  
17 the government regulate that, prevent that. You don't  
18 have to prevent all color representations in order to  
19 pass a statute that will stop someone from making a full  
20 size, actual size, actual color representation of a  
21 hundred dollar bill or any dollar bill.

22 QUESTION: May I ask you, would you have any  
23 objection if the statute merely had the size limit in  
24 it?

25 MR. GOLD: Only had the size limit?

1 QUESTION: It would be perfectly all right, I  
2 gather, under your argument.

3 MR. GOLD: I have got a couple of problems.  
4 The size -- the statute doesn't let you publish any part  
5 of the bill. Now, size may again become --

6 QUESTION: Assuming that the size applies to  
7 parts as well.

8 MR. GOLD: Okay. I would say that if the  
9 statute were struck and Congress in its considered  
10 judgment, after fully vented the First Amendment  
11 interest and the government's interest, drew the line in  
12 terms of just the size, you cannot print in the actual  
13 size, or if they drew the line as the Treasury  
14 Department submitted, one and a half times as large or  
15 less than three quarters, if after their considered  
16 judgment that was the statute that came out, this would  
17 be a very different case.

18 QUESTION: But you could still come in and  
19 say, but we really can't make quite as dramatic a symbol  
20 unless we have an exact size dollar bill on the cover --

21 MR. GOLD: But if the government were to  
22 demonstrate that there was a serious danger for bills  
23 that were one and a quarter the time -- times the size  
24 of the actual thing, and Congress then passed the line  
25 there, our case would be very weak, I submit. But here



1 we haven't had that. Here we have had a statute that --  
2 474, Paragraph 6, was not considered very much when it  
3 was passed; 504 was considered but basically on the  
4 submission of the Treasury Department. No one ever  
5 raised a First Amendment concern.

6 QUESTION: Well, what if we held it  
7 unconstitutional, Congress had a committee meeting, and  
8 they studied it at great length, say, we have thought  
9 about this, and we think the statute we used to have was  
10 absolutely necessary, and they wrote a lot of findings  
11 saying that it is kind of remote, but we think there is  
12 a danger that people might copy it if we don't, so they  
13 re-enacted precisely the same statute after lots of  
14 hearings and lots of legislative history. Would it be  
15 valid?

16 MR. GOLD: I don't think so, because I don't  
17 think that there would be any legislative history that  
18 could show that you need to prevent these kinds of  
19 pictures or these kinds of plates, even, to control what  
20 you are trying to stop, the impact on counterfeiting.

21 QUESTION: Do you think the fact that there is  
22 a specific provision in the Constitution permitting  
23 Congress to enact legislation in this area gives it more  
24 significance, the power of Congress?

25 MR. GOLD: Not --

1 QUESTION: We are not dealing with the  
2 necessary and proper clause. They have specific power  
3 in the Constitution.

4 MR. GOLD: I do not think that that has  
5 bearing on whether or not they are passing statutes that  
6 in fact further the interest against counterfeiting.  
7 This statute doesn't -- its purpose is to attack  
8 counterfeiting, but I am not sure it really addresses  
9 the problem. It really does not.

10 QUESTION: I suppose trademark laws impact on  
11 the First Amendment rights of your client, don't they?

12 MR. GOLD: Yes.

13 QUESTION: Are they unconstitutional because  
14 you can't print something that has a trademark?

15 MR. GOLD: No, those are not  
16 unconstitutional. However, here, there has been no  
17 weighing. There is a reason why trademarks are  
18 protected, just as copyrights are protected, and  
19 certainly protecting copyrights, for instance, furthers  
20 a purpose in which there has been a decision that First  
21 Amendment rights have to give way somewhat. We are not  
22 saying --

23 QUESTION: Could the Treasury -- Could the  
24 Secretary of the Treasury copyright all of his currency  
25 symbols?

1 MR. GOLD: I don't believe so.

2 QUESTION: Why not?

3 MR. GOLD: Let me amend that. I don't think  
4 he could copyright any and each part of this -- of the  
5 currency.

6 QUESTION: The whole thing.

7 MR. GOLD: The whole thing? I am not sure  
8 whether -- I am not sure whether that expression is  
9 original enough to qualify as copyright. However, if he  
10 was able to copyright the entire bill, which again I am  
11 not sure he could, then I think we would -- to a large  
12 extent might qualify in using parts of it, and we have  
13 never used the entire piece of currency as a fair use.

14 QUESTION: Let me pursue one of the other  
15 hypotheticals given. Suppose Congress had made this  
16 overwhelming, virtually conclusive legislative history  
17 of their belief, their collective belief that this was  
18 imperative, these limitations, to protect against  
19 counterfeiting. Would a court then approaching this  
20 problem have to weigh that value against the value of  
21 the -- the values, the First Amendment values, if any  
22 are involved, in what a publisher is trying to do, and  
23 consider whether there are other ways the publisher can  
24 accomplish the same thing without running afoul of the  
25 statute?

1           MR. GOLD: Yes, I think, as I said before,  
2 that would be a different case, if those findings were  
3 made. However, this case has existed for quite some  
4 time now, several years, and I have yet to hear any  
5 compelling, compelling justification of the restrictions  
6 of this statute in furthering the interest in preventing  
7 counterfeiting.

8           QUESTION: But you do agree that this is a  
9 balancing process, from what you responded.

10          MR. GOLD: That there is some element of  
11 balancing in that once the government demonstrates that  
12 this is advancing in some way their interest, then maybe  
13 our First Amendment rights to some extent have to give  
14 way, but there has been no such demonstration.

15          QUESTION: Frequently we either modify or  
16 strike down a statute because we conclude or other  
17 courts conclude that there are less intrusive, less  
18 difficult means of accomplishing the same objective.  
19 Would we then weigh whether a publishing house has other  
20 means of accomplishing their objective without striking  
21 down an Act of Congress?

22          MR. GOLD: Yes, once you are convinced that  
23 the government has demonstrated that this is a danger.  
24 Until then, I believe that it is Time as well as other  
25 people's right to make their editorial judgments, their

1 judgments that this picture, which is banned, and that  
2 we wanted to publish to demonstrate that a corporation  
3 was cash rich, and while its future was uncertain,  
4 depending on the decisions it made, the horizons were  
5 unlimited, and had to go with a picture that has coins  
6 on there to demonstrate that this is a cash rich  
7 company.

8 QUESTION: Mr. Gold, how would the government  
9 go about demonstrating what you said it must  
10 demonstrate? How would it go about it to your  
11 satisfaction?

12 MR. GOLD: Well, to demonstrate a need to do  
13 what they want to do, I don't believe they could.

14 QUESTION: Do you agree as a starter that the  
15 government does have a compelling interest to protect  
16 its own currency?

17 MR. GOLD: To protect against counterfeiting?  
18 Yes, it does.

19 QUESTION: Yes.

20 MR. GOLD: It does. And, Your Honor, if they  
21 came in with proof that demonstrated that the making of  
22 plates in copies for use as magazine covers were a  
23 problem, and then the Congress went on to write a  
24 statute that punished you for printing, publishing,  
25 possessing a plate or picture in an exact copy of the



1 currency, that probably would withstand the test.

2 QUESTION: Have you put your hand to a draft  
3 of a statute that you think would meet your views?

4 MR. GOLD: As a matter of fact, I did attempt  
5 the first --

6 QUESTION: Is it in your brief anywhere? I  
7 don't recall seeing it.

8 MR. GOLD: No, it is not. But I have tried to  
9 think of would we be sending this back for Congress to  
10 go through the motions and then come back and say there  
11 is no way to get at even what the government  
12 legitimately wants to get at. I think they could if  
13 they prohibited the making, possessing, selling of a  
14 duplicate or exact copy of an obligation of the United  
15 States or any plate or negative from which one could be  
16 made.

17 Then I thought there might be a loophole  
18 there, that there may be some people who make bad  
19 copies, and then will try and do something with them, so  
20 that they could have a statute that also prohibits the  
21 making, possessing, selling, passing of a likeness of  
22 any obligation and perhaps any part thereof with the  
23 intent to defraud.

24 There, you will get somebody who intends to do  
25 something bad with it but it just didn't come close

1 enough.

2           QUESTION: When you say, when you use the term  
3 "exact likeness," that is exactly what counterfeiters  
4 do. In other words, no use limiting that. Criminal law  
5 takes care of that.

6           MR. GOLD: Well, but the government, if I  
7 understand them, does not want, or one of their big  
8 pitches to you has been, we need -- we can't catch  
9 people when they are in the act of the counterfeiting.  
10 We have got to stop it a step before. We want to go  
11 into the printing plant, and if these plates are in  
12 there, say, we now have the right to assume that these  
13 plates may be used for counterfeiting.

14           QUESTION: Mr. Gold, you and your friend have  
15 both focused on currency. These statutes deal with more  
16 than currency, do they not, government bonds, for  
17 example? What else besides currency?

18           MR. GOLD: Anything that comes within the  
19 definition of an obligation.

20           QUESTION: Any obligation of the government.

21           MR. GOLD: Yes.

22           QUESTION: Now, there are a great many,  
23 probably many millions of people in this country who  
24 have never seen a government bond, but if they were  
25 confronted by something that looked the way they thought

1 a government bond probably looks, there being as many  
2 gullible people in this country as we constantly read  
3 about, frequently in Time Magazine --

4 (General laughter.)

5 QUESTION: -- aren't they entitled to  
6 protection, and isn't the government entitled to protect  
7 those people, laying aside dollar bills?

8 MR. GOLD: Right. Well, the first thing I  
9 would say is, yes, they are entitled to protect people,  
10 and one way to protect that is, as was just mentioned,  
11 was to go after the person who takes the copy of the --  
12 the counterfeit copy of the bond and tries to pass it.  
13 The second step would be, again, if they demonstrated  
14 that it was useful to have plates or pictures of parts  
15 of bonds that could be used to defraud people, again,  
16 with that kind of showing, perhaps they could sustain a  
17 statute that once again would protect against what they  
18 are trying to do.

19 It may be that after re-examining the statute,  
20 Congress would say bonds is a different story from  
21 currency. I am not sure they would, but they might.  
22 Again, we are dealing here with no demonstration.

23 QUESTION: Mr. Gold, you never have told me  
24 how Congress could demonstrate what you think is  
25 necessary.

1           MR. GOLD: I would think if there were -- if  
2 the government came in, for instance, as I said, and  
3 presented a problem of plates existing --  
4           QUESTION: Tell me where. Tell me where. In  
5 this one suit?  
6           MR. GOLD: Into Congress.  
7           QUESTION: Oh, into Congress? You don't  
8 demand that it be done here and --  
9           MR. GOLD: Well --  
10          QUESTION: -- we put it of record in this  
11 lawsuit?  
12          MR. GOLD: No --  
13          QUESTION: You want it by testimony,  
14 witnesses?  
15          MR. GOLD: Justice White, the record in this  
16 lawsuit, certainly in the district court, there is no  
17 evidence from the government. In this court, they have  
18 tried to make a showing by telling -- giving you various  
19 facts, like the Impacto story.  
20          That is why I said that I am highly dubious  
21 that the government, if they had to present  
22 justifications if the statute is struck down and  
23 Congress is going to deal with it, that they could  
24 justify it, because we have not heard it. I have not  
25 seen anything in their submissions to this Court,

1 forgetting about whether they are in the record, but in  
2 their briefs that lead me to believe that Paragraph 6 of  
3 474, with or without its exceptions, is a necessary tool  
4 for the government.

5           If you read the rest of the statute, the other  
6 sections that they have at their call to deal with the  
7 problem, it catches most things. Indeed, there is in my  
8 mind, depending on how you read 474, Paragraph 2, you  
9 might even catch the Impacto, the full color, full  
10 size.

11           QUESTION: You don't think Paragraph 6  
12 furthers their interest at all?

13           MR. GOLD: It furthers their interest in the  
14 sense if you are going to accept that, if it in any way  
15 furthers it, it does, because certainly they are closing  
16 a tiny loophole that may exist, but I don't believe in  
17 the First Amendment context --

18           QUESTION: Well, I suppose if the people at  
19 Time Magazine, if this was the law and if Time Magazine  
20 obeyed it, they wouldn't have to worry about plates at  
21 Time Magazine.

22           MR. GOLD: They wouldn't have to worry about  
23 plates at Time Magazine --

24           QUESTION: Or any other publisher.

25           MR. GOLD: But -- Well, they would still have



1 to check them if they wanted to make sure that no one  
2 was creating the plates.

3 QUESTION: Well, I know, but that is their  
4 point. They want to narrow the universe of where they  
5 have to look, and I can imagine what kind of a problem  
6 they would get in if they wanted to get into Time  
7 Magazine and check.

8 MR. GOLD: Your Honor, clearly, if ease of  
9 enforcement were the only test here, and I think this  
10 Court has stated in the Village Schaumburg case that  
11 ease of enforcement is not enough to get them over the  
12 hurdle before they put our burden on demonstrating why  
13 we must have the ability to print these pictures and  
14 express ourselves in that way.

15 Yes, it is easier to enforce. You can always  
16 go after a fly with a cannon. That is what they have  
17 done here. They have tried to -- What I think they have  
18 done is, they want to close the loophole that does get  
19 at the person who is making full representations of  
20 currency that do present perhaps a danger, and doing  
21 that, they say it's a lot easier if we just prevent  
22 anyone from using the symbol except in these certain  
23 ways, and when they choose the ways, they do not make  
24 any reasonable sense either. This is just not a well  
25 constructed, well thought out statute. And when I say

1 statute, it is a scheme. I include 504 in it.

2           The lines that the Congress drew with 504 just  
3 don't make it. In order to get at full color  
4 representations, you don't ban all color. If you are  
5 really after the actual color, you don't ban all color.  
6 The same with size. If you want to prevent actual size  
7 representations, you don't prevent any part of currency  
8 being represented in the actual size.

9           There is a picture in our appendix of George  
10 Washington in a life preserver, just the picture of  
11 George Washington. That we were told was no good  
12 because that part of the bill that we did show was in  
13 exact size. I submit that is not a danger. That  
14 picture was not a danger to the currency. And that  
15 Congress could pass a statute that would further the  
16 true interests that the government has a right to be  
17 interested in here, and that is preventing people from  
18 making things that do present a danger, and there is a  
19 way to do that without stopping Time from making its  
20 covers, or Gail Wagner from making her picture.

21           QUESTION: Mr. Gold, may I ask if there is  
22 anything at all in the legislative history to indicate  
23 that any publisher, Time or anyone else, has ever asked  
24 Congress to make certain exceptions such as you are  
25 asking us to make? Apparently the statute came about

1 because the Treasury Department decided that the statute  
2 was broader than they really needed and they cut back,  
3 but has anybody on your side of the fence ever said,  
4 let's cut back on it?

5 MR. GOLD: I think there are two answers to  
6 that. The first is, there is currently, as the  
7 government points out, there is currently some  
8 legislation that is pending in which certain publishers  
9 are trying to get color removed, but to go back to 1958,  
10 I am not sure why. However, I submit that before that  
11 time, Time had not in fact, at least from Time's point  
12 of view, Time had not used currency in their covers or  
13 internal pictures in a way that might violate -- at that  
14 time any use that would have violated the statute.

15 Currency -- I am sorry. Our first instance  
16 with the enforcement of the statute was in 1965, when we  
17 wanted to present the Fowler cover, which is attached to  
18 the Schwartz affidavit. Money has become a much more  
19 important symbol, in the sixties and particularly in the  
20 seventies. Most of our covers and usage have been in  
21 the seventies.

22 So in 1958, I am not sure, at least from  
23 Time's point of view, that someone had sat down and  
24 really had the problem. It wasn't brought home until we  
25 decided to make use of the symbol, and then found that

1 the Secret Service was at our door with varying  
2 interpretations, and many interpretations that would  
3 stop us from publishing.

4           Indeed, one thing to keep in mind is that the  
5 Secret Service has interpreted this statute in its  
6 narrowest form whenever it could. It has taken the --  
7 It has tried to close whatever it could to prevent  
8 things from being published, right down to when they at  
9 one point insisted that the representation of the dollar  
10 -- of the currency had to relate directly to your  
11 story. Your story had to be about that particular  
12 representation of currency to qualify under the purpose,  
13 and the Lockheed cover as an example, where we were told  
14 that that was one problem there.

15           Now, I realize that after this lawsuit was  
16 brought, and in this Court the Treasury Department and  
17 Secret Service have now withdrawn that interpretation,  
18 but if you consider the way the current statute has been  
19 interpreted by the enforcement agency, that also should  
20 raise some concern.

21           QUESTION: Let me ask you one hypothetical  
22 that may seem very far-fetched to you. Suppose someone  
23 is charged with the traffic events of driving on a  
24 particular street in excess of the 30-mile-an-hour  
25 limit, and then it is tried on stipulation, in which it

1 is stipulated that he was going 31 miles an hour, along  
2 with expert testimony of traffic people and a lot of  
3 others that 31 miles an hour is no more dangerous than  
4 30 miles an hour, and therefore the statute is invalid,  
5 and the court responds, the trial court responds that  
6 legislation cannot be perfect. Legislators are entitled  
7 to make general propositions. On appeal, do you think  
8 that should be affirmed or reversed?

9 MR. GOLD: I would submit, and I understand  
10 the teachings of cases like Grayned that we can't expect  
11 mathematical certainty, but that case, I don't believe  
12 that that person would be asserting a First Amendment  
13 right to go 31 miles an hour. I don't think we can lose  
14 sight of the fact that what we are weighing here, what  
15 we are balancing is our First Amendment rights and those  
16 of others against the government's assertion that it  
17 must have this --

18 QUESTION: The First Amendment has been  
19 thought to cover the right to travel, so it wouldn't  
20 take a genius lawyer to bring this in.

21 MR. GOLD: Well, that is true, and in that  
22 showing the burden, if there had been a showing that  
23 that furthered the government's purpose, in fact, and  
24 there had been some showing, right or wrong, and the  
25 infringement on the First Amendment right was the



1 ability to -- whether you could go that extra mile, then  
2 I would say that is a different case and that probably  
3 would be affirmed. But that is not our case.

4 QUESTION: Mr. Gold, was the substance of 474  
5 enacted way back in 1864?

6 MR. GOLD: Yes, it was.

7 QUESTION: And you are taking the position  
8 that it has been for all those years a substantial  
9 infringement of free speech, for 119 years?

10 MR. GOLD: It sat there as one, yes.  
11 Unfortunately, as I have said, it wasn't brought home to  
12 us until we in our editorial judgment tried to make  
13 something --

14 QUESTION: But free speech in the United  
15 States has suffered as a result of this for all of those  
16 years?

17 MR. GOLD: I submit it has suffered when  
18 people have tried to do these things and been told they  
19 couldn't or suffered the consequences, Gail Wagner.  
20 There is suffering when that gets confiscated. There is  
21 suffering when people who may have known the statute was  
22 on the books -- We don't know how many covers perhaps  
23 never got thought of or even attempted, or other  
24 representations like Gail Wagner's never were executed  
25 because the statute was on the books. We will never

1 know how much of a restraint on free speech it actually  
2 was.

3 QUESTION: Mr. Gold, I owe you an apology.  
4 Gail Wagner's middle name is Edward, so it must have  
5 been a man.

6 (General laughter.)

7 MR. GOLD: Thank you.

8 That concludes my presentation.

9 CHIEF JUSTICE BURGER: Do you have anything  
10 further, Mr. Schulder?

11 ORAL ARGUMENT OF ELLIOTT SCHULDER, ESQ.,  
12 ON BEHALF OF THE APPELLANTS - REBUTTAL

13 MR. SCHULDER: Yes, Your Honor. I would like  
14 to make several quick points.

15 CHIEF JUSTICE BURGER: Two minutes you have.

16 MR. SCHULDER: First of all, Time tells us  
17 that Congress was in effect foolish to think that the  
18 statutory restrictions in this case would be affected,  
19 but we submit that that is really not something that  
20 this Court should quickly second guess. For example,  
21 Mr. Gold said that he would be very suspicious if he  
22 were handed a thousand dollar bill with a portrait of  
23 Grant or Franklin on it, but he himself wasn't sure  
24 whose portrait was on the bill, and it is clear that  
25 Congress was properly or could properly have been

1 concerned with people not as astute as counsel in this  
2 case.

3           Mr. Gold has also suggested several  
4 alternative ways that the statute could be written, but  
5 I believe that there would be problems with each of  
6 those. The first suggestion is that Congress could  
7 prohibit a duplicate or exact copy of a bill or plate or  
8 negative, but what is an exact copy? A publisher could  
9 produce a copy that is only one and a half percent  
10 larger than the real thing, and most people would be  
11 fooled, especially when we are talking about all of the  
12 securities and obligations of the United States,  
13 including bonds, which most people have never seen.

14           QUESTION: I take it your position is that  
15 Congress could prohibit the manufacture of wooden  
16 nickels.

17           MR. SCHULDER: Well, we don't have to go that  
18 far in this case.

19           QUESTION: Well, I don't know why not.  
20 Couldn't they, under your view?

21           MR. SCHULDER: It conceivably could. Yes. We  
22 also -- The other alternative would be to insert an  
23 intent element, but as we pointed out in our main brief  
24 in this case, an intent requirement would make the  
25 statute meaningless. Time could publish an exact

1 duplicate illustration of currency with the perfectly  
2 innocent intent of providing news and exercising its  
3 First Amendment rights, and yet people could then take  
4 that illustration and possibly pass it.

5 We can't expect all publishers to be as  
6 responsible as Time, and so we submit that Congress  
7 clearly had these factors in mind when it enacted the  
8 statute.

9 Thank you.

10 CHIEF JUSTICE BURGER: Thank you, gentlemen.  
11 The case is submitted.

12 (Whereupon, at 2:04 p.m., the case in the  
13 above-entitled matter was submitted.)

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# CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of: #82-729 - DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL., Appellants v. TIME, INC.

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

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