OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-620

TITLE UNITED STATES, Petitioner v. LARRY WAYNE RODGERS

PLACE Washington, D. C.

DATE March 27, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 83-620

LARRY WAYNE RODGERS :

- x

Washington, D.C.

Tuesday, March 27, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:49 a.m.

APPEARANCES:

BARBARA E. ETKIND, ESQ., Washington, D.C.;
on behalf of Petitioner

ALBERT N. MOSKOWITZ, ESQ., Kansas City, Mo.;
on behalf of Respondent.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in United States against Rodgers.

Ms. Etkind, I think you may proceed when you're ready.

ORAL ARGUMENT OF BARBARA E. ETKIND, ESQ.,

ON BEHALF OF PETITIONER

MS. ETKIND: Thank you, Mr. Chief Justice, and may it please the Court:

This case is here on the petition of the United States to review a decision of the United States Court of Appeals for the Eighth Circuit. Like the preceding case, this case too involves the construction of 18 U.S.C. 1001.

The facts are not in dispute. In early June 1982, Respondent telephoned the Kansas City, Missouri, office of the FBI and reported that his wife had been kidnapped. The FBI spent more than 100 agent hours investigating the reported kidnapping, only to determine that Respondent's wife had left him voluntarily.

On June 13th, 1982, Respondent contacted the Kansas City office of the Secret Service and reported that his estranged girl friend, actually his wife, was involved in a plot to assassinate the President. The Secret Service spent more than 150 hours investigating

this report and finally located Respondent's wife in Phoenix, Arizona.

She denied that she had been kidnapped, that she had joined any assassination plot, or that she had ever threatened the President in any way. Rather, she explained, she had left the Kansas City area in order to get away from Respondent.

Respondent subsequently confessed that he had made these false reports to the federal agencies in order to induce them to help locate his wife. As a result of these acts, Respondent was charged with two counts of violating 18 U.S.C. 1001, which prohibits the knowing and willful making of any false statement "in any matter within the jurisdiction of any department or agency of the United States".

The district court dismissed the indictment, however, and the Eighth Circuit affirmed the dismissal, on the strength of the Court of Appeals' prior decision in Friedman versus United States. In that case, the Eighth Circuit had held that the investigatory jurisdiction possessed by the FBI is not the sort of jurisdiction that Congress contemplated when it used the word "jurisdiction" in Section 1001. Rather, the Court of Appeals held that Congress used that word in Section 1001 in the restrictive sense of the power to make

monetary awards, grant governmental privileges, or promulgate binding administrative and regulatory determinations.

As both the Second and the Fifth Circuits have already recognized, there is absolutely no basis for the Eighth Circuit's restrictive construction of this statute. This Court has noted on several occasions that Congress spoke in broad language in Section 1001, making it a crime in any matter within the jurisdiction of any department or agency of the United States to make any false, fictitious or fraudulent statements or representations.

And the Court has specifically counseled against narrowing this broad language by construction. In particular, there is no indication that the word "jurisdiction" was intended to distinguish among the nature of governmental functions.

In United States against Gilliland, the Court explained that the purpose of Section 1001 is to protect the authorized functions of governmental departments and agencies. The "matter within the jurisdiction" language thus was intended only to differentiate between matters constituting the official authorized functions of the department or agency involved, no matter what the nature of those functions, and matters outside the business of

that body.

This construction follows naturally from the fact that the statute encompasses any department or agency of the United States, without reference to the nature of the jurisdiction possessed by the department or agency. But notwithstanding this all-inclusive sweep of the statutory language, the Eighth Circuit's construction would virtually leave the FBI and the Secret Service out of the protection of the statute.

The theoretical distinction that the Eighth Circuit and Respondent have attempted to draw between action that finally disposes of a problem and other types of action does not hold up. Action by regulatory agencies, which the Court of Appeals and Respondent concede is within the reach of the statute, frequently does not finally dispose of a problem, because such administrative action is almost always subject to judicial review.

By contrast, when the FBI and the Department of Justice determine, on the basis of an exercise of investigatory jurisdiction, that criminal prosecution is not warranted, that determination is not reviewable. Indeed, even the narrowest definition of jurisdiction includes the power of the courts to decide the cases pending before them.

QUESTION: Ms. Etkind, what if the Respondent in this case, instead of reporting that his wife had gone to Phoenix from Kansas City, reported that she had gone to St. Louis. Would that be within the jurisdiction of the FBI?

MS. ETKIND: Well, he reported that she had been kidnapped? You mean that she'd just been kidnapped within the state?

QUESTION: Yes.

MS. ETKIND: No, I think probably not. I don't think that the jurisdiction would extend to that.

QUESTION: I'm sorry, I didn't hear your answer. Was it yes or no?

MS. ETKIND: The FBI's jurisdiction would not extend to an intrastate kidnapping?

QUESTION: So the answer's no?

MS. ETKIND: Right.

Respondent makes several arguments that it contends bear on legislative intent, but in fact these are nothing more than policy considerations that are more properly addressed to Congress than to this Court. For example, Respondent contends that Section 1001 must not apply to false statements made to law enforcement officers because such conduct is less blameworthy than committing perjury in open court, for which a less

severe penalty originally was prescribed.

But it makes no sense to say that Congress did not intend statements made to law enforcement officers to be covered by Section 1001, on the assumption that they are less serious than perjury committed before a court of law, when it is common ground that Congress did intend Section 1001 to apply to false statements made to regulatory agencies, which frequently may be less serious than perjury.

But indeed, we believe that the Court of Appeals and Respondent have severely understated the seriousness of making false statements to law enforcement officers. Not only may such statements divert finite governmental resources from bona fide investigations, but they bring to bear on the innocent subject of the false statement the full brunt of the government's investigative and prosecutorial capabilities.

The Respondent and the Court of Appeals also worry that a ruling in favor of the government in this case would mean that false statements made in the context of judicial proceedings also would be punishable under Section 1001. As we noted in our brief, it does not necessarily follow from the fact that Section 1001 applies to false crime reports that it also applies to

false statements made in the context of judicial proceeding.

But in any event, there is no intrinsic reason why the government should not be permitted to prosecute false statements under either Section 1001 or the perjury statute. The government frequently is permitted a choice of statutes under which it may proceed, and the consequences of such a choice to a defendant in this context will not be of great consequence. That is because 18 U.S.C. 1623, which was enacted in 1970, makes perjury committed before a court of law or a grand jury punishable to the same extent as are false statements under Section 1001 and eliminates the requirement that perjury be proved by two witnesses.

QUESTION: Ms. Etkind, I understand your argument that there's no necessary inconsistency, but what is the government's position on whether 1001 applies to judicial proceedings?

MS. ETKIND: Well, I think, I think that it probably would. This Court held in Bramblett that "department" in Section 1001 applies to the legislative and judicial, as well as to the executive branch of government.

Respondents' and the Court of Appeals' final policy argument is that the construction we urge will

have a chilling effect on the citizenry's willingness to report suspected criminal activity to law enforcement authorities. But the terms of the statute themselves preclude any undue chilling effect, since only false statements that are willfully and knowingly made are punishable. There is therefore no liability simply because information reported in good faith turns out to be false.

Finally, in the alternative, Respondent argues that even if the Court agrees with our construction of the statute, that decision should not be applied in his case because at the time he made the false reports his conduct was not criminal under the law prevailing in the Eighth Circuit, that is, under the Friedman decision.

But there's no due process obstacles to applying a ruling in favor of the government to the Respondent in this case. In the first place, because Section 1001 contains a willfullness requirement there's no danger that Respondent would be convicted in the absence of proof that he knew that the acts he committed were wrongful. Accordingly, the question whether the existence of the Friedman precedent in the Eighth Circuit precludes Respondent's conviction is one for the finder of fact in the determination of willfulness in the first instance.

But Respondent also appears to be making a larger argument based on notions of due process vagueness and notice, that the mere existence of a precedent in his circuit holding Section 1001 inapplicable to conduct analogous to his precludes his conviction as a matter of law.

But Respondent's argument would convert every arguable question of statutory construction into a constitutional vagueness issue. Respondent has never argued that the words of Section 1001 themselves are so vague as to fail to give notice of the prohibited conduct, as in Connelly versus General Construction Company.

Nor is this a case like Bouie versus City of Columbia, on which Respondent does rely, because there the statute on its face gave no indication that it covered the defendant's conduct, nor had it ever been construed as covering such conduct. By contrast, Respondent's retroactivity argument assumes a ruling for the government on the substantive issue, and that ruling would be based on the fact that the plain language of the statute does cover his conduct.

Respondent is thus reduced to arguing that whenever courts differ over the meaning of a statute the legislation is as a matter of law unconstitutionally

vague. But that cannot be. If it were, the government would never be able to seek this court's review of an issue of statutory construction on which the courts of appeals were divided, because we would be asking fcr an advisory opinion.

And likewise, this Court would be precluded from affirming a conviction in the face of a conflict among the circuits concerning the interpretation of a statute. Yet the Court does sc regularly.

Vagueness must rest on something more than a difference of opinion among courts and judges, and Respondent has alleged nothing more and there is nothing more in this case.

Finally, application of a ruling in favor cf the government to Respondent here is consistent with the opinion rendered in James versus United States. In James, this Court held that embezzled funds are taxable income of the embezzler, thus overruling the prior decision in Wilcox versus United States. James' conviction for willful evasion of taxes nevertheless was reversed because three Justices believed that the new construction should not be applied to him, while three other Justices would nct have overruled Wilcox.

But, significantly, a total cf five Justices were of the view that if a new rule were to be adopted

it should be applied to James, at least absent a showing of bona fide reliance by him on the prior construction. Indeed, even the view of the plurality in James is distinguishable from the present case, since James involved the overruling of a prior decision of this Court.

The willfullness requirement of Section 1001 assures that Respondent will not be convicted on the basis of conduct that he did not know was wrongful. At least in the conduct of this case, due process requires no more.

The judgment of the Court of Appeals should be reversed and the case should be remanded for reinstatement of the indictment and trial.

QUESTION: Ms. Etkind, the government did not seek cert in the Friedman case of almost 20 years ago, did it?

MS. ETKIND: No, we did not.

QUESTION: Do you know why?

MS. ETKIND: I'm not sure why. Of course, that was the first case to raise the issue.

QUESTION: It was what?

MS. ETKIND: That was the first case that --

QUESTION: But it was a split decision?

MS. ETKIND: Yes, it was.

QUESTION: With a very strong dissent?

MS. ETKIND: By a district court judge.

QUESTION: Well, a pretty good district judge. This was Judge Register, and don't downgrade him because he was a district judge.

MS. ETKIND: I didn't mean to do that.

There was no conflict in the circuits then, and of course we frequently don't -- we don't see the Court's review of every decision that we believe is incorrect, of course, in the absence of a conflict.

If the Court has no questions, I'll reserve the rest of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Moskowitz.

ORAL ARGUMENT OF ALBERT N. MOSKOWITZ, ESQ.

ON BEHALF OF RESPONDENT

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

As Petitioners accurately stated, the issue in this case concerns statutory construction, that is, what meaning should we give to the word "jurisdiction" as used in Section 1001. Petitioner raises several objections to the definition accorded that word by the Eighth Circuit in the Friedman and Rodgers cases.

As I understand her argument, she's saying that the definition that Friedman uses is overly

technical, it undermines the purpose of the statute, and it's not required by the legislative history. I want to discuss those objections.

First with regard to the over-technicality of the definition that Friedman uses. The definition that Petitioner wishes this Court to adopt is an extremely broad one. I think she defines it in her brief as "power to exercise authority." Leaving aside for the moment whether or not the Friedman definition is overly technical, I submit that Petitioner's alternative definition is hazy and overbroad and effectively takes away any meaning that the word "jurisdiction" can have in the statute.

She defines it, again, as "power to exercise authority." But the Section 1001 contains a materiality requirement. Many cases that have discussed the statute, although not all, come to the conclusion that the materiality requirement inheres to the entire statute, and they define materiality as any statement that can have the capability of influencing an agency.

It is difficult to imagine a situation where a statement would be material -- that is, having the capacity to influence an agency -- and not be within the jurisdiction of that agency, as Petitioner defines it. I think if Petitioner's alternative definition is

adopted by this Court, it is forcing this Court to assume that Congress intended absolutely nothing by the term "jurisdiction" when it used it in Section 1001. I think this is a result that ought to be avoided at all costs, particularly in a carefully worded statute like this.

As to the general criticism that the definition of the court in the Eighth Circuit is overly technical, I fail to understand that argument. The definition used by the Friedman court fits well within a common, ordinary understanding of that word. Now, admittedly the word "jurisdiction" is a word of many meanings, many shades of meaning, but I think a common thread through much of the definitions of that word found in Webster's and in the case law that have used the word is some concept, some notion that there is a final decision somewhere, that the body that has the jurisdiction can make some act of finality.

Perhaps not an act of finality for all times. Certainly courts have jurisdiction, but they can be appealed. There's no question about that. I don't think Friedman was talking about the final act; I think Friedman was talking about some positive power to make a disposition of the case before it, and --

QUESTION: May I inquire, then: You agree, I

think, that the FBI is a department or an agency within the meaning of the Act, don't you?

MR. MOSKOWITZ: Yes, Your Honor, that has been defined that way.

QUESTION: Could you give me an example of a statement within the jurisdiction of the FBI that would violate the Act?

MR. MOSKOWITZ: The FBI as I understand it has other duties other than merely investigating criminal conduct. I think they also provide information to agencies regarding employee credentials. That might be a situation where a statement given to the FBI might fall under the Act because the agency using that information would have the final say in whether or not the employee is hired.

And that is to be contrasted with the typical situation where the FBI investigates a criminal conduct and makes no decision as to whether or not a crime has been committed. It merely presents the information.

QUESTION: In other words, you'd say if it's in the jurisdiction of some agency other than the FBI the statement to the FBI could violate the statute. But does there always have to be another agency beside the FBI?

MR. MOSKOWITZ: I think there has to be an

agency that has the power tc make the final disposition that the Friedman case was talking about.

QUESTION: There has to be an agency that has some jurisdiction, and the FBI never has any jurisdiction of its own?

MR. MOSKOWITZ: That's correct.

It seems tc us that Petitioner's definitiсn requires an absurd result. It requires an assumption that Congress meant nothing by the word "jurisdiction." The Friedman interpretation is a good, common sense interpretation of the word, and the Court does not go far afield to find that definition. It's right there in Webster's. It's a commonly understood meaning of the word, and it has the beneficial side effect of acccrding the word "jurisdiction" some meaning.

Now, Petitioner also argues that it undermines the statute, and I guess within that argument is the assumption that there will be a gap in the law, people who do bad things will not be punished, that the purpose for which Section 1001 was passed will be undermined. And I challenge that argument.

First, with regard to whether or not there's a gap in the law. To be sure, there will be a limited gap in the law. But I submit, first of all, that that gap is a lot narrower than has been suggested.

First, there is another statute available to investigative agencies. 5 U.S.C. Section 303 allows investigative agencies conducting certain kinds of investigations to administer an oath to a witness. Now, admittedly these investigations are confined to fraud or employee misconduct. Nevertheless, that statute is available and it does bridge the gap somewhat.

Secondly, I maintain that whatever small gap is left in the law as a result of the Friedman decision is a beneficial one and should be preserved. The purpose of Section 1001, as this Court has noted, was to protect the integrity of governmental agencies. It is an assumption that is not borne out by closer examination to say that the Friedman rule necessarily undermines agency duties, agencies like the FBI or the Secret Service.

First of all -- and I think the Friedman court addressed this in a round-about way when it talked about the open line of communication that it is important to promote, rather than to chill, that is, the open line of communication between citizens and the law enforcement agencies.

The Friedman result promotes that open line of communication. Petitioner's overbroad and, I submit, hazy definition of "jurisdiction" chills it. And I

think it's clear which result will promcte, rather than undermine, agency functioning like the FBI. If it is assumed that the FBI's purpcse is tc gather information, any rule that would undermine that purpose would be in effect to go against what this Court saw in Section 1001.

Secondly, an important aspect of an investigation is that period of time prior to the final trial or the final disposition when questions are being asked of witnesses, statements are being taken. It is a common experience, certainly within my experience as an attorney who has had the obligation of investigating criminal allegations on behalf of my clients, to experience, particularly early on in an investigation, witnesses who are not totally truthful with me, witnesses who, because they are emotionally involved in the case or because they don't feel it's very important, they dcn't see the trial down the road, they don't realize they'll have to testify under oath, are not totally truthful.

It is only later on, when it's clear that testimony will have to be given at a jury trial and perjury is a possibility, that I find witnesses will come forward and say, well, wait a minute, this is what I really meant to say.

I think Petitioner's rigid approach to this statute is going to have the effect of locking witnesses' statements in from the beginning. It's going to encourage them to stonewall it, it's going to result in a possibility of defective investigation and wrong investigation, rather than to promote the emergence of the truth.

So I think it is wrong to assume that the Friedman result is necessarily an undermining of the investigative functioning of the FBI. In fact, it may very well be that it promotes it.

Now, in the Petitioner's brief the legislative history is also discussed as being something that doesn't require the Friedman result, and there is some agreement here between us. There is agreement, first of all, that the legislative history on its face, sparse as it is, does not address itself to this particular situation.

It is clear that what Congress was intending to do in 1934 in broadening the false statements statute was to reach, as one Senator said, all the buzzards, and I think what the Senator meant at that point was, he was talking about people who were giving false information to newly formed regulatory agencies.

If Congress had envisioned the kind of

situation, the kind of scope, the kind of reach that Petitioner attributes to this statute, then surely there would have been some discussion somewhere about the ramifications of such a broad, widely reaching statute.

QUESTION: Well, why would Congress have thought it less reprehensible to give false information to an agency such as the Federal Bureau of Investigation as opposed to say the Federal Trade Commission?

MR. MOSKOWITZ: I don't know that Congress would have thought it less reprehensible. They might and they may in the future feel that it is as reprehensible or more reprehensible. What I am saying is that they didn't think about it one way or the other.

QUESTION: Well, if they didn't think about it one way or the other, then your argument as to jurisdiction really depends on kind of just a parsing of the word itself, without necessarily any relation to what Congress had in mind.

MR. MOSKOWITZ: Well, I think the lack of Congressional awareness of the claimed scope of the statute is not dispositive of the question, but it is instructive, and I think this Court has as recently as 1982, in the Williams versus United States case which I have cited, said as much.

And of course, in that case, a very similar case in many ways in that you were dealing with a false statements statute and you were asked to accept a rather technical definition of the word "statement" and the word "check", and this Court in so doing noted that one of the factors it considered was the lack of Congressional awareness of the scope of the statute.

Now, in this case I think the facts are stronger even than that for Respondent, because in this case Respondent is not asking this Court to place an unusually technical or abstract definition on "jurisdiction". It's a common sense one, it's an ordinary one. And it has the benefit not only of according some meaning to the word, but it does not undermine what Congress obviously was primarily concerned with in passing the 1934 amendment.

Now, it may be at some time in the future Congress will consider it necessary to protect investigative agencies with some carefully worded statute, the way many states have done. But until that time, I think it would be improper to take the statute we have now, stretch it out of shape, and make it apply to this particular set of facts.

The Friedman rule has another side effect, another side benefit that's a very good one, and it was

discussed a little bit in the briefs, but not in Petitioner's opening remarks, and that is the problem of the exculpatory no situation. And that situation, of course, occurs most often in an investigative kind of situation, where an individual is being asked questions and he's then asked by the agent, did you do it. And he says no, or he says something else in denial. In effect, he's pleading not guilty to the agent.

Does that situation fall under Section 1001? Well, that is a question that has been batted about by federal courts for several years now, and there's no conclusive answer to it. It's a thorny issue.

The Friedman result, however, has the beneficial effect of for the most part avoiding that thorny issue. The Friedman result then is something that is not only commonsensical, makes sense, but it has a side benefit of avoiding a thorny issue.

In conclusion with regard to this first issue, the Friedman result gives meaning to the word "jurisdiction", where Petitioner's definition does not. It does so without going far afield to find that definition. It uses a reasonable, common sense one. It is consistent with and does not undermine the legislative history of the statute.

The primary purpose for which Congress

intended to pass the statute is not frustrated by the Friedman result. Nor does the Friedman result undermine in any significant way the investigative functions. In fact, it may even promcte them.

It preserves needed flexibility in the investigative stages of a criminal investigation, sc that witnesses aren't locked into their first statement. It preserves what the Lambert dissent from the Fifth Circuit noted as one of the most important of national policies, the open line of communication between individual citizens and investigative agencies.

And, perhaps least important, it is consistent with the rule of lenity, a rule that stil has some vitality, I take it. And to the extent that rule need be applied in this case -- and I'm not sure that it needs to be, because the definition that the Eighth Circuit uses is not an overly abstract one or an overly technical one. But to the extent that the Petitioner's overbroad definition is harsher than Friedman's, at least Friedman's result is consistent with that rule of lenity.

Now, as to the second issue which has been raised, about the retroactivity issue. As I understand Petitioner's argument, there are two basic objections. The second issue is the due process issue raised by

Respondent.

The two objections, as I take it, are that the law is in the Eighth Circuit, when Mr. Rodgers was charged with this conduct, was not all that clear. Change was foreseeable, number one. And number two, that there is no showing that the Defendant ever actually relied on the Friedman case. I want to address those two objections, because I think they're unfounded.

First with regard to the law being unclear and changes foreseeable. Well, change is always foreseeable in the law. The law never is static and never stands still. But nevertheless, in the Eighth Circuit the law was clear as a bell when Rodgers acted. Under the Friedman case, what Rodgers did was not against the law.

QUESTION: Mr. Moskowitz, would your anti-retroactivity argument apply equally if one of the district judges in the Western District of Missouri had -- if there were no Friedman case in the Eighth Circuit, but simply a ruling of similar effect by one of the district judges in the Western District of Missouri, and then that judge perhaps later changes his mind, so that it would apply not just on the Court of Appeals level, but on the district court level?

MR. MOSKOWITZ: Well, I think that's a little bit of a different situation. Here we have the highest court of the circuit declaring the law for the whole circuit.

QUESTION: Well, supposing you have only one federal district judge in the Western District of Missouri, and he declares the law for the Western District of Missouri.

MR. MOSKOWITZ: I think as long as Friedman acts within the Western District of Missouri, then I think the result would have to be the same, yes.

QUESTION: So then you would have 93 different possible claims of retroactivity, depending on which of the federal judicial districts you acted in?

MR. MOSKOWITZ: I think that's a theoretical possibility, although in the 15 years since the Friedman result has been announced there have been only two other circuit courts that have addressed squarely this issue. So while I think that's a theoretical possibility, it doesn't seem to be one that is a practical concern.

QUESTION: But they certainly addressed it specifically, didn't they?

MR. MOSKOWITZ: Yes, they did, Your Honor, absolutely. The decision couldn't have been clearer than it was, and I think the way the Rodgers case was

handled in the district court and in the Court of Appeals indicated just how solid the Friedman rule still is in the Eighth Circuit and how clear it is.

The fact that other circuits may have come to different conclusions about the statute is fine for those other circuits, but Rodgers lives on the Eighth Circuit and this is the law in the Eighth Circuit and this is where he acted.

Now, with regard to the --

QUESTION: Did he act relying on that law?

MR. MOSKOWITZ: This is the issue I want to reach next, Your Honor. It is, as I understand it, Petitioner's position that actual reliance is necessary here, and I think there's some confusion between the due process argument that's being made and the willfulness argument that was addressed in the James case.

There is a willfulness requirement in this statute, but there is no argument here that the Defendant is not guilty of this offense, if it is an offense, because he wasn't willful. That's not the position of the Respondent, and therefore the James case is not germane to Respondent's argument.

The case that is germane to Respondent's argument is the Bouie case, and the situation in the Bouie case is strong precedent and strong authority for

Respondent's position. In that case the defendants violated a trespass law.

There was no showing whatsoever in that case on the record that I can tell indicating that the defendants in that case were personally aware of a narrow reading of the trespass statute involved in that case. In fact, there's every indication to believe that they thought they were being arrested for a whole other crime, breach of peace. It was only subsequent to their arrest was the trespass charges brought.

Moreover, there's some indication that they wanted to be arrested, that they wanted to break the law to make a point totally unrelated to retroactivity. Rather than relying on some narrowly worded statute, it seems that the defendants in the Bouie case were relying on the fact that what they were doing was illegal in some way.

And this Court stated in a footnote, I think footnote 5, that subjective awareness of the criminal law is not relevant to a due process argument of fair warning. What is relevant is the announcement of the law. That's what must be looked to.

And what is the announcement of the law in this case? It couldn't be clearer.

QUESTION: Well, but Bouie dealt with a change

on the part of the Supreme Court of South Carolina, didn't it? Here you have no change of heart on the part of the Eighth Circuit. You simply, if you lose here, it would be a question of the Eighth Circuit being reversed by a ccurt that's always had pcwer to reverse the Eighth Circuit.

MR. MOSKOWITZ: That's correct, Your Honor. But I think the result and the effect would be precisely the same. A legal act, when done, would be made illegal retroactively, which this Ccurt in the Bouie case found impossible, and I submit that the same result should be reached in this case.

Certainly if the legislature had passed a statute reaching the activity cf Rodgers one day after, there would be no question that that law could not be applied retroactively to Rodgers. The same result as this Court noted in Bouie should pertain tc this particular case.

If the rule were otherwise, if actual knowledge of the statute or the law were required, it seems to me that we would have a situation where the due process guarantee would be applied to those who read their advance sheets and not applied to those who do not. Tc the lawyer cr the rich man who can afford a lawyer, he can take advantage of his due process

rights. To the poor man, to the blue collar worker, well, due process doesn't apply to him; he doesn't have a lawyer, he doesn't read his advance sheets.

It's unrealistic to require the average citizen to be aware of the law.

QUESTION: Mr. Moskowitz, I think you raise a very interesting conceptual problem. The heart of your argument is that it was not unlawful at the time this act was committed.

MR. MOSKOWITZ: That's correct.

QUESTION: Yet there was a federal statute that prohibited it, which may or may not say was misconstrued by the Eighth Circuit.

MR. MOSKOWITZ: Yes, Your Honor.

QUESTION: Does that mean that because that statute, if it comes out that way, the fact that the Eighth Circuit had misconstrued a federal statute means it was not unlawful at the time the act was committed?

MR. MOSKOWITZ: I think that's what I'm saying, Your Honor, not unlawful in the Eighth Circuit.

QUESTION: In other words, it isn't Congress that makes the law, it's the Eighth Circuit, in the Eighth Circuit?

MR. MOSKOWITZ: Well, the law is a combination of the words of Congress as interpreted by the courts,

and in the Eighth Circuit the law, although written in a rather broad way, had been interpreted by the Eighth Circuit in a narrower way.

And in that sense this case is very much like Bouie, because you had a narrow law in Bouie, you've got a narrow law here.

QUESTION: But wasn't it conceded in Bouie that there was a change in law that took place after the conduct? I think perhaps one could argue here that the law was always the same here, it just had been misconstrued by an intermediate federal court.

MR. MOSKOWITZ: I think that is a position that can be taken, that is a conceptual position that can be taken. But I think that still leaves us with the problem of applying what is essentially a legal act and making it illegal after the fact, something Congress can't do and something I submit that the judiciary can't do.

QUESTION: The state supreme court really has lawmaking authority that perhaps an intermediate federal Court of Appeals does not have. In sort of a fundamental sense, I think there may be a difference.

MR. MOSKOWITZ: There is a philosophical aspect to this question, yes, Your Honor.

If there are no further questions, thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Ms. Etkind?

REBUTTAL ARGUMENT OF BARBARA A. ETKIND, ESQ.,
ON BEHALF OF PETITIONER

MS. ETKIND: I just have one point. I would just like to address Respondent's point that our construction of the statute reads the word "jurisdiction" out of the statute because of the materiality requirement.

I would just point out that the statute itself includes a materiality requirement only as to the first clause, the falsification or covering up clause, not as to the clause that pertains here, making any false or fictitious or fradulent statements or misrepresentations.

Now, it is true that the courts have imputed a materiality requirement to all of the clauses of the statute, but I would suggest that probably is because of the requirement of "in any matter within the jurisdiction."

I believe that I addressed, I anticipated the retroactivity arguments, but if the Court has any further questions I'll be happy to answer them. Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:28 a.m., the argument in the above-entitled case was submitted.)

* * *

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:
#83-620-UNITED STATES, Petitioner v. LARRY WAYNE RODGERS

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

BY Pixie Hammond

(REPORTER)