

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-558; 85-559; 85-560

TITLE ROBERT E. O'CONNOR, ET UX., Petitioners V. UNITED STATES;
PAUL H. COPLIN, ET UX., Petitioners V. UNITED STATES; and
JACK R. MATTOX, ET UX., Petitioners V. UNITED STATES

PLACE Washington, D. C.

DATE October 14, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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ROBERT E. O'CONNOR, ET UX., :

Petitioners, :

v. : No. 85-558

UNITED STATES :

- - - - - x

PAUL H. COPLIN, ET UX., :

Petitioners, :

v. : No. 85-559

UNITED STATES :

- - - - - x

JACK R. MATTOX, ET UX., :

Petitioners, :

v. : No. 85-560

UNITED STATES :

- - - - - x

Tuesday, October 14, 1986

Washington, D.C.

Oral argument in the above-entitled matters
was convened, pursuant to notice, at 10:03 a.m.

1 APPEARANCES:

2
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4 on behalf of Petitioners.

5 JERROLD J. GANZFRIED, Esq., Washington, D.C.;

6 on behalf of Respondent.
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on behalf of Petitioners	
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behalf of Respondent.	
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on behalf of Petitioners - rebuttal	

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We'll hear argument first today in: No. 85-558, Robert E. O'Connor versus the United States; No. 85-559, Paul H. Coplin versus the United States; No. 85-560, Jack Maddox versus the United States.

Mr. Phillips, you may proceed when you're ready.

ORAL ARGUMENT OF
CARTER G. PHILLIPS, ESQ.,
ON BEHALF OF PETITIONERS

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

The issue in this case is whether Article 15 of the agreement in implementation of Article 3 of the Panama Canal Treaty exempts from United States taxation income received by U.S. citizens for work performed for the Panama Canal Commission.

Petitioners are United States employees of the Commission who seek refunds of income taxes paid for various years since 1979. The Claims Court, in a thorough and thoughtful opinion by Chief Judge Koninski, held the Petitioners are entitled to a tax exemption. The Federal Circuit, relying in some measure upon a diplomatic note from Panama, then recently supplied by

1 the Government at the Circuit Court level, reversed.

2 Petitioners submit that the Claims Court
3 correctly interpreted the implementing agreement on the
4 basis of its plain language, its structure, and the
5 negotiating history, and therefore we seek reversal of
6 the judgment below.

7 Analysis of the implementing agreement
8 obviously must begin with the plain language used by the
9 signatories, as that language is understood in context.
10 The language, we submit, is strikingly favorable to
11 Petitioners, and provides in relevant part:

12 "United States employees shall be exempt from
13 any taxes, fees, or other charges on income received as
14 a result of their work for the Commission."

15 No reference appears in that language to
16 Panamanian taxes, and it stands in stark contrast to the
17 other two paragraphs of Article 15. This language also
18 differs significantly from parallel language in Article
19 16 of the agreement in implementation of Article 4 of
20 the Panama Canal Treaty, which concerns members of the
21 military.

22 That provision, which the Government has
23 acknowledged was the model for this one, contains a
24 specific reference to Panamanian law. That reference
25 was deleted, for reasons that are not altogether clear.

1 But the inference to be drawn from that has been made
2 clear by this Court's decisions both in Air France and
3 in Santo Vincenzo that the deletion of language, of
4 parallel language, has meaning.

5 And the meaning in this instance we submit was
6 to exempt United States citizens from taxation.

7 Based on that plain meaning argument, the
8 natural question that will necessarily arise is, why
9 would United States negotiators agree to exempt United
10 States employees from taxes. I think in order to
11 understand that you have to go back to the political
12 climate in 1977 and the circumstances surrounding these
13 negotiations.

14 The Carter Administration was deeply committed
15 to an agreement. The question of giving up the canal
16 was no longer a matter of internal debate. The only
17 thing left were the circumstances under which that canal
18 would be transferred back to Panama.

19 The basic question was under what
20 circumstances Panama would receive back the Panama, and
21 Panama would not receive back that canal, which is made
22 clear through the negotiating history, except on terms
23 that demonstrated clearly Panamanian sovereignty over
24 the Canal Zone.

25 Unfortunately, we do not have the exact

1 exchanges that led up to the final agreement of Article
2 15, paragraph 2. Nevertheless, it is quite clear from
3 the exchanges among the various ministers with the
4 United States negotiators that Panama would not lightly
5 recede from its position that it should be allowed to
6 tax United States citizens who were working for the
7 Commission.

8 The reason it sought to tax United States
9 citizens who were working for the Commission -- excuse
10 me, in the Commission -- was that that was a reflection
11 of its sovereignty.

12 The United States, on the other hand, never
13 viewed the issue as a matter of tax policy, but merely
14 as a political problem to be solved. The United States
15 could not allow Panama to tax United States citizen
16 employees of the United States. It would create an
17 untoward precedent, which would in turn adversely affect
18 the negotiating posture of the United States in the
19 future.

20 In addition, the internal memoranda of the
21 Government make it abundantly clear that there was fear
22 by the negotiators that if they acceded to the
23 Panamanian request to tax these corrects, that the
24 consequences in Congress would be rather significant.
25 The opposition was going to be quite clear.

1 QUESTION: Mr. Phillips, could I ask you about
2 the language of the implementation agreement itself,
3 which I suppose is where we need to start.

4 MR. PHILLIPS: Yes, ma'am.

5 QUESTION: Under your view of it, U.S.
6 employees are exempt from taxes by any government on
7 income received from their work for the Commission.

8 MR. PHILLIPS: That's correct.

9 QUESTION: And likewise from payment of taxes
10 on income derived from sources outside Panama.

11 MR. PHILLIPS: That's correct.

12 QUESTION: But I gather under your view, if
13 there were outside income from sources within Panama
14 there is no exemption and both governments can tax?

15 MR. PHILLIPS: Well, our view is that the way
16 to read the second sentence is to incorporate by the
17 language "similarly," which is what precedes -- which is
18 what initiates the second sentence. It says,
19 "Similarly," that these things are taxed.

20 And that is derived -- what that refers to,
21 excuse me, is Commission-related income, that is from
22 outside --

23 QUESTION: So I gather if there were income
24 earned within Panama that wasn't earned from the
25 Commission work --

1 MR. PHILLIPS: Right.

2 QUESTION: -- both governments could tax that,
3 I suppose?

4 MR. PHILLIPS: I supposed they could, although
5 I don't know that the would.

6 QUESTION: And that's a little bizarre, isn't
7 it?

8 MR. PHILLIPS: Well, not terribly bizarre,
9 Your Honor. The primary concerns of the negotiators
10 were the sovereignty over the Commission, and so the
11 bilateral agreement not to tax any income either
12 directly or indirectly arising out of work for the
13 Commission was the primary purpose of the agreement and
14 the compromise.

15 The fact that they may have left open one
16 potential for U.S. citizen employees -- and this is
17 clearly going to be a very small subset of people who
18 are U.S. citizen employees --

19 QUESTION: Perhaps.

20 MR. PHILLIPS: -- of the Commission.

21 QUESTION: But it is an odd result.

22 I would also inquire, now, there is similar
23 language in a treaty pertaining to taxation of military
24 personnel of the United States stationed in Panama?

25 MR. PHILLIPS: Significantly different

1 language with respect to military personnel.

2 QUESTION: Well, remarkably similar, wouldn't
3 you say?

4 MR. PHILLIPS: Except for the --

5 QUESTION: What is your position there? Is
6 the income of military personnel stationed in Panama
7 subject to U.S. taxation?

8 MR. PHILLIPS: Well, it's not easy for me to
9 give a definitive answer on that, because I don't know
10 about the negotiating history that would have led up to
11 that part of the agreement. Based on the language,
12 however, there is clearly a significant difference
13 between Article 15 implementing Article 3 and Article 16
14 implementing Article 4.

15 The second sentence --

16 QUESTION: Well, but the first sentence says:
17 "Members of the forces and dependents," and so forth,
18 "shall be exempt from any taxes, fees, or other charges
19 on income received as a result of their work for the
20 United States forces."

21 Now, that's very similar to the language
22 you're relying on in your case.

23 MR. PHILLIPS: That's true, Justice O'Connor,
24 but if you read the next sentence, which is the sentence
25 that grounds Article 16 into Panamanian law, "Similarly,

1 as provided by Panamanian law," and then it goes on,
2 that language which grounds the second paragraph of
3 Article 16 to Panama has been deleted from Article 15,
4 thereby taking it away from concern specifically with
5 respect to Panama.

6 QUESTION: But do you take the position, if
7 pressed, that military personnel income is taxable by
8 the United States?

9 MR. PHILLIPS: My basic position would be that
10 it is clearly a much stronger case for U.S. taxation of
11 the military. I would not concede that it has to be
12 that way, because again, even if that language might
13 support no tax exemption, you'd have to go to the
14 negotiating history, and that we don't have before us.
15 In fact, we're not sure that the Government has ever
16 made the history surrounding Article 16 available.

17 QUESTION: Is there any other place in the
18 world to your knowledge where the United States has
19 agreed to make income received by United States citizen
20 or military personnel not taxable by the United States?

21 MR. PHILLIPS: Well, the United States has
22 entered into agreements, none of which have been
23 ultimately ratified by the Senate, that would provide
24 for some bilateral exemptions.

25 But I think the more important point is, I

1 don't think there is anywhere in the world that is like
2 Panama. The Panama Canal Commission creates its own
3 income. This income does not come from the United
4 States Treasury; it comes from the Panama Canal
5 Commission's tolls, and it is then paid over to United
6 States employees.

7 The whole point of the negotiations and the
8 compromise during those negotiations was that that kind
9 of income ought to be taxed by the Panamanians, and the
10 United States and Panama compromised on that issue.

11 QUESTION: But it isn't just that income that
12 your position addresses. You've said that you go all
13 the way with the logic of your position and say that the
14 second sentence means that the United States cannot tax
15 these corrects on any income.

16 MR. PHILLIPS: Well, I don't believe we have
17 to read the second sentence that broadly.

18 QUESTION: I thought you just did in your
19 response to Justice O'Connor.

20 MR. PHILLIPS: I thought in my response to
21 Justice O'Connor, Justice Scalia, I had indicated that I
22 thought you could incorporate into the second sentence
23 the word "similarly" a limitation on the scope of the
24 second sentence referring to income derived from
25 Commission-related work, but from outside sources; and

1 that that's a much narrower and clearly less important
2 provision.

3 QUESTION: That's the weight you're putting on
4 the word "similarly"?

5 MR. PHILLIPS: Well, I think it follows. It's
6 a reasonable interpretation of the word "similarly."

7 QUESTION: Well, but Mr. Phillips, if that's
8 the interpretation, then Panama could tax one of these
9 employees' income from bonds in the United States. Do
10 you think that's right? Panama could do that if you
11 read that sentence that way.

12 MR. PHILLIPS: Except that there's no
13 indication that -- while it may be able to as a matter
14 of the treaty, I don't know that Panama has ever
15 attempted to do that.

16 QUESTION: Mr. Phillips --

17 MR. PHILLIPS: And I don't know that it was a
18 concern to the United States and the Panamanian
19 negotiators.

20 QUESTION: I imagine it would be a concern to
21 one of these employees, though.

22 QUESTION: Mr. Phillips, how much income do
23 you suppose there would be that would be covered by your
24 interpretation of the second sentence of paragraph 2 of
25 Article 15? It's income derived from their work for the

1 Commission, but derived outside the Republic of Panama.

2 MR. PHILLIPS: Well, I think the best example
3 of it would be the annuitants who had worked on the
4 canal prior to the treaty, who were then rehired after
5 the treaty, because their income for work on the canal
6 that they receive as annuitants would be from sources
7 outside.

8 It comes from the United States, but that
9 would then be exempt from taxation. It also makes good
10 policy sense, because usually those are individuals who
11 are very highly skilled technicians in terms of working
12 at the canal and would have been heavily sought after.
13 So I think that there is a body of people who fall
14 within that category, and it would have been quite
15 reasonable to try to exempt them.

16 QUESTION: But do you maintain that, even if
17 the construction that you say should be attached to the
18 word "similarly" in that sentence would not be adopted,
19 nonetheless it makes some sense to say that these
20 people, if they're earning income from bank deposits in
21 the United States, nonetheless should be not taxable on
22 them?

23 MR. PHILLIPS: By whom?

24 QUESTION: By the United States.

25 MR. PHILLIPS: As I would understand it, the

1 United States could tax that income, under my
2 interpretation. Now, if you reject my interpretation
3 and say that they are not taxable, that the limitation
4 of "similarly" permits the United States to tax and is
5 only a limitation on Panama, then obviously it is a
6 little skewed.

7 That means that income outside the United
8 States would be taxable.

9 QUESTION: You say that the United States,
10 under your preferred theory, the United States could tax
11 and Panama could tax income outside, from outside
12 Panama?

13 MR. PHILLIPS: Under my preferred theory?

14 QUESTION: Yes.

15 MR. PHILLIPS: Yes, that that was not a
16 serious concern to the Government.

17 QUESTION: Why wouldn't that be a serious
18 concern to the Government? Here you have the United
19 States, that had Zonians who previously had been
20 entirely exempt from Panama taxes, and you're saying
21 that what we negotiated for was above all things to make
22 sure that they couldn't be taxed on their income from
23 the canal, but we didn't care whether they could
24 thereafter be taxed by Panama on income from elsewhere.
25 It seems to me that would have it absolutely

1 upside-down.

2 It's much more natural to allow them to be
3 taxed for their income from the canal than to allow
4 Panama to tax them on income from elsewhere. That seems
5 to me much more an assertion of --

6 MR. PHILLIPS: But Justice Scalia, the problem
7 with the alternative interpretation is that then you
8 have to go back and say, well, what does the first
9 sentence mean? And it is the first sentence that was
10 clearly uppermost in the minds of the negotiators in
11 1977.

12 And under the alternative, any other
13 alternative interpretation of the second sentence that
14 forces the United States -- that allows the United
15 States to tax this income, you have to assume that the
16 negotiators for Panama receded, they gave up, they
17 caved, even though it had been described to the United
18 States as essentially a treaty-buster if the sovereignty
19 of Panama was not recognized.

20 The debates leading up to the final agreement
21 consistently -- and most of them come from Minister Royo
22 -- indicate that they would not be able to reach an
23 agreement unless the sovereign concerns of Panama were
24 taken into account.

25 So that any other interpretation of Article 1

1 means that somewhere between the last messages we have
2 on the subject and the final agreement, without any
3 indication that Panama would give it up, had completely
4 abandoned its interest in this.

5 It makes much more sense to assume that a
6 compromise was reached, that the concerns of the
7 negotiators for the United States were not based on tax
8 policy; they were based on diplomatic and political
9 concerns. Those negotiators, who are diplomats and not
10 tax lawyers, had one uppermost, or two uppermost
11 considerations.

12 The first one was that they be able to get
13 this treaty through the Congress, which they could not
14 do if Panama was allowed to tax these citizens; and two,
15 that they not be in a position where this would cause a
16 precedent for future negotiations with respect to the
17 issue of taxation.

18 QUESTION: Mr. Phillips, before you leave the
19 "similarly" sentence, refresh my recollection. Is the
20 interpretation of that sentence which you've advanced in
21 argument today found anywhere in the blue brief?

22 MR. PHILLIPS: In the --

23 QUESTION: In the blue briefs, the Appellee's
24 brief?

25 MR. PHILLIPS: No, Justice Stevens, it doesn't

1 appear int the blue brief. It does, however, appear in
2 the yellow brief.

3 QUESTION: It's in your reply brief?

4 MR. PHILLIPS: Yes, sir.

5 Based on the negotiating history and the
6 compromise that was reached, the language of Article 15,
7 sentence one -- paragraph 2, sentence one, becomes quite
8 clear. It was clearly chosen to provide a bilateral
9 exemption.

10 And the language deleted from the second
11 sentence, which would have made it refer to Panamanian
12 law, was deleted; and that deletion was significant, and
13 from that we can immediately support that basic plain
14 meaning argument, that a bilateral tax exemption was
15 supplied here.

16 To demonstrate the merit of that
17 interpretation, based on the traditional standards of
18 interpretation, one need only look at what the
19 Government relies upon for its position in this case.
20 Interestingly, it never even cites the Restatement
21 Second of Foreign Relations Law, which provides a set of
22 traditional criteria ordinarily employed in order to
23 reach an understanding as to what the parties
24 objectively had intended.

25 Instead, it relies largely on extra-treaty and

1 extra-record materials, which we submit cannot overcome
2 the plain language of the provision, which is designed
3 to provide this tax exemption.

4 QUESTION: Mr. Phillips, may I ask also
5 whether you concede that the most recently filed
6 document from Panama's minister of foreign relations is
7 authentic?

8 MR. PHILLIPS: The most recently filed
9 document --

10 QUESTION: Yes.

11 MR. PHILLIPS: -- from the official.

12 QUESTION: Yes.

13 MR. PHILLIPS: Well, we have never received a
14 copy of it, so it's difficult to make that concession.
15 We also sought to find it published in the TIAS and have
16 not been able to find it there, either. So it's
17 difficult for us to know, you know, to concede that
18 point.

19 It would have been easier, obviously, if it
20 had been supplied to the Claims Court so that at the
21 trial level those matters could have been resolved.

22 QUESTION: But you take the position that
23 there is some reason to question its authenticity, do
24 you?

25 MR. PHILLIPS: Well, I hesitate to say that,

1 because what you have to do is assume that the
2 Government may have been acting to a certain extent in
3 bad faith and I can't do that.

4 And the whole point of the problem with
5 respect to that note is that the Government never
6 brought it to the Claims Court's attention through the
7 ordinary rules of litigation, which is Rule 60(b), so
8 that its authenticity could have been established.

9 QUESTION: Well, I grant you that that's
10 frustrating, but it would be helpful to know whether we
11 have to be concerned with its authenticity in your
12 view.

13 MR. PHILLIPS: Well, in this instance you're
14 saved the burden of having to worry about that, because
15 even the note under any circumstances, that note cannot
16 serve as a legitimate basis for interpreting the
17 treaty.

18 In the first place, the most that you can
19 derive from the note is that what it says Panama
20 believes the treaty means now, which is eight years
21 after the fact and is therefore very little evidence of
22 what the parties intended in 1977.

23 Second, the circumstances underlying the note,
24 the letters themselves which purport to serve as the
25 basis for the interpretation, are particularly

1 suspicious, given that three letters come from the
2 individuals who did not directly negotiate Article 15,
3 and that the two negotiators of Article 15 were not --
4 one was not solicited, his views were not solicited.
5 The other one, his views were solicited, according to
6 the foreign minister, and he was not -- and no letter
7 was forthcoming from him.

8 QUESTION: Well, I guess what I'm getting at
9 is, can we safely assume that right now both parties to
10 the treaty, the United States and Panama, agree that
11 Article 15 does not exempt this income from U.S.
12 taxation?

13 MR. PHILLIPS: If you take the note at face
14 value, that would seem to be the inference you would
15 draw. But the problem, of course, is that what the
16 United States and Panama agree today is of little effect
17 as to what they reached an agreement about in 1977.

18 If the United States and Panama aren't in
19 agreement as to how this matter ought to be resolved
20 today, in light of the new administration in Panama, the
21 solution to that problem is for the United States and
22 Panama to reach a new agreement that clarifies this
23 issue, not simply to send back and forth a diplomatic
24 note that is, on its face at least, intended to amend an
25 agreement reached eight years previously.

1 QUESTION: I don't know what you mean by "if
2 you take the note at face value." Is there any reason
3 not to take the note at face value?

4 MR. PHILLIPS: Well, it's just that when a
5 note -- no, not any particular reason, other than the
6 circumstances surrounding the note are suspicious. I
7 mean, in terms of its authenticity, there's no
8 question.

9 QUESTION: I don't know what you mean. Do
10 they indicate that the note is a forgery?

11 MR. PHILLIPS: No, no, I don't mean to
12 indicate that.

13 QUESTION: Suspicious --

14 MR. PHILLIPS: It is an authentic note. What
15 it is designed to achieve is not at all clear.

16 QUESTION: Well, it sets forth the Panamanian
17 position. What you think is suspicious is that maybe
18 that was not originally the Panamanian position, is that
19 what --

20 MR. PHILLIPS: Yes, I think it's absolutely
21 clear that that was not their position.

22 QUESTION: But you have no doubt that that's
23 the current Panamanian position?

24 MR. PHILLIPS: As of today, I have no doubt of
25 that. Whether the Panamanian Government might supply a

1 new note in the future is open to guess.

2 And what we have to say about the note, at
3 least as a litigating matter, aside from just the
4 general invalidity of notes such as this to be used as a
5 basis for overcoming the plain meaning, in that in the
6 Claims Court Judge Kozinski asked the Department of
7 Justice attorneys twice if they were going to provide a
8 note.

9 Indeed, he asked, are you in the process of
10 negotiating a note, are you negotiating a note, or will
11 you negotiate a note? And the Government consistently
12 said: No, that note would not be relevant to anything
13 in this case, and you should decide the case on the
14 basis of the evidence of record as of March 8th, 1984.

15 In the context of those statements --

16 QUESTION: Well, what if the Government had
17 answered different, had said, yes, we are trying to get
18 a note, and Judge Kozinski said, well, let me know when
19 you get it, and the United States came up with precisely
20 this same note? Under your position, it would be
21 irrelevant anyway.

22 MR. PHILLIPS: It would be largely
23 irrelevant.

24 QUESTION: Largely? Well, it's completely
25 irrelevant.

1 MR. PHILLIPS: Well, it is difficult for me to
2 say completely irrelevant. Under Sumitomo --

3 QUESTION: Well then, this note we have now is
4 not -- is somewhat relevant?

5 MR. PHILLIPS: Only in a circumstance where
6 the note clearly supports both the plain meaning of the
7 agreement and the understand of the United States, as it
8 did in Sumitomo. When the note is being used to impeach
9 the understanding of the parties --

10 QUESTION: Then you don't need a note. I
11 don't understand that. What use is a note if you have
12 the plain meaning of the agreement? We resort to a note
13 to clarify.

14 MR. PHILLIPS: Well, as I read the opinion in
15 Sumitomo, the Court said that, even with the
16 understanding of the United States and Japan and the
17 plain meaning, that still didn't end the inquiry in that
18 case, and the Court went on to examine whether or not
19 there was some additional evidence that might justify a
20 different interpretation of the agreement.

21 I would be inclined to agree with you that
22 that would certainly be strong evidence, Justice
23 Scalia. The Court in Sumitomo didn't stop at that
24 point. It continued on in its analysis of the
25 traditional criteria for interpreting any international

1 agreement.

2 QUESTION: Do you -- well, what is your
3 position as to whether Panama could have had one
4 interpretation originally and then changed its mind
5 about what the agreement meant? Can Panama do that?
6 Suppose initially Panama looked at that language and
7 said, it means X, but later on its foreign ministry had
8 second thoughts and said it means Y.

9 Can Panama do that?

10 MR. PHILLIPS: It can do that, but it's not
11 binding on this Court. This Court's judicial function
12 is to interpret the agreement and the understanding
13 reached by the parties in 1977.

14 QUESTION: Would the second position have any
15 force as far as the deliberations of this Court are
16 concerned?

17 MR. PHILLIPS: I would think not, not if it's
18 clear that the original understanding of the parties was
19 X. If one of the parties now believes Y --

20 QUESTION: Let's assume it's ambiguous. Let's
21 assume it's ambiguous.

22 MR. PHILLIPS: Well, this Court has said in a
23 number of instances that simply because one party to the
24 agreement has abandoned the agreement, okay -- in Santo
25 Vincenzo, Italy stopped believing that citizens should

1 be extradictable and the United States continued to
2 believe that citizens should be extradictable. The
3 Court rejected the fact that Italy had changed its
4 position as obviating the Government from fulfilling its
5 obligations under the treaty, as understood by this
6 Court based on the traditional criteria.

7 So my view would be no, that's not a basis for
8 this Court to disregard the understanding reached in
9 1977.

10 QUESTION: Well, Mr. Phillips, suppose the
11 negotiating history that you rely on here was just to
12 the contrary, that it indicated rather clearly that
13 Panama said: Okay, if you insist we won't tax, but you
14 can. And then they came out with this precise
15 language.

16 What would you say then?

17 MR. PHILLIPS: I would say I would be in a lot
18 more trouble than I am anyway.

19 QUESTION: You mean with that negotiating
20 history, but this language, that you could say this
21 language is ambiguous?

22 MR. PHILLIPS: No, it's not that it's
23 ambiguous.

24 QUESTION: Well, what would you say?

25 MR. PHILLIPS: It is that the plain meaning of

1 the language in treaty interpretation is never
2 controlling. It's not like a contract, Justice White.

3 QUESTION: Right, right, right. All right, so
4 that your plain language argument is only good insofar
5 as the negotiating history supports it?

6 MR. PHILLIPS: Well, I would put it slightly
7 differently. It is good enough to create a presumption
8 that the other -- that can only be rebutted by reference
9 to other types of interpretative aids, such as the
10 negotiating history.

11 QUESTION: But you would think if the
12 negotiating history supported the views of your opponent
13 and yet they used this language to express their
14 agreement, you would almost think that in between the
15 last meeting and the writing there had been some --
16 something you don't know about.

17 MR. PHILLIPS: Well, what I would have assumed
18 --

19 QUESTION: In your position.

20 MR. PHILLIPS: What I would have assumed --

21 QUESTION: According to your position, this
22 language really means what it says. And yet, if the
23 negotiating history were to the contrary, something must
24 have happened.

25 MR. PHILLIPS: Well, it would have been

1 possible, even if I don't know why, that the Panamanian
2 Government simply decided to recede.

3 QUESTION: That may have happened here, too.

4 MR. PHILLIPS: But we have no evidence to that
5 effect, and there is no reason at all to believe it.
6 And in the face of such strong statements in favor of
7 Panamanian sovereignty on this case, it is very
8 difficult to draw an inference that they would have
9 simply caved, as the Government's interpretation
10 requires the Court to assume.

11 QUESTION: But in any event, this language is
12 subject to some interpretation. You say these
13 international agreements are really subject to some
14 interpretation from us?

15 MR. PHILLIPS: Yes, Justice White. It is not
16 sufficient that the plain language supports us. We must
17 also demonstrate that the structure and the history
18 support us, and that I suggest we have done.

19 If there are no further questions, I'll
20 reserve the balance of my time.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
22 Phillips.

23 We'll hear now from you, Mr. Ganzfried.

24 ORAL ARGUMENT OF

25 JERROLD J. GANZFRIED, ESQ.,

1 ON BEHALF OF RESPONDENT

2 MR. GANZFRIED: Thank you, Mr. Chief Justice,
3 and may it please the Court:

4 The question in this case is simply whether
5 Petitioners have to pay federal income taxes, just like
6 all the rest of us, or whether they alone among all the
7 citizens employed by the United States Government and
8 its agencies at home and abroad, they alone are exempt
9 from United States taxation.

10 Now, when we clear away the smoke and we put
11 away the mirrors of Petitioners' argument, several
12 simple points remain and they are dispositive of this
13 case.

14 The first is that when the language of the
15 agreement is read in context Petitioners' construction
16 is implausible.

17 Second, the consistent and uniform
18 construction of the executive branch is that there is no
19 exemption from United States taxes.

20 Third, the executive branch's view was
21 authoritatively communicated to the Senate at the time
22 of ratification on behalf of the offices of the State
23 and Defense Departments that were responsible for
24 negotiating and drafting the treaty.

25 The same position was adopted and restated in

1 the Senate report, and the consistent administrative
2 practice of every affected executive branch department
3 -- the State Department, the Department of Treasury, and
4 the Internal Revenue Service -- also reflects that same
5 interpretation, namely no exemption from U.S. taxes.

6 In addition to that, both governments that
7 signed the treaty and its implementing agreements concur
8 in the interpretation that we present.

9 And finally, the 1976 tax reform bill now
10 awaiting the President's signature restates and
11 reconfirms that Petitioners are not exempt from United
12 States taxes.

13 In short, the correct result in this case
14 could scarcely be clearer. And so, in discharging its
15 sole responsibility in this area, to give effect to the
16 intent of the parties, this Court should reject
17 Petitioners' efforts to create for themselves a private
18 tax haven.

19 QUESTION: Well, the language does say "from
20 any taxes," doesn't it?

21 MR. GANZFRIED: The first sentence says "from
22 any taxes." I point out it doesn't say "from United
23 States taxes."

24 QUESTION: No.

25 MR. GANZFRIED: And it doesn't say "from any

1 taxes by any government."

2 QUESTION: No, exactly.

3 MR. CANZFRIED: It says "from any taxes,"
4 language which was derived -- well, which the
5 negotiating history makes clear the only taxes that were
6 discussed were Panamanian taxes. But that language --

7 QUESTION: Well, do you say the negotiating
8 history just isn't subject to the interpretation that
9 your opponent puts on it?

10 MR. CANZFRIED: Oh, absolutely not. This
11 discussion about a compromise where neither country
12 would tax is pure fiction. It has no support in the
13 negotiating history.

14 Incidentally, the first sentence, which is the
15 one they're relying on in this case, is in its operative
16 portion identical to the first sentence in the military
17 agreement, Article 16 of the agreement in implementation
18 of Article 4. And that is language that even the Claims
19 Court recognized at pages 45A and 46A of the petition's
20 appendix, acknowledged did not create an exemption from
21 United States taxes.

22 And the comments by the Panamanian negotiators
23 during the negotiating sessions recognized that, as far
24 as the military was concerned, there was no exemption
25 from U.S. taxes.

1 QUESTION: Well, what if we interpreted the
2 negotiating history contrary with your view of it and
3 consistent with your opponent's? Then what?

4 MR. GANZFRIED: Well, my first answer would be
5 to disagree with that conclusion. But assuming that
6 premise, if there had been a discussion in the
7 negotiating history, we have to recognize that the
8 immediate, quite open and clear position of the United
9 States was that there was no exemption from United
10 States taxes created.

11 It was stated openly to the Senate. It was

12 --

13 QUESTION: Well, yes, but stick to the
14 question.

15 MR. GANZFRIED: And Panama has never disagreed
16 with that.

17 QUESTION: Just stick to the question. What
18 if the negotiating history should be interpreted as your
19 opponent says? Then would you still insist that this
20 language be interpreted the way you insist that it
21 should?

22 MR. GANZFRIED: Well, I would still insist
23 that the language be interpreted that way, because in
24 fact even if --

25 QUESTION: And say, well, put the negotiating

1 history aside, here is --

2 MR. GANZFRIED: Well, I wouldn't say put it
3 aside, but we would then have an additional factor,
4 namely the consistent position of the United States, the
5 administrative practice in the years since the treaty
6 was ratified, and the absence of any objection from
7 Panama. And we're withholding taxes on U.S. employees
8 who are residing in Panama.

9 QUESTION: Just as a practical matter, that's
10 just the way the treaty has operated from the
11 beginning.

12 MR. GANZFRIED: It would be the
13 implementation. In fact, there is an example of that in
14 the Ross case that we cite in our brief.

15 QUESTION: You've always withheld, ever since
16 the treaty was signed?

17 MR. GANZFRIED: That's correct, and --

18 QUESTION: No objection from Panamanians?

19 MR. GANZFRIED: No objection from Panama
20 whatsoever. In fact, the only indications from Panama
21 relating to this subject indicate that Panama well knew
22 that the United States was withholding and collecting
23 taxes from its citizens employed by the Commission.

24 Now, our --

25 QUESTION: Mr. Ganzfried, as long as you're

1 interrupted, as I understand it the United States
2 Government in the proceedings below took the position
3 that the Court need not consider the official view of
4 Panama on the question, and indeed that it would be
5 inappropriate to do so.

6 MR. GANZFRIED: Well, the position in the
7 Claims Court, which was prior to the time that the
8 Panamanian Government had expressed its views, was that
9 the United States saw no need to go to Panama.

10 QUESTION: And that it would be inappropriate
11 to do so.

12 MR. GANZFRIED: It would certainly be
13 inappropriate for the Claims Court --

14 QUESTION: That was the position the
15 Government took?

16 MR. GANZFRIED: It would be inappropriate for
17 the Claims Court to direct the Government to go there, or
18 to rule in this case contrary to the Government's
19 position.

20 QUESTION: Well, as I understood the argument,
21 also inappropriate to even consider the Panamanian
22 view.

23 MR. GANZFRIED: Basically --

24 QUESTION: And now all of a sudden --

25 MR. GANZFRIED: Basically, that there was no

1 need to consider the Panamanian view.

2 QUESTION: -- the Government presents this
3 last minute Panamanian view. Is it now appropriate that
4 we consider it?

5 MR. GANZFRIED: Well, it is appropriate that
6 you consider it because it is the official view of the
7 Panamanian Government. It simply didn't exist before it
8 existed.

9 QUESTION: Why all of a sudden does it exist?

10 MR. GANZFRIED: Excuse me?

11 QUESTION: Why does it exist all of a sudden?
12 Certainly, the Government solicited the note, did it
13 not?

14 MR. GANZFRIED: The State Department has
15 advised us that the United States did not request a note
16 from the Panamanian Government.

17 QUESTION: Well, of course, the opposition is
18 suspicious to the contrary.

19 MR. GANZFRIED: The opposition is suspicious.

20 QUESTION: And feels, I suppose, that it's a
21 quid for a quo --

22 MR. GANZFRIED: There is no basis --

23 QUESTION: -- actually, to wit the grant in
24 aid.

25 MR. GANZFRIED: Well, that's nonsense. If

1 what their position is that courts of the United States
2 should be suspicious whenever a government with whom
3 we're on amiable terms states a position, then their
4 position suggests great dangers for the conduct of our
5 foreign policy.

6 QUESTION: All I'm suggesting is that there's
7 a little bit of stickiness in the case when
8 representations were made to the Claims Court, Judge
9 Kozinski, and then all of a sudden the Government turns
10 over and produces a note.

11 MR. GANZFRIED: The note had -- the note
12 simply didn't exist when the case was before Judge
13 Kozinski.

14 QUESTION: What I'm saying is I think the case
15 isn't as clear as you would make it out to be.

16 MR. GANZFRIED: Well, I think it is. In fact,
17 what were we to do when the note arrived? Were we to
18 sit back and say, well, it's not in the record in the
19 Claims Court, we can't present it?

20 And what if -- and I will assume a
21 hypothetical quite contrary to fact -- what if the
22 Panamanian note had come in and it had agreed with the
23 Petitioners? We could scarcely have sat back and said,
24 well, we have the official Panamanian view, but it's not
25 part of the record, so let's disregard it.

1 We couldn't have done that. No one would have
2 stood for that for a minute.

3 QUESTION: It's your view that it's always
4 been the view of the Panamanian Government. That's what
5 I get from what you've said --

6 MR. GANZFRIED: The Panamanian Government has
7 never said anything to the contrary.

8 QUESTION: -- from the outset, that's what the
9 parties understood this treaty to mean, and they didn't
10 object to your withholding taxes.

11 MR. GANZFRIED: They didn't object to our
12 withholding taxes.

13 QUESTION: And that this note represents
14 exactly what the Panamanians have thought all along.

15 MR. GANZFRIED: Precisely. The Panamanians --
16 this case --

17 QUESTION: I don't know why you didn't say in
18 the Claims Court: Well, this is also the view of the
19 Panamanian Government.

20 MR. GANZFRIED: Well, we didn't have an
21 official statement from the Panamanian Government to
22 that effect. We simply had the absence of any objection
23 by the Panamanian Government.

24 QUESTION: Well, I would have thought you'd
25 have said, well, we know what their view is and it's

1 consistent with ours, why don't we ask them.

2 MR. GANZFRIED: Well, I think I should get
3 back to one of the premises here, and that is that the
4 issue of United States taxation or exemption from United
5 States taxation was never a part of the discussions
6 leading up to the treaty and the implementation
7 agreements.

8 As a result, the Claims Court essentially
9 required the Government to prove a negative, namely to
10 point to a place in the negotiating history where
11 somebody would say, we are not discussing the following
12 subject. That was an impossible situation.

13 Inasmuch as the question of an exemption from
14 United States taxation was not a part of the discussion,
15 we could not say to the Claims Court that it was a
16 subject on which the Panamanian Government had ever
17 expressed a view to us in any formal sense.

18 But what we did know was that the agreement
19 had never incorporated any agreement to exempt anyone
20 from United States taxation, certainly not U.S. citizens
21 employed by the Commission.

22 QUESTION: May I ask this. Would a contrary
23 view of the Panamanian Government affect the
24 Government's, affect the United States' position?

25 MR. GANZFRIED: Would a contrary view?

1 QUESTION: Yes.

2 MR. GANZFRIED: The answer to that is no.

3 What we're dealing with here is a question of domestic
4 law, and if Panama were to take a different view and
5 there might be some international disagreement as
6 between the United States and Panama, that would be a
7 different matter for different proceedings.

8 As far as this case is concerned, it's a
9 domestic law issue.

10 QUESTION: Of what use is the note? Of what
11 use is the note?

12 MR. GANZFRIED: The note?

13 QUESTION: If it went the wrong way, it would
14 have been no good at all. What interest does Panama
15 have in the United States' relationship with its
16 citizens?

17 MR. GANZFRIED: In this case the answer is it
18 has no -- the view of the Panamanian Government is not
19 dispositive of this case.

20 QUESTION: You don't need it?

21 MR. GANZFRIED: We don't need it because we
22 didn't discuss this issue --

23 QUESTION: Well, why did you go get it?

24 MR. GANZFRIED: We didn't go get it. It
25 arrived. The context of this was that when this case

1 was --

2 (Laughter.)

3 QUESTION: I really wish the State Department
4 has asked for it, Mr. Ganzfried. I find that impossible
5 to believe. This thing just -- somebody found it under
6 the door?

7 (Laughter.)

8 MR. GANZFRIED: It was delivered to the U.S.
9 Ambassador in Panama. There was no request for it.

10 The situation was, when the case was pending
11 in the Claims Court that Panama had -- that this issue
12 had been litigated in eleven courts previcusly. All of
13 those courts had held for the Government. The
14 Government's position, the United States Government's
15 position, was stated openly in the ratification
16 hearings, which were very carefully monitored in
17 Panama.

18 QUESTION: Somebody in Panama was following
19 this litigation and just thought they should come to the
20 aid of the United States?

21 MR. GANZFRIED: I don't know whether -- but
22 the case had been -- the issue had been resolved in
23 favor of the Government in eleven courts. And then,
24 when the issue was resolved in another way, which was
25 contrary to what the understanding of the parties to the

1 agreement were, then Panama saw fit to express its
2 views, particularly when the Claims Court had relied so
3 much of what it thought was Panama's position.

4 QUESTION: The State Department didn't ask for
5 it. You don't know for sure that no other agency of the
6 Government asked for it?

7 MR. GANZFRIED: I am advised by the State
8 Department that they didn't and, as I understand it, the
9 State Department would be the appropriate Department to
10 engage in negotiations and discussions with Panama.

11 QUESTION: Of course, requests come in many
12 forms. You may not have asked for it, but somebody
13 could have said: Gee, it might help your position in
14 other positions if you wrote this letter.

15 MR. GANZFRIED: Someone from Panama --

16 QUESTION: I'm not asking you to do it, but --

17 MR. GANZFRIED: Someone from Panama might have
18 called and said: We hear about this case.

19 There is in the appendix, the Court of Appeals
20 appendix, a letter from the general counsel of the
21 Panama Canal Commission in which he indicates that
22 whenever there was even a rumor among Commission
23 employees that one of them had won one of these cases
24 there was a flood of employees changing their
25 withholding forms to claim an exemption, and then they

1 had a lot of difficulty when they discovered that the
2 rumors were untrue and people had to go back and make
3 changes.

4 So there was clearly activity in Panama, and
5 there was clearly an understanding that the United
6 States was collecting taxes. Despite all of that,
7 Panama remained silent.

8 All of the affidavits that the Petitioners
9 have submitted at various stages, attached to various
10 briefs and lodgings in the courts in which this case has
11 been litigated, are statements by former officials of
12 the Panamanian Government, who incidentally never say
13 that the subject of an exemption from U.S. taxation was
14 ever discussed during the negotiations.

15 And they then state their own personal views
16 on a subject on which none of them ever expressed that
17 view as an official of the Panamanian Government. No
18 one ever came -- when they were in their various
19 positions, no one ever came to the United States
20 Government and said: You're taxing your people and we
21 have a treaty that says you can't.

22 And in fact, quite to the contrary. When the
23 most recent such affidavit arrived from Mister --
24 submitted by Mr. Royo last week that the Petitioners
25 have filed, it seemed so curious because he had never

1 stated that position that's contained in that affidavit
2 when he was an official of the Panamanian Government,
3 that it became a subject of considerable curiosity.

4 And consequently, we did some checking on
5 those views and we found that when he was the President
6 of Panama he wrote a letter to President Carter that's
7 contained in the -- that's printed in the Congressional
8 Record, in which it's quite clear that Mr. Rcyo as the
9 President of Panama understood that the United States
10 was going to --

11 QUESTION: Is that in the record?

12 MR. GANZFRIED: It's in the Congressional
13 Record. It has not been presented previously in this
14 case.

15 QUESTION: Could we try to stay in the record
16 in this case? We're far enough outside of it. Let's
17 not go any further outside the record. I'm only
18 speaking for myself.

19 MR. GANZFRIED: Okay, I understand.

20 QUESTION: But I think the Government went
21 outside the record and negotiated it while the case was
22 pending.

23 MR. GANZFRIED: Well, the fact is that this
24 Court and, taking lead from this Court, other courts
25 have traditionally considered statements from foreign

1 governments, even if they have come in during the course
2 of litigation.

3 And as I said before, when it arrived it was
4 scarcely something that we could say, sorry, it's too
5 late, or we're not going to pay attention to. In fact,
6 if instead of putting ribbons on that note and
7 delivering it to the U.S. Ambassador in Panama, the
8 Panamanian Government had put a cover on it and filed it
9 as an amicus brief in the Federal Circuit or in the
10 Eleventh Circuit, it clearly would have been an
11 appropriate submission, even if they had taken exactly
12 the words that they wrote in the note and filed it as an
13 amicus brief.

14 And surely this Court and all other courts in
15 the country will accept amicus briefs.

16 QUESTION: What's the sense of having a record
17 if anybody can go outside of it?

18 MR. GANZFRIED: Because the issue --

19 QUESTION: Or to put it as this case, the
20 Government can go outside of it?

21 MR. GANZFRIED: The issue in this case is not
22 -- we're not talking about the adjudication of a fact on
23 which you would make your presentation and you then are
24 left with the record that you presented to the lower
25 court.

1 Determining the meaning of a treaty or the
2 implementing agreement in this case is similar, in terms
3 of the task that's called upon for judges to perform, as
4 reading a statute, and it's simply appropriate --

5 QUESTION: And it's like taking judicial
6 notice?

7 MR. GANZFRIED: It's a guide to
8 interpretation, and it's certainly an appropriate
9 subject of judicial notice.

10 In fact, though, rather than spend much more
11 time on the Panamanian note, our position doesn't depend
12 on the Panamanian note, because our position is even if
13 you look simply at the language of the implementing
14 agreement in context, the Petitioner's position is
15 implausible, particularly when you realize that what
16 we're talking about is a tax exemption and this Court
17 has said on many occasions that provisions granting
18 special tax exemptions are to be strictly construed.

19 Now, their argument flows from the notion that
20 fragments of the agreement can be isolated and
21 interpreted without regard to their surroundings. Now,
22 let's recognize that this was not first and foremost a
23 tax treaty.

24 The overall effect and the principal purpose
25 of the package of treaties and agreements signed on

1 September 7th, 1977, was to reduce the United States'
2 presence in the area of Panama known as the Canal Zone.
3 To that effect, the treaty restored to Panama
4 territorial sovereignty over the Canal Zone, ending the
5 period when the United States had exercised the rights,
6 power, and authority it would have if it were the
7 sovereign.

8 The treaty gave to the United States the
9 rights to manage, operate, and maintain the canal. But
10 it recognized in Article 1, paragraph 3, that the
11 Republic of Panama shall participate increasingly in the
12 management and protection and the defense of the canal.

13 To carry out that goal, the goal of increased
14 Panamanian participation, Article 10 of the treaty
15 requires that a preference be given to Panamanian
16 applicants for employment, that within five years from
17 the effective date the number of carry-over U.S.
18 citizens employed by the Commission be reduced by 20
19 percent, that subsequently hired United States citizen
20 employees be rotated out of Panama at least every five
21 years, and that an early retirement program be set up
22 for U.S. citizen employees to encourage early retirement
23 by making liberal annuities available to them.

24 Now, with the restoration of sovereignty to
25 Panama, one of the issues that had to be resolved was

1 how the new sovereign would treat our employees, that is
2 U.S. Government employees, keeping in mind that the
3 treaty itself recognizes that the Panama Canal
4 Commission is an agency of the United States
5 Government.

6 So all of the suggestions by Petitioner and in
7 the Claims Court opinion that somehow this is a peculiar
8 kind of organization --

9 QUESTION: Well, the agency is --

10 MR. GANZFRIED: It's defines as a U.S.
11 Government agency.

12 QUESTION: The Commission is a U.S. Government
13 agency. What has been the Commission's position on this
14 issue?

15 MR. GANZFRIED: The Commission, its practical
16 position on this issue is that it has been withholding
17 taxes from employees.

18 QUESTION: But has it ever expressed a
19 position contrary to this, that really the treaty
20 exempts its employees from U.S. taxes?

21 MR. GANZFRIED: It's never taken that
22 position. The letter from the general counsel of the
23 Commission that's contained in the record indicates that
24 treaty interpretation is a subject on which the
25 Commission felt that it did not have the expertise to

1 opine and left that to the State Department and the
2 executive branch; and on the consequences for U.S. tax
3 law, that that was a subject on which it would defer to
4 other agencies, and specifically refer to the opinion of
5 the Office of Legal Counsel of the Department of
6 Justice, that is consistent with the proposition that
7 there is no exemption from U.S. taxation.

8 In agreeing to shift the U.S. Government's
9 exercise of powers from a territorial-based position to
10 one that was functionally related to the particular
11 functions that the United States was permitted under the
12 treaty, one of the issues was how U.S. citizens were
13 going to be treated insofar as taxes.

14 And as we explain in our brief, the
15 implementation agreement in which the tax provision is
16 contained was intended to define the rights of United
17 States citizens with respect to Panama. Relations
18 between the United States Government and its own
19 citizens and employees underwent no change. That is,
20 before the treaty these were U.S. citizens employed by
21 the U.S. Government agency. After the treaty they
22 continued to be U.S. citizens employed by a U.S.
23 Government agency.

24 Now, if we turn to the treaty in
25 implementation of Article 3, the basic themes of the

1 underlying treaty itself are restated. So Articles 9
2 and 11 establish a preference for Panamanian sources to
3 furnish supplies and services for the Commission. And
4 in Article 15 we have the question of taxation.

5 At the time -- up to the time that the treaty
6 was in effect, the income tax situation was this:

7 United States citizen employed by the then Panama Canal
8 Company, like all other U.S. citizens employed by a U.S.
9 Government agency, paid U.S. income taxes. But because
10 they lived and worked in an area over which the United
11 States exercised rights it would have as sovereignty,
12 they paid no income taxes to Panama.

13 The treaty, as we've indicated, affected only
14 the relationship between the employees and Panama. So
15 Article 15 makes no reference to United States
16 taxation. It creates no express or implied exemption
17 from U.S. taxation.

18 Rather, that article preserves the status quo
19 of no income tax by Panama in a way that's consistent
20 with the position the United States maintains for its
21 citizen employees in all foreign nations around the
22 world.

23 Now, while there was, as the contemporaneous
24 negotiating history shows, considerable debate on
25 Panama's expressed desire to tax those U.S. citizens,

1 there is no doubt that that issue was resolved by
2 Panama's agreement that there would be an exemption from
3 Panamanian taxation. But there is no suggestion in the
4 negotiating history that the subject of a total
5 exemption from United States taxes was ever considered
6 or discussed.

7 We needn't go very far from the words of the
8 first sentence of Article 15, paragraph 2, to see that
9 the context supports the Government's position. In
10 fact, as mentioned earlier, we don't need to leave those
11 words at all because the words in the first sentence are
12 identical to the words in Article 16 of the military
13 agreement, and the Claims Court and the Panamanian
14 minister at page 141 of the Court of Appeals appendix
15 recognized that military people would pay taxes to the
16 United States, U.S. citizen military people.

17 QUESTION: Mr. Ganzfried, how much by way of
18 dollars are we talking about?

19 MR. GANZFRIED: I've been advised by the
20 Panama Canal Commission that from October 1, 1979, the
21 date that the treaty went into effect, until September
22 22nd, 1986, the amount of taxes withheld from salaries
23 of Commission employees was slightly in excess of \$100
24 million.

25 Our point on the meaning of the first sentence

1 of paragraph 2 is that -- is made even clearer if you
2 just go to the next sentence in paragraph 2. If the
3 Petitioners are correct as to the meaning of the first
4 sentence, then presumably the second sentence would mean
5 that U.S. citizens employed by the Commission are exempt
6 from U.S. taxes on everything that they might earn in
7 the United States, whether it be interest on bank
8 accounts, dividends on stocks, or income from rental
9 property.

10 Now, in their reply brief they've proposed a
11 new interpretation of this second sentence. It's
12 basically nonsense, because on the face of it it doesn't
13 make any sense.

14 What they have done is suggested that the
15 first sentence is subject to no limitations, it means
16 any taxes. But when they get to the second sentence
17 they say, well, the second sentence must mean only
18 taxes, only on income from the Commission outside of
19 Panama. Never mind that the agreement itself defines a
20 U.S. citizen employee as someone working for the
21 Commission in Panama. But since the second sentence
22 refers only to Commission income outside of Panama,
23 therefore the first sentence must refer to Commission
24 income inside of Panama.

25 Well, they've now put back into the first

1 sentence the very qualifier which in paragraphs 1 and 3
2 they recognize means that only Panamanian taxes are
3 affected. And you also end up with the silly result
4 that any other income they have in the United States can
5 be taxed by Panama, any other income they have in Panama
6 could be taxed by the United States. It just doesn't
7 work.

8 And to suggest that the second sentence would
9 mean that there would be an exemption for anything else
10 they earned in the United States would create the kind
11 of incentive for them to remain on the job indefinitely
12 that is contrary to the position that Panama took in the
13 negotiations and all the provisions designed to reduce
14 the U.S. role in the operations of the canal.

15 So if we had only the language of the treaty,
16 it's our position that the Government should prevail.
17 And of course we have more than that. We have the
18 position the United States consistently took in the
19 negotiating history, namely that we were discussing only
20 an exemption from Panamanian taxation.

21 In fact, the backup position that the
22 Panamanians proposed, namely, well, let us tax but you
23 give them a credit, that presupposes that the United
24 States is going to be taxing its citizens employed by
25 the Commission. There's no need for a credit if there's

1 an exemption from United States taxation.

2 And I think that maybe nothing makes the point
3 more clearly that only the subject of Panamanian
4 taxation was under discussion than the statement made by
5 Ambassador Bunker at page 146 of the appendix in the
6 Court of Appeals, at which he said that: "U.S.
7 Government employees do not pay income tax anywhere in
8 the world." Now, what could more clearly show that they
9 were talking about countries other than the United
10 States?

11 The consistency of the Government's position
12 is maintained following the signing of the treaty and
13 its implementing agreements, and we've adhered
14 vigorously to that interpretation without wavering.
15 That is, that Article 15 creates no exemption.

16 The section by section analysis, which is an
17 authoritative statement by the State and Defense
18 Departments, takes that position. The legal advisor to
19 the State Department in questions before the Senate took
20 that position.

21 And much has been made of Senator Stone's --
22 in the briefs, of Senator Stone's comments. But if we
23 read everything that Senator Stone had to say, he simply
24 -- he never expressed any disagreement with the State
25 Department's position. He simply inquired whether -- he

1 just said he was trying, he was only trying to avoid
2 lawsuits such as this one, which he agreed "would not
3 really be much of a lawsuit."

4 Now, the Senate report adopted that
5 interpretation, and the consistent administrative
6 practice, as I've indicated, has been taxes are withheld
7 and any claims for exemption based on this treaty are
8 denied by the IRS. That's been the consistent position
9 of the Department of Justice, the Department of State,
10 Department of Defense, Department of the Treasury.

11 And of course, the latest legislative action
12 on the subject is the Tax Reform Act of 1986, which
13 reconfirms and restates with all the precision and
14 clarity that anyone could ask for that the treaty has
15 never made Petitioners exempt from U.S. taxes.

16 So on the basis of all this clear history,
17 there really isn't any serious doubt that as a matter of
18 domestic law there is no exemption from U.S. taxation,
19 none was intended, and none was created.

20 So our position is that the judgment of the
21 Federal Circuit should be affirmed, even if the
22 Panamanian Government had remained silent, as we know it
23 didn't. As of this date, both governments are in
24 concurrence as to what the treaty means, and in those
25 circumstances the judgment should be affirmed and

1 Petitioners should have to pay U.S. income taxes just
2 like all the rest of us do.

3 Thank you.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
5 Ganzfried.

6 Do you have anything more, Mr. Phillips? You
7 have three minutes.

8 REBUTTAL ARGUMENT OF
9 CARTER G. PHILLIPS, ESQ.,
10 ON BEHALF OF PETITIONERS

11 MR. PHILLIPS: Yes, Mr. Chief Justice, just a
12 couple points.

13 First, Mr. Ganzfried consistently tells the
14 Court that the negotiating history preceding this
15 agreement contains no discussion of United States
16 domestic taxation. But at the very end of his comments
17 he discusses the tax credit issue.

18 When the United States responded to a proposal
19 for a domestic tax credit, the United States negotiators
20 didn't say: We don't negotiate about domestic income
21 taxes with foreign governments. They said: That's a
22 matter of money, that's a financial issue. That's fully
23 consistent with our view that the sovereignty concerns
24 that were paramount among the State diplomats were
25 protected in order to -- by conceding away the tax

1 concerns.

2 As Mr. Ganzfried said, this was not a tax
3 proposal. These were not tax lawyers who negotiated
4 this treaty.

5 Second, with respect to Justice White's
6 question concerning who has -- to whom is deference owed
7 with respect to the operation of the treaty, there is
8 evidence from the Panama Canal Commission supervisory
9 board that it did understand this treaty to provide a
10 bilateral tax exemption.

11 That board denied a cost of living increase to
12 all of these employees in part, by the foreign minister
13 who presented this note to the United States, for
14 reasons that he said clearly: that there's an exemption
15 already for U.S. taxes; they are not entitled to any
16 additional allowances, they don't need that; they've
17 gotten all of the protection they have. And that cost
18 of living adjustment was denied, largely on the basis of
19 that.

20 So the only agency that really does implement
21 this particular agreement has reached that conclusion.

22 QUESTION: They have been withholding U.S.
23 taxes, though, haven't they?

24 MR. PHILLIPS: I think on the instructions of
25 the United States Government, yes, they have been. But

1 then of course, there's a method for finally resolving
2 that, and that's in this forum. There is nothing to
3 indicate that that was based on their understanding of
4 what the treaty meant.

5 QUESTION: But the general counsel has never
6 issued any -- has never taken the position that the
7 treaty means what you say it does?

8 MR. PHILLIPS: Well, except to the extent --
9 the general counsel hasn't, but the supervisory board
10 acted pursuant to that understanding of what the
11 implementing agreement --

12 QUESTION: What's the supervisory board?

13 MR. PHILLIPS: That's the nine-member board
14 that administers the Panama Canal Commission, the five
15 United States, four Panamanians. And it does have day
16 to day responsibility, and it did understand this treaty
17 to provide --

18 QUESTION: But there would be another forum if
19 the treaty means what you say it means. That is, the
20 other forum would be to protest, a protest by the
21 Government of Panama.

22 MR. PHILLIPS: Well, certainly that would be
23 true, but my clients are not in a position to obtain a
24 protest from the Government of Panama. The only method
25 by which they can seek to resolve this issue is through

1 the courts, and that's what they've done.

2 Until it's finally resolved, I'm not sure why
3 Panama would necessarily protest. There's no reason to
4 protest until the final decision is made as to what will
5 happen here.

6 QUESTION: Do you in your brief identify
7 specifically the material in the negotiating history,
8 page by page, in the record that you think best supports
9 your position?

10 MR. PHILLIPS: Yes, Justice White. And
11 specifically in the O'Connor brief, we go through the
12 materials --

13 QUESTION: In the what?

14 MR. PHILLIPS: In the O'Connor brief. There
15 is an extensive discussion, with very clear quotations
16 from Minister Royo setting out specifically the
17 sovereign issues that were of central concern and why
18 this was in fact.

19 QUESTION: Does it specifically mention United
20 States taxes?

21 MR. PHILLIPS: No. Specifically mentioning a
22 tax credit as one of the specific proposals, yes.

23 CHIEF JUSTICE REHNQUIST: Your time is
24 expired. The case is submitted.

25 (Whereupon, at 11:04 a.m., oral argument in

1 the above-entitled case was submitted.)
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CERTIFICATION

erson Reporting Company, Inc., hereby certifies that the
ached pages represents an accurate transcription of
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ame Court of The United States in the Matter of:

#85-558-ROBERT E. O'CONNOR, ET UX., Petitioners V. UNITED STATES;

#85-559 PAUL H. COPLIN, ET UX., Petitioners V. UNITED STATES; and

#85-560 - JACK R. MATTOX, ET UX., Petitioners V. UNITED STATES

that these attached pages constitutes the original
script of the proceedings for the records of the court.

BY Paul A. Richardson

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