

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 86-88

**TITLE** CITICORP INDUSTRIAL CREDIT, INC., Petitioner  
v. WILLIAM E. BROCK, SECRETARY OF LABOR

**PLACE** Washington, D. C.

**DATE** April 20, 1987

**PAGES** 1 thru 57



ALDERSON REPORTING

(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

CITICORP INDUSTRIAL CREDIT, INC., :

Petitioner, :

v. : No. 86-88

WILLIAM E. BROCK, SECRETARY OF :

LABOR :

Washington, D.C.

Monday, April 20, 1987

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:02 o'clock a.m.

APPEARANCES:

REX E. LEE, ESQ., Washington, D.C.;

on behalf of Petitioner.

CHARLES E. ROTHFELD, ESQ., Washington, D.C.;

on behalf of Respondent

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
REX E. LEE, ESQ.,	
on behalf of the Petitioner	3
CHARLES E. ROTHFELD, ESQ.,	
on behalf of the Respondent	23
REX E. LEE, ESQ.,	
on behalf of the Petitioner - rebuttal	53

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

2 CHIEF JUSTICE REHNQUIST: We'll hear argument  
3 first this morning in No. 86-88, Citicorp Industrial  
4 Credit versus William E. Brock. Mr. Lee, you may  
5 proceed whenever you're ready.

6 ORAL ARGUMENT OF

7 REX E. LEE, ESQ.

8 ON BEHALF OF PETITIONER

9 MR. LEE: Mr. Chief Justice and may it please  
10 the Court:

11 This case involves the competing claims of  
12 creditors to proceeds of an insolvent debtor's  
13 collateral. The question presented is whether Congress  
14 when it enacted the Fair Labor Standards Act of 1938  
15 intended not only to prevent employers from paying  
16 unconscienably low wages, but also to repeal otherwise  
17 applicable state and federal laws governing the lien  
18 priorities of wage earners vis a vis other creditors  
19 where the employer becomes insolvent and therefore fails  
20 to meet his payroll just before he goes out of  
21 business.

22 The legal issue in the case arises out of the  
23 following facts. The Petitioner, Citicorp Industrial  
24 Credit, financed the manufacturing operations of a now  
25 defunct entity known as the Ely Group under an ordinary

1 secured financing arrangement that gave Petitioner a  
2 security interest, which Petitioner properly perfected,  
3 in Ely's accounts receivable and inventory.

4 Approximately one year later, Ely went out of  
5 business, defaulted on its obligations to Petitioner,  
6 and also failed to meet its payrolls in the last weeks  
7 of its operation.

8 Two district courts found -- and this is a  
9 quote from both of those opinions -- that: "Both the  
10 employees and the secured creditor are innocent parties,  
11 the culprit being the manufacturer." Factually,  
12 therefore, the case fits the classic insolvency mold:  
13 no creditor is at fault, the debtor's assets are  
14 insufficient to satisfy all creditors, some will be paid  
15 and some will not.

16 So that the crucial practical question  
17 becomes, how do you determine which claims will be paid,  
18 which will be paid ahead of the others, and what law  
19 governs that priority.

20 The Secretary and the lower courts contend  
21 that that question is answered by our minimum wage and  
22 hour law, and that the FLSA resolves this issue in favor  
23 of the unsecured wage claimants because the FLSA's  
24 so-called hot goods provision, Section 15(a)(1), permits  
25 any person from shipping goods produced in violation of

1 the Act.

2 That view, if adopted by this Court, is going  
3 to work some very large changes in state and federal  
4 statutes that specifically deal with the priorities of  
5 creditors' claims in cases of insolvency,  
6 notwithstanding the fact that even the Government agrees  
7 that there is no evidence Congress intended that  
8 result.

9 Everyone agrees that Congress has never  
10 considered whether the hot goods provision should apply  
11 to secured creditors.

12 QUESTION: Mr. Lee, has this question just  
13 never come up before in the context of a secured  
14 creditor?

15 MR. LEE: The Fair Labor Standards Act was --  
16 it has come up at least twice -- well, several times.  
17 The Fair Labor Standards Act was enacted in 1938. So  
18 far as I can tell -- and the best authority on this is  
19 the Second Circuit's decision in Powell Knitting, which  
20 was the first case to reach it in 1966 -- for the first  
21 quarter of a century the Secretary did not take the  
22 position that he takes today.

23 And indeed, if you look at that part of our  
24 brief that deals with a statement on how to insure  
25 against hot goods that the Secretary published early in

1 the game, that was not his position.

2 The first effort to take this position, to  
3 apply it against secured creditors, apparently occurred  
4 about a quarter of a century after it was enacted, in  
5 the mid-1960's. And on that occasion the Second Circuit  
6 rejected it.

7 QUESTION: The plain language of the statute  
8 does support the Respondent's view, and Congress twice,  
9 I guess, has amended the statute to take care of  
10 situations that apparently it hadn't thought about  
11 before. But it does not appear to have taken care of  
12 this situation.

13 MR. LEE: Congress has amended the Act  
14 substantively, has amended the hot goods provision,  
15 once. That amendment, in 1949, was to correct an  
16 erroneous interpretation by the Administrator as to its  
17 reach.

18 And I prefer not to go into all the detail of  
19 that legislative history here, but as set forth in our  
20 brief it is just quite clear that what Congress was  
21 doing simply correcting one erroneous interpretation by  
22 the Secretary.

23 Now, insofar as the language is concerned, the  
24 strongest argument that the Government has is the "any  
25 person" argument. This is not the first time, however,

1 that this Court has been called upon to consider a  
2 Congressional statute whose literal language reached any  
3 person or any case, and the Court has held that, though  
4 the language fit, it was not the kind of case that  
5 Congress wanted to cover with its statute.

6 QUESTION: Is that a general rule or do we  
7 know when we ignore the language and consult the  
8 spirit? Do we intuit that or what?

9 MR. LEE: I think there is a real difference,  
10 Justice Scalia, between the kind of circumstance where  
11 Congress simply came up against the issue and there were  
12 competing views on both sides, neither side had the  
13 votes, and as a consequence they simply dodged it, and  
14 both sides made a lot of legislative history and then  
15 left it for this Court to fill in the details -- I think  
16 that's one circumstance.

17 It is quite another circumstance where  
18 Congress, in order to achieve one objective, used some  
19 language that was maybe a little bit broader than it  
20 should have achieved -- or than it might have used, and  
21 then later on there is a circumstance that everyone  
22 agrees Congress has simply never focused on.

23 And it is particularly different where the  
24 effect of that interpretation is going to be to displace  
25 some state and federal laws that have specifically

1 focused on the issue.

2 The leading case on this issue -- and frankly,  
3 the more I look at it, the more I conclude it is this  
4 case -- is this Holy Trinity case. That involved also a  
5 federal statute, and it was a federal statute which  
6 prohibited the importation of any person, any person,  
7 for the purpose of performing labor within the United  
8 States. And then it provided exceptions, and there were  
9 exceptions for actors, lecturers, teachers, but not  
10 exceptions for ministers of the gospel.

11 And the Holy Trinity Church brought in a  
12 Reverend Walpole for the purpose of preaching to their  
13 congregation, and the Secretary -- or, excuse me -- the  
14 United States of America brought suit, contending that  
15 the statute was violated. And they won in the lower  
16 court.

17 The argument they made when they came to this  
18 Court, argument by Mr. William A. Maury, Assistant  
19 Attorney General of the United States, was that: where  
20 the meaning of a statute is plain it is the duty of the  
21 Court to enforce it according to its obvious terms; in  
22 such case, there is no necessity for construction.

23 The case really comes down to this, we submit  
24 --

25 QUESTION: Does it seem to you like a bad

1 statement of the law, what you just read?

2 MR. LEE: What I just read, of course, whether  
3 it is good or bad, was the statement that was rejected  
4 by this Court in Holy Trinity. And they held, in that  
5 very famous language, that it may be within the  
6 technical language, yet if it is outside what Congress  
7 was obviously thinking about the narrow language may not  
8 govern.

9 The reason that it is particularly compelling,  
10 we submit, that you not apply the literal language in  
11 this instance is as follows. It is agreed on all sides  
12 that Congress has never squarely dealt with the question  
13 whether in insolvency wage claims ought to come ahead of  
14 secured creditors.

15 It did not specifically intend, therefore, a  
16 change, to effect a change in the state and federal laws  
17 that specifically deal with that issue. Yet, a  
18 specific, focused Congressional intent is exactly what  
19 this court's cases make very clear is required before  
20 state and federal law otherwise applicable can be  
21 displaced.

22 QUESTION: Well, Mr. Lee, let me ask you one  
23 other question. Under Section 215 to remove the taint,  
24 if the Sixth Circuit view is correct, would the secured  
25 creditor have to pay just the minimum wage or the full

1 agreed wage, do you suppose?

2 MR. LEE: I'm not sure, I'm not sure.

3 QUESTION: Well, if it were only the minimum  
4 wage to remove the taint, certainly you could say that  
5 the statute -- that your view continued to operate as to  
6 the difference between the minimum wage and the agreed  
7 wage. Would that not be important --

8 MR. LEE: Yes, and I would think it probably  
9 would only be the minimum wage.

10 But the fact is that either way the entity  
11 that is in first place --

12 QUESTION: If that were true, then certainly  
13 the statute wouldn't completely have altered the  
14 priority of claims. There would still be something  
15 left to which traditional bankruptcy and priority would  
16 apply.

17 MR. LEE: There would be some money left, but  
18 insofar as the theory is concerned it would have changed  
19 around, it would have altered the priorities that are  
20 otherwise provided for, because the basic policy  
21 question is whose lien should be first, which claim  
22 should be first, in those instances where there is not  
23 enough money to go around.

24 QUESTION: Mr. Lee, is it common ground that,  
25 if the employer had not gone into insolvency and had

1 simply failed to pay a certain amount of wages, he still  
2 has plenty of money and he's still in business, would it  
3 have been a violation of the Labor Standards Act to ship  
4 the goods that was made by the labor for which he has  
5 not yet paid the wages?

6 MR. LEE: Yes, yes.

7 QUESTION: It would?

8 MR. LEE: Yes.

9 QUESTION: I mean, it's clear that it's not  
10 just a violation of you contract for a lower wage; it's  
11 also a violation if you contract for a proper wage, but  
12 fail to pay it?

13 MR. LEE: I don't know that that is that  
14 clear, and that is another issue that -- as far as I  
15 know, that is an issue that has simply never been  
16 decided.

17 QUESTION: Are there any cases?

18 MR. LEE: Not to my knowledge, not to my  
19 knowledge.

20 QUESTION: If that weren't a violation, then  
21 this whole problem --

22 MR. LEE: That is correct, that is correct.  
23 And indeed, one of our positions is -- you don't have to  
24 go quite that far -- that the Fair Labor Standards Act  
25 was simply never intended to apply to instances where

1 the employer was paying the minimum wage, there is no  
2 question that he was paying the \$3.35 an hour, but he  
3 simply went out of business and went broke, and that the  
4 Fair Labor Standards Act was never intended --

5 QUESTION: Well, you say he was paying the  
6 minimum wage but went broke. I take it you would add  
7 that a few weeks before he went broke he didn't pay the  
8 minimum wage because he was unable to?

9 MR. LEE: That is correct.

10 QUESTION: So you would put up a means test as  
11 a defense for any employer sued under the Fair Labor  
12 Standards Act?

13 MR. LEE: Well, it is simply another approach,  
14 another view that we think supports our position, that  
15 the Fair Labor Standards Act was not intended to apply  
16 to the insolvency circumstance, for a couple of  
17 reasons.

18 QUESTION: This doesn't take away the property  
19 of the secured creditor. It just says he can't ship it  
20 in interstate commerce.

21 MR. LEE: That is correct.

22 QUESTION: Granted, that makes it largely  
23 valueless. But it's not like a lien statute that says  
24 the property passes from A to B.

25 MR. LEE: That is correct, and that's

1 basically the Government's argument. We think it's  
2 insufficient, for a couple of reasons, because frankly  
3 my client just doesn't take much comfort from the  
4 Government's assurance that the Sixth Circuit's  
5 interpretation here does not create a lien, because the  
6 reality is that under the Sixth Circuit's rule  
7 Citicorp's first priority lien that it enjoys because of  
8 article 9 of the Uniform Commercial Code, which would  
9 otherwise govern but for the Sixth Circuit's ruling,  
10 does it no good unless it first pays off another batch  
11 of unsecured junior creditors.

12 So that the effect, though not the label that  
13 goes on it and not the concept -- and that's part of our  
14 argument, that since this was not the intent of the Fair  
15 Labor Standards Act it shouldn't apply to this  
16 circumstance.

17 But the effect is not only to create a wage  
18 earner's lien, but also to move that new lien ahead of  
19 secured creditors.

20 Now, there is also a batch of federal statutes  
21 that will necessarily be affected by the Secretary's  
22 interpretation of the Fair Labor Standards Act. They  
23 include: the Bankruptcy Act, which, like the UCC, gives  
24 secured creditors priority over unpaid wage earners; the  
25 Federal Tax Lien Act, under which either the Secretary

1 of the Treasury or his delegate, usually the IRS  
2 district director, both of whom are clearly persons,  
3 have the responsibility of levying and enforcing federal  
4 tax liens; and two other federal statutes that give the  
5 unpaid sellers of livestock and perishable agricultural  
6 commodities a priority over other creditors, including  
7 employes whose wages have not been paid.

8 The Government observes, and correctly so,  
9 that this case does not involve bankruptcy and does not  
10 involve any of those other statutes. But the point is  
11 that the literal interpretation of "any person" which  
12 the Government seeks will necessarily change a lot of  
13 lien statutes that would otherwise be applicable in this  
14 circumstance.

15 QUESTION: Mr. Lee, you said earlier that the  
16 Secretary has taken his current position only since the  
17 sixties; and for the first 25 years what was the  
18 situation? He had taken the opposite position or had  
19 taken no position?

20 MR. LEE: We think he had taken the opposite  
21 position. There is not a lot of evidence as to the  
22 position that he had taken. I refer you to Powell  
23 Knitting, the Second Circuit decision which was the  
24 first one to come up in 1966, and that case observes  
25 that this is apparently the first time the Secretary has

1 taken this position.

2 QUESTION: Well, but that doesn't answer my  
3 question. It may be the first time he had taken that  
4 position, but had he previously taken the opposite  
5 position or had he previously taken none?

6 MR. LEE: Yes, he had previously in our view  
7 taken exactly the opposite position.

8 QUESTION: In what form did he take it?

9 MR. LEE: It was in the form, Justice Brennan,  
10 of a statement in a -- the BNA put out a manual called a  
11 manual for Fair Labor Standards Act compliance, and  
12 there was a statement in that manual that dealt with  
13 insurance against hot goods.

14 And in that manual the Secretary took the  
15 position -- it told you how you could get insurance  
16 against hot goods, and basically where it came out was  
17 that you could get insurance against hot goods if you  
18 could show that you had acted in good faith. It used  
19 the example of those who bought -- lumber processors who  
20 bought from mills, and said that if they would monitor  
21 the FLSA compliance of the lumber mills then that would  
22 be insurance against hot goods.

23 Now, under the provision -- under the position  
24 that the Government takes today, there is no insurance  
25 against hot goods. If they are hot at one time, they

1 simply remain hot and no amount of insurance -- or,  
2 excuse me -- no amount of innocence will change that.

3 Now, the Government takes the position that  
4 what that manual said -- or, not what the manual, what  
5 the insurance against hot goods was talking about was  
6 criminal prosecution. And I simply submit that there is  
7 no way that that particular provision can be read that  
8 way, because what it talks about is goods that are in  
9 the hands of the creditor and that he can't ship them  
10 and how to avoid that circumstance.

11 QUESTION: Mr. Lee, can I ask you one other  
12 question about the history. What about the period  
13 between the Second Circuit case and the few cases  
14 recently? Was there any litigation in the seventies,  
15 for example?

16 MR. LEE: One. It was the Fourth Circuit's  
17 decision in a case called Shultz versus Factors, Inc.

18 QUESTION: Wasn't that in the eighties?

19 MR. LEE: '71.

20 QUESTION: That was '71.

21 MR. LEE: '71. And in that case, the Fourth  
22 Circuit agreed with the Second, but added one additional  
23 provision, with which we agree, and that is that there  
24 must not be any complicity, any collusion, between the  
25 creditor and the employer.

1 QUESTION: But between that decision and this  
2 one, was there litigation all through the seventies? I  
3 thought there was a period where the Government sort of  
4 threw in the towel.

5 MR. LEE: Well, you know, they go for a  
6 quarter of a century and they don't do anything, and  
7 then they lose in '66, and then they lose again in '71.  
8 I am not aware -- and there was one other one that they  
9 lost, a district court decision under Secretary Dunlop.

10 The first -- they do not have any victories  
11 other than in the Sixth Circuit before the 1980's.

12 QUESTION: Right.

13 MR. LEE: All of their victories have been  
14 Sixth Circuit victories, and they've all come in the  
15 1980's.

16 The other federal statutes that will be  
17 affected are these two that deal with the trusts that  
18 are imposed on the sellers of perishable agricultural  
19 commodities and of livestock by federal statutes. The  
20 point is that the wage and hour law need not be  
21 interpreted in such a way that it alters lien  
22 priorities, and it should not be.

23 It's a point that is further underscored by  
24 the Government's reliance on the Flammable Fabrics Act.

25 QUESTION: You say it need not be, but all you

1 appeal to is this Holy Trinity, which says it's a  
2 familiar principle, et cetera, et cetera, although it's  
3 apparently not a sufficiently familiar principle that  
4 counsel can ever find any case other than Holy Trinity  
5 to cite for it, because it's an old chestnut that comes  
6 up constantly when that principle is appealed to.

7 Is there any language, interpretation of the  
8 language, that you can give us that would lead to the  
9 conclusion that you want? Or is it just you're inviting  
10 us to throw up our hands and say, well, it doesn't say  
11 that, but we appeal to the spirit of the laws?

12 MR. LEE: Well, let me give you three brief  
13 answers. The first is, it's an old chestnut, but a good  
14 one. It's been around for a long time and it's entitled  
15 to some respect. And I submit, it is  
16 indistinguishable. They were doing exactly the same  
17 thing. They were bringing people here, and it fairly  
18 fit the statute that says that any person -- it's  
19 unlawful to import any person, any alien, for those  
20 purposes.

21 QUESTION: They made an exception for  
22 ministers, is that right?

23 MR. LEE: No. That is, the Court did, the  
24 Court did. The statute made an exception, made about  
25 six exceptions, and ministers did not fit any single one

1 of those exceptions.

2 QUESTION: You don't think they might have had  
3 some First Amendment concerns?

4 MR. LEE: They certainly didn't say so. It's  
5 strictly a matter of statutory interpretation.

6 QUESTION: Did they say what besides ministers  
7 were covered by the spirit of the law?

8 MR. LEE: No, no.

9 QUESTION: Just ministers?

10 MR. LEE: In the good spirit of true  
11 adjudication, they decided only that case that was  
12 before them at that particular instance.

13 But there was an exception for lecturers,  
14 there was an exception for teachers, there was an  
15 exception for domestics, and several others.

16 The second answer is that that isn't the only  
17 case. There is another one that we think is right on  
18 point. Unfortunately, we didn't find it until we were  
19 preparing for oral argument, though I have advised Mr.  
20 Rothfeld of that right after we found it.

21 It's a 1975 decision by this Court. I would  
22 pronounce it Muniz versus Hoffman, and it also arose out  
23 of the labor context. It involved the question. It  
24 involved the question of jury trial, jury trial for an  
25 individual who was convicted of contempt because of a

1 violation of a court's order pending -- for an  
2 injunction pending determination of that issue by the  
3 National Labor Relations Act.

4 And the statute says that in any case  
5 involving or growing out of a labor dispute the accused  
6 shall enjoy the right to a speedy trial. This Court,  
7 relying on Holy Trinity, said:

8 "It is not unusual that exceptions to the  
9 applicability of a statute's otherwise all-inclusive  
10 language are not contained in the enactment itself, but  
11 are found in another statute dealing with particular  
12 situations to which the first statute might otherwise  
13 apply."

14 All I'm saying is that there is good precedent  
15 for not extending the "any person" language where it's  
16 going to have the kind of mischievous effects that it's  
17 going to have here.

18 QUESTION: Mr. Lee, weren't there wage  
19 priorities in the 1938 Bankruptcy Act? Didn't unpaid  
20 wages have a degree of priority?

21 MR. LEE: Junior to secured creditor.

22 QUESTION: Yes, yes. But that was subsequent  
23 to the Fair Labor Standards Act, I take it.

24 MR. LEE: Well, there is a very --

25 QUESTION: At least there's an inconsistency,

1 you say, between the Bankruptcy Act and the Fair Labor  
2 Standards Act.

3 MR. LEE: That is correct.

4 QUESTION: And I suppose one argument is that  
5 the Bankruptcy Act impliedly repealed it or, if the Fair  
6 Labor Standards Act came afterwards, it really didn't  
7 intend to repeal the Bankruptcy Act.

8 MR. LEE: That's exactly right, and that is  
9 one of the most powerful arguments for Congress' real  
10 intent that there is in this whole case. It so happens  
11 that the Chandler Act, which re-enacted provisions of --  
12 it was an amendment to the Bankruptcy Act, was enacted  
13 just three days before the Fair Labor Standards Act, and  
14 it continued in effect the same preference that had  
15 existed from the beginning in the Bankruptcy Act of  
16 secured creditor over unpaid wage claims.

17 Does anyone really seriously think that --

18 QUESTION: Well, but of course. I mean,  
19 secured creditor were still intended to have that  
20 preference. But you know, we're not talking about all  
21 secured creditors here at all, and we're not talking  
22 about their preferential position.

23 MR. LEE: That is correct.

24 QUESTION: Your clients can sell the stuff in  
25 intrastate commerce, I presume.

1 MR. LEE: That is correct, that is correct.  
2 But let's go back for just a moment to the question that  
3 you just asked --

4 QUESTION: Well, they can't sell it in  
5 intrastate commerce if they think the seller is going to  
6 sell it in interstate commerce.

7 MR. LEE: That is correct, that is correct.  
8 And given this Court's interpretation of interstate  
9 commerce, we're prevented from selling it.

10 QUESTION: Was that the interpretation current  
11 at the time of the Fair Labor Standards Act?

12 MR. LEE: Probably not, probably not.

13 The point is that, just as you referred to a  
14 moment ago, Justice Scalia, in connection with how many  
15 exceptions are carved out, your ruling in this case as  
16 to any person, if it means secured creditors, I don't  
17 see how you can stop it from meaning trustees in  
18 bankruptcy.

19 And I don't believe that anyone can seriously  
20 say that Congress three days after it passed the  
21 Chandler Act intended to reverse those lien priorities  
22 that were effected there. And I also don't think --

23 QUESTION: They didn't intend to. Is it part  
24 of your theory that Congress can't make a mistake, that  
25 there is no such thing as a statute that has an

1 unanticipated consequence, because whenever that happens  
2 we invoke the spirit of the law and correct it? Is that  
3 the way the system works?

4 MR. LEE: I would not put it that way.

5 QUESTION: Well then, maybe this was a  
6 mistake.

7 MR. LEE: I would not put it that Congress  
8 cannot make a mistake. I would rather say that in  
9 melding together the rules dealing with preemption and  
10 repeal by implication, and applying both the Muniz case  
11 and also the Holy Trinity case, that in those instances  
12 where everyone agrees that Congress simply didn't face  
13 or decide these kinds of issues that you're not going to  
14 preempt inadvertently nor repeal by implication  
15 inadvertently when there is another interpretation.

16 Mr. Chief Justice, I'd like to reserve the  
17 rest of my time for rebuttal.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.  
19 We'll hear now from you, Mr. Rothfeld.

20 ORAL ARGUMENT OF

21 CHARLES E. ROTHFELD, ESQ.

22 ON BEHALF OF RESPONDENT

23 MR. ROTHFELD: Mr. Chief Justice and may it  
24 please the Court:

25 This case is not about secret liens or state

1 insolvency laws or priorities in bankruptcy, as Citicorp  
2 has argued this morning. It is about the meaning of a  
3 completely unambiguous statute, the Fair Labor Standards  
4 Act.

5 Now, when it has talked about the Act at all,  
6 Citicorp has painted a picture that is a caricature of  
7 what was and is a dramatic piece of legislation. The  
8 Act is written in the broadest possible terms. It makes  
9 it illegal for any person to sell hot goods in  
10 interstate commerce until those goods are cured.

11 And Justice O'Connor, in response to your  
12 question, the goods are cured by the payment of the  
13 minimum wage, not all wages due the employees.

14 QUESTION: Mr. Rothfeld, does the statute  
15 provide for that cure?

16 MR. ROTHFELD: No, that has been the  
17 Secretary's interpretation.

18 QUESTION: That is something that has been  
19 added to the language of the statute. If you read the  
20 statute literally, that cure would be impermissible,  
21 would it not?

22 MR. ROTHFELD: Well, the statute, as you say  
23 --

24 QUESTION: Because the goods were produced in  
25 violation of the statute.

1 MR. ROTHFELD: That's true.

2 QUESTION: So how -- where does the Secretary  
3 get the authority to okay a cure of that kind, in plain  
4 violation of the language of the statute?

5 MR. ROTHFELD: Well, I think the Secretary's  
6 interpretation is not in plain violation of the language  
7 of the statute. The Secretary has taken the position  
8 that the goods essentially are tainted, are hot, because  
9 they were produced under substandard labor conditions.

10 QUESTION: (Inaudible) in any way.

11 MR. ROTHFELD: That's true, Justice Stevens,  
12 the statute doesn't address that issue at all. And the  
13 Secretary's reasoning, I think, is that because the  
14 goods were produced under substandard conditions, the  
15 taint is cured if the conditions are essentially  
16 corrected. And the conditions are corrected by paying,  
17 albeit retroactively, what the employees were due.

18 I should add that Citicorp --

19 QUESTION: Well, why is that any different  
20 from reading into the statute an exception for a  
21 business that just goes out of business and there's no  
22 ongoing violation, which is what Congress was obviously  
23 really thinking about?

24 MR. ROTHFELD: I think that's quite different,  
25 Justice Stevens. Let me preface my answer by saying

1 Citicorp invited this relief and it was granted by the  
2 district courts, the Court of Appeals, over the  
3 Secretary's objection.

4 The Secretary did not agree that it was  
5 appropriate to stay the lower court judgments. But I  
6 think that the Secretary is dealing with an issue which  
7 simply is not addressed in the statute at all, whether  
8 or not the taint can be cured.

9 The issue here that Citicorp is talking about  
10 is quite explicitly dealt with in the statute. The  
11 statute says flatly no one can sell hot goods in  
12 interstate commerce, period.

13 QUESTION: No, it says no one can sell goods  
14 which were produced under these conditions. And they  
15 were produced in violation of the statute under your  
16 view, because the employees were not paid.

17 MR. ROTHFELD: As I say, Justice Stevens,  
18 that's true. And the Secretary's position -- well --

19 QUESTION: Is he interpreting the statute  
20 necessarily, or maybe exercising his own prosecutorial  
21 discretion?

22 MR. ROTHFELD: Well, that is one --

23 QUESTION: Just as a prosecutor may say, I'm  
24 not going to prosecute for a small amount of marijuana,  
25 maybe the Secretary thinks that his prosecutorial

1 discretion is better used on other things than seeking a  
2 remedy for wages that have been paid up.

3 MR. ROTHFELD: That is one, I think one  
4 approach to what the Secretary is doing.

5 QUESTION: So the Secretary would have had  
6 authority, if it wanted to, over these intervening  
7 years, simply not to enforce this provision in  
8 bankruptcy situations?

9 MR. ROTHFELD: That's true.

10 QUESTION: The statute doesn't require it.  
11 It's entirely up to the Secretary either to bring cases  
12 like this or not.

13 MR. ROTHFELD: That's quite right, Justice  
14 Stevens. Section 1501 is not self-enforcing. It can  
15 only be brought into effect, as it was in this case, by  
16 an action for injunction under Section 17. So if the  
17 Secretary --

18 QUESTION: (Inaudible).

19 MR. ROTHFELD: Clearly not, clearly not.

20 QUESTION: Do you agree with your opponent's  
21 view that the same plain language argument would apply  
22 to the bankruptcy trustee?

23 MR. ROTHFELD: I think so, Justice Stevens. I  
24 should add --

25 QUESTION: So if a bankruptcy trustee, say,

1 comes into possession of a large inventory of goods that  
2 have to be liquidated, he may not liquidate them, at  
3 least in interstate commerce, period?

4 MR. ROTHFELD: Well, let me say several things  
5 about that, Justice.

6 QUESTION: Or without paying them at least,  
7 which gives the wage earners a priority in bankruptcy.

8 MR. ROTHFELD: Well, as I said, there are  
9 several responses to that point, Justice Stevens. First  
10 of all, this case does not involve bankruptcy, so all of  
11 Citicorp's arguments about bankruptcy are entirely  
12 hypothetical. And anything the Court says about the  
13 applicability --

14 QUESTION: Yes, but there are a lot of  
15 bankruptcy situations in which you get the secured  
16 creditor, I'm sure, claiming the right to dispose of  
17 goods. It's not an unusual --

18 MR. ROTHFELD: No, that is true, although the  
19 Court's decision here doesn't necessarily have to reach  
20 that.

21 QUESTION: I don't see why not, if the rule is  
22 that -- all the policy reasons supporting the  
23 Government's position would apply equally in an ordinary  
24 bankruptcy, without any secured creditors.

25 MR. ROTHFELD: Well, I think actually that is

1 quite right, Justice Stevens. And there is no conflict  
2 that we see between Section 1501 and priorities in  
3 bankruptcy, for several reasons.

4 First of all, the Bankruptcy Code itself  
5 recognizes the distinction that we have drawn in our  
6 statute between regulatory statutes and creditor's  
7 rights provisions. Section 362(b)(4) and (b)(5), it  
8 explicitly permits the Government to prosecute an action  
9 to enforce an injunctive -- obtain injunctive relief  
10 when necessary to enforce public law requirements.

11 District courts and bankruptcy courts have  
12 uniformly concluded that the Fair Labor Standards Act is  
13 precisely that sort of statute. So if this were a  
14 bankruptcy case, the code itself would permit this very  
15 action to proceed and the same relief to be awarded.

16 Second of all, we don't think that the  
17 application of the Fair Labor Standards Act here affects  
18 priorities in bankruptcy at all, even apart from the  
19 Section 362(b)(4) and (b)(5) relief. Now, we talked  
20 about this at length in our brief, and what I would like  
21 to do, with your indulgence, is explain how we think the  
22 statute operates and what we think it means, because  
23 that I think answers the question about whether or not  
24 this affects priorities in bankruptcy.

25 The short answer is that, as a statute like

1 the Flammable Fabrics Act, for example, which we cite in  
2 our brief -- if flammable fabrics turned up in a  
3 bankrupt estate, the trustee certainly couldn't claim  
4 that he had a right to sell those fabrics until they  
5 were conformed to the requirements of federal law.

6 Precisely the same thing is true here. If  
7 goods that were tainted because they were produced under  
8 substandard labor conditions turn up in a bankrupt  
9 estate, the trustee cannot sell them until he satisfies  
10 the absolute requirements of federal law, which is that  
11 the taint be removed.

12 Now, the taint is removed by the payment of  
13 wages, essentially remedying the substandard labor  
14 condition. But that doesn't affect priorities in  
15 bankruptcy.

16 And as I say, I think as I outline how the  
17 operation of the statute and what Congress meant to  
18 accomplish, that becomes quite clear. I'd like to talk  
19 about, I think, two things. First --

20 QUESTION: (Inaudible) as a matter of law, is  
21 that it, not just discretion?

22 MR. ROTHFELD: Well, I think the Secretary --

23 QUESTION: That's the way you put it, anyway,  
24 although the law doesn't say that.

25 MR. ROTHFELD: That is how I put it, Justice.

1 But I think however one approaches it, the priorities in  
2 bankruptcy, priorities under state insolvency law, are  
3 simply not --

4 QUESTION: Do you think, Mr. Rothfeld, in the  
5 flammable fabrics example that you have discretion to  
6 permit these dangerous products to be shipped in  
7 interstate commerce? Is there a difference between the  
8 flammable, violations of the Flammable Fabrics Act and  
9 this kind of "hot goods"?

10 MR. ROTHFELD: Well, there would have to be an  
11 enforcement action of some sort.

12 QUESTION: But you don't think that the  
13 Secretary would have discretion to say, well, we realize  
14 these are very dangerous, but we're too busy to enforce  
15 this statute?

16 MR. ROTHFELD: Well, I think it would be  
17 inappropriate for an enforcement official to do that.

18 QUESTION: There is some difference between  
19 the two?

20 MR. ROTHFELD: Well, but the nature of the  
21 statutes are identical. Both statutes are public laws  
22 that create general regulatory prohibitions on the  
23 introduction of certain goods into interstate commerce,  
24 for particular reasons, until those reasons are removed,  
25 whether or not it's a question of enforcement discretion

1 or it's simply a straightforward interpretation of the  
2 statute.

3 QUESTION: Well, but there is, it seems to me,  
4 a considerable difference between some item that's  
5 perhaps made out of flammable fabrics and is simply  
6 dangerous, branded so by the statutory scheme, and say  
7 an automobile that may have been manufactured by a  
8 bankrupt automobile company, that the last couple weeks  
9 didn't pay minimum wages.

10 That automobile is a source of value  
11 somewhere, and you certainly want to find some way that  
12 you can cure whatever defect there was and get it back  
13 in commerce, in a way that you don't with a flammable  
14 fabric.

15 MR. ROTHFELD: Well, I'm not sure that's  
16 entirely true, as a flammable fabric can be cured, can  
17 be brought into conformity with the federal standards.  
18 The flammable fabric is not without value. It simply is  
19 of reduced value because it's defective. And I think  
20 that --

21 QUESTION: But certainly we shouldn't strain  
22 to reach a result that says Congress intended that these  
23 particular goods simply rot here because their defect  
24 can't be cured and they can't be shipped, if there's  
25 nothing really inherently wrong with the goods.

1           If Congress says that's the result, now that's  
2 what has to obtain. But you don't certainly strain to  
3 reach that result.

4           MR. ROTHFELD: Well, let me answer that in two  
5 ways, Justice Rehnquist. First, we don't suggest that  
6 that's the result which should obtain in this case. I  
7 think we all agree that if the employees are paid, if  
8 the statutory requirements are satisfied, the goods can  
9 be introduced into interstate commerce. The Secretary  
10 won't object to that.

11           Second of all --

12           QUESTION: You say we all agree. I don't  
13 agree with that at all.

14           MR. ROTHFELD: Well, I should say --

15           QUESTION: It's plainly in violation of the  
16 statute if one's going to read it literally.

17           MR. ROTHFELD: Well, I should say the parties,  
18 I think, agree.

19           QUESTION: All right.

20           MR. ROTHFELD: And as to whether the Secretary  
21 will enforce the statute under those circumstances, I  
22 think it is clear the regulat would permit these goods  
23 to be introduced into interstate commerce.

24           QUESTION: Maybe you agreed too readily that  
25 the goods are manufactured in violation of the statute,

1 if the proper wages are not paid before they are rolling  
2 off the press. I mean, what if the wages are paid in  
3 arrears and goods are manufactured before the monetary  
4 payment has been made?

5 Does it never occur that goods are shipped in  
6 interstate commerce before the workers who produced  
7 those goods picked up their paycheck?

8 MR. ROTHFELD: Well, not at all, Justice  
9 Scalia.

10 QUESTION: Well, then maybe goods, you know,  
11 manufactured in violation of the Act doesn't mean that  
12 payment has to be made before they are manufactured; it  
13 just means that payment of the wages has to be made at  
14 some point, and if it's made at some point the goods  
15 have not been manufactured in violation of the Act.

16 At least there's a linguistic way to get  
17 there, isn't there?

18 MR. ROTHFELD: Well, I don't think that that's  
19 true, Justice Scalia.

20 QUESTION: He's trying to help you a little.  
21 Of course, if you follow that argument you might prove  
22 these goods were not manufactured in violation of the  
23 Act, because they might have had a practice of shipping  
24 the goods out before the end of the week when the  
25 payroll was due.

1 MR. ROTHFELD: Well, I think that's right,  
2 Justice Stevens. And the result that the Act ordains is  
3 quite clear. Certainly if goods are produced, in the  
4 normal course of business employees are not paid until  
5 the week following the production of the goods, those  
6 goods are not hot goods during the week prior to the  
7 payment of the employees.

8 But if the employees are not paid in the normal  
9 course of business, if in this case they are not -- as  
10 in this case, they are not paid at all, certainly there  
11 is a violation of the Fair Labor Standards Act. The  
12 statute says flatly on its face in Section 6 that every  
13 employer shall pay statutory minimum wage, and it says  
14 flatly on its face in Section 7 that every employer  
15 cannot -- no employer can work its employees more than  
16 40 hours a week unless they --

17 QUESTION: Mr. Rothfeld, supposing you got an  
18 accumulation of inventory that was manufactured without  
19 the payroll being met for three or four weeks, and there  
20 are not enough assets in the estate to make up the wage  
21 shortage so the goods could -- you could not generate  
22 enough money to comply with the statute.

23 I take it under your view they could never be  
24 shipped? You'd just have to burn them.

25 MR. ROTHFELD: Well, I think it will be an

1 extraordinary situation where the goods themselves are  
2 worth less than the value of the labor that went into  
3 them. If that --

4 QUESTION: It depends on how long this has  
5 been accumulating.

6 MR. ROTHFELD: Well, if there were a case --

7 QUESTION: They may have shipped 90 percent of  
8 those, but then the ten percent that's left over in  
9 inventory is not enough to pay for the full, you know,  
10 the full amount of the arrearage. That could happen.

11 MR. ROTHFELD: Well, if there were a case  
12 where it were impossible to pay the employees what they  
13 were owed, the statutory language is quite clear.  
14 Congress provided that no person shall ship hot goods in  
15 interstate commerce.

16 QUESTION: So the trustee would just have to  
17 dispose of those goods, even though it's highly  
18 uneconomic?

19 MR. ROTHFELD: Well, as I say, Justice  
20 Stevens, that is a situation which I think is unlikely  
21 and that's demonstrated by the fact that it has never  
22 arisen in the 50 years the Act has been in operation.

23 QUESTION: Mr. Rothfeld, am I correct that it  
24 is also common ground between you and Mr. Lee that there  
25 is going to be a frustration of the bankruptcy laws by

1 reason of the Fair Labor Standards Act in a lot of  
2 situations?

3 That is, whenever you have an employer who has  
4 intentionally violated the Act and has contracted to pay  
5 substandard wages and then goes into bankruptcy, those  
6 employees, you both agree, have preference over other  
7 creditors if the goods are ever going to be sold; is  
8 that right?

9 MR. ROTHFELD: The answer is both yes and no,  
10 Justice Scalia. I think that your characterization of  
11 giving the employees priority and characterization of  
12 this as affecting priorities in bankruptcy is not  
13 correct.

14 QUESTION: All right. On the assumption that  
15 it amounts to priorities in bankruptcy, there are going  
16 to be a lot of cases where that happens, and we're  
17 arguing here not about bringing order into the whole  
18 scheme of things, but just whether one little corner of  
19 disorder is going to be eliminated.

20 MR. ROTHFELD: Well, let me give you two  
21 answers to that. First of all, accepting your  
22 assumption, it is true that this does not disturb  
23 generally priorities in bankruptcy. Congress was  
24 legislating with a particular problem in mind, the  
25 problem of employees who did not receive wages, and that

1 is dealt with in this statute explicitly. And no matter  
2 what any other provision of state law or the Bankruptcy  
3 Code says, this is the statute which deals with that  
4 problem.

5 The second answer to the question again is  
6 that this does not affect priorities in bankruptcy. The  
7 Fair Labor Standards Act does not give employees any  
8 claim in the goods, does not give employees a claim on  
9 the bankrupt estate, does not create liens, does not  
10 adjust Citicorp's property interest in the goods  
11 themselves vis a vis anyone else.

12 It simply provides a general federal  
13 prohibition, a universal prohibition, on the sale of  
14 tainted goods.

15 QUESTION: Mr. Rothfeld, in the normal  
16 violation situation doesn't the employee have a claim  
17 against his employer for a violation of the Fair Labor  
18 Standards Act?

19 MR. ROTHFELD: Yes, an employee is given a  
20 right under Section 216.

21 QUESTION: But he doesn't have a right to  
22 invoke this particular provision?

23 MR. ROTHFELD: That's quite right. This is  
24 something -- and I think that's an important point,  
25 Justice Stevens. An action of this sort under Section

1 17, 27 U.S.C. Section 217, is brought in the public  
2 interest by the Secretary. It is not brought to benefit  
3 individual employees.

4 It is brought to combat generally the spread  
5 of substandard labor conditions and to exclude tainted  
6 goods from interstate commerce -- all considerations  
7 that Congress was very concerned about when it passed  
8 the Act.

9 I think the Courts of Appeals have uniformly  
10 held that this should not be viewed as an action on  
11 behalf of the individual employee. This is an action to  
12 enforce a requirement of public law.

13 QUESTION: And the purpose of that is to  
14 prevent the goods going into the market at depressed  
15 prices because they were produced at depressed wages, I  
16 suppose.

17 MR. ROTHFELD: Well, there are a variety of  
18 purposes to be served.

19 QUESTION: But one of the things is unfair  
20 competition to the employers who pay a decent wage  
21 scale.

22 MR. ROTHFELD: Well, that's quite true,  
23 Justice.

24 QUESTION: And of course, that purpose would  
25 not be served by the sale of these goods anyway, even

1 after the wages are paid. They're going to be sold no  
2 doubt at a great discount because it's a liquidation of  
3 an inventory.

4 MR. ROTHFELD: Well, let me take a step  
5 backward.

6 QUESTION: So that purpose isn't served no  
7 matter which way we decide this case.

8 MR. ROTHFELD: Well, I don't think that's  
9 true. But again, let me step back and talk about all of  
10 the purposes in context.

11 First of all, Congress viewed the exclusion of  
12 hot goods in and of itself as a goal of the statute and  
13 as an appropriate result. When Congress passed the Act  
14 in 1938, it specifically endorsed President Roosevelt's  
15 characterization --

16 QUESTION: The goal itself is offended by  
17 these --

18 MR. ROTHFELD: Well, I think that's right --

19 QUESTION: -- these wicked goods being in  
20 interstate commerce? It's a sort of conceptual problem  
21 they have about evil goods just being there in the  
22 stream? You don't really think that that --

23 MR. ROTHFELD: Well, all I can tell you,  
24 Justice Scalia, is Congress endorsed the description of  
25 the goods offered by President Roosevelt --

1           QUESTION: It's a public policy, we don't want  
2 these offensive goods moving? Surely there was some  
3 human objective.

4           MR. ROTHFELD: Oh, yes. There were a  
5 considerable number of objectives, Justice Scalia, and I  
6 can tick them off for you.

7           QUESTION: That was in the tradition of a lot  
8 of these Acts, the Webb-Kenyon Act, the Asher-Summers  
9 Act, that all described the tainted goods in interstate  
10 commerce. That was the way Congress got at them.

11          MR. ROTHFELD: Well, that's quite right,  
12 Justice Rehnquist. There were two aspects of this. One  
13 is that was the way Congress got at a problem and  
14 accomplished its purpose.

15          Another is Congress viewed these goods as, as  
16 then Assistant Attorney General Jackson put it, the  
17 product of ruined lives and, as President Roosevelt put  
18 it, contraband which should not be allowed to pollute  
19 the channels of interstate trade.

20          I think Congress did in fact want to exclude  
21 these goods for its own sake. But there were also other  
22 purposes --

23          QUESTION: Of course, that rhetoric applies to  
24 an ongoing business doing it month after month after  
25 month. It doesn't really apply to a liquidation of a

1 bankrupt, inventory in a bankruptcy, does it?

2 MR. ROTHFELD: Well, again --

3 QUESTION: Don't you get the same price  
4 whether the employees were paid or not? The rhetoric  
5 just doesn't fit.

6 MR. ROTHFELD: Well, there were a number of  
7 purposes to be served. First of all, the Congress was  
8 concerned -- Citicorp has sort of raised the suggestion  
9 that Congress was not really concerned with problems of  
10 insolvency or employers who just didn't meet their  
11 payroll occasionally.

12 We think that is just plainly not true.  
13 Congress applied the Act to every employer. Congress  
14 wrote the Act in 1938 and it was aware of problems of  
15 insolvency and marginal employers.

16 And while it is certainly true that an  
17 employer can chisel, in Citicorp's phrase, an employee  
18 by paying him regularly at half the minimum rate, it can  
19 chisel him just as effectively by skipping half of its  
20 payrolls.

21 There is no reason to think that Congress was  
22 unconcerned with that group of marginal employers who  
23 managed to operate close to the edge and stayed in  
24 business by bouncing payroll checks that they had no  
25 real expectations of ever being able to meet.

1 QUESTION: Well, Mr. Rothfeld, there really is  
2 no concrete evidence in the legislative history, is  
3 there, to tell us that Congress was thinking about this  
4 problem of the bankrupt employer?

5 MR. ROTHFELD: Well, I think the clearest  
6 evidence of what Congress had in mind, Justice O'Connor,  
7 is what it said, and what it said is every employer --

8 QUESTION: You have to fall back on plain  
9 language. You certainly can't find it in the  
10 legislative history.

11 MR. ROTHFELD: Well, I think it does appear in  
12 the legislative history.

13 QUESTION: Well, do you feel, if you had the  
14 choice between the plain language and the legislative  
15 history, which would you choose?

16 MR. ROTHFELD: Well, I think we've clearly won  
17 on the plain language, Chief Justice Rehnquist. I'll be  
18 happy to belabor the obvious and emphasize to the Court  
19 that there is no question that the plain terms of the  
20 statute say exactly -- well, say precisely that Citicorp  
21 cannot sell hot goods in interstate commerce.

22 QUESTION: Do you have any cases in which,  
23 never mind bankruptcy, but you just have had an employer  
24 who has not paid his employees? He contracted with them  
25 to pay above the minimum wage, but he failed to pay

1       them.

2               And I asked Mr. Lee the same question and he  
3       said that he doesn't think the law is clear on it. Is  
4       the law clear?

5               MR. ROTHFELD: We think it is clear, Justice  
6       Scalia. We cited in our brief on pages 16 and 17 a  
7       number of cases in which employers were sued for back  
8       pay. There is no indication in the case, and I believe  
9       there is affirmative indication in the case, that the  
10      employers contracted to pay the regular rate, but simply  
11      didn't pay for reasons of financial difficulty.

12              And when they were sued for back pay, the  
13      Courts of Appeals uniformly held that an employer's  
14      financial difficulty is not a defense in the case, not a  
15      defense to a suit under the Fair Labor Standards Act.

16              QUESTION: If they're sued for back pay, why  
17      do you have to use the Fair Labor Standards Act?

18              MR. ROTHFELD: Well, the Fair Labor Standards  
19      Act provides a number of --

20              QUESTION: I mean, if he's promised to pay it  
21      it doesn't matter whether he is legally obliged to  
22      promise to pay it. I don't know why you'd have to bring  
23      a suit for back pay.

24              MR. ROTHFELD: Well, I think that that's not  
25      quite right, Justice Scalia. The Fair Labor Standards

1 Act provides a number of remedies which are in addition  
2 to those available under state contract law.

3 QUESTION: I see.

4 MR. ROTHFELD: It provides liquidated damages  
5 and it allows the Secretary to sue. And that is an  
6 important point, because Congress was very concerned  
7 that the Act was benefiting employees who were least  
8 able to protect themselves and that they would need the  
9 assistance of the Secretary's enforcement.

10 And the Court emphasized that point in --

11 QUESTION: Do you have cases where the  
12 employer has also been forbidden to ship his inventory  
13 in interstate commerce, just because he hasn't paid  
14 wages which were above the minimum?

15 MR. ROTHFELD: I'm not aware of any cases in  
16 which the hot goods clause --

17 QUESTION: That would be sort of  
18 self-defeating, wouldn't it? You say, you must pay your  
19 wages before you can ship your goods and get the money  
20 to pay them.

21 MR. ROTHFELD: Well, generally speaking an  
22 employer must pay its employees in the course of  
23 business.

24 QUESTION: Of course, of course.

25 MR. ROTHFELD: An employer can't operate on

1 the edge.

2 QUESTION: So I ask you, are there some cases  
3 where the employer has been forbidden to ship his goods  
4 in interstate commerce or to sell the goods until he's  
5 paid unpaid wages?

6 MR. ROTHFELD: I am not aware of any reported  
7 decisions, Justice White. The Secretary I know does  
8 bring as a matter of practice suits under both Section  
9 15(a)(1) and 15(a)(2), that combines the hot goods  
10 clause and a direct suit against the employer for  
11 violating the minimum wage and overtime requirements.

12 So I think it is a common practice to bring  
13 such suits, and I think it is so clearly accepted that  
14 perhaps it hasn't been discussed generally by the Courts  
15 of Appeals.

16 QUESTION: Mr. Rothfeld, what about the point  
17 Mr. Lee makes, that the Secretary has taken a contrary  
18 position in the past?

19 MR. ROTHFELD: Well, I think that's simply not  
20 true, Justice O'Connor. The Secretary first dealt with  
21 this issue in 1966, as Mr. Lee suggested, in the Powell  
22 Mills case, largely because, I suspect, the issue didn't  
23 arise very often and still doesn't arise very often.

24 We cite in footnote 31 in our brief all of the  
25 actions of which we're aware in which the Secretary has

1     tried to enforce the hot goods clause against secured  
2     creditor. There were two in the 1970's. There have  
3     been a number in the 1980's. There was one in 1966.

4             Prior to 1966, this issue simply wasn't  
5     addressed. Mr. Lee has suggested that in 1949 the  
6     Secretary took a contrary position. We discussed that  
7     at length in our brief at pages 29 to 31, and we think  
8     it is quite clear from the circular that Citicorp relies  
9     upon that the Secretary simply meant to say that good  
10    faith operators -- the Secretary was not dealing there  
11    at all with secured creditors, but good faith operators  
12    generally could protect themselves only by making  
13    certain that their suppliers had complied with the Act.

14            The Secretary said innocence was a defense  
15    simply to criminal prosecution under Section 16, 16(a).  
16    And I invite the Court's examination of the document  
17    that Citicorp relies upon. I think it is quite clear  
18    that our reading is correct.

19            The Secretary since 1966 has consistently  
20    taken the position in every case in which this issue has  
21    arisen --

22            QUESTION: Within the period between 1938 and  
23    1966, this fact pattern surely arose many, many times.

24            MR. ROTHFELD: Well, I'm not sure that's  
25    true. Citicorp represents, and I think it's probably

1 right, that early on inventory bank financing was  
2 relatively rare. So it may be that there simply were  
3 not that many factual situations like this.

4 And I should add that even since 1966 there  
5 have been relatively few cases. In order to prosecute  
6 an action of this sort, the Secretary has to find the  
7 violation and obtain an injunction relatively quickly,  
8 and he has to do it in the circumstance in which he  
9 thinks it's appropriate.

10 So it may be that there simply are not that  
11 many instances in which this issue arises.

12 I should return, while on that point, to the  
13 question of the Act, but before I do that I want to deal  
14 more directly with the plain language of the statute.  
15 Citicorp's entire argument, I think as the Court  
16 generally has noted, is devoted to running away from  
17 what Congress actually said in Section 15. Its entire  
18 argument is based on cases like Holy Trinity, which  
19 relies upon the proposition that Congress here simply  
20 didn't know what it was doing when it wrote Section  
21 15(a)(1).

22 Whatever the propriety of departing from the  
23 statutory language in a situation like that, where  
24 Congress specifically intended an outcome in a given  
25 case, obviously a claim that Congress didn't know what

1 it was doing is one that should be treated with great  
2 skepticism.

3 QUESTION: The SG's office isn't promising not  
4 to cite Holy Trinity to us in the future?

5 MR. ROTHFELD: I cannot make that commitment  
6 for all time, Justice Scalia.

7 QUESTION: I doubt it.

8 MR. ROTHFELD: But I can certainly say that we  
9 think that the plain language of the statute is the  
10 clearest indication of how the statute should be  
11 applied. And if one even deals with Citicorp on its own  
12 ground and says, did Congress mean what it was saying  
13 when it wrote Section 15(a)(1), I think there is no  
14 question that Congress meant precisely what it said.

15 Citicorp never exactly says precisely what the  
16 term "person" should mean if it doesn't mean what it is  
17 defined to mean in the statute. But it sort of hints in  
18 its brief that it means perhaps dealers and  
19 subcontractors or culpable parties.

20 If Congress had wanted to write those  
21 restrictions into the statute, it knew how to do that.  
22 It wrote precisely those restrictions into other  
23 provisions of the Fair Labor Standards Act. Dealers and  
24 manufacturers are dealt with by the child labor  
25 prohibitions of Section 12. Willful violators are dealt

1 with in the criminal penalty provisions of Section 16.  
2 Other provisions of the Act deal only with employers.

3 But Section 15(a)(1), alone among the  
4 substantive prohibitions of the Act, deals with "any  
5 person." That could not have been inadvertent. If  
6 there is any doubt about this, Section 15(a)(1) contains  
7 two explicit exemptions, one for common carriers, which  
8 was added only because Congress didn't want a test of  
9 the constitutionality of the statute to arise in a case  
10 involving a carrier's obligation to transport goods; the  
11 other for certain good faith purchasers which was added  
12 in 1949.

13 That exemption is worth looking at closely,  
14 because it is unusually strict. It is not enough that a  
15 purchaser acquire goods for value and in good faith. To  
16 benefit from that exemption, he also must acquire goods  
17 in reliance on the producer's written statement of  
18 compliance with the Act.

19 Now, if Congress felt it necessary to write  
20 special exemptions of that sort into Section 15 to  
21 benefit two discrete and demonstrably innocent  
22 categories of people, it certainly thought that the Act  
23 otherwise would reach everyone, no matter how innocent  
24 or uninvolved.

25 QUESTION: Would it be consistent with the

1 plain language of the Act if the employer produced a  
2 bunch of goods and put it in a warehouse and half of the  
3 goods in the warehouse were produced while he was paying  
4 his employees and half of the goods were produced when  
5 he wasn't; could he ship the goods that were produced  
6 while he was paying his wages?

7 MR. ROTHFELD: Well, probably, Justice White.  
8 The term "production" is defined in Section 3, I believe  
9 it's Section 3(j), to include goods that were handled by  
10 employees who -- both production and handling. So if  
11 the goods were handled by employees who hadn't been  
12 paid, those goods could not be shipped either.

13 If the goods had entirely been treated by  
14 employees who were paid in compliance with the Act, they  
15 could of course be shipped. There would be no statutory  
16 prohibition.

17 Our point is that the plain language of the  
18 statute applies in a case like this one, where there was  
19 the statutory obligation to pay and no pay was made, and  
20 where the person as defined in the statute, and Citicorp  
21 undoubtedly is a person as defined in the statute, is  
22 trying to introduce those goods into interstate  
23 commerce.

24 Section 15 says on its face that Citicorp  
25 shouldn't be able to do that. Applying the statute here

1 accomplishes precisely what Congress set out to  
2 accomplish when it wrote Section 15, because Congress  
3 intended to make sure that everyone -- well, Congress  
4 intended to apply Section 15 to everyone, so that no one  
5 would be able to deal in hot goods, so that everyone  
6 would be aware to watch out for hot goods, everyone  
7 would be aware that they could not benefit from an  
8 employer's failure to pay minimum wage.

9 That is part of the entire enforcement scheme  
10 of the Act. Citicorp's argument to the contrary simply  
11 ignores the theory on which the Fair Labor Standards Act  
12 operates.

13 I should add one additional thing about this  
14 insolvency and bankruptcy point, which we think is a red  
15 herring thrown into the case by Citicorp to distract the  
16 Court from the plain language of the statute. As I was  
17 suggesting before, the Act essentially creates a  
18 universal prohibition on anyone's ability to deal with  
19 certain types of goods.

20 It does not create property interests in those  
21 goods, it does not create liens. It simply says no one  
22 can deal with those goods until they have been cured in  
23 the meaning of the statute or until the Secretary  
24 determines not to bring an enforcement action.

25 Nothing in that addresses insolvency. Nothing

1 in that type of enactment addresses priorities in  
2 bankruptcy. It simply, as I say, creates a universal  
3 prohibition as a matter of public policy, a familiar  
4 type of prohibition that Congress created many times.

5 There is no doubt that if, for example, any of  
6 these goods had been flammable rather than hot, they  
7 could not have been introduced into interstate  
8 commerce. And we think precisely the same principle is  
9 at stake in this case.

10 We urge the Court to apply the statute as it  
11 was written, to accomplish the purposes Congress tried  
12 to accomplish.

13 If there are no further questions.

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
15 Rothfeld.

16 Mr. Lee, you have four minutes remaining.

17 REBUTTAL ARGUMENT OF

18 REX E. LEE, ESQ.,

19 ON BEHALF OF PETITIONER

20 MR. LEE: One objective of the Fair Labor  
21 Standards Act was to force the payment of minimum wages  
22 by chiseling employers, and it had one other objective  
23 which was supportive thereof, and that was to take away  
24 the competitive advantage in interstate commerce that  
25 the substandard employers would enjoy vis a vis those

1 who had paid standard wages.

2 You do not get at that objective by requiring  
3 third parties whose only leverage existed because of  
4 something they did a year before the insolvency occurs.

5 Mr. Rothfeld has conceded, as of course he  
6 must, that there is a conflict between the substantive  
7 provisions of the Bankruptcy Act, which deal with  
8 creditors' priorities, and the Fair Labor Standards Act  
9 as it would be interpreted here.

10 QUESTION: Mr. Lee, you do acknowledge that  
11 you have got a problem with the Bankruptcy Act in the  
12 case where -- I mean, assuming that this affects  
13 priorities, you have a problem where the employer has  
14 intentionally paid substandard wages. Now, why  
15 shouldn't we correct that impingement --

16 MR. LEE: No, not where it's intentionally,  
17 but where there's been some complicity between the  
18 creditor and the employer.

19 QUESTION: Oh, you say that even where the  
20 employer has contracted, and not because of insolvency  
21 but he's been a bad actor all along, he's contracted for  
22 substandard wages, if he later goes into bankruptcy you  
23 think that even those goods can be shipped in interstate  
24 commerce?

25 MR. LEE: Once they're in the hands --

1 QUESTION: Once they're in the hands?

2 MR. LEE: Yes, yes.

3 QUESTION: I see.

4 MR. LEE: As they are -- as he has exercised  
5 his secured lien, unless there is some complicity,  
6 unless there is some fault on the part of the secured  
7 creditor.

8 QUESTION: Okay. I didn't understand that.

9 MR. LEE: There is no question that Congress  
10 has the power to repeal state and federal laws dealing  
11 with these lien priorities and to move wage creditors to  
12 the head of the line. But this Court said just last  
13 year in *Bowen versus American Hospital Association* that  
14 the implications and limitations of our federal system  
15 constitute a major premise of all Congressional  
16 legislation and that Congress will not be deemed to have  
17 displaced state law unless otherwise the purpose of the  
18 Act would be defeated.

19 At a very minimum, we submit that means that  
20 in making decisions such as in this case some kind of a  
21 comparative balance of the comparative impact on state  
22 and federal laws must be taken into account. That does  
23 not mean that we are taking the position that Congress  
24 did not know what it was doing.

25 We are simply saying that in every instance

1 that I am aware of in which the Court has faced the  
2 identical situation in this case, Congress was aiming at  
3 a particular problem, used language that would sweep in  
4 a few other instances, this Court has not simply  
5 woodenly said, therefore those other instances were also  
6 legislated unintentionally.

7 The only cases that deal with it so far as I  
8 am aware are Holy Trinity -- and there has been no  
9 attempt to distinguish Holy Trinity -- this Muniz case,  
10 and then there is a case that comes fairly close to it,  
11 this Court's recent decision in the Jersey Shore Bank  
12 case.

13 QUESTION: The only cases in 200 years in  
14 which you think Congress has written a statute that  
15 picks up something that maybe, had they thought about  
16 it, they wouldn't have wanted to pick it up, and we  
17 caught both of them?

18 (Laughter.)

19 QUESTION: All three.

20 MR. LEE: But the point is that in every  
21 instance where you caught it, you were consistent. You  
22 were consistent in what you did. And all I'm asking is  
23 that you be consistent for a fourth time.

24 QUESTION: Mr. Lee, may I ask you, do you  
25 think the Johnson case we decided the other day is such

1 a case, the Weber case is such a case?

2 MR. LEE: Oh, Johnson, I do know the Johnson  
3 case, I do know the Johnson case. It's an entirely  
4 different --

5 QUESTION: The language is pretty clear there,  
6 wasn't it?

7 MR. LEE: That goes back to the conversation  
8 that I had with Justice Scalia. May I answer the  
9 question, Mr. Chief Justice?

10 It goes back to the conversation that I had  
11 earlier with Justice Scalia. There is a difference  
12 between the circumstances where Congress was facing  
13 either one interpretation or the other and didn't  
14 actually make it clear which it was doing. That's the  
15 Johnson and the Weber circumstance, at least as I read  
16 Johnson and Weber.

17 This is a circumstance that is quite  
18 different, where Congress used language that no one  
19 contends, no one contends, was intended to be  
20 applicable.

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lee.

22 The case is submitted.

23 (Whereupon, at 11:01 a.m., the above-entitled  
24 case was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#86-88 - CITICORP INDUSTRIAL CREDIT, INC., Petitioner V.

---

WILLIAM E. BROCK, SECRETARY OF LABOR

---

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

BY Paul A. Richardson

(REPORTER)

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'87 ABR 27 P 3:31