

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES NATIONAL BANK OF OREGON,
Petitioner v. INDEPENDENT INSURANCE AGENTS
OF AMERICA, INC., ET AL. and
EUGENE R. LUDWIG, COMPTROLLER OF THE
CURRENCY, ET AL., Petitioners v. INDEPENDENT
INSURANCE AGENTS OF AMERICA, INC., ET AL.

CASE NO: 92-484, 92-507

PLACE: Washington, D.C.

DATE: Monday, April 19, 1993

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES NATIONAL BANK OF :

4 OREGON, :

5 Petitioner : No. 92-484

6 v. :

7 INDEPENDENT INSURANCE AGENTS :

8 OF AMERICA, INC., ET AL.; :

9 and : CONSOLIDATED

10 EUGENE R. LUDWIG, COMPTROLLER :

11 OF THE CURRENCY, ET AL., :

12 Petitioners : No. 92-507

13 v. :

14 INDEPENDENT INSURANCE AGENTS :

15 OF AMERICA, INC., ET AL. :

16 - - - - -X

17 Washington, D.C.

18 Monday, April 19, 1993

19 The above-entitled matter came on for oral
20 argument before the Supreme Court of the United States at
21 10:57 a.m.

22 APPEARANCES:

23 CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor
24 General, Department of Justice, Washington, D.C.; on
25 behalf of the Petitioner.

1 ANN MARY KAPPLER, ESQ., Washington, D.C.; on behalf of
2 the Respondent.

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1 PROCEEDINGS

2 (10:57 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in number 92-484, United States
5 National Bank of Oregon v. the Independent Insurance
6 Agents of America, and a companion case.

7 Mr. Wright.

8 ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT

9 ON BEHALF OF THE PETITIONERS

10 MR. WRIGHT: Mr. Chief Justice, and may it
11 please the Court:

12 This unusual case arose out of a dispute
13 concerning the proper construction of section 92 of the
14 banking laws, a provision that authorizes banks in small
15 towns to sell insurance. No question was raised about the
16 validity of section 92. In fact, the Insurance Agents
17 pointed out that at this late date, they thought there was
18 no real question about whether section 92 remained in
19 existence.

20 They pointed out that the Controller of the
21 Currency and the Federal Reserve Board has assumed its
22 continued existence for more than 70 years; that the
23 banking industry and the insurance industry had relied on
24 section 92; and that Congress and -- and the courts had --
25 had as well. But the D.C. Circuit, nevertheless, held

1 that section 92 had been repealed by Congress in 1918.
2 And that's the question presented to this Court today.

3 The dispute between the parties has necessarily
4 turned on a few phrases and some quotation marks in -- in
5 a number of documents that were written more than 70 years
6 ago. And I'd like to direct the Court's attention to
7 those documents this morning.

8 But before I do so, I -- I'd like to say two
9 things about what I think close analysis of these
10 documents shows. The first thing it shows is that
11 Congress did not intend to repeal section 92. The Second
12 Circuit has issued a decision on this issue since the D.C.
13 Circuit handed down the judgment in this case. And the
14 Second Circuit, in -- in holding that section 92 had not
15 been repealed, stressed the clarity of the evidence
16 showing that this is not what Congress had in mind.

17 And, indeed, the Insurance Agents, while they
18 are now defending the D.C. Circuit's decision that -- that
19 section 92 has been repealed, they do not claim, as I
20 understand it anyway, that Congress intended to repeal
21 section 92. But I don't want to give what I think is the
22 false impression that this case presents some sort of
23 clash between Congress's intent and -- and the text that
24 Congress enacted.

25 The second point that I think that a close

1 analysis of the documents that I want to direct the
2 Court's attention to this morning shows is that in fact
3 the text of those documents supports the conclusion that
4 section 92 was not repealed. And -- and I -- and I hope
5 to show that the only thing that's really on the Insurance
6 Agents' side of this dispute is some quotation marks. And
7 --

8 QUESTION: You -- you can't find the section in
9 the United States Code now, can you?

10 MR. WRIGHT: Well, it -- it is -- it is true
11 that in 1952 the compilers of the United States Code
12 replaced section 92 with a statement that says omit it.
13 And -- and it's followed by an explanation that section 92
14 was repealed in -- in -- in 1918.

15 QUESTION: And who were they, the compilers?

16 MR. WRIGHT: They -- they're -- they're an
17 official body whose statements about what the law is, is
18 prima facie evidence of what the law is. If I -- if I
19 may, I'd like to make two points about that, since --
20 since you brought it up.

21 First, the -- the 1926 edition of the U.S. Code;
22 the 1934 edition of the U.S. Code, the 1940 edition, and
23 the 1946 edition all contain section 92. That is to say,
24 the -- in fact, the 1926 edition of the U.S. Code was the
25 very first edition of the U.S. Code --

1 QUESTION: But, in any event, the code has
2 omitted it since 1952?

3 MR. WRIGHT: Since 1952, the Code has omitted
4 it.

5 QUESTION: And -- and yet the banking
6 authorities have continued to say it wasn't?

7 MR. WRIGHT: After the cod -- the second point
8 I'd like to make about that is after the 1952 codifiers
9 decided that the prior codifiers has been wrong --

10 QUESTION: Yeah.

11 MR. WRIGHT: And raised this issue, Congress
12 held hearings on the subject. And -- and apparently
13 decided that it'd stayed in effect since -- since Congress
14 has twice, in the last 11 years, actually amended section
15 92. Of course, the holding that section 92 was repealed
16 makes those congressional enactments totally superfluous.
17 The Controller, since -- since almost the day after
18 section 92 --

19 QUESTION: Yeah, but -- but it would seem to me
20 the banking authorities have any doubt about it would have
21 suggested that Congress, that they -- they enact something
22 called section 92.

23 MR. WRIGHT: Well, of course, if that had ever
24 happened, we wouldn't be here today.

25 QUESTION: Well, that's true.

1 MR. WRIGHT: But -- but -- but -- every --

2 QUESTION: Is that why they didn't do it? I
3 knew they must have had a reason?

4 (Laughter.)

5 MR. WRIGHT: But the -- a -- a -- as I say, the
6 regulations governing sales of insurance by banks in small
7 towns have been in effect since 1916, have continued in
8 effect to this day. This case just involved an
9 interpretation of -- of -- of whether -- of to whom banks
10 in small towns may sell insurance. And as I say, even the
11 insurance industry thought that there was no question
12 about the continued existence of section 92.

13 And as Judge Pratt emphasized in his District
14 Court opinion, you know, the banking industry has -- had
15 relied on this provision. A lot of banks in small towns
16 have made substantial investments in -- in the insurance
17 business. And -- and -- and have relied on the Controller
18 and everyone else's assumption in the operation of their
19 business to -- that section 92 exists.

20 Well, if I may, let me -- let me turn to these
21 documents for -- for a moment. I -- there are many
22 versions of them printed. I -- I have the -- the bank's
23 cert petition in front of me and -- and I was hoping to
24 direct the Court's attention to page -- page 77a of that
25 -- of the appendix to that petition, which -- which, on

1 that single page, presents two of the critical statutes
2 that are -- that are involved in this case.

3 The dispute between the parties re -- really
4 boils down to was this provision, section 92, was it added
5 to revise statute section 5202 or was it added to section
6 13 of the Federal Reserve Act? And both of those
7 provisions are actually printed on this page of the
8 appendix. Section 5202 is up at the top of the page. And
9 I'd just like to make a -- a brief note about that
10 provision.

11 It had actually been in effect in some form or
12 another since 1863. It -- and it had always dealt with
13 the same thing. It -- it -- it involves the excess
14 indebtedness that national banks may -- may incur. And
15 the version that's printed in the bank's appendix here is
16 the way section 5202 looked before section 13 of the
17 Federal Reserve Act was enacted in 1913.

18 Now, right under that, about halfway down the
19 page, is section 13 of the Federal Reserve Act just the
20 way it was printed in 1913, the -- the -- which is when
21 the Federal Reserve Act was enacted for the first time.
22 So everything in this provision basically is new, with one
23 exception. And I'd like to direct the Court's attention
24 to that exception which appears on page 79a of the
25 appendix.

1 QUESTION: When you say everything in this
2 section was -- now you're referring to section 13 of the
3 Federal Reserve?

4 MR. WRIGHT: That's right. Yes, Your Honor.

5 However, near the bottom of page 79 of the
6 appendix, you'll see a paragraph that begins: "Section
7 5202 of the revised statutes of the United States is
8 hereby amended so as to read as follows." And it then
9 reprints section 5202, the provision we were just looking
10 at, almost exactly the way it existed before 1913, with
11 one addition. And that addition appears on page 80a of
12 the appendix. It's the line that begins fifth, and says
13 that liabilities incurred under the provisions of -- of
14 the Federal Reserve Act, that banks may also incur those
15 in excess of their -- of their capital.

16 This is a -- a strange provision, at least
17 today, a peculiar practice, that section 5202 was amended
18 as part of the Federal Reserve Act, right in the middle of
19 a number of other provisions amending the Federal Reserve
20 Act.

21 This appendix doesn't show it, but we've just
22 been looking at the 1913 vers -- I mean of section 13, the
23 -- section 12 of the Federal Reserve Act is right before
24 what's printed here, section 14 of the Federal Reserve Act
25 is what comes right after what's printed here, and -- and

1 in fact it goes 1 through 16 around this. But at that
2 time Congress had the peculiar habit of occasionally
3 amending the revised statutes as part of an act.

4 I'd also like to direct the Court's attention to
5 the very next paragraph on -- on page 80a, a paragraph
6 that I think is very important. It's -- it's the key to
7 -- to our textual argument here today. It involves the
8 re-discount authority of -- of -- of Federal Reserve
9 Banks. That provision was clearly part of section 13 of
10 the -- of the Federal Reserve Act in 1913. And -- and
11 that's shown by -- by a couple of things, one of which is
12 reading the text. It very logically belongs in the
13 Federal Reserve Act.

14 This provision grants the Federal Reserve Board
15 authority over the rediscounting practices of Federal
16 Reserve Banks, and it logically belongs in the Federal
17 Reserve Act for that reason, rather than in some other
18 provision of the banking statutes.

19 Another thing about this provision is that it
20 includes the phrase, "this act." "This act" are the last
21 -- last word of the third line and the first word of the
22 fourth line. It is undisputed that "this act" means the
23 Federal Reserve Act. The Insurance Agents agree with us
24 on that. We say that it refers to the Federal Reserve Act
25 as this act for the straightforward reason that it was

1 part of the Federal Reserve Act.

2 Now --

3 QUESTION: Mr. Wright, can I interrupt you.

4 I -- I read these briefs a little while ago, and
5 it's hard to get the sequence in mind. On page 77a, the
6 section 13 was enacted in 1913, right. And then the --
7 what the bottom begins, "Powers of Federal Reserve Banks"
8 and so forth, was that also enacted in 1913?

9 MR. WRIGHT: Yes -- yes, Your Honor. The -- the
10 -- the --

11 QUESTION: Everything from 77a, on, is -- was
12 enacted in 1913?

13 MR. WRIGHT: Everything from 77a to 79a is -- is
14 all the 1913 version, Your Honor.

15 QUESTION: And we -- we -- and we have two more
16 -- there's a 1916 statute?

17 MR. WRIGHT: Yes, Your Honor.

18 QUESTION: And a 1918 statute we have to deal
19 with, right?

20 MR. WRIGHT: Yes, Your Honor.

21 QUESTION: Okay. Well -- well, you're just
22 concentrating on 1913 now?

23 MR. WRIGHT: Yes.

24 QUESTION: Okay. I want to be sure.

25 MR. WRIGHT: But if I may turn to 1916, that --

1 that is at page 67a of the appendix. And that is the next
2 -- the next few pages are all part of the 1916 amendments,
3 which is where most of our attention has -- has
4 concentrated in the briefs.

5 Let me -- let me point out, right at the top of
6 that page the title of this act. It says it's an act to
7 amend certain sections of the act entitled Federal Reserve
8 Act approved December 23rd, 1913.

9 Now, that title doesn't have controlling
10 authority, but as we pointed out in more detail in our
11 brief, the practice at that time was that Congress had two
12 kinds of titles. One was a descriptive title, you know,
13 an act to improve the Federal banking system or something
14 like that. The other sort of title Congress used was this
15 sort of title. It identified the acts that were being
16 amended.

17 Now, what it did when it listed the acts that
18 were being amended, it had some awfully long titles
19 because they listed everything that was being amended.
20 This one lists the Federal Reserve Act. It says nothing
21 about revised statute 5202 being amended. And that's
22 important because we don't think section 5202 was amended
23 in 1916, and the Insurance Agents think it was.

24 Now, towards the bottom of page 67a comes an
25 indentation, and then it says section 13 -- that section

1 13b and is hereby amended so as to read as follows. So
2 Congress is mending -- is amending section 13, which we
3 were looking at a minute ago. And the -- the bank, in the
4 appendix, has added these little numbers in the
5 parenthesis. Ever -- everything else is just the way it
6 appeared in the statutes at large, but there -- there are
7 then 10 -- 10 numbers in the margins which are -- which
8 were added by the bank.

9 The -- the Insurance Agents, the bank and the
10 Controller all agree that the first six paragraphs were
11 part of section 13. Where we start dis --

12 QUESTION: So the bracketed numbers in the
13 margins on page 60 and 69 were added by the parties to
14 this -- this case?

15 MR. WRIGHT: Yes, Your Honor.

16 Every -- everything else is the way it looked in
17 the statutes at large.

18 But when you get to page 70a and you get to that
19 paragraph that begins number 7, that's where -- that's
20 where there is some disagreement.

21 We contend that 7, 8, 9, and 10 are all part of
22 section 13 of the Federal Reserve Act. The Insurance
23 Agents say that they were all moved into -- into revised
24 statute 5202. And that's important to their argument
25 because they're going to say -- they then say that when

1 revised statute 5202 was amended in 1918 and Congress
2 didn't -- didn't include the paragraphs numbered 8, 9 and
3 10, those paragraphs all got repealed.

4 Now, I'd like to -- I'd like to focus again on
5 paragraph number 8, which is at the bottom of page 70a.
6 That's the paragraph I was looking at just a minute ago.
7 It is almost identical -- it's the rediscounting paragraph
8 -- it's almost identical to the paragraph the way it
9 existed in 1913. Just a couple of words were changed.

10 And I'd like to make the two points again that I
11 made before. First, it refers to "this act." We say it
12 refers to "this act" because it was part of the Federal
13 Reserve Act. And if we're right on that, we win this
14 case.

15 The second thing is that it again, just as in
16 1913, grants the Federal Reserve Board authority over
17 re-discounting practices of Federal Reserve Banks. This
18 provision belongs in the Federal Reserve Act.

19 Now, the argument to the contrary relies on --
20 on these quotation marks that you'll see if you look
21 closely at -- at the 1916 amendments. In paragraph 7,
22 following that introductory phrase about section 5202 of
23 the revised statute's being amended, there's a colon, and
24 then there are some open quotation marks. No closed
25 quotation marks appear again until after the paragraph

1 marked number 10, which precedes an amendment to section
2 14 of the Federal Reserve Act.

3 The Insurance Agents argue, on the basis of
4 those quotation marks, that Congress actually moved that
5 re-discounting paragraph out of section 13 of the Federal
6 Reserve Act and into section 5202 in 1916, and then, in
7 1918, omitted it altogether. And that's important in this
8 case because they contend that the same thing happened to
9 the paragraph numbered 9 here. And that paragraph
10 numbered 9 is the -- is the paragraph that's ultimately at
11 issue here. Nine is the one that grants banks in small
12 towns the authority to sell insurance.

13 QUESTION: And is it part of your submission,
14 Mr. Wright, that in the paragraph that's numbered 7 at the
15 very end, where it says "Fifth: Liabilities incurred
16 under the provisions of the Federal Reserve Act," that
17 that reference would have been unnecessary if section 7
18 was amending the Federal Reserve Act?

19 MR. WRIGHT: No, Your Honor, because section 7
20 is, as I -- as I tried to say at the start, it's just the
21 same as in 1913. It's this peculiar provision that's part
22 of section 13, but it's clearly meant to -- to amend
23 section 5202. So there was a separate section 5202 and it
24 was amended, and Congress knew that people were going to
25 -- were going to draw out section 5202 of the revised

1 statutes from time to time and look at this provision.
2 And it had to say -- Congress had to say Federal Reserve
3 Act in that provision because otherwise a reader of
4 section 5202 wouldn't know what -- what the provision was
5 talking about if it just said something like --

6 QUESTION: Yes, that was my point, since it
7 stood separately, it had to reference the act?

8 MR. WRIGHT: Yes, Your Honor.

9 "This act," in that next paragraph, on the other
10 hand, could logically say "this act" because it was part
11 of the Federal Reserve Act, in our view.

12 Now, let me say that there -- there -- Congress
13 actually took note of the quotation marks that are the
14 heart of the Insurance Agents' case. What happened -- and
15 this is detailed in the lodging that was filed by the bank
16 if you follow through all the documents -- when Congress
17 -- the original bill in 1916 included some quotation
18 marks, it did not include these confusing quotation marks
19 that were ultimately on -- in -- that ultimately appeared
20 in the statutes at large. The quotation marks that were
21 on the original bill just started at the beginning of
22 section 13 is hereby amended, and ended at the end. So
23 there is nothing about that original bill that would make
24 you think that section 92 got moved out of section 13.

25 In the Senate, Congress actually focused on

1 those quotation marks, had a brief discussion in which
2 everyone agreed they were confusing, voted to delete the
3 quotation marks, and in fact, in the final print of the
4 House bill and the final print of the Senate bill, there
5 are no quotation marks. Someone added them back in -- no
6 one knows whom -- they appear in the statutes at large,
7 though, and we acknowledge that. But the point --

8 QUESTION: Well, aren't we supposed to accept
9 that, then? You shouldn't tell us all of this, should
10 you?

11 MR. WRIGHT: Well, Your Honor --

12 QUESTION: I mean, we don't want to know that.
13 Don't we just take the statutes at large as they are?

14 MR. WRIGHT: Well, Your Honor, that's true.

15 QUESTION: Well, then, I close my ears,
16 Mr. Wright.

17 (Laughter.)

18 QUESTION: Mr. Wright, my ears are still open.

19 (Laughter.)

20 QUESTION: Let me just assure you that I follow
21 what you're saying, because it is --

22 QUESTION: Mr. Wright -- we're -- yeah, excuse
23 me.

24 QUESTION: I'm sorry, did I -- I didn't mean to
25 interrupt you.

1 QUESTION: No, I didn't -- I interrupted you.

2 QUESTION: I just -- would you tell us, looking
3 at 70a, where the quotation mark should be omitted and
4 replaced? Am I correct in thinking that the run-over
5 paragraph on 70a, which ends with a quotation mark after
6 United States, that is the quotation mark you say should
7 be omitted? They intended -- that you say would -- to get
8 the proper meaning across, should be ignored?

9 MR. WRIGHT: That's -- that's -- that's probably
10 right, if those -- if those closed quotation marks weren't
11 there, I don't think we'd have a problem.

12 QUESTION: And do you think that there were
13 intended to be quotation marks -- opening quotation marks
14 in front of section 5202 on the next --

15 MR. WRIGHT: Well, Your Honor, that's the way it
16 appeared on the original bill.

17 QUESTION: But, in other words, what we do -- if
18 you're to follow you, you would move the closed quote from
19 after United States to an open quote beginning with
20 section 15?

21 MR. WRIGHT: Your Honor, I think that that's --
22 that that's probably what Congress really meant. That's
23 the way it appeared on the original bill. Remember,
24 though, if you're talking about what Congress intended
25 here, Congress actually voted to get rid of these

1 quotation marks. They didn't want them at all.

2 QUESTION: But what I'm trying to find out is
3 where should we place the quotation marks where we will
4 best understand your understanding of what the statute
5 really means.

6 MR. WRIGHT: If you place them exactly where you
7 just suggested. If you get rid of that closed quotation
8 marks and move the open quotation marks to the beginning
9 of section 5202 --

10 QUESTION: And then what do you do with the
11 opening quotation mark after the colon in the third line,
12 before National Bank, do you make that an internal quote?

13 MR. WRIGHT: I -- I moved those to the beginning
14 of section 52 --

15 QUESTION: You moved those to the beginning.

16 MR. WRIGHT: Right.

17 QUESTION: So it says to read as follows, and
18 you don't put any quotes around what is to read as
19 follows?

20 MR. WRIGHT: No. That's -- that's the way it
21 appeared. There were no quotation marks after that colon
22 on the original bill. I think that that's probably the
23 fairest guide to -- to what --

24 QUESTION: You put a closed quotation mark at
25 the end of the sentence marked "Fifth: Liabilities

1 incurred under the provisions of the Federal Reserve Act"?

2 MR. WRIGHT: Well, if you did that, certainly --

3 QUESTION: It would make it really clear?

4 MR. WRIGHT: Yeah, that would make it really --

5 I don't think you need to do that, but that would --

6 QUESTION: That would make it even more clear, I
7 think?

8 MR. WRIGHT: That would certainly solve matters,
9 yeah.

10 QUESTION: But, Mr. Wright, the enrolled bill
11 have the quotation marks as we find it here.

12 MR. WRIGHT: Yes, Your Honor.

13 QUESTION: And that's what the President signed.

14 MR. WRIGHT: Yes, Your Honor.

15 QUESTION: So we have to accept that, don't we?
16 I mean, goodness.

17 MR. WRIGHT: Well, I -- I -- I think you do, but
18 the enrolled bill also had the text of the provision. It
19 had -- it had that rediscount provision that I've been
20 pointing to. It had the word "this act" in that
21 provision, which meant the Federal Reserve Act.

22 QUESTION: But so far as the quotation marks
23 argument is concerned, the enrolled bill had them. And we
24 don't go behind that.

25 MR. WRIGHT: That's correct, Your Honor.

1 QUESTION: So, I'm a little bit surprised that
2 you would rest your argument at all on that.

3 MR. WRIGHT: My argument is that they were not
4 meant to have interpretive significance and that there is
5 textual ambiguity on the enrolled bill. Because the
6 enrolled bill, besides the quotation marks, also had the
7 phrase, "this act," also had the text of paragraph 8 in
8 its entirety, which logically belongs in the Federal
9 Reserve Act.

10 If you follow these quotation marks and give
11 them the meaning that the Insurance Agents say they should
12 have, you do violence to the actual words that Congress
13 enacted. And in our view, the words of what Congress
14 enacted deserve more significance than the quotation marks
15 that were part of the enrolled bill. And I think once
16 we've introduced this textual ambiguity, under anyone's
17 view, it should be perfectly fair to look at what Congress
18 -- how those quotation marks got there.

19 And when you look at how those quotation marks
20 got there, it is absolutely clear to anyone that Congress
21 didn't mean to have them there. And it's just as clear in
22 1918 that Congress didn't intend to get rid of this
23 provision.

24 QUESTION: But you would simply win if we sort
25 of followed a rule that when the ambiguity is created as

1 between punctuation and verbal text, the verbal text
2 controls?

3 MR. WRIGHT: Exactly, Your Honor.

4 QUESTION: That's all you need?

5 MR. WRIGHT: That's right.

6 And -- and if you -- and if you adjust that rule
7 to say, well, there is some ambiguity here, we're going to
8 take a look at what Congress intended, we're going to look
9 at the drafting history and that sort of matter, then we
10 surely win. Because it certainly would be a perverse rule
11 to resolve the ambiguity on the enrolled bill by holding
12 that Congress repealed a statute in the face of pretty
13 clear evidence that it didn't mean to do that.

14 QUESTION: Have our -- any of our previous cases
15 dealing with the enrolled bill doctrine indicated that an
16 ambiguity is sufficient to go behind the enrolled bill?

17 MR. WRIGHT: I -- I don't -- I don't recall any
18 case like that, Your Honor. There certainly haven't been
19 many. But I don't know what else the Court could do if
20 there's an ambiguity on the enrolled bill. It has to be
21 resolved.

22 QUESTION: Well, isn't another way of dealing
23 with it, though, simply to say don't go behind the
24 enrolled bill, but make a choice between the two signals
25 in the enrolled bill, and the verbal signal is the one

1 that controls over the punctuational signal?

2 MR. WRIGHT: There are certainly plenty of cases
3 of this Court saying that punctuation is the poorest guide
4 to Congress's intents. Surely the text ought to control
5 over the punctuation.

6 QUESTION: Mr. Wright, you may be arguing the
7 other side of that some day. Do you really want us to
8 adopt that rigid a rule, that the word always governs over
9 the punctuation? I mean, surely how much sense -- how
10 much sense it makes with different punctuation, versus how
11 much sense it makes with different languages enters into
12 the matter? I mean, you know, how much of a -- of a
13 seeming -- seemingly foolish bill is created if you -- if
14 you ignore the punctuation, versus how much of a seemingly
15 foolish bill is created if you ignore the language.

16 I think it's a very rigid rule to say just
17 ignore it.

18 MR. WRIGHT: It's -- it's hard to imagine every
19 possible future case. I certainly wouldn't have imagined
20 this. But I think that we're very comfortable with the
21 general rule that the words almost always mean more than
22 the punctuation.

23 If there are no further questions, at this time
24 I would like to reserve the remainder of my time.

25 QUESTION: Very well, Mr. Wright.

1 Ms. Kappler, we'll hear from you.

2 ORAL ARGUMENT OF ANN MARY KAPPLER

3 ON BEHALF OF THE RESPONDENT

4 MS. KAPPLER: Mr. Chief Justice, may it please
5 the Court:

6 The Petitioners assert that law exists which
7 permits national banks to sell insurance in small towns.
8 Now, as Justice White pointed out, that law cannot be
9 found in the U.S. Code, in the current version of the U.S.
10 Code. That creates a statutory presumption that no such
11 law is in force.

12 QUESTION: Well, may I ask you. Do you think
13 the changes in the U.S. Code after the enactment of this
14 statute have any bearing on what was intended when the
15 statute was enacted?

16 MS. KAPPLER: No, Your Honor, I do not think
17 they have any bearing, Your Honor.

18 QUESTION: Well, then, shouldn't we look at the
19 U.S. Code for the period right after the enactment, rather
20 than today?

21 MS. KAPPLER: No, Your Honor. The statutory
22 provision expressly states that it's the current version
23 of the Code that creates prima facie evidence of what law
24 is in force today. Therefore, Congress wants litigants to
25 look at today's Code, not at the 1950 version of the Code,

1 not at the 1926 version of the Code.

2 QUESTION: Well, let me just be sure I
3 understand you. Are you saying that in 1952, or whenever
4 it was, when the Code was published omitting this section,
5 that that worked a change in the law?

6 MS. KAPPLER: It worked a change in the
7 presumption, Your Honor, not a change in the law, whether
8 it existed or not. But, yes, it changed the presumption.

9 When the law was on the books in the U.S. Code,
10 the presumption was that it was in force. Once it was
11 omitted, and it has been omitted for the last 40 years, it
12 is not the presumption that it is not in force.

13 In either way --

14 QUESTION: Well, but changing the presumption,
15 in your view, must have changed the law, too?

16 MS. KAPPLER: No, Your Honor. In either way, we
17 can see that -- that it can't be contradicted by the
18 statutes at large. But Petitioners are here trying to
19 demonstrate to you that the statutes at large actually
20 present a law that is in force that permits national banks
21 to sell insurance.

22 Now, that provision appears once in the statutes
23 at large. And that's in 1916. On its face, the enrolled
24 bill, which is exactly the same as the statutes at large,
25 of that 1916 act places section 92 in revised statutes

1 5202. And it does both with language and with
2 punctuation. It begins by stating: Revised statutes 5202
3 are hereby amended to read as follows.

4 QUESTION: Do you have a place that we can
5 follow you, Ms. Kappler?

6 MS. KAPPLER: Certainly, Your Honor.

7 Using, again, the Bank Petitioner's cert
8 petition at page 70a, in the appendix of that. And this
9 is the paragraph that is noted as bracketed number 7. It
10 begins by stating: "Section 5202 of the revised statutes
11 of the United States is hereby amended so as to read as
12 follows."

13 It then sets out the series of paragraphs. And
14 it includes those paragraphs within bracket and quotation
15 marks.

16 Now, as this Court held in Nashville Milk, the
17 only way to interpret those words and those quotation
18 marks is as amending a statute and as setting out in haec
19 verbia the new amended version of 5202.

20 QUESTION: Ms. Kappler, I can agree with that,
21 but what do you do with the language, "this act," which
22 appears in paragraph 8? That makes no sense as included
23 in section 5202, does it?

24 MS. KAPPLER: Correct -- no, Your Honor, it does
25 make sense. And I think it's important to understand how

1 laws were made. At the time, there was no code. What --
2 what we had -- if you wanted to figure out what the law
3 was in 1916, you went first to the revised statutes. That
4 was a compilation of all the laws that had been passed up
5 through 1873. It was essentially a code.

6 From there on, however, you had to work your way
7 chronologically through the revised statutes. So, if
8 someone wanted to know what 5202 of the revised statutes
9 was in 1916, they have to begin with the revised statutes
10 and work there way through.

11 Now when they reach the text of the 1916 act,
12 they would read -- read through, and the text would say --
13 they would come to a reference of "this act" and it would
14 refer to the 1916 act. That is that 5202 is not moving
15 anyplace. The only place anyone is going to read it is
16 right there in the text of the 1916 act.

17 This act was in fact used by Congress at the
18 time as a reference to the very act that was enacting the
19 words.

20 QUESTION: Well, that makes perfect sense if the
21 provision in which this act appears is the provision which
22 expressly speaks of an amendment taking place. But it
23 doesn't make sense if this act occurs in the text which is
24 supposed to be the result of the amendment, or the result
25 of the reenactment. And we're in -- we're in the second

1 situation here, aren't we, or at least arguably so?

2 MS. KAPPLER: No, Your Honor. I think exactly
3 how someone would understand this -- well, first of all,
4 there are two ways someone would -- and we absolutely
5 agree, this act refers to the Federal Reserve Act, as
6 amended, as first passed in 1913, and then as amended in
7 1916. And there are two ways anyone who read this would
8 understand that.

9 First of all, it could only refer to the Federal
10 Reserve --

11 QUESTION: When you say "this," again, you are
12 referring to that paragraph right at the 7 in the margin.

13 MS. KAPPLER: Now I'm referring to paragraph --
14 what is bracketed number 8.

15 QUESTION: Okay.

16 MS. KAPPLER: It's the paragraph that follows
17 afterwards on page 70a. And it's this -- the use of the
18 phrase, "this act," on which the Petitioners hinge their
19 entire textual argument. If someone is reading this,
20 they're only going to read it in the context of the 1916
21 act. It's going to make reference to "this act," the 1916
22 act. They're not going to read it anywhere else, because
23 that's the way in which laws were made.

24 That's why it's not insignificant that when a
25 code was finally created, the codifiers replaced the

1 phrase, "this act," every time they saw it, and replaced
2 it with a reference to whatever the particular statute was
3 in which the phrase appeared.

4 QUESTION: Well, why is it then in the previous
5 paragraph that the statute uses the word the Federal
6 Reserve Act?

7 MS. KAPPLER: Well, I will agree, Your Honor,
8 that the -- that Congress was not stylistically
9 consistent. Whether they did that for absolute clarity or
10 not, I do not know, Your Honor. But I will agree they
11 were not consistent. But there's no ambiguity in
12 understanding what "this act" meant. And even when you
13 look -- even if there was --

14 QUESTION: Well, of course, there's no
15 ambiguity, but there's only -- there's no ambiguity
16 because it seems to me very clear that the one is intended
17 to be in 5202, and that's why they say the provisions of
18 the Federal Reserve Act, and the other one is meant to be
19 in this piece of statute that's being amended.

20 MS. KAPPLER: Well, Your Honor, the problem,
21 though, is that this piece of statute that's being amended
22 did two things. The 1913 act, when it was amended, did
23 two things. It created new law, creating the Federal
24 Reserve system, and it amended not just 5202, but 10
25 different sections of the revised statutes.

1 So to simply refer to the Federal Reserve Act is
2 to refer both to the newly enacted law, the Federal
3 Reserve system, and the amendments it made to preexisting
4 law. That's why Petitioners arguing about the title is an
5 entire red herring. I mean, of course, Congress could say
6 we are enacting -- this is an act to amend certain
7 sections of the Federal Reserve Act. But the Federal
8 Reserve Act included within it amendments to revised
9 statutes 5202. So there was absolutely no reason to
10 repeat that.

11 QUESTION: What did section 5202 deal with
12 before it was amended in 1913?

13 MS. KAPPLER: Section 5202 is derived -- its
14 origin is a section of the National Bank Act. And it
15 specifically dealt with limitations on indebtedness that
16 national banks could incur. And it's our proposition,
17 Your Honor, that that's why in fact Congress could
18 sensibly place section 92 in the revised statutes 5202.

19 The Comptroller, who is the one who suggested
20 that section 92, this permission for banks to sell
21 insurance, be enacted, specifically proposed it to be an
22 amendment to the National Bank Act.

23 Now --

24 QUESTION: What's that got to do with the
25 relationship between debt to capital?

1 MS. KAPPLER: Your Honor, I'm not sure it has a
2 relationship to debt to capital. But what Congress --

3 QUESTION: Well, isn't that what 5202 is dealing
4 with?

5 MS. KAPPLER: But 5202, Your Honor, is part of
6 the National Bank Act. The provisions which the
7 Petitioners want you to insert it -- to group it together
8 with are provisions which have nothing to do with the
9 powers of national banks. They want you to group it
10 together with language that has to do with the banking
11 powers of Federal Reserve Banks.

12 This had to do with the non-banking powers of
13 just national banks, not Federal Reserve Banks at all.

14 Now, the fact of the matter is, when Congress
15 enacted this law, section 92, it evidently didn't want to
16 just write a new law -- propose a separate bill, but
17 wanted to propose it as an amendment to a bill that was
18 already in front of it.

19 QUESTION: You may be right that -- that
20 paragraph 9 might have some connection with liabilities,
21 but paragraph 8 has no relevance to what 5202 deals with.

22 MS. KAPPLER: That's correct, Your Honor. Nor
23 does section 10. And that's why it is folly for this
24 Court to try to entertain questions of where should these
25 paragraphs go, cutting and pasting where they're connected

1 with, and should follow the signals that Congress provided
2 in the enrolled bill. That is, the opening and closing
3 quotation marks.

4 Now, the fact of the matter is, neither our
5 interpretation of the statute, which would group all three
6 of these paragraphs in 5202 as the quotation marks exactly
7 show -- and there's no other way to read them -- that is
8 not particularly sensible with those two paragraphs
9 surrounding 92. But neither is Petitioners' argument.
10 And you'll notice in their half an hour of argument, they
11 made absolutely no attempt to justify why Congress would
12 have put a provision allowing national banks to sell
13 insurance together with the rest of this Federal Reserve
14 Act.

15 If the Court is going to engage in cutting and
16 pasting, then section 92 should logically be fitted with
17 section 5202, and those other two paragraphs should be
18 fitted with the rest of the text. But this Court is not
19 about making sensible law or law that makes sense -- that
20 reads smoothly. What this Court has to do is give effect
21 to the text that's on the page. And on the page here we
22 have opening and closing quotation marks that cannot be
23 read any other way.

24 Now, the Petitioners, although they pose this as
25 a way of sort of statutory construction, in fact, they are

1 asking this Court to erase, to ignore the quotation marks.
2 And the reason they're doing that is because there's no
3 other way to read those quotation marks, except but
4 enclosing what is revised statutes 5202.

5 QUESTION: Is this provision that's marked 8
6 here the only provision in the Federal Reserve Act that
7 applies specifically to national banks?

8 MS. KAPPLER: Paragraph 9 you mean, Your Honor,
9 the one that --

10 QUESTION: Yes. Yes. Paragraph 9.

11 MS. KAPPLER: No, there are other provisions
12 which -- which relate to national banks. However, they
13 relate to national banks as they are functioning within
14 the Federal Reserve system. Both State banks and national
15 banks could become part of the Federal Reserve system.

16 So that, in other places where there is mention
17 of national banks, it's in connection with their
18 interaction, either with the Federal Reserve Board or with
19 Federal Reserve Banks. This is the only section that
20 talks specifically about simple stand-alone powers of
21 national banks.

22 QUESTION: Are there -- were there other
23 statutes enacted later that applied only to national banks
24 and that were outside of the Federal Reserve Act?

25 MS. KAPPLER: Your Honor, the preexisting

1 National Bank Act, which was codified as such in different
2 sections of the revised statutes, did just that. It
3 created national banks and gave them specific powers.
4 They are only creatures of statute.

5 I -- as to a specific question of what happened
6 afterwards --

7 QUESTION: But -- but -- but afterwards?

8 MS. KAPPLER: I don't know, Your Honor. I don't
9 know the answer to that question. I do not know whether
10 the -- I know that the National Bank Act was -- sections
11 of the National Bank Act were subsequently amended without
12 amending the Federal Reserve Act. But I don't know the
13 answer to your specific question, Your Honor.

14 QUESTION: May I ask. Did -- does the present
15 version of the code omit all three paragraphs, 8, 9 and
16 10?

17 MS. KAPPLER: Yes, Your Honor, it does.

18 QUESTION: Right.

19 MS. KAPPLER: And they are deemed repealed with
20 the exact same explanation that is given as to section 92.

21 QUESTION: And what do you -- how do you explain
22 the subsequent statutes that amend this nonexistent
23 provision? What do you do with those?

24 MS. KAPPLER: Well, as Mr. Wright has conceded,
25 a subsequent Congress cannot amend a nonexistent statute.

1 Now, the fact of the matter is that Congress, in
2 1982, apparently assumed that section 92 was still in
3 existence. And it sought, purported, to strike out a
4 provision of that law. But as this Court explained as
5 long ago, in Town of South Ottawa, Congress can't because
6 it presumes a law is in effect -- and effectively reenact
7 it.

8 QUESTION: No, but surely in deciding what a law
9 means, we try to reconcile new laws with old laws, and
10 read them together in such a way that they -- that they
11 make sense, one with the other. And if it's possible to
12 read the old law in such a way that the new amendments are
13 not vain acts, why shouldn't we read it that way?

14 MS. KAPPLER: Well, first of all, Your Honor, we
15 don't concede that it's possible to read the 1916 act any
16 other way. But, second, there's no evidence here that
17 Congress, in 1982, or again, later on, when it sought to
18 impose a moratorium, focused at all on the issue of
19 whether section 92 is in existence or not.

20 The one time in which -- well, two times -- in
21 which Congress actually focused on that issue were in
22 1958, when there was a lot of dispute as to whether
23 section 92 was in existence or not, and evidence was
24 submitted on both sides. And Congress specifically said
25 they couldn't resolve the issue.

1 Now, Justice White, you asked the question, why
2 didn't the Comptroller ask to have the law reenacted. In
3 fact, the Federal Reserve Board specifically wrote to the
4 House Judiciary Committee, and it's the House Judiciary
5 Committee that's in charge of writing the code, stating
6 that they thought the omission was wrong; that section 92
7 should be put back in; you've made a wrong judgment.

8 In 1958, the chairman of the House Judiciary
9 Committee testified, no, we think we're exactly right. It
10 was -- it was omitted purposefully. We made a conscious
11 decision. That's why it's not there. This -- the person
12 who said they made the conscious decision was the chairman
13 of the House Judiciary Committee, who testified during the
14 hearings in 1958. It's the House Judiciary Committee
15 that's charged by Congress with creating the code.

16 Again, in 1965 --

17 QUESTION: Well, then, was there -- there wasn't
18 a committee report on that? That was just his testimony?

19 MS. KAPPLER: It was his testimony, correct,
20 Your Honor. It was accompanied by the Law -- the Law
21 Revision Counsel, who is the person appointed by the
22 Speaker of the House of Representatives to be in charge
23 with the revisions.

24 QUESTION: And do you think you -- what if this
25 case had come up before 1952, do you think you could have

1 won?

2 MS. KAPPLER: Yes, Your Honor, I do. Because I
3 think the statutes --

4 QUESTION: And you could have overcome the
5 presumption?

6 MS. KAPPLER: Correct, Your Honor, because I
7 think the statutes at large are clear. Correct, Your
8 Honor.

9 I'm sorry, Justice Stevens.

10 QUESTION: I was just curious, who was the
11 chairman? Was that Congressman Celler?

12 MS. KAPPLER: It was not, Your Honor. I think
13 it's Coffee. And we do cite him in our brief. I want to
14 say it's Coffee, but I may be incorrect at the time.

15 In terms of what Congress then -- Congress did
16 in enacting, and the only way in which Congress can revive
17 section 92 is by going through the bicameral motions under
18 the Constitution, presenting it to the President, and
19 having it signed into law. No Congress has done that
20 here.

21 And if we're asking the question: What did the
22 post-1918 Congresses think, one way or another? They were
23 of mixed views. And the fact of the matter is, no matter
24 what these later Congresses thought, unless they reenacted
25 the law, they could not in any way revive the law.

1 QUESTION: May I ask. I know you think the law
2 is perfectly clear, but assuming that we thought there was
3 an ambiguity, a tension between the language and the
4 quotation and the punctuation, do you think it would be
5 permissible to look at the legislative history to try and
6 resolve the ambiguity?

7 MS. KAPPLER: No, Your Honor, not the way the
8 Petitioners ask you to do. The case --

9 QUESTION: Well, that's the way I asked you to.
10 Normally, we often look at legislative history. Some of
11 us think we shouldn't, but do you think the Court would be
12 -- and consistent with normal statutory construction
13 principles, would be permitted to look at legislative
14 history?

15 MS. KAPPLER: Yes, Your Honor, but the
16 legislative history would get you nowhere here. And the
17 fact of the matter is, there was no discussion at any
18 point in time about where this paragraph should be placed.
19 That is, whether it should be placed in 5202 or elsewhere.

20 QUESTION: No, but wouldn't it be relevant if
21 there's an absence of any stated reason for repealing
22 these provisions, whereas the discussion makes sense if
23 you -- if you treat it the way the Government would
24 interpret it? Isn't that relevant?

25 MS. KAPPLER: Well, Your Honor, what the 1918

1 Congress thought it was doing is not relevant to what the
2 1916 Congress did in enacting the law in 1916.

3 Now, in terms of what the 1918 Congress did, of
4 course, the best evidence of its purpose is the text of
5 the 1918 act, which restated 5202 without section 92.

6 QUESTION: And there is no ambiguity in that,
7 that would justify going to legislative history, even if
8 one were so disposed?

9 MS. KAPPLER: Correct, Your Honor. And even if
10 --

11 QUESTION: But doesn't that simply prove that
12 what the case turns on is not what the 1918 act provided,
13 but what the 1916 act provided?

14 MS. KAPPLER: Well, I think that's right.
15 Ultimately, it does, Your Honor. I think that is correct.
16 Of course, what this Court is going to be giving effect to
17 is what the 1918 Congress did, in light of the 1916 act.
18 But the question does, we would agree, turn on whether
19 section 92 is part of 5202 or not part of 5202.

20 QUESTION: Were there any committee reports at
21 all indicate what would be today a section-by-section
22 analysis of the 1916 act?

23 MS. KAPPLER: No, Your Honor -- not to my
24 knowledge, Your Honor. I -- I do know, in reading through
25 the descriptions of the act, there is nothing that

1 describes either the -- the section 92. That is, the
2 paragraph that allows them to sell insurance, nor section
3 13, that would give you one clue -- one, either way or
4 another.

5 There is simply no discussion at all, frankly,
6 of this new provision to allow banks to sell insurance.
7 It was introduced as an amendment on the floor in the
8 Senate after committee, and then there was no discussion.

9 If there's any indication as to where it should
10 go, it is the Comptroller's suggestion that it may be part
11 of the National Bank Act, and revised statutes 5202 is the
12 only provision in the 1916 act that comes from the
13 National Bank Act, and Senator Owen's suggestion,
14 admitting it, that it go in precisely after this
15 introductory -- introductory clause introducing revised
16 statutes 5202.

17 QUESTION: Amendments to a nonexistent provision
18 -- I suppose those amendments were -- passed both houses
19 and they were signed by the President?

20 MS. KAPPLER: Correct, Your Honor. But they
21 have no -- Congress cannot amend a nonexistent law.

22 Now, if Congress had enacted -- essentially,
23 reenacted the law, then we would -- we wouldn't be here
24 today. But what Congress purported to do was strike out
25 --

1 QUESTION: So, if they'd a said section so and
2 so is amended to read as follows?

3 MS. KAPPLER: Correct, Your Honor, that we would
4 be in a very different situation.

5 QUESTION: Well --

6 MS. KAPPLER: In that -- in that instance, as
7 this Court has said time and again --

8 QUESTION: Well, there -- at the same time,
9 however, there wouldn't have been a -- by your account,
10 there wouldn't have been a provision to amend.

11 MS. KAPPLER: Well, I think it turns on the
12 question of whether amended -- whether Congress would be
13 constrained by the use of the word amended to read as
14 follows. This Court has interpreted that -- that language
15 as meaning that Con -- what Congress intended to do was
16 enact an entirely substitute provisions.

17 QUESTION: So you think there's really -- you
18 think there's really a major difference between that way
19 of amending and the way they actually amended it?

20 MS. KAPPLER: Yes, Your Honor. I think there is
21 a large difference between Congress reenacting new
22 language and showing in fact that they are reenacting --

23 QUESTION: Well, they didn't reenact new
24 language. They said that -- they -- well, they did
25 rephrase what they thought was a -- a -- a statute already

1 on the books.

2 MS. KAPPLER: They struck out what they thought
3 was a statute that was already on the books. But they
4 were wrong. And as Con -- you know, as this Court noted
5 in Town of South Ottawa, whether by inadvertence or
6 whether they were misled by the parties who were lobbying
7 at the time, it can't effect a reenactment of a law that
8 wasn't in existence.

9 QUESTION: Of course, the Town of Ottawa case
10 was talking about something done by the Illinois
11 legislature, and this Court was really just upholding the
12 ruling of the Illinois Supreme Court in that case. I
13 don't regard that as quite the same as if the case had
14 been discussing an act of Congress.

15 MS. KAPPLER: Well, correct, Your Honor.
16 Although what -- what the Court was articulating was --
17 was a theory of statutory constructure -- construction,
18 and the notion of exactly what has to happen in order for
19 an act to be passed.

20 There's no court that I know of, and certainly
21 Petitioners have cited no court which -- which has ever
22 held that by striking out or seeking to strike out a
23 provision of a repealed statute it effectuates a
24 reenactment of that law.

25 Chadha makes quite clear you have to go through

1 the very precise constitutional steps in order to enact a
2 law. For instance, if Congress held a lot of hearings and
3 -- and you read through the hearings and read through the
4 committee reports, and it looks as if Congress really
5 wanted national banks to sell insurance, if they didn't
6 pass the law, if they didn't write it on -- on a piece of
7 paper that became the enrolled bill and present it to
8 Congress, it doesn't matter what they thought was good
9 policy or whether they wanted to enact it.

10 One thing I think is helpful in terms of trying
11 to figure out what the 1918 Congress did, is not just --
12 you need not only focus on what the text of the 1918 act
13 says, which clearly restates 5202, omitting section 92,
14 but every extant description, apart from the statutes at
15 large, of section 5202 showed section 92 as part of 5202.

16 And as the Court of Appeals noted, there were
17 two privately published compilations that tried to create
18 a code, the kind of code that we now have and can rely
19 upon. Both of those private publishers placed section 92
20 in 5202.

21 In addition, and the Court of Appeals did
22 overlook this, there was a compilation created by the
23 Comptroller of the Currency. Now, Petitioners
24 misleadingly describe that compilation. In fact, that
25 compilation clearly sets out section 92 in only one place.

1 That place is within revised statutes 5202.

2 There is a section of the Comptroller's
3 compilation which seeks to sort of put together the
4 current version of all the revised statutes. So they set
5 out in 5202 and then list the paragraphs that are included
6 within it. Included within that is section 92.

7 In a separate section --

8 QUESTION: Did 92 appear somewhere else in that
9 compilation, too?

10 MS. KAPPLER: Yes, Your Honor, it did. And
11 where it appeared was in the Comptroller's description of
12 the Federal Reserve Act, as amended up through that date.
13 The Federal Reserve Act was first enacted in 1913, amended
14 twice in 1914, one in 1915, and then we have this 1916
15 amendment.

16 What the Comptroller did there was to pull
17 together all of those amendments. But he made no attempt
18 to peel away the sections of the Federal Reserve Act that
19 were amendments to preexisting law. So when you read
20 through the text of the Federal Reserve Act, it includes
21 amendments to at least 10 different sections of the
22 revised statutes, and sets it out in text describing it,
23 beginning with section 5202 is hereby amended to read as
24 follows.

25 QUESTION: Well, assuming that the Comptroller's

1 own compilation was therefore ambiguous, would it be a
2 fair maybe speculation as to where it -- that on that
3 assumption that one purpose of the 1918 amendment to 5202
4 was in fact to clear up that ambiguity, and make it clear
5 that section 92 was in the Federal Reserve Act and not in
6 5202?

7 MS. KAPPLER: There was no ambiguity, Your
8 Honor. There is only one way you can read it.

9 QUESTION: No, but I mean, if you assume there's
10 an ambiguity created by the Comptroller's own compilation
11 merely by virtue of the fact that section 92 appears in
12 two places, might -- well, let's just stipulate that we
13 could describe that as an ambiguity -- might that be a
14 purpose -- have been a purpose of the 18 amendment?

15 MS. KAPPLER: No, Your Honor, because the 1918
16 act would not have cleared up the ambiguity. What the 19
17 --

18 QUESTION: Well, why wouldn't it have cleared it
19 up by making it clear that section 92 was not part of
20 5202?

21 MS. KAPPLER: Because then what you would have
22 is two different versions of 5202 -- one that was enacted
23 that's a stand-alone provision that was amended in 1918,
24 and one that's embedded somehow within the Federal Reserve
25 Act that wasn't change. The 1918 act --

1 QUESTION: Oh, you're saying the only way they
2 could have done that would have been unambiguously to take
3 52 out -- 5202 out of the Federal Reserve Act completely?

4 MS. KAPPLER: Correct, Your Honor.

5 The 1918 act did more than just strike out
6 section 92. It added a new limitation. Correct, Your
7 Honor.

8 QUESTION: Ms. Kappler.

9 MS. KAPPLER: Yes.

10 QUESTION: Now, none of these arguments were
11 made in the Court of Appeals?

12 MS. KAPPLER: That's correct, Your Honor.

13 QUESTION: And do you concede that the Court of
14 Appeals, nonetheless, had jurisdiction and power to reach
15 the issues?

16 MS. KAPPLER: I think there's no question that
17 it had jurisdiction and power. And certainly the United
18 States agrees, Your Honor. It's a matter of discretion as
19 to whether the Court should reach the issue. And the
20 Petitioners, the United States -- the bank does not agree
21 -- but the United States agrees that there was a proper
22 exercise of jurisdiction here, and a proper exercise of
23 discretion.

24 Just as the Court in Arcadian and Kamen found
25 that it could resolve legal issues on grounds not

1 presented or not argued by the parties, so too the Court
2 of Appeals had the authority to do so, and properly
3 exercised its discretion here.

4 QUESTION: It would be a rather strange doctrine
5 if this Court accept only the arguments of one side or the
6 arguments of the other, and couldn't possibly think the
7 thing through for itself.

8 MS. KAPPLER: Correct -- correct, Your Honor.
9 It would be an odd game of sorts, yes.

10 Unless there is anything further.

11 Thank you.

12 QUESTION: Very well, Ms. Kappler.

13 Mr. Wright, you have four minutes remaining.

14 REBUTTAL ARGUMENT OF CHRISTOPHER J. WRIGHT
15 ON BEHALF OF PETITIONERS

16 MR. WRIGHT: Thank you, Mr. Chief Justice.

17 I'd like to direct the Court's attention to
18 these documents. We were said to have been misleading
19 about what was in the -- this is a 1917 collection of the
20 banking laws that the Controller of the Currency compiled
21 and was published by the Senate. It's an official Senate
22 document. This is what Justice Souter was referring to a
23 minute ago.

24 QUESTION: Do we -- Mr. Wright, just a technical
25 question. I just can't remember this from the briefs. Is

1 there a citation to this or a title to this book?

2 MR. WRIGHT: Yes, Your Honor. This is Senate
3 document 412, and it's cited in the briefs.

4 In 1917, what the Controller thought had
5 happened in 1916 was that section 92 appeared twice. It
6 appears in the Federal Reserve Act and it appears in the
7 National Banking Act. Now, this is another -- this is --
8 and this is actually I think the more significant document
9 -- it's also cited -- this is the 1920 compilation, after
10 everything that's most relevant had happened, at the end
11 of the day, the Senate published another collection of the
12 banking laws. It was also compiled by the Controller.

13 The Controller thought that section 92 was still
14 in existence, and it was still in existence in only one
15 place, in section 13 of the Federal Reserve Act. And, as
16 Justice Souter said, one explanation -- in fact, the
17 explanation that flows most logically from the D.C.
18 Circuit's reasoning is that Congress may well have thought
19 that two versions of -- two versions of section 92 were
20 one too many, and it cured that in 1918. And after 1918,
21 there was one and only one version of section 92 and it
22 was located in the Federal Reserve Act, until 1926, when
23 the first compilers of the U.S. Code moved it to 12 USC,
24 section 92.

25 QUESTION: Mr. Wright, as I understand it, you

1 do not contest the point in principle that Congress may
2 have been ineffective in enacting its intent? I mean,
3 that that is theoretically possible?

4 MR. WRIGHT: There is certainly one reading of
5 those quotation marks that is contrary to what Congress
6 intended --

7 QUESTION: And -- and that if it was, then
8 Congress simply failed to enact what it meant to enact?
9 That that is a possibility -- that is possible,
10 theoretically possible?

11 MR. WRIGHT: That is possible. And -- and the
12 confusion is illustrated by that 1917 compilation I was
13 just referring to which showed section 92 twice. But the
14 1920 compilation shows it once, and for 70 years everyone
15 has assumed that -- everyone has operated on the
16 assumption that section 92 is in existence.

17 QUESTION: Mr. Wright, what about those other
18 sections, other than 92? How about -- is section 92
19 roughly what paragraph 9 is on 71a?

20 MR. WRIGHT: Yes, Your Honor. The only change
21 is that a few words were stricken in 1982 by Congress.

22 QUESTION: But the same -- the same problem or
23 the same -- all of these -- 8, 9, 10 -- 8, 9 and 10 will
24 suffer the same fate --

25 MR. WRIGHT: Yes, Your Honor. And -- and -- and

1 let me say that I thought it was significant that the
2 Insurance Agents agree that 8 and 10 had to go into the
3 Federal Reserve Act in 1916. They think that 9 belongs
4 more logically in the National Bank Act.

5 QUESTION: Well, I know, but --

6 MR. WRIGHT: But they all go one place or
7 another.

8 QUESTION: But they -- don't -- but don't they
9 claim that they were repealed?

10 MR. WRIGHT: They claim -- they claim they were
11 all repealed, yes, Your Honor.

12 QUESTION: Yeah. Even though they had -- they
13 really were part of the Federal Reserve Act.

14 MR. WRIGHT: Although, if I could remind the
15 Court, at oral argument in the D.C. Circuit, counsel for
16 the Insurance Agents said, and I quote, that they quote,
17 cannot advance a substantial argument that section 92 no
18 longer exists, unquote. That's what they said a few
19 months ago.

20 QUESTION: Is it the Government's position that
21 those other provisions are repealed, not repealed, what?

22 MR. WRIGHT: We think that they're not repealed
23 either. They went along with --

24 QUESTION: So your -- the two sides are in
25 disagreement as to all three of those --

1 MR. WRIGHT: Although, of course, only section

2 92 --

3 QUESTION: Is at issue here.

4 MR. WRIGHT: Is actually at issue here.

5 QUESTION: Well, I know, but it controls the
6 other two, I would think.

7 MR. WRIGHT: Yes. Yes. And the Controller
8 believes that those other two provisions are in effect as
9 well, along with section 92.

10 Thank you.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wright.
12 The case is submitted.

13 (Whereupon, at 11:02 a.m., the case in the
14 above-entitled matter was submitted.)

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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: 92-484 and 92-507

United States National Bank of Oregon, Petitioner v. Independent Insurance Agents of America, Inc., et al., and

Eugene R. Ludwig, Comptroller of the Currency, et al., Petitioner v. Independent Insurance Agents of America, Inc., et al.

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

BY Ann Marie Federico

(REPORTER)