

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: WALDEMAR RATZLAF AND LORETTA RATZLAF,
Petitioners v. UNITED STATES

CASE NO: 92-1196

PLACE: Washington, D.C.

DATE: Monday, November 1, 1993

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WALDEMAR RATZLAF AND :

4 LORETTA RATZLAF, :

5 Petitioners :

6 v. : No. 92-1196

7 UNITED STATES :

8 - - - - -X

9 Washington, D.C.

10 Monday, November 1, 1993

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 12:59 p.m.

14 APPEARANCES:

15 STEPHEN R. LaCHEEN, ESQ., Philadelphia, Pennsylvania; on
16 behalf of the Petitioners.

17 PAUL J. LARKIN, JR., ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the Respondent.

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C O N T E N T S

		PAGE
1		
2	ORAL ARGUMENT OF	
3	STEPHEN R. LaCHEEN, ESQ.	
4	On behalf of the Petitioners	3
5	PAUL J. LARKIN, ESQ.	
6	On behalf of the Respondent	20
7	REBUTTAL ARGUMENT OF	
8	STEPHEN R. LaCHEEN, ESQ.	
9	On behalf of the Petitioners	41
10	please the Court:	
11	The case before the Court this after-	
12	noon involves a statutory construction. The statu-	
13	tory question is part of the antistructuring act	
14	of 1988, U.S. Code section 8532, as it is applied	
15	to section 8534.	
16	The statute was enacted in 1988 and	
17	effective in 1989, and the penalties were	
18	enhanced by the structuring of financial	
19	transactions with financial institutions for	
20	the purpose of evading the reporting requirements. The	
21	statute was amended in 1991 to	
22	include, among other things, the	
23	requirement that any person who	
24	has any knowledge on their part that what	
25	they were doing was prohibited activity	

1 PROCEEDINGS

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 92-1196, Waldemar Ratzlaf and Loretta Ratzlaf
5 v. the United States.

6 Mr. LaCheen.

7 ORAL ARGUMENT OF STEPHEN R. LACHEEN, ESQ.

8 ON BEHALF OF THE PETITIONERS

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

11 The case before the Court this afternoon
12 involves a statutory construction. The statute in
13 question is part of the antistructuring act. It's title
14 31, U.S. Code section 5322, as it is applied to section
15 5324.

16 The statute was enacted in 1986 to become
17 effective in 1987, and the Ratzlafs were convicted -- the
18 statute punishes the structuring of financial -- currency
19 transactions with financial institutions for the purpose
20 of evading the reporting requirements. The Ratzlafs were
21 tried for activities on their part which took place in
22 1988, approximately 1 year after the statute became
23 effective, for engaging in several transactions without
24 any knowledge on their part that what it was that they
25 were doing was prohibited activity.

1 The question before this Court is the
2 interpretation of the word "willfully" as it is used in
3 section 5322 to apply to section 5324.

4 The statute -- and in the lower court, the court
5 charged the jury that it was not an essential element of
6 the offense that the Ratzlafs knew that structuring was
7 prohibited. That it was sufficient if the Government
8 established that there was a financial institution and
9 that there was a reporting requirement, that the Ratzlafs
10 knew about the reporting requirement and they acted with
11 the intent to "frustrate" that reporting requirement.
12 That was the specific word that was used. The court's
13 specific --

14 QUESTION: Mr. LaCheen, you said a moment ago
15 that the Ratzlafs acted in this case without any knowledge
16 of the prohibition against structuring.

17 MR. LACHEEN: That's correct.

18 QUESTION: There's no finding to that effect, is
19 there?

20 MR. LACHEEN: No. The judge excluded that as a
21 defense on their part. He specifically told the jury that
22 the jury was not to consider whether or not -- that was
23 not an essential element of the offense, knowledge that
24 structuring was prohibited.

25 QUESTION: So that the jury found what it did

1 without any instruction that the Ratzlafs be required to
2 know about the structuring. But we don't know as a fact
3 what they knew, and presumably it's not material.

4 MR. LaCHEEN: That's correct, Your Honor, it is
5 not material to the Court's determination. What is
6 material is the specific mens rea that is required to
7 sustain a conviction in this case. The case went to the
8 jury without that element, and we submit that a requisite
9 element should be the intentional violation of one's own
10 known legal duty. And that is what we submit that the
11 word "willfully" means as it is used in section 5322 to
12 apply to 5324.

13 Initially, let me say that in -- the words of
14 5322 simply say that a person who willfully violates this
15 subsection -- and there an argument can be made, and I
16 suppose should be made, that those words themselves
17 require knowledge of the statutory prohibition. 5322 does
18 not say anybody who commits the following acts is guilty
19 of willful structuring. It says willful -- willfully
20 violating this subchapter, or any regulation under this
21 subchapter.

22 Now, we understand that the cases indicate that
23 this is an ambiguity, and we submit that we can refer to
24 statutory construction, and language construction in the
25 statute itself, to support our argument that what

1 "willfully" means in this context is, in fact, the
2 intentional violation of one's own legal duty.

3 I point first to the fact that if that's not
4 what "willfully" means, then "willfully" doesn't mean
5 anything in this context, because 5324 makes unlawful
6 structuring for the purpose of evading the reporting
7 requirement. And there is no criminal penalty in 5324,
8 that was enacted in 1986. To find a criminal penalty, one
9 must look to 5322. 5324 was enacted to become part of
10 this subchapter. 5322 it is, which says willful
11 violations are criminally penalized.

12 And so, therefore, if one must structure a
13 transaction for the purpose of evading the reporting
14 requirement to commit the unlawful act or the prohibited
15 act under 5324, what more is needed with the word
16 "willfully" in 5322 except knowledge that one is violating
17 a known legal duty that is one's own legal duty? Because,
18 as you see, 5324 is the structuring statute which applies
19 to the depositor, and 53 -- it does not create the duty on
20 the depositor. So "willfully" must, in fact, have that
21 meaning, or it doesn't have --

22 QUESTION: You say 5324 doesn't create a duty on
23 the depositor.

24 MR. LACHEEN: 5324, does, Your Honor. It's
25 the -- the structuring with the intent to evade the

1 reporting requirement is what is made unlawful in 5324.
2 The reporting requirement is the bank's obligation to file
3 the report for the CTR. It is only the willfulness, which
4 comes in in 5322, which makes it a criminal offense, and
5 that's why we say the use of the word "willfully" in 5322
6 to apply to 5324, that supplies the additional -- the
7 requisite element of mens rea that is required.

8 The second argument --

9 QUESTION: But isn't it correct that 5322
10 doesn't just apply to 5324? It applies to a lot of other
11 sections. And the word --

12 MR. LaCHEEN: That's correct. And that's
13 another --

14 QUESTION: The word "willfully" would have
15 meaning with respect to those other sections, whether or
16 not it has meaning with respect to 5324.

17 MR. LaCHEEN: Justice Scalia, you've
18 anticipated --

19 QUESTION: So you can't say that "willfully" is
20 read out of the statute otherwise.

21 MR. LaCHEEN: It's read out of the statute
22 insofar as it would apply to 5324. Then it has -- then
23 what is the difference --

24 QUESTION: That's a good deal weaker argument.
25 I mean, you're just saying that they put in a word in 5322

1 that has substantial application in a lot of other
2 aspects; it happens to have no application with respect to
3 5324.

4 MR. LaCHEEN: Well, we don't say it has no
5 application. We say it has every application to 5324.

6 QUESTION: But on their theory, it happens to
7 have.

8 MR. LaCHEEN: On their theory, that's what they
9 say. But Congress -- I think one of the principles of
10 statutory construction is that Congress must presume that
11 every word in a statute has meaning, and one of the other
12 arguments I wish to make is that by the time 5324 --

13 QUESTION: Has all the possible meanings it
14 could? This has meaning. It has meaning with respect to
15 other sections. It just has no meaning, as you say, with
16 respect to 5324.

17 MR. LaCHEEN: But Congress was aware in 1986
18 when it enacted 5324, without using the word "willfully"
19 or any other word to describe the requisite intent, that
20 "willfully" had already been defined and construed in
21 numerous other cases to mean the intentional violation of
22 a known legal duty.

23 And so one of our other arguments, which Your
24 Honor had anticipated, is that in 1986 when Congress
25 enacted 5324, knowing what these other cases had decided

1 with regard to sections 5313, 5314, 5316, then they
2 incorporated into 5324 by putting it in the subchapter,
3 the same subchapter, where the only criminal penalty was
4 in 5322, which is defined as being a willful violation,
5 then Congress well knew what they were doing.

6 In fact, Congress had the option to change the
7 intent requirement, when it passed 5324, to consider using
8 the word "knowing" instead of the word "willful." That
9 was not accepted. And so we say that knowing what the
10 interpretation had been up to that point, Congress
11 incorporated by placing 5324 within that same subchapter
12 where it was subject only to the criminal penalty in 5322,
13 then Congress well knew what it did and did it
14 intentionally, willfully if I may use that word, to
15 require 5322 to apply to 5324.

16 The second argument that we make is that unless
17 "willfully" in this context is read as meaning exactly
18 what we say it means, which is the intentional violation
19 of a known legal duty, then the word would have two
20 different meanings in its same use in the same sentence,
21 because "willfully" has, as I mentioned earlier, been
22 interpreted in a context of these other cases as requiring
23 the intentional violation of one's own legal duty.

24 When the courts -- all of the circuits
25 interpreted the other sections: 5313, which was the

1 section requiring the banks to file the currency
2 transactions reports, and 5314 and 5316, which was the
3 statute which prohibited the movement of in excess of
4 \$10,000 across international lines. The word had been
5 defined in all of these other cases. Why would the word
6 "willfully" be used in those to relate to all of those
7 subsections, to mean --

8 QUESTION: Now, Mr. LaCheen, did Congress use
9 the same statutory language for international structuring
10 violations?

11 MR. LaCHEEN: I believe it's close enough so
12 that the issue was exactly the same when it was decided by
13 the court, Justice O'Connor.

14 QUESTION: And do you think -- and what result
15 should we reach on the willful requirements or the mens
16 rea requirement under the international structuring?

17 MR. LaCHEEN: That a person had to know that
18 they were, in fact, violating what the proscription was
19 against moving \$10,000 -- in excess of \$10,000 without
20 filing a report. The cases --

21 QUESTION: You think the requirement would have
22 to be the same.

23 MR. LaCHEEN: Yes, I do. In fact, I think as a
24 result of those decisions we now have notices in all the
25 airports and in all the boat ports where people come and

1 go across the border. There is a warning.

2 Strangely enough, this is the one situation, in
3 this, where the depositor is never warned. In fact, when
4 the Government had an opportunity to give a warning and
5 the Treasury Department suggest -- proposed certain
6 regulations to provide warnings in all the banks, that sat
7 there for 6 or 8 months and then, at the behest of the
8 Department of Justice, Treasury withdrew. So you can go
9 into any bank. There's not a bank that you can go into in
10 this country where you will be warned that the activity
11 which is proscribed by 5324 is prohibited activity.

12 QUESTION: Well, how much good does a warning
13 poster do? Is it up with the 10 public enemies on a bank
14 bulletin board?

15 MR. LaCHEEN: Judge, it does the same as it does
16 outside this building when you walk in and it says don't
17 bring guns or drugs here. It's the same as when you see
18 one in the subway that says no spitting on the sidewalk.
19 If you don't know what it is that you're not supposed to
20 have done, unless the act is itself a malum in se or
21 some -- has it's own evil motive, I believe then you must
22 have a warning. Excuse me.

23 QUESTION: Well, so these warning notices are
24 posted. Then what effect do they have at a trial where
25 you're talking about the issue of intent?

1 MR. LaCHEEN: You have the -- you have the
2 effect of the Government being able to say, these people
3 can't say they didn't know that structuring was
4 prohibited. This is the sign that was in the bank. And
5 the Government would hold up a large sign that says --

6 QUESTION: They take the stand and testify it
7 was over there with the public enemies list; I never
8 looked there.

9 MR. LaCHEEN: That may then be a jury question,
10 which the jury would be entitled to consider, just as this
11 Court -- if I remember correctly, when you sent Cheek back
12 for retrial you said, of course, one of the things that
13 the jury will consider is whether this man's subjective
14 belief was a good faith subject belief.

15 This would go to the jury the same way. The
16 problem here was that these people were deprived of
17 presenting their good faith defense on this issue. They
18 were convicted for conduct which might very well have been
19 totally innocent conduct, because --

20 QUESTION: Mr. LaCheen, that's a point that your
21 brief left me in doubt about, because sometimes you
22 characterize what they did as a mere regulatory violation
23 of 5324, and at other times you seem to say that what they
24 did, absent "willfulness," as you define it, was no
25 offense at all. So what is it? Is what they did a mere

1 regulatory violation or is it no violation at all?

2 MR. LaCHEEN: What the Ratzlafs did was no
3 violation at all. There is some provision for regulatory
4 violation where the Court could adopt a different
5 standard, for example, for the forfeiture provisions
6 for -- in the same statutory scheme there are various
7 offenses. One, you know, commission of certain acts under
8 the scheme subject you to forfeiture; commission of
9 certain other acts subject you to a civil penalty;
10 commission of the acts in this case were deemed sufficient
11 to subject them to criminal liability; and then you have
12 the money laundering.

13 There's a whole hierarchy, and one of our
14 arguments is that unless -- if this Court adopts our
15 rationale for "willfully," that puts it in its proper
16 place in this hierarchy. The Ratzlafs simply didn't
17 commit an offense.

18 QUESTION: When you say a different standard,
19 you're referring to the possibility of a reckless standard
20 in the civil context?

21 MR. LaCHEEN: Yes, Justice Souter. For a lesser
22 penalty then, it would be conceivable that a lesser
23 standard, either -- if not, you know, direct disobedience,
24 then perhaps disregard of whether or not there is a
25 statute that applies to -- for example, to use the

1 regulatory cases like McLaughlin and Hazen Paper where
2 there is a different standard because we're talking about
3 a different penalty.

4 The cases that seem to have discussed these
5 various points seem to indicate that you can supply --
6 there is a requisite mental element in every offense. The
7 question is what is the appropriate element for the
8 offense in question, and the word has been defined
9 differently in different cases.

10 You have -- if you have an offense which is
11 itself malum in se, then the act itself is sufficient. If
12 you have an offense which is a regulatory violation or an
13 offense which involves a dangerous instrumentality, then
14 the courts have said, well, maybe a little bit less is
15 needed. Maybe because you're doing this -- I'm sorry.

16 QUESTION: Is it malum in se that ought to be
17 the test, or is it rather whether the act in question is
18 an act that no one would be likely to do for other than a
19 bad motive?

20 MR. LACHEEN: I think -- I would --

21 QUESTION: Then why -- and why would anyone want
22 to avoid this reporting requirement that could possibly --
23 it's not that if you had to report you had to fill out any
24 papers. You didn't have to fill out any papers, the bank
25 would, right?

1 MR. LaCHEEN: You have -- yes, but you do have
2 to disclose not only all of your identifying
3 information -- which, by the way, these people did -- but
4 also the fact that you have this kind of money. There are
5 still people in this country who value their privacy,
6 which Justice Brandeis described as, you know, the mark of
7 a free society. This is --

8 QUESTION: You're willing -- you're willing to
9 go to 10 different banks and tell each of them that you
10 have \$2,000, but not to go to one and --

11 MR. LaCHEEN: To some people it's important.

12 QUESTION: -- Say that you have \$10,000.

13 MR. LaCHEEN: To some people it is --

14 QUESTION: You think that's plausible?

15 MR. LaCHEEN: It's plausible if you feel that
16 strongly about your privacy and don't think that the
17 Government has to know everything that it's not entitled
18 to know. The conduct here is only avoidance, Justice
19 Scalia. It's not an evasion.

20 QUESTION: It's avoidance of a nonburden as far
21 as I can tell, and therefore avoidance that has the smell
22 of malefaction about it. I can't understand why anyone
23 would want to avoid this particular imposition except for
24 the Government not to know that this person has \$10,000 in
25 cash, that came from God knows where because it wasn't

1 reported on the income tax return.

2 MR. LaCHEEN: Why don't we simply use exactly
3 what the situation was in this case, which is that these
4 people were already being looked at by the Government and
5 they simply didn't want the Government to have one shred
6 more additional information about them than the Government
7 was entitled to have. And so therefore -- it's just like
8 if you happen to know that there's a subpoena out for you
9 and you choose not to be served. There's nothing wrong
10 with avoiding service as long as you haven't committed an
11 illegal act. And the tradition is deeply rooted in the
12 American --

13 QUESTION: I thought the requirement was evade?

14 MR. LaCHEEN: Except that it's been read out of
15 the statute the way in which the judge here -- the
16 position that the Government takes and the way in which
17 the court instructed the jury. Evade has been equated
18 with avoid, and so what they've done is that they have
19 removed totally the element of moral blameworthiness.
20 Because all you have to do to be convicted is, for
21 example, go to the bank and simply knowing that the bank
22 has the reporting requirement, which doesn't say that
23 there's any duty on you, you simply act in a way so as not
24 to trigger the regulation that applies.

25 QUESTION: Well, did you get a charge on the

1 question of evading?

2 MR. LaCHEEN: The charge -- was there a charge
3 on evading? There was a charge that specifically
4 requested that they have knowledge that the statute --
5 that structuring was prohibited. There --

6 QUESTION: That doesn't answer my question.

7 MR. LaCHEEN: Yes, I know, I'm begging that. I
8 do not think there was a specific question -- a specific
9 request for evading.

10 QUESTION: Did you request such a charge?

11 MR. LaCHEEN: We were not trial counsel, Your
12 Honor, but --

13 QUESTION: Well, then did trial counsel request
14 it?

15 MR. LaCHEEN: I do not think that was requested.
16 I think the definition that was given to the jury obviated
17 that request. We can -- I believe at page 13 of our
18 appendix, the court read the regulation and the regulation
19 defines evading so that it means avoiding. It simply says
20 for purposes of section -- the court has it: "A person
21 structures a transaction if that person, acting alone or
22 in conjunction with or on behalf of other persons,
23 conducts or attempts to conduct one or more transactions
24 in any amount at one or more financial institutions at one
25 or more days in any manner, for the purpose of evading the

1 reporting requirements."

2 Evading was defined as it is used in the
3 statute. If you simply did what was necessary to avoid the
4 report being made, you were -- you had, in fact, evaded.

5 QUESTION: Well that was a definition of
6 regulation, not of a statute, wasn't it?

7 MR. LACHEEN: That's correct. Your Honor is
8 correct in that. Let me see, where am I?

9 The other point I wished to make -- and this
10 picks up what we've discussed previously -- was that it
11 seems to be -- it has been traditional and is deeply
12 rooted in the American system of criminal justice that
13 there must be some moral -- some concept, some component
14 of moral blameworthiness, not simply just an act which may
15 avoid the onus of a legal regulation or, in fact, a tax.

16 I mean, this has been traditional. If a line
17 is -- if the law draws a line, the avoidance of that line
18 by legal means, it does not subject one to any legal
19 censure. I mean, this Court said that in 1873 in *Isham*
20 versus -- *U.S. v. Isham*, where, on facts extremely similar
21 to this, a man decided to issue drafts in amounts less
22 than \$10 -- actually, less than \$11, because the stamp
23 duty tax applied to drafts in amounts exceeding \$10. So
24 this --

25 QUESTION: Well, it makes sense to me. I mean,

1 the man didn't want to pay more money. I don't have to
2 attribute any nefarious motive. If going above \$10 bucks
3 makes you pay a tax, I'd say you're just avoiding the tax.

4 MR. LaCHEEN: And that's what we have here.

5 QUESTION: I can't, for the life of me,
6 understand why someone would go to all this trouble, go to
7 all these different banks, in order to save the bank the
8 trouble of filing this statement. No tax on him, no
9 filling out of forms, nothing except that the bank has to
10 fill out forms.

11 MR. LaCHEEN: Let me give you another situation.
12 Perhaps this will answer --

13 QUESTION: It smells bad to me.

14 MR. LaCHEEN: This statute, as it is currently
15 applied -- it has not only been applied to these people,
16 but we cited another situation in our brief in which a
17 legitimate businessman who is very busy and makes one
18 deposit of cash a week for years and years. He's busy.
19 He doesn't have time to run to the bank every day.

20 And the bank then says to him we're not going to
21 exempt your deposits any more; you're now going to have to
22 file a report every time you put in \$10,000. He values
23 his privacy. And the bank says, anyway, we've been
24 telling you to put more money in. The man does that. He
25 deposits his money twice a week instead of once a week.

1 He's guilty of structuring.

2 That's not a made-up case. That's one of the --
3 that's a defendant whose case is pending cert. And if
4 you accept the Government's analysis of what "evade"
5 means, that it doesn't mean anything more than avoid, and
6 you accept the Government's argument, which the court did
7 in this case, that all you had to do was tell -- know that
8 there was a bank reporting requirement, then your actions
9 in avoiding exposing your business and invading your
10 privacy constitutes some kind of an offense without any
11 act of moral blameworthiness on your part.

12 I ask leave to reserve 5 minutes for rebuttal.

13 Thank you.

14 QUESTION: Very well, Mr. LaCheen.

15 Mr. Larkin, we'll hear from you.

16 ORAL ARGUMENT OF PAUL J. LARKIN, JR.

17 ON BEHALF OF THE RESPONDENT

18 MR. LARKIN: Thank you, Mr. Chief Justice, and
19 may it please the Court:

20 We start with the elementary principle that
21 ignorance of the law is no excuse. And we, like 10 of the
22 11 courts of appeals that have considered the question
23 presented in this case, believe that that principle,
24 considered together with the standard tools of statutory
25 interpretation, show that it is our theory of the case and

1 not petitioners' that is the correct one.

2 So let's start with the text of the statute.
3 Section 5324 requires the Government to prove that a
4 person structured a transaction for the purpose of evading
5 the reporting requirement. The jury was so instructed in
6 this case. The instructions are in the Joint Appendix at
7 pages 11 to 12 of our brief, and there is no complaint
8 raised by the petitioners that those instructions, in that
9 regard, were erroneous.

10 Section 5322 imposes criminal liability if a
11 person acts willfully, and this Court in various cases
12 such as Browder, Murdock, and most recently Cheek, has
13 said that the term "willfully" generally means
14 intentionally rather than inadvertently, accidentally, or
15 negligently. Now, the Court has gone on to say --

16 QUESTION: That's -- the price of adopting that
17 interpretation here is redundancy of the requirement.

18 MR. LARKIN: Not across the board, as Justice
19 Scalia pointed out.

20 QUESTION: Yeah. But in -- with respect to this
21 transaction, it is absolutely redundant on your theory.

22 MR. LARKIN: And we don't see that as being a
23 flaw, and let me explain why, if the structuring -- of the
24 way the statute is put --

25 QUESTION: You're a very tolerant man.

1 MR. LARKIN: Well, Your Honor, the reason is
2 this: Congress didn't pass section 5324 as a model code
3 of money laundering. Congress didn't pass this statute to
4 completely revamp the whole area. It has a precise
5 problem that it wanted to focus on. There were two lines
6 of lower court cases that had addressed this problem here,
7 structuring transactions to evade these reporting
8 requirements which Congress, in 1970, believed were an
9 invaluable means of helping to root out money laundering.

10 There was a line of cases typified by decisions
11 such as the Tobon-Builes case, which has come to be known
12 as the leading case in this area from the Government's
13 perspective, that were decided by the Eleventh Circuit,
14 and there a similar decision by the Second Circuit. There
15 were contrary decisions by the First and Ninth Circuits,
16 so that in different parts of the country it was clear
17 that the same conduct could and could not be criminally
18 prosecuted, and Congress passed this statute to deal with
19 that precise problem.

20 So in this context, if there is some redundancy
21 we're willing to accept that fact. The reason is the
22 principle that the other side relies on, the canon against
23 construing something to create redundancy, we agree is a
24 valuable one, but it's not invaluable in every context.
25 It's most valuable in the context that I've mentioned;

1 it's far less valuable in this one. And --

2 QUESTION: Not unless it's no value at all. I
3 mean your argument is that the 5324 offense is just what
4 it would be if you never had 5322. 5322 adds nothing.

5 MR. LARKIN: That's right. Because 5324 was
6 added to deal with this problem.

7 Congress passed this statute and added the
8 scienter requirement to deal with the precise problem that
9 it had to focus on because of that, as I said, clear
10 disagreement among the lower courts. And Congress added
11 the scienter requirement that it believed was necessary.
12 It didn't add the scienter requirement that was discussed
13 in cases such as Bishop and Pomponio. They were on the
14 books. Congress could have added that requirement, as
15 petitioners believe they did, but Congress didn't do it.

16 QUESTION: What was the scienter requirement you
17 say Congress was addressing in 5324?

18 MR. LARKIN: The scienter requirement discussed
19 in the lower court cases such as Tobon-Builes, which said
20 that a person violates this statute when he structures a
21 transaction for the purpose of evading the reporting
22 requirement. That's what the Eleventh Circuit said and
23 that's what the relevant committee reports discussed.
24 Those committee reports can be found at pages 33 to 35 of
25 our brief. That's what Congress focused on as far as the

1 relevant scienter requirement in this statute.

2 QUESTION: So you say Congress was there
3 addressing exactly the same issue we're dealing with here.

4 MR. LARKIN: Yes, Your Honor, I do. That's
5 exactly what happened here in this case. Congress had a
6 very real world, practical problem to deal with, and it
7 focused precisely on that problem, rather than revisiting
8 the entire area of money laundering.

9 QUESTION: Assuming it did that, why did it use
10 evade rather than avoid?

11 MR. LARKIN: Because, Your Honor, "evade" is a
12 term that indicates, as Justice Scalia pointed out, a
13 certain nefarious purpose involved. After all, the
14 petitioners here in this case were driving around Lake --

15

16 QUESTION: Which is consistent, isn't it, with
17 the argument that they probably intended "willfully" to
18 mean what your opponents say it does?

19 MR. LARKIN: Not necessarily, Your Honor.
20 Because you can have the term "willfully" used in a
21 context where deception is at issue, and you don't require
22 the heightened scienter requirement that they've
23 discussed. The Browder case that we cited in our brief is
24 such an example. In that case, this Court considered an
25 argument from the Murdock case, which is a case that

1 you -- was the grandfather of this more recent line of tax
2 cases imposing the heightened scienter requirement.

3 And the Court expressly rejected the defendant's
4 attempt to rely on the Murdock decision in that case. It
5 said instead, in a context where deception was at issue
6 since it was the knowing use and the willful use of a
7 falsely obtained passport, that only an intentional act,
8 not the type of action that the petitioners are asking
9 for, is sufficient. So you can have deceptive conduct,
10 which is at issue here, where you have the lower scienter
11 requirement that we're talking about in this context.

12 QUESTION: Mr. Larkin, can I ask you a question
13 to help me understand this statute? In the Tobon case, as
14 I remember it, there were several transactions where the
15 man and the woman each bought a \$9,500 cashier's check,
16 and so each transaction was structured in the sense that
17 each bank had a duty to report more than \$10,000 if it had
18 been done. Now, would the same reasoning apply if one
19 individual went to six separate banks and got \$9,500
20 thinking that no one of those banks would have had a
21 reporting requirement?

22 MR. LARKIN: Yes. The legislative history, for
23 example, that I mentioned earlier expressly says that if
24 you go to more than one bank you can be guilty of
25 violating the statute. And the regulation that defines

1 structuring also makes clear that going to more than one
2 bank can amount to structuring under the statute.

3 Now, the problem you've talked about, Your
4 Honor, is a problem dealing more with the actus reas
5 element, the structuring, than the mens rea element.

6 QUESTION: That's correct.

7 MR. LARKIN: But what it does indicate, I think,
8 is this, that you don't have a situation here where
9 Congress just said there's a line in sand and anyone who
10 crosses it is guilty of illegal conduct. And you're
11 encouraging people to go up to it, as you do in the tax
12 area. In the tax area you require a heightened mental
13 state because this Court has said Congress didn't want to
14 criminalize good faith disagreements with the IRS over tax
15 liability.

16 This case is different. This is a case where
17 Congress saw what was happening and drew not only a line
18 in the sand, it said you can't go near it. It said you
19 can't structure a transaction for the purpose of evading
20 this reporting requirement, so it was clearly signalling
21 that it wanted people to step back further. So it wasn't
22 a situation like in the tax area where you have, as a good
23 policy argument, the fact that there is socially valuable
24 conduct here.

25 After all, these people were driving around Lake

1 Tahoe with a shopping bag full of cash. The petitioners
2 have said that this case is a good case, on its fact, to
3 look at, so let's look at it.

4 QUESTION: How many offenses did they commit?

5 MR. LARKIN: The way I would -- I would count
6 the unit of prosecution is that when you get to an amount
7 of cash that gets you above \$10,000, that's one unit. And
8 you put those aside, and you go on to the next one. So if
9 you have a \$9,500 check and a \$9,500 check, that's one
10 violation, rather than there being two.

11 QUESTION: Then if you have a third \$9,500
12 check, that's still another violation?

13 MR. LARKIN: No. You need the fourth one. One
14 and two are above \$10, \$10,000.

15 QUESTION: I see.

16 MR. LARKIN: Three and four. Now, the unit of
17 prosecution problem has not come up in this case. It
18 wasn't --

19 QUESTION: I understand.

20 MR. LARKIN: It wasn't addressed at trial or on
21 appeal. But that's, we think, a reasonable way of looking
22 at this problem here.

23 QUESTION: Part of the problem for us is to try
24 and decide what it is that the defendant must know
25 before -- to satisfy the requirement of willfulness.

1 MR. LARKIN: Well, they -- they certainly were
2 engaged in the type of conduct that they had reason to
3 keep from the IRS. After all, in -- this is 1988 in
4 October when this occurred, October 27th. In May of that
5 year they had been told that they were under audit, and
6 they were under audit because the CTR's that had
7 previously been filed by casinos, when crosschecked by
8 computer against their gambling -- excuse me, against
9 their income tax records, showed that there had been a lot
10 of cash transactions at casinos, and they hadn't reported
11 gambling income for 1986.

12 QUESTION: Could you have submitted this case to
13 the jury based on the instruction that the petitioner
14 wants to give?

15 MR. LARKIN: No, Your Honor. Even as egregious
16 as the facts are here, we think it's not -- it's not clear
17 that a jury would say that they knew that this was
18 illegal. And, after all, you have bank tellers, bank
19 managers, and even casino --

20 QUESTION: But there would be a jury question on
21 it, would there not? The --

22 QUESTION: You don't think this could go to the
23 jury?

24 MR. LARKIN: I think it's sufficient to allow it
25 to go to the jury. I don't think I can say with a great

1 deal of assurance that a great many juries would find it
2 sufficient. After all, take a look at the record here.
3 You had bank tellers and bank managers conversing with the
4 Ratzlafs, and the bank managers and bank tellers didn't
5 tell them that this was illegal. You had --

6 QUESTION: Did you -- does the Government
7 prosecute cases on its theory of willfulness in which the
8 bank tellers and the bank managers did not inform the
9 parties?

10 MR. LARKIN: Prosecute them against who, Your
11 Honor, the bank tell?

12 QUESTION: No, against individuals accused of
13 structuring. You don't let those cases go, do you? You
14 prosecute it.

15 MR. LARKIN: Well, we prosecute them on our
16 theory. My point is --

17 QUESTION: Sure. And when you prosecute them on
18 your theory, you have to prove that they did this for the
19 purpose of evading -- of resulting in the evasion of the
20 bank's reporting requirement, don't you?

21 MR. LARKIN: Well, that's assuming the facts
22 show that they knew of the reporting requirement. But now
23 here in this case there had been prior CTR's --

24 QUESTION: Sure. But you don't confine your
25 prosecutions, as a matter of fact, only to those cases in

1 which the bank personnel informed the individuals that
2 they would have to file these reports, do you?

3 MR. LARKIN: Oh, no, no.

4 QUESTION: So if it's possible to prosecute
5 those cases in which you've got to find some kind of
6 extraneous circumstantial proof of knowledge of the
7 reporting requirement, I don't know that you're
8 significantly worse off if you've got to find
9 circumstantial evidence of the -- of knowledge of the
10 structuring prohibition.

11 MR. LARKIN: Well, we think we are, Your Honor.
12 We think that the situation would clearly be far worse
13 from the Government's perspective. But more important --

14 QUESTION: Do you think many juries are going to
15 come to the conclusion that they had knowledge of the
16 reporting requirement and that they were intending to
17 evade or intending to effect the evasion of that reporting
18 requirement, and not conclude that they -- that they also
19 knew that they were prohibited from doing that?

20 MR. LARKIN: Your Honor, I fear that a good many
21 juries would. And what's more important, however, is
22 Congress didn't require us to prove that element.

23 QUESTION: Well, that's -- well, that's the
24 issue in the case.

25 MR. LARKIN: Right.

1 QUESTION: The defendant here thinks so, anyway.
2 I mean or this is a waste of time.

3 MR. LARKIN: I mean there are --

4 QUESTION: They certainly think that they have a
5 shot at establishing to the jury that they didn't know.

6 MR. LARKIN: And I'm sure they would, if they
7 were given that opportunity, rely on the sorts of matters
8 that I mentioned, that no one brought it --

9 QUESTION: Mr. Larkin, could the Secretary have
10 made these CTR's obligatory for the depositor as well? I
11 mean, it's not the financial institution, but also people
12 in the position of the Ratzlafs. Is that something the
13 Secretary could do and then there wouldn't be any question
14 about people having notice?

15 MR. LARKIN: Well, the Secretary has the
16 statutory authority to impose that obligation on --

17 QUESTION: And hasn't done it. Is there any
18 indication why?

19 MR. LARKIN: There's no formal indication why,
20 but I've been advised by the Treasury Department it was
21 designed to avoid creating problems with consumer
22 dissatisfaction of having them fill out the forms, rather
23 than the bank do it. So that was the reason the
24 obligation was imposed on the banks rather than
25 individuals.

1 I mean that -- that is what gave rise, in part,
2 to the problem that I mentioned earlier. Because since
3 you didn't have an obligation imposed on individuals to
4 fill out these forms, and since there was no express
5 prohibition against structuring transactions to avoid --
6 to evade the obligation placed on the banks, you had a
7 situation in which people were able to engage in a
8 practice of going around, getting as many \$9,500
9 negotiable instruments as they could.

10 QUESTION: But in the smell's bad department, it
11 would smell a lot worse if these people -- if they had an
12 obligation and they defaulted on it.

13 MR. LARKIN: It would smell worse, Your Honor,
14 but we think this is pretty foul right here, and
15 sufficiently foul that what you have is precisely the type
16 of conduct that Congress feared was connected with other
17 and even more serious conduct.

18 QUESTION: Well, but you would prosecute -- I
19 take it you would have to prosecute if a small business
20 owner used to make one trip a week to the bank and decided
21 to make two just to not be burdened by the reporting
22 requirement, you'd have to prosecute that, wouldn't you?

23 MR. LARKIN: Well, there -- let me make two
24 points about that, because of the last phrase you
25 mentioned. One is, you can always get -- a business can

1 get an exemption from the bank if the cash is in the
2 normal course of business. In other words, if you run a
3 grocery store and deal in a large quantity of cash, you
4 can ask the bank to exempt you from having to fill out
5 these requirements. The --

6 QUESTION: No, no, no. But the hypothetical is
7 the businessman doesn't know that there's a structuring
8 requirement. He thinks that what he does is lawful.

9 MR. LARKIN: Well, he doesn't have to know that
10 it's unlawful --

11 QUESTION: So it's not as though he -- so he
12 wouldn't ask for an exemption if he thinks what he's doing
13 is lawful.

14 MR. LARKIN: Well, if -- if he doesn't know of
15 the obligation that the bank has to report these.

16 QUESTION: No, no. We have to assume that he
17 knows that --

18 MR. LARKIN: Okay, well if he --

19 QUESTION: -- Or the hypothetical won't work.

20 MR. LARKIN: Yeah. If he does -- if he does
21 know that, then he's in a different position. And if
22 he -- if he's been engaged in these transactions for a
23 long period of time and he doesn't get an exemption then,
24 yes, Your Honor, he would be guilty of a technical
25 violation of the act. That would be the type of conduct

1 that could criminally be prosecuted. Now, I would hope it
2 wouldn't happen, but I have to admit that it could.

3 QUESTION: But why are you putting in "long
4 period of time?" That would be a question of
5 prosecutorial discretion if he does it once, twice.

6 MR. LARKIN: I was using that phrase because
7 that was the phrase that, I think, the petitioners'
8 counsel used to describe the earlier case that he
9 mentioned. It can happen once or twice. I'm not saying
10 there has to be a long period of time. I was just trying
11 to refer back to the particular case that he had
12 mentioned, so --

13 QUESTION: There was a point of information that
14 you put in your brief, and I was wondering why you did.
15 And if you thought it was relevant, perhaps you could
16 bring us up to date. But you pointed out in footnote 5, I
17 believe, and 6, that the Ratzlafs were under criminal
18 investigation for tax evasion.

19 And you give -- you tell us that there was a
20 criminal investigation -- they were contacted by a
21 criminal investigator in November, 1988. And that's --
22 then you don't tell us any more and you file this in 1993.
23 What are we supposed to infer from the information that in
24 1987 and 1988 there were the beginnings of a criminal
25 investigation for income tax evasion?

1 MR. LARKIN: Well, that's part of the historical
2 narrative of what happened. An IRS --

3 QUESTION: Well, why didn't you bring us up to
4 date a little further, after 1988? Why do you just drop
5 it at that point?

6 MR. LARKIN: Oh, well this prosecution came
7 thereafter. There wasn't a prosecution for willfully
8 evading taxes. And the record doesn't indicate why these
9 charges were chosen rather than the tax -- a charge under
10 title XXVI. Now I --

11 QUESTION: So, are you telling us by that that
12 the tax investigation was dropped and this one was
13 substituted for it?

14 MR. LARKIN: No. This was part of it. This --
15 it started out as an investigation to determine whether
16 someone had violated the tax laws, and a prosecutorial
17 decision was made to seek an indictment under title 31
18 rather than title XXVI.

19 QUESTION: So nothing happened in the criminal
20 case -- in the criminal investigation after November '88.
21 That just sort of --

22 MR. LARKIN: No, no. This was the criminal case.
23 What I'm saying is the same criminal investigation went
24 forward, but a decision came down the -- a decision had to
25 be made down the road as to what, if any, charges should

1 be brought before the grand jury, and the grand jury
2 should be asked to return a true bill on.

3 QUESTION: So --

4 MR. LARKIN: And the decision then was made to
5 seek charges under title 31, rather than title XXVI.

6 QUESTION: Instead of seeking charges for
7 unreported gambling income.

8 MR. LARKIN: Right. Those were not brought.
9 Now, the record doesn't indicate why the prosecutor made
10 the decision to go the one route rather than the other.

11 QUESTION: Mr. Larkin, can I just ask you for
12 some comment on sort of the general thrust that Justice
13 Scalia's questioning raised? Is it reasonable to suppose
14 that a legitimate person would be concerned about the
15 disclosure of this kind of information?

16 And the question that -- one question that -- I
17 have two questions. One is what is the use made by the
18 Government of this? Does this go to the Internal Revenue
19 Service, is that it, or does it also go to U.S. Attorneys
20 General if you're suspicious of narcotics dealings and all
21 the rest?

22 And before you answer it, the reason I ask is it
23 occurs to me that a legitimate citizen might think, well,
24 if I have to file this report, I'm increasing
25 substantially the chance of a tax audit. I don't know

1 if -- there's no great sin in not wanting to be audited by
2 the IRS. Is that a possibly legitimate reason for
3 thinking I'd rather not report this and call the
4 Government's attention to the fact I have \$11,000 in cash?

5 MR. LARKIN: Well, Your Honor, the reports go to
6 the IRS, where there are uses made of them such as the one
7 that was made here. If you look at pages 7 to 8 of the
8 April 10, 1991 transcript, and you'll see the testimony of
9 IRS Agent Connie Fox, you will see that she indicates that
10 what happened was the computer did a crosscheck of CTR's
11 filed by gambling casinos involving individuals against
12 the income tax records of those individuals. And it
13 indicated here that there was a fair amount of cash
14 activity involved and there were no gambling winnings
15 reported there.

16 So it can come up in that way. Now, to my
17 knowledge, these are not generally circulated throughout
18 the law enforcement community, either to other bureaus
19 such as the Federal Bureau of Investigation, or to U.S.
20 Attorneys offices. But I don't --

21 QUESTION: There are no statutory restrictions
22 on the way they could be circulated, are there?

23 MR. LARKIN: No. Congress is presently
24 considering whether there should be, but you don't have a
25 statute similar to the one that governs tax returns have

1 to be filed under title XXVI, but it is presently under
2 consideration.

3 QUESTION: So these forms can trigger an audit.

4 MR. LARKIN: They did in this case. This is a
5 good proof of it. They --

6 QUESTION: Is there anything malum in se about
7 an attorney or an advisor telling someone they should
8 structure their transactions to avoid an audit?

9 MR. LARKIN: Well, it's not malum in se, but i
10 would have to -- I would want to say this, Your Honor.

11 QUESTION: It isn't bad policy, is it?

12 MR. LARKIN: Well, it may well be, Your Honor.
13 After all, even if \$10,001 in cash shouldn't be treated
14 the same as a hand grenade as in Freed, or dangerous
15 chemicals as in International Minerals, \$10,001 in a cash
16 transaction is something that Congress is entitled to
17 believe is very suspicious. After all, that's what we're
18 dealing with here. And the types of crimes that
19 oftentimes lead to money laundering activities are
20 narcotics trafficking, racketeering, and gambling. And so
21 it's not unreasonable for Congress to think that it's a
22 little suspicious --

23 QUESTION: Yes, but your statute applies to
24 every person who has cash in the United States.

25 MR. LARKIN: Well, it --

1 QUESTION: I mean, I had thought that there's
2 nothing wrong with structuring your transaction so the
3 Government knows as little as possible about what you're
4 doing.

5 MR. LARKIN: Well, Your Honor, I have to, I
6 think, on this point agree with Justice Scalia, that what
7 you have here is activity that, as I've said, is very
8 suspicious, and activity that indicates that someone may
9 have something to hide. Now, it may not be perfect. I
10 can't --

11 QUESTION: Well, perhaps in this case, but we're
12 interpreting the statute for all cash transactions
13 throughout the country.

14 MR. LARKIN: That's right.

15 QUESTION: Most of which are legitimate.

16 MR. LARKIN: That's right. But this Court said
17 in the Liparota case there may be times when Congress
18 regulates broadly and hopes that prosecutorial discretion
19 will fill in underneath. Congress here had a serious
20 concern that people were using the loopholes that existed
21 in the 1970 statute as a way of furthering criminal
22 activity in the various areas I've mentioned.

23 If I could completely assure you and other
24 judges that there was never going to be an impermissible
25 prosecution under this, I certainly would do so. I can't.

1 But I do think what we have here is a situation where,
2 fairly read, the statute deals with the precise problem
3 that Congress had considered, given the conflicting lower
4 court precedents.

5 And, in sum, we think that when you start with
6 the principle that ignorance of the law is no excuse, and
7 when you work through all the other tools of statutory
8 construction, we think that our interpretation of this
9 statute is --

10 QUESTION: Mr. Larkin, you didn't even cite this
11 U.S. against Isham that was about breaking instead of
12 having -- was it \$20, you break it -- the example that was
13 given in that old case was to avoid the stamp tax, it's
14 okay to pay in two units of \$10 rather than one of \$20.
15 You had to put a stamp on it if you did it in a unit of
16 \$20. So you just divide it in two, and it's just done
17 purely for the purpose of avoiding having to pay the
18 Government money.

19 I thought that case was at least relevant, and
20 wondered why you didn't address it?

21 MR. LARKIN: Well, I would say it's not a
22 difficult precedence for us for two reasons. One is the
23 one Justice Scalia mentioned, that there's a difference
24 between trying to avoid keeping information like this,
25 which is closely tied to criminal activity, out of the

1 hands of the Government, versus trying to just reduce your
2 tax liability.

3 And the second is this. That dealt with a
4 statute that, as I said earlier, drew a line and said
5 those who cross it have to engage certain obligations.
6 Here, Congress was drawing a statute that was designed to
7 keep people away from the line. They saw that what had
8 happened before was they drew a line and people found a
9 way through it. They breached it by taking advantage of a
10 loophole. Congress here was trying to make sure there
11 weren't loopholes, so we don't think that Isham case is
12 dispositive here.

13 QUESTION: In other words, you say that case
14 would be more germane if the statute in question were a
15 statute that made it unlawful to structure your
16 transactions in order to buy two \$9.90 stamps instead of
17 one \$20 stamp.

18 MR. LARKIN: That's a reasonable way of looking
19 at it.

20 QUESTION: That's the kind of statute we have
21 here specifically as to the structuring.

22 MR. LARKIN: Thank you, Your Honor.

23 QUESTION: Thank you, Mr. Larkin.

24 Now, Mr. LaCheen, you have 9 minutes remaining.

25 REBUTTAL ARGUMENT OF STEPHEN R. LACHEEN

1 ON BEHALF OF PETITIONERS

2 MR. LaCHEEN: I don't think I need 9, but I'll
3 do the best I can, Your Honor.

4 Apropos of this case, I received in the mail not
5 too long ago a book that says "how to win in the
6 no-nonsense nineties." And the first -- published by
7 Board Reports. And it says one of the best things you can
8 do is keep a low profile, because there have never been
9 more legitimate reasons for wanting financial privacy.
10 These days, the more the IRS knows you have, the greater
11 the chance of expensive, time-consuming audits.

12 And the first thing it says is: "In moving
13 funds into private investments, maintain a low profile.
14 Avoid Government reporting requirements whenever it's
15 legal." This is not some tax --

16 QUESTION: I suppose the editor of that
17 publication, if he reads our decision in the case and you
18 lose --

19 (Laughter.)

20 QUESTION: -- Will probably let everybody on his
21 subscriber list know what that risk is.

22 MR. LaCHEEN: I think that's a good faith
23 defense for those people right there, Your Honors.

24 I want to comment on the lower scienter that was
25 discussed by my colleague. With regard to those offenses,

1 I want to remind the Court that in almost every one of
2 those situations, there was at least an element of moral
3 blameworthiness in the initial act.

4 One can compare this not to the hand grenade
5 case so much as to, for example, U.S. v. Feola, where this
6 Court said it wasn't necessary that the person who struck
7 an individual knew that the person was a Federal officer
8 to be convicted of the offense of assaulting a Federal
9 officer. In the case of U.S. v. Yermian, this Court
10 decided that you didn't have to know that a falsehood was
11 given to a Federal agency or within the jurisdiction of
12 the Federal agency once you made the falsehood.

13 But in those cases and every similar case, there
14 was something morally blameworthy in the initial act. It
15 was either an assault, it was perjury, it was a lie, or it
16 was some other act which says, contrary to just having
17 \$10,000, there's something morally blameworthy about it.

18 Counsel astounds with the remark that having
19 \$10,001 or \$10,000 is some evidence or probable evidence
20 of some criminal conduct. Congress may have thought that
21 because drug dealers engage in large amounts of money,
22 that people that have large amounts of money are
23 necessarily drug dealers. That is not the case.

24 And if that was the case they could have crafted
25 a statute which the Court and the Government would

1 interpret in such a way as to catch only the guilty, not
2 to catch the minnows in the shark -- in the net that was
3 intended for the sharks. And what we --

4 QUESTION: Well, Congress, if it chooses, can
5 set out and devise a net that will catch minnows and
6 sharks.

7 MR. LaCHEEN: If they notify them, Your Honor,
8 absolutely. And the difference in this case is that up to
9 January -- to pick a date -- January 1, 1987, the conduct
10 which the Government wants to use to create the moral
11 blameworthiness here, that is the avoidance of certain
12 regulations, was never considered -- not only was it
13 considered noncriminal, it was never considered unlawful.

14 So how can doing that act constitute the moral
15 blameworthy element that makes you guilty of what you
16 don't know, which is the fact that there is a statute that
17 specifically prohibits the conduct? This is exactly the
18 kind of case where you have to have knowledge of the
19 statute, because otherwise you don't know that you're
20 violating the law, and the only thing morally blameworthy
21 is that you violated a law which Congress has passed.

22 QUESTION: There is a statute here which
23 specifically prohibits the conduct, and it's 5324.

24 MR. LaCHEEN: That's correct, Your Honor. But
25 what the Government says is you do what it says in 5324,

1 and therefore you are -- you've committed an act which
2 is -- subjects you to the criminal penalty of 5322. But
3 prior to January, 1987, no one knew that, and the
4 Government has taken every step not to notify anyone that
5 that is an offense.

6 QUESTION: Where do you get any requirement like
7 that out of our cases, that every time Congress passes a
8 new criminal statute it has to notify everybody?

9 MR. LaCHEEN: Only if it is conduct which was
10 not previously blameworthy. In the situations which we
11 have had -- for example, in Morissette, one of the cases,
12 which says where the offense was a common law offense,
13 even if Congress doesn't put the requirement in the
14 statute, the requirement in there.

15 If the conduct itself -- the badness, the evil
16 intent, the concurrence, as Your Honor said -- the
17 concurrence of the evil-meaning mind and the evil-doing
18 hand. You have to have something that's wrong to make a
19 person subject to a 20-year --

20 QUESTION: But that's not true.

21 MR. LaCHEEN: -- Felony.

22 QUESTION: But that's not true. I mean, really
23 the basic rule is ignorance of the law is no excuse.

24 MR. LaCHEEN: Except --

25 QUESTION: Congress need not, and a State

1 legislature need not make knowledge of the law an element.
2 It happens all the time. People, if they choose not to
3 look up the State law as to what the speeding limit is, if
4 they violate it that's their tough luck, whether they knew
5 about it or not.

6 MR. LaCHEEN: Only because --

7 QUESTION: All sorts of clauses like that.

8 MR. LaCHEEN: -- Everyone knows that those
9 conduct -- that that conduct is regulated. If it's bad in
10 itself, if it's conduct which the -- of which it's proper
11 to say you have reason to know it's regulated, then you --

12 QUESTION: Okay, now we're adding things. What
13 about conduct which --

14 MR. LaCHEEN: You've just invented --

15 QUESTION: -- Would ordinarily be done for a
16 nefarious -- not always, but in the ordinary course of
17 things it's conduct that there's no explanation for except
18 something shady?

19 MR. LaCHEEN: Well, there are hundreds of
20 thousands of businesses -- small businesses in this
21 country -- in this country which deal in cash.
22 Restaurants, luncheonettes, a lot of retail businesses and
23 a lot of wholesale businesses. The case I mentioned
24 before was a wholesale gun dealer. He deals in \$20,000
25 worth of cash a week, puts the money in --

1 QUESTION: Right. And do they all trot over and
2 deposit only \$9,999 at a time?

3 MR. LaCHEEN: No, they don't all do that.

4 QUESTION: No, they don't.

5 MR. LaCHEEN: But they don't --

6 QUESTION: That's the conduct we're talking
7 about. That's the conduct that seems to me usually to be
8 nefarious.

9 MR. LaCHEEN: But usually, but not always, and
10 when you --

11 QUESTION: Not always.

12 MR. LaCHEEN: When you have a statute which
13 permits the conviction of people who did it with innocent
14 motives, or let's say just non -- say noncriminal motives.

15 QUESTION: Statutes can do that, though.
16 Statutes can do it. If the only issue here --

17 MR. LaCHEEN: If you notify people.

18 QUESTION: The only issue here is whether we
19 should believe that Congress, in this case, has passed
20 such a statute. And it seems to me that if in the vast
21 majority of cases it's going to be picking up people who
22 do have some nefarious motive, then maybe Congress did
23 pass such a statute.

24 MR. LaCHEEN: I don't think that we've gotten to
25 the point where we don't mind convicting innocent people

1 because we're going to get some guilty people with the
2 same act, and that's what they did with this statute.

3 QUESTION: What innocent? They violated the
4 law.

5 MR. LaCHEEN: They didn't violate the law. They
6 didn't knowingly violate the law, and --

7 QUESTION: Well, of course, Mr. LaCheen, that's,
8 of course, the issue in the case.

9 MR. LaCHEEN: That is.

10 QUESTION: But let me just ask you this
11 question, because --

12 MR. LaCHEEN: Yes, Justice Stevens.

13 QUESTION: You don't -- you're not arguing any
14 constitutional objection to the Government's reading of
15 the statute.

16 MR. LaCHEEN: We --

17 QUESTION: And if it's -- at least assuming
18 you're not, what do you do with the legislative history
19 that suggests they wanted to codify the result in the
20 Tobon case?

21 MR. LaCHEEN: Two things. One, that's not
22 that -- it's specific that that's what they wanted to deal
23 with. It is not clear that that -- the way in which they
24 resolved it was to lower the element of scienter. They
25 did not change -- and they specifically did not change

1 "willfully" to "knowingly" when they enacted 5324. That
2 being the case, I think it's proper to assume that they
3 continued, in effect, the application of "willfully" as it
4 had previously been developed, and that is what they
5 wanted.

6 Yes, they wanted the guilty people, but the
7 guilty people are the ones that "willfully" violate the
8 statute, not the guy like Ratzlaf or the guy like Shirk,
9 the other case I mentioned, where people do it as part of
10 their normal business procedure or because they want to
11 maintain their own privacy for a nonnefarious, nonmorally
12 blameworthy act.

13 QUESTION: In the Tobon case, the argument was
14 made that we didn't do anything that was -- that we had
15 any reason to know it was unlawful. They did --

16 MR. LaCHEEN: The jury may have rejected that,
17 Justice Stevens. The jury may have rejected it in that
18 case, but at least those people had the benefit of going
19 to the jury, I believe, with that instruction. The people
20 in this case didn't have that benefit. They were told
21 that all they had to know was that there was a requirement
22 and that they acted in such a way so that the bank didn't
23 file the report. They were never told that they had to
24 know there was some duty on them.

25 And most of the cases which go the other way,

1 which Justice Scalia has mentioned, are cases where the
2 duty is directly upon the person violating the duty. If
3 the -- you're driving down the street, you can say I
4 didn't see that stop sign or that speeding sign, but
5 you're the person in the car and you're the person that
6 has the duty to obey that law.

7 In this case -- this is a rhetorical question,
8 but I want to know how a depositor who walks into a bank
9 is supposed to know that because the bank has a duty to
10 file a paper, that there's some duty on him to give them
11 the information necessary to file it? And that's what
12 this is about. The duty has been -- there's a kind of
13 transferred; not only a transferred of intent, but a
14 transferred of duty. And I submit that that is so far
15 beyond anything that this Court has ever approved --

16 QUESTION: If the Secretary had issued a
17 regulation requiring your client to file these
18 transactions, you would have no case.

19 MR. LACHEEN: That's a different story. And
20 they didn't do it because they -- that's exactly right.
21 That's a different story, Your Honors.

22 Thank you.

23 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
24 LaCheen.

25 The case is submitted.

1 (Whereupon, at 1:52 p.m., the case in the
2 above-entitled matter was submitted.)
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CERTIFICATION

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WALDAMAR AND ORETTA PATZLAF V. UNITED STATES

CASE 92-1196

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

BY Ann Marie Federico

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