

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Petitioner v. ESTATE OF FRANCIS J.
ROMANI

CASE NO: 96-1613

PLACE: Washington, D.C.

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

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 96-1613, United States v. The Estate of
5 Francis Romani.

6 Mr. Jones, you may proceed whenever you're
7 ready.

8 ORAL ARGUMENT OF KENT L. JONES

9 ON BEHALF OF THE PETITIONER

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

12 On the date of his death Francis Romani owned
13 real property worth about \$50,000. That property was
14 subject to a private judgment lien and to a later-filed
15 Federal tax lien. Both of the liens were for amounts that
16 exceeded the value of the estate, and the estate therefore
17 brought this case to determine whether the claim of the
18 United States or the claim of the private judgment
19 creditor should be paid first.

20 The answer to that question appears in the
21 direct text of what is known as the absolute priority
22 statute. Since 1797, that statute has provided a simple
23 rule for the narrow category of cases in which the United
24 States seeks to recover a claim against an insolvent
25 estate.

1 QUESTION: Well, the statute is different in
2 this respect. Until the revision of the statute in
3 question, which I think was 1982, it talked in terms of
4 debt. 3713(a) at page 2 of your brief talks about claim,
5 and it seems to me that a -- that the word claim may be
6 quite different than debt. Claim sounds to me as -- has
7 the connotation of something that's not -- that's
8 ambulatory, or that hasn't been executed yet, whereas debt
9 sounds as if it's something that's fixed.

10 MR. JONES: When Congress enacted that provision
11 in 1982 they said it was a formal change of language that
12 was not intended to change the scope of the statute.

13 QUESTION: But the language still is different.

14 MR. JONES: The language is --

15 QUESTION: One is claim, and the other is debt.

16 MR. JONES: The language is different, but
17 Congress didn't intend it to have a different meaning, but
18 moreover --

19 QUESTION: How do you know that?

20 MR. JONES: That's -- the legislative history --

21 QUESTION: Well, but, you know we don't always
22 pay a lot of attention to legislative history.

23 MR. JONES: It's -- you may not always pay a lot
24 of attention to it, but in the context where a change has
25 been made to words, and the question is whether that

1 changed the meaning of the statute, it's appropriate to
2 look to the legislative history, especially when Congress
3 says in that history, we're not changing the meaning.

4 That should be authoritative. But --

5 QUESTION: A committee says in that regard.

6 MR. JONES: That's correct.

7 There is an answer, I think, in any event to
8 your question apart from that, and that is -- I may be --
9 I may have the wrong case, but I think it's United States
10 v. Moore where the Court said that whether the claim is
11 unliquidated or not, it's still covered by the absolute
12 priority statute.

13 But the importance of the absolute priority
14 statute is that it provides the simple rule that the
15 United States shall be paid first.

16 QUESTION: Well then, what's the point of 6321
17 and 6323(a), which deal specifically with tax liens?

18 MR. JONES: Yes, that's indeed the ultimate
19 question in the case.

20 QUESTION: Yes.

21 MR. JONES: Does that statute change the
22 application of the absolute priority statute for tax
23 claims? The Pennsylvania supreme court said that it did,
24 and we say it doesn't.

25 The rationale of the Pennsylvania supreme court

1 was that this tax lien statute provides a limitation on
2 the effectiveness of the Federal tax lien, and that by
3 limiting the validity of the lien, you limit the priority
4 of the United States, but in United States v. Key and
5 United States v. Emory the Court said that only the
6 plainest inconsistency between two statutory schemes would
7 justify disregarding this ancient and clear command that
8 the United States be paid first.

9 There is no claim inconsistency between these
10 statutory schemes. The absolute priority statute is a
11 priority statute. It does not require any lien of the
12 United States. In United States v. City of New Britain,
13 and United States v. Vermont, this Court held exactly
14 that, that the right of the United States under the
15 absolute priority statute exists wholly without regard to
16 the existence of any lien.

17 QUESTION: But in the New Britain case they
18 discussed at great length the tax lien statutes, too, did
19 they not?

20 MR. JONES: Yes, because that --

21 QUESTION: Well, why would that have been
22 necessary if the only holding of the case was that it's
23 governed by the absolute priority statute?

24 MR. JONES: Because in the New Britain case the
25 debtor was solvent. The absolute priority statute did

1 not, by its terms, apply, and the very important part of
2 that opinion for this purpose is what the Court went on to
3 say about how the Tax Lien Act applies in that situation.

4 What the Court said was, the Tax Lien Act only
5 determines the validity of the Federal lien. It does not,
6 by its terms, contain any priority provisions. It does
7 not set a priorities, it is a lien statute, and the Court
8 said that to determine priorities we look to the
9 background common law rule of first in time is first in
10 right, unless that has been modified by statute, and the
11 Court pointed out that in the insolvency situations to
12 which the absolute priority statute applies, it has been
13 modified by statute.

14 Congress provided specifically since 1797 that
15 in the narrow category of cases involving insolvent
16 estates the United States is to be paid first.

17 QUESTION: But if -- the whole thing is so
18 strange. What if the insolvent debtor, instead of dying,
19 became bankrupt? Then the Government isn't necessarily
20 going to come out the same way.

21 MR. JONES: Congress specifically has provided
22 that bankruptcy cases are to be determined not under the
23 absolute priority statute but under the priority
24 provisions of the Bankruptcy Code. It's not illogical for
25 Congress to determine that one set of priority rules apply

1 in one context and a different apply in different
2 contexts.

3 QUESTION: But if the debtor is insolvent and
4 dies, then you say this 3713 has to apply, even if it's a
5 tax that we're talking about.

6 MR. JONES: Absolutely. Congress said that, but
7 more important -- well, equally importantly, this Court
8 has said that no less than seven times in the last 180
9 years.

10 QUESTION: Well, what if under 3713 instead of a
11 judgment lien there had been a prior recorded mortgage?

12 MR. JONES: Well, that takes us to the heart of
13 an ancient dispute that this Court has, by its express
14 statements, never resolved. The --

15 QUESTION: Well, what's your position? Suppose
16 there was a prior recorded mortgage here --

17 MR. JONES: The --

18 QUESTION: -- and we were talking about that in
19 the case of an insolvent who dies --

20 MR. JONES: The Court --

21 QUESTION: -- versus the Government's claim.

22 MR. JONES: In New York v. Maclay, for example,
23 the Court said a mortgage is more than a lien, that it is
24 closer to a title and possession of the property, and --

25 QUESTION: Well, do you concede that in the

1 mortgage situation the mortgage holder would come out
2 ahead of the Government here --

3 MR. JONES: I would --

4 QUESTION: -- if it were a recorded mortgage?

5 MR. JONES: I would concede it to this extent.
6 The Court so stated that in Thelusson.

7 QUESTION: Yes.

8 MR. JONES: The Court confirmed that in the
9 Maclay case, but I believe it was in either Mass -- United
10 States v. Massachusetts or United States v. Texas, in one
11 of those two opinions when they were reciting the well-
12 established rule about we prevail against judgment liens
13 but we may not prevail against mortgages, the Court said
14 something to the effect that if the mortgage cases are
15 still valid.

16 Now -- and so I suppose that what the Court was
17 saying then was, they weren't revisiting to decide whether
18 the mortgage case --

19 QUESTION: Well, what are you saying?

20 MR. JONES: Well, I'm -- I'm just --

21 QUESTION: I think we'll try to figure out --

22 MR. JONES: Okay. That issue --

23 QUESTION: -- what we were saying. I want to
24 know what you're saying about this.

25 MR. JONES: What I'm saying is that the Court

1 has always held that we prevail against the general lien
2 of the judgment. The question of whether we prevail
3 against a mortgage isn't presented in this case. The
4 question in particular --

5 QUESTION: Well, I know that. I'm asking what
6 your position is if it were.

7 MR. JONES: Well, I'm -- my position is that the
8 Court has twice held that we lose to a mortgage, and has
9 once said that it's not certain that that's good law. I
10 really don't --

11 QUESTION: What about all the repair -- the
12 repairmen? You know, people come in and they fix the
13 house, and normally you fix the house or you fix the
14 plumbing and throughout the law there are all kinds of
15 ways of making certain those people get paid.

16 They're usually called mechanic's liens, and
17 here Congress has a specific statute that says, you know,
18 if Smith dies and he -- or if Smith owes money on taxes,
19 we get it first. We use this magic word lien, but all
20 that means is, we get it first. But by the way, we don't
21 get it first in respect to the mechanic.

22 MR. JONES: No, Con --

23 QUESTION: He gets his money first, right?

24 MR. JONES: Congress --

25 QUESTION: You're saying that the mechanic

1 lien -- the mechanics get their money first, before the
2 tax money, I take it. That's not right?

3 MR. JONES: First of all --

4 QUESTION: I was reading 632 -- yes.

5 MR. JONES: -- the absolute priority statute
6 doesn't create a lien.

7 QUESTION: I mean, I'm taking -- a lien is just
8 a magic way of saying the Government gets paid first, I
9 think.

10 MR. JONES: It's not a -- it's not that kind of
11 a magic word, and this Court has made the very distinction
12 on this subject, and so it's important for me to emphasize
13 it.

14 The right of the United States under the
15 absolute priority statute does not depend upon the
16 existence of any lien, valid or not. It defeats any --
17 what the Court has described in I think seven cases that
18 we've cited. It defeats anything that is a quote, general
19 lien, which is a lien that does not -- as the Court said
20 in *Thelusson* all the way to *Gilbert Associates*, a general
21 lien does not divest title or possession from the United
22 States. The property remains in the debtor's estate and
23 therefore the United States is to be paid first.

24 And so, is the -- so the question that I believe
25 was implicit in your remark was, is a mechanic's lien a

1 general lien covered -- you know, which the United States
2 prevails, or is it a specific lien that might come in
3 ahead of the United States under the absolute priority
4 statute.

5 QUESTION: Yes.

6 MR. JONES: My perception of that is that if the
7 Court had to reach it, under its precedent it would hold
8 that it was a general lien, although it could hold it was
9 a specific --

10 QUESTION: And not like a mortgage.

11 MR. JONES: It's certainly not exactly like a
12 mortgage.

13 QUESTION: So then my question actually is --
14 thank you, that is much clearer, and my question really is
15 what any Congressman or Senator would have had in mind in
16 saying that my goodness, we want to be certain those
17 mechanics who come in and fix the roof are paid before the
18 IRS, and that's what they seem to say in 1623 and, in
19 fact, if we're reading of the statute is correct, every
20 time a person dies insolvent the IRS gets paid before the
21 mechanics. Now, that to me just doesn't make any sense.

22 MR. JONES: Well, I'm not -- I'm not saying what
23 our position is on mechanic's liens, because I can hear an
24 argument to be made for saying, oh, that's a specific lien
25 within the context of how the Court uses that term.

1 But let's take the judgment lien, which is also
2 referred to in 6323, and which the Court's opinions say
3 clearly we prevail against under the absolute priority
4 statute.

5 Did Congress intend, in adopting 6323, to repeal
6 the application of the absolute priority statute to
7 judgment liens? The answer to that is no. Why? Because
8 at the same -- in terms of intent, at the same time that
9 the repealing legislation was presented for -- I mean,
10 that the Federal tax lien legislation was presented to
11 Congress in 1966, Congress was also presented with three
12 bills designed expressly to repeal the application of this
13 statute to tax claims.

14 Congress conducted hearings on those
15 legislation, informed itself of the objections, and
16 declined to enact it. 4 years later, the same repealing
17 legis --

18 QUESTION: Or a committee did, anyway.

19 MR. JONES: Yes.

20 QUESTION: I'm normally with you on legislative
21 history, but I'm getting off the train in this instance
22 for the reason that I'd ask before these particular bills,
23 of what sense it would make? What sense would it make --

24 MR. JONES: It --

25 QUESTION: -- for -- to have a law which says,

1 like 6323, we normally put all these things ahead of the
2 secret IRS lien, because it isn't necessary -- but we
3 don't --

4 MR. JONES: The sense that it --

5 QUESTION: -- we don't put it ahead when the
6 person dies. I'm looking for some sense in that.

7 MR. JONES: The sense that it makes is, when the
8 tax lien provisions are applicable, they're applicable
9 within a priority context determined by some other statute
10 or legislation. In the situation you've described, if he
11 goes into bankruptcy, then it's the Bankruptcy Code that
12 prevails, the Bankruptcy Code that is operative.

13 All that the tax lien provisions say is whether
14 we have a valid lien, and then you should ask, so what if
15 we don't have a valid lien, and the answer under the
16 absolute priority statute is --

17 QUESTION: Mr. Jones --

18 MR. JONES: -- it doesn't matter.

19 QUESTION: You are presenting the position as
20 though it's clear and certain this is the Government's
21 position, the only question mark is what this Court may
22 have done in some mortgage cases, and yet the red brief
23 cites an Attorney General's opinion from 1857. But you
24 don't -- as far as I remember don't address that at all
25 in --

1 MR. JONES: Well, one of the reasons we don't
2 address that opinion of the Attorney General is because
3 all of that portion of their argument relates to an issue
4 that wasn't raised below, which is whether this is --

5 QUESTION: No, but they can defend the judgment
6 on the ground that it wasn't thought of below. That's
7 well-settled.

8 MR. JONES: They can defend it on a ground that
9 wasn't even raised below.

10 QUESTION: Sure.

11 MR. JONES: Or addressed below. They --

12 QUESTION: If their reading of the statute is
13 correct, namely that the -- what you call an absolute
14 priority statute merely applies to unsecured claims, then
15 we don't have to get into all this, and we would have to
16 affirm --

17 MR. JONES: If the --

18 QUESTION: -- if that's a correct reading of the
19 statute.

20 MR. JONES: If the Court were going to revisit
21 the question of whether the judgment lien was subject to
22 the absolute priority statute I would think it would want
23 to do that in a context where it was raised below, because
24 the Court has already decided that issue seven times.

25 QUESTION: Well, it's been fully briefed in

1 this, by both sides in this case. You filed a reply
2 brief.

3 MR. JONES: And stare decisis would also
4 suggest --

5 QUESTION: Well --

6 MR. JONES: -- that what the Court would do
7 would be to apply Thelusson, Gilbert Associates, United
8 States v. Texas, United States v. Massachusetts, City of
9 New Britain and Vermont, and say --

10 QUESTION: United States v. Massachusetts was a
11 5 to 4 decision, so it has less claim to stare decisis
12 than --

13 MR. JONES: Well, it was just one of a long
14 string of decisions, and my point is simply that this is
15 well-settled since 1817. If the Court wants to revisit
16 the issue, I would think it would do it in a case where we
17 had an opportunity to brief it in the courts below and
18 fully here, instead of just in a reply brief.

19 QUESTION: Mr. Jones --

20 QUESTION: But you still haven't commented --

21 MR. JONES: Yes --

22 QUESTION: -- on the merits of the Attorney
23 General's brief.

24 MR. JONES: Right.

25 QUESTION: You said we didn't discuss it because

1 it wasn't raised below, and that's your only answer to
2 that opinion?

3 MR. JONES: No, I -- that's not my only answer.
4 That opinion was in 1850-something. It was -- what it
5 really was, and what the opinion reflects, is that it was
6 an issue about whether a mortgage takes priority under the
7 absolute priority statute, and the Court cited Conard, and
8 maybe Thelusson, but certainly Conard for that
9 proposition, which -- we don't intend to dispute Conard.
10 We don't intend to dispute that a mortgage -- this Court
11 has held that a mortgage takes priority, and --

12 QUESTION: Why not? It doesn't make any sense.

13 MR. JONES: Well, when Justice O'Connor asked me
14 that, it's sort of like -- well, I -- I'm not trying to
15 reformulate the Court's cases. I'm trying to describe
16 them, and the Court's cases have contained that last
17 caveat about, well, whether that is still good law. We
18 don't place that at issue in this case.

19 But getting back to Justice Breyer's question
20 about why does this make sense, this makes sense because
21 Congress has provided priorities for cases involving
22 bankrupts in the Bankruptcy Code. Congress has provided
23 by indirection cases for insolvents, which is that they
24 haven't changed the common law rule of first in time, and
25 that's what the Court held in City of New Britain.

1 QUESTION: Well, the priority under this would
2 be first in time, first in right. I mean, it's not a
3 mystery what the priority would be if --

4 MR. JONES: No, the priority here is we're paid
5 first.

6 QUESTION: -- 6323(a) governs.

7 MR. JONES: No, the priority in an insolvent
8 estate is the absolute priority statute, and that's we're
9 paid first. These are different rules. Congress --

10 QUESTION: That's the issue. If we were to say
11 6323(a) was the more specific and it applies, then it
12 would be first in time, first in right, wouldn't it?

13 MR. JONES: That is -- well, I wouldn't think
14 you'd say that for a variety of reasons. One is, the
15 Court doesn't apply that method of analysis to the
16 absolute priority statute, but even if it did, which of
17 these provisions is more specific, which is a point I've
18 been trying to get up to.

19 The absolute priority statute is a very narrow
20 statute. It has an extremely narrow scope of operation.
21 It only applies in these narrow categories of cases
22 involving insolvent estates and a few other narrow
23 insolvency situations. The dominant majority of cases are
24 governed by other priority provisions. Bankruptcy cases,
25 solvency --

1 QUESTION: But are you saying that priorities,
2 lien, or debt priority statutes come into play in a
3 majority of cases where there is no insolvency? That
4 seems odd to me. I would think the time that it would be
5 most useful and probably most applicable is when there is
6 some sort of insolvency.

7 MR. JONES: And in the vast majority of those
8 cases they're in the Bankruptcy Code, covered by the
9 Bankruptcy Code.

10 I mean, we know Congress intended to have two
11 different priority schemes, because the absolute priority
12 statute specifically excepts bankruptcy cases from its
13 application.

14 QUESTION: But Mr. Jones, the Government is owed
15 all kinds of money by all kinds of people, and that's --
16 the absolute priority statute could cover those debts, but
17 here we have something that deals with tax liens, so
18 that's the specific subject matter, as --

19 MR. JONES: Well, that deals with tax liens, and
20 that's the point, because Congress certainly knew full
21 well that this Court had held in *Thelusson* in 1817 and in
22 the several cases in the fifties, like *City of New*
23 *Britain*, knew full well that this Court had held that you
24 don't need a tax lien. It doesn't matter if you don't
25 have a valid tax lien under the -- in the narrow

1 situations that the absolute priority statute applies, and
2 so you have to understand that these statutes really
3 operate in different -- on different issues.

4 Every Federal court that has considered this has
5 recognized that the priority statute establishes
6 priorities, the lien statute deals with liens. These are
7 different subjects. There's no inconsistency between
8 those two provisions because they both have full
9 application in the separate contexts that they apply.

10 QUESTION: What is the -- so I'm still back to
11 the -- I'm looking at it -- to be honest with you, I'm
12 seeing your statute as a very old one, and once you take
13 that statute the courts have to get into a real nightmare
14 of an issue of deciding when title is passed, or when it
15 isn't passed. It isn't true that any physical property in
16 the possession of the deceased is going to go to the
17 Government. You have to draw odd lines.

18 Time passes. Congress begins to pass specific
19 statutes dealing with specific situations that set up
20 priorities, and unless there is some reason for not
21 applying these later, specific statutes, I don't know why
22 we wouldn't --

23 MR. JONES: Well --

24 QUESTION: -- because they're a more thought-
25 out, careful method of distinguishing between different

1 kinds of --

2 MR. JONES: You can't come to that conclusion --

3 QUESTION: Yes.

4 MR. JONES: -- after reading the City of New
5 Britain opinion, because the City of New Britain opinion
6 says that in the insolvency situation Congress has
7 provided specific priorities, and we win without regard to
8 the existence of any lien.

9 QUESTION: What's the -- what is special about
10 dying insolvent as opposed to just living and not paying
11 your taxes? What -- what's the difference.

12 MR. JONES: It's not so much that there's
13 something special about it. It's that the statutes have
14 different words, they have different histories, they have
15 different purposes, they do not conflict if you take them
16 each at their fair reading.

17 The -- okay, let's say the fair reading is, this
18 is a judgment lien, our lien would not be valid against
19 it. The next question is --

20 QUESTION: If you go into history, your opponent
21 argues you go back to the prerogative of the Crown and
22 apply to everything, just general claims and not secured
23 claims.

24 MR. JONES: I think that that's a --

25 QUESTION: You ignore that history?

1 MR. JONES: -- vast overstatement again. I
2 mean, they cite a case called Marshall v. New York, where
3 the Court says that the common law rule was that specific
4 liens, only specific liens prevail

5 QUESTION: Do you think they correctly or
6 incorrectly describe the law in England before we got
7 started?

8 MR. JONES: I -- they didn't correctly describe
9 the law in England as this Court described it in Marshall.

10 QUESTION: Well --

11 MR. JONES: As far as what the law in England
12 was before, this Court has said it doesn't matter, because
13 in United States v. Moore, and all the way back in 1824, I
14 think, in the Bank of North Carolina case, the Court said
15 that whatever the common law rule is, this priority of the
16 United States arises solely by statute, and it is
17 interpreting that statute that the Court has said, seven
18 times since 1817, that a general lien such as a judgment
19 lien, or a State and municipal tax lien, or a landlord's
20 lien does not prevail against the absolute priority of the
21 United States.

22 And in City of New Britain they said we don't
23 need a lien in these cases. A lien -- and or repeated
24 that same conclusion in United States v. Vermont. The
25 lien -- the existence of a lien is a security device.

1 It's not a right to payment.

2 We don't have a lien, so when there's
3 property -- in the absolute priority situation, when
4 there's property possessed by the insolvent estate, if
5 it's transferred out of the estate we don't have a lien
6 that follows it, and the absence of such a lien doesn't
7 affect our right to be paid out of the property of the
8 estate.

9 QUESTION: You do concede that certain secured
10 creditors can get priority in an insolvent estate
11 situation, and you would --

12 MR. JONES: Yes.

13 QUESTION: -- say, well the mortgage -- is there
14 anything -- well, as to the mortgage, do you make a
15 distinction between --

16 MR. JONES: I think a purchase money mortgage --

17 QUESTION: -- title States and lien States?

18 MR. JONES: I think a purchase money mortgage
19 would plainly be the sort of thing this Court would hold
20 as a practical matter would hold it's a specific lien that
21 prevails against the absolute priority of the United
22 States. I think that much is clear, to answer your
23 question.

24 QUESTION: Any other --

25 MR. JONES: The Court has never decided that

1 question, and has specifically avoided it, so I can't tell
2 you how you'd decide it.

3 QUESTION: I just wondered what worked in with
4 your theory.

5 MR. JONES: The theory that the Court has is
6 that to be specific for purposes of the absolute priority
7 statute you have to divest title or possession of the good
8 from the debtor's estate before the claim of the United
9 States arises.

10 QUESTION: So then in mortgage lien States, as
11 distinguished from title States, then in the lien States
12 the creditor would lose.

13 MR. JONES: Justice Cardozo who addressed that
14 very point in New York v. Maclay, and he said, well, I
15 don't have -- I can't decide now whether a lien State the
16 mortgage would win, but, he says, this -- a mortgage is
17 more than a -- more than merely a lien, he said. It's
18 more akin to title. It's more akin to possession.

19 Now, there's a reason why the Court hasn't had
20 to address that question. The reason is that it has never
21 had a case before that presented anything other than a
22 general lien that did not divest title and possession, and
23 so that boundary is still out there. It -- but it's never
24 been defined by the Court other than in Thelusson, and it
25 -- they said, well, it's title or possession --

1 QUESTION: We --

2 MR. JONES: -- and the Court has followed that

3 for 180 years.

4 QUESTION: This is a slightly picky point. I'm

5 reminded of my tax professor, Ernie Brown, and I'm looking

6 at the lien statute, and you're saying, well, that's just

7 a lien statute. We win anyway. But it doesn't say the

8 United States shall have a lien. It says the amount owed

9 shall be a lien, right?

10 MR. JONES: That's 6321.

11 QUESTION: Yes, 6321.

12 MR. JONES: 6323 --

13 QUESTION: So it says, if I die insol -- I know,

14 6323 refers to the lien in 6321.

15 MR. JONES: And says it won't be valid --

16 QUESTION: Yes, the lien won't be valid.

17 MR. JONES: Right.

18 QUESTION: But what 6321 says is, the amount

19 when I die insolvent and owe it to the IRS, it says that

20 amount shall be a lien, so the amount that I owe you is a

21 lien. It's not that you have a lien.

22 MR. JONES: But we don't --

23 QUESTION: And therefore the language of the

24 statute is consistent with it replacing the statute that

25 you're talking about.

1 MR. JONES: Well, that -- I'm sorry, I --

2 QUESTION: I put that --

3 MR. JONES: -- I'm just surprised at that
4 suggestion. The Court -- I can't remember the case, but
5 I'm quite confident that the Court has said that the tax
6 lien provisions supplement the right of the United States
7 to recover a tax.

8 QUESTION: We have to say it's a supplement?

9 MR. JONES: Well, I think it obviously is.
10 Every lien is a supplement to the underlying claim. I
11 mean, it doesn't substi -- it doesn't replace the claim.
12 It's a security device. The question is, do we need it?
13 No, we don't. The Court has so held. We don't need that
14 lien.

15 QUESTION: Why did Congress give it to you if
16 you didn't need it?

17 MR. JONES: Well, we don't need it in the
18 absolute priority, in the narrow categories of the
19 absolute priority statute, because there we have a right
20 to be paid first. When those priorities aren't
21 applicable, yes, we benefit from the lien in other
22 priority contexts. Congress intended these priority rules
23 to apply here, intended other priority rules to apply
24 elsewhere.

25 I've got just a few minutes left. I only want

1 to make one other point at this time, and that is that
2 respondent claims that this ancient statute should be
3 modernized to avoid an inconvenience to creditors. The
4 simple answer to that is what the Court said in Emory.
5 Whatever the merits of that objection should be made to
6 Congress, not the Court.

7 And that brings me to the point that these
8 objections were raised with Congress twice. In '66 and
9 '70, Congress conducted hearings on them and declined to
10 make the changes that respondent now asks this Court to
11 make.

12 Going all the way back to 1805, in the first
13 case that this Court decided under the absolute priority
14 statute, Chief Justice Marshall said for this Court that
15 the inconvenience of the statute did not justify its
16 judicial nullification, and for that reason the
17 Pennsylvania supreme court's decision should be reversed.

18 I'd like to reserve time for rebuttal.

19 QUESTION: Very well, Mr. Jones.

20 Mr. McCartan, we'll hear from you.

21 ORAL ARGUMENT OF PATRICK F. McCARTAN

22 ON BEHALF OF THE RESPONDENT

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

25 If I may, I would like to start with the

1 question posed by Justice Stevens, which is whether
2 antecedent security interests, traditional security
3 interests survive assertion of the priority of the United
4 States Government under the priority statute.

5 We did not handle this case below, and cannot
6 tell the Court, therefore, why it was not discussed below,
7 but I can and do say that it is clearly embraced within
8 the question presented by the Government in its petition.
9 That is why they argued this issue at pages 9 and 10 of
10 the petition, and why they reargued it at pages 14 and 16
11 of their opening brief on the merits here.

12 The statute under which the Government claims
13 priority had its origins in the prerogative of the Crown
14 for the payment of debts due to the sovereign. When it
15 was enacted, there was more than a century of English
16 precedent to the effect that antecedent security interests
17 would survive assertion of a priority under the
18 prerogative of the Crown.

19 I would urge this Court to revisit your early
20 decisions and those of some of the lower Federal courts at
21 the time. It is old learning, but it demonstrates quite
22 clearly that there is not an unbroken line of authority
23 from *Thelusson v. Smith* to modern times, as contended by
24 the Government.

25 *Thelusson* was decided in 1817. 11 years later,

1 this Court decided Conard v. Atlantic Insurance Company,
2 stating, and it was essentially the same Court, that
3 Conard should be limited -- or, excuse me, that Thelusson
4 should be limited to the circumstances of that case, and
5 stating unequivocally that Thelusson did not stand for the
6 proposition that a perfected lien could be displaced by,
7 and I quote, the mere priority of the Government under
8 Revised Code section 3466.

9 Subsequently, this Court, in United States v.
10 Hack and Brent v. Bank of Washington, upheld traditional
11 security interests against assertion of priority under the
12 priority statute.

13 For a period of 75 years thereafter, it was the
14 understanding of the lower Federal courts that traditional
15 security interests would survive assertion of priority by
16 the Government under this statute.

17 The Attorney General of the United States in
18 1857 issued an opinion to the effect that Thelusson was
19 overruled by Conard, and that was the understanding, that
20 was the assumption, that was the premise on which the
21 lower Federal courts acted from that point on. Cottrell
22 v. Pierson, which appears on pages 11 and 12 on our brief,
23 I think is illustrative of the understanding of the lower
24 Federal courts.

25 Now, it wasn't until 1933 in New York v. Maclay

1 that the language of Thelusson referring to the need of a
2 lienor to perfect the lien by acquiring title or
3 possession was revived. Maclay, though, was a case which
4 involved personal property and an unliquidated amount in
5 terms of the lien.

6 The New York State statute with respect to
7 franchise taxes is very, very unusual. Franchise taxes
8 under the New York law are a lien in advance of the years
9 in which they are due, so in Maclay you didn't even have
10 the amount of the lien determined because it wasn't yet
11 due and, secondly, any property to which it may have
12 attached may not even have been in existence. The lien is
13 obviously --

14 QUESTION: Counsel, what's your best case for
15 support of your position that the judgment lien comes
16 before the Government's right under 3713? What's your
17 best case?

18 MR. McCARTAN: You mean ahead, Your Honor, in
19 terms of whether the lien survives? I would say it would
20 be Cottrell v. Pierson, United States v. Hack, and Brent
21 v. Bank of Washington. Those three cases all established
22 the traditional security interests would survive assertion
23 of priority by the Government under the statute.

24 QUESTION: Well, is the judgment lien situation
25 different somehow from a mortgage or other type of secured

1 interest where possession changes, or title, or --

2 MR. McCARTAN: I think not, Your Honor, and this
3 Court itself in Rankin & Schatzell v. Scott said that a
4 judgment lien has the same power as the mortgage to hold
5 the land, and if we look at these early cases --

6 QUESTION: We -- the court below didn't really
7 get into the question of the nature of the judgment lien
8 here, did it?

9 MR. McCARTAN: No, it did not, Your Honor.

10 QUESTION: So we don't actually know the nature
11 of it here.

12 MR. McCARTAN: Well, we know that it was a
13 judgment lien that was definite with respect to the
14 identity of the judgment creditor, the amount of the
15 judgment, and that it was immediately enforceable. It was
16 properly perfected --

17 QUESTION: Did it apply to all property in the
18 State of Pennsylvania?

19 MR. McCARTAN: I'm sorry, Your Honor.

20 QUESTION: Did it apply to all property in the
21 State of Pennsylvania --

22 MR. McCARTAN: No, Your Honor. It applied
23 only --

24 QUESTION: -- or just a particular county --

25 MR. McCARTAN: -- only to property located

1 within Cambria County, which is the county where the
2 judgment was entered, indexed, and was immediately
3 enforceable, and there was only one parcel of property in
4 Cambria County which was owned by the debtor.

5 QUESTION: But there was nothing to make it more
6 specific than that. Then why isn't --

7 MR. McCARTAN: There was nothing that need make
8 it more specific than that, Your Honor.

9 In order to protect the interests that are
10 involved here, which would be subsequent purchasers, or
11 anyone else with an interest in the affairs of the debtor,
12 a simple title search would reveal this. It's not just a
13 matter of journalizing the judgment in the court of
14 record. It is taking that judgment to the county recorder
15 and then entering it there and indexing it so that it will
16 appear in the land --

17 QUESTION: Well, except the suggestion is that a
18 mortgage is specific as to property, and that judgment
19 liens are not, and whether or not this Court can get into
20 State lien law as to what's specific and what's general is
21 certainly problematic, but that's the suggestion.

22 MR. McCARTAN: Well, Your Honor, when they say
23 that the mortgage is more specific, are we looking at the
24 nature of the mortgage, or are we talking just about
25 parcels? In this case, there was only one piece of real

1 property located within Cambria County to which this
2 judgment lien could attach. The judgment lien was
3 definite with respect to the identity of the judgment
4 creditor --

5 QUESTION: Well, but --

6 MR. McCARTAN: -- the amount of the lien, and
7 the property.

8 QUESTION: It seems to me unlikely we're going
9 to base our holding on that. We have to assume that there
10 were five other pieces of property in other counties, if
11 your reading of the statute is correct.

12 MR. McCARTAN: No, Your Honor, it would not
13 apply to any property located in other counties unless
14 that judgment were taken to those counties and indexed.

15 QUESTION: But under your submission if you file
16 it in every county, then your lien is good in every
17 county.

18 MR. McCARTAN: In every county -- if you take
19 that judgment and enter it according to State law, it is
20 good in any county in which real property is located, and
21 that lien has sufficient capacity to bind the land.

22 If you look at the early cases, Justice
23 O'Connor, with respect to mortgages, we have to be
24 careful, I think, in looking at these cases that we don't
25 become hidebound by the common law's emphasis on the form

1 of the transaction. At common law, a mortgage took the
2 form of a straight conveyance of title, but it was always
3 subject to defeasance. The mortgagor had an equity of
4 redemption. The mortgagee was never entitled to realize
5 any more from the property than the amount of the secured
6 interest. The mortgagor's spouse even retained dollar.
7 The mortgagee's spouse did not.

8 With respect to real property -- and none of the
9 cases relied upon by the Government here involve real
10 property. They all involve personal property. In cases
11 of real property, a lien can be perfected if it is filed
12 after entry of judgment and indexed in accordance with
13 State law. That was done here, and that lien was,
14 therefore, perfected with respect to real property within
15 the county where it was recorded.

16 Now, if the Government's theory is correct, it
17 should apply to mortgage liens as well, and mortgages are
18 liens in 30 State jurisdictions. There's no reason to
19 distinguish between a mortgage lien and a judgment
20 creditor's lien, which has a history at least at long and
21 as enforceable as a mortgage lien.

22 QUESTION: Mr. McCartan, if I understand your
23 position correctly you're not asserting that just the
24 entry of the judgment would have been sufficient to
25 overcome the Government's claim here. Is the entry of the

1 judgment plus the perfection of the lien --

2 MR. McCARTAN: That is correct.

3 QUESTION: -- by recording it in -- as against
4 particular property?

5 MR. McCARTAN: That is correct, Your Honor.

6 QUESTION: In Arizona, where I practiced, if you
7 got a judgment you would have to take a -- get a certified
8 copy of the judgment from the clerk of the court and take
9 it to the county recorder, and the county recorder would
10 record it the same way it would record a mortgage. Is
11 that the way Pennsylvania procedure works, too?

12 MR. McCARTAN: That's the way Pennsylvania
13 works, Your Honor, and at that point, that lien is
14 immediately enforceable without any further judicial
15 proceedings of any kind, as was the case in United
16 States/Texas, a case on which the Government relies here.

17 The mortgage, or the certified copy of the
18 judgment is taken to the county recorder, it is indexed,
19 and it is placed on the land records. It is therefore
20 specific with respect to any land that is located within
21 that county, and it binds that property.

22 There is no way in which a mortgagee or a
23 judgment lien creditor can protect themselves against the
24 kind of theory that's asserted by the Government here. Do
25 you realize that \$400,000 of this \$490,000 tax lien, or

1 tax claim, as the Government would prefer to say, was for
2 tax years that were after the time when this judgment was
3 entered, indexed, and perfected as a lien under
4 Pennsylvania law? The commercial mortgage market would be
5 in total chaos if that theory were to be accepted.

6 Let me address next the question of the
7 interaction of these two statutes. The Government would
8 make it appear that the only issue here is whether there
9 is an implied exception to the priority statute, when in
10 fact the issue is really whether there is an implied
11 exception to one statute or an implied limitation on
12 another, as I think Justice Breyer suggested.

13 There are really two separate and distinct
14 questions presented by this phase of the case. First,
15 whether the competing statutes are inconsistent within
16 some range of overlapping application.

17 QUESTION: Well, we've applied, I think, a
18 higher standard in justifying any displacement of section
19 3713. We really have at least articulated a higher
20 standard than just finding a more specific statute.

21 MR. McCARTAN: Well, when you say a higher
22 standard, Your Honor, I assume that you are referring to
23 the test in United States v. Key, where the Court set
24 forth a three-part test:

25 First, is there a facial inconsistency, or a

1 logical inconsistency between the two statutes, secondly,
2 would application of the priority statute make the
3 subsequently enacted and more specific statute redundant,
4 or does the legislative history in any way suggest a
5 congressional intention to carve out an exception to the
6 priority statute?

7 I submit that while it is doubtful in my mind
8 that in a case that didn't even involve an inconsistency
9 the Court was setting forth an overarching test to resolve
10 all of these cases, I submit the situation here does
11 satisfy the test that was set forth in United States v.
12 Key.

13 To begin with, the competing statutes are
14 inconsistent, and they are inconsistent in the very area
15 presented by this case. The relative priority of the
16 Government depends upon which statute applies.

17 And, Justice Breyer, it doesn't make sense for
18 the Government to argue that, well, we are here as a tax
19 claimant as well as a lien-holder, and we would prefer to
20 proceed as the holder of a tax claim rather than as a
21 lien-holder.

22 If you think about that, it's another way of
23 saying that the Government should stand in a better
24 position as an unsecured creditor than as a secured
25 creditor, something that Professor Kennedy, the leading

1 commentator in this area, said was quite paradoxical, that
2 the Government should be better off --

3 QUESTION: I think it --

4 MR. McCARTAN: -- as an unsecured than as a
5 secured creditor.

6 QUESTION: Where -- suppose they're right on the
7 lien statute, and he's clarified the argument quite well.
8 Suppose they're right, then where -- suppose they're
9 right, in other words, that the priority statute applies.
10 It would apply to people who die insolvent.

11 If that were true, where would the tax lien
12 statute apply? It couldn't apply to dead people, because
13 the other one does for dead people. It would apply to
14 live people. It couldn't apply to live bankrupt people,
15 because the bankruptcy statute would apply to those
16 people, so it would apply to insolvent live people who
17 aren't -- no, sorry, it would apply to people who --
18 perhaps solvent live people.

19 Now, what is that universe like, the universe of
20 solvent, live people for whom one needs a tax lien statute
21 for the Government to collect its money? What is that
22 universe?

23 MR. McCARTAN: That universe is one where the
24 tax lien would have no -- tax lien statute would have no
25 significance whatsoever, as the Chief Justice pointed out

1 earlier.

2 If the debtor is solvent, there is no need for
3 these carefully crafted priorities in section 6326(a). If
4 the debtor is solvent, everyone is going to paid.

5 QUESTION: There would at least be people who
6 disappear, but even --

7 MR. McCARTAN: Pardon, Your Honor?

8 QUESTION: There might be somebody who
9 disappeared, leaving a house behind, and you'd have a tax
10 lien against the property you could find.

11 MR. McCARTAN: And that very limited area of
12 cases is hardly what Congress had in mind --

13 QUESTION: Is there any other area?

14 MR. McCARTAN: -- in crafting this.

15 There isn't. The Government says, in an effort
16 really to prove that the priority statute is really the
17 more limited and specific statute, that the Tax Lien Act
18 would have application to cases involving solvent debtors,
19 where, of course, it wouldn't be necessary, and secondly
20 in bankruptcy cases.

21 Contrary to what the Government suggests,
22 priorities in bankruptcy are determined by sections 724
23 and 726 of the Bankruptcy Code, not the Tax Lien Act, and
24 the Government's reliance on Terwilliger here is
25 misplaced. There is no reference to the Tax Lien Act in

1 the Bankruptcy Code, nor does the Tax Lien Act apply with
2 full force when a trustee in bankruptcy, acting under
3 section 544 of the Bankruptcy Code, which gives the
4 trustee status of a hypothetical judgment lien creditor at
5 the outset of a bankruptcy proceeding, to determine what
6 liens would survive the bankruptcy, which secured liens
7 might exist.

8 The trustee would refer to the Tax Lien Act to
9 determine if a Federal tax lien were involved, it had been
10 perfected, but then the priorities of the bankruptcy
11 statute would kick in to determine how these payment would
12 be made and to whom and in what order, and in that
13 situation, Your Honor, the Government would apply in the
14 third category and in the sixth category, not in
15 accordance with the provisions of the Tax Lien Act.

16 This is the basic structural flaw in the
17 Government's case. If you accept this theory, the Tax
18 Lien Act has application only to cases where its carefully
19 crafted protections of other creditors would have no
20 significance, and it would also be inconsistent with what
21 this Court itself said in the Kimbell Foods case, and that
22 is that this statute represents congressional disapproval
23 of the unrestricted Federal priority in tax matters.

24 Now, I don't think that Congress took the time
25 to craft this very detailed statute in order to have it

1 apply only to situations where it would have no
2 significance, and where its priorities would be rendered
3 totally ineffective, but that is what the Government's
4 position is.

5 Going back, Justice O'Connor, to the key test,
6 I think I've already demonstrated there is an
7 inconsistency between the statutes, because the priority
8 depends upon which statute is applied. Secondly, as I've
9 just discussed, the Tax Lien Act would be totally
10 redundant, as would, I might add, other Federal lien
11 statutes if the Government's theory is to be accepted. If
12 you have a solvent debtor, it doesn't matter if you have a
13 lien or not, you're going to be paid.

14 Now, with respect to the legislative history,
15 the Government points to two proposals that were advanced
16 by the ABA in 1959 and again in 1970 by way of amendment
17 to the Federal tax lien -- or, excuse me, to the priority
18 statute.

19 Those amendments went far beyond any issue that
20 is involved in this case. This Court has always been
21 reluctant to draw any inference from congressional
22 inaction, and I submit in this case it would be totally
23 inappropriate to do so because of the breadth of the
24 amendments --

25 QUESTION: But do they go beyond what your

1 reading of the statute was in the first part of your
2 brief?

3 MR. McCARTAN: No, Your Honor. In fact, in the
4 final report of the ABA, which is referred to in the
5 legislative history, I think it is clear that the ABA at
6 that point thought that one of the proposals that was
7 being advanced was really to clarify that traditional
8 security interests have always survived assertion of
9 priority by the Government under the statute.

10 In other words, with respect to that specific
11 proposal, which was part of a much larger package, the ABA
12 was of the view that they were really conforming law to
13 what traditionally it had understood to be, contrary to
14 the suggestion in some cases.

15 If you look at the legislative history of this
16 statute in terms of how the structure of the statute has
17 evolved over time, I think it is also clear that we meet
18 the test set forth in *The United States v. Key*. This is a
19 statute that started out as a means of facilitating tax
20 collection on the part of the Government. Over the years,
21 there has been a steady expansion of the protection
22 afforded to competing creditors, and if you look at the
23 committee report of the 1913 statute, Congress was of the
24 view at that time that they were putting these other
25 creditors on an equal footing with the Government in tax

1 matters.

2 In 1966, the 1966 amendments, which gave even
3 unsecured creditors, Justice Breyer, priority over a
4 properly filed and perfected Federal tax lien, Congress
5 said that these amendments were designed to bring the
6 Federal Tax Lien Act in conformity with the provisions of
7 the Uniform Commercial Code, and under Article 9 of the
8 Uniform Commercial Code, secured claims are always given
9 preference over unsecured claims.

10 So I think that in terms of whether we have
11 satisfied the standards set forth in the United States v.
12 Key, it is clear that we have.

13 With respect to the cases relied upon by the
14 Government, I want to emphasize that in the case of New
15 York v. Maclay you had a situation of a State lien, State
16 franchise tax lien that was designed to cover all property
17 of the debtor that were accrued in advance of the years in
18 which the amount of taxes were due, so you had an amount
19 that was undetermined, you had property that was
20 undetermined.

21 QUESTION: It wouldn't have been a perfected
22 lien under the Uniform Commercial Code.

23 MR. McCARTAN: It would not have been a
24 perfected lien under the Uniform Commercial Code or under
25 any other standard, Justice Scalia, that I can consider.

1 The same was true of United States v. Texas,
2 another case on which the Government relies very heavily.
3 In that case, the amount of the lien was undetermined. It
4 required judicial proceedings to determine the amount.
5 The property there was not only all property used in the
6 business, but all property that might thereafter be
7 acquired, far different from the property in this case
8 located within the county in which this judgment was
9 entered, indexed, and perfected as a lien.

10 Every other case that is relied upon by the
11 Government involved -- and which turned on possession of
12 the property involved, was a case involving personal
13 property.

14 Liens on personal property at common law
15 required the creditor to take possession of the
16 collateral. If the creditor did not have possession of
17 the collateral, there was no lien at common law.

18 QUESTION: Are these all very old cases,
19 Mr. McCartan, because that's certainly not the rule now --

20 MR. McCARTAN: No, that --

21 QUESTION: -- under the UCC.

22 MR. McCARTAN: Now you can make the filing with
23 the UCC, but at common law, absent possession of the
24 collateral, the creditor was not deemed to have a lien.
25 In fact, any lien on personal property absent possession

1 was deemed to be fraudulent.

2 So all of these cases on which the Government
3 relies, the so-called modern cases, are really just
4 reaffirming, in the case of personal property, traditional
5 common law principles. The case is different, the
6 considerations are different with respect to real
7 property.

8 QUESTION: But you want us to bring the lien
9 statute up to date with the UCC, which is what you say the
10 legislative history expresses as the purpose --

11 MR. McCARTAN: Well, the --

12 QUESTION: -- and you're not going to do that if
13 we continue to make this absolute requirement that in the
14 case of personal property you have to be in possession.

15 MR. McCARTAN: Well, in terms of -- no, today in
16 terms of personal property with a UCC filing you can
17 obtain a lien on personal property.

18 QUESTION: Right.

19 MR. McCARTAN: What I'm talking about are the
20 cases involving State tax liens, where personal property
21 was involved and this Court said, absent divestiture of
22 title or possession of the property you don't have a
23 perfected lien on personal property.

24 QUESTION: Isn't what we're talking about here
25 real property?

1 MR. McCARTAN: That's right, Your Honor, and all
2 of the cases that the Government relies on have turned on
3 the requirement of possession for the property, as
4 enunciated in Thelusson v. Smith, have involved personal
5 property.

6 QUESTION: So you're just saying that that
7 feature makes it impossible for the Government to claim
8 authority from those cases, rather than those features
9 should be regarded by us as a basis for present law.

10 MR. McCARTAN: That's correct, Justice Souter,
11 and I think that, too, is really why stare decisis is not
12 implicated here, in addition to several other reasons, but
13 these cases on which they rely do involve personal
14 property and not real property, and if we're talking about
15 stare decisis we have to go back to Conard v. Atlantic
16 Insurance Company, and there the Court was of the view
17 that Thelusson should be limited to its facts, and that
18 the requirement that the judgment creditor obtain title or
19 possession of the property was limited to the facts in
20 that case.

21 QUESTION: Was Thelusson personal property?

22 MR. McCARTAN: No. Thelusson was real property,
23 Your Honor, but in Thelusson the judgment creditor was
24 attempting to reach the proceeds of the sale of the
25 property and, as the Court pointed out in Conard, what the

1 judgment creditor should have done was to proceed against
2 the land rather than the proceeds from the sale of the
3 land, and that is why Thelusson was being limited to what
4 the Court said were its circumstances. The Court was very
5 emphatic that Thelusson did not stand for the proposition
6 that a perfected lien could be displaced by the mere
7 priority of the Government under revised statute section
8 3466.

9 QUESTION: And that's the position you say the
10 Attorney General in that 1857 opinion --

11 MR. McCARTAN: That's correct, Justice Ginsburg.
12 In 1857 the Attorney General's opinion was to the effect
13 that Thelusson had been overruled, not just limited to the
14 circumstances of the case, and that the priority statute
15 would not reach back over liens general or specific that
16 were antecedent to the accrual of the Government's claim.

17 QUESTION: And yet he --

18 QUESTION: Your position would require us to
19 overrule Thelusson, I think.

20 MR. McCARTAN: My position, I think, would
21 require you to at least distinguish it, Your Honor.

22 Conard, if you accept what the Court said in
23 Conard, that Thelusson did not stand for the proposition
24 that a perfected lien could be overcome by the priority
25 statute, then consistent with Conard you don't have to

1 overrule it.

2 QUESTION: But normally a lien attaches to the
3 proceeds, or I mean -- well, anyway, go ahead.

4 MR. McCARTAN: You see what I mean, though, that
5 the distinction made in Conard would permit the Court to
6 proceed on the basis of Conard without addressing
7 specifically the issue of whether Thelusson should be
8 overruled.

9 As this Court said in Rankin, the judgment lien
10 does follow the property and can be foreclosed, even in
11 the case where a junior lienholder or unsecured creditor
12 has moved against the property in the first instance.

13 I submit that the Government's position in this
14 case, and we are talking about real property, confuses
15 what is necessary to perfect a lien with respect to that
16 property with satisfaction of the underlying judgment.
17 Requiring a creditor to take possession of the property or
18 to foreclose on the lien is a means of satisfying the
19 underlying obligation.

20 It is not required to perfect the lien under
21 modern recording statutes, and the only cases that would
22 indicate to the contrary are cases that have involved
23 unspecified personal property or real property that could
24 not be identified.

25 In this case, the property is clearly

1 identified, the identity of the lienor is clear, the
2 amount of the lien has been established, and the property
3 is located within the county in which the lien was
4 perfected.

5 We satisfy the test in United States/Key, in
6 United States v. Campbell, and I submit that the judgment
7 of the Pennsylvania supreme court should be affirmed.

8 Thank you.

9 QUESTION: Thank you, Mr. McCartan.

10 Mr. Jones, you have 4 minutes remaining.

11 REBUTTAL ARGUMENT OF KENT L. JONES

12 ON BEHALF OF THE PETITIONER

13 MR. JONES: Thank you.

14 There are basically two propositions respondent
15 makes. One is that the Court should disclaim reliance on
16 a distinction that's recognized for 180 years, from
17 Thelusson through Gilbert Associates, between a general
18 lien that does not defeat the absolute priority of the
19 United States and a more specific lien that may.

20 The Court has held -- I'm repeating myself,
21 probably, but I think seven times that a judgment lien is
22 such a general lien and that the priority of the United
23 States prevails against it. It's said it not only with
24 respect to personal property, it's said it at least twice
25 with respect to real property.

1 In United States v. Texas in 1941 the Court
2 said, and I'm quoting from page 7 of our brief, but I'm
3 quoting the Court's opinion, a general judgment lien upon
4 the land of an insolvent debtor does not take precedence
5 over claims of the United States unless execution of the
6 judgment has proceeded far enough to take the land out of
7 the possession of the debtor.

8 QUESTION: Mr. McCartan's point, as I recall,
9 was that the lien in that case was not perfected. The
10 amount was not even established.

11 MR. JONES: He's confusing something that this
12 Court has made clear shouldn't be confused, and that is
13 the standards for specificity under the Federal Tax Lien
14 Act, as contrasted with the standards for specificity
15 under the absolute priority statute.

16 The Court in Vermont and in New Britain made
17 clear that those are really two entirely different
18 questions. The question under the Federal Tax Lien Act
19 is, is there a State lien, and the answer is yes if it's
20 become definite in terms of the name of the lienor, the
21 amount of the lien, and the property to which it applies.

22 But as the Court explained in Vermont, the
23 question of whether you have a specific lien for purposes
24 of the absolute priority statute is a different one, and
25 turns on whether, as the Court said in that case, the

1 debtor has been divested of title --

2 QUESTION: Well, why should they be different?

3 MR. JONES: They are different because the
4 statutes have different scopes and application, which this
5 Court has clearly held in at least two cases this century.

6 QUESTION: Is it -- was the distinction, or
7 they're saying they're different based on the difference
8 in language in the statutes?

9 MR. JONES: And the statute's objectives, yes.
10 I mean, it goes back to the language. The absolute
11 priority statute simply says we get paid first, and the
12 question is, well, is there something that prevents that
13 from happening, and the Court's answer has been, well, if
14 the property has been taken away from the debtor, then you
15 don't get paid first.

16 If it's been taken away from the debtor by
17 something so specific, like a mortgage, then you don't get
18 paid first, but if it's just a general claim against that
19 property, you still get paid first, because it's still in
20 the possession of the debtor, and the statute says, and
21 the Court says we obey the plain language of the statute
22 that the United States gets paid first.

23 To reach a different conclusion the Court would
24 have to overrule no less than seven opinions over the last
25 180 years. The cases that he says are his best cases for

1 this proposition were all in the early part of the 19th
2 Century. They don't -- as our brief describes, they don't
3 stand for the proposition that he contends.

4 This Court has expressly limited the application
5 of those cases to the mortgage situation in the Maclay,
6 New York v. Maclay, that's what Justice Cardozo carefully
7 explained.

8 The second argument that they make is that this
9 statute, this application of the absolute priority statute
10 somehow makes the Federal tax lien provisions meaningless,
11 which if you think about it is a preposterous contention
12 that has absolutely no support for it.

13 The Federal tax lien provisions of course apply
14 in the ordinary situations that the absolute priority
15 statute doesn't apply. In bankruptcy court, for example,
16 they will determine whose lien comes first, where it
17 matters whether your lien came first or not.

18 In the -- I'm sorry. My time has expired.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Jones.

20 The case is submitted.

21 (Whereupon, at 12:04 p.m., the case in the
22 above-entitled matter was submitted.)
23
24
25

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:

UNITED STATES, Petitioner v. ESTATE OF FRANCIS J. ROMANI
CASE NO: 96-1613

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

BY Don Neri Federico-----

(REPORTER)