

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: JEFFREY ALLAN FISCHER, Petitioner v. UNITED STATES.

CASE NO: 99-116 *e.v.*

PLACE: Washington, D.C.

DATE: Tuesday, February 22, 2000

PAGES: 1-50

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CAPTION: BERKEY, ALAN FISHER, EDWARD, ET AL

STATE:

CASE NO. 98-1512

PLACE: Washington, D.C.

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JEFFREY ALLAN FISCHER, :

4 Petitioner :

5 v. : No. 99-116

6 UNITED STATES. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, February 22, 2000

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:14 a.m.

13 APPEARANCES:

14 MARK L. HORWITZ, ESQ., Orlando, Florida; on behalf of the
15 Petitioner.

16 LISA S. BLATT, ESQ., Assistant to the Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf
18 of the Respondent.

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1 PROCEEDINGS

2 (11:14 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 99-116, Jeffrey Allan Fischer v. the United
5 States.

6 Mr. Horwitz.

7 ORAL ARGUMENT OF MARK L. HORWITZ

8 ON BEHALF OF THE PETITIONER

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

11 The question here is does the payment to a
12 hospital for treatment of Medicare patients constitute
13 receipt of benefits under a Federal program involving
14 Federal assistance. I submit the answer is no.

15 Under section 666, the Federal statute that
16 extends bribery and theft to what would otherwise be local
17 governments and local organizations, the plain language of
18 the statute here, I submit, would define benefits as that
19 entity or that product that is being administered or cared
20 for by a surrogate of the Federal Government, which was
21 why this legislation was passed. And the Eleventh Circuit
22 in this case equated benefits with payment.

23 QUESTION: Mr. Horwitz, the -- the section is
24 quite lengthy. Is there some particular section, a
25 subsection you want us to focus on?

1 MR. HORWITZ: Yes. Subsection (b), Your Honor,
2 which provides that an -- subsection (b) is the
3 jurisdictional section for --

4 QUESTION: B as in buzz or D as in does?

5 MR. HORWITZ: B as in boy, Your Honor.

6 QUESTION: Boy, okay.

7 MR. HORWITZ: Subsection (a) sets out the
8 prohibited activity, basically theft in subpart (1), then
9 bribery or soliciting a bribe. Subpart (b) is the
10 jurisdictional limitation of the statute -- B as in boy -
11 - which says that the statute applies to organizations
12 that receive benefits in excess of \$10,000 under a Federal
13 program involving grant, contract, insurance, or other
14 form of Federal assistance. So, that's -- that subsection
15 (b) is the jurisdictional element which is -- I submit
16 under the legislative history, was included along with
17 subsection (c) so as to not extend this Federal
18 jurisdiction into what would and should be otherwise State
19 law enforcement activity.

20 QUESTION: Isn't the difficulty of your
21 position, just based on what you've just quoted, the
22 statute refers to the Government as getting the benefits?
23 So, I suppose it follows from what you're saying that the
24 statute would never have any application to a Medicare or
25 Medicaid -- a government that gives money to a Medicare or

1 Medicaid provider in -- under its contract obligations.

2 MR. HORWITZ: The -- the answer --

3 QUESTION: Is that right?

4 MR. HORWITZ: The answer to that would be yes,
5 Your Honor. And the reason is that -- that the Medicare
6 system as seen in -- in the legislation and in the Code of
7 Federal Regulation makes clear that the providers are
8 simply providing a service. The benefit here is to the
9 patient, the Medicare recipient, in getting services,
10 and --

11 QUESTION: Okay.

12 QUESTION: Well, but in a way the benefit goes
13 to the provider as well because we're dealing here with
14 Medicare services by a hospital when they weren't getting
15 paid anything for people who couldn't afford to pay. So,
16 Medicare was enacted, and now all of a sudden, a hospital
17 can get paid for doing something that it was getting
18 saddled with without pay before. And in a sense, the
19 hospital benefits.

20 MR. HORWITZ: Your Honor, in the sense of
21 benefits in the sense of a -- a verb, anyone who receives
22 largesse, any company that receives a payment from the
23 Government benefits.

24 And benefits in the sense of a noun in the sense
25 of what -- in looking at the legislative history, the Del

1 Toro, Hinton, and Mosley cases and which arose and why
2 Congress passed this law before the Dixson case sort of
3 reigned those in, those three cases all involved the
4 administration of assets of the Federal Government through
5 a surrogate. And if we take the contention of the
6 Government, that is, assistance payments and those who
7 assist -- receive assistance payments is the test, then I
8 think Congress would have said that. You know, they would
9 have said, anyone who receives assistance payments --
10 their organization will be subject to this statute.

11 QUESTION: Yes, but that does seem to be what it
12 -- it says when it -- when it refers to -- under
13 subsection (b), when it refers to benefits under a program
14 involving a grant, contract, subsidy, and so on. It
15 sounds -- I mean, the immediate -- most immediate reading
16 of that language says, oh, whatever the -- whatever the
17 organization gets under the grant, program, subsidy, and
18 so on, is -- is what the statute is referring to as a
19 benefit because that's the only kind of benefit that --
20 that organizations get. That seems to be the -- the
21 natural reading of the statute.

22 MR. HORWITZ: The benefit -- and again, getting
23 back to the difference between a noun and verb, Your
24 Honor, the -- the purpose, as seen in the legislative
25 history, is to protect the funds that surrogates of the

1 Federal Government are administering. There's no -- once
2 that hospital is paid for these services, it's no longer
3 accountable for how it spends its money, nor does the
4 Federal Government have any interest in how it spends its
5 money.

6 QUESTION: Well, it isn't with respect to a
7 given item of charge, but that doesn't mean that the
8 Government's concern is -- is somehow over because the
9 Government may have a -- a broader, systemic concern even
10 though a particular item of charge has already been paid,
11 and in that respect, it's no longer the Government's
12 business.

13 MR. HORWITZ: It might, but I would submit that
14 if that's what Congress wanted, they would have said
15 anyone who receives assistance payments. If not --

16 QUESTION: Well, the -- Congress could have --
17 could have said that.

18 But there's -- there's one other thing that --
19 that bothers me about your position, and that is, why
20 would Congress have wanted to except Medicare and Medicaid
21 from the -- from the protections that this -- for the --
22 for the public fisc and the public welfare that this
23 statute is obviously aimed at? Why would it have a
24 Medicare and Medicaid exception?

25 MR. HORWITZ: I don't think there is, Your

1 Honor, a exception for Medicaid --

2 QUESTION: But there is. You've admitted that
3 there is on your analysis because on your analysis the
4 benefit -- the person benefitted, the one who gets the
5 benefit, is always the patient at the end of the -- at the
6 end of the line. And so, it does seem to read the statute
7 out of the -- out of the Medicare/Medicaid --

8 MR. HORWITZ: Your Honor, the Medicare benefits
9 are subject to the protection as long as they stay within
10 the program funds. For example, if someone in the
11 intermediary were to solicit a bribe for making a cost
12 determination that was beneficial to the hospital, that
13 intermediary receives the benefits and disburses those
14 benefits and helps disburse those benefits and is acting
15 as a surrogate for the Government to protect that.

16 QUESTION: So -- so, benefit would include ill-
17 gotten gain.

18 MR. HORWITZ: No.

19 QUESTION: Is that what you're saying?

20 MR. HORWITZ: No, Your Honor. I'm saying that
21 the benefits here is the resources that are being utilized
22 in the Medicare system to provide the beneficiary -- that
23 is, the patient -- with its services. When the hospital
24 is paid, that ends it. But when the intermediary is
25 administering those funds, then they are still subject to

1 the protection of section 666.

2 QUESTION: So, there is a distinction between
3 benefit and funds from which benefits ultimately will be
4 paid, and that's what you rely on.

5 MR. HORWITZ: There is a distinction between
6 cost of buying a service, at which point the
7 administration of the Federal funds ends, and the
8 individual or company at that point or State, whoever
9 supplies that service, then has the funds to do it as they
10 wish.

11 Under the definition of benefits equals Federal
12 assistance, there's a whole parade of horrors that can
13 be imagined, even a -- paying a farm company not to grow
14 crops. When they receive those funds, it's over. The --
15 the Federal Government no longer has an interest in
16 administering those funds. Under the receipt of benefits
17 analysis, somebody -- an employee who steals a tractor has
18 now committed a Federal offense because the farm company
19 has received assistance in the sense of it hasn't planted
20 crops.

21 QUESTION: Mr. Horwitz, before we go on to your
22 parade of horrors, I take it from what you've said
23 distinguishing the fiscal intermediary from the provider,
24 that all hospitals that administer Medicare that receive
25 -- that receive the actual dollars, they are out from

1 under the statute. So, could -- the Government could go
2 after the fiscal intermediary, but could not go after the
3 hospital that actually receives the Federal dollars.

4 MR. HORWITZ: If the hospital is receiving those
5 Federal dollars, for example, under a program where it is
6 administering rather than just getting paid --

7 QUESTION: I'm talking about the -- the program
8 that we have before us, the Medicare program. The
9 hospital you said gets paid. It doesn't get aid.

10 MR. HORWITZ: Yes, Your Honor. And -- and I
11 would say that when the hospital is paid for the service,
12 that -- the coverage of 666 is ended.

13 The -- the Government, as it -- as it mentioned
14 in its brief in opposition to the petition for certiorari,
15 recognized that there are many other statutes passed that
16 specifically protect the Medicare system. So, there's not
17 a necessity to protect -- to -- to interject the Federal
18 Government under 666 into how the hospital spends its
19 money after it is paid for its service when the Government
20 has no interest in how it spends its money.

21 QUESTION: Well, and the hospital is normally
22 not going to be the defendant here. I mean, it's usually
23 going to be somebody who stole money from the hospital.
24 Right? I mean, the -- the hospital can acquire as much
25 ill-gotten gains as it wishes and it wouldn't be caught by

1 this statute.

2 MR. HORWITZ: Your Honor, if the hospital were
3 to bribe the intermediary, it would be covered.

4 QUESTION: Oh, yes. No, no. But I'm saying if
5 you say that the -- if, as the Government says, the
6 hospital itself falls under this statute -- never mind the
7 intermediary, the hospital itself -- the hospital would
8 not normally be the person who -- who would be prosecuted.
9 It would -- the person prosecuted would be somebody
10 stealing from the hospital.

11 MR. HORWITZ: Yes, Your Honor.

12 QUESTION: Not the hospital by reason of its
13 stealing from somebody else --

14 MR. HORWITZ: It --

15 QUESTION: -- a Medicare recipient or anybody
16 else.

17 MR. HORWITZ: It is the question of how far does
18 the jurisdictional element go. How far does the Federal
19 Government go into what should and has traditionally been
20 State law enforcement.

21 QUESTION: We're not keeping hospitals honest
22 here. That's -- that's not what the issue is.

23 MR. HORWITZ: The issue is how far does the
24 jurisdiction travel. Does -- does it go to all employees
25 of a hospital simply because the hospital is paid for

1 providing a service? Does it go to the driver who
2 delivers food in the hospital truck or picks it up if he
3 decides to steal the truck? Are we going to put that into
4 Federal court as a crime? And -- and the legislative
5 history, I would submit, read fairly, would indicate that
6 Congress was not intent in covering those commercial
7 transactions, and that's why subsection (b) --

8 QUESTION: Of course, you could -- you could get
9 an employee of the intermediary for stealing a truck.
10 Right?

11 MR. HORWITZ: Unfortunately, I would say yes.

12 QUESTION: I mean, you know, the stealing a
13 truck hypothetical has a lot of --

14 MR. HORWITZ: If -- if --

15 QUESTION: -- a lot of appeal, but -- but you
16 have to acknowledge that somebody's theft of a truck is
17 going to be covered by this. Right?

18 MR. HORWITZ: If the -- if the intermediary has
19 a car and an employee steals that car, it's covered, Your
20 Honor, yes.

21 QUESTION: You were talking about subsection
22 (c). It seems to me that that doesn't altogether help you
23 because the terms are -- the section doesn't apply to
24 salary, wages, fees, or other compensation paid. And I
25 take it you claim that this is other compensation paid?

1 MR. HORWITZ: This is reimbursement of expenses,
2 Your Honor, which is also covered in subsection (c).

3 QUESTION: Even reimbursement of expenses. If a
4 hospital sends me a bill for its x-ray and I pay it, I'm
5 not reimbursing its expenses and -- and -- nor am I paying
6 compensation in the usual sense of -- of a salary.

7 MR. HORWITZ: Well, Your Honor --

8 QUESTION: So, I --

9 MR. HORWITZ: Sorry.

10 QUESTION: I'm not sure (c) helps -- is
11 completely helpful to you.

12 MR. HORWITZ: Well, Your Honor, the -- the
13 reason why I think it's helpful is this. The -- this
14 statute was passed before the Court came down with its
15 decision in Dixson to attempt to alleviate the perceived
16 problem in Del Toro, Hinton, and Mosley, which was bribery
17 of a -- by an -- a local agency administering funds.
18 Section 201 was the statute that was attempted to be
19 applied in that setting, and if one looks at section 201,
20 there is no equivalent of subsection (c) in section 201.
21 You don't need subsection (c) to -- to modify the
22 prohibited activity. You never have a good faith, corrupt
23 bring. You never have a good faith, corrupt solicitation
24 of a bribe, and you never have a good faith theft.

25 You may, however, have a -- as -- in the

1 Congressional Record cited in the briefs where they say
2 Congress said it wasn't -- the Senate report -- excuse me
3 -- said it's not intended to cover the purchase of, say, a
4 copy machine. So, if you -- if you have a good faith
5 purchase of a copy machine for \$10,000, you're not going
6 to subject all the employees of that company to Federal
7 jurisdiction, but if it's not a good faith purchase of a
8 copy machine and therefore it is a type of theft or bribe,
9 then it would cover it.

10 So, I think that subsection (c) -- it's
11 interesting that it is not in section 201. There is
12 something somewhat similar to other provisions of section
13 201, but there is no subsection (c) there.

14 QUESTION: Mr. Horwitz, a moment ago you
15 referred to a Dixson case. Is that a decision of this
16 Court?

17 MR. HORWITZ: Yes, Your Honor.

18 QUESTION: Is it cited in your brief? If not -
19 -

20 MR. HORWITZ: It is cited in the Salinas case,
21 Your Honor, which talks about -- which is the only other
22 case discussed -- discussing this section 666 in the
23 statute.

24 QUESTION: Do you have a citation for Dixson?
25 If not, just say so.

1 MR. HORWITZ: I don't have it very handy, Your
2 Honor, but it is cited in the Salinas case. And the
3 Dixon case was the case that really was the appeal of --
4 the appeal of the Hinton case to the Supreme Court is --
5 is one and the same as Dixon.

6 And so, the --

7 QUESTION: It seems to me at least it could be
8 argued that (c) is rather narrow. It talks about
9 compensation in the sense of a salary and not a contract
10 payment.

11 MR. HORWITZ: Well --

12 QUESTION: And the very fact that it's there
13 indicates that if it weren't there, benefit could
14 otherwise be interpreted as including compensation, which
15 is not helpful to your position.

16 MR. HORWITZ: Well, Your Honor, it -- it could
17 if -- depending on how benefit is described in subpart
18 (a). That is described as corruptly benefit, and
19 corruptly has been determined to have a significant
20 meaning. Any bribe or solicitation is modified by the
21 term corruptly, which I would submit does away with the
22 necessity of subpart (c).

23 And what we -- there's another part that I want
24 to bring the Court's attention here, and that is the
25 Medicare system, when this statute was passed, comes into

1 a series of -- of -- the legislation itself, which clearly
2 talks about hospitals being providers, who are being
3 recompensed for the costs of the services, where the
4 beneficiaries are the patients. The C.F.R., the Code of
5 Federal Regulations, also talks about that.

6 QUESTION: Well, let -- let me put it this way.
7 Do -- do we have to interpret (c) in order to rule in your
8 favor?

9 MR. HORWITZ: No, Your Honor. I think it's not
10 necessary. I think (c) is just a further indication of
11 the congressional intent and this -- the plain words of
12 the statute itself. But benefits, in the sense of a noun
13 rather than a verb, that is, to -- to allow the Federal
14 Government to have an interest in -- in vindicating
15 through its criminal laws those surrogates who are
16 administering the benefits, this package of Federal
17 benefits, until it gets to the end of the road and is
18 distributed, at which point the Federal Government has no
19 further interest in it.

20 And in this case, there -- there was no further
21 interest in what and how a hospital spends its money
22 because the auditing procedures, as set forth on the Code
23 of Federal Regulations, make it clear that costs -- only
24 those costs in relation to patient care are allowable.
25 And if there's a false attempt by a hospital to be

1 reimbursed for an investment loss or a bad investment,
2 that can be vindicated through a false cost report or
3 false statements to the Government under the various
4 statutes.

5 So, the -- the issue here that -- that seems to
6 be looming is, under the Eleventh Circuit interpretation,
7 how -- how far is the end. And there is no end if we take
8 benefits and define them as receiving Federal assistance
9 because then --

10 QUESTION: Mr. Horwitz, are you -- are you
11 distinguishing Salinas on that basis, and in Salinas it
12 was the municipal unit that had the jail that is
13 administering the Federal funds? Is that --

14 MR. HORWITZ: Well, Your Honor, Salinas
15 specifically did not address the issue of what constitutes
16 benefits under 666. So, Salinas talked about whether the
17 bribe had to directly affect the Federal funds.

18 QUESTION: And the answer is no.

19 MR. HORWITZ: The answer is no. That's not --
20 we're here to determine whether the entity itself is
21 receiving benefits so as to subject its employees to
22 bribes.

23 QUESTION: Well, would you answer that question?
24 In the Salinas case, was the organization itself receiving
25 benefits?

1 MR. HORWITZ: From reading the case, Your Honor,
2 I can't give you a specific answer, but it would appear
3 that the -- the benefits are to the Federal Government in
4 a continuing basis to care for its prisoners. So, in that
5 sense it still has an interest in the administration of
6 those funds and the administration of the program to which
7 it is giving, i.e., the sheriff's jail facility. So,
8 there is --

9 QUESTION: I thought they were getting money
10 from the Federal Government.

11 MR. HORWITZ: Yes, they are.

12 QUESTION: My recollection of the case.

13 QUESTION: I wasn't -- Your Honor, I wasn't
14 intending to zero in on the money, but rather whether the
15 money that was received was received with the
16 understanding that the jail had to administer it under a
17 continuing program and be accountable to the Government as
18 to how it dealt with the Government's prisoners. So,
19 therefore, the benefit is -- was not --

20 QUESTION: There has to be some kind of
21 accountability in your theory? Why? I mean, I thought
22 the only issue would be whether the jail was being
23 reimbursed for services provided to the prisoner or not.
24 And I gather it wasn't being reimbursed for any -- any
25 debt that the prisoner owed. I mean, it's remarkable to

1 think that besides being kept in jail, you owe money for
2 your keeping. Maybe they did that once upon a time. It
3 would be a good idea, but nobody thinks that --

4 MR. HORWITZ: The -- the payment is by the
5 marshal's service, as I understand it, in Salinas to the
6 county or to the sheriff for the purpose of assisting the
7 marshal in keeping prisoners in the local facility. And
8 -- and so, the payment there -- the benefit is to the
9 continued operation of the jail under the parameters that
10 the marshal seems appropriate.

11 QUESTION: Well, as -- as I recall Salinas,
12 there was a payment per day for each prisoner, but there
13 was also a grant to improve the jail generally.

14 MR. HORWITZ: Right, and -- and the record, from
15 what I could read of the case, doesn't seem to answer the
16 question of what other provisions might be involved in the
17 marshal's office in determining whether there was some
18 obligation by the jail to satisfy the marshal in the way
19 these funds were administered, rather than simply I'm
20 going to pay you so much a day to keep a prisoner and we
21 don't care how you do it.

22 QUESTION: Well, if we had the Salinas question
23 before us and if the only thing the Feds -- the Federal
24 Government paid were a per day reimbursement for each
25 Federal prisoner housed in the facility, then it might be

1 like your case.

2 MR. HORWITZ: Yes, Your Honor, with -- I assume
3 that your -- your question also has within it the
4 presumption that the marshal has no interest in how the
5 jail spends the money and how it takes care of the
6 prisoners because then I think it starts to move it into
7 more of a program being administered by the jail. You
8 know, if marshal wanted, they could build their own jail
9 and -- and take care and control of the prisoners.

10 QUESTION: Well, if the Federal Government had
11 certain standards for how patients should be cared for in
12 the hospitals, that would change it?

13 MR. HORWITZ: No, not -- not how they should be
14 cared for. If they have certain standards on how the
15 hospital is to administer the money that it is given, if
16 the hospital has an obligation to the Government to spend
17 or not spend its money under the Government's programs so
18 that it has continued to -- to care for the Government's
19 funds in its continuing effort under the program.

20 QUESTION: Does the hospital in your case have
21 to be certified by the Federal Government to receive these
22 monies as meeting certain standards?

23 MR. HORWITZ: The hospital has to be certified
24 by the Federal Government, but that doesn't -- that's not
25 the -- in question. It has to be certified and it has to

1 have at least a decent enough reputation in the community
2 that patients want to go to it. If no patients go to it,
3 you don't get paid.

4 QUESTION: Well, then the Government is
5 interested in how it spends its money.

6 MR. HORWITZ: The -- no. The Government is
7 interested in the ultimate cost, and they protect that
8 interest through the cost analysis that goes on in a
9 routine, continuing basis to determine what is the price
10 that's paid. And -- however, the Government does not have
11 an interest in how the hospital spends its money. The
12 hospital might go out and in this case lose its money on a
13 bad loan, a fraudulent loan.

14 QUESTION: Well, it has a tremendous interest in
15 how it spends the Medicare money, and don't they have like
16 500,000 pages of regulations on it?

17 MR. HORWITZ: The -- the Government has 5 -- I
18 don't know the number, Your Honor.

19 QUESTION: I don't either. I'm making that up.
20 (Laughter.)

21 MR. HORWITZ: But -- but the Government has an
22 interest in how the money is spent only to the extent
23 that, under the Code of Federal Regulations, it will
24 reimburse only those reasonable costs related to health
25 care and providing health care to the beneficiaries. The

1 Government does not have an interest in other non-health
2 care related assets.

3 QUESTION: Nobody says -- they may not, but why
4 isn't it enough to be a beneficiary, that the Government's
5 whole program is aimed at getting money to the hospital to
6 reimburse them for these costs? I mean, obviously, they
7 -- they think that the patients are beneficiaries and they
8 obviously also think the hospitals are beneficiaries.
9 Don't they? I mean, why not? Why can't both be intended
10 beneficiaries of Government largesse, one through the
11 other?

12 MR. HORWITZ: The -- the answer to that again
13 gets back to whether they are a beneficiary in the sense
14 of a noun or a verb. Does the hospital receive a benefit
15 from dealing with -- with Medicare patients?

16 QUESTION: Yes.

17 MR. HORWITZ: Yes, they do. But is that the
18 kind of benefit that was a problem in Del, Hinton, Mosley
19 and --

20 QUESTION: Maybe not, but that's my question.
21 Why not? So what? So what?

22 QUESTION: Mr. Horwitz, do you think that these
23 regulations, 5,000 pages or however many pages -- do you
24 think that they prohibit the -- the hospital from spending
25 more on patient services than the hospital will be

1 reimbursed? They surely say we'll only reimburse you for,
2 you know, these particular procedures. If the hospital is
3 extravagant and in fact expends much more money on a
4 particular procedure, do you think that the Government
5 cares?

6 MR. HORWITZ: My point exactly, Your Honor.
7 They don't care.

8 QUESTION: It doesn't. So, the -- the hospital
9 can really ride itself into bankruptcy as far as the
10 Government is concerned.

11 MR. HORWITZ: A hospital --

12 QUESTION: But the argument is here that the
13 Government is terribly concerned about the hospital being
14 defrauded into bankruptcy.

15 MR. HORWITZ: I don't think the hospital -- the
16 Government is any more concerned about what happens with
17 the hospital's money, whether it is in the form of
18 defrauding it, spending it wisely or unwisely.

19 QUESTION: I don't think so either.

20 MR. HORWITZ: That's -- that's the difference
21 that I see.

22 And, Justice Breyer, I think that goes back to
23 your answer. They are not -- the Government has no
24 interest in whether the hospital is properly making
25 investment decisions. It has an interest in whether those

1 costs -- only costs that are related to the care and
2 treatment of Medicare patients is included in those costs
3 to the Government, and the false statement and Medicare
4 cost provisions ensure to protect that.

5 QUESTION: Well, the Government at -- at least
6 is -- is interested to the extent of making sure that it
7 gets what it pays for with -- with its money.

8 MR. HORWITZ: And --

9 QUESTION: And -- and my point -- my point is,
10 as I understand from the briefs the reimbursement scheme,
11 the reimbursement scheme is that the Government, in fact,
12 makes quarterly payments, and then at the end of the year
13 they settle up. So, in point of fact, some of what the
14 Government is paying for in any quarter may not
15 necessarily have -- have yet been earned by the hospital.
16 And I suppose the Government at least has an interest in
17 making sure that the hospital remains solvent and
18 functioning long enough to -- to use up the money properly
19 that it has been paid. So, I suppose the Government does
20 have a continuing interest.

21 MR. HORWITZ: There -- there's no interest in -
22 - if there was, I would submit that the rules and
23 regulations would be different. Many times the hospital
24 is owed money at the end of the time period. It's -- it
25 is a cost -- reimbursement for costs.

1 QUESTION: Well, sometimes it goes one way, and
2 sometimes it goes another.

3 MR. HORWITZ: The point is the hospital is
4 reimbursed for a cost of providing services. Whether it's
5 paid in advance or after is determined later when they do
6 a -- an audit for that period. So, the -- the Government
7 still does not have an interest in how the -- how the
8 hospital spends its money, whether it does so wisely or
9 not, for to do that would put the Federal Government into
10 a situation that Congress did not envision because it
11 could have simply said something else like we're going to
12 watch how you get all your Federal assistance.

13 I'd like to reserve the remaining time.

14 QUESTION: Very well, Mr. Horwitz.

15 Ms. Blatt, we'll hear from you.

16 ORAL ARGUMENT OF LISA S. BLATT

17 ON BEHALF OF THE RESPONDENT

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

20 Medicare payments to hospitals are covered by
21 section 666 because hospitals directly receive Federal
22 benefit funds under an assistance program. The text of
23 section 666(b) applies to recipients of benefits under a
24 Federal program involving Federal assistance.

25 QUESTION: What do you respond to the contention

1 of the petitioner that if that is true, the local grocery
2 store is also a beneficiary and any theft from the corner
3 grocery store becomes a Federal -- a Federal crime under
4 this provision?

5 MS. BLATT: The -- the question of whether the
6 grocery --

7 QUESTION: By -- by reason of the food stamp
8 program I'm talking about.

9 MS. BLATT: Right. And the question would be
10 whether section 666 would apply to the grocery store by
11 virtue of the fact that it receives the coupons. The
12 coupons actually go to the customer who would then turn it
13 in to the store.

14 QUESTION: Right, and the store is reimbursed
15 for what the store provides to the customer. Right?

16 MS. BLATT: Right.

17 QUESTION: By a Federal program.

18 MS. BLATT: Yes, and our position --

19 QUESTION: The same thing as happens here with
20 the hospital. The hospital provides the services, is
21 reimbursed by the Federal Government.

22 MS. BLATT: Our position is that the grocery
23 store, who is approved for participating in the food stamp
24 program, would be covered by the statute.

25 However, Justice Scalia, there's distinctive

1 features about the Medicare program. All money flows
2 directly to the hospital. No money goes to the --

3 QUESTION: But that's -- but that's not crucial
4 to your case. I mean, if your case is right, the local
5 grocery store is covered and every -- every stickup of a
6 -- of a corner supermarket is a -- is a Federal crime.

7 MS. BLATT: No, that's not correct. The theft
8 applies to only agents. So, if there is an employee who's
9 stealing \$5,000 --

10 QUESTION: Okay.

11 MS. BLATT: -- from the grocery store, that
12 employee could also be stealing the food stamp program or
13 could be receiving bribes in connection with the program,
14 and the Government would have an interest in the integrity
15 of those officials at the store. But I --

16 QUESTION: It doesn't apply to a third person
17 that just comes in and sticks up someone at the cash
18 register in the grocery store hypothesis?

19 MS. BLATT: That's correct. It applies -- what
20 -- what section 666 does is protect the integrity of
21 program funds by assuring the integrity of the agents of
22 the organization that received them, and the types of
23 officials who could be either on the take or involved in
24 transactions over \$5,000 could mishandle Federal money.

25 QUESTION: And you think the Government was

1 really concerned with -- with the financial stability of
2 local grocery stores so that it wanted to be sure that
3 nobody is embezzling money from local grocery stores
4 because, after all, these local grocery stores are in the
5 food stamp program.

6 MS. BLATT: The prototypical financial
7 assistance program Congress had in mind is no different
8 than the Medicare program, in which what the Government
9 does is give benefit monies to -- to organizations who
10 turn around and use that money to provide services or
11 other assistance to beneficiaries.

12 QUESTION: No. They're -- they're two different
13 things. In -- in some situations, the money is provided
14 to the organization, and the organization is told, go
15 provide the services. That is what is done to the
16 intermediaries under Medicare.

17 MS. BLATT: It's --

18 QUESTION: But it's quite something else to say
19 when you have provided services to somebody, we will
20 reimburse you after the fact for those services you've
21 provided. It seems to me that's fundamentally different
22 and that the Federal Government doesn't have any concern
23 about the financial stability of that organization so long
24 as the services have been provided of a quality that the
25 Government is -- desires.

1 MS. BLATT: Well, there are two responses to
2 that, Justice Scalia.

3 Medicare does not work differently than a lot of
4 programs in which what the Government does is either
5 reimburse or compensate an entity for providing services.

6 QUESTION: I know.

7 MS. BLATT: And -- but they're still financial
8 assistance programs and the Government does have an
9 interest in the integrity of those funds.

10 If a hospital is either filled with corrupt
11 officials, two things can be happening. The first is that
12 the hospital is less likely to provide care -- quality
13 patient care to Medicare beneficiaries, and that directly
14 hurts the program.

15 QUESTION: Well, you have regulations that
16 prevent that directly and immediately.

17 MS. BLATT: The -- well, the regulations or
18 criminal statutes deal with fraud in connection with the
19 program. They don't act prophylactically to protect the
20 institution from having corrupt officials.

21 The other thing that this does is the official
22 that was bribed in this case was the chief financial
23 officer. He just as well could have been taking bribes to
24 refer patients to unnecessary medical services or to
25 purchase unnecessary medical supplies or to undergo

1 unnecessary procedures.

2 QUESTION: And that would have been picked up
3 under the regulations governing the program.

4 MS. BLATT: Yes.

5 QUESTION: Right?

6 MS. BLATT: Well, it would have -- yes. But
7 this official in this case was taking a bribe in
8 connection, was just taking the hospital's money and
9 making a bogus loan. And that threatened this
10 institution's capacity to service Medicare beneficiaries,
11 and that hurts the Medicare program --

12 QUESTION: Just as the local grocery store won't
13 be able to sell groceries. I know not a swallow falls
14 from the air that the Government -- the Federal Government
15 isn't concerned about it, but do you really think that
16 this -- this statute was directed at assuring the solvency
17 of the local grocery store or -- or the local hospital?
18 What does the Government care so long as the services are
19 provided at the cost that the Government considers
20 reasonable?

21 MS. BLATT: Because this is an assistance
22 program in which the whole point of which was to provide
23 federally funded services to needy individuals who
24 qualified under the program. And if the hospital has
25 corrupt officials, something is going to give with respect

1 to the hospital. Either the hospital is going to cut its
2 staff or its going to stop providing -- performing certain
3 procedures, and that hurts the program. This was a lot of
4 money --

5 QUESTION: A swallow falling from the air. I
6 mean, you could say the same about the grocery store.
7 God, Don't start. The next thing you know they'll be
8 selling rotten beets and so forth.

9 (Laughter.)

10 MS. BLATT: Well, this case involves a -- a
11 Medicare program and the Medicare program depends upon the
12 solvency of hospitals and the -- and the integrity of the
13 officials who work there. Again, this was a -- a
14 relatively small hospital serving a rural area where a lot
15 of people were Medicare beneficiaries in the community,
16 and the Government saw an interest in this case in
17 prosecuting the -- the petitioner who bribed the chief
18 financial officer of the hospital for making a million
19 dollar loan.

20 We also --

21 QUESTION: You think here in any event -- I
22 mean, it seems to me Medicare is about \$200 billion or
23 more, isn't it?

24 MS. BLATT: It's \$300 billion.

25 QUESTION: \$300 billion, and I think isn't the

1 Federal Government aware that giving \$300 billion to
2 hospitals makes a big difference as to whether the
3 hospitals are stable or not? I mean, it seems to me that
4 I've seen cases in which the Medicare regs are -- give
5 more money to the -- to the hospital's capital costs or
6 you give less money depending on whether they're teaching
7 hospitals, on whether the hospital needs it because in the
8 absence of the extra money -- contribution to capital, the
9 hospital will fail or would be unlikely to be able to
10 provide a teaching service or certain other services, et
11 cetera. It seems to me I've seen arguments like that in
12 cases. Am I misremembering them?

13 MS. BLATT: No. I mean, there's -- there's no
14 question that the Medicare Act has a lot of features which
15 subsidize the hospital to make sure it can survive. Most
16 hospitals are dependent on Medicare to assure their
17 financial survival.

18 QUESTION: If that's so, then isn't this unlike
19 the food stamp program, whatever the merits of the food
20 stamp program are or are not vis-a-vis the statute? That
21 this statute foresees as one of its objectives a funneling
22 a lot of money to hospitals so that they, in fact, can
23 maintain the services that they previously provided or
24 might think of providing, et cetera. Or is that an unfair
25 characterization?

1 MS. BLATT: No. I think that's fair. Hospitals
2 are dependent on the Medicare program and the Medicare
3 program is dependent on hospitals.

4 QUESTION: It may be fair, but has the
5 Government established that in this case? I mean, to be
6 sure, all that (b) says is the circumstance referred to -
7 - is that the organization receives in any 1-year period
8 benefits in excess of \$10,000. Now, you're now saying
9 that indeed the hospitals may receive some other Federal
10 benefits in excess of \$10,000.

11 MS. BLATT: Our position --

12 QUESTION: I thought the only thing you were
13 relying upon was the fact that it's reimbursed for the
14 services that it provides to Medicare recipients in excess
15 of \$10,000. Wasn't that the only reliance --

16 MS. BLATT: No. Our position is that the
17 Medicare funds that are paid to hospitals are indisputably
18 Federal benefit funds that are received by the hospital.

19 QUESTION: Right. That -- those are the only
20 funds you're relying upon is under (b).

21 MS. BLATT: Well, to the extent that there's
22 some requirement that the hospitals be considered in and
23 of themselves aided, we think that criteria is met. But
24 we don't think the statute requires it. It doesn't
25 require that the recipient be an administrator. That word

1 doesn't appear anywhere in the statute.

2 QUESTION: You may think it's met, but did you
3 establish that it was met below?

4 MS. BLATT: Oh, yes. We established that \$10 to
5 \$15 million in Medicare payments went to this hospital.

6 QUESTION: I mean aside from Medicare payments.
7 You're now saying you take the position that even if
8 Medicare payments don't count, the hospital is still a
9 beneficiary under some other Federal program.

10 MS. BLATT: That's correct. The only --

11 QUESTION: Did you establish that below?

12 MS. BLATT: Yes, I think you're correct. The
13 only thing in the record is that the -- the finance
14 officer said that most health organizations are dependent
15 on funds that come from the Federal Government. But our
16 primary position is -- was that under the plain language
17 of this statute, the term benefit is talking about either
18 benefit money or other things of value that -- that are
19 provided under a Federal program involving Federal
20 assistance. Medicare is a -- is a quintessential Federal
21 assistance program that provides the benefit funds to the
22 hospitals that turn around and use this money to provide
23 federally funded medical services.

24 QUESTION: Ms. Blatt, I'd like to come back to
25 the horribles. And I gather from footnote 12 on page 31

1 in your brief you often see these, the grocery store
2 example.

3 MS. BLATT: We would take the position that a
4 grocery store that participates in the food stamp program
5 receives the money. However, Justice Ginsburg, it raises
6 the question of whether the statute would extend to
7 earmarked funds that go to the recipient only through an
8 indirect relationship. That question is not posed at all
9 under the -- by a hospital receiving money under Medicare.
10 The --

11 QUESTION: Do you make the same distinction with
12 respect to the -- the Government insured tuition?

13 MS. BLATT: Actually I don't think our theory
14 covers student loans at all because the Federal assistance
15 doesn't ever make its way to the school. The Federal
16 assistance under the loan program are interest rate
17 subsidies and the guaranteed loan that goes to the bank.

18 So -- but -- but the -- so, it's not at all like
19 the Medicare program in which all the Federal money goes
20 straight to the hospital. There is nothing the
21 beneficiary can do to direct the money to go to him or
22 herself, and the hospital cannot bill the patient for
23 Medicare services.

24 QUESTION: Mr. Horwitz made some distinction
25 between patient assigned benefits and payments that would

1 go directly to the hospital that aren't dependent on a
2 patient assignment and said that there was no showing here
3 that the direct payment rather than the assigned benefit
4 applies.

5 MS. BLATT: There is no such distinction under
6 the statute. So, it's true that the record didn't reflect
7 how -- whether this hospital -- all the money was under
8 part A or part B. But this Court -- Court will recall
9 from all its Medicare cases, what the hospital does, it
10 takes all its costs and tells the Government what they
11 were under this very complicated system, and all the money
12 goes to the hospital. So, what -- no matter what the
13 service is that the hospital is providing, the federally
14 funded service, all money flows to the hospital.

15 The patient can't say, well, I want the money to
16 go to myself and then I'll pay the hospital. And that is
17 somewhat significant because the hospital gets a huge
18 advantage from that system in that. They don't -- the
19 hospital doesn't have to rely on the solvency or the good
20 will of the patient. The money goes to the hospital.

21 QUESTION: Well, that's true, but ultimately
22 when -- when the books are balanced, the only thing that
23 the hospital gets is -- is reimbursement for the cost of
24 services it has provided to the -- reasonable cost of
25 services it has provided to the patient.

1 MS. BLATT: And essentially, Justice Scalia,
2 that is no different than the prototypical financial
3 assistance programs Congress had in mind when it passed
4 this statute. The Model Cities program, the CETA program
5 were all instances in which all the Government did was
6 give money to an organization to provide the cost and
7 expenses for providing services to needy individuals under
8 those assistance programs.

9 QUESTION: Yes, but what -- but they gave the
10 money to the organization to give it away.

11 MS. BLATT: They didn't give money away. They
12 gave job training, career counseling, and other kinds of
13 community development. There are a lot of garden variety
14 assistance programs in which what the Government does is
15 gives a grant to an organization to turn around and
16 provide counseling or training or educational services to
17 intended beneficiaries. We reimburse States for
18 immunization programs so they can provide preventative
19 health services to needy citizens.

20 QUESTION: But that's as if --

21 MS. BLATT: It's a reimbursement system.

22 QUESTION: That's as if in this case there were
23 an entity that received money and -- and held it until the
24 hospital submitted a -- a bill. And that entity, that
25 fiscal intermediary, it seems to me might well be covered

1 by the statute because it's holding finds in order to
2 disburse them to another entity that then performs
3 services.

4 MS. BLATT: Well, yes. The hospitals are
5 paid --

6 QUESTION: But here in this question, the
7 hospital itself performed the service.

8 MS. BLATT: Right, the hospital is paid in
9 advance.

10 Secondly, under the Model Cities program, as
11 this Court pointed out in Salinas, it had to first spend
12 the money and then seek a -- a funding request from the
13 Government. And the State immunization programs work the
14 same way. You reimburse the States.

15 QUESTION: The question isn't just whether
16 there's reimbursement. The question is whether it is
17 reimbursement for a debt that somebody else owes. That's
18 the crucial distinction here. In those other programs,
19 there is no debt that these people who were provided these
20 services owed to the Model Cities or anybody else. But
21 here there is a debt that the person who got the medical
22 services owes to the hospital, and all the Federal
23 Government is doing is picking up that debt.

24 MS. BLATT: Right.

25 QUESTION: That's a world of difference from --

1 from another benefit program.

2 MS. BLATT: There are a lot of benefit programs
3 in which the service provider could have charged the fee,
4 but what the Government is doing is providing a Federal -
5 - Federal funding, a benefit program, by providing funds
6 to the organization to turn around and use those funds to
7 -- to provide the services.

8 QUESTION: Ms. Blatt, you said a moment ago that
9 the hospitals are paid in advance.

10 MS. BLATT: Yes.

11 QUESTION: How do we know that?

12 MS. BLATT: We know that from the -- the
13 statute, the regulations, and in Good Samaritan actually
14 the Court concerned this very payment structure to
15 preserve the hospital's liquidity. What the statute and
16 the regulations do is provide an advance funding mechanism
17 that tries to estimate what the -- the services the
18 hospital will perform, and then there's the quarterly
19 adjustments throughout the year.

20 QUESTION: Was that established in this case,
21 that this is the mechanism?

22 MS. BLATT: It's required by the statute that
23 that's how they have to be paid. But, no, it's not in the
24 record. That's correct.

25 QUESTION: In advance of what? In advance of

1 the provision of the services or in advance of the
2 submission by the hospital of the actual accounting for
3 the services? Do we actually know that the -- that there
4 -- you know, that there's a time lapse? The Government
5 gets the -- the hospital gets the money for it's actually
6 provided services?

7 MS. BLATT: I don't think it matters. What the
8 -- what the statute does or how the program works is that
9 they're paid twice a month based on what they think
10 they're going to be paid for the whole year. And so,
11 whether or not the service has been provided or a claim
12 has been submitted, the hospital gets the money.

13 But it --

14 QUESTION: Yes, but I think it's misleading to
15 say it's paid in advance. It -- it's paid in advance of
16 -- of actually figuring out how much they -- they had
17 expended, but I don't think anybody knows whether in fact
18 they're a little bit behind or a little bit ahead at any
19 one point.

20 MS. BLATT: That's correct. The fact -- but
21 whether or not they provided the services is irrelevant.
22 They still get the money.

23 QUESTION: But --

24 MS. BLATT: Sorry.

25 QUESTION: -- what Justice Scalia just said is

1 your present position now, that sometimes they could be
2 behind and sometimes they could be ahead? It's a --

3 MS. BLATT: That's correct.

4 QUESTION: -- bimonthly thing.

5 MS. BLATT: It's a bimonthly thing, and so the
6 -- the hospitals are advanced the money until there's been
7 a reconciliation to see whether they're ahead or behind.

8 But our fundamental point is not that they get
9 the money beforehand or they get the money after. The
10 fundamental point is that when there is corruption by
11 hospital officials, the Medicare program suffers.

12 QUESTION: Well, I can understand that.

13 And don't agree with me if you think I'm wrong.

14 MS. BLATT: Okay.

15 QUESTION: But it just seems to me you're going
16 on the theory, hey, kid, here's a quarter, buy some bubble
17 gum. All right? That's one kind of program. But it
18 would be naive to think this is that kind of program. I
19 mean, this is thousands of pages of regulations that go
20 into negotiated costs with the hospital, including capital
21 costs and everything under the sun. And all you have to
22 do is put down a book of HHS regulations and you'll see
23 it. And that to me is not a program that's just like,
24 hey, reimburse the guy for some bubble gum he gave the
25 kid.

1 MS. BLATT: No. What our --

2 QUESTION: I mean, this is a -- this is a very
3 complex, cost-focusing, negotiated system of what is
4 repaid, what isn't, and how does that affect the hospital.

5 But don't agree. Say I'm wrong if I'm wrong.

6 MS. BLATT: I think the best way to look at it
7 is that Medicare is essentially a grant to hospitals that
8 is calibrated to the cost of providing the federally
9 funded services. It is true the beneficiaries are the
10 patients -- the program beneficiaries. But that is no
11 different than the prototypical financial assistance
12 programs Congress had in mind when it passed this statute,
13 and whether in the Model Cities program they said to an
14 organization, here's \$1 million, please improve the life
15 of -- of city residents or they say to a hospital, here's
16 \$1 billion or \$100 billion, provided federally funded
17 medical services to elderly people who are qualified to
18 get those services under the program.

19 QUESTION: But you wouldn't say that the food
20 stamp program is essentially a program with grant to
21 grocery stores, would you?

22 MS. BLATT: I think the food stamp program works
23 -- works differently because the Federal benefit is the
24 coupon which is essentially like cash, although it's
25 earmarked cash because it can only be spent at the grocery

1 store. But if the individual burns his coupon or it gets
2 stolen or he loses it, that's it.

3 And in the hospital case, all the money flows.
4 There's just no interference by or interruption by the
5 beneficiary, the elderly patient. He or she goes in for a
6 procedure. The hospital gets paid.

7 And again, this is -- this is so much like the
8 garden variety assistance program where what Congress does
9 is compensates an entity for providing services. And this
10 is the Model Cities program. It was to improve the -- the
11 living conditions of the city residents. Under the CETA
12 program, which was at issue in the Mosley case, it was job
13 training, career counseling. And in the Community
14 Development Block program, the beneficiaries were people
15 who needed housing assistance and what they did was
16 rehabilitate people's homes.

17 QUESTION: If we take --

18 QUESTION: -- the -- the dispensers of the job
19 training or whatever in those programs charge people for
20 the -- for the services, do you think they would get any
21 -- you know, any -- any takers if they -- if they charged
22 for the services?

23 MS. BLATT: They might. There are lots of
24 organizations now that provide career counseling or even
25 drug counseling services, but they still get grants under

1 the Federal Government to do those same kinds of services.

2 QUESTION: They get grants, but -- but the
3 Federal Government is not -- is not paying a debt that
4 somebody else owes them.

5 MS. BLATT: Yes, they are. If that person -- if
6 I went in for drug counseling or drug rehabilitation,
7 presumably I'd have to pay for the service. They're not
8 giving it to me for free.

9 QUESTION: That --

10 MS. BLATT: My parents or I might have trust
11 fund that covers it, but if it's done under a Federal
12 grant, then it's -- it's a benefit to me, but the
13 institution that's providing those services are receiving
14 the benefit funds. The plain language of the statute
15 applies to recipients of -- of benefits, and that's
16 talking about the benefit funds or other items of value.

17 And there's just no question that Medicare is a
18 classic Federal assistance program. It directly provides
19 those benefit funds to the hospitals that turn around and
20 use those funds to provide assistance to individuals.

21 Before Medicare was enacted, a lot of people got
22 these services for free. And what Medicare did was -- was
23 say, we don't want elderly people to have to pay for the
24 cost of hospitalization when they're over 65 because it
25 could ruin them financially. So, this is just a -- a

1 quintessential assistance program where the hospital is
2 receiving the benefit funds.

3 If I could turn briefly to subsection (c), which
4 the petitioner also relies on, our position is that what
5 subsection (c) does is it prevents a routine commercial
6 payment -- excuse me -- that is referring to routine
7 commercial compensation payments to individuals. That
8 section talks about bona fide salary or wages or other
9 forms of compensation or reimbursement --

10 QUESTION: Doesn't the word corruptly already
11 handle that?

12 MS. BLATT: And it's significant that the word
13 corruptly was added to the statute at the same time
14 subsection (c) was added to make absolutely clear that the
15 types of payments to individuals described in subsection
16 (c) would not be prosecuted as corrupt payments.

17 QUESTION: I think the fact that they were right
18 at the same time makes it worse rather than better.
19 Corruptly would have done the job. It suggests that (c)
20 -- (c) means something else. How can you possibly
21 corruptly solicit or demand anything of value which would
22 not automatically come within (c)? Does not apply to bona
23 fide salary, wages --

24 MS. BLATT: Right. The same thing could be said
25 of the bank bribery statute which subsection (c) was

1 lifted verbatim from. That is, 18 U.S.C. 215(c) is the
2 bank bribery provision. That provision also prohibits the
3 corrupt payments of individuals. Congress added the word
4 corrupt at the same time it added subsection (c) and
5 identical language. The same thing happened a year later
6 with this section, section 666(c), and the legislative
7 history is -- is unambiguous on this point, that -- that
8 section 666 prohibits the corrupt payment and not these
9 routine kinds of commercial payments to individuals.

10 And another problem with petitioner's reading -
11 - and this is similar to our point on the -- on the
12 subsection (b) -- is that to exclude any kind of
13 compensation or reimbursement or expenses paid to an
14 organization would exclude the very kinds of assistance
15 programs Congress had in mind when it passed this statute.
16 It's completely inconsistent with the word contract in
17 subsection (b) which shows that Congress obviously
18 contemplated the Federal Government would get
19 consideration in exchange for providing benefit funds to
20 organizations.

21 And the last point I want to leave the Court
22 with is it's very significant that this statute applies to
23 organizations, governments, and agencies. It doesn't
24 apply to individuals. The jurisdiction applies to the
25 entities. The criminal defendant is an individual, but

1 the jurisdiction reaches organizations, governments, and
2 agencies, even though the beneficiaries of most assistance
3 programs are in fact individuals. And that is because
4 what Congress was trying to do is when you have corruption
5 directed at the recipient that provides the services, the
6 beneficiaries of the program are hurt.

7 QUESTION: So, at least it won't hit the mom and
8 pop grocery store. We -- we can get the -- that gets the
9 mom and pop grocery store off, I mean, if it's not
10 incorporated.

11 MS. BLATT: Yes, it has -- right. It has to be
12 an organization, government, or agency, and it also has to
13 be a transaction involving \$5,000 or more.

14 If there are no further questions, we would ask
15 that the judgment be affirmed.

16 QUESTION: Thank you, Ms. Blatt.

17 Mr. Horwitz, you have 3 minutes remaining.

18 REBUTTAL ARGUMENT OF MARK L. HORWITZ
19 ON BEHALF OF THE PETITIONER

20 MR. HORWITZ: Thank you, Your Honor.

21 QUESTION: Mr. Horwitz, I -- I assume that if
22 Blue Cross got this money or some fiscal intermediary and
23 was holding it and then paid the hospital, if it was just
24 holding funds, that the statute would apply to Blue Cross.

25 MR. HORWITZ: It would apply to Blue Cross and,

1 Your Honor, it would apply --

2 QUESTION: Okay. Why doesn't it apply to your
3 hospital if your hospital received funds in advance and
4 simply has to wait in order to draw down on them?

5 MR. HORWITZ: The hospital -- I think the key -
6 -

7 QUESTION: Or wait -- or has to wait in order to
8 make a legitimate claim to them even though it can draw
9 down.

10 MR. HORWITZ: I'll try to answer this briefly
11 with the Government's contention here -- and it was
12 stated, even in the argument -- is simply this is still
13 Federal money. They want to say this is still Federal
14 money. This is a grant. In all those thousands of pages
15 of C.F.R.'s they never once talk about this money as a
16 grant. It's a payment for services to the provider. And
17 whether the provider is paid 1 day in advance or 1 day
18 behind, it's still payment for services. It's not Federal
19 money.

20 All of the -- Mosley, Hinton, Del Toro cases all
21 talk about administering Federal funds.

22 QUESTION: You don't challenge that, Mr.
23 Horwitz, Ms. Blatt's statement that sometimes it may be a
24 little bit ahead, sometimes it may be a little bit behind
25 so far as the actual accounting is concerned?

1 MR. HORWITZ: That may very well be, Your Honor,
2 and I don't think that's -- it's -- in any event, the
3 C.F.R. makes clear that what the hospital is getting is
4 cost reimbursement and they may have to adjust that cost
5 later.

6 QUESTION: What do you do about the argument
7 that that's what's happening in the Model Cities program?
8 Job training. You're getting the -- the company that gets
9 the money or the organization that gets the money is being
10 reimbursed for the cost of providing job training.

11 MR. HORWITZ: Because the question still is, is
12 that all that is involved? The Government wants to equate
13 this with a grant, and a grant indicates there's some
14 providing of ultimate service. If a -- if a local entity
15 is given money to administer a service and, say, that's
16 hand out methadone treatment, the service -- the benefit
17 has still not been handed out. The Government has an
18 interest in making sure that that person doesn't -- isn't
19 bribed to hand out a methadone pill to somebody who
20 doesn't deserve it. That's different from simply paying
21 for the service.

22 And, yes, Medicare is complicated. There are
23 thousands of pages of regulations, but not one time does
24 the regulations say this is a grant, this is a gift, this
25 is anything other than we're going to pay you for

1 services. We may have to fight with you about what the
2 cost of those services are. But it is clearly not Federal
3 money, and the Government wants to treat it as Federal
4 money.

5 QUESTION: Well, it is Federal money.

6 MR. HORWITZ: Your Honor, if it is --

7 QUESTION: My question -- well, maybe I'll --

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

9 Horwitz.

10 The case is submitted.

11 (Whereupon, at 12:07 p.m., the case in the
12 above-entitled matter was submitted.)

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CERTIFICATION

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

JEFFREY ALLAN FISCHER, Petitioner v. UNITED STATES.

CASE NO: 99-116

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

BY: *Lona M. May*
(REPORTER)