

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

ORIGINAL

LIBRARY
SUPREME COURT, U.S.
WASHINGTON, D.C. 20543

CAPTION: LAWRENCE H. CRANDON, ET AL., Petitioners V. UNITED STATES;
and
BOEING COMPANY, INC., Petitioner V. UNITED STATES

CASE NO: 88-931; 88-938

PLACE: WASHINGTON, D.C.

DATE: November 6, 1989

PAGES: 1 - 55

ALDERSON REPORTING COMPANY
1111 14TH STREET, N.W.
WASHINGTON, D.C. 20005-5650
202 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 LAWRENCE H. CRANDON, ET AL., :
4 Petitioners :
5 v. : No. 88-931
6 UNITED STATES; :
7 and :
8 BOEING COMPANY, INC., :
9 Petitioner :
10 v. : No. 88-938
11 UNITED STATES :
12 -----x

13 Washington, D.C.

14 Monday, November 6, 1989

15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United States at
17 10:02 a.m.

18 APPEARANCES:

19 PHILLIP A. LACOVARA, ESQ., Washington, D.C.; on behalf of
20 the Petitioners in No. 88-931.

21 BENJAMIN S. SHARP, ESQ., Washington, D.C.; on behalf of
22 the Petitioner in No. 88-938.

23 EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor
24 General, Department of Justice, Washington, D.C.; on
25 behalf of the Respondent.

C O N T E N T S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORAL ARGUMENT OF

PAGE

PHILLIP A. LACOVARA, ESQ.

On behalf of the Petitioners in No. 88-931 3

BENJAMIN S. SHARP, ESQ.

On behalf of the Petitioner in No. 88-938 14

EDWIN S. KNEEDLER, ESQ.

On behalf of the Respondent 26

1 PROCEEDINGS

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 89-931, Lawrence Crandon v.
5 United States, and Number 88-938, Boeing Company v. United
6 States. Mr. Lacovara.

7 ORAL ARGUMENT OF PHILLIP A. LACOVARA

8 ON BEHALF OF PETITIONERS IN NO. 88-931

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

11 The government's claim to recover the severance
12 payments that Boeing made to its employees suffers from
13 several significant flaws. The three issues before the
14 Court this morning are the following. First, Section 209
15 of Title 18, on which the government relied exclusively as
16 defining the fiduciary duty that the employees allegedly
17 breached, does not apply to pre-employment severance
18 payments. Second, the Fourth Circuit overstepped the
19 proper bounds of a reviewing court in disregarding the
20 amply-grounded findings of the trial court that none of
21 these men accepted that severance payment with the kind of
22 intent that Section 209 in other situations may prescribe.
23 And third, under a common law claim to recover the value
24 of any secret payments, adequate disclosure of the type
25 that the trial court found here, bars a claim by an

1 employer for recovery of any conflicting financial
2 arrangements.

3 Let me turn first to the statutory coverage
4 question. This is an issue on which all -- all roads lead
5 to Rome: statutory language, legislative history and
6 legislative purpose. The language of the statute, as it
7 was revised in 1962, which appears on page 1a of our brief
8 from Mr. Crandon, et al., could not be more clear, we
9 submit. The statute, as it is common ground, defines two
10 correlative offenses. Certain kinds of compensatory
11 payments that are made by or received by government
12 employees are prohibited.

13 Looking first at the statutory application to the
14 payor, in this case Boeing, the statute says, and I will,
15 I think fairly allied the unnecessary language, whoever
16 pays or makes any contribution to or in any way
17 supplements the salary of any such officer or employee,
18 meaning officer or employee of the United States, is
19 guilty of a crime.

20 The one overarching issue with which the government
21 has never come to grips in this case is the following.
22 Could the government, the day after these payments were
23 made by Boeing to employees still on its payroll, who, as
24 it was stipulated below and found by the trial court, not
25 only were not government employees, but not had -- had not

1 been assured government employment or even formally
2 offered government employment, could the government have
3 indicted Boeing for violating Section 209 the day after
4 these payments were made, days or weeks or in several
5 cases months before these men actually became government
6 employees. I submit the answer to that is clearly no, for
7 the same reason Boeing could not have indicted the
8 employees.

9 QUESTION: Could there have been an attempt
10 indictment in that situation?

11 MR. LACOVARA: I think not. The government
12 certainly has never alleged in this case that the conduct
13 here constituted an attempt to commit crime.

14 QUESTION: I'm just asking hypothetically. Could,
15 would the facts you state support an indictment for an
16 attempt?

17 MR. LACOVARA: I think probably not, although the
18 general law of attempt does apply to many criminal cases.
19 But here what you have is a statutory definition of a
20 particular conflict of interest crime, and for reasons
21 that we will discuss in a moment, Justice Kennedy,
22 Congress drew the line where it wanted to draw the line in
23 distinguishing lawful conduct from unlawful conduct. And
24 it is important, I think, to preserve that bright-line
25 distinction, lest we criminalize a whole category of

1 relationships that Congress never intended to cat -- to
2 criminalize.

3 QUESTION: What if the employer, before the
4 government service began, paid a sum to the employee on
5 the understanding and expectation that the employee might
6 provide some favors to that employer later, during
7 government service.

8 MR. LACOVARA: That is an issue with which Congress
9 has dealt, Justice O'Connor, in other sections. And it is
10 very important to --

11 QUESTION: Would it violate this section as well?

12 MR. LACOVARA: No, no. It would not.

13 QUESTION: Simply because of the timing.

14 MR. LACOVARA: That's right. And that is
15 explicable, I think, in light of the --

16 QUESTION: Well, you certainly can read the
17 language of the statute as not turning on the timing of
18 the payment. If -- if the payment is made to supplement
19 the government salary, you certainly can read Section 209
20 as being applicable.

21 MR. LACOVARA: Well, our opening submission,
22 Justice O'Connor, is that that is not a correct reading of
23 the language and that under the rule of lenity, if your
24 suggestion is that one could read the statute this way,
25 ambiguities in criminal statutes are to be resolved

1 against the government. Where you have statutory language
2 that talks about making a payment to, or a contribution
3 to, or -- supplementing the salary of a government officer
4 or employee, I suggest it is at least a strained reading
5 to say that the timing makes no difference.

6 But when you look at what Congress has done in
7 trying to deal with the problem that you identify it
8 becomes clear, and this is why I say that in reading this
9 statutory language, as revised in 1962, the Court ought to
10 consider the other statutes that Congress revised in 1962.
11 The bribery statute expressly deals with that situation.
12 Congress knew how to write that language. It covers
13 payments made not only to incumbent federal officers or
14 employees, but, as the statute defines it, persons
15 "selected to be" public officers or employees.

16 Similarly, Section 203 of Title 18, which was
17 revised at the same time as this statute was revised,
18 punish -- punishes certain kinds of compensatory payments
19 made to a person for services to be rendered at a time
20 when he is a government officer or employee. So there are
21 two examples of Congress' knowledge of how to reach pre-
22 government employment payments, if they are made with the
23 kinds of intent that are described in Section 201 and
24 Section 203.

25 QUESTION: Mr. Lacovara --

1 QUESTION: Mr. Lacovara, the Fourth Circuit relied
2 upon the 1962 change in this statute to say that whatever
3 may have been the case before then, they thought it now
4 covered pre-employment payment.

5 MR. LACOVARA: That is correct. The Fourth Circuit
6 relied exclusively on that change. It is, I think, common
7 ground now that the predecessor to this statute only
8 reached payments to incumbents. It said whoever being a
9 government officer or employee accepts the payment is
10 guilty of a crime. Congress took that out in 1962. It
11 did it, however, with an explanation of what limited
12 changes it intended to accomplish in revising the
13 language. We have set these out in our brief because we
14 think it is important to do what the Fourth Circuit
15 apparently didn't do, which is to read Congress' own
16 explanation of whether it was intending to make what I
17 submit would be a fairly substantial change in the
18 coverage that the statute had in its prior form, which was
19 clearly limited by time to incumbent government employees.

20 Page 10a is the Senate report; page 25a of our
21 appendix to the brief sets forth the House report, and
22 just let me read the two sentences. Section 209 is
23 similar to Title 18 United States Code, Section 1914. The
24 latter, that is the predecessor, prohibits a government
25 employee from receiving any salary in connection with its

1 government service from a private source. Subsection (a)
2 of Section 209 would reenact this prohibition in
3 substance, et cetera. The House report reads the same
4 way. Attorney General Kennedy, whose administration had
5 proposed the bill that ultimately became law, and this is
6 set forth on page 47a, said exactly the same thing.
7 Comparing the old statute with the new, Subsection (a)
8 prevents an officer or employee of the executive branch
9 from receiving, and anyone from paying him any salary or
10 supplementation from a private source, et cetera. This --
11 provision uses much of the language of former Section
12 1914 and does not vary from that statute in substance.
13 Congress --

14 QUESTION: So it leaves a rather large hole in the
15 statutory scheme, doesn't it, if an employer, a month
16 before someone becomes a government employee, can pay them
17 a large amount of money to tide them over the time that
18 they will be a government employee.

19 MR. LACOVARA: If we were sitting down today to
20 write legislations, Chief Justice, we might want to draw
21 the line differently. But that is not the purpose that
22 the statute had in mind when it was -- Congress had in
23 mind when it first enacted this statute in 1917, which was
24 to prevent carrying people on the payroll of a private
25 benefactor with the concern being, a concern that doesn't

1 apply when the payment is made before government service,
2 the concern being that the person who is supposedly
3 discharging his duties with an eye solely on the public
4 interest may be looking over his shoulder to see whether
5 or not his judgments will -- will affect whether that
6 economic lifeline, as the New York City Bar put it, is
7 going to be cut off. That danger is simply not there, the
8 danger of divided loyalty, serving two masters, when an
9 irrevocable, fixed, non-contingent payment is made before
10 government service.

11 Now, as Justice O'Connor pointed out, if there is
12 some other understanding, that could constitute a bribe.
13 Congress has defined the point where the bribery statute
14 applies, at a certain point before government employment,
15 but not at the -- not infinitely back from government
16 employment. So, Congress has decided to deal with a
17 particular problem, divided loyalty. It rationally chose
18 to draw the line at incumbency. Section 1914, it has
19 certainly drawn the line there. The explanation for the
20 changes in language in 1962 suggest only -- only a
21 narrowing purpose, changing the prior phrase in connection
22 with government employment to a phrase, as compensation
23 for government employment. And if Congress had intended
24 to cover a whole new class of payments, especially in
25 light of the fact that severance payments, pre-employment

1 severance payments, are, as the government has agreed,
2 quite common, one would think that Congress would have
3 said something about that.

4 When one looks at the reasons for dropping the
5 magic phrase on which the Fourth Circuit exclusively
6 focused, one sees that, in the original staff report back
7 in 1958, a House staff report, there was a suggestion that
8 that phrase be taken out, because the staff wanted to
9 cover not only officers of the executive branch, but also
10 members of Congress. And the phrase being a government
11 officer or employee would not have covered those
12 congressmen, that the --

13 QUESTION: Do you make the -- Mr. Lacovara, do you
14 make the same analysis of the first section -- of the
15 first paragraph of the statute as of the second? Could
16 the government's position fare any better under the first
17 paragraph than it does under the second?

18 MR. LACOVARA: I think not, Justice Kennedy,
19 because it -- I think it is common ground that these are
20 supposed to be correlative offenses. Indeed, in the
21 second paragraph the payer's defense --

22 QUESTION: Well, but the second paragraph is in
23 part controlled by the first, because they talk about such
24 officer or employee, and the first paragraph begins
25 whoever receives.

1 MR. LACOVARA: Yes, for services as a government
2 officer or employee. And what I am suggesting is that, to
3 the extent there is any doubt about whether Congress
4 intended to reach only payments received by government --
5 incumbent government officials, one can appropriately take
6 guidance from the second paragraph, which says all
7 Congress is penalizing on the payor side is the payment to
8 a government employee under circumstances that would make
9 it illegal for him to accept it, namely it's accepted with
10 compensatory intent.

11 QUESTION: Mr. Lacovara, the first paragraph
12 doesn't say -- it doesn't say receives as an officer or
13 employee. It says receives a salary, contribution to,
14 supplementation of salary, as compensation for his
15 services as an officer or an employee. You can receive it
16 as compensation for your services as an officer or an
17 employee whether or not you are now an officer or an
18 employee.

19 MR. LACOVARA: Justice Scalia, as I mentioned
20 before, there might be an ambiguity --

21 QUESTION: In the first paragraph.

22 MR. LACOVARA: In the first paragraph. If one --

23 QUESTION: Now, I think you are stronger on the
24 second paragraph.

25 MR. LACOVARA: If one read this paragraph, if that

1 was all that existed in Title 18, there would be an
2 ambiguity, which under the rule of lenity would have to be
3 resolved in our favor in any event. But one has the
4 second paragraph here, and one also has Section 201 and
5 Section 203. And when you read those statutes, without
6 even getting behind them into legislative purpose or
7 legislative history, I think you are drawn rather firmly
8 to the conclusion that when Congress wanted to reach pre-
9 employment payments it used a form of words. Indeed, the
10 City Bar, in proposing a revision of this predecessor,
11 Section 1914, the predecessor of this section, did propose
12 to add language that not only dropped the being a
13 government officer or employee language, but proposed
14 adding the language that Congress used in 203, for
15 services to be rendered when the person is a government
16 employee.

17 So, you have here, I think, a rather clear
18 statutory pattern. Certain kinds of pre-employment
19 payments are covered, others are not --

20 QUESTION: Mr. Lacovara, do you mind my asking
21 whether you concede that there is a civil cause of action
22 by the government for whatever it is the statute -- the
23 criminal statute, says? Is there a common law cause of
24 action to cover the exact contours of whatever this
25 statute means?

1 MR. LACOVARA: We have never doubted that there is
2 a common law cause of action to recover secret profits
3 obtained in breach of trust. There is ample common law
4 doctrine, federal common law doctrine, that that does
5 exist. All of the cases, however, as the Fourth Circuit
6 itself recognized, are limited to circumstances in which
7 the -- the tainting outside financial relationship is
8 undisclosed, secret, so that the employer, new employer --

9 QUESTION: Well, what is your answer? That the
10 cause of action for recovery is not covered exactly by the
11 contours of the statute? It is something else?

12 MR. LACOVARA: That is -- the government would make
13 out its prima facia burden if there had been an illegal
14 receipt of -- in violation of Section 209, but it is at
15 least a defense that that relationship was disclosed. And
16 that is what we have argued below and what we think is
17 supported by federal common law.

18 QUESTION: Thank you, Mr. Lacovara. Mr. Sharp.

19 ORAL ARGUMENT OF BENJAMIN S. SHARP

20 ON BEHALF OF THE PETITIONER IN NO. 88-938

21 MR. SHARP: Mr. Chief Justice, and may it please
22 the Court:

23 Both the district court and the court of appeals
24 held that the "as compensation for" language of Section
25 209 required some proof of subjective intent on the part

1 of the parties. In fact, the court of appeals expressly
2 found, or expressly rejected, the government's assertion
3 that the statute could be violated with simply a showing
4 of objective intent, or without any intent at all.

5 The construction that the courts below gave that,
6 the statute, we think is compelled, because otherwise the
7 statute would proscribe all manner of payment, including
8 severance payments to which the government does not
9 object. Having determined that the district court was
10 correct in its holding on the law, the court of appeals
11 nonetheless reversed on the facts. It reviewed the facts,
12 the objective facts cited by the district court below and
13 drew different inferences, but in doing so it necessarily
14 drew inferences that the district court had in fact
15 rejected.

16 This Court has, on many occasions, held that the
17 questions of intent are factual questions for the trier of
18 fact. In fact, where intent itself requires some showing
19 of actual motive or purpose or understanding, this Court's
20 opinion in Pullman-Standard v. Swint held that the legal
21 presumption to be drawn from factual showings less than
22 actual motive was not proper. But that is precisely what
23 the court of appeals has done here. It found new facts by
24 making certain limited inferences, but in doing so it did
25 not cite Rule 52(a), it did not discuss or define the

1 proper standard of review, other than to make a passing
2 reference that the court below was clearly erroneous, it
3 did not discuss testimony --

4 QUESTION: Mr. Sharp, what is it -- what is your
5 understanding of the intent requirement in the statute?
6 What do you think the government had to prove?

7 MR. SHARP: I think the government had to prove
8 expressly that the parties intended to make payments that
9 were compensation for federal services.

10 QUESTION: What other motive could there possibly
11 have been for the payments by Boeing?

12 MR. SHARP: I think a motive to fairly sever
13 relations with long-standing employees, to make sure that
14 --

15 QUESTION: But nobody got this except people who
16 were going into government service.

17 MR. SHARP: No one got it except individuals who
18 were compelled to terminate their employment with the
19 company to enter into public service. There is ample
20 evidence in the record that Boeing supported a general
21 policy of encouraging public service, and that under
22 circumstances it did not require that there be a complete
23 severance from the company, no severance payment was paid
24 because no severance was made. Under those circumstances,
25 it was not infrequently the case that people were

1 permitted to continue to participate in various company
2 benefits programs, were able to take a leave of absence
3 without pay, or in some cases a leave of absence with pay.
4 This was the only circumstance, federal government
5 service, of an encouraged, public service that required
6 absolute severance from the company. And that is the
7 reason that severance payments were only made in those
8 circumstances.

9 QUESTION: What exactly do you understand was the
10 government's theory at trial in its cause of action
11 against Boeing?

12 MR. SHARP: That has long perplexed us. At trial
13 the government for the first time took the position that
14 its cause of action of Boeing, against Boeing, was a
15 common law tort of inducing a conflict of interest
16 situation.

17 QUESTION: Is that how it went to the trier of
18 fact?

19 MR. SHARP: It is.

20 QUESTION: A common law tort of inducing breach of
21 a fiduciary relationship?

22 MR. SHARP: Well, the exact language in paragraph
23 16 of the complaint says the common law tort of inducing a
24 conflict of interest situation.

25 QUESTION: Uh huh.

1 MR. SHARP: Conversely, the claims against the
2 individuals was sounded in quasi contract for their
3 supposed breech of an undivided -- duty of undivided
4 loyalty.

5 QUESTION: Under that theory would the government
6 be entitled to recover the amounts of the payments from
7 the employees and also from Boeing, a double recovery sort
8 of?

9 MR. SHARP: I do not think they would, and the
10 district court and court of appeals both held they could
11 not based on the precedent of Continental Management case.
12 I believe that if the government made out a prima facia
13 case, that the standard, or the quantum of damages, based
14 on other precedent, might be the amount of a payment.

15 QUESTION: How did the statute ever get into the
16 case?

17 MR. SHARP: The supposed tort duty that the
18 government claimed was --

19 QUESTION: Was measured?

20 MR. SHARP: -- derived from this criminal statute.
21 So, in order to show -- to make out the common law tort,
22 they would have to show a violation of the criminal
23 statute.

24 QUESTION: Mr. Sharp, can I return to Justice
25 Stevens' question? What do you take to be the subjective

1 intent that is required by the phrase "as compensation for
2 his services"? Specifically, does there have to be an
3 exchange, does there have to be a quid pro quo? Is it --
4 is it rather like consideration in the law of contracts?

5 MR. SHARP: I, I -- we don't believe that the
6 intent requires a quid pro quo or a specific intent to
7 influence government service, but at least must be an
8 intent to compensate for government services. At the very
9 minimum, Justice Scalia --

10 QUESTION: Well, what does to compensate mean? I
11 mean, suppose somebody comes up to me after I have retired
12 from government service and they say Scalia, we really
13 admire you, you have done a great job for your country.
14 We want to give you an award of \$50,000 for outstanding
15 public service. I am sure a lot of people get awards like
16 that. Is that compensation for -- for public service?

17 MR. SHARP: I don't think so.

18 QUESTION: Why not?

19 MR. SHARP: It is paid under circumstances -- among
20 other reasons it is paid under circumstances that could
21 not conceivably create a conflict of interest or a
22 potential for divided loyalties --

23 QUESTION: There is nothing in here about that.
24 This is a prophylactic rule. You don't have to examine
25 case by case to see if there is a potential for conflict

1 of interest, it is obviously prophylactic. But why is --
2 in your mind that one is not covered. Now, I could
3 explain why that is not covered, I could say there is
4 really no quid pro quo. It is not if you go into the
5 government, I'll pay you this amount of money. And
6 therefore I could say it is not compensation for your
7 being in the government. That way I could understand your
8 arguing an intent requirement. But I don't understand
9 what kind of intent requirement you are arguing. You say
10 it has to be intent to give it to him as compensation.
11 Well, that sounds very nice, but what does "as
12 compensation" mean if it doesn't mean quid pro quo? You
13 work for the government, and I will pay you the money.

14 MR. SHARP: In the facts of this case it would fall
15 far short of a quid pro quo in any event, in that these
16 payments were fixed, final and irrevocable.

17 QUESTION: Oh, I know that. I know that. But I
18 don't understand what you mean by "as compensation."
19 There has to be a subjective intent to give it to you as
20 compensation. But, but it doesn't cover the situation
21 where I say you have done a wonderful job for your
22 country; in admiration of your work for your country I am
23 giving you \$50,000. That -- that isn't covered.

24 MR. SHARP: The only suggestion I can make is to
25 read some meaning into the phrase that would cover a

1 conflict of interest, and if you construe that phrase in a
2 fashion where there could be no conceivable conflict of
3 interest, it seems to me that it is an overbroad reading
4 of it, that doesn't serve the purpose of preventing the
5 evil which Congress sought to prevent.

6 QUESTION: Well, every prophylactic rule is over
7 broad, I mean, and --

8 MR. SHARP: The statute, as originally enacted,
9 obviously was directed at the -- at the receipt of
10 payments during a period of time where the performance of
11 government services was being rendered, where there was a
12 temptation, or at least a potential for influence of that
13 government service, to assure that that economic benefit
14 was continued to be received. If you have a factual
15 pattern that does not present that same potential, I don't
16 understand how it would be reasonable to construe the
17 statute so broadly as to -- as to sweep up factual
18 patterns which could not conceivably constitute a conflict
19 of interest.

20 QUESTION: Except here you have got a series of
21 findings which totally negate any improper actual conduct.
22 There is no -- no motive to do anything like that. But
23 then there is this finding 22 that says they were not
24 intended as supplementation for government service or as
25 compensation. I don't know quite -- I'm really kind of

1 puzzled as to what that means.

2 Does that mean that Boeing did not have a policy of
3 giving extra money to people who were going into service
4 because they thought that (a) there's a public purpose to
5 be served, and (b) these may be more valuable employees
6 when they get back later, which are -- neither of which is
7 -- when they get out of government service, neither of
8 which is necessarily an invidious motive. I'm not
9 suggesting that. But it does seem rather clear that the
10 company must have thought that these people were going to
11 have a financial sacrifice during this period of
12 government service, and they wanted to help them over a
13 tough period.

14 And -- but you are saying -- I am trying to figure
15 out -- is that what the statute prohibits? Or, if it is,
16 then it seems to me the finding is clearly erroneous,
17 frankly. I just can't see how you can under -- construe
18 these payments otherwise. But maybe it requires something
19 more, and if it requires something more, just what is it?

20 MR. SHARP: I think implicit in the "as
21 compensation for" language is -- is the notion that the
22 payor is intending something that would create a conflict
23 of interest, some impropriety. It simply cannot mean the
24 confluence of events of government service in the receipt
25 of moneys. And if it -- if it meant that only, then every

1 severance payment would be outlawed. And if you don't
2 read some --

3 QUESTION: Well, but if that only it would cover
4 the case of say, well, we'll keep your salary going while
5 you are in Washington. They clearly can't do that.

6 MR. SHARP: They clearly cannot do that.

7 QUESTION: But that would cover it even though it
8 was totally benign in motive. Say he isn't going to do
9 any work at all on Boeing matters and never coming back to
10 work, but we just think this is a decent individual who
11 ought to be given the equivalent of the kind of award that
12 Justice Scalia describes. That still --

13 MR. SHARP: Well, under those circumstances
14 certainly the employee would be acting at a time he was
15 receiving discretionary --

16 QUESTION: Right.

17 MR. SHARP: -- funds --

18 QUESTION: The statute plainly --

19 MR. SHARP: -- which could tempt him, could
20 influence him, in a way that pre-employment severance
21 payments could not.

22 QUESTION: Well --

23 MR. SHARP: The second issue that we wish to cover
24 briefly has to do with the court of appeals' determining
25 that although there was no conflict of interest, that an

1 appearance of a conflict of interest was both sufficient
2 to violate the statute and sufficient toward injury for
3 the United States to recover. We believe this conclusion
4 is both wrong as a matter of law and insufficient --
5 excuse me, wrong as a matter of fact and insufficient as a
6 matter of law.

7 The appearance of conflict of interest standard is
8 dangerously imprecise. It has been in the past --

9 QUESTION: Does this depend on the statutory
10 construction, Mr. Sharp, or does this go to the measure of
11 recovery or the nature of the common law tort?

12 MR. SHARP: I think it goes to the statutory
13 construction and to the issue of whether there has been --

14 QUESTION: But of course the statute doesn't say
15 conflict of interest at all.

16 MR. SHARP: That's correct.

17 QUESTION: So, when you say the -- to say there was
18 no conflict of interest, how does that cut one way or the
19 other with respect to the statutory construction?

20 MR. SHARP: Again, simply that the construction of
21 a conflict of interest statute ought to be such to give
22 some meaning to the evil which Congress sought to prevent.
23 If there was no conflict of interest, an overbroad reading
24 would seem unwarranted. In this case the court of appeals
25 held that an appearance of conflict of interest is

1 sufficient injury in tort for the United States to
2 recover. We would suggest that it is not sufficient
3 injury for a tort recovery and that really what the court
4 of appeals is saying here is that where there is no proof
5 of a conflict of interest, if there is a bad appearance to
6 the court it is sufficient injury and is sufficient to
7 violate the statute.

8 We think in part that that is a dangerous
9 precedent, because if there is no -- if there is
10 insufficient evidence to prove a conflict of interest, it
11 makes little sense to claim that although there is some
12 probability that conflict occurred, but not proven, that
13 we would nonetheless, as an appellate court, find -- find
14 an appearance was sufficient to predicate liability and
15 damages.

16 In other situations, courts have used conflict of
17 interest also, or appearance of conflict of interest, to
18 describe those situations where there was a clear and
19 irreducible conflict of interest. And in those
20 circumstances, as in the Kenealy case cited in all the
21 briefs, I would suggest that an appearance of conflict of
22 interest is either surplusage, in that all actual
23 conflicts would appear to be conflicts, or it's a misnomer
24 in that there is a good deal more than appearance of
25 conflict of interest in, for example, a failed bribe or a

1 self -- economic self-dealing situation that are
2 proscribed by statutes 201 and 208.

3 In this case we have found no other case where
4 liability was predicated or injury was found based on the
5 appearance of conflict of interest. It seems to us where
6 the court of appeals holds that there is in fact no
7 conflict of interest, the appearance is insufficient on
8 which to predicate liability.

9 If there are no further questions --

10 QUESTION: Thank you, Mr. Sharp.

11 Mr. Kneedler.

12 ORAL ARGUMENT OF EDWIN S. KNEEDLER

13 ON BEHALF OF THE RESPONDENT

14 MR. KNEEDLER: Thank you, Mr. Chief Justice, and
15 may it please the Court:

16 The payments made by Boeing to the individual
17 Petitioners in this case go to the very core of the
18 purposes underlying the prohibition in Section 209 against
19 the private supplementation of the salaries of federal
20 employees. Those purposes are -- it is not an appearance
21 statute as Mr. Sharp said, the statute defines the
22 existence of dual compensation as a conflict of interest,
23 and it establishes a prophylactic prohibition against the
24 temptations that might arise from the receipt of
25 compensation. As --

1 QUESTION: Mr. Kneedler, although this was a civil
2 case, I guess it is based on a criminal statute. Is the -
3 - is the statute to be construed the same was as if it
4 were a criminal proceeding?

5 MR. KNEEDLER: The statute itself, yes.

6 QUESTION: Yes.

7 MR. KNEEDLER: In terms of its scope, yes.

8 QUESTION: So, presumably the rule of lenity would
9 have some application?

10 MR. KNEEDLER: Yes, in terms of construing the
11 scope, in terms of the showing of intent required, we
12 don't think that that would be -- that that would be
13 necessary. But in terms of, for example, the scope of the
14 coverage of the statute to pre-employment payments, yes,
15 we believe that it would.

16 QUESTION: Mr. Kneedler, is -- is it correct, as
17 Mr. Lacovara said, that you concede that the two
18 paragraphs of 209(a) are coextensive? That is to say that
19 no one can be liable for making the payment under the
20 second paragraph -- put it the other way. No one can be
21 liable for receiving the payment under the first paragraph
22 unless the person making the payment would also be liable
23 under the second paragraph.

24 MR. KNEEDLER: Yes. But the interpretation of the
25 first paragraph -- the first paragraph is the -- is the

1 essential definition of the -- of the conduct being
2 covered and informs the interpretation of the second.

3 QUESTION: I understand that.

4 MR. KNEEDLER: I think Mr. Lacovara had it
5 backwards in terms of which, which provision of the
6 statute you look to first.

7 QUESTION: Well, but the first -- the first is at
8 least ambiguous, and the second doesn't seem to be
9 ambiguous, because it says whoever pays or makes any
10 contribution to or in any way supplements the salary of
11 any such officer or employee.

12 MR. KNEEDLER: Right, but it -- it -- there are
13 several aspects of that that we think are significant.
14 One is, it says in any way supplements, which suggests an
15 intent to establish an all encompassing prohibition.

16 QUESTION: Fine.

17 MR. KNEEDLER: And it's referring to, it's
18 referring to someone who, who is/was an employee. But in
19 terms of the purpose of the payment, all that is required
20 is it in any way supplement the salary of an employee.
21 And the first -- the first paragraph is written in all-
22 encompassing terms with no exceptions at all. It says
23 whoever; it doesn't say whoever, as the predecessor did,
24 whoever being a government official or employee. It says
25 whoever receives any salary or any supplementation of

1 salary. Both the all-encompassing term whoever and the
2 all-encompassing term any suggests an intent to be all
3 encompassing.

4 And in fact, with respect to the precise issue
5 here, payments received from prior employers, it is
6 significant that the second subsection of Section 209,
7 209(b), specifically provides for the receipt of certain
8 payments from prior employers, permitting continued
9 participation and severance and other employee benefit
10 plans while the person's in government.

11 So, just looking at the text of Section 209, it
12 seems to us that there is no exclusion for lump sum
13 payments. It says supplementations in any way. And this
14 is consistent with the purposes of Section 209, which is
15 to prevent the divided loyalty. If a person receives,
16 just as -- if a person receives a bribe before he goes
17 into government service, the assumption would be that that
18 bribe might continue to influence his performance while he
19 is in government.

20 QUESTION: But Congress, nonetheless, felt it
21 necessary in the sections dealing with bribery to say
22 explicitly that it covered payments made before you were
23 actually in service.

24 MR. KNEEDLER: Well --

25 QUESTION: It says it, very explicitly. Why

1 doesn't it say it explicitly here?

2 MR. KNEEDLER: Because it is unnecessary to do so,
3 because the -- because the language --

4 QUESTION: You think it is that clear?

5 MR. KNEEDLER: Pardon me?

6 QUESTION: The language is that clear.

7 MR. KNEEDLER: It seems to me it is all
8 encompassing. Whoever -- I mean, it seems to me --

9 QUESTION: Well, the legislative history of the
10 change, though, does not reflect that they intended to
11 broaden the scope, does it?

12 MR. KNEEDLER: Well, I have several responses to
13 that, Justice O'Connor. First of all, as we point out at
14 pages 26 to 27 of our brief, the Justice Department had in
15 fact taken the position before the amendment of the
16 statute in 1962 and the provision in the memo quoted in
17 the Roswell Perkins Law Review article, that the -- that
18 the statute did apply to severance payments made prior to
19 the entry onto government -- government service. And the
20 reason for that is understandable.

21 If you look at the -- turn your attention,
22 respectfully, to page 2(a) of the appendix to our brief,
23 where the prior statute is reproduced. And the second
24 paragraph -- the first paragraph of Section 1914 did
25 contain the phrase, after the word whoever, saying being a

1 government official or employee. The second paragraph,
2 however, had no such limitation. It says or in any way
3 supplements the salary of a government employee. So --
4 and one of the problems with the statute as it read prior
5 to the 1962 amendments was there was an absence of
6 correlation between the first and second paragraphs.

7 And so there was substantial support for the
8 proposition that the -- that the statute, particularly the
9 second paragraph, even prior to the passage of 1962,
10 covered such payments, and in fact the report of the
11 Association of the Bar of the City of New York, which was
12 one of the two studies that gave rise to the 1962
13 amendment, specifically noted this ambiguity but said the
14 statute should be clarified to make sure that it covers
15 payments whenever received.

16 QUESTION: Well, Mr. Kneedler, this is a criminal
17 statute. Do you think that the contours of the civil
18 recovery are defined precisely by the terms of this
19 statute?

20 MR. KNEEDLER: I'm sorry.

21 QUESTION: Just because there is a criminal
22 statute, does that automatically give the government the
23 right to a civil damages action for its violation?

24 MR. KNEEDLER: Well, as Mr. Lacovara conceded, it
25 is well established that the government has a -- has a

1 cause of action to recover payments made to its employees
2 in violation of fiduciary duties.

3 QUESTION: Right, but that, that common law cause
4 of action presumably would encompass whether there's
5 disclosure, whether there were secret profits taken, or
6 something of that sort.

7 MR. KNEEDLER: No, I think the cause of action
8 would extend to violations of the fiduciary duty, however
9 that fiduciary duty is defined. This statute defines the
10 fiduciary duty with respect to the receipt of payments for
11 government employment that contains no limitation that the
12 -- that the profits be secret.

13 QUESTION: How do you know it is a fiduciary duty
14 that the statute defines, or -- ordinarily an employee
15 does not have a fiduciary duty to his employer, does he,
16 just in the normal course of events?

17 MR. KNEEDLER: Well, or a principal agency
18 relationship. But, defining -- defining a relationship of
19 an agent to his principal as a fiduciary in this sense,
20 and --

21 QUESTION: Well, why -- you know, when you say
22 there is a violation of a fiduciary duty that suggests
23 some extraordinarily high duty, to me, that you don't find
24 among ordinary relationships.

25 MR. KNEEDLER: Well --

1 QUESTION: Why is this a fiduciary duty?

2 MR. KNEEDLER: Well, the specific fiduciary duty at
3 issue here is the duty of undivided loyalty to the
4 employer, which is a fiduciary duty. There may be aspects
5 of the performance of the job that are ministerial, but
6 with respect to the basic demand of loyalty that an
7 employer has a right to insist upon from his employees --

8 QUESTION: And can't -- well then, he can insist
9 upon that without regard to statute? Every employer can
10 insist upon that as a fiduciary obligation from every
11 employee?

12 MR. KNEEDLER: Well, as I say, the contours of the
13 employer/employee relationship would be defined by
14 whatever contract or whatever statute defines that
15 relationship. Here we had a statute that precisely
16 defines the scope of the relationship. And the common law
17 --

18 QUESTION: Well, what is the --

19 MR. KNEEDLER: -- would enforce the contract
20 between the parties.

21 QUESTION: Where does it define the scope of the
22 relationship?

23 MR. KNEEDLER: Well, it -- specifically, Section
24 209 says that a person, an employee or -- a person cannot
25 receive any compensation, any supplementation of his

1 salary for his services as a government employee.

2 QUESTION: But how does that define the
3 relationship of employer to employee?

4 MR. KNEEDLER: It defines the duty of loyalty that
5 the employee -- that the agent owes to the principal.

6 QUESTION: Well, it is a prophylactic rule to
7 prevent disloyalty. It really doesn't define the loyalty.

8 QUESTION: In any event, you don't claim that there
9 is a cause of action under this statute?

10 MR. KNEEDLER: No, we say that there is -- well,
11 the statute doesn't expressly provide a civil cause of
12 action. But it is well established that the Attorney
13 General may bring a suit on behalf of the United States to
14 protect the rights of the United States in contracts and
15 in employment relationships and its property.

16 QUESTION: Well, why -- so it is a civil cause of
17 action under the common law?

18 MR. KNEEDLER: To enforce a -- a duty defined or a
19 prohibition defined by this statute. So it -- the cause
20 of action could be characterized as a common law --

21 QUESTION: Then why do you say the -- why do you
22 say the disclosure element of the common law doesn't apply
23 here?

24 MR. KNEEDLER: Because the -- the particular duty
25 being enforced here is defined by the statute, and the

1 statute does not make the secrecy of the payments an
2 element of the -- of the prohibition. Just as, in the
3 Mississippi Valley case, which dealt with a conflict of
4 interest on the part of a government employee who had
5 outside financial interests, the argument there was made,
6 in fact, that the superior's knowledge of the fact that he
7 had this outside financial interest eliminated any
8 conflict, and that the contract was therefore enforceable.
9 And this Court said no, the statute contains no provision
10 for waiver.

11 QUESTION: And you say because it doesn't say it,
12 disclosure doesn't -- won't help any.

13 MR. KNEEDLER: That is exactly right. The statute
14 contains no provision for waiver.

15 QUESTION: How about the common law action you
16 bring, except for the statute, you say disclosure would
17 have cured the common law --

18 MR. KNEEDLER: Well, I think that isn't clear. And
19 in fact, in the Carter case --

20 QUESTION: Well, suppose it was.

21 MR. KNEEDLER: Well, I think --

22 QUESTION: I would think -- I would think the
23 statute ought to say that disclosure won't cure this
24 crime.

25 MR. KNEEDLER: Well, there is -- in essence it does

1 say that because there is no exception for situations in
2 which the -- in which the employee has disclosed the
3 matter to the government and gets a waiver. And in fact
4 the pertinent disclosure regulation that we cite in our
5 brief, promulgated by the Office of Government Ethics,
6 says that nothing in the disclosure program, either the
7 regulations or the Ethics in Government Act, excuses an
8 employee from complying with applicable statutes. So this
9 waiver argument, or this disclosure argument, is in
10 consistent not only with Section 209, but with the very
11 premises of the financial disclosure program.

12 QUESTION: But you are tacking a common law cause
13 of action onto Section 209, and if the common law cause of
14 action traditionally has required non-disclosure in order
15 -- as an element, it did -- really the shoe is on the
16 other foot, isn't it?

17 MR. KNEEDLER: No, I think not. And let me explain
18 again why I think that is not so. In a traditional suit
19 of common law, if an employer brings a suit against his
20 employee, he would be bringing a suit to enforce whatever
21 contractual or other relationship there was between the
22 employer and the employee, according to the terms of that
23 contract. That's exactly what we are saying here. This
24 statute, Section 209, is part of the statutes, the body of
25 statutes, that define the relationship between one who is

1 coming to be employed for the United States and the United
2 States. It is an element of that contractual relationship
3 which, like an element of a contractual relationship
4 between private parties, the government has a right to
5 enforce.

6 QUESTION: It is not a contractual relationship
7 though. There is a lot of law to that effect, and it
8 seems to me, and this sort of gets back to what the Chief
9 Justice was suggesting, Mr. Kneedler, it seems to me, are
10 you really arguing that this has anything to do with the
11 old common law cases dealing with fiduciary obligations?
12 Because I don't think this statute reflects a fiduciary
13 obligation. It goes well beyond fiduciary obligations to
14 enact a prophylactic rule. You're essentially arguing
15 that any federal statute that forbids an act by a federal
16 employee brings along with it a cause of action by the
17 government if that prohibition is violated. So, if it was
18 a statute that no federal employee shall get his hair cut,
19 you would be able to sue the barber that gave him a hair
20 cut for the money that he paid the barber.

21 MR. KNEEDLER: Well, it seems to me our submission
22 here is a -- is a lot narrower than that, and that is --

23 QUESTION: Well, why is it? Why?

24 MR. KNEEDLER: Well, it's well accepted even in
25 common law that when an agent receives money from a third

1 party for the performance of his duties to the principal,
2 he has a duty to account to the principal for the profits
3 that he has received. That is just a straightforward
4 principle of agency, as well as restitutionary law, that
5 he -- because he is performing that -- those services for
6 the principal, not the third party who pays him, he has a
7 duty to account to the principal for those funds. And
8 that is essentially the nature of this cause of action
9 against the individuals, we're just asking the individuals
10 to disgorge the profits that they improperly received from
11 Boeing for the performance of their federal duties.

12 And that is not an open-ended cause of action. It
13 is one firmly rooted in the -- in the common law, and 209
14 in that sense is an overlay on it --

15 QUESTION: So you assert that there is a -- that a
16 private employer, let's assume Boeing found out that
17 somebody was leaving Boeing to go to another private
18 employer, presumably not in aerospace, or they wouldn't
19 make the payment, but they say, you know, this is a good
20 job he is going to, but it is not paying very much. He
21 has been a good employee, let's give him a good, high
22 severance payment in light of the low salary he will be
23 getting for this private company. You say that private
24 company would have a cause of action at common law?

25 MR. KNEEDLER: No. Only if the -- only if the

1 second employer had a prohibition against the receipt of
2 the compensation. Presume -- no, in the example you are
3 citing, yes, he -- presumably he would, because --

4 QUESTION: He would?

5 MR. KNEEDLER: -- he would have been compensated
6 for the -- but whether or not the general common law would
7 say that --

8 QUESTION: I think that is the position you are
9 driven to. You are really driven to say that is I give
10 you a high severance payment because you are going to take
11 a low-paying job with another private employer, that
12 private employer can sue me and can sue the person that I
13 make the payment for.

14 MR. KNEEDLER: Well, in the example you are citing,
15 if the second employer had a specific provision in its --
16 in its personnel manual or its contract --

17 QUESTION: No, you say, you said this is common
18 law. You said it is the common law principle of fiduciary
19 obligation.

20 MR. KNEEDLER: But what I am saying, the common law
21 allows parties to enforce the agreement or the rules that
22 govern the relationship between themselves. It's not just
23 a free floating body of law, but also if there are
24 particular provisions in the contractual relationship or
25 in the appointment relationship of federal employees that

1 define the duties, that go beyond the common law or that
2 give particular form to the common law, then the parties
3 have a right to enforce the legal duties that arise
4 between them. Not just those defined by common law, but
5 as they are supplemented by contract or here, by statute
6 with respect to the relationship between government
7 employees.

8 QUESTION: Mr. Kneedler, do you think the statute
9 would be violated by programs such as some universities
10 have of, for giving student loan payments to students who
11 go into government service?

12 MR. KNEEDLER: If it was specifically tied to
13 government service, yes, we do. If there was -- if it was
14 tied to some somewhat broader range of public service that
15 included --

16 QUESTION: Government service and for private
17 nonprofit organizations.

18 MR. KNEEDLER: At some point --

19 QUESTION: Would that save it?

20 MR. KNEEDLER: At some point it would be
21 sufficiently broad, and we're not in a position at this
22 point to say how broad. But at some point it would be
23 sufficiently broad so that it was not focusing on
24 government employment in the specific sense that we think
25 it --

1 QUESTION: What about a MacArthur Foundation grant
2 to someone who has performed extraordinary service in
3 government?

4 MR. KNEEDLER: Well, the Justice Department has
5 taken the position on a number of occasions that awards
6 made to government employees are not covered by Section
7 209.

8 QUESTION: It certainly would be a supplement,
9 though, under your --

10 MR. KNEEDLER: It would be, but it --

11 QUESTION: -- understanding of the statute.

12 MR. KNEEDLER: Right, but I think it, I think it
13 goes into the, it is tied into the phrase "as compensation
14 for." There has to be some sense, as Justice Scalia was
15 saying, that the statute at least cover the situations
16 where the government employment is the consideration for
17 the making of the payment, the performance of the
18 government services.

19 QUESTION: Oh yes, at least, but is that required?

20 MR. KNEEDLER: It may not be required in all
21 situations, I mean, but in this situation -- in this case
22 the "as compensation for," it is clear that the federal
23 employment was the --

24 QUESTION: The quid pro quo? No, it isn't clear at
25 all.

1 MR. KNEEDLER: Well, it's clear -- it's clear that
2 these payments were made only because the employees
3 planned to go into government service.

4 QUESTION: Well, and when I get an award of \$10,000
5 for having been a wonderful whatever it is for the federal
6 government, after I have left federal government service,
7 it's also clear that the reason they are giving me the
8 \$10,000 is the work I did for the government. It is just
9 as clear. And yet you say the Justice Department takes
10 the position that that is not covered.

11 MR. KNEEDLER: Right. And it -- the language --

12 QUESTION: How can you reconcile the two? I don't
13 understand it.

14 MR. KNEEDLER: Well, I think the language may be
15 tied to the "as compensation for" --

16 QUESTION: What if they give me the \$10,000 in a
17 lump sum before I go into the government. They say
18 Scalia, we know you are going to do a great job for the
19 government. Here is a \$10,000 award in advance.

20 MR. KNEEDLER: Well, I think that would be -- that
21 would be considerably more difficult, because it is not --
22 it is not for past accomplishment. It is not in
23 recognition of a past accomplishment. I think it -- that
24 would raise the suggestion that the going into the federal
25 government to perform in a particular way --

1 QUESTION: It seems to me compensation is
2 compensation, whether it is given before or whether it is
3 given afterwards --

4 MR. KNEEDLER: That that's --

5 QUESTION: -- unless, unless you import a
6 requirement of consideration, of quid pro quo. I'll give
7 you the money if you do the work. Now, if you are willing
8 to import that, I think you have a lot more to prove in
9 this case.

10 MR. KNEEDLER: Well --

11 QUESTION: Well, Mr. Kneedler, what about -- don't
12 many of the government agencies give bonuses to
13 particularly good employees at the end of the year?

14 MR. KNEEDLER: Right. What the statute does --
15 only reaches payments from a source other than the United
16 States. So when the government itself pays the bonuses,
17 the statute does not reach it.

18 QUESTION: It does not apply.

19 MR. KNEEDLER: No. If I could, I would like to
20 make one last point on the disclosure before I go back to
21 the statutory language, and that is that even if -- even
22 if the common law rule overrode the statute or the statute
23 did not specifically govern here, there was no disclosure
24 here of the nature of these payments sufficient to
25 constitute the kind of disclosure that is talked about

1 under those cases. There was nothing in the disclosure
2 to, either on the disclosure forms or in the conversations
3 with individual officials at the Defense Department, to
4 suggest that these were payments made only because the
5 employees were going into government service or that they
6 were calculated in a way that were validly designed to
7 supplement the government -- the employee's services.

8 So there was nothing on the face of these forms to
9 alert the persons reviewing them that they even presented
10 a conflict of interest situation that the government could
11 in turn waive or regard as being an affirmative
12 disclosure. So there is just not the factual basis in
13 this case for the argument that is being made.

14 QUESTION: It is crucial to the government's case
15 here, isn't it, that the structure of the Boeing severance
16 payment was based on future hardship rather than past
17 performance?

18 MR. KNEEDLER: It is crucial that it was not based
19 on past performance. There are two factors that we rely
20 on in particular here. One is that it was paid only
21 because they were going to -- into the government service,
22 and in fact, as we point out at page 40 of our brief, only
23 because they were going to positions that were of interest
24 to Boeing. But then also, that the payments were
25 calculated on -- to essentially supplement the salaries by

1 making up the salary differential. That makes it
2 particularly clear that they -- that the payments were for
3 future service rather than past.

4 QUESTION: If the employees had changed their mind
5 and not gone to work for the government, I assume Boeing
6 couldn't receive this back?

7 MR. KNEEDLER: That was the understanding that the
8 district court found, yes. But as Mr. Little, the vice
9 president at Boeing, testified in his deposition, the --
10 Boeing had no reason to doubt that these employees were
11 going to go into the government when they left. Now, it
12 may be that, for reasons beyond the recipient's control,
13 the government wouldn't appoint him. But as far as Boeing
14 was concerned it was part of the deal, I think, that these
15 employees would follow through with their commitment to
16 accept the government jobs as they were offered.

17 QUESTION: Yes, but that wouldn't be -- that
18 wouldn't be sufficient to make out a violation of the
19 statute if they never went to work for the government,
20 would it?

21 MR. KNEEDLER: That, that -- I think it would, if -
22 - or at least on an attempt theory. But if the payments
23 are made for the purpose of supplementing the salary of
24 someone when he goes to work for the government, yes. In
25 this case, though --

1 QUESTION: And if he never -- if they never went to
2 work for the government, you say the statute would have
3 been violated?

4 MR. KNEEDLER: Yes, in the same way that paying a
5 bribe to somebody in anticipation that he is going to go
6 work for the government. If he doesn't --

7 QUESTION: Well, because the statute reads on that.
8 But you think that this, they would have -- that is very
9 interesting, I didn't realize you went that far.

10 (Laughter)

11 MR. KNEEDLER: But there is no need to reach that
12 question here, because in fact --

13 QUESTION: Well, there may be, because if the
14 statute wasn't violated when they paid them, because of
15 the possibility they might not go to work for the
16 government, that conceivably would be a reason for your
17 losing the case.

18 MR. KNEEDLER: Well, if there was a condition
19 subsequent, such as you are suggesting, that they actually
20 have to become employed, then that was satisfied here.

21 QUESTION: No, it is not a condition subsequent.
22 It is, the fact is they were not employees at the time
23 they received the payments.

24 MR. KNEEDLER: That is correct, but --

25 QUESTION: And if they never became employees, it

1 is a little difficult for me to --

2 QUESTION: I didn't know that it was clear that
3 these employees had agreed to go to work for the
4 government, if that job was offered.

5 MR. KNEEDLER: They had -- they had planned to, and
6 they had agreed --

7 QUESTION: That isn't what I asked. Had they
8 agreed to --

9 MR. KNEEDLER: They hadn't entered into a formal
10 agreement, but they -- but the -- as we cite in the
11 footnote at --

12 QUESTION: Well, formally or otherwise, they hadn't
13 agreed, they hadn't agreed to it.

14 MR. KNEEDLER: Well, they left -- I think it's a,
15 the only fair reading of the record that both sides
16 anticipated that --

17 QUESTION: Well, if one of them had gotten run over
18 by a truck after this so-called understanding, do you
19 think Boeing could have recovered the money?

20 MR. KNEEDLER: No, what I -- what I said, if
21 something happened for reasons beyond their control that
22 they didn't accept it, but I think the understanding was
23 that when they left, the plan was they were going to work
24 for Boeing unless some other --

25 QUESTION: So you figure if one of them had just

1 said well, I've decided, I've got a better offer from some
2 other company, they could have recovered the money?

3 MR. KNEEDLER: Perhaps not.

4 QUESTION: Yes or no?

5 MR. KNEEDLER: According -- the district court said
6 it was theirs to keep. All I am saying --

7 QUESTION: But under your view, the government
8 could -- could collect the money, couldn't it, Mr.
9 Kneedler?

10 MR. KNEEDLER: Uh --

11 QUESTION: Boeing couldn't, but the government
12 certainly could under your view.

13 MR. KNEEDLER: It -- it's possible that the
14 government could, yes.

15 QUESTION: Well, it's not -- that is critical to
16 your interpretation of the statute.

17 MR. KNEEDLER: Well, in this, yes. In terms of the
18 criminal violation, for purposes of the civil recovery,
19 all that's necessary for the court to say is that at least
20 at the time they became federal employees they had a duty
21 to account to the government for any payments they
22 received for their government service prior to that time.
23 And that's all that is necessary to say here. They all --
24 all five in fact did quickly become government employees
25 after they received these payments.

1 QUESTION: Well, could -- I take it the person who
2 changes his mind, goes to work for the other company, he
3 could be convicted under this statute, and so could his
4 employer who paid him the money?

5 MR. KNEEDLER: Yes.

6 QUESTION: Mr. Kneedler, what if, instead of paying
7 severance payments, Boeing had a policy of paying bonuses
8 upon employment after government service, and paid
9 precisely the same amounts -- I don't know whether these
10 people did go back to Boeing, but assume they had been
11 totally severed, worked for the government for three or
12 four years, then went to work for Boeing and received
13 advance payments that more or less supplemented for the
14 sacrifice they had made in the prior three years.

15 MR. KNEEDLER: It would be the same result, and for
16 good reason. If a person, while in government service,
17 has reason to anticipate that he is going to be rewarded
18 in the same way --

19 QUESTION: So it applies to -- if a law firm hires
20 a person out of government service and pays a higher
21 signing bonus, in effect, to compensate for the decreased
22 earnings while in government service, that would violate
23 this statute, if it is an executive employee.

24 MR. KNEEDLER: If it -- again it would depend on
25 the purpose. If the bonus is paid because of the

1 presumption of the increased experience, which I think may
2 be the basis for the signing bonuses for people coming
3 from the government, that would be all right. But if it
4 was -- if it was explicitly intended --

5 QUESTION: The presumption of increased experience
6 --in other words, would Boeing be safe if they had
7 elaborate explanation that the purpose of their policy was
8 because they thought these people would be back, likely
9 come back, and they would have increased experience when
10 they got back, and therefore be more valuable to them.
11 Would that be permissible?

12 MR. KNEEDLER: Excuse me, conceivably, yes, it
13 would. But, but at that point it gets very difficult to
14 separate what --

15 QUESTION: Well, if that is conceivable and that is
16 permissible, then how do we know these findings are
17 clearly erroneous?

18 MR. KNEEDLER: Well, if they --

19 QUESTION: On intent.

20 MR. KNEEDLER: If they are being paid -- if they
21 are being paid for -- if they are essentially being paid
22 for their government work, as it seems to me these people
23 were being paid to accept their government job, that's
24 sufficient. But if they are being paid because, after
25 they leave, because of the experience they will have

1 acquired there, that is forward looking, when they go back
2 to the former employer. And the statute, if you are
3 paying somebody for what he is worth, wherever he gained
4 that experience, the statute doesn't reach that.

5 I would like to go -- to turn to the legislative
6 history on the --

7 QUESTION: Mr. Kneedler, if you could answer one
8 short question. I think there is a short answer, but it
9 escapes me at the moment. Can the government, or does the
10 government ever rely on state law? Suppose there was a
11 law in the state of Washington that protected you in this
12 instance. Could you just sue under the Washington law?
13 Or is the argument that since there is no federal law, the
14 probably intent is that you not recover?

15 MR. KNEEDLER: I would think that ordinarily we
16 would -- we would -- because the relationship between
17 prospective employees in the federal government is one of
18 federal law, that we would ordinarily be limited to
19 federal law, although conceivably federal law might borrow
20 a state statute or principle on a particular case. But
21 here we are not relying on a particular aspect of state
22 law.

23 I think it -- with respect to the argument on the
24 legislative history, I think it is critical to point out
25 several important defects in what the Petitioners rely on

1 in the legislative history in 1962. First of all, the
2 phrase being a government official or employee in the
3 first paragraph of Section, then 1914, was specifically
4 dropped from the statute at that point.

5 And Congress had two purposes -- Congress did two
6 things. It both defined that phrase more precisely to be
7 limited to executive employees only, which is the only
8 purpose the Petitioners mentioned, but they also did
9 something else. They deleted it entirely and put the
10 reference to the types of employees further down in the
11 first paragraph, referring only to the time of the
12 performance of the services. They did not leave the
13 reference to government officials in there twice. They
14 deleted it the first time it appeared. That is, by the
15 way, precisely what Congress did when it modified the
16 former Section 281, now Section 203, which bars the
17 receipt of compensation for services performed for someone
18 outside the government while you are a government
19 employee.

20 Congress also deleted the phrase "being a
21 government official" right at the same place in the
22 statute and moved down further in the statute the
23 specification of the -- of the precise categories of
24 employees that are covered. And as the legislative
25 history shows, that was done for the specific purpose, and

1 the staff report that we cite in our brief says this, it
2 was done for the specific purpose of making clear that the
3 time of the receipt of the payment did not matter. That
4 it was -- at the time that the services were performed.

5 QUESTION: Was that done at the same time?

6 MR. KNEEDLER: It was done at the same time in
7 1962, and the precise phrase was dropped from both places.

8 Mr. Lacovara says that the, relies on the phrase
9 "to be rendered" in Section 203 and the fact that Section
10 203 covers members of Congress elect. The fact is that
11 the predecessor statute had precisely the same coverage.
12 It contained the word, and this is important, it contained
13 the phrase "to be rendered," the very phrase he relies on,
14 and it also covered members of Congress, even before they
15 qualified, or after they have qualified for office, even
16 if they haven't taken it. So it was not the phrase "to be
17 rendered" that covered employees, persons before they
18 became employees. It was the deletion of the same phrase
19 that was deleted here that resulted in the coverage of
20 persons before they enter into government.

21 And in fact at page 61 of the staff report, which
22 again formed the basis for the statute, the staff report
23 states that this language dealing with government
24 officials or employees was modified to conform its scope
25 to Section 281 as the staff report proposed to revise it,

1 which would have covered all three branches but also would
2 have revised it to apply only when, in that case, when the
3 services are performed, not when the payments are
4 received.

5 QUESTION: (Inaudible.)

6 MR. KNEEDLER: The staff report of the judiciary
7 subcommittee, which the legislative history shows was the
8 principal basis on which the revision was -- the 1962
9 revision was based.

10 QUESTION: Mr. Kneedler, could you provide us with
11 a citation to the Justice Department position that says
12 that a government employee, after leaving government
13 employment, can receive an award, or even during
14 government employment --

15 MR. KNEEDLER: I will get the opinions.

16 QUESTION: -- based upon his government service.

17 MR. KNEEDLER: There are Justice Department
18 opinions, and I will furnish them to the Court.

19 QUESTION: Thank you.

20 MR. KNEEDLER: Also, I should point out that the
21 consistent position of the Office of Legal Counsel and of
22 the Office of Government Ethics has been that the statute
23 applies to payments made prior to the time that a person
24 enters into government service, which, after all, is
25 consistent with the position that the Justice Department

1 had taken under the --

2 QUESTION: When was that, when was that position
3 first taken?

4 MR. KNEEDLER: The -- in 1974 in the -- are the
5 first times with respect to the opinions that we cited in
6 the Appendix to our brief. But it goes back to 1961 in
7 the memorandum under the prior statute.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kneedler.
9 The case is submitted.

10 (Whereupon, at 11:03 a.m., the case in the above-
11 entitled matter was submitted.)

12

13

14

15

16

17

18

19

20

21

22

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:

No. 931 - LAWRENCE H. CRANDON, ET AL., Petitioners V. UNITED STATES;

and

No. 88-938 - BOEING COMPANY, INC., Petitioner V. UNITED STATES

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

BY

Lena M. May

(REPORTER)

RECEIVED
SUPREME COURT
MARCH 22 1989

'89 NOV 13 P4.38