

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 COOK COUNTY, ILLINOIS, :
4 Petitioner :
5 v. : No. 01-1572
6 UNITED STATES, EX REL. JANET :
7 CHANDLER :
8 - - - - -X
9 Washington, D. C.
10 Tuesday, January 14, 2003
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:11 a.m.
14 APPEARANCES:
15 DONNAL M. LACH, ESQ., Assistant State's Attorney, Chicago,
16 Illinois; on behalf of the Petitioner.
17 JUDSON H. MINER, ESQ., Chicago, Illinois; on behalf of the
18 Respondent.
19 MALCOLM S. STEWART, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D. C.; on
21 behalf of the United States, as amicus curiae,
22 supporting the Respondent.
23
24
25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	DONNAL M LACH, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	JUDSON H. MINER, ESQ.	
7	On behalf of the Respondent	17
8	ORAL ARGUMENT OF	
9	MALCOLM S. STEWART, ESQ.	
10	On behalf of the United States, as amicus curiae,	
11	supporting the Respondent	29
12	REBUTTAL ARGUMENT OF	
13	DONNAL M LACH, ESQ.	
14	On behalf of the Petitioner	38
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 01-1572, Cook County, Illinois versus United
5 States, Ex Rel. Janet Chandler.

6 Ms. Lach.

7 ORAL ARGUMENT OF DONNAL M LACH

8 ON BEHALF OF THE PETITIONER

9 MS. LACH: Thank you. Mr. Chief Justice, and
10 may it please the Court:

11 The question today -- presented today turns on
12 whether Congress intended to include local governments
13 within the meaning of the False Claims Act's undefined
14 term, person, which this Court determined in Stevens has
15 remained unchanged since the original enactment in 1863.
16 The indications are that Congress did not subject local
17 governments to liability under the 1863 act,

18 As this Court observed in Stevens and in Hubbard
19 versus United States, the 1863 act was enacted as a
20 criminal statute. It imposed criminal fines or
21 imprisonment in addition to civil damages and forfeitures.
22 As this Court noted in Marcus v. Hess, any language that
23 the civil portion shares in common with the criminal
24 portion must be given careful scrutiny lest those not
25 intended are brought within the act's reach.

1 The word, persons, subject to liability, is
2 shared by both the civil and the criminal provisions of
3 the 1863 act, thus, a person that could be held liable
4 civilly must, under the 1863 act, necessarily be capable
5 of being subject to the criminal provision as well. This
6 Court, in City of Newport, noted that municipal
7 corporations were not considered capable of doing a
8 criminal act or a malicious or willful wrong -- excuse me.

9 The -- the criminal nature of the statute in
10 itself is a strong indication that Congress did not
11 include local governments within the purview of the
12 statute.

13 QUESTION: Ms. Lach, on that point, am I correct
14 in thinking that the Sherman Act does apply to
15 municipalities?

16 MS. LACH: This Court determined that the -- the
17 antitrust statutes, under the antitrust statutes the term,
18 person, does include municipalities, local governments.

19 QUESTION: And isn't it true that in the
20 original Sherman Act, imprisonment was authorized for
21 every person who violates the act?

22 MS. LACH: That is true, but we are unaware of
23 any case in which a local government has been prosecuted
24 as a criminal.

25 QUESTION: But the interpretation of the law on

1 the civil side --

2 MS. LACH: Yes.

3 QUESTION: -- was not nullified because there
4 was a provision that said, every person is subject to
5 imprisonment.

6 MS. LACH: That is correct, Your Honor, and this
7 Court in the City of Lafayette and City of Boulder, in
8 analyzing the term, person, and determining that
9 municipalities were included within that term, were also
10 faced with the treble damages of the -- of the Clayton
11 Act, and subsequent to those two decisions, Congress
12 enacted the Local Government Antitrust Act of 1984, in
13 which Congress specifically took local governments out of
14 the range of the treble damages, and now local governments
15 are subject to injunctive or declaratory relief.

16 QUESTION: My -- my simple point is that by
17 putting a clearly penal provision in the statute, that did
18 not make municipalities out of the act, and I thought
19 that's what you were arguing, that the 1863 act is penal
20 in part --

21 MS. LACH: Yes.

22 QUESTION: -- and therefore, it could not have
23 in -- covered municipalities.

24 MS. LACH: Yes, that is -- that is what we're
25 arguing.

1 QUESTION: But that's not true of the Sherman
2 Act.

3 MS. LACH: It does not appear to be true of the
4 Sherman Act, but again, we are not aware of any case in
5 which a local government was prosecuted under that act.

6 QUESTION: Any more than this is a case of
7 prosecution.

8 MS. LACH: Any more -- that's true, but now,
9 ever since 1878, the False Claims Act has been bifurcated.
10 The criminal provisions are separately codified from the
11 civil provisions.

12 Also, as this Court noted in Stevens in 1863,
13 the False Claims Act was enacted to combat fraud during
14 the Civil War by private contractors, and there is no
15 indication that in 1863 the Federal Government was buying
16 anything from local governments, or that there were any
17 Federal contracts with local governments, and without a
18 practice of Federal funding to local governments, Congress
19 would have no reason to envision a local government
20 submitting a false claim for payment, nor were local
21 governments firmly established as persons in 19 -- excuse
22 me, in 1863.

23 QUESTION: Well, Ms. Lach, you don't dispute
24 that the word persons extends to some corporations under
25 the act, do you?

1 MS. LACH: Not at all. Not at all, and in fact,
2 in -- in 1863, the term person, presumptively included
3 private corporations, and there is language in the 1863
4 act, and given the context of the act, it is reasonable to
5 assume that private corporations were included in the
6 provisions.

7 QUESTION: Well, but there -- there are also
8 cases from about that time that say that a -- a
9 municipality is included in the -- in the term,
10 corporation, at any rate.

11 MS. LACH: The -- the cases at that time were --
12 came from State courts, and the State courts were not
13 consistent throughout -- throughout the Nation as to when
14 local governments could be held liable. Some State courts
15 held they could be held liable in contract, others in
16 tort, and even when held liable in tort, there was
17 sometimes the distinction between proprietary and
18 governmental function.

19 QUESTION: Well, what about Louisville and
20 Letson?

21 MS. LACH: Louisville and Letson, though, only
22 applied to private corporations, and private corporations
23 were established by that 1844 case, but in -- this Court
24 did not extend that principle until the 1869 decision in
25 Cowles, and that was the first time --

1 QUESTION: Did n' t -- didn't we recognize it in
2 the Amity case in 1826? We -- we quoted Sir Edward Cook
3 in including municipal corporations as -- as persons.

4 MS. LACH: Yes, but still, in terms -- this
5 Court, in the Cowles decision in 1869, believed that it
6 still was not a settled issue and -- and settled the issue
7 once and for all. In the Amity case, it was not -- it was
8 not -- the issue that was before the Court that needed to
9 be decided, whether local governments were persons unlike
10 in the Cowles case --

11 QUESTION: Oh, we -- we thought otherwise in --
12 in Monell, certainly. We said in Monell, and I'm quoting
13 it, the Letson principle in 1869 was automatically and
14 without discussion extended to municipal corporations.

15 MS. LACH: Yes, but by saying that, this Court
16 in Monell dated the presumption as firmly established as
17 of the 1869 Cowles decision, rather --

18 QUESTION: So you think there was a -- a major
19 change between, when, 1863 and 1869?

20 MS. LACH: I think that --

21 QUESTION: In that 6-year period, there was
22 suddenly, whap, it applied to municipal corporations,
23 before that it didn't? It seems to me most implausible.

24 MS. LACH: Well, it doesn't -- it wasn't an
25 automatic or a dramatic change, but nonetheless, there was

1 a progression. There was -- there was a transition in law
2 within the States.

3 QUESTION: In 6 years?

4 MS. LACH: Those 6 years, of all 6 years in this
5 country's history, of course, were the most significant,
6 but -- but in terms of dating a presumption that one can
7 firmly rely on, there is no firm date, other than 1869, in
8 which acts of Congress were determined to include person
9 as a -- include municipality within the word, person.

10 QUESTION: Ms. Lach, the decision, the opinion
11 in Cowles was very brief, right?

12 MS. LACH: Yes, it was.

13 QUESTION: And it was sort of like, well, of
14 course. If this was establishing something that hadn't
15 been just taken for granted, don't you suppose the Court
16 would have engaged in a little more reasoning?

17 MS. LACH: Perhaps, but nonetheless the Court
18 did decide the issue, and made -- made it clear that for
19 once -- once and for all, this issue was being decided,
20 and it was at that point that no ambiguity was left.

21 The first case that ever -- that -- in which a
22 local government was ever brought before this Court was in
23 1861, in the Aspinwall case, and there the issue did not
24 arise, and subsequent to the 1863 act, yes, there were
25 other cases in which local governments were brought before

1 this Court, but the issue never arose. It wasn't until
2 1869 that we can firmly date when, in -- in Federal --
3 in -- in congressional enactments, we can presume that the
4 word person included local governments.

5 And this Court in Monell observed that it took
6 years of judicial conflict before corporations of all
7 sorts, including municipal corporations, were established
8 as persons that could sue and be sued in Federal court.

9 QUESTION: Ms. Lach --

10 QUESTION: Well, if we think that it -- that the
11 word, person, includes municipal corporations, as, indeed,
12 I think I do, based on Cowles and Monell, then what
13 changed it in your view? Why would we now have a
14 different view? Just because of the change in the
15 punitive damages, the treble damages provision?

16 MS. LACH: If this Court determines that the
17 word, person, in 1863 did, in fact --

18 QUESTION: Yes.

19 MS. LACH: -- include local government, that --

20 QUESTION: Yes, on that assumption, then what
21 would change that?

22 MS. LACH: The -- the -- what would change it is
23 Congress' imposition of treble damages, which this
24 Court has noted --

25 QUESTION: But without an accompanying change in

1 the definition of person, right?

2 MS. LACH: Exactly. Exactly, and the 1986
3 amendments were just that. They were amendments. What
4 was not changed in 1986 remained the same. Nonetheless,
5 when Congress provided for treble damages, which this
6 Court has determined to be punitive, Congress knew what
7 this Court said in City of Newport. This Court reiterated
8 a presumption that local governments are immune from the
9 imposition of punitive damages unless Congress
10 specifically indicates otherwise.

11 QUESTION: Well, it seems to me you would have a
12 better argument if you simply said, the 1983 change does
13 not impose punitive damages on local corporations, than to
14 say it suddenly proscribes an entire escape hatch from any
15 sort of liability at all.

16 MS. LACH: Well, under the 1863 act, there were
17 only double damages, which this Court concluded were
18 remedial, and they were not punitive, but there was a big
19 step made in 18 -- 1986, when Congress changed the remedy
20 to mandatory treble damages and, in addition to that,
21 increased the statutory fines.

22 QUESTION: But it didn't make it clear at that
23 time that the change made them punitive. It was only in
24 the Stevens opinion that we decided they were punitive.

25 MS. LACH: But there were indications prior to

1 that that -- that -- from which Congress understood that
2 the damages were punitive. In 1981, this Court, in Texas
3 Industries, a case that was cited in Stevens, stated that
4 treble damages are meant to punish, and also in 1981, in
5 City of Newport, this Court cited an 1877 a Missouri
6 supreme court case that held that a municipality was not
7 subject to treble damages under a trespass statute,
8 notwithstanding that statute's general authorization for
9 such damages against any person, and the reason was,
10 treble damages were exemplary, and --

11 QUESTION: Ms. Lach, didn't the Court also,
12 I think in the context of the Clayton Act, characterize
13 treble damages as, quote, remedial?

14 MS. LACH: The Court -- the Court noted both.
15 The Court said in -- in aspect, they are remedial, but
16 then, also they did have an intent to punish as well, but
17 as I stated, the -- the Clayton Act no longer applies to
18 local governments because Congress took affirmative
19 steps --

20 QUESTION: Nonetheless, it used the word,
21 remedial to characterize treble damages, and one of the
22 difficulties that your -- your argument that you're now
23 making encounters is that this change in 1986, wasn't it a
24 dramatic expansion of qui tam liability?

25 MS. LACH: It was a dramatic expansion, but as

1 this Court --

2 QUESTION: And then -- then you think that at
3 the same time that Congress expanded it, it also cut back,
4 without any indication at all?

5 MS. LACH: Well, we believe that Congress did
6 not cut back, that -- that local governments were never
7 subject to the act, but with this dramatic expansion,
8 there was also the dramatic increase in damages, and this
9 Court has made it clear that local governments have an
10 affirmative defense when punitive damages are at stake,
11 and in order to abrogate that immunity from punitive
12 damages, Congress has got to really say that it intends to
13 impose those punitive damages, treble damages in this
14 case, treble damages plus statutory fines in this case on
15 local governments, and there's no indication anywhere on
16 the face of the 1986 amendments that Congress intended to
17 impose such damages on local governments.

18 Local governments are mentioned twice in the
19 1986 amendments. In one provision, it's the
20 jurisdictional provision, 3732(b), which allows local
21 governments and States to bring State court claims in
22 Federal court when -- when the transaction arises from the
23 same transaction as a False Claims Act action. That
24 indicates that Congress was interested in -- in preventing
25 frauds against local governments, not in -- in imposing

1 punitive damages on local governments, and the other
2 provision is the CID provision which, as this Court noted
3 in Stevens, has a -- has a definition. That definition
4 includes States and political subdivisions of States, but
5 that is for the purpose of investigation --

6 QUESTION: I'm -- I'm sorry, I didn't fully
7 grasp the point you were just making. Were you suggesting
8 that Congress was worried about fraud against
9 municipalities, but it didn't think that fraud would be
10 engaged in by municipal units? I mean, I remember -- I'm
11 from New York, and I remember Tammany Hall. I don't think
12 it was altogether so different in Cook County, was it?

13 (Laughter.)

14 MS. LACH: But the -- but the point is that
15 where local governments are mentioned in the -- in the
16 False Claims Act in the 1986 amendment, there is no
17 indication that Congress was mentioning them because
18 Congress was intending to abrogate the immunity from
19 punitive damages.

20 QUESTION: May I ask whether you think that Cook
21 County could bring a qui tam action?

22 MS. LACH: Well, that's less clear under the
23 False Claims Act. This Court -- I -- I know that Your
24 Honor, in the dissenting opinion, suggested that the term,
25 person, is different in 30 -- 3730(b) from 3730(a). It's

1 less clear, I think, perhaps, but that was an issue that
2 this Court expressly declined to address in Stevens
3 because there was no need to discuss it or to decide it at
4 that point.

5 QUESTION: And there's no -- there's no need to
6 decide it here. I -- I was just curious if you did have a
7 position on it.

8 MS. LACH: I think perhaps local governments
9 could bring qui tam actions, but -- but it is not clear.

10 There are also the -- the policy considerations
11 with respect to the imposition of punitive damages on
12 local governments. Local governments apply for and use
13 Federal funds for the benefit of their residents and, as
14 this Court noted in Stevens, in City of Newport, the Court
15 was concerned with the imposition of punitive damages on
16 local taxpayers under any circumstances, and here we have
17 a statute that imposes three times the amount of damages
18 and imposes statutory fines, which get very hefty.

19 Punitive damages against a local government have
20 got to come from someplace, and there are only two places,
21 reduction in services, or an increase in taxes, and the
22 victims of punitive damages are not the wrongdoers.
23 They're -- they're the innocent, and some of those
24 innocents are not even taxpayers or voters, such as
25 school children or homeless medically indigent.

1 The United States significantly -- significantly
2 has other means to stop fraud by local governments, and to
3 deter local governments from committing fraud. The United
4 States has common law causes of action to be made whole,
5 and the most effective deterrent is the threat of
6 debarment from participation in Federal funding.

7 With no indication that Congress ever intended
8 to include local governments in the -- in the 1863 act,
9 and with the Dictionary Act not being enacted until 1871,
10 where Congress for the first time created a statutory
11 presumption that the word, person, includes bodies politic
12 and corporate, this case is in a very different posture
13 from the Monell case.

14 In Monell, this Court did not just look at the
15 word, person. This Court looked at the historical
16 environment in which section 1983 was enacted, it looked
17 at the legislative history, and it also looked at the
18 Dictionary Act, which was enacted just 2 months prior with
19 the same -- by the same Congress that enacted section
20 1983.

21 A review of the circumstances around the 1863
22 enactment, together with the text and the historical
23 context, leads the other way. There was no concrete
24 presumption. There were -- there were indications, yes,
25 but does that lead -- does that add up to a presumption?

1 There's no concrete presumption until this Court said so
2 in Cowles in 1869, and then we have Congress in 1871.
3 There were changes. There were articulations at that --
4 at that point in time.

5 If there are no further questions, I'll reserve
6 the remainder of my time.

7 QUESTION: Very well, Ms. Lach.

8 MS. LACH: Thank you.

9 QUESTION: Mr. Miner, we'll hear from you.

10 ORAL ARGUMENT OF JUDSON H. MINER

11 ON BEHALF OF THE RESPONDENT

12 MR. MINER: Mr. Chief Justice, may it please the
13 Court:

14 I really can't contribute much more to the
15 discussion of what Congress meant by a person in
16 section -- in 1863, other than to point out, as we did in
17 our brief, that in fact, the law in the States prior to
18 Letson -- and -- and indeed, Letson is the origin of
19 the -- of the doctrine, because in Letson, what the Court
20 actually said was, a corporation is a natural person for
21 purposes of the suit where it's incorporated or where it
22 does business, and the Court then goes on and says, and
23 that doctrine also applies to all corporations and body
24 politic.

25 QUESTION: Before that, they looked at the

1 citizenship of the individual shareholders to decide
2 whether or not there was diversity jurisdiction?

3 MR. MINER: The -- that's right. They -- they
4 defined corporations by the -- by the members, and -- and
5 they could have jurisdictions all over. That then gets
6 cleared up, and -- and the law was absolutely clear in all
7 of the States as we -- that we could find. We found no
8 dissenting opinions that -- that held, that didn't hold
9 that a local government, whether it was a corporation,
10 whether it was a quasi corporation, a city, a county,
11 wasn't held responsible for any obligations it had,
12 whether by contract, whether by charter, whether --
13 whether by statute, wherever they came from, and they were
14 also responsible for all their wrongful torts.

15 So that then brings us to really what was
16 Ms. Lach's starting point, this whole question of the
17 implications of the criminal provisions and, in fact, not
18 only the Sherman Act, but the Elkins Act also includes
19 criminal provisions, and this Court has recognized that
20 person, in that act, includes municipal corporations, but
21 the -- the question of what is the significance of
22 including criminal penalties in 1863 has to be answered in
23 the context of what was -- what was the -- the view in
24 1863.

25 Unfortunately, this argument really doesn't

1 surface until the reply, and so we haven't had a chance
2 really to brief it, but the simple reality is, in -- in
3 the period of 18 -- in the era of 1863, indeed in the 19th
4 Century, local governments were treated just like private
5 corporations, and they were, indeed, subject to
6 indictment, and they were subject to criminal punishment
7 on the same terms as local governments, and they were
8 often found liable for acts that involved both fraud and
9 deceit.

10 Since -- since this was -- now, I'd like to read
11 to the Court from Dillon, who is cited repeatedly as -- as
12 one of the -- the scholars of the era, although we -- we
13 have not cited this passage because the issue hadn't come
14 up before, but in his treatise on the law of municipal
15 corporations he states, English law, and in this
16 country -- in the English law and in this country, quote,
17 all corporations, municipal as well as private, which owe
18 duties to the public are liable to indictment for
19 malfeasance as well as nonfeasance in respect to their
20 duties. And, in fact, he goes on to explain that they're
21 responsible for palpable omissions, they're responsible
22 for willful and corrupt acts, and in a -- a leading case
23 at the turn of the century called Ludlow versus
24 Commonwealth, 56 S.W. 2d 958, the State supreme court made
25 clear that the purpose of holding cities liable criminally

1 was, indeed, to punish them and to deter future acts.

2 That really was the law and, in fact, in a
3 leading case from our own State, the Illinois supreme
4 court, in upholding a criminal conviction against the City
5 of Chicago for employing women for more than 10 hours,
6 states in the case of People versus City of Chicago,
7 100 N.E. 194, the municipality is held to the same degree
8 of responsibility as an individual.

9 In securing performance of specific duties
10 imposed upon municipal corporations, the State has the
11 same power of coercion and the same method of redress in
12 the case of individuals or purely private corporations.
13 That was the law in that era. That was the law when the
14 False Claims Act was passed and, in a battery of cases
15 which I can bring to this Court's attention, a case called
16 Howard versus Crawford County, 12 F cases 637, Chaplain
17 versus The Corporations of the City of New York, 3 Paige,
18 P-a-i-g-e, Chapter 573, or the Town of Plymouth versus the
19 Town of Windsor, 7 Vermont 325, all cases that predate the
20 1863 False Claims Act, local governments were sued in
21 lawsuits for fraudulent and deceitful conduct usually
22 involving bond issues, or trying to avoid bond
23 obligations, often in terms of their responsibilities to
24 take care of their indigent citizens, and they would then
25 engage in schemes to get their indigents into another

1 jurisdiction so the other jurisdiction would have to pay
2 for the wrong, sometimes they in fact had paid, gotten
3 paid, but they --

4 QUESTION: Well, the fact that local governments
5 were sued in these cases under some sort of common law
6 theory, I take it, does not necessarily answer the
7 question of whether statutory language using the word,
8 person includes them.

9 MR. MINER: Oh, I'm simply using these as
10 examples. I understand it's part of the argument that was
11 made in the reply briefs by my opponent that local
12 government simply cannot have the mental state of showing
13 either fraud or intent to deceive, and -- and my point is
14 simply, it was not uncommon in those days for local
15 governments to be perceived as doing fraudulent or
16 deceitful acts.

17 QUESTION: Well, I'm sure that's true, but
18 why -- why do you -- why is it that, in your opinion,
19 nobody apparently with -- just, perhaps no exceptions, or
20 one or two, has ever sued a local government before under
21 this act?

22 MR. MINER: Oh, I think -- there were suits that
23 were brought, and we brought --

24 QUESTION: I mean, a handful, virtually no --
25 none. It's --

1 MR. MINER: I think the answer is two-fold.
2 Number 1, as this Court recognized in Hess, it's really
3 not until the 1940s that money starts --
4 QUESTION: Since 1986, that's already 16 years,
5 and there are billions and billions of dollars worth of
6 Federal programs that go to cities, and --
7 MR. MINER: Well --
8 QUESTION: I imagine somewhere in those billions
9 there are a few false statements being made by people.
10 (Laughter.)
11 MR. MINER: But I think the answer is that the
12 money doesn't start coming in until 19 -- until the 1940s
13 and thereafter, and in -- in 1943, after this Court's
14 decision in Hess, the False Claims Act gets emasculated,
15 in the sense that it becomes very difficult to bring false
16 claims, particularly qui tam cases. The damages are
17 substantially reduced, and there is dramatic fall-off in
18 false claims litigation, and that's the whole purpose of
19 the 1986 amendments, to generate new life into it --
20 QUESTION: Why since 1986 have we seen virtually
21 no suits brought against municipalities?
22 MR. MINER: Since 1986? Oh, there are --
23 QUESTION: There are lots?
24 MR. MINER: Oh, there are lots of suits since
25 1986.

1 QUESTION: Against 19 -- against municipalities?

2 MR. MINER: Oh, sure.

3 QUESTION: See, what I'm worried about in the
4 back of my mind is, if the -- assuming that the history in
5 the 1860s is fairly inconclusive, which is the impression
6 the briefs have left me with, you can make a good argument
7 one way or the other, then I'd be worried about suddenly
8 unleashing potentially billions of dollars of liability as
9 lawyers comb through the vast number of Federal programs
10 that give aid to cities, looking for someone, somewhere,
11 who has made a false statement, and I'm sure there are
12 quite a few, at -- at which point the cities would
13 suddenly discover vast liability for treble damages that
14 their -- their citizens can't avoid. You can't sell a
15 share in a city, and -- and so that's the kind of thing
16 that worries me practically, and I wish you'd talk about
17 it a little.

18 MR. MINER: Well, I think there -- there are a
19 couple of answers. Number 1, I think that's -- that was
20 Congress' decision that -- that it was important to
21 protect --

22 QUESTION: I grant you, if the history of this
23 is clear, you win. Just in case, though, I'm left
24 absolutely uncertain about what the right result is on the
25 basis of what happened in 1863, I want to, just in case

1 it's relevant, to have in my mind what's likely to occur
2 in the year 2003.

3 MR. MINER: Oh, I -- I think what is going to --
4 first of all, let's understand that these cases are not
5 now brought on the basis of negligent statements, or
6 slight misrepresentations, but these cases involve -- this
7 is a statute unlike section 1983 or the Sherman Act, that
8 really does not involve itself in imposing any new
9 obligations, any new or unanticipated responsibilities on
10 local governments.

11 It merely says, when you entered into a contract
12 with us, we're going to hold you to the deal that you
13 made, and if you breach that deal in material ways, we're
14 going to try to get our money back, so there is -- there
15 are protections in the sense that it's not any statement
16 that gets litigated here. It's got to be a serious,
17 essential misrepresentation about how that money was used
18 that is at the core of these lawsuits, so that --

19 QUESTION: All right. I mean, if that's the
20 only answer, though, I -- I begin to think -- I don't know
21 how much money is involved, but I was trying to make a
22 guess and say, leaving out social security, food stamps
23 and that kind of thing, which are individuals, my guess is
24 there -- probably it's in the range of hundreds of
25 billions of dollars that go to cities, leaving those

1 things out, and you have a few bad actors in every program
2 that maybe purposely make a lie in a statement --

3 MR. MINER: Well, I think --

4 QUESTION: -- to help preserve their job, I
5 don't know why they do it, and -- and there we have
6 suddenly a huge liability imposed on citizens.

7 Now, I'm overstating this perhaps, but I want
8 you to tell me what the true dimension of that problem is.

9 MR. MINER: Well, I don't think that -- first,
10 as part of that answer, Congress has made a decision by
11 the -- by increasing damages from double to treble, there
12 will be a deterrent effect, and that one response of this
13 is going to be, in fact, less fraud. There's going to
14 be -- the money will be used for the purposes for which it
15 was given to the states, and there will be a deterrent
16 effect in terms of government officials not actually
17 engaging in fraud and -- and a related interest in the act
18 is, in fact, promoting representative, responsive
19 democracy, and by disclosing frauds to the public, you can
20 correct them. But the reality still is the contract, the
21 lawsuit is only brought if, in fact, there's been an
22 essential misrepresentation, something really basic about
23 what was done by a local government that has actually
24 misused the money.

25 Local government has gotten the money, and, in

1 fact, all the local government is giving back is, it's
2 giving back the money it wrongfully got, if it's shown
3 that it got it by -- got it falsely or -- or fraudulently.
4 It's giving back prejudgment interest and, within the
5 statute of limitations of 10 years, that is always
6 virtually going to exceed the basic laws, and it's going
7 to have to pay back the -- give a share to the relator,
8 which is an important piece of this, because Congress has
9 also recognized that, in this area, where you do have
10 large amounts of fraud out there, there are no private
11 victims.

12 There is nobody who steps forward and says, I
13 was hurt, and therefore I'm going to bring a lawsuit to
14 protect myself and the Government will benefit, and the
15 Government, the Court -- the Congress recognized, doesn't
16 have the research -- the resources to deal with all this,
17 so it desperately needs the -- the private Inspector
18 Generals who are willing to step forward oftentimes, not
19 as bounty hunters, but as -- as really offended citizens
20 who, like Dr. Chandler, who brought it to the attention of
21 the county and said, you're not doing what you're supposed
22 to do, and they took responsibilities from him and he said
23 again, and you're not supposed to -- you're supposed to be
24 providing these services, and suddenly she wasn't
25 responsible for that.

1 They need these people to come in and blow the
2 whistle, because otherwise, the Government's not going to
3 find it, and they -- they recognize that oftentimes
4 they're -- they're terminated, so we've got to pay them
5 something for coming forward, so what the Government is
6 really paying in many of the claims is not much more than
7 what, in fact, the government -- what the -- the local
8 government is paying is not much more than what the -- the
9 Federal Government paid in this case --

10 QUESTION: Don't paint too rosy a picture. I
11 mean, if qui tam actions were as desirable as you assert,
12 they would not have been eliminated in England totally,
13 and vastly reduced in the United States, because they are
14 an invitation to shakedowns. That's -- that's why they've
15 been largely eliminated from our law.

16 MR. MINER: That -- that's a --

17 QUESTION: So you know, if -- if loving qui tam
18 actions is -- is what you need to win your case, you're --
19 you're --

20 MR. MINER: No, I don't -- I don't want to
21 suggest that, and -- but I -- to be honest, I'm a little
22 offended, but the treatment their -- plaintiffs in here
23 are no different than plaintiffs in antitrust cases, or
24 securities cases. Many are truly wronged and are
25 outraged, and there are always some who will take

1 advantage of it, but the reality is that --

2 QUESTION: Most cases don't have a treble damage
3 situation, and most -- most cases don't deal with -- well,
4 as this one does, with municipalities, where it's
5 really -- you know, it's play money, right? It's not
6 really money out of your pocket.

7 MR. MINER: Oh, I don't --

8 QUESTION: So better to pay this fellow off and
9 get on with the business of the city, and -- I mean, those
10 are problems with -- with a qui tam action. Let's not --
11 let's not minimize --

12 MR. MINER: We're here in the United States
13 Supreme Court because Cook County wasn't about to simply
14 say this is play money, and we're going to pay you. That
15 isn't really what happens very often. If they're wrong,
16 they agree and they -- they pay, but they -- they also
17 fight you tooth and nail, and -- and you have to prove, in
18 fact, they didn't do what they said they were going to --
19 what they committed themselves to do, but the -- the
20 reality is that there are no -- in 1863, I think persons
21 clearly included municipal corporations, as it included
22 all corporations. There is nothing in -- in the act
23 itself that in any way suggests that Congress did not want
24 to apply it to -- to municipal --

25 QUESTION: Were there any grant in aid -- I

1 mean, it may be kind of an academic question if, in 1863,
2 the Federal Government was not giving out money to
3 municipalities.

4 MR. MINER: It wasn't, but that doesn't mean
5 that, first of all, again going back to Lafayette, this
6 Court recognized the fact that Congress in 1890 was
7 concerned about private corporations didn't preclude
8 including municipal corporations as persons under the
9 Sherman Act, and -- and the fact of the matter is, local
10 governments in that day did commercial activities. They
11 built bridges, they took care of the indigent at the
12 request of States, and they were held responsible for
13 their actions and, in fact, when they didn't live up to
14 their responsibilities, they were routinely sued, and they
15 could well have been reached by Federal Government.

16 I guess my time is up. Thank you.

17 QUESTION: Thank you, Mr. Miner.

18 Mr. Stewart, we'll hear from you.

19 ORAL ARGUMENT OF MALCOLM S. STEWART
20 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
21 SUPPORTING THE RESPONDENT

22 MR. STEWART: Mr. Chief Justice, and may it
23 please the Court:

24 The False Claims Act is the primary mechanism
25 for addressing deliberate efforts to cheat the Federal

1 Government out of money and property. Petitioner has
2 identified no legitimate ground for excluding local
3 governments from the coverage of the act. Local
4 governments receive very substantial amounts of Federal
5 money, and fraud by local governments causes precisely the
6 same harms as comparable misconduct committed by a private
7 party. Moreover, local governments are presumptively
8 encompassed by the term, person, and qui tam suits against
9 local governments raise no constitutional concerns.

10 Now, with respect to the 1863 act, to begin,
11 it's true that as of 1863, there was no square holding of
12 this Court to the effect that a municipal corporation
13 would presumptively be treated as a person for purposes of
14 Federal statutes. However, given the materials available
15 at that time, Congress would certainly have reasonably
16 concluded that municipalities were covered.

17 As Justice Souter pointed out, as early as 1826,
18 this Court quoted with approval Lord Cook's observation to
19 the effect that the term, person, presumptively includes
20 both municipal and private corporations and, again,
21 because fraud by municipal corporations in the procurement
22 of Federal --

23 QUESTION: There -- that -- that case, though,
24 was dealing with a private corporation, was it not?

25 MR. STEWART: That -- that's correct. There was

1 no square holding to that effect, but certainly all the
2 indications in the Court's opinions would have supported
3 Congress in its view that the term, person, would include
4 local governments.

5 The -- the Court in Monell held that as of 1871
6 a clear understanding to that effect had been established,
7 and petitioner has identified no evidence that would
8 suggest that the prevailing consensus changed during the
9 years between 1863 and 1871.

10 It -- it may also be the case that, as Justice
11 Ginsburg suggested, the question would have been a largely
12 academic one in 1863, because local governments wouldn't
13 have received a significant amount of Federal money. The
14 Congress deliberately drafted the act in a broad fashion
15 so that it would encompass spending programs that were
16 adopted in the future, even if they were unknown in 1863,
17 and -- and the Court --

18 QUESTION: Now, aren't you gilding the lily a
19 little bit to say that Congress in 1863 contemplated that
20 there would be massive Federal spending programs in the
21 future?

22 MR. STEWART: Oh, I'm not suggesting that
23 Congress contemplated that. I'm saying Congress wrote the
24 statute in a way that would cover whatever spending
25 programs came to be adopted in ensuing years, and -- and

1 the Court addressed essentially that situation in U. S.
2 ex rel. Marcus versus Hess, in which it said the type of
3 financial assistance that we're dealing with here would
4 not have been undertaken in 1863, yet Congress drafted the
5 act broadly, and these funds are in -- as much in need of
6 protection as other Federal money, and Congress did, in
7 some significant, some relatively minor respects, continue
8 to amend the False Claims Act at intervals during the
9 period between 1863 and 1986, and during that period, it
10 became increasingly apparent that local governments were
11 beginning to receive enhanced shares of Federal money.

12 It also became increasingly apparent that the
13 term, person would be construed generally to encompass
14 local governments, yet Congress retained the word, person,
15 even as it amended other features of the act, and I think
16 petitioner's primary argument is that even if the statute
17 included municipalities up to 1986, the 1986 amendments
18 took local governments out of the act's coverage by adding
19 a punitive component to the damages available, and -- and
20 this seems implausible for, essentially for two reasons.

21 First, the whole thrust of the 1986 amendments
22 generally was to make the act more effective, to expand
23 its coverage, to give the Government greater weapons in
24 fighting fraud, so it seems very unlikely that at the same
25 time Congress would have removed from the act's

1 coverage --

2 QUESTION: Well, we do have the presumption in
3 the City of Newport situation of not treating punitives as
4 applicable to municipal corporations.

5 MR. STEWART: That's correct. The City of
6 Newport involved a different sort of statute. That is,
7 the statute at issue in City of Newport was 42 U.S.C.
8 1983, and it provided an express cause of action, but it
9 said nothing about the remedies that would be available,
10 and essentially this Court's holding was, where the
11 statutory directive is for courts to use their own best
12 judgment as to what remedies are appropriate, punitive
13 damages should generally not be imposed upon
14 municipalities, but here, Congress has spoken precisely to
15 the remedies that will be applied at the end of a
16 successful suit.

17 QUESTION: Does it give the Government any
18 remedy that -- suppose that you think that the particular
19 qui tam action is causing a lot of trouble in a Medicare
20 area, or Medicaid area, and there are hospital grants,
21 or -- you know, there are vast numbers of grants. Can you
22 do anything about it?

23 MR. STEWART: Yes.

24 QUESTION: What?

25 MR. STEWART: The statute does authorize the

1 Government to intervene to take over the -- the
2 prosecution of a case and to settle or dismiss it, and at
3 least on occasion, the Department of Justice has
4 intervened --

5 QUESTION: Okay, so then, in other words the
6 city would have to come to you and say, this is a real
7 mess here, there's nothing to it, and let's settle it, and
8 then you'd have to get involved and -- and deal with it.

9 MR. STEWART: That --

10 QUESTION: You could do it, though.

11 MR. STEWART: That's correct. I -- I don't want
12 to represent that this is done often, but it is an
13 available --

14 QUESTION: Well, have there been a lot of cases
15 since 1986 against municipalities?

16 MR. STEWART: Yes. The figures I've been given
17 by the Civil Division are that 138 qui tam suits have been
18 filed against local governments since 1986. In 13 of
19 those, the United States has intervened.

20 QUESTION: And settled, or --

21 MR. STEWART: I don't know what the disposition
22 of those -- sometimes we might intervene to settle,
23 sometimes we might intervene because we believe the claim
24 is meritorious and we want to -- to prosecute the suit to
25 its conclusion.

1 QUESTION: Do you have some dollar figures in
2 those?

3 MR. STEWART: I don't have dollar figures with
4 respect to municipalities. I know overall since 1986 the
5 Treasury has realized a little over \$10 billion in
6 recoveries from False Claims Act suits. That includes
7 both qui tam suits and suits that were initiated by the
8 United States.

9 QUESTION: You sort of federalized this action.
10 I mean, you're going to let the private plaintiffs go out,
11 sue all the cities, and if you think there's something
12 wrong here, you will step in and deal with it?

13 MR. STEWART: Well, I don't -- I don't want to
14 represent we will do this on a regular basis. I just want
15 to say, it is an available mechanism under the False
16 Claims Act in extreme situations, where public policy
17 concerns cause the Department of Justice to conclude that
18 it's not in the public interest for the suit to go
19 forward.

20 The other point I would make with respect to the
21 City of Newport is, again, if -- the City of Newport dealt
22 with a statute that didn't specifically address the
23 question of remedies at all. Now, if we're correct about
24 the law as it existed before 1986, that local governments
25 were covered, and that they were subject to the double

1 damages remedy that this Court had held to be essentially
2 remedial, if Congress had wanted to exclude municipalities
3 from the act's coverage, it -- it really seems outlandish
4 to think that Congress would have attempted to achieve
5 that objective by leaving the word, person, in the act
6 unchanged, and by amending the act's liability provisions.

7 If Congress had believed that it was appropriate
8 either to take the municipalities out of the scope of the
9 act altogether, or at least to subject them to remedies
10 less than those available against private corporations,
11 the natural thing to do would have been to amend the act
12 so to provide. It -- it seems unlikely that Congress
13 would have attempted to achieve that objective by so
14 indirect a means.

15 The other point we would make is that there may
16 be isolated situations in which an award of treble damages
17 under the act will far exceed the harm that was done to
18 the United States, but the alternative that petitioner
19 contends we believe is much worse, because it would leave
20 the act entirely unavailable for redressing all manner of
21 fraud committed by local governments against the United
22 States.

23 When we have a contract action, when we have an
24 ordinary suit of a dispute about money, and we regard it
25 as a good faith controversy, even if we prevail at the end

1 of the day, it's often the case that the United States
2 won't be made completely whole, because we incur costs of
3 investigation, costs of prosecuting the suit, we may lose
4 the time value of money. When we're dealing with good
5 faith disputes, Congress and the executive branch have
6 been content to treat that undercompensation simply as a
7 cost of doing business.

8 QUESTION: Do any Government grants or contracts
9 have attorney's fees provisions in them?

10 MR. STEWART: I -- I don't know that any do. It
11 certainly would not be the norm. I mean, the -- the
12 American rule is that each party bears its -- its own
13 attorney's fees, and so absent some express statutory
14 authority, we would not be able to recover our fees, even
15 if we prevailed, and so again, Congress is willing --

16 QUESTION: Well, if it's a problem, you can put
17 it in your grant.

18 MR. STEWART: I don't think with -- certainly as
19 to municipalities I think we would have a hard time,
20 without express statutory authority, arriving at a
21 contractual agreement that municipalities would be subject
22 to such an unusual remedy and, as I say, Congress and the
23 executive branch are willing to live with that form of
24 undercompensation when we're dealing with a good faith
25 dispute.

1 The False Claims Act is reserved for that narrow
2 category of cases that involve people who don't simply ask
3 for money that, in fact, they're not entitled to, but who
4 ask for it knowing they're not entitled to it, and
5 Congress reasonably concluded that different remedies were
6 necessary to address efforts to defraud and cheat the
7 Federal Government.

8 QUESTION: Is a false statement a necessary
9 prerequisite to an action under these qui tam?

10 MR. STEWART: There -- a false statement is one
11 category. There -- there is a knowing requirement. That
12 is, the individual entity has to knowingly submit a false
13 claim. There -- there are instances in which the claim
14 may be false even if it doesn't contain an express false
15 statement. For instance, if it's very clear that it's
16 necessary, for instance, that medical services be
17 medically necessary in order to be reimbursable, and
18 the --

19 QUESTION: Thank you, Mr. Stewart.

20 MS. LACH, you have 11 minutes remaining.

21 REBUTTAL ARGUMENT OF DONNAL M. LACH
22 ON BEHALF OF THE PETITIONER

23 MS. LACH: Thank you.

24 The first point I'd like to address is
25 Mr. Miner's point that local governments were sued in all

1 types of tort actions across the board. Congress'
2 understanding of the suability of municipalities, and
3 municipalities as persons in 1863 was really dependent on
4 State law, because there had been no Federal expression up
5 until that time, and across the board in the States, local
6 governments were viewed differently.

7 Some -- some local governments were viewed as
8 quasi corporations and some as municipal corporations with
9 different levels of liability and, as I noted earlier,
10 some States made a distinction between proprietary and
11 Government functions, so Congress' understanding based on
12 State law at that time was not consistent enough to be
13 evidence that Congress understood person to include local
14 governments.

15 As for State criminal actions, in some States
16 there were misdemeanor actions against local governments
17 for nuisance actions such as failure to maintain a bridge,
18 but there is no common law with respect to -- to Federal
19 statutes. When -- when Congress enacts a criminal
20 statute, the States' understanding of -- of who is a
21 person subject to State criminal statutes is not
22 dispositive of what Congress had in mind, and if it is
23 ambiguous and it is inconclusive, as Justice Breyer
24 suggested, it might be what -- what Congress was actually
25 thinking in 1863.

1 Criminal statutes are interpreted narrowly,
2 and --

3 QUESTION: Ms. Lach, there's one point that you
4 didn't cover in your opening argument --

5 MS. LACH: Yes.

6 QUESTION: -- and I'm curious how you read this
7 statute. With regard to Dr. Chandler, she claimed that
8 when she blew the whistle, there was retaliation against
9 her. There is a retaliation provision in the False Claims
10 Act. On your reading of it, would she have recourse to
11 that provision against the county?

12 MS. LACH: Well, under the facts of this case,
13 the county was not her employer. The -- our codefendant,
14 Hektoen Institute for Medical Research, was her employer.
15 Cook County has been dismissed from that count, but --
16 but --

17 QUESTION: Well, whatever, the municipal
18 employer, would -- you say that there is no municipal
19 liability for the allegedly ill-gotten gains, but what
20 about retaliation against the whistleblower? Would the
21 act apply against the municipal unit to that extent?

22 MS. LACH: Well, the term employer is not
23 defined in the False Claims Act, but just very recently,
24 2 weeks ago, on December 31, the Eighth Circuit reached
25 this issue and, without reaching the question of what

1 person means under the False Claims Act, the Eighth
2 Circuit determined that employer has a broader meaning,
3 and allowed an action to proceed against a local
4 government, in that case the St. Louis Housing Authority
5 under, only under the whistleblower provision, and so the
6 whistleblower provision in itself does not indicate that
7 local governments, even if an employee can sue a municipal
8 entity under the whistleblower provision, that does not
9 automatically mean that --

10 QUESTION: If -- if the employer -- employee
11 could do that, the -- the retaliation provision refers to
12 retaliation against an employee for conduct in furtherance
13 of a False Claims Act action, so if there is no viable
14 False Claims Act claim against a municipality, then I
15 don't see how the retaliation provision could be
16 available.

17 MS. LACH: The False Claims Act actions may be
18 caused by another party.

19 QUESTION: But I'm talking about this very case.

20 MS. LACH: Yes.

21 QUESTION: I mean, if you're right that there's
22 no municipal liability --

23 MS. LACH: But -- but in this case --

24 QUESTION: -- especially by Dr. Chandler, do I
25 understand from your last answer that you are saying, no,

1 she's out of luck, the statute would not cover her?

2 MS. LACH: Not against the county, but she still
3 has a retaliation claim against her employer.

4 QUESTION: Under what law?

5 MS. LACH: Under the False Claims Act.

6 There were two defendants in this case, Cook
7 County and the institution that administered the grant,
8 and that institution employed Janet Chandler, and so --

9 QUESTION: And was that a private corporation?

10 MS. LACH: It's a not-for-profit. It's a
11 not-for-profit corporation, and so that defendant is in
12 the case, and --

13 QUESTION: But as far as a municipal employer is
14 concerned, a municipal employer, having retaliated, would
15 be, on your reading of the statute, just as free from
16 responsibility as it would be for the underlying qui tam
17 action.

18 MS. LACH: No, under the Eighth Circuit case a
19 municipality can be held liable under the whistleblower
20 provision, even though -- I mean to sound very exact --

21 QUESTION: That's what I was asking you about.

22 MS. LACH: Yes.

23 QUESTION: That's what one court has said. How
24 does that court say that the employee's action was in
25 furtherance of a False Claims Act action if there is no

1 False Claims Act action?

2 MS. LACH: The cases that have addressed this
3 have noted there -- a local government can be in cahoots
4 with another -- another entity that submits false claims,
5 the -- the local government is aware of it, and the
6 whistleblower is an employee of the local government.

7 In that case, it is -- in that scenario, the
8 whistleblower is blowing the whistle on someone else and
9 yet is employed by the local government and, under this --
10 under the Court's reasoning in -- in the Eighth Circuit
11 case and in the two cases that we cited, Satalich and Erie
12 County, an action can still proceed against a local
13 government under 3730(h), even though a local government
14 is not necessarily a person subject to suit.

15 To get -- to get back to the points, a lawsuit
16 under the False Claims Act can be brought if a statement
17 is made in reckless disregard. Mr. Miner suggested that
18 the statement has to be clearly false, deliberately false,
19 and under the 1986 amendments, the standard has been
20 reduced to reckless disregard.

21 As for deterrent, by the time some of these
22 actions are filed, the wrongdoer is not even in office any
23 more. It is the local taxpayers, the local residents that
24 bear the brunt of -- of any False Claims Act action and
25 penalty, not -- not the person that actually perpetrated

1 the wrong.

2 When -- when in 1986 Congress expanded the
3 coverage of the False Claims Act, it did not expand the
4 fraudsters. As this Court noted in Stevens, the False
5 Claims Act covers just all kinds of fraud, but it does not
6 cover all kinds of fraudsters, and there's no indication,
7 under our view, that local governments were among
8 fraudsters that are included under this act.

9 In response to Mr. Stewart, we are not aware of
10 any dismissals of False Claims Act actions that are
11 brought against local governments. The -- the Government
12 has not intervened, obviously, in -- in a number of these
13 False Claims Act actions, but we're not aware of any
14 situation in which the Government has actually dismissed a
15 claim against a local government. These actions proceed
16 and, even if -- even if the United States wanted to
17 dismiss an action, they would have to justify their
18 dismissal before the court, and the same with a
19 settlement. It has to be approved by the court.

20 In sum, I would like to say that Congress knows
21 what language it needs to impose punitive damages. If
22 this Court finds that local governments are included in
23 the 1863 act, Congress did not use the requisite language
24 to indicate that it meant to impose punitive damages on
25 local governments in 1986.

1 Thank you.

2 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Lach.

3 The case is submitted.

4 (Whereupon, at 11:06 a.m., the case in the
5 above-entitled matter was submitted.)

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25