

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - x

3   DAVID B. PASQUANTINO,                   :

4   CARL J. PASQUANTINO, AND               :

5   ARTHUR HILTS,                         :

6                   Petitioners               :

7           v.                               :   No. 03-725

8   UNITED STATES OF AMERICA,             :

9                   Respondent.             :

10  - - - - - x

11   Washington, D.C.

12   Tuesday, November 9, 2004

13                   The above-entitled matter came on for oral

14   argument before the Supreme Court of the United States at

15   11:13 a.m.

16   APPEARANCES:

17   LAURA W. BRILL, ESQUIRE, ESQ., Los Angeles; on behalf of

18       the Petitioners.

19   MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,

20       Department of Justice, Washington, D.C.; on behalf

21       of the Respondent.

22

23

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	LAURA W. BRILL, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	MICHAEL R. DREEBEN, ESQ.	
7	On behalf of the Respondent	22
8	REBUTTAL ARGUMENT OF	
9	LAURA W. BRILL, ESQ.	
10	On behalf of the Petitioners	48
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

P R O C E E D I N G S

[11:13 a.m.]

JUSTICE STEVENS: We'll hear argument in the  
case of Pasquantino against the United States.

Ms. Brill.

ORAL ARGUMENT OF LAURA W. BRILL  
ON BEHALF OF PETITIONERS

MS. BRILL: Justice Stevens, and may it please  
the Court:

There are five primary reasons why this  
prosecution is outside the scope of anything Congress has  
authorized. First, the government's interpretation of the  
wire fraud statute is inconsistent with the revenue rule.  
Second, it turns the rule of lenity on its head by  
allowing the Government to incarcerate petitioners for 57  
months for conduct that has never given rise to civil  
liability in this country. Third, this prosecution  
contravenes our national policy of demanding reciprocity  
in matters of international tax enforcement. Fourth, the  
Government acknowledged below that it cannot bring this  
prosecution without disregarding another act of Congress,  
the Mandatory Victims Restitution Act, which is, as the  
name specifies, mandatory. And, fifth, under this Court's  
decisions in McNally and Cleveland, the wire fraud statute  
applies only to schemes aimed at defrauding a victim into

1     relinquishing something that it holds as money or  
2     property. A sovereign's interest in an unassessed tax  
3     claim is neither money nor property.

4             JUSTICE O'CONNOR: Well, can you look at the  
5     interest of the Government as one of not allowing U.S.  
6     territory to be used to carry out a smuggling scheme? I  
7     mean, why does it have to be viewed as one of trying to  
8     enforce some other nation's tax laws?

9             MS. BRILL: Justice O'Connor, the government's  
10    interest in prosecuting somebody does not define the scope  
11    of what the statute at issue proscribes.

12            JUSTICE O'CONNOR: It's a wire fraud statute  
13    dealing with the use of communications capacity in this  
14    country to carry out a scheme designed to enable smuggling  
15    of goods.

16            MS. BRILL: Well, if the -- if the statute was  
17    not written as it is -- the statute, as written, uses the  
18    words "defraud" and the word -- the word "property," and  
19    both of those terms are terms that this Court has defined  
20    very narrowly. In Nader, it defined a "fraud" as --

21            JUSTICE SCALIA: Ms. Brill, I thought your brief  
22    said that we have an anti-smuggling statute, which is  
23    directed precisely against smugglers, but it only applies  
24    to those countries that have similar protection for us.

25            MS. BRILL: Yes, Justice --

1 JUSTICE SCALIA: And Canada does not.

2 MS. BRILL: Yes, Justice Scalia, that's exactly  
3 correct.

4 JUSTICE SCALIA: The existence of that  
5 statute would seem to suggest -- and a statute which is  
6 limited to countries that will do the same for us -- would  
7 seem to suggest that we don't want to do this for Canada.

8 MS. BRILL: Yes, that's exactly -- that's  
9 exactly right, Your Honor. There --

10 JUSTICE GINSBURG: But it's also limited to  
11 vessels. It's smuggling by water, not smuggling by --

12 MS. BRILL: By automobile.

13 JUSTICE GINSBURG: -- vehicles, as was done here,  
14 so that we don't have any statute that covers smuggling on  
15 land.

16 MS. BRILL: Right. Yes, Your Honor, that's  
17 correct.

18 JUSTICE SCALIA: Is there something better about  
19 reciprocity for vessels and not reciprocity for land  
20 smuggling?

21 MS. BRILL: I think it just evinces what  
22 Congress was concerned about most at the time, Justice  
23 Scalia, but it was -- it is certainly the case that in any  
24 -- any time that this country has endeavored to deal with  
25 matters of international tax enforcement, it has always

1 demanded reciprocity. It has done so through the  
2 smuggling statute, it has done so through the numerous tax  
3 treaties that the Second Circuit's RJR decision discusses  
4 at length.

5 And one of the points the RJR decision makes is  
6 that, in 1951, at the very time that Congress was looking  
7 at the wire fraud statute and enacting it, the Senate was,  
8 at the same time, becoming concerned that this country had  
9 gone too far in extending reciprocity in connection with  
10 its tax treaties and was actually evincing a policy of  
11 cutting back on the degree to which we would assist other  
12 countries in tax enforcement.

13 And so the issue is to look at -- that the  
14 revenue rule must be used as a background principle of  
15 common law against which -- against which the revenue --  
16 excuse me, against which the wire fraud statute is --

17 JUSTICE O'CONNOR: Well, if we don't view  
18 this case as involving some attempt to indirectly enforce  
19 Canada's tax laws -- suppose we don't view it with that  
20 lens -- then does that put it outside the so-called  
21 revenue --

22 MS. BRILL: Well, if it were not -- if it did  
23 not serve the function -- it doesn't matter what the  
24 government's intent is and what is in the mind of the  
25 prosecutor, but if it did not have any effect of enforcing

1 a foreign government's revenue rule, then, yes, it would  
2 be outside; but there are numerous ways in which this  
3 prosecution does enforce a foreign government's revenue  
4 rule. Certainly, it deters future violations. The  
5 sentence was based on the -- an estimate of the intended  
6 loss, and there was no assessment or an adjudication in  
7 Canada to determine what the amount was that was owed.  
8 And so the District Court became, essentially, part of the  
9 tax enforcement apparatus of the Government of Canada by  
10 performing that assessment in the first instance.

11 And so anytime that we impose criminal or civil  
12 liability in a manner that affects the tax policies of  
13 another country, we are enforcing that rule. If we --  
14 whether we're requiring compliance with the -- with the  
15 tax rule of a foreign country or punishing noncompliance.  
16 All of those --

17 JUSTICE KENNEDY: Is the rationale for the rule  
18 that enforcement of taxes is so unpopular that we want to  
19 minimize the exposure to -- of our judges so that they --  
20 the only thing they have to do is enforce taxes that --  
21 that are paid to our own Government? I'm serious about  
22 that. Is that the rationale?

23 MS. BRILL: Well, I think there's a certain  
24 amount of self-protection in some of the decision --  
25 decisions, surely; but the real -- the underlying purpose

1 of the revenue rule is a recognition that foreign -- that  
2 taxes, in general, are a matter of policy. They're  
3 inherently policy-based; they're not based on contract or  
4 other kinds of commerce. They do not -- they do not  
5 assist in resolving disputes between private parties. And  
6 often they're imposed -- especially customs duties, are  
7 imposed to disadvantage other countries, and so the courts  
8 have said these are a peculiar type of law, they serve  
9 only the interest of the -- of the foreign sovereign, and  
10 there's a particular -- there's been a particular  
11 sensitivity about scrutinizing those foreign laws,  
12 potentially declaring them invalid under the foreign  
13 governments' own laws or pursuant to our own Constitution.  
14 And so revenue rules have historically been a categorical  
15 exclusion to general principles of comity through which we  
16 might otherwise recognize foreign laws or foreign  
17 judgments.

18 And the rule has come to be so entrenched, and  
19 has been so well established, that there's a whole body of  
20 background law in the tax treatise of our country, and of  
21 many other countries, that is based on our non-recognition  
22 and our non-enforcement of foreign revenue laws. So --

23 JUSTICE GINSBURG: But if we did -- if we did  
24 enforce even a tax judgment of another country, there  
25 would be no U.S. law that would be violated. You're



1 talking about a common law, no country enforces the taxes  
2 of another. But, at least in the Restatement of Foreign  
3 Relations now, that's put in terms of -- there's no  
4 requirement that any country enforce the tax claims or  
5 judgments of another; but neither is there any  
6 prohibition.

7 MS. BRILL: Well, Justice Ginsburg, the current  
8 restatement is worded in -- addresses judgment  
9 specifically. It does not -- it doesn't address un-  
10 adjudicated tax codes. But there's always been a much  
11 greater suspicion, a much greater reluctance, to get into  
12 enforcing a claim brought by a foreign country, where that  
13 country's own processes have not been allowed to run their  
14 course and to have the initial determination.

15 There -- the restate -- the second Restatement  
16 of Foreign Relations law, which is -- was -- came out in  
17 1965 and is closer to reflecting what the law was at the  
18 time Congress enacted the wire fraud statute, says, in  
19 Section 41, Comment L, "Under the -- under the foreign  
20 relations law of the United States, courts in the United  
21 States will generally refrain from taking action to give  
22 effect to the penal or revenue laws of other states,  
23 except as provided by international agreement." And so  
24 that -- that was a statement by the -- by the propounders  
25 of the -- of the Restatement of what they -- what they

1 believed the law was at the time.

2 To the extent it's qualified, I think it's  
3 just to leave room for the fact that the Senate can  
4 promulgate treaties, or Congress can, by statute, command  
5 that courts recognize these laws. But it's --

6 JUSTICE SCALIA: You don't -- you don't assert  
7 that this -- that it -- that this couldn't be done.  
8 You just --

9 MS. BRILL: Not that --

10 JUSTICE SCALIA: -- assert that we shouldn't  
11 interpret this statute to have done it.

12 MS. BRILL: Exactly, Justice Scalia. If  
13 Congress had written a different wire fraud statute that  
14 had said, "You can't have a scheme to defraud the revenue,  
15 whether foreign or domestic," that would have been a clear  
16 statement abrogating the revenue rule. But we don't have  
17 any such clear statement, and the terms -- the terms  
18 "defraud" and the terms "property" have to be read with  
19 the background rule in mind.

20 JUSTICE GINSBURG: May I --

21 JUSTICE KENNEDY: But you would come to that  
22 conclusion even if we had a reciprocal enforcement  
23 agreement. If this were Country X, where we did have a  
24 reciprocal enforcement agreement, you'd come to the same  
25 conclusion, no prosecution under this statute.

1 MS. BRILL: Correct, Your Honor, because there  
2 wouldn't -- this statute wouldn't have been written to  
3 take that into account. This --

4 JUSTICE KENNEDY: So, in a sense, the revenue  
5 position is irrelevant to your -- to your secondary or  
6 your -- or your independent argument on statutory  
7 construction. The revenue rule is irrelevant to it.

8 MS. BRILL: As to just whether an unassessed tax  
9 claim --

10 JUSTICE KENNEDY: Yes.

11 MS. BRILL: -- is property, the revenue rule --  
12 the revenue rule adds a boost to it, but there are two --  
13 there are two dimensions to the property element. One is  
14 that, as I said -- and if a -- if a tax claim is not --  
15 has not been subject to an assessment, that whatever  
16 interest the Government may have in that is not in the  
17 nature of property; it is simply in the nature of law-  
18 enforcement power to collect. They -- some of these  
19 revenue rule cases talk about the power to --

20 JUSTICE O'CONNOR: So tax revenues are not  
21 property, in your view?

22 MS. BRILL: Once a tax is collected, once the  
23 Government actually has money in its hands, and if there's  
24 a scheme to, let's say, obtain an illegal refund through a  
25 tax and -- that would be a scheme to deprive a government

1 body of money. But a scheme to merely evade paying a tax  
2 is not something that falls within the statute, separate  
3 and apart from the revenue rule. But the revenue rule --  
4 as a result of the revenue rule, it is also the case that  
5 no state court would have recognized any property interest  
6 in a foreign sovereign, even if it had reached the point  
7 of a judgment. And so it works in both ways. The --

8 JUSTICE GINSBURG: May I ask you, Ms. Brill,  
9 something that puzzled me about this case? It is a rather  
10 peculiar use of our wire fraud statute. Are there any  
11 proceedings going on in Canada? Has there been any  
12 attempt to extradite these people?

13 MS. BRILL: Justice Ginsburg, there was an  
14 indictment that Canada issued against the Petitioners. It  
15 has charges under -- for smuggling, under Canadian law,  
16 which is Customs Act, Section 159. It charges unlawful  
17 possession of imported spirits under Excise Act 163(1)(b),  
18 disposing of goods illegally imported, in violation of  
19 Customs Act, Section 155. So Canada has its own process.

20 There has -- there has not been, to my  
21 knowledge, any request by Canada for extradition, but the  
22 treaty between the United States and Canada does include  
23 revenue violations, and --

24 JUSTICE SCALIA: Presumably, if we punish this  
25 person this way, Canada wouldn't -- there's no double

1 jeopardy, right?

2 MS. BRILL: That's correct.

3 JUSTICE SCALIA: So we'd be punishing this  
4 person for violating Canadian law, and then Canada would  
5 punish this person for violating Canadian law.

6 MS. BRILL: Yes, I haven't looked in detail at  
7 the statute of limitations provisions, but that could be  
8 the effect. And we could be punishing them much more  
9 severely than Canada would be. They have their own means  
10 of balancing what they think the appropriate balance is  
11 for these things, and certainly the wire fraud statute, 57  
12 months in our --

13 JUSTICE KENNEDY: Well, I think the Government  
14 has an interest in saying, "Look, if you're going to  
15 smuggle, have your scheme up there in Canada; don't use  
16 our wire systems for fraudulent purposes. We don't like  
17 that here."

18 MS. BRILL: And if they want to pass a law that  
19 says that, because of the -- because there's a domestic --

20 JUSTICE KENNEDY: Well, they -- of course, they  
21 say that this covers it, and it seems to me that really  
22 the -- that turns on the definition of "property" --

23 MS. BRILL: Okay.

24 JUSTICE KENNEDY: -- which is an arguable point.

25 JUSTICE STEVENS: What if the -- instead of a

1 wire fraud case, it was assault and battery? Supposing  
2 the Canadian revenue agent got inside of New York and one  
3 of your clients beat him up, would we have -- solely  
4 because he was mad at him for trying to interfere with his  
5 attempt to smuggle into Canada -- would we have to say  
6 that you can't do that, we have no jurisdiction over the  
7 assault and battery?

8 MS. BRILL: No, Justice Stevens. It's -- the  
9 question is whether you're --

10 JUSTICE STEVENS: The only purpose would be just  
11 what the purpose is here, they're trying to facilitate the  
12 smuggling operation.

13 MS. BRILL: Well, the assault and battery --  
14 whatever the assault and battery provisions are, you would  
15 be bringing the prosecution solely for that purpose; it  
16 does not have any -- the effect of applying the assault  
17 and battery statute, if there was one --

18 JUSTICE STEVENS: Is to interfere with Canadian's  
19 collection of their taxes. That's the only reason for it.

20 MS. BRILL: Well, I think it -- in that case, it  
21 would be -- it would be far too attenuated to reach that  
22 conclusion. There could be -- the motive of a person --

23 JUSTICE STEVENS: Why is that any more  
24 attenuated than a conspiracy carried out down here in  
25 Maryland using American assets to do the evil deed in

1 Canada?

2 MS. BRILL: Well, the motive of the person  
3 performing the assault and battery would be irrelevant to  
4 the prosecution. It's whether they intended to do the  
5 improper touching and, in fact, carried it out.

6 JUSTICE KENNEDY: Well, why isn't the motive  
7 irrelevant here? We don't want our facilities to be used  
8 for criminal activity.

9 MS. BRILL: The question is whether --

10 JUSTICE KENNEDY: Any more than in the -- in  
11 the hypothetical we don't want citizens beaten up on our  
12 soil.

13 MS. BRILL: Justice Kennedy, the issue is  
14 whether -- is what Congress had in mind in enacting the  
15 wire fraud statute. And, in general, we presume that  
16 Congress had domestic concerns in mind, not that we have  
17 incorporated vast bodies of --

18 JUSTICE O'CONNOR: Well, but it used broad  
19 language, "Any scheme to defraud by means of wire  
20 communications in interstate or foreign commerce."

21 MS. BRILL: The wire -- it is -- the wire  
22 communications may be an interstate or foreign commerce,  
23 the word "any" modifies "any scheme or artifice to  
24 defraud" --

25 JUSTICE SCALIA: This statute applied against

1 people who defraud the United States Government in taxes?

2 MS. BRILL: Your Honor, the government's  
3 position on that, I believe, is somewhat inconsistent.  
4 The tax -- the tax division and the Department of Justice  
5 U.S. Attorneys manual specifies that it is -- they believe  
6 it is the intent of Congress that tax matters will be  
7 dealt with through the internal revenue code, not through  
8 other means.

9 There are -- there have been some prosecutions  
10 brought in the case of an illegal -- an illegal tax  
11 shelter, where there is truly an -- a private party who is  
12 defrauded into giving up money in connection with --

13 JUSTICE SCALIA: But you don't -- you don't know  
14 of any prosecutions under this fraud statute for depriving  
15 the Federal Government of property.

16 MS. BRILL: Well, the Henderson case, which we  
17 have cited in our reply brief, is one from the Southern  
18 District of New York, where Judge Weinfeld said, when  
19 faced with a mail fraud prosecution of that type, this is  
20 outside the scope of anything that Congress intended.

21 The -- I would like to get back to the issue of  
22 money or property so that it -- to have it conceptually  
23 why an unassessed tax claim is not money or property.  
24 There is no allegation that -- in the indictment or  
25 anywhere -- that the petitioners took any money out of



1 Canada's treasury. So money is not an issue. At most, it  
2 was an effort to evade Canada's right to collect money,  
3 not any money it had --

4 JUSTICE KENNEDY: You could say the same  
5 thing if it were a building fraud. Suppose there were  
6 contractors building a Canadian building for the Canadian  
7 Government and they had a big fraud scheme down here, and  
8 it was to deprive the Canadian Government of money? I  
9 think the statute would clearly apply.

10 MS. BRILL: The statute only applies -- what  
11 McNally said is, any assistance a governmental body  
12 obtains from the statute must be in the capacity of  
13 property-holder. And so the -- a scheme to defraud  
14 somebody out of their -- out of a building, that's  
15 traditional property. There's not -- it is not the same  
16 thing.

17 Let's have an -- let's take an example of an  
18 interference with prospective economic advantage. So  
19 there is a defendant who says to somebody else who's about  
20 to get a contract -- I know my competitor is about to get  
21 a contract, and I say, "Why don't you go out of town?  
22 There's a -- there's a much bigger contract that you can  
23 get if you fly to Michigan." And, meanwhile, I go in, and  
24 I usurp the contract and take it for my own purposes.  
25 Well, I've interfered with that person's prospective

1 economic advantage, and so there would be a tort, and the  
2 person could collect from me. But I have not taken any  
3 money or property from that person that was in his  
4 possession.

5 And what McNally and Cleveland point us to is  
6 whether there was money or property in the hands of the --  
7 of the victim. And Canada's interest -- until there has  
8 been an assessment, Canada's interest is purely that of a  
9 -- of a sovereign. It is -- it does not have a claim to  
10 any money that is in the bank account of somebody who owes  
11 it a debt.

12 And the Johnston case, which we've cited in our  
13 reply brief, Your Honor, talks about -- this Court talked  
14 about a statute in which there was a boxing promoter who  
15 collected fees for the boxing match and also collected  
16 taxes at the same time. And the U.S. Government could not  
17 bring an embezzlement action against that person for not  
18 paying the taxes, because those taxes were not -- were not  
19 yet anything that qualified as governmental property.

20 JUSTICE STEVENS: Ms. Brill, in the Court of  
21 Appeals, they treated the argument that this was not  
22 property as entirely separate from the revenue rule  
23 question. And I thought your petition for cert was  
24 confined to the first question.

25 MS. BRILL: Well, Your Honor -- no, Your Honor,

1 we talked about both in the petition for cert. And in  
2 the question --

3 JUSTICE STEVENS: But the question, itself,  
4 doesn't refer to the property issue.

5 MS. BRILL: It talks about the --

6 JUSTICE SCALIA: Was it -- was it phrased the  
7 same way it is in your brief, in the petition?

8 MS. BRILL: Yes. Yes, the --

9 JUSTICE SCALIA: Well, then the last part of it  
10 --

11 MS. BRILL: Right, but --

12 JUSTICE SCALIA: -- obviously covers it.

13 MS. BRILL: Yes, the last part talks about --

14 JUSTICE STEVENS: Oh, I see. I'm sorry, you're  
15 right. Yeah.

16 MS. BRILL: Yes, okay.

17 But to return -- to return to the revenue rule  
18 -- and thank you, Justice Stevens, for bringing me back to  
19 that -- the Government has acknowledged that there can be  
20 no restitution here. And that's in -- that's in the joint  
21 appendix, at page 106. They expressly waived it. They  
22 said that even if there was a foreign judgment that  
23 Canada was trying to bring here, that would be  
24 unenforceable. There could be no RICO actions, because  
25 that's unenforceable; and no proxy suits on behalf of a

1 foreign government. And so the only thing that they say  
2 is, beyond -- is not included -- the only act of  
3 enforcement which they say is not included is, somehow,  
4 criminal enforcement.

5 And under Section 14 of the -- excuse me, under  
6 the Fourteenth Amendment of the United States  
7 Constitution, Congress has power to enforce that  
8 amendment, and it has done so both in enacting statutes  
9 for civil recovery, as well as criminal recovery --  
10 criminal punishment, excuse me. And so it's -- the notion  
11 that somehow incarcerating someone is not -- is not  
12 punishment is not something that makes much sense in that  
13 context.

14 The decisions of this Court have held that  
15 penalties are -- monetary penalties count as punishment,  
16 and also that injunctions are -- fall within the scope of  
17 the revenue rule. That's in the Wisconsin versus Pelican  
18 Insurance case, which actually addresses the penal -- the  
19 penal rule, which is the close corollary.

20 JUSTICE GINSBURG: May I ask you, when -- now  
21 that we're getting into money, one of the things that the  
22 sentencing court had to do was to find out how much of a  
23 loss there was, and that involved determining what taxes  
24 would be due under Canadian law. And did that increase  
25 the sentence? Did the -- did the sentence vary with the

1 amount of taxes that they -- we found due?

2 MS. BRILL: Yes, Justice Ginsburg, it very much  
3 did. The loss calculation was based on intended loss, and  
4 so they -- what the District Court judge did was estimated  
5 the number of cases of liquor that were intended to be  
6 brought into Canada, and applied that number to the amount  
7 of the tax that Canada, he believed, would have applied to  
8 that -- to that amount. And that ended up changing the  
9 sentence from six months to, in the case of the  
10 Pasquantino brothers, 57 months, and the -- and, in the  
11 case of Mr. Hilts, 21 months. So the bulk of the sentence  
12 was based on the Canadian tax law and our courts making  
13 that assessment.

14 JUSTICE GINSBURG: A judge making that  
15 assessment.

16 MS. BRILL: The judge made the sentence -- made  
17 the assessment at sentencing, yes. What the -- what the  
18 -- what the Government did in this case was to submit,  
19 very self-consciously, all of the issues of Canadian tax  
20 law to the jury. And the Assistant U.S. Attorney said  
21 this to the Fourth Circuit en banc panel several times,  
22 that they were presenting these matters of Canadian tax  
23 law as factual issues for the jury to find. But,  
24 ultimately, in sentencing, it was -- it was the court that  
25 ended up imposing and elevating that sentence.

1           If there aren't further questions, I'd like to  
2   reserve the balance of my time.

3           JUSTICE STEVENS:   Mr. Dreeben.

4           ORAL ARGUMENT OF MICHAEL R. DREEBEN

5           ON BEHALF OF RESPONDENT

6           MR. DREEBEN:   Justice Stevens, and may it please  
7   the Court:

8           A prosecution for wire fraud based on defrauding  
9   a foreign government of taxes serves at least four  
10   distinct United States prosecutorial interests.

11           The first is that the creation of schemes to  
12   defraud frequently spawns collateral criminal conduct in  
13   the United States above and beyond the fraudulent scheme  
14   itself.  Here, for example, one of the defendants was  
15   charged in the indictment with using a gun in relation to  
16   the charged wire fraud scheme.

17           Second --

18           JUSTICE GINSBURG:   Where?  Using a gun where?

19           MR. DREEBEN:   In the United States, Justice  
20   Ginsburg.

21           JUSTICE SCALIA:   Well, why didn't you prosecute  
22   him for that?

23           MR. DREEBEN:   That crime depended upon the  
24   validity of the wire fraud charges, because the crime was  
25   use of a gun during in relation to this wire fraud

1 scheme.

2 JUSTICE SOUTER: But that really doesn't get you  
3 anywhere, does it? I mean, if the United States says, "We  
4 don't want this gun offense to be prosecuted unless  
5 there's a wire fraud prosecution," that doesn't tell you  
6 anything as to whether there ought to be a wire fraud  
7 prosecution.

8 MR. DREEBEN: Well, what it tells you, Justice  
9 Souter, is why the United States has an interest in  
10 enforcing a law that facially is written to cover schemes  
11 to defraud that are carried out using the United States  
12 wires.

13 JUSTICE SCALIA: But that's -- but that's a  
14 reason for extending the statute to everything, to  
15 everything --

16 MR. DREEBEN: No, Justice Scalia --

17 JUSTICE SCALIA: -- reading "property" to mean  
18 anything at all. I mean, what you're saying is, the broader  
19 you read this statute, the more bad guys we're going to  
20 catch. I'll stipulate that. Of course it's true.

21 MR. DREEBEN: Well, Justice Scalia, I'm starting  
22 from the proposition that the language of the wire fraud  
23 statute textually applies to this scheme, and Petitioner's  
24 argument is that, because of the common law revenue rule,  
25 the statute should be read to exclude schemes to defraud a

1 foreign government of tax revenue. And the fact that a  
2 foreign government is defrauded of tax revenue does not  
3 mean that the United States does not have an independent  
4 interest in rooting out that scheme and prosecuting it.

5 In addition to the collateral criminal conduct  
6 that such schemes can spawn, the creation of such schemes  
7 indicates a criminal mind and a criminal group that can  
8 turn its techniques for used -- using to smuggle into  
9 Canada, also to smuggle back into the United States or to  
10 victimize other victims in the United States.

11 JUSTICE SCALIA: What about evading a Cuban tax  
12 law that we think -- that many people would think is an  
13 unjust tax law? I mean, one of the things I'm worried  
14 about is that this gets us into foreign policy. Are you  
15 sure that we always want to enforce the tax laws of  
16 foreign countries through this fraud statute, no matter  
17 what those tax laws happen to be?

18 MR. DREEBEN: The United States has  
19 prosecutorial discretion to determine when to invoke the  
20 statute and in what interests it should be served.

21 JUSTICE SCALIA: It may well, but when it comes  
22 here, this Court is going to have to decide -- we'll just  
23 approve whatever you want to prosecute and let you not  
24 prosecute whatever you want?

25 MR. DREEBEN: There is no provision in the



1 statute, Justice Scalia, for this Court to second-guess  
2 foreign-policy determinations that are made --

3 JUSTICE BREYER: Well, not just foreign policy.  
4 The White Russians come here because they don't want to  
5 pay Lenin's taxes designed to equalize all individuals, in  
6 terms of property. Country A has a tax law that makes  
7 everybody a criminal because nobody really ever pays all  
8 the taxes. Country C has a set of laws that tax bibles.  
9 Country D has a -- I mean, you know, we can spin out the  
10 examples endlessly, and they're not farfetched.

11 So take all the arguments from last week, called  
12 "any court arguments," cross- -- or two days ago -- just  
13 let's cross-reference them. The problem is complexity of  
14 tax law. The problem is many, many, many would be  
15 contrary to American policy. And the problem is, nobody  
16 really knows what they are; indeed, they don't even know  
17 what American tax law is, no single individual, I suspect.  
18 Let's put in Italy, France, Byelorussia, Belarus, Ukraine,  
19 Saudi Arabia, and 35,000 others. Everybody becomes a  
20 criminal. And then we say, "Don't worry, we'll only  
21 prosecute the real bad ones." That's the argument, I  
22 think, on the other side, and I'd like to hear your  
23 response.

24 MR. DREEBEN: Justice Breyer, I don't think  
25 there's any reason to assume that everyone becomes a

1 criminal. What this --

2 JUSTICE BREYER: No, only people who come over  
3 here because they don't want to pay taxes in those  
4 countries. Sometimes we would agree with them --

5 MR. DREEBEN: Justice Breyer, in order to  
6 violate the wire fraud statute, you have to use deception  
7 in order to deprive another --

8 JUSTICE BREYER: Yes, they don't tell Lenin that  
9 they're coming --

10 MR. DREEBEN: Well, that wouldn't involve the  
11 use of the United States wires --

12 JUSTICE BREYER: -- and they write to each  
13 other. They have a cousin, in Brooklyn, who forwards them  
14 the money to get out.

15 MR. DREEBEN: Justice Breyer, if one stipulates  
16 that that violates the wire fraud statute or that there's  
17 enough conduct that does, the question still comes down to  
18 whether the United States chooses to prosecute that case.  
19 This is not a --

20 JUSTICE SCALIA: The question comes down to  
21 whether this statute, which doesn't have to be read that  
22 way, ought to be read that way, whether it makes sense to  
23 read it that way. What about -- does Canada have an  
24 income tax?

25 MR. DREEBEN: I'm not sure of Canadian tax law.

1 JUSTICE SCALIA: Well, let's assume --

2 MR. DREEBEN: In the context of this case --

3 JUSTICE SCALIA: -- Canada has an income tax.

4 Would you -- would you prosecute a Canadian who files a  
5 deceptive Canadian income tax return?

6 MR. DREEBEN: Not for using Canadian facilities  
7 to do so.

8 JUSTICE SCALIA: No, no, no, from this country.  
9 He's -- you know, he's a snow goose and is in Florida when  
10 he files his return.

11 JUSTICE SOUTER: He files it electronically.

12 JUSTICE SCALIA: Yeah.

13 MR. DREEBEN: The wire fraud statute is  
14 applicable to schemes to defraud, generally speaking. The  
15 questions in this case are whether there is a common law  
16 rule that should be read to provide background.

17 JUSTICE BREYER: One reason for it -- I just --  
18 you don't seem to know completely about Canadian law. How  
19 much do you know about the tax law of Vietnam? Because  
20 Los Angeles is filled with Vietnamese refugees, many  
21 communities of such people in the United States. Do we  
22 know how many of them perhaps might owe taxes under the  
23 law of Vietnam, and maybe are talking to each other about  
24 whether they really want to pay it?

25 MR. DREEBEN: I don't think this is a realistic

1 problem, Justice Breyer, that should require the Court not  
2 to read a statute whose language --

3 JUSTICE BREYER: Well, what about the wealth tax  
4 in France?

5 MR. DREEBEN: There are a variety of taxing  
6 schemes all across the world. The question that the  
7 United States has to make when it determines whether to  
8 prosecute a wire fraud scheme is whether it's in interest  
9 -- in the interest --

10 JUSTICE STEVENS: Mr. Dreeben, at the beginning  
11 of your argument, you said there were four federal  
12 interests you were going to identify. You've been able to  
13 identify one. You don't want them running around with guns.  
14 What are the other three?

15 MR. DREEBEN: The other three are --

16 MR. DREEBEN: The second one, which I began to  
17 allude to before hearing some questions about -- foreign  
18 government.

19 JUSTICE STEVENS: Before you were asked a brief  
20 question.

21 MR. DREEBEN: -- are that people who engage in  
22 schemes in this country are capable of then using the same  
23 techniques against victims in this country. The third  
24 reason is that the creation of international schemes to  
25 defraud, like the smuggling scheme in this case, poses

1 independent threats to the United States Government  
2 because international criminal organizations are  
3 particularly difficult for the United States to deal with.  
4 And the fourth reason is that it is an offense to a  
5 foreign government, the United States Executive Branch may  
6 conclude, to allow our soil and our wires to be used to  
7 perpetrate a smuggling scheme against a foreign government  
8 with the United States doing nothing about it.

9 JUSTICE GINSBURG: Well, if we're concerned  
10 about offending the foreign country, then isn't the way to  
11 go, in fact, the way Congress has gone in this area, we  
12 negotiate treaties? I mean, one of the reasons why we go  
13 the treaty route are the kind of problems that Justice  
14 Breyer brought up, we want to have reciprocal treaties.  
15 We want two things. We want to make sure that it's a  
16 basically fair system that we're dealing with. On the  
17 other hand, we want to say, "If we do anything with  
18 respect to your taxes, we want to make sure that we get  
19 the same benefit from you with respect to ours."

20 So never mind the revenue rule, isn't it  
21 pervasive that -- when it comes to enforcing tax claims,  
22 that the route that Congress has chosen to go, and the  
23 Executive, as well, has been the treaty route?

24 MR. DREEBEN: Justice Ginsburg, those are tax  
25 treaties designed to mutually assist the countries to

1 collect taxes. This is a prosecution directed at fraud.  
2 The collection of taxes in a cooperative, reciprocal  
3 manner between governments implicates very different  
4 interests than the United States has when it seeks to  
5 combat people who have intended to devise, or have  
6 devised, a scheme to defraud in the --

7 JUSTICE GINSBURG: One of --

8 MR. DREEBEN: -- United States.

9 JUSTICE GINSBURG: -- one of -- one of the last  
10 interests that you mentioned, about offending foreign  
11 governments, well, on the face of this, it would seem, the  
12 one that -- the country that's been done out of taxes is  
13 Canada, not the United States. So, we should help Canada,  
14 if it's interested in collecting revenue from these people  
15 or trying them for a criminal offense, to do that. It --  
16 I asked Ms. Brill, Have they been indicted in Canada? She  
17 said yes, but she said it's -- they had not -- there has  
18 not been a request for extradition. Is that -- is that --

19 MR. DREEBEN: That's my understanding, as well,  
20 Justice Ginsburg. And the pursuit of this prosecution by  
21 the United States reflects that when United States  
22 citizens engage in fraudulent conduct on our soil, our  
23 Government has a distinct interest, from Canada's  
24 interest, in pursuing the prosecution of this case.

25 JUSTICE SCALIA: How long has this statute been

1 on the books, this wire fraud statute? Pretty old  
2 statute.

3 MR. DREEBEN: 1952. And its antecedents are the  
4 mail fraud statute, which was enacted in 1872.

5 JUSTICE SCALIA: How many prosecutions like this  
6 have there been? When was the first one?

7 MR. DREEBEN: This --

8 JUSTICE SCALIA: For, you know, using the mails  
9 or interstate commerce to defraud a foreign government of  
10 taxes?

11 MR. DREEBEN: This type of prosecution became  
12 more common in the 1980s when Canada greatly increased its  
13 taxes on importation of tobacco and alcohol.

14 JUSTICE SCALIA: More common, or didn't exist at  
15 all before the 19- -- do you know of any case before --

16 MR. DREEBEN: No, I'm not aware of any case  
17 before --

18 JUSTICE SCALIA: -- before the 1980s?

19 MR. DREEBEN: That's right.

20 JUSTICE SCALIA: Doesn't that suggest to you  
21 that the statute isn't naturally read to cover stuff like  
22 that?

23 MR. DREEBEN: No, I think the statute --

24 JUSTICE SCALIA: We didn't have smugglers before  
25 then?

1           MR. DREEBEN: No, of course there were smugglers  
2 before then, but the statute, on its face, is broad. And  
3 the only justification -- the only two justifications for  
4 seeking to read it narrowly are, first, that there's a  
5 common law revenue rule that forms a backdrop for the  
6 construction of the statute. That is wrong, the  
7 Government submits, because there is no common law revenue  
8 rule that has ever been articulated that says one country  
9 cannot prosecute people in that country for defrauding a  
10 foreign government of tax --

11           JUSTICE SCALIA: What's the second reason?

12           MR. DREEBEN: The second reason is the claim  
13 that to deprive a foreign government of money by not  
14 paying tax revenues is not common law fraud.

15           JUSTICE SCALIA: Okay. Well, and you have  
16 arguments against both of those two. Which arguments  
17 are at least -- at least -- arguable? What about a  
18 third rule, the rule of lenity?

19           MR. DREEBEN: Well, Justice Scalia --

20           JUSTICE SCALIA: If we -- if we are unsure, if  
21 it's a close question whether it's property, if it's a  
22 close question whether we're enforcing the tax laws of  
23 Canada by prosecuting somebody for violating the tax laws  
24 of Canada, if that's a closed question, why doesn't the  
25 rule of lenity apply?



1           MR. DREEBEN: Well, if the Court concluded that  
2     the question was not susceptible of resolution by resort  
3     to the usual tools of statutory construction, then you  
4     would apply the rule of lenity. But it's our submission  
5     that neither of these two theories --

6           JUSTICE STEVENS: But may I ask this question?  
7     I think you have conceded, in a footnote -- and maybe  
8     you're -- almost conceded -- that if this were a RICO  
9     case, a civil RICO case, that the Congress enacted the  
10    RICO statute against this background rule and that perhaps  
11    the RICO case could not go forward. What if it were a  
12    federal RICO case and -- the same facts -- would the RICO  
13    statute be qualified by the revenue rule?

14          MR. DREEBEN: No, it would not, Justice Stevens,  
15    and that's because of the precise distinction that I drew  
16    in response to Justice Scalia's question. This is a suit  
17    by the United States Government, as Plaintiff, not by a  
18    foreign government, as Plaintiff or prosecutor. The  
19    revenue rule essentially concerned with interests of  
20    sovereignty. One foreign government should not be able to  
21    come into our courts and enforce its sovereign power by  
22    using our courts to collect taxes from our citizens.

23          JUSTICE BREYER: What about the other reasons  
24    underlying it, which is what I was trying to get at  
25    before? I see, literally, that the common law -- you

1 know, the enforcement rule, this is not literally  
2 enforcement. But what I was driving at with my questions  
3 is, even though literally it's not, the problems of  
4 complexity, the problems of knowability, and the problems  
5 of there being so many, many foreign tax laws that we  
6 might think are basically unfair, that those  
7 considerations apply here, just as they do with the  
8 enforcement rule, and then add the fact that turning  
9 people into criminals under threat of prosecution by the  
10 Federal Government is really very much equivalent to  
11 enforcing the foreign rule in a court. I mean, that's the  
12 whole thing spelled out. And I meant it seriously, though  
13 I used foreign examples to, sort of, drive the point home.

14 What is your response to that?

15 MR. DREEBEN: Well, Justice Breyer, first of  
16 all, the complexity of foreign tax law is something that  
17 would defeat a federal prosecution in which we need to  
18 show specific intent to defraud if the law were not  
19 sufficiently clear for us to be able to meet that burden.  
20 This case illustrates the kind of prosecution that will be  
21 brought. There are taxes that are due upon the  
22 importation of alcohol. The Petitioners arranged, through  
23 the wires, to bring alcohol from Maryland up to New York,  
24 and then they got it across the border by not answering  
25 questions when asked by customs officials and by not going

1 to secondary inspection when they were asked. In order to  
2 bring a criminal prosecution that requires specific intent  
3 to defraud, the government is not going to be relying on  
4 obscure systems.

5 As to the concern about the enforcement of tax  
6 systems that the United States may believe are -- is  
7 unfair, that is the prerogative of the Executive Branch to  
8 determine in deciding whether a prosecution should be  
9 brought in a particular case. This Court has repeatedly  
10 recognized that the Executive Branch is the preeminent  
11 branch in the area of foreign affairs --

12 JUSTICE GINSBURG: To go to one more aspect of  
13 the statute which I don't think you've addressed, Congress  
14 said that -- with respect to the wire fraud and mail fraud  
15 and, I think, other things -- that restitution to the  
16 victim is mandatory, that it's not left up to the  
17 government to decide restitution or not. Except here  
18 restitution sounds very much like enforcing Canada's  
19 taxes, so you have conceded no restitution. But it seems  
20 to me that Congress thought of the wire/mail fraud  
21 statutes as cases in which there would be restitution, and  
22 that suggests that they didn't envision foreign taxes to  
23 be the object of the scheme to defraud.

24 MR. DREEBEN: Justice Ginsburg, the syllogism  
25 doesn't track, because the entire scope of the revenue

1 rule, as defined in the common law cases that can be  
2 pointed to as the background principle, has to do with a  
3 foreign government, or someone acting on its behalf,  
4 coming into this country's courts to enforce its tax  
5 rules. Here what you have is the United States Government  
6 determining that it is in the interest of the United  
7 States to bring a criminal prosecution.

8 Now, in this case, the prosecutor did concede  
9 below that restitution was not appropriately ordered.  
10 That's not the position of the United States. The  
11 position of the United States is that restitution under  
12 the mandatory statute should be ordered and it does not  
13 infringe the revenue rule. But there are --

14 JUSTICE GINSBURG: Now, how could that be,  
15 because restitution is to the victim? The victim is  
16 Canada. You collect Congress -- or Canada's tax, and you  
17 give it to Canada. Is there any other kind of  
18 restitution?

19 MR. DREEBEN: No, there isn't, Justice Ginsburg,  
20 but the revenue rule isn't of such a broad scope that it  
21 applies to efforts by the United States Government to  
22 secure punishment by -- for a criminal conviction.

23 But, Justice Ginsburg, if the Court were to  
24 disagree with that and were to believe that restitution,  
25 even when it's been sought by the United States -- not by

1 a foreign government, in its own right, with the power to  
2 instigate a lawsuit -- but that even when the United  
3 States does it, that somehow falls within the parameters  
4 of the common law revenue rule, then the answer to that  
5 problem would be to interpret the restitution statute  
6 against the background of the revenue rule, not to  
7 interpret the wire fraud statute against the background of  
8 the revenue rule and hold that a prosecution by the United  
9 States is wholly barred.

10 The Petitioner's submission here is really  
11 rather extraordinary --

12 JUSTICE SCALIA: The restitution statute is not  
13 ambiguous at all; whereas, this statute has a number of  
14 ambiguities in it. And if I had to find my way out of the  
15 restitution problem, I would pick the ambiguous statute to  
16 get out, rather than simply saying, "Well, though this  
17 restitution statute says this categorically, we will  
18 ignore it, because if we didn't ignore it, we would be  
19 enforcing the revenue laws of another country." There's  
20 nothing against enforcing the revenue laws of another  
21 country, if we want to; this is just a question of  
22 statutory interpretation. Should this ambiguous statute  
23 be interpreted that way? If Congress said, "We're going  
24 to enforce Canada's tax laws," there's nothing wrong with  
25 that. But --

1 MR. DREEBEN: Justice Scalia --

2 JUSTICE SCALIA: So you have two statutes. One  
3 of them seems to be quite ambiguous. The other one is  
4 categorical, you get restitution in all cases. Now, how  
5 do I wiggle out of it?

6 MR. DREEBEN: There's a difference --

7 JUSTICE SCALIA: Obviously, I wiggle out of  
8 it with the ambiguous statute.

9 MR. DREEBEN: -- there's a difference, Justice  
10 Scalia, between an ambiguous statute and a broad statute.  
11 The wire fraud statute is unequivocally broad, and it has  
12 been so interpreted. It's not ambiguous on the question  
13 of whether it applies to schemes to defraud that may  
14 involve foreign victims; it says "any scheme to defraud."  
15 And I think, as Justice Kennedy's questions pointed out  
16 earlier, if there were a scheme to defraud a foreign  
17 business interest in Canada or a foreign governmental  
18 interest in Canada relating to some commercial venture,  
19 the wire fraud statute would apply, and --

20 JUSTICE BREYER: What about -- what about a  
21 scheme --

22 JUSTICE SCALIA: But you haven't told me -- you  
23 haven't told me how you get out of the restitution  
24 statute. There's no ambiguity there, and it is not a rule  
25 of law that you can't -- it's unconstitutional to enforce

1 the tax laws of Canada. Since it's entirely feasible, and  
2 since the text is categorical, how do you get out of the  
3 restitution statute?

4 MR. DREEBEN: Here is how I get out of it,  
5 Justice Scalia. If you think, as I do not, that the  
6 revenue rule would bar restitution at the behest of the  
7 United States in a criminal prosecution, there is a  
8 background principle that says when there is an  
9 established rule of the common law, Congress legislates  
10 against that background, and unless it makes its intent  
11 clear and unequivocal to overcome that background rule of  
12 the common law, then the statute will not be interpreted  
13 to be in derogation of it. It was that principle that  
14 formed the basis for the government's view that Canada  
15 cannot come in under the RICO statute --

16 JUSTICE GINSBURG: Well, that view is in --  
17 somewhat in tension with your view that the common law  
18 revenue rule doesn't stand in the way of this prosecution.  
19 If you have to interpret the statute in light of the  
20 general rule that one country doesn't mess with another  
21 country's taxes, absent a treaty.

22 MR. DREEBEN: Well, Justice Ginsburg, there is  
23 no common law rule that one country doesn't mess with  
24 another country's taxes. What there are, are a set of  
25 cases that deal with specific problems in which foreign

1 taxes were at issue. And in all of the 20th century  
2 versions of this problem, what you had is a foreign  
3 government or an entity, acting at the behest of a foreign  
4 government, coming into another country seeking to use  
5 that country's courts to enforce its own tax rules. And  
6 in that context, the justifications for saying that one  
7 country will not enforce another country's revenue laws  
8 have to do with the sovereignty interests of the host  
9 country.

10 One country, when it seeks to obtain revenue to  
11 carry out its own governmental policies, is doing  
12 something fundamental to its sovereign existence, and  
13 there's no obligation of the United States to assist the  
14 foreign government in using its court system to achieve  
15 those independent sovereign aims, no prohibition on it,  
16 either. As Justice Scalia pointed out, it's not  
17 unconstitutional, if Congress wanted to allow it. But  
18 countries, historically, have not. And that principle  
19 does form an important backdrop --

20 JUSTICE BREYER: Have countries also -- just --  
21 here, I don't know, in respect to the principle -- would  
22 it have been viewed as contrary to the principle if a  
23 country were to pass a law -- say, England were to pass a  
24 law saying it is a crime in England not to pay French  
25 taxes? I'm not saying they couldn't do it; I'm just



1 saying, would a law like that, saying it is a crime in  
2 England not to pay French taxes -- would it have been  
3 viewed as contrary to an abrogation of -- or a -- you  
4 know, whatever you call it -- a derogation from the common  
5 law revenue rule?

6 MR. DREEBEN: I think that that's essentially  
7 the same question in this case, with the one significant  
8 difference that here there is a domestic --

9 JUSTICE BREYER: But do you see why I want to  
10 characterize it? I mean, would you characterize -- my  
11 criminal statute's absolutely clear -- the clear is, it is  
12 a crime in England not to pay French taxes. Now, would  
13 you, or would scholars, or whoever, knew about the common  
14 law revenue rule, would they have said, "There is a  
15 derogation from the common law revenue rule," or would  
16 they have said, "It has nothing to do with it"?

17 MR. DREEBEN: Well, I don't know what scholars  
18 would have said about it --

19 JUSTICE BREYER: No, what would you have said?

20 MR. DREEBEN: This is what I would say  
21 about it.

22 JUSTICE BREYER: Yeah.

23 MR. DREEBEN: When you're dealing with the  
24 principle that a statute of the United States will not be  
25 construed to be in derogation of a common law unless it's

1 clear that that's its purpose, the Court should be very  
2 careful in defining what the parameters of the common law  
3 are. The Court should not take a common law rule and  
4 treat it as some dynamic entity that has capability of  
5 growing a dimension that is not consistent with its  
6 purposes and that it had never assumed in any decided case  
7 as a means of telling Congress, "You can't do what you  
8 have done."

9 So I would say, Justice Breyer --

10 JUSTICE SCALIA: We haven't told -- no, no, no,  
11 no, no, no, we're not telling Congress, "You can't do what  
12 you have done." We're saying, "Congress hasn't done  
13 this."

14 MR. DREEBEN: Well, the only reason you would  
15 say that Congress hasn't done it, Justice Scalia, is if  
16 you concluded that -- and I would ask Petitioners what  
17 their best citations are, because I have not been able to  
18 find them -- what cases indicate that a country cannot  
19 bring the kind of prosecution that the United States did  
20 here to vindicate its own independent sovereign --

21 JUSTICE BREYER: Nobody says they can't do it.  
22 That's why I asked you my question. My question is simply  
23 whether you would consider an absolutely clear law -- we  
24 will -- we -- it is a crime not to pay your French taxes.  
25 I'm asking whether you would consider that -- I'm not

1 saying they can't do it; I just want to know -- would it  
2 be in derogation of the common law principle?

3 MR. DREEBEN: It would probably be in derogation  
4 of a more --

5 JUSTICE BREYER: That's what --

6 MR. DREEBEN: -- fundamental principle.

7 MR. DREEBEN: Not the revenue rule --

8 JUSTICE BREYER: Not the --

9 MR. DREEBEN: -- but a more fundamental  
10 principle that one country usually does not legislate with  
11 respect to extraterritorial acts.

12 JUSTICE BREYER: That would be another one, too.

13 MR. DREEBEN: But if you --

14 JUSTICE BREYER: Suppose they -- I -- that's why  
15 I want to know --

16 MR. DREEBEN: But that's not applicable here,  
17 either, Justice Breyer, because the crime involves wire  
18 fraud in the United States.

19 JUSTICE SOUTER: Yeah, but why isn't it applicable  
20 to the extent that there seems to be a mandatory obligation  
21 to order restitution? And it seems to me that the  
22 restitution that would be ordered would be just as much in  
23 derogation of the common law principle as the out-and-out  
24 collection in Justice Breyer's example.

25 MR. DREEBEN: Justice Souter, again, to say that

1 it's in derogation of the common law principle assumes  
2 that the common law principle has applicability to one  
3 country seeking to vindicate interests of its --

4 JUSTICE SOUTER: Well, but I -- a moment ago,  
5 you said, "Okay, we'll assume that there would be some  
6 derogation," in Justice Breyer's example. I don't see why  
7 you don't come to the same conclusion with respect to the  
8 restitution aspect here.

9 MR. DREEBEN: Because the derogation that I was  
10 talking about with respect to Justice Breyer is punishing  
11 conduct that occurs entirely extraterritorially. This is  
12 not conduct that occurs entirely --

13 JUSTICE SOUTER: Yeah, but the revenue -- the  
14 revenue rule does not rest simply on the rationale of non-  
15 extraterritorial enforcement. It has -- it has other  
16 rationales: difficulty of understanding what the revenue  
17 rule is; the -- you know, the problems of policy; there  
18 are lots of revenue rules in foreign countries that we  
19 certainly wouldn't want to enforce, and so on. It's not  
20 just extraterritoriality. And those -- those policies  
21 would be just as much implicated by the -- by the  
22 restitution as by the out-and-out enforcement in Justice  
23 Breyer's example.

24 MR. DREEBEN: Well, Justice Souter, I think that  
25 the policies underlying the revenue rule are narrower than

1 the ones that you have articulated; but, even more to the  
2 point, they are not justifications that found their way  
3 into any holdings that would lead a reasonable legislator  
4 in 1952, when the wire fraud statute was enacted, to  
5 conclude that this is a rule that I'm going to have to  
6 specifically --

7 JUSTICE SOUTER: Well, perhaps --

8 JUSTICE SCALIA: Well -- I'm sorry.

9 JUSTICE SOUTER: No, go on.

10 JUSTICE SCALIA: No, you.

11 JUSTICE SOUTER: I was going to say, perhaps  
12 there were no specific holdings, because it would have  
13 been regarded as, kind of, a bizarre derogation of the  
14 rule in the first place. Nobody had dreamed up this  
15 scheme earlier.

16 JUSTICE SCALIA: I was about to say the same --  
17 the same thing. You keep saying there are no cases that  
18 do this. Are there -- are there -- are there cases,  
19 before 1980, which do what you want to do -- that is, to  
20 use our fraud law, or something, to effectively enforce  
21 Canada's -- or some foreign country's tax law?

22 MR. DREEBEN: No, but what I would say about --

23 JUSTICE SCALIA: No.

24 MR. DREEBEN: -- the revenue rule is that it is  
25 a shrinking principle of the common law, not one that has

1    been growing.  It originally started out as a principle  
2    that allowed countries to avoid invalidating contracts  
3    that they believed were in furtherance of commerce.  It  
4    gradually came under attack, because what it said is that  
5    the United States will not notice that a foreign country's  
6    laws have been violated in the formation of a contract,  
7    and so the contract will be enforced.  Commentators  
8    recognized that that was contrary to principles of comity  
9    and recognition that each country does have a reciprocal  
10   interest in acknowledging each other's laws.

11               In the 20th century, those contract cases  
12   completely drop out of the picture, and what becomes left  
13   are sovereignty cases where a country is seeking to exert  
14   its sovereign power inside the United States or inside a  
15   foreign country -- the United States, itself, tried it  
16   once in Canada -- to collect taxes.  And countries said,  
17   "We're not going to do that.  We're going to leave it to  
18   the treaty process."

19               But the rationales that Justice Breyer and  
20   Justice Souter have articulated, about complexity of  
21   foreign law and odious foreign tax systems, have never  
22   been the driving force behind the revenue rule.  It's been  
23   --

24               JUSTICE BREYER:  I got your point.  I think it  
25   is that -- in my answer to my clear example, you would

1 say no, that's not in derogation for the reason that  
2 there's an independent local reason for doing it. It's  
3 not being done to -- whether it has that effect or not,  
4 it's not being done in order to collect the foreign tax.

5 MR. DREEBEN: That's right.

6 JUSTICE BREYER: That's been your response  
7 throughout.

8 MR. DREEBEN: That is correct.

9 JUSTICE BREYER: Okay, I --

10 MR. DREEBEN: What you have instead is a law of  
11 the United States that's enacted to serve perfectly valid  
12 interests that the United States Government has in rooting  
13 out fraud in this country and in dealing with schemes to  
14 defraud that are created here. And for the Court to say  
15 that, "We don't like these kinds of prosecutions, because  
16 we're concerned about really bad foreign tax systems, and  
17 we're concerned about complicated law, and we're concerned  
18 that some common law rule that had never actually assumed  
19 the scope that Petitioners ascribed to it, should be  
20 formed -- read as the background principle for the  
21 interpretation of this statute" is not a principle that  
22 finds any support in the construction of federal --

23 JUSTICE GINSBURG: Mr. Dreeben, can I ask you --  
24 this is such a curious case. You were very candid in  
25 telling us that when Canada put these astronomical taxes

1 on tobacco and alcohol, that was almost an invitation to  
2 smugglers. Did we have any discussions with Canada -- I  
3 mean, they do have that border, which is rather easy to  
4 cross -- about what we were going to do when they put the  
5 taxes on liquor sky-high?

6 MR. DREEBEN: I am not aware, Justice Ginsburg,  
7 of what specific law enforcement conversations occurred,  
8 but I can tell you that there is extensive law enforcement  
9 cooperation with Canada, as a close neighbor, and that the  
10 interests of the United States very much do favor our  
11 policing against smuggling here, and Canada policing  
12 against smuggling there.

13 Thank you.

14 JUSTICE STEVENS: Thank you, Mr. Dreeben.

15 Ms. Brill, you have four-and-a-half minutes  
16 left.

17 REBUTTAL ARGUMENT OF LAURA W. BRILL

18 ON BEHALF OF PETITIONERS

19 MS. BRILL: Thank you.

20 The common law cases universally say that it  
21 does not matter who is bringing the claim. It can be the  
22 foreign government or it can be another person.

23 JUSTICE STEVENS: Can I just ask you to tell us  
24 what your strongest case is? Because they did raise that  
25 question.



1 MS. BRILL: Sure. On the -- on the issue of the  
2 identity of the person bringing the claim, the contract  
3 cases, Holman and Boucher, stand for that proposition, and  
4 the Peter Buchanan case, which came down in 1950, just  
5 before the wire fraud statute was enacted -- this was in  
6 the Appellate Court in Ireland -- it says, "It is not a  
7 question whether the plaintiff is a foreign state or the  
8 representative of a foreign state or its revenue  
9 authority. In every case, the substance of a claim must  
10 be scrutinized. And if it then appears that it is really  
11 a suit brought for the purpose of collecting the debts of  
12 a foreign revenue, it must be rejected." That's at 1955  
13 A.C. 529.

14 And so with the -- with the Mandatory  
15 Restitution Act, this clearly is something to collect the  
16 debts of a foreign nation. And the sentencing scheme that  
17 Justice Ginsburg alluded to earlier, in which the  
18 sentences were enhanced based on the intended loss,  
19 demonstrate that this is an enforcement action.

20 Stringam versus Dubois, which is an Alberta  
21 case from 1992, involving -- the plaintiff there was an  
22 executor of a probate estate, and the court said, "The  
23 identity of the plaintiff in the action is not vital if  
24 the action indirectly has the effect of enforcing revenue  
25 laws of a foreign country." That's at 135 A.C. at page

1 70.

2 And the way the revenue rule has been cited  
3 repeatedly is that it -- what it prevents is not just  
4 direct enforcement, but direct or indirect enforcement.  
5 And so it is -- the fact that there have not been criminal  
6 prosecutions, it clearly would have been in derogation of  
7 the common law for a -- for England to pass a statute  
8 saying it is criminal in England to break the laws of  
9 France.

10 JUSTICE BREYER: See, he's saying it isn't, for  
11 the reason that, he says, that if England did it for  
12 independent reasons, it wasn't doing it because it wanted  
13 to help France get it's money, that then it wouldn't have  
14 been in derogation. Of course, it would have been legal,  
15 either way, but he says it wouldn't have been in  
16 derogation, for that reason.

17 MS. BRILL: Right. Well, it clearly would have.  
18 There was no common law practice -- we have -- we have not  
19 found, in all the research -- and the Government has not  
20 found -- any example of a criminal prosecution -- not just  
21 in this country; anywhere in the world -- to -- deriving  
22 from the violation of a foreign government's tax. And so  
23 --

24 JUSTICE SOUTER: You're saying, in effect, that  
25 derogation is an effects test, not an intent test.

1 MS. BRILL: Yes, Your Honor. Yes, Justice  
2 Souter.

3 And the -- in terms of what the government's  
4 interests are, there were no deceptive acts in this  
5 country. The way the Government gets a material  
6 misstatement is by a failure to disclose at the Canadian  
7 border, which only -- even though they did not put in  
8 evidence of what the -- that Canada even had a law  
9 requiring disclosure, the only way there could have been  
10 any kind of material misstatement would be if Canadian law  
11 required it, not if -- not anything that happened in the  
12 United States.

13 In Cleveland, the Court was very clear to point  
14 out -- one of the reasons to adopt a rule of lenity in  
15 interpreting the mail fraud statute and the wire fraud  
16 statute is because violations serve as a predicate for  
17 RICO actions and for money-laundering violations. And so  
18 what the government's position is, is that we should carve  
19 out this ad-hoc exception and allow wire fraud  
20 prosecution, even though we would not allow any kind of a  
21 civil RICO action and even though we're going to have an  
22 ad-hoc exception for the Mandatory Victims Restitution  
23 Act. But what the Court said in Cleveland is, the way we  
24 should do this is by adopting a proper interpretation in  
25 the first place, not by -- of the wire fraud statute --

1 not by having ad-hoc exceptions.

2 And the reference to prosecutorial discretion  
3 that there should be faith that the Government will only  
4 prosecute, I guess, what the Government regards as  
5 exceptional cases is not something that can provide any  
6 business involved in an international transaction with any  
7 -- with any comfort.

8 And thank you very much.

9 JUSTICE STEVENS: Thank you. The case is  
10 submitted.

11 (Whereupon, at 12:13 p.m., the case in the  
12 above-entitled matter was submitted.)  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25