

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 CARL W. CLEVELAND, :
4 Petitioner :
5 v. : No. 99-804
6 UNITED STATES :
7 - - - - -X
8 Washington, D.C.
9 Tuesday, October 10, 2000
10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:02 a.m.
13 APPEARANCES:
14 PAUL MOGIN, ESQ., Washington, D.C.; on behalf of
15 the Petitioner.
16 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf of
18 the Respondent.
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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 99-804, Carl W. Cleveland v. The United
5 States.

6 Mr. Mogin.

7 ORAL ARGUMENT OF PAUL MOGIN

8 ON BEHALF OF THE PETITIONER

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

11 The issue in this case is whether for purposes
12 of the Federal mail fraud statute a State or municipality
13 parts with property when it issues a license. In this
14 case, the Fifth Circuit has used a novel concept of
15 property to give the Federal Government the power to
16 police State and local license applications under the mail
17 fraud statute when State and local governments are fully
18 capable of administering and implementing their own
19 licensing schemes and punishing misconduct involving
20 licensing schemes when it occurs.

21 QUESTION: What would they be punished under?
22 What kind of State laws would cover --

23 MR. MOGIN: Well in this case, for example,
24 there's a false statement provision in the Louisiana video
25 poker statute.

1 QUESTION: And that's fairly standard in State
2 licensing schemes?

3 MR. MOGIN: I think it is, that there be a --
4 that false statements are ordinarily punished --
5 punishable by criminal provisions. I can't say that we've
6 undertaken a survey of that.

7 In addition, in the area of gambling, Justice
8 Scalia, 18 U.S.C. 1955 is available for conducting an
9 illegal gambling enterprise and, in fact, that was one of
10 the charges here. Petitioner was acquitted on it, and the
11 very theory was that the gambling operation was illegal
12 because of alleged false statements in the license
13 applications, so -- and that had also been the charge in
14 the Salvatore case, so that would be --

15 QUESTION: Is it the case that the same would
16 apply to a Federal agency? This is not -- the statute is
17 not peculiarly directed at State agencies.

18 MR. MOGIN: That's correct, Justice Ginsburg.
19 Most of our argument would apply if this was a Federal
20 agency, although in this case we have the United States v.
21 Bass and the principle about not lightly interpreting
22 statutes to reach --

23 QUESTION: But in any case it would be -- any
24 application for a permit to a Federal authority would be
25 susceptible to the same argument. There's no distinction

1 that's being made, a Federal power against the State as
2 against the Federal Government.

3 MR. MOGIN: Under the Fifth Circuit's analysis I
4 think it would be possible that a Federal license
5 application perhaps could be prosecuted if it met the
6 Fifth Circuit's test, which is somewhat difficult to
7 discern from the opinion, but there's nothing in what the
8 Fifth Circuit says that would confine it to a State
9 application, if that answers your question.

10 QUESTION: Or in the statute.

11 MR. MOGIN: Right.

12 QUESTION: Mr. Mogin, I think it would be
13 helpful if we focused somewhat on the statutory language
14 in this case to figure out what it covers, and we have to
15 read it, I suppose, in light of this Court's decision in
16 McNally, which does appear to suggest that it -- the
17 statute covers only the scheme to defraud the victim of
18 money or property, although the statute doesn't say so in
19 so many words.

20 Now, let me ask you this. Here, I take it the
21 State did more than just issue a license. It issued a
22 license with an ongoing substantial revenue component for
23 the State. It wasn't just a one-time payment of a license
24 fee and then you have this forever. It contemplates, does
25 it not, the payment of substantial amounts of money to the

1 State thereafter, and does that distinguish it, or make it
2 somehow more of a property interest than otherwise might
3 be the case?

4 MR. MOGIN: Justice O'Connor, there is no
5 question the State is taking a substantial share of the
6 revenue from video poker operations in Louisiana, but we
7 don't see how that gives rise to any property interest.
8 Certainly, under the analysis in College Savings Bank,
9 cited by this Court in 1999, the fact that there's a
10 pecuniary interest involved would not establish a property
11 right.

12 QUESTION: Well, taking money from the victim is
13 covered, according to McNally, so is it taking money from
14 the State, in a sense, because of this revenues --

15 MR. MOGIN: No, Justice O'Connor, we would say
16 it is not. To the contrary, the State views video poker
17 operations as a source of revenue for the State, and it
18 has been a very significant source of revenue for the
19 State. There was no allegation in this case that anything
20 was not paid that shouldn't have been paid in terms of the
21 State's pro rata share and, really, the States here --

22 QUESTION: Did the State ever argue that it has
23 an interest in assuring the users of these machines that
24 the operators are honest and that by this alleged
25 misstatement the goodwill, the confidence that the State

1 has in its own licenses is somehow diminished, and that
2 that's a taking of property, and of course you might say
3 this is intangible property, but did they ever make that
4 sort of argument?

5 MR. MOGIN: No, I don't believe that that
6 argument has been made by the Government and, of course,
7 there's no question that the regulatory scheme is designed
8 to ensure the honesty and suitability of licensees. That
9 argument was not made, that I recall. I mean, there's
10 been no question that the licensing process serves a
11 legitimate purpose to identify appropriate licensees, but
12 it's hard to see how that would be a property --

13 QUESTION: Are the licenses limited in number?

14 MR. MOGIN: No, they're not, Justice Kennedy.

15 QUESTION: Would that have made a difference?

16 It would be like a taxi cab medallion in New York or
17 something?

18 MR. MOGIN: Well, it's our position that even if
19 there were a limitation to some large number of licenses,
20 that the same analysis would apply, but certainly that
21 would be a factor to consider, and when you get to a very
22 limited number of licenses, you may have a different
23 analysis, because then there's -- people are actually
24 competing with each other for a license, and something
25 important is being given away by the State.

1 QUESTION: Well, but even in that case, how
2 would it affect any property interest of the State, unless
3 you could show that the person who got the license somehow
4 intended to exercise the rights under it, less than some
5 other holder might have done, and thereby produce less
6 revenue from the State, which is at least on the face of
7 it counterintuitive, because the State and the licensee
8 has the same interest in maximizing the amount of gambling
9 that goes on, but save in that odd situation, how would a
10 limited number of licenses affect your property analysis?

11 MR. MOGIN: Well, I think that you're right, the
12 mere fact that there's a limitation on the number would
13 not, in our view, give rise to a property deprivation.
14 It's one factor to consider, and --

15 QUESTION: Would it be a basis for saying that
16 there is a property interest at all, where there is not,
17 as you argue, under these circumstances?

18 MR. MOGIN: Well, we think the term license is
19 used in many different contexts, radio licenses, whatnot.
20 There may be situations in which the State is giving away
21 only one or 5 or 10 licenses, and our analysis doesn't
22 foreclose what would happen in such a case, but here
23 there's a mere grant of Government permission. There's
24 nothing in what the Government is doing that can be
25 analogized to giving away an easement. The applicants are

1 not competing with each other, so I simply --

2 QUESTION: That would be true if there were just
3 one license being given away, if there were only one
4 gambling casino allowed in the whole State. I mean, you
5 know, do you stand by your analysis or not? It seems to
6 me if you stand by your analysis you have to say -- it
7 would be a more appealing case, I suppose, if there were
8 only one license, but on the analysis that you've brought
9 us, even if there's only one license, there's no property
10 involved, isn't that right?

11 MR. MOGIN: That is our position, Justice
12 Scalia. The one -- the difference is, if there were only
13 one license, then the State really would be losing
14 something in giving away the license. We still would not
15 think that that's a property right, but there's certainly
16 no clear definition in the cases of what property is.

17 QUESTION: Well, I don't --

18 QUESTION: How does the State lose something
19 giving away one license, but not lose something giving
20 away a number of licenses?

21 MR. MOGIN: Well, if -- Mr. Chief Justice, if
22 there were only one license available, and if it were
23 understood that once given it couldn't be taken back, then
24 perhaps it could be said that the State was losing
25 something because by giving the license it lost the

1 ability to give it to anyone else.

2 QUESTION: But that's true if it gives away 10
3 licenses or 100 licenses, doesn't it?

4 MR. MOGIN: Well, in this scheme, if 10 licenses
5 are given out for video poker --

6 QUESTION: Oh, I see. If it's an infinite
7 number, sure, they can always create one more license, but
8 I don't see how that affects the property analysis as
9 opposed to a regulatory analysis.

10 MR. MOGIN: And we don't disagree. The
11 additional point we'd make is that there's no reason to
12 stretch the concept of property, as the Fifth Circuit did
13 in this case. State licensing schemes, of course, are
14 designed, drafted, implemented by State and local
15 officials. Those are the officials that are in the best
16 position to interpret them, to decide whether they've been
17 violated in a particular case. This case, in fact, arose
18 during the early years of the Louisiana video poker
19 scheme, and State and local officials can decide the
20 appropriate sanction, if there is misconduct.

21 Now, the Government argues that this license is
22 special because the State has a substantial economic stake
23 in the -- in video poker operations. We would respond,
24 since when has the existence of a property right depended
25 on something as amorphous as whether there's a substantial

1 economic stake, or the reach of a criminal statute?
2 That's not an appropriate test for defining criminal
3 liability.

4 There would be a whole host of questions that
5 would be raised under the Government's theory. How much
6 is substantial? Is it a dollar amount that counts?
7 Should it be the percentage? Does it matter what other
8 revenues the licensing authority has, so that it might
9 have a different situation if the license was issued by a
10 poor rural county as opposed to a wealthy, suburban
11 county.

12 QUESTION: Mr. Mogin, what do you do with the
13 Government's argument that under the second clause of the
14 statute you don't need a victim? They obtain money
15 pursuant to a scheme to defraud, and so forth and so on.

16 MR. MOGIN: Justice Stevens, we have a number of
17 responses to that. Passing over the procedural point
18 which is made in our brief, that is not before the Court,
19 because it wasn't raised until the brief on the merits.

20 QUESTION: An alternative basis to affirm.

21 MR. MOGIN: Right. We've argued in our brief
22 that under the Tuttle decision and other decisions this
23 Court has only rarely considered issues raised by the
24 respondent for the first time in the brief on the merits,
25 but on the merits of the point, the Court was unanimous in

1 McNally that the 1909 amendment merely codified Durland,
2 and McNally held that the statute is limited in scope to
3 the protection of property rights, and that when the
4 Government is the alleged victim, and I quote, any benefit
5 which the Government derives from the statute must be
6 limited to the Government's interest as property holder.

7 So that was then reaffirmed -- the basic holding
8 was reaffirmed in Carpenter, and I think it was a premise
9 of Neder, the Neder decision in 1999 as well, as we've
10 explained in our brief, and we've also covered the
11 background of the 1909 amendment in our brief, the
12 commission report, which there's really no suggestion that
13 Congress was attempting to create a new basis of
14 liability.

15 QUESTION: How many years since McNally?

16 MR. MOGIN: 13 years. That was decided in 1987.

17 QUESTION: So we can assume that someone in
18 Congress knew of this Court's interpretation and could
19 have done something about it if it disagreed.

20 MR. MOGIN: That's right, Justice Ginsburg, and
21 in fact in 1988 the statute was amended to deal with
22 honest services cases, which had been thought to be the
23 most important application of intangible rights doctrine,
24 and those were brought under the statute if there was a
25 deprivation of honest services.

1 Even today, just acquiring someone's services is
2 not enough. You have to have a scheme to deprive another
3 of honest services, but Congress in 1988 did not otherwise
4 change the McNally ruling, even though it was fully aware
5 of it.

6 QUESTION: Would you give me an example -- maybe
7 the most obvious example you can think of -- of the
8 deprivation of honest services? I may not understand what
9 that term refers to.

10 MR. MOGIN: Justice Souter, that refers to the
11 principle that an employer has a right to expect that an
12 employee will provide honest services, and so --

13 QUESTION: What kinds of acts would be
14 forbidden?

15 MR. MOGIN: A scheme involving kickbacks, for
16 example, where the employee is paid a kickback to divert
17 business.

18 QUESTION: Basically any kind of corruption on
19 the part of the employee.

20 MR. MOGIN: Yes.

21 QUESTION: Yes.

22 MR. MOGIN: The theory that the Government has
23 presented a substantial economic stake, if adopted, would
24 raise all kinds of thorny applications, thorny questions
25 in application, which would be particularly troublesome,

1 because it's a criminal statute, so the trial judges would
2 be required to explain the standard to the jury so the
3 jury could apply it in a particular case, and that makes
4 the situation particularly intolerable.

5 The State's expectation of receiving revenue
6 simply does not mean that when the State issues a license
7 it parts with property. To go back to the College Savings
8 Bank case, I think that makes it clear that even business
9 in the sense of -- the Court said business in the sense of
10 the activity of doing business and making a profit is not
11 property, so the State's mere expectation of obtaining
12 revenue after a license is issued.

13 QUESTION: Are there other licenses, State
14 licenses where the Government's revenue is a percentage of
15 the proceeds of the business, as distinguished from the
16 tax on the income?

17 MR. MOGIN: Well, yes, in the area of hotels, of
18 course, rooms are taxed generally based on occupancy, so
19 that in New York City, for example, the city would obtain
20 very substantial revenue from the occupancy tax. Formerly
21 it was over 20 percent. In the mid-nineties it was
22 reduced to about 15 percent. Now, that's called a tax.

23 QUESTION: Some States administer their sales
24 tax by issuing licenses to do business, don't they, and
25 all it means is that you have to pay a sales tax on your

1 gross receipts.

2 MR. MOGIN: That's common, and taxes can be
3 quite substantial, and the Governments raise money, of
4 course, through fees and charges of all sorts, not merely
5 assessments that are called taxes, so the fact that the
6 State is getting significant revenue here -- I don't know
7 why that indicates that it's losing property when it
8 issues the license.

9 QUESTION: Mr. Mogin, I can probably find this
10 out myself, but on this issue, had this issue arisen
11 before McNally was decided? I know there were a bunch of
12 post McNally cases.

13 MR. MOGIN: Well, there were limited instances,
14 and there was case called United States v. Green, brought
15 in California, a prosecution involving obtaining a
16 driver's license, and the State prosecuted that under the
17 intangible rights theory. That's really the only clear
18 case that I'm aware of.

19 There are a couple of cases involving licenses,
20 and because the intangible rights theory had been widely
21 accepted in the courts of appeals, that was the doctrine
22 that was generally relied on when a license was involved.
23 So it's our submission --

24 QUESTION: What about an automobile license, a
25 vehicle license?

1 Supposing there's a fraudulent application for a
2 vehicle license and the Government says, well, we did part
3 with property, it cost us 76 cents to make that license,
4 although they get \$300 for it.

5 MR. MOGIN: Well, the courts of appeals at least
6 I think have been in agreement that the mere cost of
7 printing the paper for the license is to de minimis to
8 support a charge, and so the analysis has focused on
9 whether some other -- on some other basis it can be said
10 that the State is losing property.

11 We think the Government's theory of liability in
12 this case is contrary to traditional law, is not supported
13 by any established concept of property, and of course the
14 Government is doing this in a criminal case.

15 Civil RICO plaintiffs, of course, could take
16 advantage of the theory if it were endorsed by the Court,
17 and the very novelty of the theory makes an inadequate
18 basis for injecting Federal law into the area of State
19 laws, local licensing, so for that reason we submit the
20 petitioner's conviction should be reversed.

21 If there are no further questions, I reserve the
22 balance of my time for rebuttal.

23 QUESTION: Very well, Mr. Mogin. Mr. Dreeben,
24 we'll hear from you.

25 ORAL ARGUMENT OF MICHAEL R. DREEBEN

1 ON BEHALF OF THE RESPONDENT

2 MR. DREEBEN: Mr. Chief Justice, and may it
3 please the Court:

4 A video poker license is property both in the
5 hands of the State and in the hands of the licensee.
6 Petitioner's scheme therefore violates both the first and
7 the second clauses of the mail fraud statute.

8 I'll address first why a video poker license is
9 property in the hands of the State. A video poker license
10 represents the State's right to a stream of payments from
11 an enormously lucrative business, a business that the
12 State has absolute power to conduct itself. Instead of
13 conducting the business itself, the State franchises that
14 opportunity to private individuals while asserting control
15 over every aspect of the business and retaining a right to
16 a large share of the revenues. By --

17 QUESTION: How has that property interest been
18 infringed in any way, because there's no claim, as I
19 understand it, and I don't know whether your argument
20 suggests that there was any intent here to deprive the
21 State of its licensing fees, and no intent here to deprive
22 the State of its percentage, and no intent here, in
23 effect, to conduct less gambling than would otherwise be
24 possible in order to minimize revenue, so even if we
25 accept your theory that there are property interests that

1 the State can claim, how have any of them been infringed
2 on the allegations of this complaint?

3 MR. DREEBEN: Justice Souter, I would agree that
4 if there were a direct fraud at money or property of the
5 State in a tangible form or in a financial form, that
6 would be an easier case than this one.

7 This case, I suggest the best way to look at it
8 is to start from the premise that the State is to be
9 treated as any property owner under the mail fraud
10 statute. It is to be no less and no more protected than a
11 private individual similarly situated, and to understand
12 how the State loses property, you have to compare the
13 State to a similarly situated private individual.

14 Now, the two analogies that most readily show
15 how the State loses an intangible property right are a
16 private franchise business, which has the right to
17 exercise franchises and grant franchises to private
18 parties, and has a contract right not to be defrauded in
19 choosing the franchisees that it chooses.

20 QUESTION: But I don't see where the fraud comes
21 into it. In other words, the only basis upon which I can
22 see any fraud here, if we start with the assumptions that
23 I made, that there's no claim that they were minimizing
24 business or skimping on the percentage or whatnot, the
25 only basis to say that there has been -- that the State

1 has been defrauded of something is to say that the
2 property right must be some kind of metaphysical entity
3 that somehow goes beyond the right to receive the fees,
4 and the right to receive the percentage, and I don't know
5 why we should take that step and recognize some kind of a
6 metaphysical property right in addition to these quite
7 easily defined property interests.

8 MR. DREEBEN: Well, it's not a metaphysical
9 property right. It is an intangible property right, and
10 under this Court's decision in *Carpenter v. United States*,
11 intangible property rights are just as protected as
12 tangible ones. Now, the way that an intangible property
13 right is identified is by looking at the legal scheme that
14 creates those rights, and Louisiana created a legal scheme
15 under which it has the exclusive right to determine who
16 may engage in the video poker business.

17 QUESTION: Okay, but as I understand it, then,
18 the -- what I was sort of disparaging as the metaphysical
19 right is basically the State's regulatory interest. It
20 has nothing to do directly -- well, strike that. It is a
21 right of -- to dispose of licenses conceived of as
22 something connected to but nonetheless distinguishable
23 from the right to receive the fee, the right to receive
24 the percentage and so on.

25 MR. DREEBEN: It is both a regulatory and a

1 proprietary interest.

2 QUESTION: But if we were to say, we're going to
3 distinguish for purposes of this statute between the
4 State's regulatory interest and the State's property
5 interest, then you'd have to lose, wouldn't you?

6 MR. DREEBEN: No, because I would define the
7 State's property interest more broadly than simply the
8 actual currency that is received under the license.

9 QUESTION: Did the State lose any revenue here
10 because of the fraud?

11 MR. DREEBEN: No. We didn't charge or attempt
12 to prove that the State lost revenue and, in fact,
13 Louisiana connects the gambling, the video poker terminals
14 to a central computer to ensure that skimming of revenues
15 does not occur.

16 QUESTION: Well then, why isn't Justice Souter's
17 question correct, that you're not talking about any
18 orthodox property interest here that was lost to the
19 State. You're talking about a loss of its regulatory
20 authority.

21 MR. DREEBEN: No, I think we are talking about a
22 property interest that in the private sector would clearly
23 be recognized as such. It would be analogizeable most
24 closely to a contract interest of a party that runs a
25 franchise business and selects its own franchisees, and if

1 it is lied to by the franchisees, it is defrauded in it's
2 act of letting a contract to that franchise holder.

3 QUESTION: But in a private action you have to
4 show money damages.

5 MR. DREEBEN: That is true, but under the mail
6 fraud statute we do not.

7 QUESTION: Well, I know. That's why I think
8 your analogy is quite imperfect.

9 MR. DREEBEN: I think that the analogy is an
10 analogy which attempts to compare the State to a private
11 party, and the difference is that the State can always be
12 said in some sense to be acting as a regulator.

13 QUESTION: Were there money damages in Carpenter
14 to the Wall Street Journal?

15 MR. DREEBEN: No. There were no money damages
16 in the Wall Street Journal case at all, because all the
17 Wall Street Journal lost was its exclusive right to
18 determine when to publish certain columns, and Winans and
19 Carpenter were accused in that case of having taken from
20 the Journal their right, the Journal's right to decide
21 when to disclose the contents of that column.

22 It was highly intangible. It's an interest only
23 created by law, and by direct analogy here the interest
24 that is created is Louisiana's interest in deciding which
25 proprietary parties will work with it in the video

1 poker --

2 QUESTION: Well, does, under Louisiana law,
3 under the statutes of Louisiana, can the State of
4 Louisiana give itself a license and go into the video
5 poker business?

6 MR. DREEBEN: Under the Louisiana law, the
7 answer is no.

8 QUESTION: Okay. Under Louisiana law, could the
9 State of Louisiana sell to Mr. Joe Smith, a private
10 citizen, the right to give out franchises to others?

11 MR. DREEBEN: Under Louisiana law --

12 QUESTION: Yes.

13 MR. DREEBEN: -- I don't believe that the State
14 has that authority.

15 QUESTION: No, I don't think so, either.
16 Therefore, it doesn't sound like McDonald's at all.

17 MR. DREEBEN: Well, it would be --

18 QUESTION: I mean, McDonald's can give the right
19 to sell to others. McDonald's has something that's
20 valuable because it could go into business itself. It can
21 do what it wants.

22 MR. DREEBEN: The State --

23 MR. DREEBEN: I mean, that's your analogy.

24 MR. DREEBEN: The State could choose to operate
25 in precisely that manner. The State could have --

1 QUESTION: Oh, of course, under the Constitution
2 it could, of the United States, but the question is, what
3 is the scheme that Louisiana has set up under positive
4 law.

5 MR. DREEBEN: But I think --

6 QUESTION: And under positive law, I'm just
7 saying in the two respects I mentioned it does not sound
8 like McDonald's.

9 MR. DREEBEN: Justice Breyer, I agree with you
10 that the State has not assigned to itself the right to
11 sell video poker licenses.

12 QUESTION: Could not. It could not.

13 MR. DREEBEN: No, I don't see any reason --

14 QUESTION: No, it could under the Constitution.
15 It couldn't under the statute.

16 MR. DREEBEN: Under its own statute, but if
17 you're looking at the legal rights that it has invested in
18 itself, it is as if Louisiana has made the State the
19 exclusive holder and determiner of who may participate in
20 the video poker industry with a substantial revenue share
21 being assigned back to the State.

22 The State could have done the exact same thing
23 in a different manner. It could have said, you, the
24 State, shall select someone who will choose all these
25 State franchise holders who will do the video poker

1 business and it could have sold that interest, could have
2 said, a private party can take over the role of deciding
3 who gets a license and collect all the money and give some
4 of the money back to the State, but it did not do that.
5 Instead, it retained those legal rights in itself, and
6 those legal rights would have been viewed as property had
7 a private property holder exercised them.

8 QUESTION: Mr. Dreeben, how does that differ
9 from giving out liquor licenses, or giving out taxi
10 medallions? My question is, how far this theory of yours
11 spreads, and as I read it in your brief it seems very far.

12 MR. DREEBEN: Justice Ginsburg, it spreads only
13 to those licenses and those State activities that are
14 generically speaking more in a proprietary mold than in a
15 regulatory mold, and there is a classification question
16 that arises. Both liquor licenses and taxi medallions
17 share some features with the Louisiana scheme and,
18 therefore, arguably both of those would fall on the
19 property side of the equation.

20 QUESTION: Well, tell me, what is the
21 Government's position? What falls, what licenses would
22 fall under the Government's theory, and which ones would
23 be left out?

24 MR. DREEBEN: Our position is that a purely
25 regulatory license, such as a license to practice

1 medicine, or a driver's license, is not encompassed within
2 this theory of property, but a license, or a regulatory
3 proprietary scheme such as a franchise scheme, or a
4 license that is very closely linked in the revenue stream
5 that goes back to the State and in the regulatory
6 component is.

7 QUESTION: Well, suppose there is, like with the
8 example of the hotel and the occupancy tax that Mr. Mogin
9 raised, or people who run liquor establishments get a much
10 higher tax than people who are in other businesses.
11 That's special to that business. Do those qualify?

12 MR. DREEBEN: I think that they do under a
13 strict analytical approach, but I also think that there is
14 a component to the analysis that is narrower than assuming
15 that all such licenses fall within the scope of the mail
16 fraud statute, and --

17 QUESTION: Mr. Dreeben -- if you answered the
18 question -- it seems to me that you really -- the property
19 right that I would think of in terms of normal usage would
20 be the right to exclude as one of the bundle of rights,
21 but you don't claim the right to exclude is sufficient,
22 because you would not include the bar, the control of the
23 membership in the bar, is that right?

24 MR. DREEBEN: That's correct.

25 QUESTION: You are not claiming -- every right

1 to exclude is not a --

2 MR. DREEBEN: That's correct.

3 QUESTION: But then I don't -- I really don't
4 understand why it makes any difference that the State
5 shares in the revenues. I don't see why it would be a
6 different case if they didn't, they just taxed the video
7 people on some income basis, rather than sharing in the
8 revenues.

9 MR. DREEBEN: Well, I think if there was no
10 linkage between the taxation and the licensing scheme,
11 then it's harder to say that the State is acting in a
12 proprietary than in a regulatory --

13 QUESTION: But even if it's acting in a
14 proprietary way, it's not deprived of any revenue. It's
15 not deprived of anything, except the right to exclude
16 these people, and that's not itself sufficient.

17 MR. DREEBEN: It's not itself sufficient, but in
18 combination with a scheme such as this, that creates in
19 the State the power to participate in a particular
20 industry, and to select, in effect, the participants in
21 the industry, the agents who will carry out the work, the
22 State has acted in a way that far more closely resembles a
23 franchise business than it does a pure, sovereign
24 regulator, and that is the question that has to be asked
25 under the mail fraud statute.

1 QUESTION: I don't --

2 QUESTION: Mr. Dreeben, you seem to be -- the
3 Government's position seems to be somewhat of a shifting
4 target. You appear to be arguing today that the State
5 itself is deprived of property under this scheme, and when
6 it's a proprietary licensing scheme that is the situation.

7 I thought in your brief the focus was an
8 argument to the effect that the statute is satisfied so
9 long as the licensee gets some kind of money or property.
10 It doesn't matter if the victim, here the State, is
11 deprived of property. Are you abandoning that argument
12 now?

13 MR. DREEBEN: No, Justice --

14 QUESTION: It was new. I don't think it was
15 pressed below.

16 MR. DREEBEN: Correct.

17 QUESTION: But do you still adhere to that as
18 well?

19 MR. DREEBEN: Yes, I do. It is our alternative
20 theory of why --

21 QUESTION: Is there any reason why we should
22 address it, since it came so late in the day?

23 MR. DREEBEN: Well, the Court has discretion to
24 address it. It certainly isn't required to address it.
25 We did not argue it below. But I will say that in favor

1 of the Court addressing it and resolving it is that it is
2 a purely legal argument that the Government made in
3 McNally, that the Court did not squarely address in
4 McNally for a variety of --

5 QUESTION: Well, by implication McNally seemed
6 to assume that it was -- the statute covers only money or
7 property obtained from the victim. I mean, that's how the
8 opinion seems to be focused, anyway.

9 MR. DREEBEN: Well, there is language in
10 McNally, without doubt, that reads that way, but that
11 language could not have announced a holding in McNally,
12 because the actual holding of McNally was, in addition to
13 the well-known part of McNally that an intangible right to
14 good government is not a property right, the Court also
15 held that there was no deception of the State and there
16 were no false statements made to any third party, so there
17 was no factual predicate in McNally itself for deciding
18 whether the second clause applies.

19 QUESTION: I suppose one argument in favor of
20 exercising our discretion here is that we took the case to
21 construe the meaning of a statute, there's a conflict in
22 the circuits, and to say, you know, we're construing it
23 this way but there's another argument that we might accede
24 to in some other case wouldn't be the best use of our
25 resources.

1 MR. DREEBEN: I agree, Mr. Chief Justice,
2 particularly --

3 QUESTION: But you say that's what we did in
4 McNally. You said this argument was available there and
5 we chose not to address it, and to leave everything sort
6 of up in the air.

7 MR. DREEBEN: Well, there is --

8 QUESTION: I mean, I was here in McNally. I
9 didn't realize we had done that.

10 MR. DREEBEN: Well, there is actually no
11 discussion in the opinion itself of the theory that the
12 Government raised that the false statements alone, when
13 the defendant obtains property, are sufficient.

14 QUESTION: Oh, you're saying we did in McNally
15 what you are now arguing it would be irresponsible for us
16 to do now. I don't think we did that in McNally. I
17 thought we had addressed the statute.

18 MR. DREEBEN: Well, as I said, Justice Scalia,
19 there -- the square holdings of McNally did not require
20 the Court to come to a definitive answer to it, and if you
21 read the McNally opinion, which is fairly brief, it
22 doesn't identify and reject in terms this theory.

23 What the McNally opinion does do is point out
24 that the second clause of the statute, which was added in
25 1909, has the effect of codifying this Court's decision in

1 Durland v. United States, which held that --

2 QUESTION: If --

3 MR. DREEBEN: -- false promises come within the
4 mail fraud statute.

5 QUESTION: That's contrary to your
6 interpretation of what the amendment did.

7 MR. DREEBEN: No, it's not contrary to it. I
8 think that the amendment did more than that. It clearly
9 at least codifies Durland. There's no question about
10 that. But the plain language of the statute does not
11 require that there be a deprivation of property.

12 QUESTION: But if it did more than that, we
13 should have said that in McNally. We shouldn't have said,
14 it just did this, which would have reached the result that
15 we reached in McNally, and simply ignored the fact that it
16 did more than that, which would have produced a different
17 result in McNally.

18 MR. DREEBEN: It would not have produced a
19 different result in McNally, Justice Scalia, because the
20 Court made quite clear in footnote 9 of its opinion that
21 there was no deception of the State at all.

22 The Government's theory in McNally was that
23 State officeholders who have an adverse interest to the
24 State are required to disclose it to the State, and this
25 Court said in footnote 9 of McNally that we should not

1 assume that there was any such duty of disclosure, and
2 without a duty of disclosure, there could have been no
3 fraud that would have triggered the second clause of the
4 statute.

5 QUESTION: You also would never reach the
6 principal holding of McNally if you're going to put all of
7 the weight on that footnote.

8 MR. DREEBEN: The Court could have decided the
9 case based on that analysis, but it decided it on a
10 broader analysis, which is --

11 QUESTION: Right. I don't think footnote --
12 what note was it?

13 MR. DREEBEN: Footnote 9.

14 QUESTION: -- 9, I don't think footnote 9 was
15 meant to preclude the question that's before us here, any
16 more than it was meant to preclude the question of whether
17 intangible services can qualify under the statute.
18 Certainly everybody assumed that's what the case decided,
19 despite footnote 9.

20 MR. DREEBEN: What I think is evident from
21 McNally is that the Court at various points in the opinion
22 wrote broadly about the mail fraud statute. But there is
23 a distinct theory of liability that we briefed before this
24 Court in McNally and that was not addressed in terms, and
25 I think that there is an explanation for why that theory

1 was not addressed, which is that there were no false
2 representations to anybody that were charged in the jury
3 instructions that could have supported that theory.

4 QUESTION: If we did have that, if that theory's
5 in front of us, it seemed a little broad. It seemed that
6 it would make guilty of mail fraud -- I was thinking, you
7 know, Richard, on the Survivors program --

8 (Laughter.)

9 QUESTION: You don't know that. But I mean, he
10 seemed absolutely guilty under your interpretation --

11 (Laughter.)

12 QUESTION: -- and then I thought that
13 probably -- probably any competitor, by the way, in a
14 commercial context, anybody who lies to his competitor,
15 any boss who lies to his subordinate, any subordinate who
16 lies to his boss or a coworker, they're all out to get
17 money, and they're telling lies or scheming to get money,
18 just like Richard on the Survivors program, and I was a
19 little surprised that the Government is suddenly going to
20 make criminal under the mail fraud statute -- I mean,
21 bring back Cotton Mather.

22 I mean, this is -- any lying in a commercial
23 context where you're trying to get money out of it is now
24 mail fraud. Is that right?

25 MR. DREEBEN: Well, I don't want to speak to

1 Richard in the Survivors, since --

2 (Laughter.)

3 MR. DREEBEN: -- we haven't charged that case

4 and I'm not familiar with it.

5 QUESTION: I hope not.

6 (Laughter.)

7 MR. DREEBEN: But as far as the breadth of the

8 theory, it is a broad theory. I'm not sure, Justice

9 Breyer, whether it covers all of the hypotheticals in your

10 question, but it is a broader theory than the license as a

11 proprietary activity theory, because it would apply

12 whenever an individual lies for the purpose of

13 obtaining property --

14 QUESTION: So what I'm most worried about in

15 that, of course, is that it is possible, you know, that

16 competitors in a commercial context may tell each other

17 lies sometime. I'm going to the trade show, and then when

18 your competitor goes you stay home and take his customer

19 away. Well, each one of those is a RICO suit, and I --

20 MR. DREEBEN: I don't think so.

21 QUESTION: No?

22 MR. DREEBEN: No. I think there is a

23 materiality component in the mail fraud statute that this

24 Court described in Neder v. United States --

25 QUESTION: It's material. You get your

1 competitor to go to the trade show and then while he's
2 away you take his customer. There was quite a lot of
3 money there.

4 MR. DREEBEN: I haven't tried to frame this as
5 an application that would sweep in routine commercial
6 conduct.

7 QUESTION: But you said you were going to treat
8 the Government just as a private person would be treated
9 under this statute that was -- but are you saying that's
10 true of the theory that it's property in the hands of the
11 Government as well, and not true under this alternative
12 theory?

13 MR. DREEBEN: No, Justice Ginsburg, but in this
14 particular case what the defendant did was lie to the
15 State, concealing adverse facts about his background in
16 order to obtain a valuable license, which --

17 QUESTION: Well, that could apply, at least in
18 the cases you excluded from your first theory. That is,
19 the license to practice law, the license to practice
20 medicine, those are very valuable in the hands of the
21 recipient.

22 MR. DREEBEN: That is true.

23 QUESTION: And I think sometimes when they
24 divide property on termination of marriage those are
25 attributed a monetary value.

1 MR. DREEBEN: That is true, and there is yet
2 another theory of the mail fraud statute which we have not
3 raised in this case and we haven't briefed in this case,
4 which holds that lying to, for example, the State in order
5 to obtain a regulatory approval that will then allow
6 someone to obtain money from a third party fits within
7 even the first clause of the mail fraud statute.

8 QUESTION: Well, my problem with your large
9 interpretation, Mr. Dreeben, is you're essentially making
10 the Federal Government monitors of what would be a false
11 statement to a Government agency. 18 U.S.C. 1001, that
12 operates on the Federal level.

13 You're just saying, well, we do the same thing
14 with overall monitoring, of making a false statement to a
15 Government official, State or Federal, and that's the kind
16 of thing, if Congress meant to do, shouldn't it be
17 required to speak clearly? Shouldn't a clear statement
18 rule apply to that level of monitoring, false statements
19 made to State agencies?

20 MR. DREEBEN: I think, Justice Ginsburg, that
21 Congress has attempted to speak very clearly and
22 comprehensively in the mail fraud statute. When this
23 Court ruled in McNally that it did not apply to the
24 intangible right to honest services, Congress came back
25 and amended the statute to make clear that it did want the

1 Federal Government in that line of business.

2 QUESTION: Well now, wait. It was a later
3 Congress that decided that's what they wanted to do. That
4 doesn't have anything to say about what the earlier
5 Congress intended when they passed this fraud statute.

6 MR. DREEBEN: I don't suggest that it does,
7 Justice Scalia.

8 QUESTION: These were different people in
9 Congress, after McNally, and they decided that they agreed
10 with the Government that there should be a way to get
11 these people, but that says nothing at all about whether
12 the statute, as originally drafted by another Congress
13 many years ago, all of whom are gone, meant what we said
14 it meant in McNally.

15 MR. DREEBEN: Even taking the Court's own
16 holding in McNally, the Court's holding is that the State
17 is not to be less favored than a private party insofar as
18 it's a property holder.

19 It's to be treated on the same footing if the
20 defendant uses a Federal jurisdictional means which
21 subjects him to a Federal regulatory system, and there are
22 lots and lots of defendants who make false statements to
23 Governments in connection with obtaining money or property
24 or even defrauding a State of tax revenue, which some
25 people might think are quintessential things for the

1 States to handle all on their own.

2 QUESTION: I don't know whether one -- 18 U.S.C.
3 1001 was passed before or after the mail fraud statute,
4 but the Government, intimated by Justice Ginsburg, really
5 doesn't need 1001 if you're right about the mail fraud
6 statute.

7 MR. DREEBEN: Well, the elements of the two
8 statutes are different, and there are many applications
9 where 1001 would fit where we wouldn't necessarily be
10 able to establish a scheme to defraud under the mail fraud
11 statute, so the --

12 QUESTION: Well, can you give me perhaps one of
13 those?

14 MR. DREEBEN: Well, you'd -- under our second
15 theory, we do not need to show that there is an intent to
16 deprive the State or the Federal Government of a property
17 interest, whereas --

18 QUESTION: So you say basically the mail fraud
19 is much broader than 1001.

20 MR. DREEBEN: In some ways it's broader, and in
21 some ways it's narrower.

22 QUESTION: In what way is it narrower?

23 MR. DREEBEN: Well, mail fraud requires a use of
24 the jurisdictional means that you have mail fraud, and it
25 also under the scheme to -- you need to have proof of the

1 mails in other words, which is not true for 1001.

2 1001 involves any Federal agency, any false
3 statement in a matter within the Federal agency's
4 jurisdiction, and it need not involve any money or
5 property loss or gain.

6 So the two statutes have a substantially
7 different sweep.

8 QUESTION: If it's only the jurisdictional peg,
9 I guess the wire -- isn't there -- there are parallel
10 statute that deals with use of wire communications?

11 MR. DREEBEN: Correct. Correct.

12 QUESTION: Which --

13 QUESTION: It seems to me there's hardly any
14 application for anything that wouldn't use one or the
15 other, a telephone or the mail.

16 MR. DREEBEN: That may be true, and there's also
17 an intent element, though, in the mail fraud statute of an
18 intent to defraud, which is not present in the 1001. 1001
19 simply applies to a knowing false statement within the
20 jurisdiction of a Federal agency.

21 QUESTION: Would your theory apply, assuming
22 there's a mailing, of course, to false statements in an
23 employment application?

24 MR. DREEBEN: To the State?

25 QUESTION: Yes. You want to get a State job,

1 and you lie about your background in some way, misstate
2 your age, or you say you were never caught speeding or
3 something like that. Would it apply?

4 MR. DREEBEN: Well, certainly the second clause
5 as we have construed it would apply in such a case,
6 because the employment applicant seeks employment.

7 QUESTION: What about a misstatement in a tax
8 return, State-filed tax return?

9 MR. DREEBEN: A misstatement that is intended to
10 result in a greater tax --

11 QUESTION: Greater deduction, or lesser tax.

12 MR. DREEBEN: Yes. But Justice Scalia, that
13 would be covered under anybody's interpretation of the
14 mail fraud statute, because it's a scheme to acquire money
15 or property that should belong to the State, and that's
16 fundamentally --

17 QUESTION: It's a scheme to keep your own
18 property, which you're supposed to give to the State. I'm
19 not sure that anything is being taken from the State.

20 MR. DREEBEN: No, the State has a right to --

21 QUESTION: You don't read the statute too
22 closely, do you?

23 MR. DREEBEN: I think that I read the statute
24 broadly in respect of money or property losses to the
25 State, and apply it in a way that makes it congruent with

1 what a private party would be subjected to.

2 QUESTION: Mr. Dreeben, I have, I guess, a basic
3 problem with how we even get to your second theory,
4 because as I understand it the trial judge in this case
5 charged the jury simply on the theory of depriving the
6 third party of property, so I don't see how we could even
7 get into this if we wanted to.

8 MR. DREEBEN: The trial judge combined the first
9 clause and the second clause of the statute which were
10 charged in the indictment. He combined them by saying a
11 scheme to defraud by making false or fraudulent
12 representations to the State.

13 QUESTION: But he did it on a theory of
14 defrauding, i.e., getting the other person's property,
15 didn't he?

16 MR. DREEBEN: He did, but a jury that found
17 guilt on those instructions necessarily found that the
18 object of the scheme was to make false statements to the
19 State to obtain the license and, indeed, the charged
20 mailings were the mailings of the license to the
21 defendants.

22 QUESTION: So you're saying it's like lesser-
23 included?

24 MR. DREEBEN: It's exactly included within what
25 the jury had to find in order to render the conviction on

1 the instructions that were given.

2 QUESTION: Mr. Dreeben, your alternate theory is
3 admittedly very broad. You gave a yes answer to the
4 employment application. Is there any guidelines that are
5 given to Federal prosecutors, given the tremendous
6 potential sweep of the statute as you construe it?

7 MR. DREEBEN: There are no guidelines beyond the
8 legal requirements for charging mail fraud that are given
9 to Federal prosecutors.

10 QUESTION: So the individual prosecutor can
11 decide if he or she would like to go after the would-be
12 employee who lied on an application for State employment?

13 MR. DREEBEN: In theory. In theory, Justice
14 Ginsburg.

15 I would also say that under the property prong
16 of mail fraud individual prosecutors have discretion on
17 what level of case they are going to bring, and the
18 competing obligations and case loads of Federal
19 prosecutors tend to send those cases to the wayside, but
20 there are small cases brought even where the State is
21 defrauded of a relatively small amount of property.

22 And one of the reasons why that is is because
23 frauds against the State often involve State actors in
24 collusion with the private parties, and the Federal
25 Government there serves a very valuable role in coming in

1 and being able to prosecute when the States themselves
2 seem to be less able to do so, and this case itself had a
3 corruption component in it involving charges against State
4 Senators, which the jury ended up rejecting, but there was
5 a reason why the Federal Government was involved in this
6 case in the beginning.

7 QUESTION: You don't think the people of
8 Louisiana deserve the kind of government that they elect.

9 (Laughter.)

10 MR. DREEBEN: I think the people of the State of
11 Louisiana are actually benefited by having the Federal
12 Government available as a supplementary prosecutorial
13 tool.

14 Thank you.

15 QUESTION: Thank you, Mr. Dreeben.

16 Mr. Mogin, you have 11 minutes remaining.

17 REBUTTAL ARGUMENT OF PAUL MOGIN

18 ON BEHALF OF THE PETITIONER

19 MR. MOGIN: Mr. Chief Justice, we will waive
20 rebuttal unless there are questions.

21 QUESTION: How do you distinguish the Carpenter
22 case, because the Carpenter case held that the
23 confidential information of the Wall Street Journal was
24 traditionally protected as property because it would be
25 subject to protection in equity, et cetera.

1 MR. MOGIN: The key distinction is that there
2 this Court was able to find prior law that recognized
3 confidential business information as property. The
4 Ruckelshaus case in this Court, a case from -- the
5 International News case I believe it is, a treatise was
6 cited in the opinion. There was substantial prior law
7 indicating that confidential business information was
8 protected as property under the civil law, so the Court
9 was not required to announce a new theory of property in
10 that case.

11 QUESTION: May I ask this, Mr. Mogin. The right
12 to exclude is mentioned over and over again in property
13 cases as one of the bundles of rights that's a property
14 right, and so forth. I know the Government doesn't press
15 this to the extreme it would go, but why isn't -- why
16 couldn't one view the video poker industry as an industry
17 that is controlled by the State and they have the right to
18 exclude newcomers, oldcomers, and that's just an old-
19 fashioned property right?

20 MR. MOGIN: Well, this Court has pointed out
21 that there's no precise or universal definition of
22 property. That's been said in some bankruptcy cases,
23 and --

24 QUESTION: But isn't it true that the right to
25 exclude is referred to in many, many property cases as a

1 strand of property right?

2 MR. MOGIN: Yes, but I don't think that from
3 that one could conclude that every right to exclude is a
4 property right, because here you have the breadth of it,
5 that the licensing and approvals and permits and
6 certifications and registrations that the Government
7 issues is truly extraordinary.

8 It's never been thought that those are property
9 rights that the Government is exercising, and property law
10 has been formed -- is based a lot on history and
11 tradition, and not merely on characteristics. There's no
12 one characteristic, such as the right to exclude, that can
13 be focused on and is the be-all and end-all of whether
14 there's a property right.

15 QUESTION: Well, of course, in this case or in
16 any regulatory case, as distinct from the case of private
17 ownership or private property, there are two capacities, I
18 suppose, on the part of the supposed property owner, and
19 one is a regulatory capacity and one is arguably a
20 proprietary one, and I suppose -- I mean, wouldn't it be
21 your argument that the right to exclude would have to be
22 classified on the regulatory side rather than the property
23 side?

24 So in other words, the right to exclude is here,
25 but the reason it isn't property in the case of the

1 Government is that the Government holds it in a different
2 capacity as regulator, which is a capacity that the
3 private property owner doesn't have.

4 MR. MOGIN: I think that's exactly right, and
5 that's why the Government prohibits all types of things,
6 excludes people from all types of activities.

7 The mere fact that the Government is excluding
8 something does not mean it's exercising a property right.
9 One has to look at the nature of the decision and see
10 whether the Government is acting in a regulatory or
11 proprietary capacity. As we cite in our briefs, the
12 courts have always viewed licensing decisions and
13 revocation decisions as regulatory rather than
14 proprietary.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Mogin.
16 The case is submitted.

17 (Whereupon, at 10:55 a.m, the case in the above-
18 entitled matter was submitted.)

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