

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CONRAD M. BLACK, JOHN A. :

4 BOULTBEE, AND MARK S. :

5 KIPNIS, :

6 Petitioners :

7 v. : No. 08-876

8 UNITED STATES. :

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10 Washington, D.C.

11 Tuesday, December 8, 2009

12

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

16 APPEARANCES:

17 MIGUEL A. ESTRADA, ESQ., Washington, D.C.; on behalf of
18 the Petitioners.

19 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,
20 Department of Justice, Washington, D.C.; on behalf of
21 the Respondent.

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1 P R O C E E D I N G S

2 (10:16 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 08-876, Conrad Black
5 et al. v. The United States.
6 Mr. Estrada.

7 ORAL ARGUMENT OF MIGUEL A. ESTRADA

8 ON BEHALF OF THE PETITIONERS

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

11 For two decades, courts of appeals
12 confronting Section 1346 have been unanimous on, at
13 most, three points.

14 The first one is that the unvarnished text
15 of the statute is vague, amorphous, open-ended, and
16 essentially, not very helpful.

17 The second one is that a meaningful attempt
18 to construe the statute can take place, if at all, only
19 in light of a body of law that this Court rejected in
20 McNally and Congress likely intended to restore in the
21 act.

22 And the third is that this exercise is
23 fraught with due process and federalism problems and
24 risks the creation of common law crimes, especially in
25 the private sector where the pre-McNally precedent was

1 not well-developed.

2 The principal question in this case is
3 whether a prosecution may be sustained under a 1346
4 theory, under a theory that was not successful before
5 McNally and, in fact, had been affirmatively rejected,
6 even in the heyday of the intangible rights doctrine.
7 Because the answer to that question is "no," all
8 convictions in this case must be reversed.

9 It would be well to start by acknowledging
10 that the root difficulty in this case is that this Court
11 asked Congress to speak clearly, and Congress did not do
12 that.

13 As a result, there is no solution that is
14 really capable of providing an -- an elegant out to the
15 morass that the lower courts have been confronting, but
16 the choices, essentially, fall on three categories.

17 And the first is to return the matter to
18 Congress, either because the statute is vague in all of
19 its applications, both public or private, or as to
20 private conduct, because there are not enough guideposts
21 for judicial decision-making to give meaning to the
22 statute.

23 The second category of choices --

24 JUSTICE SCALIA: You -- you don't ask for
25 the first, do you?

1 MR. ESTRADA: Yes, we do. I mean, we -- we
2 have -- we have written a question that necessarily has
3 that as a predicate, which, under this Court's cases,
4 leave that predicate open to the Court. We have an --

5 JUSTICE KENNEDY: Are -- are you saying that
6 unless we adopt the limiting instruction that you
7 propose, the statute is then vague?

8 MR. ESTRADA: We have argued that. It is
9 also -- you know, just to -- just to finish painting the
10 picture, Justice Kennedy, we have -- we have the trunk
11 of a tree, and that's -- you know, the statute, is it
12 vague or isn't?

13 Then we have the question of whether there
14 is a limiting construction, and Professor Altshuler, for
15 example, has made a case that limiting the statute to
16 bribes and kickbacks is a possibility, as that being,
17 arguably, the only core conduct that Congress could have
18 contemplated.

19 And -- and the third one is to go beyond
20 bribes and -- and kickbacks, and to expand the statute
21 to what Congress likes to call self-dealing or
22 non-disclosure, which is really a wholesale takeover of
23 State commercial law.

24 In our view, if the Court is disposed to
25 reach that far into the third category, it is essential

1 that the restrictions that had been recognized before
2 McNally be enforced against -- against the government,
3 but we have briefed the case in the way we have to
4 this -- basically assuming that this tree is not
5 imaginary and actually exists --

6 CHIEF JUSTICE ROBERTS: Your theory -- your
7 theory that return to the pre-McNally cases would help
8 you is based almost entirely on the D.C. Circuit case --
9 case in Lemire -- Lemire.

10 MR. ESTRADA: I think that is not a fair
11 statement, Mr. Chief Justice. I think the D.C.
12 Circuit's opinion, of course, is indeed very helpful,
13 but it was a -- a distillation of what other courts of
14 appeals have told the government again and again, in
15 Ballard in the Fifth Circuit, in Feldman in the Seventh,
16 in --

17 CHIEF JUSTICE ROBERTS: The -- the
18 government tells us it was an outlier.

19 MR. ESTRADA: Well, it had a different view,
20 as we have pointed out, when they filed the brief in the
21 Carpenter case. But the fact is, whether it is or it
22 isn't can be judged by what the contemporaneous cases
23 were.

24 And Von Barta, Dixon, all cases in the
25 Second Circuit, Feldman in the Seventh, Ballard, all had

1 indicated that this was a requirement of the theory in
2 intangible rights cases.

3 JUSTICE ALITO: Well, since the -- since the
4 body of pre-McNally lower court cases was hardly
5 completely consistent, do you think this is a workable
6 approach?

7 MR. ESTRADA: The honest answer is: I do
8 believe that the statute is vague in all of its -- all
9 of its applications, and I am happy to explain, quickly,
10 because of that, why that is.

11 Obviously, there are obvious problems of
12 notice with the statute. The more fundamental problem
13 with the statute, as if the notice problems were not
14 enough, is in the second prong of the vagueness
15 doctrine, which is the conferral of discretion to select
16 the defendant on the government, and in particular, the
17 prosecutors. And this is a situation not unlike that as
18 was outlined by Justice Breyer's concurring opinion in
19 the Morales case.

20 And what he pointed out, pointing to cases
21 like Coates v. City of Cincinnati, was that a statute
22 that essentially confers discretion on the -- on the
23 police and the prosecutors to select the quarry and come
24 up with that appropriate justification to sell to the
25 Court later --

1 JUSTICE SOTOMAYOR: I don't know what's so
2 discretionary and harmful about a bribery or kickback
3 case. Let's take just the limiting principle of the
4 trunk.

5 Whether it's in the private or the public
6 sector, why would, offering, there be any discretion or
7 any sense of vagueness about saying: It's illegal to
8 give a bribery?

9 MR. ESTRADA: I --

10 JUDGE SOTOMAYOR: To get a contract, to pass
11 legislation, it's illegal to take a kickback. There is
12 nothing seemingly vague about that or seemingly
13 troublesome about prosecutorial discretion in those --
14 at least those two situations. We could then go to the
15 self-dealing question.

16 MR. ESTRADA: I absolutely agree with the
17 statements that you made, Justice Sotomayor. It is
18 undoubtedly true that a -- that a statute that
19 proscribes bribery or kickbacks can constitutionally be
20 written, if that is what the statute says.

21 JUSTICE GINSBURG: But it's not your -- it's
22 not within your test, as I understand it. Your test is,
23 there has to be economic harm to the person owed the
24 duty of loyalty.

25 Now, you could have a bribe or a kickback

1 that will line the pockets of the person who takes it,
2 doesn't deceive the person who is giving it, and doesn't
3 harm the company to whom a duty of loyalty is owed.

4 So it seems to me that the bribe and
5 kickback, which I think is heartland McNally, would not
6 be included in yours. It must be economic harm, actual
7 or contemplated, to the person owed the duty of loyalty.

8 MR. ESTRADA: I think that is not a fair
9 statement, Justice Ginsburg, because in our economic
10 system, I think it is fairly inferable, and any jury
11 could so find that if you are a supply agent for a
12 corporation and you are taking a bribe of \$10,000 to
13 steer the contract to Company X, Company X would be more
14 than happy, and it would be a matter of indifference to
15 Company X to just give a 10K break to your employer.

16 So it is inherent in the economic system in
17 the private sector that if you're talking about bribes
18 and kickbacks, there is an obvious, though perhaps not
19 fully quantifiable, risk of loss to the person to whom
20 the duty is owed.

21 JUSTICE SCALIA: The problem with the bribe
22 or kickback explanation, unlike -- or you contend,
23 unlike yours, is that there's no basis in the statute
24 for limiting it to that.

25 MR. ESTRADA: I think, Justice Scalia --

1 JUSTICE SCALIA: I mean, we -- we can't find
2 a statute that says, "No person shall commit a bad act."
3 We can't find that to be non-vague as applied to murder.
4 Everybody knows that murder is a bad act. Would that --
5 would that law be constitutional?

6 MR. ESTRADA: No, and that was going to be
7 the second part of my answer to Justice Sotomayor, and
8 it is a point that Justice Breyer also made in the
9 Morales case, taking -- taking the example of Coates v.
10 City of Cincinnati where the law basically said, "You
11 shall not engage in annoying conduct."

12 Now, as Justice Breyer pointed out, many of
13 us would agree 100 out of 100 that certain things are
14 definitely annoying. And the fact that you could find,
15 for example, that an assault is annoying does not mean
16 that this statute gives notice that -- that, you know,
17 your conduct is -- is within its written terms --

18 CHIEF JUSTICE ROBERTS: Let's say you have a
19 bank that is going to be opening up a lot of branches in
20 the State, and one of the directors knows this and knows
21 where they are going to open them. And he goes around
22 and buys up the real estate where the bank is going to
23 put its -- put its branch, so that he gets the benefit
24 of the -- of the sale. And assume that the price that
25 -- that he's going to charge is a fair market price, no

1 different than what anybody else would charge.

2 Now, is that sort of self-dealing covered
3 under your view of the statute?

4 MR. ESTRADA: Well, I think that sort of
5 self-dealing likely would be covered, not under my view
6 of the statute, but under Carpenter, because if you were
7 stealing confidential information from your employer,
8 and the Court in Carpenter did say that confidential
9 information is a -- is a form of property as a matter of
10 Federal law --

11 CHIEF JUSTICE ROBERTS: But he is not
12 stealing -- he is not stealing the confidential
13 information. As the director, he has the perfect right
14 to know the confidential information.

15 MR. ESTRADA: But under either view, if you
16 are going to steal the corporate opportunity, that, too,
17 is a form of property, and in fact, the property counts
18 in this very --

19 CHIEF JUSTICE ROBERTS: Well, I don't know
20 that I would call it a corporate -- I don't know if I
21 would call it a corporate opportunity. They are not
22 looking to sell the land; they need to buy it.

23 MR. ESTRADA: Precisely, but -- but this is
24 not unlike cases like O'Hagan, or even Carpenter itself,
25 in which, you know, the value of the use of the

1 information comes from learning the confidential plans
2 of your employer. And in those circumstances, Carpenter
3 said that the information itself could be a form of
4 intangible property.

5 And so that is a different problem than a
6 native duty violation, which is what we are dealing
7 here.

8 JUSTICE KENNEDY: Just while we are on the
9 Oeschler thing, and then you'll probably want to go on
10 to the other thing.

11 Assume this trial were held again. The
12 government said: All the same evidence -- same
13 evidence. Would that evidence suffice for an
14 instruction to the jury? Could the case go to the jury
15 under the Oeschler theory?

16 MR. ESTRADA: Under the obstruction, or -- I
17 mean, under the -- under the kickback --

18 JUSTICE KENNEDY: Kickback or bribe.

19 MR. ESTRADA: No, it couldn't. I mean, part
20 of the point I was going to make is that under any of
21 these choices, whether the statute is vague or
22 unapplicable to private conduct, choice one, or whether
23 it is a kickback or bribe, choice two, there would not
24 be a case to send to the jury for the defendants in this
25 case.

1 The only argument comes up if you really
2 want to climb to the thinnest reed of the thinnest
3 branch and say that it could extend to naked
4 non-disclosure of confidential information or use of
5 confidential information in violation of a duty imposed
6 by contract or State law, or maybe even a consent
7 decree, as in Sorich.

8 JUSTICE SCALIA: Mr. Estrada, let -- let me
9 pursue the notion I -- I floated earlier, that the
10 problem with Professor Altshuler's approach is that
11 there is nothing in the text of the statute that would
12 enable you to limit it to kickbacks and -- and bribes.
13 Is there anything in the text of the statute that makes
14 your proposal any better?

15 I mean, to be sure, it does -- it does make
16 this a kind of fraud, and in the past, fraud did require
17 injury to somebody. But it defined a new kind of fraud,
18 namely, fraud that consists of the deprivation of honest
19 services. That's the fraud. That, in and of itself,
20 under the text of the statute, I take to be the fraud.

21 MR. ESTRADA: Your Honor, I don't think that
22 I can give an answer that would be fully satisfactory to
23 a pure textualist, that this can be taken out of the
24 words of the statute.

25 As a practical matter, however, if you

1 consider the legislative record, and the avowing hint to
2 restore some part of what McNally had thrown out, then a
3 harder question comes up, and the issue of what that was
4 actually becomes highly relevant. But I do not think
5 that, even under the textualist view, it is fair to say
6 that Congress went in the private sector from a view of
7 fraud that is -- that was classically property kind to a
8 view of fraud that has nothing to do with property.

9 And the reason for that takes understanding
10 what -- what the problem really was that Congress was
11 trying to fix, and that the intangible rights cases were
12 trying to fix. And it's really one of symmetry.

13 It has always been the case that mail fraud
14 is a specific intent crime. And it has always been the
15 case, and this is clearly stated in cases like Regent
16 Office Supply and Dixon, from Judge Friendly, that a
17 part of the specific intent to defraud is an intent to
18 harm. Now, in classic fraud, the defendant intends to
19 harm the victim by obtaining, in a corrupt manner, his
20 property. So there is a perfect symmetry between the
21 intended harm to the victim and the expected gain of the
22 defendant, because the gain comes from the victim's
23 pocket.

24 The problem of bribes and kickbacks that the
25 intangible rights cases were trying to deal with is not

1 that they were trying to dispense with the harm's
2 requirement to the victim; they were trying to deal with
3 the lack of symmetry where the person given the payoff
4 is not deceived and the harm to the victim is
5 non-quantifiable. And to fix that problem, you could
6 say that this statute could then say that the term of
7 art, as the government calls it, that Congress used was
8 intended to cover that situation.

9 Now, the proof in the pudding on that comes
10 from a very well-known case. Let's take, you know, the
11 Holzer case, which was cited extensively by Justice
12 Stevens in his dissent in McNally. You may recall it
13 was a State court judge who had been taking bribes, and
14 his conviction was affirmed in an opinion by Judge
15 Posner, which he cited in this case again, which
16 appears, I think, at 816 F.2d, and it was just a
17 straight intangible rights affirmment. He sought cert,
18 you know, Judge Holzer did, and he got a GVR in light of
19 McNally. And Judge Posner got the case back.

20 Judge Holzer goes back and there is a second
21 opinion, 840 F.2d, and Judge Posner has to conclude that
22 Judge Holzer has to be let go on the mail fraud counts.
23 And the reason he gives is: Look, the judge obviously
24 got lots of money, but he didn't get the money from
25 anybody who was deceived, and all of his victims, which

1 were the public and the litigants against whom the cases
2 were fixed, those people didn't lose any money, so that
3 under the McNally paradigm, because the money that Judge
4 Holzer got in bribes did not come from the victims, that
5 -- that judge had to be let go.

6 And I think that that's part of what
7 Congress clearly had in mind as was trying to fix.

8 Now, I agree with your -- with your apparent
9 antecedent view and what I call issue one in the case,
10 that the way that Congress did it has been one of not
11 complying with the request that this Court made. It did
12 not make anything clear in a way that sets forth in the
13 text what it does.

14 CHIEF JUSTICE ROBERTS: Well, but
15 presumably, the one thing it's odd to suggest Congress
16 did was sort of run 1346 through 1341, when what it was
17 trying to fix was the Court's understanding of what 1341
18 provided.

19 MR. ESTRADA: There are any -- there are any
20 number of problems with how Congress chose to do this,
21 Mr. Chief Justice. That is actually the tip of the
22 iceberg, because if you look as a textual matter to the
23 first words of Section 1346, you will see that this new
24 amended definition of "scheme to defraud" applies to all
25 of the offenses in Chapter 63 of Title 18. There are 11

1 of those.

2 And in addition to mail and wire fraud, at
3 least three of them -- bank fraud, securities fraud, and
4 healthcare fraud -- used the phrase "scheme to defraud."
5 And unless you are prepared to try to save the statute
6 by -- by trying to identify a core of what Congress was
7 trying to do that is squarely anchored in the
8 pre-McNally law, which may or may not be a successful
9 enterprise, you do not have any textual guidance that
10 will tell you whether this theory that the government
11 likes to state at a very high level of generality would
12 not become a deus ex machina in a number of other
13 statutes that we have yet to -- to hear from. And that
14 is --

15 JUSTICE SCALIA: What if -- what if I think
16 that even -- I mean, much of your case is directed to
17 the point that you -- you have to narrow it this way to
18 avoid constitutional problems.

19 What if I think you don't avoid
20 constitutional problems?

21 MR. ESTRADA: Then it --

22 JUSTICE SCALIA: Why should -- why should I
23 turn somersaults to -- to come out with the -- with the
24 interpretation that you want?

25 MR. ESTRADA: You should not. And in that

1 event, we fully support -- actually, we support anyway
2 -- the -- the brief that was filed by the Chamber of
3 Commerce and the National Association of Criminal
4 Defense Lawyers, for the proposition that as an
5 essential matter, this statute cannot be saved.

6 I am merely pointing out, Justice Scalia,
7 that for somebody who is not a textualist, that question
8 may not be as clear-cut.

9 CHIEF JUSTICE ROBERTS: Where -- where in
10 the record do we find your argument that the statute is
11 unconstitutional?

12 MR. ESTRADA: We made it -- we made it in
13 the district court in a motion to dismiss the
14 indictment, and I don't believe that is part of the
15 joint appendix, but it is Docket Entry 261.

16 And in that same motion, we argued that this
17 statute, if it were to be applied at all, had to be
18 interpreted solely as a matter of Federal law, which
19 oddly enough, is the position that the government has
20 finally now taken in the Weyhrauch case. And we argued
21 based on the Jerome case and Cleveland case, which are
22 the cases that the government has finally discovered.

23 We argued again in the court of appeals, and
24 we argued expressly that although the Seventh Circuit
25 had -- had previously indicated that it would uphold the

1 constitutionality of the statute against a vagueness
2 challenge, that Judge Easterbrook, writing for the court
3 in Thompson, had left open the possibility that they may
4 yet find a case in which that would be revisited. And
5 we expressly argued that this was the case for which
6 Thompson had left the -- the question open.

7 JUSTICE SCALIA: Now, what about --

8 JUSTICE KENNEDY: Under the test that you
9 propose, is the test the same? Does the statute read
10 the same way, and is the test the same for private and
11 public officials?

12 MR. ESTRADA: No. No.

13 JUSTICE KENNEDY: Well, then we -- then if
14 we accept your view, we have to have one subset of
15 definitions for private officials and another for public
16 officials. It's hard to do that under the statute.

17 MR. ESTRADA: That is a problem that is
18 inherent, as I said earlier, in trying to do anything to
19 save the statute. But let me say --

20 JUSTICE KENNEDY: Well, under the judge's
21 bribery case that we just -- that you discussed earlier,
22 couldn't you take the position that that money the judge
23 took as a bribe really should have been paid to the
24 government?

25 MR. ESTRADA: Well, oddly enough, that was

1 an argument that was made to Judge Posner and remanded,
2 the Holzer case, and Judge Posner said, Well, that is
3 really untenable.

4 JUSTICE KENNEDY: But that would fit your
5 test, though.

6 MR. ESTRADA: Well, yes, in a -- in a very
7 formal way. But -- but if I could say just one word on
8 the question of the public v. Private distinction,
9 Justice Kennedy, because I think it is important, in
10 trying to figure out how one goes about trying to fix
11 what is basically a mess, you have to keep in mind that
12 the courts had accepted the intangible rights theory
13 before McNally, and which Congress presumably and -- or
14 likely was trying to bring back, had -- had not taken
15 the view that they were doing something other than
16 fraud.

17 But they have taken the view that there was
18 a basis in the concept of fraud for distinguishing
19 between the public and the private, even before McNally.
20 And some of this -- this is found in the briefing in
21 McNally and is set forth in Justice Stevens's dissenting
22 opinion, that there was this other statute, Section 371
23 of 18 U.S.C., the conspiracy statute, that uses the
24 phrase "conspiracy to defraud the United States."

25 And on the basis of that statute, before

1 McNally, the courts of appeals have -- have ruled that
2 an intent to interfere with the property rights of the
3 government was not an element of the core meaning of the
4 fraud. And the reason for that was that since 1905, in
5 a case called Hask v. Henfold, and followed later by a
6 case called Hammerschmidt, this Court had said that in
7 order to be convicted of defrauding the government under
8 this other statute, no need -- there was no need to show
9 that the government's property interests were -- were
10 interfered with solely --

11 CHIEF JUSTICE ROBERTS: Counsel, you were --
12 I think you were about to tell me where you raised it in
13 the Court -- the constitutional argument in this Court?

14 MR. ESTRADA: We -- we raised that as a
15 predicate for our question presented. And we said this
16 is vague, but -- but if -- but if you do not accept this
17 proposed restriction that has been accepted by the -- by
18 the courts of appeals, then you would really have to
19 take the -- take the step of actually striking it down.

20 If you are asking whether we tendered it as
21 a separate question presented, the answer to that is no,
22 Mr. Chief Justice, but under this Court's cases that is
23 not needed. And the cases that I would direct the --
24 the Court to for that proposition are -- some of them
25 are cited in the Chambers brief. And the first one is

1 U.S. v. Grubbs, where this Court said that in a case
2 involving the technical sufficiency of a search warrant
3 it was, of course, open to the Court to consider whether
4 the particular type of warrant, an anticipatory search
5 warrant, was categorically improper under the Fourth
6 Amendment. And -- because, as the court explained, it
7 was an antecedent question that was a predicate for a
8 logical disposition of the actual question in front of
9 the Court.

10 In doing that -- that, by the way, was a
11 unanimous opinion by Justice Scalia.

12 In doing that, you know, the Court cited to
13 the case of Wilkinson v. Austin, which was another
14 unanimous opinion, this time by Justice Kennedy. In
15 that case the issue on which cert had been granted was
16 the -- the question of what process was due to a -- to a
17 prisoner in State custody.

18 And the State of Ohio, that case had
19 affirmatively conceded that there was a liberty interest
20 and that the suggestion of the United States as amicus
21 -- the Court concluded that whether or not there was
22 even a liberty interest was an antecedent question and
23 was a logical predicate for -- for the intelligent
24 consideration.

25 JUSTICE ALITO: Could you just take a moment

1 and explain why any error in the honest services
2 instruction wasn't harmless as applied to the
3 Forum/Paxton transaction?

4 MR. ESTRADA: That's -- that's Count Seven?

5 JUSTICE ALITO: Yes.

6 MR. ESTRADA: Well --

7 JUSTICE ALITO: As I understand it, there
8 was no evidence there that the \$600,000 was a -- a
9 recharacterized management fee; isn't that correct?

10 MR. ESTRADA: No. The argument on that,
11 Justice Alito, was entirely different. The -- the
12 record does show that the executive committee of
13 Hollinger and the full board unanimously, including
14 every member of the audit committee, had approved the
15 execution of the noncompetes with Paxton and -- and
16 Forum. And the only other evidence as to why they were
17 not in fact executed as contemplated by the board
18 resolutions was Radler's testimony that Kipnis simply
19 forgot.

20 Now, significantly, after the jury came back
21 and found all three of the defendants guilty on that
22 count, Judge Sansie entered a judgment of acquittal
23 for Kipnis on Count Seven, finding that the evidence was
24 insufficient as to him. And if there are no further
25 questions, I would like to reserve my time.

1 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
2 Mr. Dreeben.

3 ORAL ARGUMENT OF MICHAEL R. DREEBEN
4 ON BEHALF OF THE RESPONDENT

5 MR. DREEBEN: Thank you, Mr. Chief Justice.

6 The Petitioner today has sought to present a
7 question to this Court that he chose not to include in
8 his questions presented, whether the statute is
9 unconstitutionally vague in all of its applications.

10 What he did present in his question
11 presented to this Court is whether there is an element
12 of contemplated economic harm inherent in the concept of
13 fraud in Section 1341, so that any honest services
14 prosecution must show contemplated or foreseeable
15 economic harm in order to be sustained.

16 JUSTICE SCALIA: But I don't -- I don't have
17 the heart to inquire into that question if I think that
18 the whole statute is bad. And that's the point he is
19 raising, that it's -- it's a predicate to our
20 considering that question, that if you agree with him,
21 you think the statute will be sustained.

22 But if I think the whole statute is bad,
23 what -- you know, why should I engage in -- in this
24 exercise?

25 MR. DREEBEN: Well, Justice Scalia --

1 JUSTICE SCALIA: It doesn't make any sense
2 to make me do that.

3 MR. DREEBEN: Maybe you should wait for a
4 Petitioner who presents the question, rather than
5 granting relief to a Petitioner who chose not to raise
6 the constitutional issue in this Court --

7 JUSTICE KENNEDY: Well, it's a little --
8 it's a little odd that you -- you would say that an
9 argument that shows a way the statute can be saved
10 cannot be -- cannot be presented.

11 MR. DREEBEN: Well --

12 JUSTICE KENNEDY: I mean, he's saying the
13 statute could be saved, if at all, if you adopt this --
14 this construction. And if you do, his -- his conviction
15 must be set aside.

16 MR. DREEBEN: I think that the Court should
17 reach that issue, the issue whether there is
18 contemplated economic harm as a requirement for the
19 statute, and the government briefed that issue, and I
20 disagree with Petitioner that contemplated economic harm
21 is either an element of the statute or necessary to save
22 its constitutionality.

23 JUSTICE KENNEDY: Well, on the other hand,
24 if we just can't find a -- a grounding in the statute
25 for it, then that's because the statute's there.

1 MR. DREEBEN: What this statute is, Justice
2 Kennedy, is Congress's effort to reinstate the body of
3 law that this Court held was not a valid construction of
4 the mail fraud statute.

5 JUSTICE BREYER: Before you -- do you --
6 does the government feel that it hasn't had an adequate
7 opportunity to brief the constitutionality of the
8 statute?

9 MR. DREEBEN: If the Court wished to address
10 the constitutionality of the statute, the government
11 would brief it more fully, including by making the
12 points that --

13 JUSTICE BREYER: Might this come up in the
14 Skilling case?

15 MR. DREEBEN: The Skilling case raises the
16 question of whether if this Court does not interpret --

17 JUSTICE BREYER: So we have to say, in your
18 view -- no, I'm just -- I'm cutting into you because I
19 don't -- you answered it once you said that.

20 The -- the -- what I wonder is, does the
21 government feel, in order to have a full opportunity to
22 brief constitutionality, that we should issue an order
23 saying: Please brief the constitutionality?

24 MR. DREEBEN: If the Court believes that
25 that is a necessary question to resolve, then it should

1 be briefed in a supplemental passage --

2 JUSTICE BREYER: So we should say that?

3 MR. DREEBEN: But not in this case, because
4 I think if a Petitioner comes to this Court and presents
5 a particular statutory construction question and then
6 seeks to smother in --

7 JUSTICE SOTOMAYOR: Counsel --

8 CHIEF JUSTICE ROBERTS: That would be --

9 JUSTICE SOTOMAYOR: -- does Skilling -- I'm
10 sorry.

11 CHIEF JUSTICE ROBERTS: Go ahead.

12 JUSTICE SOTOMAYOR: Directly answer this
13 question: Does Skilling present the pure question or
14 not?

15 MR. DREEBEN: No, because in Skilling,
16 Justice Sotomayor, the question is whether an element of
17 personal or private gain needs to be read into the
18 statute in order to render it constitutional.

19 Now, in all fairness to Mr. Skilling, he has
20 not filed his opening brief; the government has not
21 filed its response. So that case --

22 JUSTICE SOTOMAYOR: We don't know if that's
23 going to be --

24 MR. DREEBEN: That case may present a -- a
25 different issue. But again, I -- I think that if a

1 Petitioner wishes to come to this Court and say that a
2 statute is unconstitutionally vague in all of its
3 applications, this is not a statute that offends First
4 Amendment rights or anything --

5 CHIEF JUSTICE ROBERTS: Well, Mr. Dreeben,
6 you agree that it would be very unusual if in June we
7 announced the opinion in your case agreeing with you and
8 then the next case announced that the statute is
9 unconstitutional?

10 MR. DREEBEN: Agreed.

11 (Laughter.)

12 MR. DREEBEN: I would vastly prefer,
13 Mr. Chief Justice, that the Court hold that it is
14 constitutional. And I think that it should, because --
15 let me outline --

16 JUSTICE SCALIA: Well, just -- just so we --
17 we know what is -- what is going on here: It is not the
18 case that the Petitioner here has said here that if we
19 adopt his interpretation, it will render the statute
20 constitutional. He doesn't say that.

21 He says that if we adopt his interpretation,
22 we can avoid reaching the constitutional question,
23 because whether it's constitutional or not, it at least
24 requires the -- the kind of financial harm that -- that
25 he asserts. So he is not asserting that if we -- if we

1 accept his position, the statute is constitutional. I
2 don't read his brief as saying that, anyway.

3 MR. DREEBEN: That's probably a fair
4 characterization of language in his brief, but it does
5 bear note that he never asked this Court to decide that
6 question.

7 Now, the question that is before the Court,
8 and I think it will illuminate the vagueness concerns
9 that are on the Justice's minds, is: What does the
10 statute mean? And the way to understand this statute is
11 to recognize that when this Court held in McNally that
12 the mail fraud statute did not protect intangible
13 rights, Congress came back in response to this Court's
14 invitation and said: Yes, it does; it protects the
15 intangible right of honest services which had assumed
16 the status of a term of art in --

17 JUSTICE GINSBURG: How could it have been a
18 term of art when the courts -- the lower courts were
19 massively confused?

20 MR. DREEBEN: Justice Ginsburg, I think the
21 description of the lower courts as massively confused is
22 not correct. It's not a fair description of the cases.

23 JUSTICE GINSBURG: Well, there wasn't even a
24 uniform terminology in the lower courts. They didn't
25 all use --

1 MR. DREEBEN: All of the lower courts used
2 essential synonyms for what Congress sought to
3 reinstate. They refer to the right of honest services,
4 faithful and honest services, loyal and honest services,
5 and they were talking about one thing: Divided
6 loyalties of an agent or a fiduciary.

7 JUSTICE BREYER: Now, as I hear that -- I am
8 exaggerating, possibly, but I think every agent has a
9 duty of loyalty to provide loyal and honest services to
10 the master, master agent. Every worker is an agent of
11 his master, the employer. So every instance in which a
12 worker does not provide honest services to the employer,
13 he has met your test.

14 I think there are 300 -- perhaps there are
15 150 million workers in the United States. I think
16 possibly 140 of them would flunk your test.

17 (Laughter.)

18 JUSTICE BREYER: I mean, that's what
19 worrying me. Now, why? Because -- I -- "Do you like my
20 hat?" Says the boss. "Oh, I love your hat," says the
21 worker.

22 (Laughter.)

23 JUSTICE BREYER: Why? So the boss will
24 leave the room so that the worker can continue to read
25 the racing form. Deception? Designed to work at

1 reading the racing form instead of doing your honest
2 work and, therefore, violation?

3 Now, explain to me how your test does not --
4 and I think you can probably do it; I just don't
5 understand it at the moment. Explain it to me, how your
6 test does not make this statute potentially
7 criminalizing 100 million workers in the United States,
8 or some tens of millions?

9 MR. DREEBEN: Justice Breyer, I hope you
10 give me a moment to explain my theory of the statute in
11 response to your question. The statute covers bribes,
12 kickbacks, and undisclosed conflicts of interest by an
13 agent or fiduciary who takes action to further that
14 interest.

15 These were well-recognized categories of
16 honest services violations. Virtually every circuit
17 that examined the pre-McNally case law said these are
18 the prototypical cases. Bribes, kickbacks, undisclosed
19 conflicts of interest by an agent or fiduciary who takes
20 action to further that interest. These are not --

21 CHIEF JUSTICE ROBERTS: So is that -- does
22 the right to intangible services refer to an obligation
23 that is legal or moral?

24 MR. DREEBEN: Legal, Your Honor.

25 CHIEF JUSTICE ROBERTS: Only -- only legal?

1 So that if in a State their corporate law says conflicts
2 of interest with respect to spouse and children must be
3 disclosed, but conflicts of interest with respect to
4 nieces and nephews need not, you would say you cannot
5 use this statute to prosecute somebody who, under some
6 abstract sense, should have told their employer that,
7 "My niece is going to get \$10 million if we go ahead
8 with this contract"?

9 MR. DREEBEN: Let me make two points in
10 response to that, Mr. Chief Justice.

11 The obligation under 1346 is a Federal
12 obligation. Congress, by reinstating this body of law,
13 by virtue of 1346, created a Federal obligation that is
14 not dependent on State law. And I think we will address
15 this more in the Weyhrauch case, where that issue is
16 specifically presented, but it should not be understood
17 as a State law obligation.

18 Second, the core --

19 JUSTICE SOTOMAYOR: Then what's the
20 source -- and I think that's inherent in the Chief
21 Justice's question -- what is it -- where did he draw
22 the line and where do we go to look to where you draw
23 the line on what information needs to be disclosed?
24 Because if it's not a niece, my best friend is going to
25 get a 1.4 million on this deal.

1 Where is the line drawn, and what is the
2 source of the law that we look to to figure out where to
3 draw that line?

4 MR. DREEBEN: The line is personal
5 conflicting financial interests of the individual, which
6 --

7 JUSTICE SOTOMAYOR: So you are talking about
8 private gain? Do I gain something as opposed to --
9 because that -- I know that is the Skilling case. But
10 if --

11 MR. DREEBEN: I prefer not to address the
12 Skilling case until that has been briefed.

13 JUSTICE SOTOMAYOR: No, but that's -- you
14 have to, because you have to tell us what draws -- you
15 have to give us the source or some source of limiting,
16 of limitation. And that's what Justice Breyer has been
17 talking about.

18 MR. DREEBEN: I'm trying to do that, Justice
19 Sotomayor. A personal conflicting financial interest is
20 not subtle, it is ascertainable, it is core, it is the
21 characterizing feature of the vast majority of --

22 JUSTICE BREYER: Now this -- I'm just
23 getting a label, and as I hear you talk, I think it's
24 not what you necessarily -- I found in the brief, or
25 didn't understand it from the brief -- but I found

1 precisely what you said, it seems to me in what I have
2 labeled Altshuler alternative B, does that ring a bell?

3 MR. DREEBEN: Well, I don't know what
4 Professor Altshuler's alternative B was.

5 JUSTICE BREYER: Yes, yes. You've read the
6 briefs-- you've read the briefs. He has alternative A
7 and alternative B. And alternative A he says kickbacks,
8 and it could be limited to bribery or kickbacks. In
9 alternative B he adds bribery, kickbacks and undisclosed
10 self-dealing capable of causing economic harm. That's
11 what I got out of the brief.

12 MR. DREEBEN: I would not have --

13 JUSTICE BREYER: Now I just heard what you
14 said and it sounded like the same thing.

15 MR. DREEBEN: It's not the same thing and I
16 think this goes back --

17 JUSTICE BREYER: It is not causing economic
18 harm.

19 MR. DREEBEN: Not causing economic harm
20 because there are instances where important fiduciary
21 relationships are breached personally. For example,
22 doctor-patient, lawyer-client, union-union
23 representative, where the harms are intangible; they are
24 noneconomic; they were intended to be picked up by this
25 statute. But to answer your question directly, Justice

1 Breyer --

2 JUSTICE BREYER: So what about my racing
3 form? He is acting for himself and not his employer.

4 MR. DREEBEN: That -- that is -- implicates
5 a -- one of the two important limiting principles on
6 this statute which is materiality and intent to defraud.
7 And I do not think that any jury would find and the
8 government would be very foolish to prosecute that
9 material --

10 JUSTICE BREYER: Different matter.
11 Different matter. The foolish to prosecute, jury
12 defined, worries me for the reason that what's in the
13 back of my mind -- and you will see what -- I am
14 disclosing to you what is in the back of my mind.

15 (Laughter.)

16 JUSTICE BREYER: When the criminal code was
17 reenacted and never was, one kind of joke was that it
18 there it would be -- there would one ball, the law would
19 be read as a crime to do wrong, okay? "It is a crime to
20 do wrong." Sometimes adding, "in the opinion of the
21 Attorney General." All right.

22 (Laughter.)

23 JUSTICE BREYER: Now you see the problem?
24 It may be you would never prosecute it. It may be a
25 jury would never convict. But that isn't the basis for

1 having a statute that picks up 80 or 100 million people.

2 MR. DREEBEN: Justice Breyer, the point that
3 I was making is that this statute does not establish a
4 free-floating federal crime based on a breach of a
5 trivial duty. It requires materiality, as all fraud
6 statutes do; it requires --

7 JUSTICE SOTOMAYOR: But defined how? That's
8 what I'm -- I'm trying -- material in what way? Because
9 if you don't know by an economic loss to the victim or by
10 private gain to the -- to the perpetrator, then you are
11 left with what substance to the issue of materiality?

12 MR. DREEBEN: The --

13 JUSTICE SOTOMAYOR: What becomes important?

14 MR. DREEBEN: The issue of materiality --

15 JUSTICE SOTOMAYOR: That the -- for an
16 auditor on April 14th his guy -- or April 1st his
17 employee goes off to a ball game? It could be a huge
18 economic loss to that employer by that employee's
19 decision at that particular moment to go to a baseball
20 game as opposed to working.

21 MR. DREEBEN: I agree, Justice Sotomayor,
22 but materiality as the Second Circuit said in the
23 Rybicki opinion is a time-tested way of separating
24 out --

25 JUSTICE SOTOMAYOR: But the Second Circuit

1 said economic loss --

2 MR. DREEBEN: No --

3 JUSTICE SOTOMAYOR: -- that there has to be
4 the risk of economic loss --

5 MR. DREEBEN: With all respect --

6 JUSTICE SOTOMAYOR: -- in the private
7 sector.

8 MR. DREEBEN: -- Justice Sotomayor, the
9 Seventh Circuit in its Rybicki opinion in the en banc
10 opinion did not say that, nor I think is it fair to say
11 that the Second Circuit had ever said that economic loss
12 was an element of an intangible rights fraud, either
13 pre-McNally or post-McNally.

14 JUSTICE SCALIA: What is -- I mean, I'm
15 still waiting to hear what materiality consists. It is
16 just -- de minimus doesn't count? Is that all you mean?

17 MR. DREEBEN: Materiality, Justice Scalia,
18 it takes the classic definition of your opinions for the
19 Court in Kungis and Gaudin as reasonably likely to
20 affect the decision of the body to whom the statement is
21 made.

22 JUSTICE KENNEDY: So if the employee would
23 be fired if defalcation had come to light, that's
24 material?

25 MR. DREEBEN: If the government proves that

1 it would be. And I should add --

2 JUSTICE KENNEDY: All right, that's the ball
3 game.

4 JUSTICE SCALIA: Excuse me --

5 JUSTICE KENNEDY: Then that's the ball game.

6 Hypo: you go to the ball game, the government --

7 MR. DREEBEN: No, it's not the ball game.

8 JUSTICE KENNEDY: The employer finds out
9 about it, he fires -- so it's material because you would
10 be fired for it.

11 MR. DREEBEN: Materiality isn't the only
12 element. It's not a divided loyalties issue.

13 JUSTICE KENNEDY: I'm asking about just
14 materiality. Just materiality would be satisfied. You
15 said that if the employer would fire, that is material.
16 And then we had the ball game hypothetical. Then you
17 said oh, well, and then some other thing. But we are
18 talking just about materiality so you should stick with
19 that question.

20 MR. DREEBEN: I'll -- I agree, Justice
21 Kennedy, and I intend to answer that question, but I
22 think that it is fair to say, for me that by
23 acknowledging that something can be material if the
24 employer would take different action does not mean that
25 everything that the employee does is a crime. The

1 employee is not exercising the official powers of his
2 office or job, and that is what was critical.

3 JUSTICE KENNEDY: He drives to the ball game
4 in the government -- in the company car.

5 MR. DREEBEN: He is still not exercising the
6 powers of his company, he is off on a frolic and detour.
7 What the pre-McNally cases were looking at were agents
8 who --

9 JUSTICE GINSBURG: Excuse me, may I ask you
10 to put -- in terms of your brief, you said your
11 definition of materiality -- you said materiality is
12 related to but different from what Mr. Estrada is urging
13 the Court to adopt: economic harm to the victim. So
14 can you tell us how materiality is related to economic
15 harm to the victim and how it is different from economic
16 harm to the victim?

17 MR. DREEBEN: It is related to it, Justice
18 Ginsburg, in that in a business setting materiality will
19 be in most cases coextensive with economic harm at least
20 if economic harm is conceived as I conceive it, and as
21 the cases have conceived of it as extending to things
22 like harm to reputation that will interfere with a
23 business's ability to go forward.

24 JUSTICE SCALIA: But it -- it doesn't answer
25 the racing form case. I mean, you are using materiality

1 in two senses. All you mean by materiality is that the
2 misrepresentation must have been material, okay? So in
3 the racing form case, let's say the question the boss
4 asked is, you know, "Are you going to work hard this
5 afternoon? Or do I have to stand here and look over
6 your shoulder? " And he says, "Boss, I'm going to work
7 hard this afternoon. " "Okay, then I'll leave." And the
8 boss leaves. That representation is material in that it
9 got the boss to leave, whereupon he reads the racing
10 form.

11 But you know, that's immaterial in another
12 sense, it's a -- it's not a substantial crime. And
13 that's -- that's what we are looking for here, something
14 that -- that separates reading the racing form from
15 really harming the employer --

16 MR. DREEBEN: Justice Scalia --

17 JUSTICE SCALIA: -- to a substantial degree.
18 And you have nothing in your -- in your brief or in your
19 argument that eliminates these de minimus kind of --
20 what should I say --

21 MR. DREEBEN: Fraud.

22 JUSTICE SCALIA: Misrepresentations to the
23 employer.

24 MR. DREEBEN: In -- the first line of
25 response to this, Justice Scalia, is that these are

1 all -- what you are describing are all money or property
2 frauds that could be charged if the government so chose
3 so long as the mails or the wires were involved. The
4 mail fraud statute doesn't by itself carve out de
5 minimus frauds.

6 The concept of materiality, though, in my
7 concept of the divided loyalties that lies at the heart
8 of honest services fraud, includes in itself the concept
9 of an undisclosed interest that is important in some
10 way, because the obligation of the employee, the agent,
11 the fiduciary, the company executive, the politician who
12 has been elected to office, is defined by a bedrock
13 substratum of fiduciary duties that are universally
14 recognized in the common law, that were --

15 JUSTICE STEVENS: Mr. Dreeben, can I ask
16 this? It seems to me that even if there is some
17 economic harm amounting to the cost of a World Series
18 ticket, that's all -- or the amount of gas used to drive
19 to the ballpark, that could still not meet the
20 materiality requirement.

21 MR. DREEBEN: I agree with that, justice
22 Stevens.

23 MR. DREEBEN: There is no bright line rule
24 just based on economic harm versus everything else.

25 MR. DREEBEN: There is no bright line rule

1 in the law of mail fraud in these issues but the scope
2 of the duty that has been recognized in the pre-McNally
3 cases had to do with the conflicts of interest produced
4 by bribes, produced by people who took kickbacks,
5 produced by self-dealing where somebody was selling his
6 own product to the company but not disclosing that he
7 had an interest in the company.

8 JUSTICE BREYER: That -- that is Altshuler
9 B, which I -- that seems to work, but then you want to
10 go beyond that.

11 MR. DREEBEN: Well, I --

12 JUSTICE BREYER: And I think in going beyond
13 that is the paradigm case of -- of moonlighting?

14 MR. DREEBEN: No, it's not.

15 JUSTICE BREYER: No, because --

16 MR. DREEBEN: There was no pre-McNally case
17 that ever --

18 JUSTICE BREYER: No, no, no, no. I'm trying
19 to get -- encapsulate your test in my mind. I'm just
20 trying to find a way, so as I listen to you, I think
21 what you are driving at -- a paradigm case of what you
22 are driving at would be moonlighting.

23 MR. DREEBEN: If by moonlighting, Justice
24 Breyer, you mean somebody who has a business on the side
25 and in dealing with his own company.

1 JUSTICE BREYER: Yes -- no -- yes. He takes
2 a day -- he leaves an hour early because he is selling
3 real estate.

4 MR. DREEBEN: No. That's -- no, no.
5 Self-dealing in the kind that I am talking about is
6 where somebody has -- he is playing the role of loyal
7 corporate employee, loyal corporate officer, but he is
8 actually working for himself by buying from his own
9 company, without disclosing that to the --

10 JUSTICE BREYER: You have to have all those
11 elements? One -- I mean, everybody is working for the
12 company. Everybody has loyalty to the company owner.
13 And, now, you are saying everybody has competing things
14 that they sort of like to do, which would deprive the
15 owner of the honest services, but you are saying, in
16 addition to that, he has to have his own company?

17 MR. DREEBEN: No, Justice Breyer.

18 JUSTICE BREYER: In addition to that, what?

19 MR. DREEBEN: What I -- I'm describing for
20 you are the core cases, so that this Court can put a
21 definition on honest services fraud that would be
22 familiar to the lower courts which have had this body of
23 case law ongoing for close to 40 years now and have
24 never encountered the problems that --

25 JUSTICE SOTOMAYOR: But is the problem the

1 nondisclosure?

2 MR. DREEBEN: Yes.

3 JUSTICE SOTOMAYOR: Or is the problem the --
4 the self-dealing itself, the fact that the person is
5 receiving a gain? There's where I'm trying to draw the
6 line because I keep going back to -- what is the source
7 of information that would put a limitation on how much
8 you disclose or don't disclose?

9 It has to be -- the issue has to be looked
10 at differently, which is the evil is the self-dealing,
11 the gain the person's receiving. I know, you don't want
12 me to go there because of Skilling, but I'm troubled
13 because the issue of disclosure creates a Federal common
14 law of what's important to tell either the public or a
15 private employer?

16 And I don't know how to define that issue of
17 importance --

18 MR. DREEBEN: Well, the real --

19 JUSTICE SOTOMAYOR: -- other than to say
20 that it's a gain that the individual's receiving or
21 something the individual's doing.

22 MR. DREEBEN: I think that the theory that
23 the government proposes to this Court, which involves
24 personal conflicting financial interests, that the agent
25 or fiduciary furthers by taking official action provides

1 a set of cases that subsumes what you're interested in,
2 Justice Sotomayor, and provides guidance to the lower
3 courts and to prosecutors on what can be charged.

4 JUSTICE SCALIA: What if my son gets the
5 money? I don't get the money. My son does.

6 MR. DREEBEN: Your son, Justice Scalia --

7 JUSTICE SCALIA: It's an adult son.

8 MR. DREEBEN: The adult son is not you,
9 personally, no. I don't think that this is the -- the
10 core of the pre-McNally cases involve personal
11 conflicting financial interest.

12 JUDGE SOTOMAYOR: I'm sorry. You're --

13 JUSTICE SCALIA: And that -- that is how a
14 lawyer is supposed to advise his client. He says, well,
15 what this means is the core of pre-McNally cases.

16 (Laughter.)

17 JUSTICE SCALIA: And he -- and he sends him
18 off to read the pre-McNally cases. And I have to tell
19 you, they are a mess, I don't understand them at all.
20 It's one of the reasons McNally came out the way it did.

21 Is -- you speak as though it is up to us to
22 write the statute. We can make it mean whatever it --
23 you know, whatever would -- would save it or whatever we
24 think is a good idea, but that's not our job.

25 What -- what does the statute say? And, if

1 all it does is refer us to the pre-McNally cases, I'm
2 at -- I'm at sea.

3 MR. DREEBEN: I think that Petitioner and I
4 agree that Congress wrote this statute with the use of
5 the phrase "right of honest services" as a term of art,
6 in order to refer to a body of law that it understood
7 had a consistent core, and that core --

8 JUSTICE SCALIA: Maybe it was wrong. Just
9 because it understood it had a consistent core, it has a
10 consistent -- consistent core?

11 MR. DREEBEN: No, but it, in fact, did have
12 one, and the reason that it had one, even though this
13 Court held that the mail fraud statute did not protect
14 the deprivation of intangible rights, there was,
15 nonetheless, at the heart of the pre-McNally cases, a
16 substratum of a universal common law rule of fiduciary
17 duties and agency that has, as an undisputed and not at
18 all vague core, that agents can't engage in undisclosed
19 self-dealing.

20 They can't --

21 JUSTICE GINSBURG: Now, kickbacks and -- and
22 bribes is clear. Sometimes, the government just talks
23 about conflict of interest. Sometimes, it says, "taking
24 action under conflict of interest." Well, action is
25 quite broad.

1 And that's -- what do you include concretely
2 within this self-dealing category? Taking or taking
3 action on the basis of undisclosed information?

4 MR. DREEBEN: Justice Ginsburg, it's when
5 the same person is on two sides of the transaction, so
6 you have in, for example, this case, Mr. Black is going
7 to receive compensation from his company, and on behalf
8 of the company, he is authorizing and entering into
9 alleged noncompetition agreements that recharacterize
10 the money or, in a case of Count 7, I think Justice
11 Alito is absolutely correct, outright steal the money.

12 He --

13 CHIEF JUSTICE ROBERTS: Counsel, could I
14 ask -- could I ask you just, in terms -- the terms of
15 the statute, does your theory give any independent
16 substance to the word "right"?

17 It seems, to me, your argument is that --
18 that someone who deprives another of honest services. I
19 don't know where the concept of "right" comes in, which
20 is in the statute.

21 MR. DREEBEN: The right refers,
22 Mr. Chief Justice, to the acknowledgment that there was
23 a common law fiduciary duty that was assimilated into
24 the law of fraud, really, beyond dispute. I haven't
25 understood --

1 CHIEF JUSTICE ROBERTS: So the point -- I
2 guess maybe this is -- maybe I asked you this before.
3 The -- the right is not limited to specific legal
4 obligations, but to a developing Federal common law of
5 criminal liability?

6 MR. DREEBEN: No, it certainly is not,
7 Mr. Chief Justice. Congress intended to basically say
8 to this Court, you have determined that intangible
9 rights are not protected under the mail fraud statute.
10 Only money or property is.

11 Congress desired to correct the statute by
12 protecting frauds that involve intangible rights, and it
13 did that by using a term of art that was replete
14 throughout the legislative debates, for those who read
15 them, as referring to the same core body of cases that
16 we rely on here.

17 And those cases -- any -- any legal rule
18 will have cases at the margins, in which reasonable
19 jurists will debate whether --

20 JUSTICE STEVENS: Mr. Dreeben, I should know
21 this, but refresh my memory. The body of pre-McNally
22 court of appeals cases, to what extent were they just
23 public rights versus private? Was there a substantial
24 body?

25 MR. DREEBEN: There was a larger body of

1 public sector cases. There was a very substantial body
2 of private sector cases, many of which were cited in
3 Your Honor's dissent in the McNally case.

4 And those cases, I think, as Mr. -- the
5 Chief Justice indicated earlier, contained, but a single
6 opinion, the Lemire opinion from the D.C. circuit, that
7 talked about contemplated economic harm.

8 Petitioner seeks to assimilate that,
9 somehow, into the notion of an intent to defraud that he
10 says was inherent in the mail fraud statute everywhere
11 and always before McNally.

12 But if he seriously believes in that theory,
13 then he would have to say that a -- an intangible rights
14 defendant would have to contemplate economic harm,
15 foresee economic harm in any intangible rights case,
16 which would knock out, immediately, many of the critical
17 pre-McNally public official cases, in which a legislator
18 takes a bribe for action that doesn't implicate the
19 pecuniary interests of the holder or the fiduciary duty
20 or in which a union official accepts payment for someone
21 who wants to apply for membership. Membership fees are
22 fixed. It's not as if the union is losing money.

23 And it's really inconceivable that Congress
24 would have passed a statute to say, we don't want this
25 law to be limited to property rights. And somehow,

1 through the back door, smuggle in the same test of
2 contemplated economic harm.

3 What the right way to handle this issue
4 is -- is to look at it under the rubric of materiality
5 because materiality is flexible. It considers what the
6 rights are of the particular fiduciary --

7 JUSTICE BREYER: I thought materiality just
8 has to do with whether a false statement you make, in
9 fact, causes the effect, or is likely to, that is the
10 harmful effect.

11 MR. DREEBEN: But the point, Justice Breyer,
12 is --

13 JUSTICE BREYER: That's always there.

14 MR. DREEBEN: -- that materiality would
15 function much like the Petitioner's contemplated
16 economic harm requirement in private sector, private
17 enterprise cases.

18 JUSTICE BREYER: No, and the -- and the
19 reason I say with -- maybe I have the example that I
20 mean now. In the cases you just mention, the bribe
21 case? Right, the legislature is not going to gain. The
22 legislator or the briber might, but somebody will.

23 And the object of those bribes was that
24 there would be economic gain, and that was what -- when
25 I went through all those McNally cases, I thought I

1 could fit them into this alternative Altshuler thing,
2 but now, you -- you worry me that you have a different
3 test that will bring in like any failure to fill out a
4 disclosure form.

5 A deliberate failure to answer a box, one
6 out of 1,000, for every government employee, would
7 immediately -- 20 years in jail.

8 MR. DREEBEN: No, not immediately, because
9 there needs to be an intent to defraud, which
10 includes -- Mr. Chief Justice, if I might finish.

11 CHIEF JUSTICE ROBERTS: Sure.

12 MR. DREEBEN: -- which includes knowledge of
13 the legal duty that the employee is violating and will
14 include materiality. And these are the issues that
15 screen conflicts and prosecutions in a variety of public
16 corruption type cases, and across the board economic
17 harm requirement, which I understood today Petitioner to
18 disavow would devastate the application statute in its
19 core areas of public corruption cases.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 Mr. Dreeben.

22 Mr. Estrada, you have three minutes
23 remaining.

24 REBUTTAL ARGUMENT OF MIGUEL A. ESTRADA

25 ON BEHALF OF THE PETITIONERS

1 MR. ESTRADA: Just a few points,
2 Mr. Chief Justice. First, it bear emphasis that the
3 government has once again said that this is a federal
4 obligation.

5 This entire case was tried based on Talmudic
6 debates of the ins and outs of Section 144 of the
7 Delaware law of corporations. We had motions to
8 dismiss, we had briefing. The jury was given detailed
9 instructions, and this goes to all of the fraud counts,
10 Justice Alito. You cannot say that you can uphold
11 something as harmless when the entire theory on which
12 the case was tried actually has been changed at the
13 Supreme Court of the United States.

14 Relatedly, I would like to add, because the
15 government said that count seven was a theft, that the
16 government's theory on count seven was that the
17 noncompetes were frauds from their inception, because
18 the reps from Paxton and Forum, none was wanted. And in
19 fact, other counts that charged Forum and Paxton, two
20 and three, you know, the jury returned a verdict of
21 acquittal. And as did Judge Sansieva on Kipnis on
22 seven.

23 And that makes it highly likely that -- that
24 the jury convicted based on the government 's argument,
25 that even though every single member of the audit

1 committee approved the noncompetes as a member of the
2 board, that Delaware law required a separate and prior
3 application to the audit committee.

4 And if that's what the jury was told, you
5 cannot really say that count seven is separate.

6 Second --

7 JUSTICE GINSBURG: Where was that in the
8 charge?

9 MR. ESTRADA: Excuse me, Your Honor?

10 JUSTICE GINSBURG: The charge -- the judge
11 charged the jury in terms of Delaware law?

12 MR. ESTRADA: Yes, yes, Your Honor. The
13 jury was told -- let me find that, I think it's around
14 page 336.

15 JUSTICE KENNEDY: 336.

16 MR. ESTRADA: Yeah, 336 and 337, and the
17 jury was given detailed instructions as to how all this
18 turned on whether the transactions at issue were, quote,
19 entirely fair under Delaware law.

20 And the jury was further told --

21 JUSTICE KENNEDY: But it said honest
22 services include fiduciary duties under corporate.

23 MR. ESTRADA: Correct. And then you then
24 went to say that -- that, you know, Delaware was
25 controlling -- this is the middle of page 336 A -- under

1 Delaware law, a corporation's officers have these
2 duties, one of them is loyalty. Loyalty requires this
3 and such under Delaware law.

4 One of the things that -- that would allow
5 the jury to convict was the notion that the government
6 is entirely just has odds for understandable reasons,
7 but this was not entirely fair. And a transaction could
8 fail to be entirely fair if every disclosure that should
9 have been made in accordance with Delaware law was not
10 made.

11 On the second point that I wanted to make is
12 the question of whether we are really embarking on the
13 federal common law of materiality.

14 JUSTICE SOTOMAYOR: -- I know you are
15 running out of time, but you are speaking so fast I
16 can't even follow you anymore.

17 MR. ESTRADA: I apologize, Your Honor.

18 The second question I wanted to address is a
19 question that you raised, Justice Sotomayor, it is false
20 to say that the materiality is a filter. Criminal law,
21 just as a question of doctrine, has always looked at the
22 mens rea, as the filter that takes out the culpable from
23 the nonculpable. In this case, you know, the so-called
24 filter is elusory. If you have a money or property
25 case -- Your Honor, may I finish?

1 CHIEF JUSTICE ROBERTS: Finish your thought.

2 MR. ESTRADA: -- you know what the decision
3 is that you are supposing to induce, whether you --
4 whether the person would part with the money. Here the
5 but-for world, was the decision that the employer might
6 make, do I dock his pay; do I give him a demotion; do I
7 fire him for all purposes, or do I simply say, that I
8 would not have authorized him to be absent at all for
9 the ball game. None of those things is specified, and
10 the entire test of the filter is as vague as the
11 statute.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 The case submitted.

14 (Whereupon, at 11:18 a.m., the case in the
15 above-entitled matter was submitted.)

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