IN THE SUPREME COURT OF THE UNITED STATES

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CONRAD M. BLACK, JOHN A. BOULTBEE, AND MARK S. KIPNIS, : Petitioners : v. : No. 08-876 UNITED STATES. :

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Washington, D.C.

Tuesday, December 8, 2009

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

APPEARANCES:

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

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

C O N T E N T S

P R O C E E D I N G S

(10:16 a.m.)

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

Mr. Estrada.

ORAL ARGUMENT OF MIGUEL A. ESTRADA

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

not well-developed.

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

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

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

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

The second category of choices --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. ESTRADA: I --

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

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

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

Now, you could have a bribe or a kickback

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

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

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

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

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

MR. ESTRADA: I think, Justice Scalia --

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

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

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

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

different than what anybody else would charge.

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

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

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

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

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

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

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

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

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

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

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

JUSTICE KENNEDY: Kickback or bribe.

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

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

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

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

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

As a practical matter, however, if you

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

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

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

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

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

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

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

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

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

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

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

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

of those.

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

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

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

MR. ESTRADA: Then it --

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

MR. ESTRADA: You should not. And in that

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

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

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

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

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

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

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

JUSTICE SCALIA: Now, what about --

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

MR. ESTRADA: No. No.

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

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

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

MR. ESTRADA: Well, oddly enough, that was

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

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

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

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

And on the basis of that statute, before

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

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

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

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

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

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

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

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

JUSTICE ALITO: Could you just take a moment

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

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

JUSTICE ALITO: Yes.

MR. ESTRADA: Well --

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE RESPONDENT

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

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

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

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

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

MR. DREEBEN: Well, Justice Scalia --

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

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

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

MR. DREEBEN: Well --

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

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

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

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

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

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

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

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

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

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

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

be briefed in a supplemental passage --

JUSTICE BREYER: So we should say that?

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

JUSTICE SOTOMAYOR: Counsel --

CHIEF JUSTICE ROBERTS: That would be --

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

CHIEF JUSTICE ROBERTS: Go ahead.

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

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

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

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

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

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

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

MR. DREEBEN: Agreed.

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

(Laughter.)

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

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

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

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

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

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

MR. DREEBEN: Legal, Your Honor.

CHIEF JUSTICE ROBERTS: Only -- only legal?

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

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

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

Second, the core --

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

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

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

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

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

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

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

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

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

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

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

MR. DREEBEN: I would not have --

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

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

JUSTICE BREYER: It is not causing economic harm.

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

Breyer --

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

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

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

(Laughter.)

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

(Laughter.)

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

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

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

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

MR. DREEBEN: The --

JUSTICE SOTOMAYOR: What becomes important?

MR. DREEBEN: The issue of materiality --

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

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

JUSTICE SOTOMAYOR: But the Second Circuit

said economic loss --

MR. DREEBEN: No --

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

MR. DREEBEN: With all respect --

JUSTICE SOTOMAYOR: -- in the private sector.

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

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

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

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

MR. DREEBEN: If the government proves that

it would be. And I should add --

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

JUSTICE SCALIA: Excuse me --

JUSTICE KENNEDY: Then that's the ball game. Hypo: you go to the ball game, the government --

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DREEBEN: Justice Scalia --

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

MR. DREEBEN: Fraud.

JUSTICE SCALIA: Misrepresentations to the employer.

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

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

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

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

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

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

MR. DREEBEN: There is no bright line rule

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

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

MR. DREEBEN: Well, I --

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

MR. DREEBEN: No, it's not.

JUSTICE BREYER: No, because --

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

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

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

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

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

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

MR. DREEBEN: No, Justice Breyer.

JUSTICE BREYER: In addition to that, what?

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

JUSTICE SOTOMAYOR: But is the problem the

nondisclosure?

MR. DREEBEN: Yes.

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

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

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

MR. DREEBEN: Well, the real --

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

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

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

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

MR. DREEBEN: Your son, Justice Scalia --

JUSTICE SCALIA: It's an adult son.

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

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

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

(Laughter.)

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

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

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

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

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

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

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

They can't --

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

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

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

He --

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

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

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

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

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

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

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

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

MR. DREEBEN: There was a larger body of

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

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

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

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

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

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

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

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

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

JUSTICE BREYER: That's always there.

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Sure.

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

CHIEF JUSTICE ROBERTS: Thank you, Mr. Dreeben.

Mr. Estrada, you have three minutes remaining.

REBUTTAL ARGUMENT OF MIGUEL A. ESTRADA

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

Second --

JUSTICE GINSBURG: Where was that in the charge?

MR. ESTRADA: Excuse me, Your Honor?

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

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

JUSTICE KENNEDY: 336.

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

And the jury was further told --

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

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

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

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

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

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

MR. ESTRADA: I apologize, Your Honor.

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

CHIEF JUSTICE ROBERTS: Finish your thought.

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

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

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