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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next today in Case 08-1394, Skilling v. United States.

Mr. Srinivasan.

ORAL ARGUMENT OF SRI SRINIVASAN
ON BEHALF OF THE PETITIONER

MR. SRINIVASAN: Thank you, Mr. Chief Justice, and may it please the Court:

The dramatic collapse of Enron had profound reverberations experienced throughout the Houston economy and citizenry. Countless individuals in the Houston area were affected, as the court of appeals explicitly recognized, so much so that 60 percent of the jury venire affirmatively acknowledged in the responses to questionnaires that they would be unable to set aside their deep-seated biases or doubted their ability to do so, or that they were angry about Enron's collapse, an anger that was manifested in the vitriolic terms in which Petitioner Jeff Skilling was referred to repeatedly both in the questionnaires and in the community more generally.

The passions about this case were so intense and the connections to Enron ran so deep that the entire

1 United States Attorney's Office, all 150 or so
2 attorneys, recused themselves from the investigation
3 that culminated in this prosecution.

4 In those conditions, the court of appeals
5 was correct in unanimously concluding that this was one
6 of the very rare cases in which, because of the degree
7 of passion and prejudice in the community, the process
8 of voir dire cannot be relied upon to adequately ferret
9 out and identify unduly biased jurors.

10 JUSTICE SOTOMAYOR: What do we take from
11 trial counsel at the end of the voir dire process
12 announcing that if he had had extra preemptory
13 challenges he would have used them only against 6 of the
14 12 people that were Finally selected? If that's all he
15 would have ejected, why couldn't a fair jury have been
16 found?

17 MR. SRINIVASAN: Well, Your Honor, to be
18 clear even one juror who should have been excluded and
19 wasn't would have been enough.

20 JUSTICE SOTOMAYOR: That's a different --
21 that's a different question.

22 MR. SRINIVASAN: Sure.

23 JUSTICE SOTOMAYOR: You are taking a broader
24 proposition and saying that the presumption could not
25 under any set of circumstances be overcome and that's

1 what I'm trying to probe.

2 MR. SRINIVASAN: Yes, Justice Sotomayor.
3 The reason that trial counsel objected to six jurors at
4 the juncture that Your Honor's referring to is that that
5 corresponded to six cause objections that had been in
6 our view erroneously denied. Now, that in no way
7 suggests that we were satisfied with the remainder of
8 the jury. We had made an objection --

9 JUSTICE SOTOMAYOR: I'm sorry. There was
10 only one juror that had been challenged for cause
11 against -- for which preemptory challenge wasn't used.
12 I thought that every other for-cause challenge ended up
13 being excused on the basis of a preemptory challenge.

14 MR. SRINIVASAN: That's right, and that's
15 what I was trying to say, Your Honor, that the reason
16 why trial counsel identified six specific jurors was
17 that there were six other jurors who would have been on
18 the venire as to who we had applied -- as to whom we had
19 asserted a cause challenge that was denied, and because
20 of that we had to use a preemptory to strike those
21 jurors, which left us without --

22 JUSTICE SOTOMAYOR: But that means that
23 there were six that were okay.

24 MR. SRINIVASAN: Well, no. There were
25 six -- there were six remaining as to which we didn't

1 have a corresponding for-cause objection that had been
2 denied. That in no way indicates that we were satisfied
3 with the other six.

4 From the very outset we complained about
5 this process. We said at the outset before trial that
6 no juror could be seated in this case because the
7 process of voir dire couldn't adequately be relied upon
8 in these conditions.

9 JUSTICE SOTOMAYOR: Tell me what in the
10 process itself, outside of your general proposition that
11 no process could find fair jurors? What else in the
12 process was deficient?

13 MR. SRINIVASAN: The process was deficient
14 in a couple of respects, Your Honor: First with respect
15 to time and scope. The voir dire that the trial judge
16 conducted was essentially an ordinary voir dire for
17 ordinary circumstances. He announced before the fact
18 that the voir dire would be conducted in a period of 1
19 day, and we objected to that.

20 He also announced that he would have limited
21 questioning and that counsel would have very limited
22 opportunity to follow up with additional questions. We
23 also objected clearly and repeatedly to that. And that
24 was manifested in the voir dire that occurred, because
25 what the trial judge did is made two fundamental, we

1 think, mistakes in the way he conducted the voir dire.

2 One occurs with respect to those jurors as
3 to whom they had laid bare their biases and another
4 occurs with respect to those jurors as to whom they
5 didn't affirmatively acknowledge their biases, but,
6 given the conditions that prevailed in the community,
7 they might well have had biases that they didn't
8 affirmative acknowledge. Now, with respect to the
9 first, the mistake that in our view the trial judge made
10 was to accept a simple assurance of fairness in the face
11 of overt statements of bias and in conditions that
12 confronted this community, where there was deep-seated
13 community prejudice and animus that permeated the
14 Houston -- that permeated the city of Houston, that kind
15 of acceptance of a simple assurance of fairness in the
16 face of repeated overt statements of bias, shouldn't be
17 countenanced.

18 And we think what the trial court should
19 have done in that situation is to move to an additional
20 juror. But instead of doing that, the trial court
21 interviewed 46 jurors, nearly 8 more than the minimum
22 that was necessary to constitute a jury in this case.
23 And just to give this a frame reference, the entire voir
24 dire process in this case took five hours and the trial
25 judge interviewed each juror for approximately 4-1/2

1 minutes.

2 By way of comparison --

3 JUSTICE GINSBURG: But he did -- he did give
4 time for counsel to ask additional questions, trial
5 counsel.

6 MR. SRINIVASAN: He --

7 JUSTICE GINSBURG: He asked both sides if
8 they had additional questions.

9 MR. SRINIVASAN: He gave some time, Justice
10 Ginsburg, but he made clear before the voir dire began
11 that that opportunity was going to be limited both in
12 time and scope. With respect to scope -- and this is at
13 page 11805 of the record -- what he said was that
14 follow-up questioning would be permitted if it was
15 reasonable, and if it was related to the purposes for
16 which the juror was brought before the bench. And just
17 to paint the picture a little bit, the -- the potential
18 jurors were brought before the bench, and they were left
19 standing, which I think reinforced the conception that
20 this was going to be a rather quick affair and it was
21 not going to allow the kind of extensive, meaningful
22 follow-up that we thought was required.

23 And to give it a frame of reference, in the
24 Oklahoma City bombing case, the prosecution of Timothy
25 McVeigh, that proceeding was transferred from the City

1 of Oklahoma City to Denver, but even after the transfer,
2 the trial judge conducted an 18-day voir dire with an
3 average of one hour of interviews per juror; 18 days and
4 1 hour as compared with 5 hours and 4 1/2 minutes. And
5 we think the Oklahoma City experience is much more
6 befitting of the kind of voir dire that is necessary in
7 circumstances of community prejudice and passion of the
8 kind that existed here.

9 JUSTICE GINSBURG: You made a change of
10 venue motion at the outset, right?

11 MR. SRINIVASAN: We did.

12 JUSTICE GINSBURG: And I'm unaware of any
13 case in which we have said a change is mandatory when
14 what's involved is money rather than life or limb. Life
15 or limb obviously was involved in the McVeigh case.

16 MR. SRINIVASAN: Sure, it was, Your Honor,
17 and by no means would we in any way diminish the -- the
18 profound human tragedy that accompanied the Oklahoma
19 City case, but I think the reality of the sentiment on
20 the ground in Houston was that Houston citizens, as we
21 pointed out in our brief, in fact referred to the -- to
22 what happened in the wake of the collapse of Enron in
23 terms that were similar to the way they referred to
24 terrorist attack. They -- they in fact talked about it
25 in terms of the 9-11 attack.

1 JUSTICE GINSBURG: Well, what was remarkable
2 about some of those questionnaires, there were a lot of
3 people didn't read the newspapers. There were a lot of
4 people who indicated they really didn't know anything
5 about this.

6 MR. SRINIVASAN: That's true,
7 Justice Ginsburg, but I would like to clarify one aspect
8 of that, if I could. And that is, our argument is not
9 -- and it hasn't been at any point in this proceeding --
10 that pretrial publicity caused the passion and prejudice
11 in the community. This is -- this was very much a case
12 in which pretrial publicity was a symptom rather than a
13 cause.

14 Now, pretrial publicity to be sure stoked
15 the passions that -- that already lay within the
16 community, but really this was a case in which the
17 passions existed regardless of pretrial publicity. And
18 I think the juror questionnaires and the surveys and all
19 of the other evidence that we put before the district
20 court manifests that. If you look at the juror
21 questionnaires -- and there are several examples of
22 situations in which particular jurors said that they
23 were unaware of any of the pretrial publicity; they did
24 not watch the news, they didn't read the newspapers;
25 they hadn't seen the movies about Enron -- but yet they

1 still said they had feelings about Jeff Skilling and Ken
2 Lay.

3 Juror 63, a person who wound up on the
4 panel, was a good example of that. She answered no to
5 all the questions concerning her exposure to pretrial
6 publicity, but then when she was asked whether she had
7 views about the guilt or innocence of Jeff Skilling, she
8 said yes, she did; and she elaborated on that by
9 explaining that I think he probably knew he was breaking
10 the law. So this was a person who, notwithstanding a
11 lack of exposure to pretrial publicity --

12 JUSTICE GINSBURG: But there was follow-up
13 to that.

14 MR. SRINIVASAN: There -- there was a bit of
15 follow-up to that, Your Honor, but I think the nature of
16 follow-up is quite illuminating on what we think are
17 some of the fatal flaws in this voir dire process. The
18 follow-up --

19 JUSTICE ALITO: Do you really think that
20 if -- if there had been a much more lengthy voir dire,
21 and if the trial judge had been more willing to -- to
22 grant motions to dismiss for cause, that it would have
23 been -- it would not have been possible to find a fair
24 and impartial jury in the district?

25 MR. SRINIVASAN: Well, our first --

1 certainly there should have been a more intensive voir
2 dire, Justice Alito. Now, our first order of submission
3 is that the proceedings should have been transferred,
4 not necessarily because there don't in fact exist or
5 there didn't in fact exist 12 unbiased jurors in the
6 City of Houston.

7 Our point is a different one; and that is
8 that in conditions where you have the level of passion
9 and prejudice that permeated the Houston community,
10 there is too great a risk that the process of voir dire
11 and particularly the ordinary process of voir dire
12 wouldn't be successful in identifying those 12 people.
13 That's the danger.

14 And the other problem with the argument that
15 the government makes with respect to the fact that there
16 are 4 1/2 million citizens in Houston, which I think is
17 part of Your Honor's question, is that that would mean
18 more if the trial judge had gone deeper into the jury
19 pool than the mere 46 jurors he did interview. Because
20 when he interviewed those 46 and stopped at that point,
21 what we were left with was a jury panel as to which
22 there was too great a danger of bias, too great a danger
23 that they would bring their biases to bear with them in
24 adjudicating Petitioner's guilt.

25 JUSTICE ALITO: Well, rule 21 says that the

1 judge must grant a transfer if the judge is satisfied
2 that a prejudice against -- that so great a prejudice
3 against the defendant exists in the transferring
4 district that the defendant cannot obtain a fair and
5 impartial trial there.

6 MR. SRINIVASAN: Correct.

7 JUSTICE ALITO: Well, doesn't that suggest
8 that if you could find a fair and impartial jury with an
9 adequate voir dire, then the transfer need not be
10 granted?

11 MR. SRINIVASAN: Well, I think it has to be
12 read against the context of whether we can be confident
13 that you can find a fair and impartial jury. I think in
14 any -- I think we would say that in any community in
15 which there is a 4 1/2 million people, there may in fact
16 be 12 individuals who aren't so biased that they can't
17 sit. The real danger, though, is that the ordinary
18 process of voir dire, as this Court's decisions
19 repeatedly recognize in *Mu'Min*, and *Patton*, and *Murphy*
20 and others -- the ordinary process of voir dire in that
21 situation can't be trusted to identify those people.

22 CHIEF JUSTICE ROBERTS: Because you think
23 they are going to lie, right?

24 MR. SRINIVASAN: I'm sorry?

25 CHIEF JUSTICE ROBERTS: Because you think

1 they're going to lie?

2 MR. SRINIVASAN: No --

3 CHIEF JUSTICE ROBERTS: When they fill out
4 the form and say this is what I've heard, and this -- I
5 can fairly evaluate the law and arguments?

6 MR. SRINIVASAN: No, no. No,
7 Mr. Chief Justice. With respect, that's not -- that's
8 not the only danger. I mean, that's -- that's part of
9 it, but I think there's -- there's other ones that we
10 would put forward before that one.

11 There is two in particular. First, in a
12 community like Houston, in the state of the -- the
13 passion and prejudice that existed in Houston at the
14 time of his trial, there is a real concern that jurors
15 will not feel fully free to return to that community
16 delivering anything other than the conviction for which
17 the community desires. And that, I think, is an
18 important concern that this Court's decisions identify.

19 And the other one, and this is in Murphy in
20 particular, where there is a substantial share of the
21 community that's impassioned and prejudiced, as this one
22 was, there is a concern that even jurors who don't lay
23 bare -- who don't affirmatively acknowledge their
24 biases -- are unwittingly subject to the same biases
25 that permeate the community. And that sort of danger is

1 -- is the reason that in these situations, we think
2 transfer is required.

3 But even if transfer wasn't required, what
4 needed to happen was a more extensive and intensive voir
5 dire than happened here. The voir dire was deficient,
6 and Justice Ginsburg, this gets back to your question
7 about juror 63. The voir dire was deficient in at least
8 this respect. In conditions like those that permeated
9 Houston, we think it's error to accept the assurance of
10 fairness of a juror who has already laid bare their
11 biases.

12 Now, juror 63, for example, she said she
13 thinks she knew that Jeff Skilling -- she thinks that
14 Jeff Skilling knew he was breaking the law. This is
15 someone as to whom we ought to be very concerned. In
16 our view, that person shouldn't get --

17 JUSTICE GINSBURG: Was there a challenge for
18 cause against her?

19 MR. SRINIVASAN: There -- there wasn't a
20 specific challenge for cause against her, Your Honor,
21 but -- but again, we challenged everybody on the basis
22 that voir dire wouldn't adequately ferret out biases in
23 this case. And then we did challenge -- as Justice
24 Sotomayor's question, about the six specific challenges
25 that we lodged -- at the close of voir dire, but before

1 juror was sworn, and juror 63 was one of those jurors.

2 And so I think it was evident that juror 63
3 was not at all somebody who we were satisfied with. And
4 the reason is, if you look at the nature of -- at the
5 voir dire colloquy with her, the trial court asked her
6 about that statement, and asked her: Do you remember
7 making this statement? Do you still feel that way? And
8 her response was, I don't know.

9 And then she acknowledged, I have no further
10 information to bring to bear on that question than I did
11 then. And at that point, she has only fortified the
12 bias that she brought with her, but the trial court was
13 unsatisfied and he continued to press.

14 And then he asked her at some point, can you
15 apply the presumption of innocence? And she said, yes.
16 And then that was it. But in our view, a search for a
17 -- what I think can fairly be described as a rote
18 assurance of fairness -- can't be sufficient, given the
19 very evident danger that someone like juror 63, who has
20 already laid bare her biases, would bring her biases
21 with her to the panel when she adjudicated Petitioner's
22 guilt or innocence.

23 JUSTICE BREYER: How do you say we -- in
24 your opinion, if we agreed with your basic idea -- if,
25 which is totally hypothetical.

1 MR. SRINIVASAN: Sure.

2 JUSTICE BREYER: If we agreed with that, how
3 would we sketch the lines? That is when does the
4 jury -- does the judge have to do more than is ordinary,
5 and what counts as more than ordinary? I mean, I --
6 what I have fear of, to put it out for you, is that jury
7 selection can go on a very long time.

8 MR. SRINIVASAN: Right.

9 JUSTICE BREYER: And judges have to -- have
10 to run their trials. And if we tell the judges that
11 they have got to do more, that will become exaggerated,
12 and they will administer it in a way that will make it
13 hard to select juries.

14 That's the harm I'm worried about. So I'm
15 asking you, how would you sketch a line that prevents
16 that harm?

17 MR. SRINIVASAN: Justice Breyer, it is by
18 nature a contextual inquiry. The standard that this
19 Court has articulated to identify the circumstances in
20 which this sort of extra -- I think -- precaution is
21 necessary is that there has to be, a quote, "wave of
22 public passion," in closed quote, and that's the
23 language that the Court has used in a number of
24 instances. Now, that may --

25 JUSTICE SOTOMAYOR: See, the problem with --

1 MR. SRINIVASAN: I'm sorry. Go ahead,
2 Justice Sotomayor.

3 JUSTICE SOTOMAYOR: Finish Justice Breyer.

4 MR. SRINIVASAN: I -- I -- anticipating what
5 you might feel, which is that that language may not be
6 self-evident as to the circumstances in which a deeper
7 inquiry is --

8 JUSTICE BREYER: I didn't ask you -- I just
9 asked you to do your best.

10 MR. SRINIVASAN: Yes.

11 JUSTICE BREYER: So we have got the wave of
12 public passion --

13 MR. SRINIVASAN: Wave --

14 JUSTICE BREYER: And what about the second
15 half?

16 MR. SRINIVASAN: Wave of public passion and
17 I guess the substrata that I would put beneath that,
18 especially for this category of cases, is pervasive
19 animus directed towards the defendant as responsible for
20 a harm felt by the entire community.

21 JUSTICE BREYER: All right. Now, what's the
22 second half? The second half, which I'm really worried
23 about, is that we get into the business of running the
24 trial court's trials. So I want to know what it is that
25 the trial court at that stage, in your opinion, other

1 than transfer has to do?

2 MR. SRINIVASAN: I think what the trial
3 court has to do is two things, Your Honor. First, for a
4 juror who has laid bare his or her biases, that juror
5 should not be allowed on the panel, and an assurance of
6 fairness from that sort of juror isn't enough. At the
7 very least, Your Honor, on this category, and then I
8 will go to my second point, in a situation in which a
9 juror has laid bare his or her biases, we think that
10 juror shouldn't be seated.

11 But if you are going to entertain the
12 thought of seating that person, at the least this has to
13 happen: They have to be forced to confront their
14 assurance of fairness as against the many statements of
15 bias that they may have uttered.

16 JUSTICE BREYER: -- the week, I gather, that
17 a, that a trial judge has a panel in front of him and
18 people, say, yeah, I think he is guilty? And -- and the
19 trial judge says, now, if you listen to the presumption,
20 can you be fair? You look him in the eye, and if he
21 says, yes, I can put this aside, trial judges do accept
22 those jurors.

23 Now, if that is the practice, and others
24 would know more than me, than how -- are -- are -- I'm
25 worried about changing that ordinary practice.

1 MR. SRINIVASAN: To be clear,
2 Justice Breyer, that ordinary practice would only be
3 altered in the very rare category of cases that involve
4 a wave of public passion. And -- and they would be
5 altered in the following respect: That if somebody had
6 laid bear their biases, the -- in our view, what should
7 happen is that you should move to the next juror.

8 But even if you didn't do that, at least the
9 following should happen, Justice Breyer, and that is
10 that when somebody utters an assurance of fairness, that
11 itself shouldn't be enough when the community is
12 permeated with a source of biases that attended this
13 proceeding. The jurors should at least be forced to
14 reconcile their previous statements of bias with their
15 utterance of fairness.

16 The other point I would make is this, that
17 the danger that this Court has identified in conditions
18 like those that pervaded the Houston community is that
19 even with prospective jurors who don't affirmatively
20 acknowledge their biases, there is a danger that they
21 may have biases they haven't brought to the fore. And
22 we what can't happen is what the trial judge did in this
23 case, which it to refuse to question any of the jurors
24 on the basis of any response they gave in the
25 questionnaire, other than responses that raised a red

1 flag.

2 And we think if you curtail the inquiry in
3 that regard, it doesn't allow for the sort of voir dire
4 that's necessary to in order to be --

5 JUSTICE SOTOMAYOR: Can I --

6 MR. SRINIVASAN: -- to ferret out biases
7 that may be latent.

8 JUSTICE SOTOMAYOR: Is there any place in
9 the record I can look to see questions you would have
10 posed absent the judge's limitations?

11 MR. SRINIVASAN: There are, Justice
12 Sotomayor. There is at R 12036, I think, is an --

13 JUSTICE SOTOMAYOR: I'm sorry, repeat that.

14 MR. SRINIVASAN: I sorry. R 12036 is an
15 important document, which is our renewed motion for
16 change of venue and related relief. And that was after
17 the questionnaire responses had been received.

18 And the point we made in that document is
19 that as a consequence of the questionnaire responses, we
20 already knew that a great deal of bias permeated the
21 venire. And we proposed not only that the proceedings
22 should be transferred, but also that a sort of different
23 sort of voir dire should be conducted than the one that
24 the trial court envisioned. And we laid out in that
25 motion the source of things that we thought should be

1 done.

2 And we did that in other places as well,
3 Your Honor, but I think that would be a good place to
4 look. But --

5 CHIEF JUSTICE ROBERTS: Counsel, can I --
6 perhaps it's time for you to shift gears if I could, and
7 move to the statutory question.

8 MR. SRINIVASAN: Sure.

9 CHIEF JUSTICE ROBERTS: I don't understand
10 why it's difficult. The statute prohibits scheme to
11 deprive another of the in tangible right of honest
12 services. Skilling owed the Enron shareholders honest
13 services. He acted dishonestly in a way that harmed
14 them. But I don't understand the difficulty.

15 MR. SRINIVASAN: Well, Mr. Chief Justice, I
16 think part of the problem with that sort of rendition is
17 that that -- I think nobody suggests that any dishonest
18 conduct falls within the compass of this law, that no
19 pre-McNally case suggests that. And I think the
20 government takes that position, either. If it did --

21 CHIEF JUSTICE ROBERTS: No, there has to
22 be -- there has to be a right to honesty. In other
23 words, it's not just in the abstract. And the
24 shareholders had a right to his honest services.

25 MR. SRINIVASAN: But I don't think you

1 advanced the ball, with all due respect, that much by
2 saying there is a right to honest services, because I
3 think what -- at the end of the day what that would mean
4 is that any situation in which there is a fiduciary duty
5 or even if there is not a fiduciary duty, but at least
6 any situation in which there is a fiduciary duty, a
7 nondisclosure depth of deception would give rise to a
8 Federal felony.

9 And that has never been the understanding
10 under pre-McNally case law, and that shouldn't be the
11 understanding now, because its sweep is breathtaking and
12 it's not something that we would ordinarily construed
13 Congress to have intended.

14 Now, I think in -- in this case there is
15 several objections have to the application of honest
16 services fraud statute to this case. We think the
17 statute is unconstitutionally vague. We think it's
18 particularly vague as it applies to anything beyond the
19 narrow category of bribes and kickbacks.

20 But I think in some ways the most
21 straightforward way to understand why the honest
22 services fraud statute can't be applied validly in this
23 case is to appreciate what I think is an evolution in
24 the government's theory. And at the time of the Moyer
25 Act, and this is at page of the government's brief in

1 Moyer Act just a few months ago. The government said
2 the honest services fraud statute, quote, nor does it
3 cover an official whose interest is public knowledge.

4 So at that point I think we would have
5 believed that the honest services fraud statute can't be
6 applied to Jeff Skilling, because his interest as the
7 government acknowledges, was public knowledge.

8 But the position that the government has
9 taken now is that even though his interest was
10 disclosed, he didn't disclose that he was acting in
11 pursuit of that interest at the expense of the
12 employer's interest, which I read to be contrary to the
13 position that they took in the Moyer Act case, and I
14 think which is problematic in two respects.

15 First, there is no pre-McNally
16 understanding, none, that a disclosed interest can give
17 rise to honest services liability. And second, and
18 maybe more importantly --

19 CHIEF JUSTICE ROBERTS: I'm sorry, a
20 disclosed interest?

21 MR. SRINIVASAN: A disclosed interest, where
22 the interest is disclosed. All the cases dealt with
23 situations in which the interest is undisclosed, as the
24 government suggested it be the case in the Moyer Act
25 brief.

1 But -- but perhaps even more importantly,
2 there is no more pre-McNally understanding to the effect
3 that acting in pursuit of an interest in compensation
4 can give rise to honest services liability. And, in
5 fact, in a post -- post McNally case, the Thompson case
6 out of the -- out of the Seventh Circuit Judge
7 Easterbrook, we think, explain persuasively why a
8 pursuit of an interest in personal compensation
9 shouldn't afford the gravamen of --

10 JUSTICE GINSBURG: And I thought part of the
11 government's theory was not -- wasn't limited to the
12 compensation. It was essentially Skilling owned shares
13 and he had information that those shares were inflated.
14 Shareholders owned shares. They didn't have that
15 information. Skilling then sold those shares at a great
16 profit to himself. And the shareholders were left
17 without that information. And when the stock price
18 plummeted, they all lost out.

19 I thought that the government was not
20 limiting the disposition to the compensation, but was
21 also dealing with the share price?

22 MR. SRINIVASAN: I think, Justice Ginsburg,
23 the government's theory on how the honest services fraud
24 statute that applies in this case is laid out at page 49
25 and 50. And the interest that the government identifies

1 that was furthered by Petitioner Skilling's access is
2 his interest in compensation. That's -- that's how the
3 government, I think, describes it.

4 And it's true, Your Honor --

5 JUSTICE SCALIA: 49 and 50 of the
6 government's brief?

7 MR. SRINIVASAN: Of the government's brief.

8 And it's true, Your Honor, that the
9 deception that they identify has to do the securities
10 fraud. And I'll bracket for the moment that we think
11 that the honest services fraud theory that was put
12 before the jury is not at all commensurate with the one
13 that is being asserted now.

14 But even if you take as a given that it's
15 the theory now, the elements of honest services fraud
16 under the government's theory are that the individual
17 would act in pursuit of his interest in his own
18 compensation at the expense of the employer's interest
19 in acquiring better information with which to make an
20 informed decision.

21 And one of the fundamental problems we see
22 with that approach is that it would threaten to convert
23 almost any lie in the workplace into an honest services
24 fraud prosecution.

25 JUSTICE GINSBURG: May I. I just don't

1 see -- because I'm looking at page 50. I thought this
2 discussion goes from 50 to 52, and that the part on 52
3 certainly hones in on the share -- the shares.

4 MR. SRINIVASAN: It -- it does, Your Honor,
5 but the interested at issue, and I'm reading from page
6 50, this is in the middle of the first full paragraph on
7 page 50, the government says, that constitute -- that
8 conduct constituted fraud. The only question here is
9 whether the public nature of Petitioner's compensation
10 scheme prevents his conduct from constituting honest
11 services fraud.

12 And then they go on, although the --
13 although Petitioner's basic compensation scheme was
14 public, his schemes to artificially inflate the
15 company's stock price by misrepresenting its financial
16 condition in order to derive additional personal
17 benefits, i.e., his compensation at the expense of
18 shareholders, was not disclosed.

19 So I think the theory of application here is
20 that because he was acting allegedly --

21 JUSTICE GINSBURG: Why -- why do you put in
22 the "i.e."? Additional personal benefits could be both.

23 MR. SRINIVASAN: Because the stock is the
24 compensation, Your Honor. There's -- there's no -- I
25 think in this sort of situation there is not a

1 desegregation between the stock and the compensation.
2 The stock was intimately tied to his compensation and
3 the personal benefit that, I think, was being received
4 was that compensation interest.

5 I mean, the government can clarify that, but
6 that's my understanding of the government's --

7 JUSTICE GINSBURG: I will ask the government
8 to do that.

9 MR. SRINIVASAN: The danger with that theory
10 is that it would have the capacity to convert almost any
11 workplace lie into a Federal felony, for the following
12 reason: That in a variety of situations an employee
13 might -- might engage in an act of deception to his
14 employer with respect to a work-related matter. For
15 example, suppose that there is an employer policy that
16 says you can only use workplace computers for business
17 purposes and, when asked, the employee says that he is
18 only using it for business purposes, but he is in fact
19 using it for personal reasons. Well, at that point he
20 will have made a deception to the employer. Arguably,
21 it would be material, particularly given that it acts in
22 the face of an employer policy, and it arguably was made
23 in furtherance of the employer's personal interest in
24 maximizing his compensation at the expense of the -- at
25 the expense of the employer's interest in having better

1 information with which to make an informed decision
2 about the employee's future.

3 So for that reason as well, we think that
4 the application of the --

5 CHIEF JUSTICE ROBERTS: What you've just
6 explained is why you think the statute is very broad.
7 You haven't explained why it's vague.

8 MR. SRINIVASAN: Well, there are two
9 different arguments, Your Honor. Our threshold
10 submission is the statute is unconstitutionally vague,
11 and we believe that it's particularly vague as applied
12 to a category that extends beyond bribes and kickbacks.
13 And I haven't been through those arguments, but they're
14 spelled out in our briefs.

15 Now, with respect to the remaining category,
16 which is undisclosed self-dealing, even that category we
17 think is a problem in an of itself. But it's
18 particularly problematic when it's applied to the realm
19 of compensation for the reasons that I have outlined.

20 If the Court has no further questions, I
21 would like to reserve the balance of my time for
22 rebuttal.

23 CHIEF JUSTICE ROBERTS: Thank you, counsel.

24 Mr. Dreeben.

25 ORAL ARGUMENT OF MICHAEL R. DREEBEN

1 ON BEHALF OF THE RESPONDENT

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

4 When Judge Lake approached this case with
5 the question of how to select a jury, he had 15 years of
6 experience in selecting juries and he informed the
7 parties that it was his experience that voir dire
8 conducted by the trial judge is more effective at
9 eliciting the potential biases of a juror than the
10 oftentimes contentious voir dire that is conducted by
11 the parties.

12 He did not ignore the fact that the Enron
13 collapse had a significant impact on the Houston
14 community. He worked with the parties to develop a 14-
15 page questionnaire, which I encourage the Court to look
16 at if the Court has not already done so. It's
17 extraordinarily detailed. It has more than 70 questions
18 designed to ferret out any possible connections between
19 the individual jurors and the Enron collapse. It asked
20 for their views about the Enron collapse. It asked for
21 whether --

22 JUSTICE SOTOMAYOR: Can you tell me any
23 other high-profile case comparable to this in which the
24 voir dire lasted only five hours?

25 MR. DREEBEN: Justice Sotomayor, I am not

1 familiar with the length of voir dire in particular
2 cases. But I think that there is no --

3 JUSTICE SOTOMAYOR: Are you aware of any
4 that's been reported where the selection was 5 hours
5 only.

6 MR. DREEBEN: No, I am not aware of any.
7 But I don't think that there is any problem with this
8 voir dire, and I think there is really --

9 JUSTICE BREYER: There's no problem? I went
10 through the 200 pages and I counted -- this is only my
11 own subjective recounting of it, but I counted six, of
12 whom only one lasted, but I counted five others that
13 they had to use peremptories on, that include one juror,
14 29, who herself was a victim of this offense to the tune
15 of 50 or \$60,000. The judge said: I will not challenge
16 her for cause.

17 I counted another, juror -- what's this one
18 -- juror numbers 74, who when he looked her square in
19 the eye and said, "Can you be fair?" She said: "I
20 can't say yes for sure, no."

21 Okay? So in my own subjective account there
22 were five here, maybe six, certainly three, that perhaps
23 if they'd had an appeal on peremptories, which
24 apparently they don't, they might have said these should
25 have been challenged for cause. So I am concerned about

1 the 5 hours, about the lack of excusal for cause, about
2 the very, very brief questions that he provided to
3 people who had said on the questionnaire they could
4 be -- they could be biased. They said we think he's
5 guilty, for example.

6 And all those are cause for concern. At the
7 same time, I am worried about controlling too much a
8 trial judge. I have expressed those concerns. I know
9 this is a special case. Half almost of the jury
10 questionnaires they just threw out. And the
11 community -- you know all the arguments there. You see
12 what's worrying me. And I am worried about a fair trial
13 in this instance and to say -- and I'm genuinely worried
14 and I would like to hear your response to the kind of
15 thing I'm bringing up.

16 MR. DREEBEN: Well, Justice Breyer, I think
17 that there was a fair trial in this case, and I think
18 that a full reading of the voir dire reveals that
19 individuals sitting from this vantage point with a cold
20 record who were not there may have different viewpoints
21 about --

22 JUSTICE BREYER: I never heard of an
23 instance where a trial judge would not challenge for
24 cause, but I'm not saying it doesn't happen, where the
25 juror herself is a victim of the offense to the tune of

1 50 to \$60,000. See, we are getting into an area that
2 I'm not familiar with, but I think that that's not
3 supposed to be.

4 MR. DREEBEN: I don't think that there is
5 any per se disqualification. But even if there was,
6 that juror did not sit, and this court held in the
7 United States v. Martinez-Salazar that one of the
8 purposes of peremptories was to protect against the
9 occasional accidental error.

10 JUSTICE SOTOMAYOR: But is it occasional or
11 accidental? I think that is what Justice Breyer is
12 getting at. With such a truncated voir dire and one in
13 which the judge basically said to the lawyers, I'm not
14 giving you much leeway at all, how can we be satisfied
15 that there was a fair and impartial jury picked when the
16 judge doesn't follow up on a witness who says: I'm a
17 victim of this fraud. I don't know -- I would find it
18 strange that we would permit jurors who are victims of
19 the crime to serve as jurors.

20 MR. DREEBEN: Well, none sat in this case.
21 I don't think there is any claim that they did.

22 JUSTICE SOTOMAYOR: Well, but the judge
23 didn't strike her for cause. So isn't that symptomatic
24 of not following through adequately?

25 MR. DREEBEN: I don't think that what this

1 Court may perceive as an error in the denial of one
2 for-cause challenge --

3 JUSTICE BREYER: But it's not just one.
4 There were like five, of which I have given you the
5 worst, and they had to use up all their peremptories.
6 And they can't appeal this. And it's that taken
7 together, plus the one who sat, juror 11, provides as
8 they point out for the reasons they say, some cause for
9 concern. And that's what I'm trying to get at.

10 MR. DREEBEN: Well, Justice Breyer I think
11 that reading the entire voir dire reflects that the
12 judge was interested in determining whether these jurors
13 were qualified to sit. He was not interested in having
14 the voir dire used as a lobbying or a argumentative
15 exercise by the lawyers. And as a result he relied on
16 the very extensive questionnaires to pinpoint the
17 examples of areas in which further questioning was
18 necessary. And then he went and he, I think, did fairly
19 allow sufficient inquiry into whether these jurors could
20 sit. And I think one of the best examples of that is
21 actually juror number 63, who Petitioner says was not
22 properly voir dired. I think what juror 63
23 illustrates -- and this is in the Joint Appendix at page
24 935a and then following, is that, as this Court has
25 remarked many times, the question of --

1 JUSTICE KENNEDY: Excuse me. What was the
2 page? 9 --

3 MR. DREEBEN: 935a. This was in volume 2 of
4 the Joint Appendix.

5 JUSTICE BREYER: Go ahead with it, but they
6 didn't challenge 63 for cause, so I think they waived
7 it.

8 MR. DREEBEN: They did not challenge 63 for
9 cause, but they -- but they came to this Court today and
10 tried to use 63 as an object lesson of what was wrong
11 with the voir dire. I actually think juror 63
12 illustrates not only what was right with the voir dire,
13 but the immense distortion that Petitioners have
14 attempted to perpetrate by putting together effectively
15 a highlight reel of every bad headline in every Houston
16 publication and claiming that the entire jurisdiction,
17 all 4.5 million people virtually, were infected with
18 some sort of pervasive prejudice that could not be
19 ferreted out in voir dire.

20 If you look at what happened in juror number
21 63, she happens to be a 24-year-old who comes to court.
22 She filled out a questionnaire that she said: I can be
23 impartial. She did have a statement: "I think that
24 probably Skilling is guilty of some crime." When the
25 voir dire proceeds it turns out that she's not one of

1 these jurors who has been in the Houston culture
2 pervasively exposed to what Petitioner says is
3 prejudicial publicity. She was living in Austin at the
4 time, going to school.

5 Then she's asked, are you watching major
6 networks, and she says: No, I don't really watch the
7 news at all; I'm a turtle person.

8 Do you recall anything that may have --
9 you've seen -- that you may have seen or heard on
10 television about this case? No.

11 Then the judge, after some more questioning
12 about her that reveals that, among other thing, Ken Lay
13 is a member of the country club that her parents belong
14 to, he asks her about the very question that focus on as
15 problematic: Do you have any opinion about the guilt or
16 innocence and you say, I think they were probably
17 braking the law?

18 And her answer is: "I don't know. The only
19 thing I can say is, anything I've ever heard even
20 peripherally has not been, you know -- but that's what
21 people say and, I mean, it's hard to know. People don't
22 know what they are talking about."

23 And the judge says: Well, I'm just trying
24 to find out what you think. She says: "I don't have an
25 opinion either way."

1 JUSTICE BREYER: Let's try juror number,
2 let's try 76: Judge: "Here's the detail that really
3 concerns me. You said: 'I think they're all guilty.'"

4 "Right."

5 "Now, there's nothing wrong with thinking
6 that. If that's what you really think, you just need to
7 tell us that. Okay. That's what you think, isn't it?"

8 "It's been a long time since I answering
9 that questionnaire. Right."

10 "Now, as you" -- okay.

11 Now, that as far as I can tell is as close
12 as I can get to a recantation of what she thought
13 originally.

14 MR. DREEBEN: Well, Justice Breyer, this
15 Court has recognized -- and it has recognized this as
16 long ago as Chief Justice Marshall in the Burr case --
17 that people come to court with opinions in highly
18 publicized cases. We expect our jurors to be somewhat
19 informed of civic affairs. They receive information
20 through the media or through their friends and they have
21 light opinions. And they come to court and the trial
22 judge instructs them, this is a legal proceeding; you
23 are going to hear evidence in court. What happened
24 outside of the courtroom no longer matters. What
25 matters is what has been presented in here. I'm going

1 to instruct you that defendants have a presumption of
2 innocence, can you follow that?

3 And then the judge is the only person on the
4 scene. We're not there, the court of appeals is not
5 there; the judge is the only person on the scene to
6 judge the jurors' inflection, the jurors' demeanor, the
7 jurors' apprehension of the seriousness of the duty.
8 And this Court has held that the standard for review of
9 a determination of no removable bias for cause is
10 manifest error.

11 JUSTICE KENNEDY: Were -- were these
12 colloquies that are reported, the -- the pages we have
13 just been reviewing, heard by the entire jury pool?

14 MR. DREEBEN: They were not --

15 JUSTICE KENNEDY: Or were they just where
16 the person, the juror was standing in front of the bench
17 for this?

18 MR. DREEBEN: That's correct, Justice
19 Kennedy. This was not a case like Mu'Min, where in your
20 concurrence -- your dissent, you pointed out that the
21 colloquy occurred in the full presence of the -- of
22 every other juror and there was no individualized voir
23 dire. Here there was individualized voir dire. Judge
24 Lake had that juror right in front of him, eyeball to
25 eyeball, and was able to make the kind of credibility

1 assessment, taking into account all of the context, that
2 no other judge can do.

3 And it's not to say there is no judicial
4 review of that on appeal. In the Irvin case, Irvin v.
5 Dowd, which is really the Court's first case in this
6 line, the Court noticed that there -- 90 percent of the
7 jurors had an opinion that the defendant was guilty. It
8 involved a highly sensationalized murder in rural
9 counties in southern Indiana. There was a barrage of
10 pretrial publicity; eight of the 12 jurors said they had
11 an opinion that the defendant was guilty.

12 The Court after meticulously reviewing the
13 voir dire concluded that the judge had committed
14 manifest error in accepting the representations of the
15 jurors that they could be impartial. But this is
16 nothing like that.

17 JUSTICE KENNEDY: It's hard for me to think
18 that the voir dire would have been much shorter even if
19 there had been no showing of pervasive prejudice.

20 MR. DREEBEN: I think that what Judge --

21 JUSTICE KENNEDY: Five hours sounds to me
22 about standard for a case of this difficulty.

23 MR. DREEBEN: I -- I think that's not
24 necessarily correct at all, and it would not have been
25 the case that in a normal trial there would have been as

1 detailed a 14-page questionnaire as there was in this
2 case, that was designed to elicit any and all
3 connections to Enron.

4 Now whether there may have been some
5 individualized mistakes along the way, whether some of
6 us would have preferred that the voir dire be more
7 extensive, is not the issue; and unless this Court is
8 prepared to set standards that are based either on a
9 stopwatch or some sort of, you know, notion of how many
10 days voir dire has to occur, it's going to be very
11 difficult to administer a standard that says this was
12 too little.

13 The Oklahoma City bombing case, it is true,
14 took many, many days but that was a capital case, and I
15 know that this Court is well familiar that are
16 numerous --

17 CHIEF JUSTICE ROBERTS: But it took many
18 days after it had been transferred.

19 MR. DREEBEN: It did, and Denver itself was
20 exposed, probably almost as much as Oklahoma City, to
21 the pretrial publicity, and a terrorist act of that
22 magnitude, Mr. Chief Justice, really strikes at the
23 heart of the entire nation. Judge Matsch, who sits in
24 Denver --

25 CHIEF JUSTICE ROBERTS: The atmosphere in

1 Oklahoma City was very different from that anywhere
2 else, in terms of impact of the bombing on that
3 particular community.

4 MR. DREEBEN: Agreed. It was 168 deaths,
5 many of them were children. There was a sense of -- of
6 victimization on the part of the community that I don't
7 think is comparable to what happened with a financial
8 meltdown in Houston, a 4.5 million city with a robust
9 economy and a trial that took place four years later,
10 after numerous other Enron trials had already taken
11 place in Houston, resulting in favorable verdicts for
12 defendants, mistrials, acquittals of one defendant.

13 This very trial itself of Mr. Skilling
14 resulted in nine acquittals on insider trading counts.
15 Now if you would think that the jury had some sort of
16 substratum of subterranean bias that was ineradicable by
17 the convention techniques of voir dire that we have been
18 using for 200 years, then insider trading where the
19 defendant pockets personally, as a result of the
20 exploitation of insider information -- you would think
21 that would be the first place that jurors would go.

22 CHIEF JUSTICE ROBERTS: Oh, no, no. No.
23 They would go to the statute that says honest services.
24 Right?

25 (Laughter.)

1 CHIEF JUSTICE ROBERTS: It seems -- it seems
2 -- I'm being flip. It seems that that's where you would
3 focus your attention, if you think that your community
4 has essentially been fleeced by somebody because of his
5 dishonesty.

6 MR. DREEBEN: I don't think so,
7 Mr. Chief Justice, because the honest-services component
8 actually, and the component of this trial, was really a
9 subset of the securities fraud. The essential gravamen
10 of Petitioner's crimes were lying to Enron, lying to its
11 shareholders about the health of the company in a
12 financial sense, when in fact he knew that he had been
13 engaging in numerous manipulations of earnings and
14 schemes that are detailed in the briefs, in order to
15 avoid Enron having to recognize that portions of its
16 business were imploding.

17 And the victimization was of shareholders;
18 that was expressed through securities fraud; it was
19 expressed through insider trading; there were counts
20 involving liars lying to auditors; and one object of a
21 multi-count conspiracy charge involved an
22 honest-services object as well as a money or property
23 fraud object, and as well as a securities fraud object.

24 Now in our view Petitioner has essentially
25 conceded that the honest-services statute is not vague

1 as applied, and therefore facially unconstitutional. He
2 all but acknowledges that bribes and kickbacks, which
3 constitute the bulk of pre-McNally honest-services
4 cases, can be defined with precision. There is not an
5 unconstitutional vagueness in it. And so I think at a
6 minimum --

7 JUSTICE KENNEDY: Well, a concession that a
8 bribe or a kickback scheme statute would not be vague is
9 hardly a concession that this statute as written is not
10 vague. In fact, I thought that was the point. The
11 point is that the courts shouldn't rewrite the statute,
12 that's for the Congress to do.

13 MR. DREEBEN: I don't think that in this
14 case, Justice Kennedy, the Court needs to rewrite the
15 statute so much as to recognize that what happened in
16 McNally was this Court said that the mail fraud statute
17 has two clauses, scheme to defraud and scheme for
18 obtaining money or property by false representations and
19 pretexts. The government's position in accordance with
20 all of the lower courts was that these two clauses set
21 forth two separate crimes. Scheme to defraud was not
22 limited to money or property. This Court disagreed and
23 it said, oh, yes it was.

24 And what Congress did in responding was to
25 invoke words that had appeared in this Court's decision

1 in McNally, in the dissent written by Justice Stevens,
2 in the lower court opinions, and intentionally -- as
3 this Court put in Cleveland v. United States -- cover
4 one of the intangible rights that the courts recognized
5 before McNally, and that was the right to -- intangible
6 right of honest services. And in the context of the
7 pre-McNally honest-services cases, that was well known
8 to include at its core the bribery and kickback cases,
9 and in the additional category, nondisclosure of a
10 personal conflicting substantial --

11 JUSTICE SCALIA: Well, suppose you have a
12 statute that -- that makes it criminal to -- to do any
13 bad thing, okay? Now it's clear that murder would be
14 covered. All right? Nobody would say that murder is
15 not covered by that. Does -- does that make the statute
16 non-vague?

17 MR. DREEBEN: No, Justice Scalia.

18 JUSTICE SCALIA: Just because you can pick
19 something that everybody would agree comes within a
20 denial of honest services, doesn't -- doesn't mean that
21 when you say nothing but honest services, you are saying
22 something that -- that has sufficient content to -- to
23 support a criminal prosecution.

24 MR. DREEBEN: But this is not like a
25 statute, Justice Scalia, that says prohibiting any bad

1 thing. It's a statute that responded to a decision of
2 this Court in which a term of art -- the intangible
3 right of honest services -- featured prominently. And
4 Congress --

5 JUSTICE SCALIA: And there were cases that
6 -- that -- some of which included bribery, but others of
7 which included a variety of -- of other actions, some of
8 which were allowed by some courts, and some of which
9 were disallowed by some courts. There was no solid
10 content to what McNally covered.

11 MR. DREEBEN: I think that there was a solid
12 enough content for this Court to be able to respond to
13 the McNally decision by giving shape to the crime in
14 accordance with the paradigm cases that the lower courts
15 had done and logical implications of those cases, just
16 as if it had concluded, in accordance with Justice
17 Stevens' dissent, that the statute did protect
18 intangible rights in the phrase scheme to defraud.

19 CHIEF JUSTICE ROBERTS: But if you are going
20 to say that the statute refers to a term of art, the
21 whole point of a term of art is that it is a shorthand
22 for defining something. And then -- but if you are
23 saying that it's a term of art, that means the
24 pre-McNally case law over the, you know, all the
25 different circuits and the district courts and some

1 knowledge of that -- it -- it's descriptive of
2 something, but it's not a term of art.

3 MR. DREEBEN: I think it's a term of art in
4 the sense that it referred to a -- a body of law that
5 until quite recently when defendants began making
6 vagueness arguments was understood to refer to the kinds
7 of schemes that had been prosecuted before this Court
8 held that "scheme to defraud" was limited to money or
9 property. And --

10 CHIEF JUSTICE ROBERTS: No, I'm with you
11 there. But then -- the kinds of cases, that's where it
12 gets fuzzy. I mean, you need lawyers and research
13 before you get an idea of what the pre-McNally state of
14 the law was with respect to intangible -- the right to
15 intangible services, of honest services. And I am just
16 wondering how clear does what that body of law is have
17 to be before you can say, "you know what, when we tell
18 you that right, you know that that's what it's referring
19 to"?

20 MR. DREEBEN: I think it's clear enough at
21 the core, this Court can say so, and can provide
22 definition, and it can use its standard tools of
23 interpretation of criminal statutes to dispose of cases
24 that are at the periphery and ensure that the --

25 CHIEF JUSTICE ROBERTS: It kind of puts the

1 prospective defendant I guess in an awfully difficult
2 position, though if he has got to wait. There is this
3 common law evolution. Two cases the government wins,
4 one it loses and three -- and he's supposed to keep
5 track of that. That doesn't sound like fair notice of
6 what's criminal.

7 MR. DREEBEN: Well, Mr. Chief Justice, I
8 don't think it puts a defendant in a very bad position
9 at all, because this statute is only triggered when
10 there's an intent to deceive, an intentional fraudulent
11 act taken to deprive the victim of whatever right exists
12 in question.

13 JUSTICE GINSBURG: What was -- Mr. Dreeben,
14 what was the jury told when this honest services count
15 was given to the jury? What were -- what were they told
16 was the definition?

17 MR. DREEBEN: Well, the jury instruction,
18 Justice Ginsburg, appears on page 1086a of the Joint
19 Appendix. That is in volume 3 of the Joint Appendix.
20 And I will describe the jury instruction, too, but I
21 want to say at the outset that this jury instruction was
22 drafted against the background of Fifth Circuit law
23 which I think did take a somewhat broader view of the
24 honest-services crime than the government has taken in
25 this Court and it has to be read against that

1 background.

2 But the instruction said that to show that
3 defendants deprived Enron and its shareholders of their
4 right of honest services, the government must proof
5 beyond a reasonable doubt that in rendering some
6 particular service or services the defendant knew that
7 his actions were not in the best interests of Enron and
8 its shareholders or that he consciously contemplated or
9 intended such actions, and that Enron or its
10 shareholders suffered a detriment from the defendant's
11 breach of his duty to render honest services. And this
12 was against a background --

13 JUSTICE SCALIA: But it's circular, isn't
14 it?

15 MR. DREEBEN: I would agree, Justice Scalia.
16 I have read this phrase many times and it does seem a
17 little circular to me. The introduction to this jury
18 instruction says: "Honest services are the services
19 required by the defendant's fiduciary duty to Enron and
20 its shareholders under State law." So if this was tried
21 in a circuit that followed the State law principle that
22 is at issue in the Weyerauch case, the government
23 defined the fiduciary duty in that way. But the essence
24 of the fraud was that Petitioner had a fiduciary duty to
25 the shareholders of Enron to act in their best interest

1 and he betrayed that by acting contrary to the best
2 interests of the shareholders, fraudulently upholding
3 the price, and ultimately that constituted the crime.

4 Now, I think there's --

5 CHIEF JUSTICE ROBERTS: So that covers the
6 case that your friend put of the employee using the
7 computer for personal use? That fits under this
8 instruction?

9 MR. DREEBEN: Well, whether the employee had
10 a fiduciary duty in that respect would be I think quite
11 a litigable question. This case doesn't involve any
12 subtle or arcane fiduciary duty. This is one of the
13 basic fiduciary duties that any chief executive has, not
14 to lie to shareholders about the financial condition of
15 the firm. -

16 JUSTICE SCALIA: I'm sorry. The duty of an
17 employee to provide honest services to his employer,
18 that's not included because the employee is not a
19 fiduciary?

20 MR. DREEBEN: Not all employees are
21 fiduciaries, no, Justice Scalia. I mean, most
22 fiduciaries have a sort of heightened duty towards
23 the --

24 JUSTICE SCALIA: Where do you get the
25 fiduciary limitation?

1 MR. DREEBEN: I think that it's inherent.

2 JUSTICE SCALIA: All it says is "honest
3 services." I would think that any employee has the
4 obligation to provide honest services.

5 MR. DREEBEN: I think, Justice Scalia that
6 you cannot successfully attempt to understand Congress's
7 reaction to this Court's decision in McNally without
8 some cognizance of the McNally decision and the
9 preexisting law.

10 JUSTICE KENNEDY: What authority do I look
11 to, to see that some employees are fiduciaries and
12 others are not?

13 MR. DREEBEN: That would be a standard
14 agency law principle, Justice Kennedy.

15 JUSTICE KENNEDY: If I look in the
16 Restatement of Agency and they have a section that
17 applies to fiduciaries and non-fiduciaries, both of whom
18 are employees?

19 MR. DREEBEN: Normally, Justice Kennedy, no
20 such complexities are necessary, and I think that this
21 Court can resolve this case without introducing such
22 complexities, because the core duties of loyalty that
23 have formed the core of the honest services prosecutions
24 are universal. They are equally applicable to --

25 JUSTICE KENNEDY: I would assume that any

1 employee, even at the lowest level of the corporate
2 structure, who has corporate property, a car, something,
3 has a duty to protect that car for the employer.

4 MR. DREEBEN: But that's not an honest
5 services case. The honest services cases are about
6 conflicting interests and the misuse of official
7 position.

8 I'm not even sure in the personal computer
9 use case that the government could successfully show
10 that the employee had misused his official position.
11 This case is quite typical in that respect. Petitioner
12 absolutely misused his official position to serve what
13 we say was his private interest in private gain.

14 JUSTICE ALITO: Were there any pre-McNally
15 cases that involved a situation like this, where the
16 benefit to the employee was in the form of the
17 employee's disclosed compensation?

18 MR. DREEBEN: There were not to my
19 knowledge, Justice Alito, and I would frankly
20 acknowledge that this case is a logical extension of the
21 basic principle that we have urged the Court to adopt in
22 the nondisclosure cases, and the Court can evaluate
23 whether it believes that that is legitimately within the
24 scope of an honest services violation or not. But it
25 should not obscure our fundamental submission which was

1 that there was a definable category of undisclosed
2 conflict of interest cases that a person furthered
3 through his official action that is constituted
4 honest-services fraud. A good example of that is United
5 States v. Keane, which was a Seventh Circuit decision.

6 Petitioner in his reply brief claims that
7 Keane involved financial injury to Chicago as a result
8 of an alderman's concealment of his interest in
9 properties that the city was selling. Actually there
10 were three separate schemes in Keane. In one of them,
11 the court was quite clear that, even though the alderman
12 got the same deal that every member of the public would
13 have gotten, it still was honest services fraud because
14 he did not disclose his financial interest in that
15 property to the council when the council was voting on
16 it.

17 JUSTICE SOTOMAYOR: Could I -- following
18 hypothetical. I'm a councilperson in a jurisdiction
19 that is considering a tax increase or a tax break, and I
20 vote for the tax break, and I happen to have property
21 that qualifies. Is that a breach of the statute?

22 MR. DREEBEN: It may well be, Justice
23 Sotomayor. It depends I think on whether the tax break
24 was something that basically all general members of the
25 public were in a position to benefit from, which may

1 well be the case if it's just a private residence,
2 versus if it's a particularized business property
3 interest that you have either acquired --

4 JUSTICE SOTOMAYOR: Please tell me what I
5 look to, to discern if I'm a councilperson, to discern
6 what needs to be disclosed or not disclosed?

7 MR. DREEBEN: I think in the first instance,
8 you will inevitably as a councilperson turn to your
9 local law. And I think this bring up an important point
10 that was discussed in the Weyerauch decision, which is
11 that the mail fraud statute does not criminalize
12 breaches of duty without more. There has to be a
13 showing of scienter, of a mens rea element of intent to
14 deceive. And unless the government can point to
15 something which shows that the individual knew they had
16 a duty to disclose and did not do that --

17 JUSTICE SOTOMAYOR: So could --

18 MR. DREEBEN: -- or -- if I could just
19 finish this part of the answer -- or can point to
20 circumvention type activity, using shell companies to
21 conceal an interest, then the government is not going to
22 be able to have an indictable case on honest services
23 fraud. And I think --

24 JUSTICE SCALIA: That doesn't give me a
25 whole lot of comfort, just because there is an intent to

1 deceive. An intent to deceive can be the basis for
2 terminating a contract. There's -- there's been fraud
3 in the inducement or something of that sort. So I know
4 I am liable to have the contract terminated, and maybe
5 for damages for the contract. And you say: And also,
6 by the way, you know, you can go to jail for a number of
7 years, because, oh, yeah, it's very vague, but you
8 intended to deceive and that's all, that's all you need
9 to know.

10 MR. DREEBEN: But this Court has recognized
11 in numerous cases, Justice Scalia, that a mens rea
12 element requiring an intent to deceive, an intent to
13 violate the law, is exactly what helps prevent statutes
14 that might otherwise be considered too vague from
15 falling --

16 JUSTICE BREYER: Focus on what you just put
17 together. You said intent to deceive, intent to violate
18 the law. I believe in another case you are saying they
19 don't have to have an intent to violate the law because
20 there was no State law that prohibited whatever was at
21 issue.

22 So is the government now saying, which is a
23 big difference, that you cannot convict somebody unless
24 they know, i.e., they intend to violate a law that
25 forbids the conduct in which they are engaging, other

1 than this honest-services law, or are you not saying
2 that?

3 MR. DREEBEN: I'm not saying that,
4 Justice Breyer.

5 JUSTICE BREYER: You are not saying that.

6 MR. DREEBEN: I'm saying that in the
7 ordinary case --

8 JUSTICE BREYER: Then if you're not saying
9 that, then what the person has to carry around with them
10 is an agency treatise.

11 MR. DREEBEN: Well, I think that what
12 happens, Justice Breyer, is that unless the government
13 does have some sort of legal platform like that to show
14 that there was knowledge of a duty, it's not possible
15 for the government to bring its proof to the court and
16 establish that the individual acted with the requisite
17 mens rea, unless there is activity that reveals an
18 intent to circumvent the law and to withhold the
19 information, as in Justice Sotomayor's example,
20 information about a property interest that may well
21 affect the deliberations of the council. And that kind
22 of evidence often requires use of offshore accounts --

23 JUSTICE BREYER: Yes, I mean, of course they
24 intend to -- it's not the case that is obvious, it's the
25 case that is not obvious that worries me and in the case

1 that is not obvious, of course they intend to withhold
2 information. I agree with that. But the problem is,
3 they don't know it's unlawful to do so.

4 MR. DREEBEN: Justice Breyer, I think if you
5 look at the cases in which this has happened, there is
6 not like a deliberation on somebody's part, oh, do I
7 have to disclose or not disclose what these cases are
8 are really outright criminal conduct in the form of
9 conflicting interests that every fiduciary knows you
10 need to disclose this before you take official action to
11 further that interest.

12 JUSTICE GINSBURG: Mr. Dreeben, would you
13 clarify the issue that came up, is the government's
14 theory focused simply on the compensation or does it
15 involve the sale of shares.

16 MR. DREEBEN: It involves the sale of shares
17 as well. That was part of the compensation and it is
18 linked to it. But, Justice Ginsburg, if you look at the
19 government's opening statement in this case, the
20 government opened by saying, you will see that the
21 defendants Lay and Skilling knew few -- a few key facts
22 about true condition of Enron, facts that the investing
23 public did not know. With that information, defendants
24 Lay and Skilling sold tens of millions of dollars of
25 their own Enron stock.

1 And then continued: When an investor buys a
2 share of stock, an investor buys some rights in a
3 publicly-traded company. When an investor buys a share
4 if stock, they buy the right to hear and receive truth
5 from the chief executive officer. And importantly, they
6 buy the right to have their interests placed ahead of
7 the chief executor officer every day of the week.

8 So there was, baked into this case at the
9 outset the notion that these officials were not acting
10 in the best interest of the shareholders. They were
11 furthering their own interest by maintaining a high
12 stock price so that they could profit from it. Thank
13 you.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Mr. Srinivasan, you have four minutes
16 remaining.

17 REBUTTAL ARGUMENT OF SRI SRINIVASAN

18 ON BEHALF OF THE PETITIONER

19 MR. SRINIVASAN: Thank you, Mr. Chief
20 Justice.

21 A couple of quick points on the honest
22 services fraud issue, and then a couple of points on the
23 juror issue, if I might. With respect to honest
24 services fraud, first of all, I think that the
25 government pointed jury instruction -- and,

1 Justice Ginsburg, this goes to some questions you had
2 raised -- I think what's clear from the capacious nature
3 of the jury instruction that was issued in this case is
4 that the elements that the government say make Jeff
5 Skilling guilty of honest services fraud weren't put
6 before the jury or required to be found by the jury.
7 And for that reason alone the conviction against Jeff
8 Skilling ought to be overturned.

9 Another point I'd make very quickly with
10 respect to the sweep of the government's theory
11 concerning the workplace, is under our understanding,
12 the duty of loyalty does extend to all employees. It
13 does, and therefore, the theory that they assert should
14 apply in this case, I think, has devastating
15 implications for workplace relations.

16 Now, with respect to the juror question. A
17 couple of preliminary points, and then I would like to
18 walk the Court through just one aspect of the voir dire,
19 which I think exhibits the manifest flaws in the process
20 the trial court conducted.

21 With respect to the question about the
22 issuance of questionnaires, questionnaires were also
23 issued in the Timothy McVeigh case. But I don't want to
24 limit our comparison to Timothy McVeigh, because I think
25 in response to some of the questions that were raised, I

1 don't want to leave an impression that a multiple-day
2 voir dire with the sort of extensive questioning that we
3 think was required here is not in use in other cases
4 that involve like crimes.

5 In the Martha Stewart case, for example,
6 which was a financial case, there were six days of voir
7 dire, and after a questionnaire was issued. And in that
8 case, the only reason you needed an extended voir dire
9 was because of the celebrity status of the defendant.
10 You didn't have the deep-seated community passion and
11 prejudice that characterized the Houston venue in this
12 case.

13 So, I think it's not at all unusual to have
14 that kind of extended voir dire. And, in fact, we would
15 say it's absolutely necessary to assure that the
16 defendant receives the fair and impartial jury to which
17 it's entitled.

18 JUSTICE SCALIA: So either this was too
19 little or Martha Stewart was too much?

20 (Laughter.)

21 MR. SRINIVASAN: I think the former rather
22 than the latter.

23 CHIEF JUSTICE ROBERTS: It's a different
24 model of it. As Mr. Dreeben was explaining, if you have
25 an experienced judge who goes through this all the time,

1 I think it's reasonable for him to say, look, to bring
2 the person in front of me, we have got a questionnaire,
3 I can identify the problems, look him in the eye, and I
4 have got a lot of experience picking a jury, and it's
5 better to let me do it then to have the lawyers have
6 three weeks to do it.

7 MR. SRINIVASAN: Well, you don't necessarily
8 need all of that, Your Honor, but I think with respect
9 to the way in which the district court, in fact,
10 conducted this voir dire, if I could just take -- if I
11 could just direct the Court's attention to one juror in
12 particular -- and, Justice Breyer, this is maps on to
13 some of the points you were making. This is Juror 61
14 and the relevant exchange is at pages 931 A to 932 A of
15 the Joint Appendix, which is at -- in -- in volume 2.

16 And I think the way the trial court
17 conducted the voir dire in this case exhibits the
18 manifest flaws in his approach generally. This is
19 someone who at page 932 A, it's revealed, answered the
20 question whether she was angry, whether there was anger
21 about Enron, with yes, quote -- it was, quote, based out
22 of greed, hurt a lot of innocent people.

23 And to paint the picture more fully, the
24 person was also asked: Do you have an opinion about the
25 collapse of Enron, to which the answer was, quote, yes,

1 criminal, caused a huge shock wave which the entire
2 community felt, close quote.

3 Now, at 931 A at the top she was asked the
4 question whether she had the opinion about Mr. Lay and
5 her answer was quote, shame on him.

6 And then much of this was put before her in
7 the course of the voir dire. And in the middle of page
8 932 A. The first answer, she's asked a question: Can
9 you presume as you start this trial that Mr. Lay is
10 innocent? The answer is, I hope so, but you know, I
11 don't know. I can't honestly answer that one way or
12 another.

13 JUSTICE BREYER: Then on 932 she does answer
14 it, and says, he's assumed innocent. And can you
15 conscientiously carry out that assumption? I could
16 honestly say I will give my best.

17 MR. SRINIVASAN: Not until --

18 JUSTICE BREYER: And so the judge looks her
19 in the eye and says --

20 MR. SRINIVASAN: Well, not -- not until this
21 happens first, Justice Breyer, between 932 A and 933 A.
22 And so -- she's asked, so that might -- might your views
23 about Ken Lay cloud your judgment relative to criminal
24 responsibility --

25 JUSTICE BREYER: I see. And I'll -- I'll

1 read that again. But my question is, can we get a hold
2 of these 238 questionnaires? Are they in the record in
3 front of us?

4 MR. SRINIVASAN: I believe that they are. I
5 think they are certainly in the record before the court
6 of appeals, so I think that they were.

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

9 (Whereupon, at 2:00 p.m., the case in the
10 above-entitled matter was submitted.)

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