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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We'll 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. And --

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, but --

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 specific
4 jurors at the juncture that Your Honor's referring to
5 is that that corresponded to six cause objections that had
6 been, in 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 a 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 whom 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 as -- there were six remaining as to which we didn't

1 have a corresponding for-cause objection that had been
2 denied. But 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 affirmatively acknowledge.

9 Now, with respect to the first, the mistake
10 that, in our view, the trial judge made was to accept a
11 simple assurance of fairness in the face of overt statements
12 of bias and in conditions that confronted this community,
13 where there was deep-seated community prejudice and animus
14 that permeated the Houston -- that permeated the city of
15 Houston, that kind of acceptance of a simple assurance of
16 fairness in the face of repeated overt statements of bias
17 shouldn't be 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 of reference, the entire voir
24 dire process in this case took 5 hours, and the trial
25 judge interviewed each juror for approximately 4 and a half

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 -- he did.

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.

17 And just to paint the picture a little bit,
18 the -- the potential jurors were brought before the bench,
19 and they were left standing, which I think reinforced the
20 conception that this was going to be a rather quick affair
21 and it was not going to allow the kind of extensive,
22 meaningful 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 1 hour of interviews per juror; 18 days and
4 1 hour as compared with 5 hours and 4 and a half minutes.
5 And we think the Oklahoma City experience is much more
6 befitting of the kind of voir dire that's 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. We --

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 attacks. 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 case.

6 MR. SRINIVASAN: That's true,
7 Justice Ginsburg, but I'd like to clarify one aspect
8 of that, if I could, and that's that 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 -- is very much a case
12 in which pretrial publicity was a symptom rather than the
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 the other evidence that we put before the district
20 court manifests that. If you look at the juror
21 questionnaires -- and they are -- there are several examples
22 of 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, is 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 is a person who, notwithstanding a
11 lack of exposure to pretrial publicity --

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

14 MR. SRINIVASAN: There -- there was a bit of
15 follow-up to that, Your Honor, but I think the nature of the
16 follow-up is -- 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 -- that 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's 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 and a half million citizens in Houston, which I think
17 is 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 that fair and impartial jury. I think in
14 any -- I think we would say that in any community in
15 which there is 4 and a half million people, there may,
16 in fact, be 12 individuals who aren't so biased that they
17 can't 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*, in *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 MR. SRINIVASAN: And that's the danger here.

24 CHIEF JUSTICE ROBERTS: -- they're going to lie,
25 right?

1 MR. SRINIVASAN: I'm sorry.

2 CHIEF JUSTICE ROBERTS: Because you think
3 they're going to lie?

4 MR. SRINIVASAN: No, that's --

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

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

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

21 And the other one, and this is in Murphy in
22 particular, where there's a substantial share of the
23 community that's impassioned and prejudiced, as this one
24 was, there's a concern that even jurors who don't lay
25 bare -- who don't affirmatively acknowledge their

1 biases -- are unwittingly subject to the same biases
2 that permeate the community. And that sort of danger is
3 -- is the reason that in these situations, we think
4 transfer is required.

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

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

19 JUSTICE GINSBURG: Was there a challenge for
20 cause against her?

21 MR. SRINIVASAN: There -- there wasn't a
22 specific challenge for cause against her, Your Honor,
23 but -- but again, we challenged everybody on the basis
24 that voir dire wouldn't adequately ferret out biases in
25 this case. And then we did challenge -- as Justice

1 Sotomayor's question about the six specific challenges
2 that we lodged at the close of the voir dire, but before the
3 jurors were sworn -- juror 63 was one of those jurors.

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

11 And then she acknowledged: I have no further
12 information to bring to bear on that question than I did
13 then. And at that point, she has only fortified the
14 bias that she brought with her, but the trial court was
15 unsatisfied, and he continued to press. And then he asked
16 her at some point: Can you apply the presumption of
17 innocence? And she said yes. And then that was it.

18 But in our view, a -- a search for a --
19 -- what I think can fairly be described as a rote
20 assurance of fairness can't be sufficient, given the
21 very evident danger that someone like juror 63, who has
22 already laid bare her biases, would bring her biases
23 with her to the panel when she adjudicated Petitioner's
24 guilt or innocence.

25 JUSTICE BREYER: How do you say we -- in

1 your opinion, if we agreed with your basic idea -- if,
2 which is totally hypothetical.

3 MR. SRINIVASAN: Sure.

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

10 MR. SRINIVASAN: Right.

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

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

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

1 Now, that may --

2 JUSTICE SOTOMAYOR: See, the problem with --

3 MR. SRINIVASAN: I'm sorry. Go ahead,
4 Justice Sotomayor.

5 JUSTICE SOTOMAYOR: No. Finish Justice Breyer --

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

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

12 MR. SRINIVASAN: Yes, and that --

13 JUSTICE BREYER: So we've got the wave of
14 public passion --

15 MR. SRINIVASAN: Wave --

16 JUSTICE BREYER: And what about the second
17 half?

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

23 JUSTICE BREYER: All right. Now, what's the
24 second half? The second half, which I'm really worried
25 about, is that we get into the business of running the

1 trial court's trials. So I want to know what it is that
2 the trial court at that stage, in your opinion, other
3 than transfer, has to do?

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

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

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

25 Now, if that is the practice, and others

1 would know more than me, then our -- our -- I'm
2 worried about changing that ordinary practice.

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

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

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

1 jurors on the basis of any response they gave in the
2 questionnaire, other than responses that raised a red
3 flag.

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

7 JUSTICE SOTOMAYOR: Can I look at --

8 MR. SRINIVASAN: -- in order to ferret out
9 biases that may be latent.

10 JUSTICE SOTOMAYOR: Is there any place in
11 the record I could look to see questions that you would
12 have posed absent the judge's limitations?

13 MR. SRINIVASAN: There are, Justice
14 Sotomayor. There's at R 12036, I think, is an --

15 JUSTICE SOTOMAYOR: I'm sorry. Repeat that.

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

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

1 the trial court envisioned. And we laid out in that
2 motion the sorts of things that we thought should be
3 done.

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

7 CHIEF JUSTICE ROBERTS: Counsel, can I --
8 perhaps it's time for you to shift gears, if I could --

9 MR. SRINIVASAN: Sure.

10 CHIEF JUSTICE ROBERTS: -- and move to
11 the statutory question.

12 MR. SRINIVASAN: Sure.

13 CHIEF JUSTICE ROBERTS: I don't understand
14 why it's difficult. The statute prohibits "scheme to
15 deprive another of the intangible right of honest
16 services." Skilling owed the Enron shareholders honest
17 services. He acted dishonestly in a way that harmed
18 them. But I don't understand the difficulty.

19 MR. SRINIVASAN: Well, Mr. Chief Justice, I
20 think part of the problem with that sort of rendition is
21 that that -- I think nobody suggests that any dishonest
22 conduct falls within the compass of this law, that no
23 pre-McNally case suggests that. And I think the
24 government doesn't takes that position, either.
25 If it did --

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

5 MR. SRINIVASAN: But I don't think that
6 you've advanced the ball, with all due respect, that much
7 by saying there has a right to honest services, because I
8 think what -- at the end of the day, what that would mean
9 is that any situation in which there's a fiduciary duty
10 or even if there's not a fiduciary duty, but at least
11 any situation in which there is a fiduciary duty, a
12 nondisclosure of deception would give rise to a
13 Federal felony prosecution.

14 And that has never been the understanding
15 under pre-McNally case law, and that shouldn't be the
16 understanding now, because its sweep is breathtaking, and
17 it's not something that we would ordinarily construe
18 Congress to have intended.

19 Now, I think in -- in this case, there's
20 several objections we have to the application of the
21 honest services fraud statute to this case. We think
22 the statute is unconstitutionally vague. We think it's
23 particularly vague as applies to -- as applied to anything
24 beyond the narrow category of bribes and kickbacks.

25 But I think in some ways the most

1 straightforward way to understand why the honest
2 services fraud statute can't be applied validly in this
3 case is to appreciate what I think is an evolution in
4 the government's theory. And -- and at the time of
5 Weyhrauch -- and this is at page 48 of the government's
6 brief in Weyhrauch, just a few months ago. The government
7 said that the honest services fraud statute, quote,
8 "Nor does it cover an official whose interest is public
9 knowledge."

10 So, at that point, I think we -- we would have
11 believed that the honest services fraud statute can't be
12 applied to Jeff Skilling, because his interest, as the
13 government acknowledges, was public knowledge.

14 But the position that the government has
15 taken now is that even though his interest was
16 disclosed, he didn't disclose that he was acting in
17 pursuit of that interest at the expense of the
18 employer's interests, which I read to be contrary to the
19 position that they took in the Weyhrauch case and, I
20 think, which is problematic in two respects.

21 First, there is no pre-McNally
22 understanding, none, that a disclosed interest can give
23 rise to honest services liability. And, second, and
24 maybe more importantly --

25 CHIEF JUSTICE ROBERTS: I'm sorry. A

1 disclosed interest?

2 MR. SRINIVASAN: A disclosed interest, where
3 the interest is disclosed. All the cases dealt with
4 situations in which the interest is undisclosed, as the
5 government suggested would be the case in the Weyhrauch
6 brief.

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

16 JUSTICE GINSBURG: And I thought part of
17 the government's theory was not --

18 MR. SRINIVASAN: -- an honest services
19 prosecution.

20 JUSTICE GINSBURG: -- wasn't limited to the
21 compensation. It was essentially Skilling owned shares,
22 and he had information that those shares were inflated.
23 Shareholders owned shares. They didn't have that
24 information. Skilling then sold those shares at a great
25 profit to himself. And the shareholders were left

1 without that information. And then when the stock
2 price plummeted, they all lost out.

3 I thought that the government was not
4 limiting the -- its position to the compensation, but was
5 also dealing with the share price.

6 MR. SRINIVASAN: I think, Justice Ginsburg,
7 the government's theory on how the honest services fraud
8 statute applies in this case is laid out at page 49
9 and 50. And the interest that the government identifies
10 that was furthered by Petitioner Skilling's action is
11 his interest in compensation. That's -- that's how the
12 government, I think, describes it.

13 And the -- it's true, Your Honor --

14 JUSTICE SCALIA: What 49 and 50? Of the
15 government's brief?

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

17 And it's true, Your Honor, that the
18 deception that they identify has to do with securities
19 fraud. And I'll bracket for the moment that we think
20 that the honest services fraud theory that was put
21 before the jury is not at all commensurate with the one
22 that's being asserted now.

23 But even if you take as a given that it's
24 the theory now, the elements of honest services fraud
25 under the government's theory are that the individual

1 would act in pursuit of his interest in his own
2 compensation at the expense of the employer's interests
3 in acquiring better information with which to make an
4 informed decision.

5 And one of the fundamental problems we see
6 with that approach is that it would threaten to convert
7 almost any lie in the workplace into an honest services
8 fraud prosecution for the following --

9 JUSTICE GINSBURG: May I -- I just don't
10 -- because I'm looking at page 50. I thought this
11 discussion goes from 50 to 52, and that the part on 52
12 certainly homes in on the share -- the shares.

13 MR. SRINIVASAN: It -- it does, Your Honor,
14 but the interest at issue -- and I'm reading from page
15 50. This is in the middle of the first full paragraph
16 on page 50. The government says, "That constitute" --
17 "That conduct constituted fraud." The only question here is
18 whether the public nature of petitioner's compensation
19 scheme prevents his conduct from constituting honest
20 services fraud."

21 And then they go on: "Although the" --
22 "Although petitioner's basic compensation scheme was
23 public, his scheme to artificially inflate the
24 company's stock price by misrepresenting its financial
25 condition, in order to derive additional personal

1 benefits" -- i.e., his compensation -- "at the expense of
2 shareholders, was not" disclosed.

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

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

7 MR. SRINIVASAN: Because the stock is the
8 compensation, Your Honor. There's -- there's no -- I
9 think, in this sort of situation, there's not a
10 disaggregation between the stock and the compensation.
11 The stock was intimately tied to his compensation, and
12 the personal benefit that, I think, was being received
13 was that compensation interest.

14 I mean, the government can clarify that, but
15 that's my understanding of the government's view.

16 JUSTICE GINSBURG: I think we'll ask the
17 government to do that.

18 MR. SRINIVASAN: And the danger with that theory
19 is that it would have the capacity to convert almost any
20 workplace lie into a Federal felony, for the following
21 reason: That, in a variety of situations, an employee
22 might -- might engage in an act of deception to his
23 employer with respect to a work-related matter. For
24 example, suppose that there is an employer policy that
25 says you can only use workplace computers for business

1 purposes, and when asked, the employee says that he is
2 only using it for business purposes, but he is in fact
3 using it for personal reasons. Well, at that point he
4 will have made a deception to the employer. Arguably,
5 it would be material, particularly given that it acts in
6 the face of an employer policy, and it arguably was made
7 in furtherance of the employer's personal interest in
8 maximizing his compensation at the expense of the -- at
9 the expense of the employer's interests in having better
10 information with which to make an informed decision
11 about the employee's future.

12 So for that reason as well, we think that
13 the application of the honest services fraud --

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

17 MR. SRINIVASAN: Well, there are two
18 different arguments, Your Honor. Our threshold
19 submission is the statute is unconstitutionally vague,
20 and we believe that it's particularly vague as applied
21 to a category that extends beyond bribes and kickbacks.
22 And I haven't been through those arguments, but they're
23 -- they're spelled out in our briefs.

24 Now, with respect to the remaining category,
25 which is undisclosed self-dealing, even that category we

1 think is a problem in and of itself. But it's
2 particularly problematic when it's applied to the realm
3 of compensation for the reasons that I have outlined.

4 If the Court has no further questions, I'd
5 like to reserve the balance of my time for rebuttal.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.
7 Mr. Dreeben.

8 ORAL ARGUMENT OF MICHAEL R. DREEBEN
9 ON BEHALF OF THE RESPONDENT

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

12 When Judge Lake approached this case with
13 the question of how to select a jury, he had 15 years of
14 experience in selecting juries, and he informed the
15 parties that it was his experience that voir dire
16 conducted by the trial judge is more effective at
17 eliciting the potential biases of a juror than the
18 oftentimes tendentious voir dire that's conducted by
19 the parties.

20 He did not ignore the fact that the Enron
21 collapse had a significant impact on the Houston
22 community. He worked with the parties to develop a 14-
23 page questionnaire, which I encourage the Court to look
24 at, if the Court has not already done so. It's
25 extraordinarily detailed. It has more than 70 questions

1 designed to ferret out any possible connections between
2 the individual jurors and the Enron collapse. It asked
3 for their views about the Enron collapse. It asked for
4 whether --

5 JUSTICE SOTOMAYOR: Can you tell me of any
6 other high-profile case comparable to this in which the
7 voir dire lasted only 5 hours?

8 MR. DREEBEN: Judge -- Justice Sotomayor,
9 I'm not familiar with the length of voir dire in
10 particular cases. But I think that there is no --

11 JUSTICE SOTOMAYOR: Are you aware of any
12 that's been reported where the selection was 5 hours
13 only?

14 MR. DREEBEN: No, I'm not aware of any,
15 but I don't think that there is any problem with this
16 voir dire, and I think there is really --

17 JUSTICE BREYER: There's no problem? I went
18 through the 200 pages, and I counted -- this is only my
19 own subjective recounting of it, but I counted six of
20 whom only one lasted, but I counted five others that
21 they had to use peremptories on that include one juror,
22 29, who herself was a victim of this offense to the tune
23 of \$50,000 or \$60,000. The judge said: I will not
24 challenge her for cause.

25 I counted another, juror -- what's this one

1 -- juror number -- number's 74, who when he looked her
2 square in the eye and said, "Can you be fair?" She said,
3 "I can't say yes for sure. No."

4 Okay? So, in my own subjective account, there
5 were five here, maybe six, certainly three, that perhaps
6 if they'd had an appeal on peremptories, which
7 apparently they don't, they might have said these should
8 have been challenged for cause. So I'm concerned about
9 the 5 hours, about the lack of excusal for cause, about
10 the very, very brief questions that he provided to
11 people who had said on the questionnaire they could
12 be -- they could be biased. They said we think he's
13 guilty, for example.

14 And all those are cause for concern. At the
15 same time, I'm worried about controlling too much a
16 trial judge. I've expressed those concerns. I know
17 this is a special case. Half, almost, of the jury
18 questionnaires they just threw out. And the
19 community -- you know all the arguments there. You see
20 what's worrying me. And I'm worried about a fair trial
21 in this instance and to say -- and I'm genuinely worried,
22 and -- and I'd like to hear your response to the kind of
23 thing I'm bringing up.

24 MR. DREEBEN: Well, Justice Breyer, I think
25 that there was a fair trial in this case, and I think

1 that a full reading of the voir dire reveals that
2 individuals sitting from this vantage point with a cold
3 record who were not there may have different viewpoints
4 about --

5 JUSTICE BREYER: I'd never heard of an
6 instance where a trial judge would not challenge for
7 cause -- but I'm not saying it doesn't happen -- where the
8 juror herself is a victim of the offense to the tune of
9 \$50,000 to \$60,000. See, we are getting into an area that
10 I'm not familiar with, but I think that that's not
11 supposed to be.

12 MR. DREEBEN: I don't think that there's
13 any per se disqualification. But even if there was,
14 that juror did not sit, and this Court held in
15 United States v. Martinez-Salazar that one of the
16 purposes of peremptories is to protect against the
17 occasional accidental error.

18 JUSTICE SOTOMAYOR: How -- but is it
19 occasional or accidental? I think that's what Justice
20 Breyer is getting at. With such a truncated voir dire
21 and one in which the judge basically said to the lawyers,
22 I'm not giving you much leeway at all, how can we be
23 satisfied that there was a fair and impartial jury picked
24 when the judge doesn't follow up on a witness who says,
25 I'm a victim of this fraud? I don't know -- I would find

1 it strange that we would permit jurors who are victims of
2 the crime to serve as jurors.

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

5 JUSTICE SOTOMAYOR: Well, but -- but the judge
6 didn't strike her for cause. So isn't that symptomatic
7 of not following through adequately?

8 MR. DREEBEN: I don't think that a -- what
9 this Court may perceive as an error in the denial of one
10 for-cause challenge --

11 JUSTICE BREYER: No, but it's not just one.
12 There were like five, of which I have given you the
13 worst, and they had to use up all their peremptories.
14 And they can't appeal this. And it's that taken
15 together, plus the one who sat, juror 11, provides, as
16 they point out for the reasons they say, some cause for
17 concern. And that's what I'm trying to get at.

18 MR. DREEBEN: Well, Justice Breyer, I think
19 that reading the entire voir dire reflects that the
20 judge was interested in determining whether these jurors
21 were qualified to sit. He was not interested in having
22 the voir dire used as a lobbying or a argumentative
23 exercise by the lawyers. And as a result, he relied on
24 the very extensive questionnaires to pinpoint the
25 examples of areas in which further questioning was

1 necessary. And then he went and he, I think, did fairly
2 allow sufficient inquiry into whether these jurors could
3 sit. And I think one of the best examples of that is
4 actually juror number 63, who Petitioner says was not
5 properly voir-dired. And I think what juror number 63
6 illustrates -- and this is in the Joint Appendix at page
7 935a and then following -- is that, as this Court has
8 remarked many times, the question of --

9 JUSTICE KENNEDY: Excuse me. What was the
10 page? Nine --

11 MR. DREEBEN: 935a. This is in volume 2 of
12 the Joint Appendix.

13 JUSTICE BREYER: Go ahead with it, but they
14 didn't challenge 63 for cause, so I guess they waived
15 it.

16 MR. DREEBEN: They did not challenge 63 for
17 cause, but they -- but they came to this Court today and
18 tried to use 63 as an object lesson of what was wrong
19 with the voir dire. I actually think juror 63
20 illustrates not only what was right with the voir dire,
21 but the immense distortion that Petitioners have
22 attempted to perpetrate by putting together effectively
23 a highlight reel of every bad headline in every Houston
24 publication and claiming that the entire jurisdiction,
25 all 4.5 million people virtually, were infected with

1 some sort of a pervasive prejudice that could not be
2 ferreted out in voir dire.

3 If you look at what happened in juror number
4 63, she happens to be a 24-year-old who comes to court.
5 She filled out a questionnaire that she said: I can be
6 impartial. She did have the statement: I -- I think that
7 probably Skilling is guilty of some crime. When the
8 voir dire proceeds, it turns out that she's not one of
9 these jurors who has been in the Houston culture
10 pervasively exposed to what Petitioner says is
11 prejudicial publicity. She was living in Austin at the
12 time, going to school.

13 Then she's asked, "Are you watching major
14 networks?" And she says, "No, I don't really watch the
15 news at all. I'm a turtle person."

16 "Do you recall anything that may have --
17 you've seen -- that you may have seen or heard on
18 television about this case?" "No."

19 And then the judge, after some more questioning
20 about her that reveals that, among other things, Ken Lay
21 is a member of the country club that her parents belong
22 to, he asks her about the very question that Petitioners
23 focus on as problematic: "Do you have any opinion about
24 the guilt or innocence -- and you say, I think they probably
25 were breaking the law?"

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

6 And the judge says, "Well, I'm just trying
7 to find out what you think." She says, "I don't have an
8 opinion either way."

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

12 "Right."

13 "Now, there's nothing wrong with thinking
14 that, if that's what you really think. You just need to
15 tell us that."

16 "Okay."

17 "That's what you think, isn't it?"

18 "It's been a long time since I answered that
19 questionnaire."

20 "Right. Now, as you" --

21 Okay? Now, that's -- that, as far as I could tell,
22 is as close as I can get to a recantation of what she
23 thought originally.

24 MR. DREEBEN: Well, Justice Breyer, this
25 Court has recognized -- and it has recognized this as

1 long ago as Chief Justice Marshall in the Burr case --
2 that people come to court with opinions in highly
3 publicized cases. We expect our jurors to be somewhat
4 informed of civic affairs. They receive information
5 through the media or through their friends, and they have
6 light opinions. And they come to court, and the trial
7 judge instructs them: This is a legal proceeding; you're
8 going to hear evidence in court. What happened
9 outside of the courtroom no longer matters. What
10 matters is what has been presented in here. I'm going
11 to instruct you that defendants have a presumption of
12 innocence. Can you follow that?

13 And then the judge is the only person on the
14 scene. We're not there, the court of appeals is not
15 there; the judge is the only person on the scene to
16 judge the jurors' inflection, the jurors' demeanor, the
17 jurors' apprehension of the seriousness of the duty.
18 And this Court has held that the standard for review of
19 a determination of no removable bias for cause is
20 manifest error.

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

24 MR. DREEBEN: They were not --

25 JUSTICE KENNEDY: Or were they just -- where

1 the person -- the juror was standing in front of the bench
2 for this?

3 MR. DREEBEN: That's correct, Justice
4 Kennedy. This was not a case like Mu'Min, where in your
5 concurrence -- your dissent, you pointed out that the
6 colloquy occurred in the full presence of the -- of
7 every other juror, and there was no individualized voir
8 dire. Here there was individualized voir dire. Judge
9 Lake had that juror right in front of him, eyeball to
10 eyeball, and was able to make the kind of credibility
11 assessment, taking into account all of the context, that
12 no other judge can do.

13 And it's not to say that there's no judicial
14 review of that on appeal. In the Irvin case, Irvin v.
15 Dowd, which is really the Court's first case in this
16 line, the Court noticed that there -- 90 percent of the
17 jurors had an opinion that the defendant was guilty. It
18 involved a highly sensationalized murder in rural
19 counties in southern Indiana. There was a barrage of
20 pretrial publicity. Eight of the 12 jurors said they had
21 an opinion that the defendant was guilty.

22 The Court, after meticulously reviewing the
23 voir dire, concluded that the judge had committed
24 manifest error in accepting the representations of the
25 jurors that they could be impartial. But this is

1 nothing like that.

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

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

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

8 MR. DREEBEN: I -- I think that's not
9 necessarily correct at all, and it would not have been
10 the case that in a normal trial there would have been as
11 detailed a 14-page questionnaire as there was in this
12 case, that was designed to elicit any and all
13 connections to Enron.

14 Now, whether there may have been some
15 individualized mistakes along the way, whether some of
16 us would have preferred that the voir dire be more
17 extensive, is not the issue; and unless this Court is
18 prepared to set standards that are based either on a
19 stopwatch or some sort of, you know, notion of how many
20 days voir dire has to occur, it's going to be very
21 difficult to administer a standard that says this was
22 too little.

23 The Oklahoma City bombing case, it is true,
24 took many, many days, but that was a capital case, and I
25 know that this Court is well familiar that there are

1 numerous --

2 CHIEF JUSTICE ROBERTS: It took many
3 days after it had been transferred.

4 MR. DREEBEN: It did, and Denver itself was
5 exposed, probably almost as much as Oklahoma City, to
6 the pretrial publicity, and a terrorist act of that
7 magnitude, Mr. Chief Justice, really strikes at the
8 heart of the entire nation. Judge Matsch, who sits in
9 Denver --

10 CHIEF JUSTICE ROBERTS: It was very -- the
11 atmosphere in Oklahoma City was very different from that
12 anywhere else, in terms of the impact of the bombing on
13 that particular community.

14 MR. DREEBEN: Agreed. It was 168 deaths.
15 Many of them were children. There was a sense of -- of
16 victimization in the part of the community that I don't
17 think is comparable to what happened with a financial
18 meltdown in Houston, a 4.5 million city with a robust
19 economy and a trial that took place 4 years later,
20 after numerous other Enron trials had already taken
21 place in Houston, resulting in favorable verdicts for
22 defendants, mistrials, acquittals of one defendant.

23 This very trial itself of Mr. Skilling
24 resulted in nine acquittals on insider trading counts.
25 Now, if you would think that the jury had some sort of

1 a substratum of subterranean bias that was ineradicable by
2 the conventional techniques of voir dire that we have been
3 using for 200 years, then insider trading where the
4 defendant pockets personally, as a result of the
5 exploitation of insider information -- you would think
6 that would be the first place the jurors would go to vent --

7 CHIEF JUSTICE ROBERTS: Oh, no, no. No.
8 They'd go to the statute that says honest services --
9 (Laughter.)

10 CHIEF JUSTICE ROBERTS: Right. It seems --
11 it seems -- I'm being flip. It seems that that's where
12 you would focus your attention, if you think your community
13 has essentially been fleeced by somebody because of his
14 dishonesty.

15 MR. DREEBEN: I don't think so,
16 Mr. Chief Justice, because the honest services component
17 actually, and the component of this trial, was really a
18 subset of the securities fraud. The essential gravamen
19 of Petitioner's crimes were lying to Enron, lying to its
20 shareholders about the health of the company in a
21 financial sense, when, in fact, he knew that he had been
22 engaging in numerous manipulations of earnings and
23 schemes that are detailed in the briefs, in order to
24 avoid Enron having to recognize that portions of its
25 business were imploding.

1 And the victimization was of shareholders.
2 That was expressed through securities fraud; it was
3 expressed through insider trading. There were counts
4 involving liars -- lying to auditors, and one object of a
5 multi-count conspiracy charge involved an honest services
6 object as well as a money or property fraud object, and
7 as well as a securities fraud object.

8 Now, in our view Petitioner has essentially
9 conceded that the honest services statute is not vague
10 as applied and, therefore, facially unconstitutional. He
11 all but acknowledges that bribes and kickbacks, which
12 constitute the bulk of pre-McNally honest services
13 cases, can be defined with precision. There is not an
14 unconstitutional vagueness in it. And so I think at a
15 minimum --

16 JUSTICE KENNEDY: Well, a concession that a
17 bribe or a kickback scheme statute would not be vague is
18 hardly a concession that this statute as written is not
19 vague. In fact, I thought that was the point. The
20 point is that the Court shouldn't rewrite the statute;
21 that's for the Congress to do.

22 MR. DREEBEN: I don't think that in this
23 case, Justice Kennedy, the Court needs to rewrite the
24 statute so much as to recognize that what happened in
25 McNally was this Court said that the mail fraud statute

1 has two clauses, scheme to defraud and scheme for
2 obtaining money or property by false representations and
3 pretenses. The government's position, in accordance with
4 all of the lower courts, was that these two clauses set
5 forth two separate crimes. Scheme to defraud was not
6 limited to money or property. This Court disagreed, and
7 it said, oh, yes, it was.

8 And what Congress did in responding was to
9 invoke words that had appeared in this Court's decision
10 in McNally, in the dissent written by Justice Stevens,
11 in the lower court opinions, and intentionally -- as
12 this Court put it in Cleveland v. United States -- cover
13 one of the intangible rights that the lower courts had recognized
14 before McNally, and that was the right to -- intangible
15 right of honest services. And in the context of the
16 pre-McNally honest services cases, that was well known
17 to include at its core the bribery and kickback cases
18 and, in the additional category, nondisclosure of a
19 personal, conflicting, substantial interest.

20 JUSTICE SCALIA: Well, suppose you have a
21 statute that -- that makes it criminal to -- to do any
22 bad thing, okay? Now it's clear that murder would be
23 covered. All right? Nobody would say that murder is
24 not covered by that. Does -- does that make the statute
25 non-vague?

1 MR. DREEBEN: No, Justice Scalia, but --

2 JUSTICE SCALIA: I mean, just because you can
3 pick something that everybody would agree comes within a
4 denial of honest services, doesn't -- doesn't mean that
5 when you say nothing but honest services, you're saying
6 something that -- that has sufficient content to -- to
7 support a criminal prosecution.

8 MR. DREEBEN: But this is not like a
9 statute, Justice Scalia, that says prohibiting any bad
10 thing. It's a statute that responded to a decision of
11 this Court in which a term of art, the intangible
12 right of honest services, featured prominently. And
13 Congress has --

14 JUSTICE SCALIA: And there were cases that
15 -- that -- some of which included bribery, but others of
16 which included a variety of -- of other actions, some of
17 which were allowed by some courts and some of which
18 were disallowed by some courts. There was no solid
19 content to what McNally covered.

20 MR. DREEBEN: I think that there was a solid
21 enough content for this Court to be able to respond to
22 the McNally decision by giving shape to the crime in
23 accordance with the paradigm cases that the lower courts
24 had done and logical implications of those cases, just
25 as if it had concluded, in accordance with Justice

1 Stevens's dissent, that the statute did protect
2 intangible rights in the phrase "scheme to defraud."

3 CHIEF JUSTICE ROBERTS: But if -- if you're
4 going to say that the statute refers to a term of art,
5 the whole point of a term of art is that it's a shorthand
6 for defining something. And then -- but if you're
7 saying that it's a term of art that means the
8 pre-McNally case law over the -- you know, all the
9 different circuits and the district courts and that some
10 knowledge of that, it -- it's descriptive of
11 something, but it's not a term of art.

12 MR. DREEBEN: I think it's a term of art in
13 the sense that it referred to a -- a body of law that
14 until quite recently, when defendants began making
15 vagueness arguments, was understood to refer to the kinds
16 of schemes that had been prosecuted before this Court
17 held that "scheme to defraud" was limited to money or
18 property. And it --

19 CHIEF JUSTICE ROBERTS: No, I'm with you
20 there. But then the kinds of cases -- that's where it
21 gets fuzzy. I mean, you need lawyers and research
22 before you get an idea of what the pre-McNally state of
23 law was with respect to intangible -- the right to
24 intangible services, of honest services. And I'm just
25 wondering how clear does what that body of law is have

1 to be before you can say, you know what, when we tell
2 you that right, you know that that's what it's referring
3 to?

4 MR. DREEBEN: I think it's clear enough at
5 the core, this Court can say so and can provide
6 definition, and it can use its standard tools of
7 interpretation of criminal statutes to dispose of cases
8 that are at the periphery and ensure that there is --

9 CHIEF JUSTICE ROBERTS: It kind of -- it
10 puts the prospective defendant, I guess, in an awfully
11 difficult position, though, if he has got to wait.
12 There's this common law evolution over time. You have
13 two cases the government wins, one it loses, three --
14 and he's supposed to keep track of that. That doesn't
15 sound like fair notice of what's criminal.

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

22 JUSTICE GINSBURG: What was -- Mr. Dreeben,
23 what was the jury told when this honest services count
24 was given to the jury? What was -- what were they told
25 was the definition --

1 MR. DREEBEN: Well, the jury instruction,
2 Justice Ginsburg, appears on page 1086a of the Joint
3 Appendix. That's in volume 3 of the Joint Appendix.
4 And I will describe the jury instruction, too, but I
5 want to say at the outset that this jury instruction was
6 drafted against the background of Fifth Circuit law,
7 which I think did take a somewhat broader view of the
8 honest services crime than the government has taken in
9 this Court, and it has to be read against that
10 background.

11 But the -- the instruction said that "to show
12 that defendants deprived Enron and its shareholders of
13 their right of honest services, the government must prove
14 beyond a reasonable doubt that, in rendering some
15 particular service or services, the defendant knew that
16 his actions were not in the best interests of Enron and
17 its shareholders or that he consciously contemplated or
18 intended such actions, and that Enron and its
19 shareholders suffered a detriment from the defendant's
20 breach of his duty to render honest services."

21 So -- and this was against a background --

22 JUSTICE SCALIA: But it's circular, isn't
23 it?

24 MR. DREEBEN: The -- I would agree,
25 Justice Scalia. I've read this phrase many times, and

1 it does seem a little circular to me.

2 The introduction to this jury instruction says,
3 "Honest services are the services required by the defendant's
4 fiduciary duty to Enron and its shareholders under State law."

5 So this was tried in a circuit that followed the State law
6 principle that's at issue in the Weyhrauch case. The
7 government defined the fiduciary duty in that way.

8 But the essence of the fraud was that -- that Petitioner
9 had a fiduciary duty to the shareholders of Enron to act
10 in their best interests, and he betrayed that by acting
11 contrary to the best interests of the shareholders,
12 fraudulently upholding the price, and ultimately that
13 constituted the crime.

14 Now, I think there's a --

15 CHIEF JUSTICE ROBERTS: So that covers the
16 case that your friend put of the employee using the
17 computer for personal use? That fits under this
18 instruction?

19 MR. DREEBEN: Well, whether the employee had
20 a fiduciary duty in that respect would be, I think, quite
21 a litigable question. This case doesn't involve any
22 subtle or arcane fiduciary duty. This is one of the
23 basic fiduciary duties that any chief executive has, not
24 to lie to shareholders about the financial condition of
25 the company.

1 JUSTICE SCALIA: I'm sorry. The duty of an
2 employee to provide honest services to his employer --
3 that's not included because the employee is not a
4 fiduciary?

5 MR. DREEBEN: Not all employees are
6 fiduciaries, no, Justice Scalia. I mean, most
7 fiduciaries have a sort of heightened duty towards
8 the --

9 JUSTICE SCALIA: Where do you get the
10 fiduciary limitation?

11 MR. DREEBEN: I think that it's inherent
12 in that --

13 JUSTICE SCALIA: All it says is "honest
14 services." I would think that --

15 MR. DREEBEN: Well --

16 JUSTICE SCALIA: -- any employee has the
17 obligation to provide honest services.

18 MR. DREEBEN: I think, Justice Scalia, that
19 you cannot successfully attempt to understand Congress's
20 reaction to this Court's decision in McNally without
21 some cognizance of the McNally decision and the
22 preexisting law.

23 JUSTICE KENNEDY: What authority do I look
24 to, to see that some employees are fiduciaries and
25 others are not?

1 MR. DREEBEN: That would be a standard
2 agency law principle, Justice Kennedy, and --

3 JUSTICE KENNEDY: If I look in the
4 Restatement of Agency, and they have a section that
5 applies to fiduciaries and non-fiduciaries, both of whom
6 are employees?

7 MR. DREEBEN: Normally, Justice Kennedy, no
8 such complexities are necessary, and I think that this
9 Court can resolve this case without introducing such
10 complexities, because the core duties of loyalty that
11 have formed the core of the honest services prosecutions
12 are universal. They are equally applicable to agency.

13 JUSTICE KENNEDY: I would assume that any
14 employee, even at the lowest level of the corporate
15 structure, who has corporate property, a car or something,
16 has a duty to protect that car for the employer.

17 MR. DREEBEN: But that's not an honest
18 services case. The honest services cases are about
19 conflicting interests and the misuse of official
20 position.

21 I'm not even sure, in the personal computer
22 use case, that the government could successfully show
23 that the employee had misused his official position.
24 This case is quite typical in that respect. Petitioner
25 absolutely misused his official position to serve what

1 we say was his private interest in private gain.

2 JUSTICE ALITO: Were there any pre-McNally
3 cases that involved a situation like this, where the
4 benefit to the employee was in the form of the
5 employee's disclosed compensation?

6 MR. DREEBEN: There were not to my
7 knowledge, Justice Alito, and I would frankly
8 acknowledge that this case is a logical extension of the
9 basic principle that we have urged the Court to adopt in
10 the nondisclosure cases. And the Court can evaluate
11 whether it believes that that is legitimately within the
12 scope of an honest services violation or not. But it
13 should not obscure our fundamental submission, which is
14 that there was a definable category of undisclosed
15 conflict of interest cases, that a person furthered
16 through his official actions that constituted
17 honest services fraud. A good example of that is United
18 States v. Keane, which was a Seventh Circuit decision.

19 Petitioner, in his reply brief, claims that
20 Keane involved financial injury to Chicago as a result
21 of an alderman's concealment of his interest in
22 properties that the City was selling. Actually there
23 were three separate schemes in Keane. In one of them,
24 the court was quite clear that, even though the alderman
25 got the same deal that every member of the public would

1 have gotten, it still was honest services fraud because
2 he did not disclose his financial interest in that
3 property to the council when the council was voting on
4 it.

5 JUSTICE SOTOMAYOR: Could I -- the following
6 hypothetical: I'm a councilperson in a jurisdiction
7 that's considering a tax increase or a tax break, and I
8 vote for the tax break, and I happen to have property
9 that qualifies. Is that a breach of the statute?

10 MR. DREEBEN: It may well be, Justice
11 Sotomayor. It depends, I think, on whether the tax break
12 was something that basically all general members of the
13 public were in a position to benefit from, which may
14 well be the case if it's just a private residence,
15 versus if it's a particularized business property
16 interest that you have either acquired --

17 JUSTICE SOTOMAYOR: Please tell me what I
18 look to, to discern -- if I'm a councilperson, to discern
19 what needs to be disclosed or not disclosed?

20 MR. DREEBEN: I think in the first instance,
21 you will inevitably, as a councilperson, turn to your
22 local law. And I think this brings up an important point
23 that was discussed in the Weyhrauch decision, which is
24 that the mail fraud statute does not criminalize
25 breaches of duty without more. There has to be a

1 showing of scienter, of a mens rea element of intent to
2 deceive. And unless the government can point to
3 something which shows that the individual knew that they had
4 a duty to disclose and did not do that --

5 JUSTICE SOTOMAYOR: So could --

6 MR. DREEBEN: -- or -- if I could just
7 finish this part of the answer -- or can point to
8 circumvention-type activity, using of shell companies to
9 conceal an interest, then the government is not going to
10 be able to have an indictable case on honest services
11 fraud. And I think what --

12 JUSTICE SCALIA: That doesn't give me a
13 whole lot of comfort, I mean, just because there's an
14 intent to deceive. An intent to deceive can be the basis
15 for -- for terminating a contract. There's -- there's
16 been fraud in the inducement or something of that sort.
17 So I know I'm liable to have the contract terminated, and
18 maybe for damages for the contract. And you say: And also,
19 by the way, you know, you can go to jail for a number of
20 years, because, oh, yes, it's very vague, but you
21 intended to deceive, and that's all -- that's all you need
22 to know.

23 MR. DREEBEN: But this Court has recognized
24 in numerous cases, Justice Scalia, that a mens rea
25 element requiring an intent to deceive, an intent to

1 violate the law, is exactly what helps prevent statutes
2 that might otherwise be considered too vague from
3 falling --

4 JUSTICE BREYER: You can -- well, you focus
5 on what you just put together. You said intent to deceive,
6 intent to violate the law. I believe in another case,
7 you're saying they don't have to have an intent to violate
8 the law because there was no State law that prohibited
9 whatever was at issue.

10 So is the government now saying -- which is a
11 big difference -- that you cannot convict somebody unless
12 they know, i.e., they intend to violate a law that
13 forbids the conduct in which they are engaging, other
14 than this honest services law, or are you not saying
15 that?

16 MR. DREEBEN: I'm not saying that,
17 Justice Breyer.

18 JUSTICE BREYER: You're not saying that.

19 MR. DREEBEN: I'm saying that in the
20 ordinary case --

21 JUSTICE BREYER: Then if you're not saying
22 that, what the person has to carry around with them
23 is an agency treatise.

24 (Laughter.)

25 MR. DREEBEN: Well, I think that what

1 happens, Justice Breyer, is that unless the government
2 does have some sort of legal platform like that to show
3 that there was knowledge of a duty, it's not possible
4 for the government to bring its proof to the court and
5 establish that the individual acted with the requisite
6 mens rea, unless there is activity that reveals an
7 intent to circumvent the law and to withhold the
8 information, as in Justice Sotomayor's example,
9 information about a property interest that might well
10 affect the deliberations of the council. And that kind
11 of evidence often requires use of offshore accounts --

12 JUSTICE BREYER: Yes, I mean, of course they
13 intend to -- it's not the case that is obvious; it's the
14 case that is not obvious that worries me, and --

15 MR. DREEBEN: I don't see any of those --

16 JUSTICE BREYER: -- in the case that
17 is not obvious, of course they intend to withhold
18 information. I agree with that. But the problem is
19 they don't know it's unlawful to do so.

20 MR. DREEBEN: Justice Breyer, I think if you
21 look at the cases in which this has happened, there is --
22 there's not like a deliberation on somebody's part -- oh, do
23 I have to disclose or not disclose? What these cases are,
24 are really outright criminal conduct in the form of
25 conflicting interests that every fiduciary knows you

1 need to disclose this before you take official action to
2 further that interest. That --

3 JUSTICE GINSBURG: Mr. Dreeben, would you
4 clarify the issue that came up: Is the government's
5 theory focused simply on the compensation or does it
6 involve the sale of shares?

7 MR. DREEBEN: It involves the sale of shares
8 as well. That was part of the compensation, and it's
9 linked to it. But, Justice Ginsburg, if you look at the
10 government's opening statement in this case, the
11 government opened by saying, "You will see that
12 defendants Lay and Skilling knew few -- a few key facts
13 about the true condition of Enron, facts that the investing
14 public did not know. With that information, defendants
15 Lay and Skilling sold tens of millions of dollars of
16 their own Enron stock."

17 And then continued: "When an investor buys a
18 share of stock, an investor buys some rights in a
19 publicly traded company. When an investor buys a share
20 of stock, they buy the right to hear and receive truth
21 from the chief executive officer. And, importantly, they
22 buy the right to have their interests placed ahead of
23 the chief executor officer every day of the week."

24 So there was, baked into this case at the
25 outset, the notion that these officials were not acting

1 in the best interests of the shareholders. They were
2 furthering their own interests by maintaining a high
3 stock price so that they could profit from it.

4 Thank you.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Srinivasan, you have 4 minutes remaining.

7 REBUTTAL ARGUMENT OF SRI SRINIVASAN

8 ON BEHALF OF THE PETITIONER

9 MR. SRINIVASAN: Thank you, Mr. Chief
10 Justice.

11 A couple of quick points on the honest
12 services fraud issue, and then a couple of points on the
13 juror issue, if I might.

14 With respect to honest services fraud, first
15 of all, I think that the government pointed to the jury
16 instruction -- and, Justice Ginsburg, this goes to some
17 questions that you had raised -- I think what's clear from
18 the capacious nature of the jury instruction that was issued
19 in this case is that the elements that the government say
20 make Jeff Skilling guilty of honest services fraud weren't
21 put before the jury or required to be found by the jury.
22 And for that reason alone, the conviction against Jeff
23 Skilling ought to be overturned.

24 Another point I'd make very quickly with
25 respect to the sweep of the government's theory

1 concerning the workplace is, under our understanding,
2 the duty of loyalty does extend to all employees. It
3 does, and, therefore, the theory that they assert should
4 apply in this case, I think, has devastating
5 implications for workplace relations.

6 Now, with respect to the juror question, a
7 couple of preliminary points, and then I'd like to
8 walk the Court through just one aspect of the voir dire
9 which I think exhibits the manifest flaws in the process
10 the trial court conducted.

11 With respect to the question about the
12 issuance of questionnaires, questionnaires were also
13 issued in the Timothy McVeigh case. But I don't want to
14 limit our comparison to Timothy McVeigh, because I think
15 in response to some of the questions that were raised, I
16 don't want to leave an impression that a multiple-day
17 voir dire with the sort of extensive questioning that we
18 think was required here is not in use in other cases
19 that involve like crimes.

20 In the Martha Stewart case, for example,
21 which was a financial case, there were 6 days of voir
22 dire and after a questionnaire was issued. And in that
23 case, the only reason you needed an extended voir dire
24 was because of the celebrity status of the defendant.
25 You didn't have the deep-seated community passion and

1 prejudice that characterized the Houston venue in this
2 case.

3 So, I think it's not at all unusual to have
4 that kind of extended voir dire, and, in fact, we would
5 say it's absolutely necessary to assure that the
6 defendant receives the fair and impartial jury to which
7 he's entitled.

8 JUSTICE SCALIA: So either this was too
9 little or Martha Stewart was too much?

10 (Laughter.)

11 MR. SRINIVASAN: Well, I think the former
12 rather than the latter --

13 CHIEF JUSTICE ROBERTS: Well, but it's -- it's
14 a different model of it. As Mr. Dreeben was explaining,
15 if you have an experienced judge who goes through this
16 all the time, I think it's reasonable for him to say: Look,
17 bring the person in front of me. We've got a questionnaire.
18 I can identify the problems, look him in the eye, and I've
19 got a lot of experience picking a jury, and it's better to
20 let me do it than to have the lawyers have 3 weeks to do it.

21 MR. SRINIVASAN: Well, you don't necessarily
22 need all of that, Your Honor, but I think with respect
23 to the way in which the district court, in fact,
24 conducted this voir dire, if I could just take -- if I
25 could just direct the Court's attention to one juror in

1 particular -- and, Justice Breyer, this is -- maps onto
2 some of the points you were making. This is juror 61,
3 and the relevant exchange is at pages 931a to 932a of
4 the Joint Appendix, which is at -- in -- in volume 2.

5 And I think the way the trial court
6 conducted the voir dire in this case exhibits the
7 manifest flaws in his approach generally. This is
8 someone who at page 932a, it's revealed, answered the
9 question whether she was angry, whether there was anger
10 about Enron, with yes, quote -- it was, quote, "based out
11 of greed, hurt a lot of innocent people."

12 And to paint the picture more fully, the
13 person was also asked: Do you have an opinion about the
14 collapse of Enron? To which the answer was, quote, "Yes,
15 criminal, caused a huge shock wave which the entire
16 community felt," close quote.

17 Now, at 931a at the top, she was asked the
18 question whether she had the opinion about Mr. Lay and
19 her answer was, quote, "Shame on him."

20 And then much of this was put before her in
21 the course of the voir dire. In the middle of page
22 932a, the first answer -- she's asked the question: "Can
23 you presume as you start this trial that Mr. Lay is
24 innocent?" The answer is, "I hope so, but you know, I
25 don't know. I can't honestly answer that one way or

1 another."

2 JUSTICE BREYER: Then on 932, she does answer
3 it, and says, "He's assumed innocent." "And can you
4 conscientiously carry out that assumption?" "I could
5 honestly say I will give it my best."

6 MR. SRINIVASAN: Not until --

7 JUSTICE BREYER: And so the judge looks her
8 in the eye and says -- fine.

9 MR. SRINIVASAN: Well, not -- not until this
10 happens first, Justice Breyer, between 932a and 933a.
11 And so she's asked, "So that might -- might your views
12 about Ken Lay cloud your judgment relative to criminal
13 responsibility?"

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

15 MR. SRINIVASAN: And her answer is --

16 JUSTICE BREYER: I'll read that again. But my
17 question is, can we get a hold of these 238 questionnaires?
18 Are they in the record in front of us?

19 MR. SRINIVASAN: I believe that they are. I
20 think that they're certainly in the record before the court
21 of appeals. So I think that they are.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 MR. SRINIVASAN: Thank you.

24 CHIEF JUSTICE ROBERTS: Counsel.

25 The case is submitted.

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

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