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IN THE SUPREME COURT OF THE UNITED STATES

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BASIM OMAR SABRI, :
Petitioner :
v. : No. 03-44
UNITED STATES. :

- - - - -X

Washington, D.C.
Wednesday, March 3, 2004

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

ANDREW S. BIRRELL, ESQ., Minneapolis, Minnesota; on behalf of the Petitioner.
MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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

2 (10:01 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 03-44, Basim Omar Sabri v. the United States.

5 Mr. Birrell.

6 ORAL ARGUMENT OF ANDREW S. BIRRELL

7 ON BEHALF OF THE PETITIONER

8 MR. BIRRELL: Mr. Chief Justice, and may it
9 please the Court:

10 Section 666(a)(2) of title 18 is
11 unconstitutional on its face because it never requires the
12 jury to find an element that the Constitution always
13 requires. The statute's unambiguous language allows a
14 violation to be proved with entirely local conduct
15 unrelated to Federal spending. It thus intrudes deeply
16 into an area the Court has recognized as one in which the
17 States possess primary authority.

18 QUESTION: Yet there's no doubt, Mr. Birrell, is
19 there, that in some circumstances the statute could be
20 constitutionally applied?

21 MR. BIRRELL: There are no circumstances where
22 66(a)(2) -- 666(a)(2) could be constitutionally applied,
23 Your Honor, because the -- because the statute never
24 requires that the jury find a connection between the
25 Federal spending and the offense conduct. In the same way

1 that there were possibly circumstances in Lopez where
2 there might have been an adequate Federal connection, but
3 because the jury is not required to find it, there are not
4 any circumstances where the statute could be
5 constitutional.

6 QUESTION: Why -- why can't it be constitutional
7 under the Commerce Clause? I know the Government doesn't
8 rely on that, but respondent can be supported here on any
9 -- any ground. Why -- why isn't this a commercial
10 transaction as -- as, you know, our -- our Commerce Clause
11 law is? So long as the transaction is commercial, we will
12 assume it's interstate commerce. We will accept Congress'
13 judgment on that.

14 Why isn't it a commercial transaction when you
15 bribe somebody? Money for -- for whatever the favor he
16 does.

17 MR. BIRRELL: A couple things, Your Honor.
18 First of all, there is not a requirement that interstate
19 commerce nexus be proved in the statute.

20 QUESTION: That's not necessary. So long as
21 it's commercial, our cases -- our recent cases, say so
22 long as it's commercial, we'll accept Congress' judgment
23 that it's interstate.

24 MR. BIRRELL: Well, if Congress could create
25 commerce -- Commerce Clause jurisdiction everywhere that

1 it could spend money, then --

2 QUESTION: No, no, not everywhere it could spend
3 money. Everywhere there is a commercial transaction. One
4 of our cases, for example, held that loan-sharking could
5 be covered under the Commerce Clause because it was a
6 commercial transaction, just as illegal as -- as the --
7 the bribery here, but if that could be covered by the
8 Commerce Clause, why can't this?

9 MR. BIRRELL: Because without -- without a
10 showing that in each case there was a connection between
11 interstate commerce and the transaction --

12 QUESTION: That's not what our cases require.

13 QUESTION: Is that true of the drug statutes
14 too?

15 MR. BIRRELL: I'm sorry, Your Honor?

16 QUESTION: I mean, is it true whenever the Feds
17 prosecute a person for a drug transaction, a jury has to
18 determine there was a connection between these drugs and
19 interstate commerce?

20 I've never heard of that requirement that --
21 that the -- that the jury would have to determine whatever
22 facts are necessary for the statute to be constitutional
23 even -- even though that's not an element of the offense.
24 Does that come out of a case or someplace? Where does it
25 come from?

1 MR. BIRRELL: Well, unless -- unless there was
2 an understanding that in every instance there was an
3 effect on interstate commerce, then --

4 QUESTION: I mean, there might be instances
5 where there's no effect on interstate commerce, a home --
6 you know, that -- that will be an issue, homegrown
7 marijuana. So suppose there is some drug somewhere that
8 has no effect. Suppose it didn't. There could be such a
9 thing. We can imagine it. But does that mean in all
10 these other cases that Congress -- that the statute is
11 void because the jury hasn't found -- I'd be repeating
12 myself. You answer.

13 MR. BIRRELL: I -- I think that it is different
14 because the Commerce Clause is -- is a regulatory power
15 that permits Congress to regulate. The Spending Clause
16 power is -- is a different sort of power. It does not
17 make that --

18 QUESTION: And you say here Congress does not
19 rely on the Spending Clause because it -- it makes conduct
20 criminal against an individual.

21 MR. BIRRELL: I believe that Congress passed
22 this law under the Spending Clause power. I believe
23 that's what they intended to do. All the --

24 QUESTION: To spend for the general welfare was
25 the basis in the court below and that combined with

1 Necessary and Proper.

2 MR. BIRRELL: That's right, Your Honor.

3 QUESTION: And that's the position that was
4 taken below, and I think most of the courts of appeals
5 went on that same ground.

6 MR. BIRRELL: It's my understanding that every
7 court that has looked at this has said that Congress
8 attempted to pass this -- this particular statute under
9 the Spending Clause.

10 QUESTION: Does -- does it matter what they
11 intended to pass it under? I mean, if they have the power
12 under another -- under another head, would -- would that
13 not be enough?

14 MR. BIRRELL: That is true, Your Honor. They
15 could -- they could -- the statute could be upheld if
16 Congress has the power to do it on any basis.

17 QUESTION: The justification sounds like a
18 Spending Clause justification, doesn't it, that the --
19 that they could not by a lesser means safeguard these
20 Federal funds? They tried narrower statutes and they
21 didn't work. But what they were trying to do was to
22 safeguard the integrity of the money that they were giving
23 to these units by not having corrupt operations. Isn't
24 that the case?

25 MR. BIRRELL: That -- that's what they said they

1 were trying to do. They were trying to regulate the
2 integrity of -- or -- or police the integrity of
3 organizations, agencies, and local and State governments
4 that receive Federal funds. That's what they said they
5 were trying to do.

6 QUESTION: And why is that not satisfactory?

7 MR. BIRRELL: It's not satisfactory because the
8 statute doesn't require any connection between the
9 spending -- Federal spending and the criminal conduct.

10 QUESTION: Suppose that, just to use an analogy
11 in the private sphere, a major corporation has a choice of
12 two subcontractors and one subcontractor is known for
13 engaging in lots of bribery and kickbacks, et cetera.
14 It's confident that it's got auditors that will be able to
15 protect it in this instance. But don't you think if you
16 were the CEO of the corporation, you'd rather prefer --
17 rather deal with the subcontractor that was always clean?
18 It's just a common sense business judgment, and that's all
19 the Government is doing here.

20 MR. BIRRELL: That's not what the Government is
21 doing here, Your Honor. What the Government is doing here
22 is to criminalize purely local conduct. They're
23 criminalizing conduct that has no relation to any Federal
24 spending.

25 QUESTION: Well, it has relation because it

1 wants to give its funds to those entities that it has
2 confidence in with respect to all of their operations.

3 MR. BIRRELL: Well, it can make a choice about
4 giving money or not without criminalizing conduct.
5 Congress has a number of ways that it can protect its
6 Federal money. It can protect it under Commerce Clause,
7 Property Clause, not giving money, relying on the States
8 to do -- to do what they need to do, False Claims Act,
9 conditional spending. There's --

10 QUESTION: They really say if we find a city
11 council that takes money and -- from us, the city council
12 takes the money for us for some of its programs here.
13 There's a corrupt city councilman. We want to prosecute
14 that person. Why? Because we want council -- members of
15 councils to know that we're not going to tolerate
16 corruption on behalf of the agency that's giving out our
17 money, whether in the particular instance it involved our
18 money or not. Now -- now, why isn't that sufficient
19 connection?

20 MR. BIRRELL: Because, Your Honor, there is --
21 it may be that what -- that is what the Government wants
22 to do, but the question is whether the Government has the
23 power to do that.

24 QUESTION: That's true, but why doesn't it?

25 MR. BIRRELL: It doesn't have the power to do

1 that because there's not an element in the statute that
2 requires there be a connection proved between the Federal
3 spending and the wrongful conduct. There may be one, but
4 the jury is not required to find one.

5 QUESTION: Suppose the Federal Government had
6 recast the statute and said no State can get -- what's the
7 limit -- \$10,000 or more from the Federal Government
8 unless it agrees to criminalize and impose the same
9 penalty set forth here for any State corruption. Would
10 that be constitutional under the spending power? It's a
11 condition to the grant.

12 MR. BIRRELL: It might be if --

13 QUESTION: It unquestionably would be, wouldn't
14 it? It's take it or leave it. It's --

15 MR. BIRRELL: Assuming it wasn't --

16 QUESTION: -- it's connected to the grant. It
17 has some remote connection to it. That ought to be
18 enough. It just seems very strange to me that the Federal
19 Government would be able to compel the State to impose
20 such criminal penalties, but it cannot itself do so in
21 connection with its spending.

22 MR. BIRRELL: In -- in Your Honor's
23 hypothetical, it might be coercive, unduly coercive, but
24 other than that, I don't see a problem with your
25 hypothetical.

1 But there's a -- the -- the Court -- this -- the
2 Court has said that Congress can attach conditions to
3 money provided that the four Dole factors are met. But
4 that is not what's occurring here. This Court has never
5 said that Congress can use the Spending Clause power to
6 create a criminal law statute. And the danger with this
7 is --

8 QUESTION: Well, have we ever said it can't?

9 MR. BIRRELL: Well, only inferentially by Dole.
10 So the question is never square with --

11 QUESTION: I think it's kind of hard to read
12 Dole for that proposition.

13 I may have missed your response to an earlier
14 question. You -- you bring a facial challenge. Why
15 should we entertain a facial challenge? What if we
16 treated it as an as-applied challenge? Do you say the
17 Government cannot prove the elements that you think are
18 necessary and thereby obtain a conviction?

19 MR. BIRRELL: I -- I say that we -- we properly
20 bring a facial challenge because the statute has no
21 element requiring a connection between the Federal
22 spending --

23 QUESTION: I don't -- we don't normally
24 entertain facial challenges to statutes on a ground like
25 that. If it could be applied properly in an individual

1 case, why would we entertain the broader challenge?

2 MR. BIRRELL: This statute cannot be properly
3 applied in any case. It's always unconstitutional because
4 it lacks this connection element. The statute is like --

5 QUESTION: You say because it lacks the
6 requirement of a jury finding that there was the
7 connection.

8 MR. BIRRELL: Yes. Well, there are two
9 concepts, both that there's not an element and that the
10 jury doesn't need to find it. This statute is -- is like
11 the statute in Lopez.

12 QUESTION: Well, what if -- what if Congress had
13 found that interstate commerce is involved here and did
14 not provide for an individual jury finding in every case,
15 would your argument be the same?

16 MR. BIRRELL: I don't know, Your Honor, but
17 Congress didn't make that finding.

18 QUESTION: It's a very candid answer.

19 (Laughter.)

20 QUESTION: Where -- where does this -- I mean,
21 I've asked you this before, but I'm not sure. Where does
22 this jury finding thing come from? It's quite
23 interesting.

24 But -- but where -- I mean, suppose that
25 Congress passed a statute under the Patent Clause

1 criminalizing certain conduct in respect to patent, and at
2 the border there might be an -- a question of whether it
3 does or does not fall within the Patent Clause, that
4 particular criminal behavior. But I wouldn't jump from
5 that fact that you'd have a legal argument it's outside
6 the Patent Clause to the conclusion that therefore a jury
7 has to find in every patent crime -- a jury has to find
8 that it is within the clause. I'd have thought that was a
9 question for the judge, not the jury. So you've been
10 emphasizing the contrary idea, and where do you get it
11 from?

12 MR. BIRRELL: Well, in the -- in the -- in Your
13 Honor's Patent Clause hypothetical, that is a case where
14 the Court would -- or the Congress would have a -- an
15 enumerated regulatory power. This is -- this is a
16 different thing. Now --

17 QUESTION: Well, it has the Commerce Clause
18 power.

19 I -- I don't understand your reliance on Lopez.
20 You just said just -- just as Lopez was bad, whether or
21 not there -- Lopez was -- was bad because it was not
22 commerce, which is a judgment that this Court will make,
23 whether it's commerce or not, but once it is commerce,
24 you're in a different ball park. Once it is commerce, we
25 assume it's interstate commerce, and that explains, you

1 know, a whole bunch of our cases, such as our loan-
2 sharking cases. So Lopez has nothing to do with this
3 case. Lopez was not commerce.

4 Now, you -- you may argue that -- that bribery
5 is not commerce although loan-sharking is, but I'm not
6 sure how strong an argument that is.

7 MR. BIRRELL: This case is like Lopez because
8 the way I read Lopez -- I mean, I understand your point
9 about whether the conduct in Lopez was commerce conduct or
10 not, but the way I'm reading Lopez is that the point is
11 that when you're on the -- the fringes of the power,
12 commerce power in that case, that there needs to be a --
13 an element where the jury would find in each case that
14 there was a connection between the exercised power of
15 Congress and the conduct.

16 So in our case --

17 QUESTION: You think there is such a -- such a
18 connection with loan-sharking, good, old, local, you know,
19 break-your-knees loan-sharking. It's not -- not an
20 interstate thing.

21 MR. BIRRELL: Well, you've -- you've told me
22 that -- that the Court has said that there is, and I -- I
23 accept that.

24 QUESTION: That's United States v. Perez. We
25 took a very expansive view of the Commerce Clause. And it

1 was pretty much of a local transaction in -- in the case,
2 but the Court pointed out, you know, the ripple effect
3 that all commercial transactions have.

4 MR. BIRRELL: Well, I would return to my point
5 that I think that if the Congress can create Commerce
6 Clause jurisdiction by spending money and Congress is
7 entitled to spend money under the Constitution anywhere it
8 deems it important for the general welfare, then what
9 would naturally follow, it seems to me, is the general
10 police power that the Constitution denies to the Federal
11 Government. It seems to me to be an inescapable chain of
12 reasoning that will get us there.

13 QUESTION: Have any local law enforcement
14 offices complained about the Federal presence?

15 MR. BIRRELL: There -- there's nothing in the
16 record about it, and I don't have anything to offer
17 outside the record of it. But the -- the question whether
18 the local governments or government agents consent to an
19 invasion of their area of authority is -- is not
20 dispositive.

21 QUESTION: Question whether they regard it as an
22 invasion of their authority or rather a legitimate
23 endeavor by the Federal Government to protect its money.

24 MR. BIRRELL: Well, the -- the statute doesn't
25 require the Federal Government to be acting to protect its

1 money. There -- there is not any requirement that this
2 money be the Government's money. For example, a private
3 citizen offers a -- a bribe to an agent. It could be an
4 agent of a -- a corporation. The offer is refused and 12
5 months later and for the first time more than \$10,000 is
6 given to an unrelated part of the agent's business, the
7 business the agent works for. Then we now have a Federal
8 crime committed. There's not any requirement in the
9 statute that there be a connection between the Federal
10 money and the offense conduct. And furthermore, there's
11 not any requirement that the jury find it.

12 QUESTION: Would you like to reserve the balance
13 of your time, Mr. Birrell?

14 MR. BIRRELL: I will reserve the balance of my
15 time, Your Honor.

16 QUESTION: Very well.

17 We'll hear from you, Mr. Dreeben.

18 ORAL ARGUMENT OF MICHAEL R. DREEBEN

19 ON BEHALF OF THE RESPONDENT

20 MR. DREEBEN: Mr. Chief Justice, and may it
21 please the Court:

22 The court of appeals correctly held that section
23 666 does not require proof of a Federal connection between
24 the offense conduct and the federally funded program or
25 Federal funds beyond that which the text of the statute

1 itself requires.

2 QUESTION: What -- what is the basis, Mr.
3 Dreeben? Under what authority did Congress pass the
4 statute?

5 MR. DREEBEN: Mr. Chief Justice, the Government
6 has relied on Congress' Necessary and Proper Clause
7 authority to protect its Spending Clause expenditures and
8 programs in this case.

9 I recognize that the Commerce Clause could also
10 provide a basis for Congress to reach transactions
11 involving criminal activity that affect commerce, but this
12 Court in *Salinas v. United States*, in describing why
13 section 666 was constitutional, as applied to the facts of
14 that case, discussed that there was a legitimate Federal
15 interest in protecting the particular program that
16 corruption had affected in that case. And the outgrowth
17 of section 666 historically is of an effort by Congress to
18 improve on previously deficient methods of protecting
19 federally funded programs. There were --

20 QUESTION: How far does that go? What if --
21 what if the Federal Government gave the State \$1? Could
22 it make -- could it make it -- it a crime for any person
23 to bribe any State officer anywhere in any program at all?
24 You know, the -- really is -- is there no end to the -- to
25 the scope of Congress' purported protection of its funds?

1 MR. DREEBEN: Justice Scalia, I think that this
2 Court recognized, as recently as last term in Jinks v.
3 Richland County, that analysis under the Necessary and
4 Proper Clause is deferential, tracing its roots back to
5 McCulloch v. Maryland, but there is an attenuation element
6 to the analysis. The law does need to be conducive and
7 plainly adapted to the end that Congress is seeking to
8 protect. And in your example of \$1 to a State and then
9 protection through criminalizing the activities of
10 hundreds of thousands of agents, there might be an
11 attenuation problem.

12 QUESTION: Do you think \$10,000 is -- is clearly
13 -- what's -- what's the -- what's the annual budget of New
14 York State, do you know, or California?

15 MR. DREEBEN: Okay. The annual budget of
16 California is -- at least in 1999, was \$242 billion.

17 QUESTION: \$242 billion.

18 MR. DREEBEN: And the Federal Government --

19 QUESTION: And because there's \$10,000 of
20 Federal money, a drop of Federal money in this sea of --
21 of California funds, the -- the Federal Government can
22 control the whole thing.

23 MR. DREEBEN: But there's not a drop. There's a
24 virtual flood. There was --

25 QUESTION: No, no. But for the statute to

1 apply, it takes only \$10,000.

2 MR. DREEBEN: It does, Justice Scalia, but
3 Congress was well aware that every State is the recipient
4 of billion upon billions of dollars in Federal aid. There
5 is substantial Federal money flowing to all of the States,
6 and Congress could have dispensed with any dollar
7 limitation whatsoever with respect to State aid and simply
8 made a per se finding that Federal money is so infused
9 into the State's budgetary activities, Federal programs
10 are so pervasive --

11 QUESTION: How much does it give California? I
12 just -- just --

13 (Laughter.)

14 QUESTION: You say it's a big -- a big figure.
15 I believe you, but --

16 MR. DREEBEN: As of -- as of 1999, California
17 received \$35,955,000,000.

18 QUESTION: But why is California relevant? This
19 is Minnesota, isn't it?

20 (Laughter.)

21 MR. DREEBEN: Justice Stevens --

22 QUESTION: It was my fault. I brought it up as
23 a hypothetical. Right?

24 (Laughter.)

25 MR. DREEBEN: But I have Minnesota too.

1 (Laughter.)

2 MR. DREEBEN: Minnesota received -- Minnesota's
3 budget was \$36 billion, and it received 4,000,000,496
4 Federal dollars --

5 QUESTION: What about Massachusetts?

6 (Laughter.)

7 MR. DREEBEN: Justice Breyer, I only have 30
8 minutes and there are 50 States.

9 (Laughter.)

10 QUESTION: Mr. Dreeben, I am concerned about the
11 breadth of your reliance on the Necessary and Proper
12 Clause and the Spending Clause power here. It seems to me
13 that Federal funding extends to a huge range of
14 activities, and why, under your theory, couldn't Congress
15 make -- take over the entire criminal law scheme because
16 it affects Federal taxpayers? I mean, I don't see any
17 limit to your theory, and I'm curious why you're so
18 reluctant to rely on the Commerce Clause. What's going on
19 in this case?

20 MR. DREEBEN: Justice O'Connor --

21 QUESTION: Are you trying to overcome the
22 problems of Lopez somehow, get a new thread of analysis
23 that gets you out from under that? What's -- what's
24 happening in this case?

25 MR. DREEBEN: No. I think there are ample

1 avenues for the Federal Government to legislate, when
2 things involve interstate commerce, without worrying about
3 Lopez.

4 I believe the Court could uphold the statute as
5 a regulation of interstate commerce, but it was clearly
6 not designed with that in mind, and this Court did not so
7 regard it, or at least didn't articulate itself as
8 regarding it that way in *Salinas v. United States*. The
9 problem that Congress was trying to solve was a very
10 particularized problem, not the generalized problem of
11 there is crime in America, therefore it will affect
12 federally funded activities.

13 The problem that Congress was trying to solve
14 was that it would give Federal money to particular
15 entities to -- to administer Federal programs, and there
16 would be crime that had the potential to affect those
17 Federal interests, but because of deficiencies or
18 perceived deficiencies in prior statutory law, that crime
19 could not be prosecuted. In particular, with theft crimes
20 there was a problem because once title had passed with the
21 money to the local entity or State entity, some courts
22 were saying that was no longer theft from the Federal
23 Government and the theft statute didn't apply. With
24 respect to the Federal bribery statute, 18 U.S.C. 201,
25 lower courts had divided on whether State and local

1 officials who were administering Federal programs could be
2 held accountable as Federal officials.

3 And to remedy those deficiencies of prior law,
4 section 666, as the court of appeals I think aptly
5 described it, changed the enforcement paradigm, and it
6 said that what we want now is not to focus on particular
7 Federal monies that we have difficulty tracing into
8 federally funded entities or who is a Federal official.
9 We want to make sure that the entities that we fund to
10 carry out Federal assistance programs are clean, and the
11 way that we are going to do that is to draft a
12 prophylactic statute that ensures that all agents who are
13 involved in the authority to conduct business on behalf of
14 the entity are not engaged in significant acts of theft,
15 embezzlement, or bribery.

16 It, therefore, included various limitations in
17 section 666 that prevent it from being an all-
18 encompassing, all-devouring statute that sweeps in all
19 related crimes to the entities that are funded. There's a
20 \$5,000 limitation with respect to the transactions that
21 are going to be influenced. It's not every traffic ticket
22 that is issued by any State agency. And there is a -- a
23 condition, of course, that there be \$10,000 of Federal
24 money going into the entity.

25 Of course, there are going to be cases under

1 this statute where it will be difficult to articulate a
2 clear --

3 QUESTION: \$10,000 annually or is it just a --
4 could it be a one-shot deal?

5 MR. DREEBEN: It's -- could be a one-shot deal.
6 it's a \$10,000 grant during a 12-month period that spans
7 the offense conduct in question.

8 And as I was saying --

9 QUESTION: If -- if the State got -- I mean, the
10 way you read it, just because you got \$10,000 last year
11 doesn't mean that next year you're still subject to the
12 act. It has to be --

13 MR. DREEBEN: That's right.

14 QUESTION: -- during the year. Okay.

15 MR. DREEBEN: That's right. The offense conduct
16 has to be --

17 QUESTION: It says in any 1-year period, but I
18 -- I assume that that means --

19 MR. DREEBEN: Any 1-year period, but there's
20 another provision in the statute that makes clear that the
21 period can include time before the offense conduct and
22 time after the offense conduct, which is naturally read to
23 mean that it has to span the offense conduct. And that
24 provision was designed to overcome the difficulty that
25 State and local agents would be bribed for activities that

1 they would have the power to engage in once the Federal
2 money was awarded to their agency. And in anticipation of
3 Federal money coming into the entity, the officials could
4 engage in corrupt conduct.

5 QUESTION: I assume this means that the Federal
6 Government could also criminalize federally robbery or
7 burglary committed against a private individual who has
8 received Federal funds, who has received a Federal subsidy
9 in one way or another. Right?

10 MR. DREEBEN: Yes, Justice Scalia, within
11 limits. I think that there could be a -- a point in time
12 at which the Court might say that if the Federal
13 Government passed a statute that said every robbery
14 involves --

15 QUESTION: I mean, that's probably all of us,
16 you know.

17 QUESTION: All welfare recipients --

18 MR. DREEBEN: All money --

19 QUESTION: -- all Medicare beneficiaries, and so
20 forth?

21 MR. DREEBEN: Well, the Court -- the Court long
22 ago upheld in *United States v. Hall* a statute that
23 prevented fraud and embezzlement directed at funds going
24 to veterans. So it has already upheld statutes in which
25 the Federal interest in protecting the beneficiary's

1 use --

2 QUESTION: It was limited to the funds, though.
3 It didn't say anything you -- anybody who gets any money
4 from a veteran is -- is -- you know.

5 MR. DREEBEN: That's --

6 QUESTION: And that's what this says. Anybody
7 who -- who bribes any State official, whether the Federal
8 funds are at issue or not.

9 MR. DREEBEN: Well, this -- this statute,
10 though, I think rests on a generalization that is less
11 attenuated and more reasonable than statutes that would
12 take the form of the statute Your Honor has described.
13 This statute basically says if you have corrupt officials
14 in the entity that's getting Federal money, we have reason
15 to worry that you have poor internal controls, that you
16 have a culture of corruption, that you have insufficient
17 mechanisms to root it out, and that the officials that are
18 engaged in corruption today with respect to State money
19 may tomorrow be engaged in corruption with respect to
20 Federal money.

21 QUESTION: So -- so call -- call this the clean
22 funnel rationale. The agencies are funnels funneling
23 money to the -- and say, look, we have a pretty strong
24 rationale here. We want clean funnels because a little
25 bit of the money going through is Federal. Take that as

1 given.

2 If I were to say you're right, what's the
3 standard where the Spending Clause is at issue? What
4 words would be used there? And the reason that this is
5 difficult at the moment for me is because this is not a
6 condition imposed upon spending. You're not saying to the
7 State, we'll give you the transport money if you -- this
8 is really a Federal law protecting the -- the spending.
9 You may be right in this case, but we're going to have to
10 say some kind of standard.

11 Should we say it's just whatever would be
12 necessary and proper to protect the object of the
13 spending, which is quite far out because you can spend for
14 things you don't otherwise have the power to do? Or
15 should we say something else, or should we say we don't
16 have to reach that here because if in fact the power would
17 be there under the Commerce Clause anyway, that at least
18 is good enough and isn't a stretch of the Spending Clause
19 where there's a necessary and proper rationale? What in
20 your view is the proper way to write those words?

21 MR. DREEBEN: Justice Breyer, I think the most
22 logical way to write this opinion is to rely on the test
23 that this Court articulated in 1819 through Chief Justice
24 Marshall with respect to the power under the Necessary and
25 Proper Clause. Here the enumerated power that's being

1 protected is the spending power. The Necessary and Proper
2 Clause was long ago construed to give Congress substantial
3 deference to pass laws so long as they are conducive to
4 the end that Congress is trying to achieve and its
5 legitimate.

6 QUESTION: The -- the McCulloch language? Let
7 the end be legitimate --

8 MR. DREEBEN: That's -- that's correct. That's
9 correct, Justice Kennedy.

10 QUESTION: Suppose that -- that to -- to take
11 the phrase, the clean funnel theory, we thought that that
12 theory is best sustained under the Commerce Clause. What
13 would be the closest case that we could cite in support of
14 our position if we were writing under the Commerce Clause?
15 Are there cases in which governmental entities and -- and
16 their -- the integrity of the operations are protected
17 under the Commerce Clause? Have we ever talked about
18 that?

19 MR. DREEBEN: I can't think, off the top of my
20 head, Justice Kennedy, of a Commerce Clause case that was
21 specifically directed at governmental activity. Of
22 course, this statute is not specifically directed at
23 governmental activity. It's directed at any fund
24 recipient, be it private, Indian tribe, or governmental.
25 So the Court could rely on cases probably like Reno v.

1 Condon in which the Court upheld a law that dealt with an
2 item in commerce, be it in the hands of the Government or
3 in hands of private parties. And of course, United States
4 v. Perez did uphold a very broad view of the Congress'
5 power to regulate transactional conduct.

6 QUESTION: No governmental entities in that
7 case, as I recall.

8 MR. DREEBEN: No governmental entities in -- in
9 Perez, but of course, this case doesn't focus on
10 governmental entities as such. What it focuses on them is
11 -- it focuses on them in their capacity as administrators
12 of funds that are paid out under Federal assistance
13 programs. It treats them identically to private entities
14 that also receive Federal funds under Federal programs,
15 which is strong evidence that what Congress had in mind
16 here was ensuring that its purposes and goals under the
17 Spending Clause aren't frustrated by corruption within
18 whatever entity it is that happens to be taking the funds
19 to administer the program.

20 QUESTION: I think some of our --

21 QUESTION: Is the -- is the Spending Clause --
22 is it -- is it something new or were the statutes that
23 were inadequate, the predecessors of 666 -- what was the
24 constitutional heading of authority that the predecessors
25 of 666 --

1 MR. DREEBEN: Justice Ginsburg, 18 U.S.C.,
2 section 641, which was the Federal theft statute, was
3 really a protection of Federal property, and that probably
4 could be justified under a variety of enumerated powers
5 under Article I.

6 18 U.S.C., section 201 was the Federal bribery
7 statute that primarily focuses on people who are Federal
8 officials or who are designated to become Federal
9 officials. And this Court in United States v. Dixon
10 interpreted the statute to cover State and local officials
11 who were administering Federal programs because they were
12 acting on behalf of the United States. And with respect
13 to that branch of section 201, although the Court did not
14 address the constitutional question in Dixon, I think
15 that the proper grant of authority to analyze it is the
16 Necessary and Proper Clause as applied to the spending
17 power because it, like section 666, criminalizes the
18 activities of non-U.S. persons because they are engaged in
19 an activity that relates to federally funded programs.

20 So the theory of protecting through criminal law
21 the misdeeds of agents that may impair Federal programs or
22 impair Federal funds is not new. What was new about
23 section 666 was its removal of the impediments that
24 Congress found in the prior law so that it could have an
25 effective mechanism to ensure the integrity of its

1 programs.

2 The case that is before the Court today is a
3 facial challenge to section 666, arguing that it is always
4 and everywhere unconstitutional. That submission is
5 impossible to reconcile with this Court's decision in
6 Salinas v. United States which specifically said that as
7 applied to the conduct in that case, where there was a
8 connection to a Federal program, the statute was
9 constitutional as applied.

10 What that means is that the court of appeals was
11 clearly correct in holding that section 666 is not
12 facially unconstitutional. It leaves open whether there
13 is an as-applied constitutional challenge to section 666.
14 No such challenge was brought in this case, and the United
15 States made a proffer to the district court indicating how
16 the particular bribery in this case would have had an
17 effect on Federal funds and Federal programs, making clear
18 that no such as-applied challenge would have succeeded.

19 So the only way that petitioner can prevail in
20 this case if this Court is prepared to say that
21 notwithstanding its prior decision in Salinas, holding
22 that section 666 was constitutional as applied, it now
23 turns out that section 666 is facially unconstitutional
24 and can never be applied to anyone anywhere. We submit
25 that that is incorrect.

1 QUESTION: If there were a nexus requirement
2 that we wrote into the statute -- the hypothetical gets a
3 little murky at this point -- would -- would juries have
4 to find that there was a nexus or could the judge
5 instruct --

6 MR. DREEBEN: Judging from the way that this
7 Court resolved the Salinas decision, Justice Kennedy, it
8 would be a constitutional as-applied challenge to be
9 resolved by the Court. This Court in Salinas said that
10 the statute was constitutional as applied and there had
11 been no jury finding on any nexus requirement.

12 QUESTION: But in subsequent trials, if we found
13 a nexus requirement, would the juries have to determine
14 the nexus?

15 MR. DREEBEN: I don't think that they would,
16 Justice Kennedy. Just as in a case like New York v.
17 Ferber where the Court held that child pornography can be
18 outlawed across the board, the statute is not --

19 QUESTION: Well, but --

20 MR. DREEBEN: It's not invalid on overbreadth
21 grounds.

22 QUESTION: Yes.

23 MR. DREEBEN: But the Court left open the
24 possibility that there would be as-applied challenges, and
25 it didn't suggest that those as-applied constitutional

1 challenges would raise jury issues. They would instead
2 raise issues of law for the --

3 QUESTION: Well, but if Congress in its -- in --
4 in the statute says there must be some connection with
5 interstate commerce, then certainly it's a jury issue.

6 And Justice Kennedy's question, as I understood
7 it, was that supposing the Court were to read in a nexus
8 requirement, just exactly what Congress might have put in.
9 You say that would not be a jury question then.

10 MR. DREEBEN: I am judging, Chief Justice
11 Rehnquist, by the way that this Court resolved the legal
12 issue in the Salinas case. The Court would have two
13 options open to it if it decided, contrary to our
14 arguments today, to read in some sort of a nexus
15 requirement. It could do what the Second and Third
16 Circuits have done, which is, we think incorrectly,
17 superimpose on the statute as an implicit element that has
18 no textual foundation some sort of a Federal nexus.

19 Now, if the Court did construe section 666 to
20 require a Federal nexus, that's clearly a jury issue under
21 United States v. Gaudin. Every element, be it implicit or
22 explicit, has to be found by the jury.

23 But alternatively, I understood Justice Kennedy
24 to be suggesting that there could be a constitutional
25 overlay to ensure that there was no unconstitutional

1 application of section 666, and if it's treated as a pure
2 constitutional question, then I think the better reading
3 of this Court's decisions is that it would be a question
4 of law --

5 QUESTION: Do you think this Court's decisions
6 have been consistent on that question?

7 (Laughter.)

8 MR. DREEBEN: I think they have been groping
9 towards consistency.

10 (Laughter.)

11 QUESTION: Let me write that down. Groping
12 towards --

13 (Laughter.)

14 QUESTION: I can -- I can use that in --

15 (Laughter.)

16 QUESTION: Mr. Dreeben, what answer do you give
17 to the dissenting judge in the Eighth Circuit who said it
18 is now a Federal crime for an auto mechanic to induce a
19 public high school principal to hire him to teach shop
20 class by offering free car repair?

21 MR. DREEBEN: Well, so long, Justice Ginsburg,
22 as the statutory valuation elements are met, that the
23 transaction involves \$5,000 or more, which it probably
24 would, given teacher salaries, then it would be covered by
25 section 666, and the Government would have discretion to

1 prosecute it. I think what that illustrates is that the
2 broad prophylactic approach that section 666 takes leads
3 easily to the manufacturing of hypotheticals that seem
4 attenuated from core Federal interests.

5 And the choice that Congress had before it was
6 to draft a statute that would go to that degree of breadth
7 but eliminate impediments that had previously hobbled the
8 enforcement of a law or draft a statute which Congress
9 believed was both under-inclusive and would put to the
10 jury perhaps difficult and murky issues of whether there
11 really was a Federal connection that justified application
12 of the statute. And let me give an example because it's a
13 very important, classic example of the way that we use
14 section 666.

15 Suppose that there is a city council person or a
16 mayor or some other official who has responsibilities for
17 some respect -- in some respects administering a Federal
18 program or Federal funds, and he turns out to be engaged
19 in corruption with respect to non-Federal monies and non-
20 Federal programs. The Government wants to prosecute him
21 to ensure that he doesn't begin to widen his field of
22 operation and harm the Federal program, but in the facts
23 that can actually be proved, there's no connection between
24 the Federal program and the offense conduct.

25 Conceivably could a statute be drafted that

1 would allow the Government to say that's the kind of
2 Federal nexus that's covered? Certainly, but there are
3 many, many hypotheticals where the potential injury to
4 Federal interests is not necessarily going to be easy to
5 articulate and prove to a jury.

6 As a matter of discretion, the United --

7 QUESTION: Who -- whose burden is it? I mean,
8 assume we accept your -- your proposition that we should
9 uphold it on its face, at least, and that future as-
10 applied challenges will still be allowed. Would it be the
11 burden of the defendant to establish that -- that this
12 goes too far, that this is not reasonable protection of
13 the Federal monetary interest?

14 MR. DREEBEN: Yes, Justice Scalia. If it's a
15 question of law, is the statute unconstitutional as
16 applied, then the defendant should have the burden of
17 establishing that. But I understood Justice Ginsburg's
18 hypothetical to raise the question what if Congress had
19 drafted a narrower statute that had some sort of an
20 offense nexus element. Then we'd have to prove it up.

21 The United States Attorneys Manual does direct
22 prosecutors to use 666 in cases where there's a
23 substantial and identifiable Federal interest. So what
24 you have here is a combination of Congress saying we need
25 a statute that's adequate to vindicate Federal interests

1 and prior efforts to draft narrower ones have frustrated
2 that goal. We're going to draft a broader statute. And
3 then the Federal executive branch uses its discretion to
4 prosecute cases that do, indeed, pose a real threat to
5 Federal interests. Now, that's as a matter of discretion.
6 It's not as a matter of constitutional law, and it's not
7 as a matter of what the statute provides.

8 QUESTION: Well, then why should we take that
9 into consideration deciding the question before us?

10 MR. DREEBEN: It's not relevant, strictly
11 speaking, to the constitutional question. What it is
12 relevant to is why it was rational for Congress to draft a
13 somewhat broader statute without fearing that, by virtue
14 of having given the executive branch this power, State
15 criminal law would be thoroughly swamped, I believe as one
16 of the dissenting opinions said.

17 QUESTION: But what if you have a new executive
18 coming in who is really hot on this subject and says we
19 want to prosecute every case we can under it?

20 MR. DREEBEN: Then I'll have to withdraw this
21 statement.

22 (Laughter.)

23 QUESTION: Or an even more realistic
24 hypothetical is the United States Attorney in Chicago or
25 New York, who are not always, shall I say, responsive to

1 the directives of central justice, bringing a prosecution
2 against a political opponent that has really no connection
3 with a Federal interest. That might happen.

4 MR. DREEBEN: Justice Scalia, I often say that
5 the only way that we get uniformity in Federal criminal
6 law enforcement is from a decision by this Court.

7 If the Court has no further questions.

8 QUESTION: Thank you, Mr. Dreeben.

9 MR. DREEBEN: Thank you.

10 QUESTION: Mr. Birrell, you have 12 minutes
11 remaining.

12 REBUTTAL ARGUMENT OF ANDREW S. BIRRELL

13 ON BEHALF OF THE PETITIONER

14 MR. BIRRELL: Thank you, Your Honor.

15 Turning first to the discussion about Salinas,
16 Salinas did not decide the issue presented in this case.
17 The constitutionality of the statute was not before the
18 Court in Salinas. Salinas was a question of statutory
19 interpretation. What the Court appeared to do was to
20 conduct a harmless error review because the
21 constitutionality had not been raised in the briefs, was
22 not in the cert petition, and it does not impede our
23 facial challenge.

24 I think that this -- this --

25 QUESTION: You -- you think Salinas, had the

1 constitutional been raised, would have -- should have come
2 out the other way.

3 MR. BIRRELL: I think that if the constitutional
4 issue had been raised in Salinas, it would have come out
5 the other way, yes.

6 I think as well that if I could direct the Court
7 to page 34 of our brief, that this will respond to the
8 discussion about the element, that this is an analysis
9 about the element in Lopez. We would submit the same
10 would apply here.

11 There are many noncommercial applications of
12 this statute, for example, bribery regarding civil rights
13 law. So I don't think the Commerce Clause is -- is the
14 answer.

15 Furthermore, in -- 666(a)(2) doesn't even
16 require any actual recipient corruption because the third
17 party to the funding contract under (a)(2) can -- can
18 offer a bribe to an absolutely incorruptible official and
19 yet still be charged with a Federal crime.

20 The -- the overreaching question in this case,
21 Your Honors, is that Federal power must have judicially
22 enforceable limits and this statute ignores them and is
23 unconstitutional in every instance.

24 Thank you.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr.

1 Birrell.

2 The case is submitted.

3 (Whereupon, at 10:47 a.m., the case in the
4 above-entitled matter was submitted.)

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