

1 room who he wants to influence to do the studies.

2 So in my view, there was nothing wrong -- if
3 I can complete the sentence -- in the way that the
4 indictment structured the crime in this case. The
5 "official acts" were exemplary. They were proved, and
6 the jury could properly find them.

7 Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.

9 Mr. Francisco, five minutes remaining.

10 REBUTTAL ARGUMENT OF NOEL J. FRANCISCO

11 ON BEHALF OF PETITIONER

12 MR. FRANCISCO: Thank you, Mr. Chief
13 Justice.

14 I have three basic points I would like to
15 make.

16 First, I'd like to start out with the
17 government's argument that a lot of the problems with
18 its theory are solved by the quid pro quo requirement.
19 Well, in fact, the gratuity statute, the Federal
20 gratuity statute, has the exact same "official act"
21 requirement, but no quid pro quo requirement at all.

22 So what that means is that if you take
23 somebody to a fancy lunch with a -- I can't remember the
24 name of the bottle of wine you mentioned, Justice
25 Breyer, but if you took them to that fancy lunch to

1 thank them for referring you to a meeting with a
2 mid-level staffer, even if there was no suggestion at
3 all that you were going to do anything other than call
4 that staffer and say, hey, can you take a meeting with
5 this guy, hear him out, and exercise your independent
6 judgment, that would be a violation of the Federal
7 gratuity statute.

8 And, indeed, under the government's broad
9 theory that anything within the range of official duties
10 counts, that means that if you took the person out to
11 that lunch as thanks for giving you a tour of the
12 Capitol Building, you would likewise have violated the
13 Federal gratuity statute, because there, there is no
14 quid pro quo requirement at all.

15 Point two, Justice Breyer --

16 JUSTICE SOTOMAYOR: There is a difference
17 between someone saying, thank you for a decision you
18 made independent of the gift -- that's the Sun Growers
19 case -- and someone buying you an expensive lunch and
20 saying, I'm paying for this lunch, but make sure I get a
21 tour. You don't see the difference?

22 MR. FRANCISCO: Not under the Federal
23 gratuity statute, Your Honor, because the Federal
24 gratuity statute is meant to prohibit thanking somebody
25 for giving you an "official act." And so if an

1 "official act" is, in fact, a tour of the Capitol
2 Building or a meeting with a staffer, then you have, in
3 fact, violated the Federal gratuity statute when you
4 take them to lunch as a thanks for that particular act.

5 Second point, Justice Breyer, in trying to
6 figure out the right verbal formulation, the first point
7 I'd like to make is, if we can't figure out a proper
8 verbal formulation, then I think there are some ver
9 serious vagueness problems with the statute --

10 JUSTICE BREYER: It's Birdsall.

11 JUSTICE SOTOMAYOR: You --

12 JUSTICE BREYER: It's Birdsall. Look, I
13 can -- I've read the Brown Commission Report. I've read
14 the Model Penal Code. I've read all these efforts to
15 get language. And I've looked at the present statute.
16 And I think I can limit that because the statute,
17 itself, seems to cover things like voting and contracts,
18 et cetera. But it's also true that a person who tries
19 to influence those things has committed bribery. I
20 think that's correct.

21 MR. FRANCISCO: And --

22 JUSTICE BREYER: Now, my problem is with
23 Birdsall and how do we write those words so that they do
24 catch people who are doing this dishonest thing without,
25 as I've said five times, allowing the government the

1 freedom to go and do these ridiculous cases.

2 MR. FRANCISCO: And -- and I think the D.C.
3 Circuit's en banc decision --

4 JUSTICE BREYER: Not saying this is a
5 ridiculous one, by the way.

6 MR. FRANCISCO: Understood, Your Honor. I
7 think that the right answer, you start out with the D.C.
8 Circuit's decision in Valdes. You look at that listing
9 of words --

10 JUSTICE BREYER: Uh-huh.

11 MR. FRANCISCO: -- question, matter, suit,
12 cause proceeding. And those are actual decisions that
13 the government makes, the government as a whole, as a
14 sovereign. And then you say, are you making a decision
15 on that, if you're the final decisionmaker, or if you're
16 not the final decisionmaker, but because of your
17 official power, you have the -- the ability and the
18 authority to influence other decision-makers, then
19 you're -- are you doing that? Here are two
20 fundamental --

21 JUSTICE GINSBURG: What do you say to
22 Mr. Dreeben's argument that if we read this statute as
23 you are urging, then every government official can say,
24 you want to have a meeting? Pay me a thousand dollars.
25 The corruption that's inherent in the position that says

1 it's okay to facilitate a meeting, it's okay to say,
2 I'll do it for you if you pay me a thousand dollars.
3 That's your view, that that would be okay?

4 MR. FRANCISCO: Your Honor, and, frankly,
5 this was leading to my third point, which is, if there
6 is absolutely no way that -- if there's no indicia that
7 you're actually trying to influence the outcome, and it
8 really is just a meeting, yes. But that reflects the
9 fact that these broad and vague statutes are not
10 comprehensive codes of ethical conduct. There are lots
11 of other statutes that would prohibit precisely what you
12 are suggesting, Justice O'Connor, and you don't have to
13 interpret --

14 JUSTICE GINSBURG: That hasn't happened in
15 quite some time.

16 (Laughter.)

17 MR. FRANCISCO: Justice Ginsburg. I am
18 very, very, very sorry.

19 (Laughter.)

20 MR. FRANCISCO: Justice Ginsburg, my
21 apologies.

22 There are lots of other statutes that would
23 prohibit that precise conduct, and you don't need to
24 take statutes like the Hobbs Act and honest-services
25 statute.

1 JUSTICE KAGAN: Well, what would --
2 Mr. Francisco, just take Mr. Dreeben's own example,
3 which is the example of somebody -- he's running a
4 business, and he's taking \$5,000 at a pop every time he
5 arranges a meeting with the criminal division for
6 somebody.

7 MR. FRANCISCO: Sure. There is a statute
8 that prohibits supplementing your public salary with
9 private money. So if you're essentially taking outside
10 money for the performance of your official duties,
11 that's illegal. That was discussed in the Sun-Diamond
12 case.

13 There is another statute that -- that
14 prohibits you from doing any -- taking anything from
15 anybody whose interests could be substantially affected
16 by the performance or nonperformance of your duties. So
17 that's another one. It would prohibit -- that would
18 prohibit it.

19 There is another provision of this bribery
20 statute that prohibits you from taking any action, not
21 just "official action" but any action in violation of
22 your official duties. So I think that might --

23 JUSTICE SOTOMAYOR: Why aren't they any less
24 vague?

25 MR. FRANCISCO: Excuse me?

1 JUSTICE SOTOMAYOR: Why aren't they any less
2 vague? And what you're saying is that holding a
3 meeting, taking a phone call, having a party is not
4 illegal, that that is something that you're entitled to
5 do. So why would all those statutes be any less --

6 MR. FRANCISCO: They may well be in certain
7 circumstances, but I think that the ones that are simply
8 saying -- for example, the civil service statutes that
9 simply say, you can't take anything from anybody who is
10 a covered person. That's not vague. It just says that
11 you can't take anything from anybody who is in your job.

12 Most Federal government officials are very
13 familiar with that. That's why you really just don't
14 take gifts from anyone. The problem here is that we had
15 a State regime that was much less stringent than the
16 Federal regime, and the government wanted to use the
17 open-ended Hobbs Act and honest-services statute to fill
18 that gap in what they perceived is the State law.

19 I would respectfully submit that that is an
20 inappropriate use of Federal power.

21 Thank you, Mr. Chief Justice.

22 CHIEF JUSTICE ROBERTS: Thank you, counsel.

23 Mr. Dreeben, could I invite you to return to
24 the lectern? Our records reflect that this was your
25 one-hundredth oral argument before the Court. You are

1 the second person to reach that rare milestone this
2 century.

3 I distinctly recall your first argument in
4 January of 1989. Throughout your career, you have
5 consistently advocated positions on behalf of the
6 United States in an exemplary manner.

7 On behalf of the Court, I extend to you our
8 appreciation for the many years of advocacy and
9 dedicated service during your tenure in the Solicitor
10 General's Office and as an officer of this Court.

11 We look forward to hearing from you many
12 more times. Thank you.

13 The case is submitted.

14 MR. DREEBEN: Thank you.

15 (Whereupon, at 11:04 a.m., the case in the
16 above-entitled matter was submitted.)

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