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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Nijhawan v. Holder. Mr. Moseley.

ORAL ARGUMENT OF THOMAS E. MOSELEY
ON BEHALF OF THE PETITIONER

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

At issue in this case is an aggravated felony definition, 8 U.S.C. 1101(a)(43)(M)(i), one that serves both as a ground of deportation and as an integral part of a Federal criminal statute.

For the Court's convenient reference, because I suspect we will return to this and the other definitions, I would refer the Court to the statutory appendix in the government's brief: 3a gives (M)(i); 6a gives the conviction requirement; and 7a to 8a gives the underlying criminal statute in which this aggravated felony definition forms an integral part.

Now, Congress has required -- for deportation, Congress has required conviction of this defined offense, in a definition that says absolutely nothing about the word "tether" utilized by the Third Circuit below, and the definition begins with a

1 restrictive clause, "that," to require conviction of
2 both the fraud and deceit element and also the loss
3 amount as an integral part of this definition.

4 Since Congress required conviction, the
5 time-honored categorical approach really should be the
6 governing standard, and I submit that there's nothing in
7 the plain language of the statute, the underlying
8 statute enacted by Congress, to oust that time-honored
9 approach, which I submit is perhaps on a par as being
10 presumptively applicable, similarly to the -- to the
11 stay standards that this Court discussed very recently
12 in the Nken case.

13 JUSTICE SOUTER: Another --

14 JUSTICE KENNEDY: Under the time-honored --

15 JUSTICE SOUTER: No, please.

16 JUSTICE KENNEDY: Under the time-honored
17 approach, if the jury verdict necessarily -- or not
18 necessarily, but did in fact refer to the amount
19 involved and it was over \$10,000, would that be part of
20 the time-honored approach and then the statute would be
21 fulfilled?

22 MR. MOSELEY: I -- under those
23 circumstances, Justice Kennedy, yes. But here the jury
24 was specifically instructed that they did not have to
25 make any finding with respect to loss in this case.

1 JUSTICE KENNEDY: Well, in that connection,
2 at some point in the argument -- and you may be a little
3 early because you're talking about the statute -- I'd
4 like to know either anecdotally from your experience or
5 -- or because it's written somewhere, how often do
6 juries give special verdicts? It actually applies in
7 the second case we're to hear as well. And has that
8 changed in the light of -- of Apprendi? In -- in my
9 experience, we just didn't know many of the features of
10 the crime from -- from the jury verdict, and I just
11 would like to know if that's changed in this day and
12 age.

13 MR. MOSELEY: Well, I -- I --

14 JUSTICE KENNEDY: But you may reach that
15 after you've talked about the statute.

16 MR. MOSELEY: Yes, but let me -- certainly
17 among the State statutes that we cite, the State
18 statutes where it's clear that a loss amount is an
19 element, the jury is going to be instructed they have to
20 return that, and they do. The -- the special verdict
21 opportunity here is in effect, I would submit, a kind of
22 lifeline, if you will, that we're giving to the
23 government in these -- in these more general fraud
24 statutes, where the government has that -- certainly has
25 that opportunity or that option to do. But there

1 certainly have been -- and I know we cite them in our
2 brief -- cases --

3 JUSTICE ALITO: And if you -- if you do
4 extend that lifeline to the government, aren't you
5 conceding that the amount of the loss is not an element
6 of the offense, and aren't you conceding that it is not
7 necessary for the loss amount to be an element of the
8 offense?

9 MR. MOSELEY: No, Justice Alito. What I am
10 saying is that this statute -- and again, (M)(i) was
11 enacted as part of a number of criminal statutes --
12 excuse me -- as a number of provisions that were
13 addressed to white collar offenses, of which this is
14 just one, and it also encompasses the State -- it also
15 encompasses the State statutes where this clearly is --

16 JUSTICE ALITO: Well, let me give you a
17 concrete example. Let's say it's a Federal mail fraud
18 case. Let's say there are two Federal mail fraud cases,
19 and you don't have to prove the amount of loss in order
20 to convict under the mail fraud statute. In the first
21 case, after the jury returns a guilty verdict they also
22 return -- or together with that they answer a special
23 interrogatory and they say the loss exceeded \$10,000.
24 In the second case, the defendant pleads guilty and
25 admits during the plea colloquy that the amount is more

1 than \$10,000. Would there be a problem in those cases?

2 MR. MOSELEY: In those cases, no. In those
3 cases, that would have satisfied the traditional
4 categorical approach.

5 JUSTICE GINSBURG: In this --

6 JUSTICE ALITO: And then --

7 JUSTICE GINSBURG: In this case, how many of
8 the defendants were alien? You're -- the jury is given
9 a charge that covers all of the defendants. They're all
10 charged with the same crime. How many of them were
11 aliens?

12 MR. MOSELEY: I believe two in addition to
13 Mr. Nijhawan, Justice Ginsburg. I believe two or three
14 more were. This case -- this case involved roughly 15
15 defendants. There are only five who went to trial. The
16 number who -- the number who are aliens, in addition to
17 Mr. Nijhawan, I believe were two.

18 JUSTICE GINSBURG: Then the judge wouldn't
19 distinguish -- it would not be relevant for the -- for
20 the defendants who were not aliens because it would have
21 no consequences for them. So why should the judge --
22 even if the question could be asked, why should the
23 judge -- the judge takes a position: It's not an
24 element of the crime. Therefore, I'm not going to
25 charge it, and I'm not going to confuse the jury by

1 saying as to the defendants who are aliens, you have to
2 find the amount.

3 MR. MOSELEY: Well, under -- under those --
4 under those circumstances, Justice Ginsburg, Mr.
5 Nijhawan actually himself had asked for a charge with --
6 with respect to loss. I don't think -- I don't think
7 there's an issue of jury confusion here, and indeed
8 under -- under -- ironically under this Court's -- well,
9 this would have been a situation in which a request was
10 -- could have been made. I don't think there would have
11 been -- there certainly wouldn't have been jury
12 confusion to have requested it here.

13 But I think you have to put this in -- in
14 the larger picture of a statute of a set of aggravated
15 felony definitions that were enacted.

16 JUSTICE GINSBURG: But before you go on to
17 that, we're talking about (M)(i). It's coupled with
18 another provision that's an offense that is described in
19 section 21 -- 7201 of Title 26 -- that's tax evasion --
20 in which the revenue loss to the government exceeds
21 10,000. So it's the same "in which" construction, and
22 there's no requirement -- to convict someone of tax
23 evasion, the jury does not have to find the deficiency.

24 MR. MOSELEY: Well, actually, Justice
25 Ginsburg, under this Court's decision in Boulware, a

1 deficiency is indeed a necessary element of that --

2 JUSTICE GINSBURG: A deficiency, but not the
3 amount of the deficiency.

4 MR. MOSELEY: But -- no. A -- a deficiency
5 is a necessary element of that offense. That's --
6 that's where, for example, the Babaisakov decision got
7 that point flatly wrong. And this is, I think, the
8 classic --

9 JUSTICE GINSBURG: But is the amount --
10 there's a deficiency. The jury has to find in order to
11 find tax evasion there is a deficiency. Does it have to
12 find that the revenue loss to the government exceeds
13 \$10,000?

14 MR. MOSELEY: No, it doesn't have to find
15 that, but it may. And this is a classic example of the
16 application of the modified categorical approach, where
17 this statute sweeps broadly to include both loss amounts
18 or, in this case, revenue loss amounts that would exceed
19 \$10,000 and those that would be less than \$10,000. Most
20 of these cases, most of the tax cases, as the
21 government's own materials that we cite indicate, are
22 resolved by guilty pleas with respect to where those
23 amounts are designated. And I think it's important here
24 to realize that by pairing these two statutes, by
25 pairing these two provisions, (M)(i) and (M)(ii),

1 Congress in effect I submit sent the signal with that
2 language in (M)(ii) that we're talking about the kind --
3 we're talking about the application of the modified
4 categorical --

5 JUSTICE ALITO: What is the -- What is the
6 difference between a defendant's saying during a guilty
7 plea colloquy, the loss was -- I admit the loss was more
8 than \$10,000; and the defendant's agreeing for
9 sentencing purposes that the loss was more than \$10,000?

10 MR. MOSELEY: Because, Justice Alito, in the
11 sentencing context we're truly dealing with a
12 post-verdict situation where the government in terms of
13 having to prove loss is up against a far lesser amount
14 -- a far more liberal standard, a preponderance of the
15 evidence standard. And the defendant under those
16 circumstances --

17 JUSTICE SOUTER: Well, if he's admitting it,
18 what does the standard of the evidence matter?

19 MR. MOSELEY: He's admitting it here,
20 Justice Souter, under these circumstances. He's
21 admitting it here only in the context of a resolution of
22 the sentencing issue. If you go back to the --

23 JUSTICE SOUTER: Well, he's not saying, I
24 admit to a degree of preponderance of the evidence that
25 it was over 10,000. He's saying, period, over 10,000.

1 The burden of proof, the standard of proof doesn't
2 matter.

3 MR. MOSELEY: No, but he's -- but he's doing
4 this in the context of resolving, of resolving a
5 disputed issue with respect to --

6 JUSTICE SOUTER: And he definitively
7 resolves it by admission.

8 MR. MOSELEY: But he does so certainly in
9 the context of reserving, of reserving his right to
10 contest that and to make the arguments that we're making
11 here.

12 JUSTICE SOUTER: No, I understand the facts
13 of this case. I was commenting on your answer to
14 Justice Alito's question, and it would seem to me that
15 the answer to the question is there is no difference.

16 MR. MOSELEY: No, I submit -- I submit that
17 there -- there really is a -- a profound difference
18 under the circumstances of someone being in a situation
19 before, before conviction, and then someone being in a
20 postconviction situation. And then I think we should
21 come back in terms -- we should come back to the
22 underlying, to the underlying requirement that the
23 person had been -- the person under the statute be
24 convicted of the loss.

25 JUSTICE SOUTER: All right, that really gets

1 to the question that I was going to ask, and that is, I
2 don't see how the modified categorical approach is
3 something that you could admit would be sufficient
4 because, as I understand your argument -- and it is in
5 part an argument based on sort of standard grammatical
6 construction -- you're saying that in the definition
7 "The term 'aggravated felony' means an offense that" --
8 and you emphasize the "that," the restrictive nature of
9 the "that" clause -- "involves fraud or deceit in which
10 the loss exceeds \$10,000."

11 if I understand your restrictive clause argument,
12 the definition of the offense has got to include the
13 element of exceeding \$10,000 or it does not satisfy
14 your, the -- it does not satisfy the standard that you
15 were arguing for based on the restrictive clause. So it
16 seems to me that you've got to go the whole hog or you
17 get nothing, and the whole hog is that it's got to be an
18 element of the offense that the loss exceed \$10,000. Am
19 I wrong?

20 MR. MOSELEY: I don't think necessarily.
21 Well, under these circumstances, Justice Souter, what I
22 would say is that there may be statutes, there may be
23 statutes in which, there are statutes, there are State
24 statutes, where you have a range of conduct that may
25 include \$10,000, may not include \$10,000, and the

1 modified categorical approach would apply under those.

2 JUSTICE SOUTER: Okay, how about this one.

3 You were arguing based on this statute and you make an

4 argument based on the restrictive nature of a "that"

5 modifying clause, and if you're going to make the

6 restrictive clause argument, it seems to me you've got

7 to go the whole hog and say the element of the offense

8 has got to include the loss in excess of \$10,000.

9 MR. MOSELEY: Certainly if it does, then

10 under the statutes involved here we would prevail.

11 JUSTICE SOUTER: Well, yeah, you would

12 prevail, but you would prevail, it seems to me, at the

13 expense of this objection, and the government makes it.

14 There are very, very few fraud and deceit statutes that

15 define the offense by reference to a loss in excess of

16 \$10,000. My recollection from the government's brief is

17 that they come up with three.

18 The fact is also that this provision, the

19 \$10,000 figure, was placed into the statute at a time

20 when Congress was trying to expand the category of

21 deportable, removable offenses, and it would be passing

22 strange in that context to define the offense by

23 reference to a \$10,000 figure as an element of the

24 offense which would cut it down, which would cut the

25 compass of the statute down to three offenses. What is

1 your response to that?

2 MR. MOSELEY: Well, I think the government
3 vastly understates the statutory provisions that were
4 involved here. Even if you look at the State statutes,
5 a majority of the State statutes, as I think we make
6 clear in our reply brief, a majority of States have
7 statutes, generally the theft by deception statutes and
8 others which have loss thresholds that will get you over
9 --

10 JUSTICE SOUTER: Well, once you get into the
11 State statutes you get into the further problem of an
12 utter and I would suppose unjust patchwork of statutory
13 reference to which this would apply. If you -- if you
14 steal the \$11,000 in State A, you get booted out of the
15 country. If you steal it across the State line in State
16 B, you stay home. I mean, I can't imagine that Congress
17 would have enacted that kind of scheme.

18 MR. MOSELEY: But what Congress has done
19 here is to provide for a uniform test, in effect.

20 JUSTICE SOUTER: A uniform test that
21 produces both unjust results and I would suppose
22 strangely unsatisfying results to a Congress that wanted
23 to expand the concept of deportable offense.

24 MR. MOSELEY: But what -- but what -- if I
25 can just go back for a moment, Justice Souter, to the

1 original premise that it under all circumstances has to
2 be an element. There are certainly statutes, even
3 Federal statutes, for example, the theft from Federal --
4 federally funded programs, which give specific loss
5 amounts of 5,000 or more, which would -- which -- excuse
6 me.

7 JUSTICE GINSBURG: But the problem is that
8 there's no pattern to it, The point that Justice Souter
9 made. If we take your position that there are a number
10 of statutes that mention amount, some as an element,
11 some by this, there seems to be no rhyme or reason to
12 when the amount is there and when it isn't, and then you
13 have these unequal results within the Federal system and
14 in the States, so when you think -- would it make any
15 sense for Congress to have drawn the line that way if
16 the State happens to make -- to have the "in which" or
17 if it just has fraud and deceit with no amount?

18 MR. MOSELEY: What -- Justice Ginsburg, I
19 think what Congress did here was to create a uniform
20 test, a uniform test in the sense you look to see if --
21 if someone has been convicted of both these
22 requirements, fraud or deceit or the loss. That
23 certainly produces far more uniformity than had --

24 JUSTICE GINSBURG: But it's treating people
25 who do the identical thing differently.

1 MR. MOSELEY: But Congress chose under these
2 circumstances, Congress chose under these circumstances
3 to -- swept broadly to, swept broadly to State statutes
4 in addition, in addition, in addition to, in addition to
5 encompassing the Federal statute.

6 JUSTICE GINSBURG: But what you're saying is
7 you're not denying that people who commit the identical
8 theft or deceit or fraud will be treated differently
9 depending on whether the statute under which they're
10 convicted has this "in which" clause?

11 MR. MOSELEY: What I believe, what I believe
12 that I am conceding is that it will determine -- as with
13 any of the criminal cases that lead to deportation, it
14 will determine -- it will be determined on the basis of
15 how the prosecution chooses -- excuse me -- chooses to
16 charge.

17 JUSTICE SCALIA: Mr. Moseley --

18 JUSTICE STEVENS: Mr. Moseley, can I get
19 your help on a question I really have difficulty with.
20 It seems to me as I read the text, it is easy to read it
21 in one of two ways: It involves fraud or deceit in
22 which the loss to the victim in fact exceeded \$10,000.
23 In that case you would lose. Or it could be read to say
24 involves fraud or deceit in which an element of the
25 crime is that the victim or victims exceeded a loss of

1 \$10,000. You would lose under that also because it is
2 not an element of the crime.

3 So you are relying on a modified approach,
4 and under your modified approach what does the statute
5 say?

6 MR. MOSELEY: The -- the statute -- the
7 statute says that someone has to be convicted of -- of
8 both these aspects, both of --

9 JUSTICE STEVENS: But the statute doesn't
10 say anything about conviction.

11 MR. MOSELEY: If, Justice Stevens, if you
12 read it in conjunction with the conviction
13 requirement -- in other words, to -- to be deportable,
14 to be deportable, that's in -- in 6a. Someone who has
15 been convicted of an aggravated felony is deportable;
16 and also someone who has been convicted of an aggravated
17 felony is subject to, under -- under --

18 JUSTICE SCALIA: I don't -- I don't
19 understand how you squeeze your -- your modified
20 categorical approach, which seems to be a deus ex
21 machina which is intended to blunt the government's
22 argument that very few statutes would be covered by
23 this. I don't see how you get that out of the word
24 "convicted."

25 Are you convicted of an offense involving

1 more than \$10,000 if in a separate interrogatory the
2 jury, though it has no obligation in order to find you
3 guilty to say how much you stole, in an interrogatory
4 the jury says, oh, yes, the amount was more than
5 \$10,000? Does that cause you to have been convicted of
6 that? You are convicted of what you are charged with.
7 You are convicted of the elements of the offense, not --
8 not of whatever, whatever the judge chooses to allow the
9 jury to be questioned about.

10 MR. MOSELEY: I think under those
11 circumstances, though, particularly if you look at the
12 statutes which make gradations of sentencing on the
13 basis of loss amounts, you clearly would be convicted of
14 that. It is -- because that's a necessary element
15 that's going to -- that's a necessary fact that's going
16 to have to be found to put you in a particular
17 sentencing range. So you -- so you definitely would be
18 -- you would be under those circumstances convicted of
19 that amount.

20 But I think it's important to -- to
21 recognize what -- that Congress -- that Congress in
22 enacting the statute and in predicating removal upon
23 conviction used language that sharply distinguishes --
24 that is sharply distinguished from the position that the
25 government advocates here that loss should be something

1 to be determined in separate -- in -- in separate
2 removal proceedings.

3 JUSTICE GINSBURG: Can we go back to my
4 question, which I don't think you've fully answered?
5 And that's the tax evasion situation. For any tax -- a
6 person who is charged with tax evasion who goes to trial
7 and is convicted, that person would not be deportable,
8 as I understand it under your reading, because the jury
9 is not asked to determine the amount of the deficiency.

10 MR. MOSELEY: Well, the jury -- under those
11 circumstances, it will depend upon how the government
12 chooses, Justice Ginsburg, to prosecute the case. And
13 if the government chooses to prosecute the case by
14 seeking a determination of the deficiency amount in a
15 jury charge, then -- then, yes -- then, yes, indeed,
16 they would. But again, the vast majority of these cases
17 are resolved.

18 JUSTICE GINSBURG: I know. You told me that
19 most of them admit it at the plea stage. But going to
20 trial, these are parallel provisions, and it seems to me
21 they are meant to operate the same way.

22 MR. MOSELEY: Well, they -- they are -- they
23 are meant to operate the same way. But I think that
24 what we have here is a situation where the fact that
25 deficiency is a requirement and that deficiency in most

1 cases will be established by a plea, and that this is a
2 statute that sweeps broadly; that this is a statute that
3 sweeps -- excuse me -- sweeps broadly to encompass both
4 a loss in excess of 10,000 -- a deficiency in excess of
5 \$10,000 or a deficiency under \$10,000.

6 JUSTICE ALITO: Did you have any authority
7 for the -- the idea that a trial judge in a criminal
8 case should ask the jury to answer a special
9 interrogatory regarding a question that has no bearing
10 on the conviction, but may have a bearing on the future
11 immigration status of the defendant, which is what
12 you're suggesting should be done in these tax cases?

13 MR. MOSELEY: What -- what I am suggesting
14 in the tax case is that it would be perfectly
15 appropriate for the government to seek such a special
16 interrogatory if they wish to establish the tax loss,
17 which is an element of the -- which is a necessary
18 component of the offense, if they wanted to establish it
19 -- if they wanted to establish it for -- for purposes --
20 for whatever purpose they wanted to establish it.

21 JUSTICE KENNEDY: But I can see that if
22 there are multiple defendants in the case, some of the
23 defendants might say that this is unnecessary, it's
24 inflammatory.

25 MR. MOSELEY: That's -- that's -- that --

1 again, that is going to depend on -- that's going to
2 depend upon how the government chooses to -- to
3 prosecute under these particular --

4 JUSTICE KENNEDY: But all that just
5 underscores the fact that --

6 JUSTICE SCALIA: -- your earlier -- your
7 earlier assertion that it was necessary to -- that --
8 that it would be necessary to get that -- that amount
9 specified for sentencing purposes is simply not true. I
10 mean, we didn't -- we didn't hold that the guidelines
11 are mandatory, and you -- that you need a -- a jury
12 determination. We've said they are discretionary.

13 MR. MOSELEY: No, I --

14 JUSTICE SCALIA: So if you don't have a jury
15 determination, you can still sentence on the basis of
16 the amount taken, even though that was not found by the
17 jury.

18 MR. MOSELEY: I -- I understand. But my --
19 my point, Justice Scalia, on this one is that -- on
20 (M)(ii) is that it is -- it is a statute in which -- in
21 which loss can or is required to be shown, some
22 deficiency is required to be shown, and this may -- and
23 this may well be done by the modified -- the modified
24 categorical approach, particularly in -- in --
25 particularly in situations in which, as in most cases,

1 it's resolved by a plea.

2 Now, if -- if -- but -- and also, this
3 statute was enacted against the backdrop of -- of the
4 categorical approach, and the act was amended -- has
5 been amended roughly four times during this period with
6 no indication that Congress certainly intended to
7 jettison this. And I think it's also important here to
8 note the structure of the act in terms of how Congress
9 sharply distinguished between what would happen with
10 conviction and -- and what would happen with sentence.

11 They did enact specific provisions,
12 101(a)(43), subpart (F) at 2a of the statutory appendix
13 and (G) at 2a of the statutory appendix, which talk
14 about -- which -- which talk about sentencing and make
15 that sharp distinction.

16 But I think we should not also lose sight of
17 the overarching fact here that this provision is an
18 integral part of a Federal criminal statute, 1326(b), so
19 that any ambiguity in the -- so that an ambiguity in the
20 construction and application of this statute should as
21 -- similarly to -- to what this Court held in *Leocal*,
22 should be resolved in favor of the -- in favor of the
23 alien, because it's the classic multiple or dual use
24 statute that has both civil and criminal applications,
25 and very severe criminal applications as well.

1 I see I have 5 minutes. If there are no
2 further questions, I would like to reserve the time for
3 rebuttal.

4 JUSTICE SCALIA: I hope in rebuttal you'll
5 address the argument about deferring to the agency's
6 finding about what it means. We usually do that.

7 MR. MOSELEY: The -- I will -- I will --

8 JUSTICE SCALIA: You can save it for
9 rebuttal.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 Mr. Gannon.

12 ORAL ARGUMENT OF CURTIS E. GANNON

13 ON BEHALF OF THE RESPONDENT

14 MR. GANNON: Mr. Chief Justice, and may it
15 please the Court:

16 Petitioner's reading of subparagraph (M)(i)
17 implausibly excludes the mainstays of Federal fraud
18 prosecutions and applies at best to a tiny handful of
19 outlying offenses: Thefts of major works of art,
20 extreme cases of government contract fraud, and some
21 frauds obtaining confidential phone records and --

22 JUSTICE SCALIA: Well, except -- except for
23 his modified hangout. His modified -- his modified
24 categorical does -- does expand; doesn't it?

25 MR. GANNON: Well, I -- I think, Justice

1 Scalia, that he does offer this -- this variation on a
2 so-called modified categorical approach by saying that
3 we could use extraneous facts in guilty pleas in order
4 to satisfy the categorical approach. But we think that
5 that doesn't work for both practical reasons and for the
6 types of reasons that -- that several of the questions
7 raised in the first half of the argument --

8 JUSTICE SCALIA: And also interrogatories to
9 the jury.

10 MR. GANNON: He does seem to contemplate
11 that interrogatories for the jury might also achieve the
12 same purpose. But as Justice Alito was pointing out,
13 there -- there is little reason to believe that a judge
14 is going to permit such extraneous questions to be put
15 to a jury that are -- that are not necessary for the
16 criminal proceeding that is actually being held at that
17 point. It's unlikely that the government wants to make
18 the entire -- wants to imply that the conviction needs
19 to turn on that.

20 And obviously, both with the -- the special
21 interrogatories and the guilty pleas, there are
22 practical problems, because this could only apply
23 prospectively, even though Congress's definition of
24 aggravated felonies is intended to apply to convictions
25 that predated the enactment of IIRIRA. It -- I just

1 mean that it would not be until we knew that this was
2 the rule, that we could implement such -- such a rule.
3 And it's not clear why any alien who would be contesting
4 his removability in the civil removal proceedings would
5 concede in the -- in a guilty plea or to a fact that is
6 extraneous to that conviction that would ultimately --

7 JUSTICE GINSBURG: But this -- but this
8 defendant did ask, didn't -- he asked the judge.

9 MR. GANNON: Well, he did not ask the judge
10 for a finding of loss. He -- he asked for an
11 instruction -- for a special interrogatory as to "the
12 amount of money my client is responsible for." That's
13 on page 14a of his opening brief. And that's not the
14 relevant question for purposes of the loss threshold in
15 subparagraph (M)(i), which is actually about the -- the
16 loss to the victims from the offense involving fraud or
17 deceit, not how much any individual defendant might have
18 been responsible for. And even now --

19 CHIEF JUSTICE ROBERTS: Well, but then you
20 just -- you, the government, says -- you know, you'll
21 have a little debate about what the special
22 interrogatory, how it is phrased, and your objection
23 there could be dealt with on -- during that negotiation.

24 MR. GANNON: Well, and at that point he --
25 he -- we -- we presumably wouldn't want to have to prove

1 up a loss at that point that's irrelevant for purposes
2 of the criminal guilt proceeding, although it may well
3 become relevant for the sentencing proceeding, as it did
4 become relevant here, and there was a sentencing
5 stipulation.

6 JUSTICE KENNEDY: And -- and why would you
7 be reluctant to do that? Would you just spell that out
8 a little bit?

9 MR. GANNON: Well, I -- I think that it
10 could confuse the jury. Even if it were clear that it
11 had nothing to do with a determination of guilt, that
12 would be a particularly odd sort of bifurcation to
13 thrust upon the original criminal proceeding, to require
14 the jury to make findings about facts that are truly
15 extraneous to the purposes of the criminal proceeding
16 that is being held there, and for -- at least for guilt
17 purposes, there is no reason for the jury to have to
18 find that.

19 And as -- as the questions before were
20 making clear, the reason this Court has applied the
21 modified categorical approach is to determine what is
22 necessary for the underlying conviction. That's why
23 it's tied to an investigation into what really were the
24 elements of the underlying offense. And interrogatories
25 about facts that were not, in fact, necessary for the

1 conviction or -- or extraneous facts that are introduced
2 into guilty pleas do not change the fact that that
3 particular attribute was not necessary for the
4 conviction.

5 And so, we think that it makes sense, in
6 context of the other definitions in paragraph 43 of the
7 definition of aggravated felonies, where it is
8 indisputable that there are multiple provisions that
9 include both an element that needs to be evaluated as an
10 element of the offense and some other limiting factor
11 that need not be an element of the offense; that it
12 makes sense to construe the loss threshold in
13 subparagraph (M)(i) as something that need not be an
14 element, because the consequences of Petitioner's
15 approach would be to read out virtually all Federal
16 fraud prosecutions, including such mainstays as mail
17 fraud, wire fraud, conspiracy to defraud the government,
18 bank fraud, the offenses that were at issue here.

19 And he does offer a patchwork of some State
20 offenses that could be satisfied. But even there,
21 there -- there's not any particular consistency to it.
22 He invokes the Model Penal Code, which has a gradation
23 scheme for theft by deception offenses. And although
24 the BIA has -- has acknowledged that theft by deception
25 offenses may in certain circumstances constitute fraud

1 offenses, the Model Penal Code does not in the next
2 chapter dealing with forgery and fraudulent practices
3 have a consistent gradation scheme.

4 So even in the States that Petitioner cites
5 in his reply brief, Delaware doesn't have monetary
6 thresholds for insurance fraud, even though it does for
7 health care fraud; and New Jersey doesn't have monetary
8 thresholds for credit card fraud or payment card fraud,
9 and so a million-dollar fraud would not be -- would not
10 be treated consistently, depending upon which State it
11 was committed in and even which type of fraud it was in
12 an individual State, if the State --

13 JUSTICE ALITO: Could I ask you this, does
14 this -- which is not exactly on point to the issue here,
15 but does the government have a theory about how the loss
16 is measured for purposes of this statute? Under the
17 sentencing guidelines, the loss was a very complicated
18 calculation, lots of rules about relevant conduct and
19 lots of cases and different ways of proving loss, and
20 here we just have the statute.

21 MR. GANNON: Yes, we think that it is not
22 necessarily the same as the loss determination that
23 would be made for sentencing. And so, the board has
24 made it very clear that even though a restitution order,
25 for example, can be sufficient evidence of loss to the

1 victim, that it needs to be assessed with an eye to
2 exactly what losses were determined in the underlying
3 restitution order and with regard to the burden of proof
4 there. And so --

5 JUSTICE ALITO: What if you have somebody
6 who participates in a -- in a scheme involving
7 \$100 million, the total loss is \$100 million, but this
8 person had no way of reasonably anticipating that this
9 would be the -- the total amount of the loss, this was a
10 minor participant, and -- where would the -- how would
11 that come out?

12 MR. GANNON: Well, I think that the text of
13 the statute here in subparagraph (M)(i) talks about an
14 offense that involves fraud or deceit in which the loss
15 to the victim or victims exceeds \$10,000. And so, we
16 think that the loss threshold is tied to the offense
17 that involves fraud or deceit, not to the individual
18 defendant's role.

19 If he's convicted of a \$100 million fraud or
20 in this case what may well have been a \$683 million
21 fraud, he is -- that -- that is the offense of which he
22 was convicted, and it is an offense in which the loss to
23 the victims exceeded \$10,000. And so we think --

24 JUSTICE GINSBURG: Does the judge, when he
25 arrives at the restitution amount, have discretion to

1 say, as to this particular defendant, he was just an
2 accountant with the company that was committing the
3 fraud, he didn't put anything into his own pocket except
4 the salary they paid him, so I'm going to exclude him
5 from the restitution order?

6 MR. GANNON: Yes, Justice Ginsburg, in
7 general the -- the judge does have discretion to -- to
8 adjust aspects of the restitution order on the basis of
9 the facts of the underlying offense. And that's --
10 that's one of the reasons why I think the board has been
11 sensitive to the idea that the restitution order does
12 not necessarily determine what the amount of loss is
13 going to be for purposes of --

14 JUSTICE SCALIA: You -- you wouldn't allow
15 that exclusion to have any effect on deportation, would
16 you?

17 MR. GANNON: It would depend upon the facts
18 of the underlying case. If the underlying fraud was one
19 in which the victims lost not more than \$10,000 and we could
20 prove that by clear and convincing evidence in the
21 removal proceeding, then -- then we think that we would
22 not be bound by the judge's discretionary refusal to
23 impose a restitution requirement on the particular
24 defendant.

25 JUSTICE GINSBURG: So in -- in my very

1 hypothetical --

2 MR. GANNON: Depending upon the facts of the
3 case, yes, Justice Ginsburg, in your hypothetical if we
4 can prove by clear and convincing evidence that the
5 amount of loss associated with a fraud offense was more
6 than \$10,000, we think that would satisfy.

7 JUSTICE GINSBURG: Even -- even though this
8 defendant did not pocket any gain?

9 MR. GANNON: Yes. Yes, Justice Ginsburg.
10 It's not a pecuniary gain threshold. It's a loss to the
11 victim threshold. And -- and although the judge may
12 well take that into account for purposes of restitution,
13 it doesn't change the metric that Congress chose to
14 determine which types of frauds are serious enough to be
15 considered aggravated felonies.

16 In 1994, they -- they picked a threshold of
17 \$200,000. In 1996, they dropped that to 5 percent of
18 that value, to \$10,000. I think Congress's judgment
19 here is that if the fraud is so severe that it --
20 that -- that somebody -- that the victims lost \$10,000,
21 then -- then that is a qualifying offense for purposes
22 of subparagraph (M)(i), even if the original criminal
23 sentencing judge, on the basis of all sorts of factors
24 associated with the case and under the restitution
25 standards, decided that the defendant was not

1 necessarily liable to pay restitution in that amount.

2 JUSTICE GINSBURG: What about the
3 defendant's argument that at least as far as his
4 admission for sentencing purposes, he did that only
5 because otherwise the government wouldn't ask for a
6 downward departure?

7 MR. GANNON: Well, I -- I think that we are
8 not taking the position that the -- the stipulation for
9 sentencing purposes, which was pursuant to (6)(B) of the
10 guidelines and was for stipulation purposes -- we're not
11 arguing that that is -- is dispositive in the -- in the
12 civil removal proceeding. We're arguing that it's
13 persuasive evidence of the amount of loss here.

14 And so, he's -- he is certainly able to say
15 before the board or before the immigration judge that --
16 that for some reason the amount that he admitted to
17 isn't really the -- the actual amount of loss associated
18 with the case. That's not what he has done here. He
19 has -- he has consistently tried to establish that --
20 that this -- these -- this gargantuan loss amount was --
21 was not one that was found by the jury, not that it was
22 not in fact the loss that actually accrued in
23 association with the --

24 JUSTICE STEVENS: But your position -- I
25 want to be sure I understand it -- is that if the record

1 in this case had been -- let's say it's a mail fraud
2 case, they proved one mailing and one victim lost \$30,
3 and that's all the trial established, but as a matter of
4 fact you could establish this was part of a scheme, just
5 like the one we've got here, in which millions of
6 dollars were lost, you could prove that independently
7 and he would still be required to be deported?

8 MR. GANNON: Not necessarily, Justice
9 Stevens. If the conviction was for the entire scheme,
10 then we could bring in the amounts that were relevant to
11 the scheme. But if --

12 JUSTICE STEVENS: But the scheme -- the
13 evidence of the scheme consisted of just two mailings,
14 say. They allege a scheme and say it's a broad -- a
15 broad scheme, but they don't describe the amount. They
16 merely prove two mailings that involved \$25 apiece. But
17 the scheme itself, because you proved it in other cases,
18 you have the facts, actually was a big scheme like we
19 have here. Could they rely on that for -- for
20 immigration purposes in a proceeding like this?

21 MR. GANNON: It's possible. I think it
22 would depend upon exactly what we could determine had
23 actually been associated with the original --

24 JUSTICE STEVENS: You can determine exactly
25 what you proved in this case.

1 MR. GANNON: Well, I -- if we had that
2 amount of evidence in this case, we had sentencing
3 stipulations and all sorts of determinations at the time
4 of the sentencing where the defendant did not even try
5 to argue that this wasn't actually the amount of loss
6 associated with his offense and conviction, then we
7 probably would be able to establish by clear and
8 convincing that the --

9 JUSTICE SCALIA: I'm not -- I -- I'm losing
10 you. I would -- I would have thought that you have to
11 have convicted him of the larger scheme.

12 MR. GANNON: I -- I thought, Justice Scalia,
13 that that was the premise of Justice Stevens' question.
14 That that --

15 JUSTICE STEVENS: Yes, it was.

16 JUSTICE SCALIA: Oh, I didn't --

17 JUSTICE STEVENS: But it didn't describe the
18 dimensions of the scheme. As far as the record shows,
19 it only affected -- it was one scheme that was as large
20 as this one, but the evidence to prove the scheme only
21 required you to prove two or three mailings involving
22 small amounts of money. But then later on you proved
23 before the immigration judge there really was a big
24 scheme, and that's the one he was convicted of. Isn't
25 that enough?

1 MR. GANNON: Well -- I think that it's
2 unlikely if we didn't have the evidence contemporaneous
3 with the trial.

4 JUSTICE STEVENS: You had the evidence, but
5 you didn't need it.

6 MR. GANNON: Well, I -- if it were like
7 this, we had the evidence contemporaneous with
8 sentencing, with \$100 million stipulations and things
9 like that, and that makes it obviously much easier for
10 us to prove the extent of the underlying fraud.

11 JUSTICE STEVENS: I know it's easy; I'm
12 wondering if it's necessary. I -- I think under your
13 theory, it would not be necessary. As long as the
14 evidence is out there, you can use it in a de novo
15 proceeding before the immigration judge.

16 MR. GANNON: If -- if that were, in fact,
17 the scope of the conviction, because it was for -- for
18 the entire fraudulent scheme, then that may well be so.
19 Obviously, that -- the cases that have applied the --
20 the tethered approach, to use the word that Petitioners
21 invoked here, are cases in which the -- the courts and
22 the BIA have recognized that sometimes it is necessary
23 to recognize that there's a distinction between what the
24 defendant actually pleaded guilty to. If the defendant
25 pleads guilty to only an individual account, that's

1 involved in the scheme --

2 JUSTICE STEVENS: No, my -- he pleads guilty
3 to the mammoth scheme proved, the evidence before the
4 court or on the plea colloquy, whatever is described is
5 enough to show that he was guilty.

6 MR. GANNON: Well I --

7 JUSTICE STEVENS: But then as I understand
8 it, you can prove the size of the scheme later on.

9 MR. GANNON: I -- in those circumstances I
10 -- I think that we may well be able to prove that in the
11 second proceeding.

12 JUSTICE SCALIA: Well, I would -- I thought
13 that was the whole case we had before us, Where you
14 haven't proved either as an element or -- or by a
15 separate jury finding how much money was involved. Your
16 point is you don't have to.

17 MR. GANNON: Well --

18 JUSTICE SCALIA: You can establish that
19 later.

20 MR. GANNON: Yes, that's right, Justice
21 Scalia, and as long as it is the scope of the scheme
22 that -- that he was convicted --

23 JUSTICE KENNEDY: I suppose your answer,
24 it's your first argument, it's the -- it's the offense.

25 MR. GANNON: Yes, yes, Justice Kennedy.

1 JUSTICE KENNEDY: And if for Blockburger
2 purposes or for double jeopardy purposes, you couldn't
3 retry him for those other -- for that additional loss,
4 then that's -- I assume your argument is that that's
5 included within the offense for which he was convicted.

6 MR. GANNON: As long as the offense were in
7 fact the scheme rather than an individual instance of a
8 mailing, that's correct; and so I think that that --
9 that that is consistent with Justice Stevens'
10 hypothetical and that we would in those circumstances be
11 able to -- attempts to prove by clear and convincing
12 evidence in the civil removal proceedings that the loss
13 associated with the offense, which was the scheme rather
14 than just an individual mailing, then -- then we would
15 be able to prove that. Given --

16 JUSTICE KENNEDY: Your position is that in
17 ancillary, subsequent proceedings anything you prove
18 that's within the offense convicted -- say, as measured
19 by double jeopardy purposes, as protection against
20 multiple prosecutions, that you can make that showing?

21 MR. GANNON: Well, with -- here it's --
22 we're not trying to prove a separate criminal offense.
23 We're trying to prove that the offense --

24 JUSTICE KENNEDY: That's my point.

25 MR. GANNON: Yes.

1 JUSTICE KENNEDY: I take it that that's your
2 whole argument.

3 MR. GANNON: Yes, that it -- this is the
4 offense of conviction. This is just like the domestic
5 relationship prong of the misdemeanor crime of domestic
6 violence that the Court decided in its recent decision
7 in United States v Hayes, that -- that there is a prior
8 conviction, some aspects of which were elements of the
9 underlying offense, and in order to establish whether
10 the prior conviction needs the statutory definition in
11 the subsequent proceeding, the government will need to
12 bear the appropriate burden of proof for that
13 proceeding. Whether it's --

14 JUSTICE GINSBURG: But the appropriate
15 burden of proof was beyond a reasonable doubt. That is
16 in the second proceeding, the recidivist, the multiple
17 offender proceeding --

18 MR. GANNON: Yes.

19 JUSTICE GINSBURG: -- the relationship,
20 domestic relationship had to be proved beyond a
21 reasonable doubt, which is not the standard that the BIA
22 used.

23 MR. GANNON: I -- I think it was beyond the
24 reasonable doubt in the context of the 922(g)(9)
25 prosecution --

1 JUSTICE GINSBURG: Yes.

2 MR. GANNON: -- because that was itself a
3 criminal proceeding, and that's right, Justice Ginsburg.

4 JUSTICE GINSBURG: Yes, yes.

5 MR. GANNON: We think that if this
6 definition were -- were to be applied in the criminal
7 context, then we would need to prove this aspect, the
8 loss threshold.

9 JUSTICE GINSBURG: That's what you're
10 talking about, the alien who is convicted of a
11 qualifying crime, an aggravating felony, then tries --
12 then comes back illegally. The difference between two
13 years and 20 years, you admit there you would have to
14 prove beyond a reasonable doubt?

15 MR. GANNON: Yes, Justice Ginsburg, just to
16 be clear it's -- there's already a 10-year statutory
17 maximum that applies under 1326(b)(1) for the prior
18 conviction for a felony. I think that's something that
19 can easily be established through the categorical
20 approach and we would not need to have a "beyond a
21 reasonable doubt" determination in the illegal reentry
22 proceeding under 1326 to determine it's a felony.

23 But in order to determine that it is an
24 aggravated felony, as long as we could not satisfy
25 through a categorical approach to demonstrate that it

1 was an element of the offense in the original
2 proceeding, then, yes, I agree; we would need to meet
3 the relevant burden of proof in the 1326(b)(2)
4 proceeding.

5 Now, as it happens, this -- the extra
6 10-year statutory maximum at issue in 1326(b)(2)
7 effectively never gets litigated because the sentencing
8 guidelines arrange for aggravated felony enhancements in
9 that context for crimes like subparagraph (M)(1), ranges
10 from 21 months on the low end with no criminal history
11 to 5 months on the high end with criminal history of 6.
12 And so this effectively -- the extra 10 years of
13 statutory range is never employed by -- by judges for
14 these types of crimes.

15 In the last three years, according to
16 sentencing commission data, there isn't a single
17 defendant in the 1326 proceeding who received a sentence
18 of more than 10 years and had an increase on the basis
19 of an aggravated felony that would include the category
20 that we're dealing with here in subparagraph (M)(1).

21 CHIEF JUSTICE ROBERTS: Mr. Gannon, we're
22 dealing with the definition of a particular term,
23 aggravated felony. And yet you say the only thing that
24 you have to prove under the protections of criminal law
25 to prove that this is an aggravated felony is that it

1 involved fraud or deceit. Now, the other elements --
2 the other provisions here talk about firearms offenses,
3 child pornography offenses, national security offenses,
4 but here it's fraud or deceit. I mean, it's a felony,
5 but there's nothing that strikes -- strikes me that it's
6 particularly an aggravated felony.

7 MR. GANNON: Well --

8 CHIEF JUSTICE ROBERTS: And yet that's all
9 you have to prove with the protections of the criminal
10 law as opposed to the civil.

11 MR. GANNON: Well, I think we have to prove
12 for purposes of the relevant proceeding in which we're
13 trying to establish that it is an aggravated felony that
14 it also exceeded the \$10,000 threshold.

15 CHIEF JUSTICE ROBERTS: But not subject to
16 the protections of criminal law that you have to show.

17 MR. GANNON: No more --

18 CHIEF JUSTICE ROBERTS: Beyond the
19 reasonable doubt, with the jury protections.

20 MR. GANNON: Well, we would need to prove
21 that if it were relevant to a criminal proceeding, but
22 in the civil removal proceeding those protections aren't
23 there. And so we --

24 CHIEF JUSTICE ROBERTS: Yes, I guess what
25 I'm saying, the only thing that makes this aggravated,

1 the \$10,000, in contrast to the other things, which are
2 aggravated by virtue of elements that you have to
3 approve -- you have to prove beyond a reasonable
4 doubt -- is that it's fraud or deceit. And as I said,
5 there's nothing about that that -- it's bad, but it
6 doesn't strike me as particularly aggravated.

7 MR. GANNON: Well, Mr. Chief Justice, there
8 are several other statutes here that have extra limiting
9 factors that are necessary to make the crime an
10 aggravated one for purposes of the aggravated felony,
11 but don't have to be proved as an element of the
12 original offense. Congress has established --

13 CHIEF JUSTICE ROBERTS: Well, that's just --
14 I think that's kind of begging the question. You assume
15 that those elements, those provisions also don't have to
16 be proved as elements. And what I'm suggesting, I
17 guess, is that if the only thing that makes it
18 aggravated is -- is something you don't have to prove
19 beyond a reasonable doubt, it seems that we ought to
20 look, well, is that really aggravated?

21 MR. GANNON: Well --

22 CHIEF JUSTICE ROBERTS: And when you're
23 talking about firearm offenses, or child pornography,
24 yes, that's aggravated; but fraud and deceit is kind of
25 a run of the mill felony.

1 MR. GANNON: Well, but for many of the
2 offenses it's things that as Petitioner acknowledges,
3 would never be proved as elements of the offense. It's
4 the notion that a crime of violence is one in which the
5 term of imprisonment is at least one year. There are
6 other ones that depend on the actual sentence that was
7 imposed.

8 There is a second or subsequent offense
9 that's referred to in subparagraph (J); there is an
10 exception for purely political offenses from the
11 definition of -- of crime of violence. There are
12 affirmative defenses --

13 CHIEF JUSTICE ROBERTS: Well, I guess I
14 don't understand how that's responsive. It's -- it's --

15 MR. GANNON: Well --

16 CHIEF JUSTICE ROBERTS: -- part of violence.
17 In other words it seems to me you're already in the
18 aggravated area, so it makes sense to say that's what
19 you have to prove.

20 MR. GANNON: But not according to Congress.
21 It is only in the area, if it is not a purely political
22 offense, and if the term of imprisonment is at least one
23 year. And so by definition, it already can't be an
24 aggravated felony according to Congress if it doesn't
25 meet other factors that we would not have expected the

1 original jury to determine as an element of the original
2 crime of violence.

3 CHIEF JUSTICE ROBERTS: I -- I guess I don't
4 understand the answer, and I'm sorry if it's --

5 MR. GANNON: Well, I'm the one that's sorry.

6 CHIEF JUSTICE ROBERTS: -- I'm hard to get
7 through.

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: It just -- you're
10 saying is that there are exceptions, but I don't see
11 that that detracts from the point that "crime of
12 violence" -- you think right away, well, that's
13 aggravated; national security crimes, that's aggravated;
14 firearms offenses, that's aggravated. They're sort of
15 on their own without respect to these other things that
16 you say you only have to prove by the civil -- pursuant
17 to the civil burden requirements. Fraud or deceit -- as
18 I guess I've already said, that doesn't strike me as
19 particularly aggravated.

20 MR. GANNON: Well -- and I think that's --

21 CHIEF JUSTICE ROBERTS: What makes it
22 aggravated is something as to which you have a much
23 lighter burden.

24 MR. GANNON: Well, it's -- it's not a much
25 lighter burden in the sense that we do, for purposes of

1 the civil removal proceeding, need to establish it by
2 clear and convincing evidence, and -- and it is, in --
3 in a subsequent criminal proceeding, there will be all
4 the constitutional protections that you're talking
5 about, just like the domestic relationship prong of the
6 -- of the crime that the Court considered in Hayes.

7 JUSTICE SCALIA: I -- I would have thought
8 you would not accept the Chief Justice's premise, that a
9 crime of violence is an aggravated felony.

10 MR. GANNON: Well, I --

11 JUSTICE SCALIA: It isn't.

12 MR. GANNON: I tried to explain that it is
13 not as long as there isn't a sentence that is imposed of
14 at least 1 year according to Congress's way of
15 determining what is an aggravated felony, and Congress
16 has determined that --

17 JUSTICE STEVENS: But the -- but the Chief
18 Justice points out that the facts that make the fraud
19 aggravated are facts that you do not have to prove
20 beyond a reasonable doubt, which takes back to your
21 opponent's argument. Therefore, you were not convicted
22 by proof beyond a reasonable doubt of the aggravated
23 felony that's the basis for the immigration order.

24 MR. GANNON: Well, that's correct, Justice
25 Stevens, but in -- in that regard --

1 JUSTICE STEVENS: So you were not convicted
2 of the aggravated offense that -- the issue in this
3 case.

4 MR. GANNON: Well, no, we think that you
5 were convicted of the offense, which is an offense that
6 involves fraud or deceit, and then there is the further
7 limitation that Congress has imposed, not as an element
8 --

9 JUSTICE STEVENS: But the -- but you hadn't
10 been convicted of the aggravated offense until you
11 established its aggravation by proof of less -- not
12 under a reasonable doubt. So the word "convicted"
13 really is pretty important.

14 MR. GANNON: But it -- it can't have that
15 same meaning with regard to all of these other things in
16 all of these other offenses in which Congress has
17 determined they're not an aggravated felony until those
18 other criteria are also satisfied. I mean -- so we
19 think that in a statute that indisputably involves
20 individual offenses that have both elements of the
21 offense and nonelement limiting factors in order to
22 limit the category to those that Congress would have
23 deemed to be aggravated, that it makes sense to not have
24 to find as an element of the offense those extra factors
25 that generally wouldn't be for most of the other

1 provisions. And here we know if that reading is imposed
2 on this statute, that it reads out all the mainstays of
3 Federal fraud prosecutions and brings in a haphazard
4 patchwork of --

5 JUSTICE SCALIA: It depends on how you read
6 the language. I guess -- I guess grammatically it could
7 be read either way. You can read it: an offense that
8 involves fraud or deceit in which -- in which the loss
9 to the victim exceeds \$10,000. Or you could read it:
10 convicted of an offense that involves fraud or deceit,
11 in which the loss to the victim exceeds \$10,000.

12 I mean, "convicted" doesn't necessarily
13 apply to the last -- to the last phrase.

14 MR. GANNON: And we --

15 JUSTICE SCALIA: -- and that's basically
16 what we're arguing about.

17 MR. GANNON: And we think --

18 JUSTICE STEVENS: No, but the word
19 "convicted" -- the question is whether the word
20 "convicted" applies to the word "aggravated." That's
21 the point, as I understand the Chief Justice's
22 questioning, which goes to the burden of proof. So you
23 would win even under that approach if you said you had a
24 proof beyond a reasonable doubt of the other factors.

25 But the thing that creates the -- the

1 missing link is that to convert it from ordinary fraud
2 to aggravated fraud, you have to prove X under one view
3 by a reasonable -- beyond a reasonable doubt, but, under
4 your view, by only clear and convincing evidence.

5 MR. GANNON: Well, for purposes of a civil
6 removal proceeding, that's true, and that's no different
7 from the limiting factors in several of the other
8 provisions, like the sentence that was imposed -- the
9 potential sentence -- whether there was an exception for
10 a first offense that involved family members, for the
11 alien smuggling and document fraud, crimes in (N) and
12 (P).

13 And the -- this also is a reading that we
14 can't impose on subparagraph (M)(ii), where we know that
15 there is no loss requirement there, that the government
16 have a revenue loss of more than \$10,000 for a crime in
17 which the loss to the government is \$10,000. The "in
18 whiches" here are parallel to the "for whiches"
19 elsewhere in --in the statute.

20 And although Petitioner invokes the guilty
21 plea practice in the context of tax evasion offenses for
22 purposes of section 7201, this -- this doesn't help his
23 argument for the same reason that he cannot use
24 extraneous elements and guilty pleas generally to
25 establish that something was necessary for a conviction.

1 But if you look at the criminal tax manual that he
2 invokes, it makes clear by referring to relevant conduct
3 and the need for the loss amount there to include all of
4 the losses for all of the years in the indictment, even
5 if the defendant has pleaded guilty to an individual
6 count for a single year of tax evasion, that the loss
7 amounts that is typically included in guilty pleas in
8 7201 cases is not the loss amount that is relevant here.
9 It is in fact directly parallel to the sentencing
10 stipulation that -- that the Petitioner entered into
11 here.

12 If the Court has no further questions --
13 CHIEF JUSTICE ROBERTS: Thank you, Mr.
14 Gannon.

15 MR. GANNON: The court of appeals should be
16 affirmed.

17 CHIEF JUSTICE ROBERTS: Mr. Moseley, you
18 have 4 minutes remaining.

19 REBUTTAL ARGUMENT OF THOMAS E. MOSELEY
20 ON BEHALF OF THE PETITIONER

21 MR. MOSELEY: With respect to the issue of
22 deference, the fact that this is part of a Federal
23 criminal statute I believe doesn't get us -- cuts off
24 the inquiry, and we don't get to Chevron deference here.
25 We deal with a dual use statute which has both civil and

1 criminal applications, so that under these
2 circumstances, certainly as this Court held in Leocal
3 and in Lopez-Gonzalez, Chevron deference with respect to
4 Babaisakov would not -- for example -- would not be
5 triggered.

6 I think, moreover, it's important to note
7 that the Babaisakov got (M)(ii) wrong -- got the -- the
8 requirement of a deficiency wrong, and also got wrong
9 the fact that there were no statutes involved where
10 fraud -- where a loss amount in excess of \$10,000 would
11 be an element.

12 Finally, I think the government's reading of
13 this statute might make sense if Congress had said that
14 -- convicted of a crime in -- a crime in which fraud or
15 deceit is an element, with loss to be found at removal
16 proceedings in excess of \$10,000. But that's not the
17 language that Congress employed here, and under these
18 circumstances, even if the statute is perceived to be
19 ambiguous, that ambiguity should be resolved in the
20 Petitioner's favor.

21 JUSTICE SCALIA: To come back to the
22 deference point, you say -- is this relevant to the
23 criminal conviction? He's convicted criminally
24 regardless of how you read that. You acknowledge it
25 doesn't -- it isn't an element of the crime, and so to

1 be convicted criminally you acknowledge you don't have
2 to show the amount --

3 MR. MOSELEY: But --

4 JUSTICE SCALIA: -- right?

5 MR. MOSELEY: But what the government has
6 said, if they're going to do a prosecution under 8
7 U.S.C. 1326(b), that they would seek to prove this
8 amount de novo in the underlying criminal proceeding.
9 So it will form -- it would form part of a -- it would
10 form part of a criminal prosecution --

11 JUSTICE SCALIA: Well, in that later
12 criminal proceeding, they would have to prove it
13 undoubtedly --

14 MR. MOSELEY: Right, and that --

15 JUSTICE SCALIA: But this is not a later
16 criminal proceeding; this is an administrative
17 proceeding. And why shouldn't it be up to the BIA
18 initially to determine how to interpret this language
19 for purposes of the deportation laws?

20 MR. MOSELEY: It shouldn't, Justice Scalia,
21 because we deal with a dual use statute, as this Court
22 Leocal, which indeed was also a civil removal
23 proceeding, or Lopez-Gonzalez, which was a civil removal
24 proceedings. Leocal involved 18 U.S.C. 16 -- 16(b), and
25 --

1 JUSTICE SCALIA: But there -- was it not
2 true that there the interpretation placed upon the
3 statute by BIA would also be the interpretation
4 necessary to secure the criminal conviction? And that's
5 not the case here.

6 MR. MOSELEY: But it was -- but in
7 Lopez-Gonzalez, there was a -- there was a Board of
8 Immigration Appeals decision, Matter of Yanez, which was
9 directly opposite to what this Court held and ultimately
10 rejected in that decision. There -- this clearly is a
11 statute, I submit, that implicates -- that implicates a
12 Federal criminal prosecution later. And indeed if the
13 government, as the government's brief, says that they're
14 going to prove this amount in some subsequent illegal
15 reentry prosecution, that I submit raises more far more
16 concerns with respect to practicality.

17 JUSTICE KENNEDY: I frankly couldn't
18 understand the government's concession on that point. I
19 thought the -- the offense on illegal entry was to enter
20 illegally after you've been deported. It's a -- there's
21 a defense if the original deportation was flawed?

22 MR. MOSELEY: No --

23 JUSTICE KENNEDY: I don't understand that.

24 MR. MOSELEY: Well, that may be a separate
25 issue, Justice Kennedy. There is the sentencing

1 enhancement if it's after -- if someone enters or
2 reenters illegally after a conviction of an aggravated
3 felony. And what the government apparently has said is
4 that they would prove for a person whose aggravated
5 felony arguably falls within (i) --

6 JUSTICE KENNEDY: I see. I see.

7 MR. MOSELEY: -- they would prove that loss
8 de novo in Federal Court.

9 MR. MOSELEY: I see my time is up.

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

12 (Whereupon, at 11:01 a.m., the case in the
13 above-entitled matter was submitted.)

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