OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner v. MICHAEL E. GAUDIN

CASE NO: No. 94-514

PLACE: Washington, D.C.

DATE: Monday, April 17, 1995

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 94-514

MICHAEL E. GAUDIN :

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Washington, D.C.

Monday, April 17, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

RICHARD A. HANSEN, ESQ., Seattle, Washington; on behalf of the Respondent.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 94-514, the United States v. Michael Gaudin.

Is that the way your client pronounces his name?

MR. HANSEN: It is, Your Honor, Mr. Chief Justice.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE PETITIONER

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

The question in this case is whether the issue of materiality in a prosecution under 18 U.S.C. 1001 is an issue of law for the court or an issue of fact for the jury to decide.

The Ninth Circuit held in its en banc decision in this case that materiality presents a factual matter that must be decided by the jury under this Court's due process and Sixth Amendment decisions. In so holding, it disagreed with the holding of every other regional court of appeals that had considered the question, as well as this Court's decision under an analogous statute under Sinclair v. United States.

The Ninth Circuit's holding is incorrect for three reasons. First, this Court's decision in Sinclair

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and its more recent decision in Kungys v. United States establish that the issue of materiality in a prosecution for making false statements to a Government body is a legal issue and, as such, it is properly a matter for the court to resolve.

Second, the classification of materiality as an issue of law has deep historical roots in the law of perjury, and that law has always recognized that the question of whether a particular false statement is material raises a question of law for decision by the courts. That long history is critical in resolving the question of the propriety and constitutionality of deciding materiality by the court.

QUESTION: If you were deciding it as an original proposition it would make sense to say it was a mixed question of law and fact, wouldn't it?

MR. DREEBEN: I think that it might make sense in some cases to describe it as a mixed question of law and fact, Justice O'Connor, but the question of what kinds of facts need to be determined either in a perjury or a prosecution under 1001 is very different from the kinds of historical facts that we usually associate with a jury determination such as, did the defendant do it, and what his intent was.

In a perjury case, the kinds of considerations

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that come to bear are, what were the issues in the prior trial, and what was the transcript of evidence before the finder of fact in the prior trial. Those kinds of factual matters are not really the kind of thing that call for a jury to sort out conflicting evidence, except perhaps in the rare case which arose in the 19th Century, when there was no transcript of the trial and there had to be some decision made about what the defendant actually said and what was at issue in a particular trial.

QUESTION: In prosecutions under 1001 does it depend at all on what the issue is? If it made a difference what the Government agent actually thought about the form in question, that seems pretty factually related. I mean, how important was it to that official that an answer be thus and so?

MR. DREEBEN: In a normal 1001 prosecution the ultimate question that the court is asking is, would the particular misstatement have the capability of affecting the decision of the agency, and the proposition to be established is, what are the agency's functions as a matter of law, what is it authorized to carry out and, in some cases, it may go down to a somewhat more refined policy level of what is the agency actually trying to do within the broad scope of its statutory mandate?

Certainly the question of what the agency is

authorized to do as a matter of law is a pure legal question. It requires the consultation of statutes, sometimes of regulations, perhaps of legislative history, but those are all materials that a court deals with as a matter of law.

QUESTION: Now, in this case the trial court held a hearing to determine what effect the agency officials give to these applications?

MR. DREEBEN: No, I don't think in this case the judge held a hearing on that.

There was testimony at the trial, more along the lines of the testimony that Justice O'Connor was describing, testimony about would the false statements on the HUD forms in question have affected the agency's decision to make a loan, that all came in at trial, and the judge then instructed the jury before the jury got the case that the issue of materiality was for the court to resolve as one of law, and there was no debate that I have seen in the transcript about whether the materiality element was satisfied in this case. It doesn't --

QUESTION: In your view, was that testimony significant in helping the judge form his conclusion?

MR. DREEBEN: Well, I don't know, since the judge didn't write an opinion. It may very well have informed his decision in the matter, although there were

other ways that materiality could have been proved in this case, but our position --

QUESTION: It seems to me that if I were the trial judge in this case I wouldn't have had the slightest idea of how these forms worked, and that I would have wanted to hear the testimony, and that indicates that it's something that I don't know much about as a matter of law, and that is a jury question.

MR. DREEBEN: Well, I think that it indicates that the details of any particular program are something that needs to be established to the satisfaction of the court that's hearing the particular case, but that alone, in our view, isn't enough to treat the issue as one that must be resolved by the jury.

QUESTION: Well, do you think that it might have been proper in a case like this for the judge to hold a hearing outside the presence of the jury in order to make his determination, or her determination, whether or not the agency would reasonably rely on these matters, whether or not it would be material?

MR. DREEBEN: Well, the judge could have held a hearing outside the hearing of the jury. There's no question about that.

QUESTION: Does that ever occur in any --

MR. DREEBEN: Yes, it does --

QUESTION: -- other kind of criminal case?

MR. DREEBEN: Yes, it does occur in this kind of case as well as in a perjury case where judges want to decide the issue of materiality and for one reason or another the evidence isn't admissible in the case in chief, so that a hearing outside the presence of the jury would be appropriate.

QUESTION: Do we do this in any cases where the issue is something other than materiality? Have --

MR. DREEBEN: If there are very many issues like that, there aren't too many of them. One analogous area where the judge does decide a question that may turn on facts is whether a particular piece of property is within the territorial jurisdiction of the United States, which is a jurisdictional prerequisite as well as an element of many offenses that the United States prosecutes. It's settled that the court determines whether a particular piece of property is within the territory of the United States, and I think that rule would apply whether the judge was looking at a deed, or whether he was looking at a description of land and needed to hear some evidence about what that land actually entailed, so that is not a totally unknown process.

But our position here is largely one that is predicated on the long historical view that determining

whether a particular piece of information or a particular misstatement is material is something that the court does do.

QUESTION: But Mr. Dreeben, you recognize that in the case of material misrepresentations to a private party, for example in the securities area, that those are regarded as questions for the jury, the materiality of a misrepresentation, say, in a proxy statement.

MR. DREEBEN: We do concede that.

QUESTION: So how -- what is the distinction? Do you just say, whenever it's to a Government agency it's for the judge, and whenever it's to a nongovernmental entity it's for the jury, and what's the rhyme or reason?

MR. DREEBEN: Well, I think that the line that history has drawn is between the materiality of false statements to private parties and the materiality of false statements to Government bodies, and we accept that line as one that has enough basis in reason to survive the question of whether it violates the Due Process Clause of the Fifth Amendment.

The basic question in determining the materiality of a false statement to a private party is how a reasonable person would react to that statement, and the question of how reasonable people do things has been in our system one that we've been very comfortable assigning

to juries.

And it's, of course, assigned to the jury in the negligence context, and there really is an analogy between the reasonable person standard in determining materiality and the reasonable person standard in tort law that justifies certainly that long tradition of having materiality issues decided by the jury when they are to private parties.

When Government bodies are at issue, in contrast, the highest level of generality of the question, and I would submit also most of the lower levels, or more specific levels of analysis, have to do with what that agency's policies and practices are, which raises a determination that in many cases is a pure question of law.

And even in those cases where it requires some consideration of evidence about what the agency actually does, the ultimate inquiry focuses on what that agency's policies are, which is something that should not be resolved differently in courtroom around the country depending upon whether a particular jury accepts or rejects testimony.

It should rather be resolved on a uniform basis, considering all of the evidence that's available, including agency regulations and policies.

QUESTION: You're assuming that judges will all agree, so it would be -- every judge would agree on what's material.

MR. DREEBEN: I'm not making the factual assumption that every judge would agree, but I do make the assertion that when a question of law is at issue there is only one right answer to the question that judges should reach in determining whether an agency would have viewed particular information --

QUESTION: Well, you could say that as to whether particular acts affect interstate commerce under the Hobbs Act, and that always goes to a jury, doesn't it?

MR. DREEBEN: Well, the question of what is proved in a particular case does go to the jury, but I think that judges routinely instruct juries that if certain facts are found they constitute the requisite effect on interstate commerce --

QUESTION: Well, we could say the same thing here. You could say the same thing here, and there could be uniformity Nationwide as to what the standards of materiality are. Ladies and gentlemen of the jury, if you find that in processing the loan application this is of relevance to the agency, then you may determine that it is material.

MR. DREEBEN: Well, I think that there is a

substantial potential for disuniformity if you entrust the question of whether an agency would have been capable of being influenced by a particular piece of information to juries.

QUESTION: Yes, but that's an argument against the jury system. It's not an argument against submitting this issue, is it? I mean, that -- what you say there, to the extent that it's true, it could be true of any issue that gets submitted to a jury.

MR. DREEBEN: Well, the -- in our system, the threshold question of deciding whether the jury decides a particular issue is how the court system, the judicial system, classifies it as an issue of law or an issue of fact.

QUESTION: But that cannot inform our answer, because that would simply involve us in total circularity.

MR. DREEBEN: I don't think it involves the Court in total circularity, Justice Souter. What I think that it does is require the Court to look back into the legal traditions that have always informed the determination of whether a particular issue is factual or legal.

QUESTION: All right, but if we do that, it seems to me we could say, well, when the materiality issue is simply a strictly relational issue, if it's strictly an

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issue of relevance, okay, there's a good common law antecedent for saying it is a question of law and nothing but that.

But on the basis of your own answer to, first to Justice O'Connor and then I thought to Justice Ginsburg, I think you're saying there's more to it than that, because it seems to me there are two possibilities consistent with your answer.

One is that we are looking to what you called policies, which in fact are I guess statements of how the agency does, in fact, treat certain factual material that may come before it, or a second possibility might be that we look to the statutes and we look to the relevant facts, and we ask, in effect, what would a reasonable official with these responsibilities do with these kinds of facts, which gets us into the category that you mentioned of kind of the classic reasonable person tort law concept.

In either case, whether we're looking for the actual policy or the policy that a reasonable person would follow, we're doing something more than simply asking a question of the relevance of one proposition to another proposition.

MR. DREEBEN: I don't dispute, Justice Souter, the inquiry of 1001 does involve a bit more than a strict relational inquiry, but I submit that the core of the

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inquiry is a relational issue, and the determination of what the fact must relate to -- in other words, what the policy actually is -- is in most cases one that can be resolved as a pure question of law, and I don't think that the Court should assume that in the typical 1001 case that the issue is whether some individual agency official sitting in some office can dictate whether the Government values or doesn't value particular information based on his testimony.

QUESTION: Well, that then leaves you with, I suppose, the reasonable official, given the responsibilities that the law imposes.

MR. DREEBEN: That is right, and I think that what --

QUESTION: Why doesn't that, therefore, get you right into the analogy with tort law, reasonable person questions, or classic jury questions?

MR. DREEBEN: Well, I think certainly what a reasonable person -- a reasonable private person would do is one that tort law has assigned to the jury system, but what a reasonable agency official would do, what a hypothetical reasonable governmental official would do is a categorically different question.

QUESTION: Well, in the sense that there is a legal fact that is one of the facts that would inform the

judgment.

MR. DREEBEN: But I think just to state that proposition, Justice Souter, is to illustrate why it's an appropriate determination for a court. Determining and interpreting how the law and particular statutes and regulations bear on an agency official's assessment of a problem is not something that we typically entrust juries to do, and I think the --

QUESTION: You're right. Does that take you to the point of saying that whenever the question is, as you've said to Justice O'Connor, a mixed question of law and fact, that it must always be reserved by the -- or may constitutionally always be reserved by the court as if it were an issue of pure law?

MR. DREEBEN: Well, it doesn't, and the reason that I think that the Court doesn't have to make such a sweeping analysis in this case in order to decide it in the Government's favor is that the notion of what constitutes a mixed question of law and fact is one that we commonly use and associate with the standards applicable to appellate review.

It's not one that we typically use for sorting out what questions have to be decided by a jury versus what questions may be decided by a judge, and as a result, we use the words, mixed question of law or fact, in a

variety of different ways that don't have any bearing on this particular problem.

This problem --

QUESTION: Whenever the question before a trial court is, in the same sense that it is here, one in which facts about the law as well as facts about the world outside the law have to be taken into consideration, I take it your position would be, when that is the sense of the mixed law and fact question, it's always going to be a question -- it may constitutionally always be a question reserved for the court?

MR. DREEBEN: No, I would not go that far, and I don't think that I have to go that far. There may be questions about a defendant's intent in particular circumstances that could be described as Your Honor has described them, as bearing on how the defendant saw particular laws and regulations as bearing on his conduct, say, in a tax fraud prosecution, and it's not the Government's position that you could take the ultimate issue of intent from the jury in a question like that, simply because there may be some legal principles that come to bear on a set of facts that the jury has to --

QUESTION: Well, but what if the issue involved whether this particular defendant had acted as a reasonable person subject to the legal responsibilities

that taxpayers have would have acted? Would that -- which sounds like what we're talking about here. Would that kind of a question be one for the court alone?

MR. DREEBEN: I don't think so, not in a criminal case, and again, what we are primarily talking about there is the difference between private conduct and the conduct of those people who are agents of and who represent the Government, and we're talking about that against the backdrop of a very long tradition in our law, not only in perjury cases but also in cases that arise under section 1001, which is a fairly broad statute.

QUESTION: Yes, but how long does that -- that goes -- takes you back to sometime in the 19th Century, but that's as far as that tradition goes.

MR. DREEBEN: Well, the -- as far as we have been able to ascertain from reviewing all of the legal sources available, although the crime of perjury is a very old crime and it has always included an issue of materiality as a prerequisite for conviction, there doesn't seem to have been very much debate on the issue until the 19th Century.

In the early part of the 19th Century, courts did address the question and reported decisions, and they resolved it with a uniformity that I think is rather rare in common law and early criminal law decisions by holding

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that the issue of materiality is one that judges decide.

QUESTION: But we would be going a step beyond that if we hold your way in this case.

MR. DREEBEN: I don't think that -- I think the step, if the Court has to take a step further, is a very small step indeed, because it was always recognized, as I said, even in the perjury cases, that there might have to be some limited amount of fact-finding to determine what the issues in the prior trial were, and to determine what the testimony is alleged to be, and I think that those really form analogues to what courts have to do in resolving materiality under section 1001. They have to --

QUESTION: Mr. Dreeben, now, the defendant below did not object to the instruction that was given saying it was a question of law, is that right?

MR. DREEBEN: That's correct. That is correct.

QUESTION: And so the lower courts treated it as a matter of plain error.

MR. DREEBEN: They did.

QUESTION: And do you think that any so-called Winship-type error is always plain error?

MR. DREEBEN: No. It was our --

QUESTION: Why should this be?

MR. DREEBEN: We do not think this should be plain error.

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QUESTION: But you don't quarrel with our resolution of it on the merits.

MR. DREEBEN: No. In fact, we believe that it would be preferable, from the Government's standpoint, to have this legal issue resolved on its merits because courts are instructing juries quite often on how materiality should be resolved in section 1001 prosecutions.

And the Ninth Circuit hinted very strongly that it would be unconstitutional to take materiality from the jury in a perjury prosecution, and we would like to have a uniform national rule that is compatible with what all of the circuits but the Ninth Circuit have said, which is that the court may continue to resolve this issue as a matter of law, and we're not as interested in having a plain error determination on the particularized facts of this case, even though --

QUESTION: May I ask you a question, Mr. Dreeben? You started out telling us there are three reasons we should affirm.

MR. DREEBEN: Yes.

QUESTION: The Sinclair case, the history of perjury trials, and you never got to the third.

MR. DREEBEN: I think the third one has been brought out in the Court's questions, which is that once

the determination that a question before the Court is one that is classifiable as a legal issue, this Court's decisions in In Re Winship, which recognized a principle that antedated In Re Winship and that has been since reaffirmed, namely that the jury must decide the factual components of an offense beyond a reasonable doubt, is not implicated.

The primary question here is, is it a permissible determination under the United States Constitution for legislatures to make the issue of materiality one resolvable by a court, and our answer to that is yes, in view of the very long legal tradition that views that as a question of law. As a result, the In Re Winship line of cases, which do not concern the distinction between issues of law and fact, simply is not implicated in this case.

QUESTION: Mr. Dreeben, can you -- you gave us one example of a prosecution in which an element would be -- an element of the crime would be found by the judge, other than this one, and that was whether particular land is within the territory of the United States. Do you have any other examples?

MR. DREEBEN: Well, I hesitate to give very many examples, because the issue doesn't arise often enough to generalize.

QUESTION: Oh, it would really help me a lot to know that this is a common occurrence.

MR. DREEBEN: I would not be able to give Your Honor that assurance. There are a certain number of instances in which courts have done it. The Ninth Circuit did it, for example, in deciding whether a particular property was property of the United States in a prosecution for stealing property of the United States.

QUESTION: What about a prosecution under section 1984 for depriving someone of civil rights, a conspiracy to deprive someone of civil rights, and the deprivation is that two law enforcement officers conspire to conduct an unreasonable search and seizure. Who would determine whether it was an unreasonable search and seizure?

MR. DREEBEN: I haven't seen the question put. I think it might depend on what kind of an unreasonable search and seizure it is. If the claim is that excessive force was used and therefore it became unreasonable, the question of whether the force is excessive might be viewed as one that's appropriate for a jury.

If the issue were whether police are authorized to stop somebody based on reasonable suspicion and conduct a brief pat-down search, then that's a question of law resolved by this Court's cases.

QUESTION: Does the principle of judicial notice have any application in criminal cases?

MR. DREEBEN: It does, to the extent that the Court is the proper body for resolving the issue.

I don't think that I've seen cases in which courts drew upon judicial notice to instruct the jury as a particular matter, but that might be, Chief Justice Rehnquist, the kind of thing that has a family resemblance to determining what is the territory of the United States in a prosecution that depends on proving that a particular crime occurred within the territory of the United States.

The jury decides where did this crime occur? The judge instructs the jury based on consulting materials of which he may take judicial notice, I assume, that a particular piece of land belongs to the United States, and that allocation of authority between the judge and jury has never seemed to raise any problems in any of the reported cases that --

QUESTION: Is there an analogy between that, and I'm not sure there is, and the earlier discussion you had with some of the other of my colleagues about an administrative agency, that the judge might well instruct the jury about what the duties of the agency are and what its responsibilities under the law, but then leave the question -- with that kind of guidance say the material

issues shall be decided in that light?

MR. DREEBEN: Well, I think that's the strongest analogy that respondent could have in support of his position, but I would return to three reasons why that is not the path this Court should go down in this case.

The first is that the ultimate quarry here, the ultimate object of the materiality inquiry, does depend on a conclusion about what the agency is legally authorized and is doing, and whether a particular piece of information could affect that determination, and I would submit that whether the question of the agency's actions is resolved at the level of explicit statutory direction, less explicit but perhaps embodied in policies, or policy statements, or even testimony by agency officials, it's all the same generic inquiry. It's an inquiry into the agency's legally authorized activities.

The second reason is that I don't believe that kind of a question should be resolved differently around the country in different courtrooms depending on whether a particular jury believes this agency official who says yes, we always consider this kind of -- piece of information in making a decision, versus another jury who credits some former agency official who says, oh, no, that was never important to us.

QUESTION: Well, but I don't quite follow that,

because it might well be true that fact A is terribly important to a certain group of administrators, even administering the same statute, whereas other administrators may say, get on the -- say we never pay any attention to fact A.

MR. DREEBEN: But under section 1001 --

QUESTION: That should not matter.

MR. DREEBEN: -- in contrast to some statutes that does not matter at all, because the ultimate legal issue is whether it could affect the activities of a department or agency.

It's resolved at a very high level of generality. It's different from the materiality inquiry in a case like Kungys v. United States, where it was whether this particular individual who received citizenship procured his citizenship by a material misrepresentation.

That is not the level of generality at which you resolve materiality in section 1001. It's much higher than --

QUESTION: Mr. Dreeben --

QUESTION: The test is whether or not it can affect the agency --

MR. DREEBEN: Whether it's --

QUESTION: -- or whether or not it is likely to?

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MR. DREEBEN: Whether it's predictably capable of, or whether it has a natural tendency to affect the agency or --

QUESTION: Well, but that might very well vary from region to region in the country, depending on the way a statute is administered.

MR. DREEBEN: Well, as a particular factual matter --

QUESTION: Perhaps that ought not to be the case, but perhaps that is in fact the case.

MR. DREEBEN: Yes, it can, but it has never been the law that under section 1001 particular agency officials that occupy particular positions are able to nullify what could affect that agency's determination under its overall authority and program to act. It simply isn't --

QUESTION: Maybe that's because you never let it go to the jury.

MR. DREEBEN: Well, I think that --

(Laughter.)

MR. DREEBEN: -- if we did let it go to the jury we would be inviting all kinds of defenses that depended on whether a particular agency official actually knew that the statement was false and therefore couldn't possibly have been affected by it.

QUESTION: Does it have any relationship to special doctrines that apply to actors for the Government, like there's no estoppel against the Government based on the particular agent's -- is it --

MR. DREEBEN: I think that that strongly supports the position that we're taking that materiality is not something that individual agency officials are in a position to create or destroy by their individual conduct.

QUESTION: But if the inquiry becomes one about what the reasonable agent does, that's no problem.

MR. DREEBEN: This Court has never framed the inquiry in terms of a reasonable agency official, and I would further submit that the question of what reasonable governmental actors do is quite different from reasonable private actors.

I'd like to reserve the --

QUESTION: Because of the fact that the legal responsibilities inform the judgment.

MR. DREEBEN: That's correct.

QUESTION: Yes.

MR. DREEBEN: I'd like to reserve the balance of my time.

QUESTION: Very well, Mr. Dreeben. Mr. Hansen, we'll hear from you.

ORAL ARGUMENT OF RICHARD A. HANSEN

ON BEHALF OF THE RESPONDENT

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

It is our position in this case that the Government is, indeed, asking this Court to take a very great step beyond the Sixth Amendment cases and the due process cases that this Court has consistently applied, and in that regard, in making that observation it's interesting to me to note that the Government's position has evolved considerably from its opening brief to its reply brief.

The Government for the first time has adopted this distinction of -- between public and private officials. It urges this Court to find what we would characterize as an exception to the Sixth Amendment and to the Fifth Amendment requirements of Winship based upon that distinction.

QUESTION: You speak of the requirements of Winship, Mr. Hansen. The holding of Winship, as I recall, was that the burden of proof in juvenile court was beyond a reasonable doubt just as it was in adult court. I never read that case to simply revolutionize the criminal law.

MR. HANSEN: It did not revolutionize the criminal law, but it recognized, for example, the broad application of that Fifth Amendment requirement, and the

Sixth Amendment cases certainly do recognize that wherever the court is dealing with a fact-bound element -- and really in Kungys, even, this Court characterized in a footnote the determination of materiality as fact-bound, which is why the Ninth Circuit adopted that language.

Whenever that is the case, and it's an essential element, as the Government concedes, it must be decided by a jury beyond a reasonable doubt.

QUESTION: What do you do with the Sinclair case? That's a precise holding right on the issue here.

MR. HANSEN: With due respect, Mr. Chief Justice, we can distinguish Sinclair. We feel that Sinclair dealt with an entirely different issue, and that some of the more modern cases that we have relied upon to support our position have drawn the distinction and have shown the confusion between perjury and materiality where materiality is an essential element.

In Sinclair, the question was the pertinency to a congressional inquiry in the Teapot Dome scandal. In Sinclair, the Court specifically stated that pertinency in that context is akin to relevancy, and the Court explained that it involves no factual determination. That was essential to the Court's holding in Sinclair, and we have just the opposite situation here.

As this Court said in TFC Industries v.

Northway, which was a securities fraud case, materiality involves mixed questions of law and fact.

QUESTION: But does materiality involve the same kind of inquiry every single time you have the word materiality? What precisely is the issue here under 1001?

MR. HANSEN: I think that's a very critical issue to examine, and we ask the Court to --

QUESTION: Well, will you examine it right now?

MR. HANSEN: I certainly will, Mr. Chief Justice. We feel that if the Court looks at the record in this case and the record in the other cases from the other circuits, the Court will see that it is a fact-bound inquiry. In this case, there was no reference to a single regulation or statute.

QUESTION: But whether it's a fact-bound inquiry or what the precise element is, you look at the statute for it. You don't look at a bunch of records in other cases, do you?

MR. HANSEN: No, you don't, and in this case, Your Honor, the Court never did look at a single statute.

If the Government's position is correct, then this Court should reverse my client's convictions based upon the Government's position, because there was no single statute, regulation, or anything of the kind ever referred to.

What the Court heard in deciding materiality in this case was common sense testimony from bank officials that we want to know who's paying the closing costs because a) that helps us calculate the amount of the loan --

QUESTION: Well --

MR. HANSEN: -- et cetera.

QUESTION: -- the question presented by the Government's petition for certiorari -- in a prosecution under section 1001 for making false statements in a matter within the jurisdiction of a Federal agency, is the materiality of those statements to be resolved by the court rather than the jury? -- I would think you'd look at 1001 for that.

MR. HANSEN: You would, and as a matter of statutory interpretation, every court that's examined it has determined that materiality is an essential element.

Now, some of the courts who have ruled against us, like in the Hausmann opinion, have stated, there is merit to the argument that this should be decided by the jury, but the United States Supreme Court will have to address Sinclair before we can rule in your favor.

There have been a number of cases that have questioned this antiquated rule.

QUESTION: So in looking at the language of

1001, where do you find the materiality requirement?

MR. HANSEN: Materiality is stated that -- directly in the statute.

QUESTION: Material fact?

MR. HANSEN: Yes, a material fact, and I think it's instructive that the statute itself talks about material facts. We're not talking about legal standards, as the Government would --

QUESTION: Well, but it says --

MR. HANSEN: -- argue to this Court.

QUESTION: -- wilfully falsifies, conceals, or covers up a material fact. That fact that it says, covers up a fact, doesn't mean that materiality is a factual question.

MR. HANSEN: We submit that it does. We submit that --

QUESTION: You submit that just because the noun, fact, is being modified by the adjective, material, that means that -- the adjective means it's a factual thing?

MR. HANSEN: There's much more to it that supports my conclusion that it is factual. If one looks at the cases, at the nature and character of the testimony presented in this case, for example, which is a prime example, it was entirely factual. There is no reference

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made to guidelines. The loan officer said, I want to know who's paying the closing costs, because it affects whether we issue title insurance, for example.

QUESTION: Well, the -- couldn't you say the same as -- in a -- as a matter of relevance to a perjury conviction? The -- in a perjury trial? There was another trial before.

MR. HANSEN: Correct.

QUESTION: And this judge now doesn't look to what actually would have affected the jury. Rather, this judge now looks to the circumstances of the prior trial and, given his knowledge as a judge and what usually affects juries, whether or not it would have done, it says, this is relevant or not.

Now here, I think the Government is saying, but I'm not positive, that materiality in respect to a Government program is roughly the same. The judge goes, reads the statute books, finds out the nature of the program, and on the basis of how the program works and how it's supposed to work, works out whether or not this statement would likely have affected the -- not what it really would.

The psychology of the individual lending officer is beside the point, but basically it calls upon the knowledge of the judge to understand Government programs

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in the same way that a perjury prosecution calls upon the knowledge of the second judge to understand how the first trial worked, and it's in that sense I think that they seem quite similar.

MR. HANSEN: I would say that the similarity, the much stronger similarity exists between 1001 prosecutions, which have nothing to do with a court proceeding, as perjury does, or with a congressional proceeding.

QUESTION: Yes, but you see judges are not only experts on court proceedings. They're also experts on how regulatory programs work, how statute books work, how when you understand -- that's a fairly close analogy. I mean, I'm honestly not certain about this case, and it seems to me that this is quite a strong analogy, given the history and so forth, but that's why I'm interested in your answer.

MR. HANSEN: Justice Breyer, as many of the cases have said, the distinction between law and fact which the Government is resting upon here --

QUESTION: No, no, it's fact, but it's certain facts about how programs work based upon your knowledge of statutes, regulatory things, rather than what actually influences, just as relevance is fact. The relevance of something that the second judge has to decide about grows

out of the facts of the first trial. The judge in the second trial has to put himself back in that situation. That's where I'm finding the analogy, and the words, fact and law, don't help very much, because I'm prepared to say that both involve facts or law or whatever you want.

MR. HANSEN: I agree that that analogy of law and fact does not help. It doesn't enlighten. I think the better comparison, though, is the issue of materiality and the way it is determined in securities fraud cases, bank fraud cases, wire fraud cases, and mail fraud cases, where this court has historically, and every court has historically held that that must be submitted to the jury as a matter of Sixth Amendment and Fifth Amendment jurisprudence.

I think once you realize that 1001, and look at it for what it is, which is a generic false statement statute that has nothing to do with courtrooms, the better analogy is to the securities fraud cases, which often involve complex practices.

As this Court said in Santa Fe Industries we've got -- that's discussed in our brief, that it's difficult for juries, but nevertheless the jury has to decide whenever it's an element of the offense, and I would submit that the most pertinent and important distinction here to be drawn is whether it's an element of the

offense.

Now, in Sinclair, it was akin to relevance. The Court was determining in Sinclair that the issue was whether or not that was a pertinent question to the inquiry, and certainly it was akin to relevance, and the Court did emphatically say, it does not require any resolution of the probative force of any evidence. Here we have --

QUESTION: You're saying that was not an element of the offense in Sinclair?

MR. HANSEN: In Sinclair the Court uses the term, element. I acknowledge that it does, in it's holding. It was not an element in the sense that we are speaking of here, where all the courts have said --

QUESTION: What's the difference between the sense we're speaking of it here and the sense it was used in Sinclair?

MR. HANSEN: Whether it was a proper question, was the issue in Sinclair. The defendant in that case said, you're asking about my private affairs, regarding my business dealings, you have no right to ask that, and he refused to answer.

Now, it would be, I think, much more analogous to a contempt situation, where one might raise, or in the Hugh Act cases, where one might raise the relevance in the

priority of the question as a defense.

QUESTION: But that's not the way the Court treated it in Sinclair.

MR. HANSEN: No, and it's not the way the courts have treated it under 1001 or under securities fraud cases, where it's clearly, legislatively, an element of the offense that must be proven beyond a reasonable doubt.

I think that there's a great potential here for confusion between --

QUESTION: Well --

MR. HANSEN: -- relevance --

QUESTION: Yes, but --

MR. HANSEN: -- and elements.

QUESTION: There's also, I think, a great potential for confusion if you can bring in all sorts of witnesses that would say, you know, a reasonable person would have thought this, or a reasonable person would have thought that, about whether an agency official might have -- you know, you can probably bring in the whole hierarchy of the agency and get 18 different answers.

MR. HANSEN: But that's not what happens in these cases, Mr. Chief Justice.

QUESTION: Well, it may not be what's happened so far because no circuit agrees with the Ninth Circuit, but if the Ninth Circuit is affirmed I think it will start

happening.

MR. HANSEN: Well, I would submit that the same kind of cross-examination that has occurred in past cases where the Court has determined it would be the same kind of cross-examination that would occur if the jury determined it, namely -- in this case was the payment of $38 in closing costs, which is the lowest amount of any of the accounts in a multi-$10,000 loan transaction. Why was that important to you? You could ask the same questions on cross-examination.

And I think it's curious to note that this case could have been prosecuted as a bank fraud case, and if that had occurred, the witnesses would have been the same, the questions would have been the same, the issue would have been the same, but it would have been submitted to the jury on the issue of materiality, because under that statute, bank fraud, which is certainly much more similar to this case than perjury cases, it is a jury question, and that's very well established.

QUESTION: What is your position on the perjury statute?

MR. HANSEN: My position is that any other statutes need to be examined for legislative extent. If materiality is an essential element of the statute, whether it be perjury or a different statute, then I

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think, consistent with the Sixth Amendment and with all of this Court's decisions about the Sixth Amendment and the structural guarantee of the Sixth Amendment, and the importance of submitting all elements of the Sixth Amendment to the jury no matter how overwhelming the evidence, I would say if it's an element, then even under some perjury statutes it should be submitted to the jury.

QUESTION: Well, it is an element, isn't it, in most perjury statutes -- materiality?

MR. HANSEN: It certainly is with --

QUESTION: So what you're saying, then, the whole line of cases, the whole perjury line of cases is incorrectly decided, I guess.

MR. HANSEN: I wouldn't say the whole line, but I would say that some of them are troubling.

QUESTION: Yes.

MR. HANSEN: And I think the distinction, again, must be, is it an element of the offense? Is it something that the jury has the ability to decide?

And with regard to materiality under the generic false statement statute, the answer is certainly yes, the jury can decide it. We just have to look to the securities cases and the bank fraud cases to see that juries routinely decide this based on pattern jury instructions.

QUESTION: Is it open to us to decide this case in your favor without reaching the constitutional determination that would bind the States?

MR. HANSEN: I would urge this Court to reach the constitutional issue and, with all due respect to the Government, I believe that the Government has avoided the constitutional issue because I think there is no good answer to the question, if it's an element of the offense, why shouldn't the jury be deciding it, particularly if it is a fact-bound element? Why shouldn't it be decided like every other element?

Every element, to some extent, of every criminal offense requires application of the law to the facts. We call upon juries to do that as a matter of constitutional mandate in every criminal case. Kungys, of course, was not criminal.

QUESTION: What you're saying now is that we should simply go through the statute books and through all our decided cases and apply this very bright line rule that you're talking about. We'll have to overrule some cases, but presumably the abstract symmetry that you're seeking will be accomplished.

I think the Sixth Amendment does require something similar to that, and I would point out, Mr. Chief Justice, that the inconsistency that exists here

is not simply between 1001 and perjury, which is not a very often brought prosecution, but rather between 1001 and bank fraud, mail fraud, securities, fraud, which are very commonly employed statutes, criminal and civil, and in all of those cases there is a glaring anomaly, I would submit, that this Court should clarify, because in all of those cases the jury routinely decides the issue of materiality based on the standard of proof beyond a reasonable doubt.

QUESTION: So we'd have to go back and also change the rule on relevance in a perjury conviction.

MR. HANSEN: I think what the Court needs to do, as other courts that we have discussed in our brief, many of them State supreme courts, the number isn't many, perhaps, but several -- State v. Anderson and others, and Judge Posner in the Staniforth case, which we discuss -- the Court needs to clarify that there is a difference between relevance, as that term is used in Sinclair, and materiality as that term is used in a false statement to a Government official or in a securities fraud case.

QUESTION: Or as it is used in evidence. The standard litany, when you're objecting to a question, is, Your Honor, it's incompetent, irrelevant, immaterial.

MR. HANSEN: Correct.

QUESTION: Does that immaterial mean something

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different than the materiality concept that you are discussing?

MR. HANSEN: As different as night from day, and I think that's the reason there has been some confusion. Materiality as a concept of relevancy is antiquated, and I think some of the perjury cases are antiquated that the Government relies upon.

Materiality, when it's an essential element of the offense, is subject to a very clear definition. This Court set forth that definition in Kungys. Devitt, Blackmar and O'Malley has a conceptually indistinguishable definition which should be used with juries for deciding materiality.

QUESTION: Why wouldn't we have to -- why -- just overrule all the relevance, because relevance in a prior trial might well involve a host of factual matters. What would in those circumstances have proved to have been relevant might depend on what might have been admitted later on. I mean, you can easily construct -- so I guess the relevance to would be out the window, wouldn't it?

MR. HANSEN: It's not --

QUESTION: I know Posner makes that distinction, but I'm not certain I get the clarity of the distinction.

MR. HANSEN: Justice Breyer, relevance would not be out the window. I think -- well, one unit of research

that was not included in our brief concerns the Hugh Act cases, and in any proceeding where a witness feels that they should not answer a question because it's not relevant, it's not germane, their attorney or they should raise an objection, and that's a procedural requirement under the Hugh Act cases that were decided mainly by this Court in the fifties.

Relevance is not out the window. Relevance is a different concept. It has a different place and a different application than an essential fact-bound element of a criminal offense, which is what materiality is.

And again, I think we confuse materiality and relevance because of the reason stated by Justice Ginsburg, that it used to be part of a litany of objections that attorneys made in courtrooms.

QUESTION: Well, maybe you can define them for us. When -- tell me what the old, and now you say obsolete, immaterial meant as distinguished from relevant, and then tell me what material means in the context of this 1001 statute.

MR. HANSEN: In the prior context, Your Honor, immaterial meant, it's not relevant, it's not probative of the issues here in court, and that was an objection that was --

QUESTION: Just a synonym for relevant, then.

MR. HANSEN: I believe it's been subsumed within the objection, it's not relevant, in modern practice.

I know that I was taught in law school evidence class not to make that objection any more because judges want precise objections. It's not relevant. It's too prejudicial. It's incompetent.

QUESTION: Yes, but wasn't traditionally the added feature of materiality something to do with importance?

MR. HANSEN: Yes.

QUESTION: You're saying it's irrelevant, it's immaterial, when you get to immaterial in effect you're saying well, even if it is logically relevant, it is factually so trivial as to be unimportant here. Wasn't that where the line was --

MR. HANSEN: I think so. I think it's been a vague concept. I think maybe it's similar, now, to the Federal Rule of Evidence 403. It may have some relevance but it's overly prejudicial or time-consuming or a burden upon the court.

To finish answering Justice Ginsburg's question, relevance -- materiality is defined by Kungys very adequately, and again I would reiterate, in different terms, but conceptually indistinguishably from the Devitt and Blackmar and O'Malley definition.

Is it of the type of information that would likely be relied upon by the person, whether it's a Government official, or a stockbroker, or a bank, in making the official decision that is at issue in that case?

QUESTION: But didn't -- in Kungys we held the other way, didn't we? We held it was a matter for the judge to decide.

MR. HANSEN: Only, I submit, because there was no right to a jury trial in Kungys, and the Court in Kungys made clear that it's very much a factual inquiry. In Kungys, a denaturalization proceeding, the defendant had been deported, according to the court of appeals decision, or should be denaturalized, because he had misstated his age, and they were concerned -- the Court was concerned, the Government was concerned that he had previously worked at a Nazi death camp.

He had his own explanation for why he had changed his date of birth, and that was to avoid Nazi persecution when he was a resident of Germany, and because he claimed that he had worked with the Lithuanian resistance.

In that case, the Court states several times in the course of the opinion, and I quote the phrase from a body that this court reiterated and quoted in Kungys,

"materiality rests upon a factual, evidentiary showing," and at another point in discussing the opinion, or the test in Kungys, the Court stated that "there are an infinite variety of factual patterns that would affect materiality."

It is clearly the kind of factual dispute that a jury should resolve, and it bears no resemblance, I submit, to the question of relevance and materiality as that term has been used in the past.

In conclusion, I would urge this Court to affirm the Ninth Circuit decision. We feel that the distinction that the Government is drawing, based upon whether the person lied to, in effect, is a Government official, or a bank, or a securities firm, is not a valid distinction, and it certainly is not a valid reason for overriding the very important Sixth Amendment requirement that a jury pass upon all factual elements in a criminal offense.

If there are no further questions --

QUESTION: Thank you, Mr. Hansen.

Mr. Dreeben, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE PETITIONER

MR. DREEBEN: Mr. Chief Justice, in our view, there has always been in a perjury case the need to ascertain predicate facts in order to make a determination

of materiality, but that has never meant to courts around the country that the ultimate question was a factual one that had to be decided by a jury rather than a determination that the court made.

QUESTION: What about your opponent's argument that if that is sound, then we should go the other way, I suppose he says in the bank, in the mail, in the securities fraud cases?

MR. DREEBEN: Well, I think, Justice Souter, that's the same distinction that we were discussing earlier between the effect of the representation on a reasonable private person and the effect of a representation on a Government agent.

In Kungys and Sinclair, this Court did ascertain what the particular governmental entity was doing. It ascertained that the INS was seeking to determine whether somebody was qualified for citizenship. In Sinclair, the Court had to determine what the congressional inquiry was in order to figure out whether a question was pertinent to it.

But once it had ascertained those predicate facts, which I think are analogous, as Justice Breyer pointed out, to the determination of what the agency's program is, the ultimate application of the legal standard is one that the court can do as a matter of law.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Dreeben.

The case is submitted.

(Whereupon, at 1:51 p.m., the case in the above-entitled matter was submitted.)

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BY Ann Marie Federico

(REPORTER)