

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MARIO SALINAS v. UNITED STATES

CASE NO: No. 96-738 *07*

PLACE: Washington, D.C.

DATE: Wednesday, October 8, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARIO SALINAS, :

4 Petitioner :

5 v. : No. 96-738

6 UNITED STATES :

7 - - - - -X

8 Washington, D.C.

9 Wednesday, October 8, 1997

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 1:00 p.m.

13 APPEARANCES:

14 FRANCISCO J. ENRIQUEZ, ESQ., McAllen, Texas; on behalf of
15 the Petitioner.

16 PAUL R. Q. WOLFSON, ESQ., Assistant to the Solicitor
17 General, Department of Justice; Washington, D.C.; on
18 behalf of the Respondent.

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

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 96-738, Mario Salinas v. United States.

5 Mr. Enriquez.

6 ORAL ARGUMENT OF FRANCISCO J. ENRIQUEZ

7 ON BEHALF OF THE PETITIONER

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

10 This case involves the interpretation of the
11 RICO statute and the Federal theft, bribery and
12 embezzlement statutes.

13 Concerning the Federal bribery statute, this
14 case presents the issue of whether this prosecution in
15 Federal court, of State officials, is within the scope of
16 the statute, even though it does not -- the conduct
17 complained of does not impinge upon -- upon, affect or
18 divert Federal or even State or even any local funds
19 whatsoever.

20 Concerning the RICO statute, this case presents
21 the issue of what are the elements of a RICO conspiracy
22 and how that should be charged to a jury. Because of the
23 nature of the prosecution in this case, State officials
24 being tried for primarily State law violations in Federal
25 court, it raises great issues concerning Federalism and

1 the federalization of State crimes.

2 As to the Federal bribery statute, it is our
3 position that the statute itself does not reach as far as
4 a prosecution in this case. Of course, the -- the funds
5 which funded the bribery did not involve any State,
6 Federal or local funds; but, more importantly, no Federal
7 funds, no local funds, no State funds, whatsoever, were
8 diverted.

9 18 U.S.C., Section 666 contemplates the kind of
10 transaction where, for example, money is embezzled from
11 the government, where there is a theft of government
12 property, or, in the bribery context, where government
13 funds are diverted as a result of the bribe. And what I
14 mean by this, for example, is where money is, for example,
15 paid to a government official, and then a -- a bid is
16 awarded or a contract is given or a lease is awarded or a
17 grant is made or a job is given, something of that nature.

18 QUESTION: Of course, it's clear the statute
19 would apply in those cases. But are you suggesting there
20 is no Federal interest in how Federal prisoners are
21 treated when they're housed in State facilities?

22 MR. ENRIQUEZ: Not at all, Your Honor. I am
23 saying that there -- I do recognize that there is a
24 Federal interest in how the prisoners are treated. And --
25 and I think that could be vindicated probably in a

1 properly worded statute that is directed to that. But
2 this statute is not directed to that.

3 Additionally, if I may point out, the
4 government's interest is -- is probably satisfied if, for
5 example, it makes sure that the grant that it's giving
6 or -- or the Federal funds that -- that it is awarding are
7 to an organization that, for example, shares its views --
8 shares its views or its policies.

9 QUESTION: But our -- our inquiry, really -- we
10 think probably that Congress is the one to decide whether
11 the government's interest is satisfied. So I don't think
12 there's any separate inquiry. If -- if the statute covers
13 this, then the government's interests would be satisfied
14 by an application of the statute, I take it.

15 MR. ENRIQUEZ: Well, yes, it would be, Justice
16 Rehnquist, Mr. Chief Justice. It would be, but it's our
17 position that the purpose of this statute is a protection
18 of property statute. That's what this statute is directed
19 at. That's the focus of it. That is what the government
20 is -- is trying to take care of.

21 QUESTION: Then why -- why -- why is this
22 statute -- I gather the government gave 860 -- or
23 \$850,000, and about 915,000 a year, to house 100 -- 100
24 Federal prisoners -- up to 100.

25 MR. ENRIQUEZ: Yes, Your Honor.

1 QUESTION: That's about \$9,000 or \$10,000 a
2 prisoner.

3 MR. ENRIQUEZ: Yes, Justice Breyer.

4 QUESTION: To create a certain kind of a room, a
5 cell.

6 MR. ENRIQUEZ: Right.

7 QUESTION: And now that room or cell was
8 misused. So why doesn't it affect the -- exactly the --
9 the very, very expenditure that the Federal Government
10 made? We'll give you a thous -- we'll give you this
11 prisoner, \$10,000, to create a certain kind of cell that
12 is to be used in a certain kind of way. And now, this --
13 your client took a bribe to use it in a different way. So
14 why does that not directly affect the Federal expenditure
15 that was at issue?

16 MR. ENRIQUEZ: Well, because in -- in -- in the
17 trial court level, the judge faced the issue of whether
18 this conduct in this case, the -- the conjugal visits or
19 the contact visits, were -- were illegal. And the jury
20 was not asked to find whether that was improper conduct in
21 this situation. And what they were asked were whether
22 bribes were paid for contact visits.

23 The -- the purpose of the statute, as we see it,
24 is a protection of property statute. We see it from --
25 from the internal structure of the statute.

1 QUESTION: I'm --I'm sorry, I didn't -- I didn't
2 quite grasp the -- the answer to your question. Is
3 there -- is there a doubt, is it disputed that conjugal
4 visits are unauthorized for -- for Federal prisoners
5 housed in this jail?

6 MR. ENRIQUEZ: Yes -- yes, ma'am.

7 QUESTION: So why would that have to be put to
8 the jury? That's a given, right?

9 MR. ENRIQUEZ: No -- no, ma'am. The -- the
10 judge, in instructing the jury, said that the question of
11 whether there were conjugal visits or contact visits --
12 and that was disputed in the evidence -- was not the
13 issue. The question was, was their payment for these
14 visits, whatever their nature may have been.

15 QUESTION: Well, why would there have been a
16 need for the briber to bribe if the conjugal visits were
17 lawful?

18 MR. ENRIQUEZ: I -- I think it's because it was
19 a policy of the sheriff's department not to allow conjugal
20 visits. And -- and, of course, the sheriff indicated that
21 the visits that occurred were not conjugal -- conjugal
22 visits. Although they were very liberal, as far as the
23 number of contact visits that were allowed, he denied that
24 conjugal visits occurred.

25 QUESTION: Well, wouldn't there also be a

1 Federal interest in -- in not wanting its -- its contract
2 jails to be used for bribery, even if in fact the briber
3 gets a very bad deal?

4 MR. ENRIQUEZ: Yes, I -- I think there is --

5 QUESTION: So, if that's the case, then what
6 difference does it make whether, in fact, these visits
7 were, in fact, lawful or not lawful?

8 MR. ENRIQUEZ: Well, because this statute is
9 directed to the protection of property. That is the --
10 the structure of the statute. That is the history of the
11 statute.

12 For example, this -- this statute is not limited
13 to bribery. It is -- it also deals with theft of
14 government property. It deals with embezzlement of
15 government funds. And -- and it's talking about
16 something -- something of value, something monetary,
17 something that can be measured, being taken away as a
18 result -- or being given out -- the government largess
19 being given out as a result of a bribe given to a
20 government official. That didn't occur --

21 QUESTION: Well, suppose -- suppose the jail
22 official charged with purchasing the food for the
23 prisoners is taking a -- a bribe and a kickback, and
24 siphons off \$10,000 a month. And, as a result, the
25 prisoners get much worse food.

1 MR. ENRIQUEZ: Yes.

2 QUESTION: Is that covered by this statute?

3 MR. ENRIQUEZ: Yes, it is covered by that
4 statute, because then there is -- is something that was
5 taken from the Federal funds or from the State funds, but
6 not the local funds.

7 QUESTION: No -- no; these are State funds.
8 These are State. It just is in the Federal facility.

9 MR. ENRIQUEZ: Yes, sir, it -- it is -- Justice
10 Kennedy, it is covered by this statute, because the
11 statute, in my reading of it, says, not only are we
12 protecting Federal funds, but state, we're going to
13 protect your funds, we're going to protect your property,
14 we're going to protect you from bribery. So, yes, from
15 the plain reading of the statute, it does cover that
16 situation.

17 QUESTION: Suppose the Federal Government gives
18 money for a museum or for a dam, and a State official
19 improperly says to the public, I'll charge you to use the
20 dam, and keeps the money. Or, I'll only let you use the
21 dam if you bribe me.

22 MR. ENRIQUEZ: Mmm-hmm.

23 QUESTION: Is that covered by the statute?

24 MR. ENRIQUEZ: I -- I think it would be probably
25 not covered by the statute, because nothing was taken from

1 the Federal Government or the State government or the
2 local government. The -- there was no taking of funds
3 from these entities. And so I don't think it would be
4 covered by the statute. And I don't think this statute is
5 intended to cover all of those situations.

6 For example, from the legislative history, it --
7 and from the reading of the statute, it makes it clear
8 that not all prohibited transactions are covered, even if
9 the agency receives --

10 QUESTION: Well, that -- that -- that's a bit
11 tautological to say that not all prohibited transactions
12 are covered.

13 MR. ENRIQUEZ: Yes.

14 QUESTION: Where -- where in the statute do you
15 find the language that would make it not applicable, say,
16 to Justice Breyer's question?

17 MR. ENRIQUEZ: I find it in -- in the bribery
18 portion of the statute that says that in order for it to
19 be a violation, there has to be -- it has to involve a
20 transaction -- business transaction or series of
21 transaction of government, involving more than \$5,000.
22 That \$5,000 figure is something that is carried through,
23 throughout the statute, not only in the bribery
24 provisions, but also in the theft and embezzlement
25 provisions.

1 QUESTION: So you say the amount of the bribe
2 would have to be \$5,000?

3 MR. ENRIQUEZ: No, Your Honor, I do not. Under
4 the terms of the statute, the amount of the bribe can be
5 any amount.

6 QUESTION: Then what does the \$5,000 refer to?

7 MR. ENRIQUEZ: It refers to the value to the
8 Federal Government or the State government or the local
9 government of what was taken away from them. Similar to
10 the embezzlement and theft provisions that say, if -- if
11 money is taken from the Federal Government, embezzled, and
12 it's \$5,000, then it's a violation under the statute.

13 QUESTION: But you don't tie it into the text of
14 this provision, Mr. Enriquez; that -- that -- that's what
15 troubles me. Why not -- I -- I find it difficult to -- to
16 see that there's any business transaction or series of
17 transactions involved here. What -- what is the business?
18 You -- you -- or you've conceded that point, haven't you

19 -- MR. ENRIQUEZ: I -- I don't -- I don't --

20 QUESTION: -- there's no business?

21 MR. ENRIQUEZ: I think that's -- that's our
22 point, Your Honor, that -- that these --

23 QUESTION: Well, you didn't put it that way in
24 your brief. I -- I wish you had focused on the -- on the
25 text, "in connection with any business transaction or

1 series of transactions." That does seem to -- to call to
2 mind that there have been a deal. Transaction doesn't --
3 I wouldn't call assigning someone to a cell a transaction
4 --

5 MR. ENRIQUEZ: I -- I wouldn't either, and
6 even --

7 QUESTION: -- or a business.

8 MR. ENRIQUEZ: That's right. I -- I don't see
9 it that way, Your Honor.

10 We feel, Justice Scalia, that the statute
11 applies when -- for example, more appropriately, let's
12 someone comes to an official, who has the power to
13 disburse Federal funds or Federal largess, and -- and they
14 pay him something, and then he gives the contract.

15 QUESTION: He gives the contract or he gives --

16 MR. ENRIQUEZ: A bid.

17 QUESTION: -- or gives the business --

18 MR. ENRIQUEZ: Or the grant.

19 QUESTION: Or the grant or whatever, yeah.

20 MR. ENRIQUEZ: Or things of that nature.

21 QUESTION: Are you saying that --

22 QUESTION: Well, why isn't the transaction the
23 housing of Federal prisoners under the contract with the
24 government? It's in connection with the agreement to
25 house Federal prisoners.

1 MR. ENRIQUEZ: I -- I think that's -- there's a
2 possibility of that reading. But I think when you look,
3 Justice O'Connor, at the structure of the statute that
4 talks about the other parts, embezzlement and theft of
5 property, they're talking about taking it -- taking it
6 from the government.

7 QUESTION: Well, but we're looking at (B),
8 somebody who corruptly solicits or demands for the demand
9 of any person -- that could be for the benefit of
10 Beltran -- or agrees to accept anything of value from any
11 person -- and he agreed to accept money from Beltran --
12 intending to be influenced or rewarded -- which he was --
13 in connection with a transaction of the government or
14 agency -- the transaction being the housing of Federal
15 prisoners, pursuant to the contract.

16 I mean, I could read it, and it seemed to fit.
17 Am I missing something?

18 MR. ENRIQUEZ: I -- I guess our position,
19 Justice O'Connor, is that the -- the only transaction
20 there was a transaction between the marshal's office and
21 the County of Hidalgo to establish this agreement. And --
22 and I don't think that -- unless it be under some kind of
23 third-party beneficiary theory or some other kind of -- of
24 theory, that that would bring Beltran --

25 QUESTION: It isn't that complicated. The jail

1 agreed to house the Federal prisoners. This Petitioner
2 worked at the jail. And he agreed to take money to allow
3 contact visits.

4 MR. ENRIQUEZ: That's right. But it -- it
5 didn't have anything to do with, for example, whether he
6 should be in the jail or not. That was something that was
7 strictly the marshal's -- the U.S. marshal's decision.
8 He's the one that decides how many people -- Federal
9 prisoners -- are going to be in that jail or whether
10 they're going to be housed in that jail or another jail.

11 QUESTION: Well, the reason the government wants
12 a statute like this is to avoid the unseemliness of giving
13 large sums of Federal money for services to the Federal
14 Government that are being carried out in a corrupt fashion
15 by the entity and the employees charged with conducting
16 it.

17 MR. ENRIQUEZ: Yes, ma'am. And -- and, Justice
18 O'Connor, I don't think that -- that that's the basis for
19 this particular statute. The basis for this statute is to
20 protect property, to avoid funds leaving the --

21 QUESTION: Well, but the language of (B) is
22 broader than that. I mean (A) talks about property; (B)
23 doesn't.

24 MR. ENRIQUEZ: Yes, Your Honor --

25 QUESTION: I mean, we -- we look at the language

1 of the statute.

2 MR. ENRIQUEZ: Yes. And -- and I think we also
3 look at the -- at the history of the statute, the
4 legislative history, because it is unclear.

5 QUESTION: Convince my colleague, Justice
6 Scalia, of that, would you?

7 (Laughter.)

8 MR. ENRIQUEZ: I will try.

9 If I could, another indication --

10 QUESTION: May I just ask this? I -- I -- I
11 guess I didn't read it the same way Justice O'Connor did.
12 I thought the transaction was the conjugal visit, and that
13 that had a value of over \$5,000.

14 QUESTION: Isn't that what the court below
15 relied on, the conjugal visit?

16 MR. ENRIQUEZ: That's what -- that's what --

17 QUESTION: And -- and --

18 MR. ENRIQUEZ: -- that's what both courts below
19 relied on.

20 QUESTION: -- and is it not -- is not correct
21 that the -- the transaction term is broader than business?
22 There's a comma between "business" and "transaction" -- so
23 presumably it applies to any -- in connection with any
24 business or any nonbusiness transaction?

25 MR. ENRIQUEZ: Yes, sir. But then --

1 QUESTION: And this is surely a nonbusiness
2 transaction.

3 MR. ENRIQUEZ: -- Justice Stevens, yes. But
4 then you would have a situation where, within the bribery
5 context, there's a portion of the bribery statute that
6 says that the bribe can be of any value --

7 QUESTION: Yeah, but the -- but the transaction
8 has to have value of more than 5,000. They said the visit
9 was worth more than 5,000, using market value in the -- in
10 the relevant market area.

11 MR. ENRIQUEZ: Well --

12 (Laughter.)

13 QUESTION: Mr. --

14 MR. ENRIQUEZ: -- Justice Stevens --

15 QUESTION: -- Mr. Enriquez, you --

16 MR. ENRIQUEZ: Yes.

17 QUESTION: -- you would call allowing somebody a
18 conjugal visit in exchange for a bribe a transaction. But
19 that's not what they said was the transaction here.

20 MR. ENRIQUEZ: No. That's correct.

21 QUESTION: What they called a transaction was
22 allowing the conjugal visit. And that does not seem to me
23 a common way in which to use the word "transaction."

24 MR. ENRIQUEZ: And I think it --

25 QUESTION: Doesn't "transaction" usually mean a

1 deal between two people?

2 MR. ENRIQUEZ: And --

3 QUESTION: Transaction?

4 MR. ENRIQUEZ: Yes, sir. And -- and the statute
5 seems to be stretching that definition to fit this set of
6 circumstances.

7 QUESTION: It seems to be stretching it.

8 QUESTION: Well, what does -- what does the
9 legislative history say?

10 MR. ENRIQUEZ: The legislative --

11 QUESTION: I mean, and specifically on the point
12 of --

13 MR. ENRIQUEZ: Yes, Your Honor, the legislative
14 history --

15 QUESTION: -- as you're reading -- as you are
16 reading it.

17 MR. ENRIQUEZ: Yes.

18 QUESTION: It's like a commercial bribery
19 statute. And that's it. When they have a transaction in
20 the government -- they're awarding contracts or whatever
21 it is -- that's what you look to. The opposite in that
22 will immunize --

23 MR. ENRIQUEZ: Right.

24 QUESTION: -- and misuse of government property?

25 MR. ENRIQUEZ: Right.

1 QUESTION: If -- if what we're after is a bribe
2 to obtain misuse of government property, this doesn't
3 count, right?

4 MR. ENRIQUEZ: That -- that's correct.

5 QUESTION: Okay. Now, there's something in the
6 legislative history that's going to support that?

7 MR. ENRIQUEZ: There's something in the
8 legislative history that -- that talks in terms of
9 bribery, which influences Federal funds. Additionally,
10 another indication that this is its purpose is illustrated
11 by reference to what is, in essence, what -- what I
12 consider the com -- the companion statute to 666, which is
13 18 U.S.C., Section 201, which is also a bribery statute,
14 and which, it can be said, was the impetus for the
15 creation of Section 666. And Section 201 is referred to
16 in the legislative history.

17 Section 666 was enacted because, in interpreting
18 Section 201, many courts had given a narrow definition to
19 agents of government, or who was acting on behalf of the
20 government, to come within the scope of that bribery
21 statute. However, this Court interpreted Section 201,
22 in -- in the case of Dikson v. United States, and stated,
23 quote, the regulation and oversight of the funds is aimed
24 precisely at the harm that occurred here: diversion of
25 Federal money to unauthorized purposes -- diversion of

1 Federal money to un -- unauthorized purposes.

2 QUESTION: When it says it's aimed precisely,
3 that doesn't mean it's only aimed.

4 MR. ENRIQUEZ: That -- that apparently is the
5 intent of this statute. I see it as a protection of
6 property statute.

7 QUESTION: Well, how about the title? It says
8 theft or bribery concerning programs receiving Federal
9 money. This is a program receiving Federal money --

10 MR. ENRIQUEZ: Yes, ma'am.

11 QUESTION: -- and it's bribery. It just fits
12 like a glove, if you read (B).

13 MR. ENRIQUEZ: Well, it -- it -- it does, Your
14 Honor, if we ignore the structure, I think, of the statute
15 in its entirety, and we ignore the fact that concerning
16 the bribery, what amount --

17 QUESTION: You mean if you ignore the literal
18 language in the title, you have an argument, is that it?

19 MR. ENRIQUEZ: No -- no. Additionally, within
20 the bribery -- the bribery provisions, itself, it has two
21 elements in there. What is the amount of the bribe? It
22 can be any amount. And, then, what does it have to deal
23 with? It has to deal with a transaction involving \$5,000
24 or more. And -- and that is something that is carried out
25 throughout the terms of the statute, not only in this

1 bribery provision, but in the theft and also in the
2 embezzlement provisions.

3 May it please the Court:

4 Concerning RICO, it's our position that in order
5 to be found guilty of a RICO conspiracy, the government
6 has to prove that the defendant either committed two
7 predicate acts or agreed to commit two predicate acts. We
8 believe this is so, first of all, because it's a natural
9 reading of the RICO substantive, which states that the
10 essence of the violation is to conduct or participate,
11 through a pattern of racketeering. That is, the
12 performance of two predicate acts.

13 It doesn't speak in terms of joining a
14 conspiracy or simply joining an enterprise. Indeed, the
15 indictment in this case read in that fashion. It alleges
16 that the defendant conspired to conduct or participate.
17 It says nothing about conspired to join an enterprise.

18 Even the case law cited by the government
19 indicates that in reading RICO substantive and the RICO
20 conspiracy statutes together, that that's the natural
21 reading -- conspire to conduct or participate -- not
22 simply to conspire to join.

23 Well, we -- we feel that this pattern of
24 racketeering element is what makes this RICO statute so
25 unique. This is the core of the statute. And that

1 conduct or participating in a pattern of racketeering is
2 what brings one within the scope of this statute. And we
3 feel that the government is seeking to circumvent this
4 core requirement in the statute.

5 In -- instructive on this issue, again, is the
6 legislative history of the statute, where the principal
7 sponsor of the bill pointed out that even to come within
8 the proscription of -- of Title IX of the Organized Crime
9 Control Act, which is RICO, and which contains the
10 conspiracy provision, to even come within its prohibition,
11 the individual has to commit the crimes, the predicate
12 acts. And if he doesn't do it, then he's simply not
13 within the scope of the statute.

14 QUESTION: Well, now, at common law, suppose
15 somebody is accused of a conspiracy to commit robbery.

16 MR. ENRIQUEZ: Yes, ma'am.

17 QUESTION: Now, I suppose that you don't have to
18 find that the defendant agreed to personally commit the
19 robbery. That's not the common law definition of
20 conspiracy. You just have to agree that the offense will
21 be committed. The government doesn't have to prove --

22 MR. ENRIQUEZ: I -- I think it depends --

23 QUESTION: -- that the defendant intended to
24 personally do it.

25 MR. ENRIQUEZ: Justice O'Connor, I think it --

1 it varies from statute to statute, crime to crime, as to
2 what the specific intent is; and, in some instances, you
3 probably do. I know that the government has cited the
4 Pinkerton case. That has been rejected in the context
5 of -- of RICO. But, regardless, the argument of whether
6 you bring --

7 QUESTION: Who -- who -- who has rejected it in
8 the context of RICO?

9 MR. ENRIQUEZ: It has been rejected by the
10 government's own decisions in, for example, the Neapolitan
11 case, where it held against our position, but they
12 discussed the idea of whether Pinkerton would apply in the
13 RICO conspiracy context, and the court -- the court --

14 QUESTION: Well, what court was -- was the
15 Neapolitan?

16 MR. ENRIQUEZ: It was the 7th Circuit, Your
17 Honor.

18 And -- and, in addition, in that discussion,
19 they pointed out that the Department of Justice manual
20 indicates that Pinkerton should not be used in this
21 context.

22 Additionally, if we get into the -- the -- the
23 question of traditional conspiracy law, which rules do we
24 import from traditional conspiracy law into what is
25 admittedly a new and drastic statute? I think if we look,

1 like, for example, in the Pinkerton case, it talks about
2 an agree -- that if you -- if the substantive statute
3 requires an agreement of -- of two people or more, then
4 you can't have a conspiracy violation. That is
5 traditional conspiracy law.

6 QUESTION: Mr. Enriquez --

7 MR. ENRIQUEZ: Yes.

8 QUESTION: -- this -- this question puzzles me.

9 I thought one of the aims of RICO was to get after
10 organized crime, including the top people. And the top
11 people may plan, agree to, but ordinarily don't themselves
12 perform the predicate acts. They don't engage in the
13 robberies, the murders and the rest. So it -- it would
14 not seem a -- a logical reading --

15 MR. ENRIQUEZ: Justice --

16 QUESTION: -- to say that -- that it has to
17 be -- that you have to agree to do the act, instead of
18 that the act will be done.

19 MR. ENRIQUEZ: Justice Ginsburg, I would suggest
20 to the Court that that is a logical reading, because if
21 you can't get them under RICO substantive, how can you get
22 them under RICO conspiracy? And -- and so I think, under
23 RICO substantive, this Court has instructed us that -- in
24 the *Reves v. Ernst B. Young* case, that in order to be
25 within RICO, it's not simply enough to be somehow

1 associated with the enterprise, but, rather, you've got to
2 participate by management or control of the enterprise.

3 And so, in -- in your hypothetical, if they
4 can't get you for RICO substantive, then I think it may be
5 fair that they can't get you for RICO conspiracy. And as
6 a practical matter, in the cases that -- that are charged
7 below, I -- I -- I've never seen a case where they don't
8 charge RICO substantive and RICO conspiracy also, anyway.

9 QUESTION: You can -- you can --

10 QUESTION: The reason you have to be a manager
11 is -- is because the statute requires that you participate
12 directly or indirectly in the conduct of such enterprise's
13 affairs.

14 MR. ENRIQUEZ: That's correct, Justice Scalia.

15 QUESTION: And it's the word "conduct" that --
16 that brings in that requirement, not -- not any -- any --
17 any implication that you're not liable for the acts of
18 coconspirators.

19 MR. ENRIQUEZ: Yes, Your Honor. But -- but
20 that, again -- that is true -- but, again, that
21 incorporates some pretty stunning language in the
22 Pinkerton case. The Pinkerton case being, of course,
23 where someone was charged with a conspiracy, and they
24 proved a conspiracy, but because somebody else committed a
25 substantive crime, he was also charged and found guilty of

1 that substantive crime under the partnership of crime
2 theory.

3 And -- and that's been highly criticized and --
4 and criticized even by the cases that -- that support the
5 government's position.

6 QUESTION: But the government doesn't need that
7 part of the Pinkerton case here. It seems to me it just
8 needs what -- what you apparently agree with the common
9 law idea. That if you agree that a robbery should be
10 committed, the agreement doesn't have to provide for you
11 personally com -- committing the robbery.

12 MR. ENRIQUEZ: As I indicated, Mr. Chief
13 Justice, I -- I think that it depends on a crime-to-crime
14 basis. I don't think that, across the board --

15 QUESTION: Well, how about robbery? Take that
16 for a crime.

17 MR. ENRIQUEZ: Well, I think it's a specific
18 intent, and you have to agree that -- that a robbery is
19 going to be committed, and you've got to do something in
20 furtherance of it. Drug crimes --

21 QUESTION: But -- but are -- are you -- are you
22 saying that you would have to personally commit the
23 robbery in a situation like that?

24 MR. ENRIQUEZ: No. I -- I think agree to commit
25 elements of the robbery, yes.

1 If it please the Court, I would like to reserve
2 my remaining time for rebuttal.

3 QUESTION: Very well, Mr. Enriquez.

4 Mr. Wolfson, we'll hear from you.

5 ORAL ARGUMENT OF PAUL R. Q. WOLFSON

6 ON BEHALF OF THE RESPONDENT

7 MR. WOLFSON: Mr. Chief Justice, and may it
8 please the Court:

9 The first statute before the Court, the bribery
10 offense, which is stated in Section 666, specifies four
11 elements. First, the defendant must be an agent of an
12 entity that receives Federal benefits. Second, the
13 Federal benefits received by that entity must exceed
14 \$10,000 in a 1-year period. Third, during that 1-year
15 period, the defendant must accept something of value,
16 intending to be influenced in a transaction of the entity.
17 And, fourth, the transaction must involve something of
18 value.

19 QUESTION: What was the transaction?

20 MR. WOLFSON: The transaction in this case was
21 allowing con -- was allowing conjugal visits. That was
22 the theory on which the case was submitted to the jury.
23 The jury instruction is found on page 127 of the joint
24 appendix. And the judge says, now -- says, now, what are
25 the transactions? The transactions are allowing contact

1 visits, I -- I should say. And the Court of Appeals,
2 basically, took the same -- the same view.

3 QUESTION: If I took a bribe for -- for allowing
4 the prisoner to open his window, would -- would opening
5 the window be a transaction?

6 MR. WOLFSON: I think that if the -- it could
7 be. I think that if the -- if the person who is taking
8 the bribe is a jail guard, who -- you know, I think that
9 you have to say that.

10 QUESTION: Yeah, I think you're using
11 "transaction" in -- in a -- in a broad sense that I really
12 don't recognize. I think --

13 MR. WOLFSON: I do think that what --

14 QUESTION: -- the word really has, to me, a --
15 a, you know, a flavor of a deal between two people --

16 MR. WOLFSON: Well, let me first --

17 QUESTION: -- as "business" does.

18 MR. WOLFSON: -- let me first say, this is not a
19 point that's discussed in the briefs. But I -- I have to
20 say --

21 QUESTION: No, I know that.

22 MR. WOLFSON: -- whatever it -- as a
23 transaction, it can't be limited to a deal, because I do
24 think that the statute does -- whatever else it does get
25 at -- and I know that's been a subject of disagreement --

1 it does get at situations where a -- a recipient of
2 Federal funds just simply hands out money to other --
3 other people, without something necessarily in exchange --
4 a kind of a grant program. And I think, in many cases, in
5 that situation, the -- say, the government gives money to
6 a local agency, in turn, to hand out money, the local
7 agency won't be getting -- won't be getting a deal for it.

8 But I think, clearly, one thing that is within
9 the statute is if someone bribes a -- an agent of a local
10 agency, you know, to send -- send the grant money my way,
11 rather than to somebody else. I think -- so --

12 QUESTION: Mr. Wolfson, on Justice Scalia's
13 example of opening a window, it would have to be worth
14 \$5,000, that -- to -- the market value of opening a
15 window.

16 MR. WOLFSON: That -- that's right. And --

17 QUESTION: And if it was letting him out
18 in the --

19 MR. WOLFSON: Right.

20 QUESTION: -- out in the open, in the --

21 MR. WOLFSON: Right.

22 QUESTION: -- public park every Thursday, Friday
23 and Saturday, instead of staying in prison, that would be
24 the same kind of transaction as opening the window, and it
25 might be worth a little more.

1 MR. WOLFSON: I -- I think that's right. And I
2 think that --

3 QUESTION: How do you think that helps you? I
4 mean --

5 MR. WOLFSON: Right.

6 QUESTION: -- the -- the -- the notion that we
7 have to place a dollar value on such things as opening a
8 window or having a visit from -- from your wife --

9 MR. WOLFSON: Right.

10 QUESTION: -- I mean, I -- I can place \$5,000 on
11 most business transactions. I -- I can place a monetary
12 limit on it. But -- but the interpretation you're giving
13 the statute makes you say, how much is it worth to open a
14 window? That's ridiculous. I --

15 MR. WOLFSON: Well, I --

16 QUESTION: -- people don't write statutes that
17 way.

18 MR. WOLFSON: -- I think that -- well, the --

19 QUESTION: Why shouldn't the transaction be the
20 housing of Federal prisoners?

21 MR. WOLFSON: Well --

22 QUESTION: I mean, that looked like the most
23 normal reading of it. What's the matter with that?

24 MR. WOLFSON: I think that could be --

25 QUESTION: And I -- and I might add, on that

1 very same point, that that's the way I think your
2 indictment is -- is better interpreted

3 MR. WOLFSON: Well, I think that the -- I think
4 that the business of the jail could have been -- the
5 ongoing housing of Federal prisoners. But here, the -- I
6 mean, I think the --

7 QUESTION: Well, now, it seems to me, under
8 Justice O'Connor's question, it's either one or the other.
9 It's either the Federal program of prisoners or the
10 conjugal visits.

11 MR. WOLFSON: Well, the -- the case was --

12 QUESTION: And you can't say it could be one or
13 the other, because the statute doesn't permit you to read
14 it "one way or the other." So which is it?

15 MR. WOLFSON: Well, the case was certainly
16 submitted to the jury on the theory that the
17 transaction --

18 QUESTION: What -- what is the government's
19 position as to what the transaction is in this case?

20 MR. WOLFSON: Allowing the conjugal visits.

21 QUESTION: All right. So, then, you're saying
22 that the statute can't be interpreted, as Justice O'Connor
23 suggested, so that the business or transaction is the
24 program of -- of keeping the prisoners?

25 MR. WOLFSON: I -- I think it can't be applied

1 that way in this case, because the -- the statute requires
2 a payment from the briber -- you know, intending to be
3 influenced --

4 QUESTION: In most cases, it would make a lot
5 more sense. The title of the statute is theft or bribery
6 concerning programs receiving Federal money. That's why
7 Congress wanted to enact this. They don't want to support
8 some program that's being corruptly administered.

9 MR. WOLFSON: I -- I think that the case -- I
10 think that, certainly, one could have tried this case on
11 the theory that the ongoing treatment of the prisoner --
12 you know, if the prisoner received just, generally, day to
13 day, more favorable treatment than somebody else, and gave
14 money in return for that, that that could have been a
15 business, which is the -- the conditions under which the
16 prisoner was housed at the jail.

17 QUESTION: But the \$5,000 has -- has to be given
18 in connection with.

19 MR. WOLFSON: Right.

20 QUESTION: Now, by "in connection with," I
21 assume -- don't you take that to mean in payment for?

22 MR. WOLFSON: I -- there -- I think there is an
23 element, yes --

24 QUESTION: Otherwise, the statute has a wild
25 breadth to it.

1 MR. WOLFSON: Yes. I think there is an element
2 of exchange.

3 QUESTION: Of exchange.

4 MR. WOLFSON: Yes.

5 QUESTION: And -- and he's not exchanging \$5,000
6 for the whole business of the prison --

7 MR. WOLFSON: That's --

8 QUESTION: -- and housing Federal prisoners.

9 MR. WOLFSON: But I -- but I don't -- but I
10 don't think that the payment -- I don't think that the
11 transaction requires an exchange.

12 QUESTION: He's exchanging it for the window --
13 for the opening of the window or for the conjugal visit.

14 MR. WOLFSON: At -- at any rate, I -- I do want
15 to point out that the issue of transaction is not in the
16 briefs.

17 QUESTION: Mr. Wolfson, maybe -- maybe -- maybe
18 this would clarify it. When the government says it's a
19 conjugal visit, suppose Beltran was a State prisoner.
20 Would you say the statute still applied? Because there is
21 Federal funding to help on the construction. There is
22 Federal funding to house prisoners. This prisoner happens
23 to be a State prisoner, but there is -- there is a sheriff
24 or an assistant that is taking bribes. Would the statute,
25 in -- on your reading, cover this case if Beltran had been

1 a State, and not a Federal, prisoner?

2 MR. WOLFSON: Yes, it -- it would. It -- it's
3 because the -- the -- all of the four elements of the
4 offense are -- are stated in the hypothetical --

5 QUESTION: And because the -- because the
6 transaction is that there's a previous Federal grant to
7 the prison?

8 MR. WOLFSON: No, no. The -- the trans -- the
9 transaction is -- let's suppose there was a State --

10 QUESTION: What's the -- what's the Federal
11 grant transaction that's involved in --

12 MR. WOLFSON: The Federal grant --

13 QUESTION: -- in Justice Ginsburg's
14 hypothetical?

15 MR. WOLFSON: The Federal --

16 QUESTION: The transaction, you have told me, is
17 the conjugal visit, which is not -- is not related to the
18 Federal grant.

19 MR. WOLFSON: Well, the Federal -- the Federal
20 Government is giving -- on the hyp -- I -- I hope I'm
21 understanding the hypothetical correctly -- the Federal
22 Government is giving the jail money to house a Federal
23 prisoner. Now, it so happens that at -- during that
24 1-year period, there is a State prisoner in the jail cell
25 next to Beltran --

1 QUESTION: Right.

2 MR. WOLFSON: -- who is giving bribes --

3 QUESTION: Right.

4 MR. WOLFSON: -- in return for the -- the

5 privilege of receiving conjugal visits.

6 QUESTION: Right.

7 MR. WOLFSON: The statute clearly does cover

8 that --

9 QUESTION: Yes.

10 MR. WOLFSON: -- that situation. Because --

11 QUESTION: But there you -- regarding the

12 transaction, is the conjugal visit --

13 MR. WOLFSON: Yes.

14 QUESTION: -- for which the bribe was paid?

15 MR. WOLFSON: Yes. That's right.

16 QUESTION: Was there any objection at the trial

17 court to the charge on what trans -- what "transaction"

18 meant?

19 MR. WOLFSON: I -- I'm not aware of any. But,

20 certainly -- certainly, that's the way in which the -- as

21 I read the jury instruction, that's the way in which it

22 was submitted to the jury. And that hasn't been

23 challenged in this Court, at any rate. And the -- the

24 whole point hasn't been briefed at all.

25 QUESTION: Does it help to focus on business?

1 MR. WOLFSON: Excuse me?

2 QUESTION: If the statute is primarily aimed at
3 commercial bribery -- that's the normal situation --
4 they're selling something or they're buying something, and
5 that's the transaction with the government, that's the
6 heart of the statute -- you want to apply it, as well, to
7 misuse of government property, let's say, that was bought
8 by the government -- the Federal Government -- and why
9 doesn't the word "business," then, come into play? I
10 mean, there is no transaction here, but this is bribery in
11 connection with the business of this organization, which
12 is to house prisoners.

13 And, moreover, it affects -- that word, in
14 connection with, is very loose -- it affects that
15 business -- or \$5,000, or more, worth of that business --
16 because it's misuse of that property for a period of a
17 year, and the single cell cost 10,000 for the year.

18 MR. WOLFSON: I -- I think it could be -- I
19 think it could be applied in that situation. I don't
20 think that the statute covers only a situation where
21 Congress gives an entity money and then sets that entity
22 loose in the world to engage in -- with that money -- to
23 engage in a commercial transaction. I think that it -- it
24 clearly covers -- it clearly covers broader --

25 QUESTION: Well, it seems to me that the

1 criminal statute --

2 QUESTION: Do you consider the Justice
3 Department a business, Mr. Wolfson?

4 MR. WOLFSON: Excuse me?

5 QUESTION: Do you consider the Justice
6 Department a business?

7 MR. WOLFSON: I think that the business -- it
8 could be said that the business of the Justice Department
9 is to -- is to bring cases -- the business of --

10 QUESTION: It could be said analogously, I
11 think --

12 MR. WOLFSON: Right.

13 QUESTION: -- but I wouldn't -- that wouldn't be
14 the normal use of "business." I don't --

15 MR. WOLFSON: It's the -- but it's the
16 business --

17 QUESTION: -- regard Federal agencies as being
18 in business.

19 MR. WOLFSON: It is -- what it says, it is the
20 business or transaction of -- of an -- of an organization,
21 agency or government. And it doesn't --

22 QUESTION: I'd like to get just one point clear.
23 Are -- are you saying that, under this statute, business
24 transaction or series of transactions can be, depending on
25 the way the government charges in the indictment, either

1 the business of keeping Federal prisoners that Justice
2 Breyer asked about or the conjugal visit?

3 MR. WOLFSON: I think it can. I think the
4 business -- I think --

5 QUESTION: It seems to me that that is a very
6 strange way to interpret a criminal statute.

7 MR. WOLFSON: I think that --

8 QUESTION: It seems to me it has to be either
9 one or the other.

10 MR. WOLFSON: I think that business -- that
11 business could be -- could reach -- that business or
12 transaction could reach different -- different points. I
13 mean, business, for example, could reach the broad
14 programmatic -- the broad programmatic purpose, such as,
15 you know, the -- the general business of housing
16 prisoners. Transaction is one implementation of that --
17 of that business, such as allowing -- allowing a prisoner
18 to have more privileges than he would normally, under the
19 generally applicable rules.

20 There are also situations, I should say, where
21 the courts have held "business" to cover situations where
22 one local agency is an intergovernmental entity, where
23 it -- where the local agency doesn't have the authority to
24 do something on its own, and they've said, well -- and,
25 say, one entity's representative votes on an

1 intergovernmental board -- and they say, well, this is
2 clearly a business, because it's -- it's engaged in a --
3 you know, in a relationship with another entity. I
4 think --

5 QUESTION: I -- I'm just trying to clarify my --
6 you could have charged and -- and convicted the
7 defendants, in your view, in this case, by interpreting
8 "transaction" in either of these two ways? You had the
9 option to charge, and you would prevail on either
10 interpretation?

11 MR. WOLFSON: I -- I don't know that we would
12 have -- I think if we had charged -- I think we might
13 have charged by saying that he offered a bribe and a bribe
14 was taken in connection with a series of transactions.
15 But I don't know that we would have charged in connection
16 with a business of the jail. But, as I -- again, this has
17 not been -- we -- we're bound by the theory which we took
18 in a lower court, which was that the transaction is the --
19 is the conjugal -- is -- was the contact visits that were
20 allowed.

21 Because that was basically an exercise of the --
22 of the authority, or of the discretion, of the sheriff and
23 the deputy sheriff of the county, who had the -- whose job
24 it was -- whose official function it was to decide when
25 and under what circumstances the door of the jail cell

1 would be allowed open so that the -- a prisoner could be
2 allowed to see his family or -- or whatever. And that's
3 how we viewed the -- the transaction.

4 QUESTION: What is your response to Justice
5 Kennedy's -- at the end, he said, I think, if business --
6 the word "business" fits pretty uneasily here, and the
7 word "transaction" also fits pretty uneasily. And it's a
8 criminal statute?

9 MR. WOLFSON: I think that the -- I think that
10 there are situations where a word "business" could apply.
11 I'm not sure that it would apply to the -- the treatment
12 -- I -- I'm not sure that it would apply to the -- to the
13 -- the various exercises of discretion in which a prisoner
14 is treated. But I -- I think the word "transaction"
15 clearly does fit it. I -- I guess I -- it doesn't seem to
16 me to be -- to be that ambiguous.

17 QUESTION: Of course, none -- none of this leads
18 you to the precise thing that the Petitioner here is
19 complaining of, which is the fact that there is no Federal
20 money directly involved. None of this really goes to --

21 MR. WOLFSON: Right.

22 QUESTION: -- whether it's a business or a
23 transaction or not a transaction. It doesn't speak to the
24 question of whether you have to re -- and -- and how --
25 how is the question presented, again?

1 MR. WOLFSON: Well, the -- the question -- the
2 question presented is clearly whether there has to be a
3 nexus shown to the treatment of -- well, it says what
4 kinds of cases involving State employees are subject to
5 prosecution under 18 U.S.C. 666. But then it goes on to
6 say, do such cases include cases where no Federal funds
7 are di -- disbursed or impinged.

8 QUESTION: Right. Right.

9 MR. WOLFSON: Now, having said that, I think
10 that the statute -- I mean, the statute clearly covers
11 cases like this one, where there is a strong Federal
12 interest in the integrity of -- there is an -- there is an
13 important Federal interest in cases like this, where
14 the -- the recipient of the Federal funds is housing
15 Federal prisoners, is responsible for their custody and
16 their safekeeping and is obligated to -- to keep them
17 under certain conditions, but also to keep them under
18 certain privileges. And --

19 QUESTION: Well, what -- what if -- what if
20 Congress had simply provided for grants to allow the State
21 prisons, without requiring that the house State prisoners.
22 Now, would this statute still apply? With -- with Federal
23 prisoners.

24 MR. WOLFSON: If Congress -- I mean, if Congress
25 gave the Federal -- gave the States or local governments

1 just money to house State prisoners, yes, I think that --

2 QUESTION: The statute would still apply.

3 MR. WOLFSON: Yes. The statute does not require
4 a nexus to the implementation of the Federal program.

5 QUESTION: Nor does it require any special
6 Federal interest.

7 MR. WOLFSON: I think that's correct, on the
8 terms of the statute. I think, though, that -- I mean,
9 Congress could, for example, give a local government a --
10 an unrestricted block grant, sort of a -- a
11 revenue-sharing grant in aid program. And I think that
12 Congress could -- under the Spending Clause, Congress
13 could have restrictions such as this follow the grants and
14 -- the grants and their funds.

15 QUESTION: So that for the next 30 years, any
16 bribery -- if it's more than \$5,000 involved -- in
17 conjunction with the ordinary, day-to-day running of a
18 prison that's been built with Federal monies, is under
19 this statute --

20 MR. WOLFSON: No, the bribe has to -- the bribe
21 has to take place during the -- the 1-year -- a 1-year
22 period surrounding the -- the receipt of Federal benefits.
23 So it's not -- it's not as though once you get Federal --
24 once you get \$10,000 of Federal money, you -- you're on
25 the hook forever. It's -- the -- the statute is --

1 QUESTION: Well, subsection (B) says that the
2 statute applies where the organization, government or
3 agency, gets, in any 1-year period --

4 MR. WOLFSON: Right.

5 QUESTION: -- benefits in excess of \$10,000 from
6 the Federal Government.

7 MR. WOLFSON: Right. But 1-year period is then
8 defined -- this is on page 3a of our -- the appendix in
9 our brief -- the term, "in any 1-year period" means a
10 continuous period that commences no earlier than 12 months
11 before the commission of the offense and ends no later
12 than 12 months after the commission of the offense.

13 So -- I mean, it has -- the bribe has to be
14 roughly contemporaneous with the -- with the receipt of
15 Federal funds. And the -- so, after the 1-year period is
16 over, if the agency doesn't get or take Federal funds --

17 QUESTION: That doesn't say that. I don't -- I
18 don't read the 1-year period to impose that requirement.
19 It just describes -- that just defines the period in which
20 the \$10,000 or more has to be received. It doesn't say
21 anything about when the crime has to be committed.

22 MR. WOLFSON: Well --

23 QUESTION: Before the commission of the offense.

24 QUESTION: Oh.

25 MR. WOLFSON: Yeah. I mean, it's -- you see,

1 the statute --

2 QUESTION: Oh, I see.

3 MR. WOLFSON: -- is -- is somewhat of a -- of
4 a -- of an acrostic. If you -- if you look at Section (B)
5 -- well, let's -- let me start with Section (A). Whoever
6 -- if the circumstance described in Section (B) exists,
7 then you have to look at (B). And it says, the
8 circumstance referred to in subsection (A) is that the --

9 QUESTION: Beautiful.

10 MR. WOLFSON: -- is that the organization
11 received benefits in any 1-year period.

12 And then you go on to (D)(5), and it says what
13 the term "in any 1-year period" means. So, although --

14 QUESTION: So that is related to the time of the
15 offense?

16 MR. WOLFSON: Right. That's right.

17 QUESTION: And if I read it correctly, you --
18 you -- you can take a bribe, and if you're unfortunate
19 enough that the prison you take the bribe from, later,
20 within less than 1 year after you commit the offense, gets
21 Federal money, they got you under the statute; is that
22 right? You -- you are retroactively --

23 MR. WOLFSON: I think that is -- I think that
24 is --

25 QUESTION: -- sucked into the vortex of --

1 MR. WOLFSON: Yeah. I think that is the reading
2 of the statute. But I think that it -- it --

3 (Laughter.)

4 MR. WOLFSON: -- the -- the -- it operates on
5 the -- it operates on a prophylactic principle, which is
6 that -- which is that Congress is entitled to insist that
7 any entity to which it gives money be free of significant
8 corruption. And even if the -- even if the corrupt act
9 takes place before the money is actually in the hands of
10 the recipient, it -- you know, the --

11 QUESTION: It's perfectly reasonable from
12 Congress' point of view, you know. But I'm not sure it's
13 still reasonable from the poor defendant's point of view.
14 He -- he thinks he's stealing the money from -- from --
15 from an agency that hasn't gotten any Federal aid. And,
16 all of a sudden, within a year, it gets Federal aid. That
17 doesn't seem fair.

18 MR. WOLFSON: Well, the -- the receipt of
19 Federal funds is a -- is a -- is -- was seen by Congress
20 as a jurisdictional -- as a jur -- and -- and has been
21 seen by the courts as a jurisdictional requirement that
22 brings Federal authority along with it.

23 QUESTION: But there is a simpler way that's
24 consistent with the words "business transaction." The
25 Federal Government gives almost everyone in -- you know,

1 not almost everyone, but an awful lot of people money.
2 And many of them are businesses or, many that aren't
3 businesses, buy things and sell things with the money.
4 And they may, even before they get the money, make
5 contracts that have to do with the money they're going to
6 get.

7 And commercial bribery often involves bribing a
8 selling agent or a purchasing agent in respect to such
9 money and the use thereof. And that would be a natural
10 reading of the words. We wouldn't have to struggle with
11 business transaction, et cetera.

12 MR. WOLFSON: Well --

13 QUESTION: So why not read it as a commercial
14 bribery statute, basically, which those words, "business
15 transaction," et cetera, seem to suggest?

16 MR. WOLFSON: Well, in this --

17 QUESTION: I'm not saying I would; I just point
18 that out.

19 MR. WOLFSON: I mean, in this regard, I do think
20 it is actually useful to remember that the statute was
21 enacted while the Dikson case was -- while the Dikson
22 case, under 18 U.S.C. 201 -- while that issue was
23 percolating in the courts. And there were many cases that
24 have been prosecuted under Section 201 that would not fit
25 a commercial bribery situation, where the Federal

1 Government gave community organizations grants, and said
2 to the community organizations, you go out and relieve
3 poverty with this money. And -- and --

4 QUESTION: There are different ideas of how to
5 do it.

6 MR. WOLFSON: Yes.

7 Well, I do want to point out, there is
8 another -- there is a limitation -- there -- there is a
9 limitation that is in the statute, which is that the --
10 which is that the -- there are two limitations I do want
11 to point out. First of all, the -- the defendant has to
12 be an agent of a local organization. And he has to be
13 able to act on behalf of the organization. So it may not
14 be that every single employee of every organization is
15 covered. There is a level of, I think, responsibility,
16 official responsibility, that is covered -- captured in
17 the term "agent."

18 And the other point is that the statute
19 covers -- this is in subsection (B) -- benefits under a
20 Federal program that covers a variety of forms of Federal
21 assistance, and that -- the legislative history and the
22 courts have -- have -- do point out that there are some
23 purely commercial transactions between the government and,
24 say, somebody who the government buys computers from, just
25 without any kind of Federal programmatic aspect.

1 I mean, if the government just goes out into the
2 open market and spends \$10,000 for fungible equipment,
3 that's not necessarily ben -- that's not benefits under a
4 Federal program or form of Federal assistance. There is
5 a -- there is an aspect of the implementation of a Federal
6 policy that comes with those words.

7 I want to turn at this point to the -- the other
8 issue before the Court, which is the RICO conspiracy
9 issue. Our posissue -- our position on that issue --
10 excuse me -- is -- is quite straightforward, which is that
11 the RICO conspiracy provision follows traditional
12 principles of conspiracy law. And under the traditional
13 principles, the government is not required to prove that
14 the defendant -- the conspiracy defendant agreed
15 personally to commit the offense that is the object of the
16 conspiracy.

17 The government needs to prove only that the
18 conspirators agreed among themselves that the offense
19 would be committed by one or more of them, and that the
20 defendant associated himself with that -- with that
21 agreement. Nothing in the RICO conspiracy statute
22 suggests that Congress intended to depart from this
23 well-settled rule.

24 Congress used, really, a term of art, "to
25 conspire," when it used that language in Section 1962(D).

1 And that term has a settled common law meaning, and there
2 is no indication in the statute that there are any
3 additional elements of proof.

4 QUESTION: I'm not sure that I know of another
5 statute which requires, you know, multiple acts by the
6 same person. I mean, it can be argued that you cannot
7 conspire to violate (C) unless you conspire to have a
8 person -- it may not -- it may not be the person you're
9 prosecuting.

10 MR. WOLFSON: Right. Right.

11 QUESTION: But you have to conspire to have one
12 particular person commit a pattern of -- of racketeering
13 activity.

14 MR. WOLFSON: I -- I think that may be right.
15 That is, let's say a group of people get together and say,
16 you know, we want to have a -- a -- a conspiracy of some
17 kind. It may be that the conspirators must foresee that a
18 person carry out -- a -- one person carry out two
19 predicate acts of racketeering.

20 QUESTION: Right. Right.

21 MR. WOLFSON: And, of course, two people could
22 carry out four or three carry out six or whatever.

23 QUESTION: Yes. Yes.

24 MR. WOLFSON: But I think that the --

25 QUESTION: That's not the argument here, though?

1 MR. WOLFSON: Right. No. But I think that
2 the -- but what -- I think it is important to point out,
3 as I think what Justice Ginsburg's colloquy with my
4 colleague pointed out, one thing RICO clearly was intended
5 to get at was the -- the person who sits at the top of the
6 organization, who effectively insulates himself.

7 And to -- to use, sort of, that classic example,
8 suppose the -- the middle people in the organizations go
9 to the top -- the organized crime chieftain and the say,
10 you know, we really want to get into the business of
11 arson. And we -- we -- you know, we have a plan -- you
12 know, we're going to start burning down buildings for --
13 you know, for -- for hire. And the head of the
14 organization says, you know, that sounds good, you know,
15 do you have any particular plans in mind? They say, no,
16 but, you know, we think we've got it.

17 I think that, in that situation, you know, it
18 falls squarely within the -- the coverage of the statute.
19 And by agreeing to that -- I mean, the -- the chief has
20 really, you know, has really allowed the -- allowed the
21 thing to go forward. And his agreement is -- is
22 essential, in that case, to the -- to the achievement of
23 the -- of the enterprise, which have the necessary
24 structure. As the plan is presented to him, there clearly
25 is a pattern, because there is to be continuity, plus

1 relationship. And the -- the -- the requirement is
2 satisfied that there be two predicate acts of
3 racketeering.

4 QUESTION: By a person.

5 MR. WOLFSON: By a person.

6 QUESTION: By a person.

7 MR. WOLFSON: Right. Right.

8 But -- but I think, under the -- the rule that
9 is suggested by the defendants, really, the -- it would
10 hamper the government's ability to -- to effectively
11 prosecute racketeering.

12 If there's nothing further, I'd just like to
13 close by saying we -- we submit that the judgment of the
14 Court of Appeals should be affirmed.

15 QUESTION: Thank you, Mr. Wolfson.

16 Mr. Enriquez, you have 5 minutes remaining.

17 REBUTTAL ARGUMENT OF FRANCISCO J. ENRIQUEZ

18 ON BEHALF OF PETITIONER

19 MR. ENRIQUEZ: Mr. Chief Justice, and may it
20 please the Court:

21 It -- the discussion that General Wolfson
22 engaged in with this Court concerning RICO conspiracy, the
23 great debates that went on in Congress concerning the
24 enactment of this statute, the legislative history, all of
25 that was directed to RICO substantive. RICO substantive,

1 itself, is directed to the heads of the enterprises, the
2 people that manage or control.

3 Ernst -- Reves v. Ernst & Young indicates
4 that -- that that's the idea. So it -- it just doesn't
5 seem unfair that if you can't get them under RICO
6 substantive, that there's apparently a great discussion in
7 the legislative history that -- that would indicate, well,
8 we -- we can get them under RICO conspiracy.

9 The -- the focus here is, what is the object of
10 the conspiracy? And the object of the conspiracy, in --
11 in our view, is not simply to join an enterprise that --
12 that operates in that fashion, but to -- to personally
13 agree to commit two specific acts of racketeering. That's
14 what the whole discussion in the legislative history was
15 about, not limited RICO substantive or RICO conspiracy --
16 just to when the statute would or would not apply.

17 I would suggest to the Court, concerning both of
18 these statutes, Section 666 and -- and the RICO statute,
19 that there are certain areas of government which
20 historically this Court has indicated to us, under the
21 Constitution, have been deemed within the province, or
22 primarily within the province, of States. For example,
23 education, domestic relations, State officials and
24 criminal law.

25 This case has two of those areas: State

1 officials and criminal law. And it has been established,
2 in the context of State officials, that before it can be
3 said that Congress intended to reach their conduct or
4 regulate their conduct or affect their status or
5 qualifications of State officers, it must be clear that
6 the officers, under the circumstances of the case, are
7 within the scope of the statute. And that's the clear
8 statement rule.

9 Unless -- under that rule, unless the officers
10 are clearly within the scope of the statute, they're not.
11 And even if they are arguably --

12 QUESTION: Well, Mr. -- Mr. Enriquez, the
13 statute here says, whoever being an agent of a State,
14 local or Indian tribe, so there's no doubt that Congress
15 meant to include those -- those persons, is there?

16 MR. ENRIQUEZ: Mr. Chief Justice, that is
17 correct. The question is, under the circumstances of the
18 case. For example --

19 QUESTION: So you say we must read each clause
20 in the Act with -- with that in mind, even though it was
21 clear that Congress intended to include State officials?

22 MR. ENRIQUEZ: Yes, because, all -- all of a
23 sudden, we have a situation here where Congress is
24 indicating that it wants to work upon or -- or affect
25 State officials. And when you -- when that happens, then

1 it becomes an issue of Federalism. And it's, I feel, to
2 be determined under those rules.

3 QUESTION: Are you suggesting there's a Tenth
4 Amendment --

5 MR. ENRIQUEZ: Yes, ma'am, I do.

6 QUESTION: -- and that this is -- that -- that
7 it would be unconstitutional for the Federal Government to
8 say, now, when we give our money to State operators, we
9 want that agency, in all of its parts, to be clean,
10 because if there's bribery going on with the State
11 program, the -- there's the risk that the same officers
12 that are dishonest with regard to the State program are
13 going to be dishonest with regard to the Federal program?

14 MR. ENRIQUEZ: I -- I think the Federal
15 Government can do that, ma'am, if -- if it is couched in
16 terms of protecting its property or if it's couched in
17 another jurisdictional element, such as it affects
18 interstate commerce, or one of the jurisdictional
19 elements --

20 QUESTION: Well, what's wrong with Federal
21 money -- that seems to be a big Federal peg -- we're
22 giving you Federal money --

23 MR. ENRIQUEZ: Yes, ma'am.

24 QUESTION: -- to make conditions on it?

25 MR. ENRIQUEZ: And I understand that -- that

1 the -- the government's position on this is that it's
2 under the Spending Clause and that, by virtue of spending,
3 they can go ahead and regulate. But I -- I think this
4 goes beyond the cases that they've cited. None of the
5 cases that they have cited on this regulation issue are
6 criminal law cases. All of the cases that they have cited
7 speak in terms of -- of conditions or -- or incentives to
8 the States. None of them speak in terms of -- of
9 something as coercive as, we're going to put your -- your
10 officials in jail.

11 So I -- I think, when you get to that point,
12 then we run into a Spending Clause problem. It doesn't
13 seek to justify itself under the terms of -- of the
14 Commerce Clause, and so I think it does exceed the scope
15 of the Constitution, as applied in this case.

16 QUESTION: Did you make that argument somewhere
17 else along the line, or did you just today?

18 MR. ENRIQUEZ: No, ma'am. I -- I did make that
19 argument. The government has in fact tried to justify --

20 QUESTION: You made that argument in the lower
21 courts?

22 MR. ENRIQUEZ: I -- I don't know that we argued
23 it in terms of Commerce Clause, but we argued it in terms
24 of property of the government; that this was a protection
25 of property statute, and -- and that it could be just --

1 it could be justified only on that basis.

2 QUESTION: But the Tenth Amendment argument that
3 you're presenting to us now --

4 MR. ENRIQUEZ: Yes, ma'am.

5 QUESTION: -- did you make that in the lower
6 courts?

7 MR. ENRIQUEZ: We didn't specifically come out
8 and say Tenth Amendment, Your Honor.

9 CHIEF JUSTICE REHNQUIST: Thank you,
10 Mr. Enriquez. The case is submitted.

11 MR. ENRIQUEZ: Thank you.

12 (Whereupon, at 1:54 p.m., the case in the
13 above-entitled matter was submitted.)

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CERTIFICATION

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The United States in the Matter of:

MARIO SALINAS v. UNITED STATES
CASE NO: 96-738

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BY Don Mari Federico

(REPORTER)