

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES C. LIU, ET AL.,)
) Petitioners,
) v.) No. 18-1501
SECURITIES AND EXCHANGE COMMISSION,)
) Respondent.

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CHARLES C. LIU, ET AL.,)

Petitioners,)

v.) No. 18-1501

SECURITIES AND EXCHANGE COMMISSION,))

Respondent.)

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Washington, D.C.

Tuesday, March 3, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:25 a.m.

APPEARANCES:

GREGORY G. RAPAWEY, ESQ., Washington, D.C.;

on behalf of the Petitioners.

MALCOLM L. STEWART, Deputy Solicitor General,

Department of Justice, Washington, D.C.;

on behalf of the Respondent.

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P R O C E E D I N G S

(11:25 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 18-1501, Liu versus the Securities and Exchange Commission.

Mr. Rapawy.

ORAL ARGUMENT OF GREGORY G. RAPAWY

ON BEHALF OF THE PETITIONERS

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

SEC disgorgement orders compel a payment to the Treasury as a consequence for violation of a public law. An order like that is a penalty, as this Court's unanimous decision in Kokesh makes clear.

A penalty must be authorized by statute. So must any action by an administrative agency. There is no statutory authority for the SEC to seek disgorgement orders from a federal court and, therefore, it cannot.

I have three main points to make this morning. First, the text, structure, and context of the securities laws offer a straightforward route to reversal. Congress has

1 created for SEC court actions a tiered system of
2 civil money penalties that does not include
3 disgorgement.

4 Congress has also given the SEC
5 authority for an order requiring accounting and
6 disgorgement, using those very words, in an --
7 in an administrative proceeding but no similar
8 authority for court actions.

9 And Congress has given other agencies
10 clear textual authority for judicial
11 disgorgement orders. Using traditional tools of
12 statutory construction, the result is clear:
13 The SEC can seek the authorized penalties but no
14 others.

15 Second, the statute's allowance for
16 equitable relief does not help the SEC because
17 penalties are not equitable relief. That has
18 been the law for centuries.

19 There is no principal distinction
20 between the characteristics that make SEC
21 disgorgement a penalty under Kokesh and those
22 that make it a penalty under the old equity
23 rule. Its purpose is to punish disobedience of
24 a public law. Any return of money or property
25 to those injured by the violation is

1 discretionary at best and often never happens.

2 Third, the phrase "equitable relief,"
3 enacted as part of Sarbanes-Oxley in 2002, did
4 not ratify circuit court cases that had approved
5 SEC disgorgement. Those cases, beginning with
6 Texas Gulf Sulphur, did not look to statutory
7 text. They certainly did not settle the meaning
8 of text that did not even exist yet.

9 Instead, we have here only
10 congressional silence, and silence does not give
11 an agency any authority to act, much less the
12 authority to punish.

13 JUSTICE GINSBURG: Mr. Rapawy, you
14 started out by saying Kokesh labeled this a
15 penalty and equity doesn't enforce penalties and
16 that's it.

17 But Kokesh was in a specific context.
18 It said, for statute of limitations purposes, it
19 is a penalty. For a different purpose, it need
20 not be characterized as -- as a penalty for
21 determining whether the fraudster can retain the
22 profits of the fraud. That's something
23 different.

24 But the notion that because we
25 categorize it in one context, disgorgement, as a

1 penalty, does not necessarily carry over to
2 another. There was a great legal scholar who
3 has been often quoted by this Court, Walter
4 Wheeler Cook, who said the tendency to assume
5 that a word appearing in two or more legal
6 contexts and so in connection with more than one
7 purpose -- one purpose is statute of
8 limitations, another is depriving the fraudster
9 of the profits of the fraud -- to assume that
10 that characterization in one context carries
11 over to another is a notion that has all the
12 tenacity of original sin and must constantly be
13 guarded against.

14 So all Kokesh did was say, for statute
15 of limitations purposes, this is a penalty. It
16 did not say -- in fact, it was specific in
17 footnoting that it was not saying that in every
18 context it is a penalty.

19 MR. RAPAWY: Justice Ginsburg, I
20 certainly agree that this Court reserved this
21 question in Kokesh in Footnote 3. And my
22 argument is not that the holding of that case
23 resolves this case but that the reasoning of
24 that case can't effectively been -- be
25 distinguished from this case.

1 And my reasons for saying that, the
2 issues to which this Court looked in *Kokesh* in
3 determining whether SEC disgorgement is a
4 penalty track the reason or the -- the
5 justifications or the -- the cases in which
6 equity said it would not enforce penalties.

7 The -- the most important of those is
8 *Kokesh*'s second reason, which is the -- that --
9 it found that SEC disgorgement has primarily a
10 punitive purpose, and that goes directly to the
11 core of the equity distinction.

12 JUSTICE GINSBURG: Why is it -- is
13 that so? Is it not an equitable principle that
14 no one should be allowed to profit from his own
15 wrong? That's not an equitable principle?

16 MR. RAPAWY: That is certainly an
17 equitable principle, Your Honor. However, it is
18 -- it is also an equitable principle that --
19 that a court of equity will not inflict a
20 penalty; it will make the person no worse off
21 than they were had they not committed the wrong.

22 And SEC disgorgement is a penalty
23 within the meaning of that rule because, as the
24 Court stated in *Kokesh*, it does, in fact, it
25 frequently does, did in this case, leave the

1 wrongdoer worse off than if the wrong had never
2 been committed.

3 JUSTICE ALITO: But is your argument
4 that disgorgement is never possible or that
5 disgorgement has been interpreted too broadly by
6 the courts?

7 Suppose it were limited to net profits
8 and suppose every effort was made to return the
9 money to the victims of the fraud. Would that
10 not fall within a traditional form of equitable
11 relief?

12 MR. RAPAWY: I think it still would
13 not, Your Honor, and the reason is that the --
14 the traditional form of equitable relief to
15 which the government has drawn an analogy is the
16 accounting, and an accounting did have those
17 characteristics that Your Honor has stated.

18 But it also had the characteristic
19 that it was typically available only in cases
20 involving a breach of fiduciary duty. Now there
21 are instances in which it was applied outside
22 breaches of fiduciary duty, but I believe that
23 in those cases it would be properly
24 characterized as part of the equity court's
25 ancillary jurisdiction. And a remedy that was

1 only within the ancillary jurisdiction of a
2 court of equity would not be a remedy that was
3 typically available in equity, as this Court has
4 interpreted that phrase.

5 JUSTICE GINSBURG: What -- what do you
6 mean by "ancillary"?

7 MR. RAPAWEY: Ancillary jurisdiction
8 meaning that once a court had some other
9 independent ground of equitable jurisdiction
10 over the case -- and this is true of the old
11 patent and copyright cases -- it might then to
12 go on -- go on to award an accounting in order
13 to afford complete relief.

14 JUSTICE SOTOMAYOR: How about the
15 fraud cases in which it was granted?

16 MR. RAPAWEY: So I believe that the
17 fraud cases -- and we do address this in our --
18 in our reply, Your Honor -- I believe the fraud
19 cases all -- that the professors -- I assume
20 you're referring to the fraud cases cited in
21 Professor Laycock's brief, and I think those all
22 involve fiduciary relationships.

23 JUSTICE SOTOMAYOR: But let me -- let
24 me go back to that answer you gave. There is a
25 statute here that entitles the court to give

1 equitable relief that may be appropriate or
2 necessary for the benefit of investors.

3 I'm not sure why this doesn't provide
4 ancillary jurisdiction in the manner that you've
5 spoken about, assuming, as Justice Alito has
6 just stated, that the accounting is only for net
7 profits that are given to the actual people
8 injured.

9 We -- we have other -- I recognize the
10 multitude of questions, joint and several
11 liability, recovery for net profits of people,
12 tippees and things like that. Putting all of
13 that aside, just a simple straightforward case
14 of net profits from investors who are actually
15 injured.

16 MR. RAPAWY: So I have -- I have two
17 answers to that, Justice Sotomayor, if I may.
18 And one -- the first answer is that precisely
19 because of the complexities that your question
20 recognizes, the better course would be to say
21 this remedy that the SEC has sought here, SEC
22 disgorgement, which does not have a historical
23 parallel, does not exist. And if the S --

24 JUSTICE SOTOMAYOR: So why is it okay
25 in the administrative process and in all the

1 other laws where you say disgorgement is
2 referenced? You're making an argument that
3 there should never, ever be disgorgement --

4 MR. RAPAWY: Not at all, Your Honor.

5 JUSTICE SOTOMAYOR: -- in any statute,
6 because it's undefined in some way outside the
7 common law?

8 MR. RAPAWY: Not at all, Your Honor.
9 I am saying that in those con -- when Congress
10 says disgorgement, then it is the Court's task
11 to figure out what does disgorgement mean.

12 And perhaps in doing so, it would look
13 at that history and say, well, it would -- you
14 know, the money has to go back to the
15 individuals and it can be no more than -- than
16 the amount of the gains and so forth.

17 But, in a case where Congress has not
18 said disgorgement, and they did not say so here,
19 I think the Court should hesitate to read it
20 into a general provision for equitable relief.

21 JUSTICE KAVANAUGH: If we --

22 MR. RAPAWY: And my --

23 JUSTICE KAVANAUGH: Keep going, sorry.

24 MR. RAPAWY: And my second point in
25 connection with that is that the reason not to

1 read equitable relief to encompass ancillary
2 jurisdiction is the same one this Court gave in
3 Great-West. And that is that if you -- because
4 an equity court having jurisdiction of the case
5 could award any kind of relief using its
6 ancillary jurisdiction, including even
7 compensatory or punitive damages, if you were to
8 read the term that broadly, it would be no
9 limitation at all.

10 JUSTICE KAVANAUGH: If we were not to
11 agree with you on this last point, what do you
12 then say to Justice Alito's two conditions, net
13 profits, returned to victims?

14 MR. RAPAWEY: If you were not to agree
15 with me on that point, then those are the -- the
16 primary inconsistencies that we've identified,
17 we've established with regard to historical
18 remedy.

19 I do think that the remedy that was
20 applied here, that the SEC sought here, was --
21 was clearly a penalty and clearly inconsistent
22 with Kokesh and that the -- there -- there is an
23 important background principle that --

24 JUSTICE KAVANAUGH: And that's because
25 it was not limited to net profits and was not

1 returned to the victims, at least not
2 necessarily?

3 MR. RAPAWY: Yes. And I would also
4 say because it -- it doesn't have the historical
5 parallel because there was no fiduciary duty
6 pleaded or proved, but --

7 JUSTICE KAVANAUGH: Right. That's the
8 --

9 MR. RAPAWY: -- Your Honor has
10 questioned that point.

11 JUSTICE KAVANAUGH: Yeah.

12 MR. RAPAWY: And --

13 JUSTICE KAVANAUGH: You may be right
14 or wrong on that point. I just wanted to
15 isolate your answer just to be --

16 MR. RAPAWY: Okay. So --

17 JUSTICE KAVANAUGH: -- just to be
18 clear.

19 MR. RAPAWY: -- analytically, Your
20 Honor, the point is -- the point is separate.

21 I do think that there are substantive
22 reasons for limiting the remedy to the fiduciary
23 duty as well, and that goes -- and this is
24 discussed in the amicus brief by Professors Bray
25 and Smith that talk about the origins of the

1 fiduciary or, rather, the accounting remedy, and
2 -- and explain that it is -- it is in some
3 respect equity forcing the fiduciary to do what
4 the fiduciary should have been doing in the
5 first place, which is to keep -- keep track of
6 the property that person is holding for someone
7 else, to make no profits on it, and to remit to
8 that person any -- any profits they had gained.

9 Those are substantive duties that do
10 not apply to everyone who is subject to the
11 securities laws.

12 JUSTICE ALITO: But how -- how
13 realistic do you think it is to assume that when
14 Congress used this term "equitable relief,"
15 Congress meant to incorporate every curlicue of
16 old equity jurisprudence?

17 MR. RAPAWY: My best answer to that,
18 Your Honor, is that this Court had given the
19 phrase "equitable relief" in ERISA that meaning
20 six months before Congress passed this statute.

21 So, if Congress had wanted to know
22 exactly what "equitable relief" meant in the
23 most recent precedent of this Court, in a
24 statute that I think has some similar structure
25 -- structural issues to this one, and I'd like

1 to get to those, they would have gone to
2 Great-West and they would have said, huh, okay,
3 this -- they will look to history if we use
4 these words.

5 If we don't want them to look to
6 history, we should use other words. We should
7 use words, for example, such as they later used
8 for the -- for the C -- CFTC where they said
9 equitable remedies and disgorgement and
10 restitution count as equitable remedies. They
11 would have enlarged it if they wanted to go
12 beyond historical remedies, given the -- the
13 interpretation that this Court had -- has -- had
14 given those words so recently.

15 JUSTICE KAGAN: But, Mr. Rapawy,
16 Congress acted against a backdrop in which the
17 SEC was routinely seeking disgorgement, didn't
18 it?

19 MR. RAPAWY: It did, Your Honor.
20 However, I do not think that that supports the
21 government's position here for two reasons.

22 The first is that those cases, the
23 cases that form that backdrop were not
24 interpreting the text, not interpreting the
25 words, and so the prior construction canon by

1 its terms does not apply.

2 The second and perhaps more
3 substantive reason is that the decisions in the
4 court -- in the circuit courts were not,
5 although there was -- there was a consensus that
6 the SEC could get something accounted as
7 disgorgement, there was not a consensus as to
8 what the -- what that disgorgement was. And I
9 would point to two specific examples.

10 One is the Lipson case, which the
11 government cites in its brief as one of its
12 consensus cases. That's a Seventh Circuit
13 decision by Judge Posner. It's earlier the same
14 year that Sarbanes-Oxley was enacted. And that
15 decision says that the relief in that case, the
16 disgorgement in that case, counted as equitable
17 relief under Section 21(d) only because it was
18 relief against a fiduciary.

19 So, if you think that Congress meant
20 to adopt the circuits, you would then have to
21 decide did it mean to adopt Judge Posner's view,
22 in which case we would be correct that only
23 fiduciaries are covered.

24 The second example that I would give
25 you is the Fifth Circuit's decision in SEC

1 versus Blatt, and that was a decision in which
2 it explicitly stated the money was going back to
3 the investors.

4 And so, to the extent that what the
5 government has sought to assert here is the
6 authority to send the money to the Treasury,
7 well, would Congress have looked to the decision
8 in Blatt and said: Well, no, actually, the
9 money, it looks like it would go back to the
10 investors and not to the Treasury.

11 JUSTICE KAGAN: Well, that may raise
12 the qualifications that Justice Alito was
13 talking about on what the disgorgement remedy
14 would entail. But the basic understanding that
15 there was something that counted as -- as -- as
16 that, that was in line with equitable powers,
17 isn't that a reasonable way to read the statute?

18 MR. RAPAWY: I don't think it is, Your
19 Honor, because I think it would leave too many
20 -- it would essentially leave this Court in the
21 position of deciding how the traditional remedy,
22 which would not by its terms apply here, the
23 government agrees in its brief that SEC
24 disgorgement is a substantial departure from
25 historical norms.

1 How do you craft that historical
2 remedy in light of all the policies under the
3 securities acts to -- to make sense here and
4 apply here? And I think that should be done by
5 the legislature in the first instance.

6 JUSTICE SOTOMAYOR: I'm sorry, but
7 they don't do it when they gave the SEC
8 administrative authority for disgorgement. And
9 if we have an administrative order by the SEC,
10 we have to do exactly what you're telling us not
11 to do. We would have to define what they meant
12 by that.

13 And -- and so what's the difference
14 between doing it in that context, where Congress
15 has used the word disgorgement, and this
16 context, where we can presume or would presume
17 that there was something called disgorgement
18 that could have been restitution on -- or unjust
19 enrichment or something else of that ilk?

20 MR. RAPAWY: Well, Your Honor, with
21 respect, I think in -- in the -- in the
22 administrative context, they did. They gave the
23 SEC regulatory -- rule-making authority
24 concerning its disgorgement proceedings.

25 So that question is not going to go to

1 the courts in the first instance. It's going to
2 go to the agency in the first instance, and then
3 the agency will balance all the policy
4 considerations that I'm talking about.

5 But at least Congress has clearly said
6 you, agency, may do this, and you, agency, may
7 do this even if it's a punishment, I would -- I
8 would submit. And there are important
9 background principles that this Court should not
10 and -- and the courts in general should not say
11 an agency may do this where Congress has not
12 said so. And equally to the court -- the -- the
13 -- that the court should not say this person may
14 be punished where Congress has not said so.

15 And I would refer back in that context
16 to this Court's decision in Wallace versus
17 Cutten, one of the early administrative law
18 decisions, the Court's opinion through Justice
19 Brandeis, where the -- the agency in that case
20 had the authority to bar people from trading in
21 grain futures. But the language of the statute
22 permitted them to do it only for -- in cases of
23 ongoing violations. And they wanted to do it in
24 cases of past violations, effectively to serve
25 as a punishment for those past violations.

1 And the Court said we will not --
2 Justice Brandeis for the Court said: We will
3 not enlarge the statute. We will not put
4 something in that Congress has -- has not put
5 there to make punishable what the stat -- what
6 -- what -- by the terms of the statute -- I'm
7 not quoting exactly now but paraphrasing -- what
8 by the terms of the statute was only to be
9 prevented.

10 And I think that that is a principle
11 that ought to, you know, have some weight here
12 as the Court considers what to do. This
13 authority is being used by the agency to punish,
14 that their justification for it is punitive.
15 The Court's decision in Kokesh said that it is
16 punitive.

17 JUSTICE GINSBURG: But I believe you
18 agreed with me that it's an equitable principle,
19 that no one should profit from his or her own
20 wrong. And I already suggested to you that it
21 can be punishment in one context and it can be
22 an equitable remedy in another context.

23 MR. RAPAWEY: Yes, Justice Ginsburg,
24 but I would say that in -- I would refer back to
25 this Court's decision in Livingston, which

1 talked specifically about what counts as
2 punishment in terms of the equitable rule.

3 And in that case, it's -- it's one of
4 the older patent cases, the special master had
5 imposed a remedy, a -- that -- that effectively
6 was what we probably would call a damages remedy
7 now. He allowed the -- the -- the patent owner
8 to recover from the infringer not what the
9 infringer actually did gain but what the
10 infringer might have gained. And he said the
11 measure is going to be -- because this person is
12 a trespasser and a wrongdoer, the -- the measure
13 of recovery is going to be what the -- the
14 patent owner lost, not what the infringer
15 gained.

16 And this Court said no, that is a
17 penalty that goes beyond the practices of
18 equity. We are aware of no rule that converts a
19 court of equity into an institute for the
20 punishment of simple torts.

21 And I think with all -- with the
22 greatest respect, when you take the principle
23 that no one can punish by their own -- no one
24 can benefit from their own wrong, excuse me, and
25 you decouple that from the historical context

1 and the historical remedies in which those rules
2 would apply, and you turn it into something, as
3 was done here, where it exceeds what the
4 district court found to be the gross pecuniary
5 gain and where it requires a payment to the
6 Treasury, it has gone beyond the realm of -- of
7 what equity would have recognized.

8 JUSTICE GINSBURG: Would it be -- I
9 thought there were efforts to get the money to
10 the investors. It doesn't require the money to
11 be paid into the Treasury. If the SEC can
12 locate the investors and get the money back to
13 them, the SEC says that's what it would do.

14 MR. RAPAWEY: They -- they do that in
15 some cases, Your Honor. They do not do it in
16 all cases. It is difficult from the public
17 materials to determine how often they do it and
18 how much money they do give back to investors.

19 JUSTICE KAGAN: Well, suppose we were
20 to reject your broad argument and focus the
21 question on -- on this issue and also on the net
22 profits issue.

23 What constraints do you think the SEC
24 is under?

25 MR. RAPAWEY: I'm sorry, Your Honor.

1 Constraints?

2 JUSTICE KAGAN: On the -- on the
3 question of giving money back to the investors,
4 I think Justice Ginsburg raised the issue about
5 maybe you can't find them, they're not
6 identifiable, there are too many of them.

7 How -- what -- what do you think that
8 if -- if we -- if we said, you know, it's an
9 equitable principle that the money should go
10 back to the investors if possible, what does
11 that mean exactly that the SEC has to do?

12 MR. RAPAWY: I would say that if you
13 were to take that position and disagree with my
14 primary argument, it would -- then the -- the
15 rule should be, if you're giving the money back
16 to the investors, then you can take it and not
17 otherwise, because if you're not giving it back
18 to the investors, then it's just a punishment.

19 JUSTICE KAGAN: So not otherwise, even
20 if like you -- you've tried to find the
21 investors and you can't?

22 MR. RAPAWY: Well, I mean, I don't
23 know that there's any way in which the Court
24 could workably police how hard they're trying,
25 Your Honor. And their --

1 JUSTICE KAGAN: Well, you know, make
2 -- make good-faith efforts; make, you know,
3 diligent efforts. What -- whatever words you
4 want to use.

5 MR. RAPAWY: I -- I mean, Your Honor
6 could certainly write that a decision -- in a
7 decision. I don't think it would be sufficient
8 guidance or sufficient compulsion to the agency
9 to ensure that this was used for compensatory
10 purposes and not for punitory --

11 JUSTICE GORSUCH: Counsel --

12 CHIEF JUSTICE ROBERTS: How --

13 JUSTICE GORSUCH: -- why -- why -- oh,
14 I'm sorry, Chief.

15 CHIEF JUSTICE ROBERTS: Excuse me.
16 How hard is that? Presumably, the investors
17 would want money, and I -- I suppose these
18 things could be done, you know, secretly or --
19 but, if -- if the SEC is engaged in a proceeding
20 like this with respect to investments, I would
21 assume that investors should be pretty easy to
22 find if there's money available.

23 MR. RAPAWY: I -- I guess what I would
24 say, Your Honor, is that the -- the -- in many
25 cases that they currently use the power, they

1 don't even believe that it's appropriate to
2 return the money to investors. And I would
3 point to the Foreign Corrupt Practices Act cases
4 as the biggest example of that.

5 In theory, you know, could they find
6 them? They apparently do find it difficult in
7 many cases because, in many cases, the money
8 goes to the Treasury, but there are many cases
9 in which it is currently applied under which
10 none of this rationale would -- would apply at
11 all, including nine- and ten-figure recoveries
12 against private companies that are basically
13 just money taken from the investors and put to
14 the Treasury because they -- because that's how
15 they -- because they -- they want to use it as a
16 deterrent. They want to use it as a deterrent
17 and a punishment and to make an example out of
18 the violators of the securities laws.

19 JUSTICE GORSUCH: Counsel, in -- in --
20 in equity and kind of paralleled in our class
21 action practice today, we do police the efforts
22 of the defendant to find and return money to the
23 investors that he or she's defrauded. Sometimes
24 there's some left over and -- and -- because
25 people can't be found and we've had cases about

1 what to do with that money as well.

2 But why doesn't that supply at least a
3 ready guide and maybe make it impermissible for
4 the government to not make any effort at all or
5 -- but why can't we police it, assuming we
6 reject your primary argument?

7 MR. RAPAWY: I guess that would go --
8 I would -- I'm not saying you couldn't draw an
9 analogy to the class action cases, Justice
10 Gorsuch. Clearly you could. I think at that
11 point --

12 JUSTICE GORSUCH: And they come from
13 equity and traditional principles of equity,
14 right? I mean, they're drawn from that?

15 MR. RAPAWY: Under traditional
16 principles of equity, they couldn't recover
17 because there's no fiduciary here, Your Honor,
18 but --

19 JUSTICE GORSUCH: I understand your
20 argument.

21 MR. RAPAWY: But -- but in the class
22 action context as a workable matter, you could,
23 but I really think that is getting to the point
24 where the Court is creating a new regulatory
25 scheme where one doesn't currently exist to save

1 a remedy that was originally created on the
2 basis of circuit court decisions that the
3 government doesn't really defend anymore and
4 that the best course would be to say: This
5 remedy that the agency sought here does not
6 exist, and if -- if they think that they need
7 this remedy, they should go to Congress for it.

8 JUSTICE KAGAN: And may I ask you
9 about your net profits rule, a similar kind of
10 question? I mean, what does the SEC, in your
11 view, have to deduct?

12 MR. RAPAWEY: So, at a minimum, they
13 have to start from the right place, which is
14 they have to start from the gains to the
15 individual defendant rather than what they did
16 in this case, which is starting from the losses
17 to investors.

18 And then I believe the standard that
19 this Court -- if you're -- if you're going to go
20 by the accounting standard that's applied in --
21 in the old patent cases, you would say it's you
22 calculate the profits as a manufacturer
23 calculates the profits of his -- of their own
24 business.

25 So it would be certainly legitimate

1 expenses. Here, we had lease payments that
2 weren't disputed that were actual lease payments
3 and equipment payments that it wasn't disputed
4 it was actual equipment payment. And the
5 district court said: I'm not going to count any
6 of that essentially for punitive reasons. I
7 think you're bad guys. You had fraudulent
8 intent from the start and so none of it counts.

9 JUSTICE BREYER: If the leases in the
10 machinery was just a printout, only used for
11 more fraudulent stuff, would you deduct it then?
12 I mean, what they did is they had fliers going
13 around saying invest in my fraudulent gold
14 company, the equivalent thereof.

15 MR. RAPAWY: Well, I suppose that --

16 JUSTICE BREYER: Then you'd deduct it?

17 MR. RAPAWY: I'm sorry.

18 JUSTICE BREYER: Is that legitimate?

19 MR. RAPAWY: I think there may be a
20 certain point at which you could say -- I mean,
21 there's -- you could imagine a Ponzi scheme,
22 Your Honor, and in the case of the Ponzi scheme,
23 okay, it's all tainted.

24 But I think that the decision below
25 did not give the kind of consideration you would

1 need to give before reaching that kind of
2 conclusion about these defendants, where --

3 CHIEF JUSTICE ROBERTS: You -- finish
4 that sentence.

5 MR. RAPAWEY: I'll wrap it up there,
6 Your Honor.

7 CHIEF JUSTICE ROBERTS: You may not
8 want to -- okay. Thank -- thank you, counsel.

9 Mr. Stewart.

10 ORAL ARGUMENT OF MALCOLM L. STEWART

11 ON BEHALF OF THE RESPONDENT

12 MR. STEWART: Thank you, Mr. Chief
13 Justice, and may it please the Court:

14 I'd like to begin by discussing the
15 significance of Kokesh, and, as some of the
16 questions have illuminated, the Court in Kokesh
17 said that SE -- disgorgement in SEC cases was a
18 penalty for purposes of a statute of limitations
19 provision. There's no reason to read the
20 decision more broadly.

21 And, in particular, the three reasons
22 that the Court gave for concluding that it was a
23 penalty for these purposes don't -- they can't
24 map onto the criteria for determining whether
25 something is equitable relief. The three

1 characteristics that the Court identified were
2 it's imposed as a consequence of violating a
3 public law, it serves a deterrent purpose, and
4 it's not compensatory.

5 And I'd say first that all three of
6 those characteristics were present in Kansas
7 versus Nebraska, in which this Court, sitting as
8 a court of original jurisdiction, ordered
9 disgorgement in an interstate compact case. And
10 in that case, the Court emphasized that when the
11 interstate compact was ratified by Congress, it
12 took on the character of a public law. And the
13 Court said the equitable power of a court of
14 equity is all the greater when the public
15 interest is concerned.

16 Second, the disgorgement remedy in
17 that case was intended only to serve deterrent
18 purposes. That was the whole justification for
19 the remedy, because, due to the fairly
20 idiosyncratic economic circumstances of the
21 parties, the special master concluded and the
22 Court agreed that a compensatory damages remedy
23 would not be sufficient to deter future
24 violations. And so compensatory damages were
25 awarded, but the Court ordered disgorge --

1 partial disgorgement on top of that in order to
2 ensure that there would be an adequate
3 deterrent.

4 And for the same reason, the third
5 characteristic that the Court identified in
6 Kokesh, namely, that disgorgement in SEC cases
7 is not compensatory, was true in Kansas versus
8 Nebraska as well. The disgorgement remedy was
9 ordered on top of the compensatory damages
10 award. That was deemed adequate to compensate
11 Kansas for its losses.

12 I'd like to turn next to the issue
13 that was taking up the discussion towards the
14 end of Mr. Rapawy's argument, which is the
15 formula by which the SEC urges that disgorgement
16 be calculated and courts ordinarily calculate
17 disgorgement in -- in fraud cases.

18 The Court in Kokesh cited the third
19 restatement of restitution and unjust enrichment
20 for the general rule that net profits are the
21 measure of disgorgement and that the defendant
22 is entitled to deduct its marginal costs.

23 Now the term "general rule" implies
24 that there will be exceptions. And if you look
25 at literally the next page of the restatement

1 from the one that the Court cited, the
2 restatement says the defendant will not be
3 allowed a deduction for the direct expenses of
4 an attempt to defraud the claimant.

5 And so, for example, if part of your
6 expenditures are, as Justice Breyer were -- was
7 hypothesizing, if part of your expenditures are
8 sending out fraudulent communications, false
9 sales pitches that are intended to deceive
10 consumers in to -- to buying securities, that
11 would be the kind of expense that under
12 traditional equitable expenses -- under
13 traditional equitable principles would not be
14 allowed.

15 A second example. In Foreign Corrupt
16 Practices cases -- Act cases, the wrong is that
17 the defendant company has obtained a contract by
18 paying a bribe to the public official, and the
19 SEC would say, in those cases, the proper
20 measure of disgorgement is net profits earned on
21 the contract.

22 And so the defendant wouldn't be
23 charged gross receipts. The defendant would be
24 allowed to deduct its operating expenses, but we
25 wouldn't allow the defendant to count the bribe

1 itself as a cost of doing business, as a
2 deductible expense. That, in our view, wouldn't
3 be allowed in computing the amount of
4 disgorgement that would be ordered.

5 So the one thing that I would
6 emphasize most strongly is we are not -- as to
7 measure of disgorgement, we are not asking for
8 an SEC-specific rule. We believe that the
9 arguments we've made in prior cases have been
10 consistent with traditional equitable principles
11 because, even though the general rule is that
12 you use net profits as the measure, that is
13 subject to exceptions. And we rely on the
14 exceptions in a variety of circumstances.

15 The second point I would make is, if
16 we're wrong, if in some instance or instances or
17 in some category of cases courts have been
18 awarding disgorgement in an amount that exceeds
19 what traditional equitable principles would
20 produce, then the correct answer is not to give
21 us everything and it's not to give us nothing.
22 It's that courts should continue to order
23 disgorgement but compute it in accordance with
24 traditional general equitable rules, not in
25 accordance with any SEC-specific formula.

1 JUSTICE SOTOMAYOR: But your -- your
2 position is, if I understand it correctly,
3 follow whatever the common law rule was with
4 respect to calculating net profits, return it to
5 investors, but that you're also a victim and so
6 that you -- you could take the money ahead of
7 investors, that you can keep the leftover
8 amounts? What -- what is your position with
9 respect to that broader question of who gets the
10 money? Why is it the Treasury? It's not the
11 SEC getting the money.

12 And one could see if -- potentially an
13 argument that if the SEC got the money, it could
14 then spend it on protecting investors, but if
15 the Treasury's getting it -- and I know you're
16 going to say money is fungible -- but, if the
17 Treasury is getting it, we don't really know if
18 it's being used to help investors.

19 MR. STEWART: Let me say three or four
20 things in -- in response to that. The first is
21 that, as an empirical matter, the SEC tries to
22 return the money to investors when it can, and
23 we're largely successful in doing that.

24 Now there is a category of cases like
25 the FCPA cases, the Foreign Corrupt Practices

1 Act cases, where sometimes we do get big
2 judgments. They're not returned to investors
3 because there really is no obvious universe of
4 individual victims from an FCPA violation -- an
5 FCPA violation. But, in cases where individual
6 victims can be located and the money can be
7 distributed, it's our general practice to do so.

8 The second thing is that --

9 JUSTICE GORSUCH: Before you -- before
10 you leave that, I'm sorry to interrupt, but I --
11 I thought last time around in Kokesh that the
12 representation from the government was different
13 on that score and that sometimes you do and
14 sometimes you don't.

15 MR. STEWART: I mean, sometimes it is
16 done and sometimes it is not done. Sometimes
17 the reason that it is not done is, as I was
18 saying with respect to the FCPA, there just is
19 no obvious universe of investors.

20 Sometimes it's not done because it's a
21 fraud that involves bilking a very large number
22 of investors out of a very small amount of money
23 each, and it's deemed infeasible to go to the
24 expense of locating the individuals given the
25 small amount that each would receive.

1 JUSTICE GORSUCH: Is it sometimes not
2 done just because it's not done?

3 MR. STEWART: I -- I can't rule out
4 that possibility. I will say that this is at
5 the discretion of the court. Now the statute
6 doesn't require that it be forwarded to
7 investors in any particular category of cases,
8 but this is at the court's discretion.

9 JUSTICE GORSUCH: Would the government
10 have any difficulty with a rule that the money
11 should be returned to investors where feasible?

12 MR. STEWART: I would say if -- if
13 that is couched as a general equitable
14 principle; that is, the court is sitting as a
15 court of equity, there would be nothing wrong
16 with a district judge in an individual case
17 saying unless you can persuade me that it is
18 infeasible to return this money to investors, I
19 am going to order that that be done. I don't
20 think that's typical practice, but --

21 JUSTICE GORSUCH: I'm sorry, I didn't
22 mean to interrupt from Justice Sotomayor's
23 question. I apologize.

24 MR. STEWART: No. And -- and so, yes,
25 there -- there is nothing in the statute that

1 precludes -- in individual cases where it seems
2 to be feasible, there's nothing that would
3 preclude the district court from insisting on
4 that.

5 Now, as we pointed out in the brief,
6 the Dodd-Frank Act does have these -- I'm sorry,
7 the Dodd-Frank Act has these provisions that
8 identify permissible uses of money that is
9 disgorged in a judicial or administrative action
10 but is not ultimately forwarded to investors.
11 It can be used, for instance, to pay
12 whistleblowers.

13 And so the statute specifically
14 contemplates the possibility that disgorged
15 funds sometimes will not be distributed for what
16 -- whatever reason. And it would really
17 undermine the statutory scheme to say that
18 distribution to investors is in all
19 circumstances a prerequisite to disgorgement.

20 JUSTICE SOTOMAYOR: Why? If -- if --
21 if the statute says that equitable relief that
22 may be appropriate or necessary for the benefit
23 of investors, do we have to say here and should
24 we say or not say here that that means if it's
25 not feasible to return it to investors, that

1 it's for the benefit of investors to give it to
2 the SEC?

3 MR. STEWART: I -- that statutory
4 language, we think, and I want to explain why,
5 refers to measures that will benefit the
6 investor community generally, not necessarily
7 the particular individual victims.

8 And I'd give the following reasons.
9 The first is that language applies to equitable
10 relief generally under Section 21(d)(5). And
11 so, if you imagine a court contemplating an
12 injunction, it would obviously be a very
13 constrained view of the court's injunctive
14 authority in an SEC enforcement action to say
15 that the court can only issue an injunction that
16 will benefit the particular individuals who have
17 been victimized.

18 JUSTICE GORSUCH: But if we can get
19 back to the money, which is where we're at, not
20 injunctive relief. I -- I -- I just want to --
21 I would like an answer to Justice Sotomayor's
22 question, which is, if -- if it's feasible, on
23 what account should the government not be in the
24 business of returning the money, given -- given
25 the statement in the statute that we're supposed

1 to be following equitable principles here?

2 MR. STEWART: I -- I -- I --

3 JUSTICE GORSUCH: I take that to be
4 her point or her question to you, and -- and I
5 would appreciate an answer to that.

6 MR. STEWART: I -- I -- I don't -- I
7 don't see a problem with saying it is
8 appropriate or necessary only if it is forwarded
9 to investors if it is feasible to do that. The
10 point I was making about the -- the
11 whistleblowers and such was Congress clearly
12 didn't think that a disgorgement award could be
13 appropriate or necessary only if it was
14 forwarded to investors, because it made specific
15 provision for the circumstance in which
16 disgorged funds were left over.

17 The -- the other point I'd like to
18 address, and Mr. --

19 JUSTICE KAVANAUGH: Can I make sure
20 I'm clear on your answer to Justice Gorsuch and
21 Justice Sotomayor? Because the first time you
22 answered it, you said it would be appropriate
23 for a district court to say that.

24 And I think Justice Gorsuch then
25 followed up and Justice Sotomayor. Would it be

1 appropriate for this Court to say that's the
2 rule; namely, that it has to be returned to
3 investors where feasible?

4 MR. STEWART: I -- I -- I wouldn't
5 have a problem with that. I mean, I don't know
6 that it is kind of in accordance with usual
7 principles for the Court to announce that sort
8 of instruction, but it would be consistent with
9 the SEC's practice. It would certainly be
10 directing the district courts to do something
11 that they could do already as an exercise of
12 their equitable discretion.

13 The only other thing I would say is
14 it's common ground that the SEC is authorized to
15 impose disgorgement administratively, and its
16 decisions are reviewable, but they're reviewed
17 under a more deferential standard.

18 And so the Court reviewing an SEC
19 disgorgement order is not going to be asking was
20 this a correct exercise of equitable discretion,
21 just was it within the range of reasonableness.

22 JUSTICE GINSBURG: The --

23 MR. STEWART: The other thing I wanted
24 to say that I -- I think is -- I'm sorry,
25 Justice Ginsburg.

1 JUSTICE GINSBURG: Well, you -- you
2 were talking about the administrative authority
3 to order disgorgement, but you said that an
4 admin -- an ALJ can't do what a court could do,
5 as it did in this case, order an asset freeze.

6 But couldn't you take the
7 administrative decision and ask a court to
8 enforce that decision by freezing assets?

9 MR. STEWART: I mean, we sometime --
10 we sometimes do, after issuing an administrative
11 order, go to a court for enforcement if the
12 defendant is not obeying, and I think one of the
13 reasons that the SEC sometimes elects to proceed
14 in court originally is if we have doubts about
15 the defendant's compliance and we think we're
16 going to be in court anyway, then we might want
17 to save a step and go there first.

18 I guess part of our response to the
19 arguments about could we do this
20 administratively are to the effect that it
21 wouldn't be entirely unworkable. It would be
22 better than no alternative at all, but there's
23 no reason for the Court to set up an incentive
24 that creates an artificial -- a system that
25 creates an artificial incentive for us to

1 proceed in that way, since the defendant will
2 receive additional proceed -- protections if the
3 case is in court.

4 The -- the other thing I would say
5 that I -- I think is at least in part respective
6 -- responsive to Justice Sotomayor's question
7 and -- and also responds to something that Mr.
8 Rapawy said, he -- he characterized the
9 government as having conceded that our
10 disgorgement is a substantial departure from
11 historical norms. And that -- that's not really
12 what we said.

13 In the last paragraph of our brief,
14 the point we were trying to make was that you
15 look back at the 19th century cases in which
16 disgorgement was ordered, and they all involved
17 awards to individual victims. That wasn't
18 because there was a large body of law saying you
19 couldn't award disgorgement to the government.
20 It was simply because, until the middle part of
21 the 20th century, civil enforcement actions
22 filed by federal regulatory agencies were not a
23 thing, and so the question didn't come up one
24 way or the other.

25 And when those types of actions

1 started to become prevalent, courts had to -- to
2 grapple with questions about how do legal
3 principles that were developed in the context of
4 private suits map onto government enforcement
5 actions?

6 And in 1950, somebody could have
7 argued very plausibly that it just doesn't make
8 sense to order disgorgement to the government
9 because the essence of disgorgement has always
10 been payment to the wronged entity. You could
11 also have made a strong argument on the other
12 side that the core purposes of disgorgement are
13 to prevent the wrongdoer from profiting from its
14 own wrong and thereby to deter future
15 violations, and disgorgement can serve those
16 traditional purposes, regardless of where the
17 money ends up.

18 And as of 1850, that was an open
19 question. By the time that Congress enacted
20 Section 21(d)(5) in 2002, that question had
21 really been resolved, because this Court in
22 Porter and Mitchell had said the federal courts'
23 equitable powers are at their height when the
24 public interest is involved. For 30 years,
25 courts in SEC enforcement actions had been

1 awarding disgorgement. Congress had passed
2 statutory provisions that pre- -- both
3 presuppose the availability of disgorgement in
4 SEC judicial proceedings and that authorized the
5 SEC to impose disgorgement administratively.

6 And so whatever else you -- whatever
7 other lessons you might derive from the decision
8 to authorize this to be done at administrative
9 proceedings, clearly, Congress didn't think that
10 there was anything incongruous about the idea of
11 disgorgement going to the government,
12 disgorgement going in an SE -- in a government
13 enforcement action.

14 And so, when Congress passed
15 Section 21(d)(5) in 2002, if you were asking
16 kind of a conscientious well-informed member of
17 Congress what do you think you are authorizing
18 when you authorize district courts to issue
19 appropriate -- equitable relief that may be
20 appropriate or necessary, the first thing they
21 would ask is, what kind of equitable relief have
22 courts been awarding up to this point?

23 For -- for instance, when you get
24 statutes where -- that authorize a court to
25 issue an injunction in accordance with the

1 principles of equity, how do you decide whether
2 a particular injunction is in accordance with
3 the principles of equity? You look at the way
4 that equity courts have been doing it in the
5 past.

6 And the lesson the Court has drawn is
7 you look to factors like adequacy of the remedy
8 at law, irreparable injury, a grant of authority
9 to proceed in accordance with the principles of
10 equity, is basically an admonition, keep doing
11 it the way that courts of equity have been doing
12 it.

13 And, similarly, in 2002, a
14 conscientious member of Congress would have
15 thought, at the very least, I'm authorizing
16 courts to continue to enter the equitable
17 remedies that they have entered up to that
18 point. And that was buttressed by the other
19 provision of the Sarbanes-Oxley Act in -- in
20 2002 that we've emphasized in our brief, which
21 was the fair funds provision that establishes a
22 mechanism to facilitate the distribution to
23 investors of funds that are disgorged in a
24 judicial or administrative proceeding. And it
25 also authorizes civil penalties to be added to

1 those funds.

2 JUSTICE BREYER: What is your answer
3 -- what is your response to the argument, if I
4 have it right, that in equity, the closest thing
5 is restitution, and in Great-West, the majority
6 said: Well, restitution was an equitable remedy
7 when it was a case in equity, but it was a legal
8 remedy when it was a case in law?

9 MR. STEWART: Well, I think what
10 Great-West was dealing with specifically was --

11 JUSTICE BREYER: A different thing. I
12 agree with that, but there's this statement
13 there that restitution -- just what I said.

14 MR. STEWART: Let me say two things in
15 response to that. The -- the first, Great-West
16 was dealing with a breach of contract action,
17 and so the Court in Great-West said that, in
18 breach -- in breach-of-contract suits, if the
19 contract calls for party A to pay money to party
20 B, a suit seeking to compel A to pay the money
21 to B had historically been regarded as seeking
22 legal relief, not equitable relief.

23 And then, as Mr. Rapawy was saying,
24 the Court in Great-West emphasized that, yes,
25 there are some sorts of legal remedies. They're

1 not considered inherently equitable, but courts
2 of equity could sometimes award them as a matter
3 ancillary to their equitable jurisdiction. And
4 the Court said, at least under ERISA, that's not
5 what equitable relief meant.

6 I -- I don't think disgorgement can
7 really be portrayed in that way. I mean,
8 obviously, in Kansas versus Nebraska, the Court
9 ordered disgorgement as -- treated disgorgement
10 as inherently equitable relief. And one sign
11 that it regarded disgorgement as equitable
12 rather than legal was it said it is an
13 appropriate exercise of authority to enter
14 partial disgorgement. Yes, we would have
15 authority to issue -- require the defendant to
16 hand over the full amount of its profits, but,
17 under the circumstances of the case, we think an
18 adequate deterrent purpose would be served by
19 requiring Nebraska to hand over a fraction of
20 its profits but far from the whole.

21 That -- that's the kind of equitable
22 discretion that the -- that's the kind of
23 discretionary judgment that is inherent in
24 equity.

25 The other thing I would say about

1 Mr. Rapawy's argument with respect to Livingston
2 and the patent cases, I mean, before the Court
3 had specific statutory authority to do so, in
4 cases like Livingston, the Court held that a
5 defendant's profits were the -- were an
6 appropriate element of relief in a patent
7 infringement suit. And the defendant was not
8 acting as a fiduciary or trustee; the defendant
9 was simply committing a wrong using an invention
10 in which the plaintiff had a property right, and
11 that was found to be an appropriate element of
12 relief. And the Court in Livingston said it is
13 not permissible for a court of equity to also
14 award interest because that would be a penalty.

15 Now I think our legal system regards
16 interest differently than it did back in the
17 day, but I think the general principle from
18 Livingston remains sound. That is, if a court
19 were to compute disgorgement in accordance with
20 traditional equitable principles, both the
21 general rule that net profits are the measure
22 and any established equitable exceptions to that
23 rule, if the court computed its -- a
24 disgorgement award in that manner and then said
25 I'm tacking on another 50 percent because your

1 behavior was so egregious, we would agree that
2 that would be a penalty. That would be
3 something that would not be an appropriate
4 exercise of equitable authority under
5 Section 21(d)(5).

6 It -- it could still be done in the
7 SEC cases, because the Congress has authorized
8 civil penalties in addition to equitable relief,
9 but it could not be justified as an exercise of
10 equitable authority. But that's not what --
11 what's being done in this case.

12 JUSTICE GINSBURG: What do you do with
13 the Ninth Circuit saying there were no
14 legitimate expenses to -- to deduct, to arrive
15 at net profit?

16 MR. STEWART: I -- they -- they
17 allowed us a very small deduction for the amount
18 that remained in the corporate account and could
19 be distributed to investors, and, certainly,
20 that would always be an appropriate deduction,
21 any -- any benefit that the investors received
22 at the end of the day.

23 But there were basically two
24 categories of expenses that the Ninth Circuit
25 and the district court didn't allow. One was

1 for the overseas marketing attempts. And I
2 think that was simply the -- the type of expense
3 that Justice Breyer was talking about. This was
4 money spent to perpetrate the fraud, money spent
5 to try to induce other investors to pay their
6 money into what was an -- essentially a fraud --
7 pervasively a fraudulent scheme.

8 The other was Mr. Rapawy is correct
9 that some of the money was spent on things like
10 equipment, facilities, things that in another
11 context might have qualified as legitimate
12 business expenses had there been a true intent
13 to construct a cancer treatment facility and do
14 what the marketer said they were going to do.

15 What the district court said -- and I
16 believe this is on page 18a of the Petition
17 Appendix -- it characterized those expenses as a
18 half-hearted attempt to convey the illusion of
19 progress.

20 And so the court's analysis on that
21 point was not extensive, but -- but we take the
22 point to have been these were not legitimate
23 business expenses because they didn't represent
24 a true good-faith effort to construct the
25 relevant facility. They simply represented an

1 effort to fool investors into thinking that
2 things were going along as planned.

3 And those -- those findings were
4 certainly subject to being reviewed on appeal.
5 We would agree that, had the investors had it in
6 their minds to construct the facility and it
7 just didn't pan out at the end of the day, those
8 would have been the sorts of things that could
9 have been used as deductions.

10 But given the conclusion of the lower
11 courts that this was a pervasively fraudulent
12 scheme in which essentially all of the expenses
13 were made to perpetrate the fraud, then we think
14 it's in accordance with traditional equitable
15 principles to allow no deductions.

16 But, again, the point we had stressed
17 most strongly is we think that Congress has
18 authorized courts to award disgorgement as
19 computed under traditional rules of equity.

20 If in a particular case or even if in
21 some larger category of cases the Court believes
22 that exorbitant disgorgement has been awarded,
23 then the proper response is be more careful
24 about -- to tell lower courts be more careful
25 about the computation.

1 It -- it couldn't under any
2 circumstances be a justification for holding
3 that Congress has not authorized disgorgement at
4 all.

5 If there -- there are no further
6 questions, we would urge the Court to affirm.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Four minutes, Mr. Rapawy.

10 REBUTTAL ARGUMENT OF GREGORY G. RAPAWY

11 ON BEHALF OF THE PETITIONERS

12 MR. RAPAWY: Thank you, Your Honor. I
13 will be brief.

14 On the question of Kansas versus
15 Nebraska, I believe that the Court was
16 explicitly in that case exercising its authority
17 in the singular sphere of interstate relations
18 to craft a new remedy. It was not applying
19 traditional equitable principles.

20 There was a dispute between the
21 majority and the dissent about whether it was
22 appropriate to adopt Section 39 of the third
23 restatement, but, either way, that was a case of
24 the Court making a new remedy that did not
25 previously historically exist.

1 And that would not be appropriate to
2 do here, where you are interpreting a statute in
3 which Congress has already set forth a detailed
4 remedial scheme.

5 On the question of the calculation of
6 the individuals -- of the amounts of
7 disgorgement, there are explicit findings in
8 this record as to the gross pecuniary gain to
9 each individual. It's 6.7 for Mr. Liu and it is
10 1.5 million for -- for Ms. Wang.

11 And if you are applying the
12 traditional historical approach, you would start
13 at the gain to each defendant -- to each
14 defendant. You wouldn't start at the total
15 losses to investors and take deductions from
16 there. And I think that goes to show how far
17 the -- the -- both -- both what happened in this
18 individual case and also how far the analysis
19 that's going on here is from the historical
20 approach.

21 I think the scope of disgorgement has
22 grown over time in part because it is not
23 grounded in statutory text, and that counsel's
24 for returning it to Congress rather than
25 crafting a new remedy and -- and -- by -- as a

1 sort of adapting equitable principles.

2 I think its practical function has
3 been to compel payments to the Treasury. There
4 is no historical precedent for that. I would
5 cite to the Court's Gabelli case, in which the
6 Court found that there was no precedent for
7 applying the equitable doctrine of the discovery
8 rule to -- to cases by the government.

9 So, too, here, there's no precedent
10 for using an accounting to compel funds be paid
11 to the Treasury.

12 Finally --

13 JUSTICE GINSBURG: What -- what about
14 the statutes that assume the availability of
15 disgorgement? Those statutes would have no work
16 to do if -- if the Court can order disgorgement
17 absent express statutory authority?

18 MR. RAPAWEY: We tried to show in our
19 opening brief, Your Honor, that -- that most of
20 those statutes do have some work to do. There
21 are one or two that don't.

22 Even in those cases, I would say that
23 those statutes at most reflect a presupposition
24 or awareness by Congress that courts were doing
25 this, not an authorization, and authorization is

1 what's needed to authorize -- to inflict a
2 penalty.

3 Finally, if the Court does conclude
4 that some remedy may survive -- may survive in
5 some case, I would urge it, nevertheless, to
6 reverse and not to remand in this case.

7 These individuals have already been
8 ordered to pay their entire gross pecuniary
9 gains, and anything above and beyond that would
10 go beyond the equitable principle that no
11 individual should be -- should be permitted to
12 profit from his or her own wrong.

13 And with that, Your Honors, I would
14 respectfully request the Court reverse.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel. The case is submitted.

17 (Whereupon, at 12:18 p.m., the case
18 was submitted.)

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