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IN THE SUPREME COURT OF THE UNITED STATES

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MARC J. GABELLI AND BRUCE ALPERT, :

Petitioners : No. 11-1274

v. :

SECURITIES AND EXCHANGE :

COMMISSION :

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Washington, D.C.

Tuesday, January 8, 2013

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:13 a.m.

APPEARANCES:

LEWIS LIMAN, ESQ., New York, New York; on behalf of  
Petitioners.

JEFFREY B. WALL, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.;  
on behalf of Respondent.

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P R O C E E D I N G S

(10:13 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 11-1274, Gabelli and Alpert v. the Securities and Exchange Commission.

Mr. Liman.

ORAL ARGUMENT OF LEWIS LIMAN  
ON BEHALF OF THE PETITIONERS

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

This case concerns the statute dealing exclusively with penalty claims brought by government agencies to punish conduct made unlawful by statute. Congress provided a clear and easily administered statutory time limitation on the government's power to punish: 5 years, except as otherwise provided by Congress.

The case does not concern -- the statute does not concern the government's power to seek remedial remedies such as disgorgement and injunction. Consistent with -- Congress's normal approach in penal situations, Congress fixed a statute of limitations for penalties. The court below, for the first time over the century the statute has been in existence, sweepingly concluded that unless Congress clearly directed

1 otherwise, the statute and the 5 years did not begin to  
2 run from the time the defendant violated the law, the  
3 ordinary rule for statutes providing for accrual, but  
4 instead --

5 JUSTICE GINSBURG: Mr. Liman. Mr. Liman,  
6 you -- you are typing this a penalty case. The  
7 government says yes the accrual is the ordinary rule, but  
8 discovery is the rule when there is fraud, and fraud is  
9 alleged here. So how does the Court decide whether to  
10 type this case a penalty case, as you urge, or a fraud  
11 case, as the government urged -- urges, when both  
12 captions fit?

13 MR. LIMAN: Your Honor, I think there are  
14 two answers to that. First is that the Court doesn't  
15 need to decide, Congress has decided. Congress made it  
16 quite clear that the rule of accrual applied to all  
17 penalty claims. And as this Court held in  
18 Clark v. Martinez, the same word in a statute cannot be  
19 given different interpretations depending on the  
20 underlying statute to which it is applied.

21 The second reason, though, Justice Ginsburg,  
22 is that it is not correct to say, and this Court has  
23 never said, that either the Bailey rule or the injury  
24 accrual rule applies to a statutory fraud claim where  
25 the government is seeking to punish. That would --

1 JUSTICE KENNEDY: Excuse me.

2 Justice Ginsburg points out that you're talking about  
3 the statute, but the statute uses the term "accrual."

4 Is it correct to say that the term "accrual" is not used  
5 in statute of limitations for crimes -- generally -- for  
6 crimes?

7 MR. LIMAN: For -- for crimes, the general  
8 word that is used is time period from the violation.

9 JUSTICE KENNEDY: Right. And this -- and  
10 this talks about accrual. So that is indicative -- is  
11 indicative of the fact that Congress is using a civil  
12 analogue in the drafting of this statute.

13 MR. LIMAN: Your Honor, it indicates that  
14 Congress is using accrual as it is understood at common  
15 law. Common law, it means when the claim becomes ripe  
16 and the plaintiff has the ability to sue. What that  
17 means is, as the D.C. Circuit said in 3M -- and we think  
18 the D.C. Circuit got it right on this -- that you look  
19 to the underlying statute pursuant to which the  
20 government is seeking a penalty to see when the claim  
21 became ripe.

22 In a penalty situation, and under the IAA,  
23 which is what this concerns -- it doesn't concern a  
24 common law fraud claim; it doesn't concern a claim where  
25 there's even any element of deception that's required.

1 It's a breach of fiduciary duty. What the IAA says is  
2 that the government can sue when the violation occurs.

3 Now --

4 JUSTICE SOTOMAYOR: Mr. Liman, I understand  
5 your argument, but I have a fundamental difficulty,  
6 okay?

7 Bailey and Exploration Company, with  
8 statutes not too dissimilar from this one, who read the  
9 discovery rule into a fraud claim, both for a civil  
10 litigant and for the government. The only way that I  
11 can tease out a potential difference between Exploration  
12 and this case is somehow that the penalty in this case  
13 is not for injury, but for punishment, as you called it.  
14 Government as enforcer, rather than government as  
15 victim.

16 Some of us would say that the common wheel  
17 is injured whenever someone breaks a law, so that that  
18 distinction between enforcer and victim makes no sense.

19 How do you answer that point?

20 MR. LIMAN: Justice Sotomayor, let me give  
21 you the precise answer to that, which is that in this  
22 case where the government is seeking a penalty, it is  
23 not acting on behalf of underlying investors, and the  
24 recovery is not one that is brought by way of damages or  
25 disgorgement.

1 JUSTICE SOTOMAYOR: It's acting as a  
2 sovereign to protect what it thinks is an ordered  
3 society. And if you break that order, you are injuring  
4 the society. That -- that's the best --

5 MR. LIMAN: Your Honor, I think that is the  
6 articulation that the government would have to make. I  
7 don't think it holds up, for several reasons. First of  
8 all, it would represent an extreme departure from  
9 anything this Court has ever held or, to our knowledge,  
10 any court has ever held with respect to the application  
11 of the discovery rule.

12 Second, when you're talking about penalty,  
13 you're not talking about recovery to -- to victims.  
14 Third, when we're talking about implying a rule, which  
15 is what the government's argument is here -- it's not an  
16 argument to follow the plain language, it's an argument  
17 to depart from the plain language -- you should look at,  
18 and the cases direct you to look at, the policy  
19 concerns. And when you're talking about discover -- a  
20 discovery rule with respect to the government as  
21 enforcer, the rules don't work. They don't work for  
22 several reasons.

23 First of all, when you've got an injury, a  
24 party who is injured, the statute of limitations has a  
25 natural start date that is not in control of the

1 plaintiff. There is a relationship to the underlying  
2 violation. And that can be readily measured. None of  
3 that is true when you're talking about the government in  
4 a law enforcement capacity.

5 JUSTICE KAGAN: Mr. Liman, what you  
6 suggested, when we talked about the discovery rule, is  
7 that it has its basis in the notion that a defendant with  
8 unclean hands who has committed deceptive conduct  
9 preventing the plaintiff from understanding that he or  
10 it has a cause of action -- you know, shouldn't be  
11 entitled to the benefit of a statute of limitations.

12 And if that's the understanding that lies  
13 behind the discovery rule, I guess the question for you  
14 is, why doesn't it apply in this case, as well as, in  
15 a case where the person bringing the action has  
16 himself suffered a harm?

17 MR. LIMAN: Justice Kagan, I've got two  
18 answers to that question as well. The first is that --  
19 that I don't think is the basis for the -- for the  
20 discovery rule at bottom. The basis for the discovery  
21 rule -- if you look at this Court's opinion in -- in  
22 Rotella, if you look at the Seventh Circuit in Cada, the  
23 D.C. Circuit in Connor -- is the notion that when the  
24 plaintiff cannot discover the injury, doesn't know that  
25 it's been injured, and cannot reasonably know that the



1 plaintiff's been injured, the plaintiff cannot take the  
2 steps that other plaintiffs would take to investigate  
3 and determine whether they've got a cause of action.

4 That's not applicable in a government  
5 enforcement context because you're not talking about  
6 there the government as a victim. The government may  
7 not know of the underlying transaction, will not know of  
8 the underlying transaction, unless the government asks.

9 The second reason is that there is a strain  
10 that -- in the Bailey line of cases -- that really  
11 speaks in terms of equitable tolling and fraudulent  
12 concealment, that sort of a notion of unclean -- unclean  
13 hands. That's not in this case because the government  
14 affirmatively took it out. But we would submit --

15 JUSTICE GINSBURG: How did the government  
16 take it out? I mean, the point here is that there was a  
17 concealment. There was a hiding of what was -- the  
18 impermissible action.

19 MR. LIMAN: That's -- that's not correct,  
20 Justice Ginsburg. If you'd look at the -- at the  
21 opinion below and you look at the complaint, the essence  
22 of the allegation, which we have not yet had a chance to  
23 disprove before you on a motion to dismiss, is that  
24 there were misrepresentations and omissions made to the  
25 board of the mutual fund. There was no

1 misrepresentations made to the investing public. That  
2 allegation is not in the complaint. It would not be  
3 accurate. And there is no allegation whatsoever that  
4 anything was hidden from the government or was in any  
5 way concealed from the government. The records here  
6 would have been available -- were available for the  
7 government to look at, at any time.

8 JUSTICE SOTOMAYOR: Mr. Liman, finishing up  
9 a point you were just on previously, what's your  
10 position with respect to fraudulent concealment?  
11 Doesn't your theory preclude even the application of  
12 that to tolling of the statute?

13 MR. LIMAN: Your Honor, I think you could  
14 and should conclude -- that if you reach that issue. I  
15 don't think you need to reach that issue.

16 JUSTICE SOTOMAYOR: But tell me about --

17 MR. LIMAN: Our theory doesn't require you  
18 to come to that conclusion.

19 JUSTICE SOTOMAYOR: This is -- it's nice for  
20 you to say that. But tell me, having announced your  
21 theory, how the next step is avoidable? Under what  
22 theory would we say you can't have a discovery rule, but  
23 you can have a fraudulent concealment rule?

24 MR. LIMAN: Your Honor, in the -- using the  
25 same type of theory and the same methodology that the

1 Court employed in the RICO context, in the Claire case,  
2 and in the Rotella case, one can read the statute, I  
3 think you have to read the statute, here to say that  
4 "accrue" means accrue. It's the time that the  
5 government can first sue.

6 That does not necessarily resolve the  
7 question of whether there are equitable exceptions that  
8 the government or any party could affirmatively assert  
9 to toll the statute of limitations, not to delay the  
10 accrual of the statute of limitations.

11 JUSTICE SCALIA: Mr. -- Mr. Liman, you  
12 acknowledge that a civil action could be brought  
13 beginning from the time when the injured plaintiff  
14 discovers the fraud, right?

15 MR. LIMAN: That's --

16 JUSTICE SCALIA: So you're really not  
17 arguing for what you might call a total statute of  
18 repose. It seems to me odd that the defendant would be  
19 relieved from prosecution by the government, but not  
20 relieved from a suit for sometimes very substantial  
21 damages by -- by an injured plaintiff who doesn't have  
22 to sue until he's discovered the fraud.

23 MR. LIMAN: Your Honor, respectfully, we  
24 don't think that's not odd at all. If you look in the  
25 securities context, there is a 5-year statute of repose.

1 And it would be odd to think that the same Congress that  
2 passed that 5-year statute of repose limiting even the  
3 ability of an injured plaintiff without the tools of the  
4 government to bring a private suit for damages, that's  
5 the --

6 JUSTICE SCALIA: Sure. But that 5 years  
7 doesn't begin to run until the private plaintiff  
8 discovers the fraud, right?

9 MR. LIMAN: That's -- that's not correct,  
10 Your Honor.

11 JUSTICE SCALIA: No?

12 MR. LIMAN: Under Title 28 1658(b) the 5  
13 years runs from the time of the violation. It's exactly  
14 coextensive with 2462, and it's not an accident that it's  
15 exactly coextensive.

16 JUSTICE GINSBURG: Mr. Liman, how does it  
17 work with a disgorgement remedy? I take it that that's  
18 still -- that you are not challenging the disgorgement?

19 MR. LIMAN: We are not challenging the  
20 disgorgement in front of this Court, and if this Court  
21 reverses the Second Circuit that -- that issue will  
22 remain in the case and the SEC's claim for disgorgement  
23 will remain, and that's really been the way --

24 JUSTICE GINSBURG: But you don't apply --  
25 you don't say it's too late for them to sue for

1 disgorgement?

2 MR. LIMAN: 2462 applies exclusively with  
3 respect to penalties, fines and forfeitures. It does  
4 not apply with respect to equitable remedies.

5 JUSTICE GINSBURG: So is there any statute  
6 of limitations on disgorgement?

7 MR. LIMAN: There is none. There is none.

8 JUSTICE BREYER: Does it apply to Social  
9 Security? Does it apply to Veterans Affairs?

10 MR. LIMAN: The -- there is a Social  
11 Security statute that --

12 JUSTICE BREYER: Does this statute apply to  
13 Social Security?

14 MR. LIMAN: Yes.

15 JUSTICE BREYER: Does it apply to Veterans  
16 Affairs? Yes or no or you don't know?

17 MR. LIMAN: I don't know on Veterans  
18 Affairs.

19 JUSTICE BREYER: What about Social Security?

20 MR. LIMAN: Social Security, there is an  
21 underlying statute --

22 JUSTICE BREYER: Then, I'm asking about this  
23 statute. Does it apply?

24 MR. LIMAN: The answer is yes. The answer  
25 is yes. It applies to a broad range of statutes, unless

1 Congress otherwise provided. In fact, there are very  
2 few penalty statutes to which it does not apply.

3 JUSTICE BREYER: Defense Department?

4 MR. LIMAN: It does apply to a number of  
5 Defense Department statutes. I'm hesitating --

6 JUSTICE BREYER: Antitrust?

7 MR. LIMAN: I'm not sure on antitrust. But  
8 I believe that it applies to -- it does apply to a  
9 number of unfair trade practices. Antitrust, there may  
10 be a separate statute.

11 JUSTICE BREYER: FTC, you don't know?

12 MR. LIMAN: FTC, yes.

13 JUSTICE BREYER: It does apply to FTC, okay.  
14 So Social Security, FTC. Veterans Affairs we don't  
15 know, antitrust we don't know. Okay.

16 MR. LIMAN: One of the notable features,  
17 Justice Breyer, is that if you look across the U.S.  
18 Code, the government makes a point of saying: Well,  
19 Congress uses penalty -- acknowledges that Congress has  
20 used penalty when -- the word "penalty" when the  
21 Congress has -- I'm sorry, it has used the word  
22 "discovery" when Congress has wanted the statute to --

23 JUSTICE SOTOMAYOR: Mr. Liman, I'm a little  
24 confused in your answer to Justice Scalia. You said  
25 that the underlying case has a 5-year statute of repose

1 for a civil claim. If Bailey applies, however, those  
2 claimants who have -- under your theory, who have been  
3 directly injured. The presumption would apply of  
4 discovery, if they were claiming a fraud.

5 MR. LIMAN: No -- no, Your Honor.

6 JUSTICE SOTOMAYOR: So are you just arguing  
7 that under this statutory scheme there is no application  
8 of the discovery?

9 MR. LIMAN: This -- this Court has held in  
10 the Lampf case that Bailey and Holmberg do not apply to  
11 securities fraud case.

12 JUSTICE SOTOMAYOR: Because of the  
13 alternative language of 5 years.

14 MR. LIMAN: Well, in Lampf it was 1-year and  
15 3-year.

16 JUSTICE SOTOMAYOR: Right.

17 MR. LIMAN: And in the Merck case, the Court  
18 made clear that the 5 years was the statute of -- the  
19 statute of repose.

20 JUSTICE SOTOMAYOR: That's what I thought  
21 those involved.

22 JUSTICE BREYER: Medicare, Medicaid?

23 MR. LIMAN: Yes.

24 JUSTICE KAGAN: It is true, though, isn't  
25 it, that Justice Scalia pointed to an anomaly that could

1 easily exist in other contexts because this isn't only a  
2 statute about securities violations. So that you might  
3 have in other contexts in which this statute applies a  
4 world in which a private individual could sue, but the  
5 government -- could sue after the -- the period of  
6 time --

7 MR. LIMAN: Yes.

8 JUSTICE KAGAN: -- the 5 years, but the  
9 government could not.

10 MR. LIMAN: Yes, Justice Kagan. And we  
11 don't think that's an anomaly. We don't think it's an  
12 anomaly for two reasons. First of all, in the private  
13 context, as again I mentioned, the statute, the start  
14 date for the statute of limitations is not in the  
15 control of the plaintiff. That's a critical point.  
16 It's critical in this Court's jurisprudence from Hubrick  
17 forward. It -- there is a natural start date from when  
18 the injury would be known to a reasonable plaintiff.  
19 Not true with respect to the government, who may not  
20 even know of the transaction. And -- but what it -- so  
21 it's -- I don't think there's an anomaly because there  
22 are different statutes of limitation.

23 JUSTICE KAGAN: And I take it that your view  
24 would be that a case like Exploration, it's different  
25 than this case because it does have a natural start



1 date; is that the idea?

2 MR. LIMAN: Number one, it does. And number  
3 two, the relief being sought in Exploration was the  
4 cancellation of a patent, so it was the government as a  
5 party to a transaction. And what the Court really said  
6 in Exploration, what the Court, in fact, said in  
7 Exploration, is that there is no reason why the same  
8 rule applied the same way couldn't benefit the  
9 government, as well as the private plaintiff.

10 What the government is seeking here is not  
11 the same rule and would not be applied in the same way  
12 because you are talking about a transaction that is a,  
13 frankly, a private transaction that there is no reason  
14 that the government would know anything about. The  
15 claim ultimately here is a claim about what was said in  
16 a private conversation between the advisor to a mutual  
17 fund and the mutual fund -- fund board.

18 So Exploration, what's notable is that the  
19 government doesn't cite a single case where the  
20 discovery rule has been applied to a party who is not a  
21 victim or that it's been applied -- where it's been  
22 applied and a penalty hasn't been -- a penalty has been  
23 at issue. I mean, neither of those circumstances. We  
24 are talking about a statute ultimately where the plain  
25 language is clear and the government is invoking a

1 statutory canon not to try to interpret language of the  
2 statute, not even to fill a gap in a statute, but to  
3 override it. The canon that they say overrides the  
4 plain language doesn't exist.

5 JUSTICE KENNEDY: In a civil -- in a civil  
6 action brought by an injured investor or private party,  
7 can that plaintiff, the injured investor, the private  
8 party, in the ordinary course plead and rely upon an  
9 earlier government determination that there had been a  
10 violation and so that that's presumptive showing of  
11 liability?

12 MR. LIMAN: Your Honor --

13 JUSTICE KENNEDY: In other words, the SEC  
14 makes an investigation, finds a violation; can a private  
15 investor then rely on that as a presumptive showing of  
16 liability?

17 MR. LIMAN: Yeah. I think the lower courts  
18 are mixed on the extent to which you can rely upon the  
19 actual allegations in a complaint.

20 JUSTICE KENNEDY: No, not the allegation.  
21 It's an ultimate finding.

22 MR. LIMAN: Absolutely.

23 JUSTICE KENNEDY: But then under your rule.  
24 The plaintiff would be deprived of that.

25 MR. LIMAN: No, that's not correct,

1 Your Honor. Under our rule the plaintiff has exactly  
2 the same rights, regardless of how this case is  
3 determined. The plaintiff's cause of action will turn  
4 upon the underlying --

5 JUSTICE KENNEDY: But if the government's  
6 statute of limitations runs out and the private investor  
7 is on his own, then the private investor doesn't have  
8 the advantage that exists in other cases of reliance on  
9 a -- SEC finding as a presumptive showing of liability.

10 MR. LIMAN: Your Honor, that -- that -- our  
11 argument only applies with respect to penalty. The  
12 government has huge powers with respect to disgorgement  
13 and injunctive relief. So, if the government believes  
14 that there is a wrongdoing, the government still has the  
15 ability to bring a claim and the private investors still  
16 have the ability to rely upon the government's  
17 enforcement action and whatever findings come out of  
18 that. So there is nothing in our argument that  
19 diminished, to any degree, the recovery abilities of a  
20 private plaintiff.

21 In fact, as we've highlighted, that 5-year  
22 period for the -- in the securities laws puts a premium  
23 on the SEC acting promptly. And I would note that  
24 that's something that is not accidental. If you go back  
25 in the legislative history and look to the SEC's

1 reaction to the Lampf decision, the SEC urged a 5-year  
2 statute of repose, saying that that struck in the  
3 private context the right balance between repose when  
4 you're dealing with complex commercial transactions and  
5 enforcement and -- and recovery.

6           There's -- the position that the SEC is  
7 taking now is a novel position that to -- to our  
8 knowledge has not been taken by other regulators and  
9 hasn't been taken by the SEC until -- until quite  
10 recently. This statute's been on the books for quite a  
11 long time, and it's notable that agencies have not urged  
12 that -- that interpretation.

13           JUSTICE GINSBURG: Are there no statutes,  
14 Mr. Liman, that say the claim accrues when the injury is  
15 discovered, that use both -- both terms?

16           MR. LIMAN: I'm sorry, Justice Ginsburg. I  
17 missed the question.

18           JUSTICE GINSBURG: Are there no statutes  
19 that use both terms, "accrues" and "discovery"? A  
20 statute, for example, that says, this claim accrues when  
21 the injury is discovered?

22           MR. LIMAN: There are statutes that use that  
23 kind of language, and that's precisely our point because  
24 it reflects that Congress recognizes the difference and  
25 could, if Congress wanted, provide that a claim for the

1 violation of the IAA or for any other statute accrues  
2 when it is discovered.

3 If there are no further questions, I would  
4 like to reserve the remainder of my time.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
6 Mr. Wall.

7 ORAL ARGUMENT OF JEFFREY B. WALL

8 ON BEHALF OF THE RESPONDENT

9 MR. WALL: Mr. Chief Justice and may it  
10 please the Court:

11 I think Justice Kennedy started us off in  
12 the right place by focusing on the statute and its use  
13 of the term "accrual." And when counsel concedes that  
14 that term had an established meaning at common law and  
15 this statute picks it up, I think he gave away his case  
16 because there were a cluster of concepts. One was the  
17 general rule governing accrual: It accrues when the  
18 plaintiff can -- has a right to sue.

19 But there was a specific principle for cases  
20 of fraud and concealment. And I don't think there is  
21 any basis in law or logic for Petitioner saying that  
22 this statute meant to pick up one of those concepts and  
23 not the other concept.

24 JUSTICE SCALIA: I don't think the common  
25 law held that it didn't accrue. I think it was an

1 exception to the accrual rule, that, even though it  
2 accrued earlier, we are going to allow a later suit  
3 where -- where discovery is made later. I -- is that  
4 the way those cases were framed, that it didn't accrue  
5 until discovery?

6 MR. WALL: Justice Scalia, I don't want to  
7 fight about it too much because from the government's  
8 perspective, it doesn't matter --

9 JUSTICE SCALIA: Well, you are making the  
10 argument, so you ought to fight about it.

11 MR. WALL: It doesn't matter how it's  
12 labeled. It doesn't matter whether we label it as an  
13 interpretation of the statute or an exception for cases  
14 of fraud or concealment. The result is the same.

15 But I will say you are right, in some cases  
16 it was described as an exception, but as long ago as  
17 Kirby in 1887 and as recently as Merck --

18 JUSTICE SCALIA: And never in a criminal  
19 case, right? Do you have a single case in which the  
20 discovery rule was -- was applied in a criminal case  
21 with respect to a penalty or a criminal sanction?

22 MR. WALL: No, not in --

23 JUSTICE SCALIA: Not a single one.

24 MR. WALL: Well, no. The criminal context  
25 is fundamentally different. This Court has said that

1 those statutes are construed liberally in favor of  
2 repose and are presumptively not subject to --

3 JUSTICE BREYER: Now, that's the question  
4 because I certainly agree with Justice Scalia that this  
5 is not an SEC statute, this is not a securities statute;  
6 it is a statute that applies to all government actions,  
7 which is a huge category across the board and it's about  
8 200 years old.

9 And until 2004 I haven't found a single case  
10 in which the government ever tried to assert the  
11 discovery rule where what they were seeking was a civil  
12 penalty, not to try to make themselves whole where they  
13 are a victim, with one exception, a case called Maillard  
14 in the 19th century where they did make that assertion.  
15 They were struck down by the district court, and the  
16 attorney general in his opinion said, the district  
17 court's absolutely right; of course, the government  
18 cannot effectively abolish the statute of limitations  
19 where what they're trying to do is to gather something  
20 that's so close to a criminal case.

21 So my question is: Is there any case at all  
22 until the year 2004, approximately, in which the  
23 government has either tried or certainly succeeded in  
24 taking this general statute and applying the discovery  
25 rule where they are not a victim, they are trying to

1 enforce the law for the civil penalty?

2           The reason I brought up Social Security,  
3 Veteran's Affairs, Medicare, is it seems to me to have  
4 enormous consequences for the government suddenly to try  
5 to assert a quasi-criminal penalty and abolish the  
6 statute of limitations, I mean, in a vast set of cases.  
7 And that -- you know, I have overstated that last remark  
8 a little bit, but I want you to see where I'm coming  
9 from, which isn't so different from the -- from the  
10 questions that have been put to you.

11           MR. WALL: Justice Breyer, most or many of  
12 the penalty claims that are being brought under Section  
13 2462 and other penalty statutes don't deal with fraud or  
14 concealment, and I grant you that it is a problem --

15           JUSTICE BREYER: All I'm asking you for is  
16 one case.

17           MR. WALL: So in -- it's a problem of fairly  
18 recent vintage, to be sure --

19           JUSTICE BREYER: No, it is not a problem of  
20 fairly recent vintage. I'd say for 200 years there is  
21 no case. The only case, as far as I have been able to  
22 discover, which is why I am asking, is that what created  
23 the problem of recent vintage is that the Seventh  
24 Circuit, I guess, or a couple of other circuits decided  
25 that this discovery rule did apply to an effort by the



1 government to assert a civil penalty. That's what  
2 created the problem. Before that there was no problem;  
3 it was clear the government couldn't do it.

4 All right. Now, you will tell me that I'm  
5 wrong by citing some cases that show I'm wrong. And  
6 that's what I'm asking. I want to be told I'm wrong,  
7 sort of.

8 (Laughter.)

9 MR. WALL: And I guess what I want to tell  
10 you is there aren't cases out there one way or the  
11 other. There aren't cases endorsing or declining to  
12 adopt the discovery rule in the context of fraud or  
13 concealment with civil penalty actions --

14 JUSTICE SCALIA: You'd expect that - you'd  
15 expect there to be some cases in a couple of hundred  
16 years.

17 JUSTICE BREYER: No, I haven't found one.

18 JUSTICE SCALIA: Fraud is nothing new, for  
19 Pete's sake.

20 MR. WALL: Justice Scalia, it's not that --

21 JUSTICE SCALIA: This is brand-new assertion  
22 by the government that -- tell -- is there much  
23 difference between the rule you are arguing for and a  
24 rule that there is no statute of limitations?

25 MR. WALL: Absolutely there is. Since --

1 look, in 1990 the Commission was given the right to seek  
2 civil penalties, so it could only have brought these  
3 actions for the last 20 years. In those 20-plus years,  
4 we have seen 25 reported cases dealing with 2462 and  
5 civil penalties. In 19 of those cases, the Commission  
6 brought its action within 5 years of the end of the  
7 fraud. It used the discovery rule only to reach back  
8 and get the beginning of the fraud.

9 CHIEF JUSTICE ROBERTS: Well, but that  
10 ignores the point that has been raised, is that this  
11 statute does not just apply in the SEC context. How  
12 many cases have you found across the board in the range  
13 of those areas that Justice Breyer catalogued?

14 MR. WALL: There are cases from the 1980s  
15 and 1990s dealing with concealment, and in our view the  
16 justification is the same for concealment as fraud.

17 JUSTICE BREYER: I mean, we are asking the  
18 same question, but in 30 seconds I am going to conclude  
19 there is none. What I want is a case before the year  
20 2000 in which the government sought a civil penalty and  
21 was not trying to recover money or land that it had  
22 lost, and I want the name of that case in which they  
23 said that the discovery rule applies.

24 The two that you cited, Amy and the case of  
25 Broderick's Will, did involve the government being

1 injured by losing land or losing money, something like  
2 that. So I have those and I don't think they count, but  
3 I will look at them again. Is there anything else you  
4 would like to refer me to?

5 MR. WALL: Justice Breyer, I don't think  
6 there is anything on either side of the ledger, I will  
7 be very upfront, other than the Maillard case, which I  
8 think even courts at the time, an exploration company,  
9 the court of appeals recognized --

10 JUSTICE SCALIA: It's not a matter of there  
11 being nothing on either side of the ledger. What's  
12 extraordinary is that the government has never asserted  
13 this, except in the 19th century, when it was rebuffed  
14 and -- and repudiated its position. It isn't just that  
15 there are no cases against you. It's you've never --  
16 the government has never asserted it before.

17 MR. WALL: Justice Scalia, there were very  
18 few civil penalty actions in which -- that involved  
19 fraud or concealment, in which the government would have  
20 needed to invoke it, or did invoke it and was rebuffed  
21 by courts. I mean, this is a fairly modern problem, and  
22 the question is do all of the same concepts that  
23 compelled one answer in these other contexts compel the  
24 same answer here or does a rule that blankets the  
25 waterfront --

1 JUSTICE SOTOMAYOR: So, this is a very  
2 modern problem, but how about the statute of Elizabeth,  
3 which talked about penalties as being a criminal  
4 sanction, but permitted private individuals, not the  
5 government, to seek the penalties and keep it. So you  
6 cite the statute of James, and I look at the statute of  
7 Elizabeth, and try to find the analogy between which  
8 one.

9 MR. WALL: Well, if this were a criminal  
10 penalty, the government agrees --

11 JUSTICE SOTOMAYOR: Even though private  
12 parties could keep the money back then.

13 MR. WALL: That's right. But what the  
14 Court's been clear on is that there are civil penalties  
15 and there are criminal penalties and which side of the  
16 line it falls on invokes a different set of background  
17 rules and legal norms. The Congress denominated this as  
18 a civil penalty --

19 JUSTICE SOTOMAYOR: Could I move you to  
20 another issue? If a party can defeat the government's  
21 claim of discovery by showing that the government wasn't  
22 reasonably diligent, how does a party ever accomplish  
23 that? Aren't you going to raise the law enforcement  
24 privilege, the -- some other privilege to block --  
25 discovery?

1           MR. WALL: Justice Sotomayor, discovery is  
2 playing itself out in cases like these in district  
3 courts. Privilege has not been a very major issue and  
4 the reason is defendants are by and large pointing to  
5 things in the public domain -- private lawsuits, public  
6 filings with the Commission, public statements -- to say  
7 those put the Commission on constructive words --

8           JUSTICE SOTOMAYOR: Well, if they fail  
9 there, don't you think that they are going to also fail  
10 because they are not going to be able to look at your  
11 records to figure out exactly what you knew or didn't  
12 know?

13          MR. WALL: No, not invariably. I mean, the  
14 way this plays itself out in the district court is the  
15 Commission says that it didn't know and a defendant  
16 points to something in the public domain and says either  
17 that put you on constructive notice or --

18          CHIEF JUSTICE ROBERTS: So it depends really  
19 on how many enforcement officers the SEC has, is it  
20 reasonable for them to have been aware of the particular  
21 item in some publication. Maybe if they've got 1,000  
22 people reviewing it, but maybe not if they have 10; and  
23 that's just not the -- I mean, it's not just the SEC;  
24 it's all these other government areas.

25           It seems to me that it's going to be almost

1 impossible for somebody to prove that the government  
2 should have known about something. And which part of  
3 the government? I mean, it's a big, big government, and  
4 particular agencies -- well, you say, well, the Defense  
5 Contractor Board should have known, but does that mean  
6 that the U.S. attorney's office or the Defense Counsel's  
7 office should have known?

8           It seems to me that, at least with respect  
9 to that aspect, you really are eliminating any real --  
10 it's certainly not a lot of repose if the idea is, well,  
11 I've got to establish that this particular government  
12 agency should have known about this.

13           You certainly can't sit back and say, well,  
14 5 years has gone by and --

15           MR. WALL: Mr. Chief Justice, they can't  
16 point to a single case where it has been difficult here,  
17 and it hasn't been difficult --

18           CHIEF JUSTICE ROBERTS: They can't point to  
19 a single case?

20           MR. WALL: Where it's been difficult in  
21 order to make that determination. And it hasn't proven  
22 difficult --

23           CHIEF JUSTICE ROBERTS: So you think it's  
24 significant if you can't point to a single case?

25           MR. WALL: Well, I think there are -- where

1 you should expect those cases to exist, yes.

2 JUSTICE KENNEDY: Are -- are there cases  
3 discussing whether or not a government agency has been  
4 diligent in pursuing a fraud, a fraud investigation?  
5 You see, in the private context we have some sense of  
6 what the plaintiff has to do to protect the plaintiff's  
7 rights. He has to be diligent. But to transpose that  
8 to a governmental agency -- suppose the agency's over --  
9 overworked or underfunded? I don't -- which way do you  
10 come out when the government says that?

11 MR. WALL: Justice Kennedy, not just this  
12 statute. There are other statutes, the False Claims Act  
13 and others, that have specific provisions requiring  
14 courts to determine when a government official would  
15 reasonably have been on notice of certain circumstances.  
16 That hasn't proven difficult in those contexts. It's  
17 not difficult here.

18 JUSTICE ALITO: Well I have the same question  
19 that Justice Kennedy just asked? What if a claim could  
20 have reasonably been discovered by a government agency if  
21 it had more resources, but given the resources that it had  
22 it couldn't have reasonably discovered the claim? Would  
23 the discovery rule apply there?

24 MR. WALL: I -- I don't think so,  
25 Justice Alito. I mean, I think we could say that there

1 might be circumstances where the Commission would be on  
2 constructive notice and not a private plaintiff because  
3 of its expertise. It would see something in the public  
4 domain that should be meaningful to it that might not be  
5 meaningful to a private plaintiff --

6 JUSTICE SCALIA: The False Claims Act  
7 example you give is indeed a private plaintiff kind of a  
8 case.

9 MR. WALL: That's --

10 JUSTICE SCALIA: Yes, you can say the  
11 government, having been cheated, should have known it  
12 was cheated. But we are talking here about prosecution,  
13 essentially, prosecution for a civil penalty rather than  
14 a criminal. By the way, doesn't the rule of lenity  
15 apply whether the penalty is criminal or civil? So if I  
16 think the word "accrual" is, at best, ambiguous,  
17 shouldn't the tie go to the defendant?

18 MR. WALL: No. The court's been very -- I  
19 mean, in all of the civil cases applying the fraud  
20 discovery rule, the court has never looked to the  
21 criminal analogies. The canon here is that ambiguities  
22 get construed for the sovereign, not against it.

23 JUSTICE SCALIA: But my question is broader  
24 than that. Does the rule of lenity not apply to all  
25 penalties?



1           MR. WALL: I don't think it applies in the  
2 context of a civil penalty. I don't think the -- I  
3 don't think the --

4           JUSTICE SCALIA: Are you sure of that? My  
5 belief is the contrary.

6           MR. WALL: I can't say that I focused on it  
7 specifically, but I think if the Petitioner said --

8           JUSTICE SCALIA: Well, it's an important  
9 issue in this case, surely. I mean, if "accrual" is  
10 ambiguous and we have a rule of lenity, we should  
11 interpret it to favor the defendant.

12          MR. WALL: Justice Scalia, I don't --  
13 Petitioner certainly couldn't claim that this civil  
14 penalty should have to be proved beyond a reasonable  
15 doubt, or that they are entitled to a constitutional  
16 right to counsel. I don't know why one legal norm among  
17 them all should change in the civil context and not the  
18 others.

19          JUSTICE BREYER: The reason would be that  
20 the -- you know, once you start talking about applying  
21 this to Social Security, for example, or to Medicare,  
22 for example, or to DOD, for example, you have somebody  
23 who did commit some fraud and they kept the money. You  
24 know, she had five children not four, or she has five,  
25 not six. And I can understand it being fair when the

1 government catches her -- you know, 18 years later, they  
2 say, We want our money back. Okay. I say that's fair,  
3 not necessarily merciful, but fair.

4 But then to go and say, and in addition we  
5 want this civil penalty, even though -- of course, we  
6 couldn't have discovered it. Don't you know there are 4  
7 million people who get Social Security or 40 million or  
8 something, and we can't police every one. And so  
9 suddenly, I see I am opening the door, not just to  
10 getting your money back, but to also you're having what  
11 looked like criminal penalties years later without much  
12 benefit of a statute of limitations.

13 That is at the back of my mind. And I'd  
14 like to know, having brought it up front, what -- what  
15 your response is.

16 MR. WALL: Absolutely. There are anomalies  
17 on both sides of the coin and I just want to touch on  
18 both very briefly. Take the example you gave. In that  
19 situation, the defendant's fraud or concealment  
20 would allow it or him to escape paying civil penalties,  
21 but not private damages.

22 JUSTICE BREYER: That's right.

23 MR. WALL: This Court has never privileged a  
24 private lawsuit above a government enforcement action in  
25 the securities context --

1 JUSTICE BREYER: But this is not the  
2 securities context. This is the context of -- that's  
3 why I started down the road I was down.

4 MR. WALL: But even in that context, imagine  
5 if there's a private right of action, the private  
6 plaintiff will be able to recover damages and the  
7 government will not --

8 JUSTICE BREYER: Yes, because you have two  
9 people who are hurt, where two people have been hurt.  
10 For example, I wrote the case in *Burk* and we had the  
11 statute of limitations and Congress focused on this.  
12 And it wrote a two-tier statute. And it wrote a  
13 two-tier statute in large part because it was concerned  
14 about the problem you mention. You have a victim. So  
15 you're either going to let the defendant keep the money  
16 or the victim gets it back. I understand that, but this  
17 is not that context. This is like a criminal context,  
18 where not only are you getting your money back, but you  
19 also want to assess a kind of criminal penalty. And in  
20 that situation, I see a pretty clear line and I don't  
21 understand why the government is so anxious to change  
22 what has long been the apparent --

23 MR. WALL: Justice Breyer imagine the opposite,  
24 which is far more dangerous. Imagine a bank makes a bad  
25 loan to a veteran, or a bank tells the FDIC that it's gotten

1 mortgage insurance to help lower income families buy  
2 homes, and then that fraud or falsity escapes detection  
3 for five years. The Veterans Administration or the FHA  
4 then is barred from bringing a civil penalty action, and  
5 there is no private right of action.

6 JUSTICE BREYER: That's correct, you have a  
7 fraud and you can't put them in jail either, but you can  
8 get your money back.

9 MR. WALL: But the reason there's no private  
10 right of action in those contexts is, in part, because  
11 government agencies can seek civil penalties. And I  
12 cannot imagine that the Congress, which allowed agencies  
13 to seek civil penalties, where here they had existing  
14 remedies, would have thought that the only people who  
15 could get away without paying them are the ones who  
16 commit fraud or concealment and that remains hidden for  
17 five years.

18 CHIEF JUSTICE ROBERTS: And the reason --  
19 the reason there's no private action -- right of action  
20 is not because the government could seek civil  
21 penalties, it's because Congress hasn't provided a  
22 private right of action.

23 MR. WALL: That's right because it thought  
24 that the agencies could seek civil penalties and that  
25 was sufficient.

1 JUSTICE BREYER: Oh, no, your case--

2 CHIEF JUSTICE ROBERTS: But it didn't -- it  
3 didn't necessarily think, and that's why we have a case,  
4 that they could seek civil penalties 10 years later,  
5 18 years later, however long, so long as they were busy  
6 doing other things and didn't have a chance to know.

7 MR. WALL: No question. And in the average  
8 typical case, the time that Congress afforded is enough  
9 and we're not here claiming any different, but that --

10 JUSTICE GINSBURG: And it is a generous  
11 period. It's -- it's 5 years. And, Mr. Wall, maybe you  
12 can explain the SEC's pursuit of this -- of this case.  
13 The alleged fraud went on from 1999 to 2002. It was  
14 discovered in 2003. The SEC waited from 2003 to 2008 to  
15 commence suit. What -- what is the reason for -- for  
16 the delay from the time of discovery till the time suit  
17 is instituted?

18 MR. WALL: Justice Ginsburg, there was a lot  
19 of back and forth between the parties, document  
20 exchanges, they wanted to make additional submissions.  
21 The government hoped that there would be a settlement  
22 that would encompass all the defendants. Ultimately,  
23 there was a settlement that only went to the fund and  
24 Petitioners did not settle and then the government put  
25 together and brought its case.

1 JUSTICE KAGAN: But, Mr. Wall, I'll go even  
2 further than Justice Ginsburg. I mean this case actually  
3 seems to me a good example when Mr. Liman said there's  
4 no natural starting point and Justice Kennedy and  
5 Justice Alito referred to just -- this is a -- this is a  
6 decision about enforcement priorities. The government  
7 had decided not to go after market timers. And it  
8 changed its decision when a State attorney general  
9 decided to do it, and it embarrassed them that they had  
10 made that enforcement priority decision, and then the  
11 government made a different enforcement priority  
12 decision. But that's not the kind of situation that the  
13 discovery rule was intended to operate on, is it?

14 MR. WALL: Justice Kagan, I don't think  
15 that's fair. We didn't go -- it wasn't market timing  
16 that we discovered. What General Spitzer announced was  
17 there are advisors that are permitting market timing,  
18 but misleading investors about it and they're doing it  
19 in return for investments in other funds that they  
20 manage, what are called sticky asset agreements, and  
21 then we started doing market sweeps for those  
22 agreements.

23 And I don't think we can ignore the evidence  
24 here because we shouldn't decide the case based on  
25 feverish hypotheticals. There are 25 reported cases

1 brought by the Commission involving this statute, 19  
2 were brought within 5 years and they were just reaching  
3 back to pick up the beginning of the fraud. And the  
4 other six, including this case, the longest lag time was  
5 six and a half years from the end of the fraud to  
6 bringing the complaint.

7 And the reason is these are dynamic markets.  
8 There's a lot going on in the public domain that puts  
9 the commission on notice, inquiry or constructive, and  
10 starts the clock running. Not only have we not seen a  
11 10, a 15, a 20-year case, we haven't seen a 7-year case.

12 JUSTICE BREYER: Well, if all that's true,  
13 and this is a point I want you to -- I'm not sure I am  
14 right about this point, but remember your banking case  
15 now, we're sounding like that, I thought -- doesn't the  
16 doctrine of fraudulent concealment still apply? That  
17 is, if the defendant, in fact, takes any affirmative  
18 action to hide what's going on, the statute will be  
19 tolled. Is that right?

20 MR. WALL: That's right, but that --

21 JUSTICE BREYER: All right. As long as  
22 that's right, then in all your banking cases, there are  
23 bank inspectors all over these banks, I hope -- you  
24 know, about once a month or so --

25 MR. WALL: But Justice Breyer, that's --

1 JUSTICE BREYER: -- or once a year. And so  
2 the chance of there -- the chance of this somehow  
3 escaping notice without fraudulent concealment, which  
4 would allow the government to extend the toll strikes me  
5 as small, but am I right?

6 MR. WALL: Justice Breyer, I want to be  
7 clear. In the government's view, the concealment would  
8 apply, though Petitioners or others like them will be  
9 back here making exactly the same arguments. The  
10 government's point is just at equity fraud and  
11 concealment were a pair and the justification was the  
12 same for both.

13 JUSTICE KENNEDY: Well, perhaps I've missed  
14 something. I -- I came in here thinking that both  
15 parties were willing to concede for purposes of this  
16 case that there was a fraudulent concealment. Is  
17 that -- is that wrong?

18 MR. WALL: I -- I --

19 JUSTICE KENNEDY: I mean, for purposes of  
20 presenting the statute of limitations issue that's  
21 before us.

22 MR. WALL: I don't think the Petitioners are  
23 disputing it here, but I think Mr. Liman acknowledged  
24 earlier that, if pressed, his arguments could be  
25 leveraged to get rid of the concealment doctrine, too.



1 JUSTICE SCALIA: He didn't concede that  
2 there was fraudulent concealment. All he conceded is  
3 that there was fraud, but later concealment to cover up  
4 that fraud I don't think has been conceded.

5 MR. WALL: Oh, no, no, not -- I didn't --  
6 I'm sorry, Justice Scalia. I wasn't trying to mislead.  
7 This is not a concealment case. This is a fraud case.

8 JUSTICE BREYER: I thought it was the  
9 opposite. In other words, I thought both parties, for  
10 purposes of this argument, are assuming fraudulent  
11 concealment has nothing to do with it. We are not to  
12 consider fraudulent concealment.

13 MR. WALL: This is a fraud case, not a  
14 concealment case.

15 JUSTICE BREYER: Am I right when I say that?

16 MR. WALL: Yes. I was just trying to say  
17 that once you say there is a concealment exception, the  
18 fraud exception follows from equity because they were of  
19 a piece. And once you say there is not a fraud  
20 exception, the same arguments will be leveraged to get  
21 rid of a concealment exception. And the reason that  
22 equity treated them as -- of a piece was the deception  
23 was the same. The fraud was self-concealing or even if  
24 it was non-fraud, the defendant could conceal, but  
25 either way --

1 JUSTICE SCALIA: Except that concealment is  
2 sort -- you know, it's sort of a self-starter. You --  
3 you -- it -- it doesn't apply always. It applies when  
4 there is concealment, and the person who is being  
5 subjected to the longer statute of limitations is on  
6 notice that if he fraudulently conceals, he's extending  
7 the statute. So I -- I don't think that the one has to  
8 go with the other. Maybe they're both equitable  
9 doctrines, but that doesn't -- that doesn't mean that we  
10 have to apply them to this statute.

11 MR. WALL: Justice Scalia, for 300 years,  
12 English and American courts looking at this problem have  
13 said where the defendant's misconduct, be it fraud or be  
14 it concealment of a non-fraud, but where the defendant's  
15 deception prevents a plaintiff from knowing that he, she  
16 or it has a cause of action, equity suspends the running  
17 of a statute of limitations. Those -- that has been --

18 JUSTICE SCALIA: And for 300 years, that has  
19 been said only with respect to civil actions, not with  
20 respect to the government's attempt to exact a penalty.

21 JUSTICE KENNEDY: That's correct.

22 MR. WALL: Justice Scalia, this is a civil  
23 action. I don't think even Petitioners are disputing  
24 that.

25 JUSTICE BREYER: I assume that we are on the

1 same ground, but I don't know that you have -- I mean,  
2 I'm worried about your giving up the fraudulent  
3 concealment. I mean, you wouldn't give up equitable  
4 estoppel, would you?

5 MR. WALL: If I gave up anything on  
6 fraudulent concealment, I didn't mean to.

7 JUSTICE BREYER: No, no, no. I mean -- I  
8 mean, there's nothing --

9 (Laughter.)

10 MR. WALL: I want to be very clear, I give  
11 up nothing.

12 JUSTICE BREYER: If we were to say -- if  
13 we -- if the Court were to hold, it seemed to me, and  
14 this is again tentative to get your response, but if the  
15 -- if the Court were to hold the discovery doesn't --  
16 rule doesn't apply, there's nothing in that that says  
17 equitable -- equitable tolling doesn't apply, nothing in  
18 that that says equitable estoppel doesn't apply, nothing  
19 in that that says fraudulent concealment doesn't apply.

20 Now, you've shaken me a little bit on the  
21 fraudulent concealment, but I don't know about the other  
22 two.

23 MR. WALL: Well, all the same arguments are  
24 going to apply. Petitioners --

25 JUSTICE BREYER: Oh, not the equitable

1 estoppel.

2 MR. WALL: Oh, sure.

3 JUSTICE BREYER: Equitable estoppel, the  
4 person comes in and says, oh, yes, I'll tell you all  
5 about what I did, but by the way, I won't assert a  
6 statute of limitations defense, I promise. And the  
7 Court says, hey, you just asserted one, you can't.

8 MR. WALL: Justice Breyer, Petitioners in a  
9 future case would be back here saying: The text of the  
10 statute says nothing about equitable estoppel. And even  
11 if you've applied it to everybody else's actions, you  
12 can't apply it to me because I'm somehow different.

13 JUSTICE SCALIA: And you will say nonsense  
14 in that future case, won't you?

15 (Laughter.)

16 MR. WALL: That's -- I'll be as right then  
17 as I am now.

18 (Laughter.)

19 MR. WALL: I mean, Petitioners' argument has  
20 this sort air of unreality. You've applied it  
21 everywhere else he says, but not to me. Think how odd  
22 that is, Justice Scalia, that where you have a  
23 background canon that says ambiguities get construed  
24 for, and not against, the sovereign. When the sovereign  
25 sues quasi-sovereign to enforce the laws, that is

1 somehow a subordinate interest and the sovereign alone  
2 cannot take advantage of the Fraud Discovery Rule.

3 JUSTICE KAGAN: Mr. Wall, why is it that you  
4 don't you have any cases? I mean, you said way back  
5 when: This didn't come up, this is a modern problem.  
6 So explain to me why this is a modern problem. This is  
7 obviously an old statute. Are you saying that this  
8 statute has not been used very -- was not used very much  
9 until very, very recently?

10 MR. WALL: There are -- that's right. There  
11 are very few cases that deal with this statute at all  
12 and, obviously, in this context because the Commission's  
13 only had the ability to bring civil penalties for about  
14 20 years.

15 But I think that is not a problem unknown to  
16 the law. Again and again, facing garden variety  
17 limitations provisions written just like this one, this  
18 Court applied the fraud discovery rule. And now they  
19 come in and say, oh, but you've never applied it to this  
20 statute. That's true, but everything about this statute  
21 is identical as a matter of text and history to the  
22 statute of Bailey.

23 The cause of action equally accrued there,  
24 and this Court's applied it across bankruptcy, land,  
25 patent cases --

1 JUSTICE KAGAN: But what you're running up  
2 against is a skepticism, that -- you know, the  
3 government, which has not -- asserted this power for 200  
4 years, is now coming in and saying we want it. And  
5 the question is why hasn't the government asserted this  
6 power previously?

7 MR. WALL: I -- there are just very few  
8 cases on it. I think there are very few civil penalty  
9 actions that are being brought at all, certainly to  
10 which this statute apply, and certainly that deal with  
11 fraud or concealment and reach outside the 5-year  
12 period. And I don't have a great answer for why there  
13 aren't cases. All I can tell you is that -- it isn't  
14 like there are cases rejecting our arguments. We just  
15 see an absence of case law.

16 But what we do see are -- is cases like  
17 Exploration Company, where the government comes in, is  
18 really suing in a sovereign capacity, to redistribute  
19 land from some private land owners to another by  
20 annulling their patents. And this Court rejects  
21 basically exactly the same arguments Petitioners are  
22 making and says it applies equally to the government  
23 when it brings an action as to private plaintiffs.

24 Now, an action for civil penalties? No, the  
25 relief here is a little different, but if one looks back

1 at the briefs the arguments are exactly the same. They  
2 made exactly the same claims that the sky was falling  
3 there, and for 100 years they have not been true. There  
4 is nothing important about this statute as a matter of  
5 text, structure or anything else from the other statutes  
6 to which this Court has again and again applied the  
7 rule. And the justification is the same. It's the  
8 defendant's misconduct which keeps the plaintiff from  
9 knowing of her cause of action.

10 CHIEF JUSTICE ROBERTS: Counsel, you made  
11 the point earlier that it would be very odd that it's  
12 only the sovereign that doesn't benefit from the  
13 discovery rule when other people can. But it's when  
14 it's the sovereign that's bringing the action that the  
15 concerns about repose are particularly presented. You  
16 know, the sovereign, with all of its resources, can  
17 decide to go after whomever it discovers, however many  
18 years after -- whether it's the Social Security  
19 recipient that Justice Breyer mentioned or -- or anyone  
20 else.

21 So I at least don't find it unusual that  
22 it's the sovereign in particular that doesn't get the  
23 benefit of whenever you happen to find about it rule.

24 MR. WALL: No question in the typical case,  
25 but what equity has always said is in cases of fraud or

1 concealment the defendant is not entitled to repose  
2 until there is discovery of the fraud. And equity has  
3 never looked at the identity of the plaintiff, the  
4 elements of the cause of action, the plaintiff's status,  
5 role, party to what happened in the case. That is  
6 never --

7 CHIEF JUSTICE ROBERTS: Would you agree that  
8 when we're talking about the interests in repose that  
9 the one plaintiff we should be particularly  
10 concerned about is the government?

11 MR. WALL: I -- I don't think that there's a  
12 basis for separating as between private damages lawsuits  
13 and civil penalties. I think when Congress sets a  
14 statute of limitations, that's a limitation on the  
15 various forms of --

16 JUSTICE SCALIA: What about criminal  
17 penalties? Would your argument be different with regard  
18 to criminal?

19 MR. WALL: Justice Scalia --

20 JUSTICE SCALIA: Incidentally, what makes  
21 something a civil penalty? You just call it a civil  
22 penalty and -- and you don't have to prove it beyond a  
23 reasonable doubt, and you get the benefit of this  
24 extension that you are arguing for?

25 MR. WALL: Justice Scalia, two very



1 important things. Yes, our argument would absolutely be  
2 different in a criminal context. In cases like Marion  
3 and Toussie, this Court has explained how statutes of  
4 limitations function in the criminal context is very  
5 different. They are presumptively not equitably tolled,  
6 whereas civil statutes are presumptively equitably  
7 tolled.

8 JUSTICE SCALIA: What makes -- what makes a  
9 penalty a civil penalty?

10 MR. WALL: In Hudson v. United States --

11 JUSTICE SCALIA: I mean, a penalty is a  
12 penalty as far as I'm concerned if the government's  
13 taking money from me.

14 MR. WALL: Justice Scalia, the Court walked  
15 through in Hudson v. United States the test for  
16 denominating a civil from a criminal penalty. The main  
17 thing is what Congress denominates it, although you can  
18 look behind that.

19 JUSTICE SCALIA: That's nice.

20 MR. WALL: Here, there is no question that  
21 this is a civil penalty. It was denominated by Congress  
22 that way, it functions that way, it is phrased that way.  
23 I think even Petitioners and all of their amici -- not a  
24 single person on that side of the case has attempted to  
25 argue this penalty is criminal rather than civil under

1 Hudson.

2 JUSTICE SCALIA: That isn't my point, that  
3 it is criminal. My point is, it doesn't seem to me to  
4 make a whole lot of difference as far as these issues  
5 are concerned.

6 MR. WALL: Justice Scalia, the Court has  
7 always said that whether the penalty is civil or  
8 criminal carries with it a different set of legal rules  
9 or norms, and no party has ever successfully come into  
10 court and said, well, it may be civil, but it's a little  
11 criminal-like, so I should borrow from the criminal  
12 context.

13 CHIEF JUSTICE ROBERTS: What about the --  
14 what about the Halper case?

15 MR. WALL: Mr. Chief Justice, I think Hudson  
16 overruled Halper in large part, and no one here has  
17 asked this Court to label this a criminal penalty. They  
18 have asked the Court to call this a civil penalty and  
19 yet say the fraud discovery rule does not apply. That,  
20 there is no precedent for.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
22 Mr. Liman, you have 5 minutes remaining.

23 REBUTTAL ARGUMENT OF LEWIS LIMAN

24 ON BEHALF OF THE Petitioners

25 MR. LIMAN: Just a few points in rebuttal.

1           First of all, with respect to whether this  
2 is a criminal penalty and whether the rules of lenity  
3 apply, this Court has held in the Commissioner v.  
4 Ackerly case that the rule of lenity applies to civil  
5 penalties.

6           Just as an --

7           CHIEF JUSTICE ROBERTS: I'm sorry. What  
8 case?

9           MR. LIMAN: I believe it's Commissioner  
10 against Ackerly. It's cited in one of the -- one of the  
11 amicus briefs.

12           Second, the concession that you just heard a  
13 moment ago, that the statute would not apply as the  
14 government says it should apply if this was deemed to be  
15 a criminal penalty, we submit under this Court's  
16 reasoning in Clark v. Martinez, it just gave away the  
17 store in the government's case because if it is  
18 possible -- as the government has now admitted it's  
19 possible -- and I don't want to get into all of the  
20 permutations of Hudson -- but if it is possible that the  
21 label of civil penalty does not -- is not dispositive as  
22 to whether a penalty is civil or criminal, then, as the  
23 Court held in Clark v. Martinez, the lowest common  
24 denominator applies.

25           One has to interpret this statute so that it

1 is applicable across the range of statutes. And if  
2 that's so, then it follows, it runs from accrual as that  
3 word is commonly understood.

4 Next point. The government said that there  
5 are no cases where the Court considered the -- the claim  
6 that it is making. We would point the Court's attention  
7 to the Rotella case, in which in the context of a  
8 private plaintiff, who did not have the resources of the  
9 government, the argument was made that the RICO statute  
10 should have a discovery of the violation-type principle.

11 And the argument was made there that RICO  
12 can encompass a pattern of fraudulent acts. And the  
13 plaintiff in that case said, as the government says  
14 here, fraud can be concealed, can be complex, can be  
15 difficult to discover.

16 And the Court unanimously had a response to  
17 that. The response was that, at least as soon as you  
18 know the injury, where there is an injury element, the  
19 difficulty of discovery of the actual violation doesn't  
20 defer the running of the statute of limitations. It  
21 would defeat the purposes of a statute of limitations.

22 The government also argued that the problems  
23 of privilege are not significant ones. We would point  
24 the Court's attention to the Joint Appendix in the  
25 Second Circuit, where the government asserted privilege

1 with respect to our questions about its investigations  
2 of the counterparty to this alleged quid -- quid pro  
3 quo.

4           The Court also asked a question of whether  
5 there are any cases in which courts have dealt with  
6 government agencies being diligent, and the claim being  
7 the government agency was not diligent. The Court has  
8 dealt with that in a related context, in the  
9 Heckler v. Cheney context. And in the Heckler v. Cheney  
10 context the Court held that type of issue, how an  
11 administrative agency treats facts that are -- that it  
12 discovers and whether it chooses to bring a claim or  
13 not, whether it chooses to believe that they are in  
14 violation of a statute, the agency is charged with  
15 administering is not fit for judicial review. No  
16 different result should apply here.

17           Just two more points. The False Claims Act  
18 has a -- which has an explicit discovery rule, also has  
19 a statute of repose. It would be very odd, indeed, if  
20 the one circumstance where Congress, one of the few  
21 circumstances where Congress chose to use the word  
22 "discovery," was where the government was injured, and  
23 they -- Congress chose to impose a statute of repose,  
24 where, as they say in the 100 or other statutes that use  
25 language, fraud-like language, Congress intended there

1 to be discovery and no repose.

2 And that really ties into the last point,  
3 which is that there are, by our count, if you look at  
4 fraud, misleading, false statement-type statutes, there  
5 are somewhere like 80 or 100-type statutes that use that  
6 kind of language that would be applicable if this Court  
7 affirms the Second Circuit.

8 This case was in -- the government says this  
9 case was an outlier. There is no reason to believe this  
10 case will remain an outlier.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
13 Counsel.

14 The case is submitted.

15 (Whereupon, at 11:14 a.m., the case in the  
16 above-entitled matter was submitted.)

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