



	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	SAMUEL J. BUFFONE, ESQ.	
4	On behalf of the Petitioner	3
5	MICHAEL R. DREEBEN, ESQ.	
6	On behalf of the Respondent	21
7	REBUTTAL ARGUMENT OF	
8	SAMUEL J. BUFFONE, ESQ.	
9	On behalf of the Petitioner	49
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument today in Yeager v. United States.

Mr. Buffone.

ORAL ARGUMENT OF SAMUEL J. BUFFONE

ON BEHALF OF THE PETITIONER

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

When a jury's acquittal resolves an issue in a defendant's favor, that determination is final and the government may not seek an inconsistent determination of that issue from a second jury. Unlike acquittals, hung counts are not verdicts. They decide nothing, and therefore a hung count cannot be inconsistent with an acquittal. A straightforward application of this Court's decision in Ashe v. Swenson is all that is called for in this case. A new rule is not necessary.

JUSTICE SOUTER: Mr. Buffone, may I raise one preliminary issue? And it's an issue which is -- does not go to the reason we took the case, but I'd like your response to it. Your argument, your Ashe v. Swenson argument, assumes, as you have said in the brief, that the -- that the verdicts of acquittal essentially determined that your client did not possess

1 insider knowledge, and I question whether the verdicts  
2 of acquittal did necessarily establish that fact. I've  
3 looked at the -- at the jury instructions, and I -- I  
4 will be candid to say I did not parse the whole jury  
5 instruction, so you may very well correct me in the  
6 assumption that I'm going to make. But the point of the  
7 -- of the jury instruction that seemed to go to your  
8 argument is set out on page 105 of the Joint Appendix,  
9 and the judge is telling the jurors what they had to  
10 find. And one of them was that your client made any  
11 untrue statement of a material fact or omitted to state a  
12 material fact necessary in order to make the statements  
13 made, in the light of the circumstances under which they  
14 were made, not misleading as charged.

15           It seems to me that the jury under that  
16 instruction could have come back with a verdict of  
17 acquittal simply on the assumption that your client had  
18 not made affirmative statements at the -- at the meeting  
19 in question, therefore he had no obligation to -- to  
20 correct any statements, because it is not clear from  
21 this instruction that he had to correct the statements  
22 of other people who omitted material facts, and that  
23 therefore the only thing that the verdict proves or the  
24 only thing that the verdict may have assumed is that he  
25 didn't speak up and say anything.

1           Is that a possible analysis?

2           MR. BUFFONE: I do not believe so, Your  
3 Honor, for two reasons. First, under the Ashe test as  
4 interpreted by this Court in Dowling, the record as a  
5 whole must be analyzed. And in Dowling, the Court  
6 looked at admissions made by the defendant's attorney  
7 during the course of the second proceeding that  
8 identification of his client was not an issue.

9           Similarly here, looking at the entirety of  
10 the record, in its arguments closing and opening, and  
11 most importantly in its cross-examination of Mr. Yeager,  
12 the government made clear to the jury its theory of  
13 omissions. And that theory of omission was that Mr.  
14 Yeager when he was at the 2000 analysts conference had a  
15 duty to stand up and correct omissions if there were any  
16 misstatements made by others. They argued to the jury  
17 that he would be guilty of omissions if he did not  
18 affirmatively correct it.

19           JUSTICE SOUTER: No, I -- I agree that --  
20 that did seem to be the point of the cross-examination,  
21 and in fact I guess you set it out in one of the briefs.  
22 But is -- is that enough? We -- to my knowledge, we've  
23 never held that that is enough to convict or -- let's  
24 say, to -- to -- for us to assume, despite a more  
25 protean jury instruction, that the jury necessarily had

1 to find a -- a fact. And I guess maybe my question  
2 boils down to is: Why should what perhaps consumed 60  
3 or 80 seconds of cross-examination suffice to tighten up  
4 a jury instruction which -- which basically is  
5 open-ended?

6 MR. BUFFONE: Well, Your Honor, first there  
7 was more to the trial record than a snippet of  
8 cross-examination. Again, in opening statement the  
9 government began by arguing to the jury that Mr. Yeager  
10 was the man behind the screen, that he was --

11 JUSTICE ALITO: That's the government's --  
12 that's the government's argument. And in order to  
13 convict for securities fraud based on an omission, isn't  
14 it necessary for there to be a duty to disclose? And  
15 what would prevent -- how can we be sure that the jury  
16 here did not find that there was no securities fraud  
17 because, insofar as the government was proceeding on an  
18 omissions theory, your client didn't have a duty to  
19 disclose, did not cause a material fact to be omitted?

20 MR. BUFFONE: Your Honor, first, the  
21 instructions permitted alternative ways to reach the  
22 first element of securities fraud, and one of the three  
23 alternatives was either misstatements or omissions. And  
24 I think the instruction, for all of its frailty, was  
25 clear that the jury could convict on an omissions

1 theory. Now, Your Honor's question --

2 JUSTICE ALITO: I agree with that, but why  
3 couldn't they find that there was no securities fraud  
4 based on an omissions theory because there wasn't any  
5 duty on Mr. Yeager's part to disclose?

6 MR. BUFFONE: Your Honor, the indictment was  
7 an integrated theory of fraud, that had charged that Mr.  
8 Yeager and others had planned to make misrepresentations  
9 and material omissions for one purpose, and that purpose  
10 was to enhance the price of Enron stock so that they  
11 could later engage in insider trading to sell that  
12 stock. The omissions theory was grounded in the  
13 indictment. It was elucidated by the instructions, and  
14 it was clarified so that there could be no uncertainty  
15 by the cross-examination and arguments of counsel.

16 This jury -- under an Ashe analysis, the  
17 question is what did this jury believe and what did they  
18 rationally decide? They --

19 JUSTICE GINSBURG: But Ashe is quite a  
20 different case. Ashe is a seriatim prosecution. It was  
21 one event, a robbery. There were six victims. Victim  
22 number one -- the charge relating to victim number one,  
23 was an acquittal that necessarily decided that the  
24 defendant was not among the robbers. So that is quite a  
25 different situation from what we have here.

1           MR. BUFFONE: Justice Ginsburg, first, it is  
2 my belief that seriatim prosecutions raise no greater  
3 threat to the core values of double jeopardy than was  
4 raised here. Those core values are, first of all, the  
5 finality of acquittals. And the acquittal here was  
6 offended by any effort to retry an issue of fact  
7 necessarily decided. This --

8           JUSTICE GINSBURG: You're not -- you're not  
9 contending that double jeopardy itself was at issue? In  
10 other words, claim preclusion. There would be no claim  
11 preclusion, so we're talking only about issue  
12 preclusion?

13           MR. BUFFONE: Yes, Your Honor, I'd like to  
14 --

15           JUSTICE GINSBURG: That means it was  
16 necessarily -- the issue was necessarily decided?

17           MR. BUFFONE: That's correct, Your Honor.  
18 We do not argue claim preclusion here. Our argue is  
19 issue preclusion or previously known as collateral  
20 estoppel before clarification by this Court.

21           Your Honor, to the question of seriatim  
22 prosecution, again, although Ashe was in a sense a  
23 seriatim prosecution, in all of the Ashe-type cases  
24 decided by this Court jeopardy had not even attached,  
25 let alone terminated.

1           The issue we believe should be addressed in  
2 terms of what was the finality of the judgment. The  
3 finality of the judgment here were six acquittals.  
4 Those acquittals were final and were not subject to  
5 redetermination. The issue preclusive effect arises  
6 from the jury's acquittals, not from the hung counts,  
7 the hung counts which were not final and which resolved  
8 nothing.

9           JUSTICE GINSBURG: So the hung counts are  
10 equivalent -- equivalent to an acquittal then?

11           MR. BUFFONE: No, Your Honor, I think  
12 precisely the opposite. Hung counts have none of the  
13 force of an acquittal. They have none of what this  
14 Court has historically recognized as the powerful way  
15 that a jury speaks when it acquits in cases such as  
16 Martin Linen, where the court recognized that. The hung  
17 counts historically, as we set out in our brief, were  
18 not even accepted at common law as an option for a jury.

19           JUSTICE SCALIA: But we said -- we said in  
20 Ashe, didn't we, that you should take into account all  
21 the circumstances in determining what was decided in the  
22 first acquittal, all the circumstances. How can -- how  
23 can you close your eyes to the circumstance that is  
24 alleged here, that the -- the hung jury portion of the  
25 jury's verdict is simply inconsistent with the acquittal

1 portion, and therefore you should not count the  
2 acquittal for double jeopardy purposes? Isn't this part  
3 of the total circumstances?

4 MR. BUFFONE: Justice Scalia, first, we  
5 believe that the -- I believe that the Ashe test relates  
6 to the total circumstances on the record. What is it  
7 from the record that the Court can derive meaning from?  
8 The Court can derive meaning from all that was presented  
9 to the jury, and from all that the jury decided. In its  
10 hung counts, the jury did not speak with the unanimity  
11 and the finality that it did in its acquittals. As this  
12 Court, speaking through -- in both the majority and the  
13 concurring opinions -- dissenting opinions in Sattazahn,  
14 recognized, hung counts speak nothing. Hung counts --

15 JUSTICE KENNEDY: But in a sense that's  
16 Justice Scalia's point, that the jury has in effect told  
17 us nothing, and in effect that argument hurts your case  
18 in one sense. Hung counts are meaningless.

19 MR. BUFFONE: Justice Kennedy, I agree that  
20 the hung counts are meaningless and that is my point,  
21 but I believe that it does further our analysis and the  
22 proper analysis that this Court should engage in. And  
23 that is, do the acquittals have finality, and is there  
24 anything inconsistent with the jury's inability to reach  
25 a determination with the finality of its acquittals?

1 The jury did not speak unanimously in its acquittals.  
2 There is no record way to determine why they failed to  
3 reach a determination, and they are therefore not  
4 inconsistent with the final determination of acquittal.

5 JUSTICE SCALIA: No, but it shows -- it shows  
6 that -- that the point on which they -- you assert they  
7 were unanimous and the point on which you say later  
8 prosecution should be disallowed was in fact a point on  
9 which the jury was confused, because they would have  
10 come out the other way if indeed they were unanimous on  
11 the counts that -- that acquitted. They should have  
12 come out the same way on the -- on the hung counts.

13 MR. BUFFONE: Your Honor, we simply don't  
14 know that. The jury may have failed to reach a verdict  
15 for any number of reasons. On the basis of this record,  
16 it's quite possible that the reason that the jury failed  
17 to reach a verdict was that it had 176 counts before it;  
18 that the jury, as set out in our reply brief, had made  
19 known to the district court that it was under severe  
20 financial stress. The jurors wanted the trial to be  
21 over so that they could get back to their full-time  
22 employment, and one of the jurors actually asked to be  
23 removed from the jury because of that financial  
24 distress.

25 In the face of that, the court gave a very

1 unusual Allen charge; that after the jury had sent out a  
2 note saying that they were deadlocked, the court issued  
3 an Allen charge and 70 minutes later discharged the  
4 jury. It -- the -- the point, Your Honor, is that we  
5 will never know why this jury --

6 JUSTICE SCALIA: The point is that they were  
7 deadlocked and would not have been deadlocked, assuming  
8 we don't inquire into -- into the issue that Justice  
9 Souter raised. They were deadlocked and would not have  
10 been deadlocked if indeed they made the -- the acquittal  
11 finding that you're relying upon for double jeopardy.

12 MR. BUFFONE: Your Honor, we know that they  
13 acquitted. That is a certainty. We have finality to  
14 those acquittals. They were unanimous and are not  
15 subject to question again. They cannot be subject to  
16 appeal, and they cannot be subject to overturning, even  
17 if they are egregiously erroneous.

18 When we lay next to that the hung counts and  
19 the way that hung counts have historically been looked  
20 at, first not tolerated by courts: Coercive means  
21 applied depriving jurors of food and drink and heat in  
22 cold climates until they reached a verdict; contemporary  
23 law where we permit Allen charges in a quest for  
24 unanimity to, wherever possible, have a jury speak its  
25 will. We cannot equate, in the light of that history

1 and the firm precedent of this Court, an inability to  
2 reach a decision with the finality and persuasion of an  
3 acquittal.

4 CHIEF JUSTICE ROBERTS: Counsel, if Powell  
5 extends to subsequent prosecutions -- I know you argue  
6 that it doesn't -- but if it does, isn't it unusual that  
7 the defendant is in better shape if a jury hangs on the  
8 non-acquitted count than if he is convicted on the non-  
9 acquitted count?

10 MR. BUFFONE: Well, Your Honor, that's a --  
11 a two-edged sword, Mr. Chief Justice. The defendant is  
12 on the opposite horns of that dilemma. If the counts  
13 are not joined, then the effect of the acquittal would  
14 be to bar them by res judicata. So, by joinder, he's on  
15 the other side of that fence. It's, as this Court  
16 recognized, whose ox is being gored in Powell by either  
17 the acquittals or the convictions.

18 Well, this is a case of whose ox is being  
19 gored by the joinder, and it should not be dispositive.  
20 Collateral estoppel effect should apply to counts within  
21 an indictment, just as res judicata would apply if they  
22 were separated.

23 JUSTICE BREYER: It's an obvious question, I  
24 guess. I'd just like to hear your answer directly.  
25 Case 1, count 1, selling drugs; count 2, using the

1 telephone to sell the drugs. All right? The jury  
2 acquits of the first, convicts of the second. Logically  
3 impossible, but permitted under the law, right?

4 MR. BUFFONE: I agree, Your Honor. Under  
5 Powell --

6 JUSTICE BREYER: Okay. Case 2 --

7 MR. BUFFONE: -- there's no question. We  
8 have conflicting verdicts --

9 JUSTICE BREYER: Yes, yes.

10 MR. BUFFONE: -- and we are not going to try  
11 to determine what the --

12 JUSTICE BREYER: Okay. Absolutely  
13 illogical. Okay. Case 2, there is no count 1. Case 2,  
14 telephone count, hung jury. We retry it. Permitted,  
15 right?

16 MR. BUFFONE: Now, Your Honor, that would  
17 depend on what happened at the trial.

18 JUSTICE BREYER: All that happened was that  
19 they hung.

20 MR. BUFFONE: Well, if they hung, Your  
21 Honor, yes, it would be permitted.

22 JUSTICE BREYER: Yes. Okay. Case 2, hung  
23 jury, telephone count. We retry it. All right. So  
24 now, why is it, when we put them together and -- case 3,  
25 count 1, substantive drugs, acquitted; count 2,

1 telephone, hung jury. Well, in case 2, we could get a  
2 retrial of the telephone count. Why can't we get a  
3 retrial of the telephone count now?

4 MR. BUFFONE: Your Honor, it would depend.

5 JUSTICE BREYER: All that happened is they  
6 are retrying it just as they did in case 2. Why does  
7 the presence of count 1 there mean that they can't retry  
8 it?

9 MR. BUFFONE: Your Honor, the presence of  
10 count 1 in your hypothetical is not dispositive. An  
11 acquittal on count 1 says --

12 JUSTICE BREYER: No, I -- I'm going too fast  
13 because you didn't take the cases in. Do you want me to  
14 repeat them? Maybe it's too complicated.

15 I'm just saying case 1, count 1, the  
16 substantive count, conviction. On count 2, telephone  
17 count, acquittal. Everybody agrees that's permissible.  
18 Case 2 is only the telephone. That's all they indicted  
19 him for. And if they have a hung jury, you can, can't  
20 you, retry him?

21 MR. BUFFONE: Yes, sir.

22 JUSTICE BREYER: So, now, when we have case  
23 3, which is the same as case 1 except that, instead of  
24 convicting him, they had a hung jury, why can't you  
25 retry him, just as you could in case 2?

1 MR. BUFFONE: Because a hung jury resolves  
2 nothing, Your Honor. It doesn't --

3 JUSTICE BREYER: Oh, everybody agrees it  
4 resolves nothing, and that's why you could retry him in  
5 -- that's why you could retry him in case 2, because it  
6 resolves nothing. So if you could retry him in case 2,  
7 why can't you retry him in case 3? What does the  
8 presence of this other substantive count have to do with  
9 it? Since it never would have blocked the conviction on  
10 count 2, why does it stop you from retrying count 2? It  
11 would never have blocked the conviction of count 2. Why  
12 does it stop you from retrying it?

13 Do you see -- do you see my --

14 MR. BUFFONE: Yes, Your Honor.

15 JUSTICE BREYER: That's the logical point I  
16 thought the other side was making, and maybe they're not  
17 because it seems to be striking you as surprising or  
18 maybe I'm not making it in a clear way. But what I  
19 wanted was a clear answer to it.

20 MR. BUFFONE: Your Honor, I believe the --  
21 the clear answer is that for collateral estoppel to  
22 attach, there must be a necessary determination of a  
23 factual issue, and the necessary determination of that  
24 factual issue can occur in your count 1 through an  
25 acquittal or a conviction. It cannot occur through a

1 hung count because there is nothing to be resolved.  
2 There is nothing that would be necessarily decided.

3 JUSTICE SOUTER: Mr. Buffone, you're --  
4 you're going through a logical analysis. If I  
5 understand your position, the logical analysis is not  
6 going to win the case for you because, as I understand  
7 the case that we've got in front of us, we have in  
8 effect two lines of authority, two models, that describe  
9 what the law might be in these circumstances.  
10 One model, on -- on the assumption that -- that the  
11 acquittals determined what you say they did -- on that  
12 model there -- there is -- there is an issue preclusion  
13 that is raised.

14 On the second model, the model of what we do  
15 in the case of a hung jury, there is no -- of course, no  
16 preclusion, and there is no bar to a retrial. And we've  
17 simply got both in the same case. The question is:  
18 Which model do we follow? Do we say preclusion is the  
19 most important issue here, or do we say the  
20 open-endedness and uncertainty of the hung jury, the --  
21 the failure to reach a verdict, is the model that --  
22 that tells us what we ought to do? How do we choose  
23 between those two possibilities, each of which is open  
24 to us?

25 MR. BUFFONE: Yes, Your Honor, I believe

1 that that is a clear choice, and the rationale for the  
2 clarity of that choice is that acquittals have long been  
3 recognized as being important for finality purposes for  
4 double jeopardy law. So, for example --

5 JUSTICE SOUTER: Look, I know that, and --  
6 and by the same token, hung juries have long been  
7 recognized as raising no bar to a further trial. And  
8 the question is: Why are the values in the -- the  
9 acquittal case predominating, as you say they are, over  
10 the values of the retrial possibilities? Why do I  
11 choose one rather than another?

12 MR. BUFFONE: Yes, Your Honor. The -- the  
13 Perez line that tells us that when there is manifest  
14 necessity arising from a jury not reaching a verdict,  
15 that retrial is appropriate following a hung count.  
16 That line of cases stands in -- as I believe it's the  
17 basis of Your Honor's question, stands in sharp contrast  
18 to the line of cases that require that jury acquittals  
19 be given final effect, cases like Foo Fong -- Fong Foo,  
20 excuse me.

21 JUSTICE SOUTER: We have got both.

22 MR. BUFFONE: All right, so what --

23 JUSTICE SOUTER: What -- what is it -- and I  
24 would almost suggest that it has to be something outside  
25 the lines of authority, because the issue here is which

1 line of authority are you going to pick? What is it  
2 outside the lines of authority that says we should -- we  
3 should pick the acquittal model rather than the hung  
4 jury model to determine what to do here?

5 MR. BUFFONE: Your Honor, I think we should  
6 go -- the Court should go to the history of its double  
7 jeopardy jurisprudence, and that makes clear that the  
8 core concepts underlying the Double Jeopardy Clause are,  
9 first, finality of jury verdicts, and, second, to avoid  
10 all of the constitutional perils of successive trials,  
11 because successive trials --

12 JUSTICE ALITO: Can I ask you this about the  
13 finality of jury verdicts? Is -- does the Constitution  
14 require either Federal or State law to permit the -- a  
15 partial verdict?

16 MR. BUFFONE: Your Honor, I do not believe  
17 that -- I am not aware of a constitutional underpinning  
18 for that, but certainly the practices in the courts are  
19 to permit partial verdicts.

20 JUSTICE ALITO: In every State?

21 MR. BUFFONE: I do not know the answer to  
22 that question.

23 JUSTICE ALITO: Well, if the Constitution  
24 doesn't require that, then why does the Constitution, in  
25 your view, require that issue preclusion occur when the

1 jury acquits on certain counts but hangs on other  
2 counts? If -- if a partial verdict were not required,  
3 and if the jury came back and said, we -- we've reached  
4 a verdict on some counts but not all counts, the remedy  
5 would be a mistrial on all counts and a retrial on all  
6 counts.

7 Why -- why is it -- does the Constitution  
8 require a different result if Federal law or State law  
9 chooses to allow the return of a partial verdict?

10 MR. BUFFONE: Your Honor, I don't believe  
11 that it would be a different result because I think in  
12 -- in most jurisdictions, as I understand it, the  
13 reaction to that kind of a split verdict would be to try  
14 to get the jury to reach a full and final verdict, to  
15 give some form of an Allen charge to encourage  
16 additional deliberations, to seek unanimity in the  
17 jury's verdict. Where we don't have that unanimity, the  
18 court is forced for collateral estoppel, for issue  
19 preclusion purposes, to Justice Ginsburg's point, not to  
20 claim preclusion issues.

21 If we set aside claim preclusion, the Perez  
22 line of cases tells us to do what we do with claim  
23 preclusion. For issue preclusion, the question is, is  
24 there some finality to what the jury did, in your  
25 hypothetical its partial verdict, that speaks to the

1 counts that it was not able to resolve? And if it  
2 speaks that, after the Ashe analysis, that there was an  
3 issue necessarily decided, then there is a bar under the  
4 doctrine of issue preclusion to the re-litigation of  
5 that question.

6 If there are no further questions, I'd like  
7 to reserve the remainder of my time for rebuttal.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
9 Mr. Dreeben.

10 ORAL ARGUMENT OF MICHAEL R. DREEBEN

11 ON BEHALF OF THE RESPONDENT

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

14 Two separate lines of double jeopardy  
15 analysis lead to the conclusion that the government can  
16 retry hung counts that occur in a verdict simultaneously  
17 with acquittals. The first is the principle that the  
18 government may, under the doctrine of continuing  
19 jeopardy, try to obtain a verdict when a jury is hung.  
20 The basic principle there is that the government is  
21 entitled to one full and fair opportunity to convict and  
22 that the hung counts, when the jury cannot agree,  
23 interrupt and prevent the government from achieving  
24 that. Double jeopardy, therefore, does not bar the  
25 government from completing its opportunity to obtain a

1 verdict.

2           The second doctrinal line is that which  
3 grows out of the Powell case. Collateral estoppel is  
4 premised on the idea that the jury has acted rationally.

5           CHIEF JUSTICE ROBERTS: You -- you are  
6 asking us for a pretty dramatic extension of Powell.  
7 Powell was not a case involving subsequent prosecutions.

8           MR. DREEBEN: No. Powell was a case in  
9 which the Court rejected the doctrine of collateral  
10 estoppel as a means of upsetting a mixed verdict of  
11 acquittals and convictions, and --

12           CHIEF JUSTICE ROBERTS: Well, that's because  
13 in the same proceeding you have two different jury  
14 verdicts, one going the other way and one -- obviously,  
15 one way and one the other way. So to protect the jury's  
16 conclusions, you couldn't give effect to one without  
17 undermining the other.

18           It's a very different case here. The only  
19 jury determination you have is the acquittal. If you  
20 give effect -- if you don't give effect to the findings  
21 in the acquittal, you are undermining the jury -- the  
22 only determination by the jury.

23           MR. DREEBEN: Well, I don't think that it  
24 undermines that determination, Mr. Chief Justice,  
25 because the acquittals will stand as acquittals, and

1 they will bar re-prosecution on that offense. To the  
2 extent that there are determinations that are made by  
3 the acquittals that are independent of any inconsistency  
4 with the hung counts, that too can have collateral  
5 estoppel effect in a successive prosecution.

6 But I think the crucial thing here is that  
7 this is not properly viewed as a successive prosecution  
8 for double jeopardy purposes. *Ashe v. Swenson* and the  
9 cases --

10 JUSTICE STEVENS: Well, why not? It is a  
11 successive prosecution.

12 MR. DREEBEN: No, it's not in the sense, I  
13 think, Justice Stevens that the Court used that in *Ashe*.

14 JUSTICE STEVENS: It is a successive  
15 indictment that took place after the other acquittal.

16 MR. DREEBEN: Well, that indictment simply  
17 embodies non-jeopardy-barred counts that were in the --

18 JUSTICE STEVENS: Isn't there a difference  
19 in the fact that in the first case where there's --  
20 where there was a conflicting simultaneous verdict, one  
21 can explain the acquittal on grounds of leniency or  
22 compromise or something like that, that says that,  
23 therefore, we will give effect to the -- the conviction  
24 when they're simultaneous because of the reasons why  
25 there may be irrationality in the conflict. But there

1 is no reason to doubt the -- the validity of the  
2 acquittal in this case.

3 MR. DREEBEN: Well, no, I think that there  
4 is, Justice Stevens, if on the theory that the  
5 Petitioner propounds the verdict on the acquittals is  
6 inconsistent with the mistrial. And that's the only way  
7 in which collateral estoppel could apply, only if the  
8 jury had necessarily determined a fact on the acquittals  
9 that should have led to acquittals on the insider  
10 trading counts.

11 JUSTICE STEVENS: But if they had time. And  
12 when you have 150 counts, it's entirely possible they  
13 just didn't reach a decision on it.

14 MR. DREEBEN: Well, I -- Petitioner's theory  
15 would be identical if there were one insider trading  
16 count. And I think that for purposes of this case, the  
17 Court should not get too distracted by the number of  
18 counts, because all of the insider trading counts turned  
19 on a common core of fact. They were all resolved  
20 identically --

21 JUSTICE STEVENS: When you have a case in  
22 which there is no conflict between a guilty and an  
23 innocent verdict, there isn't -- there is no reason to  
24 doubt the integrity of the acquittal.

25 MR. DREEBEN: We're not questioning the

1 integrity of the acquittal as far as it has direct  
2 double jeopardy application. The question is whether  
3 the doctrine of collateral estoppel ought to be applied.

4 JUSTICE BREYER: And why not? Because the  
5 answer to my question was exactly what Justice Stevens  
6 said. Why is it that -- that if you could have  
7 inconsistent verdicts in Powell, well, then, why can't,  
8 since they hung, couldn't you try him again on the hung  
9 count? And the answer is, because you're trying him  
10 again.

11 And that's why we have all the briefs that  
12 we have, because the only way to answer this is and look  
13 and see if the policies that underlie the collateral  
14 estoppel part of double jeopardy apply here. And I  
15 can't think of one that doesn't. I can't think of one  
16 single one that wouldn't apply.

17 Maybe there are some. And I can't think of  
18 any reason for allowing the government to have a second  
19 bite at this apple. What is the reason?

20 MR. DREEBEN: The reason, Justice Breyer, is  
21 that the hung counts do not constitute a resolution in  
22 favor of the defendant's issues --

23 JUSTICE BREYER: Of course, they don't. Of  
24 course, they don't. Suppose that they never brought up  
25 that hung count. Then you wouldn't even have the first

1 bite at the apple. So you would think it would be a  
2 fortiori you could go ahead. But that's the case; you  
3 clearly can't go ahead.

4 MR. DREEBEN: But there's a reason for that,  
5 Justice Breyer, that is grounded in double jeopardy  
6 policies, and I think it goes to the question that  
7 Justice Souter asked as well: Why the Court should  
8 prefer the double jeopardy doctrine that allows the  
9 government to retry the hung counts when they are all  
10 brought together in the same proceeding? And that is  
11 this -- and I think it's made most vivid by imagining  
12 *Ashe v. Swenson* in a slightly different posture.

13 *Ashe v. Swenson* involved robberies of six  
14 individuals at a poker game. The government indicted  
15 each one of them as a separate robbery, and the  
16 government tried one of them first. And in that one,  
17 the jury's acquittal was understood to mean that the  
18 defendant was not the robber. If the government could  
19 go sequentially through and try the other five, it has  
20 the opportunity to try to wear the defendant down or  
21 refine its case or improve its case in a way that the  
22 Court regarded as impermissible.

23 But suppose that in *Ashe* the government  
24 hadn't done that, it had brought all six robbery  
25 prosecutions together, and the jury returned one verdict

1 of acquittal on one robber, and on the other five it  
2 hung. In that situation, I think -- which is the  
3 situation we have here --

4 JUSTICE STEVENS: But the reason for that is  
5 there are doubts about the integrity of the acquittal.  
6 They probably compromised, just decided not to be too  
7 tough on --

8 MR. DREEBEN: But, Justice Stevens, that is  
9 identical to this case. There is no difference to this  
10 case.

11 JUSTICE STEVENS: No, here you have  
12 sequential prosecutions, and there's no reason to  
13 question the integrity of the acquittal in this case.

14 MR. DREEBEN: No. But, Justice Stevens, if  
15 you would question the integrity of the acquittal, if  
16 the jury acquits on one robber and hangs on five, that  
17 is this case. The only difference in this case is it's  
18 a securities fraud case.

19 JUSTICE BREYER: I didn't think it had  
20 anything to do with integrity of anything. I thought  
21 what it had to do with is that they are being tried at  
22 the same time. And to test that out in my mind, I  
23 imagine this: In February, we try the individual for  
24 the drug count; he's acquitted. In June, we bring a  
25 telephone count. Absolutely forbidden, right?

1 MR. DREEBEN: Correct.

2 JUSTICE BREYER: Okay. So why should the  
3 government be one whit better off because, in addition  
4 to doing that, they happened to bring a telephone count  
5 in January along with the other?

6 MR. DREEBEN: There are two reasons for  
7 that, Justice Breyer. The first is that the Double  
8 Jeopardy Clause is not aimed at preventing the  
9 government from attempting to bring its -- all of its  
10 charges in one indictment against the defendant. What  
11 the collateral estoppel component is aimed at is the  
12 government going sequentially, carving its prosecution  
13 up into pieces, and trying in different attempts.

14 JUSTICE SOUTER: But isn't -- isn't the real  
15 problem that -- that you raised by your answer the  
16 following problem: That in this age in which there are,  
17 as Justice Breyer's hypo suggests, lots of overlapping  
18 criminal statutes -- you can indict not only for drugs  
19 but for telephones, and I don't know what other  
20 overlapping crimes there -- there may be. Therefore,  
21 that gives the government by joining a lot of  
22 overlapping charges or lots of charges with common  
23 elements in either one indictment through various counts  
24 or simply by a series of indictments to be tried  
25 together -- it gives the government a bigger chance of

1 getting a hung jury or some irrational resolution on  
2 some of those issues. And if the government can bring  
3 loads of counts, increase the likelihood of getting a  
4 hung jury on one issue or one indictment, the government  
5 in effect has a key to avoiding just what Justice  
6 Breyer's hypothetical suggested.

7           If they wait and bring the second count in  
8 June, there's an issue preclusion. But if they bring it  
9 together, they've got an irrational verdict, and there's  
10 no issue preclusion. Therefore, isn't the policy behind  
11 both double jeopardy and the issue preclusion extension  
12 a policy that argues in favor of saying, don't let the  
13 government have all these bites at the apple, because in  
14 fact it results or can result in seriatim prosecutions?  
15 What's -- what's your response to that argument?

16           MR. DREEBEN: My response to that, Justice  
17 Souter, is that double jeopardy has always consisted of  
18 a balance of values. There is, of course, the interest  
19 that Your Honor has identified, but the countervailing  
20 interest is that the government should have one full and  
21 fair opportunity to convict a defendant on charges that  
22 have been preferred by a grand jury on a showing of  
23 probable cause, and that does not occur when the hung  
24 counts deprive the government of that one opportunity.

25           JUSTICE SOUTER: But does the -- does the

1 government ask for something more than one fair chance  
2 when it comes in with 117 counts? Maybe the fair chance  
3 consists of a fair chance with a number of counts or a  
4 number of indictments that one can reasonably expect a  
5 -- a jury to handle without either getting totally  
6 confused or totally exhausted.

7 MR. DREEBEN: Well, let me -- let me give  
8 two answers to that, Justice Souter. First of all, the  
9 position for which Petitioner argues does not depend on  
10 the number of counts. If there had been two counts in  
11 the indictment --

12 JUSTICE SOUTER: Oh, that's right. I'm  
13 making an argument that he did not make.

14 MR. DREEBEN: -- it would be the same.

15 But more fundamentally, I think that the  
16 number of counts in this indictment should not lead the  
17 Court to think that this was a case in which the  
18 government overcharged in some nefarious effort. First  
19 of all, nefarious efforts like that tend to backfire on  
20 the government, and that's why sound prosecution policy  
21 dictates against overcharging. Here, I don't think it's  
22 fair to regard the number of counts as a proxy for  
23 overcharging, and that is because they break up into  
24 logically distinct units.

25 JUSTICE GINSBURG: Why not, when considering

1 what the government did on its second chance? It  
2 trimmed 5 -- there were 20 insider trading, on the  
3 new indictment, there were 5. There were 99 counts of  
4 laundering, which were trimmed to 8, something within  
5 the jury's ken. But isn't the most likely thing in this  
6 case that the jury was simply exhausted?

7 MR. DREEBEN: I don't think so, Justice  
8 Ginsburg, because all of the insider trading counts turn  
9 on the same fact: Did Petitioner have inside  
10 information -- did he know that the Enron broadband  
11 system that he was integrally involved in, was the  
12 strategic manager in charge of, wasn't working? If he  
13 had that knowledge and he traded, the number of counts  
14 is really irrelevant. And I think that the fact that  
15 the jury resolved all of the insider trading counts the  
16 same way, and the money laundering counts just had to do  
17 with the disposition of the proceeds, they're all  
18 resolved the same way.

19 The jury obviously deadlocked on whether  
20 some fact that the government needed to prove for those  
21 counts was established. And the bizarre thing, I think,  
22 about Petitioner's position is that he seeks to get  
23 through a legal doctrine, collateral estoppel, which is  
24 a big extension from what the Double Jeopardy Clause  
25 textually prohibits, exactly what the jury would not

1 give him. The jury --

2 CHIEF JUSTICE ROBERTS: Well, the -- the  
3 point about the big extension, you were rather coy in  
4 your brief about what you think about Ashe v. Swenson.  
5 Are you asking us to revisit that?

6 MR. DREEBEN: No, Mr. Chief Justice, I don't  
7 think that the Court needs to revisit Ashe v. Swenson in  
8 order to resolve this case, but I think it's fair to say  
9 that Ashe v. Swenson is a doctrine that transposed  
10 certain civil policies that are -- are expressed through  
11 the doctrine of issue preclusion into the double  
12 jeopardy context in a way that was not supported by the  
13 history of the Fifth Amendment and is not supported by  
14 the text of the Double Jeopardy Clause, which requires  
15 the same events.

16 CHIEF JUSTICE ROBERTS: Well, you're not  
17 going to talk about -- you're not going to talk about  
18 the text of the Double Jeopardy Clause, are you?

19 MR. DREEBEN: Well, I --

20 CHIEF JUSTICE ROBERTS: If we rely on that  
21 the case is pretty easy, isn't it?

22 MR. DREEBEN: I think that it is because it  
23 says that the same offense is what you're protected  
24 against for double jeopardy, and the offenses in this  
25 case are distinct under Blockburger. But my point

1 about --

2 CHIEF JUSTICE ROBERTS: The person was in  
3 jeopardy on the hung offense as well.

4 MR. DREEBEN: Well, this Court has made  
5 clear that the jeopardy continues until the government  
6 has the opportunity to obtain a verdict. So the fact  
7 that his jeopardy began is not what entitles him to --

8 CHIEF JUSTICE ROBERTS: Under this Court's  
9 decisions, but not under the text of the Double Jeopardy  
10 Clause.

11 MR. DREEBEN: I think it then becomes a  
12 question of what is the meaning of "jeopardy." But  
13 insofar as the Court imported collateral estoppel into  
14 the Double Jeopardy Clause, it should keep in mind, in  
15 deciding whether to extend that doctrine, that in the  
16 civil context a crucial predicate for collateral  
17 estoppel is the ability of the adversely affected party  
18 to appeal, and that is because before we rely on  
19 collateral estoppel, we want to have some assurances  
20 that there actually is integrity to the necessarily  
21 determined fact that is going to preclude litigation in  
22 another case.

23 JUSTICE STEVENS: But the key to your  
24 argument is the government is entitled to one full and  
25 fair opportunity to try its case. It had that

1 opportunity the first time around.

2 MR. DREEBEN: Well, I think that this  
3 Court's decisions since --

4 JUSTICE STEVENS: If there were no separate  
5 counts, that would have been -- that would have been a  
6 fair -- that would be the end of the matter.

7 MR. DREEBEN: Since 1824, this Court has  
8 defined the government's full and fair opportunity to  
9 include the right to retry if the jury hangs, and here  
10 what the defendant --

11 JUSTICE STEVENS: But it has -- but it has  
12 the right to retry in the same position as it would have  
13 been if it had not brought the first proceeding. And if  
14 it had not brought the first proceeding in this case, it  
15 would have been barred.

16 MR. DREEBEN: No, I don't -- I don't agree  
17 that it's in the same position --

18 JUSTICE STEVENS: Why not?

19 MR. DREEBEN: -- as if it had not brought it.

20 JUSTICE STEVENS: Oh.

21 MR. DREEBEN: It's -- it -- in this case  
22 what the government did was to bring all of its cases  
23 together. And I return to the hypothetical about  
24 Ashe v. Swenson because I think it -- it strikes  
25 everyone as very strange to say that if the jury in Ashe

1 v. Swenson had been presented with all six robbers and  
2 had acquitted on only one and had a returned -- you  
3 know, an inability to reach a verdict --

4 JUSTICE STEVENS: That's because we have the  
5 Dunn doctrine, which itself is questionable. It  
6 basically says there is a certain situation in which we  
7 will tolerate what may be an irrational verdict, and the  
8 reason we tolerate it is that the acquittal itself may  
9 be explained on other grounds. Namely --

10 MR. DREEBEN: I'm not relying on Dunn in  
11 this hypothetical. I'm presupposing that the jury hung  
12 with respect to the other five robbers. And all the  
13 government would come back and say is: For two separate  
14 reasons, we should be able to retry those counts against  
15 the other five robbers. One is that when there is a  
16 hung jury it's settled double jeopardy law that the  
17 government has an opportunity to retry; and the other is  
18 if you accept the proposition that the jury's action was  
19 inconsistent because one of the robbers earned an  
20 acquittal and the other five logically should have been  
21 the same if the jury had found that the defendant wasn't  
22 the robber, the jury was unable to return a verdict.

23 Collateral estoppel depends on the idea that  
24 there is a rational jury, and if a jury has acted  
25 inconsistently, we don't have that basis of rationality

1 that supports the policy justifications of collateral  
2 estoppel.

3 JUSTICE STEVENS: But the whole -- whole  
4 doctrine of inconsistent verdicts depends on the  
5 assumption that what appears to be an irrational  
6 inconsistency may have another explanation.

7 MR. DREEBEN: Yes, such as lenity for the  
8 defendant. The government doesn't get the opportunity  
9 to appeal an acquittal. The government doesn't get the  
10 opportunity to go behind the acquittal and ask whether  
11 the jury acted rationally. All of things -- those  
12 things are true in civil cases where the doctrine of  
13 issue preclusion applies.

14 JUSTICE BREYER: Start the other side, which  
15 I think Justice Stevens was suggesting. Assume that  
16 there was only one trial on the substantive count in  
17 January. Now you decide -- he's acquitted. Now you  
18 decide to indict him in July on the telephone count.  
19 You argue to the judge: Judge, there shouldn't be  
20 double jeopardy here because maybe the jury just  
21 acquitted him the first time because they were lenient.  
22 Maybe they liked his looks. Maybe they were distracted  
23 by a fly. Maybe they were, maybe they were -- and we  
24 didn't even get an appeal. Are you going to win that  
25 case?

1 MR. DREEBEN: Not under --

2 JUSTICE BREYER: No, not even a close.

3 Okay. Not even close.

4 Now, since you're going to lose that case, I  
5 grant you there's thousands of cases talking about your  
6 ability to bring more cases if you have a hung jury. I  
7 concede all those. None of them talks about double  
8 jeopardy, to my knowledge.

9 So we're back to the hypothetical. You've  
10 lost your case. Now, all that you did to turn that case  
11 into a winning case was you also indicted him on the  
12 telephone count in January. Now, that was my question  
13 the first time, and you began to have two answers. I  
14 just didn't see why the government should be any better  
15 off because they also indicted him in January. Given  
16 the language "double jeopardy," you might think the  
17 government, if anything, should be worse off, but let's  
18 keep them neutral.

19 So what is the reason that the government  
20 should be worse off because they indicted him in January  
21 on the telephone count as well as in June?

22 MR. DREEBEN: Well, the government should  
23 not be worse off.

24 JUSTICE BREYER: No, no -- better. I  
25 misspoke.

1           MR. DREEBEN: I think that the reason is  
2 that when, Justice Breyer, you said that double jeopardy  
3 is not involved in the cases involving the government's  
4 ability to retry on a hung count, that's not accurate.  
5 The Court has regarded the doctrine of double jeopardy  
6 as a balance of policies, and one of the fundamental  
7 policies is when the jury cannot agree, the government  
8 has the right to retry.

9           CHIEF JUSTICE ROBERTS: I think that's  
10 right, and your argument depends upon that interest  
11 balancing against the interest in giving effect to the  
12 acquittal verdict.

13           Now, what if I think, under the Seventh  
14 Amendment, that's -- that what is important is  
15 protecting jury verdicts? And the interest in the  
16 irrational case, when you have a conviction and  
17 acquittal, is that you have two jury verdicts and you  
18 can't go one way or the other without undermining one of  
19 them.

20           Here, however, you can give full effect to  
21 the verdict of acquittal without undermining another  
22 jury verdict. You certainly undermine the government's  
23 interest in prosecuting after a hung jury, but if I  
24 think what's important under the Seventh Amendment is  
25 the jury verdicts, then the case comes out the other

1 way, right?

2 MR. DREEBEN: Well, I don't think so, Mr.  
3 Chief Justice, because I think you still have to focus  
4 on the intrinsic character of the doctrine of issue  
5 preclusion, which does depend on a rational jury. Let's  
6 apply it to the facts of this case, because there is --

7 JUSTICE GINSBURG: Well, you qualify it in  
8 your statement of the facts. Is there any insider  
9 information with relation to the insider information  
10 charges that is different in any respect from the  
11 insider information in connection with the substantive  
12 counts?

13 MR. DREEBEN: No, Justice Ginsburg, there is  
14 not. The government's theory here was that on the  
15 substantive securities fraud count, which related to the  
16 January 20th, 2000, analysts meeting, Mr. Yeager was  
17 integrally involved in formulating the message and was  
18 therefore accountable for misstatements to the  
19 marketplace about Enron broadband communications  
20 efficacy and effectiveness and technological value. The  
21 jury, if it rejected that, would acquit on those counts  
22 -- on that count, without reaching the question did Mr.  
23 Yeager know factually that the statements that were made  
24 by others at that analysts conference and in the press  
25 releases subsequently were inaccurate? If the answer to

1 that question is yes, he had the information, then he  
2 could be liable for insider trading even though he is  
3 not liable for substantive securities fraud because he  
4 had nothing to do with creating the statements or  
5 misstatements to the marketplace.

6           And I think I do take issue with  
7 Petitioner's suggestion that the theory of this case was  
8 an omissions theory. The way that Mr. Yeager argued the  
9 case to the jury was that I didn't have any involvement  
10 in preparing or making statements at that January 20th  
11 analysts conference; you can't convict me of what other  
12 people may have said. And the jury instructions advised  
13 the jury that it had to find that he participated in the  
14 scheme and that he either made the statements or caused  
15 the statements or omissions to be made. If it rejected  
16 that, it easily acquits on the securities fraud.

17           And as a result, even if this Court were  
18 inclined to apply collateral estoppel across mixed  
19 counts in a verdict of acquittals and hung counts, which  
20 we submit it should not do, the defendant still has to  
21 carry his burden of showing necessarily that the jury  
22 resolved an issue of fact in his favor that would  
23 preclude the next prosecution.

24           CHIEF JUSTICE ROBERTS: Well, he -- he  
25 carried that burden before the court of appeals.

1           MR. DREEBEN: But the court of appeals  
2 relied on the view that Mr. Yeager did not contest that  
3 he participated in the planning and preparation and  
4 statements that were made.

5           CHIEF JUSTICE ROBERTS: Revisiting of that  
6 issue was not included within the question presented.

7           MR. DREEBEN: Well, I think it's included in  
8 our ability to defend the judgment. The district court  
9 in this case made it quite clear that collateral  
10 estoppel did not apply because the acquittals could rest  
11 on the basis that Mr. Yeager did not participate in the  
12 analysts conference and in the press statements that  
13 were the basis for the wire fraud and the securities  
14 fraud omissions.

15           CHIEF JUSTICE ROBERTS: So if we -- if we  
16 agree with you on that proposition, then the conflict  
17 that we granted cert to resolve would still continue?

18           MR. DREEBEN: Well, you could resolve it. I  
19 would hope that you would resolve it in a favor of a  
20 disposition that doesn't require you to reach the  
21 factual issue, but if the Court resolves the legal issue  
22 against us, I think it should revisit the analysis of  
23 the court of appeals because government isn't defending  
24 the precise way in which the court of appeals went about  
25 analyzing the double jeopardy issue, and its question of

1 what facts were necessarily determined was resolved  
2 incorrectly, I think, as a matter of clear error. I  
3 don't even think Mr. Yeager will stand up on rebuttal  
4 and tell you that he didn't argue to the jury that his  
5 client was not involved in -- in the creation of the  
6 statements at that analyst meeting because he did make  
7 that argument.

8           And I do think that it's important that if  
9 the Court is going to go down a track of allowing  
10 collateral estoppel for mixed verdicts, that it  
11 encourage rigor in the way that courts determine whether  
12 a fact was necessarily decided by the jury.

13           JUSTICE KENNEDY: Well, on that first  
14 theory, in your theory that a retrial on hung counts is  
15 always permitted, I -- I take it there are no court of  
16 appeals opinions or decisions that agree with you on  
17 that point, or am I incorrect?

18           MR. DREEBEN: They have not reasoned it the  
19 way that the government reasons it, but I think that the  
20 Fifth Circuit's result is equivalent to what the  
21 government argued as well as the D.C. Circuit.

22           JUSTICE KENNEDY: A different question:  
23 Suppose you prevail. The hung counts are retried. And  
24 the jury hangs again, and the jury hangs a second time.  
25 Is there any point at which the district court can

1 intervene in the exercise of its own authority and  
2 discretion just to dismiss the charges?

3 MR. DREEBEN: I don't think so, Justice  
4 Kennedy, because I think that the interest that's being  
5 vindicated here is a balance of interests, and it's --  
6 as I responded to the Chief Justice and -- and referred  
7 to Justice Souter's question earlier, double jeopardy  
8 has never been a jurisprudence of black and white. You  
9 could you read the clause as saying one trial for a  
10 defendant. If the defendant is -- doesn't get a  
11 conviction at that trial, game over. But the Court has  
12 never done that because the double jeopardy clause has  
13 always involved a balance of the -- society's very  
14 important interest in having the opportunity for a  
15 decision up or down on whether a defendant is guilty.

16 JUSTICE KENNEDY: Then the government can  
17 try year after year to get a conviction and wear the  
18 defendant down? Nothing the Court can do so long as  
19 there's a hung jury?

20 MR. DREEBEN: If the -- if the jury hangs,  
21 the government can retry. There have been cases where  
22 --

23 JUSTICE KENNEDY: Is that the rule in all of  
24 the States? Don't some States give authority to the  
25 judges to say, enough is enough?

1           MR. DREEBEN: I am not aware whether any  
2 States do, but certainly as a matter of double jeopardy,  
3 this Court has never suggested that there is. I think  
4 as a matter of common sense, prosecutors who are unable  
5 to achieve a verdict after a certain number of trials do  
6 tend to conclude that it's not in the interest of  
7 society to keep trying. But certainly one hung jury  
8 followed by a retrial is customary rather than an  
9 exception to the rule, and the reason why that's --

10           JUSTICE STEVENS: But one hung jury followed  
11 by a second when there has been an acquittal the first  
12 time around is not customary.

13           MR. DREEBEN: But the --

14           JUSTICE STEVENS: So the difference is in  
15 the -- in the first trial, you're not impugning the  
16 integrity of the jury's verdict. You're following the  
17 acquittal, and that's true in the compromise cases, the  
18 Dunn case and those cases, but that's not the case here  
19 because you're talking about two different juries.  
20 You're saying the second jury should have an -- an  
21 opportunity to correct what the first jury did, even  
22 though it would not have that opportunity if the first  
23 jury had not faced the issue.

24           MR. DREEBEN: Well, I -- I -- Justice  
25 Stevens, all I can say is that if the first jury had

1 really believed that Mr. Yeager acted in good faith and  
2 was completely innocent, it should have acquitted on all  
3 counts.

4 JUSTICE STEVENS: It should have, but it  
5 didn't. We know that. And we just know they did not  
6 reach a conclusion on this issue, but they did reach a  
7 conclusion on the count on which they acquitted.

8 MR. DREEBEN: We should -- we should presume  
9 that, as we do in other areas of the law, that the jury  
10 followed the instructions that it was given, and the  
11 instructions that it was given --

12 JUSTICE STEVENS: But you make the same  
13 presumption when there's an inconsistent verdict, but  
14 you say even if it's irrational we'll go along with it  
15 because of the one jury, and they may have had non --  
16 unsound legal reasons for saying, well, we'll let the  
17 guy off on the one count.

18 MR. DREEBEN: But I think that there is no  
19 reason for the fact that a jury takes irrational action  
20 to then be used for the jury's acquittal to block  
21 complete prosecution.

22 JUSTICE STEVENS: The jury did not take  
23 irrational action in this case. The only action --  
24 that's relevant was the acquittal. The other they  
25 didn't act.

1           MR. DREEBEN: Well, they acted irrationally  
2 in the sense that if a fact necessarily determined  
3 acquittals on the -- on the insider trading counts --

4           JUSTICE STEVENS: It would be irrational if  
5 they had returned a verdict, but they said we can't  
6 agree -- for who knows why.

7           MR. DREEBEN: But the point is they should  
8 have agreed logically if they believed that Mr. Yeager  
9 never had inside information or acted in good faith.  
10 And the jury is instructed to consider each count, count  
11 by count. It was given instructions at the Allen phase  
12 of the case that it should strive to achieve a verdict,  
13 that Mr. Yeager is entitled to a verdict of not guilty  
14 if, in fact, the jury believes that he is not guilty,  
15 and that it should make every effort to reach the  
16 verdict.

17           Now, the fact that it didn't, and it would  
18 have been very easy for it to do, if it had determined  
19 logically that he did not have inside information, is a  
20 reason for hesitating before extrapolating out from  
21 those acquittals and blocking the government's  
22 opportunity to retry the hung counts.

23           Mr. Yeager's position logically --

24           JUSTICE STEVENS: It's not all that clear,  
25 because, as you argue, the court -- the district court

1 was correct in analyzing the -- the estoppel issue. And  
2 it's obviously a very difficult issue because judges  
3 have disagreed about it and the government and your  
4 opponent disagree on it. So, it's entirely possible  
5 that the jury just wasn't able to figure it all out.

6 MR. DREEBEN: I -- I don't think that it is  
7 that difficult of an issue. I think that the district  
8 court, which was closer to it, which had presided over  
9 the trial, and which read the closing arguments, made  
10 findings that make it quite clear what Mr. Yeager argued  
11 and how those arguments were totally consistent --

12 JUSTICE STEVENS: The jury could not have  
13 been as confused as the court of appeals was.

14 MR. DREEBEN: I'm not sure that --

15 (Laughter.)

16 MR. DREEBEN: If the jury was confused and  
17 it acted in an irrational manner, that's a reason not to  
18 apply collateral estoppel, not a reason to do it. What  
19 Mr. Yeager's theory implies is that if the jury had come  
20 back and -- under the Federal Rules of Criminal  
21 Procedure it can return partial verdicts. If the jury  
22 had come back and said, we're struggling on some of the  
23 counts, we have a partial verdict on others of them, and  
24 the judge said, okay, we'll take the partial verdict;  
25 and the jury came in and said, we acquit on five counts,

1 that Mr. Yeager's theory would be that the judge should  
2 say, well, that's great, collateral estoppel now means  
3 you don't get to finish the deliberations on the counts  
4 on which you said you can't agree. And that result  
5 makes no sense, neither does blocking retrial in this  
6 case.

7 CHIEF JUSTICE ROBERTS: Your -- your theory  
8 depends upon viewing a hung jury as constituting some  
9 action by the jury. Now, obviously it does in some  
10 sense.

11 But if you view -- if you accept the  
12 proposition that juries only act by returning verdicts,  
13 and that's the reason you can retry, because with a hung  
14 jury, the jury hasn't really done anything in the way  
15 jurors act, then the case comes out -- then the  
16 defendant prevails, right?

17 MR. DREEBEN: I assume I can answer your  
18 question, Mr. Chief Justice?

19 CHIEF JUSTICE ROBERTS: Yes.

20 MR. DREEBEN: No, because the -- the logic  
21 of -- of the situation here is that in order for  
22 collateral estoppel to apply, there needs to be a  
23 rational jury verdict. And *Ashe v. Swenson* tells us  
24 that in attempting to decide what the jury rationally  
25 resolved, we look at all evidence in the record, not

1 just some.

2           So it isn't necessary to treat the jury's  
3 hung counts as if they are verdicts of a sort. They  
4 simply are data which show that if the jury had been  
5 rational and it had resolved a fact in favor of the  
6 defendant that was necessary for the government to prove  
7 on the other counts, it would have resolved those as  
8 acquittals as well. And once you take into account that  
9 total record, the doctrine of collateral estoppel with  
10 its premise of rationality cannot be applied.

11           CHIEF JUSTICE ROBERTS: Thank you, counsel.

12           MR. DREEBEN: Thank you.

13           CHIEF JUSTICE ROBERTS: Mr. Buffone, you  
14 have six minutes remaining.

15           REBUTTAL ARGUMENT OF SAMUEL J. BUFFONE

16           ON BEHALF OF THE PETITIONER

17           MR. BUFFONE: The Solicitor General has  
18 essentially asked this Court to take a metaphysical view  
19 of the Double Jeopardy Clause, but the teachings of this  
20 Court from Sealton through Ashe is that the important  
21 protections of the Double Jeopardy Clause as applied to  
22 issue preclusion must be approached with reason, with  
23 rationality, with a non-hypertechnical view in order to  
24 protect the public policies that underlie the Double  
25 Jeopardy Clause. And that is quite simply that what

1 happened here should not occur. That a defendant should  
2 not be forced to relitigate before a second jury an  
3 issue that was necessarily decided.

4 I sat through and argued through a  
5 13-and-a-half-week jury trial. A reasonable and  
6 rational explanation of what occurred there is that we  
7 had a conscientious jury that followed its instructions,  
8 that tried to reach through a complex 176-count  
9 indictment, and they simply were not able to. They  
10 spoke the community will, and they spoke it forcefully  
11 in their acquittals. Six of them.

12 And the only conclusion that can be reached  
13 from those acquittals is that Mr. Yeager did not possess  
14 insider information.

15 At the beginning of this trial, we filed two  
16 motions, the first challenging the specificity of the  
17 indictment, and the second seeking a bill of  
18 particulars. The district court answered both with the  
19 same answer. The insider information that Mr. Yeager is  
20 charged with possessing in the insider trading counts is  
21 the false statements made by others at the 2000 analysts  
22 conference.

23 The omissions theory was not, as the  
24 Solicitor General submits, some afterthought. It was  
25 core to the government's prosecution, and it was core to

1 the case. The jury decided that the omissions theory  
2 was not a basis to convict on the six counts that it  
3 acquitted. It determined that Mr. Yeager did not  
4 possess that information. And Mr. Yeager is entitled to  
5 the benefits of those acquittals.

6 Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 The case is submitted.

9 (Whereupon, at 11:04 a.m., the case in the  
10 above-entitled matter was submitted.)

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<b>ability</b> 33:17 37:6 38:4 41:8	22:11,25,25 23:3 24:5,8,9 40:19 41:10 46:3,21 49:8 50:11,13 51:5	<b>allowing</b> 25:18 42:9 <b>allows</b> 26:8 <b>alternative</b> 6:21 <b>alternatives</b> 6:23 <b>Amendment</b> 32:13 38:14,24 <b>analysis</b> 5:1 7:16 10:21,22 17:4 17:5 21:2,15 41:22 <b>analyst</b> 42:6 <b>analysts</b> 5:14 39:16,24 40:11 41:12 50:21 <b>analyzed</b> 5:5 <b>analyzing</b> 41:25 47:1 <b>answer</b> 13:24 16:19,21 19:21 25:5,9,12 28:15 39:25 48:17 50:19 <b>answered</b> 50:18 <b>answers</b> 30:8 37:13 <b>appeal</b> 12:16 33:18 36:9,24 <b>appeals</b> 40:25 41:1,23,24 42:16 47:13 <b>APPEARAN...</b> 1:14 <b>appears</b> 36:5 <b>Appendix</b> 4:8 <b>apple</b> 25:19 26:1 29:13 <b>application</b> 3:16 25:2 <b>applied</b> 12:21 25:3 49:10,21 <b>applies</b> 36:13 <b>apply</b> 13:20,21 24:7 25:14,16 39:6 40:18 41:10 47:18	48:22 <b>approached</b> 49:22 <b>appropriate</b> 18:15 <b>areas</b> 45:9 <b>argue</b> 8:18,18 13:5 36:19 42:4 46:25 <b>argued</b> 5:16 40:8 42:21 47:10 50:4 <b>argues</b> 29:12 30:9 <b>arguing</b> 6:9 <b>argument</b> 1:12 2:2,7 3:4,6,22 3:23 4:8 6:12 10:17 21:10 29:15 30:13 33:24 38:10 42:7 49:15 <b>arguments</b> 5:10 7:15 47:9,11 <b>arises</b> 9:5 <b>arising</b> 18:14 <b>Ashe</b> 3:17,22 5:3 7:16,19,20 8:22 9:20 10:5 21:2 23:8,13 26:12,13,23 32:4,7,9 34:24 34:25 48:23 49:20 <b>Ashe-type</b> 8:23 <b>aside</b> 20:21 <b>asked</b> 11:22 26:7 49:18 <b>asking</b> 22:6 32:5 <b>assert</b> 11:6 <b>assume</b> 5:24 36:15 48:17 <b>assumed</b> 4:24 <b>assumes</b> 3:23 <b>assuming</b> 12:7 <b>assumption</b> 4:6 4:17 17:10	36:5 <b>assurances</b> 33:19 <b>attach</b> 16:22 <b>attached</b> 8:24 <b>attempting</b> 28:9 48:24 <b>attempts</b> 28:13 <b>attorney</b> 5:6 <b>authority</b> 17:8 18:25 19:1,2 43:1,24 <b>avoid</b> 19:9 <b>avoiding</b> 29:5 <b>aware</b> 19:17 44:1 <b>a.m</b> 1:13 3:2 51:9
B				
<b>back</b> 4:16 11:21 20:3 35:13 37:9 47:20,22 <b>backfire</b> 30:19 <b>balance</b> 29:18 38:6 43:5,13 <b>balancing</b> 38:11 <b>bar</b> 13:14 17:16 18:7 21:3,24 23:1 <b>barred</b> 34:15 <b>based</b> 6:13 7:4 <b>basic</b> 21:20 <b>basically</b> 6:4 35:6 <b>basis</b> 11:15 18:17 35:25 41:11,13 51:2 <b>began</b> 6:9 33:7 37:13 <b>beginning</b> 50:15 <b>behalf</b> 1:15,18 2:4,6,9 3:7 21:11 49:16 <b>belief</b> 8:2 <b>believe</b> 5:2 7:17 9:1 10:5,5,21				

16:20 17:25 18:16 19:16 20:10 <b>believed</b> 45:1 46:8 <b>believes</b> 46:14 <b>benefits</b> 51:5 <b>better</b> 13:7 28:3 37:14,24 <b>big</b> 31:24 32:3 <b>bigger</b> 28:25 <b>bill</b> 50:17 <b>bite</b> 25:19 26:1 <b>bites</b> 29:13 <b>bizarre</b> 31:21 <b>black</b> 43:8 <b>block</b> 45:20 <b>Blockburger</b> 32:25 <b>blocked</b> 16:9,11 <b>blocking</b> 46:21 48:5 <b>boils</b> 6:2 <b>break</b> 30:23 <b>Breyer</b> 13:23 14:6,9,12,18 14:22 15:5,12 15:22 16:3,15 25:4,20,23 26:5 27:19 28:2,7 36:14 37:2,24 38:2 <b>Breyer's</b> 28:17 29:6 <b>brief</b> 3:24 9:17 11:18 32:4 <b>briefs</b> 5:21 25:11 <b>bring</b> 27:24 28:4 28:9 29:2,7,8 34:22 37:6 <b>broadband</b> 31:10 39:19 <b>brought</b> 25:24 26:10,24 34:13 34:14,19 <b>Buffone</b> 1:15 2:3	2:8 3:5,6,8,19 5:2 6:6,20 7:6 8:1,13,17 9:11 10:4,19 11:13 12:12 13:10 14:4,7,10,16 14:20 15:4,9 15:21 16:1,14 16:20 17:3,25 18:12,22 19:5 19:16,21 20:10 49:13,15,17 <b>burden</b> 40:21,25 <hr/> <b>C</b> <b>C</b> 2:1 3:1 <b>called</b> 3:18 <b>candid</b> 4:4 <b>carried</b> 40:25 <b>carry</b> 40:21 <b>carving</b> 28:12 <b>case</b> 3:18,21 7:20 10:17 13:18,25 14:6 14:13,13,22,24 15:1,6,15,18 15:22,23,25 16:5,6,7 17:6,7 17:15,17 18:9 22:3,7,8,18 23:19 24:2,16 24:21 26:2,21 26:21 27:9,10 27:13,17,17,18 30:17 31:6 32:8,21,25 33:22,25 34:14 34:21 36:25 37:4,10,10,11 38:16,25 39:6 40:7,9 41:9 44:18,18 45:23 46:12 48:6,15 51:1,8,9 <b>cases</b> 8:23 9:15 15:13 18:16,18 18:19 20:22	23:9 34:22 36:12 37:5,6 38:3 43:21 44:17,18 <b>cause</b> 6:19 29:23 <b>caused</b> 40:14 <b>cert</b> 41:17 <b>certain</b> 20:1 32:10 35:6 44:5 <b>certainly</b> 19:18 38:22 44:2,7 <b>certainty</b> 12:13 <b>challenging</b> 50:16 <b>chance</b> 28:25 30:1,2,3 31:1 <b>character</b> 39:4 <b>charge</b> 7:22 12:1 12:3 20:15 31:12 <b>charged</b> 4:14 7:7 50:20 <b>charges</b> 12:23 28:10,22,22 29:21 39:10 43:2 <b>Chief</b> 3:3,8 13:4 13:11 21:8,12 22:5,12,24 32:2,6,16,20 33:2,8 38:9 39:3 40:24 41:5,15 43:6 48:7,18,19 49:11,13 51:7 <b>choice</b> 18:1,2 <b>choose</b> 17:22 18:11 <b>chooses</b> 20:9 <b>Circuit</b> 42:21 <b>Circuit's</b> 42:20 <b>circumstance</b> 9:23 <b>circumstances</b> 4:13 9:21,22 10:3,6 17:9	<b>civil</b> 32:10 33:16 36:12 <b>claim</b> 8:10,10,18 20:20,21,22 <b>clarification</b> 8:20 <b>clarified</b> 7:14 <b>clarity</b> 18:2 <b>clause</b> 19:8 28:8 31:24 32:14,18 33:10,14 43:9 43:12 49:19,21 49:25 <b>clear</b> 4:20 5:12 6:25 16:18,19 16:21 18:1 19:7 33:5 41:9 42:2 46:24 47:10 <b>clearly</b> 26:3 <b>client</b> 3:25 4:10 4:17 5:8 6:18 42:5 <b>climates</b> 12:22 <b>close</b> 9:23 37:2,3 <b>closer</b> 47:8 <b>closing</b> 5:10 47:9 <b>Coercive</b> 12:20 <b>cold</b> 12:22 <b>collateral</b> 8:19 13:20 16:21 20:18 22:3,9 23:4 24:7 25:3 25:13 28:11 31:23 33:13,16 33:19 35:23 36:1 40:18 41:9 42:10 47:18 48:2,22 49:9 <b>come</b> 4:16 11:10 11:12 35:13 47:19,22 <b>comes</b> 30:2 38:25 48:15 <b>common</b> 9:18	24:19 28:22 44:4 <b>communicatio...</b> 39:19 <b>community</b> 50:10 <b>complete</b> 45:21 <b>completely</b> 45:2 <b>completing</b> 21:25 <b>complex</b> 50:8 <b>complicated</b> 15:14 <b>component</b> 28:11 <b>compromise</b> 23:22 44:17 <b>compromised</b> 27:6 <b>concede</b> 37:7 <b>concepts</b> 19:8 <b>conclude</b> 44:6 <b>conclusion</b> 21:15 45:6,7 50:12 <b>conclusions</b> 22:16 <b>concurring</b> 10:13 <b>conference</b> 5:14 39:24 40:11 41:12 50:22 <b>conflict</b> 23:25 24:22 41:16 <b>conflicting</b> 14:8 23:20 <b>confused</b> 11:9 30:6 47:13,16 <b>connection</b> 39:11 <b>conscientious</b> 50:7 <b>consider</b> 46:10 <b>considering</b> 30:25 <b>consisted</b> 29:17 <b>consistent</b> 47:11
--	--	---	--	---

<p><b>consists</b> 30:3  <b>constitute</b> 25:21  <b>constituting</b>  48:8  <b>Constitution</b>  19:13,23,24  20:7  <b>constitutional</b>  19:10,17  <b>consumed</b> 6:2  <b>contemporary</b>  12:22  <b>contending</b> 8:9  <b>contest</b> 41:2  <b>context</b> 32:12  33:16  <b>continue</b> 41:17  <b>continues</b> 33:5  <b>continuing</b>  21:18  <b>contrast</b> 18:17  <b>convert</b> 5:23  <b>convict</b> 6:13,25  21:21 29:21  40:11 51:2  <b>convicted</b> 13:8  <b>convicting</b> 15:24  <b>conviction</b> 15:16  16:9,11,25  23:23 38:16  43:11,17  <b>convictions</b>  13:17 22:11  <b>convicts</b> 14:2  <b>core</b> 8:3,4 19:8  24:19 50:25,25  <b>correct</b> 4:5,20  4:21 5:15,18  8:17 28:1  44:21 47:1  <b>counsel</b> 7:15  13:4 21:8  49:11 51:7  <b>count</b> 3:15 10:1  13:8,9,25,25  14:13,14,23,25  14:25 15:2,3,7</p>	<p>15:10,11,15,16  15:16,17 16:8  16:10,10,11,24  17:1 18:15  24:16 25:9,25  27:24,25 28:4  29:7 36:16,18  37:12,21 38:4  39:15,22 45:7  45:17 46:10,10  46:11  <b>countervailing</b>  29:19  <b>counts</b> 3:14 9:6  9:7,9,12,17  10:10,14,14,18  10:20 11:11,12  11:17 12:18,19  13:12,20 20:1  20:2,4,4,5,6  21:1,16,22  23:4,17 24:10  24:12,18,18  25:21 26:9  28:23 29:3,24  30:2,3,10,10  30:16,22 31:3  31:8,13,15,16  31:21 34:5  35:14 39:12,21  40:19,19 42:14  42:23 45:3  46:3,22 47:23  47:25 48:3  49:3,7 50:20  51:2  <b>course</b> 5:7 17:15  25:23,24 29:18  <b>court</b> 1:1,12 3:9  5:4,5 8:20,24  9:14,16 10:7,8  10:12,22 11:19  11:25 12:2  13:1,15 19:6  20:18 21:13  22:9 23:13  24:17 26:7,22</p>	<p>30:17 32:7  33:4,13 34:7  38:5 40:17,25  41:1,8,21,23  41:24 42:9,15  42:25 43:11,18  44:3 46:25,25  47:8,13 49:18  49:20 50:18  <b>courts</b> 12:20  19:18 42:11  <b>Court's</b> 3:17  33:8 34:3  <b>coy</b> 32:3  <b>creating</b> 40:4  <b>creation</b> 42:5  <b>crimes</b> 28:20  <b>criminal</b> 28:18  47:20  <b>cross-examina...</b>  5:11,20 6:3,8  7:15  <b>crucial</b> 23:6  33:16  <b>customary</b> 44:8  44:12</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>D</b> 3:1  <b>data</b> 49:4  <b>deadlocked</b> 12:2  12:7,7,9,10  31:19  <b>decide</b> 3:14 7:18  36:17,18 48:24  <b>decided</b> 7:23 8:7  8:16,24 9:21  10:9 17:2 21:3  27:6 42:12  50:3 51:1  <b>deciding</b> 33:15  <b>decision</b> 3:17  13:2 24:13  43:15  <b>decisions</b> 33:9  34:3 42:16  <b>defend</b> 41:8</p>	<p><b>defendant</b> 7:24  13:7,11 26:18  26:20 28:10  29:21 34:10  35:21 36:8  40:20 43:10,10  43:15,18 48:16  49:6 50:1  <b>defendant's</b>  3:11 5:6  <b>defendant's</b>  25:22  <b>defending</b> 41:23  <b>defined</b> 34:8  <b>deliberations</b>  20:16 48:3  <b>Department</b>  1:18  <b>depend</b> 14:17  15:4 30:9 39:5  <b>depends</b> 35:23  36:4 38:10  48:8  <b>deprive</b> 29:24  <b>depriving</b> 12:21  <b>Deputy</b> 1:17  <b>derive</b> 10:7,8  <b>describe</b> 17:8  <b>despite</b> 5:24  <b>determination</b>  3:11,12 10:25  11:3,4 16:22  16:23 22:19,22  22:24  <b>determinations</b>  23:2  <b>determine</b> 11:2  14:11 19:4  42:11  <b>determined</b> 3:25  17:11 24:8  33:21 42:1  46:2,18 51:3  <b>determining</b>  9:21  <b>dictates</b> 30:21  <b>difference</b> 23:18</p>	<p>27:9,17 44:14  <b>different</b> 7:20  7:25 20:8,11  22:13,18 26:12  28:13 39:10  42:22 44:19  <b>difficult</b> 47:2,7  <b>dilemma</b> 13:12  <b>direct</b> 25:1  <b>directly</b> 13:24  <b>disagree</b> 47:4  <b>disagreed</b> 47:3  <b>disallowed</b> 11:8  <b>discharged</b> 12:3  <b>disclose</b> 6:14,19  7:5  <b>discretion</b> 43:2  <b>dismiss</b> 43:2  <b>disposition</b>  31:17 41:20  <b>dispositive</b>  13:19 15:10  <b>dissenting</b> 10:13  <b>distinct</b> 30:24  32:25  <b>distracted</b> 24:17  36:22  <b>distress</b> 11:24  <b>district</b> 11:19  41:8 42:25  46:25 47:7  50:18  <b>doctrinal</b> 22:2  <b>doctrine</b> 21:4,18  22:9 25:3 26:8  31:23 32:9,11  33:15 35:5  36:4,12 38:5  39:4 49:9  <b>doing</b> 28:4  <b>double</b> 8:3,9  10:2 12:11  18:4 19:6,8  21:14,24 23:8  25:2,14 26:5,8  28:7 29:11,17  31:24 32:11,14</p>
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32:18,24 33:9 33:14 35:16 36:20 37:7,16 38:2,5 41:25 43:7,12 44:2 49:19,21,24 <b>doubt</b> 24:1,24 <b>doubts</b> 27:5 <b>Dowling</b> 5:4,5 <b>dramatic</b> 22:6 <b>Dreeben</b> 1:17 2:5 21:9,10,12 22:8,23 23:12 23:16 24:3,14 24:25 25:20 26:4 27:8,14 28:1,6 29:16 30:7,14 31:7 32:6,19,22 33:4,11 34:2,7 34:16,19,21 35:10 36:7 37:1,22 38:1 39:2,13 41:1,7 41:18 42:18 43:3,20 44:1 44:13,24 45:8 45:18 46:1,7 47:6,14,16 48:17,20 49:12 <b>drink</b> 12:21 <b>drug</b> 27:24 <b>drugs</b> 13:25 14:1,25 28:18 <b>Dunn</b> 35:5,10 44:18 <b>duty</b> 5:15 6:14 6:18 7:5 <b>D.C</b> 1:8,15,18 42:21	<b>effect</b> 9:5 10:16 10:17 13:13,20 17:8 18:19 22:16,20,20 23:5,23 29:5 38:11,20 <b>effectiveness</b> 39:20 <b>efficacy</b> 39:20 <b>effort</b> 8:6 30:18 46:15 <b>efforts</b> 30:19 <b>egregiously</b> 12:17 <b>either</b> 6:23 13:16 19:14 28:23 30:5 40:14 <b>element</b> 6:22 <b>elements</b> 28:23 <b>elucidated</b> 7:13 <b>embodies</b> 23:17 <b>employment</b> 11:22 <b>encourage</b> 20:15 42:11 <b>engage</b> 7:11 10:22 <b>enhance</b> 7:10 <b>Enron</b> 7:10 31:10 39:19 <b>entirely</b> 24:12 47:4 <b>entirety</b> 5:9 <b>entitled</b> 21:21 33:24 46:13 51:4 <b>entitles</b> 33:7 <b>equate</b> 12:25 <b>equivalent</b> 9:10 9:10 42:20 <b>erroneous</b> 12:17 <b>error</b> 42:2 <b>ESQ</b> 1:15,17 2:3 2:5,8 <b>essentially</b> 3:25 49:18	<b>establish</b> 4:2 <b>established</b> 31:21 <b>estoppel</b> 8:20 13:20 16:21 20:18 22:3,10 23:5 24:7 25:3 25:14 28:11 31:23 33:13,17 33:19 35:23 36:2 40:18 41:10 42:10 47:1,18 48:2 48:22 49:9 <b>event</b> 7:21 <b>events</b> 32:15 <b>everybody</b> 15:17 16:3 <b>evidence</b> 48:25 <b>exactly</b> 25:5 31:25 <b>example</b> 18:4 <b>exception</b> 44:9 <b>excuse</b> 18:20 <b>exercise</b> 43:1 <b>exhausted</b> 30:6 31:6 <b>expect</b> 30:4 <b>explain</b> 23:21 <b>explained</b> 35:9 <b>explanation</b> 36:6 50:6 <b>expressed</b> 32:10 <b>extend</b> 33:15 <b>extends</b> 13:5 <b>extension</b> 22:6 29:11 31:24 32:3 <b>extent</b> 23:2 <b>extrapolating</b> 46:20 <b>eyes</b> 9:23	<b>fact</b> 4:2,11,12 5:21 6:1,19 8:6 11:8 23:19 24:8,19 29:14 31:9,14,20 33:6,21 40:22 42:12 45:19 46:2,14,17 49:5 <b>facts</b> 4:22 39:6,8 42:1 <b>factual</b> 16:23,24 41:21 <b>factually</b> 39:23 <b>failed</b> 11:2,14,16 <b>failure</b> 17:21 <b>fair</b> 21:21 29:21 30:1,2,3,22 32:8 33:25 34:6,8 <b>faith</b> 45:1 46:9 <b>false</b> 50:21 <b>far</b> 25:1 <b>fast</b> 15:12 <b>favor</b> 3:11 25:22 29:12 40:22 41:19 49:5 <b>February</b> 27:23 <b>Federal</b> 19:14 20:8 47:20 <b>fence</b> 13:15 <b>Fifth</b> 32:13 42:20 <b>figure</b> 47:5 <b>filed</b> 50:15 <b>final</b> 3:11 9:4,7 11:4 18:19 20:14 <b>finality</b> 8:5 9:2,3 10:11,23,25 12:13 13:2 18:3 19:9,13 20:24 <b>financial</b> 11:20 11:23 <b>find</b> 4:10 6:1,16 7:3 40:13	<b>finding</b> 12:11 <b>findings</b> 22:20 47:10 <b>finish</b> 48:3 <b>firm</b> 13:1 <b>first</b> 5:3 6:6,20 6:22 8:1,4 9:22 10:4 12:20 14:2 19:9 21:17 23:19 25:25 26:16 28:7 30:8,18 34:1,13,14 36:21 37:13 42:13 44:11,15 44:21,22,25 50:16 <b>five</b> 26:19 27:1 27:16 35:12,15 35:20 47:25 <b>fly</b> 36:23 <b>focus</b> 39:3 <b>follow</b> 17:18 <b>followed</b> 44:8,10 45:10 50:7 <b>following</b> 18:15 28:16 44:16 <b>Fong</b> 18:19,19 <b>Foo</b> 18:19,19 <b>food</b> 12:21 <b>forbidden</b> 27:25 <b>force</b> 9:13 <b>forced</b> 20:18 50:2 <b>forcefully</b> 50:10 <b>form</b> 20:15 <b>formulating</b> 39:17 <b>fortiori</b> 26:2 <b>found</b> 35:21 <b>frailty</b> 6:24 <b>fraud</b> 6:13,16,22 7:3,7 27:18 39:15 40:3,16 41:13,14 <b>front</b> 17:7 <b>full</b> 20:14 21:21
<hr/> <b>E</b> <hr/> <b>E</b> 2:1 3:1,1 <b>earlier</b> 43:7 <b>earned</b> 35:19 <b>easily</b> 40:16 <b>easy</b> 32:21 46:18	<b>erroneous</b> 12:17 <b>error</b> 42:2 <b>ESQ</b> 1:15,17 2:3 2:5,8 <b>essentially</b> 3:25 49:18	<hr/> <b>F</b> <hr/> <b>F</b> 1:3 <b>face</b> 11:25 <b>faced</b> 44:23	<b>financial</b> 11:20 11:23 <b>find</b> 4:10 6:1,16 7:3 40:13	<b>full</b> 20:14 21:21

29:20 33:24 34:8 38:20 <b>full-time</b> 11:21 <b>fundamental</b> 38:6 <b>fundamentally</b> 30:15 <b>further</b> 10:21 18:7 21:6	3:12 5:12 6:9 6:17 21:15,18 21:20,23,25 25:18 26:9,14 26:16,18,23 28:3,9,12,21 28:25 29:2,4 29:13,20,24 30:1,18,20 31:1,20 33:5 33:24 34:22 35:13,17 36:8 36:9 37:14,17 37:19,22 38:7 41:23 42:19,21 43:16,21 47:3 49:6	<b>heat</b> 12:21 <b>held</b> 5:23 <b>hesitating</b> 46:20 <b>historically</b> 9:14 9:17 12:19 <b>history</b> 12:25 19:6 32:13 <b>Honor</b> 5:3 6:6 6:20 7:6 8:13 8:17,21 9:11 11:13 12:4,12 13:10 14:4,16 14:21 15:4,9 16:2,14,20 17:25 18:12 19:5,16 20:10 29:19 <b>Honor's</b> 7:1 18:17 <b>hope</b> 41:19 <b>horns</b> 13:12 <b>hung</b> 3:13,15 9:6,7,9,12,16 9:24 10:10,14 10:14,18,20 11:12 12:18,19 14:14,19,20,22 15:1,19,24 16:1 17:1,15 17:20 18:6,15 19:3 21:16,19 21:22 23:4 25:8,8,21,25 26:9 27:2 29:1 29:4,23 33:3 35:11,16 37:6 38:4,23 40:19 42:14,23 43:19 44:7,10 46:22 48:8,13 49:3 <b>hurts</b> 10:17 <b>hypo</b> 28:17 <b>hypothetical</b> 15:10 20:25 29:6 34:23 35:11 37:9	<b>I</b>	23:3 <b>indict</b> 28:18 36:18 <b>indicted</b> 15:18 26:14 37:11,15 37:20 <b>indictment</b> 7:6 7:13 13:21 23:15,16 28:10 28:23 29:4 30:11,16 31:3 50:9,17 <b>indictments</b> 28:24 30:4 <b>individual</b> 27:23 <b>individuals</b> 26:14 <b>information</b> 31:10 39:9,9 39:11 40:1 46:9,19 50:14 50:19 51:4 <b>innocent</b> 24:23 45:2 <b>inquire</b> 12:8 <b>inside</b> 31:9 46:9 46:19 <b>insider</b> 4:1 7:11 24:9,15,18 31:2,8,15 39:8 39:9,11 40:2 46:3 50:14,19 50:20 <b>insofar</b> 6:17 33:13 <b>instructed</b> 46:10 <b>instruction</b> 4:5,7 4:16,21 5:25 6:4,24 <b>instructions</b> 4:3 6:21 7:13 40:12 45:10,11 46:11 50:7 <b>integrally</b> 31:11 39:17 <b>integrated</b> 7:7 <b>integrity</b> 24:24
<b>G</b>				
<b>G</b> 3:1 <b>game</b> 26:14 43:11 <b>General</b> 1:17 49:17 50:24 <b>getting</b> 29:1,3 30:5 <b>Ginsburg</b> 7:19 8:1,8,15 9:9 30:25 31:8 39:7,13 <b>Ginsburg's</b> 20:19 <b>give</b> 20:15 22:16 22:20,20 23:23 30:7 32:1 38:20 43:24 <b>given</b> 18:19 37:15 45:10,11 46:11 <b>gives</b> 28:21,25 <b>giving</b> 38:11 <b>go</b> 3:21 4:7 19:6 19:6 26:2,3,19 36:10 38:18 42:9 45:14 <b>goes</b> 26:6 <b>going</b> 4:6 14:10 15:12 17:4,6 19:1 22:14 28:12 32:17,17 33:21 36:24 37:4 42:9 <b>good</b> 45:1 46:9 <b>gored</b> 13:16,19 <b>government</b>	<b>government's</b> 6:11,12 34:8 38:3,22 39:14 46:21 50:25 <b>grand</b> 29:22 <b>grant</b> 37:5 <b>granted</b> 41:17 <b>great</b> 48:2 <b>greater</b> 8:2 <b>grounded</b> 7:12 26:5 <b>grounds</b> 23:21 35:9 <b>grows</b> 22:3 <b>guess</b> 5:21 6:1 13:24 <b>guilty</b> 5:17 24:22 43:15 46:13,14 <b>guy</b> 45:17			
	<b>H</b>			
	<b>handle</b> 30:5 <b>hangs</b> 13:7 20:1 27:16 34:9 42:24,24 43:20 <b>happened</b> 14:17 14:18 15:5 28:4 50:1 <b>hear</b> 3:3 13:24			

<p>25:1 27:5,13 27:15,20 33:20 44:16 <b>interest</b> 29:18 29:20 38:10,11 38:15,23 43:4 43:14 44:6 <b>interests</b> 43:5 <b>interpreted</b> 5:4 <b>interrupt</b> 21:23 <b>intervene</b> 43:1 <b>intrinsic</b> 39:4 <b>involved</b> 26:13 31:11 38:3 39:17 42:5 43:13 <b>involvement</b> 40:9 <b>involving</b> 22:7 38:3 <b>irrational</b> 29:1,9 35:7 36:5 38:16 45:14,19 45:23 46:4 47:17 <b>irrationality</b> 23:25 <b>irrationally</b> 46:1 <b>irrelevant</b> 31:14 <b>issue</b> 3:10,13,20 3:20 5:8 8:6,9 8:11,16,19 9:1 9:5 12:8 16:23 16:24 17:12,19 18:25 19:25 20:18,23 21:3 21:4 29:4,8,10 29:11 32:11 36:13 39:4 40:6,22 41:6 41:21,21,25 44:23 45:6 47:1,2,7 49:22 50:3 <b>issued</b> 12:2 <b>issues</b> 20:20 25:22 29:2</p>	<p style="text-align: center;"><b>J</b></p> <p><b>J</b> 1:15 2:3,8 3:6 49:15 <b>January</b> 28:5 36:17 37:12,15 37:20 39:16 40:10 <b>jeopardy</b> 8:3,9 8:24 10:2 12:11 18:4 19:7,8 21:14 21:19,24 23:8 25:2,14 26:5,8 28:8 29:11,17 31:24 32:12,14 32:18,24 33:3 33:5,7,9,12,14 35:16 36:20 37:8,16 38:2,5 41:25 43:7,12 44:2 49:19,21 49:25 <b>joinder</b> 13:14,19 <b>joined</b> 13:13 <b>joining</b> 28:21 <b>Joint</b> 4:8 <b>judge</b> 4:9 36:19 36:19 47:24 48:1 <b>judges</b> 43:25 47:2 <b>judgment</b> 9:2,3 41:8 <b>judicata</b> 13:14 13:21 <b>July</b> 36:18 <b>June</b> 27:24 29:8 37:21 <b>juries</b> 18:6 44:19 48:12 <b>jurisdictions</b> 20:12 <b>jurisprudence</b> 19:7 43:8 <b>jurors</b> 4:9 11:20 11:22 12:21 48:15</p>	<p><b>jury</b> 3:13 4:3,4,7 4:15 5:12,16 5:25,25 6:4,9 6:15,25 7:16 7:17 9:15,18 9:24 10:9,9,10 10:16 11:1,9 11:14,16,18,23 12:1,4,5,24 13:7 14:1,14 14:23 15:1,19 15:24 16:1 17:15,20 18:14 18:18 19:4,9 19:13 20:1,3 20:14,24 21:19 21:22 22:4,13 22:19,21,22 24:8 26:25 27:16 29:1,4 29:22 30:5 31:6,15,19,25 32:1 34:9,25 35:11,16,21,22 35:24,24 36:11 36:20 37:6 38:7,15,17,22 38:23,25 39:5 39:21 40:9,12 40:13,21 42:4 42:12,24,24 43:19,20 44:7 44:10,20,21,23 44:25 45:9,15 45:19,22 46:10 46:14 47:5,12 47:16,19,21,25 48:8,9,14,14 48:23,24 49:4 50:2,5,7 51:1 <b>jury's</b> 3:10 9:6 9:25 10:24 20:17 22:15 26:17 31:5 35:18 44:16 45:20 49:2 <b>Justice</b> 1:18 3:3</p>	<p>3:8,19 5:19 6:11 7:2,19 8:1 8:8,15 9:9,19 10:4,15,16,19 11:5 12:6,8 13:4,11,23 14:6,9,12,18 14:22 15:5,12 15:22 16:3,15 17:3 18:5,21 18:23 19:12,20 19:23 20:19 21:8,12 22:5 22:12,24 23:10 23:13,14,18 24:4,11,21 25:4,5,20,23 26:5,7 27:4,8 27:11,14,19 28:2,7,14,17 29:5,16,25 30:8,12,25 31:7 32:2,6,16 32:20 33:2,8 33:23 34:4,11 34:18,20 35:4 36:3,14,15 37:2,24 38:2,9 39:3,7,13 40:24 41:5,15 42:13,22 43:3 43:6,7,16,23 44:10,14,24 45:4,12,22 46:4,24 47:12 48:7,18,19 49:11,13 51:7 <b>justifications</b> 36:1</p> <p style="text-align: center;"><b>K</b></p> <p><b>keep</b> 33:14 37:18 44:7 <b>ken</b> 31:5 <b>Kennedy</b> 10:15 10:19 42:13,22 43:4,16,23</p>	<p><b>key</b> 29:5 33:23 <b>kind</b> 20:13 <b>know</b> 11:14 12:5 12:12 13:5 18:5 19:21 28:19 31:10 35:3 39:23 45:5,5 <b>knowledge</b> 4:1 5:22 31:13 37:8 <b>known</b> 8:19 11:19 <b>knows</b> 46:6</p> <p style="text-align: center;"><b>L</b></p> <p><b>language</b> 37:16 <b>Laughter</b> 47:15 <b>laundering</b> 31:4 31:16 <b>law</b> 9:18 12:23 14:3 17:9 18:4 19:14 20:8,8 35:16 45:9 <b>lay</b> 12:18 <b>lead</b> 21:15 30:16 <b>led</b> 24:9 <b>legal</b> 31:23 41:21 45:16 <b>leniency</b> 23:21 <b>lenient</b> 36:21 <b>lenity</b> 36:7 <b>let's</b> 5:23 37:17 39:5 <b>liable</b> 40:2,3 <b>light</b> 4:13 12:25 <b>liked</b> 36:22 <b>likelihood</b> 29:3 <b>line</b> 18:13,16,18 19:1 20:22 22:2 <b>Linen</b> 9:16 <b>lines</b> 17:8 18:25 19:2 21:14 <b>litigation</b> 33:21 <b>loads</b> 29:3 <b>logic</b> 48:20</p>
--	---	--	--	---

<p><b>logical</b> 16:15 17:4,5 <b>logically</b> 14:2 30:24 35:20 46:8,19,23 <b>long</b> 18:2,6 43:18 <b>look</b> 18:5 25:12 48:25 <b>looked</b> 4:3 5:6 12:19 <b>looking</b> 5:9 <b>looks</b> 36:22 <b>lose</b> 37:4 <b>lost</b> 37:10 <b>lot</b> 28:21 <b>lots</b> 28:17,22</p> <hr/> <p style="text-align: center;"><b>M</b></p> <p><b>majority</b> 10:12 <b>making</b> 16:16 16:18 30:13 40:10 <b>man</b> 6:10 <b>manager</b> 31:12 <b>manifest</b> 18:13 <b>manner</b> 47:17 <b>March</b> 1:9 <b>marketplace</b> 39:19 40:5 <b>Martin</b> 9:16 <b>material</b> 4:11,12 4:22 6:19 7:9 <b>matter</b> 1:11 34:6 42:2 44:2,4 51:10 <b>mean</b> 15:7 26:17 <b>meaning</b> 10:7,8 33:12 <b>meaningless</b> 10:18,20 <b>means</b> 8:15 12:20 22:10 48:2 <b>meeting</b> 4:18 39:16 42:6 <b>message</b> 39:17</p>	<p><b>metaphysical</b> 49:18 <b>MICHAEL</b> 1:17 2:5 21:10 <b>mind</b> 27:22 33:14 <b>minutes</b> 12:3 49:14 <b>misleading</b> 4:14 <b>misrepresenta...</b> 7:8 <b>misspoke</b> 37:25 <b>misstatements</b> 5:16 6:23 39:18 40:5 <b>mistrial</b> 20:5 24:6 <b>mixed</b> 22:10 40:18 42:10 <b>model</b> 17:10,12 17:14,14,18,21 19:3,4 <b>models</b> 17:8 <b>Monday</b> 1:9 <b>money</b> 31:16 <b>motions</b> 50:16</p> <hr/> <p style="text-align: center;"><b>N</b></p> <p><b>N</b> 2:1,1 3:1 <b>necessarily</b> 4:2 5:25 7:23 8:7 8:16,16 17:2 21:3 24:8 33:20 40:21 42:1,12 46:2 50:3 <b>necessary</b> 3:18 4:12 6:14 16:22,23 49:2 49:6 <b>necessity</b> 18:14 <b>needed</b> 31:20 <b>needs</b> 32:7 48:22 <b>nefarious</b> 30:18 30:19 <b>neither</b> 48:5 <b>neutral</b> 37:18</p>	<p><b>never</b> 5:23 12:5 16:9,11 25:24 43:8,12 44:3 46:9 <b>new</b> 3:18 31:3 <b>non</b> 13:8 45:15 <b>non-acquitted</b> 13:8 <b>non-hypertec...</b> 49:23 <b>non-jeopardy-...</b> 23:17 <b>note</b> 12:2 <b>number</b> 7:22,22 11:15 24:17 30:3,4,10,16 30:22 31:13 44:5</p> <hr/> <p style="text-align: center;"><b>O</b></p> <p><b>O</b> 2:1 3:1 <b>obligation</b> 4:19 <b>obtain</b> 21:19,25 33:6 <b>obvious</b> 13:23 <b>obviously</b> 22:14 31:19 47:2 48:9 <b>occur</b> 16:24,25 19:25 21:16 29:23 50:1 <b>occurred</b> 50:6 <b>offended</b> 8:6 <b>offense</b> 23:1 32:23 33:3 <b>offenses</b> 32:24 <b>Oh</b> 16:3 30:12 34:20 <b>okay</b> 14:6,12,13 14:22 28:2 37:3 47:24 <b>omission</b> 5:13 6:13 <b>omissions</b> 5:13 5:15,17 6:18 6:23,25 7:4,9 7:12 40:8,15</p>	<p>41:14 50:23 51:1 <b>omitted</b> 4:11,22 6:19 <b>once</b> 49:8 <b>open</b> 17:23 <b>opening</b> 5:10 6:8 <b>open-ended</b> 6:5 <b>open-endedness</b> 17:20 <b>opinions</b> 10:13 10:13 42:16 <b>opponent</b> 47:4 <b>opportunity</b> 21:21,25 26:20 29:21,24 33:6 33:25 34:1,8 35:17 36:8,10 43:14 44:21,22 46:22 <b>opposite</b> 9:12 13:12 <b>option</b> 9:18 <b>oral</b> 1:11 2:2 3:6 21:10 <b>order</b> 4:12 6:12 32:8 48:21 49:23 <b>ought</b> 17:22 25:3 <b>outside</b> 18:24 19:2 <b>overcharged</b> 30:18 <b>overcharging</b> 30:21,23 <b>overlapping</b> 28:17,20,22 <b>overturning</b> 12:16 <b>ox</b> 13:16,18</p> <hr/> <p style="text-align: center;"><b>P</b></p> <p><b>P</b> 3:1 <b>page</b> 2:2 4:8 <b>parse</b> 4:4 <b>part</b> 7:5 10:2</p>	<p>25:14 <b>partial</b> 19:15,19 20:2,9,25 47:21,23,24 <b>participate</b> 41:11 <b>participated</b> 40:13 41:3 <b>particulars</b> 50:18 <b>party</b> 33:17 <b>people</b> 4:22 40:12 <b>Perez</b> 18:13 20:21 <b>perils</b> 19:10 <b>permissible</b> 15:17 <b>permit</b> 12:23 19:14,19 <b>permitted</b> 6:21 14:3,14,21 42:15 <b>person</b> 33:2 <b>persuasion</b> 13:2 <b>Petitioner</b> 1:4 1:16 2:4,9 3:7 24:5 30:9 31:9 49:16 <b>Petitioner's</b> 24:14 31:22 40:7 <b>phase</b> 46:11 <b>pick</b> 19:1,3 <b>pieces</b> 28:13 <b>place</b> 23:15 <b>planned</b> 7:8 <b>planning</b> 41:3 <b>please</b> 3:9 21:13 <b>point</b> 4:6 5:20 10:16,20 11:6 11:7,8 12:4,6 16:15 20:19 32:3,25 42:17 42:25 46:7 <b>poker</b> 26:14 <b>policies</b> 25:13</p>
--	---	--	---	---

26:6 32:10 38:6,7 49:24 <b>policy</b> 29:10,12 30:20 36:1 <b>portion</b> 9:24 10:1 <b>position</b> 17:5 30:9 31:22 34:12,17 46:23 <b>possess</b> 3:25 50:13 51:4 <b>possessing</b> 50:20 <b>possibilities</b> 17:23 18:10 <b>possible</b> 5:1 11:16 12:24 24:12 47:4 <b>posture</b> 26:12 <b>Powell</b> 13:4,16 14:5 22:3,6,7,8 25:7 <b>powerful</b> 9:14 <b>practices</b> 19:18 <b>precedent</b> 13:1 <b>precise</b> 41:24 <b>precisely</b> 9:12 <b>preclude</b> 33:21 40:23 <b>preclusion</b> 8:10 8:11,12,18,19 17:12,16,18 19:25 20:19,20 20:21,23,23 21:4 29:8,10 29:11 32:11 36:13 39:5 49:22 <b>preclusive</b> 9:5 <b>predicate</b> 33:16 <b>predominating</b> 18:9 <b>prefer</b> 26:8 <b>preferred</b> 29:22 <b>preliminary</b> 3:20 <b>premise</b> 49:10 <b>premised</b> 22:4	<b>preparation</b> 41:3 <b>preparing</b> 40:10 <b>presence</b> 15:7,9 16:8 <b>presented</b> 10:8 35:1 41:6 <b>presided</b> 47:8 <b>press</b> 39:24 41:12 <b>presume</b> 45:8 <b>presumption</b> 45:13 <b>presupposing</b> 35:11 <b>pretty</b> 22:6 32:21 <b>prevail</b> 42:23 <b>prevails</b> 48:16 <b>prevent</b> 6:15 21:23 <b>preventing</b> 28:8 <b>previously</b> 8:19 <b>price</b> 7:10 <b>principle</b> 21:17 21:20 <b>probable</b> 29:23 <b>probably</b> 27:6 <b>problem</b> 28:15 28:16 <b>Procedure</b> 47:21 <b>proceeding</b> 5:7 6:17 22:13 26:10 34:13,14 <b>proceeds</b> 31:17 <b>prohibits</b> 31:25 <b>proper</b> 10:22 <b>properly</b> 23:7 <b>proposition</b> 35:18 41:16 48:12 <b>propounds</b> 24:5 <b>prosecuting</b> 38:23 <b>prosecution</b> 7:20 8:22,23	11:8 23:5,7,11 28:12 30:20 40:23 45:21 50:25 <b>prosecutions</b> 8:2 13:5 22:7 26:25 27:12 29:14 <b>prosecutors</b> 44:4 <b>protean</b> 5:25 <b>protect</b> 22:15 49:24 <b>protected</b> 32:23 <b>protecting</b> 38:15 <b>protections</b> 49:21 <b>prove</b> 31:20 49:6 <b>proves</b> 4:23 <b>proxy</b> 30:22 <b>public</b> 49:24 <b>purpose</b> 7:9,9 <b>purposes</b> 10:2 18:3 20:19 23:8 24:16 <b>put</b> 14:24	<b>questions</b> 21:6 <b>quite</b> 7:19,24 11:16 41:9 47:10 49:25	<hr/> <b>R</b> <hr/> <b>R</b> 1:17 2:5 3:1 21:10 <b>raise</b> 3:19 8:2 <b>raised</b> 8:4 12:9 17:13 28:15 <b>raising</b> 18:7 <b>rational</b> 35:24 39:5 48:23 49:5 50:6 <b>rationale</b> 18:1 <b>rationality</b> 35:25 49:10,23 <b>rationally</b> 7:18 22:4 36:11 48:24 <b>reach</b> 6:21 10:24 11:3,14,17 13:2 17:21 20:14 24:13 35:3 41:20 45:6,6 46:15 50:8 <b>reached</b> 12:22 20:3 50:12 <b>reaching</b> 18:14 39:22 <b>reaction</b> 20:13 <b>read</b> 43:9 47:9 <b>real</b> 28:14 <b>really</b> 31:14 45:1 48:14 <b>reason</b> 3:21 11:16 24:1,23 25:18,19,20 26:4 27:4,12 35:8 37:19 38:1 44:9 45:19 46:20 47:17,18 48:13 49:22 <b>reasonable</b> 50:5	<b>reasonably</b> 30:4 <b>reasoned</b> 42:18 <b>reasons</b> 5:3 11:15 23:24 28:6 35:14 42:19 45:16 <b>rebuttal</b> 2:7 21:7 42:3 49:15 <b>recognized</b> 9:14 9:16 10:14 13:16 18:3,7 <b>record</b> 5:4,10 6:7 10:6,7 11:2 11:15 48:25 49:9 <b>redeterminati...</b> 9:5 <b>referred</b> 43:6 <b>refine</b> 26:21 <b>regard</b> 30:22 <b>regarded</b> 26:22 38:5 <b>rejected</b> 22:9 39:21 40:15 <b>related</b> 39:15 <b>relates</b> 10:5 <b>relating</b> 7:22 <b>relation</b> 39:9 <b>releases</b> 39:25 <b>relevant</b> 45:24 <b>relied</b> 41:2 <b>relitigate</b> 50:2 <b>rely</b> 32:20 33:18 <b>relying</b> 12:11 35:10 <b>remainder</b> 21:7 <b>remaining</b> 49:14 <b>remedy</b> 20:4 <b>removed</b> 11:23 <b>repeat</b> 15:14 <b>reply</b> 11:18 <b>require</b> 18:18 19:14,24,25 20:8 41:20 <b>required</b> 20:2 <b>requires</b> 32:14
		<hr/> <b>Q</b> <hr/> <b>qualify</b> 39:7 <b>quest</b> 12:23 <b>question</b> 4:1,19 6:1 7:1,17 8:21 12:15 13:23 14:7 17:17 18:8,17 19:22 20:23 21:5 25:2,5 26:6 27:13,15 33:12 37:12 39:22 40:1 41:6,25 42:22 43:7 48:18 <b>questionable</b> 35:5 <b>questioning</b> 24:25			

<p><b>res</b> 13:14,21  <b>reserve</b> 21:7  <b>resolution</b> 25:21            29:1  <b>resolve</b> 21:1            32:8 41:17,18            41:19  <b>resolved</b> 9:7            17:1 24:19            31:15,18 40:22            42:1 48:25            49:5,7  <b>resolves</b> 3:10            16:1,4,6 41:21  <b>respect</b> 35:12            39:10  <b>responded</b> 43:6  <b>Respondent</b>            1:19 2:6 21:11  <b>response</b> 3:22            29:15,16  <b>rest</b> 41:10  <b>result</b> 20:8,11            29:14 40:17            42:20 48:4  <b>results</b> 29:14  <b>retrial</b> 15:2,3            17:16 18:10,15            20:5 42:14            44:8 48:5  <b>retried</b> 42:23  <b>retry</b> 8:6 14:14            14:23 15:7,20            15:25 16:4,5,6            16:7 21:16            26:9 34:9,12            35:14,17 38:4            38:8 43:21            46:22 48:13  <b>retrying</b> 15:6            16:10,12  <b>return</b> 20:9            34:23 35:22            47:21  <b>returned</b> 26:25            35:2 46:5  <b>returning</b> 48:12</p>	<p><b>revisit</b> 32:5,7            41:22  <b>Revisiting</b> 41:5  <b>re-litigation</b>            21:4  <b>re-prosecution</b>            23:1  <b>right</b> 14:1,3,15            14:23 18:22            27:25 30:12            34:9,12 38:8            38:10 39:1            48:16  <b>rigor</b> 42:11  <b>robber</b> 26:18            27:1,16 35:22  <b>robberies</b> 26:13  <b>robbers</b> 7:24            35:1,12,15,19  <b>robbery</b> 7:21            26:15,24  <b>ROBERTS</b> 3:3            13:4 21:8 22:5            22:12 32:2,16            32:20 33:2,8            38:9 40:24            41:5,15 48:7            48:19 49:11,13            51:7  <b>rule</b> 3:18 43:23            44:9  <b>Rules</b> 47:20</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p><b>S</b> 2:1 3:1  <b>SAMUEL</b> 1:15            2:3,8 3:6 49:15  <b>sat</b> 50:4  <b>Sattazahn</b> 10:13  <b>saying</b> 12:2            15:15 29:12            43:9 44:20            45:16  <b>says</b> 15:11 19:2            23:22 32:23            35:6  <b>Scalia</b> 9:19 10:4</p>	<p>11:5 12:6  <b>Scalia's</b> 10:16  <b>scheme</b> 40:14  <b>SCOTT</b> 1:3  <b>screen</b> 6:10  <b>Sealfon</b> 49:20  <b>second</b> 3:13 5:7            14:2 17:14            19:9 22:2            25:18 29:7            31:1 42:24            44:11,20 50:2            50:17  <b>seconds</b> 6:3  <b>securities</b> 6:13            6:16,22 7:3            27:18 39:15            40:3,16 41:13  <b>see</b> 16:13,13            25:13 37:14  <b>seek</b> 3:12 20:16  <b>seeking</b> 50:17  <b>seeks</b> 31:22  <b>sell</b> 7:11 14:1  <b>selling</b> 13:25  <b>sense</b> 8:22 10:15            10:18 23:12            44:4 46:2 48:5            48:10  <b>sent</b> 12:1  <b>separate</b> 21:14            26:15 34:4            35:13  <b>separated</b> 13:22  <b>sequential</b> 27:12  <b>sequentially</b>            26:19 28:12  <b>seriatim</b> 7:20            8:2,21,23            29:14  <b>series</b> 28:24  <b>set</b> 4:8 5:21 9:17            11:18 20:21  <b>settled</b> 35:16  <b>Seventh</b> 38:13            38:24  <b>severe</b> 11:19</p>	<p><b>shape</b> 13:7  <b>sharp</b> 18:17  <b>show</b> 49:4  <b>showing</b> 29:22            40:21  <b>shows</b> 11:5,5  <b>side</b> 13:15 16:16            36:14  <b>Similarly</b> 5:9  <b>simply</b> 4:17 9:25            11:13 17:17            23:16 28:24            31:6 49:4,25            50:9  <b>simultaneous</b>            23:20,24  <b>simultaneously</b>            21:16  <b>single</b> 25:16  <b>sir</b> 15:21  <b>situation</b> 7:25            27:2,3 35:6            48:21  <b>six</b> 7:21 9:3            26:13,24 35:1            49:14 50:11            51:2  <b>slightly</b> 26:12  <b>snippet</b> 6:7  <b>society</b> 44:7  <b>society's</b> 43:13  <b>Solicitor</b> 1:17            49:17 50:24  <b>sort</b> 49:3  <b>sound</b> 30:20  <b>Souter</b> 3:19 5:19            12:9 17:3 18:5            18:21,23 26:7            28:14 29:17,25            30:8,12  <b>Souter's</b> 43:7  <b>speak</b> 4:25            10:10,14 11:1            12:24  <b>speaking</b> 10:12  <b>speaks</b> 9:15            20:25 21:2</p>	<p><b>specificity</b> 50:16  <b>split</b> 20:13  <b>spoke</b> 50:10,10  <b>stand</b> 5:15 22:25            42:3  <b>stands</b> 18:16,17  <b>Start</b> 36:14  <b>state</b> 4:11 19:14            19:20 20:8  <b>statement</b> 4:11            6:8 39:8  <b>statements</b> 4:12            4:18,20,21            39:23 40:4,10            40:14,15 41:4            41:12 42:6            50:21  <b>States</b> 1:1,6,12            3:4 43:24,24            44:2  <b>statutes</b> 28:18  <b>Stevens</b> 23:10            23:13,14,18            24:4,11,21            25:5 27:4,8,11            27:14 33:23            34:4,11,18,20            35:4 36:3,15            44:10,14,25            45:4,12,22            46:4,24 47:12  <b>stock</b> 7:10,12  <b>stop</b> 16:10,12  <b>straightforward</b>            3:16  <b>strange</b> 34:25  <b>strategic</b> 31:12  <b>stress</b> 11:20  <b>strikes</b> 34:24  <b>striking</b> 16:17  <b>strive</b> 46:12  <b>struggling</b> 47:22  <b>subject</b> 9:4            12:15,15,16  <b>submit</b> 40:20  <b>submits</b> 50:24  <b>submitted</b> 51:8</p>
---	---	---	--	---

51:10	<b>teachings</b> 49:19	38:13,24 39:2	26:19,20 27:23	13:6
<b>subsequent</b> 13:5	<b>technological</b>	39:3 40:6 41:7	33:25 43:17	<b>upsetting</b> 22:10
22:7	39:20	41:22 42:2,3,8	<b>trying</b> 25:9	<hr/>
<b>subsequently</b>	<b>telephone</b> 14:1	42:19 43:3,4	28:13 44:7	<b>V</b>
39:25	14:14,23 15:1	44:3 45:18	<b>turn</b> 31:8 37:10	<b>v</b> 1:5 3:4,17,22
<b>substantive</b>	15:2,3,16,18	47:6,7	<b>turned</b> 24:18	23:8 26:12,13
14:25 15:16	27:25 28:4	<b>thought</b> 16:16	<b>two</b> 5:3 17:8,8	32:4,7,9 34:24
16:8 36:16	36:18 37:12,21	27:20	17:23 21:14	35:1 48:23
39:11,15 40:3	<b>telephones</b>	<b>thousands</b> 37:5	22:13 28:6	<b>validity</b> 24:1
<b>successive</b> 19:10	28:19	<b>threat</b> 8:3	30:8,10 35:13	<b>value</b> 39:20
19:11 23:5,7	<b>tell</b> 42:4	<b>three</b> 6:22	37:13 38:17	<b>values</b> 8:3,4
23:11,14	<b>telling</b> 4:9	<b>tighten</b> 6:3	44:19 50:15	18:8,10 29:18
<b>suffice</b> 6:3	<b>tells</b> 17:22 18:13	<b>time</b> 21:7 24:11	<b>two-edged</b> 13:11	<b>various</b> 28:23
<b>suggest</b> 18:24	20:22 48:23	27:22 34:1	<hr/>	<b>verdict</b> 4:16,23
<b>suggested</b> 29:6	<b>tend</b> 30:19 44:6	36:21 37:13	<b>U</b>	4:24 9:25
44:3	<b>terminated</b> 8:25	42:24 44:12	<b>unable</b> 35:22	11:14,17 12:22
<b>suggesting</b>	<b>terms</b> 9:2	<b>today</b> 3:4	44:4	17:21 18:14
36:15	<b>test</b> 5:3 10:5	<b>token</b> 18:6	<b>unanimity</b> 10:10	19:15 20:2,4,9
<b>suggestion</b> 40:7	27:22	<b>told</b> 10:16	12:24 20:16,17	20:13,14,17,25
<b>suggests</b> 28:17	<b>text</b> 32:14,18	<b>tolerate</b> 35:7,8	<b>unanimous</b> 11:7	21:16,19 22:1
<b>supported</b> 32:12	33:9	<b>tolerated</b> 12:20	11:10 12:14	22:10 23:20
32:13	<b>textually</b> 31:25	<b>total</b> 10:3,6 49:9	<b>unanimously</b>	24:5,23 26:25
<b>supports</b> 36:1	<b>Thank</b> 21:8	<b>totally</b> 30:5,6	11:1	29:9 33:6 35:3
<b>suppose</b> 25:24	49:11,12 51:6	47:11	<b>uncertainty</b>	35:7,22 38:12
26:23 42:23	51:7	<b>tough</b> 27:7	7:14 17:20	38:21,22 40:19
<b>Supreme</b> 1:1,12	<b>theory</b> 5:12,13	<b>track</b> 42:9	<b>underlie</b> 25:13	44:5,16 45:13
<b>sure</b> 6:15 47:14	6:18 7:1,4,7,12	<b>traded</b> 31:13	49:24	46:5,12,13,16
<b>surprising</b> 16:17	24:4,14 39:14	<b>trading</b> 7:11	<b>underlying</b> 19:8	47:23,24 48:23
<b>Swenson</b> 3:17	40:7,8 42:14	24:10,15,18	<b>undermine</b>	<b>verdicts</b> 3:14,24
3:23 23:8	42:14 47:19	31:2,8,15 40:2	38:22	4:1 14:8 19:9
26:12,13 32:4	48:1,7 50:23	46:3 50:20	<b>undermines</b>	19:13,19 22:14
32:7,9 34:24	51:1	<b>transposed</b> 32:9	22:24	25:7 36:4
35:1 48:23	<b>thing</b> 4:23,24	<b>treat</b> 49:2	<b>undermining</b>	38:15,17,25
<b>sword</b> 13:11	23:6 31:5,21	<b>trial</b> 6:7 11:20	22:17,21 38:18	42:10 47:21
<b>system</b> 31:11	<b>things</b> 36:11,12	14:17 18:7	38:21	48:12 49:3
<hr/>	<b>think</b> 6:24 9:11	36:16 43:9,11	<b>underpinning</b>	<b>victim</b> 7:21,22
<b>T</b>	19:5 20:11	44:15 47:9	19:17	<b>victims</b> 7:21
<b>T</b> 2:1,1	22:23 23:6,13	50:5,15	<b>understand</b> 17:5	<b>view</b> 19:25 41:2
<b>take</b> 9:20 15:13	24:3,16 25:15	<b>trials</b> 19:10,11	17:6 20:12	48:11 49:18,23
40:6 42:15	25:15,17 26:1	44:5	<b>understood</b>	<b>viewed</b> 23:7
45:22 47:24	26:6,11 27:2	<b>tried</b> 26:16	26:17	<b>viewing</b> 48:8
49:8,18	27:19 30:15,17	27:21 28:24	<b>United</b> 1:1,6,12	<b>vindicated</b> 43:5
<b>takes</b> 45:19	30:21 31:7,14	50:8	3:4	<b>vivid</b> 26:11
<b>talk</b> 32:17,17	31:21 32:4,7,8	<b>trimmed</b> 31:2,4	<b>units</b> 30:24	<hr/>
<b>talking</b> 8:11	32:22 33:11	<b>true</b> 36:12 44:17	<b>unsound</b> 45:16	<b>W</b>
37:5 44:19	34:2,24 36:15	<b>try</b> 14:10 20:13	<b>untrue</b> 4:11	<b>wait</b> 29:7
<b>talks</b> 37:7	37:16 38:1,9	21:19 25:8	<b>unusual</b> 12:1	<b>want</b> 15:13

33:19	47:10 50:13,19	<b>5</b> 31:2,3		
<b>wanted</b> 11:20	51:3,4			
16:19	<b>Yeager's</b> 7:5	<hr/> <b>6</b> <hr/>		
<b>Washington</b> 1:8	46:23 47:19	<b>60</b> 6:2		
1:15,18	48:1	<hr/> <b>7</b> <hr/>		
<b>wasn't</b> 7:4 31:12	<b>year</b> 43:17,17	<b>70</b> 12:3		
35:21 47:5		<hr/> <b>8</b> <hr/>		
<b>way</b> 9:14 11:2	<hr/> <b>0</b> <hr/>			
11:10,12 12:19	<b>08-67</b> 1:5	<b>8</b> 31:4		
16:18 22:14,15	<hr/> <b>1</b> <hr/>	<b>80</b> 6:3		
22:15 24:6	<b>1</b> 13:25,25 14:13	<hr/> <b>9</b> <hr/>		
25:12 26:21	14:25 15:7,10	<b>99</b> 31:3		
31:16,18 32:12	15:11,15,15,23			
38:18 39:1	16:24			
40:8 41:24	<b>10:06</b> 1:13 3:2			
42:11,19 48:14	<b>105</b> 4:8			
<b>ways</b> 6:21	<b>11:04</b> 51:9			
<b>wear</b> 26:20	<b>117</b> 30:2			
43:17	<b>13-and-a-half-...</b>			
<b>went</b> 41:24	50:5			
<b>we'll</b> 45:14,16	<b>150</b> 24:12			
47:24	<b>176</b> 11:17			
<b>we're</b> 8:11 24:25	<b>176-count</b> 50:8			
37:9 47:22	<b>1824</b> 34:7			
<b>we've</b> 5:22 17:7	<hr/> <b>2</b> <hr/>			
17:16 20:3	<b>2</b> 13:25 14:6,13			
<b>whit</b> 28:3	14:13,22,25			
<b>white</b> 43:8	15:1,6,16,18			
<b>win</b> 17:6 36:24	15:25 16:5,6			
<b>winning</b> 37:11	16:10,10,11			
<b>wire</b> 41:13	<b>20</b> 31:2			
<b>words</b> 8:10	<b>20th</b> 39:16 40:10			
<b>working</b> 31:12	<b>2000</b> 5:14 39:16			
<b>worse</b> 37:17,20	50:21			
37:23	<b>2009</b> 1:9			
<b>wouldn't</b> 25:16	<b>21</b> 2:6			
25:25	<b>23</b> 1:9			
<hr/> <b>X</b> <hr/>	<hr/> <b>3</b> <hr/>			
<b>x</b> 1:2,7	<b>3</b> 2:4 14:24			
<hr/> <b>Y</b> <hr/>	15:23 16:7			
<b>Yeager</b> 1:3 3:4	<hr/> <b>4</b> <hr/>			
5:11,14 6:9 7:8	<b>49</b> 2:9			
39:16,23 40:8	<hr/> <b>5</b> <hr/>			
41:2,11 42:3				
45:1 46:8,13				