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IN THE SUPREME COURT OF THE UNITED STATES

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F. SCOTT YEAGER, :

Petitioner :

v. : No. 08-67

UNITED STATES. :

- - - - - x

Washington, D.C.
Monday, March 23, 2009

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 a.m.

APPEARANCES:

SAMUEL J. BUFFONE, ESQ., Washington, D.C.; on behalf of the Petitioner.

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

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C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
SAMUEL J. BUFFONE, ESQ.	
On behalf of the Petitioner	3
MICHAEL R. DREEBEN, ESQ.	
On behalf of the Respondent	21
REBUTTAL ARGUMENT OF	
SAMUEL J. BUFFONE, ESQ.	
On behalf of the Petitioner	49

1
2
3
4
5
6
7
8
9
10
11
12
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14
15
16
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18
19
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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 will be
4 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 jurists 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
12 a material fact necessary in order to make the
13 statements made, in the light of the circumstances under
14 which they 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 correct
20 any statements, because it is not clear from this
21 instruction that he had to correct the statements of
22 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 looked
6 at admissions made by the defendant's attorney during
7 the course of the second proceeding that identification
8 of his client was not an issue. Similarly here, looking
9 at the entirety of the record, in its arguments closing
10 and opening, and most importantly in its
11 cross-examination of Mr. Yeager, the government made
12 clear to the jury its theory of omissions. And that
13 theory of omission was that Mr. Yeager when he was at
14 the 2000 Analysts Conference had a duty to stand up and
15 correct omissions if there were any misstatements made
16 by others. They argued to the jury that he would be
17 guilty of omissions if he did not affirmatively correct
18 it.

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

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

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

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

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

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

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

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

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

25 MR. BUFFONE: Justice Ginsburg, first, it is

1 my belief that seriatim prosecutions raise no greater
2 threat to the core values of double jeopardy than was
3 raised here. Those core values are, first of all, the
4 finality of acquittals; and the acquittal here was
5 offended by any effort to retry an issue of fact
6 necessarily decided.

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

12 MR. BUFFONE: Yes, Your Honor, I would like
13 to --

14 JUSTICE GINSBURG: That means it was
15 necessarily, the issue was necessarily decided?

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

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

25 The issue we believe should be addressed in

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

8 JUSTICE GINSBURG: So the hung counts are
9 equivalent, equivalent to an acquittal?

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

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

1 acquittal for double jeopardy purposes? Isn't this part
2 of the total circumstances?

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

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

18 MR. BUFFONE: Justice Kennedy, I agree that
19 the hung counts are meaningless and that is my point,
20 but I believe that it does further our analysis and the
21 proper analysis that this Court should engage in. And
22 that is, do the acquittals have finality, and is there
23 anything inconsistent with the jury's inability to reach
24 a determination with the finality of its acquittals?
25 The jury did not speak unanimously in its acquittals.

1 There is no record way to determine why they failed to
2 reach a determination, and they are therefore not
3 inconsistent with the final determination --

4 JUSTICE SCALIA: It shows -- it shows that
5 -- that the point on which they -- you assert they were
6 unanimous and the point on which you say later
7 prosecution should be disallowed was in fact a point on
8 which the jury was confused, because they would have
9 come out the other way if indeed they were unanimous on
10 the counts that -- that acquitted. They should have
11 come out the same way on the -- on the hung counts.

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

24 In the face of that, the court gave a very
25 unusual Allen charge; that after the jury had sent out a

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

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

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

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

1 reach a decision with the finality and persuasion of an
2 acquittal.

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

9 MR. BUFFONE: Well, Your Honor, that's a --
10 a two-edged sword, Mr. Chief Justice. The defendant is
11 on the opposite horns of that dilemma. If the counts
12 are not joined, then the effect of the acquittal would
13 be to bar them by res judicata. So by joinder, he's on
14 the other side of that fence. It's, as this Court
15 recognized, whose ox is being gored in Powell by either
16 the acquittals or the convictions. Well, this is a case
17 of whose ox is being gored by the joinder, and it should
18 not be dispositive. Collateral estoppel effect should
19 apply to counts within an indictment just as res
20 judicata would apply if they were separated.

21 JUSTICE BREYER: It's an obvious question, I
22 guess. I would just like to hear your answer directly.
23 Case 1, count 1, selling drugs; count 2, using the
24 telephone to sell the drugs. All right? The jury
25 acquits of the first, convicts of the second. Logically

1 impossible, but permitted under the law, right?

2 MR. BUFFONE: I agree, Your Honor. Under
3 Powell --

4 JUSTICE BREYER: Okay. Case 2 --

5 MR. BUFFONE: -- there is no question. We
6 have conflicting verdicts, and we are not going to try
7 to determine what the --

8 JUSTICE BREYER: Okay. Absolutely
9 illogical. Case 2, there is no count 1. Case 2,
10 telephone count, hung jury; we retry it. Permitted,
11 right?

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

14 JUSTICE BREYER: All that happened was that
15 they hung.

16 MR. BUFFONE: Well, if they hung, Your
17 Honor, yes.

18 JUSTICE BREYER: Okay. Case 2, hung jury,
19 telephone count; we retry it. All right. So now why is
20 it when we put them together and, case 3, count 1,
21 substantive drugs, acquitted; count 2, telephone, hung
22 jury. Well, in case 2 we could get a retrial of the
23 telephone count. Why can't we get a retrial of the
24 telephone count now?

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

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

5 MR. BUFFONE: Your Honor, the presence of
6 count 1 in your hypothetical is not dispositive. An
7 acquittal on count 1 says --

8 JUSTICE BREYER: I -- I'm going too fast
9 because you didn't take the cases in. Do you want me to
10 repeat them? Maybe it's too complicated.

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

17 MR. BUFFONE: Yes, sir.

18 JUSTICE BREYER: So, now, when we have case
19 3, which is the same as case 1 except that, instead of
20 convicting him, they had a hung jury, why can't you
21 retry him, just as you could in case 2?

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

24 JUSTICE BREYER: Oh, everybody agrees it
25 resolves nothing, and that's why you could retry him in

1 -- that's why you could retry him in case 2, because it
2 resolves nothing. So if you could retry him in case 2,
3 why can't you retry him in case 3? What does the
4 presence of this other substantive count have to do with
5 it. Since it never would have blocked the conviction on
6 count 2, why does it stop you from retrying count 2?

7 It would never have blocked the conviction
8 of count 2. Why does it stop you from retrying it?

9 Do you see -- do you see my --

10 MR. BUFFONE: Yes, Your Honor.

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

16 MR. BUFFONE: Your Honor, I believe the --
17 the clear answer is that for collateral estoppel to
18 attach, there must be a necessary determination of a
19 factual issue, and the necessary determination of that
20 factual issue can occur in your count 1 through an
21 acquittal or a conviction. It cannot occur through a
22 hung count because there is nothing to be resolved.
23 There is nothing that would be necessarily decided.

24 JUSTICE SOUTER: Mr. Buffone, you're --
25 you're going through a logical analysis. If I

1 understand your position, the logical analysis is not
2 going to win the case for you because, as I understand
3 the case that we've got in front of us, we have in
4 effect two lines of authority, two models, that describe
5 what the law might be in these circumstances.

6 One model, on -- on the assumption that -- that the
7 acquittals determined what you say they did, on that
8 model there -- there is -- there is an issue preclusion
9 that is raised.

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

21 MR. BUFFONE: Yes, Your Honor, I believe
22 that that is a clear choice, and the rationale for the
23 clarity of that choice is that acquittals have long been
24 recognized as being important for finality purposes for
25 double jeopardy law. So, for example --

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

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

17 JUSTICE SOUTER: We have got both.

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

19 JUSTICE SOUTER: What -- what is it -- and I
20 would almost suggest THAT it has to be something outside
21 the lines of authority, because the issue here is which
22 line of authority are you going to pick. What is it
23 outside the lines of authority that says we should -- we
24 should pick the acquittal model rather than the hung
25 jury model to determine what to do here?

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

8 JUSTICE ALITO: Can I ask you this about the
9 finality of jury verdicts? Is -- does the Constitution
10 require either Federal or State law to permit the -- a
11 partial verdict?

12 MR. BUFFONE: Your Honor, I do not believe
13 that -- I am not aware of a constitutional underpinning
14 for that, but certainly the practices in the courts are
15 to permit partial verdicts.

16 JUSTICE ALITO: In every State?

17 MR. BUFFONE: I do not know the answer to
18 that question.

19 JUSTICE ALITO: Well, if the Constitution
20 doesn't require that, then why does the Constitution, in
21 your view, require that issue preclusion occur when the
22 jury acquits on certain counts but hangs on other
23 counts? If -- if a partial verdict were not required,
24 and if the jury came back and said, we -- we've reached
25 a verdict on some counts but not all counts, the remedy

1 would be a mistrial on all counts and a retrial on all
2 counts.

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

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

17 If we set aside claim preclusion, the Perez
18 line of cases tells us to do what we do with claim
19 preclusion. For issue preclusion, the question is, is
20 there some finality to what the jury did, in your
21 hypothetical its partial verdict that speaks to the
22 counts that it was not able to resolve. And if it
23 speaks, that after the Ashe analysis that there was an
24 issue necessarily decided, then there is a bar under the
25 doctrine of issue preclusion to the re-litigation of

1 that question.

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

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.
5 Mr. Dreeben.

6 ORAL ARGUMENT OF MICHAEL R. DREEBEN

7 ON BEHALF OF THE RESPONDENT

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

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

23 The second doctrinal line is that which
24 grows out of the Powell case. Collateral estoppel is
25 premised on the idea that the jury has acted rationally.

1 CHIEF JUSTICE ROBERTS: You are asking us
2 for a pretty dramatic extension of Powell. Powell is
3 not a case involving subsequent prosecutions.

4 MR. DREEBEN: No. Powell was a case in
5 which the Court rejected the doctrine of collateral
6 estoppel as a means of upsetting a mixed verdict of
7 acquittals and convictions.

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

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

19 MR. DREEBEN: Well, I don't think that it
20 undermines that determination, Mr. Chief Justice,
21 because the acquittals will stand as acquittals, and
22 they will bar reprosecution on that offense. To the
23 extent that there are determinations that are made by
24 the acquittals that are independent of any inconsistency
25 with the hung counts, that too can have collateral

1 estoppel effect in a successive prosecution.

2 But I think the crucial thing here is that
3 this is not properly viewed as a successive prosecution
4 for double jeopardy purposes. Ashe v. Swenson and the
5 cases --

6 JUSTICE STEVENS: Well, why not? It is a
7 successive prosecution.

8 MR. DREEBEN: No, it is not in the sense, I
9 think, Justice Stevens that the Court used that in Ashe.

10 JUSTICE STEVENS: It is in the sense of an
11 indictment that took place after the other acquittal.

12 MR. DREEBEN: Well, that indictment simply
13 embodies non-jeopardy-barred counts that --

14 JUSTICE STEVENS: Isn't there a difference
15 in the fact that in the first case where there was a
16 conflicting simultaneous verdict, one can explain the
17 acquittal on grounds of leniency or compromise or
18 something like that, that says that, therefore, we will
19 give effect to the -- the conviction when they're
20 simultaneous because of the reasons why there may be
21 irrationality in the conflict. But there is no reason
22 to doubt the -- the validity of the acquittal in this
23 case.

24 MR. DREEBEN: Well, no, I think that there
25 is, Justice Stevens, if on the theory that the

1 Petitioner propounds the verdict on the acquittals is
2 inconsistent with the mistrial. And that's the only way
3 in which collateral estoppel could apply, only if the
4 jury had necessarily determined a fact on the acquittals
5 that should have led to acquittals on the insider
6 trading counts.

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

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

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

21 MR. DREEBEN: We're not questioning the
22 integrity of the acquittal as far as it has direct
23 double jeopardy application. The question is whether
24 the doctrine of collateral estoppel ought to be applied.

25 JUSTICE BREYER: And why not? Because the

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

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

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

16 MR. DREEBEN: The reason, Justice Breyer, is
17 that the hung counts do not constitute a resolution in
18 favor of the defendant.

19 JUSTICE BREYER: Of course they don't. Of
20 course they don't. Suppose that they never brought up
21 that hung count. Then you wouldn't even have the first
22 bite at the apple. So you would think it would be a
23 fortiori you could go ahead. But that's the case; you
24 clearly can't go ahead.

25 MR. DREEBEN: But there's a reason for that,

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

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

19 But suppose that in *Ashe* the government
20 hadn't done that, it had brought all six robbery
21 prosecutions together, and the jury returned one verdict
22 of acquittal on one robber and on the other five it
23 hung? In that situation I think -- which is the
24 situation we have here --

25 JUSTICE STEVENS: But the reason for that is

1 there are doubts about the integrity of the acquittal.
2 They probably compromised, just to say not to be too
3 tough on --

4 MR. DREEBEN: But, Justice Stevens, that is
5 identical to this case. There is no difference to this
6 case --

7 JUSTICE STEVENS: No, here you have
8 sequential prosecutions, and there is no reason to
9 question the integrity of the acquittal in this case.

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

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

22 MR. DREEBEN: Correct.

23 JUSTICE BREYER: Okay. So why should the
24 government be one whit better off because, in addition
25 to doing that, they happened to bring a telephone count

1 in January along with the other?

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

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

1 in effect has a key to avoiding just what Justice
2 Breyer's hypothetical suggested.

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

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

21 JUSTICE SOUTER: But does the -- does the
22 government ask for something more than one fair chance
23 when it comes in with 117 counts? Maybe the fair chance
24 consists of a fair chance with a number of counts or a
25 number of indictments that one can reasonably expect a

1 -- a jury to handle without either getting totally
2 confused or totally exhausted.

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

8 JUSTICE SOUTER: That's right, I'm making an
9 argument that he did not make.

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

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

21 JUSTICE GINSBURG: Why not, when considering
22 what the government did on its second chance? It
23 trimmed 5 -- if there were 20 insider trading, on the
24 new indictment, there were 5. There were 99 counts of
25 laundering, which were trimmed to 8, something within

1 the jury's ken. But isn't the most likely thing in this
2 case that the jury was simply exhausted?

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

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

23 CHIEF JUSTICE ROBERTS: Well, the -- the
24 point about the big extension, you were rather coy in
25 your brief about what you think about *Ashe v. Swenson*.

1 Are you asking us to revisit that?

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

12 CHIEF JUSTICE ROBERTS: Well, you're not
13 going to talk about -- you're not going to talk about
14 the text of the Double Jeopardy Clause, are you?

15 MR. DREEBEN: Well, I --

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

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

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

25 MR. DREEBEN: Well, this Court has made

1 clear that the jeopardy continues until the government
2 has the opportunity to obtain a verdict. So the fact
3 that his jeopardy began is not what entitles him to --

4 CHIEF JUSTICE ROBERTS: Under this Court's
5 decisions, but not under the text of the Double Jeopardy
6 Clause.

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

19 JUSTICE STEVENS: But the key to your
20 argument is the government is entitled to one full and
21 fair opportunity to try its case. It had that
22 opportunity the first time around.

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

25 JUSTICE STEVENS: If there were no separate

1 counts, that would have been -- that would have been a
2 fair -- that would be the end of the matter.

3 MR. DREEBEN: Since 1824 this Court has
4 defined the government's full and fair opportunity to
5 include the right to retry if the jury hangs, and here
6 what the defendant --

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

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

14 JUSTICE STEVENS: Why not?

15 MR. DREEBEN: -- as if it had not bought it.

16 JUSTICE STEVENS: Oh.

17 MR. DREEBEN: It's -- it -- in this case
18 what the government did was to bring all of its cases
19 together. And I return to the hypothetical about
20 Ashe v. Swenson because I think it strikes everyone as
21 very strange to say that if the jury in Ashe v. Swenson
22 had been presented with all six robbers and had
23 acquitted on only one and had a returned -- you know, an
24 inability to reach a verdict --

25 JUSTICE STEVENS: That's why we have the

1 Dunn doctrine, which itself is questionable. It
2 basically says there is a certain situation in which we
3 will tolerate what may be an irrational verdict, and the
4 reason we tolerate it is that the acquittal itself may
5 be explained on other grounds. Namely --

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

19 Collateral estoppel depends on the idea that
20 there is a rational jury, and if the jury has acted
21 inconsistently, we don't have that basis of rationality
22 that supports the policy justifications of collateral
23 estoppel.

24 JUSTICE STEVENS: But the whole -- whole
25 doctrine of inconsistent verdicts depends on the

1 assumption that what appears to be an irrational
2 inconsistency may have another explanation.

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

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

21 MR. DREEBEN: Not under --

22 JUSTICE BREYER: No, not even a close.
23 Okay. Not even close.

24 Now, since you're going to lose that case, I
25 grant you there's thousands of case talking about your

1 ability to bring more cases if you have a hung jury. I
2 concede all those. None of them talks about double
3 jeopardy, to my knowledge.

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

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

17 MR. DREEBEN: Well, the government should
18 not be worse off.

19 JUSTICE BREYER: No, no -- better. I
20 misspoke.

21 MR. DREEBEN: I think the reason is that
22 when, Justice Breyer, you said double jeopardy is not
23 involved in the cases involving the government's ability
24 to retry on a hung count, that's not accurate. The
25 Court has regarded the doctrine of double jeopardy as a

1 balance of policies, and one of the fundamental policies
2 is when the jury cannot agree, the government has the
3 right to retry.

4 CHIEF JUSTICE ROBERTS: I think that's
5 right, and your argument depends upon that interest
6 balancing against the interest in giving effect to the
7 acquittal verdict.

8 Now, what if I think, under the Seventh
9 Amendment that's -- that what is important is protecting
10 jury verdicts? And the interest in the irrational case,
11 when you have a conviction and acquittal, is that you
12 have two jury verdicts and you can't go one way or the
13 other without undermining one of them. Here, however,
14 you can give full effect to the verdict of acquittal
15 without undermining another jury verdict. You certainly
16 undermine the government's interest in prosecuting after
17 a hung jury, but if I think what's important under the
18 Seventh Amendment is the jury verdicts, then the case
19 comes out the other way, right?

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

25 JUSTICE GINSBURG: Well, you qualify it in

1 your statement of the facts. Is there any insider
2 information with relation to the insider information
3 charges that is different in any respect from the
4 insider information in connection with the substantive
5 challenge?

6 MR. DREEBEN: No, Justice Ginsburg, there is
7 not. The government's theory here was that on the
8 substantive securities fraud count, which related to the
9 January 20th, 2000, analysts meeting, Mr. Yeager was
10 integrally involved in formulating the message and was
11 therefore accountable for misstatements to the
12 marketplace about Enron broadband communications
13 efficacy and effectiveness and technological value. The
14 jury, if it rejected that, would acquit on those counts
15 -- on that count, without reaching the question did Mr.
16 Yeager know factually that the statements that were made
17 by others at that analysts conference and in the press
18 releases subsequently were inaccurate? If the answer to
19 that question is yes, he had the information, then he
20 could be liable for insider trading even though he is
21 not liable for substantive securities fraud because he
22 had nothing to do with creating the statements or
23 misstatements to the marketplace.

24 And I think I do take issue with
25 Petitioner's suggestion that the theory of this case was

1 an omissions theory. The way that Mr. Yeager argued the
2 case to the jury was that I didn't have any involvement
3 in preparing or making statements at that January 20th
4 analysts conference; you can't convict me of what other
5 people may have said. And the jury instructions advised
6 the jury that it had to find that he participated in the
7 scheme and that he either made the statements or caused
8 the statements or omissions to be made. If it rejected
9 that, it easily acquits on the securities fraud. And as
10 a result even if this Court were inclined to apply
11 collateral estoppel across mixed counts in a verdict of
12 acquittals and hung counts, which we submit it should
13 not do, the defendant still has to carry his burden of
14 showing necessarily that the jury resolved an issue of
15 fact in his favor that would preclude the next
16 prosecution.

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

19 MR. DREEBEN: But the court of appeals
20 relied on the view that Mr. Yeager did not contest that
21 he participated in the planning and preparation and
22 statements that were made.

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

25 MR. DREEBEN: Well, I think it's included in

1 our ability to defend the judgment. The District Court
2 in this case made it quite clear that collateral
3 estoppel did not apply because the acquittals could rest
4 on the basis that Mr. Yeager did not participate in the
5 analysts conference and in the press statements that
6 were the basis for the wire fraud and the securities
7 fraud omissions.

8 CHIEF JUSTICE ROBERTS: So if we -- if we
9 agree with you on that proposition, then the conflict
10 that we granted cert to resolve would still continue.

11 MR. DREEBEN: Well, you could resolve it. I
12 would hope that you would resolve it in a favor of a
13 disposition that doesn't require you to reach the
14 factual issue, but if the Court resolves the legal issue
15 against us, I think it should revisit the analysis of
16 the court of appeals because government isn't defending
17 the precise way in which the court of appeals went about
18 analyzing the double jeopardy issue, and its question of
19 what facts were necessarily determined was resolved
20 incorrectly, I think, as a matter of clear error. I
21 don't even think Mr. Yeager will stand up on rebuttal
22 and tell you that he didn't argue to the jury that his
23 client was not involved in -- in the creation of the
24 statements at that analyst meeting because he did make
25 that argument.

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

6 JUSTICE KENNEDY: Well, on that first
7 theory, and your theory that a retrial on hung counts is
8 always permitted, I -- I take it there are no court of
9 appeals opinions or decisions that agree with you on
10 that point, or am I incorrect?

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

15 JUSTICE KENNEDY: A different question:
16 Suppose you prevail. The hung counts are retried. And
17 the jury hangs again and the jury hangs a second time.
18 Is there any point at which the district court can
19 intervene in the exercise of its own authority and
20 discretion just to dismiss the charges?

21 MR. DREEBEN: I don't think so, Justice
22 Kennedy, because I think the interest that's being
23 vindicated here is a balance of interests, and it's --
24 as I responded to the Chief Justice and -- and referred
25 to Justice Souter's question earlier, double jeopardy

1 has never been a jurisprudence of black and white. You
2 could you read the clause as saying one trial for a
3 defendant. If the defendant is -- doesn't get a
4 conviction at that trial, game over. But the Court has
5 never done that because the double jeopardy clause has
6 always involved a balance of the society's very
7 important interests in having the opportunity for a
8 decision up or down on whether a defendant is guilty.

9 JUSTICE KENNEDY: Then the government can
10 try year after year to get a conviction and were the
11 defendant down? Nothing the Court can do so long as
12 there's a hung jury?

13 MR. DREEBEN: If the -- if the jury hangs,
14 the government can retry, and there have been cases
15 where --

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

19 MR. DREEBEN: I am not aware whether any
20 States do, but certainly as a matter of double jeopardy,
21 this Court has never suggested that there is. I think
22 as a matter of common sense, prosecutors who are unable
23 to achieve a verdict after a certain number of trials do
24 tend to conclude that it's not in the interest of
25 society to keep trying. But certainly one hung jury

1 followed by a retrial is customary rather than an
2 exception to the rule, and the reason why that's --

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

6 MR. DREEBEN: But the --

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

17 MR. DREEBEN: Well, I -- I -- Justice
18 Stevens, all I can say is that if the first jury had
19 really believed that Mr. Yeager acted in good faith and
20 was completely innocent, it should have acquitted on all
21 counts.

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

1 MR. DREEBEN: We should have -- we should
2 presume that, as we do in other areas of the law, that
3 the jury followed the instructions that it was given,
4 and the instructions that it was given --

5 JUSTICE STEVENS: Do you make the same
6 presumption when there is an inconsistent verdict, but
7 you say even if it's irrational we'll go along with it
8 because of the one jury, and they may have had non --
9 unsound legal reasons for saying, well, we'll let the
10 guy off on the one count.

11 MR. DREEBEN: But I think that there is no
12 reason for the fact that a jury takes irrational action
13 to then be used for the jury's acquittal to block
14 complete prosecution.

15 JUSTICE STEVENS: The jury did not take
16 irrational action in this case. The only action --
17 that's relevant was the acquittal. The other they
18 didn't act.

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

22 JUSTICE STEVENS: It would be irrational if
23 they had returned a verdict, but they said we can't
24 agree for who knows why.

25 MR. DREEBEN: But the point is they should

1 have agreed logically if they believed that Mr. Yeager
2 never had inside information or acted in good faith.
3 And the jury is instructed to consider each count, count
4 by count, it was given instructions at the Allen phase
5 of the case that it should strive to achieve a verdict,
6 that Mr. Yeager is entitled to a verdict of not guilty
7 if, in fact, the jury believes that he is not guilty and
8 that it should make every effort to reach the verdict.

9 Now, the fact that it didn't, and it would
10 have been very easy for it to do, if it had determined
11 logically that he did not have inside information, is a
12 reason for hesitating before extrapolating out from
13 those acquittals and blocking the government's
14 opportunity to retry the hung counts.

15 Mr. Yeager's position logically --

16 JUSTICE STEVENS: It's not all that clear,
17 because as you argue the court -- the district court was
18 correct in analyzing the -- the estoppel issue. And
19 it's obviously a very difficult issue because judges
20 have disagreed about it and the government and your
21 opponent disagree on it. So, it's entirely possible
22 that the jury wasn't able to figure it all out.

23 MR. DREEBEN: I -- I don't think it is that
24 difficult of an issue. I think the district court which
25 was closer to it, which had presided over the trial and

1 which read the closing arguments, made findings that
2 make it quite clear what Mr. Yeager argued and how those
3 arguments were totally consistent --

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

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

7 (Laughter.)

8 MR. DREEBEN: If the jury was confused and
9 it acted in an irrational manner, that's a reason not to
10 apply collateral estoppel, not a reason to do it. What
11 Mr. Yeager's theory implies is that if the jury had come
12 back and -- under the Federal Rules of Criminal
13 Procedure it can return partial verdicts. If the jury
14 had come back and said we're struggling on some of the
15 counts, we have a partial verdict on others of them, and
16 the judge said, okay, we'll take the partial verdict;
17 and the jury came in and said, we acquit on five counts,
18 that Mr. Yeager's theory would be that the judge should
19 say that's great, collateral estoppel now means you
20 don't get to finish the deliberations on the counts on
21 which you said you can't agree. And that result makes
22 no sense, neither does blocking retrial in this case.

23 CHIEF JUSTICE ROBERTS: Your -- your theory
24 depends upon viewing a hung jury as constituting some
25 action by the jury. Now, obviously it does in some

1 sense.

2 But if you view -- if you accept the
3 proposition that juries only act by returning verdicts,
4 and that's the reason you can retry, because with a hung
5 jury the jury hasn't really done anything in the way
6 jurors act, then the case comes out -- then the
7 defendant prevails, right?

8 MR. DREEBEN: I assume I can answer your
9 question, Mr. Chief Justice?

10 CHIEF JUSTICE ROBERTS: Yes.

11 MR. DREEBEN: No, because the -- the logic
12 of the situation here is that in order for collateral
13 estoppel to apply, there needs to be a rational jury
14 verdict. And Ashe versus Swenson tells us that in
15 attempting to decide what the jury rationally resolved,
16 we look at all evidence in the record, not just some.

17 So it isn't necessary to treat the jury's
18 hung counts as if they are verdicts of a sort. They
19 simply are data which show that if the jury had been
20 rational and it had resolved a fact in favor of the
21 defendant that was necessary for the government to prove
22 on the other counts, it would have resolved those as
23 acquittals as well. And once you take into account that
24 total record, the doctrine of collateral estoppel with
25 its premise of rationality cannot be applied.

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 Mr. Buffone, you have six minutes remaining.

3 REBUTTAL ARGUMENT OF SAMUEL J. BUFFONE

4 ON BEHALF OF THE PETITIONER

5 MR. BUFFONE: The Solicitor General has
6 essentially asked this Court to take a metaphysical view
7 of the Double Jeopardy Clause, but the teachings of this
8 Court from Sealton through Ashe is that the important
9 protections of the Double Jeopardy Clause as applied to
10 issue preclusion must be approached with reason, with
11 rationality, with a non-hypertechnical view in order to
12 protect the public policies that underlie the Double
13 Jeopardy Clause. And that is quite simply that what
14 happened here should not occur. That a defendant should
15 not be forced to relitigate before a second jury an
16 issue that was necessarily decided.

17 I sat through and argued through
18 13-and-a-half-week jury trial. A reasonable and
19 rational explanation of what occurred there is that we
20 had a conscientious jury that followed its instructions,
21 that tried to reach through a complex 176-count
22 indictment, and they simply were not able to. They
23 spoke the community will, and they spoke it forcefully
24 in their acquittals. Six of them.

25 And the only conclusion that can be reached

1 from those acquittals is that Mr. Yeager did not possess
2 insider information.

3 At the beginning of this trial we filed two
4 motions, the first challenging the specificity of the
5 indictment, and the second seeking a Bill of
6 Particulars. The district court answered both with the
7 same answer. The insider information that Mr. Yeager is
8 charged with possessing in the insider trader counts is
9 the false statements made by others at the 2000 Analysts
10 Conference.

11 The omissions theory was not as the
12 Solicitor General submits, some afterthought. It was
13 core to the government's prosecution and it was core to
14 the case. The jury decided that the omissions theory
15 was not a basis to convict on the six counts that it
16 acquitted. It determined that Mr. Yeager did not
17 possess that information. And Mr. Yeager is entitled to
18 the benefits of those acquittals. Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

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

23

24

25

A							
ability 33:13 37:1,23 41:1	24:4,5 40:12 41:3 45:21 46:13 48:23 49:24 50:1,18	allows 26:4	approached 49:10	attach 16:18			
able 20:22 35:10 46:22 49:22	acquitted 11:10 12:12 13:8 14:21 27:20 34:23 36:13,16 44:20,25 50:16	alternative 6:20	appropriate 18:11	attached 8:23			
above-entitled 1:11 50:22	act 45:18 48:3,6	alternatives 6:22	areas 45:2	attempting 28:5 48:15			
Absolutely 14:8 27:21	acted 21:25 35:20 36:7 44:19 45:19 46:2 47:9	Amendment 32:9 38:9,18	argue 8:17,17 13:4 36:14 41:22 46:17	attempts 28:9			
accept 35:14 48:2	action 35:14 45:12,16,16 47:25	analysis 5:1 7:15 10:20,21 16:25 17:1 20:23 21:11 41:15	argued 5:16 40:1 42:14 47:2 49:17	attorney 5:6			
accepted 9:17	addition 27:24	analyst 41:24	argues 29:8 30:5	authority 17:4 18:21,22,23 42:19 43:17			
account 9:19 48:23	additional 20:11	analysts 5:14 39:9,17 40:4 41:5 50:9	arguing 6:8	avoid 19:5			
accountable 39:11	addressed 8:25	analyzed 5:5	argument 1:12 2:2,7 3:4,6,22 3:23 4:8 6:11 10:16 21:6 29:11 30:9 33:20 38:5 41:25 49:3	avoiding 29:1			
accurate 37:24	admissions 5:6	analyzing 41:18 46:18	arguments 5:9 7:14 47:1,3	aware 19:13 43:19			
achieve 43:23 46:5	adversely 33:13	answer 13:22 16:15,17 19:17 25:1,5,8 28:11 39:18 48:8 50:7	arises 9:4	a.m 1:13 3:2 50:21			
achieving 21:19	advised 40:5	answered 50:6	arising 18:10				
acquit 39:14 47:17	affirmative 4:18	answers 30:4 37:8	Ashe 3:17,22 5:3 7:15,18,19 8:21 9:19 10:4 20:23 23:4,9 26:8,9,19 31:25 32:3,5 34:20,21 48:14 49:8				
acquits 9:14 13:25 19:22 27:12 40:9	affirmatively 5:17	appeal 12:15 33:14 36:5,20	back 4:16 11:20 19:24 35:9 37:4 47:12,14				
acquittal 3:10 3:16,24 4:2,17 7:22 8:4 9:9,12 9:21,24 10:1 12:9 13:2,12 15:7,13 16:21 18:5,24 22:15 22:17 23:11,17 23:22 24:20,22 26:13,22 27:1 27:9,11 35:4 35:16 36:5,6 38:7,11,14 44:4,10 45:13 45:17	afterthought 50:12	appeals 40:18 40:19 41:16,17 42:9 47:5	backfire 30:15				
acquittals 3:13 8:4 9:2,3,5 10:10,22,24,25 12:13 13:16 17:7,23 18:14 21:13 22:7,21 22:21,24 24:1	age 28:12	APPEARAN... 1:14	balance 29:14 38:1 42:23 43:6				
	agree 5:19 7:1 10:18 14:2 21:18 34:12 38:2 41:9 42:9 45:24 47:21	appears 36:1	balancing 38:6				
	agreed 46:1	Appendix 4:8	bar 13:13 17:12 18:3 20:24 21:20 22:22				
	agrees 15:13,24	apple 25:15,22 29:9	barred 34:11				
	ahead 25:23,24	application 3:16 24:23	based 6:12 7:3				
	aimed 28:4,7	applied 12:20 24:24 48:25 49:9	basic 21:16				
	ALITO 6:10 7:1 19:8,16,19	applies 36:9	basically 6:4 35:2				
	alleged 9:23	apply 13:19,20 24:3 25:10,12 38:24 40:10 41:3 47:10 48:13	basis 11:14 18:13 35:21 41:4,6 50:15				
	Allen 11:25 12:2 12:22 20:11 46:4		began 6:8 33:3 37:8				
	allow 20:5		beginning 50:3				
	allowing 25:14 42:2		behalf 1:15,18 2:4,6,9 3:7 21:7 49:4				
			belief 8:1				
			believe 5:2 7:16 8:25 10:4,4,20 16:16 17:21 18:12 19:12				

B

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

<p>constitute 25:17 constituting 47:24 Constitution 19:9,19,20 20:3 constitutional 19:6,13 consumed 6:2 contemporary 12:21 contending 8:7 contest 40:20 context 32:8 33:12 continue 41:10 continues 33:1 continuing 21:14 contrast 18:13 convert 5:23 convict 6:12,24 21:17 29:17 40:4 50:15 convicted 13:7 convicting 15:20 conviction 15:12 16:5,7,21 23:19 38:11 43:4,10 convictions 13:16 22:7 convicts 13:25 core 8:2,3 19:4 24:15 50:13,13 correct 4:5,19 5:15,17 8:16 27:22 44:14 46:18 correction 4:21 counsel 7:14 13:3 21:4 49:1 50:19 count 3:15 9:25 13:7,8,23,23 14:9,10,19,20 14:21,23,24</p>	<p>15:3,6,7,11,12 15:12,13 16:4 16:6,6,8,20,22 18:11 24:12 25:5,21 27:20 27:21,25 29:3 36:12,14 37:7 37:16,24 39:8 39:15 44:25 45:10 46:3,3,4 countervailing 29:15 counts 3:14 9:5 9:6,8,11,16 10:9,13,17,19 11:10,11,16 12:17,18 13:11 13:19 19:22,23 19:25,25 20:1 20:2,22 21:12 21:18 22:25 23:13 24:6,8 24:14,14 25:17 26:5 28:19,24 29:20,23,24 30:6,6,12,18 30:24 31:4,9 31:11,12,17 34:1 35:10 39:14 40:11,12 42:7,16 44:21 45:21 46:14 47:15,17,20 48:18,22 50:8 50:15 course 5:7 17:11 25:19,20 29:14 court 1:1,12 3:9 5:4,5 8:19,23 9:13,15 10:6,7 10:11,21 11:18 11:24 12:1,25 13:14 19:2 20:13 21:9 22:5 23:9 24:13 26:3,18 30:13 32:3,25</p>	<p>33:9 34:3 37:25 40:10,18 40:19 41:1,14 41:16,17 42:2 42:8,18 43:4 43:11,21 46:17 46:17,24 47:5 49:6,8 50:6 courts 12:19 19:14 42:4 Court's 3:17 33:4,24 coy 31:24 creating 39:22 creation 41:23 crimes 28:16 criminal 28:14 47:12 cross-examina... 5:11,20 6:2,7 7:14 crucial 23:2 33:12 customary 44:1 44:5</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>D 3:1 data 48:19 deadlocked 12:1 12:6,6,8,9 31:15 decide 3:14 7:17 36:13 48:15 decided 7:22 8:6 8:15,23 9:20 10:8 16:23 20:24 42:5 49:16 50:14 deciding 33:11 decision 3:17 13:1 24:9 43:8 decisions 33:5 33:24 42:9 defend 41:1 defendant 7:23 13:6,10 25:18</p>	<p>26:14,16 28:6 29:17 34:6 35:17 36:4 40:13 43:3,3,8 43:11 48:7,21 49:14 defendant's 3:11 5:6 defending 41:16 defined 34:4 deliberations 20:12 47:20 Department 1:18 depend 14:13,25 30:5 38:23 depends 35:19 35:25 38:5 47:24 deprive 29:20 depriving 12:20 Deputy 1:17 derive 10:6,7 describe 17:4 despite 5:24 determination 3:11,12 10:24 11:2,3 16:18 16:19 22:15,18 22:20 determinations 22:23 determine 11:1 14:7 18:25 42:4 determined 3:25 17:7 24:4 33:17 41:19 45:20 46:10 50:16 determining 9:20 dictates 30:17 difference 23:14 27:5,13 44:7 different 7:19 7:24 20:4,7</p>	<p>22:9,14 26:8 28:9 39:3 42:15 44:12 difficult 46:19 46:24 dilemma 13:11 direct 24:22 directly 13:22 disagree 46:21 disagreed 46:20 disallowed 11:7 discharged 12:2 disclose 6:13,18 7:4 discretion 42:20 dismiss 42:20 disposition 31:13 41:13 dispositive 13:18 15:6 dissenting 10:12 distinct 30:20 32:21 distracted 24:13 36:18 distress 11:23 district 11:18 41:1 42:18 46:17,24 50:6 doctrinal 21:23 doctrine 20:25 21:14 22:5 24:24 26:4 31:19 32:5,7 33:11 35:1,25 36:8 37:25 38:22 48:24 doing 27:25 double 8:2,8 10:1 12:10 17:25 19:2,4 21:10,20 23:4 24:23 25:10 26:1,4 28:3 29:7,13 31:20 32:7,10,14,20 33:5,10 35:12</p>
--	---	---	--	---

36:15 37:2,11 37:22,25 41:18 42:25 43:5,20 49:7,9,12 doubt 23:22 24:20 doubts 27:1 Dowling 5:4,5 dramatic 22:2 Dreeben 1:17 2:5 21:5,6,8 22:4,19 23:8 23:12,24 24:10 24:21 25:16,25 27:4,10,22 28:2 29:12 30:3,10 31:3 32:2,15,18,25 33:7,23 34:3 34:12,15,17 35:6 36:3,21 37:17,21 38:20 39:6 40:19,25 41:11 42:11,21 43:13,19 44:6 44:17 45:1,11 45:19,25 46:23 47:6,8 48:8,11 drink 12:20 drug 27:20 drugs 13:23,24 14:21 28:14 Dunn 35:1,6 44:11 duty 5:14 6:13 6:17 7:4 D.C 1:8,15,18 42:14	17:4 18:15 22:12,16,16 23:1,19 29:1 38:6,14 effectiveness 39:13 efficacy 39:13 effort 8:5 30:14 46:8 efforts 30:15 egregiously 12:16 either 6:22 13:15 19:10 28:19 30:1 40:7 element 6:21 elements 28:19 elucidated 7:12 embodies 23:13 employment 11:21 encourage 20:11 42:4 engage 7:10 10:21 enhance 7:9 Enron 7:9 31:6 39:12 entirely 24:8 46:21 entirety 5:9 entitled 21:17 33:20 46:6 50:17 entitles 33:3 equate 12:24 equivalent 9:9,9 42:13 erroneous 12:16 error 41:20 ESQ 1:15,17 2:3 2:5,8 essentially 3:25 49:6 establish 4:2 established	31:17 estoppel 8:19 13:18 16:17 20:14 21:24 22:6 23:1 24:3 24:24 25:10 28:7 31:19 33:9,13,15 35:19,23 40:11 41:3 42:3 46:18 47:10,19 48:13,24 event 7:20 events 32:11 everybody 15:13,24 evidence 48:16 exactly 25:1 31:21 example 17:25 exception 44:2 excuse 18:16 exercise 42:19 exhausted 30:2 31:2 expect 29:25 explain 23:16 explained 35:5 explanation 36:2 49:19 expressed 32:6 extend 33:11 extends 13:4 extension 22:2 29:7 31:20,24 extent 22:23 extrapolating 46:12 eyes 9:22	24:4,15 29:10 31:5,10,16 33:2,17 40:15 42:5 45:12,20 46:7,9 48:20 facts 4:22 38:24 39:1 41:19 factual 16:19,20 41:14 factually 39:16 failed 11:1,13,15 failure 17:17 fair 21:17 29:17 29:22,23,24 30:18 32:4 33:21 34:2,4 faith 44:19 46:2 false 50:9 far 24:22 fast 15:8 favor 3:11 25:18 29:8 40:15 41:12 48:20 February 27:19 Federal 19:10 20:4 47:12 fence 13:14 Fifth 32:9 42:13 figure 46:22 filed 50:3 final 3:11 9:3,6 11:3 18:15 20:10 finality 8:4 9:1,2 10:10,22,24 12:12 13:1 17:24 19:5,9 20:20 financial 11:19 11:22 find 4:10 5:25 6:15 7:2 40:6 finding 12:10 findings 22:16 47:1 finish 47:20 firm 12:25	first 5:3 6:5,19 6:21 7:25 8:3 9:21 10:3 12:19 13:25 19:5 21:13 23:15 25:21 26:12 28:3 30:4,14 33:22 34:9,10 36:16 37:8 42:6 44:4 44:8,14,15,18 50:4 five 26:15,22 27:12 35:8,11 35:16 47:17 fly 36:18 focus 38:21 follow 17:14 followed 44:1,3 45:3 49:20 following 18:11 28:12 44:9 Fong 18:15,15 Foo 18:15,15 food 12:20 forbidden 27:21 force 9:12 forced 20:13 49:15 forcefully 49:23 form 20:11 formulating 39:10 fortiori 25:23 found 35:17 frailty 6:23 fraud 6:12,15,21 7:2,6 27:14 39:8,21 40:9 41:6,7 front 17:3 full 20:10 21:17 29:16 33:20 34:4 38:14 full-time 11:20 fundamental 38:1
E				
E 2:1 3:1,1 earlier 42:25 earned 35:15 easily 40:9 easy 32:17 46:10 effect 9:4 10:15 10:16 13:12,18				
		F		
		F 1:3 face 11:24 faced 44:16 fact 4:2,11,12 5:21,25 6:18 8:5 11:7 23:15		

fundamentally 30:11	27:24 28:5,8 28:17,21,23,25	9:16 12:18	27:5	26:10 37:6,10
further 10:20	29:9,16,20,22	history 12:24	identically 24:16	37:15
18:3 21:2	30:14,16,22	19:2 32:9	identification 5:7	indictment 7:5
<hr/> G <hr/>	31:16 33:1,20	Honor 5:3 6:5	identified 29:15	7:12 13:19
G 3:1	34:18 35:9,13	6:19 7:5 8:12	illogical 14:9	23:11,12 28:6
game 26:10 43:4	36:4,5 37:9,12	8:16,20 9:10	imagined 27:19	28:19,25 30:7
General 1:17	37:14,17 38:2	11:12 12:3,11	imagining 26:7	30:12,24 49:22
49:5 50:12	41:16 42:12,14	13:9 14:2,12	impermissible 26:18	50:5
getting 28:22,24	43:9,14 46:20	14:17,25 15:5	implies 47:11	indictments 28:20 29:25
30:1	48:21	15:23 16:10,16	important 17:15	individual 27:19
Ginsburg 7:18	government's 6:10,11 34:4	17:21 18:8	17:24 38:9,17	individuals 26:10
7:25 8:7,14 9:8	37:23 38:16	19:1,12 20:6	42:1 43:7 49:8	information 31:6 39:2,2,4
30:21 31:4	39:7 46:13	29:15	importantly 5:10	39:19 46:2,11
38:25 39:6	50:13	Honor's 6:25	imported 33:9	50:2,7,17
Ginsburg's 20:15	grand 29:18	18:13	impossible 14:1	innocent 24:19
give 20:10 22:12	grant 36:25	hope 41:12	improve 26:17	44:20
22:16,16 23:19	granted 41:10	horns 13:11	impugning 44:8	inquire 12:7
30:3 31:22	great 47:19	hung 3:13,15	inability 10:23	inside 31:5 46:2
38:14 43:17	greater 8:1	9:5,6,8,11,15	12:25 34:24	46:11
given 18:15	grounded 7:11	9:23 10:9,13	inaccurate 39:18	insider 4:1 7:10
37:10 45:3,4	26:1	10:17,19 11:11	inclined 40:10	24:5,11,14
46:4	grounds 23:17	12:17,18 14:10	include 34:5	30:23 31:4,11
gives 28:17,21	35:5	14:15,16,18,21	included 40:24	39:1,2,4,20
giving 38:6	grows 21:24	15:15,20,22	40:25	45:21 50:2,7,8
go 3:21 4:7 19:2	guess 5:21,25	16:22 17:11,16	inconsistency 22:24 36:2	insofar 6:16
19:2 25:23,24	13:22	18:2,11,24	inconsistent 3:12,15 9:24	33:9
26:15 36:6	guilty 5:17	21:12,15,18	10:23 11:3	instructed 46:3
38:12 42:2	24:18 43:8	22:25 25:4,4	24:2 25:3	instruction 4:5,7
45:7	46:6,7	25:17,21 26:5	35:15,25 45:6	4:16,21 5:24
goes 26:2	guy 45:10	26:23 28:22,25	inconsistently 35:21	6:3,23
going 4:6 14:6	<hr/> H <hr/>	29:19 32:24	incorrect 42:10	instructions 4:3
15:8 16:25	handle 30:1	35:7,12 37:1	41:20	6:20 7:12 40:5
17:2 18:22	hangs 13:6	37:24 38:17	increase 28:24	45:3,4 46:4
22:10 28:8	19:22 27:12	40:12 42:7,16	independent 22:24	49:20
32:13,13 33:17	34:5 42:17,17	43:12,25 44:3	indict 28:14	integrally 31:7
36:20,24 42:2	43:13	46:14 47:24	36:14	39:10
good 44:19 46:2	happened 14:13	48:4,18	indicted 15:14	integrated 7:6
gored 13:15,17	14:14 15:1	hurts 10:16		integrity 24:20
government 3:12 5:11 6:8	27:25 49:14	hypo 28:13		24:22 27:1,9
6:16 21:11,14	hear 3:3 13:22	hypothetical 15:6 20:21		27:11,16 33:16
21:16,19,21	heat 12:20	29:2 34:19		44:9
25:14 26:5,10	held 5:22	35:7 37:4		interest 29:14
26:12,14,19	hesitating 46:12	<hr/> I <hr/>		29:16 38:5,6
	historically 9:13	idea 21:25 35:19		38:10,16 42:22
		identical 24:11		

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

43:11 look 18:1 25:8 48:16 looked 4:3 5:5 12:18 looking 5:8 looks 36:18 lose 36:24 lost 37:5 lot 28:17 lots 28:13,18	minutes 12:2 49:2 misleading 4:14 misrepresenta... 7:7 misspoke 37:20 misstatements 5:15 6:22 39:11,23 mistrial 20:1 24:2 mixed 22:6 40:11 42:3 model 17:6,8,10 17:10,14,17 18:24,25 models 17:4 Monday 1:9 money 31:12 motions 50:4	13:7 non-hypertec... 49:11 non-jeopardy-... 23:13 note 12:1 number 7:21,21 11:14 24:13 29:24,25 30:6 30:12,18 31:9 43:23	17:16 opinions 10:12 10:12 42:9 opponent 46:21 opportunity 21:17,21 26:16 29:17,20 33:2 33:21,22 34:4 35:13 36:4,6 43:7 44:14,15 46:14 opposite 9:11 13:11 option 9:17 oral 1:11 2:2 3:6 21:6 order 4:12 6:11 32:4 48:12 49:11 ought 17:18 24:24 outside 18:20,23 overcharged 30:14 overcharging 30:17,19 overlapping 28:13,16,18 overturning 12:15 ox 13:15,17	Perez 18:9 20:17 perils 19:6 permissible 15:13 permit 12:22 19:10,15 permitted 6:20 14:1,10 42:8 person 32:23 persuasion 13:1 Petitioner 1:4 1:16 2:4,9 3:7 24:1 30:5 31:5 49:4 Petitioner's 24:10 31:18 39:25 phase 46:4 pick 18:22,24 pieces 28:9 place 23:11 planned 7:7 planning 40:21 please 3:9 21:9 point 4:6 5:20 10:15,19 11:5 11:6,7 12:3,5 16:11 20:15 31:24 32:21 42:10,18 45:25 poker 26:10 policies 25:9 26:2 32:6 38:1 38:1 49:12 policy 29:6,8 30:16 35:22 portion 9:23,25 position 17:1 30:5 31:18 34:8,13 46:15 possess 3:25 50:1,17 possessing 50:8 possibilities 17:19 18:6 possible 5:1 11:15 12:23
M	N	O	P	
majority 10:11 making 16:12 16:14 30:8 40:3 man 6:9 manager 31:8 manifest 18:9 manner 47:9 March 1:9 marketplace 39:12,23 Martin 9:15 material 4:11,12 4:22 6:18 7:8 matter 1:11 34:2 41:20 43:20,22 50:22 mean 15:3 26:13 meaning 10:6,7 33:8 meaningless 10:17,19 means 8:14 12:19 22:6 47:19 meeting 4:18 39:9 41:24 message 39:10 metaphysical 49:6 MICHAEL 1:17 2:5 21:6 mind 27:18 33:10	N 2:1,1 3:1 necessarily 4:2 5:25 7:22 8:6 8:15,15 16:23 20:24 24:4 33:16 40:14 41:19 42:5 45:20 49:16 necessary 3:18 4:12 6:13 16:18,19 48:17 48:21 necessity 18:10 needed 31:16 needs 32:3 48:13 nefarious 30:14 30:15 neither 47:22 neutral 37:13 never 5:22 12:4 16:5,7 25:20 43:1,5,21 46:2 new 3:18 30:24 non 13:7 45:8 non-acquitted	O 2:1 3:1 obligation 4:19 obtain 21:15,21 33:2 obvious 13:21 obviously 22:10 31:15 46:19 47:25 occur 16:20,21 19:21 21:12 29:19 49:14 occurred 49:19 offended 8:5 offense 22:22 32:19,24 offenses 32:20 Oh 15:24 34:16 okay 14:4,8,18 27:23 36:23 47:16 omission 5:13 6:12 omissions 5:12 5:15,17 6:17 6:22,24 7:3,8 7:11 40:1,8 41:7 50:11,14 omitted 4:11,22 6:18 once 48:23 open 17:19 opening 5:10 6:7 open-ended 6:4 open-endedness	P 3:1 page 2:2 4:8 parse 4:4 part 7:4 10:1 25:10 partial 19:11,15 19:23 20:5,21 47:13,15,16 participate 41:4 participated 40:6,21 Particulars 50:6 party 33:13 people 4:22 40:5	

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

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

39:25 suggests 28:13 supported 32:8 32:9 supports 35:22 suppose 25:20 26:19 42:16 Supreme 1:1,12 sure 6:14 47:6 surprising 16:13 Swenson 3:17 3:23 23:4 26:8 26:9 31:25 32:3,5 34:20 34:21 48:14 sword 13:10 system 31:6	27:18 text 32:10,14 33:5 textually 31:21 Thank 21:4 49:1 50:18,19 theory 5:12,13 6:17,25 7:3,6 7:11 23:25 24:10 39:7,25 40:1 42:7,7 47:11,18,23 50:11,14 thing 4:23,24 23:2 31:1,17 things 36:7,8 think 6:23 9:10 19:1 20:7 22:19 23:2,9 23:24 24:12 25:11,11,13,22 26:2,7,23 27:15 30:11,13 30:17 31:3,10 31:17,25 32:3 32:4,18 33:7 33:23 34:20 36:11 37:11,21 38:4,8,17,20 38:21 39:24 40:25 41:15,20 41:21 42:1,12 42:21,22 43:21 45:11 46:23,24 thought 16:12 27:16 thousands 36:25 threat 8:2 three 6:21 tighten 6:3 time 21:3 24:7 27:18 33:22 36:17 37:8 42:17 44:5 today 3:4 token 18:2 told 10:15	tolerate 35:3,4 tolerated 12:19 total 10:2,5 48:24 totally 30:1,2 47:3 tough 27:3 track 42:2 traded 31:9 trader 50:8 trading 7:10 24:6,11,14 30:23 31:4,11 39:20 45:21 transposed 32:5 treat 48:17 trial 6:6 11:19 14:13 18:3 36:12 43:2,4 44:8 46:25 49:18 50:3 trials 19:6,7 43:23 tried 26:12 27:17 28:20 49:21 trimmed 30:23 30:25 true 36:8 44:10 try 14:6 20:9 21:15 25:4 26:15,16 27:19 33:21 43:10 trying 25:5 28:9 43:25 turn 31:4 37:5 turned 24:14 two 5:3 17:4,4 17:19 21:10 22:9 28:2 30:4 30:6 35:9 37:8 38:12 44:12 50:3 two-edged 13:10	43:22 unanimity 10:9 12:23 20:12,13 unanimous 11:6 11:9 12:13 unanimously 10:25 uncertainty 7:13 17:16 underlie 25:9 49:12 underlying 19:4 undermine 38:16 undermines 22:20 undermining 22:13,17 38:13 38:15 underpinning 19:13 understand 17:1 17:2 20:8 understood 26:13 United 1:1,6,12 3:4 units 30:20 unsound 45:9 untrue 4:11 unusual 11:25 13:5 upsetting 22:6	17:17 18:10 19:11,23,25 20:5,9,10,12 20:21 21:12,15 21:22 22:6 23:16 24:1,19 26:21 29:5 33:2 34:24 35:3,18 38:7 38:14,15 40:11 43:23 44:9 45:6,23 46:5,6 46:8 47:15,16 48:14 verdicts 3:14,24 4:1 14:6 19:5,9 19:15 22:10 25:3 35:25 38:10,12,18 42:3 47:13 48:3,18 versus 48:14 victim 7:20,21 victims 7:20 view 19:21 40:20 48:2 49:6,11 viewed 23:3 viewing 47:24 vindicated 42:23 vivid 26:7
T				
T 2:1,1 take 9:19 15:9 39:24 42:8 45:15 47:16 48:23 49:6 takes 45:12 talk 32:13,13 talking 8:10 36:25 44:12 talks 37:2 teachings 49:7 technological 39:13 telephone 13:24 14:10,19,21,23 14:24 15:12,14 27:21,25 36:14 37:7,16 telephones 28:15 tell 41:22 telling 4:9 tells 17:18 18:9 20:18 48:14 tend 30:15 43:24 terminated 8:24 terms 9:1 test 5:3 10:4				
			V	W
			v 1:5 3:4,17,22 23:4 26:8,9 31:25 32:3,5 34:20,21 validity 23:22 value 39:13 values 8:2,3 18:4,6 29:14 various 28:19 verdict 4:16,23 4:24 9:24 11:13,16 12:21	wait 29:3 want 15:9 33:15 wanted 11:19 16:15 Washington 1:8 1:15,18 wasn't 7:3 31:8 35:17 46:22 way 9:13 11:1,9 11:11 12:18 16:14 22:10,11 22:11 24:2 25:8 26:17
		U		
		unable 35:18		

31:11,14 32:8 38:12,19 40:1 41:17 42:4,12 48:5 ways 6:20 wear 26:16 went 41:17 we'll 45:7,9 47:16 we're 8:10 24:21 37:4 47:14 we've 5:22 17:3 17:12 19:24 whit 27:24 white 43:1 win 17:2 36:20 winning 37:6 wire 41:6 words 8:9 working 31:8 worse 37:12,15 37:18 wouldn't 25:12 25:21	10:06 1:13 3:2 105 4:8 11:04 50:21 117 29:23 13-and-a-half-... 49:18 150 24:8 176 11:16 176-count 49:21 1824 34:3			
<hr/> X <hr/>	<hr/> 2 <hr/>			
x 1:2,7	2 13:23 14:4,9,9 14:18,21,22 15:2,12,14,21 16:1,2,6,6,8 20 30:23 20th 39:9 40:3 2000 5:14 39:9 50:9 2009 1:9 21 2:6 23 1:9			
<hr/> Y <hr/>	<hr/> 3 <hr/>			
Yeager 1:3 3:4 5:11,13 6:8 7:7 39:9,16 40:1 40:20 41:4,21 44:19 46:1,6 47:2 50:1,7,16 50:17 Yeager's 7:4 46:15 47:11,18 year 43:10,10	3 2:4 14:20 15:19 16:3			
<hr/> 0 <hr/>	<hr/> 4 <hr/>			
08-67 1:5	49 2:9			
<hr/> 1 <hr/>	<hr/> 5 <hr/>			
1 13:23,23 14:9 14:20 15:3,6,7 15:11,11,19 16:20	5 30:23,24			
	<hr/> 6 <hr/>			
	60 6:2			
	<hr/> 7 <hr/>			
	70 12:2			
	<hr/> 8 <hr/>			
	8 30:25 80 6:2			
	<hr/> 9 <hr/>			
	99 30:24			