



1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	SARAH E. HARRINGTON, ESQ.	
7	On behalf of the Respondent	26
8	REBUTTAL ARGUMENT OF	
9	PAUL D. CLEMENT, ESQ.	
10	On behalf of the Petitioner	57
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:10 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 this morning first in Case 12-357, Sekhar v. United  
5 States.

6 Mr. Clement?

7 ORAL ARGUMENT OF PAUL D. CLEMENT

8 ON BEHALF OF THE PETITIONER

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

11 The crime of extortion under the Hobbs Act,  
12 like the related crimes of larceny, burglary and  
13 embezzlement, is at bottom a property crime.  
14 Accordingly, understanding the scope of obtainable  
15 property under the Hobbs Act is critical to deciding the  
16 scope of the basic criminal prohibition.

17 The Government has offered you a definition  
18 of property that only a prosecutor could love. Any  
19 intangible right with economic value, but that  
20 definition is fundamentally incompatible with this  
21 Court's precedence and with Congress's conscious  
22 decision in the Hobbs Act to criminalize the State --  
23 New York State crime of extortion, but not the New York  
24 crime of coercion.

25 JUSTICE KENNEDY: If the jury had -- had

1 returned the verdict, which is at JA142, and it had  
2 marked that the attempt to extort was to extort the  
3 commitment, you might still maybe have some causation  
4 arguments, but I assume the property argument you're  
5 about to make is just irrelevant.

6 MR. CLEMENT: Well, I don't think it's  
7 irrelevant, Justice Kennedy. I would have a different  
8 argument. I think that I would stand first and foremost  
9 on this Court's decision in Cleveland, where it  
10 recognized that something like, I think the commitment,  
11 certainly the video poker license was at issue there,  
12 the Court also referenced an unissued patent.

13 And it recognized that there are things that  
14 have value once they're issued, but in the hands of the  
15 Government, they don't have value, and therefore don't  
16 qualify as property.

17 JUSTICE KENNEDY: Could -- could the case  
18 have been indicted -- has it been charged as one in  
19 which what they were taking was the commissions that  
20 would ultimately have been generated?

21 MR. CLEMENT: Well, Justice Kennedy, it  
22 might have been possible to say that what was obtained  
23 here was money, but I think if the Government had  
24 prosecuted it under that theory, it would have to prove  
25 that somehow the Government paid too much. I don't

1 think it can point just to the commissions.

2                   And I would analogize it to the McNally  
3 case. In the McNally case, you know, there was this  
4 scheme in which various sort of friends of government  
5 officials were getting the commissions from a workmen's  
6 compensation policy. And what this Court said is, well,  
7 it would have been one thing if the Government had come  
8 in and said that the Government paid commissions that  
9 were too high, or the Government had received inferior  
10 quality insurance.

11                   But what the Government did there instead  
12 was sort of take the shortcut and plead that what had  
13 happened is, the Government had been deprived of its  
14 interest in having the honest services --

15                   JUSTICE KENNEDY: Well, here, what the  
16 Petitioner wanted were the commissions, ultimately. And  
17 you can't commit extortion in order to get -- and that's  
18 real money. It's for the Government to answer, not you,  
19 but can -- do you have any idea why they didn't charge  
20 that?

21                   MR. CLEMENT: Well, I think the reason that  
22 they didn't charge that is probably practically twofold.  
23 One is that a commitment under New York law and practice  
24 is not quite as what it sounds, it's not really a  
25 commitment. And the best evidence of that is with the

1 last fund for this particular management company, they  
2 got a commitment from the State and there was no  
3 ultimate investment made.

4 So there's a subsequent step down the road.

5 JUSTICE KENNEDY: I see. I see.

6 MR. CLEMENT: So I think that's part of it.

7 The other thing I would say is as in  
8 McNally, I think they would have had to prove that the  
9 management fees were somehow excessive or something like  
10 that, so they -- they didn't do that. They focused on  
11 this recommendation.

12 JUSTICE KAGAN: Mr. Clement --

13 JUSTICE KENNEDY: Well, I took you away from  
14 your argument about intangible property.

15 JUSTICE KAGAN: Mr. Clement, just along the  
16 same lines. What you're saying is that it still would  
17 not be extortion -- let's say somebody in your client's  
18 position runs an investment company, wants an  
19 investment, wants the fees that come along with that  
20 investment. Goes to -- let's say that there's a single  
21 person who gets to decide whether to make that  
22 investment, and so to pay those fees, goes to that  
23 person, threatens that person with something terrible  
24 happening to him.

25 You're saying that that does not count as

1 extortion, that there's a reason that the Government  
2 didn't charge it like that?

3 MR. CLEMENT: I would say that that -- I  
4 would say a couple of things. I would say that's a  
5 harder case than the one I have before you today. I  
6 would say that I don't think that's actually extortion  
7 if what they charge is the commitment, not the money  
8 that goes -- that flows from the Government. And then  
9 what I would say -- and the reason I would say that is  
10 because of Cleveland.

11 JUSTICE KAGAN: Well, they want the  
12 investment with -- and the fees that come with the  
13 investment. So -- and that's why they're threatening  
14 the person.

15 MR. CLEMENT: Right. And I would say that  
16 under McNally, in that kind of case, what the Government  
17 has to prove is that if they want to make the property  
18 the money interest that the Government is paying out and  
19 the person is obtaining, they have to show that there's  
20 some sort of excessive commission or excessive sort of  
21 management fee.

22 JUSTICE KAGAN: Even -- even though they  
23 wouldn't have gotten the investment and they wouldn't  
24 have gotten the fees absent the -- the threat of force  
25 or -- or violence?

1                   MR. CLEMENT: Again, that would be my  
2 position. And I think it would follow from this Court's  
3 decisions in cases like Cleveland and McNally because in  
4 McNally, of course, the people who were part of that  
5 fraudulent scheme, they were getting commissions from  
6 the workmen comp program.

7                   And the Government's theory was that just  
8 interfering with the Government's decision about who to  
9 give the workmen -- where to place the workmen's comp  
10 policies was enough of an interference to -- to support  
11 a fraud conviction. And this Court said no. And one of  
12 the things it then said is well, it would be different  
13 if -- if the Government went in and proved that the  
14 commissions that were paid were too high, or that the  
15 Government somehow got inadequate insurance.

16                   But if all they're doing is saying that  
17 what's going on here is sort of the interest of the  
18 Government in having its employees serve them honestly  
19 and in their best interest, and not in some third  
20 party's best interest, that brings you squarely into  
21 honest services. And nobody's saying that doing that's  
22 a good thing, but it's -- it's the traditional office of  
23 the State law crime of coercion. It's --

24                   JUSTICE GINSBURG: But it's -- the coercion  
25 crime, at least under New York definition, requires



1 force. And -- and here, it's a threat of exposure of an  
2 embarrassing fact.

3 So what -- am I right about that, that the  
4 coercion, which is not a Federal crime but is a State  
5 crime, requires a threat of force to restrict another's  
6 freedom?

7 MR. CLEMENT: I don't believe that's  
8 correct, Justice Ginsburg.

9 This was charged by New York State  
10 authorities as coercion. So the very crime that  
11 Congress didn't incorporate into the Hobbs Act, the New  
12 York crime of coercion, was charged here, and it's my  
13 understanding that the New York crime of coercion, like  
14 the earlier version of coercion in the racketeer -- in  
15 the Anti-Racketeering Act of 1934, like the traditional  
16 model penal code definition of coercion -- it's the --  
17 the threat part of it is the same as extortion.

18 So it covers a threat to a person or to  
19 property. And it's been interpreted certainly to  
20 include threats to disclose information like this.

21 So I think the real difference between the  
22 crime of extortion and the crime of coercion, both as a  
23 general matter and under New York law, is whether or not  
24 property is obtained. And that's ultimately what's so  
25 problematic about the Government's definition here

1     because their definition is essentially the property  
2     includes the autonomy interest of a business to operate  
3     free from coercion.

4                     JUSTICE ALITO:   What is your definition  
5     of -- of property?   In your reply brief, you begin by  
6     saying that you're -- you are not arguing that the  
7     property has to be tangible and includes some forms of  
8     intangible property.

9                     How would you draw the line?

10                    MR. CLEMENT:   I would say that for property  
11    to come within the terms of the Hobbs Act prohibition on  
12    obtaining property, it has to be alienable,  
13    transferable, moveable.   That's the critical thing.   So  
14    the distinction is not between alienable and  
15    inalienable.

16                    A patent is an inalienable -- I mean,  
17    rather, a patent is an intangible property right, but  
18    it's transferable, it's obtainable, it is sellable, and  
19    so it has the characteristics of things that I think  
20    come within the traditional definition.

21                    JUSTICE BREYER:   What about -- what about  
22    the mob goes to a grocer and says, you know, you're dead  
23    or something if you sell Cheerios, and the reason is  
24    because they have a monopoly, some other grocer who's  
25    connected has a monopoly.   And they threaten him.   Now,

1 does that violate Hobbs Act?

2 MR. CLEMENT: I think --

3 JUSTICE BREYER: What he did was -- and  
4 he's -- he's not going to sell Cheerios.

5 MR. CLEMENT: Right. I -- I would say that  
6 that hypothetical that you've given me would be  
7 coercion, it would not be extortion under the Hobbs Act.

8 JUSTICE BREYER: Now -- now, in fact,  
9 they're doing it to get money, and they do get money,  
10 but via the means of the other grocer. And there is  
11 nothing in the words of this Act that says that the  
12 property has to be taken from the individual whom you  
13 coerce.

14 It's easy to imagine situations where the  
15 coerced individual has a relationship, direct, special  
16 and so forth, with the person who has the money. So  
17 what happens when, say, the mob coerces the person  
18 without the property so that he will do a thing such  
19 that the person with the property gives them the  
20 property?

21 MR. CLEMENT: I think, at least as I  
22 understand your hypothetical, where the relationship  
23 between the two parties, basically they are competitors,  
24 I would say that that's two distinct relationships.

25 JUSTICE BREYER: All right. Now just make

1 it different. What they do is they get the assistant  
2 bank employee and they threaten him to do such a thing  
3 such as shout at a certain time where they know that  
4 that shouting will lead them to be able to rob the bank.  
5 I mean, you know, it's easy to think up.

6 What I can't figure out here is, is there  
7 some requirement that the person who is coerced has to  
8 be the same person as the person who gives them the  
9 property. If the answer to that's no, then none of the  
10 Government's chamber of horrors is horrible because  
11 there's a way around it.

12 MR. CLEMENT: Well, I think the answer to it  
13 is, it depends. I don't think I can give you a  
14 definitive that the --

15 JUSTICE BREYER: And you haven't found  
16 anything on this. You'd be making it up now, is that  
17 basically it?

18 MR. CLEMENT: Well, what -- what I would  
19 tell you is I think the assumption of most of the cases  
20 is that the person that is the pressure of --

21 JUSTICE BREYER: Is the -- is the one?

22 MR. CLEMENT: Is the person who's offering  
23 up the property. This Court's --

24 JUSTICE SCALIA: Isn't that what the word  
25 "extort" means? You extort something from someone? It

1 means you get it from him, you don't get it from some  
2 third party.

3 MR. CLEMENT: I think that's basically  
4 right, Justice Scalia. What I would say, though, is I  
5 think there's an exception to the -- at least to the  
6 following extent, which I think it would be open to the  
7 Government, to basically say that within an entity, if  
8 you sort of put the pressure on one agent of the  
9 corporation and you actually get the money from another  
10 agent of the same corporation, that that's probably  
11 close enough.

12 And so in this case, if the pressure was put  
13 on a particular individual and they obtained like actual  
14 cash from the Government, that might be a different  
15 case. But, of course, here what they received was this  
16 commitment, which I think is analogous to the video  
17 poker license in the Cleveland case, so I don't think  
18 that's --

19 JUSTICE KAGAN: But if you think the  
20 commitment is real cash, is a real contract, real cash,  
21 real property, right? Then it wouldn't matter under  
22 that -- under what you just said, that the threat was  
23 made to the general counsel rather than to the final  
24 person who issued the money, isn't that right?

25 MR. CLEMENT: I -- I don't disagree with

1     that, Justice Kagan, but I think that's because they're  
2     all sort of agents to the same principal. And I'm not  
3     sure you get all the way to what Justice Breyer was  
4     suggesting, which you can sort of run it through  
5     competitors or something like that.

6                 JUSTICE KAGAN: Right. But you wouldn't  
7     say, well, we're dealing with an organization, so it's  
8     only extortion if you threaten the person who writes the  
9     check?

10                MR. CLEMENT: No. I --

11                JUSTICE KAGAN: If you threaten the person  
12     who makes a recommendation to the person who writes the  
13     check, that's good enough.

14                MR. CLEMENT: Exactly, Your Honor. But what  
15     I would also say is, you know, this is a real case and  
16     there are real jury findings, and as Justice Kennedy  
17     alluded to, there were a variety of theories of property  
18     put in front of the jury. They were invited to circle  
19     as many of them as they could, as many as they found  
20     satisfied, and the only one they circled was the  
21     recommendation.

22                JUSTICE SOTOMAYOR: Mr. Clement, what is --  
23     I'm sort of trying to figure out why you're trying to  
24     get the word "property" to do the work of the "obtain"  
25     part of the statute because when you answered

1 Justice Alito you were using the terms of "obtain" to  
2 define property, which is in my mind a sort of strange  
3 way to do things, okay? Property generally means value  
4 of some sort and you don't use any of those words in  
5 your definition.

6 So what you're using in my mind, and not  
7 illogically, is to say that the second part of the  
8 statute has to do some work, so it has to mean that  
9 you're taking something of value away from someone else.  
10 That makes logical sense to me. And I understand the  
11 second piece of your argument, which is the  
12 recommendation -- not the recommendation, but his honest  
13 services were -- wasn't being given to your client, it  
14 was being given to the employer.

15 So your client obtained nothing of value for  
16 himself. He didn't get anything transferred to him.  
17 And that -- that argument makes eminent sense to me.  
18 And I tease it out of your brief, but I don't know why  
19 you're trying to get our definition of "property" to do  
20 that work.

21 MR. CLEMENT: Well --

22 JUSTICE SOTOMAYOR: Why isn't the work in  
23 the "obtain" part?

24 MR. CLEMENT: Justice Sotomayor, I'm happy  
25 to have you rule in favor of my client on "obtained" or

1 "property" and, as Scheidler II demonstrates, those  
2 terms are really kind of married together. And I guess  
3 the reason I sort of think that the "obtained" and the  
4 "property" should be construed together is twofold.  
5 One, structurally that's what the statute does. So when  
6 you're talking about, in a statute, property that can be  
7 obtained, I think that's a clue that you're not talking  
8 about property in its broadest manifestation.

9 And you contrast that with, say, the Clayton  
10 Act that talks about disjunctively property and -- or  
11 property rights, and there you have a clue that Congress  
12 means a very broad conception. When it's talking about  
13 it in conjunction with "obtained," I think it has a  
14 narrower ambit in mind.

15 JUSTICE SOTOMAYOR: So take the Government's  
16 definition that property is anything of value.

17 MR. CLEMENT: Right.

18 JUSTICE SOTOMAYOR: All right. And let's  
19 assume because it -- as I said, that seems to have some  
20 sort of conceptual appeal. Then make the argument for  
21 me.

22 MR. CLEMENT: Well --

23 JUSTICE SOTOMAYOR: Then make your argument  
24 for me why this isn't an obtaining.

25 MR. CLEMENT: Well, what I would say is



1 obtaining, as this Court made clear in Scheidler II, is  
2 not some metaphysical obtaining. I mean, the argument  
3 was made to this Court that the abortion protesters  
4 obtained the autonomy interest of the business in -- the  
5 clinics, in deciding whether -- who to serve and when to  
6 serve and when to be open and when to be closed.

7 And this Court said no, and it said  
8 principally that that's not obtaining, but it's -- but  
9 it also noted, I guess you'd call it dictum, that  
10 what -- what -- obviously, what the Hobbs Act, based on  
11 its common law roots in extortion, is talking about is  
12 the kind of property that can be deprived, it can then  
13 be transferred, sold, exercised.

14 And I do think. Just to get the second part  
15 of my answer out if I could, it's just -- the common law  
16 roots here are also where you see the definition of  
17 property can't be as broad as the Government suggests.  
18 Because extortion is one of the classic common law  
19 property crimes. The definition of property, for  
20 purposes of extortion, ought to be the same as the  
21 definition of property for larceny, embezzlement,  
22 burglary.

23 You can't go into somebody's house and steal  
24 their honest services or their autonomy interests. So  
25 the kind of property you can obtain for purposes of the

1 Hobbs Act is that same kind of alienable, transferable,  
2 moveable property.

3 JUSTICE SCALIA: Suppose -- suppose that the  
4 person coerced here was a -- was a corrupt person and  
5 had put his recommendation out for bids. Okay? He  
6 said, you know, I'll -- I'll recommend whoever pays me  
7 the most money. Would that alter this case?

8 MR. CLEMENT: I don't --

9 JUSTICE SCALIA: If -- if then somebody  
10 comes in and says, well, I'm not going to pay you the  
11 money, but I'll -- I'll break your knees if you don't  
12 recommend me, would that be extortion?

13 MR. CLEMENT: It would not, Justice Scalia,  
14 and I would say because -- if the State of Louisiana in  
15 the Cleveland case, if there was a corrupt official who  
16 was putting those video poker licenses on sale on the on  
17 the sly, I don't think that would change the result there.  
18 This Court said that those kind of government things do  
19 not have value in the hands of the government. The fact  
20 that somebody, you know, could sort of be corrupt and  
21 therefore have a little auction on the side I don't  
22 think changes that basic fact.

23 I would say, too, that there's an important  
24 difference here between a hypothetical case where what  
25 somebody's trying to do is kind of get something for

1 nothing and essentially get the benefit of the work of a  
2 government official. But that's not what's at issue  
3 here.

4                   This is not a client who's trying to get --  
5 like, you know, they wanted an opinion on how to  
6 incorporate in the State of New York and they thought,  
7 well, the lawyers are kind of expensive in the private  
8 sector, so I'm just going to coerce it from this  
9 government official. All they care about in this case  
10 is the bottom line, thumbs up, thumbs down  
11 recommendation.

12                   I don't think this case would be any  
13 different if there were an investment committee within  
14 the State government and you had to get unanimous assent  
15 to an investment and there was one holdout.

16                   CHIEF JUSTICE ROBERTS: Why isn't that --  
17 you focused on transferability when you began. Why  
18 isn't that completely transferable? I have leverage  
19 against this official and if you want him to recommend  
20 yes on your investment, you have to pay me a certain  
21 amount of money. And you can transfer that. You've got  
22 everybody in, say, you know, the association or whatever  
23 and you can auction that off. It seems to me it's  
24 perfectly transferable from the defendant to anyone  
25 else.

1                   MR. CLEMENT: With respect,  
2   Mr. Chief Justice, I wouldn't think so. Now, there are  
3   some voting rights that are transferable in that sense.  
4   I mean, if you have a stock -- a proxy in a stock, or  
5   something like that, that may well come within the  
6   definition. But when you have these essentially voting  
7   or autonomy interests that are really -- you know,  
8   they're -- they're sort of inherently inalienable  
9   because this recommendation matters because it's the  
10  general counsel and the comptroller's office  
11  recommendation. And --

12                  CHIEF JUSTICE ROBERTS: Well, but the  
13  lawyer's going to make recommendations in many other  
14  cases as well. And if you have an application coming up  
15  and you want a favorable recommendation, you can go to  
16  the -- the individual that has the leverage and say, I  
17  will pay you this much money if you can get the person  
18  to give me a favorable recommendation. And that's  
19  transferable from the person with the -- the leverage  
20  to -- to someone else.

21                  MR. CLEMENT: Well, the confident -- I may  
22  not be understanding the hypothetical. Certainly, the  
23  confidential information that the potential coercer has  
24  may be transferable, and under this Court's decision in  
25  Carpenter, that may be property. But the voting right

1 within the State government or the role within the State  
2 government's internal deliberative process, that really  
3 belongs to the general counsel, and he can't --

4 JUSTICE KENNEDY: Well, just let me make  
5 sure that I understand your position. Suppose roughly  
6 these facts, the general counsel is threatened with  
7 something very serious, let's say violence, unless he  
8 makes a favorable recommendation. He does. They act on  
9 that recommendation, it's -- it's a substantial cause in  
10 making the investment, and the investment is made and  
11 they get the money. Violation?

12 MR. CLEMENT: I would say no, but I would  
13 say it's a much more difficult case. And the reason I  
14 would say no is because the Government -- or I'd say  
15 potentially no. I would still say that the Government  
16 has to prove something more, which is that it's an  
17 investment where there either was not the optimal  
18 investment or they paid too high a commission. And --  
19 and I take that from McNally.

20 JUSTICE KENNEDY: Well, but -- but that's a  
21 causation argument, not whether or not you received  
22 property.

23 MR. CLEMENT: Right, because -- but my point  
24 is simply that if the Government --

25 JUSTICE KENNEDY: But so far as the property

1 point in my hypothetical, if the recommendation leads to  
2 the contract and the contract leads to the commission  
3 and the commission means money in your pocket, that's  
4 property.

5 MR. CLEMENT: Yes.

6 JUSTICE KENNEDY: And so then we just have a  
7 causation argument, not a property argument.

8 MR. CLEMENT: I think that's right. If  
9 what's obtained is money, and that's what the Government  
10 focuses its prosecution on, then that is -- that  
11 satisfies the property requirement of the Hobbs Act.

12 JUSTICE BREYER: It has to be more property,  
13 more money, more money in return for less services or  
14 something than otherwise. That's what you're saying.  
15 But I don't think that's -- I mean, right. But the  
16 answer -- go ahead because I -- that's the qualification  
17 you're making, the McNally qualification.

18 MR. CLEMENT: Right, exactly. Exactly,  
19 exactly. So you obtained the property, so that box is  
20 checked, but the -- sorry.

21 JUSTICE GINSBURG: What about -- you said  
22 transfer, sell, but there's also exercise. And the  
23 theory is that the defendant sought to take away the  
24 officer's right to make this recommendation, take it  
25 away from the officer, exercise it himself. So why

1 doesn't it fit -- why isn't this an intangible right  
2 taken from one and exercised by another?

3 MR. CLEMENT: Justice Ginsburg, I would say  
4 that what you've just articulated is exactly the  
5 Government's theory, and the problem is that I can use  
6 that same theory to take any autonomy interest and turn  
7 it into property that can be exercised, it can be  
8 obtained by somebody and then exercised by them in a way  
9 different from the way that the person would otherwise  
10 exercise it.

11 And whatever -- I mean, you know, we're  
12 talking about one word in a three-word phrase in  
13 Scheidler II. And the first thing I would say is I  
14 think it's a mistake to read that phrase the way you  
15 would read a statute.

16 But the second thing I would say is the one  
17 thing the Chief Justice did not mean with respect to the  
18 word "exercise" is it meant that it opened up a big gap  
19 so you could take every coercion case and turn it into  
20 an extortion case.

21 JUSTICE GINSBURG: Is this -- there is, I  
22 take it, no Federal crime that this conduct would fit?  
23 You said New York State has a coercion crime which you  
24 say this conduct might fit. But there's no Federal  
25 crime.

1                   MR. CLEMENT:  There's -- there's no Federal  
2   crime and that's the result of a very deliberative  
3   decision by Congress in 1946 in enacting the Hobbs Act.  
4   Of course, they had in front of them the model of the  
5   Anti-Racketeering Act of 1934 that prohibited both  
6   coercion and extortion.  Congress made a conscious  
7   decision to, in the Hobbs Act, prohibit robbery and  
8   extortion, but not pick up the prohibition on coercion.

9                   And so there isn't a Federal crime directly  
10  on point, but it's a very conscious decision by  
11  Congress.  And, of course, the New York crime on point  
12  is exquisitely on point because not only is there a  
13  coercion offense under New York statute, but it is an  
14  aggravated offense if the victim is a government  
15  official discharging their public duty.

16                  And so this is really a situation where the  
17  State courts have a crime that directly fits.  It's  
18  as -- I mean, it's almost amazing because it's not just  
19  any State, it's the State of New York.  And Congress, in  
20  passing the Hobbs Act, was looking at New York law.  And  
21  they looked at New York law and they said, New York has  
22  a coercion prohibition and extortion prohibition.

23                  JUSTICE GINSBURG:  And why did -- why did  
24  New York -- was the New York case dropped and the State  
25  officials urged the Government, the Federal Government,



1 to make this a Federal case?

2 MR. CLEMENT: Well, I'd be happy to address  
3 that. What happened is there were some pretrial  
4 rulings. And one of the pretrial rulings gave the  
5 defendant an opportunity to do some discovery on the  
6 State government to figure out whether this was really  
7 done in the discharge of public duties or maybe this was  
8 sort of a political thing that was going on.

9 And once that State law discovery happened  
10 into the government of Albany, all of a sudden the State  
11 prosecution didn't seem like such a great idea anymore.  
12 And the Federal prosecutors are just down the street, so  
13 they were very happy to lateral it to the Federal  
14 prosecutors and have them take it over. And because the  
15 Federal offense doesn't have an element of interfering  
16 with the public duty, they didn't have to worry about  
17 the discovery.

18 And that is just a very concrete  
19 illustration of the problem of over-federalizing crime  
20 because this -- we're talking -- this is the opposite of  
21 the typical public corruption case where you think,  
22 well, maybe there are people in the State government who  
23 aren't going to -- State prosecutors won't be willing to  
24 prosecute one of the bigs in the State government, so we  
25 need the Federal Government to step in.

1           The one thing a State doesn't need extra  
2   incentive to do is to protect the integrity of its  
3   internal deliberative process from coercion or  
4   extortion, for that matter. But the -- the real cost  
5   then to having these duplicative Federal crimes, and  
6   they were front and center in this case -- if I may  
7   reserve the remainder of my time.

8           CHIEF JUSTICE ROBERTS: Thank you, counsel.  
9           Ms. Harrington.

10          ORAL ARGUMENT OF SARAH E. HARRINGTON  
11           ON BEHALF OF THE RESPONDENT

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

14           I'd like to start, if I could, where Justice  
15   Kennedy began and ended, which is asking whether there  
16   would have been extortion if the jury had found here  
17   that what -- that the property that was obtained was the  
18   commissions at the end of the day after the investment.  
19   My friend Mr. Clement says no, no, no, McNally says no.

20           But what McNally actually said was the case  
21   would have come out differently if the property that had  
22   been alleged to be deprived was either money or  
23   property, but it also said it would have come out  
24   differently if the Commonwealth had been deprived of  
25   control over how its money was spent. And that's the

1 type of property that's at issue here, control over a  
2 property right.

3 Now --

4 JUSTICE KAGAN: Ms. Harrington, just to go  
5 back to Justice Kennedy's -- I mean, suppose -- was  
6 there a reason why it wasn't charged in what seems to me  
7 to be the simpler way, which is a threat was made in  
8 order to get an investment and in order to get fees to  
9 put in your pocket and -- and go away with, and that's  
10 extortion. So why wasn't it -- why wasn't that the  
11 theory of the case?

12 MS. HARRINGTON: Well, he was charged with  
13 attempting to obtain the commitment, which in most cases  
14 ends up being the investment itself. That's not what  
15 the jury found was the property that was obtained, so  
16 it's not the verdict that we are here defending today.

17 JUSTICE KAGAN: Do you think there's an  
18 obstacle to charging a case that way? Mr. Clement seems  
19 to think that there's an obstacle, that even though  
20 there's property in that case, there's some other  
21 problem with charging the case that way.

22 MS. HARRINGTON: No, that's what I'm saying.  
23 What he's saying is that the obstacle is you'd have to  
24 prove that the State was out more money than it would  
25 have been if it had invested in the company it wanted to

1 invest in. What I'm saying is no, McNally said the  
2 result would have been different if the State had been  
3 deprived of control, of the ability to control its  
4 money, and that's the property that would have been  
5 obtained in that kind of a case. Because property and  
6 control of property are just -- are just different  
7 aspects of the same property.

8               This Court has said repeatedly that  
9 exclusive control of property is one vital aspect of  
10 private property. And that's the -- that's the type of  
11 property that was charged, that was -- that was obtained  
12 in this case.

13              JUSTICE BREYER: The obvious problem, which  
14 you might want to address at some point, is that -- that  
15 if you take your definition that this recommendation,  
16 legal recommendation, is property and the fellow said,  
17 you know, I'm going to fix you if you don't do it, if  
18 that's property, we're back to the honest services  
19 statute because anyone in the government and anyone in  
20 business, indeed everybody, has a job and those jobs  
21 always require you to do things.

22              So if every time somebody threatens a person  
23 and says, we don't want you to do the thing you're  
24 supposed to do, we want you to do the thing like this,  
25 well, then you're violating this property statute.

1 MS. HARRINGTON: But Justice --

2 JUSTICE BREYER: Now, that seems very far-  
3 reaching, hard to reconcile with the abortion case --  
4 the abortion clinic case, et cetera, and it is easy to  
5 reconcile with the honest services case.

6 MS. HARRINGTON: Well, I guess I would have  
7 two points. The first is that this is not about honest  
8 services because the victim here is not the State of New  
9 York, it wasn't the citizenry of New York. That's the  
10 kind of --

11 JUSTICE BREYER: Well, I mean, that sounds  
12 technical. You see, the problem I'm interested in is,  
13 by accepting your definition do we suddenly throw within  
14 the statute, which speaks of property, any time there is  
15 an appropriate threat which has as a condition the  
16 person doing the job differently? That's true of  
17 whether it's a postman, you know, any public official,  
18 any private official, anybody.

19 MS. HARRINGTON: Whatever --

20 JUSTICE BREYER: That seems very  
21 far-reaching. So what's the answer?

22 JUSTICE KENNEDY: Just to add to  
23 Justice Breyer's question, it's -- suppose the  
24 secretary/typist is -- the stenographer is charged with  
25 typing the letter "I do not recommend" and they bribe

1 her and she says "I recommend." She has an interest in  
2 her integrity to give an honest transcription. Under  
3 your view, and this is what Justice Breyer is getting  
4 at, I think, that -- that secretary has property that  
5 you are taking. That's very far-reaching.

6 MS. HARRINGTON: Well, I want to separate  
7 again the question of what is property and when property  
8 is obtained. Under the Hobbs Act -- the Hobbs Act  
9 absorbed the New York State extortion law. And in  
10 that -- in the -- in the cases construing that law, they  
11 had construed the word "property" to include the running  
12 of a business, the engagement of a person in their  
13 occupation, and the doing of a job. People have  
14 property interests in doing those things because those  
15 are the source of economic wealth for those people.  
16 They generate a stream of revenue for people to live  
17 their lives on.

18 Now, it's a different question -- not every  
19 time you interfere with someone's doing of their job are  
20 you obtaining that property. Here, what Petitioner was  
21 trying to do was not keep the general counsel from  
22 making a recommendation, he was attempting to dictate  
23 the substance of what the recommendation was.

24 JUSTICE BREYER: Yes, I understand that.  
25 But I still would like an answer to my question, and

1 it's well-phrased with an example by Justice Kennedy.

2 Every secretary in the United States who is  
3 about to write a recommendation for somebody to go to  
4 college or some other thing then is faced with a threat,  
5 you put in name such-and-such or put in yes instead of  
6 no, and is under your definition that person's property,  
7 that what she does the taking of property? The answer  
8 is either you think yes, in which case I would like you  
9 to defend it --

10 MS. HARRINGTON: Yes.

11 JUSTICE BREYER: Or the -- yes. Okay. Then  
12 what conceivable ground? I'm not -- I don't want to --  
13 that sounds a little pejorative, but I say, what  
14 ground is there for a definition that is so broad that  
15 it sweeps within it all working people in the United  
16 States in the performance of their ordinary jobs?

17 MS. HARRINGTON: The ground is the general  
18 particularized meaning that the word "property" has  
19 obtained in the law, and including in New York cases  
20 construing the very law on which the Hobbs Act was  
21 based.

22 A person has a property interest in running  
23 their business. They also have a property interest in  
24 doing their job. When -- when someone comes along and  
25 uses threats of harm or threats of force or violence to

1 try to get them to do their job in a different way, what  
2 they are doing is they are taking control of that  
3 property interest that the person has.

4 JUSTICE SCALIA: What -- what is -- I have a  
5 property interest in doing my job? I don't know what  
6 that means. I mean, just throwing words around. You  
7 are calling doing a job a property interest. Normally  
8 when I think of property, I think of something that can  
9 be conveyed. Can I convey the -- the doing of my job to  
10 somebody else?

11 MS. HARRINGTON: Well, you can convey your  
12 labor to your employer in that sense. When you enter an  
13 employment contract, you are selling your labor to your  
14 employer. And the -- the extent of your right to do  
15 that job is then defined by the parameters of your job.

16 JUSTICE SCALIA: But I'm not talking about  
17 my labor. I'm talking about my doing the job that the  
18 employer has assigned to me.

19 MS. HARRINGTON: But that is your labor.

20 JUSTICE SCALIA: It's not my -- not my labor  
21 in the abstract. Nobody is taking my labor away from  
22 me.

23 MS. HARRINGTON: But in this case what  
24 Petitioner was trying to take was the fruits of the  
25 general counsel -- counsel's labor. His job was to give



1 his recommendation to his client about what was in  
2 keeping with the client's --

3 JUSTICE SCALIA: Can you cite one -- one  
4 extortion case at common law -- or let me put it another  
5 way. What is the closest extortion case at common law  
6 that you can allude to?

7 MS. HARRINGTON: I can't because at common  
8 law the person --

9 JUSTICE SCALIA: We -- we are using a common  
10 law term here, "extortion."

11 MS. HARRINGTON: Yes, but it was a different  
12 crime at common law because it only involved public  
13 officials taking money or other thing of value in  
14 exchange for doing something --

15 JUSTICE SCALIA: Whatever. What's the  
16 closest that comes to this abstract, "the doing of my  
17 job is property"?

18 MS. HARRINGTON: I don't have an example of  
19 that, but what I do have are examples from the New York  
20 cases which were construing the New York State extortion  
21 law, and this Court has noted again and again that  
22 that's the basis that the -- for the Hobbs Act.  
23 Congress was explicitly trying to evoke that law.

24 JUSTICE SCALIA: What -- what's the closest  
25 New York case?

1 MS. HARRINGTON: So I think there are two  
2 cases. The Barondess case and the Short case are the  
3 best cases. And in the Barondess case, which is from  
4 1893, I think, the -- the Court said that the running of  
5 a business was property. And in the Short case the  
6 Court said that, just the same way that the running of a  
7 business is property, a person's doing their job is  
8 property, and that that can be damaged --

9 JUSTICE GINSBURG: How was it -- could you  
10 tell us a little more? How was it taken?

11 MS. HARRINGTON: Well, in those cases the  
12 property wasn't taken. Under the New York extortion  
13 law, the law used "property" in two different places,  
14 and this is noted in our brief. First, it was something  
15 that could be taken, that could be obtained through  
16 extortion. And second, it was -- one of the means of  
17 committing extortion was doing violence to property, it  
18 was harming property. And the court was construing  
19 property -- in those cases, it was -- it was in the  
20 latter sense of what qualified as harm to property.

21 But the court said in the Short case, which  
22 is from 1911 -- the court noted that property is used  
23 in -- in both provisions, Section 850 and Section 851,  
24 and said it was construing it as it was used in both of  
25 those sections. And in that -- that was the case that

1 said doing a person's job, the person has a property  
2 interest in doing their job.

3 JUSTICE KAGAN: Ms. Harrington, go back to  
4 the Scheidler example because that was a case where we  
5 said there was not extortion when there were threats of  
6 violence meant to close down an abortion clinic's  
7 operations. What you are suggesting is that if those  
8 threats of violence had been targeted at the abortion  
9 clinic's lawyer in order to get him to tell the clinic  
10 to shut down their operations because they were a  
11 violation of law, that it would be an entirely different  
12 case. Now, how could that be?

13 MS. HARRINGTON: We -- that's absolutely  
14 what we are saying, in the same way that we said that if  
15 the target of the -- if the -- if the protesters, excuse  
16 me, had been trying to get the clinics, if they had been  
17 trying to take over the clinics and get them to provide  
18 a different type of service, to get them to be a  
19 restaurant or to provide a different type of medical  
20 service, then they would have been obtaining the right  
21 of the -- of the clinic the right to run -- to operate  
22 their business.

23 JUSTICE KAGAN: So -- so you think if -- if  
24 they targeted the -- the clinic's lawyer or the -- if  
25 the threats were, Don't shut down the clinic, instead,

1 start delivering babies, that that would be extortion,  
2 whereas in the real case it wasn't?

3 MS. HARRINGTON: Yes, because Scheidler came  
4 out the way it did not because there wasn't property at  
5 issue, but because there wasn't an obtaining. And I do  
6 think it's important to try to keep those two things  
7 separate.

8 JUSTICE KAGAN: Well, because there  
9 wasn't -- and there's nothing obtained either way. I  
10 mean, you are trying to change what the person is doing,  
11 but you are not getting anything from it.

12 MS. HARRINGTON: But you are dictating the  
13 substance of what they are doing, and so you are  
14 obtaining their right to exercise their property right.

15 JUSTICE SCALIA: Well, that -- that's the  
16 problem with your New York cases as well. You -- you  
17 are focusing on property in another context, where the  
18 property is harmed, not whether property is taken.  
19 You -- you have neither a New York case nor any other  
20 common law case involving extortion where the property  
21 taken consists of somebody's doing his job.

22 MS. HARRINGTON: It's true, but the New  
23 York courts -- the New York cases said that they were  
24 construing the word "property" to mean the same thing as  
25 used -- used in both places in the statute.

1                   And there is no reason to -- to define the  
2 word "property" to include the concept of being  
3 obtainable because the statute already separately  
4 requires that property be obtained before there is  
5 extortion.

6                   Just, if I can just note that --

7                   JUSTICE SCALIA: I'm not sure that  
8 obtainable property and -- and harmable property are one  
9 and the same thing, I'm really not.

10                  MS. HARRINGTON: They might not be, but they  
11 are both -- but property is property. That's our  
12 position, that there is a legal meaning of property, it  
13 includes the right to run a business, the right to -- to  
14 engage in an occupation. In a particular instance that  
15 property may not be obtainable and then there won't be a  
16 Hobbs Act violation. But you don't have to read the  
17 obtainability into the definition of "property."

18                  It's the same thing. The Hobbs Act also  
19 says that you can commit a violation by committing  
20 physical violence against property. Now, in their  
21 opening brief, Petitioner said, well, if something can't  
22 be physically harmed, it can't be property. We are  
23 happy to see in the reply brief they sort of gave that  
24 up by saying, "Okay, yeah. Well, business secrets are  
25 property. A patent is property. Those things can't be

1 physically harmed.

2 But there is no reason to read "property"  
3 means different things. If something can't be  
4 physically harmed, it won't be the basis for liability  
5 under that provision of the Hobbs Act.

6 JUSTICE SCALIA: You are -- you are  
7 contradicting what you yourself said a little bit  
8 before, which is that property means the same thing for  
9 both provisions --

10 MS. HARRINGTON: No, that's exactly what I'm  
11 saying.

12 JUSTICE SCALIA: -- for both the obtaining  
13 and the harming.

14 MS. HARRINGTON: That's exactly --

15 JUSTICE SCALIA: But it doesn't mean the  
16 same thing for the harming because there is some  
17 property that can't be harmed.

18 MS. HARRINGTON: Right. But that doesn't  
19 mean that property means something different. It just  
20 means if it's property that can't be harmed, then it --  
21 it won't be a basis for liability under that provision.

22 I'm just saying you don't want to give a  
23 different definition to the same word used different  
24 times in the same statute, when the concept is -- is --  
25 where the work is carried by other words in the statute.

1 I think if I could point to --

2 JUSTICE SOTOMAYOR: I -- I -- going back a  
3 little bit to Justice Breyer's question, how do you gain  
4 possession of someone's advice or how they do their job  
5 when it's not giving you a direct benefit, it's  
6 something that belongs to someone else?

7 MS. HARRINGTON: What you are doing is --  
8 what happened in this case is Petitioner was attempting  
9 to obtain control over the fruits of the general  
10 counsel's labor.

11 JUSTICE SOTOMAYOR: That's the problem, this  
12 obtaining controlled concept.

13 MS. HARRINGTON: Right, so what --

14 JUSTICE SOTOMAYOR: Because you're -- you're  
15 equating taking control with possession. And that's  
16 where I'm having difficulty.

17 MS. HARRINGTON: Well, this Court has  
18 repeatedly said that property and exclusive control of  
19 property are just different aspects of the same thing.  
20 They're different sticks in the bundle that make up the  
21 property.

22 Here, what Petitioner was trying to do was  
23 he was trying to dictate the substance of the  
24 recommendation, and in doing so, he was trying to  
25 exorcise the General Counsel's right to make the

1 recommendation, his right to do his job, and that was  
2 his property. He wasn't just trying to keep him from  
3 going to work, he was trying to literally dictate what  
4 the recommendation was. And that's how it was charged  
5 in the indictment, that's what the jury found. That was  
6 where the obtaining came in.

7                   The -- the concept of property and control  
8 of property is well illustrated by this Court's decision  
9 in Carpenter. There the property -- one of the pieces  
10 of property at issue was confidential business  
11 information, which was taken from The Wall Street  
12 Journal.

13                   But it wasn't -- it wasn't really taken from  
14 The Wall Street Journal because The Wall Street Journal  
15 still had the information at the end of the day. What  
16 the Court found was taken from The Wall Street Journal  
17 was the ability to control, to have the exclusive  
18 control over the information.

19                   JUSTICE BREYER: As I think about it in  
20 terms of the New York cases, as you write them up here,  
21 it sounds as if someone was trying to get control of a  
22 business. So I think business, land, labor, and  
23 capital. All right. I can see why somebody who's  
24 trying to get control of a whole business is trying to  
25 take land, labor, and capital. There may be no land



1     there, but so what. And -- but a person's trying to  
2     take control of another's job by just telling him what  
3     to do 2 percent of the time seems well across some kind  
4     of line.

5                   MS. HARRINGTON: Well, I mean, you might  
6     have an obtaining question if it's only 2 percent of the  
7     time.

8                   JUSTICE BREYER: No, no. No attaining  
9     question. I'm just thinking is it reasonable to call a  
10    secretary doing one job which takes 3 percent of her  
11    time that hour property, in a way is that different from  
12    taking control of Macy's?

13                  MS. HARRINGTON: Well, you should --

14                  JUSTICE BREYER: And -- and it seems to me  
15    that probably it is.

16                  MS. HARRINGTON: Well, I guess -- I mean,  
17    it's sort of two -- two different kinds of responses.  
18    One is that when you're asking if something is property,  
19    you want to look at it sort of on a class-wide or  
20    aggregate basis. If you have one, single unauthorized  
21    download of a copyrighted song, that's not necessarily  
22    going to cause harm to the record company --

23                  JUSTICE BREYER: No, no, I'm not worried  
24    about copyrights or other intangibles.

25                  MS. HARRINGTON: No, I understand.

1 JUSTICE BREYER: That's not the issue.

2 MS. HARRINGTON: But I'm just saying you  
3 want to look at something in the aggregate on a  
4 class-wide basis, and persons doing their job on a  
5 class-wide basis is something that is economically  
6 valuable to them. And therefore, it's property.

7 I lost track of what my second response was  
8 going to be.

9 So anyway, the -- the Hobbs Act clearly was  
10 targeted -- was trying to get at racketeering activity.  
11 It was trying to get at organized crime families. And  
12 Congress knew that one of the main means that organized  
13 crime families use was taking control of businesses.

14 Now, those cases might seem easier because  
15 taking control of a brick and mortar business may seem  
16 more obviously like property than taking control of a  
17 person's occupation or their job. But a person's right  
18 to labor is economically valuable to them and is  
19 property to them in the same way that the running of a  
20 business is.

21 Now, Petitioner's view would -- if it -- I  
22 mean, his real view is that he'd want to wipe out the  
23 heartland of Hobbs Act organized crime prosecutions, but  
24 I think his fallback position is that he would want to  
25 wipe out any extortion of a business that provides

1 services instead of providing a tangible good. But that  
2 doesn't make sense either.

3 If Petitioner had threatened harm to a  
4 plumber if the plumber didn't come and -- and fix his  
5 leaky faucet, he would have been extorting that  
6 plumber's labor, and the same thing for a gardener, if  
7 he tried to get a gardener to come and mow his lawn.  
8 Now, he wouldn't end up with anything tangible at -- at  
9 the back end, but what he would have taken from those  
10 laborers would be their right to labor, their right  
11 to --

12 JUSTICE KAGAN: Well, yes, he would have  
13 ended up with something intangible in those  
14 hypotheticals. He would have ended up with the mowed  
15 lawn. He would have ended up with the thing that the  
16 service was providing them.

17 MS. HARRINGTON: But he wouldn't --

18 JUSTICE KAGAN: The -- the problem here is  
19 that there is no obtaining of anything that the person  
20 is getting in your theory.

21 MS. HARRINGTON: It's the same kind of  
22 obtaining here because he wouldn't take the mowed lawn  
23 from the -- from the gardener, he wouldn't take a lack  
24 of leaking from the plumber. What he's taking from them  
25 is their services in order to get a particular result.

1                   It's the same thing here, he's trying to  
2   take from the General Counsel his service of making a  
3   recommendation that's in his client's best interest and  
4   he's trying to dictate the substance of the  
5   recommendation to try to get him to give a particular  
6   recommendation, a positive recommendation.

7                   JUSTICE SCALIA:   Why is that valuable to me?  
8   Why is it valuable to me -- I can see how the job is  
9   valuable to me.   I get paid to do the job.   But why  
10   making one recommendation rather than another is  
11   valuable to me?   I don't think it's valuable to me.

12                  MS. HARRINGTON:   Well, that's why I'm  
13   saying --

14                  JUSTICE SCALIA:   It's only because I'm an  
15   honest person that I want to make the proper  
16   recommendation, but to say that it has any economic  
17   value that I recommend A rather than B?   It's -- it's  
18   totally neutral whether one is -- is more economically  
19   valuable than the other.

20                  MS. HARRINGTON:   It has economic value  
21   because the lawyer's job is to give his advice in  
22   keeping with his client's best interest.   It's the same  
23   thing as the record company.   A single unauthorized  
24   download --

25                  JUSTICE SCALIA:   That's all very true and an

1 honest lawyer should do that, but that doesn't prove  
2 that it's economically valuable for the lawyer to give  
3 the right advice rather than the wrong advice.

4 MS. HARRINGTON: It is. If Petitioner had  
5 tried to blackmail the General Counsel every week to  
6 give a different recommendation than what he wanted, the  
7 result would have been the General Counsel would have  
8 lost his job. He would have lost his stream of revenue.  
9 He might have been disbarred.

10 JUSTICE SCALIA: Oh, I see. I see.

11 MS. HARRINGTON: That's economically  
12 valuable to him. It's the same thing as a single  
13 download of a -- of a record that might not cause  
14 economic harm to a record company, but it's still taking  
15 property because in the aggregate, the rights of that  
16 copyright or trademark have -- the property right has  
17 value to the record company.

18 It's important to keep in mind the factual  
19 scenario here. Here, Petitioner was trying to use  
20 blackmail to coerce a State agent into doing something  
21 that was against his -- his will in order to get a  
22 \$35 million investment from the State. Now, again, this  
23 might seem like a harder case than if he was trying to  
24 coopt the running of a brick and mortar business, but  
25 what he was trying to do is coopt an individual's doing

1 of his job. He's trying to dictate the substance of the  
2 recommendation. In doing that, he's obtaining property  
3 from the victim.

4 JUSTICE KAGAN: Ms. Harrington, I guess I'm  
5 just confused, and this goes back again to  
6 Justice Kennedy's initial question, why it wasn't  
7 charged in a much simpler way where the property is not  
8 a right by a lawyer to do his job, which seems no other  
9 person can get, but where the property was the contract,  
10 was the -- was the investment and the fees, and the  
11 theory was that a threat was used in order to get that  
12 investment and fees.

13 And why wasn't -- why isn't that just -- you  
14 know, I look at the facts here and I say extortion, but  
15 not on your theory, on my theory. And why wasn't that  
16 simple theory used?

17 MS. HARRINGTON: Well, it was charged on  
18 several different theories, and one of the theories was  
19 that he was trying to gain the commitment to the  
20 investment. Now, the jury was given choices. The jury  
21 circled the lawyer's positive recommendation as the  
22 property that was obtained. I assume that's because the  
23 evidence in the case, the e-mails from Petitioner to  
24 General Counsel talked about the recommendation and so  
25 that was a tangible thing in the jury's mind.

1                   It was sort of that there was a really  
2   direct connection between what Petitioner was saying,  
3   what he was trying to do, and the recommendation.

4                   JUSTICE SCALIA:   Is what --

5                   JUSTICE KAGAN:   But you don't think that  
6   there's any reason why it, in a future case, it couldn't  
7   be charged just the way I said it?

8                   MS. HARRINGTON:   I don't think -- I think it  
9   could have been charged that he was trying to get the  
10   money here.

11                  JUSTICE SCALIA:   Was that one of the choices  
12   the jury had?

13                  MS. HARRINGTON:   That he was trying to get  
14   the commitment, that was one of the choices.   What they  
15   circled was the recommendation.   Now, who knows why a  
16   jury does anything.   I assume, like I said, it's because  
17   that was what the e-mails were about, they were about  
18   the recommendation.

19                  JUSTICE SOTOMAYOR:   I didn't think they  
20   circled recommendation.   They circled his honest advice,  
21   didn't they?

22                  MS. HARRINGTON:   No, they circled -- it says  
23   the General Counsel's recommendation -- this is on the  
24   JA 142.   That's where it starts --

25                  JUSTICE SOTOMAYOR:   I'm sorry.

1 MS. HARRINGTON: JA 142. What they circled  
2 was the General Counsel's recommendation to approve the  
3 commitment. And I think that wording is very helpful to  
4 us because it's not just that he's trying to obtain a  
5 recommendation from the General Counsel. He's trying to  
6 obtain a particular recommendation, the recommendation  
7 to approve the commitment. I think that encapsulates  
8 both the property and the obtaining that is the theory  
9 of our case.

10 The General Counsel's job was to give his  
11 legal advice. The Petitioner was trying to dictate the  
12 substance of that legal advice. His property interest  
13 was in doing his job. The General Counsel -- the  
14 Petitioner was trying to take control of the doing of  
15 the job, and therefore trying to take the General  
16 Counsel's property.

17 JUSTICE KENNEDY: It -- it does seem to me  
18 important that you can't give us a common law case  
19 because common law is extortion -- at common law is  
20 extortion, it's usually the other way around. It's  
21 usually the official who's doing the extorting.

22 MS. HARRINGTON: It was always the official  
23 who was doing the extorting.

24 JUSTICE KENNEDY: At -- at common law, could  
25 anyone ever extort an official, or we just don't have



1     those cases?

2                   MS. HARRINGTON:  No.  At common law, it was  
3     only limited to acts by an official.  There was no --  
4     and -- and the Court has recognized that when Congress  
5     enacted the Hobbs Act, it expanded the -- the reach of  
6     extortion in that sense, in the same way that New York  
7     did when it enacted the State extortion law.

8                   And I do think it's important to keep in  
9     mind that the -- the Hobbs Act is based on the New York  
10    law and we don't want to just ignore the New York cases  
11    that construe the word "property" to mean the running of  
12    a business and the doing of a job.

13                  JUSTICE SCALIA:  But not the obtaining of  
14    property.

15                  MS. HARRINGTON:  But it wasn't -- I mean,  
16    it's true there weren't cases --

17                  JUSTICE SCALIA:  That's true.  Not the  
18    obtaining the property, right?

19                  MS. HARRINGTON:  I concede that point.  I  
20    concede that point.  But it was -- it was defining the  
21    word "property" and that property is used twice.  And so  
22    again, it's a separate question here whether the  
23    property was obtained.  We think it's clear that there  
24    was property.  We think it's clear the property was  
25    obtained as well, but those are two separate questions.

1 CHIEF JUSTICE ROBERTS: You -- you point  
2 out, of course, that it was based on the New York law,  
3 but what do you do with the point that they did not  
4 carry forward the separate crime of coercion, which was  
5 in the New York law but not in the Hobbs Act?

6 MS. HARRINGTON: That's true -- I mean, it  
7 was a separate crime of coercion. There was a separate  
8 crime of coercion under New York law. I think, you  
9 know, the Congress conceived of the Hobbs Act as a  
10 property -- as a crime of -- against property, and so it  
11 didn't want to include coercion. It included extortion  
12 and robbery.

13 Of course, every extortion crime --

14 CHIEF JUSTICE ROBERTS: What do you do with  
15 the fact that the State authorities did charge it under  
16 coercion?

17 MS. HARRINGTON: In this case. Well, I  
18 think it's important to note, and Petitioner doesn't  
19 mention this, that the attempted extortion charge he was  
20 initially charged with was a misdemeanor and the  
21 attempted coercion charge he ultimately ended up being  
22 charged with in State law was a felony. So I think that  
23 explains what was going on there.

24 And it's a good example -- it's a good  
25 illustration of why it's hard to judge ex-post what

1 happened, you know, what was motivating different  
2 charging decisions.

3 JUSTICE SCALIA: What do you think would be  
4 covered by coercion that wouldn't be covered by the  
5 Government's extortion theory here?

6 Give me an example of -- of coercion?

7 MS. HARRINGTON: So anything that doesn't  
8 involve property. So if you're trying to coerce --

9 JUSTICE SCALIA: Well, for example --

10 MS. HARRINGTON: So trying to coerce someone  
11 to marry someone they don't want.

12 I think, in the Scheidler case --

13 JUSTICE SCALIA: Why -- why isn't that  
14 property? Why? You know, my -- my choice of marrying  
15 whom I want, why isn't that as much property as -- as my  
16 ability to -- to perform my job the way I want?

17 MS. HARRINGTON: Because it's -- I think  
18 it's more properly viewed as a liberty interest. It's  
19 not a source of economic value in the sort of  
20 traditional sense. I think if you take the Scheidler  
21 case --

22 JUSTICE SCALIA: A lot of people marry for  
23 money.

24 (Laughter.)

25 MS. HARRINGTON: It's true. I walked into

1     that one.

2                   I think -- so let's take the Scheidler case  
3     for an example.  There were different types of property  
4     that were initially alleged in that case.  One of them  
5     was the right of women to access the services of the  
6     clinics.

7                   This Court -- this Court distinguished that  
8     from the other alleged property interests, which were  
9     the running of the business that was the clinic.  And  
10    the Court said that the right of women to access the  
11    services of the clinics was really more of a liberty  
12    interest and the running of a business was really more  
13    of -- it didn't say it was property because it didn't  
14    have to decide that, but it said that's really more in  
15    the nature of property.  That was the property  
16    right alleged.

17                  CHIEF JUSTICE ROBERTS:  It seems to me you  
18    could characterize the right to work as more of a  
19    liberty interest than a property interest.

20                  MS. HARRINGTON:  I think it's both.  And  
21    so someone -- the general counsel could have been  
22    coerced in this case if he had been prevented from going  
23    to jobs, to his job.  But here what Petitioner was  
24    trying to do again was to -- to take the substance of  
25    the job, where he was trying to take the fruits of the

1 labor of the general counsel by trying to dictate the  
2 substance of the recommendation.

3 CHIEF JUSTICE ROBERTS: So you draw a  
4 distinction between extorting someone not to go to work  
5 and extorting him how to do his job once he's at work?

6 MS. HARRINGTON: Not on the basis of  
7 property, but on the basis of obtaining. The former  
8 is -- there's no obtaining and in the latter there's  
9 obtaining because what you're doing is you are  
10 exercising the person's right to do their job.

11 And the Court has said again and again that  
12 exclusive control of property is an essential element of  
13 all personal property, of all private property.

14 JUSTICE BREYER: Why -- why, just as long as  
15 we are idly speculating, didn't you use 18 U.S.C. 875,  
16 "Whoever with intent to extort from any person," you  
17 know, "anything of value"?

18 MS. HARRINGTON: Well, we did use it, and he  
19 was -- I mean, there are five convictions under 875.  
20 What happened is in this case we conceded that Section  
21 875 uses the word "extort." We conceded in the court of  
22 appeals that "extort" has the same meaning as  
23 "extortion" under the Hobbs Act.

24 And so if there wasn't extortion under the  
25 Hobbs Act, there wouldn't be --

1 JUSTICE BREYER: You don't have -- you don't  
2 have property in there. You have a thing of value --

3 MS. HARRINGTON: That's --

4 JUSTICE BREYER: -- is there some -- I mean,  
5 it just seems obvious you'd be in a much stronger  
6 position when you say that the recommendation not to buy  
7 or to buy a particular service from somebody is a thing  
8 of value.

9 MS. HARRINGTON: That's true. In this case,  
10 again, we have treated them as the same. But I think  
11 you would want to reserve for another case the question  
12 whether Section 875 --

13 JUSTICE BREYER: Have they in the Court been  
14 treated as a thing of value means property?

15 MS. HARRINGTON: I think "thing of value" is  
16 a broader term than "property."

17 JUSTICE BREYER: So no.

18 MS. HARRINGTON: Right. So we haven't made  
19 an argument about 875 here. We've conceded that  
20 whatever the result is as to the Hobbs Act would control  
21 as to 875. But I do think that's a question for another  
22 case if we don't prevail in this case.

23 JUSTICE SCALIA: Well, it -- it at least  
24 makes available the argument that you don't have to go  
25 this far, that there are other provisions that would

1 enable you to get to this person.

2 MS. HARRINGTON: Well, again, I don't think  
3 we are going too far --

4 JUSTICE SCALIA: So why -- instead of  
5 inducing us to define property so broadly that it's  
6 unrecognizable, as far as I am concerned --

7 MS. HARRINGTON: But, Justice Scalia, you  
8 have already defined it this broadly in cases dealing  
9 with Section 20 of the Clayton Act, the Due Process  
10 Clause, the scope of a court's equity jurisdiction. The  
11 Court has said that the running of a business is  
12 property. The Court has also said that pursuit of an  
13 occupation is property.

14 JUSTICE SCALIA: We're talking about  
15 property for purposes of extortion, the common law crime  
16 of extortion.

17 MS. HARRINGTON: I hear what you're saying.  
18 But what I am saying is that property is property. And  
19 it's true that in extortion the property has to be  
20 obtained for there to be a crime. That work is done by  
21 the word "obtained."

22 JUSTICE SCALIA: I don't think property is  
23 property. I think property can -- can have a -- a  
24 different meaning with -- with regard to various  
25 provisions of the law. And -- and the provision of the

1 law defining extortion brings with it a whole baggage  
2 of -- of common law cases. And that may well be  
3 different from the word "property" used in some other  
4 Federal statute that does not invoke the common law of  
5 extortion.

6 MS. HARRINGTON: But this Federal crime of  
7 extortion brings with -- brings with it the baggage of  
8 the New York State extortion law, and the New York cases  
9 said in that law the word "property" includes the  
10 running of a business and doing a job.

11 It's true that that wasn't the property  
12 being extorted in those cases, but that's what they said  
13 property means. And if you are worried that those  
14 things can't be obtained, you don't need to worry -- you  
15 don't need to have a special definition of property to  
16 take care of that because the Hobbs Act already requires  
17 that property be obtained before there is extortion, so  
18 there is no need to have a redundancy built in for that.

19 Again, I can understand how -- how the main  
20 Hobbs Act, sort of heartland cases which involve the  
21 co-opting of a brick and mortar business, seem like  
22 easier cases. And you might want to draw a line between  
23 the running of a business and the doing of labor.

24 But a person has a -- has a property  
25 interest in doing their job the same way that they have



1 a property interest in running a business. The fact  
2 that they work for someone else shouldn't mean that they  
3 have less of an interest in doing their job than if they  
4 run their own business.

5 Doing a job is a source of economic value to  
6 a person and the Court should construe it as property,  
7 and the right to exercise control over doing their job  
8 is also property.

9 If the Court has no questions?

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 Mr. Clement, 5 minutes.

12 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

13 ON BEHALF OF THE PETITIONER

14 MR. CLEMENT: Thank you, Mr. Chief Justice.  
15 A couple of points in rebuttal.

16 Ms. Harrington started by pointing to the  
17 language in McNally. And she is absolutely correct that  
18 at the same time that McNally got rid of the honest  
19 services prosecution that was brought there, they  
20 reserved two possible prosecutions. One would be the  
21 obtaining of money, where there was a difference in what  
22 the government paid for and what the government got.

23 The other thing that she alludes to is  
24 there -- the Court did say, well, maybe there's a  
25 possibility that you could prosecute based on the

1 government's loss of control over its allocation of  
2 these workman's comp policies.

3           The problem is, of course, that McNally  
4 precedes Cleveland. And in Cleveland, the government  
5 seized on that language and said, well, even if the  
6 video poker license isn't property, the right to control  
7 who gets it is property, and that got exactly zero votes  
8 from this Court. So I think that argument is no longer  
9 viable.

10           Ms. Harrington also points to these New York  
11 cases about the scope of property for purposes of 851 of  
12 the New York Penal Code. But of course, what we're  
13 talking about is 850 of the New York Penal Code, the  
14 kind of property that can be obtained. I think it's  
15 common ground that -- they are not co-extensive. There  
16 are -- there is property that you can obtain that you  
17 can't threaten.

18           Indeed, the classic thing you obtained in --  
19 in an extortion case is money, and I'm not sure how you  
20 really threaten money. You can threaten to take money  
21 from someone, but you don't really threaten the money.  
22 So these are different terms.

23           So relying on the Barondess case, which is  
24 the same case that Justice Stevens relied on in dissent  
25 in Scheidler II just doesn't work.

1                   Now, she's also absolutely correct that  
2     extortion at common law only involved official  
3     extortion, but that doesn't mean that there aren't  
4     common law places to look for a relevant definition of  
5     property. Because the same basic concept was in the  
6     larceny statutes, the -- not statutes, the common law  
7     crime of burglary, larceny, and embezzlement.

8                   And indeed to this very day, New York refers  
9     to extortion as larceny by extortion. And if you go to  
10    those New York cases, the place I would point you to is  
11    the Ashworth case, which is cited in both of our briefs.  
12    This is a case that makes very clear that under New York  
13    law, they didn't even think that services at all were  
14    property.

15                  This is a case where the foreman of a mill  
16    gets the bright idea that he's going to do some work for  
17    his own company using the mill's facilities. And he's  
18    charged with larceny.

19                  And the court in that case says, no, that's  
20    not larceny, you didn't obtain any goods. Classic sort  
21    of common law property is in order to be the kind of  
22    property that you can steal or extort it has to be  
23    moveable. One of the elements of the common law crime  
24    is asportation, literally moving it --

25                  JUSTICE SOTOMAYOR: Mr. Clement, when you

1 finish --

2 MR. CLEMENT: And if I can just sort of put  
3 the point, they say all of that and they reject that  
4 argument. And they use a line which I think really  
5 captures what's going on here. They say, well, maybe  
6 you can conceive of such a conception of property, but  
7 they say to conceive this requires a certain  
8 intellectual flexibility which is probably not possessed  
9 by the average person. And I would simply submit it  
10 also is not the kind of flexibility that should be  
11 possessed by the average judge in a criminal case.

12 JUSTICE SOTOMAYOR: Let -- look, I think if  
13 we take your argument to its logical conclusion, what  
14 you are telling us is, do away with the Second Circuit's  
15 Tropiano decision, and the large progeny of cases that  
16 come from it.

17 The most common is the threat to a business  
18 that says pull out of this market because we don't want  
19 you in it. And we want all the customers. And courts  
20 routinely have said that is a Hobbs Act violation.  
21 You're using the threat of force to tell people to keep  
22 out of a particular market.

23 Today you are telling us that under your  
24 theory of the Hobbs Act and your definition of property,  
25 that doesn't count as a Hobbs Act violation.

1                   MR. CLEMENT: Well, a couple of things,  
2 Justice Sotomayor. I went back to the Tropiano case  
3 because it is sort of the pro genitor of this whole line  
4 of Second Circuit cases, and I noticed two things.

5                   One, I noticed it was written by a district  
6 court sitting by designation. So I mean, I -- I don't  
7 mean anything by that other than this is not Marbury.

8                   Second, I would say that the second thing I  
9 noticed is that the debt --

10                  JUSTICE SOTOMAYOR: Oh, I think when I sat  
11 as a district court judge, I would have been insulted by  
12 that.

13                  (Laughter.)

14                  MR. CLEMENT: Well, it's not -- it's a good  
15 thing you're no longer sitting in that capacity, Your  
16 Honor --

17                  JUSTICE SOTOMAYOR: Okay. It's really is,  
18 for you.

19                  MR. CLEMENT: -- because I -- I certainly  
20 mean you no offense. You could write Marbury here.

21                  So the -- the difference is, Your Honor,  
22 that that could have also been, I think, actually  
23 prosecuted as a property crime because in that case,  
24 there were customer accounts that were obtained, and  
25 those customer accounts, as the facts of Tropiano

1 discussed it, actually had value, they could have been  
2 transferred from one business to another.

3                   So I think what would happen in the Second  
4 Circuit, if you decide this case the way we would like  
5 you to, is the Government's going to have to be careful.  
6 They're going to have to write their indictments to  
7 focus on things like money or obtainable property, and  
8 they can't get sloppy and put together these autonomy  
9 interests and call them property.

10                   Thank you, Your Honor.

11                   CHIEF JUSTICE ROBERTS: Thank you, counsel.

12                   The case is submitted.

13                   (Whereupon, at 11:09 a.m., the case in the  
14 above-entitled matter was submitted.)

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<b>A</b>				
<b>ability</b> 28:3 40:17 51:16	42:3 45:15 <b>ahead</b> 22:16	21:21 22:7,7 26:10 54:19,24	46:5 61:2 <b>baggage</b> 56:1,7	54:13,17 <b>breyers</b> 29:23
<b>able</b> 12:4	<b>albany</b> 25:10	57:12 58:8	<b>bank</b> 12:2,4	39:3
<b>abortion</b> 17:3 29:3,4 35:6,8	<b>alienable</b> 10:12 10:14 18:1	60:4,13	<b>barondess</b> 34:2 34:3 58:23	<b>bribe</b> 29:25
<b>aboveentitled</b> 1:11 62:14	<b>alito</b> 10:4 15:1	<b>arguments</b> 4:4	<b>based</b> 17:10 31:21 49:9	<b>brick</b> 42:15 45:24 56:21
<b>absent</b> 7:24	<b>alleged</b> 26:22 52:4,8,16	<b>articulated</b> 23:4	50:2 57:25	<b>brief</b> 10:5 15:18 34:14 37:21,23
<b>absolutely</b> 35:13 57:17 59:1	<b>allocation</b> 58:1	<b>ashworth</b> 59:11	<b>basic</b> 3:16 18:22 59:5	<b>briefs</b> 59:11
<b>absorbed</b> 30:9	<b>allude</b> 33:6	<b>asking</b> 26:15 41:18	<b>basically</b> 11:23 12:17 13:3,7	<b>bright</b> 59:16
<b>abstract</b> 32:21 33:16	<b>alluded</b> 14:17	<b>aspects</b> 28:7 39:19	<b>basis</b> 33:22 38:4 38:21 41:20	<b>brings</b> 8:20 56:1 56:7,7
<b>accepting</b> 29:13	<b>alludes</b> 57:23	<b>asportation</b> 59:24	42:4,5 53:6,7	<b>broad</b> 16:12 17:17 31:14
<b>access</b> 52:5,10	<b>alter</b> 18:7	<b>assent</b> 19:14	<b>began</b> 19:17 26:15	<b>broader</b> 54:16
<b>accounts</b> 61:24 61:25	<b>amazing</b> 24:18	<b>assigned</b> 32:18	<b>behalf</b> 1:15,19 2:4,7,10 3:8	<b>broadest</b> 16:8
<b>act</b> 3:11,15,22 9:11,15 10:11	<b>ambit</b> 16:14	<b>assistant</b> 1:17 12:1	26:11 57:13	<b>broadly</b> 55:5,8
11:1,7,11	<b>amount</b> 19:21	<b>association</b> 19:22	<b>believe</b> 9:7	<b>brought</b> 57:19
16:10 17:10	<b>analogize</b> 5:2	<b>assume</b> 4:4 16:19 46:22	<b>belongs</b> 21:3 39:6	<b>built</b> 56:18
18:1 21:8	<b>analogous</b> 13:16	47:16	<b>benefit</b> 19:1 39:5	<b>bundle</b> 39:20
22:11 24:3,5,7	<b>anothers</b> 9:5 41:2	<b>assumption</b> 12:19	<b>best</b> 5:25 8:19 8:20 34:3 44:3	<b>burglary</b> 3:12 17:22 59:7
24:20 30:8,8	<b>answered</b> 14:25	<b>attaining</b> 41:8	44:22	<b>business</b> 10:2 17:4 28:20
31:20 33:22	<b>antiracketeeri...</b> 9:15 24:5	<b>attempt</b> 4:2	<b>bids</b> 18:5	30:12 31:23
37:16,18 38:5	<b>anybody</b> 29:18	<b>attempted</b> 50:19 50:21	<b>big</b> 23:18	34:5,7 35:22
42:9,23 49:5,9	<b>anymore</b> 25:11	<b>attempting</b> 27:13 30:22	<b>bigs</b> 25:24	37:13,24 40:10
50:5,9 53:23	<b>anyway</b> 42:9	39:8	<b>bit</b> 38:7 39:3	40:22,22,24
53:25 54:20	<b>appeal</b> 16:20	<b>auction</b> 18:21 19:23	<b>blackmail</b> 45:5 45:20	42:15,20,25
55:9 56:16,20	<b>appeals</b> 53:22	<b>authorities</b> 9:10 50:15	<b>bottom</b> 3:13 19:10	45:24 49:12
60:20,24,25	<b>appearances</b> 1:14	<b>autonomy</b> 10:2 17:4,24 20:7	<b>box</b> 22:19	52:9,12 55:11
<b>activity</b> 42:10	<b>application</b> 20:14	23:6 62:8	<b>break</b> 18:11	56:10,21,23
<b>acts</b> 49:3	<b>appropriate</b> 29:15	<b>available</b> 54:24	<b>breyer</b> 10:21 11:3,8,25	57:1,4 60:17
<b>actual</b> 13:13	<b>approve</b> 48:2,7	<b>average</b> 60:9,11	12:15,21 14:3	62:2
<b>add</b> 29:22	<b>april</b> 1:9		22:12 28:13	<b>businesses</b> 42:13
<b>address</b> 25:2 28:14	<b>arent</b> 25:23 59:3		29:2,11,20	<b>buy</b> 54:6,7
<b>advice</b> 39:4 44:21 45:3,3	<b>arguing</b> 10:6		30:3,24 31:11	
47:20 48:11,12	<b>argument</b> 1:12 2:2,5,8 3:3,7		40:19 41:8,14	<b>C</b>
<b>agent</b> 13:8,10 45:20	4:4,8 6:14		41:23 42:1	<b>c</b> 1:3,8,15,18 2:1 3:1 53:15
<b>agents</b> 14:2	15:11,17 16:20		53:14 54:1,4	<b>call</b> 17:9 41:9 62:9
<b>aggravated</b> 24:14	16:23 17:2			<b>calling</b> 32:7
<b>aggregate</b> 41:20				<b>cant</b> 5:17 12:6 17:17,23 21:3 33:7 37:21,22 37:25 38:3,17
<b>B</b>				
		<b>b</b> 44:17		
		<b>babies</b> 36:1		
		<b>back</b> 27:5 28:18 35:3 39:2 43:9		

38:20 48:18 56:14 58:17 62:8 <b>capacity</b> 61:15 <b>capital</b> 40:23,25 <b>captures</b> 60:5 <b>care</b> 19:9 56:16 <b>careful</b> 62:5 <b>carpenter</b> 20:25 40:9 <b>carried</b> 38:25 <b>carry</b> 50:4 <b>case</b> 3:4 4:17 5:3 5:3 7:5,16 13:12,15,17 14:15 18:7,15 18:24 19:9,12 21:13 23:19,20 24:24 25:1,21 26:6,20 27:11 27:18,20,21 28:5,12 29:3,4 29:5 31:8 32:23 33:4,5 33:25 34:2,2,3 34:5,21,25 35:4,12 36:2 36:19,20 39:8 45:23 46:23 47:6 48:9,18 50:17 51:12,21 52:2,4,22 53:20 54:9,11 54:22,22 58:19 58:23,24 59:11 59:12,15,19 60:11 61:2,23 62:4,12,13 <b>cases</b> 8:3 12:19 20:14 27:13 30:10 31:19 33:20 34:2,3 34:11,19 36:16 36:23 40:20 42:14 49:1,10 49:16 55:8 56:2,8,12,20	56:22 58:11 59:10 60:15 61:4 <b>cash</b> 13:14,20,20 <b>causation</b> 4:3 21:21 22:7 <b>cause</b> 21:9 41:22 45:13 <b>center</b> 26:6 <b>certain</b> 12:3 19:20 60:7 <b>certainly</b> 4:11 9:19 20:22 61:19 <b>cetera</b> 29:4 <b>chamber</b> 12:10 <b>change</b> 18:17 36:10 <b>changes</b> 18:22 <b>characteristics</b> 10:19 <b>characterize</b> 52:18 <b>charge</b> 5:19,22 7:2,7 50:15,19 50:21 <b>charged</b> 4:18 9:9,12 27:6,12 28:11 29:24 40:4 46:7,17 47:7,9 50:20 50:22 59:18 <b>charging</b> 27:18 27:21 51:2 <b>check</b> 14:9,13 <b>checked</b> 22:20 <b>cheerios</b> 10:23 11:4 <b>chief</b> 3:3,9 19:16 20:2,12 23:17 26:8,13 50:1 50:14 52:17 53:3 57:10,14 62:11 <b>choice</b> 51:14 <b>choices</b> 46:20 47:11,14	<b>circle</b> 14:18 <b>circled</b> 14:20 46:21 47:15,20 47:20,22 48:1 <b>circuit</b> 61:4 62:4 <b>circuits</b> 60:14 <b>cite</b> 33:3 <b>cited</b> 59:11 <b>citizenry</b> 29:9 <b>classic</b> 17:18 58:18 59:20 <b>classwide</b> 41:19 42:4,5 <b>clause</b> 55:10 <b>clayton</b> 16:9 55:9 <b>clear</b> 17:1 49:23 49:24 59:12 <b>clearly</b> 42:9 <b>clement</b> 1:15 2:3 2:9 3:6,7,9 4:6 4:21 5:21 6:6 6:12,15 7:3,15 8:1 9:7 10:10 11:2,5,21 12:12,18,22 13:3,25 14:10 14:14,22 15:21 15:24 16:17,22 16:25 18:8,13 20:1,21 21:12 21:23 22:5,8 22:18 23:3 24:1 25:2 26:19 27:18 57:11,12,14 59:25 60:2 61:1,14,19 <b>cleveland</b> 4:9 7:10 8:3 13:17 18:15 58:4,4 <b>client</b> 15:13,15 15:25 19:4 33:1 <b>clients</b> 6:17 33:2 44:3,22 <b>clinic</b> 29:4 35:9	35:21,25 52:9 <b>clinics</b> 17:5 35:6 35:9,16,17,24 52:6,11 <b>close</b> 13:11 35:6 <b>closed</b> 17:6 <b>closest</b> 33:5,16 33:24 <b>clue</b> 16:7,11 <b>code</b> 9:16 58:12 58:13 <b>coerce</b> 11:13 19:8 45:20 51:8,10 <b>coerced</b> 11:15 12:7 18:4 52:22 <b>coercer</b> 20:23 <b>coerces</b> 11:17 <b>coercion</b> 3:24 8:23,24 9:4,10 9:12,13,14,16 9:22 10:3 11:7 23:19,23 24:6 24:8,13,22 26:3 50:4,7,8 50:11,16,21 51:4,6 <b>coextensive</b> 58:15 <b>college</b> 31:4 <b>come</b> 5:7 6:19 7:12 10:11,20 20:5 26:21,23 43:4,7 60:16 <b>comes</b> 18:10 31:24 33:16 <b>coming</b> 20:14 <b>commission</b> 7:20 21:18 22:2,3 <b>commissions</b> 4:19 5:1,5,8,16 8:5,14 26:18 <b>commit</b> 5:17 37:19 <b>commitment</b> 4:3	4:10 5:23,25 6:2 7:7 13:16 13:20 27:13 46:19 47:14 48:3,7 <b>committee</b> 19:13 <b>committing</b> 34:17 37:19 <b>common</b> 17:11 17:15,18 33:4 33:5,7,9,12 36:20 48:18,19 48:19,24 49:2 55:15 56:2,4 58:15 59:2,4,6 59:21,23 60:17 <b>commonwealth</b> 26:24 <b>comp</b> 8:6,9 58:2 <b>company</b> 6:1,18 27:25 41:22 44:23 45:14,17 59:17 <b>compensation</b> 5:6 <b>competitors</b> 11:23 14:5 <b>completely</b> 19:18 <b>comptrollers</b> 20:10 <b>concede</b> 49:19 49:20 <b>conceded</b> 53:20 53:21 54:19 <b>conceivable</b> 31:12 <b>conceive</b> 60:6,7 <b>conceived</b> 50:9 <b>concept</b> 37:2 38:24 39:12 40:7 59:5 <b>conception</b> 16:12 60:6 <b>conceptual</b> 16:20
---	---	--	---	--



<b>concerned</b> 55:6	57:7 58:1,6	34:4,6,18,21	<b>debt</b> 61:9	48:11 53:1
<b>conclusion</b> 60:13	<b>controlled</b> 39:12	34:22 39:17	<b>decide</b> 6:21	<b>dictating</b> 36:12
<b>concrete</b> 25:18	<b>convey</b> 32:9,11	40:16 49:4	52:14 62:4	<b>dictum</b> 17:9
<b>condition</b> 29:15	<b>conveyed</b> 32:9	52:7,7,10	<b>deciding</b> 3:15	<b>didnt</b> 5:19,22
<b>conduct</b> 23:22	<b>conviction</b> 8:11	53:11,21 54:13	17:5	6:10 7:2 9:11
23:24	<b>convictions</b> 53:19	55:11,12 57:6	<b>decision</b> 3:22	15:16 25:11,16
<b>confident</b> 20:21	<b>coopt</b> 45:24,25	57:9,24 58:8	4:9 8:8 20:24	43:4 47:19,21
<b>confidential</b> 20:23 40:10	<b>coopting</b> 56:21	59:19 61:6,11	24:3,7,10 40:8	50:11 52:13,13
<b>confused</b> 46:5	<b>copyright</b> 45:16	<b>courts</b> 3:21 4:9	60:15	53:15 59:13,20
<b>congress</b> 9:11	<b>copyrighted</b> 41:21	8:2 12:23	<b>decisions</b> 8:3	<b>difference</b> 9:21
16:11 24:3,6	<b>copyrights</b> 41:24	20:24 24:17	51:2	18:24 57:21
24:11,19 33:23	<b>corporation</b> 13:9,10	40:8 55:10	<b>defend</b> 31:9	61:21
42:12 49:4	<b>correct</b> 9:8	60:19	<b>defendant</b> 19:24	<b>different</b> 4:7
50:9	57:17 59:1	<b>covered</b> 51:4,4	22:23 25:5	8:12 12:1
<b>congresss</b> 3:21	<b>corrupt</b> 18:4,15	<b>covers</b> 9:18	<b>defending</b> 27:16	13:14 19:13
<b>conjunction</b> 16:13	18:20	<b>crime</b> 3:11,13	<b>define</b> 15:2 37:1	23:9 28:2,6
<b>connected</b> 10:25	<b>corruption</b> 25:21	3:23,24 8:23	55:5	30:18 32:1
<b>connection</b> 47:2	<b>cost</b> 26:4	8:25 9:4,5,10	<b>defined</b> 32:15	33:11 34:13
<b>conscious</b> 3:21	<b>couldnt</b> 47:6	9:12,13,22,22	55:8	35:11,18,19
24:6,10	<b>counsel</b> 13:23	23:22,23,25	<b>defining</b> 49:20	38:3,19,23,23
<b>consists</b> 36:21	20:10 21:3,6	24:2,9,11,17	56:1	39:19,20 41:11
<b>construe</b> 49:11	26:8 30:21	25:19 33:12	<b>definition</b> 3:17	41:17 45:6
57:6	32:25 44:2	42:11,13,23	3:20 8:25 9:16	46:18 51:1
<b>construed</b> 16:4	45:5,7 46:24	50:4,7,8,10,13	9:25 10:1,4,20	52:3 55:24
30:11	48:5,13 52:21	55:15,20 56:6	15:5,19 16:16	56:3 58:22
<b>construing</b> 30:10 31:20	53:1 57:10	59:7,23 61:23	17:16,19,21	<b>differently</b> 26:21,24 29:16
33:20 34:18,24	62:11	<b>crimes</b> 3:12	20:6 28:15	<b>difficult</b> 21:13
36:24	<b>counsels</b> 32:25	17:19 26:5	29:13 31:6,14	<b>difficulty</b> 39:16
<b>context</b> 36:17	39:10,25 47:23	<b>criminal</b> 3:16	37:17 38:23	<b>direct</b> 11:15
<b>contract</b> 13:20	48:2,10,16	60:11	56:15 59:4	39:5 47:2
22:2,2 32:13	<b>count</b> 6:25 60:25	<b>criminalize</b> 3:22	60:24	<b>directly</b> 24:9,17
46:9	<b>couple</b> 7:4 57:15	<b>critical</b> 3:15	<b>definitive</b> 12:14	<b>disagree</b> 13:25
<b>contradicting</b> 38:7	61:1	10:13	<b>deliberative</b> 21:2 24:2 26:3	<b>disbarred</b> 45:9
<b>contrast</b> 16:9	<b>course</b> 8:4 13:15	<b>customer</b> 61:24	<b>delivering</b> 36:1	<b>discharge</b> 25:7
<b>control</b> 26:25	24:4,11 50:2	61:25	<b>demonstrates</b> 16:1	<b>discharging</b> 24:15
27:1 28:3,3,6,9	50:13 58:3,12	<b>customers</b> 60:19	<b>department</b> 1:18	<b>disclose</b> 9:20
32:2 39:9,15	<b>courses</b> 36:23	<b>D</b>	<b>depends</b> 12:13	<b>discovery</b> 25:5,9
39:18 40:7,17	<b>court</b> 1:1,12	<b>d</b> 1:8,15,15,18	<b>deprived</b> 5:13	25:17
40:18,21,24	3:10 4:12 5:6	2:3,9 3:1,7	17:12 26:22,24	<b>discussed</b> 62:1
41:2,12 42:13	8:11 17:1,3,7	57:12	28:3	<b>disjunctively</b> 16:10
42:15,16 48:14	18:18 26:13	<b>damaged</b> 34:8	<b>designation</b> 61:6	<b>dissent</b> 58:24
53:12 54:20	28:8 33:21	<b>day</b> 26:18 40:15	<b>dictate</b> 30:22	<b>distinct</b> 11:24
		59:8	39:23 40:3	<b>distinction</b> 10:14 53:4
		<b>dead</b> 10:22	44:4 46:1	
		<b>dealing</b> 14:7		
		55:8		

<b>distinguished</b> 52:7	<b>duty</b> 24:15 25:16	<b>engage</b> 37:14	<b>expost</b> 50:25	<b>families</b> 42:11
<b>district</b> 61:5,11		<b>engagement</b> 30:12	<b>exposure</b> 9:1	42:13
<b>doesnt</b> 23:1	<b>E</b>	<b>enter</b> 32:12	<b>exquisitely</b> 24:12	<b>far</b> 21:25 29:2
25:15 26:1	<b>e</b> 1:17 2:1,6 3:1	<b>entirely</b> 35:11	<b>extent</b> 13:6	54:25 55:3,6
38:15,18 43:2	3:1 26:10	<b>entity</b> 13:7	32:14	<b>farreaching</b> 29:21 30:5
45:1 50:18	<b>earlier</b> 9:14	<b>equating</b> 39:15	<b>extort</b> 4:2,2	<b>faucet</b> 43:5
51:7 58:25	<b>easier</b> 42:14	<b>equity</b> 55:10	12:25,25 48:25	<b>favor</b> 15:25
59:3 60:25	56:22	<b>esq</b> 1:15,17 2:3,6	53:16,21,22	<b>favorable</b> 20:15
<b>doing</b> 8:16,21	<b>easy</b> 11:14 12:5	2:9	59:22	20:18 21:8
11:9 29:16	29:4	<b>essential</b> 53:12	<b>extorted</b> 56:12	<b>federal</b> 9:4
30:13,14,19	<b>economic</b> 3:19	<b>essentially</b> 10:1	<b>extorting</b> 43:5	23:22,24 24:1
31:24 32:2,5,7	30:15 44:16,20	19:1 20:6	48:21,23 53:4	24:9,25 25:1
32:9,17 33:14	45:14 51:19	<b>et</b> 29:4	53:5	25:12,13,15,25
33:16 34:7,17	57:5	<b>everybody</b> 19:22 28:20	<b>extortion</b> 3:11	26:5 56:4,6
35:1,2 36:10	<b>economically</b> 42:5,18 44:18	<b>evidence</b> 5:25	3:23 5:17 6:17	<b>fee</b> 7:21
36:13,21 39:7	45:2,11	46:23	7:1,6 9:17,22	<b>fees</b> 6:9,19,22
39:24 41:10	<b>either</b> 21:17	<b>evoke</b> 33:23	11:7 14:8	7:12,24 27:8
42:4 45:20,25	26:22 31:8	<b>exactly</b> 14:14	17:11,18,20	46:10,12
46:2 48:13,14	36:9 43:2	22:18,18,19	18:12 23:20	<b>fellow</b> 28:16
48:21,23 49:12	<b>element</b> 25:15	23:4 38:10,14	24:6,8,22 26:4	<b>felony</b> 50:22
53:9 56:10,23	53:12	58:7	26:16 27:10	<b>figure</b> 12:6
56:25 57:3,5,7	<b>elements</b> 59:23	<b>example</b> 31:1	30:9 33:4,5,10	14:23 25:6
<b>dont</b> 4:6,15,15	<b>emails</b> 46:23	33:18 35:4	33:20 34:12,16	<b>final</b> 13:23
4:25 7:6 9:7	47:17	50:24 51:6,9	34:17 35:5	<b>findings</b> 14:16
12:13 13:1,17	<b>embarrassing</b> 9:2	52:3	36:1,20 37:5	<b>finish</b> 60:1
13:25 15:4,18	<b>embezzlement</b> 3:13 17:21	<b>examples</b> 33:19	42:25 46:14	<b>first</b> 3:4 4:8
18:8,11,17,21	59:7	<b>exception</b> 13:5	48:19,20 49:6	23:13 29:7
19:12 22:15	<b>eminent</b> 15:17	<b>excessive</b> 6:9	49:7 50:11,13	34:14
28:17,23 31:12	<b>employee</b> 12:2	7:20,20	50:19 51:5	<b>fit</b> 23:1,22,24
32:5 33:18	<b>employees</b> 8:18	<b>exchange</b> 33:14	53:23,24 55:15	<b>fits</b> 24:17
35:25 37:16	<b>employer</b> 15:14	<b>exclusive</b> 28:9	55:16,19 56:1	<b>five</b> 53:19
38:22 44:11	32:12,14,18	39:18 40:17	56:5,7,8,17	<b>fix</b> 28:17 43:4
47:5,8 48:25	<b>employment</b> 32:13	53:12	58:19 59:2,3,9	<b>flexibility</b> 60:8
49:10 51:11	<b>enable</b> 55:1	<b>excuse</b> 35:15	59:9	60:10
54:1,1,22,24	<b>enacted</b> 49:5,7	<b>exercise</b> 22:22	<b>extra</b> 26:1	<b>flows</b> 7:8
55:2,22 56:14	<b>enacting</b> 24:3	22:25 23:10,18	<b>F</b>	<b>focus</b> 62:7
56:15 58:21	<b>encapsulates</b> 48:7	36:14 57:7	<b>faced</b> 31:4	<b>focused</b> 6:10
60:18 61:6	<b>ended</b> 26:15	<b>exercised</b> 17:13	<b>facilities</b> 59:17	19:17
<b>download</b> 41:21	43:13,14,15	23:2,7,8	<b>fact</b> 9:2 11:8	<b>focuses</b> 22:10
44:24 45:13	50:21	<b>exercising</b> 53:10	18:19,22 50:15	<b>focusing</b> 36:17
<b>draw</b> 10:9 53:3	<b>ends</b> 27:14	<b>exorcise</b> 39:25	57:1	<b>follow</b> 8:2
56:22		<b>expanded</b> 49:5	<b>facts</b> 21:6 46:14	<b>following</b> 13:6
<b>dropped</b> 24:24		<b>expensive</b> 19:7	61:25	<b>force</b> 7:24 9:1,5
<b>due</b> 55:9		<b>explains</b> 50:23	<b>factual</b> 45:18	31:25 60:21
<b>duplicative</b> 26:5		<b>explicitly</b> 33:23	<b>fallback</b> 42:24	<b>foreman</b> 59:15
<b>duties</b> 25:7				<b>foremost</b> 4:8

<b>former</b> 53:7	23:21 24:23	<b>governments</b>	38:18 39:7,13	<b>honestly</b> 8:18
<b>forms</b> 10:7	34:9	8:7,8 9:25	39:17 41:5,13	<b>honor</b> 14:14
<b>forth</b> 11:16	<b>giridhar</b> 1:3	12:10 16:15	41:16,25 42:2	61:16,21 62:10
<b>forward</b> 50:4	<b>give</b> 8:9 12:13	21:2 23:5 51:5	43:17,21 44:12	<b>horrible</b> 12:10
<b>found</b> 12:15	20:18 30:2	58:1 62:5	44:20 45:4,11	<b>horribles</b> 12:10
14:19 26:16	32:25 38:22	<b>great</b> 25:11	46:4,17 47:8	<b>hour</b> 41:11
27:15 40:5,16	44:5,21 45:2,6	<b>grocer</b> 10:22,24	47:13,22 48:1	<b>house</b> 17:23
<b>fraud</b> 8:11	48:10,18 51:6	11:10	48:22 49:2,15	<b>hypothetical</b>
<b>fraudulent</b> 8:5	<b>given</b> 11:6 15:13	<b>ground</b> 31:12,14	49:19 50:6,17	11:6,22 18:24
<b>free</b> 10:3	15:14 46:20	31:17 58:15	51:7,10,17,25	20:22 22:1
<b>freedom</b> 9:6	<b>gives</b> 11:19 12:8	<b>guess</b> 16:2 17:9	52:20 53:6,18	<b>hypotheticals</b>
<b>friend</b> 26:19	<b>giving</b> 39:5	29:6 41:16	54:3,9,15,18	43:14
<b>friends</b> 5:4	<b>go</b> 17:23 20:15	46:4	55:2,7,17 56:6	
<b>front</b> 14:18 24:4	22:16 27:4,9		57:16 58:10	<b>I</b>
26:6	31:3 35:3 53:4	<b>H</b>	<b>havent</b> 12:15	<b>id</b> 21:14 25:2
<b>fruits</b> 32:24 39:9	54:24 59:9	<b>hands</b> 4:14	54:18	26:14
52:25	<b>goes</b> 6:20,22 7:8	18:19	<b>hear</b> 3:3 55:17	<b>idea</b> 5:19 25:11
<b>fund</b> 6:1	10:22 46:5	<b>happen</b> 62:3	<b>heartland</b> 42:23	59:16
<b>fundamentally</b>	<b>going</b> 8:17 11:4	<b>happened</b> 5:13	56:20	<b>idly</b> 53:15
3:20	18:10 19:8	25:3,9 39:8	<b>hed</b> 42:22	<b>ignore</b> 49:10
<b>future</b> 47:6	20:13 25:8,23	51:1 53:20	<b>helpful</b> 48:3	<b>ii</b> 16:1 17:1
	28:17 39:2	<b>happening</b> 6:24	<b>hes</b> 11:4,4 27:23	23:13 58:25
<b>G</b>	40:3 41:22	<b>happens</b> 11:17	43:24 44:1,4	<b>ill</b> 18:6,6,11,11
<b>g</b> 3:1	42:8 50:23	<b>happy</b> 15:24	46:1,2 48:4,5	<b>illogically</b> 15:7
<b>gain</b> 39:3 46:19	52:22 55:3	25:2,13 37:23	53:5 59:16,17	<b>illustrated</b> 40:8
<b>gap</b> 23:18	59:16 60:5	<b>hard</b> 29:3 50:25	<b>high</b> 5:9 8:14	<b>illustration</b>
<b>gardener</b> 43:6,7	62:5,6	<b>harder</b> 7:5	21:18	25:19 50:25
43:23	<b>good</b> 8:22 14:13	45:23	<b>hobbs</b> 3:11,15	<b>im</b> 14:2,23 15:24
<b>general</b> 1:18	43:1 50:24,24	<b>harm</b> 31:25	3:22 9:11	18:10 19:8
9:23 13:23	61:14	34:20 41:22	10:11 11:1,7	27:22 28:1,17
20:10 21:3,6	<b>goods</b> 59:20	43:3 45:14	17:10 18:1	29:12 31:12
30:21 31:17	<b>gotten</b> 7:23,24	<b>harmable</b> 37:8	22:11 24:3,7	32:16,17 37:7
32:25 39:9,25	<b>government</b>	<b>harmed</b> 36:18	24:20 30:8,8	37:9 38:10,22
44:2 45:5,7	3:17 4:15,23	37:22 38:1,4	31:20 33:22	39:16 41:9,23
46:24 47:23	4:25 5:4,7,8,9	38:17,20	37:16,18 38:5	42:2 44:12,14
48:2,5,10,13	5:11,13,18 7:1	<b>harming</b> 34:18	42:9,23 49:5,9	46:4 47:25
48:15 52:21	7:8,16,18 8:13	38:13,16	50:5,9 53:23	58:19
53:1	8:15,18 13:7	<b>harrington</b> 1:17	53:25 54:20	<b>imagine</b> 11:14
<b>generally</b> 15:3	13:14 17:17	2:6 26:9,10,12	56:16,20 60:20	<b>important</b> 18:23
<b>generate</b> 30:16	18:18,19 19:2	27:4,12,22	60:24,25	36:6 45:18
<b>generated</b> 4:20	19:9,14 21:1	29:1,6,19 30:6	<b>holdout</b> 19:15	48:18 49:8
<b>genitor</b> 61:3	21:14,15,24	31:10,17 32:11	<b>honest</b> 5:14 8:21	50:18
<b>getting</b> 5:5 8:5	22:9 24:14,25	32:19,23 33:7	15:12 17:24	<b>inadequate</b> 8:15
30:3 36:11	24:25 25:6,10	33:11,18 34:1	28:18 29:5,7	<b>inalienable</b>
43:20	25:22,24,25	34:11 35:3,13	30:2 44:15	10:15,16 20:8
<b>ginsburg</b> 8:24	28:19 57:22,22	36:3,12,22	45:1 47:20	<b>incentive</b> 26:2
9:8 22:21 23:3	58:4	37:10 38:10,14	57:18	<b>include</b> 9:20

30:11 37:2 50:11 <b>included</b> 50:11 <b>includes</b> 10:2,7 37:13 56:9 <b>including</b> 31:19 <b>incompatible</b> 3:20 <b>incorporate</b> 9:11 19:6 <b>indicted</b> 4:18 <b>indictment</b> 40:5 <b>indictments</b> 62:6 <b>individual</b> 11:12 11:15 13:13 20:16 <b>individuals</b> 45:25 <b>inducing</b> 55:5 <b>inferior</b> 5:9 <b>information</b> 9:20 20:23 40:11,15,18 <b>inherently</b> 20:8 <b>initial</b> 46:6 <b>initially</b> 50:20 52:4 <b>instance</b> 37:14 <b>insulted</b> 61:11 <b>insurance</b> 5:10 8:15 <b>intangible</b> 3:19 6:14 10:8,17 23:1 43:13 <b>intangibles</b> 41:24 <b>integrity</b> 26:2 30:2 <b>intellectual</b> 60:8 <b>intent</b> 53:16 <b>interest</b> 5:14 7:18 8:17,19 8:20 10:2 17:4 23:6 30:1 31:22,23 32:3 32:5,7 35:2	44:3,22 48:12 51:18 52:12,19 52:19 56:25 57:1,3 <b>interested</b> 29:12 <b>interests</b> 17:24 20:7 30:14 52:8 62:9 <b>interfere</b> 30:19 <b>interference</b> 8:10 <b>interfering</b> 8:8 25:15 <b>internal</b> 21:2 26:3 <b>interpreted</b> 9:19 <b>invest</b> 28:1 <b>invested</b> 27:25 <b>investment</b> 6:3 6:18,19,20,22 7:12,13,23 19:13,15,20 21:10,10,17,18 26:18 27:8,14 45:22 46:10,12 46:20 <b>invited</b> 14:18 <b>invoke</b> 56:4 <b>involve</b> 51:8 56:20 <b>involved</b> 33:12 59:2 <b>involving</b> 36:20 <b>irrelevant</b> 4:5,7 <b>isnt</b> 12:24 13:24 15:22 16:24 19:16,18 23:1 24:9 46:13 51:13,15 58:6 <b>issue</b> 4:11 19:2 27:1 36:5 40:10 42:1 <b>issued</b> 4:14 13:24	<b>ja</b> 42:4:1 <b>job</b> 28:20 29:16 30:13,19 31:24 32:1,5,7,9,15 32:15,17,25 33:17 34:7 35:1,2 36:21 39:4 40:1 41:2 41:10 42:4,17 44:8,9,21 45:8 46:1,8 48:10 48:13,15 49:12 51:16 52:23,25 53:5,10 56:10 56:25 57:3,5,7 <b>jobs</b> 28:20 31:16 52:23 <b>journal</b> 40:12,14 40:14,16 <b>judge</b> 50:25 60:11 61:11 <b>jurisdiction</b> 55:10 <b>jury</b> 3:25 14:16 14:18 26:16 27:15 40:5 46:20,20 47:12 47:16 <b>jurys</b> 46:25 <b>justice</b> 1:18 3:3 3:9,25 4:7,17 4:21 5:15 6:5 6:12,13,15 7:11,22 8:24 9:8 10:4,21 11:3,8,25 12:15,21,24 13:4,19 14:1,3 14:6,11,16,22 15:1,22,24 16:15,18,23 18:3,9,13 19:16 20:2,12 21:4,20,25 22:6,12,21 23:3,17,21 24:23 26:8,13	26:14 27:4,5 27:17 28:13 29:1,2,11,20 29:22,23 30:3 30:24 31:1,11 32:4,16,20 33:3,9,15,24 34:9 35:3,23 36:8,15 37:7 38:6,12,15 39:2,3,11,14 40:19 41:8,14 41:23 42:1 43:12,18 44:7 44:14,25 45:10 46:4,6 47:4,5 47:11,19,25 48:17,24 49:13 49:17 50:1,14 51:3,9,13,22 52:17 53:3,14 54:1,4,13,17 54:23 55:4,7 55:14,22 57:10 57:14 58:24 59:25 60:12 61:2,10,17 62:11	48:17,24 <b>kennedys</b> 27:5 46:6 <b>kind</b> 7:16 16:2 17:12,25 18:1 18:18,25 19:7 28:5 29:10 41:3 43:21 58:14 59:21 60:10 <b>kinds</b> 41:17 <b>knees</b> 18:11 <b>knew</b> 42:12 <b>know</b> 5:3 10:22 12:3,5 14:15 15:18 18:6,20 19:5,22 20:7 23:11 28:17 29:17 32:5 46:14 50:9 51:1,14 53:17 <b>knows</b> 47:15
<b>L</b>				
<b>labor</b> 32:12,13 32:17,19,20,21 32:25 39:10 40:22,25 42:18 43:6,10 53:1 56:23 <b>laborers</b> 43:10 <b>lack</b> 43:23 <b>land</b> 40:22,25,25 <b>language</b> 57:17 58:5 <b>larceny</b> 3:12 17:21 59:6,7,9 59:18,20 <b>large</b> 60:15 <b>lateral</b> 25:13 <b>laughter</b> 51:24 61:13 <b>law</b> 5:23 8:23 9:23 17:11,15 17:18 24:20,21 25:9 30:9,10 31:19,20 33:4				
<b>K</b>				
<b>kagan</b> 6:12,15 7:11,22 13:19 14:1,6,11 27:4 27:17 35:3,23 36:8 43:12,18 46:4 47:5 <b>keep</b> 30:21 36:6 40:2 45:18 49:8 60:21 <b>keeping</b> 33:2 44:22 <b>kennedy</b> 3:25 4:7,17,21 5:15 6:5,13 14:16 21:4,20,25 22:6 26:15 29:22 31:1				

33:5,8,10,12 33:21,23 34:13 34:13 35:11 36:20 48:18,19 48:19,24 49:2 49:7,10 50:2,5 50:8,22 55:15 55:25 56:1,2,4 56:8,9 59:2,4,6 59:13,21,23 <b>lawn</b> 43:7,15,22 <b>lawyer</b> 35:9,24 45:1,2 46:8 <b>lawyers</b> 19:7 20:13 44:21 46:21 <b>lead</b> 12:4 <b>leads</b> 22:1,2 <b>leaking</b> 43:24 <b>leaky</b> 43:5 <b>legal</b> 28:16 37:12 48:11,12 <b>letter</b> 29:25 <b>leverage</b> 19:18 20:16,19 <b>liability</b> 38:4,21 <b>liberty</b> 51:18 52:11,19 <b>license</b> 4:11 13:17 58:6 <b>licenses</b> 18:16 <b>limited</b> 49:3 <b>line</b> 10:9 19:10 41:4 56:22 60:4 61:3 <b>lines</b> 6:16 <b>literally</b> 40:3 59:24 <b>little</b> 18:21 31:13 34:10 38:7 39:3 <b>live</b> 30:16 <b>lives</b> 30:17 <b>logical</b> 15:10 60:13 <b>long</b> 53:14 <b>longer</b> 58:8	61:15 <b>look</b> 41:19 42:3 46:14 59:4 60:12 <b>looked</b> 24:21 <b>looking</b> 24:20 <b>loss</b> 58:1 <b>lost</b> 42:7 45:8,8 <b>lot</b> 51:22 <b>louisiana</b> 18:14 <b>love</b> 3:18 <hr/> <b>M</b> <hr/> <b>m</b> 1:13 3:2 62:13 <b>macys</b> 41:12 <b>main</b> 42:12 56:19 <b>making</b> 12:16 21:10 22:17 30:22 44:2,10 <b>management</b> 6:1,9 7:21 <b>manifestation</b> 16:8 <b>marbury</b> 61:7 61:20 <b>marked</b> 4:2 <b>market</b> 60:18,22 <b>married</b> 16:2 <b>marry</b> 51:11,22 <b>marrying</b> 51:14 <b>matter</b> 1:11 9:23 13:21 26:4 62:14 <b>matters</b> 20:9 <b>mcnally</b> 5:2,3 6:8 7:16 8:3,4 21:19 22:17 26:19,20 28:1 57:17,18 58:3 <b>mean</b> 10:16 12:5 15:8 17:2 20:4 22:15 23:11,17 24:18 27:5 29:11 32:6 36:10,24 38:15 38:19 41:5,16	42:22 49:11,15 50:6 53:19 54:4 57:2 59:3 61:6,7,20 <b>meaning</b> 31:18 37:12 53:22 55:24 <b>means</b> 11:10 12:25 13:1 15:3 16:12 22:3 32:6 34:16 38:3,8 38:19,20 42:12 54:14 56:13 <b>meant</b> 23:18 35:6 <b>medical</b> 35:19 <b>mention</b> 50:19 <b>metaphysical</b> 17:2 <b>mill</b> 59:15 <b>million</b> 45:22 <b>mills</b> 59:17 <b>mind</b> 15:2,6 16:14 45:18 46:25 49:9 <b>minutes</b> 57:11 <b>misdemeanor</b> 50:20 <b>mistake</b> 23:14 <b>mob</b> 10:22 11:17 <b>model</b> 9:16 24:4 <b>money</b> 4:23 5:18 7:7,18 11:9,9 11:16 13:9,24 18:7,11 19:21 20:17 21:11 22:3,9,13,13 26:22,25 27:24 28:4 33:13 47:10 51:23 57:21 58:19,20 58:20,21 62:7 <b>monopoly</b> 10:24 10:25 <b>morning</b> 3:4 <b>mortar</b> 42:15	45:24 56:21 <b>motivating</b> 51:1 <b>moveable</b> 10:13 18:2 59:23 <b>moving</b> 59:24 <b>mow</b> 43:7 <b>mowed</b> 43:14,22 <hr/> <b>N</b> <hr/> <b>n</b> 2:1,1 3:1 <b>name</b> 31:5 <b>narrower</b> 16:14 <b>nature</b> 52:15 <b>necessarily</b> 41:21 <b>need</b> 25:25 26:1 56:14,15,18 <b>neither</b> 36:19 <b>neutral</b> 44:18 <b>new</b> 3:23,23 5:23 8:25 9:9 9:11,13,23 19:6 23:23 24:11,13,19,20 24:21,21,24,24 29:8,9 30:9 31:19 33:19,20 33:25 34:12 36:16,19,22,23 40:20 49:6,9 49:10 50:2,5,8 56:8,8 58:10 58:12,13 59:8 59:10,12 <b>nobodys</b> 8:21 <b>normally</b> 32:7 <b>note</b> 37:6 50:18 <b>noted</b> 17:9 33:21 34:14,22 <b>noticed</b> 61:4,5,9 <hr/> <b>O</b> <hr/> <b>o</b> 2:1 3:1 <b>obstacle</b> 27:18 27:19,23 <b>obtain</b> 14:24 15:1,23 17:25	27:13 39:9 48:4,6 58:16 59:20 <b>obtainability</b> 37:17 <b>obtainable</b> 3:14 10:18 37:3,8 37:15 62:7 <b>obtained</b> 4:22 9:24 13:13 15:15,25 16:3 16:7,13 17:4 22:9,19 23:8 26:17 27:15 28:5,11 30:8 31:19 34:15 36:9 37:4 46:22 49:23,25 55:20,21 56:14 56:17 58:14,18 61:24 <b>obtaining</b> 7:19 10:12 16:24 17:1,2,8 30:20 35:20 36:5,14 38:12 39:12 40:6 41:6 43:19,22 46:2 48:8 49:13,18 53:7,8,9 57:21 <b>obvious</b> 28:13 54:5 <b>obviously</b> 17:10 42:16 <b>occupation</b> 30:13 37:14 42:17 55:13 <b>offense</b> 24:13,14 25:15 61:20 <b>offered</b> 3:17 <b>offering</b> 12:22 <b>office</b> 8:22 20:10 <b>officer</b> 22:25 <b>officers</b> 22:24 <b>official</b> 18:15 19:2,9,19 24:15 29:17,18
---	---	--	---	---

48:21,22,25 49:3 59:2 <b>officials</b> 5:5 24:25 33:13 <b>oh</b> 45:10 61:10 <b>okay</b> 15:3 18:5 31:11 37:24 61:17 <b>once</b> 4:14 25:9 53:5 <b>open</b> 13:6 17:6 <b>opened</b> 23:18 <b>opening</b> 37:21 <b>operate</b> 10:2 35:21 <b>operations</b> 35:7 35:10 <b>opinion</b> 19:5 <b>opportunity</b> 25:5 <b>opposite</b> 25:20 <b>optimal</b> 21:17 <b>oral</b> 1:11 2:2,5 3:7 26:10 <b>order</b> 5:17 27:8 27:8 35:9 43:25 45:21 46:11 59:21 <b>ordinary</b> 31:16 <b>organization</b> 14:7 <b>organized</b> 42:11 42:12,23 <b>ought</b> 17:20 <b>overfederalizi...</b> 25:19	17:14 <b>particular</b> 6:1 13:13 37:14 43:25 44:5 48:6 54:7 60:22 <b>particularized</b> 31:18 <b>parties</b> 11:23 <b>party</b> 13:2 <b>partys</b> 8:20 <b>passing</b> 24:20 <b>patent</b> 4:12 10:16,17 37:25 <b>paul</b> 1:15 2:3,9 3:7 57:12 <b>pay</b> 6:22 18:10 19:20 20:17 <b>paying</b> 7:18 <b>pays</b> 18:6 <b>pejorative</b> 31:13 <b>penal</b> 9:16 58:12 58:13 <b>people</b> 8:4 25:22 30:13,15,16 31:15 51:22 60:21 <b>percent</b> 41:3,6 41:10 <b>perfectly</b> 19:24 <b>perform</b> 51:16 <b>performance</b> 31:16 <b>person</b> 6:21,23 6:23 7:14,19 9:18 11:16,17 11:19 12:7,8,8 12:20,22 13:24 14:8,11,12 18:4,4 20:17 20:19 23:9 28:22 29:16 30:12 31:22 32:3 33:8 35:1 36:10 43:19 44:15 46:9 53:16 55:1	56:24 57:6 60:9 <b>personal</b> 53:13 <b>persons</b> 31:6 34:7 35:1 41:1 42:4,17,17 53:10 <b>petitioner</b> 1:4,16 2:4,10 3:8 5:16 30:20 32:24 37:21 39:8,22 43:3 45:4,19 46:23 47:2 48:11,14 50:18 52:23 57:13 <b>petitioners</b> 42:21 <b>phrase</b> 23:12,14 <b>physical</b> 37:20 <b>physically</b> 37:22 38:1,4 <b>pick</b> 24:8 <b>piece</b> 15:11 <b>pieces</b> 40:9 <b>place</b> 8:9 59:10 <b>places</b> 34:13 36:25 59:4 <b>plead</b> 5:12 <b>please</b> 3:10 26:13 <b>plumber</b> 43:4,4 43:24 <b>plumbers</b> 43:6 <b>pocket</b> 22:3 27:9 <b>point</b> 5:1 21:23 22:1 24:10,11 24:12 28:14 39:1 49:19,20 50:1,3 59:10 60:3 <b>pointing</b> 57:16 <b>points</b> 29:7 57:15 58:10 <b>poker</b> 4:11 13:17 18:16 58:6 <b>policies</b> 8:10	58:2 <b>policy</b> 5:6 <b>political</b> 25:8 <b>position</b> 6:18 8:2 21:5 37:12 42:24 54:6 <b>positive</b> 44:6 46:21 <b>possessed</b> 60:8 60:11 <b>possession</b> 39:4 39:15 <b>possibility</b> 57:25 <b>possible</b> 4:22 57:20 <b>postman</b> 29:17 <b>potential</b> 20:23 <b>potentially</b> 21:15 <b>practically</b> 5:22 <b>practice</b> 5:23 <b>precedence</b> 3:21 <b>precedes</b> 58:4 <b>pressure</b> 12:20 13:8,12 <b>pretrial</b> 25:3,4 <b>prevail</b> 54:22 <b>prevented</b> 52:22 <b>principal</b> 14:2 <b>principally</b> 17:8 <b>private</b> 19:7 28:10 29:18 53:13 <b>pro</b> 61:3 <b>probably</b> 5:22 13:10 41:15 60:8 <b>problem</b> 23:5 25:19 27:21 28:13 29:12 36:16 39:11 43:18 58:3 <b>problematic</b> 9:25 <b>process</b> 21:2 26:3 55:9 <b>progeny</b> 60:15	<b>program</b> 8:6 <b>prohibit</b> 24:7 <b>prohibited</b> 24:5 <b>prohibition</b> 3:16 10:11 24:8,22 24:22 <b>proper</b> 44:15 <b>properly</b> 51:18 <b>property</b> 3:13 3:15,18 4:4,16 6:14 7:17 9:19 9:24 10:1,5,7,8 10:10,12,17 11:12,18,19,20 12:9,23 13:21 14:17,24 15:2 15:3,19 16:1,4 16:6,8,10,11 16:16 17:12,17 17:19,19,21,25 18:2 20:25 21:22,25 22:4 22:7,11,12,19 23:7 26:17,21 26:23 27:1,2 27:15,20 28:4 28:5,6,7,9,10 28:11,16,18,25 29:14 30:4,7,7 30:11,14,20 31:6,7,18,22 31:23 32:3,5,7 32:8 33:17 34:5,7,8,12,13 34:17,18,19,20 34:22 35:1 36:4,14,17,18 36:18,20,24 37:2,4,8,8,11 37:11,12,15,17 37:20,22,25,25 38:2,8,17,19 38:20 39:18,19 39:21 40:2,7,8 40:9,10 41:11 41:18 42:6,16 42:19 45:15,16
<b>P</b>				
<b>p</b> 3:1 <b>page</b> 2:2 <b>paid</b> 4:25 5:8 8:14 21:18 44:9 57:22 <b>parameters</b> 32:15 <b>part</b> 6:6 8:4 9:17 14:25 15:7,23				

46:2,7,9,22 48:8,12,16 49:11,14,18,21 49:21,23,24,24 50:10,10 51:8 51:14,15 52:3 52:8,13,15,15 52:19 53:7,12 53:13,13 54:2 54:14,16 55:5 55:12,13,15,18 55:18,19,22,23 55:23 56:3,9 56:11,13,15,17 56:24 57:1,6,8 58:6,7,11,14 58:16 59:5,14 59:21,22 60:6 60:24 61:23 62:7,9 <b>prosecute</b> 25:24 57:25 <b>prosecuted</b> 4:24 61:23 <b>prosecution</b> 22:10 25:11 57:19 <b>prosecutions</b> 42:23 57:20 <b>prosecutor</b> 3:18 <b>prosecutors</b> 25:12,14,23 <b>protect</b> 26:2 <b>protesters</b> 17:3 35:15 <b>prove</b> 4:24 6:8 7:17 21:16 27:24 45:1 <b>proved</b> 8:13 <b>provide</b> 35:17 35:19 <b>provides</b> 42:25 <b>providing</b> 43:1 43:16 <b>provision</b> 38:5 38:21 55:25 <b>provisions</b> 34:23	38:9 54:25 55:25 <b>proxy</b> 20:4 <b>public</b> 24:15 25:7,16,21 29:17 33:12 <b>pull</b> 60:18 <b>purposes</b> 17:20 17:25 55:15 58:11 <b>pursuit</b> 55:12 <b>put</b> 13:8,12 14:18 18:5 27:9 31:5,5 33:4 60:2 62:8 <b>putting</b> 18:16 <hr/> <b>Q</b> <hr/> <b>qualification</b> 22:16,17 <b>qualified</b> 34:20 <b>qualify</b> 4:16 <b>quality</b> 5:10 <b>question</b> 29:23 30:7,18,25 39:3 41:6,9 46:6 49:22 54:11,21 <b>questions</b> 49:25 57:9 <b>quite</b> 5:24 <hr/> <b>R</b> <hr/> <b>r</b> 3:1 <b>racketeer</b> 9:14 <b>racketeering</b> 42:10 <b>reach</b> 49:5 <b>reaching</b> 29:3 <b>read</b> 23:14,15 37:16 38:2 <b>real</b> 5:18 9:21 13:20,20,20,21 14:15,16 26:4 36:2 42:22 <b>really</b> 5:24 16:2 20:7 21:2	24:16 25:6 37:9 40:13 47:1 52:11,12 52:14 58:20,21 60:4 61:17 <b>reason</b> 5:21 7:1 7:9 10:23 16:3 21:13 27:6 37:1 38:2 47:6 <b>reasonable</b> 41:9 <b>rebuttal</b> 2:8 57:12,15 <b>received</b> 5:9 13:15 21:21 <b>recognized</b> 4:10 4:13 49:4 <b>recommend</b> 18:6,12 19:19 29:25 30:1 44:17 <b>recommendat...</b> 6:11 14:12,21 15:12,12 18:5 19:11 20:9,11 20:15,18 21:8 21:9 22:1,24 28:15,16 30:22 30:23 31:3 33:1 39:24 40:1,4 44:3,5,6 44:6,10,16 45:6 46:2,21 46:24 47:3,15 47:18,20,23 48:2,5,6,6 53:2 54:6 <b>recommendat...</b> 20:13 <b>reconcile</b> 29:3,5 <b>record</b> 41:22 44:23 45:13,14 45:17 <b>redundancy</b> 56:18 <b>referenced</b> 4:12 <b>refers</b> 59:8 <b>regard</b> 55:24	<b>reject</b> 60:3 <b>related</b> 3:12 <b>relationship</b> 11:15,22 <b>relationships</b> 11:24 <b>relevant</b> 59:4 <b>relied</b> 58:24 <b>relying</b> 58:23 <b>remainder</b> 26:7 <b>repeatedly</b> 28:8 39:18 <b>reply</b> 10:5 37:23 <b>require</b> 28:21 <b>requirement</b> 12:7 22:11 <b>requires</b> 8:25 9:5 37:4 56:16 60:7 <b>reserve</b> 26:7 54:11 <b>reserved</b> 57:20 <b>respect</b> 20:1 23:17 <b>respondent</b> 1:19 2:7 26:11 <b>response</b> 42:7 <b>responses</b> 41:17 <b>restaurant</b> 35:19 <b>restrict</b> 9:5 <b>result</b> 18:17 24:2 28:2 43:25 45:7 54:20 <b>return</b> 22:13 <b>returned</b> 4:1 <b>revenue</b> 30:16 45:8 <b>rid</b> 57:18 <b>right</b> 3:19 7:15 9:3 10:17 11:5 11:25 13:4,21 13:24 14:6 16:17,18 20:25 21:23 22:8,15 22:18,24 23:1	27:2 32:14 35:20,21 36:14 36:14 37:13,13 38:18 39:13,25 40:1,23 42:17 43:10,10 45:3 45:16 46:8 49:18 52:5,10 52:16,18 53:10 54:18 57:7 58:6 <b>rights</b> 16:11 20:3 45:15 <b>road</b> 6:4 <b>rob</b> 12:4 <b>robbery</b> 24:7 50:12 <b>roberts</b> 3:3 19:16 20:12 26:8 50:1,14 52:17 53:3 57:10 62:11 <b>role</b> 21:1 <b>roots</b> 17:11,16 <b>roughly</b> 21:5 <b>routinely</b> 60:20 <b>rule</b> 15:25 <b>rulings</b> 25:4,4 <b>run</b> 14:4 35:21 37:13 57:4 <b>running</b> 30:11 31:22 34:4,6 42:19 45:24 49:11 52:9,12 55:11 56:10,23 57:1 <b>runs</b> 6:18 <hr/> <b>S</b> <hr/> <b>s</b> 2:1 3:1 53:15 <b>sale</b> 18:16 <b>sarah</b> 1:17 2:6 26:10 <b>sat</b> 61:10 <b>satisfied</b> 14:20 <b>satisfies</b> 22:11 <b>saying</b> 6:16,25
---	--	--	--	--

8:16,21 10:6 22:14 27:22,23 28:1 35:14 37:24 38:11,22 42:2 44:13 47:2 55:17,18 <b>says</b> 10:22 11:11 18:10 26:19,19 28:23 30:1 37:19 47:22 59:19 60:18 <b>scalia</b> 12:24 13:4 18:3,9,13 32:4 32:16,20 33:3 33:9,15,24 36:15 37:7 38:6,12,15 44:7,14,25 45:10 47:4,11 49:13,17 51:3 51:9,13,22 54:23 55:4,7 55:14,22 <b>scenario</b> 45:19 <b>scheidler</b> 16:1 17:1 23:13 35:4 36:3 51:12,20 52:2 58:25 <b>scheme</b> 5:4 8:5 <b>scope</b> 3:14,16 55:10 58:11 <b>second</b> 15:7,11 17:14 23:16 34:16 42:7 60:14 61:4,8,8 62:3 <b>secretary</b> 29:24 30:4 31:2 41:10 <b>secrets</b> 37:24 <b>section</b> 34:23,23 53:20 54:12 55:9 <b>sections</b> 34:25 <b>sector</b> 19:8 <b>see</b> 6:5,5 17:16	29:12 37:23 40:23 44:8 45:10,10 <b>seized</b> 58:5 <b>sekhar</b> 1:3 3:4 <b>sell</b> 10:23 11:4 22:22 <b>sellable</b> 10:18 <b>selling</b> 32:13 <b>sense</b> 15:10,17 20:3 32:12 34:20 43:2 49:6 51:20 <b>separate</b> 30:6 36:7 49:22,25 50:4,7,7 <b>separately</b> 37:3 <b>serious</b> 21:7 <b>serve</b> 8:18 17:5 17:6 <b>service</b> 35:18,20 43:16 44:2 54:7 <b>services</b> 5:14 8:21 15:13 17:24 22:13 28:18 29:5,8 43:1,25 52:5 52:11 57:19 59:13 <b>shes</b> 59:1 <b>short</b> 34:2,5,21 <b>shortcut</b> 5:12 <b>shouldnt</b> 57:2 <b>shout</b> 12:3 <b>shouting</b> 12:4 <b>show</b> 7:19 <b>shut</b> 35:10,25 <b>side</b> 18:21 <b>simple</b> 46:16 <b>simpler</b> 27:7 46:7 <b>simply</b> 21:24 60:9 <b>single</b> 6:20 41:20 44:23 45:12	<b>sitting</b> 61:6,15 <b>situation</b> 24:16 <b>situations</b> 11:14 <b>sloppy</b> 62:8 <b>sly</b> 18:17 <b>sold</b> 17:13 <b>solicitor</b> 1:17 <b>somebody</b> 6:17 18:9,20 23:8 28:22 31:3 32:10 40:23 54:7 <b>somebodys</b> 17:23 18:25 36:21 <b>someones</b> 30:19 39:4 <b>song</b> 41:21 <b>sorry</b> 22:20 47:25 <b>sort</b> 5:4,12 7:20 7:20 8:17 13:8 14:2,4,23 15:2 15:4 16:3,20 18:20 20:8 25:8 37:23 41:17,19 47:1 51:19 56:20 59:20 60:2 61:3 <b>sotomayor</b> 14:22 15:22,24 16:15,18,23 39:2,11,14 47:19,25 59:25 60:12 61:2,10 61:17 <b>sought</b> 22:23 <b>sounds</b> 5:24 29:11 31:13 40:21 <b>source</b> 30:15 51:19 57:5 <b>speaks</b> 29:14 <b>special</b> 11:15 56:15 <b>speculating</b>	53:15 <b>spent</b> 26:25 <b>squarely</b> 8:20 <b>stand</b> 4:8 <b>start</b> 26:14 36:1 <b>started</b> 57:16 <b>starts</b> 47:24 <b>state</b> 3:22,23 6:2 8:23 9:4,9 18:14 19:6,14 21:1,1 23:23 24:17,19,19,24 25:6,9,10,22 25:23,24 26:1 27:24 28:2 29:8 30:9 33:20 45:20,22 49:7 50:15,22 56:8 <b>states</b> 1:1,6,12 3:5 31:2,16 <b>statute</b> 14:25 15:8 16:5,6 23:15 24:13 28:19,25 29:14 36:25 37:3 38:24,25 56:4 <b>statutes</b> 59:6,6 <b>steal</b> 17:23 59:22 <b>stenographer</b> 29:24 <b>step</b> 6:4 25:25 <b>stevens</b> 58:24 <b>sticks</b> 39:20 <b>stock</b> 20:4,4 <b>strange</b> 15:2 <b>stream</b> 30:16 45:8 <b>street</b> 25:12 40:11,14,14,16 <b>stronger</b> 54:5 <b>structurally</b> 16:5 <b>submit</b> 60:9 <b>submitted</b> 62:12 62:14	<b>subsequent</b> 6:4 <b>substance</b> 30:23 36:13 39:23 44:4 46:1 48:12 52:24 53:2 <b>substantial</b> 21:9 <b>suchandsuch</b> 31:5 <b>sudden</b> 25:10 <b>suddenly</b> 29:13 <b>suggesting</b> 14:4 35:7 <b>suggests</b> 17:17 <b>support</b> 8:10 <b>suppose</b> 18:3,3 21:5 27:5 29:23 <b>supposed</b> 28:24 <b>supreme</b> 1:1,12 <b>sure</b> 14:3 21:5 37:7 58:19 <b>sweeps</b> 31:15 <hr/> <b>T</b> <hr/> <b>t</b> 2:1,1 <b>take</b> 5:12 16:15 21:19 22:23,24 23:6,19,22 25:14 28:15 32:24 35:17 40:25 41:2 43:22,23 44:2 48:14,15 51:20 52:2,24,25 56:16 58:20 60:13 <b>taken</b> 11:12 23:2 34:10,12,15 36:18,21 40:11 40:13,16 43:9 <b>takes</b> 41:10 <b>talked</b> 46:24 <b>talking</b> 16:6,7 16:12 17:11 23:12 25:20 32:16,17 55:14
---	--	---	--	---



58:13	<b>theories</b> 14:17	13:3,5,6,16,17	19:10	42:10,11 44:1
<b>talks</b> 16:10	46:18,18	13:19 14:1	<b>time</b> 12:3 26:7	44:4 45:19,23
<b>tangible</b> 10:7	<b>theory</b> 4:24 8:7	16:3,7,13	28:22 29:14	45:25 46:1,19
43:1,8 46:25	22:23 23:5,6	17:14 18:17,22	30:19 41:3,7	47:3,9,13 48:4
<b>target</b> 35:15	27:11 43:20	19:12 20:2	41:11 57:18	48:5,11,14,15
<b>targeted</b> 35:8,24	46:11,15,15,16	22:8,15 23:14	<b>times</b> 38:24	51:8,10 52:24
42:10	48:8 51:5	25:21 27:17,19	<b>today</b> 7:5 27:16	52:25 53:1
<b>tease</b> 15:18	60:24	30:4 31:8 32:8	60:23	<b>tuesday</b> 1:9
<b>technical</b> 29:12	<b>theres</b> 6:4,20 7:1	32:8 34:1,4	<b>totally</b> 44:18	<b>turn</b> 23:6,19
<b>tell</b> 12:19 34:10	7:19 12:11	35:23 36:6	<b>track</b> 42:7	<b>twice</b> 49:21
35:9 60:21	13:5 18:23	39:1 40:19,22	<b>trademark</b>	<b>two</b> 11:23,24
<b>telling</b> 41:2	22:22 23:24	42:24 44:11	45:16	29:7 34:1,13
60:14,23	24:1,1 27:17	47:5,8,8,19	<b>traditional</b> 8:22	36:6 41:17,17
<b>term</b> 33:10	27:19,20,20	48:3,7 49:8,23	9:15 10:20	49:25 57:20
54:16	36:9 47:6 53:8	49:24 50:8,18	51:20	61:4
<b>terms</b> 10:11	53:8 57:24	50:22 51:3,12	<b>transcription</b>	<b>twofold</b> 5:22
15:1 16:2	<b>theyre</b> 4:14 7:13	51:17,20 52:2	30:2	16:4
40:20 58:22	8:16 11:9 14:1	52:20 54:10,15	<b>transfer</b> 19:21	<b>type</b> 27:1 28:10
<b>terrible</b> 6:23	20:8,8 39:20	54:21 55:2,22	22:22	35:18,19
<b>thank</b> 26:8,12	62:6	55:23 58:8,14	<b>transferability</b>	<b>types</b> 52:3
57:10,14 62:10	<b>thing</b> 5:7 6:7	59:13 60:4,12	19:17	<b>typical</b> 25:21
62:11	8:22 10:13	61:10,22 62:3	<b>transferable</b>	<b>typing</b> 29:25
<b>thats</b> 5:17 6:6	11:18 12:2	<b>thinking</b> 41:9	10:13,18 18:1	<b>typist</b> 29:24
7:4,6,13 8:21	23:13,16,17	<b>third</b> 8:19 13:2	19:18,24 20:3	
9:7,24 10:13	25:8 26:1	<b>thought</b> 19:6	20:19,24	<hr/> <b>U</b> <hr/>
11:24 12:9	28:23,24 31:4	<b>threat</b> 7:24 9:1,5	<b>transferred</b>	<b>u</b> 53:15
13:3,10,18	33:13 36:24	9:17,18 13:22	15:16 17:13	<b>ultimate</b> 6:3
14:1,13 16:5,7	37:9,18 38:8	27:7 29:15	62:2	<b>ultimately</b> 4:20
17:8 19:2	38:16 39:19	31:4 46:11	<b>treated</b> 54:10,14	5:16 9:24
20:18 21:20	43:6,15 44:1	60:17,21	<b>tried</b> 43:7 45:5	50:21
22:3,8,9,14,15	44:23 45:12	<b>threaten</b> 10:25	<b>tropiano</b> 60:15	<b>unanimous</b>
22:16 24:2	46:25 54:2,7	12:2 14:8,11	61:2,25	19:14
26:25 27:1,9	54:14,15 57:23	58:17,20,20,21	<b>true</b> 29:16 36:22	<b>unauthorized</b>
27:14,22 28:4	58:18 61:8,15	<b>threatened</b> 21:6	44:25 49:16,17	41:20 44:23
28:10,10,18	<b>things</b> 4:13 7:4	43:3	50:6 51:25	<b>understand</b>
29:9,16 30:5	8:12 10:19	<b>threatening</b>	54:9 55:19	11:22 15:10
33:22 35:13	15:3 18:18	7:13	56:11	21:5 30:24
36:15 37:11	28:21 30:14	<b>threatens</b> 6:23	<b>try</b> 32:1 36:6	41:25 56:19
38:10,14 39:11	36:6 37:25	28:22	44:5	<b>understanding</b>
39:15 40:4,5	38:3 56:14	<b>threats</b> 9:20	<b>trying</b> 14:23,23	3:14 9:13
41:21 42:1	61:1,4 62:7	31:25,25 35:5	15:19 18:25	20:22
44:3,12,25	<b>think</b> 4:6,8,10	35:8,25	19:4 30:21	<b>unissued</b> 4:12
45:11 46:22	4:23 5:1,21 6:6	<b>threeword</b>	32:24 33:23	<b>united</b> 1:1,6,12
47:24 49:17	6:8 7:6 8:2	23:12	35:16,17 36:10	3:4 31:2,15
50:6 52:14	9:21 10:19	<b>throw</b> 29:13	39:22,23,24	<b>unrecognizable</b>
54:3,9,21	11:2,21 12:5	<b>throwing</b> 32:6	40:2,3,21,24	55:6
56:12 59:19	12:12,13,19	<b>thumbs</b> 19:10	40:24 41:1	<b>urged</b> 24:25

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