

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	THOMAS E. MOSELEY, ESQ.	
4	On behalf of the Petitioner	3
5	CURTIS E. GANNON, ESQ.	
6	On behalf of the Respondent	23
7	REBUTTAL ARGUMENT OF	
8	THOMAS E. MOSELEY, ESQ.	
9	On behalf of the Petitioner	50
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
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10
11
12
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14
15
16
17
18
19
20
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22
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Nijhawan v. Holder.

Mr. Moseley.

ORAL ARGUMENT OF THOMAS E. MOSELEY

ON BEHALF OF THE PETITIONER

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

At issue in this case is an aggravated felony definition, 8 U.S.C. 1101(a)(43)(M)(i), one that serves both as a ground of deportation and as an integral part of a Federal criminal statute.

For the Court's convenient reference, because I suspect we will return to this and the other definitions, I would refer the Court to the statutory appendix in the government's brief: 3a gives (M)(i); 6a gives the conviction requirement; and 7a to 8a gives the underlying criminal statute in which this aggravated felony definition forms an integral part.

Now, Congress has required -- for deportation, Congress has required conviction of this defined offense, a definition that says absolutely nothing about the word "tether" utilized by the Third Circuit below, and a definition begins with a

1 restrictive clause, "that," to require conviction of
2 both a fraud and deceit element and also the loss amount
3 as an integral part of this definition.

4 Since Congress required conviction, the
5 time-honored categorical approach really should be the
6 governing standard, and I submit that there's nothing in
7 the plain language of the statute, the underlying
8 statute enacted by Congress, to oust that time-honored
9 approach, which I submit is perhaps on a par as being
10 presumptively applicable, similarly to the -- to the
11 stay standards that this Court discussed very recently
12 in the Nken case.

13 JUSTICE SOUTER: Another --

14 JUSTICE KENNEDY: Under the time-honored --

15 JUSTICE SOUTER: No, please.

16 JUSTICE KENNEDY: Under the time-honored
17 approach, if the jury verdict necessarily -- or not
18 necessarily, but did in fact refer to the amount
19 involved and it was over \$10,000, would that be part of
20 the time-honored approach and then the statute would be
21 fulfilled?

22 MR. MOSELEY: I -- under those
23 circumstances, Justice Kennedy, yes. But here the jury
24 was specifically instructed that they did not have to
25 make any finding with respect to loss in this case.

1 JUSTICE KENNEDY: In that connection, at
2 some point in the argument -- and you may be a little
3 early because you're talking about the statute -- I'd
4 like to know either anecdotally from your experience or
5 -- or because it's written somewhere, how often do
6 juries give special verdicts? It actually applies in
7 the second case we're to hear as well. And has that
8 changed in the light of -- of Apprendi? In -- in my
9 experience, we just didn't know many of the features of
10 the crime from -- from the jury verdict, and I just
11 would like to know if that's changed in this day and
12 age.

13 MR. MOSELEY: Well, I -- I --

14 JUSTICE KENNEDY: But you may reach that
15 after you've talked about the statute.

16 MR. MOSELEY: Yes, but let me -- certainly
17 among the State statutes that we cite, the State
18 statutes where it's clear that a loss amount is an
19 element, the jury is going to be instructed they have to
20 return that, and they do. The -- the special verdict
21 opportunity here is in effect, I would submit, a kind of
22 lifeline, if you will, that we're giving to the
23 government in these -- in these more general fraud
24 statutes, where the government has that -- certainly has
25 that opportunity or that option to do. But there

1 certainly have been -- and I know we cite them in our
2 brief -- cases --

3 JUSTICE ALITO: And if you -- if you do
4 extend that lifeline to the government, aren't you
5 conceding that the amount of the loss is not an element
6 of the offense, and aren't you conceding that it is not
7 necessary for the loss amount to be an element of the
8 offense?

9 MR. MOSELEY: No, Justice Alito. What I am
10 saying is that this statute -- and again, (M)(i) was
11 enacted as part of a number of criminal statutes --
12 excuse me -- as a number of provisions that were
13 addressed to white collar offenses, of which this is
14 just one, and it also encompasses the State -- it also
15 encompasses the State statutes where this clearly is --

16 JUSTICE ALITO: Well, let me give you a
17 concrete example. Let's say it's a Federal mail fraud
18 case. Let's say there are two Federal mail fraud cases,
19 and you don't have to prove the amount of loss in order
20 to convict under the mail fraud statute. In the first
21 case, after the jury returns a guilty verdict they also
22 return -- or together with that they answer a special
23 interrogatory, and they say the loss exceeded \$10,000.
24 In the second case, the defendant pleads guilty and
25 admits during the plea colloquy that the amount is more

1 than \$10,000. Would there be a problem in those cases?

2 MR. MOSELEY: In those cases, no. In those
3 cases, that would have satisfied the traditional
4 categorical approach.

5 JUSTICE GINSBURG: In this --

6 JUSTICE ALITO: And then --

7 JUSTICE GINSBURG: In this case, how many of
8 the defendants were alien? You're -- the jury is given
9 a charge that covers all of the defendants. They're all
10 charged with the same crime. How many of them were
11 aliens?

12 MR. MOSELEY: I believe two in addition to
13 Mr. Nijhawan, Justice Ginsburg. I believe two or three
14 more were. This case -- this case involved roughly 15
15 defendants. There were only five who went to trial.
16 The number who -- the number who are aliens, in addition
17 to Mr. Nijhawan, I believe were two.

18 JUSTICE GINSBURG: Then the judge wouldn't
19 distinguish -- it would not be relevant for the -- for
20 the defendants who were not aliens because it would have
21 no consequences for them. So why should the judge --
22 even if the question could be asked, why should the
23 judge -- the judge takes a position: It's not an
24 element of the crime. Therefore, I'm not going to
25 charge it, and I'm not going to confuse the jury by

1 saying as to the defendants who are aliens, you have to
2 find the amount.

3 MR. MOSELEY: Well, under -- under those --
4 under those circumstances, Justice Ginsburg, Mr.
5 Nijhawan actually himself had asked for a charge with --
6 with respect to loss. I don't think -- I don't think
7 there's an issue of jury confusion here, and indeed
8 under -- under -- ironically under this Court's -- well,
9 this would have been a situation in which a request was
10 -- could have been made. I don't think there would have
11 been -- there certainly wouldn't have been jury
12 confusion to have requested it here.

13 But I think you have to put this in -- in
14 the larger picture of a statute of a set of aggravated
15 felony definitions that were enacted.

16 JUSTICE GINSBURG: But before you go on to
17 that, we're talking about (M)(i). It's coupled with
18 another provision that's an offense that is described in
19 section 21 -- 7201 of Title 26 -- that's tax evasion --
20 in which the revenue loss to the government exceeds
21 10,000. So it's the same "in which" construction, and
22 there's no requirement -- to convict someone of tax
23 evasion, the jury does not have to find the deficiency.

24 MR. MOSELEY: Well, actually, Justice
25 Ginsburg, under this Court's decision in Boulware, a

1 deficiency is indeed a necessary element of that --

2 JUSTICE GINSBURG: A deficiency, but not the
3 amount of the deficiency.

4 MR. MOSELEY: But -- no. A -- a deficiency
5 is a necessary element of that offense. That's --
6 that's where, for example, the Babaisakov decision got
7 that point flatly wrong. And this is, I think, the
8 classic --

9 JUSTICE GINSBURG: But is the amount --
10 there's a deficiency the jury has to find in order to
11 find tax evasion. There is a deficiency. Does it have
12 to find that the revenue loss to the government exceeds
13 \$10,000?

14 MR. MOSELEY: No, it doesn't have to find
15 that, but it may. And this is a classic example of the
16 application of the modified categorical approach, where
17 this statute sweeps broadly to include both loss amounts
18 or, in this case, revenue loss amounts that would exceed
19 \$10,000 and those that would be less than \$10,000. Most
20 of these cases, most of the tax cases, as the
21 government's own materials that we cite indicate, are
22 resolved by guilty pleas with respect to the -- where
23 those amounts are -- are designated.

24 And I think it's important here to realize
25 that by pairing these two statutes, by pairing these two

1 provisions, (M)(i) and (M)(ii), Congress in effect, I
2 submit, sent the signal with that language in (M)(ii)
3 that we're talking about the kind -- we're talking about
4 the application of -- of the modified categorical --

5 JUSTICE ALITO: Now, what is the -- what is
6 the difference between a defendant's saying, during a
7 guilty plea colloquy, the loss was -- I admit the loss
8 was more than \$10,000; and the defendant's agreeing for
9 sentencing purposes that the loss was more than \$10,000?

10 MR. MOSELEY: Because, Justice Alito, in the
11 sentencing context we're truly dealing with a
12 post-verdict situation where the government in terms of
13 having to prove loss is up against a far lesser amount
14 -- a far more liberal standard, a preponderance of the
15 evidence standard. And the defendant under those
16 circumstances --

17 JUSTICE SOUTER: Well, if he's admitting it,
18 what -- what does the standard of the evidence matter?

19 MR. MOSELEY: He's admitting it here,
20 Justice Souter, under these circumstances. He's
21 admitting it here only in the context of a resolution of
22 the sentencing issue. If you go back to the --

23 JUSTICE SOUTER: Well, he's not saying, I
24 admit to a degree of preponderance of the evidence that
25 it was over 10,000. He's saying, period, over 10,000.

1 The burden of proof, the standard of proof doesn't
2 matter.

3 MR. MOSELEY: No, but he's -- but he's doing
4 this in the context of -- of resolving -- of resolving a
5 disputed issue with respect --

6 JUSTICE SOUTER: And he definitively
7 resolves it by admission.

8 MR. MOSELEY: But he does so certainly in
9 the context here of reserving -- of reserving his right
10 to contest that and to make the arguments that we're
11 making here that he was --

12 JUSTICE SOUTER: No, you're -- I -- I
13 understand the facts of this case. I'm -- I'm -- I was
14 commenting on your answer to Justice Alito's question,
15 and it would seem to me that the answer to the question
16 is there is no difference.

17 MR. MOSELEY: No, I submit -- I submit that
18 there -- there really is a -- a profound difference
19 under the circumstances of someone being in a situation
20 before -- before conviction, and then someone being in a
21 postconviction situation. And then I think we should
22 come back in terms -- we should come back to the
23 underlying -- to the underlying requirement that the
24 person had been -- the person under the statute be
25 convicted of the loss.

1 JUSTICE SOUTER: All right, that -- that
2 really gets to the question that I was going to ask, and
3 that is, I don't see how the modified categorical
4 approach is something that you could admit would be
5 sufficient because, as I understand your argument -- and
6 it is in part an argument based on sort of standard
7 grammatical construction -- you're saying that in the
8 definition "The term 'aggravated felony' means an
9 offense that" -- and you emphasize the "that," the
10 restrictive nature of the "that" clause -- "involves
11 fraud or deceit in which the loss exceeds \$10,000."

12 If I understand your -- your restrictive clause
13 argument, the definition of the offense has got to
14 include the element of exceeding \$10,000 or it does not
15 satisfy your, the -- it does not satisfy the standard
16 that you were arguing for based on the restrictive
17 clause. So it seems to me that you've got to go the
18 whole hog or you get nothing, and the whole hog is that
19 it's got to be an element of the offense that the --
20 that the loss exceed 10,000. Am I wrong?

21 MR. MOSELEY: I -- I don't think
22 necessarily. Well, under these circumstances, Justice
23 Souter, what I would say is that there may be statutes
24 -- there may be statutes in which -- and there are
25 statutes, there are State statutes, where you have a

1 range -- where you have a range of conduct that may
2 include 10,000, may not include \$10,000, and the
3 modified categorical approach would apply under those
4 circumstances.

5 JUSTICE SOUTER: Okay, how about this one?
6 You're -- you're arguing based on this statute and you
7 make an argument based on the restrictive nature of a
8 "that" modifying clause, and if you're going to make the
9 restrictive clause argument, it seems to me you've got
10 to go the whole hog and say the element of the offense
11 has got to include the loss in excess of 10,000.

12 MR. MOSELEY: Certainly if it does, then --
13 then under the statutes involved here we would prevail
14 --

15 JUSTICE SOUTER: Well, yes, you would
16 prevail, but you would prevail, it seems to me, at the
17 -- at the expense of this objection, and the government
18 makes it. There are very, very few fraud and deceit
19 statutes that define the offense by reference to a loss
20 in excess of 10,000. My recollection from the
21 government's brief is that they could come up with
22 three.

23 The -- the fact is also that this provision
24 was -- or the 10,000 figure was placed into the statute
25 at a time when Congress was trying to expand the

1 category of deportable, removable offenses, and it would
2 be passing strange in that context to define the offense
3 by -- by reference to a \$10,000 figure as an element of
4 the offense which would cut it down -- which would cut
5 the compass of the statute down to three offenses. What
6 is your response to that?

7 MR. MOSELEY: Well, I think the government
8 vastly understates the -- the statutory provisions that
9 -- that were involved here. Even if you look at the
10 State statutes, a majority of the State statutes, as I
11 think we make clear in our reply brief, there are a -- a
12 majority of States have statutes, generally the theft by
13 deception statutes and others which -- which have loss
14 thresholds that will get you over the --

15 JUSTICE SOUTER: But once you get into the
16 State statutes, you get into the further problem of --
17 of an utter and I would suppose unjust patchwork of
18 statutory reference to which this would apply. If you
19 -- if you steal the \$11,000 in State A, you get booted
20 out of the country. If you steal it across the State
21 line in State B, you stay home. I mean, I can't imagine
22 that Congress would have enacted that kind of a scheme.

23 MR. MOSELEY: But -- but what Congress has
24 done here is to provide for a uniform test, in effect.

25 JUSTICE SOUTER: A uniform test that

1 produces both unjust results and I would suppose
2 strangely unsatisfying results to a Congress that wanted
3 to expand the concept of deportable offense.

4 MR. MOSELEY: But what -- but what -- if I
5 can just go back for a moment, Justice Souter, to -- to
6 the original premise that it under all circumstances has
7 to be an element. There are -- there are certainly
8 statutes, even Federal statutes, for example, the theft
9 from Federal -- federally funded programs, which give
10 specific loss amounts of 5,000 or more, which would --
11 which -- excuse me -- which --

12 JUSTICE GINSBURG: But the problem is that
13 there's no pattern to it, the point that Justice Souter
14 made. If we take your position that there are a number
15 of statutes that mention amount, some as an element,
16 some like this, there seems to be no rhyme or reason to
17 when the amount is there and when it isn't, and then you
18 have these unequal results within the Federal system and
19 in the States. So when you -- when you think -- would
20 it make any sense for Congress to have drawn the line
21 that way if the State happens to make -- to have the "in
22 which" or if it just has fraud and deceit with no
23 amount?

24 MR. MOSELEY: What -- Justice Ginsburg, I
25 think what Congress did here was to create a uniform

1 test. You look -- a uniform test in the sense that you
2 look to see if -- if someone has been convicted of both
3 these requirements, fraud or deceit or the loss. That
4 -- that certainly produces far more uniformity than
5 having --

6 JUSTICE GINSBURG: But it's treating people
7 who do the identical thing differently.

8 MR. MOSELEY: But Congress chose under these
9 circumstances -- Congress chose under these
10 circumstances to -- swept broadly to -- swept broadly to
11 State statutes in addition -- in addition to
12 encompassing the Federal statute. And --

13 JUSTICE GINSBURG: But what you're saying is
14 you're not denying that people who commit the identical
15 theft or deceit or fraud will be treated differently
16 depending on whether the statute under which they're
17 convicted has this "in which" clause?

18 MR. MOSELEY: What I believe that I -- what
19 I believe that I am conceding is that it will
20 determine -- as with any of the criminal cases that lead
21 to deportation, it will determine -- it will be
22 determined on the basis of how the prosecution chooses
23 -- excuse me -- chooses to charge --

24 JUSTICE STEVENS: Mr. Moseley --

25 JUSTICE SCALIA: Can you --

1 JUSTICE STEVENS: -- can I get your help on
2 a question I really have difficulty with? It seems to
3 me as I read the text, it's easy to read it in one of
4 two ways: It involves fraud or deceit in which the loss
5 to the victim in fact exceeded \$10,000. In that case
6 you would lose. Or it could be read to say: involves
7 fraud or deceit in which an element of the crime is that
8 the victim or victims exceeded a loss of \$10,000. You'd
9 lose under that also because it is not an element of the
10 crime.

11 So you're relying on a modified approach,
12 and under your modified approach, what does the statute
13 say?

14 MR. MOSELEY: The -- the statute -- the
15 statute says that someone has to be convicted of -- of
16 both these aspects, both of --

17 JUSTICE STEVENS: But the statute doesn't
18 say anything about conviction.

19 MR. MOSELEY: If -- Justice Stevens, if you
20 read it in conjunction with the conviction
21 requirement -- in other words, to -- to be deportable --
22 to be deportable, that's in -- in 6a. Someone who has
23 been convicted of an aggravated felony is deportable;
24 and also someone who has been convicted of an aggravated
25 felony is subject to, under -- under 8 U.S.C. --

1 JUSTICE SCALIA: I don't -- I don't
2 understand how you squeeze your -- your modified
3 categorical approach, which seems to be a deus ex
4 machina which is intended to blunt the government's
5 argument that very few statutes would be covered by
6 this. I don't see how you get that out of the word
7 "convicted."

8 Are you convicted of an offense involving
9 more than \$10,000 if in a separate interrogatory the
10 jury, though it has no obligation in order to find you
11 guilty to say how much you stole, in an interrogatory
12 the jury says, oh, yes, the amount was more than
13 \$10,000? Does that cause you to have been convicted of
14 that? You're convicted of what you are charged with.
15 You're convicted of the elements of the offense, not --
16 not of whatever -- whatever the judge chooses to allow
17 the jury to be questioned about.

18 MR. MOSELEY: I think under those
19 circumstances, though, particularly if you look at the
20 statutes which make gradations of sentencing on the
21 basis of loss amounts, you clearly would be convicted of
22 that. It is -- because that's a necessary element
23 that's going to -- that's a necessary fact that's going
24 to have to be found to put you in a particular
25 sentencing range. So you -- so you definitely would be

1 -- you would be under those circumstances convicted of
2 -- of that amount.

3 But I think it's important to -- to
4 recognize what -- that Congress -- that Congress in
5 enacting the statute and in predicating removal upon
6 conviction used language that sharply distinguishes --
7 that is sharply distinguished from the position that the
8 government advocates here, that loss should be something
9 to be determined in separate -- in -- in separate
10 removal proceedings.

11 JUSTICE GINSBURG: Can we go back to my
12 question, which I don't think you've fully answered?
13 And that's the tax evasion situation. For any tax -- a
14 person who is charged with tax evasion who goes to trial
15 and is convicted, that person would not be deportable,
16 as I understand it under your reading, because the jury
17 is not asked to determine the amount of the deficiency.

18 MR. MOSELEY: Well, the jury -- under those
19 circumstances, it will depend upon how the government
20 chooses, Justice Ginsburg, to prosecute the case. And
21 if the government chooses to prosecute the case by
22 seeking a determination of the deficiency amount in a
23 jury charge, then -- then, yes -- then, yes, indeed,
24 they would. But, again, the vast majority of these
25 cases are resolved.

1 JUSTICE GINSBURG: I know. You told me that
2 most of them admit it at the plea stage. But going to
3 trial, these are parallel provisions, and it seems to me
4 they are meant to operate the same way.

5 MR. MOSELEY: Well, they -- they are -- they
6 are meant to operate the same way. But I think that
7 what we have here is a situation where the fact that
8 deficiency is a requirement and that deficiency in most
9 cases will be established by a plea, and that this is a
10 statute that sweeps broadly -- that this is a statute
11 that sweeps -- excuse me -- sweeps broadly to encompass
12 both a loss in excess of 10,000 -- a deficiency in
13 excess of 10,000 or a deficiency under 10,000.

14 JUSTICE ALITO: Did you have any authority
15 for the -- the idea that a trial judge in a criminal
16 case should ask the jury to answer a special
17 interrogatory regarding a question that has no bearing
18 on the conviction, but may have a bearing on the future
19 immigration status of the defendant, which is what
20 you're suggesting should be done in these tax cases?

21 MR. MOSELEY: What -- what I am suggesting
22 in the tax case is that it would be perfectly
23 appropriate for the government to seek such a special
24 interrogatory if they wish to establish the tax loss,
25 which is an element of the -- which is a necessary

1 component of the offense, if they wanted to establish it
2 -- if they wanted to establish it for -- for purposes --
3 for whatever purpose they wanted to establish it.

4 JUSTICE KENNEDY: But I can see that if
5 there are multiple defendants in the case, some of the
6 defendants might say that this is unnecessary, it's
7 inflammatory.

8 MR. MOSELEY: That's -- that's -- that --
9 again, that is going to depend on -- that's going to
10 depend upon how the government chooses to -- to
11 prosecute under these particular --

12 JUSTICE SCALIA: I might add --

13 JUSTICE KENNEDY: But all that just
14 underscores the fact that --

15 JUSTICE SCALIA: -- that your earlier --
16 your earlier assertion that it was necessary to -- that
17 -- that it would be necessary to get that -- that amount
18 specified for sentencing purposes is simply not true. I
19 mean, we didn't -- we didn't hold that the guidelines
20 are mandatory, and you -- that you need a -- a jury
21 determination. We've said they're discretionary.

22 MR. MOSELEY: No, I --

23 JUSTICE SCALIA: So if you don't have a jury
24 determination, you can still sentence on the basis of
25 the amount taken, even though that was not found by the

1 jury.

2 MR. MOSELEY: I -- I understand. But my --
3 my point, Justice Scalia, on this one is that -- on
4 (M)(ii) is that it is -- it is a statute in which -- in
5 which loss can or is required to be shown -- some
6 deficiency is required to be shown, and this may -- and
7 this may well be done by the modified -- the modified
8 categorical approach, particularly in -- in --
9 particularly in situations in which, as in most cases,
10 it's resolved by a plea.

11 Now, if -- if -- but -- and also, this
12 statute was enacted against the backdrop of -- of the
13 categorical approach, and the Act was amended -- has
14 been amended roughly four times during this period with
15 no indication that Congress certainly intended to
16 jettison this. And I think it's also important here to
17 note the structure of the Act in terms of how Congress
18 sharply distinguished between what would happen with
19 conviction and -- and what would happen with sentence.

20 They did enact specific provisions,
21 101(a)(43) subpart (F) at 2a of the statutory appendix
22 and (G) at 2a of the statutory appendix, which talk
23 about -- which -- which talk about sentencing and make
24 that sharp distinction.

25 But I think we should not also lose sight of

1 the overarching fact here that this provision is an
2 integral part of a Federal criminal statute, 1326(b), so
3 that any ambiguity in the -- so that ambiguity in the
4 construction and application of this statute should as
5 -- similarly to -- to what this Court held in Leocal,
6 should be resolved in favor of the -- in favor of the
7 alien, because it's the classic multiple or dual use
8 statute that has both civil and criminal applications,
9 and very severe criminal applications as well.

10 I see I have 5 minutes. If there are no
11 further questions, I'd like to reserve the time for
12 rebuttal.

13 JUSTICE SCALIA: I hope in rebuttal you'll
14 address the argument about deferring to the agency's
15 finding about what it means. We usually do that.

16 MR. MOSELEY: The -- I will -- I will --

17 JUSTICE SCALIA: You can save it for
18 rebuttal.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 MR. MOSELEY: Thank you.

21 CHIEF JUSTICE ROBERTS: Mr. Gannon.

22 ORAL ARGUMENT OF CURTIS E. GANNON

23 ON BEHALF OF THE RESPONDENT

24 MR. GANNON: Mr. Chief Justice, and may it
25 please the Court:

1 Petitioner's reading of subparagraph (M)(i)
2 implausibly excludes the mainstays of Federal fraud
3 prosecutions and applies at best to a tiny handful of
4 outlying offenses: thefts of major works of art,
5 extreme cases of government contract fraud, and some
6 frauds obtaining confidential phone records and --

7 JUSTICE SCALIA: Well, except -- except for
8 his modified hangout. His modified -- his modified
9 categorical does -- does expand, doesn't it?

10 MR. GANNON: Well, I -- I think, Justice
11 Scalia, that he does offer this -- this variation on a
12 so-called modified categorical approach by saying that
13 we could use extraneous facts in guilty pleas in order
14 to satisfy the categorical approach. But we think that
15 that doesn't work for both practical reasons and for the
16 types of reasons that -- that several of the questions
17 raised in the first half of the argument, that --

18 JUSTICE SCALIA: And also interrogatories to
19 the jury. He would --

20 MR. GANNON: He does seem to contemplate
21 that interrogatories for the jury might also achieve the
22 same purpose. But as Justice Alito was pointing out,
23 there -- there is little reason to believe that a judge
24 is going to permit such extraneous questions to be put
25 to a jury that are -- that are not necessary for the

1 criminal proceeding that is actually being held at that
2 point. It's unlikely that the government wants to make
3 the entire -- wants to imply that the conviction needs
4 to turn on that.

5 And obviously, both with the -- the special
6 interrogatories and the guilty pleas, there are
7 practical problems, because this could only apply
8 prospectively, even though Congress's definition of
9 aggravated felonies is intended to apply to convictions
10 that predated the enactment of IIRIRA. I just mean that
11 it would not be until we knew that this was the rule
12 that we could implement such -- such a rule. And it's
13 not clear why any alien who would be contesting his
14 removability in the civil removal proceedings would
15 concede in the -- in a guilty plea or to a fact that is
16 extraneous to that conviction that would ultimately --

17 JUSTICE GINSBURG: But this -- this
18 defendant did ask, didn't -- he asked the judge to have
19 a finding --

20 MR. GANNON: Well, he did not ask the judge
21 for a finding of loss. He -- he asked for an
22 instruction -- for a special interrogatory as to "the
23 amount of money my client is responsible for." That's
24 on page 14a of his opening brief. And that's not the
25 relevant question for purposes of the loss threshold in

1 subparagraph (M)(i), which is actually about the -- the
2 loss to the victims from the offense involving fraud or
3 deceit, not how much any individual defendant might have
4 been responsible for. And even now --

5 CHIEF JUSTICE ROBERTS: Well, but then you
6 just -- you, the government, says -- you know, you'll
7 have a little debate about what the special
8 interrogatory -- how it is phrased, and your objection
9 there could be dealt with on -- during that negotiation.

10 MR. GANNON: Well, and at that point he --
11 he -- we -- we presumably wouldn't want to have to prove
12 up a loss at that point that's irrelevant for purposes
13 of the criminal guilt proceeding, although it may well
14 become relevant for the sentencing proceeding, as it did
15 become relevant here, and there was a sentencing
16 stipulation.

17 JUSTICE KENNEDY: And -- and why would you
18 be reluctant to do that? Would you just spell that out
19 a little bit?

20 MR. GANNON: Well, I -- I think that it
21 could confuse the jury. Even if it were clear that it
22 had nothing to do with a determination of guilt, that
23 would be a particularly odd sort of bifurcation to
24 thrust upon the original criminal proceeding, to require
25 the jury to make findings about facts that are truly

1 extraneous to the purposes of the criminal proceeding
2 that is being held there, and for -- at least for guilt
3 purposes, there's no reason for the jury to have to find
4 that.

5 And as -- as the questions before were
6 making clear, the reason this Court has applied the
7 modified categorical approach is to determine what is
8 necessary for the underlying conviction. That's why
9 it's tied to an investigation into what really were the
10 elements of the underlying offense. And interrogatories
11 about facts that were not, in fact, necessary for the
12 conviction or -- or extraneous facts that are introduced
13 into guilty pleas do not change the fact that that
14 particular attribute was not necessary for the
15 conviction.

16 And so, we think that it makes sense, in
17 context of the other definitions in paragraph 43 of the
18 definition of aggravated felonies, where it is
19 indisputable that there are multiple provisions that
20 include both an element that needs to be evaluated as an
21 element of the offense and some other limiting factor
22 that need not be an element of the offense; that it
23 makes sense to construe the loss threshold in
24 subparagraph (M)(i) as something that need not be an
25 element, because the consequences of Petitioner's

1 approach would be to read out virtually all Federal
2 fraud prosecutions, including such mainstays as mail
3 fraud, wire fraud, conspiracy to defraud the government,
4 bank fraud, the -- the offenses that were at issue here.

5 And he does offer a -- a patchwork of some
6 State offenses that could be satisfied. But even there,
7 there -- there's not any particular consistency to it.
8 He invokes the Model Penal Code, which has a gradation
9 scheme for theft by deception offenses. And although
10 the BIA has -- has acknowledged that theft by deception
11 offenses may in certain circumstances constitute fraud
12 offenses, the Model Penal Code does not in the next
13 chapter dealing with forgery and fraudulent practices
14 have a consistent gradation scheme.

15 So even in the States that Petitioner cites
16 in his reply brief, Delaware doesn't have monetary
17 thresholds for insurance fraud, even though it does for
18 health care fraud; and New Jersey doesn't have monetary
19 thresholds for credit card fraud or payment card fraud,
20 and so a million-dollar fraud would not be -- would not
21 be treated consistently, depending upon which State it
22 was committed in and even which type of fraud it was in
23 an individual State, if the State --

24 JUSTICE ALITO: Could I ask you this: Does
25 this -- which is not exactly on point to the issue here,

1 but does the government have a theory about how the loss
2 is measured for purposes of this statute? Under the
3 sentencing guidelines, the loss was a very complicated
4 calculation, lots of -- lots of rules about relevant
5 conduct and lots of cases and different ways of proving
6 loss, and here we just have the statute.

7 MR. GANNON: Yes, we think that it is not
8 necessarily the same as the loss determination that
9 would be made for sentencing. And so, the board has
10 made it very clear that even though a restitution order,
11 for example, can be sufficient evidence of loss to the
12 victim, that it needs to be assessed with an eye to
13 exactly what losses were determined in the underlying
14 restitution order and with regard to the burden of proof
15 there. And so --

16 JUSTICE ALITO: What if you have somebody
17 who participates in a -- in a scheme involving
18 \$100 million, the total loss is \$100 million, but this
19 person had no way of reasonably anticipating that this
20 would be the -- the total amount of the loss. This was
21 a minor participant, and -- where would the -- how would
22 that come out?

23 MR. GANNON: Well, I think that this text of
24 the statute here in subparagraph (M)(i) talks about an
25 offense that involves fraud or deceit in which the loss

1 to the victim or victims exceeds \$10,000. And so, we
2 think that the loss threshold is tied to the offense
3 that involves fraud or deceit, not to the individual
4 defendant's role.

5 If he's convicted of a \$100 million fraud
6 or, in this case, what may well have been a \$683 million
7 fraud, he is -- that -- that is the offense of which he
8 was convicted, and it is an offense in which the loss to
9 the victims exceeded \$10,000. And so we think --

10 JUSTICE GINSBURG: Does the judge, when he
11 arrives at the restitution amount, have discretion to
12 say, as to this particular defendant, he was just an
13 accountant with the company that was committing the
14 fraud; he didn't put anything into his own pocket except
15 the salary they paid him; so I'm going to exclude him
16 from the restitution order?

17 MR. GANNON: Yes, Justice Ginsburg, in
18 general the -- the judge does have discretion to -- to
19 adjust aspects of the restitution order on the basis of
20 the facts of the underlying offense. And that's --
21 that's one of the reasons why I think the board has been
22 sensitive to the idea that the restitution order does
23 not necessarily determine what the amount of loss is
24 going to be for purposes of --

25 JUSTICE SCALIA: You -- you wouldn't allow

1 that exclusion to have any effect on deportation, would
2 you?

3 MR. GANNON: It would depend upon the facts
4 of the underlying case. If the underlying fraud was one
5 in which the victims lost more than \$10,000, we -- and
6 we could prove that by clear and convincing evidence in
7 the removal proceeding, then -- then we think that we
8 would not be bound by the judge's discretionary refusal
9 to impose a restitution requirement on the particular
10 defendant.

11 JUSTICE GINSBURG: So in -- in my very
12 hypothetical --

13 MR. GANNON: Depending upon the facts of the
14 case, yes, Justice Ginsburg, in your hypothetical if we
15 can prove by clear and convincing evidence that the
16 amount of loss associated with a fraud offense was more
17 than \$10,000, we think that would satisfy.

18 JUSTICE GINSBURG: Even -- even though this
19 defendant did not pocket any gain?

20 MR. GANNON: Yes. Yes, Justice Ginsburg.
21 It's not a pecuniary gain threshold. It's a loss to the
22 victim threshold. And -- and although the judge may
23 well take that into account for purposes of restitution,
24 it doesn't change the -- the metric that Congress chose
25 to determine which types of frauds are serious enough to

1 be considered aggravated felonies.

2 In 1994, they -- they picked a threshold of
3 \$200,000. In 1996, they dropped that to 5 percent of
4 that value, to \$10,000. And I think Congress's judgment
5 here is that if the fraud is so severe that it --
6 that -- that somebody -- that the victims lost \$10,000,
7 then -- then that is a qualifying offense for purposes
8 of subparagraph (M)(i), even if the original criminal
9 sentencing judge, on the basis of all sorts of factors
10 associated with the case and under the restitution
11 statutes, decided that the defendant was not necessarily
12 liable to pay restitution in that amount.

13 JUSTICE GINSBURG: What about the
14 defendant's argument that at least as far as his
15 admission for sentencing purposes, he did that only
16 because otherwise the government wouldn't ask for a
17 downward departure?

18 MR. GANNON: Well, I -- I think that we are
19 not taking the position that the -- the stipulation for
20 sentencing purposes, which was pursuant to 6B of the
21 guidelines and was for stipulation purposes. We're not
22 arguing that that is -- is dispositive in the -- in the
23 civil removal proceeding. We're arguing that it's
24 persuasive evidence of the amount of loss here.

25 And so, he's -- he is certainly able to say

1 before the board or before the immigration judge that --
2 that for some reason the amount that he admitted to
3 isn't really the -- the actual amount of loss associated
4 with the case. That's not what he has done here. He
5 has -- he has consistently tried to establish that --
6 that this -- these -- this gargantuan loss amount was --
7 was not one that was found by the jury, not that it was
8 not in fact the loss that actually accrued in
9 association with the fraud and deceit.

10 JUSTICE STEVENS: But your position -- I
11 want to be sure I understand it -- is that if the record
12 in this case had been -- let's say it's a mail fraud
13 case. They proved one mailing and one victim lost \$30,
14 and that's all the trial established. But as a matter
15 of fact you could establish this was part of a scheme,
16 just like the one we've got here, in which millions of
17 dollars were lost. You could prove that independently,
18 and he would still be required to be deported?

19 MR. GANNON: Not necessarily, Justice
20 Stevens. If the conviction was for the entire scheme,
21 then we could bring in the amounts that were relevant to
22 the scheme. But if --

23 JUSTICE STEVENS: But the scheme -- the
24 evidence of the scheme consisted of just two mailings,
25 say. They allege a scheme and say it's a broad -- a

1 broad scheme, but they don't describe the amount. They
2 merely prove two mailings that involved \$25 apiece. But
3 the scheme itself, because you proved it in other cases,
4 you have the facts, actually was a big scheme like we
5 have here. Could they rely on that for -- for
6 immigration purposes in a proceeding like this?

7 MR. GANNON: It's possible. I think it
8 would depend upon exactly what we could determine had
9 actually been associated with the original conviction,
10 but --

11 JUSTICE STEVENS: Well, you could determine
12 exactly what you proved in this case.

13 MR. GANNON: Well, but I -- and if -- if we
14 had that amount of evidence -- in this case, we had
15 sentencing stipulations and all sorts of determinations
16 at the time of the -- the sentencing where the defendant
17 did not even try to argue that this wasn't actually the
18 amount of loss associated with his offense and
19 conviction, then we probably would be able to establish
20 by clear and convincing evidence that the --

21 JUSTICE SCALIA: I don't -- I don't -- I'm
22 losing you. I would -- I would have thought that you
23 have to have convicted him of the larger scheme.

24 MR. GANNON: I -- I thought, Justice Scalia,
25 that that was the premise of Justice Stevens's question,

1 that that --

2 JUSTICE SCALIA: Oh, I didn't --

3 JUSTICE STEVENS: Yes, it was, but it didn't
4 describe the dimensions of the scheme. As far as the
5 record shows, it only affected -- it was one scheme that
6 was as large as this one, but the evidence to prove the
7 scheme only required you to prove two or three mailings
8 involving small amounts of money. But then later on you
9 proved before the immigration judge there really was a
10 big scheme, and that's the one he was convicted of.
11 Isn't that enough?

12 MR. GANNON: Well -- I think that it's
13 unlikely if we didn't have the evidence contemporaneous
14 with the trial.

15 JUSTICE STEVENS: You had the evidence, but
16 you didn't need it.

17 MR. GANNON: Well, I -- if it were like
18 this, we had the evidence contemporaneous with
19 sentencing, with \$100 million stipulations and things
20 like that, and that makes it obviously much easier for
21 us to prove the extent of the underlying fraud.

22 JUSTICE STEVENS: I know it's easy; I'm
23 wondering if it's necessary. I -- I think under your
24 theory, it would not be necessary. As long as the
25 evidence is out there, you can use it in a de novo

1 proceeding before the immigration judge.

2 MR. GANNON: If -- if that were, in fact,
3 the scope of the conviction, because it was for -- for
4 the entire fraudulent scheme, then that may well be so.
5 Obviously, that -- the cases that have applied the --
6 the "tethered" approach, to use the word that Petitioner
7 has invoked here, are cases in which the -- the courts
8 and the BIA have recognized that sometimes it is
9 necessary to recognize that there's a distinction
10 between what the defendant actually pleaded guilty to.
11 If the defendant pleads guilty to only an individual
12 count, it's -- it's involved in the scheme.

13 JUSTICE STEVENS: No, my -- he pleads guilty
14 to the mammoth scheme proved, and the evidence before
15 the court or on the plea colloquy or whatever only
16 described enough to show that he was guilty.

17 MR. GANNON: Well --

18 JUSTICE STEVENS: But then as I understand
19 it, you can prove the size of the scheme later on.

20 MR. GANNON: I -- in those circumstances I
21 -- I think that we may well be able to prove that in the
22 second proceeding --

23 JUSTICE SCALIA: Well, I would -- I -- I
24 thought that was the whole case we had before us, where
25 you haven't proved either as an element or -- or by a

1 separate jury finding how much money was involved. Your
2 point is you don't have to.

3 MR. GANNON: Well --

4 JUSTICE SCALIA: You can establish that
5 later.

6 MR. GANNON: Yes, that's right, Justice
7 Scalia, and as long as it is the scope of the scheme
8 that -- that he was convicted for, then I think --

9 JUSTICE KENNEDY: I suppose that your answer
10 is -- it's your first argument -- it's the -- it's the
11 offense.

12 MR. GANNON: Yes, yes, Justice Kennedy.

13 JUSTICE KENNEDY: And if for Blockburger
14 purposes or for double jeopardy purposes, you couldn't
15 retry him for those other -- for that additional loss,
16 then that's -- I assume your argument is that that's
17 included within the offense for which he was convicted.

18 MR. GANNON: As long as the offense were in
19 fact the scheme rather than an individual instance of a
20 mailing, that's correct. And so I -- I think that that
21 -- that that is consistent with Justice Stevens's
22 hypothetical and that we would in those circumstances be
23 able to -- attempts to prove by clear and convincing
24 evidence in the civil removal proceedings that the loss
25 associated with the offense, which was the scheme rather

1 than just an individual mailing, then -- then we would
2 be able to prove that. Given --

3 JUSTICE KENNEDY: Well, your position is
4 that in ancillary, subsequent proceedings anything you
5 prove that's within the offense convicted -- say, as
6 measured by double jeopardy purposes, as protection
7 against multiple prosecutions, that you can -- you can
8 make that showing?

9 MR. GANNON: Well, with -- here it's --
10 we're not trying to prove a separate criminal offense.
11 We're trying to prove that the offense --

12 JUSTICE KENNEDY: That's my point.

13 MR. GANNON: Yes.

14 JUSTICE KENNEDY: I take it that that's your
15 whole argument.

16 MR. GANNON: Yes, that it -- this is -- this
17 is the offense of conviction. This is just like the
18 domestic relationship prong of the misdemeanor crime of
19 domestic violence that the Court decided in its recent
20 decision in *United States v. Hayes*, that -- that there
21 is a prior conviction, some aspects of which were
22 elements of the underlying offense, and in order to
23 establish whether the prior conviction meets the
24 statutory definition in the subsequent proceeding, the
25 government will need to bear the appropriate burden of

1 proof for that proceeding. Whether it's --

2 JUSTICE GINSBURG: But the appropriate
3 burden of proof was beyond a reasonable doubt. That is
4 in the second proceeding, the recidivist -- the
5 multiple-offender proceeding --

6 MR. GANNON: Yes.

7 JUSTICE GINSBURG: -- the relationship,
8 domestic relationship had to be proved beyond a
9 reasonable doubt, which is not the standard that the BIA
10 uses.

11 MR. GANNON: I -- I think it was beyond a
12 reasonable doubt in the context of the 922(g)(9)
13 prosecution --

14 JUSTICE GINSBURG: Yes.

15 MR. GANNON: -- because that was itself a
16 criminal proceeding, and that's right, Justice Ginsburg.

17 JUSTICE GINSBURG: Yes.

18 MR. GANNON: We think that if this
19 definition were -- were to be applied in the criminal
20 context, then we would need to prove this aspect, the
21 loss threshold.

22 JUSTICE GINSBURG: That's what you're
23 talking about, the alien who is convicted of a
24 qualifying crime, an aggravated felony, then tries --
25 then comes back illegally. The difference between 2

1 years and 20 years, you admit there you would have to
2 prove beyond a reasonable doubt?

3 MR. GANNON: Yes, Justice Ginsburg, just to
4 be clear it's -- there's already a 10-year statutory
5 maximum that applies under 1326(b)(1) for the prior
6 conviction for a felony. I think that's something that
7 can easily be established through the categorical
8 approach, and we would not need to have a "beyond a
9 reasonable doubt" determination in the -- in the illegal
10 reentry proceeding under 1326 to determine that it's a
11 felony.

12 But in order to determine that it is an
13 aggravated felony, as long as we could not satisfy it
14 through a categorical approach to demonstrate that it
15 was an element of the offense the -- in the original
16 proceeding, then, yes, I agree; we would need to meet
17 the relevant burden of proof in the 1326(b)(2)
18 proceeding.

19 Now, as it happens, this -- the extra
20 10-year statutory maximum at issue in 1326(b)(2)
21 effectively never gets litigated because the sentencing
22 guidelines range -- for aggravated felony enhancements
23 in that context for crimes like subparagraph (M)(i), it
24 ranges from 21 months on the low end with no criminal
25 history to 57 months on the high end with a criminal

1 history of 6. And so this effectively -- the extra 10
2 years of statutory range is never employed by -- by
3 judges for these types of crimes.

4 In the last 3 years, according to Sentencing
5 Commission data, there isn't a single defendant in a
6 1326 proceeding who received a sentence of more than 10
7 years and had an increase on the basis of an aggravated
8 felony that would include the category that we're
9 dealing with here in subparagraph (M)(i).

10 CHIEF JUSTICE ROBERTS: Mr. Gannon, we're
11 dealing with the definition of a particular term,
12 "aggravated felony." And yet you say the only thing
13 that you have to prove under the protections of criminal
14 law to prove that this is an aggravated felony is that
15 it involved fraud or deceit. Now, the other elements --
16 the other provisions here talk about firearms offenses,
17 child pornography offenses, national security offenses,
18 but here it's fraud or deceit. I mean, it's a felony,
19 but there's nothing that strikes -- strikes me that it's
20 particularly an aggravated felony.

21 MR. GANNON: Well --

22 CHIEF JUSTICE ROBERTS: And yet that's all
23 you have to prove with the protections of the criminal
24 law as opposed to the civil.

25 MR. GANNON: Well, I think that we have to

1 prove for purposes of the relevant proceeding in which
2 we're trying to establish that it is an aggravated
3 felony that it also exceeded the \$10,000 threshold, and
4 so --

5 CHIEF JUSTICE ROBERTS: But not subject to
6 the protections of criminal law that you have to show.

7 MR. GANNON: No more --

8 CHIEF JUSTICE ROBERTS: Beyond a reasonable
9 doubt, with the -- with the jury protections.

10 MR. GANNON: Well, we would need to prove
11 that if it were relevant to a criminal proceeding, but
12 in a civil removal proceeding, those protections aren't
13 there. And so we --

14 CHIEF JUSTICE ROBERTS: Yes, I guess what
15 I'm saying, the only thing that makes this aggravated,
16 the \$10,000, in contrast to the other things, which are
17 aggravated by virtue of elements that you have to
18 approve -- you have to prove beyond a reasonable
19 doubt -- is that it's fraud or deceit. And as I said,
20 there's nothing about that that -- it's bad, but it
21 doesn't strike me as particularly aggravated.

22 MR. GANNON: Well, Mr. Chief Justice, there
23 are several other statutes here that have extra limiting
24 factors that are necessary to make the crime an
25 aggravated one for purposes of the aggravated felony,

1 but don't have to be proved as an element of the
2 original offense. Congress has established --

3 CHIEF JUSTICE ROBERTS: Well, that's just --
4 I think that's kind of begging the question. You assume
5 that those elements, those provisions also don't have to
6 be proved as elements. And what I'm suggesting, I
7 guess, is that if the only thing that makes it
8 aggravated is -- is something that you don't have to
9 prove beyond a reasonable doubt, it seems that we ought
10 to look, well, is that really aggravated?

11 MR. GANNON: Well --

12 CHIEF JUSTICE ROBERTS: And when you're
13 talking about firearms offenses or child pornography,
14 yes, that's aggravated; but fraud and deceit is kind of
15 the run-of-the-mine felony.

16 MR. GANNON: Well, but for many of the
17 offenses it's things that, as Petitioner acknowledges,
18 would never be proved as elements of the offense. It's
19 the notion that a crime of violence is one in which the
20 term of imprisonment is at least 1 year. There are
21 other ones that depend on the actual sentence that was
22 imposed. There is a second or subsequent offense that's
23 referred to in subparagraph (J). There is an exception
24 for purely political offenses from the definition of --
25 of crime of violence. There are affirmative defenses --

1 CHIEF JUSTICE ROBERTS: Well, I guess I
2 don't understand how that's responsive. It's -- it's --

3 MR. GANNON: Well --

4 CHIEF JUSTICE ROBERTS: Crime of violence,
5 in other words, it seems to me you're already in the
6 aggravated area, so it makes sense to say that's what
7 you have to prove.

8 MR. GANNON: But not according to Congress.
9 It's only in the area, if it is not a purely political
10 offense, and if the term of imprisonment is at least 1
11 year. And so by definition, it already can't be an
12 aggravated felony according to Congress if it doesn't
13 meet other factors that we would not have expected the
14 original jury to determine as an element of the original
15 crime of violence.

16 CHIEF JUSTICE ROBERTS: I -- I guess I don't
17 understand the answer, and I'm sorry if it's --

18 MR. GANNON: Well, I'm the one that's sorry.

19 CHIEF JUSTICE ROBERTS: -- I'm hard to get
20 through.

21 (Laughter.)

22 CHIEF JUSTICE ROBERTS: It just -- you're
23 saying is that there are exceptions, but I don't see
24 that that detracts from the point that "crime of
25 violence" -- you think right away, well, that's

1 aggravated; national security crimes, that's aggravated;
2 firearms offenses, that's aggravated. They're sort of
3 on their own without respect to these other things that
4 you say you only have to prove by the civil -- pursuant
5 to the civil burden requirements. Fraud or deceit -- as
6 I guess I've already said, that doesn't strike me as
7 particularly aggravated.

8 MR. GANNON: Well -- and I think that's --

9 CHIEF JUSTICE ROBERTS: What makes it
10 aggravated is something as to which you have a much
11 lighter burden.

12 MR. GANNON: Well, it's -- it's not a much
13 lighter burden in the sense that we do, for purposes of
14 the civil removal proceeding, need to establish it by
15 clear and convincing evidence, and -- and it is, in --
16 in a subsequent criminal proceeding, there will be all
17 the constitutional protections that you're talking
18 about, just like the domestic relationship prong of the
19 -- of the crime that the Court considered in Hayes.

20 JUSTICE SCALIA: I -- I would have thought
21 you would not accept the Chief Justice's premise, that a
22 crime of violence is an aggravated felony.

23 MR. GANNON: Well, I --

24 JUSTICE SCALIA: It isn't.

25 MR. GANNON: I tried to explain that it is

1 not as long as there isn't a sentence that is imposed of
2 at least 1 year according to Congress's way of
3 determining what is an aggravated felony, and Congress
4 has determined that --

5 JUSTICE STEVENS: But the -- but the Chief
6 Justice points out that the facts that make the fraud
7 aggravated are facts that you do not have to prove
8 beyond a reasonable doubt, which takes back to your
9 opponent's argument. Therefore, you were not convicted
10 by proof beyond a reasonable doubt of the aggravated
11 felony that's the basis for the immigration order.

12 MR. GANNON: Well, that's correct, Justice
13 Stevens, but in -- in that regard --

14 JUSTICE STEVENS: So you were not convicted
15 of the aggravated offense that -- the issue in this
16 case.

17 MR. GANNON: Well, no, we think that you
18 were convicted of the offense, which is an offense that
19 involves fraud or deceit, and then there is the further
20 limitation that Congress has imposed, not as an element
21 --

22 JUSTICE STEVENS: But the -- but you hadn't
23 been convicted of the aggravated offense until you
24 established its aggravation by proof of less -- that's
25 not under a reasonable doubt. So the word "convicted"

1 really is pretty important.

2 MR. GANNON: But it -- it can't have that
3 same meaning with regard to all of these other things in
4 all of these other offenses in which Congress has
5 determined they're not an aggravated felony until those
6 other criteria are also satisfied. I mean -- so we
7 think that in a statute that indisputably involves
8 individual offenses that have both elements of the
9 offense and nonelement limiting factors in order to
10 limit the category to those that Congress would have
11 deemed to be aggravated, that it makes sense to not have
12 to find as an element of the offense those extra factors
13 that generally wouldn't be for most of the other
14 provisions. And here we know if that reading is imposed
15 on this statute, that it reads out all the mainstays of
16 Federal fraud prosecutions and brings in a haphazard
17 patchwork of --

18 JUSTICE SCALIA: It depends on how you read
19 the language. I guess -- I guess grammatically it could
20 be read either way. You can read it: an offense that
21 involves fraud or deceit in which -- in which the loss
22 to the victim exceeds \$10,000. Or you could read it:
23 convicted of an offense that involves fraud or deceit,
24 in which the loss to the victim exceeds \$10,000.

25 I mean, "convicted" doesn't necessarily

1 apply to the last -- to the last phrase.

2 MR. GANNON: And we --

3 JUSTICE SCALIA: -- and that's basically
4 what we're arguing about.

5 MR. GANNON: And we think --

6 JUSTICE STEVENS: No, but the word
7 "convicted" -- the question is whether the word
8 "convicted" applies to the word "aggravated." That's
9 the point, as I understand the Chief Justice's
10 questioning, which goes to the burden of proof. So you
11 would win even under that approach if you said you had a
12 proof beyond a reasonable doubt of the other factors.

13 But the thing that creates the -- the
14 missing link is that to convert it from ordinary fraud
15 to aggravated fraud, you have to prove facts under one
16 view by a reasonable -- beyond a reasonable doubt, but,
17 under your view, by only clear and convincing evidence.

18 MR. GANNON: Well, for purposes of a civil
19 removal proceeding, that's true, and that's no different
20 from the limiting factors in several of the other
21 provisions, like the sentence that was imposed -- the
22 potential sentence -- whether there was an exception for
23 a first offense that involved family members, for the
24 alien smuggling and document fraud, crimes in (N) and
25 (P).

1 And the -- this also is a reading that we
2 can't impose on subparagraph (M)(ii), where we know that
3 there is no loss requirement there, that the government
4 have a revenue loss of more than \$10,000 for a crime in
5 which the loss to the government is \$10,000. The "in
6 whiches" here are parallel to the "for welches"
7 elsewhere in -- in the statute.

8 And although Petitioner invokes the guilty
9 plea practice in the context of tax evasion offenses for
10 purposes of section 7201, this -- this doesn't help his
11 argument for the same reason that he cannot use
12 extraneous elements and guilty pleas generally to
13 establish that something was necessary for a conviction.
14 But if you look at the criminal tax manual that he
15 invokes, it makes clear by referring to relevant conduct
16 and the need for the loss amount there to include all of
17 the losses for all of the years in the indictment, even
18 if the defendant has pleaded guilty to only an
19 individual count for a single year of tax evasion, that
20 the -- the loss amount that is typically included in
21 guilty pleas in 7201 cases is not the loss amount that
22 is relevant here. It is in fact directly parallel to
23 the sentencing stipulation that -- that the Petitioner
24 entered into here.

25 If the Court has no further questions --

1 CHIEF JUSTICE ROBERTS: Thank you, Mr.
2 Gannon.

3 MR. GANNON: The court of appeals should be
4 affirmed.

5 CHIEF JUSTICE ROBERTS: Mr. Moseley, you
6 have 4 minutes remaining.

7 REBUTTAL ARGUMENT OF THOMAS E. MOSELEY

8 ON BEHALF OF THE PETITIONER

9 MR. MOSELEY: With respect to the issue of
10 deference, the fact that this is part of a Federal
11 criminal statute I believe doesn't get us -- cuts off
12 the inquiry, and we don't get to Chevron deference here.
13 We deal with a dual use statute which has both civil and
14 criminal applications, so that under these
15 circumstances, certainly as this Court held in Leocal
16 and in Lopez-Gonzalez, Chevron deference with respect to
17 Babaisakov would not -- for example -- would not be
18 triggered.

19 I think, moreover, it's important to note
20 that Babaisakov got (M)(ii) wrong -- got the -- the
21 requirement of a deficiency wrong, and also got wrong
22 the fact that there were no statutes involved where
23 fraud -- where a loss amount in excess of \$10,000 would
24 be an element.

25 Finally, I think the government's reading of

1 this statute might make sense if Congress had said that
2 -- convicted of a crime in -- a crime in which fraud or
3 deceit is an element, with loss to be found at removal
4 proceedings in excess of \$10,000. But that's not the
5 language that -- that Congress employed here, and -- and
6 under these circumstances, even if the statute is
7 perceived to be ambiguous, that ambiguity should be
8 resolved in the Petitioner's favor.

9 JUSTICE SCALIA: To come back to the
10 deference point, you say -- is this relevant to the
11 criminal conviction? He's convicted criminally
12 regardless of how you read that. You acknowledge it
13 doesn't -- it isn't an element of the crime, and so to
14 be convicted criminally you acknowledge you don't have
15 to show the amount --

16 MR. MOSELEY: But --

17 JUSTICE SCALIA: -- right?

18 MR. MOSELEY: But what the government has
19 said, if they're going to do a prosecution under 8
20 U.S.C. 1326(b), that they would seek to prove this
21 amount de novo in the underlying criminal proceeding.
22 So it will form -- it would form part of a -- it would
23 form part of a criminal prosecution --

24 JUSTICE SCALIA: Well, in that later
25 criminal proceeding, they would have to prove it

1 undoubtedly --

2 MR. MOSELEY: Right, and that --

3 JUSTICE SCALIA: -- but this is not a later
4 criminal proceeding; this is an administrative
5 proceeding. And why shouldn't it be up to the BIA
6 initially to determine how to interpret this language
7 for purposes of the deportation laws?

8 MR. MOSELEY: It shouldn't, Justice Scalia,
9 because we deal with a dual use statute, as this Court
10 said in *Leocal*, which indeed was also a civil removal
11 proceeding, or *Lopez-Gonzalez*, which was a civil removal
12 proceedings. *Leocal* involved 18 U.S.C. 16 -- 16(b), and
13 --

14 JUSTICE SCALIA: But there -- was it not
15 true that there the interpretation placed upon the
16 statute by BIA would also be the interpretation
17 necessary to secure the criminal conviction? And that's
18 not the case here.

19 MR. MOSELEY: But it was -- but in
20 *Lopez-Gonzalez*, there was a -- there was a Board of
21 Immigration Appeals decision, *Matter of Yanez*, which was
22 directly opposite to what this Court held and ultimately
23 rejected in that decision. There -- this clearly is a
24 statute, I submit, that implicates -- that implicates a
25 Federal criminal prosecution later. And indeed if the

1 government, as I read the government's brief, says that
2 they're going to prove this amount in some subsequent
3 illegal reentry prosecution, that I submit raises far
4 more concerns with respect to practicality.

5 JUSTICE KENNEDY: I frankly couldn't
6 understand the government's concession on that point. I
7 thought the -- the offense on illegal entry was to enter
8 illegally after you've been deported. It's a -- there's
9 a defense if the original deportation was flawed?

10 MR. MOSELEY: No --

11 JUSTICE KENNEDY: I don't -- I don't
12 understand that.

13 MR. MOSELEY: Well, that -- that may be a
14 separate issue, Justice Kennedy. There is the
15 sentencing enhancement if it's after -- if someone
16 enters or reenters illegally after a conviction of an
17 aggravated felony. And what the government apparently
18 has said is that they would prove for a person whose
19 aggravated felony arguably falls within (i) --

20 JUSTICE KENNEDY: I see. I see.

21 MR. MOSELEY: -- they would prove that loss
22 de novo in Federal court.

23 I see my time is up.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 The case is submitted.

1 (Whereupon, at 11:01 a.m., the case in the
2 above-entitled matter was submitted.)

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A	17:23,24 25:9 27:18 32:1 39:24 40:13,22 41:7,12,14,20 42:2,15,17,21 42:25,25 43:8 43:10,14 44:6 44:12 45:1,1,2 45:7,10,22 46:3,7,10,15 46:23 47:5,11 48:8,15 53:17 53:19	51:15,21 53:2 amounts 9:17,18 9:23 15:10 18:21 33:21 35:8 ancillary 38:4 anecdotally 5:4 answer 6:22 11:14,15 20:16 37:9 44:17 answered 19:12 anticipating 29:19 apiece 34:2 apparently 53:17 appeals 50:3 52:21 APPEARAN... 1:15 appendix 3:17 22:21,22 applicable 4:10 application 9:16 10:4 23:4 applications 23:8,9 50:14 applied 27:6 36:5 39:19 applies 5:6 24:3 40:5 48:8 apply 13:3 14:18 25:7,9 48:1 Apprendi 5:8 approach 4:5,9 4:17,20 7:4 9:16 12:4 13:3 17:11,12 18:3 22:8,13 24:12 24:14 27:7 28:1 36:6 40:8 40:14 48:11 appropriate 20:23 38:25 39:2 approve 42:18 April 1:10	area 44:6,9 arguably 53:19 argue 34:17 arguing 12:16 13:6 32:22,23 48:4 argument 1:13 2:2,7 3:4,6 5:2 12:5,6,13 13:7 13:9 18:5 23:14,22 24:17 32:14 37:10,16 38:15 46:9 49:11 50:7 arguments 11:10 arrives 30:11 art 24:4 asked 7:22 8:5 19:17 25:18,21 aspect 39:20 aspects 17:16 30:19 38:21 assertion 21:16 assessed 29:12 Assistant 1:18 associated 31:16 32:10 33:3 34:9,18 37:25 association 33:9 assume 37:16 43:4 attempts 37:23 ATTORNEY 1:7 attribute 27:14 authority 20:14 a.m 1:14 3:2 54:1	46:8 51:9 backdrop 22:12 bad 42:20 bank 28:4 based 12:6,16 13:6,7 basically 48:3 basis 16:22 18:21 21:24 30:19 32:9 41:7 46:11 bear 38:25 bearing 20:17 20:18 begging 43:4 begins 3:25 behalf 1:16,20 2:4,6,9 3:7 23:23 50:8 believe 7:12,13 7:17 16:18,19 24:23 50:11 best 24:3 beyond 39:3,8 39:11 40:2,8 42:8,18 43:9 46:8,10 48:12 48:16 BIA 28:10 36:8 39:9 52:5,16 bifurcation 26:23 big 34:4 35:10 bit 26:19 Blockburger 37:13 blunt 18:4 board 29:9 30:21 33:1 52:20 booted 14:19 Boulware 8:25 bound 31:8 brief 3:17 6:2 13:21 14:11 25:24 28:16 53:1
		B		
		B 14:21 Babaisakov 9:6 50:17,20 back 10:22 11:22,22 15:5 19:11 39:25		

bring 33:21	certainly 5:16	32:23 37:24	concession 53:6	11:4,9 14:2
brings 47:16	5:24 6:1 8:11	41:24 42:12	concrete 6:17	27:17 39:12,20
broad 33:25	11:8 13:12	45:4,5,14	conduct 13:1	40:23 49:9
34:1	15:7 16:4	48:18 50:13	29:5 49:15	contract 24:5
broadly 9:17	22:15 32:25	52:10,11	confidential	contrast 42:16
16:10,10 20:10	50:15	classic 9:8,15	24:6	convenient 3:14
20:11	change 27:13	23:7	confuse 7:25	convert 48:14
burden 11:1	31:24	clause 4:1 12:10	26:21	convict 6:20
29:14 38:25	changed 5:8,11	12:12,17 13:8	confusion 8:7,12	8:22
39:3 40:17	chapter 28:13	13:9 16:17	Congress 3:21	convicted 11:25
45:5,11,13	charge 7:9,25	clear 5:18 14:11	3:22 4:4,8 10:1	16:2,17 17:15
48:10	8:5 16:23	25:13 26:21	13:25 14:22,23	17:23,24 18:7
	19:23	27:6 29:10	15:2,20,25	18:8,13,14,15
C	charged 7:10	31:6,15 34:20	16:8,9 19:4,4	18:21 19:1,15
C 2:1 3:1	18:14 19:14	37:23 40:4	22:15,17 31:24	30:5,8 34:23
calculation 29:4	Chevron 50:12	45:15 48:17	43:2 44:8,12	35:10 37:8,17
card 28:19,19	50:16	49:15	46:3,20 47:4	38:5 39:23
care 28:18	Chief 3:3,8	clearly 6:15	47:10 51:1,5	46:9,14,18,23
case 3:10 4:12	23:19,21,24	18:21 52:23	Congress's 25:8	46:25 47:23,25
4:25 5:7 6:18	26:5 41:10,22	client 25:23	32:4 46:2	48:7,8 51:2,11
6:21,24 7:7,14	42:5,8,14,22	Code 28:8,12	conjunction	51:14
7:14 9:18	43:3,12 44:1,4	collar 6:13	17:20	conviction 3:18
11:13 17:5	44:16,19,22	colloquy 6:25	connection 5:1	3:22 4:1,4
19:20,21 20:16	45:9,21 46:5	10:7 36:15	consequences	11:20 17:18,20
20:22 21:5	48:9 50:1,5	come 11:22,22	7:21 27:25	19:6 20:18
30:6 31:4,14	53:24	13:21 29:22	considered 32:1	22:19 25:3,16
32:10 33:4,12	child 41:17	51:9	45:19	27:8,12,15
33:13 34:12,14	43:13	comes 39:25	consisted 33:24	33:20 34:9,19
36:24 46:16	chooses 16:22	commenting	consistency 28:7	36:3 38:17,21
52:18 53:25	16:23 18:16	11:14	consistent 28:14	38:23 40:6
54:1	19:20,21 21:10	Commission	37:21	49:13 51:11
cases 6:2,18 7:1	chose 16:8,9	41:5	consistently	52:17 53:16
7:2,3 9:20,20	31:24	commit 16:14	28:21 33:5	convictions 25:9
16:20 19:25	Circuit 3:25	committed	conspiracy 28:3	convincing 31:6
20:9,20 22:9	circumstances	28:22	constitute 28:11	31:15 34:20
24:5 29:5 34:3	4:23 8:4 10:16	committing	constitutional	37:23 45:15
36:5,7 49:21	10:20 11:19	30:13	45:17	48:17
categorical 4:5	12:22 13:4	company 30:13	construction	correct 37:20
7:4 9:16 10:4	15:6 16:9,10	compass 14:5	8:21 12:7 23:4	46:12
12:3 13:3 18:3	18:19 19:1,19	complicated	construe 27:23	counsel 23:19
22:8,13 24:9	28:11 36:20	29:3	contemplate	53:24
24:12,14 27:7	37:22 50:15	component 21:1	24:20	count 36:12
40:7,14	51:6	concede 25:15	contemporane...	49:19
category 14:1	cite 5:17 6:1	conceding 6:5,6	35:13,18	country 14:20
41:8 47:10	9:21	16:19	contest 11:10	coupled 8:17
cause 18:13	cites 28:15	concept 15:3	contesting 25:13	court 1:1,13 3:9
certain 28:11	civil 23:8 25:14	concerns 53:4	context 10:11,21	3:16 4:11 23:5

23:25 27:6 36:15 38:19 45:19 49:25 50:3,15 52:9 52:22 53:22 courts 36:7 Court's 3:14 8:8 8:25 covered 18:5 covers 7:9 create 15:25 creates 48:13 credit 28:19 crime 5:10 7:10 7:24 17:7,10 38:18 39:24 42:24 43:19,25 44:4,15,24 45:19,22 49:4 51:2,2,13 crimes 40:23 41:3 45:1 48:24 criminal 3:13,19 6:11 16:20 20:15 23:2,8,9 25:1 26:13,24 27:1 32:8 38:10 39:16,19 40:24,25 41:13 41:23 42:6,11 45:16 49:14 50:11,14 51:11 51:21,23,25 52:4,17,25 criminally 51:11 51:14 criteria 47:6 CURTIS 1:18 2:5 23:22 cut 14:4,4 cuts 50:11	de 35:25 51:21 53:22 deal 50:13 52:9 dealing 10:11 28:13 41:9,11 dealt 26:9 debate 26:7 deceit 4:2 12:11 13:18 15:22 16:3,15 17:4,7 26:3 29:25 30:3 33:9 41:15,18 42:19 43:14 45:5 46:19 47:21,23 51:3 deception 14:13 28:9,10 decided 32:11 38:19 decision 8:25 9:6 38:20 52:21,23 deemed 47:11 defendant 6:24 10:15 20:19 25:18 26:3 30:12 31:10,19 32:11 34:16 36:10,11 41:5 49:18 defendants 7:8,9 7:15,20 8:1 21:5,6 defendant's 10:6,8 30:4 32:14 defense 53:9 defenses 43:25 deference 50:10 50:12,16 51:10 deferring 23:14 deficiency 8:23 9:1,2,3,4,10,11 19:17,22 20:8 20:8,12,13 22:6 50:21	define 13:19 14:2 defined 3:23 definitely 18:25 definition 3:11 3:20,23,25 4:3 12:8,13 25:8 27:18 38:24 39:19 41:11 43:24 44:11 definitions 3:16 8:15 27:17 definitively 11:6 defraud 28:3 degree 10:24 Delaware 28:16 demonstrate 40:14 denying 16:14 Department 1:19 departure 32:17 depend 19:19 21:9,10 31:3 34:8 43:21 depending 16:16 28:21 31:13 depends 47:18 deportable 14:1 15:3 17:21,22 17:23 19:15 deportation 3:12,22 16:21 31:1 52:7 53:9 deported 33:18 53:8 describe 34:1 35:4 described 8:18 36:16 designated 9:23 determination 19:22 21:21,24 26:22 29:8 40:9 determinations	34:15 determine 16:20 16:21 19:17 27:7 30:23 31:25 34:8,11 40:10,12 44:14 52:6 determined 16:22 19:9 29:13 46:4 47:5 determining 46:3 detracts 44:24 deus 18:3 difference 10:6 11:16,18 39:25 different 29:5 48:19 differently 16:7 16:15 difficulty 17:2 dimensions 35:4 directly 49:22 52:22 discretion 30:11 30:18 discretionary 21:21 31:8 discussed 4:11 dispositive 32:22 disputed 11:5 distinction 22:24 36:9 distinguish 7:19 distinguished 19:7 22:18 distinguishes 19:6 document 48:24 doing 11:3 dollars 33:17 domestic 38:18 38:19 39:8 45:18 double 37:14	38:6 doubt 39:3,9,12 40:2,9 42:9,19 43:9 46:8,10 46:25 48:12,16 downward 32:17 drawn 15:20 dropped 32:3 dual 23:7 50:13 52:9 D.C 1:9,19
<hr/> D <hr/> D 3:1 data 41:5 day 5:11				<hr/> E <hr/> E 1:16,18 2:1,3 2:5,8 3:1,1,6 23:22 50:7 earlier 21:15,16 early 5:3 easier 35:20 easily 40:7 easy 17:3 35:22 effect 5:21 10:1 14:24 31:1 effectively 40:21 41:1 either 5:4 36:25 47:20 element 4:2 5:19 6:5,7 7:24 9:1 9:5 12:14,19 13:10 14:3 15:7,15 17:7,9 18:22 20:25 27:20,21,22,25 36:25 40:15 43:1 44:14 46:20 47:12 50:24 51:3,13 elements 18:15 27:10 38:22 41:15 42:17 43:5,6,18 47:8 49:12 emphasize 12:9 employed 41:2 51:5

enact 22:20	ex 18:3	17:5 18:23	9:11,12,14	funded 15:9
enacted 4:8 6:11	exactly 28:25	20:7 21:14	18:10 27:3	further 14:16
8:15 14:22	29:13 34:8,12	23:1 25:15	47:12	23:11 46:19
22:12	example 6:17	27:11,13 33:8	finding 4:25	49:25
enacting 19:5	9:6,15 15:8	33:15 36:2	23:15 25:19,21	future 20:18
enactment	29:11 50:17	37:19 49:22	37:1	
25:10	exceed 9:18	50:10,22	findings 26:25	G
encompass	12:20	factor 27:21	firearms 41:16	G 3:1 22:22
20:11	exceeded 6:23	factors 32:9	43:13 45:2	gain 31:19,21
encompasses	17:5,8 30:9	42:24 44:13	first 3:4 6:20	Gannon 1:18
6:14,15	42:3	47:9,12 48:12	24:17 37:10	2:5 23:21,22
encompassing	exceeding 12:14	48:20	48:23	23:24 24:10,20
16:12	exceeds 8:20	facts 11:13	five 7:15	25:20 26:10,20
enhancement	9:12 12:11	24:13 26:25	flatly 9:7	29:7,23 30:17
53:15	30:1 47:22,24	27:11,12 30:20	flawed 53:9	31:3,13,20
enhancements	exception 43:23	31:3,13 34:4	forgery 28:13	32:18 33:19
40:22	48:22	46:6,7 48:15	form 51:22,22	34:7,13,24
enter 53:7	exceptions	falls 53:19	51:23	35:12,17 36:2
entered 49:24	44:23	family 48:23	forms 3:20	36:17,20 37:3
enters 53:16	excess 13:11,20	far 10:13,14	found 18:24	37:6,12,18
entire 25:3	20:12,13 50:23	16:4 32:14	21:25 33:7	38:9,13,16
33:20 36:4	51:4	35:4 53:3	51:3	39:6,11,15,18
entry 53:7	exclude 30:15	favor 23:6,6	four 22:14	40:3 41:10,21
ERIC 1:6	excludes 24:2	51:8	frankly 53:5	41:25 42:7,10
ESQ 1:16,18 2:3	exclusion 31:1	features 5:9	fraud 4:2 5:23	42:22 43:11,16
2:5,8	excuse 6:12	Federal 3:13	6:17,18,20	44:3,8,18 45:8
establish 20:24	15:11 16:23	6:17,18 15:8,9	12:11 13:18	45:12,23,25
21:1,2,3 33:5	20:11	15:18 16:12	15:22 16:3,15	46:12,17 47:2
33:15 34:19	expand 13:25	23:2 24:2 28:1	17:4,7 24:2,5	48:2,5,18 50:2
37:4 38:23	15:3 24:9	47:16 50:10	26:2 28:2,3,3,4	50:3
42:2 45:14	expected 44:13	52:25 53:22	28:11,17,18,19	gargantuan
49:13	expense 13:17	federally 15:9	28:19,20,22	33:6
established 20:9	experience 5:4,9	felonies 25:9	29:25 30:3,5,7	general 1:7,19
33:14 40:7	explain 45:25	27:18 32:1	30:14 31:4,16	5:23 30:18
43:2 46:24	extend 6:4	felony 3:11,20	32:5 33:9,12	generally 14:12
evaluated 27:20	extent 35:21	8:15 12:8	35:21 41:15,18	47:13 49:12
evasion 8:19,23	extra 40:19 41:1	17:23,25 39:24	42:19 43:14	Ginsburg 7:5,7
9:11 19:13,14	42:23 47:12	40:6,11,13,22	45:5 46:6,19	7:13,18 8:4,16
49:9,19	extraneous	41:8,12,14,18	47:16,21,23	8:25 9:2,9
evidence 10:15	24:13,24 25:16	41:20 42:3,25	48:14,15,24	15:12,24 16:6
10:18,24 29:11	27:1,12 49:12	43:15 44:12	50:23 51:2	16:13 19:11,20
31:6,15 32:24	extreme 24:5	45:22 46:3,11	frauds 24:6	20:1 25:17
33:24 34:14,20	eye 29:12	47:5 53:17,19	31:25	30:10,17 31:11
35:6,13,15,18		figure 13:24	fraudulent	31:14,18,20
35:25 36:14	F	14:3	28:13 36:4	32:13 39:2,7
37:24 45:15	F 22:21	Finally 50:25	fulfilled 4:21	39:14,16,17,22
48:17	fact 4:18 13:23	find 8:2,23 9:10	fully 19:12	40:3

<p>give 5:6 6:16 15:9 given 7:8 38:2 gives 3:17,18,18 giving 5:22 go 8:16 10:22 12:17 13:10 15:5 19:11 goes 19:14 48:10 going 5:19 7:24 7:25 12:2 13:8 18:23,23 20:2 21:9,9 24:24 30:15,24 51:19 53:2 governing 4:6 government 5:23,24 6:4 8:20 9:12 10:12 13:17 14:7 19:8,19 19:21 20:23 21:10 24:5 25:2 26:6 28:3 29:1 32:16 38:25 49:3,5 51:18 53:1,17 government's 3:17 9:21 13:21 18:4 50:25 53:1,6 gradation 28:8 28:14 gradations 18:20 grammatical 12:7 grammatically 47:19 ground 3:12 guess 42:14 43:7 44:1,16 45:6 47:19,19 guidelines 21:19 29:3 32:21 40:22 guilt 26:13,22</p>	<p>27:2 guilty 6:21,24 9:22 10:7 18:11 24:13 25:6,15 27:13 36:10,11,13,16 49:8,12,18,21</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>H 1:6 half 24:17 handful 24:3 hangout 24:8 haphazard 47:16 happen 22:18,19 happens 15:21 40:19 hard 44:19 Hayes 38:20 45:19 health 28:18 hear 3:3 5:7 held 23:5 25:1 27:2 50:15 52:22 help 17:1 49:10 high 40:25 history 40:25 41:1 hog 12:18,18 13:10 hold 21:19 Holder 1:6 3:4 home 14:21 hope 23:13 hypothetical 31:12,14 37:22</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>idea 20:15 30:22 identical 16:7,14 ii 10:1,2 22:4 49:2 50:20 IIRIRA 25:10 illegal 40:9 53:3 53:7</p>	<p>illegally 39:25 53:8,16 imagine 14:21 immigration 20:19 33:1 34:6 35:9 36:1 46:11 52:21 implausibly 24:2 implement 25:12 implicates 52:24 52:24 imply 25:3 important 9:24 19:3 22:16 47:1 50:19 impose 31:9 49:2 imposed 43:22 46:1,20 47:14 48:21 imprisonment 43:20 44:10 include 9:17 12:14 13:2,2 13:11 27:20 41:8 49:16 included 37:17 49:20 including 28:2 increase 41:7 independently 33:17 indicate 9:21 indication 22:15 indictment 49:17 indisputable 27:19 indisputably 47:7 individual 26:3 28:23 30:3 36:11 37:19 38:1 47:8 49:19</p>	<p>inflammatory 21:7 initially 52:6 inquiry 50:12 instance 37:19 instructed 4:24 5:19 instruction 25:22 insurance 28:17 integral 3:13,20 4:3 23:2 intended 18:4 22:15 25:9 interpret 52:6 interpretation 52:15,16 interrogatories 24:18,21 25:6 27:10 interrogatory 6:23 18:9,11 20:17,24 25:22 26:8 introduced 27:12 investigation 27:9 invoked 36:7 invokes 28:8 49:8,15 involved 4:19 7:14 13:13 14:9 34:2 36:12 37:1 41:15 48:23 50:22 52:12 involves 12:10 17:4,6 29:25 30:3 46:19 47:7,21,23 involving 18:8 26:2 29:17 35:8 ironically 8:8 irrelevant 26:12 issue 3:10 8:7</p>	<p>10:22 11:5 28:4,25 40:20 46:15 50:9 53:14</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>J 43:23 jeopardy 37:14 38:6 Jersey 28:18 jettison 22:16 JR 1:6 judge 7:18,21,23 7:23 18:16 20:15 24:23 25:18,20 30:10 30:18 31:22 32:9 33:1 35:9 36:1 judges 41:3 judge's 31:8 judgment 32:4 juries 5:6 jury 4:17,23 5:10,19 6:21 7:8,25 8:7,11 8:23 9:10 18:10,12,17 19:16,18,23 20:16 21:20,23 22:1 24:19,21 24:25 26:21,25 27:3 33:7 37:1 42:9 44:14 Justice 1:19 3:3 3:8 4:13,14,15 4:16,23 5:1,14 6:3,9,16 7:5,6 7:7,13,18 8:4 8:16,24 9:2,9 10:5,10,17,20 10:23 11:6,12 11:14 12:1,22 13:5,15 14:15 14:25 15:5,12 15:13,24 16:6 16:13,24,25</p>
---	--	---	---	---

17:1,17,19 18:1 19:11,20 20:1,14 21:4 21:12,13,15,23 22:3 23:13,17 23:19,21,24 24:7,10,18,22 25:17 26:5,17 28:24 29:16 30:10,17,25 31:11,14,18,20 32:13 33:10,19 33:23 34:11,21 34:24,25 35:2 35:3,15,22 36:13,18,23 37:4,6,9,12,13 37:21 38:3,12 38:14 39:2,7 39:14,16,17,22 40:3 41:10,22 42:5,8,14,22 43:3,12 44:1,4 44:16,19,22 45:9,20,24 46:5,6,12,14 46:22 47:18 48:3,6 50:1,5 51:9,17,24 52:3,8,14 53:5 53:11,14,20,24 Justice's 45:21 48:9	49:2 <hr/> L language 4:7 10:2 19:6 47:19 51:5 52:6 large 35:6 larger 8:14 34:23 Laughter 44:21 law 41:14,24 42:6 laws 52:7 lead 16:20 Leocal 23:5 50:15 52:10,12 lesser 10:13 let's 6:17,18 33:12 liable 32:12 liberal 10:14 lifeline 5:22 6:4 light 5:8 lighter 45:11,13 limit 47:10 limitation 46:20 limiting 27:21 42:23 47:9 48:20 line 14:21 15:20 link 48:14 litigated 40:21 little 5:2 24:23 26:7,19 long 35:24 37:7 37:18 40:13 46:1 look 14:9 16:1,2 18:19 43:10 49:14 Lopez-Gonzalez 50:16 52:11,20 lose 17:6,9 22:25 losing 34:22 loss 4:2,25 5:18 6:5,7,19,23 8:6	8:20 9:12,17 9:18 10:7,7,9 10:13 11:25 12:11,20 13:11 13:19 14:13 15:10 16:3 17:4,8 18:21 19:8 20:12,24 22:5 25:21,25 26:2,12 27:23 29:1,3,6,8,11 29:18,20,25 30:2,8,23 31:16,21 32:24 33:3,6,8 34:18 37:15,24 39:21 47:21,24 49:3 49:4,5,16,20 49:21 50:23 51:3 53:21 losses 29:13 49:17 lost 31:5 32:6 33:13,17 lots 29:4,4,5 low 40:24 <hr/> M M 3:17 6:10 8:17 10:1,1,2 22:4 24:1 26:1 27:24 29:24 32:8 40:23 41:9 49:2 50:20 machina 18:4 mail 6:17,18,20 28:2 33:12 mailing 33:13 37:20 38:1 mailings 33:24 34:2 35:7 mainstays 24:2 28:2 47:15 major 24:4 majority 14:10 14:12 19:24	making 11:11 27:6 mammoth 36:14 mandatory 21:20 MANJO 1:3 manual 49:14 materials 9:21 matter 1:12 10:18 11:2 33:14 52:21 54:2 maximum 40:5 40:20 mean 14:21 21:19 25:10 41:18 47:6,25 meaning 47:3 means 12:8 23:15 meant 20:4,6 measured 29:2 38:6 meet 40:16 44:13 meets 38:23 members 48:23 mention 15:15 merely 34:2 metric 31:24 million 29:18,18 30:5,6 35:19 millions 33:16 million-dollar 28:20 minor 29:21 minutes 23:10 50:6 misdemeanor 38:18 missing 48:14 Model 28:8,12 modified 9:16 10:4 12:3 13:3 17:11,12 18:2 22:7,7 24:8,8,8 24:12 27:7	modifying 13:8 moment 15:5 Monday 1:10 monetary 28:16 28:18 money 25:23 35:8 37:1 months 40:24,25 morning 3:4 Moseley 1:16 2:3,8 3:5,6,8 4:22 5:13,16 6:9 7:2,12 8:3 8:24 9:4,14 10:10,19 11:3 11:8,17 12:21 13:12 14:7,23 15:4,24 16:8 16:18,24 17:14 17:19 18:18 19:18 20:5,21 21:8,22 22:2 23:16,20 50:5 50:7,9 51:16 51:18 52:2,8 52:19 53:10,13 53:21 multiple 21:5 23:7 27:19 38:7 multiple-offen... 39:5 <hr/> N N 2:1,1 3:1 48:24 national 41:17 45:1 nature 12:10 13:7 necessarily 4:17 4:18 12:22 29:8 30:23 32:11 33:19 47:25 necessary 6:7 9:1,5 18:22,23
--	--	---	--	--

<p>20:25 21:16,17 24:25 27:8,11 27:14 35:23,24 36:9 42:24 49:13 52:17 need 21:20 27:22,24 35:16 38:25 39:20 40:8,16 42:10 45:14 49:16 needs 25:3 27:20 29:12 negotiation 26:9 never 40:21 41:2 43:18 New 28:18 Newark 1:16 Nijhawan 1:3 3:4 7:13,17 8:5 Nken 4:12 nonelement 47:9 note 22:17 50:19 notion 43:19 novo 35:25 51:21 53:22 number 6:11,12 7:16,16 15:14 N.J 1:16</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 2:1 3:1 objection 13:17 26:8 obligation 18:10 obtaining 24:6 obviously 25:5 35:20 36:5 odd 26:23 offense 3:23 6:6 6:8 8:18 9:5 12:9,13,19 13:10,19 14:2 14:4 15:3 18:8 18:15 21:1 26:2 27:10,21 27:22 29:25</p>	<p>30:2,7,8,20 31:16 32:7 34:18 37:11,17 37:18,25 38:5 38:10,11,17,22 40:15 43:2,18 43:22 44:10 46:15,18,18,23 47:9,12,20,23 48:23 53:7 offenses 6:13 14:1,5 24:4 28:4,6,9,11,12 41:16,17,17 43:13,17,24 45:2 47:4,8 49:9 offer 24:11 28:5 oh 18:12 35:2 Okay 13:5 once 14:15 ones 43:21 opening 25:24 operate 20:4,6 opponent's 46:9 opportunity 5:21,25 opposed 41:24 opposite 52:22 option 5:25 oral 1:12 2:2 3:6 23:22 order 6:19 9:10 18:10 24:13 29:10,14 30:16 30:19,22 38:22 40:12 46:11 47:9 ordinary 48:14 original 15:6 26:24 32:8 34:9 40:15 43:2 44:14,14 53:9 ought 43:9 oust 4:8 outlying 24:4</p>	<p>overarching 23:1</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 48:25 page 2:2 25:24 paid 30:15 pairing 9:25,25 par 4:9 paragraph 27:17 parallel 20:3 49:6,22 part 3:13,20 4:3 4:19 6:11 12:6 23:2 33:15 50:10 51:22,23 participant 29:21 participates 29:17 particular 18:24 21:11 27:14 28:7 30:12 31:9 41:11 particularly 18:19 22:8,9 26:23 41:20 42:21 45:7 passing 14:2 patchwork 14:17 28:5 47:17 pattern 15:13 pay 32:12 payment 28:19 pecuniary 31:21 Penal 28:8,12 people 16:6,14 perceived 51:7 percent 32:3 perfectly 20:22 period 10:25 22:14 permit 24:24 person 11:24,24 19:14,15 29:19</p>	<p>53:18 persuasive 32:24 Petitioner 1:4 1:17 2:4,9 3:7 28:15 36:6 43:17 49:8,23 50:8 Petitioner's 24:1 27:25 51:8 phone 24:6 phrase 48:1 phrased 26:8 picked 32:2 picture 8:14 placed 13:24 52:15 plain 4:7 plea 6:25 10:7 20:2,9 22:10 25:15 36:15 49:9 pleaded 36:10 49:18 pleads 6:24 36:11,13 pleas 9:22 24:13 25:6 27:13 49:12,21 please 3:9 4:15 23:25 pocket 30:14 31:19 point 5:2 9:7 15:13 22:3 25:2 26:10,12 28:25 37:2 38:12 44:24 48:9 51:10 53:6 pointing 24:22 points 46:6 political 43:24 44:9 pornography 41:17 43:13 position 7:23</p>	<p>15:14 19:7 32:19 33:10 38:3 possible 34:7 postconviction 11:21 post-verdict 10:12 potential 48:22 practical 24:15 25:7 practicality 53:4 practice 49:9 practices 28:13 predated 25:10 predicating 19:5 premise 15:6 34:25 45:21 preponderance 10:14,24 presumably 26:11 presumptively 4:10 pretty 47:1 prevail 13:13,16 13:16 prior 38:21,23 40:5 probably 34:19 problem 7:1 14:16 15:12 problems 25:7 proceeding 25:1 26:13,14,24 27:1 31:7 32:23 34:6 36:1,22 38:24 39:1,4,5,16 40:10,16,18 41:6 42:1,11 42:12 45:14,16 48:19 51:21,25 52:4,5,11 proceedings 19:10 25:14 37:24 38:4</p>
--	---	--	--	--

51:4 52:12 produces 15:1 16:4 profound 11:18 programs 15:9 prong 38:18 45:18 proof 11:1,1 29:14 39:1,3 40:17 46:10,24 48:10,12 prosecute 19:20 19:21 21:11 prosecution 16:22 39:13 51:19,23 52:25 53:3 prosecutions 24:3 28:2 38:7 47:16 prospectively 25:8 protection 38:6 protections 41:13,23 42:6 42:9,12 45:17 prove 6:19 10:13 26:11 31:6,15 33:17 34:2 35:6,7,21 36:19,21 37:23 38:2,5,10,11 39:20 40:2 41:13,14,23 42:1,10,18 43:9 44:7 45:4 46:7 48:15 51:20,25 53:2 53:18,21 proved 33:13 34:3,12 35:9 36:14,25 39:8 43:1,6,18 provide 14:24 proving 29:5 provision 8:18 13:23 23:1	provisions 6:12 10:1 14:8 20:3 22:20 27:19 41:16 43:5 47:14 48:21 purely 43:24 44:9 purpose 21:3 24:22 purposes 10:9 21:2,18 25:25 26:12 27:1,3 29:2 30:24 31:23 32:7,15 32:20,21 34:6 37:14,14 38:6 42:1,25 45:13 48:18 49:10 52:7 pursuant 32:20 45:4 put 8:13 18:24 24:24 30:14	41:2 ranges 40:24 reach 5:14 read 17:3,3,6,20 28:1 47:18,20 47:20,22 51:12 53:1 reading 19:16 24:1 47:14 49:1 50:25 reads 47:15 realize 9:24 really 4:5 11:18 12:2 17:2 27:9 33:3 35:9 43:10 47:1 reason 15:16 24:23 27:3,6 33:2 49:11 reasonable 39:3 39:9,12 40:2,9 42:8,18 43:9 46:8,10,25 48:12,16,16 reasonably 29:19 reasons 24:15 24:16 30:21 rebuttal 2:7 23:12,13,18 50:7 received 41:6 recidivist 39:4 recognize 19:4 36:9 recognized 36:8 recollection 13:20 record 33:11 35:5 records 24:6 reenters 53:16 reentry 40:10 53:3 refer 3:16 4:18 reference 3:14 13:19 14:3,18	referred 43:23 referring 49:15 refusal 31:8 regard 29:14 46:13 47:3 regarding 20:17 regardless 51:12 rejected 52:23 relationship 38:18 39:7,8 45:18 relevant 7:19 25:25 26:14,15 29:4 33:21 40:17 42:1,11 49:15,22 51:10 reluctant 26:18 rely 34:5 relying 17:11 remaining 50:6 removability 25:14 removable 14:1 removal 19:5,10 25:14 31:7 32:23 37:24 42:12 45:14 48:19 51:3 52:10,11 reply 14:11 28:16 request 8:9 requested 8:12 require 4:1 26:24 required 3:21 3:22 4:4 22:5,6 33:18 35:7 requirement 3:18 8:22 11:23 17:21 20:8 31:9 49:3 50:21 requirements 16:3 45:5 reserve 23:11 reserving 11:9,9	resolution 10:21 resolved 9:22 19:25 22:10 23:6 51:8 resolves 11:7 resolving 11:4,4 respect 4:25 8:6 9:22 11:5 45:3 50:9,16 53:4 Respondent 1:20 2:6 23:23 response 14:6 responsible 25:23 26:4 responsive 44:2 restitution 29:10,14 30:11 30:16,19,22 31:9,23 32:10 32:12 restrictive 4:1 12:10,12,16 13:7,9 results 15:1,2,18 retry 37:15 return 3:15 5:20 6:22 returns 6:21 revenue 8:20 9:12,18 49:4 rhyme 15:16 right 11:9 12:1 37:6 39:16 44:25 51:17 52:2 ROBERTS 3:3 23:19,21 26:5 41:10,22 42:5 42:8,14 43:3 43:12 44:1,4 44:16,19,22 45:9 50:1,5 53:24 role 30:4 roughly 7:14 22:14 rule 25:11,12
	Q			
	qualifying 32:7 39:24 question 7:22 11:14,15 12:2 17:2 19:12 20:17 25:25 34:25 43:4 48:7 questioned 18:17 questioning 48:10 questions 23:11 24:16,24 27:5 49:25			
	R			
	R 3:1 raised 24:17 raises 53:3 range 13:1,1 18:25 40:22			

rules 29:4	security 41:17	single 41:5	status 20:19	strangely 15:2
run-of-the-mine	45:1	49:19	statute 3:13,19	strike 42:21
43:15	see 12:3 16:2	situation 8:9	4:7,8,20 5:3,15	45:6
<hr/>	18:6 21:4	10:12 11:19,21	6:10,20 8:14	strikes 41:19,19
S	23:10 44:23	19:13 20:7	9:17 11:24	structure 22:17
S 2:1 3:1	53:20,20,23	situations 22:9	13:6,24 14:5	subject 17:25
salary 30:15	seek 20:23 51:20	size 36:19	16:12,16 17:12	42:5
satisfied 7:3	seeking 19:22	small 35:8	17:14,15,17	submit 4:6,9
28:6 47:6	sense 15:20 16:1	smuggling 48:24	19:5 20:10,10	5:21 10:2
satisfy 12:15,15	27:16,23 44:6	Solicitor 1:18	22:4,12 23:2,4	11:17,17 52:24
24:14 31:17	45:13 47:11	somebody 29:16	23:8 29:2,6,24	53:3
40:13	51:1	32:6	47:7,15 49:7	submitted 53:25
save 23:17	sensitive 30:22	sorry 44:17,18	50:11,13 51:1	54:2
saying 6:10 8:1	sent 10:2	sort 12:6 26:23	51:6 52:9,16	subparagraph
10:6,23,25	sentence 21:24	45:2	52:24	24:1 26:1
12:7 16:13	22:19 41:6	sorts 32:9 34:15	statutes 5:17,18	27:24 29:24
24:12 42:15	43:21 46:1	Souter 4:13,15	5:24 6:11,15	32:8 40:23
44:23	48:21,22	10:17,20,23	9:25 12:23,24	41:9 43:23
says 3:23 17:15	sentencing 10:9	11:6,12 12:1	12:25,25 13:13	49:2
18:12 26:6	10:11,22 18:20	12:23 13:5,15	13:19 14:10,10	subpart 22:21
53:1	18:25 21:18	14:15,25 15:5	14:12,13,16	subsequent 38:4
Scalia 16:25	22:23 26:14,15	15:13	15:8,8,15	38:24 43:22
18:1 21:12,15	29:3,9 32:9,15	so-called 24:12	16:11 18:5,20	45:16 53:2
21:23 22:3	32:20 34:15,16	special 5:6,20	32:11 42:23	sufficient 12:5
23:13,17 24:7	35:19 40:21	6:22 20:16,23	50:22	29:11
24:11,18 30:25	41:4 49:23	25:5,22 26:7	statutory 3:16	suggesting
34:21,24 35:2	53:15	specific 15:10	14:8,18 22:21	20:20,21 43:6
36:23 37:4,7	separate 18:9	22:20	22:22 38:24	suppose 14:17
45:20,24 47:18	19:9,9 37:1	specifically 4:24	40:4,20 41:2	15:1 37:9
48:3 51:9,17	38:10 53:14	specified 21:18	stay 4:11 14:21	Supreme 1:1,13
51:24 52:3,8	serious 31:25	spell 26:18	steal 14:19,20	sure 33:11
52:14	serious 31:25	squeeze 18:2	Stevens 16:24	suspect 3:15
scheme 14:22	serves 3:12	stage 20:2	17:1,17,19	sweeps 9:17
28:9,14 29:17	set 8:14	standard 4:6	33:10,20,23	20:10,11,11
33:15,20,22,23	severe 23:9 32:5	10:14,15,18	34:11 35:3,15	swept 16:10,10
33:24,25 34:1	sharp 22:24	11:1 12:6,15	35:22 36:13,18	system 15:18
34:3,4,23 35:4	sharply 19:6,7	39:9	46:5,13,14,22	<hr/>
35:5,7,10 36:4	22:18	standards 4:11	48:6	T
36:12,14,19	show 36:16 42:6	State 5:17,17	Stevens's 34:25	T 2:1,1
37:7,19,25	51:15	6:14,15 12:25	37:21	take 15:14 31:23
scope 36:3 37:7	showing 38:8	14:10,10,16,19	stipulation	38:14
second 5:7 6:24	shown 22:5,6	14:20,21 15:21	26:16 32:19,21	taken 21:25
36:22 39:4	shows 35:5	16:11 28:6,21	49:23	takes 7:23 46:8
43:22	sight 22:25	28:23,23	stipulations	talk 22:22,23
section 8:19	signal 10:2	States 1:1,13	34:15 35:19	41:16
49:10	similarly 4:10	14:12 15:19	stole 18:11	talked 5:15
secure 52:17	23:5	28:15 38:20	strange 14:2	talking 5:3 8:17
	simply 21:18			

10:3,3 39:23 43:13 45:17 talks 29:24 tax 8:19,22 9:11 9:20 19:13,13 19:14 20:20,22 20:24 49:9,14 49:19 term 12:8 41:11 43:20 44:10 terms 10:12 11:22 22:17 test 14:24,25 16:1,1 tether 3:24 tethered 36:6 text 17:3 29:23 Thank 23:19,20 50:1 53:24 theft 14:12 15:8 16:15 28:9,10 thefts 24:4 theory 29:1 35:24 thing 16:7 41:12 42:15 43:7 48:13 things 35:19 42:16 43:17 45:3 47:3 think 8:6,6,10 8:13 9:7,24 11:21 12:21 14:7,11 15:19 15:25 18:18 19:3,12 20:6 22:16,25 24:10 24:14 26:20 27:16 29:7,23 30:2,9,21 31:7 31:17 32:4,18 34:7 35:12,23 36:21 37:8,20 39:11,18 40:6 41:25 43:4 44:25 45:8 46:17 47:7	48:5 50:19,25 Third 3:24 THOMAS 1:16 2:3,8 3:6 50:7 thought 34:22 34:24 36:24 45:20 53:7 three 7:13 13:22 14:5 35:7 threshold 25:25 27:23 30:2 31:21,22 32:2 39:21 42:3 thresholds 14:14 28:17,19 thrust 26:24 tied 27:9 30:2 time 13:25 23:11 34:16 53:23 times 22:14 time-honored 4:5,8,14,16,20 tiny 24:3 Title 8:19 told 20:1 total 29:18,20 traditional 7:3 treated 16:15 28:21 treating 16:6 trial 7:15 19:14 20:3,15 33:14 35:14 tried 33:5 45:25 tries 39:24 triggered 50:18 true 21:18 48:19 52:15 truly 10:11 26:25 try 34:17 trying 13:25 38:10,11 42:2 turn 25:4 two 6:18 7:12,13 7:17 9:25,25 17:4 33:24	34:2 35:7 type 28:22 types 24:16 31:25 41:3 typically 49:20 <hr/> U <hr/> ultimately 25:16 52:22 underlying 3:19 4:7 11:23,23 27:8,10 29:13 30:20 31:4,4 35:21 38:22 51:21 underscores 21:14 understand 11:13 12:5,12 18:2 19:16 22:2 33:11 36:18 44:2,17 48:9 53:6,12 understates 14:8 undoubtedly 52:1 unequal 15:18 uniform 14:24 14:25 15:25 16:1 uniformity 16:4 United 1:1,13 38:20 unjust 14:17 15:1 unnecessary 21:6 unsatisfying 15:2 use 23:7 24:13 35:25 36:6 49:11 50:13 52:9 uses 39:10 usually 23:15 utilized 3:24	utter 14:17 U.S.C 3:11 17:25 51:20 52:12 <hr/> V <hr/> v 1:5 3:4 38:20 value 32:4 variation 24:11 vast 19:24 vastly 14:8 verdict 4:17 5:10,20 6:21 verdicts 5:6 victim 17:5,8 29:12 30:1 31:22 33:13 47:22,24 victims 17:8 26:2 30:1,9 31:5 32:6 view 48:16,17 violence 38:19 43:19,25 44:4 44:15,25 45:22 virtually 28:1 virtue 42:17 <hr/> W <hr/> want 26:11 33:11 wanted 15:2 21:1,2,3 wants 25:2,3 Washington 1:9 1:19 wasn't 34:17 way 15:21 20:4 20:6 29:19 46:2 47:20 ways 17:4 29:5 went 7:15 we're 5:7,22 8:17 10:3,3,11 11:10 32:21,23 38:10,11 41:8 41:10 42:2	48:4 we've 21:21 33:16 whiches 49:6,6 white 6:13 win 48:11 wire 28:3 wish 20:24 wondering 35:23 word 3:24 18:6 36:6 46:25 48:6,7,8 words 17:21 44:5 work 24:15 works 24:4 wouldn't 7:18 8:11 26:11 30:25 32:16 47:13 written 5:5 wrong 9:7 12:20 50:20,21,21 <hr/> X <hr/> x 1:2,8 <hr/> Y <hr/> Yanez 52:21 year 43:20 44:11 46:2 49:19 years 40:1,1 41:2,4,7 49:17 <hr/> \$ <hr/> \$10,000 4:19 6:23 7:1 9:13 9:19,19 10:8,9 12:11,14 13:2 14:3 17:5,8 18:9,13 30:1,9 31:5,17 32:4,6 42:3,16 47:22 47:24 49:4,5 50:23 51:4 \$100 29:18,18 30:5 35:19
---	---	---	--	--

\$11,000 14:19	3 2:4 41:4			
\$200,000 32:3	3a 3:17			
\$25 34:2				
\$30 33:13	<hr/> 4 <hr/>			
\$683 30:6	4 50:6			
<hr/> 0 <hr/>	43 27:17			
08-495 1:5	<hr/> 5 <hr/>			
<hr/> 1 <hr/>	5 23:10 32:3			
1 43:20 44:10	5,000 15:10			
46:2	50 2:9			
10 41:1,6	57 40:25			
10,000 8:21	<hr/> 6 <hr/>			
10:25,25 12:20	6 41:1			
13:2,11,20,24	6a 3:17 17:22			
20:12,13,13	6B 32:20			
10-year 40:4,20	<hr/> 7 <hr/>			
10:04 1:14 3:2	7a 3:18			
101(a)(43) 22:21	7201 8:19 49:10			
11:01 54:1	49:21			
1101(a)(43)(M...	<hr/> 8 <hr/>			
3:11	8 3:11 17:25			
1326 40:10 41:6	51:19			
1326(b) 23:2	8a 3:18			
51:20	<hr/> 9 <hr/>			
1326(b)(1) 40:5	922(g)(9) 39:12			
1326(b)(2) 40:17				
40:20				
14a 25:24				
15 7:14				
16 52:12				
16(b) 52:12				
18 52:12				
1994 32:2				
1996 32:3				
<hr/> 2 <hr/>				
2 39:25				
2a 22:21,22				
20 40:1				
2009 1:10				
21 8:19 40:24				
23 2:6				
26 8:19				
27 1:10				
<hr/> 3 <hr/>				