

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

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
GEN. STEVE SIX, ESQ.	
On behalf of the Plaintiff	3
GEN. JOHN W. SUTHERS, ESQ.	
On behalf of the Defendant	26
REBUTTAL ARGUMENT OF	
GEN. STEVE SIX, ESQ.	
On behalf of the Plaintiff	48

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

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 105 on our original docket, Kansas v. Colorado.

General Six.

ORAL ARGUMENT OF STEVE SIX
ON BEHALF OF THE PLAINTIFF

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

Article III makes a clear distinction between the Court's appellate and original jurisdiction, and expressly grants Congress power to make exceptions and regulations for appellate jurisdiction, but Congress is not granted the same power over original jurisdiction.

CHIEF JUSTICE ROBERTS: That's an extremely sensitive clause in Article III. We can decide this case without relying on the distinction you just discussed, can't we?

MR. SIX: Well, I think can you, and the Court certainly can interpret the statute not to even reach the original jurisdiction of the Supreme Court and avoid that constitutional conflict. And I think the stronger reading of the statute arrives at that very

1 result.

2 The statute at issue, the cost provision, 28
3 U.S.C. section 1920, states: "A judge or clerk of any
4 court of the United States may tax as costs the
5 following." And it lists six subparagraphs, including
6 subparagraph 3 at issue here, Fees and Disbursements for
7 Printing and Witnesses.

8 The statute has two terms in it that are
9 defined, "judge" and "court of the United States," and,
10 importantly, one term in 28 U.S.C. section 451 that is
11 defined but does not appear in the cost provision, and
12 that is "Justice of the United States." "Justice of the
13 United States" is defined as "the Chief Justice and the
14 Associate Justices of the Supreme Court." The cost
15 provision says "a judge." "Judge of the United States"
16 is defined as including judges on the court of appeals,
17 the district court, the Court of International Trade,
18 essentially the listed courts and the Article III
19 judges.

20 JUSTICE: But, on the other hand, "court of
21 the United States" is defined specifically to include
22 the Supreme Court. So you have a contradiction no
23 matter which way you flip it. On the one hand, it says
24 "judge," which does not include the Justices of the
25 Supreme Court. On the other hand, it says "court of the

1 United States," which does include the Supreme Court.
2 So why should we pick one -- one answer to the
3 contradiction rather than the other?

4 MR. SIX: You don't have to pick. And
5 you're correct, "the court of the United States" is
6 defined to include the Supreme Court. But the strongest
7 reading of the statute gives meaning to all of the words
8 in the statute, and it says you can be a judge who
9 appears in the court of the United States. And if you
10 think about it, there's a circle of judges that are
11 defined here and a circle of courts that are defined
12 here, and where the two overlap, where you are both a
13 judge and in the court of the United States, the statute
14 should apply.

15 CHIEF JUSTICE ROBERTS: What about --

16 MR. SIX: And that --

17 CHIEF JUSTICE ROBERTS: It also says
18 "clerk." We may not be judges, but we certainly have a
19 clerk.

20 MR. SIX: You do, and 28 U.S.C. section
21 1911, another provision in Title 28, specifically deals
22 with the Supreme Court Clerk. And throughout title 28,
23 the Supreme Court is treated differently than the lower
24 courts.

25 JUSTICE KENNEDY: Is 1911 a stand-alone

1 provision that would justify relief for you, or do we
2 have to also refer to the general cost statute?

3 MR. SIX: I don't think the Court would
4 refer to the general cost statute in its original
5 jurisdiction cases at all or any authorization from
6 Congress. 28 U.S.C. 19 --

7 JUSTICE KENNEDY: Well, but let's assume
8 that we think Congress can control this, this issue,
9 this question. Now, I'm asking if 911 isn't a
10 stand-alone section so that you can interpret it without
11 reference to 1920.

12 MR. SIX: I mean, I would -- if your
13 assumption is Congress has the power to do it and has
14 done so through 1911, I read 1911 more as simply a grant
15 of the discretion the Court already has. They are
16 turning over to the Supreme Court the power to have the
17 clerk set costs.

18 JUSTICE KENNEDY: If I think this case is
19 controlled by 1911, do I have to refer to 1920?

20 MR. SIX: No. I don't believe you have to
21 refer to 1920.

22 JUSTICE KENNEDY: Why can't you rest your
23 case just on 1911?

24 MR. SIX: Because in the original
25 jurisdiction of the Supreme Court, Congress isn't given

1 power to make exceptions or regulations over original
2 jurisdiction. And in the 219 years of the Court's
3 original practice, they have never referred to a
4 congressional cost provision, and --

5 JUSTICE KENNEDY: Are you saying that 1911
6 doesn't cover expert witness fees because it's not
7 included within the term "other necessary
8 disbursements"?

9 MR. SIX: I believe the expert witness fees
10 in this case were vital to the resolution. They were --

11 JUSTICE KENNEDY: Were they within 1911?

12 MR. SIX: I don't believe they were other
13 incidental disbursements. That's not our position.

14 JUSTICE KENNEDY: Other necessary
15 disbursements.

16 MR. SIX: Other necessary disbursements.

17 JUSTICE KENNEDY: Incidental to the case.
18 You don't that think that covers expert witness fees?

19 MR. SIX: If -- if this Court determines
20 that Congress has the power, and it's done so through --
21 since 1911 -- has the power and done it from 1911, I
22 certainly would accept that position as the result.
23 However, I would point out to the Court that I think the
24 expert witness costs and the work was vital to the
25 resolution of the case here.

1 JUSTICE ALITO: If you're reading of the
2 statute is correct, then I take it we would have the
3 discretion to decide what would be appropriate expert
4 fees. Is that correct?

5 MR. SIX: Absolutely.

6 JUSTICE ALITO: If that's so, why shouldn't
7 we exercise that discretion by saying that the expert
8 fees that are available in case of the original
9 jurisdiction of this Court should be the same as the
10 expert fees that would be available in a district court?
11 Maybe they are too low in the district court, but why
12 should there be -- why should we as a discretionary
13 matter, if we have the discretion, provide for radically
14 different fees depending on the court in which the case
15 originates?

16 MR. SIX: Clearly the Court has the power to
17 make that rule for original cases. However, the
18 original jurisdiction was developed when the States
19 agreed to submit and ratify the Constitution, submit
20 their sovereign immunity to resolution in the original
21 jurisdiction to handle unique disputes between the
22 sovereign States. And as the Court said in Florida v.
23 Georgia in 1854, "The analogies and rules and
24 foundations of law that apply to private parties are not
25 necessarily a good fit for sovereign States.

1 JUSTICE KENNEDY: Well, but Justice Alito is
2 saying we have discretion, we look for guidance, we have
3 guidance from Congress. They have adhered to the \$40 a
4 day limit in very important cases; why don't we just
5 say, Justice Alito is suggesting, that this is -- that
6 this is a good guidepost for us and we will follow it?

7 MR. SIX: Because what Colorado's position
8 is that they are telling you that the Special Master's
9 hands were tied; that the Special Master couldn't even
10 exercise that discretion in a bright line rule that
11 would save \$40 a day.

12 JUSTICE KENNEDY: We are saying it's our
13 discretion and our discretion is guided by what Congress
14 has suggested so there is uniformity in the system and
15 so forth.

16 MR. SIX: Clearly, the Court would have the
17 power to do that. However, there has only been
18 approximately 200 original jurisdiction cases in the 219
19 years of the Court. To suggest that the rules --

20 JUSTICE GINSBURG: In all those -- in all
21 those cases has the Special Master ever called a court's
22 witness, that is a court's expert, appointed a court's
23 expert, and if so what is the pay rate for such a
24 witness? I mean, courts of the United States, district
25 courts, occasionally appoint witnesses, court witnesses

1 as distinguished from party's witnesses. Do you know if
2 that's happened in Special Master situations?

3 MR. SIX: I can tell you it didn't happen in
4 this case. I certainly can't speak to whether it's
5 happened in other cases involving special masters, so I
6 don't know the answer to that. Certainly 1920 makes a
7 distinction for court- appointed experts rather than the
8 expert witnesses appearing under subsection 3 of 1920.

9 I think the important point to consider,
10 though, is in the original jurisdiction the Court in its
11 219 years of developing essentially an interstate common
12 law in these cases has never relied on the trilogy of
13 cost statutes that the court discussed in Crawford
14 Fitting, with is I essentially Colorado's position: You
15 have to apply Rule 54D first to have the court even have
16 the discretion to award costs; then you get to 1920,
17 which the Court said is the arena of costs; and only
18 after that do you get down to 1821, which tells you
19 you're limited to \$40 a day.

20 JUSTICE KENNEDY: How do Special Master fees
21 work? The Special Master always has fees and the
22 parties I think usually divide them. How does that --
23 how is their authority to order them --

24 MR. SIX: Sure. Rule 53 of the Federal
25 Rules of Civil Procedure deals with special masters in

1 the lower courts. It has no application here and wasn't
2 used. The Special Master's fees, which total
3 approximately a million dollars, just shy of that, were
4 resolved by the parties after the Special Master was
5 allowed to exercise discretion on that area of cost.

6 JUSTICE SOUTER: Well, what if they hadn't
7 -- what if the parties hadn't resolved it?

8 MR. SIX: If they hasn't resolved the
9 Special Master's --

10 JUSTICE SOUTER: Yes. How would the -- how
11 would the Special -- what would be the authority of this
12 Court to make an order that the Special Master be paid X
13 dollars?

14 MR. SIX: Well, I think the authority of the
15 Court comes from the order appointing the Special Master
16 to handle the case and to do the specific things that
17 were --

18 JUSTICE SOUTER: Okay. We just, we just
19 regressed one step. Where does the authority come from?

20 MR. SIX: To appoint a Special Master?

21 JUSTICE SOUTER: Yes.

22 MR. SIX: It's an inherent authority the
23 Court has in original jurisdiction cases.

24 JUSTICE SOUTER: So that the authority to
25 compensate is inherent?

1 MR. SIX: The authority to compensate is
2 inherent. In the Judiciary --

3 JUSTICE SOUTER: Are you making -- would you
4 make an inherent authority argument here?

5 MR. SIX: Yes.

6 JUSTICE SOUTER: Regardless of original
7 jurisdiction and appellate jurisdiction, would you say
8 that this Court simply has the inherent authority to, to
9 in effect to decree these sorts of claims.

10 MR. SIX: Well, again there is a distinction
11 between appellate and original and, focusing on
12 original, I think the Court has entirely the authority.
13 The Judiciary Act of 1789, which gave the Court
14 exclusive jurisdiction over these disputes, didn't set
15 forth any procedures to govern the disputes. That's
16 always been carefully preserved to the discretion of the
17 Court to apply each unique case.

18 JUSTICE STEVENS: General Six, under your
19 reading of the statute, 1934 particularly, would the
20 Court have authority to charge your fees to your
21 adversary, shift attorney's fees?

22 MR. SIX: Yes. In the original jurisdiction
23 the Court would have the inherent authority to do
24 fee-shifting if the --

25 JUSTICE STEVENS: Did you make such a

1 request in this case? Why should -- why should
2 attorney's fees be treated differently from expert
3 witness fees? Let me put it that way. Or should it be
4 treated differently?

5 MR. SIX: The Special Master should have the
6 discretion to consider all the costs and unique
7 circumstances of the case. In this case we chose expert
8 witness fees --

9 JUSTICE SCALIA: We should have the
10 discretion. Why do you keep talking about the Special
11 Master? He's just -- he's just our amanuensis.
12 Ultimately it's our discretion, isn't it?

13 MR. SIX: It is, and the benefit of having
14 the Special Master make a recommendation is we could
15 have gone through these different categories of costs
16 and come up with a recommendation. The Court certainly
17 could have learned --

18 CHIEF JUSTICE ROBERTS: I take it the usual
19 practice is for the parties to settle this matter and
20 submit an agreed amount to the Special Master; is that
21 correct?

22 MR. SIX: The way it's worked in this case
23 is the Special Master has provided guidance, like on the
24 Special Master's fees. The Special Master suggested it
25 wouldn't be unfair to award them two-thirds Colorado,

1 one-third Kansas. After that the parties resolved it,
2 just like we resolved every other issue of cost where
3 the Special Master was allowed to apply that discretion.

4 CHIEF JUSTICE ROBERTS: So why didn't -- -
5 then are we here? We are talking about limited amounts.
6 So much more is at stake on the merits and why wouldn't
7 the parties just say, well, when it comes to Special
8 Master fees this is what we are going to agree to. It
9 doesn't have to be limited to \$40. You can agree as
10 part of a global settlement to whatever you want.

11 MR. SIX: Well, the Special Master's fees
12 we resolved. The experts fees at issue here, of course
13 that bright-line rule was drawn by the Special Master
14 and he never was allowed to make a recommendation to the
15 Court to consider that. In balancing -- the remedies in
16 these cases are highly equitable remedies.

17 JUSTICE STEVENS: Would you just answer my
18 question of a moment ago. Why should expert witness
19 fees be treated differently from attorney's fees?

20 MR. SIX: Well, in this case they should be
21 treated differently because the model at issue that the
22 experts for Kansas developed, the HI model, was used to
23 prove our claims at trial, which would have --

24 JUSTICE STEVENS: You used lawyers to prove
25 your case, too.

1 MR. SIX: Excuse me?

2 JUSTICE STEVENS: You used lawyers to prove
3 your case, too. Why should they not be compensated?

4 MR. SIX: Because we considered the special
5 circumstances of the model. It proved the claims at
6 trial. It was adopted by the Court in 2004 in Kansas v.
7 Colorado to monitor compliance in the Arkansas River
8 Basin. It's the water use -- it's applied by the
9 Colorado State water use rule. So it was special
10 features like that that we wanted to present to the
11 Special Master to explain why the fees should be fairly
12 balanced and divided in a way other than he did.

13 JUSTICE STEVENS: I don't understand that to
14 be an answer to why he didn't also ask for attorney's
15 fees.

16 MR. SIX: Well, in a particular case where
17 perhaps a order of the Supreme Court wasn't followed or
18 some other situation developed, fee shifting may be
19 appropriate. In this case we felt the expert model we
20 developed was so vital that it would be persuasive to
21 the Special Master and fair and equitable to award it to
22 us.

23 JUSTICE GINSBURG: Do you know whether any
24 other -- you didn't know, in answer to my last question,
25 what the practice had been, but with respect to expert

1 fees in other original jurisdiction cases, has the Court
2 ever deviated from the \$40 or when it was \$30, \$30?

3 MR. SIX: In original cases the Court has
4 never referred to any of that trilogy of cost statutes
5 discussed in Crawford Fitting.

6 JUSTICE GINSBURG: But have they ever
7 approved a Special Master's recommendation of a rate for
8 the expert witness that deviates from the \$40?

9 MR. SIX: I think the answer to that is yes
10 and I would direct the Court to New Jersey v. New York
11 in 1931, which was a division of the waters of the
12 Delaware River. And the Court pointed out in that
13 opinion that a mass of evidence was presented to the
14 Special Master, and on costs the Court said: "The cost
15 of the cause shall be divided 35 percent to New Jersey,
16 35 to City of New York," and so on. The "cost of the
17 cause" I would argue is the cost to get the case to the
18 point where it was resolved. In the boundary dispute --

19 JUSTICE GINSBURG: Do you know -- do you
20 know whether there were expert witnesses in that case?

21 MR. SIX: It does not say in the published
22 opinion exactly what the cost of the cause is. However,
23 from a fair reading of the -- the water distribution
24 issues, I wouldn't imagine it would be possible to do
25 that without experts. But I would point the Court to

1 the boundary dispute cases where the Court has discussed
2 the costs of surveyors, mappers, geographers,
3 historians, and divided the cost in boundary disputes
4 equally between the States -- not each State to bear
5 their own cost, but divided them equally.

6 And the -- the experts that are involved in
7 resolving a boundary dispute, I think, are no different
8 than the hydrologists and engineers and the type of
9 experts that we used in this case.

10 JUSTICE BREYER: You're right. They are all
11 different. They did a lot of work on that. I -- I know
12 they did a lot of work on this. Congress has a statute,
13 and the statute is: We don't care if the witness is
14 Albert Einstein, Steven Spielberg, or the local
15 zookeeper. Okay. We don't care. We don't care if they
16 did a lot of work or a little work. We want them to be
17 paid \$40 a day, period. It's too much trouble to figure
18 out how much work they did. That's what we want.
19 That's the law.

20 Now, Justice Alito said: I agree with you
21 for argument's sake; we are not bound by that rule. But
22 I take it his question, which I heard no answer to, is:
23 Assume you are right; we are not bound by the law;
24 still, why shouldn't we follow it?

25 MR. SIX: Because in the original cases the

1 Court has always tried to reach an equitable balance --

2 JUSTICE BREYER: Have do you any example
3 where Congress had a statute which says every court in
4 the United States must pay da-da-da, whatever that
5 number is; it's \$382.50, okay. Now, despite that clear
6 statute, this court for exactly the same thing paid a
7 different amount. Is there any such case?

8 MR. SIX: I'm not aware of that.

9 JUSTICE BREYER: Okay. And is there
10 anything in the -- in the nature of litigation? And
11 there might be. I'm not asking it as a rhetorical
12 question. Is there anything in the nature of original
13 jurisdiction lawsuits that, as a general matter, would
14 call for higher fees to be paid for witnesses, or to
15 make a distinction between expert witnesses and others,
16 or to do other things that would complicate it?

17 I'm not speaking of your case. You have a
18 wonderfully strong case in your case. I want to know
19 about in general, in original actions.

20 MR. SIX: I would suggest the only
21 difference is the parties. And the Court in its 219
22 years --

23 JUSTICE BREYER: If anything, the parties
24 are in a better position to pay the money than the
25 average person.

1 JUSTICE SCALIA: Well, I assume -- I assume
2 your answer is that it's -- that it's our business, and
3 we don't have to agree with Congress; that we -- we may
4 think \$40 a day for the zookeeper and for Albert
5 Einstein is ridiculous. And, therefore, if it's up to
6 us, we would adopt a different rule. Isn't that your
7 answer?

8 MR. SIX: That's exactly my answer. And if
9 you think -- if Congress can adopt a congressional --

10 JUSTICE KENNEDY: Well, I'm not sure that
11 answer is -- is at all adequate. Number one, what is
12 there, as Justice Breyer pointed out, that's so
13 different about this case?

14 Let's say one landowner secretly and
15 intentionally is stealing another landowner's water, and
16 -- and he has no legal right to do that. And the only
17 way the injured landowner can recover is to hire a very,
18 very expensive expert, a hydrologist. And by the time
19 he goes to court, he is really going to lose the benefit
20 of the damages. Congress has said too bad. That's the
21 way it is.

22 Why isn't it that way with States,
23 especially, as Justice Breyer said, when States can
24 really afford the -- afford it better than the
25 landowner. What's the difference?

1 MR. SIX: The difference is the Court has
2 indicated for original cases: These are such disputes
3 of a serious magnitude that can affect whole populations
4 that the model case for even taking a case is where the
5 acts between the States would be a *causus belli*, a type
6 of thing that would lead to war.

7 CHIEF JUSTICE ROBERTS: I haven't seen -- I
8 mean the \$40 limitation makes absolutely no sense, does
9 it? I mean I never saw an expert who would agree to
10 spend the day appearing in court worth being called an
11 "expert" for \$40.

12 I mean the fact that -- I guess I'm just
13 repeating Justice Scalia's question. The fact that
14 Congress has picked an arbitrary number with no basis in
15 reality doesn't mean that we should do the same.

16 MR. SIX: I would agree. The special
17 master 's fees, for example, for one person -- and he
18 was an excellent special|master -- were almost a million
19 dollars. The appearance fees for the 22 experts Kansas
20 had amounted to approximately \$30,000. So that
21 different there, I think, demonstrates the very
22 unfairness --

23 JUSTICE BREYER: It's not unfair to have a
24 rule which says each party pays his own experts, win or
25 lose. That's the rule, isn't it?

1 MR. SIX: I don't think that's the rule in
2 original jurisdiction cases. At least the Court has
3 never said that. The Court has --

4 JUSTICE BREYER: If you lose this case, if
5 we were to follow Congress, we would have adopted a rule
6 where, because the \$40 is trivial, each party pays his
7 own experts. Is that right or wrong?

8 MR. SIX: I think that's correct, but we
9 didn't lose. And the Court found that Kansas proved
10 that Colorado violated a compact for over -- for over 50
11 years by clear and convincing evidence. But one point
12 I'd like to make --

13 JUSTICE BREYER: Well, can we do this then?
14 I think maybe in many cases that are technical in nature
15 it might be quite a good thing for the losing party to
16 pay the winning side's lawyers.

17 MR. SIX: The Court would have that ability
18 to do that in original jurisdiction --

19 JUSTICE BREYER: Well, should we do that,
20 too? If we are going to have them pay the experts, why
21 don't we have them, the losing side, pay the lawyers'
22 fees? That would be quite a revolution.

23 MR. SIX: Because in the original
24 jurisdiction cases involving prevailing parties or
25 litigious cases, the Court has traditionally and

1 historically awarded the prevailing party costs. And if
2 Congress can make a congressional limitation on cost,
3 Congress could pass a statute that says: You have to
4 take all original jurisdiction cases, or you can't use
5 special masters, or you can't use certain special
6 masters in cases involving Colorado and Kansas.

7 JUSTICE SCALIA: Could you save that for the
8 lower courts? I mean, you are -- you are trying to
9 distinguish what it can say for the Supreme Court when
10 the Supreme Court is the trial court vis-a-vis what it
11 can say, and has said, for the lower courts.

12 MR. SIX: Yes, It could say that for the
13 lower courts.

14 JUSTICE SCALIA: Why?

15 MR. SIX: Because --

16 JUSTICE SCALIA: You think that, so long as
17 Congress could not create the lower courts at all, once
18 it creates them it can -- it can tie their hands to any
19 sort of absurd rules?

20 MR. SIX: I think they could pass a rule
21 like they did, Rule 54 -- 53, which allows for special
22 masters, and they could through the Rules Enabling Act
23 pass a rule that says you can't use special masters. I
24 think you get into whether that's --

25 JUSTICE SCALIA: I -- I just don't agree

1 with your assumption that just because Congress need not
2 have created any lower Federal courts, the only Federal
3 court required by the Constitution is this Court,
4 therefore once Congress creates them, it can do whatever
5 it wants with them. I -- I don't agree with that.

6 MR. SIX: Well, I would certainly focus more
7 on the original jurisdiction issue here and haven't
8 focused as much on that issue, but --

9 CHIEF JUSTICE ROBERTS: When we award the --
10 the special master's fees in original cases, do we
11 specify who will bear those fees?

12 MR. SIX: Yes, you do. In -- you do in the
13 cases that have discussed costs. For instance, in
14 boundary dispute cases you have suggested that the cost
15 -- the costs will be divided equally; in litigious
16 cases, that they will be awarded to the prevailing
17 party.

18 CHIEF JUSTICE ROBERTS: Do we include the
19 special master's fees as part of the costs that are
20 allocated?

21 MR. SIX: Yes, and in this case the parties
22 have agreed to that and never made an issue about that.
23 And there is no --

24 CHIEF JUSTICE ROBERTS: Well, why -- why did
25 the parties agree to it if we do it? In other words, if

1 we say in our orders who bears the special master's
2 fees, why -- why would the parties agree to it?

3 MR. SIX: Well, in this case -- maybe I
4 misheard your question. The order appointing the
5 special master did not resolve the issue of fees.

6 CHIEF JUSTICE ROBERTS: Right.

7 MR. SIX: And the parties did not agree to
8 that ahead of time. It was an issue to be determined
9 and decided at the end of the litigation.

10 JUSTICE GINSBURG: Isn't it -- isn't it
11 customary for it to be divided 50/50? I mean, we
12 periodically will approve the fees that the special
13 master charges and then they are divided between the
14 parties. And I thought that they were divided 50/50.
15 Is that not so?

16 MR. SIX: Well, as the case progressed, the
17 special master submitted bills that were divided 50/50.
18 At the conclusion of the case the parties suggested
19 reasons and special circumstances that should allow the
20 special master to apply discretion.

21 He then suggested it wouldn't be unfair to
22 award the special master fee costs two-thirds Colorado,
23 one-third Kansas because of the unique features of the
24 case. And the parties then settled the special master
25 fees with that guidance.

1 JUSTICE KENNEDY: Of course, I think you
2 gave the answer earlier. Rule 53 allows for the -- an
3 order to say that one or both parties shall pay the
4 special master fee. So if we are going to follow other
5 analogies, we don't have much problem here with expert
6 witness fees -- pardon me -- with special master fees.
7 It's under Rule 53.

8 Of course, you say we don't have to follow
9 that as a model, but it is a model if we -- if we were
10 to look to congressional and -- and to other rules.

11 MR. SIX: It is a model; however, the Court
12 has always carefully preserved its discretion to treat
13 each dispute between the sovereign states as a unique
14 dispute. And the Court never even enacted an original
15 action rule until 1939, so after 150 years. And in 1939
16 the Court enacted Rule 5, which just set up the bare
17 minimums of commencing the action. And Rule 17 today
18 has essentially the same framework that tells the
19 parties how to start the action but reserves all the
20 other rules to the discretion of the special master.

21 It does point to the Federal Rules of Civil
22 Procedure and the Rules of Evidence as guides but not
23 binding, mandatory rules that tie the Court's hand.

24 JUSTICE SCALIA: What is magical about
25 original actions? I mean, what -- what is magical is

1 that we are the only court that is required by the
2 Constitution. But we are -- we are not just the only
3 court for original actions in -- in -- in all appeals.
4 Can Congress prescribe division of costs and expenses in
5 the appeals that come to us from the lower Federal
6 courts?

7 MR. SIX: Well, the Court has, in 1913,
8 determined that -- excuse me, in 1912, that when a case
9 is affirmed, the Supreme Court can adjudge costs for
10 damages and delay. So they have directed, I think, a --
11 a regulation at the appellate jurisdiction, but never at
12 the original jurisdiction.

13 CHIEF JUSTICE ROBERTS: You mean Congress
14 has done that?

15 MR. SIX: Congress, I'm sorry.

16 I would like to reserve the remainder of my
17 time for rebuttal.

18 CHIEF JUSTICE ROBERTS: Thank you, General.
19 General Suthers.

20 ORAL ARGUMENT OF JOHN W. SUTHERS

21 ON BEHALF OF THE DEFENDANT

22 MR. SUTHERS: Mr. Chief Justice, and may it
23 please the Court:

24 The special master in this case found clear
25 direction from the statutes and rightly so. Section

1 1821 of Title 28 is unambiguous. It provides that a
2 witness in attendance at any court of the United States
3 shall be paid an attendance fee of \$40 per day in
4 addition to travel and accommodation allowances.

5 Section 451 of Title 28 defines "court of
6 the United States" to include this Court, the Supreme
7 Court of the United States, and that definition has been
8 part of the statute since 1948. Because witness fees
9 are only at issue in the Supreme Court in cases of
10 original jurisdiction, it's apparent that Congress
11 intended the limits set forth in 1821 to apply in such
12 cases.

13 CHIEF JUSTICE ROBERTS: So what if they said
14 in original actions no fees shall be allowed to any
15 special master appointed by the Supreme Court?

16 MR. SUTHERS: Chief Justice, it would then
17 be up to the Court to decide whether that's somehow an
18 intrusion into your --

19 CHIEF JUSTICE ROBERTS: If we allow -- if we
20 allow Congress to regulate fees in our original
21 jurisdiction in that matter, it seems to me that we've
22 given up the principle and we are just negotiating over
23 price.

24 MR. SUTHERS: It would not be the first time
25 that you've allowed Congress to legislate some aspects

1 of your original jurisdiction. Congress has told you in
2 what is now Section 1251 that your original jurisdiction
3 is not entirely exclusive. Only State versus State is
4 exclusive, and all the rest of your jurisdiction is
5 nonexclusive.

6 CHIEF JUSTICE ROBERTS: Isn't this an area,
7 though, where we should be particularly sensitive? In
8 other words, one reason that we were given original
9 jurisdiction in these cases is that the States were
10 afraid of what Congress would do in its own courts, the
11 courts it set up -- might set up under the Constitution.

12 I think it would be surprising if you told
13 the States at the framing that Congress gets to regulate
14 this original jurisdiction where you, for example, can
15 sue the Federal Government, that -- I think that would
16 be surprising. It would not be regarded by them as a
17 significant safeguard.

18 MR. SUTHERS: Chief Justice, if it was such
19 a sensitive issue, why is it we are now in 2008 and this
20 Court has never decided to enact any kind of rules --

21 JUSTICE GINSBURG: But we don't know -- -
22 General Suthers, do we know what has happened in past
23 original jurisdiction cases? Maybe it hasn't come up
24 because other special masters have said, we'll give the
25 expert witness a reasonable fee for services

1 commensurate with the qualifications and the work that
2 the expert has done. We don't know if that has or
3 hasn't happened in the past, do we?

4 MR. SUTHERS: Justice Ginsburg, we -- we
5 looked at it very carefully -- and it's difficult to
6 research -- but we could not find an original
7 jurisdiction case where there was an award of witness
8 fees outside the -- this \$40 per day limitation.

9 JUSTICE GINSBURG: Did you find any cases
10 where the special master had appointed his own witness
11 as distinguished from the parties?

12 MR. SUTHERS: No. We did not. But --

13 JUSTICE GINSBURG: But you -- but you
14 recognize that if a special master appointed a witness,
15 or the court, that that witness would be paid a
16 compensatory fee?

17 MR. SUTHERS: Whatever the special master
18 determined was appropriate. That's correct.

19 JUSTICE GINSBURG: Now, in a -- in a case
20 like this one, where the nature of the work that the
21 expert did seemed to be very helpful to both sides,
22 isn't it odd that the special master chose the court
23 expert, that expert would be compensated fairly but if
24 you have one party calls an expert who renders great
25 service to the Court, to both sides, doesn't get

1 compensated? Isn't that an anomaly?

2 MR. SUTHERS: The special master, Justice
3 Ginsburg, found clear direction from the statute and did
4 not believe that he had an option in the matter, if
5 you're talking about the unfairness of it. Number one,
6 this situation here is no more unfair to Kansas than any
7 litigant in Federal court. And number two, it's
8 appropriate matter to take to Congress.

9 The last time they changed it was 1990 from
10 \$30 to \$40. I think it's time to revisit it. But it
11 is, in fact, what Congress has dictated should be the
12 compensation --

13 JUSTICE SCALIA: It's not a matter of
14 unfairness to Einstein anyway. I mean, you know, the
15 expert witness is going to get his money.

16 MR. SUTHERS: That's correct, Justice. They
17 certainly did in this case.

18 JUSTICE SCALIA: The question is --

19 MR. SUTHERS: Both sides can vouch for that.

20 JUSTICE SCALIA: The question is whether one
21 side can get some money from the other to help pay for
22 it.

23 Do you happen to know whether at the time
24 the original jurisdiction of this Court was established,
25 there was such a thing as the charging of expert witness

1 fees?

2 MR. SUTHERS: Justice Scalia, I do not. We
3 do know --

4 JUSTICE SCALIA: I don't either.

5 MR. SUTHERS: -- that it's 1853 when for the
6 first time Congress, desiring to have uniform fees,
7 began the structure of expert witness fees. It started
8 at \$1.50 a day, in 1853.

9 JUSTICE SOUTER: Do you -- may I ask you a
10 statutory question just about the application of the
11 statute. As -- as you have pointed out, if the \$40
12 applies it's because I -- it is, in effect, a
13 determination of a particular item under section 1920:
14 Judge and clerk of any court of the United States may
15 tax its cost. My question is this. One of the items
16 covered by 1920, one of the items that a judge or clerk
17 may tax, is fees of the clerk.

18 Under section 1911, which relates entirely
19 to the Supreme Court, there is a provision that the
20 Supreme Court may fix the fees to be charged by its
21 clerk. That is totally redundant if 1920 covers the
22 Supreme Court of the United States.

23 Doesn't it follow, therefore, that section
24 1920 was -- despite its reference to any court of the
25 United States, doesn't it follow that that statute was

1 not intended to apply to the Supreme Court; and doesn't
2 it follow from that that either the Supreme Court's
3 authority is to fix the fees if this is a fee to be
4 charged by the clerk or, in the alternative, that there
5 is no statute on it at all?

6 But the main point is unless 1911 is totally
7 redundant in -- in referring to fixing the fees to be
8 charged by its clerk, then 1920 must not cover the
9 Supreme Court.

10 MR. SUTHERS: Justice Ginsburg, 1920 --

11 JUSTICE SOUTER: I'm greatly flattered.

12 (Laughter.)

13 MR. SUTHERS: Justice Souter, Justice
14 Souter, sorry. Justice Souter.

15 JUSTICE SOUTER: You're not the first to
16 have done that.

17 (Laughter.)

18 MR. SUTHERS: 1920 there may be some
19 redundancies in it, but it's much more expansive than is
20 1911. It talks about court reporter fees, printing --

21 JUSTICE SOUTER: Oh, we didn't -- no
22 question about that. I recognize 1920 goes a lot
23 further. But there is no -- there is no need in 1911 to
24 say to that the Supreme Court may -- may fix the fees to
25 be charged by its clerk if the Supreme Court is already

1 covered by 1920.

2 MR. SUTHERS: Justice Souter, I think if you
3 look at the history of it, 1911 was enacted at the
4 same -- there is a separate statute -- statute that
5 applies to the court of appeals and to the district
6 courts. I think it's like 1913 and 1914. So I -- I --
7 I don't think that you can --

8 JUSTICE SOUTER: In other words, if it's
9 redundancy it proves too much is what you're saying?

10 MR. SUTHERS: Yes.

11 JUSTICE SOUTER: Okay.

12 MR. SUTHERS: I think the important thing
13 about 1911, in response to Justice Kennedy's question,
14 it is limited to fees charged by the Supreme Court
15 clerk, cost of serving process and incidental
16 disbursements. It does not address witness fees in --

17 JUSTICE KENNEDY: Do you think it includes
18 printing fees?

19 MR. SUTHERS: 1911 does not, unless --

20 JUSTICE KENNEDY: You don't -- you don't
21 think that --

22 MR. SUTHERS: Incidental disbursements?

23 JUSTICE KENNEDY: -- what number here? You
24 don't think that 1911 would allow the clerk to charge
25 for printing fees?

1 MR. SUTHERS: As an incidental disbursement,
2 it may. But it clearly does not address witness fees.

3 JUSTICE KENNEDY: Well, the reason I ask is
4 because printing, in 1920, printing and witness fees are
5 in -- in the same sentence.

6 MR. SUTHERS: And I -- I don't know whether
7 printing would be considered incidental disbursements.

8 JUSTICE KENNEDY: So if you allowed
9 printing, then I think it would allow witnesses under
10 1911. Citing Crawford Fitting, this Court made clear
11 that no statute will be construed to authorize taxing
12 witness fees and costs, unless it refers explicitly to
13 witness fees.

14 JUSTICE BREYER: It is -- I mean, if you
15 want to really get a little complicated, the -- you
16 have -- you have 11, and 11 talked about the Supreme
17 Court fees and then we have 20 and that talks about all
18 the other fees, right? Okay. So the thing is, you
19 can't pay money in the United States unless have you
20 some authorization, but 1911 gives the Supreme Court
21 some authorization to fix fees.

22 Now we look back at 1821. And 1821 tells
23 you how much mileage per diem and subsistence will be.
24 It says he will be paid an attendance fee of \$40 per
25 day. Doesn't say you couldn't pay him more. Just says

1 that's what he is entitled to. Now of course, in the
2 lower courts, you can't pay him more because there is no
3 authority to pay him more. But in the Supreme Court,
4 there is authority to pay him more. That comes out of
5 1911.

6 I mean, I grant you that this is -- what I'm
7 actually doing here is I'm trying to avoid this problem
8 of whether Congress can start legislating the details of
9 original jurisdiction rules and so forth. Just -- there
10 is some desirability here constitutionally to prevent
11 ourselves from going down that road. That's -- I'm
12 deliberately being gimmicky, but what do you think of
13 this gimmick?

14 MR. SUTHERS: Well, not much.

15 (Laughter.)

16 JUSTICE BREYER: That's fair.

17 (Laughter.)

18 MR. SUTHERS: This Court -- this Court
19 decided three cases regarding the application of 1821.

20 JUSTICE BREYER: Yes. Yes.

21 MR. SUTHERS: Cases in which litigants, like
22 Kansas, were trying to get around, in Federal court,
23 this witness fee limitations, starting with Crawford
24 Fitting. In that case you held that the prevailing
25 seeks -- who seeks reimbursements for fees paid to its

1 own expert, is limited by the statute unless we're
2 talking about a contract or express statutory --

3 JUSTICE BREYER: Which part did they think
4 limited it? Was it 1821 they thought limited it?

5 MR. SUTHERS: Yes. And by the way, there is
6 a contract here. It's the compact between, the 1949
7 compact between Kansas and Colorado, and --

8 JUSTICE BREYER: In an ordinary case, if a
9 witness -- doesn't -- never does go to court, but just
10 goes to a deposition, that's the only thing, he goes to
11 a deposition, does he get paid the 40 dollars? He goes
12 to a lawyer's office; he's never in attendance at a
13 court. But Do they count that as being in attendance at
14 a court?

15 MR. SUTHERS: I don't believe so, Justice
16 Breyer.

17 JUSTICE BREYER: Then where is his --

18 MR. SUTHERS: It's liberally construed.

19 JUSTICE BREYER: What?

20 MR. SUTHERS: It's liberally construed. You
21 don't have to --

22 JUSTICE BREYER: If that isn't attendance at
23 a court, where did these witnesses show up?

24 MR. SUTHERS: These witnesses show up for
25 trial.

1 JUSTICE BREYER: Where? Where do they have
2 this proceeding? I don't know; it wasn't here; it
3 wasn't in this --

4 MR. SUTHERS: It was in California.

5 JUSTICE BREYER: Where?

6 MR. SUTHERS: Pasadena, California, for 272
7 days.

8 JUSTICE BREYER: In the courthouse?

9 MR. SUTHERS: Yes. Tenth Circuit Court of
10 Appeals. They show up; they are in attendance; it's not
11 just on the stand; all the time they're there, all the
12 time they're travelling back and forth; it is liberally
13 construed.

14 JUSTICE STEVENS: May I ask. Just to put
15 one thing on the table if I could. How do you deal with
16 the problem that Justice Ginsburg raises: If a court
17 wants to appoint an independent expert and pay him more
18 than \$40 a day? Do you say that's flatly prohibited?
19 And if it's not flatly prohibited, what is the authority
20 for doing so, other than 1911?

21 MR. SUTHERS: Justice Stevens, nothing
22 prevents higher compensation for a court-appointed
23 expert. We are talking about --

24 JUSTICE STEVENS: But what authorizes it?
25 Doesn't 1911 authorize it?

1 MR. SUTHERS: I don't believe 1911 does.

2 JUSTICE STEVENS: Well, then what does?

3 MR. SUTHERS: The inherent authority of the
4 Court.

5 JUSTICE STEVENS: Then why don't you have
6 the inherent authority to pay expert witness fees a
7 little more money, then?

8 MR. SUTHERS: Because the statute addresses
9 that. It does not address --

10 JUSTICE SCALIA: The Constitution says that
11 no money shall be -- shall be withdrawn from the
12 Treasury except by appropriations made by law. I think
13 -- I think you need a law to spend -- to spend the
14 government's money.

15 JUSTICE STEVENS: You're not spending the
16 government's money; you're spending the litigant's
17 money.

18 MR. SUTHERS: Well, in the case of the -- of
19 the Court appointing an expert, it is typical at the
20 conclusion of the case as part of the cost for the judge
21 to determine what was an appropriate award the losing
22 party -- what they should pay as part of that expert's
23 expense. But that's not what we are dealing with in
24 1821.

25 JUSTICE BREYER: Well, what about -- I mean

1 now, as long as I'm starting down the road to outer
2 space, why not -- could we say, look, they were very
3 impressive models these people did; on both sides they
4 had terrific experts, very expensive; and would we have
5 the authority to say to the master, although you didn't
6 treat them as your experts, you should have done, for
7 purposes of paying them.

8 MR. SUTHERS: Justice Breyer, you are the
9 Supreme Court and if you found that this statute --

10 (Laughter.)

11 JUSTICE BREYER: I don't want to be
12 unreasonable about this.

13 (Laughter.)

14 MR. SUTHERS: Yes. If you found that this
15 statute was an intrusion which somehow violated your,
16 you know, authority as a Court, you could do that. But
17 why would you want to get into the business -- going to
18 Justice Alito's point -- you have so far refrained from
19 enacting your own rules on this highly procedural matter
20 of expert witness fees.

21 CHIEF JUSTICE ROBERTS: Well, we would want
22 to get into the business because it's our business; and
23 it seems to me that if you yield on a basic point like
24 this, that you're giving up, who knows how much?

25 MR. SUTHERS: Justice Roberts, I'm not --

1 you have done it before in -- in highly procedural
2 matters where you do not -- no one here is doing
3 anything that prevents your exercise of original
4 jurisdiction, that expands your exercise of original
5 jurisdiction. The cases also say that your original
6 jurisdiction is self-executing, doesn't need any
7 statutory implementation; but this is a -- a totally
8 procedural matter, much as -- in fact, I think less of
9 an intrusion, when the -- when the Congress said to you
10 these cases will not be exclusive jurisdiction. Even
11 though they are part of your original jurisdiction.

12 This is a very procedural matter.

13 JUSTICE SCALIA: Could I ask you what --
14 what are the fees to be charged by its clerk, referred
15 to in 1911. "Supreme Court may fix the fees to be
16 charged by its clerk," and then the next paragraph says
17 the fees of the clerk. Is that what the first paragraph
18 refers to, the fees of the clerk? Or does it mean other
19 fees that the clerk charges which could include costs?
20 Are the costs part of the fees to be charged by the
21 clerk?

22 MR. SUTHERS: I don't believe so, Justice
23 Scalia.

24 JUSTICE SCALIA: They are not? Fees of the
25 clerk -- in 1920 says fees of the clerk in Marshall, but

1 that could be taxed as costs. Right? A judge or clerk
2 can tax as costs the following.

3 1911 says Supreme Court may fix "the fees to
4 be charged by its clerk," and you say that doesn't
5 include costs. Boy, it's a messy, messy bunch of
6 statutes, don't you think?

7 MR. SUTHERS: Not -- not a whole lot more so
8 than others I've seen.

9 (Laughter.)

10 JUSTICE SCALIA: Well --

11 MR. SUTHERS: By the way --

12 JUSTICE SCALIA: Well, that's some comfort.

13 MR. SUTHERS: -- it has been pointed out to
14 me in this compensation of court-appointed experts that
15 that is specifically addressed in section 1920,
16 paragraph 6, compensation of court-appointed experts is
17 covered there. So there is that statute authority which
18 you indicated there should be.

19 JUSTICE SCALIA: Yes, but that taxes costs,
20 and it doesn't say the Supreme Court may fix costs. May
21 fix the fees to be charged by its clerk, which you say
22 don't include costs.

23 MR. SUTHERS: I don't believe they do.

24 JUSTICE SCALIA: So that wouldn't allow to
25 us fix that.

1 JUSTICE KENNEDY: Except 1911 may do two
2 things. Number one it may authorize the Supreme Court
3 to fix the fees to be charged by the clerk. And then in
4 the second paragraph it for taxing of those fees, the
5 cost of serving process and other necessary
6 disbursements; so it does two things.

7 JUSTICE SCALIA: Well, it tells you how they
8 are to be taxed. It doesn't say what their level is to
9 be. May be taxed against the litigants as the court
10 directs, but I don't see any authority to fix them --
11 fix the amounts. It's not a very good statute, really.

12 MR. SUTHERS: If I may, once again going to
13 the issue of why I think some uniformity is important in
14 original jurisdiction cases, is because so many of the
15 cases are not exclusive jurisdiction; and there is in
16 fact a need for uniformity here; and the fact that this
17 Court has not chosen to issue a conflicting rule, I
18 think is very significant.

19 If in fact you had set an appropriate fee
20 for expert witness fees in case original jurisdiction,
21 and Congress came along and said gee, no; it shouldn't
22 be that, you should be stuck with \$40, then we might
23 have some kind of a constitutional issue here; but
24 absent that, I simply don't --

25 CHIEF JUSTICE ROBERTS: What if -- what if

1 Congress had done nothing? In other words, let's say
2 they haven't addressed costs at all. Would we be able
3 to set what we think are reasonable attendance costs?

4 MR. SUTHERS: I would concede that you --
5 you probably could. But --

6 CHIEF JUSTICE ROBERTS: Pursuant to what
7 authority?

8 MR. SUTHERS: Your inherent authority over
9 original jurisdiction cases.

10 CHIEF JUSTICE ROBERTS: Well, if we have
11 inherent authority over original jurisdiction cases, how
12 does it -- how come it disappears whenever Congress
13 decides to legislate in the area?

14 MR. SUTHERS: Because Congress is
15 entitled -- you've recognized their right to deal with
16 certain types of issues. I find it very interesting
17 that Kansas cited *Ford v Georgia*, because that case says
18 Congress has undoubtedly the right to prescribe the
19 process and mode of proceeding in original jurisdiction
20 cases as fully as in other Federal courts, but that the
21 omission to legislate such process does not deprive the
22 Court of its constitutionally conferred jurisdiction.
23 If this is something you have historically --

24 CHIEF JUSTICE ROBERTS: Is a substantive
25 level of fees a mode of proceeding?

1 MR. SUTHERS: Chief Justice, I would argue
2 that the setting of fees is a procedural matter; and it
3 is -- and has to do with the mode of proceeding in a
4 case. That's correct.

5 CHIEF JUSTICE ROBERTS: Is there any -- do
6 you think \$40 a day for an expert is a realistic
7 assessment of what experts charge?

8 MR. SUTHERS: Absolutely not, Chief Justice.
9 And in fact, of course, as I think Justice Breyer
10 pointed out, Einstein does not only get \$40 a day. We
11 pay them a lot of money; but Congress has decided \$40 is
12 what they -- what they get. Congress ought to revisit
13 it. There is no question about it.

14 JUSTICE GINSBURG: Parties pay a lot -- a
15 lot of expenses and then they may be -- may or not be
16 reimbursed to the prevailing party; but the prevailing
17 party in our system certainly doesn't get anything like
18 the full cost of the litigation.

19 MR. SUTHERS: That's correct, Justice
20 Ginsburg. They certainly do not. Experts in this case
21 were paid lots and lots of money, and they don't even
22 get that when the court has -- it's not -- at least the
23 trial courts --

24 JUSTICE SCALIA: Maybe lawyers get even
25 more.

1 MR. SUTHERS: That's right.

2 JUSTICE SCALIA: And you don't get that back
3 either.

4 MR. SUTHERS: That's exactly right.

5 JUSTICE SOUTER: May I just get clear on
6 your view of inherent power? As I understand it, you're
7 -- when you answered it, in a situation in which the
8 slate is completely clean, we would have inherent power,
9 you're using "inherent power" in effect to be a kind of
10 default power. If Congress hasn't acted, somebody has
11 got to do something. That's got to be us, so -- so we
12 would have the authority. But you are not using the
13 term "inherent power" in the sense of being a power
14 which is sort of essential and indefeasible by Congress
15 in any respect. Is that correct?

16 MR. SUTHERS: That's correct, Justice
17 Souter, to the extent that there was nothing applicable
18 to this and it came before you, should expert witnesses
19 get compensated some -- some amount, Congress hasn't
20 spoken on it, I would think, as a matter of default, you
21 could say yes. And -- but --

22 JUSTICE SOUTER: Do you think there is --
23 there is any inherent power in, let's say, this Court --
24 just keep to it simple -- that Congress in effect could
25 not eliminate? For example, if Congress passed a

1 statute saying the Supreme Court of the United States
2 shall not have authority to punish direct contempt,
3 would that statute be constitutional in your view?

4 MR. SUTHERS: No, Justice Souter, it would
5 not be because then it's interfering with your ability
6 to do what courts do as a central matter.

7 JUSTICE SOUTER: Isn't that a pretty
8 slippery slope then that you're on? Because if in fact
9 parties are going to be reluctant to -- to hire the kind
10 of experts that are necessary, unless they think that at
11 the end of the day there is going to be some kind of an
12 equitable disposition of the expense, at that point that
13 starts interfering with the conduct of the kind of
14 business that the Court ought to be engaged in.

15 MR. SUTHERS: Justice Souter, it's not
16 telling you how to decide cases. And there is another
17 case before the Court in which Congress reinstated
18 time-barred cases. That's the kind of thing that
19 intrudes on your judicial function. Setting witness
20 fees doesn't come close to doing that.

21 JUSTICE SCALIA: What if Congress -- really
22 you think Congress could set any -- there's not some
23 point at which it is so destructive of the process here?
24 What if Congress provides that the winning -- that the
25 winning party shall pay the costs of the losing party?

1 Can Congress do that?

2 MR. SUTHERS: It's -- I think the question
3 would be, Justice Scalia, is that a fundamental
4 interference with the Court's ability to decide cases?
5 I would suggest it might be to the -- did they do
6 something wholly irrational like that.

7 JUSTICE SOUTER: But that would be a matter
8 of due process, not a matter of inherent power, I take
9 it.

10 MR. SUTHERS: I believe that's correct.
11 That's correct.

12 Members of the Court, Special Master
13 Littleworth spent a lot of time on this case. He has
14 been fair, competent, and conscientious in resolving all
15 the issues before this Court, including this issue of
16 expert witness fees. It was the plain language of the
17 statute and the clear direction of the case law that led
18 him to his conclusion that the expert witnesses' fees
19 were limited by statute in this case. We would ask you
20 to deny Kansas's exception to the final report, and that
21 the Court should enter the proposed judgment and decree.

22 Mr. Chief Justice. If there are no other
23 questions from the Court, I'll conclude my argument.

24 CHIEF JUSTICE ROBERTS: Thank you, General.
25 General Six, you have four minutes

1 remaining.

2 REBUTTAL ARGUMENT OF STEVE SIX

3 ON BEHALF OF THE PLAINTIFF

4 MR. SIX: 1920 didn't appear in 1948
5 magically. It came from the 1853 Fee Act. And the
6 language in the Fee Act was, "A judge shall tax costs."
7 "A judge" -- it says, "Costs shall be taxed by a judge
8 or clerk of the court." I'm sorry. And 1920 says, "A
9 judge or clerk of any court of the United States." In
10 1853, as the Court has discussed in *Alyeska Pipeline*,
11 the Fee Act applied to the circuit courts. It says that
12 in its title. And "judge" in 1853 meant a lower court
13 judge. In 1920, we have exactly the same word -- "a
14 judge" who can tax costs -- and we have a definition
15 that Congress tells us it means exactly the same thing.

16 Under Colorado's reading "court of the
17 United States" would expand to read "judge" right out of
18 the statute, and it would make the statute apply to
19 "magistrate judge," for example, which is not included
20 in the definition, but they're somebody who wears a robe
21 and presides over a court of the United States, and it
22 would apply to Justices, even though 451 in title 28
23 defines "Justices" as a separate group. So that's not
24 --

25 JUSTICE GINSBURG: But the Constitution uses

1 the word "judge." A "judge of the United States" is a
2 Supreme Court Justice or a judge of an inferior court.

3 MR. SIX: And certainly Congress isn't tied
4 to the way the word is used in the Constitution, no more
5 than the paper I got on my way in here told me not to
6 refer to any of you as "judges."

7 The point, I think, is that the Fee Act was
8 carried forward to 1920, and the language is almost the
9 same. The only thing they have added is a definition of
10 "court of the United States." And if after 168 years,
11 Congress is going to tread on the Court's original
12 jurisdiction, they ought to at least have some express
13 language that they intend to do that -- do so, where the
14 Court could at the very least adopt a clear statement
15 rule that would require Congress to say, "We are going
16 to do this now. We've never done it in our history, but
17 now after 168 years we are."

18 Not only that, Colorado's position relies on
19 the fact that they did this in 1948, and it's gone
20 unnoticed by the Court, any major treatise, or
21 commentary --

22 JUSTICE BREYER: I'm sorry. I got mixed up
23 on my dates. The words "in any court of the United" --
24 what the words are now is "in any court." It says
25 "court of the United States includes" in 451 courts.

1 When did that language come in?

2 MR. SIX: In 1948.

3 JUSTICE BREYER: In '48?

4 MR. SIX: Yes.

5 JUSTICE BREYER: So the inclusion wasn't
6 there till then. Now, normally, in the '48 revision,
7 the rule is they intended to make no substantive change.
8 When they did intend to make a substantive change, they
9 said as much. So is there anything in the history of
10 that that suggests they intended to make a substantive
11 change here?

12 MR. SIX: No, there isn't. And they changed
13 --

14 JUSTICE BREYER: No?

15 MR. SIX: They changed --

16 JUSTICE BREYER: So, in other words, the
17 language "in addition to the courts listed in section
18 451 of this title," that -- those words I just said have
19 no appearance in the statutes before 1948? Yes or no.

20 MR. SIX: Yes.

21 JUSTICE BREYER: They do appear before?

22 MR. SIX: No.

23 JUSTICE BREYER: No, they do not.

24 MR. SIX: First time in 1948.

25 JUSTICE BREYER: First time in 1948. So

1 they were put in there by a revisor.

2 MR. SIX: Yes.

3 JUSTICE BREYER: And there is no indication
4 the revisor intended to change the meaning that
5 pre-existed.

6 MR. SIX: Yes.

7 JUSTICE BREYER: Okay. I got the argument.
8 Thank you.

9 MR. SIX: And they did change something
10 else. They changed "shall" to "may," and they gave a
11 reason for that change.

12 Thank you, Mr. Chief Justice.

13 CHIEF JUSTICE ROBERTS: Thank you, General.
14 The case is submitted.

15 (Whereupon, at 10:59 a.m., the case in the
16 above-entitled matter was submitted.)

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A				
ability 21:17 46:5 47:4	agreed 8:19 13:20 23:22	appearing 10:8 20:10	51:7	awarded 22:1 23:16
able 43:2	ahead 24:8	appears 5:9	argument's 17:21	aware 18:8
above-entitled 1:11 51:16	Albert 17:14 19:4	appellate 3:12 3:14 12:7,11 26:11	Arkansas 15:7	a.m 1:13 3:2 51:15
absent 42:24	Alito 8:1,6 9:1,5 17:20	applicable 45:17	arrives 3:25	B
absolutely 8:5 20:8 44:8	Alito's 39:18	application 11:1 31:10 35:19	Article 3:11,18 4:18	back 34:22 37:12 45:2
absurd 22:19	allocated 23:20	applied 15:8 48:11	asking 6:9 18:11	bad 19:20
accept 7:22	allow 24:19 27:19,20 33:24 34:9 41:24	applies 31:12 33:5	aspects 27:25	balance 18:1
accommodation 27:4	allowances 27:4	apply 5:14 8:24 10:15 12:17 14:3 24:20 27:11 32:1 48:18,22	assessment 44:7	balanced 15:12
Act 12:13 22:22 48:5,6,11 49:7	allowed 11:5 14:3,14 27:14 27:25 34:8	appoint 9:25 11:20 37:17	Associate 4:14	balancing 14:15
acted 45:10	allows 22:21 25:2	appointed 9:22 10:7 27:15 29:10,14	assume 6:7 17:23 19:1,1	bare 25:16
action 25:15,17 25:19	alternative 32:4	appointing 11:15 24:4 38:19	assumption 6:13 23:1	basic 39:23
actions 18:19 25:25 26:3 27:14	Alyeska 48:10	appropriate 8:3 15:19 29:18 30:8 38:21 42:19	attendance 27:2 27:3 34:24 36:12,13,22 37:10 43:3	Basin 15:8
acts 20:5	amanuensis 13:11	appointed 9:22 10:7 27:15 29:10,14	Attorney 1:15 1:17	basis 20:14
added 49:9	amount 13:20 18:7 45:19	appointing 11:15 24:4 38:19	attorney's 12:21 13:2 14:19 15:14	bear 17:4 23:11
addition 27:4 50:17	amounted 20:20	appropriate 8:3 15:19 29:18 30:8 38:21 42:19	authority 10:23 11:11,14,19,22 11:24 12:1,4,8 12:12,20,23 32:3 35:3,4 37:19 38:3,6 39:5,16 41:17 42:10 43:7,8 43:11 45:12 46:2	bears 24:1
address 33:16 34:2 38:9	amounts 14:5 42:11	appropriate 8:3 15:19 29:18 30:8 38:21 42:19	attorney's 12:21 13:2 14:19 15:14	began 31:7
addressed 41:15 43:2	analogies 8:23 25:5	appropriate 8:3 15:19 29:18 30:8 38:21 42:19	attorney's 12:21 13:2 14:19 15:14	behalf 1:16,18 2:4,6,9 3:8 26:21 48:3
addresses 38:8	anomaly 30:1	appropriate 8:3 15:19 29:18 30:8 38:21 42:19	attorney's 12:21 13:2 14:19 15:14	believe 6:20 7:9 7:12 30:4 36:15 38:1 40:22 41:23 47:10
adequate 19:11	answer 5:2 10:6 14:17 15:14,24 16:9 17:22 19:2,7,8,11 25:2	appropriate 8:3 15:19 29:18 30:8 38:21 42:19	attorney's 12:21 13:2 14:19 15:14	belli 20:5
adhered 9:3	answered 45:7	appropriate 8:3 15:19 29:18 30:8 38:21 42:19	attorney's 12:21 13:2 14:19 15:14	benefit 13:13 19:19
adjudge 26:9	anyway 30:14	appropriate 8:3 15:19 29:18 30:8 38:21 42:19	attorney's 12:21 13:2 14:19 15:14	better 18:24 19:24
adopt 19:6,9 49:14	apparent 27:10	appropriate 8:3 15:19 29:18 30:8 38:21 42:19	attorney's 12:21 13:2 14:19 15:14	bills 24:17
adopted 15:6 21:5	appeals 4:16 26:3,5 33:5 37:10	appropriate 8:3 15:19 29:18 30:8 38:21 42:19	attorney's 12:21 13:2 14:19 15:14	binding 25:23
adversary 12:21	appear 4:11 48:4 50:21	appropriate 8:3 15:19 29:18 30:8 38:21 42:19	attorney's 12:21 13:2 14:19 15:14	bound 17:21,23
affect 20:3	appearance 20:19 50:19	appropriate 8:3 15:19 29:18 30:8 38:21 42:19	attorney's 12:21 13:2 14:19 15:14	boundary 16:18 17:1,3,7 23:14
affirmed 26:9	APPEARAN... 1:14	appropriate 8:3 15:19 29:18 30:8 38:21 42:19	attorney's 12:21 13:2 14:19 15:14	Boy 41:5
afford 19:24,24		appropriate 8:3 15:19 29:18 30:8 38:21 42:19	attorney's 12:21 13:2 14:19 15:14	Breyer 17:10 18:2,9,23 19:12,23 20:23 21:4,13,19 34:14 35:16,20 36:3,8,16,17 36:19,22 37:1 37:5,8 38:25
afraid 28:10		appropriate 8:3 15:19 29:18 30:8 38:21 42:19	attorney's 12:21 13:2 14:19 15:14	
ago 14:18		appropriate 8:3 15:19 29:18 30:8 38:21 42:19	attorney's 12:21 13:2 14:19 15:14	
agree 14:8,9 17:20 19:3 20:9,16 22:25 23:5,25 24:2,7		appropriate 8:3 15:19 29:18 30:8 38:21 42:19	attorney's 12:21 13:2 14:19 15:14	

<p>39:8,11 44:9 49:22 50:3,5 50:14,16,21,23 50:25 51:3,7 bright 9:10 bright-line 14:13 bunch 41:5 business 19:2 39:17,22,22 46:14</p> <hr/> <p style="text-align: center;">C</p> <p>C 2:1 3:1 California 37:4 37:6 call 18:14 called 9:21 20:10 calls 29:24 care 17:13,15,15 carefully 12:16 25:12 29:5 carried 49:8 case 3:4,19 6:18 6:23 7:10,17 7:25 8:8,14 10:4 11:16 12:17 13:1,7,7 13:22 14:20,25 15:3,16,19 16:17,20 17:9 18:7,17,18,18 19:13 20:4,4 21:4 23:21 24:3,16,18,24 26:8,24 29:7 29:19 30:17 35:24 36:8 38:18,20 42:20 43:17 44:4,20 46:17 47:13,17 47:19 51:14,15 cases 6:5 8:17 9:4,18,21 10:5 10:12 11:23 14:16 16:1,3</p>	<p>17:1,25 20:2 21:2,14,24,25 22:4,6 23:10 23:13,14,16 27:9,12 28:9 28:23 29:9 35:19,21 40:5 40:10 42:14,15 43:9,11,20 46:16,18 47:4 categories 13:15 cause 16:15,17 16:22 causis 20:5 central 46:6 certain 22:5 43:16 certainly 3:22 5:18 7:22 10:4 10:6 13:16 23:6 30:17 44:17,20 49:3 change 50:7,8 50:11 51:4,9 51:11 changed 30:9 50:12,15 51:10 charge 12:20 33:24 44:7 charged 31:20 32:4,8,25 33:14 40:14,16 40:20 41:4,21 42:3 charges 24:13 40:19 charging 30:25 Chief 3:3,9,17 4:13 5:15,17 13:18 14:4 20:7 23:9,18 23:24 24:6 26:13,18,22 27:13,16,19 28:6,18 39:21 42:25 43:6,10 43:24 44:1,5,8</p>	<p>47:22,24 51:12 51:13 chose 13:7 29:22 chosen 42:17 circle 5:10,11 circuit 37:9 48:11 circumstances 13:7 15:5 24:19 cited 43:17 Citing 34:10 City 16:16 Civil 10:25 25:21 claims 12:9 14:23 15:5 clause 3:18 clean 45:8 clear 3:11 18:5 21:11 26:24 30:3 34:10 45:5 47:17 49:14 clearly 8:16 9:16 34:2 clerk 4:3 5:18 5:19,22 6:17 31:14,16,17,21 32:4,8,25 33:15,24 40:14 40:16,17,18,19 40:21,25,25 41:1,4,21 42:3 48:8,9 close 46:20 Colo 1:18 Colorado 1:6 3:5 13:25 15:7 15:9 21:10 22:6 24:22 36:7 Colorado's 9:7 10:14 48:16 49:18 come 11:19 13:16 26:5</p>	<p>28:23 43:12 46:20 50:1 comes 11:15 14:7 35:4 comfort 41:12 commencing 25:17 commensurate 29:1 commentary 49:21 common 10:11 compact 21:10 36:6,7 compensate 11:25 12:1 compensated 15:3 29:23 30:1 45:19 compensation 30:12 37:22 41:14,16 compensatory 29:16 competent 47:14 completely 45:8 compliance 15:7 complicate 18:16 complicated 34:15 concede 43:4 conclude 47:23 conclusion 24:18 38:20 47:18 conduct 46:13 conferred 43:22 conflict 3:24 conflicting 42:17 Congress 3:13 3:14 6:6,8,13 6:25 7:20 9:3 9:13 17:12 18:3 19:3,9,20</p>	<p>20:14 21:5 22:2,3,17 23:1 23:4 26:4,13 26:15 27:10,20 27:25 28:1,10 28:13 30:8,11 31:6 35:8 40:9 42:21 43:1,12 43:14,18 44:11 44:12 45:10,14 45:19,24,25 46:17,21,22,24 47:1 48:15 49:3,11,15 congressional 7:4 19:9 22:2 25:10 conscientious 47:14 consider 10:9 13:6 14:15 considered 15:4 34:7 Constitution 8:19 23:3 26:2 28:11 38:10 48:25 49:4 constitutional 3:24 42:23 46:3 constitutionally 35:10 43:22 construed 34:11 36:18,20 37:13 contempt 46:2 contract 36:2,6 contradiction 4:22 5:3 control 6:8 controlled 6:19 convincing 21:11 correct 5:5 8:2,4 13:21 21:8 29:18 30:16 44:4,19 45:15 45:16 47:10,11</p>
---	---	---	--	---

cost 4:2,11,14 6:2,4 7:4 10:13 11:5 14:2 16:4 16:14,16,17,22 17:3,5 22:2 23:14 31:15 33:15 38:20 42:5 44:18	26:3,7,9,23 27:2,5,6,7,9,15 27:17 28:20 29:15,22,25 30:7,24 31:14 31:19,20,22,24 32:1,9,20,24 32:25 33:5,14 34:10,17,20 35:3,18,18,22 36:9,13,14,23 37:9,16 38:4 38:19 39:9,16 40:15 41:3,20 42:2,9,17 43:22 44:22 45:23 46:1,14 46:17 47:12,15 47:21,23 48:8 48:9,10,12,16 48:21 49:2,2 49:10,14,20,23 49:24,25	create 22:17 created 23:2 creates 22:18 23:4 customary 24:11	demonstrates 20:21 Denver 1:17 deny 47:20 depending 8:14 deposition 36:10 36:11 deprive 43:21 desirability 35:10 desiring 31:6 despite 18:5 31:24 destructive 46:23 details 35:8 determination 31:13 determine 38:21 determined 24:8 26:8 29:18 determines 7:19 developed 8:18 14:22 15:18,20 developing 10:11 deviated 16:2 deviates 16:8 dictated 30:11 diem 34:23 difference 18:21 19:25 20:1 different 8:14 13:15 17:7,11 18:7 19:6,13 20:21 differently 5:23 13:2,4 14:19 14:21 difficult 29:5 direct 16:10 46:2 directed 26:10 direction 26:25 30:3 47:17 directs 42:10 disappears	43:12 disbursement 34:1 disbursements 4:6 7:8,13,15 7:16 33:16,22 34:7 42:6 discretion 6:15 8:3,7,13 9:2,10 9:13,13 10:16 11:5 12:16 13:6,10,12 14:3 24:20 25:12,20 discretionary 8:12 discussed 3:20 10:13 16:5 17:1 23:13 48:10 disposition 46:12 dispute 16:18 17:1,7 23:14 25:13,14 disputes 8:21 12:14,15 17:3 20:2 distinction 3:11 3:19 10:7 12:10 18:15 distinguish 22:9 distinguished 10:1 29:11 distribution 16:23 district 4:17 8:10,11 9:24 33:5 divide 10:22 divided 15:12 16:15 17:3,5 23:15 24:11,13 24:14,17 division 16:11 26:4 docket 3:4
costs 4:4 6:17 7:24 10:16,17 13:6,15 16:14 17:2 22:1 23:13,15,19 24:22 26:4,9 34:12 40:19,20 41:1,2,5,19,20 41:22 43:2,3 46:25 48:6,7 48:14	303:3,7,9,23 307:2,5,6,7,9,15 307:17 308:20 309:15,22,25 310:7,24 311:14 311:19,20,22,24 312:1,9,20,24 312:25 313:5,14 314:10,17,20 315:3,18,18,22 316:9,13,14,23 317:9,16 318:4 318:19 319:9,16 320:15 321:3,20 322:2,9,17 323:22 324:22 325:23 326:1,14 326:17 327:12,15 327:21,23 328:8 328:9,10,12,16 328:21 329:2,2 329:10,14,20,23 329:24,25	D D 3:1 damages 19:20 26:10 dates 49:23 day 9:4,11 10:19 17:17 19:4 20:10 27:3 29:8 31:8 34:25 37:18 44:6,10 46:11 days 37:7 da-da-da 18:4 deal 37:15 43:15 dealing 38:23 deals 5:21 10:25 December 1:9 decide 3:18 8:3 27:17 46:16 47:4 decided 24:9 28:20 35:19 44:11 decides 43:13 decree 12:9 47:21 default 45:10,20 Defendant 1:18 2:6 26:21 defined 4:9,11 4:13,16,21 5:6 5:11,11 defines 27:5 48:23 definition 27:7 48:14,20 49:9 Delaware 16:12 delay 26:10 deliberately 35:12	developing 10:11 deviated 16:2 deviates 16:8 dictated 30:11 diem 34:23 difference 18:21 19:25 20:1 different 8:14 13:15 17:7,11 18:7 19:6,13 20:21 differently 5:23 13:2,4 14:19 14:21 difficult 29:5 direct 16:10 46:2 directed 26:10 direction 26:25 30:3 47:17 directs 42:10 disappears	disbursement 34:1 disbursements 4:6 7:8,13,15 7:16 33:16,22 34:7 42:6 discretion 6:15 8:3,7,13 9:2,10 9:13,13 10:16 11:5 12:16 13:6,10,12 14:3 24:20 25:12,20 discretionary 8:12 discussed 3:20 10:13 16:5 17:1 23:13 48:10 disposition 46:12 dispute 16:18 17:1,7 23:14 25:13,14 disputes 8:21 12:14,15 17:3 20:2 distinction 3:11 3:19 10:7 12:10 18:15 distinguish 22:9 distinguished 10:1 29:11 distribution 16:23 district 4:17 8:10,11 9:24 33:5 divide 10:22 divided 15:12 16:15 17:3,5 23:15 24:11,13 24:14,17 division 16:11 26:4 docket 3:4
count 36:13 course 14:12 25:1,8 35:1 44:9	courthouse 37:8 courts 4:18 5:11 5:24 9:24,25 11:1 22:8,11 22:13,17 23:2 26:6 28:10,11 33:6 35:2 43:20 44:23 46:6 48:11 49:25 50:17	December 1:9 decide 3:18 8:3 27:17 46:16 47:4 decided 24:9 28:20 35:19 44:11 decides 43:13 decree 12:9 47:21 default 45:10,20 Defendant 1:18 2:6 26:21 defined 4:9,11 4:13,16,21 5:6 5:11,11 defines 27:5 48:23 definition 27:7 48:14,20 49:9 Delaware 16:12 delay 26:10 deliberately 35:12	developing 10:11 deviated 16:2 deviates 16:8 dictated 30:11 diem 34:23 difference 18:21 19:25 20:1 different 8:14 13:15 17:7,11 18:7 19:6,13 20:21 differently 5:23 13:2,4 14:19 14:21 difficult 29:5 direct 16:10 46:2 directed 26:10 direction 26:25 30:3 47:17 directs 42:10 disappears	disbursement 34:1 disbursements 4:6 7:8,13,15 7:16 33:16,22 34:7 42:6 discretion 6:15 8:3,7,13 9:2,10 9:13,13 10:16 11:5 12:16 13:6,10,12 14:3 24:20 25:12,20 discretionary 8:12 discussed 3:20 10:13 16:5 17:1 23:13 48:10 disposition 46:12 dispute 16:18 17:1,7 23:14 25:13,14 disputes 8:21 12:14,15 17:3 20:2 distinction 3:11 3:19 10:7 12:10 18:15 distinguish 22:9 distinguished 10:1 29:11 distribution 16:23 district 4:17 8:10,11 9:24 33:5 divide 10:22 divided 15:12 16:15 17:3,5 23:15 24:11,13 24:14,17 division 16:11 26:4 docket 3:4
court 1:1,12 3:10,22,23 4:4 4:9,14,16,17 4:17,20,22,25 4:25 5:1,5,6,9 5:13,22,23 6:3 6:15,16,25 7:19,23 8:9,10 8:11,14,16,22 9:16,19,25 10:7,10,13,15 10:17 11:12,15 11:23 12:8,12 12:13,17,20,23 13:16 14:15 15:6,17 16:1,3 16:10,12,14,25 17:1 18:1,3,6 18:21 19:19 20:1,10 21:2,3 21:9,17,25 22:9,10,10 23:3,3 25:11 25:14,16 26:1	court's 3:12 7:2 9:21,22,22 25:23 32:2 47:4 49:11 court-appointed 37:22 41:14,16 cover 7:6 32:8 covered 31:16 33:1 41:17 covers 7:18 31:21 Crawford 10:13 16:5 34:10 35:23	defined 4:9,11 4:13,16,21 5:6 5:11,11 defines 27:5 48:23 definition 27:7 48:14,20 49:9 Delaware 16:12 delay 26:10 deliberately 35:12	developing 10:11 deviated 16:2 deviates 16:8 dictated 30:11 diem 34:23 difference 18:21 19:25 20:1 different 8:14 13:15 17:7,11 18:7 19:6,13 20:21 differently 5:23 13:2,4 14:19 14:21 difficult 29:5 direct 16:10 46:2 directed 26:10 direction 26:25 30:3 47:17 directs 42:10 disappears	disbursement 34:1 disbursements 4:6 7:8,13,15 7:16 33:16,22 34:7 42:6 discretion 6:15 8:3,7,13 9:2,10 9:13,13 10:16 11:5 12:16 13:6,10,12 14:3 24:20 25:12,20 discretionary 8:12 discussed 3:20 10:13 16:5 17:1 23:13 48:10 disposition 46:12 dispute 16:18 17:1,7 23:14 25:13,14 disputes 8:21 12:14,15 17:3 20:2 distinction 3:11 3:19 10:7 12:10 18:15 distinguish 22:9 distinguished 10:1 29:11 distribution 16:23 district 4:17 8:10,11 9:24 33:5 divide 10:22 divided 15:12 16:15 17:3,5 23:15 24:11,13 24:14,17 division 16:11 26:4 docket 3:4

doing 35:7 37:20 40:2 46:20	18:6 19:8 45:4 48:13,15	explain 15:11	33:14,16,18,25	37:12
dollars 11:3,13 20:19 36:11	example 18:2 20:17 28:14	explicitly 34:12	34:2,4,12,13	forward 49:8
drawn 14:13	45:25 48:19	express 36:2 49:12	34:17,18,21	found 21:9 26:24 30:3 39:9,14
due 47:8	excellent 20:18	expressly 3:13	35:25 38:6	foundations 8:24
D.C 1:8	exception 47:20	extent 45:17	39:20 40:14,15	four 47:25
<hr/> E <hr/>	exceptions 3:13 7:1	extremely 3:17	40:17,18,19,20	framework 25:18
E 2:1 3:1,1	exclusive 12:14 28:3,4 40:10	<hr/> F <hr/>	40:24,25 41:3	framing 28:13
earlier 25:2	42:15	fact 20:12,13 30:11 40:8	41:21 42:3,4	full 44:18
effect 12:9 31:12 45:9,24	excuse 15:1 26:8	42:16,16,19	42:20 43:25	fully 43:20
Einstein 17:14 19:5 30:14	exercise 8:7 9:10 11:5 40:3,4	44:9 46:8	44:2 46:20	function 46:19
44:10	expand 48:17	49:19	47:16,18	fundamental 47:3
either 31:4 32:2 45:3	expands 40:4	fair 15:21 16:23 35:16 47:14	fee-shifting 12:24	further 32:23
eliminate 45:25	expansive 32:19	fairly 15:11 29:23	felt 15:19	<hr/> G <hr/>
Enabling 22:22	expense 38:23 46:12	far 39:18	figure 17:17	G 3:1
enact 28:20	expenses 26:4 44:15	features 15:10 24:23	final 47:20	gee 42:21
enacted 25:14 25:16 33:3	expensive 19:18 39:4	Federal 10:24 23:2,2 25:21	find 29:6,9 43:16	GEN 1:15,17 2:3,5,8
enacting 39:19	expert 7:6,9,18 7:24 8:3,7,10	26:5 28:15	first 3:4 10:15 27:24 31:6	general 1:15,17 3:6 6:2,4 12:18
engaged 46:14	9:22,23 10:8	30:7 35:22	32:15 40:17	18:13,19 26:18
engineers 17:8	13:2,7 14:18	43:20	50:24,25	26:19 28:22
enter 47:21	15:19,25 16:8	fee 15:18 24:22 25:4 27:3	fit 8:25	47:24,25 51:13
entirely 12:12 28:3 31:18	16:20 18:15	28:25 29:16	Fitting 10:14 16:5 34:10	geographers 17:2
entitled 35:1 43:15	19:18 20:9,11	32:3 34:24	35:24	Georgia 8:23 43:17
equally 17:4,5 23:15	25:5 28:25	35:23 42:19	fix 31:20 32:3,24 34:21 40:15	gimmick 35:13
equitable 14:16 15:21 18:1	29:2,21,23,23	48:5,6,11 49:7	41:3,20,21,25	gimmicky 35:12
46:12	29:24 30:15,25	fees 4:6 7:6,9,18 8:4,8,10,14	42:3,10,11	Ginsburg 9:20 15:23 16:6,19
especially 19:23	31:7 36:1	10:20,21 11:2	fixing 32:7	24:10 28:21
ESQ 1:15,17 2:3 2:5,8	37:17,23 38:6	12:20,21 13:2	flatly 37:18,19	29:4,9,13,19
essential 45:14	38:19 39:20	13:3,8,24 14:8	flattered 32:11	30:3 32:10
essentially 4:18 10:11,14 25:18	42:20 44:6	14:11,12,19,19	flip 4:23	37:16 44:14,20
established 30:24	45:18 47:16,18	15:11,15 16:1	Florida 8:22	48:25
evidence 16:13 21:11 25:22	experts 10:7 14:12,22 16:25	18:14 20:17,19	focus 23:6	give 28:24
exactly 16:22	17:6,9 20:19	21:22 23:10,11	focused 23:8	given 6:25 27:22 28:8
	20:24 21:7,20	23:19 24:2,5	focusing 12:11	gives 5:7 34:20
	39:4,6 41:14	24:12,25 25:6	follow 9:6 17:24 21:5 25:4,8	giving 39:24
	41:16 44:7,20	25:6 27:8,14	31:23,25 32:2	global 14:10
	46:10	27:20 29:8	followed 15:17	
	expert's 38:22	31:1,6,7,17,20	following 4:5 41:2	
		32:3,7,20,24	Ford 43:17	
			forth 9:15 12:15 27:11 35:9	

go 36:9	highly 14:16 39:19 40:1	inherent 11:22 11:25 12:2,4,8 12:23 38:3,6 43:8,11 45:6,8 45:9,13,23 47:8	26:20	21:4,13,19 22:7,14,16,25 23:9,18,24 24:6,10 25:1 25:24 26:13,18 26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
goes 19:19 32:22 36:10,10,11	hire 19:17 46:9	injured 19:17	judge 4:3,9,15 4:15,24 5:8,13 31:14,16 38:20 41:1 48:6,7,7,9 48:12,13,14,17 48:19 49:1,1,2	25:24 26:13,18 26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
going 14:8 19:19 21:20 25:4 30:15 35:11 39:17 42:12 46:9,11 49:11 49:15	historians 17:3	instance 23:13	Judges 4:16,19 5:10,18 49:6	26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
good 8:25 9:6 21:15 42:11	historically 22:1 43:23	intend 49:13 50:8	judgment 47:21	25:24 26:13,18 26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
government 12:15	history 33:3 49:16 50:9	intended 27:11 32:1 50:7,10 51:4	judicial 46:19	26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
Government 28:15	hydrologist 19:18	intentionally 19:15	Judiciary 12:2 12:13	26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
government's 38:14,16	hydrologists 17:8	interest 43:16	jurisdiction 3:12,14,16,23 6:5,25 7:2 8:9 8:18,21 9:18 10:10 11:23 12:7,7,14,22 16:1 18:13 21:2,18,24 22:4 23:7 26:11,12 27:10 27:21 28:1,2,4 28:9,14,23 29:7 30:24 35:9 40:4,5,6 40:10,11 42:14 42:15,20 43:9 43:11,19,22 49:12	26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
grant 6:14 35:6	<hr/> I <hr/>	interference 47:4	Justice 3:3,9,17 4:12,12,13,20 5:15,17,25 6:7 6:18,22 7:5,11 7:14,17 8:1,6 9:1,1,5,12,20 10:20 11:6,10 11:18,21,24 12:3,6,18,25 13:9,18 14:4 14:17,24 15:2 15:13,23 16:6 16:19 17:10,20 18:2,9,23 19:1 19:10,12,23 20:7,13,23	26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
granted 3:15	III 3:11,18 4:18	interfering 46:5 46:13		26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
grants 3:13	imagine 16:24	International 4:17		26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
great 29:24	immunity 8:20	interpret 3:22 6:10		26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
greatly 32:11	implementation 40:7	interstate 10:11		26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
group 48:23	important 9:4 10:9 33:12 42:13	intrudes 46:19		26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
guess 20:12	importantly 4:10	intrusion 27:18 39:15 40:9		26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
guidance 9:2,3 13:23 24:25	impressive 39:3	involved 17:6		26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
guided 9:13	incidental 7:13 7:17 33:15,22 34:1,7	involving 10:5 21:24 22:6		26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
guidepost 9:6	include 4:21,24 5:1,6 23:18 27:6 40:19 41:5,22	irrational 47:6		26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
guides 25:22	included 7:7 48:19	issue 4:2,6 6:8 14:2,12,21 23:7,8,22 24:5 24:8 27:9 28:19 42:13,17 42:23 47:15		26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
<hr/> H <hr/>	includes 33:17 49:25	issues 16:24 43:16 47:15		26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
hand 4:20,23,25 25:23	including 4:5,16 47:15	item 31:13		26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14,19 44:24 45:2,5 45:16,22 46:4 46:7,15,21 47:3,7,22,24 48:25 49:2,22 50:3,5,14,16 50:21,23,25 51:3,7,12,13
handle 8:21 11:16	inclusion 50:5	items 31:15,16		26:22 27:13,16 27:19 28:6,18 28:21 29:4,9 29:13,19 30:2 30:13,16,18,20 31:2,4,9 32:10 32:11,13,13,14 32:15,21 33:2 33:8,11,13,17 33:20,23 34:3 34:8,14 35:16 35:20 36:3,8 36:15,17,19,22 37:1,5,8,14,16 37:21,24 38:2 38:5,10,15,25 39:8,11,18,21 39:25 40:13,22 40:24 41:10,12 41:19,24 42:1 42:7,25 43:6 43:10,24 44:1 44:5,8,9,14

36:7 43:17 Kansas's 47:20 keep 13:10 45:24 KENNEDY 5:25 6:7,18,22 7:5,11,14,17 9:1,12 10:20 19:10 25:1 33:17,20,23 34:3,8 42:1 Kennedy's 33:13 kind 28:20 42:23 45:9 46:9,11,13,18 know 10:1,6 15:23,24 16:19 16:20 17:11 18:18 28:21,22 29:2 30:14,23 31:3 34:6 37:2 39:16 knows 39:24	legal 19:16 legislate 27:25 43:13,21 legislating 35:8 let's 6:7 19:14 43:1 45:23 level 42:8 43:25 liberally 36:18 36:20 37:12 limit 9:4 limitation 20:8 22:2 29:8 limitations 35:23 limited 10:19 14:5,9 33:14 36:1,4,4 47:19 limits 27:11 line 9:10 listed 4:18 50:17 lists 4:5 litigant 30:7 litigants 35:21 42:9 litigant's 38:16 litigation 18:10 24:9 44:18 litigious 21:25 23:15 little 17:16 34:15 38:7 Littleworth 47:13 local 17:14 long 22:16 39:1 look 9:2 25:10 33:3 34:22 39:2 looked 29:5 lose 19:19 20:25 21:4,9 losing 21:15,21 38:21 46:25 lot 17:11,12,16 32:22 41:7 44:11,14,15 47:13	lots 44:21,21 low 8:11 lower 5:23 11:1 22:8,11,13,17 23:2 26:5 35:2 48:12 <hr/> M <hr/> magical 25:24 25:25 magically 48:5 magistrate 48:19 magnitude 20:3 main 32:6 major 49:20 making 12:3 mandatory 25:23 mappers 17:2 Marshall 40:25 mass 16:13 master 9:9,21 10:2,20,21 11:4,12,15,20 13:5,11,14,20 13:23,24 14:3 14:8,13 15:11 15:21 16:14 20:17 24:5,13 24:17,20,22,24 25:4,6,20 26:24 27:15 29:10,14,17,22 30:2 39:5 47:12 masters 10:5,25 22:5,6,22,23 28:24 master's 9:8 11:2,9 13:24 14:11 16:7 23:10,19 24:1 matter 1:11 4:23 8:13 13:19 18:13 27:21 30:4,8,13	39:19 40:8,12 44:2 45:20 46:6 47:7,8 51:16 matters 40:2 mean 6:12 9:24 20:8,9,12,15 22:8 24:11 25:25 26:13 30:14 34:14 35:6 38:25 40:18 meaning 5:7 51:4 means 48:15 meant 48:12 Members 47:12 merits 14:6 messy 41:5,5 mileage 34:23 million 11:3 20:18 minimums 25:17 minutes 47:25 misheard 24:4 mixed 49:22 mode 43:19,25 44:3 model 14:21,22 15:5,19 20:4 25:9,9,11 models 39:3 moment 14:18 Monday 1:9 money 18:24 30:15,21 34:19 38:7,11,14,16 38:17 44:11,21 monitor 15:7 morning 3:4 <hr/> N <hr/> N 2:1,1 3:1 nature 18:10,12 21:14 29:20 necessarily 8:25	necessary 7:7,14 7:16 42:5 46:10 need 23:1 32:23 38:13 40:6 42:16 negotiating 27:22 never 7:3 10:12 14:14 16:4 20:9 21:3 23:22 25:14 26:11 28:20 36:9,12 49:16 New 16:10,10,15 16:16 nonexclusive 28:5 normally 50:6 number 18:5 19:11 20:14 30:5,7 33:23 42:2 <hr/> O <hr/> O 2:1 3:1 occasionally 9:25 odd 29:22 office 36:12 Oh 32:21 okay 11:18 17:15 18:5,9 33:11 34:18 51:7 omission 43:21 once 22:17 23:4 42:12 one-third 14:1 24:23 opinion 16:13 16:22 option 30:4 oral 1:11 2:2 3:7 26:20 order 10:23 11:12,15 15:17
---	--	---	--	--

<p>24:4 25:3 orders 24:1 ordinary 36:8 Orig 1:5 original 3:4,12 3:15,23 6:4,24 7:1,3 8:8,17,18 8:20 9:18 10:10 11:23 12:6,11,12,22 16:1,3 17:25 18:12,19 20:2 21:2,18,23 22:4 23:7,10 25:14,25 26:3 26:12 27:10,14 27:20 28:1,2,8 28:14,23 29:6 30:24 35:9 40:3,4,5,11 42:14,20 43:9 43:11,19 49:11 originates 8:15 ought 44:12 46:14 49:12 outer 39:1 outside 29:8 overlap 5:12</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 3:1 PAGE 2:2 paid 11:12 17:17 18:6,14 27:3 29:15 34:24 35:25 36:11 44:21 paper 49:5 paragraph 40:16,17 41:16 42:4 pardon 25:6 part 14:10 23:19 27:8 36:3 38:20,22 40:11 40:20 particular 15:16</p>	<p>31:13 particularly 12:19 28:7 parties 8:24 10:22 11:4,7 13:19 14:1,7 18:21,23 21:24 23:21,25 24:2 24:7,14,18,24 25:3,19 29:11 44:14 46:9 party 20:24 21:6 21:15 22:1 23:17 29:24 38:22 44:16,17 46:25,25 party's 10:1 Pasadena 37:6 pass 22:3,20,23 passed 45:25 pay 9:23 18:4,24 21:16,20,21 25:3 30:21 34:19,25 35:2 35:3,4 37:17 38:6,22 44:11 44:14 46:25 paying 39:7 pays 20:24 21:6 people 39:3 percent 16:15 period 17:17 periodically 24:12 person 18:25 20:17 persuasive 15:20 pick 5:2,4 picked 20:14 Pipeline 48:10 plain 47:16 Plaintiff 1:4,16 2:4,9 3:8 48:3 please 3:10 26:23 point 7:23 10:9</p>	<p>16:18,25 21:11 25:21 32:6 39:18,23 46:12 46:23 49:7 pointed 16:12 19:12 31:11 41:13 44:10 populations 20:3 position 7:13,22 9:7 10:14 18:24 49:18 possible 16:24 power 3:13,15 6:13,16 7:1,20 7:21 8:16 9:17 45:6,8,9,10,13 45:13,23 47:8 practice 7:3 13:19 15:25 prescribe 26:4 43:18 present 15:10 presented 16:13 preserved 12:16 25:12 presides 48:21 pretty 46:7 prevailing 21:24 22:1 23:16 35:24 44:16,16 prevent 35:10 prevents 37:22 40:3 pre-existed 51:5 price 27:23 principle 27:22 printing 4:7 32:20 33:18,25 34:4,4,7,9 private 8:24 probably 43:5 problem 25:5 35:7 37:16 procedural 39:19 40:1,8 40:12 44:2</p>	<p>Procedure 10:25 25:22 procedures 12:15 proceeding 37:2 43:19,25 44:3 process 33:15 42:5 43:19,21 46:23 47:8 progressed 24:16 prohibited 37:18,19 proposed 47:21 prove 14:23,24 15:2 proved 15:5 21:9 proves 33:9 provide 8:13 provided 13:23 provides 27:1 46:24 provision 4:2,11 4:15 5:21 6:1 7:4 31:19 published 16:21 punish 46:2 purposes 39:7 Pursuant 43:6 put 13:3 37:14 51:1</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qualifications 29:1 question 6:9 14:18 15:24 17:22 18:12 20:13 24:4 30:18,20 31:10 31:15 32:22 33:13 44:13 47:2 questions 47:23 quite 21:15,22</p>	<p style="text-align: center;">R</p> <hr/> <p>R 3:1 radically 8:13 raises 37:16 rate 9:23 16:7 ratify 8:19 reach 3:23 18:1 read 6:14 48:17 reading 3:25 5:7 8:1 12:19 16:23 48:16 realistic 44:6 reality 20:15 really 19:19,24 34:15 42:11 46:21 reason 28:8 34:3 51:11 reasonable 28:25 43:3 reasons 24:19 rebuttal 2:7 26:17 48:2 recognize 29:14 32:22 recognized 43:15 recommenda... 13:14,16 14:14 16:7 recover 19:17 redundancies 32:19 redundancy 33:9 redundant 31:21 32:7 refer 6:2,4,19,21 49:6 reference 6:11 31:24 referred 7:3 16:4 40:14 referring 32:7 refers 34:12 40:18 refrained 39:18</p>
--	--	---	---	--

<p>regarded 28:16 regarding 35:19 Regardless 12:6 regressed 11:19 regulate 27:20 28:13 regulation 26:11 regulations 3:14 7:1 reimbursed 44:16 reimburseme... 35:25 reinstated 46:17 relates 31:18 relied 10:12 relief 6:1 relies 49:18 reluctant 46:9 relying 3:19 remainder 26:16 remaining 48:1 remedies 14:15 14:16 renders 29:24 repeating 20:13 report 47:20 reporter 32:20 request 13:1 require 49:15 required 23:3 26:1 research 29:6 reserve 26:16 reserves 25:19 resolution 7:10 7:25 8:20 resolve 24:5 resolved 11:4,7 11:8 14:1,2,12 16:18 resolving 17:7 47:14 respect 15:25 45:15 response 33:13</p>	<p>rest 6:22 28:4 result 4:1 7:22 revision 50:6 revisit 30:10 44:12 revisor 51:1,4 revolution 21:22 rhetorical 18:11 ridiculous 19:5 right 17:10,23 19:16 21:7 24:6 34:18 41:1 43:15,18 45:1,4 48:17 rightly 26:25 River 15:7 16:12 road 35:11 39:1 robe 48:20 Roberts 3:3,17 5:15,17 13:18 14:4 20:7 23:9 23:18,24 24:6 26:13,18 27:13 27:19 28:6 39:21,25 42:25 43:6,10,24 44:5 47:24 51:13 rule 8:17 9:10 10:15,24 14:13 15:9 17:21 19:6 20:24,25 21:1,5 22:20 22:21,23 25:2 25:7,15,16,17 42:17 49:15 50:7 rules 8:23 9:19 10:25 22:19,22 25:10,20,21,22 25:23 28:20 35:9 39:19</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>s 2:1 3:1 20:17 safeguard 28:17 sake 17:21</p>	<p>save 9:11 22:7 saw 20:9 saying 7:5 8:7 9:2,12 33:9 46:1 says 4:15,23,25 5:8,17 18:3 20:24 22:3,23 34:24,25 38:10 40:16,25 41:3 43:17 48:7,8 48:11 49:24 Scalia 13:9 19:1 22:7,14,16,25 25:24 30:13,18 30:20 31:2,4 38:10 40:13,23 40:24 41:10,12 41:19,24 42:7 44:24 45:2 46:21 47:3 Scalia's 20:13 second 42:4 secretly 19:14 section 4:3,10 5:20 6:10 26:25 27:5 28:2 31:13,18 31:23 41:15 50:17 see 42:10 seeks 35:25,25 seen 20:7 41:8 self-executing 40:6 sense 20:8 45:13 sensitive 3:18 28:7,19 sentence 34:5 separate 33:4 48:23 serious 20:3 service 29:25 services 28:25 serving 33:15 42:5 set 6:17 12:14</p>	<p>25:16 27:11 28:11,11 42:19 43:3 46:22 setting 44:2 46:19 settle 13:19 settled 24:24 settlement 14:10 shift 12:21 shifting 15:18 show 36:23,24 37:10 shy 11:3 side 21:21 30:21 sides 29:21,25 30:19 39:3 side's 21:16 significant 28:17 42:18 simple 45:24 simply 6:14 12:8 42:24 situation 15:18 30:6 45:7 situations 10:2 six 1:15 2:3,8 3:6,7,9,21 4:5 5:4,16,20 6:3 6:12,20,24 7:9 7:12,16,19 8:5 8:16 9:7,16 10:3,24 11:8 11:14,20,22 12:1,5,10,18 12:22 13:5,13 13:22 14:11,20 15:1,4,16 16:3 16:9,21 17:25 18:8,20 19:8 20:1,16 21:1,8 21:17,23 22:12 22:15,20 23:6 23:12,21 24:3 24:7,16 25:11 26:7,15 47:25 48:2,4 49:3 50:2,4,12,15</p>	<p>50:20,22,24 51:2,6,9 slate 45:8 slippery 46:8 slope 46:8 somebody 45:10 48:20 sorry 26:15 32:14 48:8 49:22 sort 22:19 45:14 sorts 12:9 Souter 11:6,10 11:18,21,24 12:3,6 31:9 32:11,13,14,14 32:15,21 33:2 33:8,11 45:5 45:17,22 46:4 46:7,15 47:7 sovereign 8:20 8:22,25 25:13 space 39:2 speak 10:4 speaking 18:17 special 9:8,9,21 10:2,5,20,21 10:25 11:2,4,9 11:11,12,15,20 13:5,10,14,20 13:23,24,24 14:3,7,11,13 15:4,9,11,21 16:7,14 20:16 22:5,5,21,23 23:10,19 24:1 24:5,12,17,19 24:20,22,24 25:4,6,20 26:24 27:15 28:24 29:10,14 29:17,22 30:2 47:12 special master 20:18 specific 11:16 specifically 4:21</p>
--	---	---	--	---

<p>5:21 41:15 specify 23:11 spend 20:10 38:13,13 spending 38:15 38:16 spent 47:13 Spielberg 17:14 spoken 45:20 stake 14:6 stand 37:11 stand-alone 5:25 6:10 start 25:19 35:8 started 31:7 starting 35:23 39:1 starts 46:13 State 15:9 17:4 28:3,3 statement 49:14 states 1:1,12 4:3 4:4,9,12,13,15 4:21 5:1,5,9,13 8:18,22,25 9:24 17:4 18:4 19:22,23 20:5 25:13 27:2,6,7 28:9,13 31:14 31:22,25 34:19 46:1 48:9,17 48:21 49:1,10 49:25 statute 3:22,25 4:2,8 5:7,8,13 6:2,4 8:2 12:19 17:12,13 18:3 18:6 22:3 27:8 30:3 31:11,25 32:5 33:4,4 34:11 36:1 38:8 39:9,15 41:17 42:11 46:1,3 47:17 47:19 48:18,18 statutes 10:13 16:4 26:25</p>	<p>41:6 50:19 statutory 31:10 36:2 40:7 stealing 19:15 step 11:19 STEVE 1:15 2:3 2:8 3:7 48:2 Steven 17:14 Stevens 12:18 12:25 14:17,24 15:2,13 37:14 37:21,24 38:2 38:5,15 strong 18:18 stronger 3:25 strongest 5:6 structure 31:7 stuck 42:22 submit 8:19,19 13:20 submitted 24:17 51:14,16 subparagraph 4:6 subparagraphs 4:5 subsection 10:8 subsistence 34:23 substantive 43:24 50:7,8 50:10 sue 28:15 suggest 9:19 18:20 47:5 suggested 9:14 13:24 23:14 24:18,21 suggesting 9:5 suggests 50:10 Supreme 1:1,12 3:23 4:14,22 4:25 5:1,6,22 5:23 6:16,25 15:17 22:9,10 26:9 27:6,9,15 31:19,20,22</p>	<p>32:1,2,9,24,25 33:14 34:16,20 35:3 39:9 40:15 41:3,20 42:2 46:1 49:2 sure 10:24 19:10 surprising 28:12 28:16 surveyors 17:2 Suthers 1:17 2:5 26:19,20,22 27:16,24 28:18 28:22 29:4,12 29:17 30:2,16 30:19 31:2,5 32:10,13,18 33:2,10,12,19 33:22 34:1,6 35:14,18,21 36:5,15,18,20 36:24 37:4,6,9 37:21 38:1,3,8 38:18 39:8,14 39:25 40:22 41:7,11,13,23 42:12 43:4,8 43:14 44:1,8 44:19 45:1,4 45:16 46:4,15 47:2,10 system 9:14 44:17</p>	<p>taxed 41:1 42:8 42:9 48:7 taxes 41:19 taxing 34:11 42:4 technical 21:14 tell 10:3 telling 9:8 46:16 tells 10:18 25:18 34:22 42:7 48:15 Tenth 37:9 term 4:10 7:7 45:13 terms 4:8 terrific 39:4 Thank 26:18 47:24 51:8,12 51:13 thing 18:6 20:6 21:15 30:25 33:12 34:18 36:10 37:15 46:18 48:15 49:9 things 11:16 18:16 42:2,6 think 3:21,24 5:10 6:3,8,18 7:18,23 10:9 10:22 11:14 12:12 16:9 17:7 19:4,9 20:21 21:1,8 21:14 22:16,20 22:24 25:1 26:10 28:12,15 30:10 33:2,6,7 33:12,17,21,24 34:9 35:12 36:3 38:12,13 40:8 41:6 42:13,18 43:3 44:6,9 45:20 45:22 46:10,22 47:2 49:7 thought 24:14</p>	<p>36:4 three 35:19 tie 22:18 25:23 tied 9:9 49:3 till 50:6 time 19:18 24:8 26:17 27:24 30:9,10,23 31:6 37:11,12 47:13 50:24,25 time-barred 46:18 title 5:21,22 27:1,5 48:12 48:22 50:18 today 25:17 told 28:1,12 49:5 Topeka 1:15 total 11:2 totally 31:21 32:6 40:7 Trade 4:17 traditionally 21:25 travel 27:4 travelling 37:12 tread 49:11 Treasury 38:12 treat 25:12 39:6 treated 5:23 13:2,4 14:19 14:21 treatise 49:20 trial 14:23 15:6 22:10 36:25 44:23 tried 18:1 trilogy 10:12 16:4 trivial 21:6 trouble 17:17 trying 22:8 35:7 35:22 turning 6:16 two 4:8 5:12 30:7 42:1,6</p>
---	---	---	--	--

two-thirds 13:25 24:22	v 1:5 3:5 8:22 15:6 16:10 43:17	7:24 9:22,24 13:3,8 14:18 16:8 17:13 25:6 27:2,8 28:25 29:7,10 29:14,15 30:15 30:25 31:7 33:16 34:2,4 34:12,13 35:23 36:9 38:6 39:20 42:20 46:19 47:16	19:4	1913 26:7 33:6
type 17:8 20:5	versus 28:3	witnesses 4:7 9:25,25 10:1,8 16:20 18:14,15 34:9 36:23,24 45:18 47:18	\$	1914 33:6
types 43:16	view 45:6 46:3	wonderfully 18:18	\$1.50 31:8	1920 4:3 6:11,19 6:21 10:6,8,16 31:13,16,21,24 32:8,10,18,22 33:1 34:4 40:25 41:15 48:4,8,13 49:8
typical 38:19	violated 21:10 39:15	word 48:13 49:1 49:4	\$30 16:2,2 30:10 \$30,000 20:20 \$382.50 18:5 \$40 9:3,11 10:19 14:9 16:2,8 17:17 19:4 20:8,11 21:6 27:3 29:8 30:10 31:11 34:24 37:18 42:22 44:6,10 44:11	1931 16:11
<hr/> U <hr/>	vis-a-vis 22:10	worship 13:22	1	1934 12:19
Ultimately 13:12	vital 7:10,24 15:20	worth 20:10	10:04 1:13 3:2 10:59 51:15 105 1:5 3:4 11 34:16,16 1251 28:2 150 25:15 168 49:10,17 17 25:17 1789 12:13 1821 10:18 27:1 27:11 34:22,22 35:19 36:4 38:24 1853 31:5,8 48:5 48:10,12 1854 8:23 19 6:6 1911 5:21,25 6:14,14,19,23 7:5,11,21,21 31:18 32:6,20 32:23 33:3,13 33:19,24 34:10 34:20 35:5 37:20,25 38:1 40:15 41:3 42:1 1912 26:8	1939 25:15,15 1948 27:8 48:4 49:19 50:2,19 50:24,25 1949 36:6 1990 30:9
unambiguous 27:1	vouch 30:19	wouldn't 13:25 14:6 16:24 24:21 41:24	<hr/> 1 <hr/>	1931 16:11
understand 15:13 45:6	<hr/> W <hr/>	wrong 21:7	1	1934 12:19
undoubtedly 43:18	W 1:17 2:5 26:20	x 1:2,7 11:12	<hr/> 1 <hr/>	1939 25:15,15
unfair 13:25 20:23 24:21 30:6	want 14:10 17:16,18 18:18 34:15 39:11,17 39:21	<hr/> Y <hr/>	1	1948 27:8 48:4 49:19 50:2,19 50:24,25
unfairness 20:22 30:5,14	wanted 15:10	years 7:2 9:19 10:11 18:22 21:11 25:15 49:10,17	<hr/> 1 <hr/>	1949 36:6
uniform 31:6	wants 23:5 37:17	yield 39:23	<hr/> 1 <hr/>	1990 30:9
uniformity 9:14 42:13,16	war 20:6	York 16:10,16	<hr/> 1 <hr/>	
unique 8:21 12:17 13:6 24:23 25:13	Washington 1:8	<hr/> Z <hr/>	1	
United 1:1,12 4:4,9,12,13,15 4:21 5:1,5,9,13 9:24 18:4 27:2 27:6,7 31:14 31:22,25 34:19 46:1 48:9,17 48:21 49:1,10 49:23,25	wasn't 11:1 15:17 37:2,3 50:5	zookeeper 17:15	<hr/> 1 <hr/>	
unnoticed 49:20	water 15:8,9 16:23 19:15		<hr/> 1 <hr/>	
unreasonable 39:12	waters 16:11		<hr/> 1 <hr/>	
use 15:8,9 22:4,5 22:23	way 4:23 13:3 13:22 15:12 19:17,21,22 36:5 41:11 49:4,5		<hr/> 1 <hr/>	
uses 48:25	wears 48:20		<hr/> 1 <hr/>	
usual 13:18	we'll 3:3 28:24		<hr/> 1 <hr/>	
usually 10:22	we're 36:1		<hr/> 1 <hr/>	
U.S.C 4:3,10 5:20 6:6	we've 27:21 49:16		<hr/> 1 <hr/>	
<hr/> V <hr/>	wholly 47:6		<hr/> 1 <hr/>	
	win 20:24		<hr/> 1 <hr/>	
	winning 21:16 46:24,25		<hr/> 1 <hr/>	
	withdrawn 38:11		<hr/> 1 <hr/>	
	witness 7:6,9,18		<hr/> 1 <hr/>	

53 10:24 22:21 25:2,7 54 22:21 54D 10:15 <hr/> 6 <hr/> 6 41:16 <hr/> 9 <hr/> 911 6:9				
--	--	--	--	--