

Appearances continued:

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United States District Court
333 Constitution Avenue, NW
Washington, DC 20001

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

2 THE DEPUTY CLERK: Civil action 12-1192, Nasser
3 Al-Aulaqi versus Sarah Khan, et al.

4 For the plaintiffs, Arthur Spitzer, Brett Kaufman, Hina
5 Shamsi, Maria LaHood, Pardiss Kebriaei.

6 For the defense, Paul Werner and Brian Hauck.

7 THE COURT: Well, before we really begin I just want
8 to say holy cow. This is a really serious matter. So I
9 shouldn't say holy cow, but holy cow.

10 All right, we're here on a motion to dismiss filed by
11 the Government against the lawsuit brought by Mr. Al-Aulaqi,
12 Nasser Al-Aulaqi.

13 Since it's the Government's motion they get to go first.
14 I understand that there will be two people speaking for the
15 Government; is that correct?

16 MR. HAUCK: Your Honor, just one person speaking for
17 the Government, Brian Hauck. I believe there are two people
18 speaking for the plaintiffs.

19 THE COURT: Okay, then I misunderstood.

20 Okay, one person speaking for the Government and who is
21 speaking for the defendants or for the plaintiffs, and how are
22 you going to divide your argument?

23 MS. KEBRIAIEI: Your Honor.

24 THE COURT: Can you just come to the mic? It just
25 works so much better.

1 MS. KEBRIAIEI: Sure.

2 Ms. Shamsi and I will be dividing, would like to divide
3 our arguments. Defendants don't have an objection to that.

4 I would be addressing the defendant's political question
5 doctrine and Ms. Shamsi would take Bivens and qualified
6 immunity.

7 THE COURT: And would take what?

8 MS. KEBRIAIEI: Bivens and qualified immunity.

9 THE COURT: Could you do me a big favor and pronounce
10 your last name for me.

11 MS. KEBRIAIEI: Kebriaei.

12 THE COURT: Kebriaei.

13 MS. KEBRIAIEI: That's exactly right.

14 And we would like to, Ms. Shamsi and I would like to
15 divide our time pretty equally if that's okay with you unless
16 you have a preference in terms of the allotment of how much
17 time you would like for political question versus Bivens and
18 qualified immunity.

19 THE COURT: Well, I actually think political question
20 and Bivens are the two that, but Bivens and qualified immunity
21 are almost the same thing, so they all come out even.

22 MS. KEBRIAIEI: Okay, we're on the same page.

23 Thank you.

24 THE COURT: Thank you.

25 All right then, Mr. Hauck.

1 MR. HAUCK: Good morning, Your Honor, and we have one
2 housekeeping request.

3 One of my colleagues from the Justice Department who has
4 been integral in preparing the case, is not yet a member of the
5 Bar, but if the Court had not objection, I'd like to invite him
6 to counsel table. Plaintiffs have no objection.

7 THE COURT: I don't have any objection.

8 MR. HAUCK: Thank you, Your Honor.

9 THE COURT: Is this a person who's a lawyer?

10 MR. HAUCK: He's a law student, Your Honor.

11 THE COURT: Law student, okay. Then that means he's
12 done all of the grunt work.

13 MR. HAUCK: He's done a lot of work, Your Honor.

14 THE COURT: He really should be able to come forward.
15 A man that's done the grunt work, he knows all of the answers,
16 so when you're not sure, you turn to him, okay.

17 MR. HAUCK: I may tag him in, Your Honor.

18 THE COURT: Yes. All right, go ahead, Mr. Hauck.

19 MR. HAUCK: Thank you, Your Honor.

20 Again, it's Brian Hauck representing former Secretary
21 Panetta, former Director Petraeus and for Admiral McRaven and
22 Lieutenant General Votel.

23 As the Court knows, these defendants are some of the
24 highest ranking military and civilian leaders in the country.

25 THE COURT: Or they were.

1 MR. HAUCK: That's correct, Your Honor. Secretary
2 Panetta and Director Petraeus are no longer in Government
3 service. Although Admiral McRaven and Lieutenant General Votel
4 remain positions, commanding positions at SOCOM and Joint
5 Special Operations Command.

6 Unless the Court has a different preference, I'll begin
7 with a quick overview of the case followed by going directly
8 into the core of justiciability issues.

9 THE COURT: Well, unless the audience needs it, I
10 actually think that there isn't much argument about the facts.

11 If you think that there are points particularly as to
12 his son who has died, there might be factual points that you
13 need to make, but I don't think there's a whole lot. So you
14 could go very on the top of the water, okay.

15 MR. HAUCK: I understand, Your Honor.

16 So to address the political question doctrine first and
17 why that doctrine bars the Court from hearing the case and why
18 even if it didn't, the doctrine of special factors would
19 counsel dispositive hesitation towards creating a remedy that
20 Congress has not. I'm also happy to address the qualified
21 immunity questions.

22 An issue is raised by this complaint are serious matters
23 of great importance. Decisions are made from the highest level
24 of executive branch with robust oversight by Congress and the
25 President in a recent speech at the National Defense University

1 has invited further dialogue on the important policy questions
2 that are raised by this case.

3 One avenue to which that policy dialogue cannot occur is
4 through a personal liability damages remedy involving the most
5 delicate national security and foreign policy judgments when
6 Congress fully aware of and engaged on the issues has declined
7 to create one.

8 The political question doctrine recognizes that out of
9 respect for the separation of powers there are certain
10 questions that are so textually committed to the executive and
11 Congress and that are so within their core competence and so
12 foreign to the judiciary's competence that they are not fit for
13 adjudication.

14 And so Your Honor, the methodology for applying the
15 political question analysis is clear. It doesn't just turn on
16 how sensitive the case is or how plaintiffs caption their
17 claims. You look at the precise questions that the Court would
18 have to answer in resolving it and then you apply the Baker v.
19 Carr factors to those questions.

20 And when the Court does that it reaches decisions like
21 the D.C. Circuit reached in El-Shifa where it concluded that
22 the decision to launch, to launch a strike against a foreign
23 target abroad is a decision that is outside the Court's
24 competence and is committed to the executive.

25 THE COURT: But in this case, we're talking about

1 U.S. citizens. And I have questions of course for the
2 plaintiffs, but you're talking about U.S. citizens who were
3 killed by a U.S. strike. I need you to talk about the second
4 of those strikes.

5 But as to the first, the fact that Congress and the
6 President agreed, what you're arguing is therefore that
7 Articles I and II overcome the obligation of the Article III
8 Courts to interpret and apply the Constitution.

9 Is that what you're saying?

10 MR. HAUCK: That's not --

11 THE COURT: I mean, you're leaving it to them to
12 decide. So where does that stop? At what point could a
13 President and the only couple of members in the senate and
14 house who are on special committees to know about these things,
15 at what point can they not decide that an American citizen
16 overseas is a danger to the country and therefore, without
17 process of law be killed?

18 MR. HAUCK: I think there's a couple of questions in
19 there and I'll try to address all of them.

20 THE COURT: There actually are.

21 MR. HAUCK: Beginning first with the question of the
22 plaintiff's citizenship. The reasoning in El-Shifa was much
23 broader than that. It encompassed the consequences that the
24 Court would have to go through of dealing with questions of
25 whether the strike was appropriate there. It wasn't turning on

1 whether the plaintiffs there were foreign or U.S. citizens.

2 Judge Bates recognized that in the injunction case here
3 where he recognized that the question of whether a citizen
4 hiding abroad who has been determined to be a member of, leader
5 of AQAP presents such an imminent threat that it warrants
6 lethal force is a question again committed to the Executive and
7 Congress.

8 So the citizenship question doesn't change the
9 difficulty with which, the difficulty of the question that the
10 Court would have to answer in the political question doctrine.

11 THE COURT: Except that, I mean Judge Bates in the
12 end decided that the plaintiff in that case or plaintiffs
13 didn't have standing and that was ultimately his decision. And
14 he talked about these other things, but didn't ultimately
15 decide them. He made statements and everything, but it was
16 really a standing decision.

17 And I know you have standing arguments here, but I'm
18 going to not, we don't need to spend our time on that today.

19 A foreign national targeted by the United States in a
20 foreign place may not have, doesn't have constitutional rights
21 a U.S. citizen does. And so when targeted by his own
22 Government, are you saying that the U.S. citizen in a foreign
23 nation has no constitutional right?

24 Let's say he was targeted and only injured. Could he
25 file a tort claim?

1 MR. HAUCK: Your Honor, I think that question sounds
2 like come up under the Federal Tort Claims Act and we would
3 analyze it there.

4 THE COURT: Well, it's the same difference. I mean,
5 it's the statute and not the Constitution. The Constitution is
6 slightly more weighty.

7 MR. HAUCK: Right, no doubt. But again, the
8 political question doctrine I'm sticking here for a moment
9 although I can address special factors in the other questions
10 and the constitutional rights questions as you like.

11 But the political question doctrine really looks at what
12 are the questions that the Court would have to answer here.

13 THE COURT: Okay. So what you're saying is that the
14 questions here, that the plaintiffs who posit that the question
15 is whether or not the deceased grown Al-Aulaqi was an active
16 belligerent or posed an imminent threat of some kind, that's
17 their approach to this, and you're saying just to ask that
18 question is beyond the can of the Court?

19 MR. HAUCK: That's correct, Your Honor.

20 And Courts have recognized this. Courts like the D.C.
21 Circuit in People's Mojahedin recognize that imminent analysis
22 of whether a threat abroad is so serious that it requires that
23 kind of action. It's a question that Courts don't have the
24 apparatus to analyze in the same way that the executive or
25 Congress do.

1 In fact, the Waterman Supreme Court decision talks about
2 when analyzing the foreign policy issue the consequences of
3 these kinds of decisions involve a kind of prophecy that the
4 Courts aren't able to deal with.

5 But in fact, Your Honor, it's not prophecy, it's
6 expertise, an institutional apparatus that is built up through
7 foreign service agents, through military officials, through
8 covert operations to inform the judgments that have to go into
9 this. The Courts just aren't in a position to second guess or
10 analyze those questions in the same way that the executive or
11 Congress are.

12 THE COURT: And so as a result of that, the targeted
13 individual has no constitutional right at all?

14 MR. HAUCK: This isn't a question of whether they
15 have a constitutional right. It's whether the Courts can
16 adjudicate through private litigation that kind of claim.

17 THE COURT: Okay. So they might have constitutional
18 rights, but I'm sorry, you can't assert them anywhere.

19 I mean, where else would one assert a constitutional
20 right except in an Article III Court? I mean, this is, the
21 problem is how far does your argument take you?

22 Let me say and I would be interested in what the
23 plaintiffs have to say. If we were at active war with a
24 country and I'll pick a country that's easy to identify and
25 nobody will think it has any political implications except I

1 needed a country. Let's say we're at war with Switzerland.
2 They don't go to war. They don't go to war, Switzerland
3 they're very firm about that. But we're at war with
4 Switzerland and some Swiss descendants in the United States
5 decide that they are actually on the side of the Swiss, they
6 think that we have been belligerent and terrible. They go to
7 Switzerland and they join that Army and then we have a battle
8 and they get killed.

9 Well, they didn't have, they exercised their rights and
10 they got killed in active battle and I think that there is no
11 claim that they might have to any sort of constitutional right.
12 We all agree.

13 You agree with that, right?

14 MR. HAUCK: The question is whether they have a
15 constitutional right?

16 THE COURT: Yeah.

17 MR. HAUCK: Well, Your Honor, I think the --

18 THE COURT: They've taken up arms against the United
19 States. They've joined with others against whom we're in
20 battle and they get killed because other people in battle get
21 killed.

22 You agree with that?

23 MR. HAUCK: I think the President has said that the
24 United States could never kill a U.S. citizen without due
25 process of law. So I think there may be constitutional issues.

1 THE COURT: Which President?

2 MR. HAUCK: I think it's in the President's National
3 Defense University speech. We can check the text though.

4 THE COURT: Well, okay, if the President thinks that
5 no American get killed without due process of law --

6 MR. HAUCK: I should be specific.

7 No U.S. citizen could be targeted for killing without
8 due process of law.

9 THE COURT: Where was the due process in this case?

10 MR. HAUCK: Your Honor, that would shift us from the
11 political question doctrine to the rights at issue. And Your
12 Honor --

13 THE COURT: Well, no. If the political question
14 doctrine is as broadly as you describe, none of the rest of
15 this matters. Right?

16 MR. HAUCK: It does matter, Your Honor. I'm not
17 saying that there are no checks on this system.

18 THE COURT: Okay, where are they?

19 MR. HAUCK: First of all, there's an extensive
20 executive review process.

21 THE COURT: No, no, I'm sorry.

22 The executive is not an effective check on the executive
23 when it comes to an individual's constitutional rights.

24 It's not that I intend to disrespect any person in the
25 executive branch from you all the way up. But you cannot ask a

1 Judge to say okay well, the executive will check himself.

2 MR. HAUCK: Your Honor, I think I would note that the
3 decisions are made at the highest level after an extensive
4 review but I understand the Court's point.

5 Then there's an extensive and robust congressional
6 oversight process that even in this case involved the relevant
7 committees of Congress being aware of the decision to target
8 Mr. Al-Aulaqi before it occurred and then being briefed on
9 every decision to strike -- excuse me -- every strike outside
10 of Iraq and Afghanistan regardless.

11 So Congress is imminently engaged in this. It's the
12 Constitution that dictates that these branches or the
13 appropriate branches to resolve the issue.

14 To return to the Court's question about the -- so it's
15 not just theoretical oversight but it's actively happening
16 here.

17 But the second point, Your Honor, to return to the
18 citizenship question is that the -- sorry -- the issue of the
19 constitutional right. Courts do hear constitutional rights all
20 the time but not when they're barred by doctrines like standing
21 or political question doctrine or special factors.

22 Gilligan, the due process case we site in our brief.
23 That is at page 6, it's a due process claim. That is a
24 constitutional right that was barred by the political question
25 doctrine.

1 THE COURT: Believe me, I know the political question
2 doctrine. I've applied it. I understand the hesitation to
3 extend Bivens to unclear places, I understand the clarity of
4 the wrong that has to exist, et cetera. I promise, I
5 understand the law that you're talking about.

6 What I'm trying to figure out is where is it cabined.
7 How broadly are you asserting the right for the executive with
8 or without knowledge of Congress to target an American citizen,
9 and I understand that this American citizen had dual
10 citizenship, he's still an American citizen. I don't know if
11 the young man had dual citizenship. I'm not sure.

12 Anyway, where is the limit to this? And the limit is
13 the courthouse door. Okay. That's the limit. And you're
14 saying, well there's no courthouse door that this has to go
15 through. Judges don't have the understanding of the, all of
16 the circumstances that they need to have.

17 MR. HAUCK: I think --

18 THE COURT: You would be surprised at the amount of
19 understanding that other parts of the Government think Judges
20 need to have.

21 MR. HAUCK: I understand, Your Honor.

22 The case we are talking about is a very extraordinary
23 narrow set of facts.

24 THE COURT: But the argument you are making isn't.
25 You see, that's the problem I am having. The argument you're

1 making isn't tied to these facts. It's tied to an assertion of
2 authority that says that the Court has no role in this. None,
3 none, none.

4 And if I decide that the way you have argued it, I find
5 that a little disconcerting that the executive and according to
6 you, the Congress, would just say, okay, American citizens you
7 can travel wherever you want but if we decide that you're an
8 enemy or that you're a danger to us, we can get you wherever
9 you are and you have no recourse to any court.

10 Now I'm not saying that they have a meritorious claim
11 because we haven't finished the argument and I haven't decided.
12 But you see, the scope of your argument is what concerns me.
13 It just would gobble up all of the air in the room.

14 MR. HAUCK: Your Honor, just to go through some of
15 the questions that the Court would have to answer just in this
16 case.

17 THE COURT: Okay.

18 MR. HAUCK: You would have to look at how imminent
19 was the threat. What was the likelihood of heading off of,
20 when would the window of opportunity close here. What would
21 the consequences be not of just this action but of alternative
22 actions. What were the consequences of foreign policy of some
23 of those actions be.

24 What would the consequences be of not acting.
25 Particularly with respect to the second strike, Your Honor, and

1 actually the one plaintiff's claim with respect to the first
2 strike. It's a question of what is the right moment to strike?
3 And where should they strike. These questions are
4 extraordinarily sensitive questions that Courts have recognized
5 belong in the executive's competence. You can tie the ruling
6 in this case to those precise questions.

7 Your Honor, even if, even if the Court were concerned
8 about the political question doctrine, it's all of these
9 reasons that counsel dispositively against creating a remedy
10 that Congress has not.

11 We're talking in the Bivens context. We're talking
12 about a situation where the D.C. Circuit has been clear and
13 firm in it's respect of these separation of powers cases that
14 the Court should not apply a remedy.

15 It's most recent pronouncement was in Doe v. Rumsfeld
16 where it recognized that the Supreme Court has never implied a
17 Bivens remedy in a case involving the military national
18 security and foreign policy.

19 And the reason that we don't want these counterterrorism
20 and national security officials distracted by the threat of
21 litigation in their personal capacity when they're making these
22 decisions and Doe was building on a long line of cases
23 involving things like Ali and Rasul in which the Courts are
24 talking about the dangers of implying a remedy and hindering
25 our ability to act decisively and without hesitation when we

1 need to. It's Ali that talks about fettering a field commander
2 with litigation.

3 Your Honor, these are actually commanders still in
4 active operation that would be called into court perhaps to
5 testify, to give depositions by the very individuals that the
6 United States has asked them to defeat.

7 So creating a remedy here would be extraordinary and the
8 D.C. Circuit has been clear and firm that that's not the way to
9 go here.

10 One thing I flag, Your Honor, is that all of these cases
11 are in fact detention cases where the Supreme Court -- excuse
12 me -- where the Constitution recognizes a role for the
13 judiciary through the suspension clause. Where the Courts are
14 much more accustomed to dealing with kinds of long term
15 detention issues. So even in the detention context the Courts
16 aren't going to imply a remedy or the D.C. Circuit is not going
17 to imply a remedy.

18 THE COURT: There might be remedy in the detention
19 cases except for statutory considerations. I mean, it depends
20 which is the detention and who is the detainee and where they
21 are being detained, of course. It matters a lot who is the
22 detainee and where they are being detained. And so there are
23 no absolutes in that context. It, it is so person specific.
24 And here the persons in question are all U.S. citizens.

25 Now, at some point I want you to talk about collateral

1 because there's a, statements in your brief that the death of
2 Mr. Kahn and of the younger Al-Aulaqi are as a result of
3 collateral consequences, not targeted consequences.

4 The plaintiffs say well, you targeted someone and so you
5 still didn't give these U.S. citizens their rights. I
6 understand that. But I think that it makes a material
7 difference if the descendant is just an accident of having been
8 close to where a targeted strike occurred.

9 So why don't we move to that for just a minute because
10 we have two entirely different kinds of claims here.

11 MR. HAUCK: Sure. Just briefly on that habeas
12 question, Your Honor. Doe v. Rumsfeld involved a U.S. citizen
13 and the Court is still not going to imply a remedy there.

14 THE COURT: I know, I remember.

15 MR. HAUCK: In terms of the individuals who are not
16 specifically targeted. I think you cannot separate those
17 strikes, remember, from the fact that those were strikes that
18 were targeting individuals.

19 So the very concerns whether in the political question
20 and the special factors doctrine about the consequences of --

21 THE COURT: Well, but wait. If the, I mean, maybe my
22 analysis is wrong. But if the United States is going after X,
23 X is not a U.S. citizen, X is not a plaintiff. Going after X
24 and Y who is a citizen and who is a plaintiff happened to be
25 having coffee I'll say, I'm making this up entirely, with X,

1 and is injured or killed as a result, it's not that the United
2 States targeted Y. So I think that the constitutional analysis
3 is very different. I mean, it's accidental as opposed to
4 intentional.

5 Is that not what your argument is?

6 MR. HAUCK: I guess if we're moving from the special
7 factors analysis directly to the constitutional rights.

8 THE COURT: No. I'm moving to the facts of the death
9 of the two persons who were not targeted. I want to know if
10 your argument is that well, their deaths while unfortunate were
11 not intended, or no, we intended them and the analysis should
12 be the same. That's what I need to know what your argument is
13 as to those two.

14 MR. HAUCK: Your Honor, I think the argument is that
15 we still cannot imply a Bivens remedy for those cases because
16 there are -- maybe I'm misunderstanding the Court's question.

17 THE COURT: You are misunderstanding the question.

18 I think that the constitutional analysis in the very
19 first place, forget remedies, whether or not there's even a
20 claim would vary depending on whether the U.S. citizen was
21 targeted by the United States or was killed when the United
22 States was actually targeting someone else and they just
23 happened to be too close.

24 Question, are the two persons, Mr. Kahn and the younger
25 Mr. Al-Aulaqi, are those persons deceased by the accident of

1 their presence when there was a target on someone else, or are
2 they deceased because they were also targeted? Can you answer
3 that question?

4 MR. HAUCK: They were -- the plaintiffs do not allege
5 they were specifically targeted. So the plaintiffs allege that
6 other individuals were targeted there and that they were killed
7 by those strikes that were targeting other individuals.

8 THE COURT: All right. Do you agree with me that if
9 they were not targeted by the United States that the
10 constitutional analysis to the extent one goes through one
11 would vary?

12 MR. HAUCK: It would. I can walk through the
13 different claims and talk about that.

14 THE COURT: Okay.

15 MR. HAUCK: With respect to the procedural due
16 process claim, Your Honor, Plaintiffs do not describe in their
17 brief any procedural due process right that was violated with
18 respect to those other individuals. They were not the subject
19 of a targeting process that could have been unconstitutional.

20 THE COURT: Right.

21 MR. HAUCK: That one is easy.

22 With respect to the Fourth Amendment claim whether they
23 were seized. Now we would have to walk through a number of
24 suppositions about the manner in which the Fourth Amendment
25 applies abroad, but it was certainly whether it was clearly

1 established. We can talk about those questions.

2 THE COURT: We don't have to.

3 MR. HAUCK: We don't have to. But the question of
4 assuming that the domestic law enforcement cases where how the
5 Fourth Amendment applies here, we would know that there was not
6 a Fourth Amendment event in that instant. You look at the
7 cases where bystanders are caught up in law enforcement events
8 and those cases recognize that the individual who may have been
9 the intended target, that's the phrase from the Supreme Court
10 decision, the intended target may have had Fourth Amendment
11 event, but the effects on those were not targeted, not the
12 intended target, there's not a Fourth Amendment event there.

13 THE COURT: Okay.

14 MR. HAUCK: But before we would get there we would be
15 talking about whether these rights were clearly established.

16 THE COURT: No. You see, you can do it either way.
17 As you know, you can do it either way. You can either say
18 well, they're not clearly established and so I'm not even going
19 to go into them or you can start with whether there's actually
20 a constitutional right that's even asserted. Okay. So you
21 have answered that for me.

22 Go back to, I understand your argument about Bivens,
23 you're saying it's impossible to apply Bivens against persons
24 who are executing U.S. military and foreign policy at the
25 highest levels. And I recognize that argument having dealt

1 with it before.

2 So are you saying then that in the end there is no claim
3 for not just Mr. Al-Aulaqi's family, but no claim for a U.S.
4 citizen in his circumstance?

5 MR. HAUCK: Your Honor, I think there could be a
6 claim if Congress were to create one but Congress hasn't. I
7 should note that --

8 THE COURT: Well, but you're talking that there could
9 be a claim if Congress created one, that would be a statutory
10 claim.

11 I'm talking about a constitutional claim. Does a U.S.
12 citizen have a constitutional claim to, we'll call it due
13 process for lack of another immediately available concept, to
14 avoidance of death at the hand of the United States without
15 declaration of guilt?

16 MR. HAUCK: Your Honor, this is not -- there are
17 other context in which there may be important events at issue,
18 incredibly important events at issue, important rights at issue
19 but in which the case is not ultimately going to be one that
20 the Courts get to the merits of.

21 It may be barred by standing. It may be barred by, you
22 know, in the special factors in other cases. It may be barred
23 because the Ferris doctrine bars it. It may be barred because
24 under the foreign, Federal Tort Claims Act the foreign country
25 exception bars it.

1 So this case is unusual but if it's very naturally
2 within a pretty well established body of law the Courts are not
3 going to reach the merits of every constitutional claim.
4 That's the constitutional design in entrusting these issues to
5 the executive and to Congress.

6 THE COURT: There's a man who won't be taken off
7 message.

8 MR. HAUCK: Your Honor, I would note one other thing
9 with respect to the qualified immunity analysis.

10 THE COURT: Yes.

11 MR. HAUCK: You noted that it could be possible to
12 begin either with the particular right in question or with the,
13 whether it was clearly established.

14 Ali talks very clearly about it would be the very
15 unusual case in this Circuit to begin with the right at issue.
16 I would note that beginning with the right at issue, could lead
17 the Court very much into the most delicate and consequential
18 military national security foreign policy questions. So for
19 those reasons avoiding the constitutional issues on this
20 record.

21 THE COURT: You are of course talking about all of
22 these concepts that are in fact as you describe them well
23 established and well known to anybody who has done any work in
24 this area, if not to the general public.

25 But you haven't told me what's the, where is the fence.

1 What constrains the executive in this decision process?

2 MR. HAUCK: Your Honor, I think first of all, there's
3 the constitution structure imposes a very strong rule.

4 THE COURT: The constitutional structure has three
5 branches of Government of which, you know, I happen to be the
6 third, the one that is normally yelled at and not given any
7 money, that's the one that I'm in.

8 Actually, I take it seriously to be in this branch of
9 Government because I consider us a nation of laws. Do you see?
10 That's what we're talking about. The most important thing
11 about the United States is that it's a nation of law. And
12 everybody from Presidents down to homeless people are obligated
13 to follow the law, including Judges. Okay.

14 So if there are precedence that apply I have to follow
15 the precedence. I understand that. But your argument has no,
16 no end to it. You say the, and the force of your argument is
17 that if the President acting with his military advisors is
18 considering someone in the world to be a threat against the
19 United States, someone in the world who maybe is a threat
20 against the United States, the President can decide
21 unilaterally to kill that person regardless of whether they
22 have a status as a U.S. citizen.

23 And I need to know where you say the ends of that right
24 are. Do they end when he goes up to Capital Hill and somebody
25 on a Congressional committee says oh, no, we don't agree with

1 that? Is that the end of that right?

2 MR. HAUCK: Your Honor, let me be very clear about
3 one thing that we're arguing here. The argument we're making
4 is very much tied to the locus of this conduct being overseas.
5 The theory that we're advancing --

6 THE COURT: No, I understand that. I completely
7 understand that.

8 I mean, you're not talking about a domestic activity at
9 all. Although to be perfectly frank, your argument does not
10 make that distinction but I understand that that's the point
11 you're making.

12 But you still don't have any fence around it. You don't
13 have any end to it. The best I can get out of you is well, he
14 talks to Congress.

15 MR. HAUCK: No, Your Honor. I think looking at the
16 questions that the Court would have to answer --

17 THE COURT: No, no, no, no. Wait. I'm going into
18 the thicket you don't want me to go into.

19 And my problem is that your argument is that a U.S.
20 citizen has no constitutional right at all, can't even bring it
21 to court.

22 MR. HAUCK: Your Honor, to be clear. We're not, the
23 question of whether they have constitutional rights and whether
24 it's a case that can be heard in court are different.

25 We are talking about whether the case can be heard in

1 court.

2 THE COURT: If they have constitutional rights where
3 would they assert such rights if not in court?

4 MR. HAUCK: Again, Your Honor, there are
5 constitutional rights that end up not being heard in courts.

6 THE COURT: Okay, I agree with that. Where would
7 they assert it?

8 MR. HAUCK: Your Honor, it's a right that the, that
9 the President and the Congress work together to make sure that
10 they're protected.

11 We're talking not just about the deterring, deterring
12 the violation of constitutional rights. We're also talking
13 about deterring federal national security officials from doing
14 their jobs. This case is not just about a broad policy
15 dispute. It's about litigating an actual case and determining
16 whether these four individuals would be liable.

17 THE COURT: I, believe me, I promise you. I just,
18 I'm really troubled. I mean, I think as might be obvious, I'm
19 really troubled by the argument that, that you cannot explain
20 to me where the end of it is. That yes, they have
21 constitutional rights, but there is no remedy for those
22 constitutional rights. That's what you're telling me.

23 MR. HAUCK: Your Honor --

24 THE COURT: And there's no avenue to raise them?

25 MR. HAUCK: Your Honor, the President has invited a

1 dialogue about whether there should be and Congress could
2 decide that.

3 THE COURT: I'm sorry. Congress cannot interpret the
4 Constitution. They can pass laws. The Court interprets the
5 Constitution.

6 MR. HAUCK: But they can decide when there are
7 remedies that are appropriate.

8 THE COURT: Yes. They can decide that under a
9 statute. That's not what we're talking about here.

10 MR. HAUCK: Your Honor, they could create a cause of
11 action to bring this kind of constitutional claim.

12 THE COURT: No. If there is a constitutional claim
13 that can be brought, it doesn't require Congress to approve it.

14 MR. HAUCK: But Congress could approve it, Your
15 Honor.

16 THE COURT: They could approve it. But if it exists
17 we don't need them to say as much. That's what courts are for.

18 Now I'm not saying that in the end everything you say
19 may not be right. But the fact that you give me no
20 alternatives, that you claim full authority for the President
21 and the Congress to do whatever without any aspect of court
22 oversight is very troubling, let me just be clear.

23 MR. HAUCK: Your Honor, if I could also be clear.
24 The President has described how often this kind of situation
25 has occurred. He referred to there being one instance and it's

1 this instance in which the United States has targeted a U.S.
2 citizen abroad since 2009.

3 This is not the kind of thing that arises again and
4 again and again. This is extraordinary. So for the Court to
5 create a new remedy here would be creating a remedy that will
6 effect how federal officials protect a national security when
7 Congress is entrusted with that decision.

8 THE COURT: Okay. I, we're talking past each other
9 because you are not grappling with the problem that you're
10 posing to me.

11 You're grappling with all of the reasons why I shouldn't
12 even consider the problem that you're posing to me. And I
13 understand that that's your legal position.

14 But I'm saying if that's your legal position that
15 there's this place where the Court can't go, who can go there?
16 What is a U.S. citizen to do if not to turn to the Court, the
17 rule of law in the United States?

18 MR. HAUCK: Your Honor, I understand the Court's
19 concern with entrusting that entirely to the political
20 branches. But again, I remind the Court that this is not
21 extraordinary in the legal framework. There are areas where
22 the proper resolution and what the Constitution requires is not
23 a judicial litigation.

24 THE COURT: And on that, you are one hundred percent
25 correct. Thank you, sir.

1 MR. HAUCK: Thank you.

2 THE COURT: All right. Who is going to argue first
3 for plaintiffs?

4 MS. KEBRIAEEI: Good morning, Your Honor.

5 If I may, I wanted to also just begin with a brief
6 response to defendant's arguments before I turn to political
7 question and then my co-counsel will take Bivens and clearly
8 establish.

9 Your Honor, defendants' arguments in this case aren't
10 just wrong. They're dangerous. It's basic proposition is that
11 the executive branch has the power to kill its own citizens far
12 from any battlefield without ever having to present evidence to
13 any Court.

14 One of the people the Government killed was 16 year old
15 Abdulrahman whom not even the Government says was doing
16 anything wrong. With respect to that 16 year old boy
17 defendant's position is that the Court has no role to play as
18 you heard, that the executive can kill an American teenager
19 without ever having to explain why. That can't be the law.

20 The Fifth Amendment prohibits the Government from
21 depriving an American of life without due process and accepting
22 defendant's arguments would empty that phrase of any meaning.

23 Before I go on to the political question doctrine I just
24 wanted to underscore how narrow this case ultimately is. There
25 is no dispute that these killings took place outside of any

1 actual hostilities. The Attorney General's letter which Your
2 Honor inquired about publicly acknowledges that, that these
3 strikes were outside of the area of active hostilities.

4 Therefore, there's no dispute that the government's
5 authority to use lethal force here was subject to the Fourth
6 and Fifth Amendments. The letter and the Justice Department's
7 white paper discussing its authority to kill American citizens
8 in these precise circumstances acknowledges that the Fourth and
9 Fifth Amendments attach to American citizens even abroad.

10 There's also general agreement about what the standards
11 are. The white paper uses the same standards that we use in
12 our brief. It cites the same cases that we cite in our brief.
13 The fundamental disagreement here is about whether the legal
14 standards were met and that's the kind of disagreement Your
15 Honor and the Courts resolve all the time.

16 Turning to political question directly. We would agree,
17 Your Honor, that defendants would read out the Constitution's
18 commitment to the Fifth Amendment and the Court's role in
19 interpreting and enforcing the Fifth Amendment and replace it
20 with their asserted war powers under the AUMF.

21 Plaintiff's question here which is the focus of the
22 political question inquiry is whether defendants use of lethal
23 force against their American citizens, sons and grandsons
24 violated the Fourth and Fifth Amendment. That question is
25 squarely committed to the Court.

1 THE COURT: Okay, let's look at this sort of
2 realistically. There is no doubt that Al Qaeda attacked the
3 United States in 2011. And that that organization has called
4 for continued war against U.S. interests around the world and
5 has attacked U.S. interests in various places around the world.

6 There's also I think little doubt as a matter of fact
7 that Al Qaeda has spread to many locations and that it is
8 operative in Yemen.

9 Do you disagree with that?

10 MS. KEBRIAIEI: Your Honor, for political question
11 purposes and whether Your Honor has a role in adjudicating the
12 ability to even hear this case, whether we are within or
13 outside of the AUMF, whether we accept defendant's position or
14 not, doesn't matter. You have a role. And the scope of your
15 inquiry may expand or contract depending on whether you believe
16 plaintiffs which asserts that we are outside of the context of
17 our own conflict.

18 Just to be clear on the armed conflict question, we
19 agree the Attorney General said it, the white paper says it, we
20 all agree that this was outside of any active hostilities. The
21 only dispute is whether the AUMF applies. And that is relevant
22 only because the inquiry might, you either have one textual
23 commitment if you are outside of armed conflict like the
24 plaintiffs allege or you have the political branches involved
25 as well.

1 If the political branches are involved, that doesn't
2 read out the judiciary's role. It may call for a more
3 differential inquiry like Hamdi. Hamdi made that clear. The
4 Court maintains it's role even when you're looking at an
5 American citizen who is captured on the battlefield in
6 Afghanistan, the Court maintains a role alongside the political
7 branches. Hamdi made that clear and we're not even in a Hamdi
8 situation. We're outside of hostilities.

9 So the question of context is really only an AUMF
10 question. Your Honor may find that the AUMF applies. But for
11 justiciability, it doesn't matter. It doesn't read out the
12 Court's role in looking at these claims.

13 THE COURT: So on my example of Switzerland carefully
14 selected to be a silly example. My example of Switzerland you
15 would agree that if Swiss descendants left, and citizens of the
16 United States left the United States, went to Switzerland,
17 joined their Army, went out on the battlefield and were killed,
18 that they had taken up arms against the United States and
19 therefore put themselves at that risk and they did not suffer
20 due process wrongs as a result; do you agree with that?

21 MS. KEBRIAIEI: Again, for political question purposes
22 which goes to the role of the Court, I think that the Supreme
23 Court has made clear even in the World War II cases that
24 citizenship is the head of jurisdiction. And they would have a
25 right to assert Fourth and Fifth Amendment rights in court.

1 I think it's also just important though to go back to
2 context and that we are, I accept Your Honor's hypothetical,
3 but what we're talking about here is far from a, a World War II
4 or a nation state sort of conflict. We're talking about a, an
5 area that the Government now concedes completely was outside of
6 any active fighting. We're not talking about an active combat
7 situation. We're only talking about --

8 THE COURT: No, I'm just trying to --

9 MS. KEBRIAIEI: Right.

10 THE COURT: -- trying to mark places off. I can't
11 get either side to kind of say okay, that's fine. We're not
12 arguing, Judge, you can believe that, that's fine, we're not
13 arguing about that.

14 I'm just trying to say okay, now how broadly do I really
15 have to consider all of this? According to the Government, I
16 don't consider any of it because it's a political question and
17 I can just say that and be done with it.

18 MS. KEBRIAIEI: Your Honor, if the AUMF applied and we
19 concede that Your Honor may find that the AUMF applied and the
20 AQAP is associated with Al Qaeda but that doesn't, the
21 Government and we agree on the standards that would apply in
22 that situation.

23 They say, they cite Gardner, they cite Scott in their
24 white paper and they say the test here is reasonableness. The
25 test here is whether the person presented an imminent threat.

1 The test here is whether capture was not feasible.

2 Those are exactly the standards and the criteria and the
3 cases that we cite in our brief and the defendants say in their
4 brief are not the appropriate guide. So we're actually talking
5 about the same standards. And the same factual context. It
6 is, you know, for political question purposes, it is about
7 whether your power is shared with the political branches and
8 your determination about how that role contracts or not, if we
9 are in that context. That's only if you get to deciding that
10 we're in the AUMF.

11 Plaintiffs allege that we are not in that context. Even
12 if you do that, even if you accept that we are, it's just a
13 matter of the scope of your inquiry. It doesn't extinguish the
14 inquiry.

15 THE COURT: Okay, what about the distinction between
16 the accidental, unintended victim and the intended victim?

17 MS. KEBRIAIEI: Your Honor, with respect to --

18 THE COURT: The unintended victim, and particularly
19 the 16 year old unintended victim, may be tragic but the
20 question is does such an unintended victim have a claim?

21 MS. KEBRIAIEI: Just to be clear, Your Honor, we
22 allege in our complaint, we allege that whether or not
23 Abdulrahman, 16 year old Abdulrahman was the target, the use of
24 lethal force against him was unreasonable.

25 We don't allege that he was not the target. The

1 defendants assume that. For political question purposes,
2 though, you don't assuming he wasn't the target. Assuming he
3 wasn't the target, you wouldn't need to even decide the target
4 because for political question purposes, the question here is
5 still about his Fourth and Fifth Amendment rights. It's about
6 whether his killing was constitutional or not.

7 And to determine that question you have standards
8 available to you. Under the Fourth Amendment it's a
9 reasonableness test. We would allege that an operation that
10 targets a civilian eating area in plain view, outside of the
11 area of active hostilities that kills at least seven people
12 including two minors is unreasonable, is objectively
13 unreasonable.

14 So you don't even really need to figure out who the
15 target is. We can assume for manageability concerns that even
16 if Abdulrahman were killed as a bystander that the question is
17 still about his constitutional rights, the test is
18 reasonableness.

19 THE COURT: Well reasonableness is the Fourth
20 Amendment, right?

21 MS. KEBRIAIEI: That's right.

22 THE COURT: So you're saying that he was seized?

23 MS. KEBRIAIEI: Yes.

24 THE COURT: I have trouble with that analysis. I
25 understand your Fifth Amendment arguments, but I have trouble

1 with your Fourth Amendment seizure argument.

2 MS. KEBRIAIEI: Your Honor, we cite Fourth Amendment
3 cases in our brief that establish that when force is used
4 willfully, even if the casualty isn't the specific intended
5 target, when force is used willfully there can be a seizure.

6 I can point you to the cases in our brief. That again
7 though for justiciability purposes would be a matter for you to
8 determine whether he was seized and whether force was
9 unreasonable. But for political question purposes, defendant's
10 argument that you can't manage that question because standards
11 don't exist just doesn't comport with the standards that do
12 exist for you to determine under the Fourth Amendment if --

13 THE COURT: Well, but you would apply Fourth,
14 domestic Fourth Amendment rights in this very nondomestic
15 environment, right?

16 MS. KEBRIAIEI: Your Honor, the Government does that.
17 The Government in their white paper, they cite Garner. They
18 cite Scott. They are applying the same cases. They are
19 drawing the same criteria from those cases.

20 So what's become evident since briefing is that we
21 actually agree. We agree that the Fourth and Fifth Amendments
22 apply, we agree what the test is. We agree what the cases, the
23 right cases are for Your Honor to look at. We agree on what
24 the criteria are. I mean, there is no daylight at this point.

25 Maybe in, you know, in February when we're months ago

1 when we were briefing it was unclear what the disagreement was.
2 But at this point it is absolutely clear we are talking about
3 the same factual context. They're not saying that this was
4 hostilities, they're not saying this was Afghanistan. We are
5 talking about the same rights.

6 They're not disputing that the Fourth and Fifth
7 Amendments apply to all three of these individuals and we're
8 talking about the same tests. So for political question
9 purposes it is absolutely Your Honor's role and ability to look
10 at these claims.

11 THE COURT: And so you would think and argue that the
12 issue of the imminence of danger and things like that are
13 subject to judicial analysis even in the context of what the
14 Government, Mr. Hauck, uses determinations made at the highest
15 levels of the executive and military, executive with military
16 advice and counsel and also at the highest levels of the
17 Congress that I can still have a judicial role in deciding was
18 this really a risk or not?

19 MS. KEBRIAEEI: Your Honor, I mean, let's look at the
20 habeas cases. Those are enemy combatant determinations made at
21 the highest levels. The Court reviews those determinations.
22 It looks at facts in the past and in determining whether
23 someone and how significant, whether and how significant are a
24 part of Al Qaeda an individual is, the Court is determining
25 threat. It is reviewing the military's determination at the

1 point of capture about enemy combatant status. The facts don't
2 change. The review --

3 THE COURT: It's not actually at the point of
4 capture, but okay. Other than that, your statement is correct.

5 MS. KEBRIAEI: You know, look at the arguments
6 defendants bring up. They cite El-Shifa. As Your Honor
7 pointed out, the absence of constitutional claims in that case
8 mattered to the en banc Court.

9 They said to plaintiffs you can point to no comparable
10 textual commitment here versus Article III power. Those
11 plaintiffs were foreign plaintiffs. They were alleging tort
12 claims for defamation. That is the case they cite to say that
13 you have no power, you have no role here in looking at Fourth
14 and Fifth Amendment claims of U.S. citizens.

15 They cite PMOI. PMOI I think is also for the same
16 reason. There was no constitutional claim there. The
17 plaintiffs were foreign groups, challenging the designation of
18 the Secretary of State. Her designation is they were foreign
19 terrorist organizations. They asserted Fifth Amendment rights.

20 The Court said no, you have no Fourth and Fifth
21 Amendment rights, there's no constitutional claim here. And
22 furthermore, I think they were probably looking at that review
23 of that determination was more unmanageable or more better left
24 with the local branches perhaps because it was a continuing and
25 ongoing threat. We're looking at facts two years in the past.

1 THE COURT: Well, but had the drone strike been
2 unsuccessful, it might be a continuing threat.

3 MS. KEBRIAIEI: But that would be a different case.

4 THE COURT: All right, if you assume arguendo that
5 the, forgive me for not being able to -- but that one of the
6 leaders of Al Qaeda in the Arabian peninsula was engaged in,
7 had been engaged in belligerent activity against the United
8 States and now he's not available, but if he were he would be
9 continuing that. The argument that it was in the past, but now
10 something else is not, doesn't actually, it just means this was
11 a successful strike.

12 MS. KEBRIAIEI: Okay, but that is the case you have
13 before you. The case you have before you is an ex-post case.
14 It is looking at facts in the past. And as far as --

15 THE COURT: Well, that's a legitimate point.

16 MS. KEBRIAIEI: As far as the defendant's cases in
17 relying on El-Shifa and PMOI to say that imminence is a
18 determination, is a political question determination when we're
19 talking about the Fourth Amendment and they concede the Fourth
20 Amendment applies and they concede the test is reasonableness
21 and they cite Garner.

22 THE COURT: If I could just say, they haven't
23 actually conceded that.

24 MS. KEBRIAIEI: One would hope --

25 THE COURT: Let's say that the Department of Justice

1 had a white paper, but their litigating position in this case
2 doesn't concede any of that.

3 MS. KEBRIAIEI: Well, Your Honor, one would hope there
4 would be consistency between the Justice Department's legal
5 analysis and the Justice Department attorneys asserting a
6 position in court and it just --

7 THE COURT: But one is perhaps an overarching, this
8 is how we're going to approach it, and the other is a very
9 specific this is how we're going to defend it situation. There
10 are always alternatives, you know. You're a quite fine lawyer,
11 you understand that part.

12 MS. KEBRIAIEI: Your Honor, you know, defendants would
13 still as far as, you know, they would still say the Fourth
14 Amendment applies. You know, when I say we agree on the
15 standards even if we didn't agree that imminence and last
16 resort are capture with a criteria, there would still be
17 standards. They're not saying, and if that's their position
18 they should say it, but they're not saying that the Fourth and
19 Fifth Amendments don't apply.

20 THE COURT: No, but what they are saying is that
21 there may be, it may be possible to articulate constitutional
22 rights for the deceased.

23 However, in this fact pattern, those constitutional
24 rights cannot be vindicated in court. That's really what
25 they're saying.

1 They don't want to say, no, they didn't have any
2 constitutional rights. They're just saying but Judge, you're
3 not someone to evaluate whether those constitutional rights
4 were violated because we went through this very complicated
5 process before we did anything and we understood rights and we
6 understand they were Americans and we were very careful about
7 it and besides which we're at war. Something like that.

8 That was a quick summary, Mr. Hauck. I don't quite pin
9 you to my words.

10 MS. KEBRIAIEI: Your Honor, even accepting their
11 framework, even accepting the AUMF and even accepting that the
12 war powers were involved, that's Hamdi. That is a situation
13 where you have shared powers, you have shared powers and the
14 Court maintains its roles.

15 THE COURT: And your arguments are well presented
16 here as is the Government and well presented in your briefs.

17 Why don't you let your colleague speak some before your
18 time is up.

19 MS. KEBRIAIEI: Thank you, Your Honor.

20 THE COURT: Thank you. Hold on, I have to do this
21 right. Ms. Kebriaei, did I say that right?

22 MS. SHAMSI: That was Ms. Kebriaei and I'm Ms. Hina
23 Shamsi.

24 THE COURT: I know that you're Ms. Shamsi. I was
25 trying to pronounce Kebriaei.

1 MS. KEBRIAEEI: You said it perfect.

2 THE COURT: Did I say it right?

3 MS. KEBRIAEEI: Yes.

4 THE COURT: I was trying to pronounce her name
5 correctly.

6 Go ahead, Ms. Shamsi.

7 MS. SHAMSI: Thank you, Your Honor. Good morning.

8 You have been concerned throughout this argument, Your
9 Honor, with the question of limits. The limits of our
10 positions, the limits of the Government's position. So let me
11 just start out with that if I may before talking about Bivens
12 and qualified immunity to the extent that you have questions.

13 The limits that are part of our case is that this is not
14 a case about individuals who are on an actual battlefield.
15 Your hypothetical about Switzerland doesn't apply here. And I
16 think it applies --

17 THE COURT: I know that. I was just trying to start
18 at the end and work into the middle. I've never even got past
19 the end but it's okay.

20 MS. SHAMSI: But I do want to acknowledge, Your
21 Honor, that that is a far more difficult case. It's not likely
22 a case that we would have brought and it's not the case that we
23 have brought.

24 So I'm not taking away from your hypothetical. I'm
25 acknowledging the extent to which it raises the kind of

1 difficult concerns that you have brought up and trying to argue
2 and show that those concerns aren't implicated here.

3 That what we're talking about is something that is not
4 on an actual battlefield and that is part of, a large part of
5 our concern with respect to the killings that are at issue
6 here.

7 THE COURT: And I appreciate that concern.

8 But how does the United States or any power, any nation
9 deal with an enemy that is not a nation of national enemy, it
10 is not a traditional Army. It is, it acts through small
11 groups, large or small but mostly fairly small groups,
12 scattered around the world, and to be found wherever they are
13 in fact found as opposed to where they might be because that's
14 where their headquarters is or something, they don't have
15 headquarters.

16 So if you were in fact defending against such an enemy,
17 how would you identify where the battlefield is?

18 MS. SHAMSI: Your Honor, the law provides the answers
19 there and here this is another one of the limits that we are
20 seeking to enforce and that we think applies.

21 The law does not say that the Government cannot respond
22 to a genuine threat and we recognize that there are threats out
23 there. It says that it can do so, but under cabined authority.

24 And outside the context of an armed conflict, that
25 authority permits the use of lethal force when there is a

1 specific concrete and imminent threat. The importance of the
2 white paper that Ms. Kebriaei pointed out is that the
3 Government agrees with us.

4 Now where there's factual disagreement is with respect
5 to how the facts apply to the law. That on this justiciability
6 set of arguments, Your Honor, is something for you to decide at
7 a merit stage.

8 Essentially the point is that the Government has the
9 tools, it had the legal authority but it is cabined legal
10 authority. It is not unending, expansive legal authority. One
11 of the ways --

12 THE COURT: I was going to say you say when we get to
13 the merits.

14 What is in your mind the difference between this
15 argument and the merits because are you anticipating that if I
16 deny the motion to dismiss that you would then go into
17 discovery?

18 MS. SHAMSI: Your Honor, that is a concern that
19 clearly the defendants have a great deal of trepidation or
20 concern about.

21 And the answer is that discovery is a normal part of
22 every case as Your Honor knows. And to the extent that there
23 is a concern which has arisen in the context of Bivens cases
24 and I'll just address this here since it is where it most
25 rises, the Court has full capacity and capability to organize a

1 discovery plan, discovery may be limited. There may be
2 interrogatories and there are ways of managing discovery for
3 cases to proceed for telling --

4 THE COURT: Okay, what would you think necessary to
5 discover before a merits hearing?

6 MS. SHAMSI: Your Honor, I'm quite frankly not
7 prepared to lay out a discovery plan now, but what I would say
8 is that at the justiciability stage it would be premature to
9 dismiss the case for fear of what discovery might bring.

10 THE COURT: I don't disagree with that. But the
11 point is, the argument is that the Court should not, even if it
12 could, should not proceed because of the complexity of
13 entangling the judiciary with these very delicate difficult
14 decisions made by the executive and the congressional branches
15 and so in that context, it matters whether you anticipate
16 discovery that would intrude into the time and the attention of
17 the individual defendants beyond what were your, you know, what
18 was your role having to do with this particular strike period.

19 MS. SHAMSI: Right. Your Honor, first of all, just to
20 take your last point which is that this is a case very much
21 about this particular strike. To the extent that courts in
22 other context especially in Bivens have raised concerns about
23 entangling with time, there have been concerns where entire
24 policies have been challenged by plaintiffs. This is very much
25 about three particular strikes. And with respect --

1 THE COURT: Two I thought.

2 MS. SHAMSI: Sorry, two strikes, three particular
3 descendant Americans.

4 With respect to your question about entangling and time
5 intention, Your Honor, what defendants have ignored is the fact
6 that high level officials, including some of the defendants
7 here, present their views to the Court all the time and provide
8 declarations, and affidavits in the form of, in Freedom of
9 Information Act cases. They do it in the context of Guantanamo
10 cases, and the time that it would take is certainly something
11 that you might consider, but I would also say to you, Your
12 Honor, that the entire goal of Bivens, the remedy that we are
13 seeking here is deterrence.

14 And if the issue is as it is here that top level
15 officials have ordered the killing of their fellow citizens
16 then a few hours out to explain why those actions occurred is
17 not too much to ask. There is no Leon Panetta exception to the
18 ability to answer for the killing of U.S. citizens.

19 THE COURT: Well, there is no Presidential exception
20 for actions taken before the presidency, but there is an
21 exception during and about actions taken by a President.

22 And I think your argument is somewhat too easily stated
23 and too hard to imagine right now. But you are correct, that
24 that's not the point of today's hearing.

25 Assuming for the moment that for purposes of this

1 question only, I hasten to add only for this question, even if
2 I were to agree with you when we get to Bivens it seems to me
3 that this is a stretch and it's a highly unusual case under
4 Bivens and everything that the D.C. Circuit has said putting
5 aside the Supreme Court would suggest that I shouldn't find a
6 remedy for your plaintiffs against these individual persons
7 under a Bivens analysis.

8 MS. SHAMSI: And respectfully, Your Honor, I think
9 that the cases that you are concerned about and the defendants
10 cite none of them apply and none of them control here for a
11 number of key reasons.

12 And prime among them is that virtually all of those
13 cases and certainly the ones in the Circuit Doe and Rasul and
14 Ali, Doe and Ali were in the context of actual battlefield
15 situations, armed conflict in Iraq and Afghanistan, that is not
16 the situation here. The Government has conceded that that's
17 not the situation here.

18 In most of the other cases citizenship was also a
19 factor. And citizenship was a factor because courts were
20 concerned about the foreign affairs implications of drawing,
21 according rights to foreign citizens that might be vindicated
22 in U.S. courts. There is no such concern here in this context.

23 In the other cases including Doe, there was an issue
24 with who the plaintiffs were who were bringing the lawsuit. In
25 Doe, in a number of the other cases plaintiffs were military

1 personnel or military contractors who in the view of the courts
2 were no different from the military itself and those were
3 analyses that were conducted under the Stanley v. Chappell line
4 of cases. No court has said, Your Honor, that Stanley and
5 Chappell apply to civilians whose contact with the military
6 comes only as a result of being killed by it.

7 To the contrary, Circuit and District Courts routinely
8 decide cases brought by civilians against the military.

9 Another distinguishing factor, Your Honor, is that in
10 those cases there was a concern that plaintiffs' challenge
11 would second guess entire policies or raise issues of
12 supervisory liability as opposed to a discreet set of facts.
13 Neither of those concerns is presented by our case.

14 And if I may go back though, Your Honor, to what the
15 general rule of Bivens is about. One, that the Supreme Court
16 reaffirmed in Minnecci last year. The entire purpose, Your
17 Honor, of Bivens is to deter unconstitutional conduct. The
18 Supreme Court has said over and over again and the D.C. Circuit
19 has said nothing different, it agreed. It is a matter of
20 judgment for a Court to determine whether even if special
21 factors exist and counsel hesitation, a remedy should
22 nevertheless be applied.

23 And Your Honor this is, we submit, a quintessential
24 Bivens case because in this case, a case that involves the
25 deaths of U.S. citizens which makes this case different from

1 any other in the context that you have raised or that the
2 courts have discussed, it is a case that without Bivens
3 plaintiffs really have nothing. They have no other source of
4 remedy to seek the Court's review of constitutionality of this
5 conduct.

6 THE COURT: That is true, but as *Schneider v.*
7 *Kissinger* shows that doesn't mean that the absence of a remedy
8 requires approval of the case. I mean there are instances
9 where wrongs are done, but for one reason or another they
10 cannot be remedied in a civil suit.

11 MS. SHAMSI: That is indeed correct, Your Honor, but
12 the, it is also equally correct to say that in the Bivens
13 analysis the question becomes is there an alternative remedial
14 scheme and here there is none and do the special factors
15 counsel hesitation and for the reasons that I have discussed,
16 all of the cases in which courts have found special factors
17 counseling hesitation are different from this one.

18 And at bottom the key differences are based on death as
19 courts have said over and over again in a variety of context,
20 death is different. This case does not involve an actual
21 battlefield situation. So the concern about Your Honor looking
22 over the shoulders of military officials carrying out
23 activities simply isn't presented.

24 All of the four defendants are here in the United
25 States. The facts that we have alleged have shown that there

1 was time and deliberation taken after for example, Anwar
2 Al-Aulaqi was put on kill list. Years passed before he was
3 killed. Surveillance was carried out for three weeks before he
4 was killed. The kinds of hot battlefield concerns even if the
5 Government hadn't conceded that it is not a hot battlefield
6 simply don't apply here.

7 And I understand Your Honor's point about the
8 concession, but the issue is that when the Attorney General
9 sends a letter to Congress saying here are the standards that
10 we are applying and here are the ones that we are abiding by,
11 then it is also true, and tells the public the same thing, and
12 it is also true that the Government shouldn't be telling the
13 Court something different.

14 THE COURT: All right, thank you, ma'am.

15 MS. SHAMSI: Thank you, Your Honor.

16 But Your Honor, you had a quick question about immunity
17 and I wonder if I, I felt like I didn't answer that properly.

18 THE COURT: All right.

19 MS. SHAMSI: Because the consequence of, again we're
20 going back to limitations, the consequence of the Government's
21 arguments with both Bivens and immunity is a rule in which
22 there will be absolute immunity for the Government's killings
23 of an American citizen far from any battlefield and it doesn't
24 matter whether that citizen is Anwar Al-Aulaqi, a reporter or a
25 16 year old boy against whom no allegation of wrongdoing has

1 been made.

2 And the kinds of national security concerns that the
3 Government raises were raised and rejected by the, raised by
4 the Government and rejected by the Supreme Court in Mitchell v.
5 Forsyth. The case that said Attorney General who claimed that
6 for national security reasons he could conduct unlawful
7 surveillance of an American citizen did not have absolute
8 immunity because the Court found in that case that in national
9 security context where secrecy is likely to result in, in
10 states being made or greater concerns about Government action
11 being taken, that immunity cannot be the rule.

12 And national security context especially where
13 Government officials may be zealous in carrying out their
14 duties and with that intent may not need to happen, the Court
15 still has a role to play in adjudicating whether or not a
16 citizen's rights have been violated.

17 And so when we talk about limits, when we end with
18 limits, the Government's argument is virtually without limits.
19 And that simply is not the law or the role of your court, Your
20 Honor.

21 THE COURT: Thank you very much.

22 MS. SHAMSI: Thank you.

23 THE COURT: Mr. Hauck.

24 MR. HAUCK: Your Honor, I'll try to be very brief.

25 Starting with one area of disagreement with the

1 plaintiffs. Bivens remedy is not just -- the only
2 consideration is not whether we want to deter constitutional
3 rights as Bush v. Lucas goes on in some detail. You also don't
4 want to deter federal officials from doing their jobs. And as
5 Bush v. Lucas notes, the best entity to balance the deterrence
6 effect of a Bivens remedy in terms of preventing violation of
7 constitutional rights and allowing officials to do their jobs
8 is a decision made by Congress. That's in the context of an
9 employment retaliation claim, the kind of case courts deal with
10 all the time.

11 A couple of things that we do agree with on the
12 plaintiffs, Your Honor. First, we absolutely agree that
13 there's law to apply here. The apply the Attorney General has
14 talked about the kinds of reviews that these decisions go
15 through.

16 What we disagree with is that the extent to which the
17 law was clearly established, sufficiently clearly established
18 in this context to put these officials on notice that they were
19 somehow doing something illegal. We can quibble over whether
20 it's an armed conflict or not. I think you can just look at
21 the plaintiff's complaint though and they are suing the
22 Secretary of Defense, two JSOC commanders and the Director of
23 the Central Intelligence Agency for launching a missile strike.
24 This is clearly a different context from the cases they are
25 citing.

1 How much force you use when you are dealing with a
2 diabetic who is acting strangely outside of a convenience
3 store. So we're just in different worlds in terms of putting
4 these officials on notice of what kind of conduct would be
5 illegal.

6 We do agree that the Fourth Amendment standard were the
7 Court to reach it would be a reasonable standard. And to spin
8 out an example of that, Your Honor, the plaintiffs raise
9 questions about whether there were other alternatives short of
10 lethal force with respect to either strike.

11 That kind of decision would have to look at what are the
12 consequences of those kind of, suppose a capture operation as
13 opposed to a strike.

14 The President said in his speech that he would have
15 preferred the capture of Al-Aulaqi, but we couldn't. So for
16 the Court to get into that again, as the Court raised these
17 questions, how would the Court make that judgment? Would it
18 involve depositions of Yemeni officials about the security
19 situation in their state, or the United States officials about
20 the security situation in their state.

21 These are extraordinarily difficult questions, and if
22 the Court were to reach a judgment about whether a different
23 kind of operation would have been feasible, it could be
24 potentially either consistent with the President's commander in
25 chief statement or in conflict. So this would be a very

1 serious thing that go directly to the heart of the political
2 question.

3 THE COURT: When you agree that the Fourth Amendment
4 standard is reasonableness, do you agree that there was a
5 seizure?

6 MR. HAUCK: Your Honor, I think we absolutely agree
7 to the extent that the domestic law enforcement cases were
8 applicable here that the strike that got Mr. Al-Aulaqi was a
9 Fourth Amendment event and therefore a seizure.

10 With the other two individuals, I think it's less clear
11 in light of the by standard cases that we've discussed.

12 THE COURT: Okay.

13 MR. HAUCK: The last point I make, Your Honor, is the
14 questions that the Court would have to go into for example, on
15 this capture issue and the alternative being short of lethal
16 force is that those questions don't get any easier or less or
17 more into the Court's core competence because you are looking
18 retrospectively. You still have to go through those judgments
19 and you still have to make the kind of pronouncement the Court
20 in El-Shifa and the fact that Judge Bates' decision recognized
21 would be part of that political question doctrine.

22 If there are no further questions, I'm happy to sit.

23 THE COURT: I guess not.

24 I just had one other question. The question of whether
25 the Government's position is that the AUMF applies to the

1 circumstances in Yemen or not?

2 MR. HAUCK: It is our position that it does apply.

3 THE COURT: All right, thank you, sir.

4 MR. HAUCK: Thank you, Your Honor.

5 THE COURT: Thank you everybody.

6 I do not consider this particularly easy set of
7 questions as I hope you understand that my questions to you
8 were merely to try to elicit the best help I could get while I
9 had a chance to actually talk to you live, and I will now do a
10 lot of reading and considering and studying and thinking and
11 will try to reach a decision as soon as I can.

12 Thank you very much for your advocacy and your legal
13 skills. They're very helpful to me.

14 (Proceedings concluded at 11:30 a.m.)

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CERTIFICATE

1
2 I certify that the foregoing is a true and correct
3 transcript, to the best of my ability, of the above pages, of
4 the stenographic notes provided to me by the United States
5 District Court, of the proceedings taken on the date and time
6 previously stated in the above matter.

7 I further certify that I am neither counsel for, related
8 to, nor employed by any of the parties to the action in which
9 this hearing was taken, and further that I am not financially
10 nor otherwise interested in the outcome of the action.

11
12 _____
/s/Crystal M. Pilgrim, RPR

_____ Date: August 19, 2013

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-	31/8	34/20 38/24 40/6 51/2
-----	acknowledging [1] 43/25	51/24 54/15 55/8
1/7	actx[4] 10/2 17/25 23/24	AL-AULAQI [8] 1/3 3/3
-ooo [1] 56/15	47/9	3/12 10/15 19/2 51/2
/	acting [3] 16/24 25/17	51/24 54/15
/s/Crystal [1] 57/12	54/2	Ali [5] 17/23 18/1 24/14
1	action [7] 3/2 10/23	48/14 48/14
10004-2400 [1] 1/16	16/21 28/11 52/10 57/8	all [38] 3/10 4/21 4/25
10012 [1] 1/23	57/10	5/12 5/15 5/18 8/19 11/13
10:05 [1] 1/6	actions [5] 16/22 16/23	12/12 13/19 13/25 14/19
1192 [2] 1/4 3/2	47/16 47/20 47/21	15/15 16/13 17/8 18/10
11:30 [1] 56/14	active [9] 10/15 11/23	18/24 21/8 24/21 25/2
12-1192 [2] 1/4 3/2	12/10 18/4 31/3 32/20	26/9 26/20 29/11 30/2
125 [1] 1/16	34/6 34/6 36/11	31/15 32/20 34/15 38/7
16 [5] 30/14 30/16 35/19	actively [1] 14/15	40/4 46/19 47/7 48/12
35/23 51/25	activities [1] 50/23	50/16 50/24 51/14 51/18
18th [1] 1/16	activity [2] 26/8 40/7	53/10 56/3
19 [2] 1/6 57/12	acts [1] 44/10	allegation [1] 51/25
2	actual [6] 27/15 31/1	allege [8] 21/4 21/5
20001 [1] 2/7	43/14 44/4 48/14 50/20	32/24 35/11 35/22 35/22
20008 [1] 1/19	actually [15] 4/19 6/10	35/25 36/9
20044 [1] 2/4	8/20 12/5 17/1 18/3 20/22	alleged [1] 50/25
2009 [1] 29/2	22/19 25/8 35/4 37/21	alleging [1] 39/11
2011 [1] 32/3	39/3 40/10 40/23 56/9	allotment [1] 4/16
2013 [2] 1/6 57/12	add [1] 48/1	allowing [1] 53/7
2400 [1] 1/16	address [5] 6/16 6/20	almost [1] 4/21
3	8/19 10/9 45/24	alongside [1] 33/6
333 [1] 2/7	addressing [1] 4/4	also [16] 6/20 21/2 27/12
4	adjudicate [1] 11/16	28/23 30/5 31/10 32/6
4301 [1] 1/18	adjudicating [2] 32/11	34/1 38/16 39/15 47/11
434 [1] 1/19	52/15	48/18 50/12 51/11 51/12
6	adjudication [1] 7/13	53/3
666 [1] 1/22	Admiral [2] 5/21 6/3	alternative [3] 16/21
7	advancing [1] 26/5	50/13 55/15
7146 [1] 2/3	advice [1] 38/16	alternatives [3] 28/20
A	advisors [1] 25/17	41/10 54/9
a.m [2] 1/6 56/14	advocacy [1] 56/12	although [3] 6/3 10/9
Abdulrahman [4] 30/15	affairs [1] 48/20	26/9
35/23 35/23 36/16	affidavits [1] 47/8	always [1] 41/10
abiding [1] 51/10	Afghanistan [4] 14/10	am [3] 15/25 57/7 57/9
ability [5] 17/25 32/12	33/6 38/4 48/15	Amendment [28] 21/22
38/9 47/18 57/3	after [4] 14/3 19/22	21/24 22/5 22/6 22/10
able [3] 5/14 11/4 40/5	19/23 51/1	22/12 30/20 31/18 31/19
about [80]	again [14] 5/20 9/6 10/7	31/24 33/25 36/5 36/8
above [2] 57/3 57/6	27/4 29/3 29/4 29/4 29/20	36/20 36/25 37/1 37/2
abroad [6] 7/23 9/4 10/22	33/21 37/6 49/18 50/19	37/12 37/14 39/14 39/19
21/25 29/2 31/9	51/19 54/16	39/21 40/19 40/20 41/14
absence [2] 39/7 50/7	against [17] 3/11 7/22	54/6 55/3 55/9
absolute [2] 51/22 52/7	12/18 12/19 17/9 22/23	Amendments [5] 31/6 31/9
absolutely [4] 38/2 38/9	25/18 25/20 31/23 32/4	37/21 38/7 41/19
53/12 55/6	33/18 35/24 40/7 44/16	American [16] 1/15 1/18
absolutes [1] 18/23	48/6 49/8 51/25	8/15 13/5 15/8 15/9 15/10
accept [3] 32/13 34/2	Agency [1] 53/23	16/6 30/18 30/21 31/7
35/12	agents [1] 11/7	31/9 31/23 33/5 51/23
accepting [4] 30/21 42/10	ago [1] 37/25	52/7
42/11 42/11	agree [26] 12/12 12/13	Americans [2] 42/6 47/3
accident [2] 19/7 20/25	12/22 21/8 25/25 27/6	among [1] 48/12
accidental [2] 20/3 35/16	31/16 32/19 32/20 33/15	amount [1] 15/18
according [3] 16/5 34/15	33/20 34/21 37/21 37/21	analyses [1] 49/3
48/21	37/22 37/22 37/23 41/14	analysis [14] 7/15 10/21
accustomed [1] 18/14	41/15 48/2 53/11 53/12	19/22 20/2 20/7 20/11
acknowledge [1] 43/20	54/6 55/3 55/4 55/6	20/18 21/10 24/9 36/24
acknowledges [2] 31/2	agreed [2] 8/6 49/19	38/13 41/5 48/7 50/13
	agreement [1] 31/10	analyze [3] 10/3 10/24
	agrees [1] 45/3	11/10
	ahead [2] 5/18 43/6	analyzing [1] 11/2
	aided [1] 2/10	another [4] 23/13 44/19
	air [1] 16/13	49/9 50/9
	al [21] 1/3 1/3 1/6 3/3	answer [9] 7/18 9/10
	3/3 3/11 3/12 10/15 14/8	10/12 16/15 21/2 26/16
	19/2 20/25 23/3 32/2 32/7	45/21 47/18 51/17

<p>A</p> <p>answered [1] 22/21 answers [2] 5/15 44/18 anticipate [1] 46/15 anticipating [1] 45/15 Anwar [2] 51/1 51/24 any [26] 5/7 11/25 12/11 13/24 16/9 21/17 24/23 25/6 26/12 26/13 28/21 30/12 30/13 30/22 30/25 32/20 34/6 34/16 41/2 42/1 44/8 44/8 50/1 51/23 55/16 57/8 anybody [1] 24/23 anything [2] 30/16 42/5 Anyway [1] 15/12 anywhere [1] 11/18 apparatus [2] 10/24 11/6 APPEARANCES [2] 1/13 2/1 applicable [1] 55/8 applied [4] 15/2 34/18 34/19 49/22 applies [9] 21/25 22/5 32/21 33/10 40/20 41/14 43/16 44/20 55/25 apply [18] 7/18 8/8 17/14 22/23 25/14 34/21 37/13 37/22 38/7 41/19 43/15 45/5 48/10 49/5 51/6 53/13 53/13 56/2 applying [3] 7/14 37/18 51/10 appreciate [1] 44/7 approach [2] 10/17 41/8 appropriate [4] 8/25 14/13 28/7 35/4 approval [1] 50/8 approve [3] 28/13 28/14 28/16 AQAP [2] 9/5 34/20 Arabian [1] 40/6 are [113] area [6] 24/24 31/3 34/5 36/10 36/11 52/25 areas [1] 29/21 aren't [5] 11/4 11/9 18/16 30/9 44/2 argue [3] 30/2 38/11 44/1 argued [1] 16/4 arguendo [1] 40/4 arguing [4] 8/6 26/3 34/12 34/13 argument [27] 3/22 6/10 11/21 15/24 15/25 16/11 16/12 20/5 20/10 20/12 20/14 22/22 22/25 25/15 25/16 26/3 26/9 26/19 27/19 37/1 37/10 40/9 43/8 45/15 46/11 47/22 52/18 arguments [10] 4/3 9/17 30/6 30/9 30/22 36/25 39/5 42/15 45/6 51/21 arisen [1] 45/23 arises [1] 29/3 armed [5] 32/18 32/23 44/24 48/15 53/20 arms [2] 12/18 33/18 Army [3] 12/7 33/17 44/10 around [4] 26/12 32/4</p>	<p>32/5 44/12 ARTHUR [2] 1/17 3/4 Article [3] 8/7 11/20 39/10 Articles [1] 8/7 articulate [1] 41/21 as [43] 5/23 6/11 8/5 10/10 11/12 13/14 13/14 19/2 20/1 20/3 20/13 22/17 24/22 25/22 27/18 28/17 30/17 32/6 32/25 33/20 36/16 39/6 40/14 40/14 40/16 40/16 41/13 41/13 42/16 44/13 45/22 47/14 49/6 49/12 50/6 50/18 53/3 53/4 54/12 54/16 56/7 56/11 56/11 aside [1] 48/5 ask [3] 10/17 13/25 47/17 asked [1] 18/6 aspect [1] 28/21 assert [5] 11/18 11/19 27/3 27/7 33/25 asserted [3] 22/20 31/20 39/19 asserting [2] 15/7 41/5 assertion [1] 16/1 asserts [1] 32/16 associated [1] 34/20 assume [3] 36/1 36/15 40/4 assuming [4] 22/4 36/2 36/2 47/25 attach [1] 31/9 attacked [2] 32/2 32/5 attention [1] 46/16 Attorney [5] 31/1 32/19 51/8 52/5 53/13 attorneys [1] 41/5 audience [1] 6/9 August [1] 57/12 AULAQI [12] 1/3 3/3 3/11 3/12 10/15 14/8 19/2 20/25 51/2 51/24 54/15 55/8 Aulaqi's [1] 23/3 AUMF [10] 31/20 32/13 32/21 33/9 33/10 34/18 34/19 35/10 42/11 55/25 authority [9] 16/2 28/20 31/5 31/7 44/23 44/25 45/9 45/10 45/10 available [3] 23/13 36/8 40/8 avenue [4] 1/18 2/7 7/3 27/24 avoidance [1] 23/14 avoiding [1] 24/19 aware [2] 7/6 14/7 away [1] 43/24 AZMY [1] 1/21</p>	<p>23/21 23/21 23/22 23/23 bars [3] 6/17 23/23 23/25 based [1] 50/18 basic [1] 30/10 Bates [2] 9/2 9/11 Bates' [1] 55/20 battle [4] 12/7 12/10 12/20 12/20 battlefield [11] 30/12 33/5 33/17 43/14 44/4 44/17 48/14 50/21 51/4 51/5 51/23 be [84] because [24] 12/20 16/11 19/1 19/9 20/15 21/2 23/23 23/23 25/9 29/9 32/22 34/16 36/4 37/10 39/24 42/4 44/13 45/15 46/12 48/19 49/24 51/19 52/8 55/17 become [1] 37/20 becomes [1] 50/13 been [16] 5/4 9/4 12/6 17/12 18/8 19/7 21/19 22/8 40/1 40/7 43/8 46/23 46/24 52/1 52/16 54/23 before [16] 1/10 3/7 14/8 22/14 23/1 30/6 30/23 40/13 40/13 42/5 42/17 43/11 46/5 47/20 51/2 51/3 begin [5] 3/7 6/6 24/12 24/15 30/5 beginning [2] 8/21 24/16 being [12] 14/7 14/8 18/21 18/22 26/4 27/5 28/25 40/5 49/6 52/10 52/11 55/15 believe [5] 3/17 15/1 27/17 32/15 34/12 belligerent [3] 10/16 12/6 40/7 belong [1] 17/5 besides [1] 42/7 best [4] 26/13 53/5 56/8 57/3 better [2] 3/25 39/23 between [3] 35/15 41/4 45/14 beyond [2] 10/18 46/17 big [1] 4/9 Bivens [27] 4/5 4/8 4/17 4/20 4/20 15/3 17/11 17/17 20/15 22/22 22/23 30/7 43/11 45/23 46/22 47/12 48/2 48/4 48/7 49/15 49/17 49/24 50/2 50/12 51/21 53/1 53/6 body [1] 24/2 both [1] 51/21 bottom [1] 50/18 Box [1] 2/3 boy [2] 30/16 51/25 branch [4] 6/24 13/25 25/8 30/11 branches [10] 14/12 14/13 25/5 29/20 32/24 33/1 33/7 35/7 39/24 46/14 BRETT [2] 1/14 3/4 BRIAN [4] 2/2 3/6 3/17 5/20</p>
<p>B</p> <p>back [4] 22/22 34/1 49/14 51/20 BAHER [1] 1/21 Baker [1] 7/18 balance [1] 53/5 banc [1] 39/8 Bar [1] 5/5 barred [6] 14/20 14/24</p>		

B	50/20 52/5 52/8 53/9 cases [37] 17/13 17/22 18/10 18/11 18/19 20/15 22/4 22/7 22/8 23/22 31/12 33/23 35/3 37/3 37/6 37/18 37/19 37/22 37/23 38/20 40/16 45/23 46/3 47/9 47/10 48/9 48/13 48/18 48/23 48/25 49/4 49/8 49/10 50/16 53/24 55/7 55/11 casualty [1] 37/4 caught [1] 22/7 cause [1] 28/10 Center [1] 1/22 Central [1] 53/23 certain [1] 7/9 certainly [3] 21/25 47/10 48/13 CERTIFICATE [1] 57/1 certify [2] 57/2 57/7 cetera [1] 15/4 challenge [1] 49/10 challenged [1] 46/24 challenging [1] 39/17 chance [1] 56/9 change [2] 9/8 39/2 Chappell [2] 49/3 49/5 check [3] 13/3 13/22 14/1 checks [1] 13/17 chief [1] 54/25 Circuit [10] 7/21 10/21 17/12 18/8 18/16 24/15 48/4 48/13 49/7 49/18 circumstance [1] 23/4 circumstances [3] 15/16 31/8 56/1 cite [12] 31/12 34/23 34/23 35/3 37/2 37/17 37/18 39/6 39/12 39/15 40/21 48/10 cites [1] 31/12 citing [1] 53/25 citizen [23] 8/15 9/3 9/21 9/22 12/24 13/7 15/8 15/9 15/10 19/12 19/23 19/24 20/20 23/4 23/12 25/22 26/20 29/2 29/16 33/5 51/23 51/24 52/7 citizen's [1] 52/16 citizens [16] 8/1 8/2 9/1 16/6 18/24 19/5 30/11 31/7 31/9 31/23 33/15 39/14 47/15 47/18 48/21 49/25 citizenship [8] 8/22 9/8 14/18 15/10 15/11 33/24 48/18 48/19 civil [4] 1/15 1/18 3/2 50/10 civilian [2] 5/24 36/10 civilians [2] 49/5 49/8 claim [24] 9/25 11/16 12/11 14/23 16/10 17/1 20/20 21/16 21/22 23/2 23/3 23/6 23/9 23/10 23/11 23/12 24/3 28/11 28/12 28/20 35/20 39/16 39/21 53/9 claimed [1] 52/5 claims [10] 7/17 10/2	19/10 21/13 23/24 33/12 38/10 39/7 39/12 39/14 clarity [1] 15/3 clause [1] 18/13 clear [14] 7/15 17/12 18/8 26/2 26/22 28/22 28/23 32/18 33/3 33/7 33/23 35/21 38/2 55/10 clearly [10] 21/25 22/15 22/18 24/13 24/14 30/7 45/19 53/17 53/17 53/24 close [3] 16/20 19/8 20/23 co [1] 30/7 co-counsel [1] 30/7 coffee [1] 19/25 collateral [2] 18/25 19/3 colleague [1] 42/17 colleagues [1] 5/3 COLLYER [1] 1/10 COLUMBIA [1] 1/1 combat [1] 34/6 combatant [2] 38/20 39/1 come [4] 3/24 4/21 5/14 10/2 comes [2] 13/23 49/6 Command [1] 6/5 commander [2] 18/1 54/24 commanders [2] 18/3 53/22 commanding [1] 6/4 commitment [3] 31/18 32/23 39/10 committed [4] 7/10 7/24 9/6 31/25 committee [1] 25/25 committees [2] 8/14 14/7 comparable [1] 39/9 competence [5] 7/11 7/12 7/24 17/5 55/17 complaint [3] 6/22 35/22 53/21 completely [2] 26/6 34/5 complexity [1] 46/12 complicated [1] 42/4 comport [1] 37/11 computer [1] 2/10 computer-aided [1] 2/10 concede [4] 34/19 40/19 40/20 41/2 conceded [3] 40/23 48/16 51/5 concedes [1] 34/5 concept [1] 23/13 concepts [1] 24/22 concern [9] 29/19 44/5 44/7 45/18 45/20 45/23 48/22 49/10 50/21 concerned [4] 17/7 43/8 48/9 48/20 concerns [11] 16/12 19/19 36/15 44/1 44/2 46/22 46/23 49/13 51/4 52/2 52/10 concession [1] 51/8 concluded [2] 7/21 56/14 concrete [1] 45/1 conduct [5] 26/4 49/17 50/5 52/6 54/4 conducted [1] 49/3 conflict [8] 32/17 32/18 32/23 34/4 44/24 48/15
C	CA [1] 1/4 cabined [3] 15/6 44/23 45/9 call [2] 23/12 33/2 called [2] 18/4 32/3 can [37] 3/24 8/15 10/9 10/18 11/15 13/3 16/7 16/8 17/5 21/2 21/12 22/1 22/16 22/17 22/17 22/19 25/20 26/13 26/24 26/25 28/4 28/6 28/8 28/13 29/15 30/18 34/12 34/17 36/15 37/5 37/6 38/17 39/9 44/23 53/19 53/20 56/11 can't [6] 11/18 26/20 29/15 30/19 34/10 37/10 cannot [10] 7/3 13/25 19/16 20/15 27/19 28/3 41/24 44/21 50/10 52/11 capability [1] 45/25 capacity [2] 17/21 45/25 Capital [1] 25/24 caption [1] 7/16 capture [7] 35/1 39/1 39/4 41/16 54/12 54/15 55/15 captured [1] 33/5 careful [1] 42/6 carefully [1] 33/13 Carr [1] 7/19 carried [1] 51/3 carrying [2] 50/22 52/13 case [52] 5/4 6/7 6/17 7/2 7/16 7/25 9/2 9/12 13/9 14/6 14/22 15/22 16/16 17/6 17/17 23/19 24/1 24/15 26/24 26/25 27/14 27/15 30/9 30/24 32/12 39/7 39/12 40/3 40/12 40/13 40/13 41/1 43/13 43/14 43/21 43/22 43/22 45/22 46/9 46/20 48/3 49/13 49/24 49/24 49/24 49/25 50/2 50/8	change [2] 9/8 39/2 Chappell [2] 49/3 49/5 check [3] 13/3 13/22 14/1 checks [1] 13/17 chief [1] 54/25 Circuit [10] 7/21 10/21 17/12 18/8 18/16 24/15 48/4 48/13 49/7 49/18 circumstance [1] 23/4 circumstances [3] 15/16 31/8 56/1 cite [12] 31/12 34/23 34/23 35/3 37/2 37/17 37/18 39/6 39/12 39/15 40/21 48/10 cites [1] 31/12 citing [1] 53/25 citizen [23] 8/15 9/3 9/21 9/22 12/24 13/7 15/8 15/9 15/10 19/12 19/23 19/24 20/20 23/4 23/12 25/22 26/20 29/2 29/16 33/5 51/23 51/24 52/7 citizen's [1] 52/16 citizens [16] 8/1 8/2 9/1 16/6 18/24 19/5 30/11 31/7 31/9 31/23 33/15 39/14 47/15 47/18 48/21 49/25 citizenship [8] 8/22 9/8 14/18 15/10 15/11 33/24 48/18 48/19 civil [4] 1/15 1/18 3/2 50/10 civilian [2] 5/24 36/10 civilians [2] 49/5 49/8 claim [24] 9/25 11/16 12/11 14/23 16/10 17/1 20/20 21/16 21/22 23/2 23/3 23/6 23/9 23/10 23/11 23/12 24/3 28/11 28/12 28/20 35/20 39/16 39/21 53/9 claimed [1] 52/5 claims [10] 7/17 10/2

<p>C</p> <p>conflict... [2] 53/20 54/25</p> <p>Congress [28] 6/20 6/24 7/6 7/11 8/5 9/7 10/25 11/11 14/7 14/11 15/8 16/6 17/10 23/6 23/6 23/9 24/5 26/14 27/9 28/1 28/3 28/13 28/14 28/21 29/7 38/17 51/9 53/8</p> <p>congressional [3] 14/5 25/25 46/14</p> <p>Connecticut [1] 1/18</p> <p>consequence [2] 51/19 51/20</p> <p>consequences [9] 8/23 11/2 16/21 16/22 16/24 19/3 19/3 19/20 54/12</p> <p>consequential [1] 24/17</p> <p>consider [6] 25/9 29/12 34/15 34/16 47/11 56/6</p> <p>consideration [1] 53/2</p> <p>considerations [1] 18/19</p> <p>considering [2] 25/18 56/10</p> <p>consistency [1] 41/4</p> <p>consistent [1] 54/24</p> <p>constitution [10] 2/7 8/8 10/5 10/5 14/12 18/12 25/3 28/4 28/5 29/22</p> <p>Constitution's [1] 31/17</p> <p>constitutional [46] 1/22 9/20 9/23 10/10 11/13 11/15 11/17 11/19 12/11 12/15 12/25 13/23 14/19 14/19 14/24 20/2 20/7 20/18 21/10 22/20 23/11 23/12 24/3 24/4 24/19 25/4 26/20 26/23 27/2 27/5 27/12 27/21 27/22 28/11 28/12 36/6 36/17 39/7 39/16 39/21 41/21 41/23 42/2 42/3 53/2 53/7</p> <p>constitutionality [1] 50/4</p> <p>constrains [1] 25/1</p> <p>contact [1] 49/5</p> <p>context [26] 17/11 18/15 18/23 23/17 32/16 33/9 34/2 35/5 35/9 35/11 38/3 38/13 44/24 45/23 46/15 46/22 47/9 48/14 48/22 50/1 50/19 52/9 52/12 53/8 53/18 53/24</p> <p>continued [2] 2/1 32/4</p> <p>continuing [3] 39/24 40/2 40/9</p> <p>contract [1] 32/15</p> <p>contractors [1] 49/1</p> <p>contracts [1] 35/8</p> <p>contrary [1] 49/7</p> <p>control [1] 48/10</p> <p>convenience [1] 54/2</p> <p>core [3] 6/8 7/11 55/17</p> <p>correct [9] 3/15 6/1 10/19 29/25 39/4 47/23 50/11 50/12 57/2</p> <p>correctly [1] 43/5</p> <p>could [21] 4/9 6/14 8/12 9/24 12/24 13/7 21/19</p>	<p>23/5 23/8 24/11 24/16 28/1 28/10 28/14 28/16 28/23 40/22 46/12 52/6 54/23 56/8</p> <p>couldn't [1] 54/15</p> <p>counsel [8] 5/6 6/19 17/9 30/7 38/16 49/21 50/15 57/7</p> <p>counseling [1] 50/17</p> <p>counterterrorism [1] 17/19</p> <p>country [6] 5/24 8/16 11/24 11/24 12/1 23/24</p> <p>couple [3] 8/13 8/18 53/11</p> <p>course [3] 8/1 18/21 24/21</p> <p>court [74]</p> <p>Court's [9] 7/23 14/4 14/14 20/16 29/18 31/18 33/12 50/4 55/17</p> <p>courthouse [2] 15/13 15/14</p> <p>courts [26] 8/8 10/20 10/20 10/23 11/4 11/9 11/15 14/19 17/4 17/23 18/13 18/15 23/20 24/2 27/5 28/17 31/15 46/21 48/19 48/22 49/1 49/7 50/2 50/16 50/19 53/9</p> <p>covert [1] 11/8</p> <p>cow [3] 3/8 3/9 3/9</p> <p>create [4] 7/7 23/6 28/10 29/5</p> <p>created [1] 23/9</p> <p>creating [4] 6/19 17/9 18/7 29/5</p> <p>criteria [4] 35/2 37/19 37/24 41/16</p> <p>CRYSTAL [2] 2/5 57/12</p>	<p>22/10 25/1 29/7 53/8 54/11 55/20 56/11</p> <p>decisions [7] 6/23 7/20 11/3 14/3 17/22 46/14 53/14</p> <p>decisively [1] 17/25</p> <p>declaration [1] 23/15</p> <p>declarations [1] 47/8</p> <p>declined [1] 7/6</p> <p>defamation [1] 39/12</p> <p>defeat [1] 18/6</p> <p>defend [1] 41/9</p> <p>defendant's [7] 4/4 30/6 30/17 30/22 32/13 37/9 40/16</p> <p>defendants [17] 1/7 2/2 3/21 4/3 5/23 31/17 31/22 35/3 36/1 39/6 41/12 45/19 46/17 47/5 47/6 48/9 50/24</p> <p>defendants' [1] 30/9</p> <p>defending [1] 44/16</p> <p>defense [4] 3/6 6/25 13/3 53/22</p> <p>deliberation [1] 51/1</p> <p>delicate [3] 7/5 24/17 46/13</p> <p>deny [1] 45/16</p> <p>Department [4] 2/3 5/3 40/25 41/5</p> <p>Department's [2] 31/6 41/4</p> <p>depending [2] 20/20 32/15</p> <p>depends [1] 18/19</p> <p>depositions [2] 18/5 54/18</p> <p>depriving [1] 30/21</p> <p>descendant [2] 19/7 47/3</p> <p>descendants [2] 12/4 33/15</p> <p>describe [3] 13/14 21/16 24/22</p> <p>described [1] 28/24</p> <p>design [1] 24/4</p> <p>designation [2] 39/17 39/18</p> <p>detail [1] 53/3</p> <p>detained [2] 18/21 18/22</p> <p>detainee [2] 18/20 18/22</p> <p>detention [5] 18/11 18/15 18/15 18/18 18/20</p> <p>deter [3] 49/17 53/2 53/4</p> <p>determination [5] 35/8 38/25 39/23 40/18 40/18</p> <p>determinations [3] 38/14 38/20 38/21</p> <p>determine [4] 36/7 37/8 37/12 49/20</p> <p>determined [1] 9/4</p> <p>determining [3] 27/15 38/22 38/24</p> <p>deterrence [2] 47/13 53/5</p> <p>deterring [3] 27/11 27/11 27/13</p> <p>diabetic [1] 54/2</p> <p>dialogue [3] 7/1 7/3 28/1</p> <p>dictates [1] 14/12</p> <p>did [5] 33/19 42/5 42/21 43/2 52/7</p> <p>didn't [8] 6/18 9/13 9/14 12/9 19/5 41/15 42/1</p>
	<p>D</p> <p>D.c [9] 1/5 2/4 7/21 10/20 17/12 18/8 18/16 48/4 49/18</p> <p>damages [1] 7/4</p> <p>danger [3] 8/16 16/8 38/12</p> <p>dangerous [1] 30/10</p> <p>dangers [1] 17/24</p> <p>date [2] 57/5 57/12</p> <p>daylight [1] 37/24</p> <p>DC [2] 1/19 2/7</p> <p>deal [4] 11/4 44/9 45/19 53/9</p> <p>dealing [3] 8/24 18/14 54/1</p> <p>dealt [1] 22/25</p> <p>death [5] 19/1 20/8 23/14 50/18 50/20</p> <p>deaths [2] 20/10 49/25</p> <p>deceased [4] 10/15 20/25 21/2 41/22</p> <p>decide [13] 8/12 8/15 9/15 12/5 16/4 16/7 25/20 28/2 28/6 28/8 36/3 45/6 49/8</p> <p>decided [2] 9/12 16/11</p> <p>deciding [2] 35/9 38/17</p> <p>decision [14] 7/22 7/23 9/13 9/16 11/1 14/7 14/9</p>	

<p>D</p> <p>didn't... [1] 51/17 died [1] 6/12 difference [3] 10/4 19/7 45/14 differences [1] 50/18 different [15] 6/6 19/10 20/3 21/13 26/24 40/3 49/2 49/19 49/25 50/17 50/20 51/13 53/24 54/3 54/22 differential [1] 33/3 difficult [4] 43/21 44/1 46/13 54/21 difficulty [2] 9/9 9/9 directly [4] 6/7 20/7 31/16 55/1 Director [3] 5/21 6/2 53/22 disagree [3] 32/9 46/10 53/16 disagreement [5] 31/13 31/14 38/1 45/4 52/25 disconcerting [1] 16/5 discover [1] 46/5 discovery [8] 45/17 45/21 46/1 46/1 46/2 46/7 46/9 46/16 discreet [1] 49/12 discussed [3] 50/2 50/15 55/11 discussing [1] 31/7 dismiss [3] 3/10 45/16 46/9 dispositive [1] 6/19 dispositively [1] 17/9 dispute [4] 27/15 30/25 31/4 32/21 disputing [1] 38/6 disrespect [1] 13/24 distinction [2] 26/10 35/15 distinguishing [1] 49/9 distracted [1] 17/20 DISTRICT [6] 1/1 1/1 1/11 2/6 49/7 57/5 divide [3] 3/22 4/2 4/15 dividing [1] 4/2 do [29] 4/9 10/25 14/19 21/4 21/8 21/16 22/16 22/17 25/9 25/24 28/21 29/16 32/9 33/20 34/14 35/12 37/11 42/20 43/20 44/23 46/18 47/9 50/14 53/7 53/11 54/6 55/4 56/6 56/9 Docket [1] 1/4 doctrine [18] 4/5 6/16 6/17 6/18 7/8 9/10 10/8 10/11 13/11 13/14 14/21 14/25 15/2 17/8 19/20 23/23 30/23 55/21 doctrines [1] 14/20 Doe [7] 17/15 17/22 19/12 48/13 48/14 48/23 48/25 does [13] 7/20 8/12 9/21 11/21 13/16 23/11 26/9 35/20 37/16 44/8 44/21 50/20 56/2 doesn't [16] 7/15 9/8</p>	<p>9/20 28/13 32/14 33/1 33/11 33/11 34/20 35/13 37/11 40/10 41/2 43/15 50/7 51/23 doing [4] 27/13 30/15 53/4 53/19 domestic [4] 22/4 26/8 37/14 55/7 don't [33] 4/3 5/7 6/13 9/18 10/23 12/2 12/2 15/10 15/15 17/19 19/9 22/2 22/3 25/25 26/12 26/12 26/18 28/17 34/16 35/25 36/2 36/14 37/11 39/1 41/19 42/1 42/8 42/17 44/14 46/10 51/6 53/3 55/16 done [6] 5/12 5/13 5/15 24/23 34/17 50/9 door [2] 15/13 15/14 doubt [3] 10/7 32/2 32/6 down [1] 25/12 drawing [2] 37/19 48/20 drone [1] 40/1 dual [2] 15/9 15/11 due [11] 12/24 13/5 13/8 13/9 14/22 14/23 21/15 21/17 23/12 30/21 33/20 during [1] 47/21 duties [1] 52/14</p>	<p>49/11 49/16 entirely [3] 19/10 19/25 29/19 entity [1] 53/5 entrusted [1] 29/7 entrusting [2] 24/4 29/19 environment [1] 37/15 equally [2] 4/15 50/12 especially [2] 46/22 52/12 Esquire [9] 1/14 1/14 1/15 1/17 1/20 1/21 1/21 2/2 2/2 Essentially [1] 45/8 establish [2] 30/8 37/3 established [8] 22/1 22/15 22/18 24/2 24/13 24/23 53/17 53/17 et [4] 1/3 1/6 3/3 15/4 evaluate [1] 42/3 even [33] 4/21 6/18 14/6 17/7 17/7 18/15 20/19 22/18 22/20 26/20 29/12 30/15 31/9 32/12 33/4 33/7 33/23 35/11 35/12 36/3 36/14 36/15 37/4 38/13 41/15 42/10 42/11 42/11 43/18 46/11 48/1 49/20 51/4 event [4] 22/6 22/11 22/12 55/9 events [3] 22/7 23/17 23/18 ever [2] 30/12 30/19 every [4] 14/9 14/9 24/3 45/22 everybody [2] 25/12 56/5 everything [3] 9/15 28/18 48/4 evidence [1] 30/12 evident [1] 37/20 ex [1] 40/13 ex-post [1] 40/13 exactly [2] 4/13 35/2 example [6] 33/13 33/14 33/14 51/1 54/8 55/14 except [4] 9/11 11/20 11/25 18/19 exception [4] 23/25 47/17 47/19 47/21 excuse [2] 14/9 18/11 executing [1] 22/24 executive [20] 6/24 7/10 7/24 9/6 10/24 11/10 13/20 13/22 13/22 13/25 14/1 15/7 16/5 24/5 25/1 30/11 30/18 38/15 38/15 46/14 executive's [1] 17/5 exercised [1] 12/9 exist [4] 15/4 37/11 37/12 49/21 exists [1] 28/16 expand [1] 32/15 expansive [1] 45/10 expertise [1] 11/6 explain [3] 27/19 30/19 47/16 extend [1] 15/3 extensive [3] 13/19 14/3 14/5</p>
<p>E</p> <p>each [1] 29/8 easier [1] 55/16 easily [1] 47/22 easy [3] 11/24 21/21 56/6 eating [1] 36/10 effect [2] 29/6 53/6 effective [1] 13/22 effects [1] 22/11 either [8] 22/16 22/17 22/17 24/12 32/22 34/11 54/10 54/24 E1 [5] 7/21 8/22 39/6 40/17 55/20 E1-shifa [5] 7/21 8/22 39/6 40/17 55/20 elicit [1] 56/8 else [4] 11/19 20/22 21/1 40/10 employed [1] 57/8 employment [1] 53/9 empty [1] 30/22 en [1] 39/8 encompassed [1] 8/23 end [12] 9/12 23/2 25/16 25/24 26/1 26/13 27/5 27/20 28/18 43/18 43/19 52/17 ends [1] 25/23 enemy [6] 16/8 38/20 39/1 44/9 44/9 44/16 enforce [1] 44/20 enforcement [3] 22/4 22/7 55/7 enforcing [1] 31/19 engaged [4] 7/6 14/11 40/6 40/7 entangling [3] 46/13 46/23 47/4 entire [4] 46/23 47/12</p>	<p>each [1] 29/8 easier [1] 55/16 easily [1] 47/22 easy [3] 11/24 21/21 56/6 eating [1] 36/10 effect [2] 29/6 53/6 effective [1] 13/22 effects [1] 22/11 either [8] 22/16 22/17 22/17 24/12 32/22 34/11 54/10 54/24 E1 [5] 7/21 8/22 39/6 40/17 55/20 E1-shifa [5] 7/21 8/22 39/6 40/17 55/20 elicit [1] 56/8 else [4] 11/19 20/22 21/1 40/10 employed [1] 57/8 employment [1] 53/9 empty [1] 30/22 en [1] 39/8 encompassed [1] 8/23 end [12] 9/12 23/2 25/16 25/24 26/1 26/13 27/5 27/20 28/18 43/18 43/19 52/17 ends [1] 25/23 enemy [6] 16/8 38/20 39/1 44/9 44/9 44/16 enforce [1] 44/20 enforcement [3] 22/4 22/7 55/7 enforcing [1] 31/19 engaged [4] 7/6 14/11 40/6 40/7 entangling [3] 46/13 46/23 47/4 entire [4] 46/23 47/12</p>	<p>each [1] 29/8 easier [1] 55/16 easily [1] 47/22 easy [3] 11/24 21/21 56/6 eating [1] 36/10 effect [2] 29/6 53/6 effective [1] 13/22 effects [1] 22/11 either [8] 22/16 22/17 22/17 24/12 32/22 34/11 54/10 54/24 E1 [5] 7/21 8/22 39/6 40/17 55/20 E1-shifa [5] 7/21 8/22 39/6 40/17 55/20 elicit [1] 56/8 else [4] 11/19 20/22 21/1 40/10 employed [1] 57/8 employment [1] 53/9 empty [1] 30/22 en [1] 39/8 encompassed [1] 8/23 end [12] 9/12 23/2 25/16 25/24 26/1 26/13 27/5 27/20 28/18 43/18 43/19 52/17 ends [1] 25/23 enemy [6] 16/8 38/20 39/1 44/9 44/9 44/16 enforce [1] 44/20 enforcement [3] 22/4 22/7 55/7 enforcing [1] 31/19 engaged [4] 7/6 14/11 40/6 40/7 entangling [3] 46/13 46/23 47/4 entire [4] 46/23 47/12</p>

E	31/23 35/24 37/3 37/5 37/8 44/25 54/1 54/10 55/16 foregoing [1] 57/2 foreign [20] 7/5 7/12 7/22 9/1 9/19 9/20 9/22 11/2 11/7 16/22 17/18 22/24 23/24 23/24 24/18 39/11 39/17 39/18 48/20 48/21	Good [3] 5/1 30/4 43/7 got [3] 12/10 43/18 55/8 Government [29] 3/11 3/15 3/17 3/20 6/2 9/22 15/19 25/5 25/9 30/14 30/15 30/20 34/5 34/15 34/21 37/16 37/17 38/14 42/16 44/21 45/3 45/8 48/16 51/5 51/12 52/3 52/4 52/10 52/13 government's [7] 3/13 31/4 43/10 51/20 51/22 52/18 55/25 grandsons [1] 31/23 grappling [2] 29/9 29/11 great [2] 6/23 45/19 greater [1] 52/10 groups [3] 39/17 44/11 44/11 grown [1] 10/15 grunt [2] 5/12 5/15 Guantanamo [1] 47/9 guess [4] 11/9 20/6 49/11 55/23 guide [1] 35/4 quilt [1] 23/15	
F	fact [13] 8/5 11/1 11/5 18/11 19/17 24/22 28/19 32/6 41/23 44/13 44/16 47/5 55/20 factor [3] 48/19 48/19 49/9 factors [10] 6/18 7/19 10/9 14/21 19/20 20/7 23/22 49/21 50/14 50/16 facts [11] 6/10 15/23 16/1 20/8 38/22 39/1 39/25 40/14 45/5 49/12 50/25 factual [4] 6/12 35/5 38/3 45/4 fairly [1] 44/11 family [1] 23/3 far [8] 11/21 30/11 34/3 40/14 40/16 41/13 43/21 51/23 favor [1] 4/9 fear [1] 46/9 feasible [2] 35/1 54/23 February [1] 37/25 federal [5] 10/2 23/24 27/13 29/6 53/4 fellow [1] 47/15 felt [1] 51/17 fence [2] 24/25 26/12 Ferris [1] 23/23 fettering [1] 18/1 few [1] 47/16 field [1] 18/1 Fifth [15] 30/20 31/6 31/9 31/18 31/19 31/24 33/25 36/5 36/25 37/21 38/6 39/14 39/19 39/20 41/19 fighting [1] 34/6 figure [2] 15/6 36/14 file [1] 9/25 filed [1] 3/10 financially [1] 57/9 find [4] 16/4 33/10 34/19 48/5 fine [3] 34/11 34/12 41/10 finished [1] 16/11 firm [3] 12/3 17/13 18/8 first [11] 3/13 6/16 8/5 8/21 13/19 17/1 20/19 25/2 30/2 46/19 53/12 fit [1] 7/12 flag [1] 18/10 Floor [2] 1/16 1/22 focus [1] 31/21 follow [2] 25/13 25/14 followed [1] 6/7 force [12] 9/6 25/16 31/5	forget [1] 20/19 forgive [1] 40/5 form [1] 47/8 former [2] 5/20 5/21 Forsyth [1] 52/5 forward [1] 5/14 found [4] 44/12 44/13 50/16 52/8 four [2] 27/16 50/24 Fourth [29] 21/22 21/24 22/5 22/6 22/10 22/12 31/5 31/8 31/24 33/25 36/5 36/8 36/19 37/1 37/2 37/12 37/13 37/14 37/21 38/6 39/13 39/20 40/19 40/19 41/13 41/18 54/6 55/3 55/9 framework [2] 29/21 42/11 frank [1] 26/9 frankly [1] 46/6 Freedom [1] 47/8 Friday [1] 1/6 full [2] 28/20 45/25 fully [1] 7/6 fundamental [1] 31/13 further [4] 7/1 55/22 57/7 57/9 furthermore [1] 39/22	government's [7] 3/13 31/4 43/10 51/20 51/22 52/18 55/25 grandsons [1] 31/23 grappling [2] 29/9 29/11 great [2] 6/23 45/19 greater [1] 52/10 groups [3] 39/17 44/11 44/11 grown [1] 10/15 grunt [2] 5/12 5/15 Guantanamo [1] 47/9 guess [4] 11/9 20/6 49/11 55/23 guide [1] 35/4 quilt [1] 23/15
G	Gardner [1] 34/23 Garner [2] 37/17 40/21 general [9] 5/22 6/3 24/24 31/10 32/19 49/15 51/8 52/5 53/13 General's [1] 31/1 genuine [1] 44/22 get [16] 3/13 12/8 12/20 12/20 13/5 16/8 22/14 23/20 26/13 34/11 35/9 45/12 48/2 54/16 55/16 56/8 Gilligan [1] 14/22 give [3] 18/5 19/5 28/19 given [1] 25/6 go [25] 3/13 5/18 6/14 8/24 11/8 12/2 12/2 12/6 15/14 16/14 18/9 22/19 22/22 26/18 29/15 29/15 30/23 34/1 43/6 45/16 49/14 53/14 55/1 55/14 55/18 goal [1] 47/12 gobble [1] 16/13 goes [4] 21/10 25/24 33/22 53/3 going [17] 3/22 6/7 9/18 18/16 18/16 19/13 19/22 19/23 22/18 23/19 24/3 26/17 30/2 41/8 41/9 45/12 51/20	H	habeas [2] 19/11 38/20 had [12] 5/5 15/9 15/11 22/10 33/18 40/1 40/7 41/1 45/9 51/16 55/24 56/9 hadn't [1] 51/5 Hamdi [5] 33/3 33/3 33/7 33/7 42/12 hand [1] 23/14 happen [2] 25/5 52/14 happened [2] 19/24 20/23 happening [1] 14/15 happy [2] 6/20 55/22 hard [1] 47/23 has [45] 5/3 6/6 6/12 6/20 7/1 7/6 9/4 9/23 11/13 11/25 12/23 15/4 15/14 16/2 17/10 17/12 17/16 18/6 18/8 24/23 25/4 25/15 26/20 27/25 28/24 28/25 29/1 30/11 30/17 32/3 32/5 32/7 32/11 33/23 45/8 45/23 45/25 48/4 48/16 49/4 49/18 49/19 51/25 52/15 53/13 hasn't [1] 23/6 hasten [1] 48/1 HAUCK [9] 2/2 3/6 3/17 4/25 5/18 5/20 38/14 42/8 52/23 have [99] haven't [4] 16/11 16/11 24/25 40/22 having [7] 15/25 19/7 19/25 22/25 30/12 30/19 46/18 he [21] 5/14 5/15 9/3 9/14 9/15 9/24 9/24 25/24 26/13 28/25 35/25 36/2 36/2 36/22 37/8 40/8 40/8 51/2 51/3 52/6 54/14 he's [5] 5/10 5/11 5/13

H	I'll [6] 6/6 8/19 11/24 19/25 45/24 52/24 I'm [28] 6/20 9/17 10/8 11/18 13/16 13/21 15/6 15/11 16/10 19/25 20/8 20/16 22/18 23/11 25/7 26/17 27/18 27/18 28/3 28/18 29/14 34/8 34/14 42/22 43/24 43/24 46/6 55/22 I've [2] 15/2 43/18 identify [2] 11/24 44/17 ignored [1] 47/5 II [3] 8/7 33/23 34/3 III [3] 8/7 11/20 39/10 illegal [2] 53/19 54/5 imagine [1] 47/23 immediately [1] 23/13 imminence [3] 38/12 40/17 41/15 imminent [6] 9/5 10/16 10/21 16/18 34/25 45/1 imminently [1] 14/11 immunity [12] 4/6 4/8 4/18 4/20 6/21 24/9 43/12 51/16 51/21 51/22 52/8 52/11 implicated [1] 44/2 implications [2] 11/25 48/20 implied [1] 17/16 imply [4] 18/16 18/17 19/13 20/15 implying [1] 17/24 importance [2] 6/23 45/1 important [6] 7/1 23/17 23/18 23/18 25/10 34/1 imposes [1] 25/3 impossible [1] 22/23 including [4] 25/13 36/12 47/6 48/23 incredibly [1] 23/18 indeed [1] 50/11 individual [5] 11/13 22/8 38/24 46/17 48/6 individual's [1] 13/23 individuals [10] 18/5 19/15 19/18 21/6 21/7 21/18 27/16 38/7 43/14 55/10 inform [1] 11/8 Information [1] 47/9 injunction [1] 9/2 injured [2] 9/24 20/1 inquired [1] 31/2 inquiry [6] 31/22 32/15 32/22 33/3 35/13 35/14 instance [2] 28/25 29/1 instances [1] 50/8 instant [1] 22/6 institutional [1] 11/6 integral [1] 5/4 Intelligence [1] 53/23 intend [1] 13/24 intended [7] 20/11 20/11 22/9 22/10 22/12 35/16 37/4 intent [1] 52/14 intention [1] 47/5 intentional [1] 20/4 interested [2] 11/22	57/10 interests [2] 32/4 32/5 interpret [2] 8/8 28/3 interpreting [1] 31/19 interprets [1] 28/4 interrogatories [1] 46/2 intrude [1] 46/16 invite [1] 5/5 invited [2] 7/1 27/25 involve [3] 11/3 50/20 54/18 involved [5] 14/6 19/12 32/24 33/1 42/12 involves [1] 49/24 involving [3] 7/4 17/17 17/23 Iraq [2] 14/10 48/15 is [227] isn't [6] 6/10 11/14 15/24 16/1 37/4 50/23 issue [16] 6/22 11/2 13/11 14/13 14/18 23/17 23/18 23/18 24/15 24/16 38/12 44/5 47/14 48/23 51/8 55/15 issues [7] 6/8 7/6 12/25 18/15 24/4 24/19 49/11 it [120] it's [43] 3/13 5/20 10/4 10/5 10/23 11/5 11/5 11/15 13/2 13/24 14/11 14/14 14/15 14/23 16/1 17/2 17/8 17/13 17/15 18/1 20/1 20/3 22/23 24/1 25/11 26/24 27/8 27/15 28/25 30/10 33/4 34/1 34/16 35/12 36/5 36/8 39/3 43/19 43/21 43/22 48/3 53/20 55/10 its [3] 30/11 31/7 42/14 itself [1] 49/2
I	J	
I'd [1] 5/5	JAFFER [1] 1/15 JAMEEL [1] 1/15 jobs [3] 27/14 53/4 53/7 join [1] 12/7 joined [2] 12/19 33/17 Joint [1] 6/4 JSOC [1] 53/22 JUDGE [7] 1/11 9/2 9/11 14/1 34/12 42/2 55/20 Judges [3] 15/15 15/19 25/13 judgment [3] 49/20 54/17 54/22 judgments [3] 7/5 11/8 55/18 judicial [3] 29/23 38/13 38/17 judiciary [2] 18/13 46/13 judiciary's [2] 7/12 33/2 July [1] 1/6 jurisdiction [1] 33/24 just [45] 3/7 3/16 3/24 3/24 7/15 10/17 11/9 14/15 16/6 16/13 16/14 16/15 16/21 19/7 19/9 19/11 20/22 23/3 27/11 27/14 27/17 28/22 30/5 30/10 30/23 32/18 34/1	

<p>J</p> <p>just... [18] 34/8 34/14 34/17 35/12 35/21 37/11 40/10 40/22 41/6 42/2 43/11 43/17 45/24 46/19 53/1 53/20 54/3 55/24 Justice [6] 2/3 5/3 31/6 40/25 41/4 41/5 justiciability [5] 6/8 33/11 37/7 45/5 46/8</p>	<p>least [1] 36/11 leaving [1] 8/11 left [3] 33/15 33/16 39/23 legal [9] 29/13 29/14 29/21 31/13 41/4 45/9 45/9 45/10 56/12 legitimate [1] 40/15 LEON [2] 1/6 47/17 less [2] 55/10 55/16 let [5] 11/22 26/2 28/22 42/17 43/10 let's [5] 9/24 12/1 32/1 38/19 40/25 lethal [7] 9/6 31/5 31/22 35/24 44/25 54/10 55/15 letter [3] 31/1 31/6 51/9 level [4] 6/23 14/3 47/6 47/14 levels [4] 22/25 38/15 38/16 38/21 liability [2] 7/4 49/12 liable [1] 27/16 Liberties [2] 1/15 1/18 Lieutenant [2] 5/22 6/3 life [1] 30/21 light [1] 55/11 like [16] 4/2 4/14 4/14 4/17 5/5 7/20 10/2 10/10 10/20 14/20 17/23 32/23 33/3 38/12 42/7 51/17 likelihood [1] 16/19 likely [2] 43/21 52/9 limit [3] 15/12 15/12 15/13 limitations [1] 51/20 limited [1] 46/1 limits [8] 43/9 43/9 43/10 43/13 44/19 52/17 52/18 52/18 line [2] 17/22 49/3 list [1] 51/2 litigating [2] 27/15 41/1 litigation [4] 11/16 17/21 18/2 29/23 little [2] 16/5 32/6 live [1] 56/9 local [1] 39/24 locations [1] 32/7 locus [1] 26/4 long [2] 17/22 18/14 longer [1] 6/2 look [10] 7/17 16/18 22/6 32/1 37/23 38/9 38/19 39/5 53/20 54/11 looking [9] 26/15 33/4 33/12 39/13 39/22 39/25 40/14 50/21 55/17 looks [2] 10/11 38/22 lot [4] 5/13 6/13 18/21 56/10 Lucas [2] 53/3 53/5</p>	<p>42/14 make [6] 6/13 26/10 27/9 54/17 55/13 55/19 makes [2] 19/6 49/25 making [6] 15/24 16/1 17/21 19/25 26/3 26/11 man [3] 5/15 15/11 24/6 manage [1] 37/10 manageability [1] 36/15 managing [1] 46/2 manner [1] 21/24 many [1] 32/7 MARIA [2] 1/21 3/5 mark [1] 34/10 material [1] 19/6 matter [10] 3/8 13/16 32/6 32/14 33/11 35/13 37/7 49/19 51/24 57/6 mattered [1] 39/8 matters [4] 6/22 13/15 18/21 46/15 may [25] 5/17 9/20 12/25 22/8 22/10 23/17 23/21 23/21 23/22 23/23 28/19 30/5 32/15 33/2 33/10 34/19 35/19 41/21 41/21 43/11 46/1 46/1 49/14 52/13 52/14 maybe [4] 19/21 20/16 25/19 37/25 McRaven [2] 5/21 6/3 me [24] 4/9 4/10 11/22 14/9 15/1 16/12 18/12 21/8 22/21 24/25 26/2 26/18 27/17 27/20 27/22 28/19 28/22 29/10 29/12 40/5 43/10 48/2 56/13 57/4 mean [14] 8/11 9/11 10/4 11/19 11/20 18/19 19/21 20/3 26/8 27/18 37/24 38/19 50/7 50/8 meaning [1] 30/22 means [2] 5/11 40/10 member [2] 5/4 9/4 members [1] 8/13 merely [1] 56/8 merit [1] 45/7 meritorious [1] 16/10 merits [5] 23/20 24/3 45/13 45/15 46/5 message [1] 24/7 met [1] 31/14 methodology [1] 7/14 mic [1] 3/24 middle [1] 43/18 might [11] 6/12 11/17 12/11 18/18 27/18 32/22 40/2 44/13 46/9 47/11 48/21 military [14] 5/24 11/7 17/17 22/24 24/18 25/17 38/15 38/15 48/25 49/1 49/2 49/5 49/8 50/22 military's [1] 38/25 mind [1] 45/14 Minneci [1] 49/16 minors [1] 36/12 minute [1] 19/9 missile [1] 53/23 misunderstanding [2]</p>
<p>K</p> <p>Kahn [2] 19/2 20/24 KAUFMAN [2] 1/14 3/4 KEBRIAEEI [8] 1/20 3/5 4/11 4/12 42/21 42/22 42/25 45/2 key [2] 48/11 50/18 khan [1] 3/3 kill [6] 12/24 25/21 30/11 30/18 31/7 51/2 killed [16] 8/3 8/17 12/8 12/10 12/20 12/21 13/5 20/1 20/21 21/6 30/14 33/17 36/16 49/6 51/3 51/4 killing [4] 13/7 36/6 47/15 47/18 killings [3] 30/25 44/5 51/22 kills [1] 36/11 kind [16] 10/16 10/23 11/3 11/16 28/11 28/24 29/3 31/14 34/11 43/25 53/9 54/4 54/11 54/12 54/23 55/19 kinds [6] 11/3 18/14 19/10 51/4 52/2 53/14 Kissinger [1] 50/7 know [22] 8/14 9/17 15/1 15/10 19/14 20/9 20/12 22/5 22/17 23/22 25/5 25/23 35/6 37/25 39/5 41/10 41/12 41/13 41/14 42/24 43/17 46/17 knowledge [1] 15/8 known [1] 24/23 knows [3] 5/15 5/23 45/22</p>	<p>L</p> <p>lack [1] 23/13 LAHOOD [2] 1/21 3/5 large [2] 44/4 44/11 last [5] 4/10 41/15 46/20 49/16 55/13 launch [2] 7/22 7/22 launching [1] 53/23 law [21] 5/10 5/11 8/17 12/25 13/5 13/8 15/5 22/4 22/7 24/2 25/11 25/13 29/17 30/19 44/18 44/21 45/5 52/19 53/13 53/17 55/7 laws [2] 25/9 28/4 lawsuit [2] 3/11 48/24 lawyer [2] 5/9 41/10 lay [1] 46/7 lead [1] 24/16 leader [1] 9/4 leaders [2] 5/24 40/6</p>	<p>M</p> <p>ma'am [1] 51/14 machine [1] 2/9 made [12] 6/23 9/15 14/3 33/3 33/7 33/23 38/14 38/20 46/14 52/1 52/10 53/8 maintains [3] 33/4 33/6</p>

M
 misunderstanding... [2] 20/16 20/17
 misunderstood [1] 3/19
 Mitchell [1] 52/4
 Mojahedin [1] 10/21
 moment [3] 10/8 17/2 47/25
 money [1] 25/7
 months [1] 37/25
 more [7] 10/6 18/14 33/2 39/23 39/23 43/21 55/17
 morning [3] 5/1 30/4 43/7
 most [6] 7/4 17/15 24/17 25/10 45/24 48/18
 mostly [1] 44/11
 motion [4] 1/10 3/10 3/13 45/16
 move [1] 19/9
 moving [2] 20/6 20/8
 Mr. [12] 3/11 4/25 5/18 14/8 19/2 20/24 20/25 23/3 38/14 42/8 52/23 55/8
 Mr. Al-Aulaqi [4] 3/11 14/8 20/25 55/8
 Mr. Al-Aulaqi's [1] 23/3
 Mr. Hauck [5] 4/25 5/18 38/14 42/8 52/23
 Mr. Kahn [2] 19/2 20/24
 Ms [4] 42/22 42/22 42/24 43/6
 Ms. [5] 4/2 4/5 4/14 42/21 45/2
 Ms. Kebriaei [2] 42/21 45/2
 Ms. Shamsi [3] 4/2 4/5 4/14
 much [14] 3/25 4/16 6/10 8/22 18/14 24/17 26/4 28/17 46/20 46/24 47/17 52/21 54/1 56/12
 my [9] 5/3 19/21 26/19 30/7 33/13 33/14 42/9 56/7 57/3

N
 name [2] 4/10 43/4
 narrow [2] 15/23 30/24
 NASSER [3] 1/3 3/2 3/12
 nation [6] 9/23 25/9 25/11 34/4 44/8 44/9
 national [14] 6/25 7/5 9/19 13/2 17/17 17/20 24/18 27/13 29/6 44/9 52/2 52/6 52/8 52/12
 naturally [1] 24/1
 necessary [1] 46/4
 need [12] 6/13 8/3 9/18 15/16 15/20 18/1 20/12 25/23 28/17 36/3 36/14 52/14
 needed [1] 12/1
 needs [1] 6/9
 neither [2] 49/13 57/7
 never [3] 12/24 17/16 43/18
 nevertheless [1] 49/22
 new [3] 1/16 1/23 29/5
 no [59]

nobody [1] 11/25
 nondomestic [1] 37/14
 none [7] 13/14 16/2 16/3 16/3 48/10 48/10 50/14
 normal [1] 45/21
 normally [1] 25/6
 not [120]
 note [4] 14/2 23/7 24/8 24/16
 noted [1] 24/11
 notes [2] 53/5 57/4
 nothing [2] 49/19 50/3
 notice [2] 53/18 54/4
 now [12] 16/10 18/25 21/23 28/18 34/5 34/14 40/8 40/9 45/4 46/7 47/23 56/9
 number [3] 21/23 48/11 48/25
 NW [2] 1/18 2/7
 NY [2] 1/16 1/23

O
 objection [4] 4/3 5/5 5/6 5/7
 objectively [1] 36/12
 obligated [1] 25/12
 obligation [1] 8/7
 obvious [1] 27/18
 occur [1] 7/3
 occurred [4] 14/8 19/8 28/25 47/16
 off [3] 16/19 24/6 34/10
 Official [1] 2/6
 officials [14] 11/7 17/20 27/13 29/6 47/6 47/15 50/22 52/13 53/4 53/7 53/18 54/4 54/18 54/19
 often [1] 28/24
 oh [1] 25/25
 okay [30] 3/19 3/20 4/15 4/22 5/11 5/16 6/14 10/13 11/17 13/4 13/18 14/1 15/13 16/6 16/17 21/14 22/13 22/20 25/13 27/6 29/8 32/1 34/11 34/14 35/15 39/4 40/12 43/19 46/4 55/12
 old [5] 30/14 30/16 35/19 35/23 51/25
 one [34] 3/16 3/20 5/1 5/3 7/3 7/7 11/19 17/1 18/10 21/10 21/10 21/21 23/6 23/9 23/19 24/8 25/6 25/7 26/3 28/25 29/24 30/14 32/22 40/5 40/24 41/3 41/7 44/19 45/10 49/15 50/9 50/17 52/25 55/24
 ones [2] 48/13 51/10
 ongoing [1] 39/25
 only [11] 8/13 9/24 32/21 32/22 33/9 34/7 35/9 48/1 48/1 49/6 53/1
 oOo [1] 56/15
 operation [4] 18/4 36/9 54/12 54/23
 operations [2] 6/5 11/8
 operative [1] 32/8
 opportunity [1] 16/20
 opposed [4] 20/3 44/13

49/12 54/13
 ordered [1] 47/15
 organization [1] 32/3
 organizations [1] 39/19
 organize [1] 45/25
 other [22] 9/14 10/9 12/20 15/19 21/6 21/7 21/18 23/17 23/22 24/8 29/8 39/4 41/8 46/22 48/18 48/23 48/25 50/1 50/3 54/9 55/10 55/24
 others [1] 12/19
 otherwise [1] 57/10
 our [17] 4/3 4/15 9/18 14/22 17/25 31/12 31/12 32/17 35/3 35/22 37/3 37/6 43/9 43/13 44/5 49/13 56/2
 out [19] 4/21 7/8 15/6 26/13 31/17 33/2 33/11 33/17 36/14 39/7 43/11 44/22 45/2 46/7 47/16 50/22 51/3 52/13 54/8
 outcome [1] 57/10
 outside [13] 7/23 14/9 30/25 31/3 32/13 32/16 32/20 32/23 33/8 34/5 36/10 44/24 54/2
 over [6] 49/18 49/18 50/19 50/19 50/22 53/19
 overarching [1] 41/7
 overcome [1] 8/7
 overseas [2] 8/16 26/4
 oversight [4] 6/24 14/6 14/15 28/22
 overview [1] 6/7
 own [3] 9/21 30/11 32/17

P
 P-R-O-C-E-E-D-I-N-G-S [1] 3/1
 P.O [1] 2/3
 page [2] 4/22 14/23
 pages [1] 57/3
 PANETTA [4] 1/6 5/21 6/2 47/17
 paper [7] 31/7 31/11 32/19 34/24 37/17 41/1 45/2
 PARDISS [2] 1/20 3/5
 part [7] 38/24 41/11 43/13 44/4 44/4 45/21 55/21
 particular [5] 24/12 46/18 46/21 46/25 47/2
 particularly [4] 6/11 16/25 35/18 56/6
 parties [1] 57/8
 parts [1] 15/19
 pass [1] 28/4
 passed [1] 51/2
 past [6] 29/8 38/22 39/25 40/9 40/14 43/18
 pattern [1] 41/23
 PAUL [2] 2/2 3/6
 peninsula [1] 40/6
 people [6] 3/14 3/17 12/20 25/12 30/14 36/11
 People's [1] 10/21
 percent [1] 29/24
 perfect [1] 43/1

P		Q
<p>perfectly [1] 26/9 perhaps [3] 18/4 39/24 41/7 period [1] 46/18 permits [1] 44/25 person [7] 3/16 3/20 5/9 13/24 18/23 25/21 34/25 personal [2] 7/4 17/21 personnel [1] 49/1 persons [6] 18/24 20/9 20/24 20/25 22/23 48/6 Petraeus [2] 5/21 6/2 phrase [2] 22/9 30/22 pick [1] 11/24 PILGRIM [2] 2/5 57/12 pin [1] 42/8 place [4] 9/20 20/19 29/15 30/25 places [3] 15/3 32/5 34/10 plain [1] 36/10 plaintiff [3] 9/12 19/23 19/24 plaintiff's [4] 8/22 17/1 31/21 53/21 plaintiffs [32] 1/4 1/14 3/4 3/18 3/21 5/6 7/16 8/2 9/1 9/12 10/14 11/23 19/4 21/4 21/5 21/16 30/3 32/16 32/24 35/11 39/9 39/11 39/11 39/17 46/24 48/6 48/24 48/25 50/3 53/1 53/12 54/8 plaintiffs' [1] 49/10 plan [2] 46/1 46/7 play [2] 30/17 52/15 PMOI [3] 39/15 39/15 40/17 point [19] 8/12 8/15 14/4 14/17 18/25 26/10 37/6 37/24 38/2 39/1 39/3 39/9 40/15 45/8 46/11 46/20 47/24 51/7 55/13 pointed [2] 39/7 45/2 points [2] 6/11 6/12 policies [2] 46/24 49/11 policy [9] 7/1 7/3 7/5 11/2 16/22 17/18 22/24 24/18 27/14 political [37] 4/4 4/17 4/19 6/16 7/8 7/15 9/10 10/8 10/11 11/25 13/11 13/13 14/21 14/24 15/1 17/8 19/19 29/19 30/6 30/23 31/16 31/22 32/10 32/24 33/1 33/6 33/21 34/16 35/6 35/7 36/1 36/4 37/9 38/8 40/18 55/1 55/21 posed [1] 10/16 posing [2] 29/10 29/12 posit [1] 10/14 position [11] 11/9 29/13 29/14 30/17 32/13 41/1 41/6 41/17 43/10 55/25 56/2 positions [3] 6/4 6/4 43/10 possible [2] 24/11 41/21</p>	<p>post [1] 40/13 potentially [1] 54/24 power [5] 30/11 35/7 39/10 39/13 44/8 powers [6] 7/9 17/13 31/20 42/12 42/13 42/13 precedence [2] 25/14 25/15 precise [3] 7/17 17/6 31/8 preference [2] 4/16 6/6 preferred [1] 54/15 premature [1] 46/8 prepared [1] 46/7 preparing [1] 5/4 presence [1] 21/1 present [2] 30/12 47/7 presented [5] 34/25 42/15 42/16 49/13 50/23 presents [1] 9/5 presidency [1] 47/20 President [14] 6/25 8/6 8/13 12/23 13/1 13/4 25/17 25/20 27/9 27/25 28/20 28/24 47/21 54/14 President's [2] 13/2 54/24 Presidential [1] 47/19 Presidents [1] 25/12 pretty [2] 4/15 24/2 preventing [1] 53/6 previously [1] 57/6 prime [1] 48/12 private [1] 11/16 probably [1] 39/22 problem [5] 11/21 15/25 26/19 29/9 29/12 procedural [2] 21/15 21/17 proceed [2] 46/3 46/12 proceedings [3] 2/9 56/14 57/5 process [17] 8/17 12/25 13/5 13/8 13/9 13/20 14/6 14/22 14/23 21/16 21/17 21/19 23/13 25/1 30/21 33/20 42/5 produced [1] 2/9 prohibits [1] 30/20 promise [2] 15/4 27/17 pronounce [3] 4/9 42/25 43/4 pronouncement [2] 17/15 55/19 proper [1] 29/22 properly [1] 51/17 prophecy [2] 11/3 11/5 proposition [1] 30/10 protect [1] 29/6 protected [1] 27/10 provide [1] 47/7 provided [1] 57/4 provides [1] 44/18 public [2] 24/24 51/11 publicly [1] 31/2 purpose [1] 49/16 purposes [9] 32/11 33/21 35/6 36/1 36/4 37/7 37/9 38/9 47/25 put [3] 33/19 51/2 53/18 putting [2] 48/4 54/3</p>	<p>Qaeda [5] 32/2 32/7 34/20 38/24 40/6 qualified [7] 4/5 4/8 4/18 4/20 6/20 24/9 43/12 question [72] questions [29] 6/21 7/1 7/10 7/17 7/19 8/1 8/18 8/24 10/9 10/10 10/12 10/14 11/10 16/15 17/3 17/4 17/6 22/1 24/18 26/16 43/12 54/9 54/17 54/21 55/14 55/16 55/22 56/7 56/7 quibble [1] 53/19 quick [3] 6/7 42/8 51/16 quintessential [1] 49/23 quite [3] 41/10 42/8 46/6</p> <p>R</p> <p>raise [3] 27/24 49/11 54/8 raised [7] 6/22 7/2 46/22 50/1 52/3 52/3 54/16 raises [2] 43/25 52/3 ranking [1] 5/24 Rasul [2] 17/23 48/13 reach [4] 24/3 54/7 54/22 56/11 reached [1] 7/21 reaches [1] 7/20 read [3] 31/17 33/2 33/11 reading [1] 56/10 reaffirmed [1] 49/16 realistically [1] 32/2 really [13] 3/7 3/8 5/14 9/16 10/11 27/18 27/19 33/9 34/14 36/14 38/18 41/24 50/3 reason [3] 17/19 39/16 50/9 reasonable [1] 54/7 reasonableness [6] 34/24 36/9 36/18 36/19 40/20 55/4 reasoning [1] 8/22 reasons [6] 17/9 24/19 29/11 48/11 50/15 52/6 recent [2] 6/25 17/15 recognize [4] 10/21 22/8 22/25 44/22 recognized [6] 9/2 9/3 10/20 17/4 17/16 55/20 recognizes [2] 7/8 18/12 record [1] 24/20 recorded [1] 2/9 recourse [1] 16/9 referred [1] 28/25 regardless [2] 14/10 25/21 rejected [2] 52/3 52/4 related [1] 57/7 relevant [2] 14/6 32/21 relying [1] 40/17 remain [1] 6/4 remedial [1] 50/13 remedied [1] 50/10 remedies [2] 20/19 28/7 remedy [22] 6/19 7/4 17/9 17/14 17/17 17/24 18/7</p>

<p>R</p> <p>remedy... [15] 18/16 18/17 18/18 19/13 20/15 27/21 29/5 29/5 47/12 48/6 49/21 50/4 50/7 53/1 53/6</p> <p>remember [2] 19/14 19/17 remind [1] 29/20 replace [1] 31/19 reporter [3] 2/5 2/6 51/24 representing [1] 5/20 request [1] 5/2 require [1] 28/13 requires [3] 10/22 29/22 50/8 resolution [1] 29/22 resolve [2] 14/13 31/15 resolving [1] 7/18 resort [1] 41/16 respect [15] 7/9 16/25 17/1 17/13 21/15 21/18 21/22 24/9 30/16 35/17 44/5 45/4 46/25 47/4 54/10 respectfully [1] 48/8 respond [1] 44/21 response [1] 30/6 rest [1] 13/14 result [6] 11/12 19/2 20/1 33/20 49/6 52/9 retaliation [1] 53/9 retrospectively [1] 55/18 return [2] 14/14 14/17 review [5] 13/20 14/4 39/2 39/22 50/4 reviewing [1] 38/25 reviews [2] 38/21 53/14 right [45] 3/10 4/13 4/25 5/18 9/23 10/7 11/13 11/15 11/20 12/11 12/13 12/15 13/15 14/19 14/24 15/7 17/2 21/8 21/17 21/20 22/20 24/12 24/15 24/16 25/23 26/1 26/20 27/8 28/19 30/2 33/25 34/9 36/20 36/21 37/15 37/23 40/4 42/21 42/21 43/2 46/19 47/23 51/14 51/18 56/3 rights [35] 1/22 9/20 10/10 11/18 12/9 13/11 13/23 14/19 19/5 20/7 22/15 23/18 26/23 27/2 27/3 27/5 27/12 27/21 27/22 33/25 36/5 36/17 37/14 38/5 39/19 39/21 41/22 41/24 42/2 42/3 42/5 48/21 52/16 53/3 53/7 rises [1] 45/25 risk [2] 33/19 38/18 robust [2] 6/24 14/5 role [18] 16/2 18/12 30/17 31/18 32/11 32/14 33/2 33/4 33/6 33/12 33/22 35/8 38/9 38/17 39/13 46/18 52/15 52/19 roles [1] 42/14 room [1] 16/13</p>	<p>ROSEMARY [1] 1/10 routinely [1] 49/7 RPR [2] 2/5 57/12 rule [5] 25/3 29/17 49/15 51/21 52/11 ruling [1] 17/5 Rumsfeld [2] 17/15 19/12</p> <p>S</p> <p>said [12] 12/23 32/19 39/9 39/20 43/1 48/4 49/4 49/18 49/19 50/19 52/5 54/14 same [17] 4/21 4/22 10/4 10/24 11/10 20/12 31/11 31/12 35/5 35/5 37/18 37/19 38/3 38/5 38/8 39/15 51/11 Sarah [1] 3/3 say [37] 3/8 3/9 9/24 11/22 11/23 12/1 14/1 16/6 19/4 19/25 22/17 25/16 25/23 28/17 28/18 34/11 34/14 34/17 34/23 34/24 35/3 39/12 40/17 40/22 40/25 41/13 41/14 41/18 42/1 42/21 43/2 44/21 45/12 45/12 46/7 47/11 50/12 saying [20] 8/9 9/22 10/13 10/17 13/17 15/14 16/10 22/23 23/2 28/18 29/14 36/22 38/3 38/4 41/17 41/18 41/20 41/25 42/2 51/9 says [5] 16/2 25/25 30/15 32/19 44/23 scattered [1] 44/12 scheme [1] 50/14 Schneider [1] 50/6 scope [3] 16/12 32/14 35/13 Scott [2] 34/23 37/18 second [5] 8/3 11/9 14/17 16/25 49/11 secrecy [1] 52/9 Secretary [4] 5/20 6/1 39/18 53/22 security [12] 7/5 17/18 17/20 24/18 27/13 29/6 52/2 52/6 52/9 52/12 54/18 54/20 see [4] 15/25 16/12 22/16 25/9 seek [1] 50/4 seeking [2] 44/20 47/13 seems [1] 48/2 seized [3] 21/23 36/22 37/8 seizure [4] 37/1 37/5 55/5 55/9 selected [1] 33/14 senate [1] 8/13 sends [1] 51/9 sensitive [2] 7/16 17/4 separate [1] 19/16 separation [2] 7/9 17/13 serious [4] 3/8 6/22 10/22 55/1 seriously [1] 25/8 service [2] 6/3 11/7</p>	<p>set [4] 15/23 45/6 49/12 56/6 seven [1] 36/11 Seventh [1] 1/22 SHAMSI [8] 1/14 3/5 4/2 4/5 4/14 42/23 42/24 43/6 shared [3] 35/7 42/13 42/13 Shifa [5] 7/21 8/22 39/6 40/17 55/20 shift [1] 13/10 short [2] 54/9 55/15 shorthand [1] 2/9 should [11] 5/14 13/6 17/3 17/14 20/11 23/7 28/1 41/18 46/11 46/12 49/21 shoulders [1] 50/22 shouldn't [4] 3/9 29/11 48/5 51/12 show [1] 44/2 shown [1] 50/25 shows [1] 50/7 side [2] 12/5 34/11 significant [2] 38/23 38/23 silly [1] 33/14 simply [3] 50/23 51/6 52/19 since [4] 3/13 29/2 37/20 45/24 sir [2] 29/25 56/3 sit [1] 55/22 site [1] 14/22 situation [12] 17/12 28/24 33/8 34/7 34/22 41/9 42/12 48/16 48/17 50/21 54/19 54/20 situations [1] 48/15 skills [1] 56/13 slightly [1] 10/6 small [3] 44/10 44/11 44/11 so [54] 3/8 3/25 4/21 5/16 6/13 6/16 7/10 7/11 7/11 7/14 8/12 9/8 9/21 10/13 10/22 11/12 11/17 12/25 14/11 14/14 18/7 18/15 18/22 18/23 19/4 19/9 19/19 20/2 21/5 22/18 22/20 23/2 24/1 24/18 25/14 29/4 33/9 33/13 35/4 36/14 36/22 37/20 38/8 38/11 43/10 43/24 44/16 44/23 46/15 50/21 52/17 54/3 54/15 54/25 SOCOM [1] 6/4 some [9] 5/23 10/16 12/4 16/14 16/22 18/25 42/17 47/6 53/3 somebody [1] 25/24 somehow [1] 53/19 someone [7] 19/4 20/22 21/1 25/18 25/19 38/23 42/3 something [8] 40/10 42/7 44/3 44/14 45/6 47/10 51/13 53/19 somewhat [1] 47/22 son [1] 6/12</p>
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<p>S</p> <p>sons [1] 31/23 soon [1] 56/11 sorry [5] 11/18 13/21 14/18 28/3 47/2 sort [3] 12/11 32/1 34/4 sounds [1] 10/1 source [1] 50/3 speak [1] 42/17 speaking [5] 3/14 3/16 3/18 3/20 3/21 special [11] 6/5 6/18 8/14 10/9 14/21 19/20 20/6 23/22 49/20 50/14 50/16 specific [5] 13/6 18/23 37/4 41/9 45/1 specifically [2] 19/16 21/5 speech [3] 6/25 13/3 54/14 spend [1] 9/18 spin [1] 54/7 SPITZER [2] 1/17 3/4 spread [1] 32/7 squarely [1] 31/25 stage [2] 45/7 46/8 standard [4] 54/6 54/7 55/4 55/11 standards [12] 31/10 31/11 31/14 34/21 35/2 35/5 36/7 37/10 37/11 41/15 41/17 51/9 standing [5] 9/13 9/16 9/17 14/20 23/21 Stanley [2] 49/3 49/4 start [3] 22/19 43/11 43/17 Starting [1] 52/25 state [4] 34/4 39/18 54/19 54/20 stated [2] 47/22 57/6 statement [2] 39/4 54/25 statements [2] 9/15 19/1 states [29] 1/1 1/11 2/6 9/19 12/4 12/19 12/24 18/6 19/22 20/2 20/21 20/22 21/9 23/14 25/11 25/19 25/20 29/1 29/17 32/3 33/16 33/16 33/18 40/8 44/8 50/25 52/10 54/19 57/4 status [2] 25/22 39/1 statute [2] 10/5 28/9 statutory [2] 18/19 23/9 stenographic [1] 57/4 sticking [1] 10/8 still [15] 15/10 18/3 19/5 19/13 20/15 26/12 36/5 36/17 38/17 41/13 41/13 41/16 52/15 55/18 55/19 stop [1] 8/12 store [1] 54/3 strangely [1] 54/2 Street [1] 1/16 stretch [1] 48/3 strike [18] 7/22 8/3 8/25 14/9 14/9 16/25 17/2 17/2 17/3 19/8 40/1 40/11</p>	<p>46/18 46/21 53/23 54/10 54/13 55/8 strikes [7] 8/4 19/17 19/17 21/7 31/3 46/25 47/2 strong [1] 25/3 structure [2] 25/3 25/4 student [2] 5/10 5/11 studying [1] 56/10 subject [3] 21/18 31/5 38/13 submit [1] 49/23 successful [1] 40/11 such [5] 9/5 27/3 35/20 44/16 48/22 suffer [1] 33/19 sufficiently [1] 53/17 suggest [1] 48/5 suing [1] 53/21 suit [1] 50/10 Suite [1] 1/19 summary [1] 42/8 supervisory [1] 49/12 suppose [1] 54/12 suppositions [1] 21/24 Supreme [9] 11/1 17/16 18/11 22/9 33/22 48/5 49/15 49/18 52/4 sure [5] 4/1 5/16 15/11 19/11 27/9 surprised [1] 15/18 surveillance [2] 51/3 52/7 suspension [1] 18/13 Swiss [3] 12/4 12/5 33/15 Switzerland [8] 12/1 12/2 12/4 12/7 33/13 33/14 33/16 43/15 system [1] 13/17</p>	<p>targeting [4] 19/18 20/22 21/7 21/19 targets [1] 36/10 teenager [1] 30/18 telling [3] 27/22 46/3 51/12 tells [1] 51/11 term [1] 18/14 terms [4] 4/16 19/15 53/6 54/3 terrible [1] 12/6 terrorist [1] 39/19 test [7] 34/24 34/25 35/1 36/9 36/17 37/22 40/20 testify [1] 18/5 tests [1] 38/8 text [1] 13/3 textual [2] 32/22 39/10 textually [1] 7/10 than [2] 8/23 39/4 thank [17] 4/23 4/24 5/8 5/19 29/25 30/1 42/19 42/20 43/7 51/14 51/15 52/21 52/22 56/3 56/4 56/5 56/12 that [406] that's [36] 4/13 4/15 5/15 6/1 8/10 10/16 10/19 11/24 15/13 15/25 18/8 20/12 22/9 22/20 24/4 25/7 25/10 26/10 27/22 28/9 28/17 29/13 29/14 31/14 34/11 34/12 35/9 36/21 40/15 41/17 41/24 42/12 44/13 47/24 48/16 53/8 their [27] 7/11 7/16 10/17 12/9 17/21 19/5 20/10 21/1 21/16 27/14 31/20 31/23 33/17 34/23 35/3 37/17 41/1 41/17 42/10 44/14 47/7 47/15 52/13 53/4 53/7 54/19 54/20 them [13] 8/11 8/19 9/15 11/18 18/6 20/11 22/19 24/22 27/24 28/17 48/10 48/10 48/12 themselves [1] 33/19 then [12] 3/19 4/25 5/11 7/18 12/7 14/5 14/8 23/2 30/7 45/16 47/16 51/11 theoretical [1] 14/15 theory [1] 26/5 there [69] there's [19] 6/13 8/18 13/19 14/5 15/14 19/1 20/19 22/12 22/19 24/6 25/2 27/24 29/15 31/4 31/10 32/6 39/21 45/4 53/13 therefore [5] 8/6 8/16 31/4 33/19 55/9 these [31] 5/23 8/14 9/14 11/3 14/12 16/1 17/3 17/8 17/13 17/19 17/21 18/3 18/10 19/5 22/15 24/4 24/22 27/16 30/25 31/2 31/8 33/12 38/7 38/10 46/13 48/6 53/14 53/18 54/4 54/16 54/21</p>
	<p>T</p> <p>table [1] 5/6 tag [1] 5/17 take [7] 4/5 4/7 11/21 25/8 30/7 46/20 47/10 taken [9] 12/18 24/6 33/18 47/20 47/21 51/1 52/11 57/5 57/9 taking [1] 43/24 talk [6] 8/3 18/25 21/13 22/1 52/17 56/9 talked [2] 9/14 53/14 talking [29] 7/25 8/2 15/5 15/22 17/11 17/11 17/24 22/15 23/8 23/11 24/21 25/10 26/8 26/25 27/11 27/12 28/9 29/8 34/3 34/4 34/6 34/7 35/4 38/2 38/5 38/8 40/19 43/11 44/3 talks [4] 11/1 18/1 24/14 26/14 target [14] 7/23 14/7 15/8 21/1 22/9 22/10 22/12 35/23 35/25 36/2 36/3 36/3 36/15 37/5 targeted [18] 9/19 9/21 9/24 11/12 13/7 19/3 19/4 19/8 19/16 20/2 20/9 20/21 21/2 21/5 21/6 21/9 22/11 29/1</p>	

<p>T</p> <p>they [85] they're [14] 12/3 14/20 17/21 22/18 27/10 30/10 38/3 38/4 38/6 41/17 41/18 41/25 42/2 56/13 They've [2] 12/18 12/19 thicket [1] 26/18 thing [8] 4/21 18/10 24/8 25/10 26/3 29/3 51/11 55/1 things [5] 8/14 9/14 17/23 38/12 53/11 think [39] 4/19 6/10 6/11 6/13 8/18 10/1 11/25 12/6 12/10 12/17 12/23 12/25 13/2 14/2 15/17 15/19 19/6 19/16 20/2 20/14 20/18 23/5 25/2 26/15 27/18 32/6 33/22 34/1 38/11 39/15 39/22 43/16 44/20 46/4 47/22 48/8 53/20 55/6 55/10 thinking [1] 56/10 thinks [1] 13/4 third [1] 25/6 this [84] those [33] 7/19 8/4 11/10 16/23 17/6 19/16 19/17 20/13 20/15 20/25 21/7 21/18 22/1 22/8 22/11 24/19 27/21 35/2 37/19 38/20 38/21 39/10 41/23 42/3 44/2 47/16 48/12 49/2 49/10 49/13 54/12 55/16 55/18 though [6] 13/3 34/1 36/2 37/7 49/14 53/21 thought [1] 47/1 threat [13] 9/5 10/16 10/22 16/19 17/20 25/18 25/19 34/25 38/25 39/25 40/2 44/22 45/1 threats [1] 44/22 three [5] 25/4 38/7 46/25 47/2 51/3 through [16] 7/4 8/24 11/6 11/7 11/7 11/16 15/15 16/14 18/13 21/10 21/12 21/23 42/4 44/10 53/15 55/18 throughout [1] 43/8 tie [1] 17/5 tied [3] 16/1 16/1 26/4 time [14] 4/15 4/17 9/18 14/20 31/15 42/18 46/16 46/23 47/4 47/7 47/10 51/1 53/10 57/5 today [1] 9/18 today's [1] 47/24 together [1] 27/9 told [1] 24/25 too [4] 20/23 47/17 47/22 47/23 took [1] 30/25 tools [1] 45/9 top [2] 6/14 47/14 tort [4] 9/25 10/2 23/24 39/11 towards [1] 6/19</p>	<p>traditional [1] 44/10 tragic [1] 35/19 transcript [3] 1/10 2/9 57/3 transcription [1] 2/10 travel [1] 16/7 trepidation [1] 45/19 trouble [2] 36/24 36/25 troubled [2] 27/18 27/19 troubling [1] 28/22 true [4] 50/6 51/11 51/12 57/2 try [4] 8/19 52/24 56/8 56/11 trying [8] 15/6 34/8 34/10 34/14 42/25 43/4 43/17 44/1 turn [4] 5/16 7/15 29/16 30/6 turning [2] 8/25 31/16 two [13] 3/14 3/17 4/20 19/10 20/9 20/13 20/24 36/12 39/25 47/1 47/2 53/22 55/10</p>	<p>unsuccessful [1] 40/2 unusual [3] 24/1 24/15 48/3 up [13] 10/2 11/6 12/18 13/25 16/13 19/25 22/7 25/24 27/5 33/18 39/6 42/18 44/1 us [4] 13/10 16/8 25/9 45/3 use [6] 31/5 31/11 31/22 35/23 44/25 54/1 used [2] 37/3 37/5 uses [2] 31/11 38/14</p>
<p>U</p> <p>U.s [27] 2/3 8/1 8/2 8/3 9/1 9/21 9/22 12/24 13/7 18/24 19/5 19/12 19/23 20/20 22/24 23/3 23/11 25/22 26/19 29/1 29/16 32/4 32/5 39/14 47/18 48/22 49/25 ultimately [4] 9/13 9/14 23/19 30/24 unclear [2] 15/3 38/1 unconstitutional [2] 21/19 49/17 under [10] 10/2 23/24 28/8 31/20 36/8 37/12 44/23 48/3 48/7 49/3 underscore [1] 30/24 understand [21] 3/14 6/15 14/4 15/2 15/3 15/5 15/9 15/21 19/6 22/22 25/15 26/6 26/7 26/10 29/13 29/18 36/25 41/11 42/6 51/7 56/7 understanding [2] 15/15 15/19 understood [1] 42/5 unending [1] 45/10 unfortunate [1] 20/10 unilaterally [1] 25/21 unintended [4] 35/16 35/18 35/19 35/20 Union [2] 1/15 1/18 UNITED [28] 1/1 1/11 2/6 9/19 12/4 12/18 12/24 18/6 19/22 20/1 20/21 20/21 21/9 23/14 25/11 25/19 25/20 29/1 29/17 32/3 33/16 33/16 33/18 40/7 44/8 50/24 54/19 57/4 University [2] 6/25 13/3 unlawful [1] 52/6 unless [3] 4/15 6/6 6/9 unmanageable [1] 39/23 unreasonable [4] 35/24 36/12 36/13 37/9</p>	<p>V</p> <p>variety [1] 50/19 various [1] 32/5 vary [2] 20/20 21/11 versus [3] 3/3 4/17 39/10 very [27] 6/14 12/3 15/22 18/5 19/19 20/3 20/18 24/1 24/14 24/14 24/17 25/3 26/2 26/4 28/22 37/14 41/8 42/4 42/6 46/13 46/20 46/24 52/21 52/24 54/25 56/12 56/13 victim [5] 35/16 35/16 35/18 35/19 35/20 view [2] 36/10 49/1 views [1] 47/7 vindicated [2] 41/24 48/21 violated [4] 21/17 31/24 42/4 52/16 violation [2] 27/12 53/6 virtually [2] 48/12 52/18 votel [2] 5/22 6/3</p>	
		<p>W</p> <p>wait [2] 19/21 26/17 walk [2] 21/12 21/23 want [10] 3/7 16/7 17/19 18/25 20/9 26/18 42/1 43/20 53/2 53/4 wanted [2] 30/5 30/24 war [11] 11/23 12/1 12/2 12/2 12/3 31/20 32/4 33/23 34/3 42/7 42/12 warrants [1] 9/5 was [65] Washington [4] 1/5 1/19 2/4 2/7 wasn't [3] 8/25 36/2 36/3 water [1] 6/14 waterman [1] 11/1 way [7] 10/24 11/10 13/25 16/4 18/8 22/16 22/17 ways [2] 45/11 46/2 we [89] we'll [1] 23/12 we're [38] 3/10 4/22 7/25 12/1 12/3 12/19 17/11 17/11 20/6 25/10 26/3 26/3 26/5 26/22 27/11 27/12 28/9 29/8 33/7 33/8 34/3 34/4 34/6 34/7 34/11 34/12 35/4 35/10 37/25 38/7 39/25 40/18 41/8 41/9 42/7 44/3 51/19 54/3 we've [1] 55/11 weeks [1] 51/3</p>

<p>W</p> <p>weighty [1] 10/6 well [28] 3/7 4/19 6/9 10/4 12/9 12/17 13/4 13/13 14/1 15/14 19/4 19/21 20/10 22/18 23/8 24/2 24/22 24/23 26/13 32/25 36/19 37/13 40/1 40/15 41/3 42/15 42/16 47/19 went [3] 33/16 33/17 42/4 were [55] 5/25 8/2 9/1 11/23 16/22 17/7 19/17 19/18 20/9 20/10 21/2 21/4 21/5 21/6 21/6 21/7 21/9 21/18 21/23 22/11 22/15 23/6 31/3 31/14 33/17 36/16 38/1 39/11 39/11 39/17 39/18 39/22 40/8 42/4 42/6 42/6 42/12 44/16 46/17 48/2 48/14 48/19 48/24 48/24 48/25 49/2 49/2 49/3 52/3 53/18 54/6 54/9 54/22 55/7 56/8 WERNER [2] 2/2 3/6 what [47] 4/7 8/6 8/9 8/12 8/15 10/11 10/13 11/22 15/6 16/12 16/19 16/20 16/22 16/24 17/2 20/5 20/12 20/12 25/1 25/10 27/22 28/9 28/17 29/16 29/22 31/10 34/3 35/15 37/22 37/22 37/23 38/1 38/13 41/20 41/24 44/3 45/14 46/4 46/7 46/9 46/17 46/17 47/5 49/14 53/16 54/4 54/11 what's [2] 24/25 37/20 whatever [1] 28/21 when [30] 5/16 7/5 7/20 9/21 11/2 13/23 14/20 16/20 17/21 17/25 20/21 21/1 25/24 28/6 29/6 33/4 37/3 37/5 37/25 38/1 40/18 41/14 44/25 45/12 48/2 51/8 52/17 52/17 54/1 55/3 where [36] 7/21 8/12 9/3 11/19 13/9 13/18 15/6 15/12 17/3 17/12 17/16 18/11 18/12 18/13 18/20 18/22 19/8 22/4 22/7 24/25 25/23 27/2 27/6 27/20 29/15 29/21 42/13 44/13 44/14 44/17 45/4 45/24 46/23 50/9 52/9 52/12 wherever [3] 16/7 16/8 44/12 whether [48] 8/25 9/1 9/3 10/15 10/22 11/14 11/15 12/14 19/19 20/19 20/20 21/22 21/25 22/15 22/19 24/13 25/21 26/23 26/23 26/25 27/16 28/1 31/13 31/22 32/11 32/12 32/13 32/15 32/21 34/25 35/1 35/7 35/22 36/6 37/8 37/8 38/22 38/23 42/3 46/15 49/20 51/24 52/15 53/2</p>	<p>53/19 54/9 54/22 55/24 which [23] 7/3 9/9 13/1 17/23 18/20 21/24 23/17 23/19 25/5 29/1 31/1 31/21 32/16 33/22 42/7 43/25 45/23 46/20 49/25 50/16 51/21 53/16 57/8 while [2] 20/10 56/8 white [7] 31/7 31/11 32/19 34/24 37/17 41/1 45/2 who [28] 3/20 5/3 6/12 8/2 8/14 9/4 10/14 18/20 18/21 19/15 19/24 19/24 20/9 22/8 22/24 24/6 24/23 25/19 29/15 30/2 33/5 36/14 43/14 48/24 48/24 49/1 52/5 54/2 who's [1] 5/9 whole [1] 6/13 whom [3] 12/19 30/15 51/25 whose [1] 49/5 why [7] 6/17 6/17 19/9 29/11 30/19 42/17 47/16 will [9] 3/14 4/2 11/25 14/1 29/5 30/7 51/22 56/9 56/11 willfully [2] 37/4 37/5 window [1] 16/20 within [3] 7/11 24/2 32/12 without [13] 8/16 12/24 13/5 13/7 15/8 17/25 23/14 28/21 30/12 30/19 30/21 50/2 52/18 won't [1] 24/6 wonder [1] 51/17 words [1] 42/9 work [6] 5/12 5/13 5/15 24/23 27/9 43/18 works [1] 3/25 world [7] 25/18 25/19 32/4 32/5 33/23 34/3 44/12 worlds [1] 54/3 would [82] wouldn't [1] 36/3 wrong [4] 15/4 19/22 30/10 30/16 wrongdoing [1] 51/25 wrongs [2] 33/20 50/9</p> <p>Y</p> <p>Yeah [1] 12/16 year [6] 30/14 30/16 35/19 35/23 49/16 51/25 years [2] 39/25 51/2 yelled [1] 25/6 Yemen [2] 32/8 56/1 Yemeni [1] 54/18 yes [6] 5/18 24/10 27/20 28/8 36/23 43/3 yet [1] 5/4 York [2] 1/16 1/23 you [167] you're [25] 5/16 8/2 8/6 8/9 8/11 10/13 10/17 15/5 15/13 15/25 16/7 16/8 22/23 23/8 26/8 26/11 27/22 29/9 29/11 29/12</p>	<p>33/4 36/22 41/10 42/2 42/24 young [1] 15/11 younger [2] 19/2 20/24 your [134]</p> <p>Z</p> <p>zealous [1] 52/13</p>
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