

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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SUHAIL SHARABI (ISN 569),	:	
ABDULLATIF NASSER (ISN 244), <i>et al.</i> ,	:	
	:	
Petitioners,	:	
	:	Civil Action No. 05-cv-764-CKK
v.	:	Judge Colleen Kollar-Kotelly
	:	
DONALD TRUMP, <i>et al.</i> ,	:	
	:	
Respondents.	:	
	:	
_____	X	

PETITIONER NASSER’S REPLY TO RESPONDENT’S RESPONSE (DKT. #330)

Petitioner, **ABDULLATIF NASSER (ISN #244)**, by and through his Attorneys, **THOMAS ANTHONY DURKIN, BERNARD E. HARCOURT, and MARK MAHER**, in reply to Respondent’s Response to Petitioner Nasser’s Supplemental Brief Modifying His Position in the Ongoing Litigation in Light of the D.C. Court of Appeals’ Opinion in *Ali v. Trump*, filed on November 23, 2020, (Dkt. #330), hereby states as follows:

I. LAW-OF-WAR DETENTION MUST BE TETHERED TO THE DETAINEE’S RISK OF RETURNING TO THE BATTLEFIELD

Respondent argues, as it has done so for almost twenty years now, that Nasser’s detention remains lawful, so long as hostilities against al-Qaeda, the Taliban, and associated forces are ongoing. Respondent appears to contend as well that the threat of a detainee returning to the field of battle is wholly irrelevant to the arbitrariness and legality of their detention at Guantanamo. Respondent’s Response to Petitioner Nasser’s Supplemental Brief Modifying His Position in the

Ongoing Litigation in Light of the D.C. Court of Appeals’ Opinion in *Ali v. Trump* (Dkt. #330) (“Gov’t Response”) at 9, 11, 15.

Respondent’s position that the legality of Guantanamo detention relies principally and exclusively on ongoing hostilities and a one-time determination of enemy combatant status is dangerous, unconstitutional, and contrary to the D.C. Circuit’s opinion in *Ali v. Trump (Ali III)*, 959 F.3d 364 (D.C. Cir. 2020). Respondent cites *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010), *Almerfed v. Obama*, 654 F.3d 1, 4 n.3 (D.C. Cir. 2011), and *Al-Alwi v. Trump*, 901 F.3d 294, 297 (D.C. Cir. 2018), for the proposition that continued detention is lawful so long as hostilities remain ongoing, Gov’t Response at 1–2, 13–15. Yet, Respondent fails to square those opinions with the reasoning of *Ali III*, the impetus behind counsels’ filing of this Supplemental Brief in the first place. In making the sweeping claim that continued detention need not serve the underlying purpose of law-of-war detention, Respondent omits key language in the D.C. Circuit’s opinions that tailors executive law-of-war detention to the narrow and specific purpose of “prevent[ing] captured individuals from returning to the field of battle and taking up arms once again.” *Ali III*, 959 F.3d at 370 (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (“The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.” (citation omitted))); *Al-Alwi*, 901 F.3d at 297–98); *see also Ali v. Obama (Ali II)*, 736 F.3d 542, 545 (D.C. Cir. 2013) (“The purpose of military detention is to detain enemy combatants for the duration of hostilities so as to keep them off the battlefield and help win the war.”). What the higher courts’ precedents hold is that the duration of hostilities simply sets the outer limit of permissible detention; but Guantanamo detention must nonetheless be tethered to the underlying purpose of incapacitating enemy belligerents, as required by the Authorization for Use of Military Force (“AUMF”), Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001) (“[T]he President is

authorized to use all necessary and appropriate force . . . *in order to prevent any future acts of international terrorism against the United States . . .*” (emphasis added)).

And even as *Ali III* held that the lengthy duration of Abdul Razak Ali’s detention did not violate substantive due process, the panel carefully reasoned that the PRB had reviewed Ali’s detention at least eight times. 959 F.3d at 370–71. The *Ali III* panel found material that the PRB “ha[d] recommended continued detention because of the threat his release would pose[,]” *id.* at 370, and thus placed the detainee’s enemy combatant status as a primary inquiry in considering the legality of continued detention. PRB review is a strong indicator of whether enemy combatant status continues to attach to Guantanamo detainees because such review is the only procedural mechanism available to them short of full-on habeas corpus review. Thus, as *Ali III* and other precedential Circuit opinions make clear, ongoing hostilities during the duration of detention is more properly understood as one, rather than the only, necessary condition for Guantanamo detention, with incapacitation serving as the pervading purpose of such detention.

Respondent points out that the AUMF may allow the detention of enemy combatants for the duration of hostilities, full stop. Gov’t Response at 13–14 (citing *Ali III*, 959 F.3d at 370; *Alwi*, 901 F.3d at 297). But taken to its logical conclusion, Respondent’s position would allow for endless detention and possibly even civilian detention because, without PRB review or habeas corpus review, there is no meaningful opportunity to revisit a Guantanamo detainee’s combatant status.¹ It simply cannot be that once a person is deemed to be an enemy combatant, that initial status determination remains categorically and limitlessly true without any subsequent review of the factual and legal bases of such a determination. PRB review provides such an opportunity to

¹ Notwithstanding the absurdity of this proposition, government counsel told Judge Hogan in oral argument on the “Mass Petition” exactly that, in response to Judge Hogan’s question about whether the government believed it could hold these men for the duration of the Hundred Years’ War between France and England. See Transcript of Oral Argument, *Anam et al., v. Trump, et al.*, (D.C. Cir. 2018), pp. 36-37, attached hereto as Exhibit A.

reassess enemy combatant status. *Al Hela v. Trump*, 972 F.3d 120, 152 (D.C. Cir. 2020) (Griffith, J., concurring in part and concurring in judgment) (“[T]he Executive Branch has reviewed Al Hela’s detention no less than eight times, each time reaffirming that he represents ‘a continuing significant threat to the security of the United States[,]’ . . . repeatedly [finding] that Al Hela’s detention continues to serve this preventive purpose[.]” (citations omitted)).

Undersigned counsel for Nasser submit that the PRB’s determination, while not fully determinative of the legality of continued detention, is strong evidence regarding the legality of a detainee’s continued detention. Thus, when a PRB determines that any risk of further hostile acts is mitigable by reasonable security assurances, and when those security assurances are met as they have been here, the Executive Branch for all intents and purposes should lose its presumption that continued detention is justified. Put another way, in the “Forever War” in which Nasser finds himself, a final Executive Branch finding that a Guantanamo detainee no longer presents a meaningful threat of returning to the battlefield should rebut the ridiculous proposition that the government may detain someone forever.

To find evidence that Nasser’s ongoing detention is arbitrary, the Court need look no further than the results of the very process that the Government purports to rely upon. *See* Respondents’ Opposition to Petitioners’ Motion for Granting Writ of Habeas Corpus (“Gov’t Response Opposing Mass Petition”) at 24 (stating that the Government “does not have an interest in detaining enemy combatants longer than necessary, which is why it has reviewed, and continues to review, whether individual Guantanamo detainees need to remain detained”). Even if the Government had some level of discretion in its administration of law-of-war detention, that discretion has to be confined to the purpose of preventing detainees from returning to the battlefield. As Nasser’s detention continues to stretch on, the Government faces an increased

burden to demonstrate that its actions fit within these lawful boundaries. *See Rasul v. Bush*, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring) (“[A]s the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.”). As the PRB process developed by the Executive Branch has already made clear, any potential law-of-war purpose has “unravel[ed]” in the many years since Nasser’s initial detention. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004). The PRB recognized this unraveling of any law-of-war purpose in 2016, when it made its recommendation of Nasser’s transfer. *See* Exhibit B, Unclassified Summary of Final Determination. Nasser’s detention is thus arbitrary not only because it is untethered to a legitimate law-of-war purpose, but because it is also inconsistent with the stated purpose of the Government’s PRB process and with the way the Government has implemented the PRB process with past transferees.

II. *ALI III* STRONGLY SUGGESTED THAT A FAVORABLE PRB DETERMINATION SERVES AS A BASIS FOR NASSER TO CHALLENGE HIS CONTINUED DETENTION UNDER THE SUSPENSION AND DUE PROCESS CLAUSES

Respondent asks this Court to disregard the measured carve-out of footnote 4 in the *Ali III* opinion and to hold that neither PRB review nor enemy combatant status play any role in evaluating a Guantanamo detainee’s Due Process or Suspension challenge. Gov’t Response at 15–20. Respondent’s position, like its other positions, is inconsistent with D.C. Circuit precedent and with the position the Government has advanced in previous challenges to Guantanamo detention.

Nasser’s arguments for relief under the Suspension Clause and Due Process Clause are directly responsive to *Ali III*. The *Ali III* Court pointedly noted that its decision does not “present the question of what protections might apply to a detainee whom the [Periodic Review] Board has determined to be suitable for release, yet who continues to be detained,” 959 F.3d at 371 n.4, which is Nasser’s exact circumstance. Respondent downplays this statement by the Court, arguing that

it should not affect the adjudication of Nasser's claims. Gov't Response at 12. However, Respondent's reading away of the footnote cannot be accepted because it would render the Court's careful carve-out in footnote 4 meaningless. The *Ali III* panel went out of its way to note that its fact-specific analysis—however purportedly rooted in Circuit precedent—did not answer the question of what constitutional protections might be due to a petitioner who, like Nasser, has been cleared for release by the PRB yet continues to be detained at Guantanamo. It would have been unnecessary for the *Ali III* Court to note this exception unless, at minimum, it implicitly meant to invite further argument from detainees in Nasser's position on the very open question of the extent to which PRB determinations affect the constitutional rights of Guantanamo detainees. Even if the carve-out was unnecessary to the opinion's holding, the Court's intentional disclaimer shows that the *Ali III* panel considered PRB review as an important factor in the analysis of the constitutional protections due to detainees. In considering those protections due to Nasser, the *Ali III* panel's obvious concern and its analytical approach mean that the habeas challenge presented by the Supplemental Brief must be given its proper weight.

Respondent argues that PRB review does not render Nasser's continued detention arbitrary and points to the discretionary nature of the PRB process. Gov't Response at 15–16. Respondent's argument misses the point. PRB review need not be the sole or even principal determinant of arbitrariness. Rather, a favorable PRB determination must be viewed as evidence that Nasser's detention has strayed from the underlying original purpose of law-of-war detention—preventing enemy belligerents from returning to the battlefield.

This position is consistent with the reasoning of *Ali III*, which affirmed the denial of Ali's petition for habeas corpus, in part, because he lacked “ground to stand on in claiming that time has dissipated the threat he poses.” 959 F.3d at 370. Specifically, the D.C. Circuit reasoned that the

PRB reviewed “Ali’s detention no less than eight times[,]” each time determining that detention was warranted in his case. *Id.* at 370–71. In other words, *Ali III* weighed unfavorable PRB determinations as aggravating factors in determining whether the Due Process Clause afforded him any greater procedural or substantive protections than those already extended to him at the time. Thus, consistent with the Court’s holding in *Ali III*, what’s good for the goose is good for the gander. This Court should and constitutionally must, it is submitted, weigh Nasser’s PRB recommendation of transfer as a critical determining factor towards granting the rightful relief he seeks. To reason otherwise would render PRB review empty and meaningless, in contravention to the reasoning of *Ali III*, not to mention that it would make a mockery of any meaningful sense of justice for someone detained without charges by this country for going on twenty years.

Further, Respondent’s argument that a favorable PRB decision holds no weight when analyzing a detainee’s constitutional protections is inconsistent with the Government’s past arguments, which have relied heavily on PRB recommendations. The Government encouraged the *Ali III* Court’s reliance on PRB recommendations by emphasizing that unfavorable PRB determinations show that Ali’s detention was not “arbitrary.” Brief for Respondents in *Ali v. Trump* (“Gov’t Brief in *Ali III*”) at 21. The Government stated that the Executive decided not to transfer Ali because it “determined through multiple periodic reviews that petitioner poses a continuing and significant threat to the security of the United States.” *Id.* at 22. And the Government’s reliance on PRB review extends beyond *Ali III*. In its brief opposing a mass petition for habeas corpus from a group of detainees including both Ali and Nasser, the Government similarly emphasized its reliance on the PRB process, noting that it “does not have an interest in detaining enemy combatants longer than necessary, which is why it has reviewed, and continues to review, whether individual Guantanamo detainees need to remain detained.” Gov’t Response

Opposing Mass Petition at 24. Instead of sticking to this sensible policy, the Government has left Nasser in what Judge Hogan astutely called a “Catch-22” “no-man’s land.” *See* Ex. A, Transcript of Oral Argument, *Anam et al., v. Trump, et al.*, (D.C. Cir. 2018), p. 31. It is directly contradictory to the Government’s previous position, and thus arbitrary, for Respondent to switch course now and argue that Nasser’s favorable PRB recommendation holds no weight.

And when the Government seeks to strike a favorable PRB determination as irrelevant to determining the legality of continued detention, as the Government has argued in Nasser’s case, it effectively tells Guantanamo detainees: “Heads I win; tails you lose.” The Government cloaks this Catch-22, lose-lose scenario under the guise of “discretion,” only ever applying that discretion when it favors prolonged detention without proper regard for the weighty constitutional interests at stake in Guantanamo detention. Thus, the Court should find that Nasser’s favorable PRB determination is, in fact and in law, a basis for determining the legality of his continued detention.

III. AL HELA STANDS ON SHAKY GROUND

Respondent justifies the categorical dismissal of Nasser’s, and all the detainees’, due process rights by pointing to the D.C. Court of Appeals’ recent decision in *Al Hela*, referring to it as “the current law of the Circuit.” Gov’t Response at 18. However, *Al Hela* is inconsistent with prior established D.C. Circuit precedent. While it may represent the view of that panel’s majority, it does not, cannot, and should not represent the law of the Circuit.

In *Qassim v. Trump*, 938 F.3d 522, 530 (D.C. Cir. 2019), the D.C. Circuit emphasized that constitutional protections for Guantanamo detainees may be housed in “the Fifth Amendment’s Due Process Clause, the Suspension Clause, both, or elsewhere.” The D.C. Circuit has consistently assumed that some due process protections may apply at Guantanamo. *See, e.g., Ali III*, 959 F.3d

at 369; *Aamer v. Obama*, 742 F.3d 1023, 1039 (D.C. Cir. 2014); *Al-Madhwani v. Obama*, 642 F.3d 1071, 1077 (D.C. Cir. 2011).

In *Al Helá*, “Judge Rao and Judge Randolph transformed their minority view of the application of the Due Process Clause at Guantanamo into binding circuit precedent.” Petition by Petitioner-Appellant Al Helá for Rehearing *En Banc* by the D.C. Court of Appeals in *Al Helá v. Trump* (“Petition for Rehearing *En Banc* in *Al Helá*”) at 7. Judge Rao joined a dissent to the D.C. Circuit Court of Appeals’ denial of rehearing *en banc* in *Qassim*, arguing that the Due Process Clause does not apply at Guantanamo. Petition for Rehearing *En Banc* in *Al Helá* at 7. Judge Randolph was similarly critical of the Circuit’s assumption that the Due Process Clause may apply in his concurrence in *Ali III*. Petition for Rehearing *En Banc* in *Al Helá* at 7.

Al Helá forgoes judicial restraint to impose a far-reaching and unnecessary constitutional decision that is inconsistent with D.C. Circuit precedent. See *Al Helá*, 772 F.3d at 143 (Griffith, J., concurring in part and concurring in judgment) (“It is considerably more restrained to apply our established precedents to Al Helá’s narrow claims than it is to make sweeping proclamations about the Constitution’s application at Guantanamo.”). With a petition for rehearing *en banc* still being considered by the D.C. Court of Appeals, *Al Helá* is a slender reed on which to lean.

IV. CONCLUSION

For the foregoing reasons, this Court should grant Petitioner Nasser’s motion for immediate release; or at a minimum delay any decision on the Petition until after the Court of Appeals decides the *en banc* petition in *Al Helá*.

Counsel would also suggest that it might be prudent, from a judicial economy standpoint, to consider delaying any decision on Nasser’s supplemental brief until the Biden Administration can weigh in on this dilemma. Since the Obama Administration believed the Trump

Administration's Department of Defense would act in good faith on Nasser's release, perhaps another Administration might.

Dated: December 21, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Thomas Anthony Durkin, Attorney at Law, hereby certifies that the foregoing was served on December 21, 2020, in accordance with Fed.R.Civ.P.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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SUHAIL ABDU ANAM, et al., CA No. 1:04-cv-01194

Petitioners, Washington, D.C.
v. Wednesday, July 11, 2018
11:00 a.m.

DONALD J. TRUMP, et al.,
Respondents.

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TRANSCRIPT OF ORAL ARGUMENT
HELD BEFORE THE HONORABLE THOMAS F. HOGAN
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

1
2 THE DEPUTY CLERK: Your Honor, this morning, this
3 is in re: Suhail Abdu Anam, et al., v. Donald J. Trump, et
4 al., Civil Action No. 04-1194.

5 I ask the parties to step forward; identify
6 yourselves for the record, please.

7 THE COURT: Starting with petitioners, please.

8 MR. AZMY: Good morning, Your Honor. Baher Azmy,
9 A-Z-M-Y --

10 THE COURT: You've got to get to this mic up here,
11 please.

12 MR. AZMY: Good morning, Your Honor. Baher Azmy,
13 A-Z-M-Y, from the Center for Constitutional Rights. At
14 counsel table, I'm joined by my -- for Petitioner Sharqawi
15 Al Hajj, and with the consent of all counsel, will be
16 appearing for the eight petitioners that have been
17 consolidated before Your Honor. At counsel table with me
18 for Petitioner Sharqawi Al Hajj are Pardiss Kebriaei and
19 Shayana Kadidal; and for Petitioner Tofiq Al-Bihani, a
20 cleared detainee, George Clarke; and for Petitioner Abdu
21 Latif Nasser, another cleared petitioner, Thomas Durkin.

22 THE COURT: All right. Thank you. I appreciate
23 it.

24 MR. WILTSIE: Good morning, Your Honor. For the
25 Government, Ronald Wiltsie, and with me at counsel table is

1 Terry Henry.

2 THE COURT: All right. Thank you.

3 All right. We're gathered today. There are, on
4 line -- on the phone line, several other counsel who are
5 appearing in these cases. They can introduce themselves.
6 Additionally, there are three other counsel representing
7 other detainees not before me today. They're listening to
8 the argument, as the public can listen to the argument. But
9 those who are appearing today for various individuals before
10 me can introduce themselves, please, for the record.

11 MS. RAYNER: Hi. Martha Rayner. This is Martha
12 Rayner, appearing on behalf of Defendant Al Kazimi.

13 THE COURT: Okay. Would you spell your name. We
14 can't -- the sound is not very good for us here.

15 MS. RAYNER: Certainly. It's R-A-Y-N-E-R.

16 THE COURT: Okay.

17 MS. RAYNER: First name is Martha.

18 THE COURT: All right. Thank you, Ms. Rayner.

19 Next, please.

20 MR. KILLMER: Good morning, Your Honor. This is
21 Darold Killmer, K-I-L-L-M-E-R, in Denver, Colorado, with
22 Killmer, Lane & Newman, on behalf of Petitioner Suhail Anam
23 Sharabi, ISN 569.

24 THE COURT: All right. Thank you.

25 MR. HOLLAND: And John Holland on behalf of Abdul

1 Rabbani, Your Honor, from Denver, Colorado, also.

2 THE COURT: All right. Thank you.

3 All right. Today, we have the motions for an
4 order granting writ of habeas corpus.

5 Is there any other counsel I haven't heard from
6 who are actually representing parties before me on the
7 phone?

8 MS. SULLIVAN-BENNIS: Yes. Sorry, Your Honor.
9 This is Shelby Sullivan-Bennis representing Ahmed Rabbani,
10 Abdul Malik Bajabu and Tofiq Al-Bihani.

11 THE COURT: All right. All right. Thank you.

12 The order requested for grant of writ of habeas
13 corpus and it's a -- contains a -- upon my review, multiple
14 challenges for these group of habeas petitioners about --
15 they're raising issues as to the constitutional
16 considerations of due process applying to these petitioners
17 more than they've had; and raising issues as to the
18 individual cases and their status, particularly at the
19 prolonged detention without end; and, finally, as to the
20 procedures the courts have used here -- this court -- since
21 the beginning of these cases under our orders as to how the
22 trials will be conducted in habeas corpus hearings with the
23 presumptions for the -- and the evidentiary rulings that
24 have been made.

25 So we'll hear from the petitioners first as to

1 these matters with the Government to respond and then a
2 reply brief.

3 Additionally, I'd had a request of oral
4 accessibility by the petitioners themselves in Guantanamo
5 that just recently came in. It was impractical to arrange
6 that in such short notice to have all the petitioners moved
7 and brought to a room where there was ability to hear these
8 arguments. The Government has indicated and I have agreed
9 that they will be having either a playback of this argument
10 for them each to be played or they will have a transcript of
11 these arguments made available to them properly translated
12 for their consideration so that they can understand the
13 proceedings we're in today.

14 And so with that, I'm ready to proceed with these
15 matters. I have had a chance to read all the briefing
16 materials submitted by the Government, as well.

17 And I'll start with Mr. Azmy, then.

18 MR. AZMY: Thank you, Your Honor.

19 Before I get into the details of the due process
20 and AUMF argument, I'd like to offer a brief overview of
21 where we stand now after 16 years which is that all of these
22 petitioners were apprehended in a time and place very
23 different from today. They have endured 16 years of
24 indefinite detention without charge or trial which is a
25 duration of detention typically associated with the high end

1 of felony convictions, including material support for
2 terrorism, and which have been secured by the government on
3 the basis of thin and attenuated evidence and a burden of
4 proof that's typically associated with a personal injury
5 case.

6 Now, petitioners do not come before the Court to
7 challenge the legal facts -- sorry, the factual basis for
8 their original detention because --

9 THE COURT: I want to make clear if I could review
10 as correct a question I raised when I read through these
11 materials. None of these petitioners have yet gone through
12 a habeas hearing before a court on their individual cases?

13 MR. AZMY: No, they have, Your Honor. Some of --
14 many of them have gone through --

15 THE COURT: Some of them have had trials here?

16 MR. AZMY: Yes, Your Honor. And at this point --

17 THE COURT: The records I've reviewed are --

18 MR. AZMY: No, many of them have, but --

19 THE COURT: I'm talking about the named
20 petitioners here before me.

21 MR. AZMY: Yes.

22 THE COURT: All right. I'll look at that. I
23 didn't see that.

24 MR. AZMY: But, Your Honor, what's important is
25 that they are no longer interested in challenging the

1 original factual basis of their detention because,
2 regrettably, as Judge Tatel observed, that contest has been
3 called in the Government's favor. They're here now because,
4 in our view, any of the --

5 THE COURT: Not all of them.

6 MR. AZMY: Hmm?

7 THE COURT: Not all of them. There are several
8 that were ordered to be conditionally released.

9 MR. AZMY: By the PRBs, Your Honor, but the
10 problem is -- and here is --

11 THE COURT: By trial before this court. There
12 have been judges that ordered some of these to be released.

13 MR. AZMY: They have been, Your Honor, but that's
14 been a long time since the rules regarding the
15 Government's -- and, you know, burdens of proof --

16 THE COURT: Certain have disagreed, but the
17 District Courts --

18 MR. AZMY: Yes. Yes, the District Courts --

19 MS. RAYNER: I'm sorry. May I interrupt for a
20 moment? This is Martha Rayner. We've lost the audio of
21 you, Your Honor. We're not able to hear you.

22 THE COURT: All right. I can't tell you why. Is
23 this on? (Indicating.) My mic is on. So we'll do the best
24 we can. Let's go ahead.

25 MS. RAYNER: That's much better. Thank you.

1 MR. AZMY: They are here, Your Honor, because in
2 our opinion, any veneer regarding the legality of Guantanamo
3 has been stripped bare by this administration because unlike
4 the past four presidential terms in which these petitioners
5 had been detained, this administration has made very clear
6 they're not releasing anyone. And it's not only from the
7 President's campaign promises. He's issued an executive
8 order reversing the Obama order to close the prison and
9 ordering General Mattis to develop procedures for new
10 detainees. Based on a submission from our supplemental
11 authority, Gitmo staff and Army command are preparing for,
12 quote, the perpetual detention of current detainees and
13 lifetime detention. The concession the Government basically
14 made; that they're making no effort to clear any of -- clear
15 detainees, including the two petitioners before this Court,
16 at the same time that the Government has dismantled the
17 architecture for releasing detainees. If I may, Your Honor,
18 read into the record an -- a, kind of, revealing and sad
19 email from Heather Heldman on February 16th, 2018, from the
20 State Department to Shelby Sullivan-Bennis, one of the
21 counsel for Ahmed Rabbani, it's an out-of-office message
22 that says, I have been directed to cease working on
23 Guantanamo detention-related matters. The Office of
24 Guantanamo Closure is no longer staffed. So please direct
25 any Guantanamo detention-related inquiries to the

1 appropriate regional bureau.

2 But there are no regional bureaus answering any
3 inquiries. The Guantanamo officials have turned off the
4 lights and thrown away the key. And the Government tries to
5 paper over this proclamation -- this policy -- by saying
6 that their authority to detain is bounded by the end of
7 active hostilities, but then they define the "end of active
8 hostilities" in an entirely self-serving way which is when
9 the Government itself has determined that al-Qaeda will
10 unconditionally surrender, and that is no boundary at all,
11 Your Honor, which is why, of course, Guantanamo staff is
12 preparing for lifetime detention, and our position is this
13 kind of perpetual detention violates the due process clause
14 and the AUMF.

15 With respect to due process, our position is that
16 the due process clause both applies to Guantanamo and
17 imposes substantive limitations. We know it applies because
18 the Supreme Court in Boumediene said to ask whether
19 constitutional rights apply extraterritorially, you have to
20 ask whether it would be improper or anomalous to apply them
21 there. And in Boumediene, of course, the Supreme Court said
22 it wouldn't be improper and anomalous to apply the
23 suspension clause and to hold meaningful habeas review for
24 hundreds of detainees. The Government has no argument about
25 how applying due process limits of detention --

1 THE COURT: Wait, wait, wait a minute. You're
2 presuming now that there's more due process than the Supreme
3 Court argued in -- ordered in Boumediene; right?

4 MR. AZMY: That the --

5 THE COURT: You're saying that the due process
6 clause should be interpreted much broader to apply or their
7 rights should be much broader than the habeas relief ordered
8 in Boumediene?

9 MR. AZMY: Yes, Your Honor.

10 THE COURT: All right. And then what do I do with
11 my circuit cases about that? You've got four -- at least
12 four circuit cases that said it's uncontested; does not
13 apply, the Fifth Amendment rights.

14 MR. AZMY: Yes. May I address --

15 THE COURT: I think we have said that. I
16 understand your arguments, it's dicta. But how many times
17 do I have to have dicta to make it the law for me to follow?

18 MR. AZMY: I understand, Your Honor. And if
19 you -- if I could just be heard on this matter, because we
20 feel very strongly that this has been incorrectly
21 interpreted because, yes, the --

22 THE COURT: I mean, you've got --

23 MR. AZMY: -- proclamation in Kiyemba --

24 THE COURT: You've got Kiyemba; you've got Ali;
25 you've got Nawar [ph]; you've got Al-Bihani; you've got Doe

1 v. Mattis --

2 MR. AZMY: Respectfully, Your Honor, it's just --

3 THE COURT: -- and each one all say that. Maybe
4 they're repeating what someone else had already said, but I
5 don't know what's clearer, and the District Court's at least
6 taken that as binding. Judge Huvelle, on a series of cases,
7 started off saying it may not be -- it may be that
8 there's -- more due process rights apply, and then after
9 these cases came out, she's consistently written -- one of
10 our best judges -- in three opinions we're bound by these
11 statements.

12 MR. AZMY: Your -- actually, in Basardh, Judge
13 Huvelle recognizes that Kiyemba is dicta because it only
14 deals with the ability to enter the United States --

15 THE COURT: But then she went on in the next
16 case --

17 MR. AZMY: And I believe there are other cases
18 that recognize it's dicta, including subsequent panels of
19 Kiyemba itself. Kiyemba II and Kiyemba III --

20 THE COURT: Right.

21 MR. AZMY: -- cabin the holding to the possibility
22 of entry. And I would note the four justices in Kiyemba who
23 dissented from the denial of cert also classified the
24 holding as narrow. And the, you know -- the Government has
25 conceded in Al Bahlul in the D.C. Circuit that the ex post

1 facto clause applies and Judge Kavanaugh --

2 THE COURT: And I agree, and then so that -- and I
3 agree Judge Kavanaugh, in a concurring opinion, left that
4 open.

5 MR. AZMY: Well, he does, but -- and then the
6 majority opinion says five of the seven judges of this court
7 believe the ex post facto clause applied. If Kiyemba had
8 been the law, the D.C. Circuit would not have said that.

9 THE COURT: How do I treat the dicta where they
10 clearly say that? Particularly, Judge Henderson clearly
11 says it does not apply -- she repeats that it does not apply
12 in the next two different opinions.

13 MR. AZMY: Your Honor, I think the way to treat it
14 is to follow the Supreme Court's admonition in Boumediene to
15 identify whether or not it's improper and anomalous and ask
16 the Government if they have any arguments about why it would
17 be improper and anomalous any more so than the suspension
18 clause or the ex post facto clause --

19 THE COURT REPORTER: Can you slow down, please.

20 MR. AZMY: Sorry.

21 -- any more than the ex post facto or the due
22 process clause, and to recognize that five judges of the
23 D.C. Circuit agree that Kiyemba cannot be the law because
24 they have concluded that the ex post facto clause applies to
25 Guantanamo. So that --

1 THE COURT: Was that a Government concession under
2 a prior administration that may have changed their position
3 at this time?

4 MR. AZMY: They may have changed their position,
5 but I mean to stress that the -- had the Kiyemba dicta
6 governed the D.C. Circuit, you would not have had a
7 statement from Judge Kavanaugh saying the ex post facto
8 clause clearly applies because Guantanamo's like Puerto
9 Rico, and you would not have had a statement from the full
10 en banc court saying it appears that five of the seven
11 judges believe the ex post facto clause applies. That
12 statement is totally inconsistent with the overreading of
13 Kiyemba, in our opinion. So we would just -- all we can ask
14 is that Your Honor, you know, study that question for us and
15 then --

16 THE COURT: I appreciate that. But is part of
17 that request -- two things, if there's due process rights
18 that apply; and your beginning argument was that it's
19 indefinite without end, the detention. The Government argue
20 it's indeterminate because it doesn't -- it depends upon the
21 war ending or not and that's why detention is lawful; that
22 there's still ongoing conflict. And I mean, how do we make
23 that judgment? How do I determine it's indefinite -- that
24 is, in perpetuity -- as opposed to indeterminate? Just the
25 number of years alone or the fact the Government's closed

1 the State Department office or negotiating these releases?
2 I mean, what would amount to making this as an illegal
3 detention of these individuals?

4 MR. AZMY: Thank you, Your Honor. If I could
5 address the, sort of -- the -- that, kind of, factual
6 disposition and then talk about what flows legally from
7 that.

8 So the Government continues to talk about the
9 continuation of active hostilities. They cite to troops on
10 the ground and the number of sorties which -- and yet they
11 define the end of hostilities as when al-Qaeda
12 unconditionally surrenders. That itself suggests an
13 admission that the conflict will not end in anyone's
14 lifetime. And what is remarkable, unlike any of the other
15 conflicts that inform the laws of war, is the Government
16 will always come back to this court every single year and
17 say there are sorties and bullets flying and it's totally
18 disconnected with the nature of the conflict before.

19 If I could just take from the Government's
20 submissions to this Court, they cite a Department of Defense
21 report that's full of a number of ground attacks, sorties,
22 etcetera, to suggest that the conflict is ongoing. This is
23 at Page 20 of their opposition. What they failed to cite is
24 that half of those ground actions were against ISIS; some
25 number were against the al-Qahtani -- al-Haqqani network;

1 and al-Qaeda is actually nowhere mentioned in that. In
2 their exhibits to this which we studied, a number of things
3 come through. All of the sources -- they cite, maybe, 25
4 different news articles, congressional testimony, press
5 briefings to say that circumstances are like they were
6 before. The sources are almost entirely about the Taliban
7 and ISIS, al-Qaeda affiliate -- and al-Qaeda affiliates that
8 did not exist on 9/11. So we're talking about a conflict
9 not only against al-Qaeda, but against spinoff groups who
10 have not yet even spun off. It is totally boundless, Your
11 Honor, and what due process requires is some rationality;
12 some reason; some limits. Now, in the non-criminal
13 detention context, this is where the due process clause
14 comes into play. Governments cannot indefinitely detain
15 individuals based on past conduct or association. There
16 have to be durational limits that are reasonably tied to the
17 purpose, and we've far exceeded that at this point and
18 particularly --

19 THE COURT: How -- I understand that, but what --
20 you've got Al-Bihani's case and the court stated, The
21 determination of when hostilities have ceased is a political
22 decision. That's one. They defer to the Executive's
23 opinion on the matter, at least in the absence of an
24 authoritative congressional declaration purporting to
25 determine the -- that the war has been terminated. And,

1 quote, In the absence of a determination by the political
2 branches that hostilities in Afghanistan have ceased,
3 Al-Bihani's continued detention is justified. It's not
4 what's going on presently, but that -- as to Mr. Bihani
5 himself, but as to the continuation of the war that is a
6 factor that you have to consider and that if the war is
7 continuing -- and I understand it may be attenuated.

8 There's some question I have for the Government on a lot of
9 these areas. Obviously, people from Africa, etcetera. But
10 if the war is continuing, then if the petitioners were
11 released, that would undermine the purpose of the law of war
12 of detention; that is, you keep individuals from returning
13 to the field of battle. I mean, that's the rationale. What
14 is suspect about that --

15 MR. AZMY: Several responses --

16 THE COURT: -- with the Court of Appeals's opinion
17 in Al-Bihani?

18 MR. AZMY: Right. Several responses, Your Honor.

19 One, Al-Bihani was from eight years ago and the en
20 banc court subsequently disavowed that statement, but I
21 don't necessarily just want to rely on that technicality
22 because I want to make clear what our position is. Our
23 position is that the test under the AUMF and the due process
24 clause is that any detention has to be connected to a
25 legitimate purpose. In this context -- in the preventive

1 detention context, that purpose has to be to prevent a
2 return to the battlefield. And, one, what the Government's
3 submissions reveal is not only are hostilities ongoing, but
4 they will never end in our lifetime and that implicates due
5 process; and, two, with respect to the nature of
6 hostilities -- and Your Honor has been dealing with these
7 cases for a long time. And we know this is so unlike prior
8 conflicts that informed the laws of war for so many reasons.
9 One, it's not between -- it's longer than any conflict in
10 U.S. history; two, it's not between two state parties. It
11 is one thing if the United States Government would
12 repatriate German POWs who, by law in Germany, would have to
13 re-enter the fight.

14 THE COURT: Right.

15 MR. AZMY: It's quite another -- we understand
16 what we're dealing with here, Your Honor. We're -- the
17 Government talks about replenishing the enemy. We're
18 talking about 40 people. We've, sort of, crossed the
19 threshold of reality.

20 And then in addition, Your Honor, we also know why
21 this is unlike any other battlefield, not the, sort of,
22 paradigmatic World War II prisoner-of-war scenario.
23 These -- we know what happens to these petitioners. The two
24 cleared petitioners, one had security arrangements
25 negotiated with Morocco --

1 THE COURT: I understand.

2 MR. AZMY: -- and the other one was, I believe,
3 going into custodial --

4 THE COURT: Saudi Arabia.

5 MR. AZMY: And the other -- so Mr. Nasser had
6 arrangements that were negotiated with the Moroccan
7 Government --

8 THE COURT: Right.

9 MR. AZMY: -- security arrangements. He was not
10 going to be sent to a state party that would order him back
11 to fight. And Mr. Al-Bihani was going to Saudi Arabia, and
12 we know Your Honor knows what that looks like. We've --
13 this is why this has gone so far beyond the pale and we're
14 not depending upon the kind of political analysis here that
15 the Trump administration won't release anyone, although I
16 think that is certainly relevant.

17 And so just to round out the due process argument,
18 we think there have to be durational limitations and,
19 certainly, it could not be that an individual is detained
20 for this long and possibly in perpetuity based merely on a
21 preponderance of the evidence standard about what someone
22 did or who they were associated with 16 years ago. There is
23 no Supreme Court jurisprudence that would support that.
24 Non-criminal -- criminal detention can be based on what one
25 has done. Non-criminal detention has to be forward-looking;

1 it has to be connected to a legitimate preventative purpose;
2 and the fact that someone may have associated with
3 al-Qaeda/the Taliban 16 years ago is not sufficient proof
4 that they will return to the battlefield.

5 So if you're -- just to make clear how our
6 argument works, Your Honor, if you're not -- if you do not
7 agree that due process puts absolute temporal limits and
8 requires release, our secondary argument is it's -- this
9 duration of detention cannot be based on a mere
10 preponderance and that any analysis cannot only be
11 backward-looking which is -- only exists in the criminal
12 context; it has to be forward-looking, and so that
13 petitioners would be able to come to this court and present
14 evidence about why they are unlikely to return to the
15 battlefield and the Government would have to overcome
16 that --

17 THE COURT: I've got --

18 MR. AZMY: -- by clear and convincing evidence.

19 THE COURT: I've got two questions about that.

20 MR. AZMY: Yes.

21 THE COURT: One is on the standard of the evidence
22 and the preponderance burden to the Government that I
23 adopted as part of the general rules of procedure this --
24 many years ago, 2008.

25 MR. AZMY: Yes, Your Honor's opinion. I know.

1 THE COURT: Judge Randolph commented on that --
2 and Judge Kavanaugh actually was on that panel and didn't
3 say anything -- in a case called Al-Adahi v. Obama, 2010,
4 613 F.3d 1102. He commented, The district judge in this
5 case adopted the preponderance standard; that is, the
6 burden's on the Government by a preponderance to show why
7 they should be kept. Their rationale is unstated.
8 Actually, I had talked about it. And they talked of how we
9 coordinated all the cases and I had to coordinate these --
10 all these matters. The order stated, among other things,
11 that, quote, The Government should bear the burden of
12 proving by a preponderance of the evidence petitioner's
13 detention is lawful. In support, the order cited
14 Boumediene. But Boumediene held only that the, quote,
15 Extent of the showing required of the Government in these
16 cases is a matter to be determined. That's what I did,
17 according to the Supreme Court's ruling.

18 Boumediene also held, in determining the scope of
19 the writ, the analysis may, or, quote, must begin with
20 precedents as of 1789, and the court has stated that at
21 absolute minimum, the clause protects the writ as it existed
22 when the Constitution was drafted and ratified. Yet we are
23 aware of no precedents in which the 18th century English
24 courts adopted a preponderance standard. Even in later
25 statutory habeas cases in this country, that standard was

1 not the norm. For years, in habeas proceedings contesting
2 orders of deportation, the Government had to only produce
3 some evidence to support the order.

4 And then they say, After oral argument, we ordered
5 the parties to file supplemental briefs discussing what
6 factual showing, if any, the Government must make to justify
7 detaining Al-Adahi. The supplemental briefs we received are
8 not exactly illuminating. The Government was satisfied with
9 the appropriate standard that we had set which was
10 preponderance. Al-Adahi readily agreed with the Government
11 the preponderance standard should govern the case. We are
12 thus left with no adversary presentation on an important
13 question affecting many pending cases in this court and in
14 the District Court. Although we doubt, for the reasons
15 stated above, the suspension clause requires the use of the
16 preponderance standard, we will not decide the question in
17 this case. As we did in Al-Bihani, we'll assume the --
18 arguendo the Government must show by a preponderance of the
19 evidence Al-Adahi was part of al-Qaeda.

20 So what you're asking for is much more than a
21 preponderance of the evidence. You're asking clear and
22 convincing evidence, despite Judge Randolph, joined by
23 Henderson and Kavanaugh, saying even that standard is
24 questionable as being too much of a burden on the
25 Government.

1 MR. AZMY: May I -- yeah. If I may address that,
2 just to make clear what our argument is?

3 THE COURT: All right.

4 MR. AZMY: There are two ways in which our
5 argument is not foreclosed by that.

6 One, we're -- that is a preponderance standard
7 under the common law and under the, sort of, writ as it
8 exists in 1789, but if the due process clause applies --
9 which we understand will require some work from Your Honor
10 to get through -- then the due process clause requires more.
11 And after this much time, we think the due process clause
12 should apply.

13 The second argument which is very important is,
14 whatever standard one applies, clear and convincing or
15 preponderance, we believe that under the due process clause,
16 it cannot merely be a determination as the courts were doing
17 10 years ago of what someone did and who they were with 15
18 years ago. The due process clause requires a connection to
19 a purpose -- non-criminal purpose for detention --
20 preventive detention and the AUMF, you'll recall, Your
21 Honor, Justice O'Connor said, has to be tied to a return to
22 hostility. So even if we're using a preponderance standard,
23 we should be able to introduce evidence that individuals
24 will not return to the battlefield. And I think, for the
25 cleared detainees, that is -- that's clear because the

1 United States Government has already determined that they
2 are no longer a threat. And respectfully, Your Honor, I
3 don't think the United States Government should, through a
4 broad interagency process that they tout on the one hand as
5 being rigorous, say individuals are no longer -- no longer a
6 threat and arrange security agreements -- which, apparently,
7 they've now abandoned -- and then come into a United States
8 court and say, No, that doesn't mean they're not dangerous
9 and they are detainable. There have to be some limits, Your
10 Honor, and that's what we're asking for.

11 THE COURT: Let me ask a couple other questions
12 about the existing law and in conjunction with the executive
13 orders that are outstanding in this matter.

14 President Trump's Executive Order 13823 set aside
15 part of President Obama's order closing Guantanamo and --
16 but left into effect, as far as I can tell, the remaining
17 part of his orders -- the -- President Obama's orders, but
18 they requested within 90 days of the date of this order --
19 this order dated January 30th, this year, long ago --
20 Secretary of Defense, in consultation with Secretary of
21 State, the Attorney General, Secretary of Homeland Security
22 and the Director of National Intelligence and heads of other
23 appropriate agencies, etcetera, shall recommend policy to
24 the President regarding the disposition of individuals
25 captured in connection with armed conflict, including the

1 policies governing transfer of individuals to Guantanamo
2 Bay, and then they go on to continue about the periodic
3 reviews that shall be made, etcetera.

4 What is the result of that? Do you know what --
5 the results of this 90-day study that was being done? That
6 report by the Secretary of Defense to the President.

7 MR. AZMY: We have little to no information, Your
8 Honor, because whatever Secretary Mattis prepared is
9 classified. So we don't know what the result --

10 THE COURT: There's been nothing released as to
11 that?

12 MR. AZMY: Right. But we also know from the
13 Government's submission that there have been no efforts to
14 effectuate the transfers that had been negotiated for any of
15 the cleared detainees, including the two petitioners. We
16 know that the Guantanamo Special Envoy's office and,
17 therefore, the entire infrastructure of Guantanamo has been
18 destroyed. So they're ending that staffing but beefing up
19 staffing for lifetime detention.

20 THE COURT: On the petitioners -- not including
21 the two that have already been cleared for release -- who
22 were held by the review board, as I indicated, in 2010 when
23 they finally had a review for prosecution, are you aware if
24 any of them have been charged with any offense?

25 MR. AZMY: They have not, Your Honor. None of

1 those petitioners.

2 THE COURT: That was 2010.

3 MR. AZMY: That's right.

4 THE COURT: So the Government's still deliberating
5 what to do?

6 MR. AZMY: Apparently, Your Honor. And under
7 their capacious view of the law, they can take whatever time
8 they want. And, Your Honor, rest assured, the Government
9 will, absent judicial review, and that's why we're before
10 the Court.

11 THE COURT: When was the last individual
12 transferred out of Guantanamo?

13 MR. AZMY: That would have been in the waning
14 weeks of the Obama administration. I don't have the exact
15 date.

16 THE COURT: One of the two that you --

17 MR. AZMY: Oh, forgive me. Forgive me, Your
18 Honor. Sorry. al-Darbi, a Saudi petitioner, was released
19 during the Trump administration. I want to speak to that,
20 because --

21 THE COURT: There had been one released during the
22 Trump administration that was arranged before the Trump
23 administration came into office.

24 MR. AZMY: More than that, Your Honor, al-Darbi
25 had pled guilty to war crimes; had served a sentence; and,

1 therefore, was released by the binding terms of the sentence
2 and a negotiated agreement with Saudi Arabia and, to some
3 extent, that underscores the arbitrariness of this whole
4 process, because these individuals have been detained longer
5 than people who are charged with war crimes, and when we go
6 to our clients, it has nothing to do with what they are
7 presently doing or what their profile is. Petitioner
8 Sharqawi Al Hajj told his PRB -- he's old. He's 43. That's
9 not so old. I should not concede that myself, Your Honor,
10 having long passed it. One hundred and eight pounds; sick;
11 collapsed in his cell; he's made pronouncements renouncing
12 violence; family statements; all of these things to get out.
13 That will not get him out of Guantanamo. He's not going to
14 be heard again for another two years. What do we tell our
15 clients? Confess to a war crime? Is that the only way to
16 get yourself out? It's the height of arbitrariness and,
17 again, the need for some sort of judicial oversight which I
18 understand has waned, but I think it's time to revisit those
19 questions, respectfully, Your Honor.

20 THE COURT: What has happened, as a practical
21 matter, you've got to admit that the courts are willing to
22 try these cases and make some determination on the trial
23 court level. Most were not successful; several were
24 successful in convincing that they should be released. The
25 Circuit basically shut a lot of that down for the District

1 Courts in their opinions. Additionally, factors came to
2 light about 20 percent up to, maybe, 30 percent at the
3 highest -- probably closer to 20 percent -- were
4 recidivists; went back into the battle. So it's not clear
5 anybody who's released is never going back into the battle,
6 and the Government may have taken that into account in their
7 later determination. I don't know.

8 But I was curious about one of your two clients
9 that are here today that are represented by their counsel.
10 If you don't know, they can answer. Secretary Carter, on
11 the -- of the Obama administration, is the one that did
12 not -- that made the determination not to release, I believe
13 it was, Nasser. Was it Nasser?

14 And why don't you introduce yourself for the
15 record, so it's clear who's speaking.

16 MR. DURKIN: For the record, I'm Tom Durkin. I'm
17 from Chicago.

18 THE COURT: All right.

19 MR. DURKIN: Nice to be here.

20 THE COURT: But Secretary Carter made that
21 determination before the Trump administration came in.

22 MR. DURKIN: He made the decision to defer to the
23 Trump administration. He did not make --

24 THE COURT: He was scheduled for release and he
25 had a country that would take him. That was all negotiated.

1 MR. DURKIN: Yes, Morocco gave him the assurances
2 they wanted, but I believe it was December 28th and
3 Secretary Carter, because that was within the 30-day
4 period -- or it was after the 30-day period, decided to
5 defer his decision on certification to the --

6 THE COURT: I had read he had made a determination
7 not to release him. Maybe I --

8 MR. DURKIN: No, that was --

9 THE COURT: -- misread that.

10 MR. DURKIN: -- the other client.

11 THE COURT: Pardon me?

12 MR. DURKIN: That was the other --

13 THE COURT: That was Al-Bihani, he made that
14 determination?

15 MR. CLARKE: It was, Your Honor, as far as we
16 know.

17 THE COURT: All right. Thank you. All right.

18 MR. DURKIN: But that's --

19 THE COURT: Your person was just deferred? Your
20 client.

21 MR. DURKIN: He's -- yes, his was deferred. We
22 filed an emergency petition before Judge Kollar-Kotelly and
23 that was denied and we still wait.

24 THE COURT: All right. Thank you, sir.

25 MR. DURKIN: Thank you.

1 THE COURT: All right. I'll -- Mr. Bihani's
2 counsel want to come up and explain what happened to him
3 for -- just for the record for a minute.

4 MR. CLARKE: Yeah. Yes, Your Honor. George
5 Clarke.

6 THE COURT: Introduce yourself again, please.

7 MR. CLARKE: George Clarke with Baker McKenzie.

8 I actually don't know exactly what happened to
9 him. I know that he was -- that there were 10 people who
10 the State Department negotiated with the Saudis to take and
11 only 9 -- he was one of them. And only 9 went and he did
12 not go. And what we heard, sort of, through the grapevine
13 through piecing things together -- nothing was ever formally
14 communicated to us -- was that Secretary Carter did, in
15 fact, refuse to transfer him. That --

16 THE COURT: That's what's represented in the
17 pleadings --

18 MR. CLARKE: That is what we understand to be the
19 case, but -- I mean, it's not like I have a piece of paper
20 that says that, Your Honor, but the timing works. Certainly
21 what my client saw in Guantanamo from that perspective is
22 what happened. We also have heard that there was a -- there
23 was potentially another potential for him to be transferred
24 right at the end of the Obama administration; that something
25 similar happened then, and we have no idea why. He was

1 cleared -- he wasn't cleared under a PRB, Your Honor. He
2 was cleared by the task force --

3 THE COURT: Right.

4 MR. CLARKE: -- January 2010 and he's still been
5 sitting there. And all the other 30 people who were put in
6 that same category are -- the other 29, they're all gone.
7 There were 30 people put in that category. He's the only
8 one that's still sitting there.

9 THE COURT: Well, I did want to raise -- so the
10 Government knows where I'm going to go -- as to Mr.
11 Al-Bihani and Mr. Abdu Nasser. The issue is that they had
12 both been cleared for transfer. As such, then, their status
13 is such -- it's apparent to me, at least -- they're no
14 longer being reviewed by the PRB. So they're in a no-man's
15 land. They're in a Catch-22. They aren't being reviewed by
16 anybody to see if they should be released again. And I
17 don't know if I'm reading that correctly, but the Government
18 should address that, because it seems that we have left
19 these individuals out of the process at this point.

20 All right. Thank you.

21 MR. CLARKE: Thank you, Your Honor.

22 MR. DURKIN: Judge, I just --

23 THE COURT: All right. Introduce yourself again.
24 So we've got a different lawyer speaking.

25 MR. DURKIN: I'm sorry. This is Tom Durkin again.

1 I think you're absolutely correct on that --

2 THE COURT: All right.

3 MR. DURKIN: -- without question. And I think --
4 I mean, certainly, all the other --

5 THE COURT: All right. Well, I just wanted to
6 raise that for the Government now that we're going to go
7 there.

8 I'll get counsel back -- Mr. Azmy, please -- and
9 let him finish his argument here.

10 MR. AZMY: I just wanted to address the recidivism
11 statistics, just for the record.

12 THE COURT: Sure.

13 MR. AZMY: The 30 percent number includes
14 confirmed and suspected cases, and confirmed counts as just
15 one source based on the preponderance of the evidence.
16 We've always contested these numbers. And I think it's not
17 just us that think that they've been floated for an
18 instrumental reason. And under Obama, as opposed to under
19 President Bush where there was a more rigorous review
20 process, those numbers have dwindled to, at most, a
21 handful --

22 THE COURT: I think --

23 MR. AZMY: -- of cases.

24 THE COURT: -- the history is Mr. Bush had about
25 700 more people rotate through there or more.

1 MR. AZMY: Right.

2 THE COURT: And a lot were gone eventually before
3 he ended his term and then Mr. Obama eventually released
4 more, and so the numbers got down to --

5 MR. AZMY: Forty.

6 THE COURT: -- I think only the last few that had
7 more issues, unfortunately, although some of your people
8 also got caught up and are being held, but -- I mean,
9 there's no question there are some people who are under
10 military commission charges that are not going to be
11 released until those are resolved, at least.

12 MR. AZMY: Yeah.

13 Your Honor, if I could just make one last point --

14 THE COURT: Yes.

15 MR. AZMY: -- since you mentioned the PRBs. I
16 want to make clear that our position is the PRBs should not
17 be a substitute for the judicial review we're seeking. In
18 our view, at this point, they're like the CSRTs. They're
19 procedurally weak. They are undertaken once every three
20 years by a military official under the chain of command and,
21 at best, it's a recommendation to the Secretary of Defense,
22 who can ignore it. And given the other policy
23 pronouncements, we don't think -- and given what we know
24 about these two cleared petitioners, no one would get out
25 anyway. And, as I mentioned, Sharqawi Al Hajj, he made an

1 enormously persuasive presentation about why he would not
2 return to hostilities, and the rubber stamp was to deny him
3 release. And for other petitioners, they've simply given up
4 hope and are not participating, and that leads to a finding
5 that they should not be cleared and that's, respectfully, an
6 understandable reaction, given the state of hopelessness in
7 the prison and the state of unreason and lawlessness.

8 Thank you, Your Honor.

9 THE COURT: All right. Well, I appreciate the
10 argument very much.

11 I also didn't acknowledge and I should have
12 acknowledged that there were amicus briefs filed by due
13 process scholars in support of petition [sic] by the Gibbons
14 P.C. and group that I have reviewed as well as a brief
15 amicus curiae, the Muslim, faith-based and civil rights
16 community organizations from Amir Ali from Washington, D.C.,
17 from Roderick & Solange and Jonathan Smith from Muslim
18 Advocates from Washington, D.C., that I reviewed as well for
19 this process.

20 All right. For the Government -- and also, a
21 brief of amicus curiae from the victims of torture in
22 support of the petitioners' habeas motion from Center for
23 Victims of Torture and Laura Wilkinson from Weil, Gotshal
24 here in town.

25 All right. Mr. Wiltsie, do you want to argue?

1 MR. WILTSIE: Yes, Your Honor. Thank you.

2 THE COURT: All right. Thank you.

3 MR. WILTSIE: Your Honor, if I may start, I
4 believe, and correct Mr. Azmy on one issue, as to the eight
5 petitioners who have been referred to you for a decision on
6 this motion, only one of them has taken their case to
7 merits.

8 THE COURT: Yeah, I couldn't find them all tried.

9 MR. WILTSIE: That was Mr. Bihani, and he lost.

10 THE COURT: Right, I remember --

11 MR. WILTSIE: The --

12 THE COURT: -- Bihani.

13 MR. WILTSIE: There are three of them who have
14 active cases but are not prosecuting them; and there are
15 two, I believe, who have stayed their cases; and one who has
16 dismissed his case without prejudice.

17 THE COURT: All right. I appreciate that, because
18 my review, I couldn't find any -- I knew Al-Bihani went to
19 the Court of Appeals, but I hadn't -- couldn't find any
20 others that actually had gone to trial and have not
21 exercised their rights that they do have, at least at this
22 time, for a trial.

23 All right. You're going to have to start with an
24 opening statement, if you'd like, and then I have some
25 questions for you about some of these problems.

1 MR. WILTSIE: Of course, Your Honor.

2 Your Honor, as we argued in our brief, a binding
3 precedent and persuasive and, I would argue, authoritative
4 decisions by other judges of this district have -- provide
5 that petitioners' ongoing detention is permitted under the
6 laws of war, authorized by the Authorization for Use of
7 Military Force, and constitutional under the due process
8 clause. For example, Your Honor, the Supreme Court in Hamdi
9 and the Court of Appeals in Ali both held that the
10 Authorization for Use of Military Force authorizes the
11 United States to detain these petitioners for the duration
12 of active hostilities.

13 THE COURT: Okay. And the duration can be of any
14 length?

15 MR. WILTSIE: Yes, Your Honor. You cannot tell
16 when hostilities end until they have ended.

17 THE COURT: All right. So if we have the Hundred
18 Years' War in England -- which was the 14th, 15th century;
19 it's a 116-year war -- under your theory, the prisoners
20 could be held for that long because -- actually, there was
21 never a peace treaty signed in that war. They finally just
22 gave up fighting after 116 years. But --

23 MR. WILTSIE: Yes, Your Honor.

24 THE COURT: -- your -- under your theory, the
25 petitioners, if this continues for 116 years, can be held

1 constitutionally?

2 MR. WILTSIE: Yes, Your Honor.

3 THE COURT: And --

4 MR. WILTSIE: We hope that they'll --

5 THE COURT: -- under the AMU -- under the
6 Authorization for Use of Military Force, although al-Qaeda
7 itself could be destroyed and may not be gone, but there may
8 be associated groups still in --

9 MR. WILTSIE: No, Your Honor. That's a
10 mischaracterization of our position by petitioners.
11 Answering your questions, I think, in order, yes, we could
12 hold them for 100 years, if the conflict lasted for 100
13 years. It is the United States's certain hope that it will
14 not last that long. The argument they pose is that we are
15 now engaged against other forces in other geographic
16 locations --

17 THE COURT: Exactly.

18 MR. WILTSIE: -- and that we can hold these
19 detainees until all of those forces have been defeated. Our
20 point is, that question is not ripe, for the evidence before
21 Your Honor in this record is that we are still engaged
22 against the compatriots of these petitioners in the same
23 battle space against the same battle foes right now. The
24 ongoing fight is on -- against al-Qaeda and the Taliban and
25 associated forces in Afghanistan, and so long as that is

1 true, these petitioners are being held for the conflict for
2 which they were detained and, under the laws of war, we can
3 continue to detain them until that -- until active
4 hostilities in that conflict have come to an end.

5 THE COURT: We have one, according to your theory,
6 Abdul Malik, citizen of Kenya; detained 12 years;
7 recommended for continued detention, 2010, for prosecution.
8 No prosecution has resulted. At his most recent review -- I
9 think full review was 2016 -- the -- is necessary to protect
10 the country against his relationship with high-level
11 operational plans and members of al-Qaeda -- I guess it's
12 al-Qaeda -- in East Africa; participation and execution of
13 an attack in Mombassa, Kenya, upon Jewish elements, and
14 that's related to al-Qaeda in Afghanistan.

15 MR. WILTSIE: Remember, Your Honor, the
16 Authorization for Use of Military Force permits us to
17 detain --

18 THE COURT: Associated --

19 MR. WILTSIE: -- members of al-Qaeda and
20 associated forces who perpetuated the attacks of 9/11. He
21 is detained pursuant to that. If he has a merits argument
22 that he was not a member of al-Qaeda or associated with
23 al-Qaeda at the time of 9/11, then they need to bring that
24 on the merits level, but it is not properly presented here.

25 THE COURT: Now, in fairness, he's also received a

1 full review -- file review -- whatever that means -- in June
2 of 2017 and they reviewed relevant new information and the
3 prior information. The board, by consensus, determined that
4 he -- detention is warranted. But I mean, what -- you're
5 expanding your argument that it has to be this
6 Afghanistan-related thing to anyone else around the world
7 that may be connected, you believe, with al-Qaeda?

8 MR. WILTSIE: No, Your Honor. The point is, these
9 petitioners were detained at a time when we were engaged in
10 a conflict against al-Qaeda and the Taliban and associated
11 forces in Afghanistan. As long as that conflict goes on,
12 they are all properly detainable under the Authorization for
13 Use of Military Force.

14 THE COURT: What happens from the Government's
15 viewpoint, then, if there is a peace effected in Afghanistan
16 with the Taliban who promise not to support al-Qaeda any
17 longer and there's no active engagement of al-Qaeda in
18 Afghanistan? What do you do then? How do you hold these
19 people?

20 MR. WILTSIE: I'm not -- Your Honor, my -- that's
21 my point exactly which is, at the moment, that question is
22 not before you. The question you pose, I can't -- I don't
23 want to limit our future arguments that we might bring.

24 THE COURT: All right.

25 MR. WILTSIE: But that is -- but -- that is a

1 merits argument for another day.

2 Your Honor, I point out to the Court that Judge
3 Leon last year in Al-Alwi rejected petitioners' primary
4 argument which is that somehow, the government's right to
5 detain petitioner times out; that somehow, duration matters
6 within law of war detention; or perhaps, Your Honor, as the
7 Court of Appeals in Al-Bihani stated, common sense tells us
8 what must be true which is that release is required only
9 when the fighting stops. Thus, Your Honor, under the laws
10 of war and the Authorization for Use of Military Force, the
11 only --

12 THE COURT: Justice Breyer suggested, did he not,
13 in a concurring opinion that there may be some temporal
14 limit? He said we haven't reached that issue yet, but there
15 could be a limit to how long they can be held.

16 MR. WILTSIE: He did say that, and that is
17 certainly indicative that he may hold that opinion, but it
18 is not indicative that any other -- any majority of that
19 court or any other court would agree with him. And right
20 now, Your Honor, binding precedent indicates that there is
21 no violation if we hold them for the duration of the active
22 --

23 THE COURT: What is it about the due process
24 argument that the statements by Judge Henderson, and
25 concurring by a couple others in those statements, that

1 it's due process beyond what's already been granted by the
2 Supreme Court does not apply being dicta necessarily to any
3 of those opinions and, therefore, not binding?

4 MR. WILTSIE: Well, Your Honor, there's an
5 interesting opinion from the Supreme Court that I can't
6 recall right now which says, Yeah, sometimes we speak in
7 dicta, but the lower court should pay attention to that.
8 And I refer the Court to Rasul which was referred back to
9 the Court of Appeals by the Supreme Court for
10 reconsideration in light of Boumediene. And the Court of
11 Appeals distinctly said that they would not reconsider
12 Kiyemba in light of that. They said the -- historically,
13 the Supreme Court has very -- had limited -- had a very
14 limited view of the extension of the Constitution
15 extraterritorially and that Boumediene reaches only the
16 suspension clause and that, therefore, it would not reverse
17 its prior decision that --

18 THE COURT: I think Judge Kavanaugh has a
19 different view --

20 MR. WILTSIE: Well, I don't -- I wouldn't --

21 THE COURT: -- in his concurring opinion, without
22 commenting on his prospects --

23 MR. WILTSIE: I would not wish to opine on Judge
24 Kavanaugh's future views, Your Honor.

25 THE COURT: Well, he found a concurring opinion in

1 a case here indicating he thought at least it was an open
2 issue still, why using the functional analysis wouldn't
3 apply as well, basically, is what he said.

4 Let me go back to a couple particulars and then
5 we'll get to the general argument on some of these matters.

6 About Al-Bihani's situation, there had been an
7 order issued on January 18th, 2018, by Judge Kotelly
8 who's -- got this before I was kindly given all the cases
9 again by the court to handle, where she required the
10 Government to inform the Court, Whether the Government
11 intends to transfer petitioners previously designated for
12 transfer by the task force and/or the PRB. And the answer
13 we got, I think, was, In January '17, Secretary Carter
14 determined the petitioner, Al-Bihani, should not be
15 transferred based on a variety of substantive concerns
16 relevant to his circumstances, including factors not related
17 to petitioner himself. I'm not sure that satisfied the
18 Court about whether it -- the order of the Court, whether
19 the Government intends to transfer petitioners previously
20 designated for transfer and what efforts were made to
21 transfer him since that January '17 decision by Secretary
22 Carter, whether that was revisited, and there's no evidence
23 of that -- of what has happened and whether there's been a
24 review committee, etcetera, that has considered that.

25 Mr. Nasser is somewhat in the same situation. His

1 report was, from the Government, no date -- to date, no
2 decision has been made whether to proceed with that
3 transfer.

4 So what is the update of those two individuals?

5 MR. WILTSIE: Your Honor, I don't -- I cannot say
6 with any degree of certainty whether or not either of those
7 individuals will be transferred. What I can tell the Court
8 is that under the executive order from President Trump,
9 transfers from Guantanamo are permitted. That is a very,
10 very complex process. Mr. Azmy referred to parts of it that
11 requires negotiations, obviously, by the State Department
12 with foreign governments to accept a detainee; further
13 negotiations to get adequate assurances that if the
14 detainees are transferred, they would -- the threat of them
15 returning to the battlefield would be minimized. Let me
16 correct Mr. Azmy. Being cleared for transfer or proposed
17 for transfer in no way indicates they are no longer a threat
18 to the United States. It just means that we believe we can
19 transfer them and minimize that threat through appropriate
20 conditions. Once all that is done, the transfer and those
21 conditions need to be routed through an interagency approval
22 process which includes the intelligence community and,
23 ultimately, as the Court may be aware, the Secretary of
24 Defense has to certify by statute that the transfer would be
25 in accordance with the national security interests and he

1 has to adhere to a whole -- other steps that Congress has
2 required. What I can tell the Court is that the policies
3 and practices under the executive order are deliberative
4 right now; that we -- it is hoped that the -- that transfers
5 may occur in the future, but we are not currently --
6 nobody's being transferred tomorrow. Let me put it like
7 that, Your Honor.

8 THE COURT: Right. Well, one concern is the State
9 Department's Office of Special Envoy for Guantanamo may no
10 longer exist. It's no longer functional; is that correct?

11 MR. WILTSIE: That's correct, Your Honor.

12 THE COURT: So how does the Government expect to
13 transfer them if that office was dismantled who organizes
14 the transfers; who finds the countries available to accept
15 them; who oversees not only the transfer, but their
16 continued operation in the countries they're transferred to,
17 etcetera, I mean, on their post-transfer progress? I mean,
18 how is that to be done if you don't have an office to do
19 that?

20 MR. WILTSIE: Your Honor, that -- there's no
21 reason you need an office to do that. The State Department
22 has embassies in all countries. They can reach out -- those
23 embassies can reach out. As I indicated just a minute ago,
24 the actual practices and the policies that will be
25 implemented are being deliberated right now. So -- but you

1 don't need these offices dedicated to this job. They didn't
2 exist initially. They were --

3 THE COURT: What --

4 MR. WILTSIE: -- creations of --

5 THE COURT: Right --

6 MR. WILTSIE: -- President Obama.

7 THE COURT: -- I agree. I agree. They did not
8 exist initially and he did it. What I'm getting towards --
9 and I'll get there eventually. What -- the 90-day report,
10 apparently, at the time it was run -- so I assume the
11 Secretary of Defense has given that to the President.

12 MR. WILTSIE: I do not know, Your Honor.

13 THE COURT: That's called -- under a 13823
14 executive order --

15 MR. WILTSIE: I apologize --

16 THE COURT: -- requiring the Secretary of Defense,
17 after consulting with the other agencies, to give a report,
18 including policies governing the transfer of individuals to
19 the U.S. Navy station in Guantanamo Bay.

20 MR. WILTSIE: I apologize to the Court. I do not
21 read that the same way the Court does. I'd read that as
22 referring -- as --

23 THE COURT: To future --

24 MR. WILTSIE: -- Section 2 to future --

25 THE COURT: Future individuals --

1 MR. WILTSIE: -- future transfers to Guantanamo --

2 THE COURT: Covers about -- policies about
3 disposition of individuals captured in connection with armed
4 conflict?

5 MR. WILTSIE: Yes, Your Honor.

6 THE COURT: That would cover the past people?

7 MR. WILTSIE: Yes, Your Honor. Your Honor's
8 reading may be perfectly reasonable, but I am unaware of
9 that. I did not focus on a need to brief the -- this Court
10 on the status of that report.

11 THE COURT: All right. You're not cognizant of
12 any efforts the government's made to transfer any of these
13 two individuals previously cleared and whose transfer had
14 been arranged already? You're not cognizant of anything
15 that's -- efforts that have been made to transfer them;
16 right?

17 MR. WILTSIE: No, Your Honor.

18 THE COURT: All right. Okay. What I'm getting to
19 is it become [sic] a de facto policy unannounced that there
20 will be no transfers from Guantanamo Bay, period, and that
21 based upon President Trump's statement on January 3rd --
22 post-election statement, not campaign rhetoric -- that
23 there, quote, Should be no further releases from Gitmo, end
24 quote.

25 MR. WILTSIE: Your Honor, I would point the Court

1 to the executive order which was issued at least a year
2 later in which President Trump specifically allowed --
3 instructs the Secretary of Defense that he may transfer
4 individuals from Guantanamo under appropriate circumstances.
5 And, additionally, that same executive order requires that
6 any new arrivals at Guantanamo would be entitled to periodic
7 review boards. If that -- if there were to be no transfers
8 from Guantanamo at all, that provision is totally
9 superfluous. So I don't believe that you can say that the
10 President's certainly official position is that there will
11 be no transfers.

12 THE COURT: Is -- his Twitter position -- call it
13 that for a minute -- in January '17 -- 2017, recognizing
14 there was a subsequent order in 2018, concerning release of
15 individuals held in Guantanamo, but the petitioner supplied
16 information of news reports indicating detention operations
17 of Guantanamo are shifting to a permanent detention of
18 detainees, including hospice care and a rise in the number
19 of individuals assigned to protect the -- and care for these
20 individuals and with only 40 or 41 left, they're estimating,
21 maybe, 2,000 people there to care for them. I can't imagine
22 the expense this is causing. But if that is indicative
23 of -- you believe there will not be any releases from -- the
24 Government will not actually be releasing people? I mean,
25 the policy is not to release because of this -- additional

1 expenses that are going into --

2 MR. WILTSIE: No, Your Honor. I don't think you
3 can draw that conclusion at all. The fact of the matter is,
4 at the moment, there are 40 individuals detained at
5 Guantanamo. They are aging, as we all are, and the
6 Government is making prudent efforts to care for them and,
7 as I indicated before, we do not know when active
8 hostilities will end. So we are making efforts to be able
9 to care for them for the foreseeable future; however, that
10 does not indicate in any way, shape or form that none of
11 them will be transferred. It is quite likely that some of
12 them will be transferred in the future. The question is --
13 but the question remains whether they will all be
14 transferred. And what facilities do we need to take care of
15 those who remain?

16 THE COURT: What -- on the detainees before me --
17 the ones before me -- separating out Mr. Nasser and Mr.
18 Al-Bihani, the others, in 2010, were to be held according to
19 the reviews for prosecution. And as far as I have here in
20 reviewing these files, there have been no prosecutions
21 recommended.

22 MR. WILTSIE: I believe that's accurate, Your
23 Honor.

24 THE COURT: So again, are they in a state of limbo
25 just waiting to see if they're going to be prosecuted or

1 not? I mean, how long can the Government wait to determine
2 if they're going to do anything --

3 MR. WILTSIE: Well, I can't answer that because
4 I'm not on the criminal side, Your Honor. My understanding
5 is that some referrals for prosecution have occurred
6 recently; however, these individuals that you're referring
7 to are still subject to the periodic review boards and would
8 be considered for transfer even though their status --
9 initial status out of the executive task force was to be
10 considered for prosecution.

11 So Your Honor, turning to -- briefly to the
12 decision whether active hostilities are ongoing, that is --
13 the Court of Appeals has stated in Al-Bihani, is a question
14 for the political branches.

15 THE COURT: Judge Garland raised an interesting
16 question in the argument on that in the Court of Appeals.
17 His question was that, is it proper of the judiciary to
18 refer entirely to the Executive if you have a hypothetical
19 case where there is -- no conflict actually exists by common
20 agreement, but the Executive still wants to keep some of
21 these people in prison they don't approve of? And at that
22 point, the courts step in. Are there still a political
23 question where the Government is claiming there is still an
24 ongoing war but everyone else agrees it's over? I mean,
25 it's -- again, eventually, the courts have a role to step in

1 --

2 MR. WILTSIE: I think, at that point, it would be
3 incumbent on a judge to decide whether he had the power to
4 step in. The -- that is certainly not the case we face
5 today which, I believe, is the answer we gave there.

6 THE COURT: I think the only thing you face today
7 in that regard is -- I agree with -- that we should not be
8 second-guessing the political decision about the wars
9 ongoing and your file indicates that it is. But is the
10 extent of the association under the AUMF on the territorial
11 war being related to other terrorists elsewhere? If ISIS
12 appears in Libya aligned with a local warlord who has not
13 pledged allegiance to al-Qaeda, can we capture the ISIS
14 people and put them in Guantanamo under the Authorization
15 for Use of Military Force? Is that an associated group?

16 MR. WILTSIE: Well, Your Honor, it may very well
17 be that when that day comes, myself or one of my associates
18 will stand before the Court and argue that very fact; that
19 -- for that very conclusion; however, we're not there yet.
20 Al-Qaeda is still present in Afghanistan, as the generals --
21 as the statements by the generals that we put in the record
22 attest. They are still fighting al-Qaeda; they are still
23 fighting the Taliban; and they are still fighting their
24 associated forces in Afghanistan. That is the conflict for
25 which these detainees were detained and active hostilities

1 are ongoing against that -- for that conflict and,
2 therefore, Your Honor, they're detainable. If they have an
3 argument that they were never detained for that conflict,
4 that's a merits decision that they need to bring forward and
5 prosecute themselves. It's not a question for this Court on
6 this motion today.

7 Your Honor, just briefly, as to the political
8 branches, it's clear the Executive, as Judge Leon noted just
9 last year, considers the hostilities to be ongoing against
10 al-Qaeda/the Taliban in Afghanistan. The evidence there is
11 the semi-annual War Powers Resolutions Letters. We filed
12 the last one with the Court on Monday. In it, both
13 Presidents Trump and President Obama have continually stated
14 that we remain engaged since 9/11 -- or since, actually,
15 October 2001 against the -- against al-Qaeda, the Taliban
16 and associated forces.

17 As to Congress, Judge Leon found the 2012 National
18 Defense Authorization Act dispositive. There, Congress
19 endorsed the President's ability to detain individuals under
20 the AUMF until the end of hostilities. That had two
21 implications for Judge Leon. The first was clearly that as
22 of 2012, hostilities were ongoing; and the second was in the
23 interim between 2012 and 2017, Congress had never repealed,
24 revoked or otherwise declared that hostilities had ended.
25 So he implied that Congress still believed active

1 hostilities were ongoing.

2 Thus, Your Honor, we turn to the due process
3 clause --

4 THE COURT: Right.

5 MR. WILTSIE: -- which --

6 THE COURT: Why wouldn't that apply on a
7 functional analysis? It would be no more anomalous to use
8 Article 1, Section 9 ex post factos than to apply the habeas
9 corpus of Article 1, Section 9. Why wouldn't -- lead to
10 that conclusion following Boumediene's analysis? I'm trying
11 to parse that out because, on one hand, I have individuals
12 who are not refugees who did not want to come here for any
13 reason whatsoever who are forced to be here who are now
14 demanding constitutional rights and have no legitimate right
15 to be here except being forced to be here as opposed to
16 refugees, etcetera, who are facing now a different problem.
17 Boumediene, however, they -- it was determined by the
18 Supreme Court that -- using a functional analysis that
19 extended habeas corpus rights to non-citizens, detainees.
20 And under the same section, why wouldn't it be right to give
21 them other rights of due process? Broader rights.

22 MR. WILTSIE: Well, Your Honor, I start with the
23 Court of Appeals's opinion in Rasul where they rejected that
24 approach specifically. Second, Your Honor, the -- Kiyemba
25 itself involved a due process right and a right of entry

1 into the United States, but also a right of release.

2 THE COURT: Rasul was remanded from the Supreme
3 Court.

4 MR. WILTSIE: Yes, Your Honor.

5 THE COURT: And they reissued the opinion stating
6 -- or the judgment, what they said, on a more limited basis.

7 MR. WILTSIE: They -- as we were discussing, Your
8 Honor, you can point to the fact that Rasul mentions Kiyemba
9 in dicta; however, they did reinstate the decision and they
10 did, in doing so, state they were unwilling to apply a
11 functional analysis. They were unwilling to extend the
12 rationale of Boumediene beyond the suspension clause.

13 THE COURT: If more due process rights do apply,
14 is that separate, then, from the authorized use of military
15 force? The statute. Constitutionally, does that call more
16 question to the continued long duration of detention? Does
17 it provide them with different kinds of evidentiary rulings
18 and presumptions that have been provided in the past? Does
19 that --

20 MR. WILTSIE: No, Your Honor.

21 THE COURT: -- necessarily give more rights to the
22 --

23 MR. WILTSIE: No, I -- no, Your Honor. I think
24 the answer to that question is, the law of -- under the due
25 process clause, the law of wars and detention under the law

1 of wars is sui generis. As the Court of Appeals said in
2 Ali, it's not punishment. Its purpose is solely to
3 prevent retain -- return to the battlefield and there is no
4 time limit. And the reason there's no time limit is it's
5 cabined by an objective fact, the end of hostilities. And
6 accordingly, Your Honor, they -- we would still be able to
7 detain them until the end of active hostilities. The due
8 process clause doesn't affect that. As the Court pointed
9 out Judge Randolph's opinion, the preponderance of the
10 evidence standard, the question has always been whether the
11 preponderance of the evidence standard is too high for the
12 Government to have to sustain, not too low, and so I don't
13 think the due process clause changes anything.

14 They miscast the due process argument in two ways.
15 They say it's, essentially, perpetual detention for -- or to
16 prevent them -- the petitioners from being dangerous. The
17 first -- the second part of that, dangerousness, is simply
18 inapposite here. Law of war detention is not a -- under law
19 of war of detention, it is not a question whether an enemy
20 combatant, if released, would return to the battlefield.
21 The question is whether the enemy combatant, if released,
22 could return to the battlefield. And that is why the laws
23 of war are clear and allow detention until the end of active
24 hostilities. Certainly, some detainees -- some enemy
25 combatants who are released during wars will not return to

1 battle -- to the battle. They'll choose not to. They'll go
2 into hiding. They'll doing some. The question is, once you
3 have a detainee, whether he could return to the battlefield.

4 As for the perpetual war aspect, Your Honor, we
5 talked about that before. First of all, they believe it's a
6 forever war, but they don't know that; we don't know that.
7 We can only tell when the war is over when active
8 hostilities end. Second, Your Honor, they miscast this as
9 the war having unraveled; having morphed, but as I pointed
10 out, the question here for this Court is whether the initial
11 battle is the same. The analogy, Your Honor, to play off of
12 one Mr. Azmy uses, December 8th, 1941, did the Germans and
13 the Italians release their French and English prisoners
14 because we entered the war? The answer to that is no. The
15 initial war started in Afghanistan and it is ongoing today.
16 That it may have grown is irrelevant to the ongoing
17 detention of these petitioners.

18 Lastly, Your Honor, I would point out that as to
19 the other procedural due process aspects that they
20 challenge, the procedures and evidentiary rulings, those are
21 rulings of the Court of Appeals and they're binding here. I
22 would also point out, Your Honor, as I mentioned earlier,
23 only one of these detainees has taken the case to merits.
24 As to the other seven, we suggest the proper procedure, if
25 they want to challenge those evidentiary procedures, is to

1 take their case to merits. If they lose, they, then, have
2 an argument in the Court of Appeals, as applied, that the
3 standard affected their outcome, and that is the proper path
4 for them, not this, essentially, facial challenge they bring
5 today.

6 Your Honor, in conclusion, in *Ali*, the Court of
7 Appeals stated that it's not the judiciary's proper role to
8 devise a novel detention standard that would vary with the
9 length of detention. And, rightly so, for -- if you did so,
10 Your Honor, you would be undercutting the law of war
11 principle that prevents enemy combatants from returning to
12 the fight and you'd be endorsing a system in which the enemy
13 combatants -- petitioners here -- could, essentially, run
14 out -- they could have their compatriots run out the clock,
15 much like a penalty kill in hockey, and they could return to
16 the battlefield. We note here that petitioners make no
17 claim that they would not return to the fight. We urge this
18 Court to adhere to the binding precedent which we argue
19 disposes of all the issues in this case and to deny them the
20 relief that they seek.

21 THE COURT: Thank you, Mr. Wiltsie. I appreciate
22 the argument.

23 Mr. Azmy, you'd like to come back and have a short
24 rebuttal?

25 MR. AZMY: I would, Your Honor, if I could just

1 clarify one technical question; then address some of the
2 outstanding arguments.

3 So we've referred to Mr. Al-Bihani a number of
4 times. I want to be clear that Mr. Al-Bihani in the D.C.
5 Circuit opinion is Ghaleb, who was released. Tofiq
6 Al-Bihani is still --

7 THE COURT: Are they brothers, as I understand it?

8 MR. CLARKE: They are brothers, Your Honor.

9 THE COURT: Yes, that's what I understood.

10 MR. AZMY: So if I could address the due process
11 argument while noting that Mr. Wiltsie did not answer your
12 question about why it would be improper or anomalous to
13 apply the due process clause, given that we've had
14 suspension clause hearings, he mentions that, you know,
15 Supreme Court has said lower courts should respect dicta.
16 But what about the Court of Appeals? The subsequent panels
17 of Kiyemba have read Kiyemba I narrowly on its facts; four
18 Supreme Court Justices have read it that way; and the Al
19 Bahlul opinion has read it that way. This is not a matter
20 of rogue District Courts disobeying the Court of Appeals.

21 THE COURT: What about Mr. Wiltsie's last point,
22 though? If you haven't had an actual trial for any of these
23 individuals, how are you going to show that a different
24 burden or more process, in other words, owed to them?
25 Separating out the duration of the -- them being held in

1 prison --

2 MR. AZMY: Sure.

3 THE COURT: But just that they come before a court
4 here and you're saying, Well, there should have been a
5 different process here in the court for considering the
6 evidence. I mean, how can you show that that needs to be
7 done with an actual hearing? And then they appeal saying,
8 If you'd have had a different burden, I could have won this;
9 if you'd have allowed different evidence in, I could have
10 won this, you know? Don't you need a hearing for these
11 individual cases first?

12 MR. AZMY: Yes, Your Honor. Let me answer that.
13 That's this question about addressing the cases on the
14 merits. If Your Honor doesn't agree that all of these
15 detentions are unlawful on their face, there may be merits
16 hearings, but our position is the merits hearings have to
17 look differently than they've looked at before, because due
18 process imposes durational limits. It would not permit
19 continuing detention based on past association. That's the
20 criminal context, and it has to be forward-looking and the
21 Government would have to be able to overcome, in our view,
22 by clear and convincing evidence that the individuals would
23 not -- would return to the battlefield, overcoming some of
24 the evidence we have, including evidence from the cleared
25 petitioners. And I would separately say, Your Honor can

1 rule on behalf of the cleared petitioners based on the
2 arguments we've already made and has equitable power to
3 divide up these cases however you wish, but if we had a
4 remand merits hearing, we are seeking a rule of law where
5 due process would apply and all of the accordant procedures
6 that would come to that.

7 With respect to the AUMF which is a separate
8 argument, they continue the mantra that there is no time
9 limit and it's a political question, but Hamdi was very
10 clear that these detentions under the law of war have to be
11 temporary, connected to a purpose, a purpose that is
12 connected to preventing a return to the battlefield.

13 And then separately, Hamdi itself -- and the
14 Government ignores this -- has its own limitation -- a
15 sunset clause, so to speak -- that speaks directly to the
16 idea that these detentions cannot be perpetual. Mr. Hamdi
17 presents Justice O'Connor with this quandary. Under this
18 view of the law, I could be detained for a lifetime.
19 Justice O'Connor says that is not -- that is a very serious
20 concern. So while his detention is permissible, having been
21 captured two years before with a Kalashnikov on the
22 battlefield, there may come a time when the practical
23 circumstances of a conflict are so unlike those that inform
24 the laws of war that the detention authorization, now 17
25 years in effect, has unraveled. And we submit that any

1 conflict where the Government can point to sorties and troop
2 levels year after year after year and that it could last
3 forever does not resemble past conflicts that inform the
4 laws of war and where the Government gets to define in a
5 self-serving way the boundaries of that conflict. The
6 courts and, I think, Justice O'Connor are clear it cannot
7 accept that. I need to -- and the other piece of this is
8 the -- Hamdi permits detention to prevent return to a
9 battlefield in the particular conflict that existed.

10 And if you'll indulge me, Your Honor, I would like
11 to develop for the record -- because I know, maybe, some
12 other judges will be reviewing this transcript -- some of
13 the additional -- the evidence that comes from the
14 Government's analysis about what this conflict looks like
15 now. So in their exhibits which rely on congressional
16 testimony, press briefings, etcetera, to say that
17 circumstances are like they were in 2001, al-Qaeda is barely
18 mentioned.

19 With respect to al-Qaeda, the press briefing by
20 the Commander of Operation Resolute Support in Afghanistan
21 says, Al-Qaeda and Afghanistan is primarily in the form of
22 al-Qaeda on the Indian subcontinent. Most of al-Qaeda is
23 trying to hide, essentially. Second, when al-Qaeda -- core
24 al-Qaeda, quote, is mentioned, the threat to attack in the
25 U.S. is described as aspirational. Core al-Qaeda is not

1 described as an organized armed group in its current form.
2 That comes from Exhibit-20 where the Director of National
3 Counterterrorism Center says, We have constrained al-Qaeda's
4 effectiveness and its ability to recruit, train and deploy
5 operatives.

6 And as for the Taliban, much of the sourcing
7 describes it as a counter-narcotics campaign against the
8 Taliban in Afghanistan, a strike on poppy fields. In
9 Exhibit-15, Senate testimony from the Commander of Operation
10 Resolute Support in Afghanistan says, We believe that the
11 Taliban have evolved into a criminal or narco insurgency.
12 They are fighting to defend their revenue streams. They
13 have increasingly lost whatever ideological anchor they once
14 had.

15 And, to be clear, we're not resting on the fact
16 that the conflict has changed. Our primary argument is that
17 the duration is too long and for the Government -- it -- the
18 conflict itself looks unlike any other conflict when the
19 Government can always point to some source that says there
20 is a danger and there have to be limits on that piece.

21 With respect to the transfer process, the -- Mr.
22 Wiltsie says it is hoped that some will be released, as if,
23 you know, mistakes were made. He says it's a complicated
24 process. Maybe. But, Your Honor, we know that process will
25 not be undertaken until the -- and unless the Court orders

1 it.

2 With respect to Secretary Mattis, Mr. Wiltsie
3 points to -- I think it's Section 3 of the executive order
4 where he was -- where it says, Nothing in this order shall
5 prevent the Secretary of Defense from transferring
6 individuals away from the U.S. naval base.

7 THE COURT: Right.

8 MR. AZMY: Well, in a May 2nd, 2018, CNN
9 interview, Secretary Mattis says, quote, Right now, I am not
10 working on that issue. Again, he will not, absent a Court
11 order.

12 In conclusion, Your Honor, you know, I've been,
13 regrettably, working on these cases for 15 years, as has
14 Your Honor. And this -- the present government's legal
15 mantra -- we can detain anyone until the end of
16 hostilities -- reminds me eerily of the mantra in 2002 to
17 2004 which is the, you know -- foreign nationals held on
18 foreign soil are entitled to no rights that this Court is
19 bound to respect. It's like the earlier position. And in
20 both cases, what strikes me is the Government erogate --
21 cites international human rights law, yet erogates to itself
22 all of the power that comes from the law -- that law. At
23 the same time, it rejects any constraints that come with
24 that law, and that is not law. That is just unchecked,
25 unbounded Executive authority, because international human

1 rights law is designed to constrain the Executive's
2 authority to detain, not to give it license, and I think the
3 Government has that law upside down. So we think the
4 Executive and this particular Executive -- the time has run
5 for deference to the kinds of arguments the Government has
6 made and the courts have to say so.

7 THE COURT: I appreciate that. And, as I've said,
8 I appreciate the work and I understand the concerns, I
9 believe, of the detainees after many years of being detained
10 and in the -- for the -- originally having been charged as
11 being part of al-Qaeda or associated factors. I think one
12 of the instructive things in this is that it -- I'm pleased
13 that Mr. Azmy went back to Hamdi which is really the
14 essential case prior to Boumediene. The difference which is
15 key, however, Mr. Hamdi was an American citizen, but Justice
16 O'Connor wrote that opinion, and I think a lot of that is
17 important to follow.

18 Thank you, Mr. Azmy. You can sit down.

19 MR. AZMY: Thank you.

20 THE COURT: I'm going to get into a soliloquy
21 instead of an argument at this point.

22 Is -- her language in that case, I think, is very
23 instructive, although, as I've said, there was a key
24 difference where he was a citizen, but Mr. Hamdi argued
25 before the Supreme Court that, Congress has not authorized

1 the indefinite detention to which he is now subject. Hamdi
2 contends the AUMF does not authorize indefinite/perpetual
3 detention. Certainly, we agree that indefinite detention
4 for the purpose of interrogation is not authorized.
5 Further, we understand Congress's grant of authority for the
6 use of necessary and appropriate force, to include the
7 authority to detain for the duration of the relevant
8 conflict. Our understanding is based upon longstanding
9 war-of-law [sic] principles. If the practical circumstances
10 of a given conflict are entirely unlike those of the
11 conflict that informed the development of the law of war,
12 that understanding may unravel. But that is not the
13 situation we face as of this date. That was 2004. Active
14 combat operations against Taliban fighters are apparently
15 ongoing in Afghanistan, and then she holds, The United
16 States may detain, for the duration of these hostilities,
17 individuals legitimately determined to be Taliban combatants
18 who engaged in armed conflict against the United States. If
19 the record establishes United States troops are still
20 involved in active combat in Afghanistan, these detentions
21 are part of the exercise of necessary and appropriate force
22 and, therefore, authorized by the AUMF.

23 And she goes on as follows, but she also talks
24 about due process. Even in cases in which the detention of
25 enemy combatants is legally authorized, there remains the

1 question of what process is constitutionally due a
2 citizen -- so it's a citizen; we have non-citizens here --
3 who dispute his enemy-combat status. Our resolution of this
4 dispute requires a careful examination of both the writ of
5 habeas corpus which Hamdi now seeks to employ as a mechanism
6 of judicial review and of the due process clause which
7 informs the procedural contours of that mechanism in this
8 instance. Since he's a citizen, obviously, due process
9 applies to him.

10 And she goes on to discuss what to do, and it's
11 obviously -- it was a plurality opinion with several other
12 concurring and dissenting opinions, especially Justice
13 Scalia, as to what rights are accorded this citizen
14 charged or this non-citizen, but she does point out as to --
15 relevant to the proceedings that we have had in these cases
16 the following things:

17 For more than a century, the meaning of procedural
18 due process has been clear. Parties whose rights are to be
19 affected are entitled to be heard. And in order -- heard --
20 they may enjoy that right, they must first be notified.
21 It's equally a fundamental right the right to notice,
22 opportunity to be heard must be granted at a meaningful time
23 and in a meaningful manner. These essential constitutional
24 promises may not be eroded.

25 Then she concludes, At the same time, the

1 exigencies of the circumstances may depend -- may demand
2 that, aside from these core elements, enemy combatant
3 proceedings may be tailored to alleviate their uncommon
4 potential to burden the Executive at a time of ongoing
5 military conflict. Hearsay, for example, may need to be
6 accepted as the most reliable available evidence from the
7 Government in such proceedings. Likewise, the Constitution
8 would not be offended by a presumption in favor of the
9 Government's evidence, so long as that presumption remains
10 rebuttable and fair opportunity for rebuttal were provided.
11 So thus, once the Government puts forth credible evidence
12 that the habeas petitioner meets the combatant --
13 enemy-combatant criteria, the onus could shift to petitioner
14 to rebut that evidence with more persuasive evidence that he
15 falls outside the criteria, and goes on to discuss, this
16 satisfies the Constitution.

17 The option of this court was that more strict
18 presumption against the Government; that they had the burden
19 to produce evidence beyond -- by a preponderance that, then,
20 could be rebutted by the defendant. That presumption was
21 not in favor of the Government. And she went on to discuss
22 about those continued to hold -- those who have been
23 continued to -- and it said, That process is due only when
24 the determination is made to continue to hold those who have
25 been seized, but obviously, she concluded that at this

1 juncture, it was sufficient. But she did discuss clearly to
2 me that there are due process concerns that you could
3 review. She also approved, obviously, in here the military
4 tribunals as a method.

5 And, finally -- which I've always appreciated a
6 District Court judge -- she says at the end, We anticipate
7 that a District Court would proceed with the caution that we
8 have indicated is necessary in this setting, engaging in a
9 fact-finding process that is both prudent and incremental.
10 We have no reason to doubt that courts faced with these
11 sensitive matters will pay proper heed to both the matters
12 of national security that might arise in individual cases
13 and to the constitutional limitations safeguarding essential
14 liberties that remain vibrant even in times of security
15 concerns. And, as a result, we inherited all these cases
16 and we have been trying to work our way through these
17 concerning the rights of these individual detainees, along
18 with the Government's interests in national security.

19 There is obvious sympathy for these detainees
20 being held for up to 15 or 16 years at this point without
21 any charges being brought against them as being engaged in
22 criminal acts of terrorism, etcetera, without any military
23 commissions being raised against them, the particular ones
24 before me. And with evidence that their reluctance, if not
25 outright refusal, to release any of these individuals under

1 the criteria established by the presidential executive
2 orders, including those of President Obama that remain in
3 effect as well as President Trump's that do consider and
4 discuss release of these individuals as being appropriate
5 under the circumstances in the discretion of the Secretary
6 of Defense.

7 The Court is left with substantial attacks on the
8 viability of the present system that has been in effect for
9 the treatment of these detainees' concerns, not only on an
10 as-applied basis -- and that is to the evidentiary standards
11 and the burden of proof alleging that it's not sufficient
12 due process -- but on a facial basis that the whole
13 proceedings are improperly organized. If you consider the
14 cases in our court and the Supreme Court, reading the tea
15 leaves of those cases -- not the actual statement, what they
16 say they hold -- as not requiring the courts to be so
17 accepting of the process -- of the statement that due
18 process does not apply to these detainees beyond which the
19 Supreme Court has already determined and that, basically,
20 both the Authorization for Use of Military Force and under
21 the Constitution, they have been given all the rights
22 they're entitled to and there's still a legitimate detention
23 of these individuals because of the ongoing conflict because
24 of -- they're related to associated individuals with
25 al-Qaeda or the Taliban which would include Islamic State of

1 Iraq and Syria individuals as well as others, and that they
2 asked the Court to not follow which is at least the dicta,
3 if not the actual holdings of our Circuit, and to applying
4 this enhanced due process to hold that indefinite -- not
5 indeterminate, but indefinite -- detention is
6 unconstitutional or is also in violation of AUMF as no
7 longer being related to the purpose of the AUMF to detain
8 these people who have been allegedly in support of al-Qaeda,
9 the Taliban or associated forces engaged in hostilities
10 against the United States.

11 I'm going to take the matter under advisement. I
12 do think that the petitioners, with their substantial
13 support of all the lawyers that work so hard in these cases,
14 have presented some serious issues. I do not, however, come
15 away convinced that this Court has a position to overrule
16 our Court of Appeals and interpret what the Supreme Court --
17 some of the Supreme Court judges may have said or some of
18 our judges may have said as the law that applies to these
19 cases as opposed to the law of this Circuit that seems
20 fairly clear, at least in some of the Circuit opinions.
21 There are some conflicts and some more involved issues in
22 some of these cases; that I will trace them.

23 But I do want to note for the record, again, how
24 much these attorneys who are volunteer attorneys have meant
25 to the Court and to our system of justice representing these

1 individuals who are detained, who have been detained for
2 many, many years -- as long as, I'm sure, the average
3 sentence is for very serious crimes in the United States --
4 who yet have no seen way of being released. Whether that's
5 been foreclosed because of the announcements of the
6 President or because of the actions taken by the Executive
7 to date and which may conflict with the executive orders, we
8 will review. But the Court appreciates the work that has
9 been done, and it is an ongoing issue that I'm sure the
10 Court and all the judges who handle these cases would like
11 to see finally resolved in a reasonable time frame.

12 So with that, I'm going to, again, thank counsel;
13 thank counsel for the Government; and we'll stand in recess.
14 Thank you.

15 MR. AZMY: Thank you, Your Honor.

16 THE DEPUTY CLERK: All rise. This Honorable Court
17 stands adjourned.

18 (Proceedings concluded at 12:37 p.m.)

19 * * * * *

20 **CERTIFICATE OF OFFICIAL COURT REPORTER**

21 I, **TIMOTHY R. MILLER, RPR, CRR, NJ-CCR**, do hereby certify
22 that the above and foregoing constitutes a true and accurate
23 transcript of my stenographic notes and is a full, true and
24 complete transcript of the proceedings to the best of my
25 ability, dated this 25th day of July 2018.

/s/Timothy R. Miller, RPR, CRR, NJ-CCR
Official Court Reporter
United States Courthouse
Room 6722
333 Constitution Avenue, NW
Washington, DC 20001

	2017 [3] - 39:2, 47:13, 51:23	8	Act [1] - 51:18	45:17
'17 [3] - 42:13, 42:21, 47:13	2018 [5] - 1:4, 9:19, 42:7, 47:14, 62:8	80202 [1] - 2:7	Action [1] - 3:4	aging [1] - 48:5
0	202 [3] - 1:17, 1:24, 2:18	80218 [1] - 2:10	actions [2] - 15:24, 70:6	ago [8] - 17:19, 19:22, 20:3, 20:24, 23:17, 23:18, 24:19, 44:23
04-1194 [1] - 3:4	20530-0001 [1] - 1:24	815 [1] - 1:16	active [17] - 10:7, 15:9, 35:14, 36:12, 38:3, 39:17, 40:21, 48:7, 49:12, 50:25, 51:25, 54:7, 54:23, 55:7, 64:13, 64:20	agree [10] - 13:2, 13:3, 13:23, 20:7, 40:19, 45:7, 50:7, 58:14, 64:3
1	212 [2] - 1:14, 2:4	835-6184 [1] - 1:17	acts [1] - 67:22	agreed [2] - 6:8, 22:10
1 [2] - 52:8, 52:9	2446 [1] - 1:19	860-1331 [1] - 2:11	actual [5] - 44:24, 57:22, 58:7, 68:15, 69:3	agreement [2] - 27:2, 49:20
10 [2] - 23:17, 30:9	25 [1] - 16:3	8th [1] - 55:12	Adahi [4] - 21:3, 22:7, 22:10, 22:19	agreements [1] - 24:6
100 [2] - 37:12	28th [1] - 29:2	9	addition [1] - 18:20	agrees [1] - 49:24
10012 [1] - 1:14	29 [1] - 31:6	9 [4] - 30:11, 52:8, 52:9	additional [2] - 47:25, 60:13	ahead [1] - 8:24
10023 [1] - 2:3	2nd [1] - 62:8	9/11 [4] - 16:8, 38:20, 38:23, 51:14	address [7] - 11:14, 15:5, 23:1, 31:18, 32:10, 57:1, 57:10	Ahmed [2] - 5:9, 9:21
10163 [1] - 2:13	3	90 [1] - 24:18	adequate [1] - 43:13	aided [1] - 2:20
11 [1] - 1:4	3 [1] - 62:3	90-day [2] - 25:5, 45:9	adhere [2] - 44:1, 56:18	AI [34] - 3:15, 3:18, 3:19, 4:12, 5:10, 11:25, 12:25, 16:20, 17:3, 17:17, 17:19, 19:11, 21:3, 22:7, 22:10, 22:17, 22:19, 27:8, 29:13, 31:11, 33:25, 35:18, 40:3, 40:7, 42:6, 42:14, 48:18, 49:13, 50:20, 57:3, 57:4, 57:6, 57:18, 60:21
1102 [1] - 21:4	30 [4] - 28:2, 31:5, 31:7, 32:13	913-9300 [1] - 1:20	adjoined [1] - 70:17	al [43] - 1:2, 1:5, 3:3, 3:4, 10:9, 15:11, 15:25, 16:1, 16:7, 16:9, 20:3, 22:19, 26:18, 26:24, 37:6, 37:24, 38:11, 38:12, 38:14, 38:19, 38:22, 38:23, 39:7, 39:10, 39:16, 39:17, 50:13, 50:22, 51:10, 51:15, 60:17, 60:19, 60:22, 60:23, 60:24, 60:25, 61:3, 63:11, 68:25, 69:8
116 [2] - 36:22, 36:25	30-day [2] - 29:3, 29:4	929 [1] - 2:14	administration [12] - 9:3, 9:5, 14:2, 19:15, 26:14, 26:19, 26:22, 26:23, 28:11, 28:21, 28:23, 30:24	AI-Adahi [4] - 21:3, 22:7, 22:10, 22:19
116-year [1] - 36:19	303 [2] - 2:7, 2:11	9th [1] - 2:3	admission [1] - 15:13	AI-Alwi [1] - 40:3
11:00 [1] - 1:4	307-1401 [1] - 1:24	A	admit [1] - 27:21	AI-Bihani [17] - 3:19, 5:10, 11:25, 17:17, 17:19, 19:11, 22:17, 29:13, 31:11, 35:18, 40:7, 42:14, 48:18, 49:13, 57:3, 57:4, 57:6
12 [1] - 38:6	30th [1] - 24:19	a.m [1] - 1:4	admonition [1] - 13:14	AI-Bihani's [3] - 16:20, 17:3, 42:6
12:37 [1] - 70:18	312 [1] - 1:20	abandoned [1] - 24:7	adopted [3] - 20:23, 21:5, 21:24	al-Darbi [2] - 26:18, 26:24
13823 [2] - 24:14, 45:13	333 [1] - 2:17	Abdu [3] - 3:3, 3:20, 31:11	adversary [1] - 22:12	al-Haqqani [1] - 15:25
1437 [1] - 2:10	354-3111 [1] - 2:18	ABDU [1] - 1:2	advisement [1] - 69:11	al-Qaeda [32] - 10:9, 15:11, 16:1, 16:7,
14th [1] - 36:18	3627 [1] - 2:13	Abdul [3] - 4:25, 5:10, 38:6	Advocates [1] - 34:18	
15 [3] - 23:17, 62:13, 67:20	376-8446 [1] - 2:14	ability [4] - 6:7, 12:14, 51:19, 61:4	affect [1] - 54:8	
150 [1] - 2:3	3rd [1] - 46:21	able [6] - 8:21, 20:13, 23:23, 48:8, 54:6, 58:21	affected [2] - 56:3, 65:19	
1543 [1] - 2:6	4	absence [2] - 16:23, 17:1	affecting [1] - 22:13	
15th [1] - 36:18	40 [3] - 18:18, 47:20, 48:4	absent [2] - 26:9, 62:10	affiliate [1] - 16:7	
16 [5] - 6:21, 6:23, 19:22, 20:3, 67:20	400 [1] - 2:6	absolute [2] - 20:7, 21:21	affiliates [1] - 16:7	
16th [1] - 9:19	41 [1] - 47:20	absolutely [1] - 32:1	Afghanistan [17] - 17:2, 37:25, 38:14, 39:6, 39:11, 39:15, 39:18, 50:20, 50:24, 51:10, 55:15, 60:20, 60:21, 61:8, 61:10, 64:15, 64:20	
17 [1] - 59:24	43 [1] - 27:8	accept [3] - 43:12, 44:14, 60:7	Afghanistan-related [1] - 39:6	
1789 [2] - 21:20, 23:8	5	accepted [1] - 66:6	Africa [2] - 17:9, 38:12	
18th [2] - 21:23, 42:7	569 [1] - 4:23	accepting [1] - 68:17	agencies [2] - 24:23,	
1941 [1] - 55:12	571-1000 [1] - 2:7	accessibility [1] - 6:4		
1:04-cv-01194 [1] - 1:2	6	accordance [1] - 43:25		
2	60614 [1] - 1:20	accordant [1] - 59:5		
2 [1] - 45:24	613 [1] - 21:4	accorded [1] - 65:13		
2,000 [1] - 47:21	614-6452 [1] - 1:14	according [3] - 21:17, 38:5, 48:18		
20 [4] - 1:23, 15:23, 28:2, 28:3	62nd [1] - 2:3	accordingly [1] - 54:6		
20001 [1] - 2:17	636-6941 [1] - 2:4	account [1] - 28:6		
20006 [1] - 1:17	666 [1] - 1:13	accurate [1] - 48:22		
2001 [2] - 51:15, 60:17	6722 [1] - 2:16	acknowledge [1] - 34:11		
2002 [1] - 62:16	7	acknowledged [1] - 34:12		
2004 [2] - 62:17, 64:13	700 [1] - 32:25			
2008 [1] - 20:24	7th [1] - 1:13			
2010 [6] - 21:3, 25:22, 26:2, 31:4, 38:7, 48:18				
2012 [3] - 51:17, 51:22, 51:23				
2016 [1] - 38:9				

16:9, 22:19, 37:6, 37:24, 38:11, 38:12, 38:14, 38:19, 38:22, 38:23, 39:7, 39:10, 39:16, 39:17, 50:13, 50:22, 51:15, 60:17, 60:19, 60:22, 60:23, 60:24, 60:25, 63:11, 68:25, 69:8
Al-Qaeda [2] - 50:20, 60:21
al-Qaeda's [1] - 61:3
al-Qaeda/the [2] - 20:3, 51:10
al-Qahtani [1] - 15:25
Ali [5] - 11:24, 34:16, 36:9, 54:2, 56:6
aligned [1] - 50:12
allegedly [1] - 69:8
allegiance [1] - 50:13
alleging [1] - 68:11
alleviate [1] - 66:3
allow [1] - 54:23
allowed [2] - 47:2, 58:9
almost [1] - 16:6
alone [1] - 14:25
Alwi [1] - 40:3
Amendment [1] - 11:13
American [1] - 63:15
amicus [3] - 34:12, 34:15, 34:21
Amir [1] - 34:16
amount [1] - 15:2
AMU [1] - 37:5
analogy [1] - 55:11
analysis [9] - 19:14, 20:10, 21:19, 42:2, 52:7, 52:10, 52:18, 53:11, 60:14
Anam [2] - 3:3, 4:22
ANAM [1] - 1:2
anchor [1] - 61:13
announcements [1] - 70:5
annual [1] - 51:11
anomalous [6] - 10:20, 10:22, 13:15, 13:17, 52:7, 57:12
answer [8] - 28:10, 42:12, 49:3, 50:5, 53:24, 55:14, 57:11, 58:12
answering [2] - 10:2, 37:11
anticipate [1] - 67:6
anyway [1] - 33:25
apologize [2] - 45:15, 45:20

apparent [1] - 31:13
appeal [1] - 58:7
Appeals [14] - 35:19, 36:9, 40:7, 41:9, 41:11, 49:13, 49:16, 54:1, 55:21, 56:2, 56:7, 57:16, 57:20, 69:16
Appeals's [2] - 17:16, 52:23
APPEARANCES [2] - 1:10, 2:1
appearing [4] - 3:16, 4:5, 4:9, 4:12
applied [3] - 13:7, 56:2, 68:10
applies [10] - 10:16, 10:17, 13:1, 13:24, 14:8, 14:11, 23:8, 23:14, 65:9, 69:18
apply [19] - 10:19, 10:20, 10:22, 11:6, 11:13, 12:8, 13:11, 14:18, 23:12, 41:2, 42:3, 52:6, 52:8, 53:10, 53:13, 57:13, 59:5, 68:18
applying [3] - 5:16, 10:25, 69:3
appreciate [7] - 3:22, 14:16, 34:9, 35:17, 56:21, 63:7, 63:8
appreciated [1] - 67:5
appreciates [1] - 70:8
apprehended [1] - 6:22
approach [1] - 52:24
appropriate [8] - 10:1, 22:9, 24:23, 43:19, 47:4, 64:6, 64:21, 68:4
approval [1] - 43:21
approve [1] - 49:21
approved [1] - 67:3
Arabia [3] - 19:4, 19:11, 27:2
arbitrariness [2] - 27:3, 27:16
architecture [1] - 9:17
areas [1] - 17:9
argue [5] - 14:19, 34:25, 36:3, 50:18, 56:18
argued [3] - 11:3, 36:2, 63:24
arguendo [1] - 22:18
ARGUMENT [1] - 1:8
argument [3] - 4:8, 6:9, 6:20, 10:24, 14:18, 19:17, 20:6,

20:8, 22:4, 23:2, 23:5, 23:13, 32:9, 34:10, 37:14, 38:21, 39:5, 40:1, 40:4, 40:24, 42:5, 49:16, 51:3, 54:14, 56:2, 56:22, 57:11, 59:8, 61:16, 63:21
arguments [8] - 6:8, 6:11, 11:16, 13:16, 39:23, 57:2, 59:2, 63:5
arise [1] - 67:12
armed [4] - 24:25, 46:3, 61:1, 64:18
Army [1] - 9:11
arrange [2] - 6:5, 24:6
arranged [2] - 26:22, 46:14
arrangements [3] - 18:24, 19:6, 19:9
arrivals [1] - 47:6
Article [2] - 52:8, 52:9
articles [1] - 16:4
as-applied [1] - 68:10
aside [2] - 24:14, 66:2
aspect [1] - 55:4
aspects [1] - 55:19
aspirational [1] - 60:25
assigned [1] - 47:19
associated [16] - 6:25, 7:4, 19:22, 20:2, 37:8, 37:25, 38:18, 38:20, 38:22, 39:10, 50:15, 50:24, 51:16, 63:11, 68:24, 69:9
associates [1] - 50:17
association [3] - 16:15, 50:10, 58:19
assume [2] - 22:17, 45:10
assurances [2] - 29:1, 43:13
assured [1] - 26:8
attack [2] - 38:13, 60:24
attacks [3] - 15:21, 38:20, 68:7
attention [1] - 41:7
attenuated [2] - 7:3, 17:7
attest [1] - 50:22
Attorney [1] - 24:21
attorneys [2] - 69:24
audio [1] - 8:20
AUMF [1] - 6:20, 10:14, 17:23, 23:20, 50:10, 51:20, 59:7, 64:2, 64:22, 69:6,

69:7
authoritative [2] - 16:24, 36:3
authority [6] - 9:11, 10:6, 62:25, 63:2, 64:5, 64:7
authorization [1] - 59:24
Authorization [9] - 36:6, 36:10, 37:6, 38:16, 39:12, 40:10, 50:14, 51:18, 68:20
authorize [1] - 64:2
authorized [6] - 36:6, 53:14, 63:25, 64:4, 64:22, 64:25
authorizes [1] - 36:10
available [3] - 6:11, 44:14, 66:6
Avenue [3] - 1:16, 1:23, 2:17
average [1] - 70:2
aware [3] - 21:23, 25:23, 43:23
AZMY [6] - 3:8, 3:9, 3:12, 3:13, 6:18, 7:13, 7:16, 7:18, 7:21, 7:24, 8:6, 8:9, 8:13, 8:18, 9:1, 11:4, 11:9, 11:14, 11:18, 11:23, 12:2, 12:12, 12:17, 12:21, 13:5, 13:13, 13:20, 14:4, 15:4, 17:15, 17:18, 18:15, 19:2, 19:5, 19:9, 20:18, 20:20, 20:25, 23:1, 23:4, 25:7, 25:12, 25:25, 26:3, 26:6, 26:13, 26:17, 26:24, 32:10, 32:13, 32:23, 33:1, 33:5, 33:12, 33:15, 56:25, 57:10, 58:2, 58:12, 63:19, 70:15
Azmy [12] - 1:11, 3:8, 3:12, 6:17, 32:8, 35:4, 43:10, 43:16, 55:12, 56:23, 63:13, 63:18

B

backward [1] - 20:11
backward-looking [1] - 20:11
Baher [3] - 1:11, 3:8, 3:12
Bahlul [2] - 12:25, 57:19
Bajabu [1] - 5:10

Baker [1] - 30:7
BAKER [1] - 1:16
banc [2] - 14:10, 17:20
bare [1] - 9:3
barely [1] - 60:17
Basardh [1] - 12:12
base [1] - 62:6
based [12] - 9:10, 16:15, 19:20, 19:24, 20:9, 32:15, 34:15, 42:15, 46:21, 58:19, 59:1, 64:8
basis [6] - 7:3, 7:7, 8:1, 53:6, 68:10, 68:12
battle [8] - 17:13, 28:4, 28:5, 37:23, 55:1, 55:11
battlefield [15] - 18:2, 18:21, 20:4, 20:15, 23:24, 43:15, 54:3, 54:20, 54:22, 55:3, 56:16, 58:23, 59:12, 59:22, 60:9
Bay [3] - 25:2, 45:19, 46:20
bear [1] - 21:11
become [1] - 46:19
beefing [1] - 25:18
BEFORE [1] - 1:8
begin [1] - 21:19
beginning [2] - 5:21, 14:18
behalf [4] - 4:12, 4:22, 4:25, 59:1
Bennis [3] - 2:12, 5:9, 9:20
BENNIS [1] - 5:8
best [3] - 8:23, 12:10, 33:21
better [1] - 8:25
between [3] - 18:9, 18:10, 51:23
beyond [5] - 19:13, 41:1, 53:12, 66:19, 68:18
Bihani [20] - 3:19, 5:10, 11:25, 17:4, 17:17, 17:19, 19:11, 22:17, 29:13, 31:11, 35:9, 35:12, 35:18, 40:7, 42:14, 48:18, 49:13, 57:3, 57:4, 57:6
Bihani's [4] - 16:20, 17:3, 30:1, 42:6
binding [7] - 12:6, 27:1, 36:2, 40:20, 41:3, 55:21, 56:18
board [2] - 25:22, 39:3

boards [2] - 47:7, 49:7 Boumediene [13] - 10:18, 10:21, 11:3, 11:8, 13:14, 21:14, 21:18, 41:10, 41:15, 52:17, 53:12, 63:14 Boumediene's [1] - 52:10 bound [2] - 12:10, 62:19 boundaries [1] - 60:5 boundary [1] - 10:10 bounded [1] - 10:6 boundless [1] - 16:10 Box [1] - 2:13 Branch [1] - 1:23 branches [3] - 17:2, 49:14, 51:8 Breyer [1] - 40:12 brief [6] - 6:2, 6:20, 34:14, 34:21, 36:2, 46:9 briefing [2] - 6:15, 60:19 briefings [2] - 16:5, 60:16 briefly [2] - 49:11, 51:7 briefs [3] - 22:5, 22:7, 34:12 bring [4] - 38:23, 39:23, 51:4, 56:4 broad [1] - 24:4 broader [3] - 11:6, 11:7, 52:21 Broadway [1] - 1:13 brothers [2] - 57:7, 57:8 brought [2] - 6:7, 67:21 bullets [1] - 15:17 burden [9] - 7:3, 20:22, 21:11, 22:24, 57:24, 58:8, 66:4, 66:18, 68:11 burden's [1] - 21:6 burdens [1] - 8:15 bureau [1] - 10:1 bureaus [1] - 10:2 Bush [1] - 32:19 bush [1] - 32:24	16:14, 20:9, 20:10, 23:16, 36:15, 43:5, 59:16, 60:6 capacious [1] - 26:7 capture [1] - 50:13 captured [3] - 24:25, 46:3, 59:21 care [6] - 47:18, 47:19, 47:21, 48:6, 48:9, 48:14 careful [1] - 65:4 Carter [6] - 28:10, 28:20, 29:3, 30:14, 42:13, 42:22 case [18] - 7:5, 12:16, 16:20, 21:3, 21:5, 22:11, 22:17, 30:19, 35:6, 35:16, 42:1, 49:19, 50:4, 55:23, 56:1, 56:19, 63:14, 63:22 cases [35] - 4:5, 5:18, 5:21, 7:12, 11:11, 11:12, 12:6, 12:9, 12:17, 18:7, 21:9, 21:16, 21:25, 22:13, 27:22, 32:14, 32:23, 35:14, 35:15, 42:8, 58:11, 58:13, 59:3, 62:13, 62:20, 64:24, 65:15, 67:12, 67:15, 68:14, 68:15, 69:13, 69:19, 69:22, 70:10 Catch-22 [1] - 31:15 category [2] - 31:6, 31:7 caught [1] - 33:8 causing [1] - 47:22 caution [1] - 67:7 CCR [1] - 2:15 cease [1] - 9:22 ceased [2] - 16:21, 17:2 cell [1] - 27:11 Center [3] - 3:13, 34:22, 61:3 CENTER [1] - 1:13 century [3] - 21:23, 36:18, 65:17 cert [1] - 12:23 certain [2] - 8:16, 37:13 certainly [10] - 4:15, 19:16, 19:19, 30:20, 32:4, 40:17, 47:10, 50:4, 54:24, 64:3 certainty [1] - 43:6 certification [1] - 29:5 certify [1] - 43:24 chain [1] - 33:20	challenge [4] - 7:7, 55:20, 55:25, 56:4 challenges [1] - 5:14 challenging [1] - 7:25 Champa [1] - 2:6 chance [1] - 6:15 changed [3] - 14:2, 14:4, 61:16 changes [1] - 54:13 charge [1] - 6:24 charged [4] - 25:24, 27:5, 63:10, 65:14 charges [2] - 33:10, 67:21 Chicago [2] - 1:20, 28:17 choose [1] - 55:1 Circuit [9] - 12:25, 13:8, 13:23, 14:6, 27:25, 57:5, 69:3, 69:19, 69:20 circuit [2] - 11:11, 11:12 circumstances [8] - 16:5, 42:16, 47:4, 59:23, 60:17, 64:9, 66:1, 68:5 cite [4] - 15:9, 15:20, 15:23, 16:3 cited [1] - 21:13 cites [1] - 62:21 citizen [8] - 38:6, 63:15, 63:24, 65:2, 65:8, 65:13, 65:14 citizens [2] - 52:19, 65:2 civil [1] - 34:15 Civil [1] - 3:4 claim [1] - 56:17 claiming [1] - 49:23 clarify [1] - 57:1 Clark [1] - 1:19 Clarke [4] - 1:15, 3:20, 30:5, 30:7 CLARKE [7] - 29:15, 30:4, 30:7, 30:18, 31:4, 31:21, 57:8 classified [2] - 12:23, 25:9 clause [32] - 10:13, 10:16, 10:23, 11:6, 13:1, 13:7, 13:18, 13:22, 13:24, 14:8, 14:11, 16:13, 17:24, 21:21, 22:15, 23:8, 23:10, 23:11, 23:15, 23:18, 36:8, 41:16, 52:3, 53:12, 53:25, 54:8, 54:13, 57:13, 57:14, 59:15, 65:6	clear [23] - 7:9, 9:5, 9:14, 17:22, 20:5, 20:18, 22:21, 23:2, 23:14, 23:25, 28:4, 28:15, 33:16, 51:8, 54:23, 57:4, 58:22, 59:10, 60:6, 61:15, 65:18, 69:20 cleared [16] - 3:20, 3:21, 18:24, 23:25, 25:15, 25:21, 31:1, 31:2, 31:12, 33:24, 34:5, 43:16, 46:13, 58:24, 59:1 clearer [1] - 12:5 clearly [5] - 13:10, 14:8, 51:21, 67:1 CLERK [2] - 3:2, 70:16 client [3] - 29:10, 29:20, 30:21 clients [3] - 27:6, 27:15, 28:8 clock [1] - 56:14 close [1] - 9:8 closed [1] - 14:25 closer [1] - 28:3 closing [1] - 24:15 Closure [1] - 9:24 CNN [1] - 62:8 CO [2] - 2:7, 2:10 cognizant [2] - 46:11, 46:14 collapsed [1] - 27:11 Colorado [2] - 4:21, 5:1 COLUMBIA [1] - 1:1 combat [3] - 64:14, 64:20, 65:3 combatant [5] - 54:20, 54:21, 66:2, 66:12, 66:13 combatants [5] - 54:25, 56:11, 56:13, 64:17, 64:25 command [2] - 9:11, 33:20 Commander [2] - 60:20, 61:9 commented [2] - 21:1, 21:4 commenting [1] - 41:22 commission [1] - 33:10 commissions [1] - 67:23 committee [1] - 42:24 common [3] - 23:7, 40:7, 49:19 communicated [1] -	30:14 community [2] - 34:16, 43:22 compatriots [2] - 37:22, 56:14 complex [1] - 43:10 complicated [1] - 61:23 computer [1] - 2:20 computer-aided [1] - 2:20 concede [1] - 27:9 conceded [1] - 12:25 concern [2] - 44:8, 59:20 concerning [2] - 47:14, 67:17 concerns [5] - 42:15, 63:8, 67:2, 67:15, 68:9 concession [2] - 9:13, 14:1 concluded [3] - 13:24, 66:25, 70:18 concludes [1] - 65:25 conclusion [5] - 48:3, 50:19, 52:10, 56:6, 62:12 concurring [6] - 13:3, 40:13, 40:25, 41:21, 41:25, 65:12 conditionally [1] - 8:8 conditions [2] - 43:20, 43:21 conduct [1] - 16:15 conducted [1] - 5:22 confess [1] - 27:15 confirmed [2] - 32:14 conflict [32] - 14:22, 15:13, 15:18, 15:22, 16:8, 18:9, 24:25, 37:12, 38:1, 38:4, 39:10, 39:11, 46:4, 49:19, 50:24, 51:1, 51:3, 59:23, 60:1, 60:5, 60:9, 60:14, 61:16, 61:18, 64:8, 64:10, 64:11, 64:18, 66:5, 68:23, 70:7 conflicts [4] - 15:15, 18:8, 60:3, 69:21 Congress [6] - 44:1, 51:17, 51:18, 51:23, 51:25, 63:25 Congress's [1] - 64:5 congressional [3] - 16:4, 16:24, 60:15 conjunction [1] - 24:12 connected [5] - 17:24,
C				
CA [1] - 1:2 cabin [1] - 12:21 cabined [1] - 54:5 campaign [3] - 9:7, 46:22, 61:7 cannot [9] - 13:23,				

<p>20:1, 39:7, 59:11, 59:12</p> <p>Connecticut [1] - 1:16</p> <p>connection [3] - 23:18, 24:25, 46:3</p> <p>consensus [1] - 39:3</p> <p>consent [1] - 3:15</p> <p>consider [3] - 17:6, 68:3, 68:13</p> <p>consideration [1] - 6:12</p> <p>considerations [1] - 5:16</p> <p>considered [3] - 42:24, 49:8, 49:10</p> <p>considering [1] - 58:5</p> <p>considers [1] - 51:9</p> <p>consistently [1] - 12:9</p> <p>consolidated [1] - 3:17</p> <p>Constitution [6] - 2:17, 21:22, 41:14, 66:7, 66:16, 68:21</p> <p>CONSTITUTIONAL [1] - 1:13</p> <p>Constitutional [1] - 3:13</p> <p>constitutional [6] - 5:15, 10:19, 36:7, 52:14, 65:23, 67:13</p> <p>constitutionally [3] - 37:1, 53:15, 65:1</p> <p>constrain [1] - 63:1</p> <p>constrained [1] - 61:3</p> <p>constraints [1] - 62:23</p> <p>consultation [1] - 24:20</p> <p>consulting [1] - 45:17</p> <p>contains [1] - 5:13</p> <p>contends [1] - 64:2</p> <p>contest [1] - 8:2</p> <p>contested [1] - 32:16</p> <p>contesting [1] - 22:1</p> <p>context [5] - 16:13, 17:25, 18:1, 20:12, 58:20</p> <p>continually [1] - 51:13</p> <p>continuation [2] - 15:9, 17:5</p> <p>continue [4] - 25:2, 38:3, 59:8, 66:24</p> <p>continued [6] - 17:3, 38:7, 44:16, 53:16, 66:22, 66:23</p> <p>continues [2] - 15:8, 36:25</p> <p>continuing [3] - 17:7, 17:10, 58:19</p> <p>contours [1] - 65:7</p> <p>convictions [1] - 7:1</p>	<p>convinced [1] - 69:15</p> <p>convincing [5] - 20:18, 22:22, 23:14, 27:24, 58:22</p> <p>coordinate [1] - 21:9</p> <p>coordinated [1] - 21:9</p> <p>core [3] - 60:23, 60:25, 66:2</p> <p>corpus [6] - 5:4, 5:13, 5:22, 52:9, 52:19, 65:5</p> <p>correct [6] - 7:10, 32:1, 35:4, 43:16, 44:10, 44:11</p> <p>correctly [1] - 31:17</p> <p>counsel [13] - 3:14, 3:15, 3:17, 3:25, 4:4, 4:6, 5:5, 9:21, 28:9, 30:2, 32:8, 70:12, 70:13</p> <p>counter [1] - 61:7</p> <p>counter-narcotics [1] - 61:7</p> <p>Counterterrorism [1] - 61:3</p> <p>countries [3] - 44:14, 44:16, 44:22</p> <p>country [3] - 21:25, 28:25, 38:10</p> <p>counts [1] - 32:14</p> <p>couple [3] - 24:11, 40:25, 42:4</p> <p>course [3] - 10:11, 10:21, 36:1</p> <p>Court [57] - 2:15, 2:16, 7:6, 9:15, 10:18, 10:21, 11:3, 15:20, 17:16, 19:23, 22:14, 26:10, 35:19, 36:8, 36:9, 40:7, 41:2, 41:5, 41:8, 41:9, 41:10, 41:13, 42:10, 42:18, 43:23, 46:25, 49:13, 49:16, 51:5, 51:12, 52:18, 52:23, 53:3, 54:1, 54:8, 55:21, 56:2, 56:6, 57:15, 57:16, 57:18, 57:20, 61:25, 62:10, 62:18, 63:25, 67:6, 67:7, 68:14, 68:19, 69:16, 69:17, 70:10, 70:16</p> <p>COURT [133] - 1:1, 3:7, 3:10, 3:22, 4:2, 4:13, 4:16, 4:18, 4:24, 5:2, 5:11, 7:9, 7:15, 7:17, 7:19, 7:22, 8:5, 8:7, 8:11, 8:16, 8:22, 11:1,</p>	<p>11:5, 11:10, 11:15, 11:22, 11:24, 12:3, 12:15, 12:20, 13:2, 13:9, 13:19, 14:1, 14:16, 16:19, 17:16, 18:14, 19:1, 19:4, 19:8, 20:17, 20:19, 20:21, 21:1, 23:3, 24:11, 25:10, 25:20, 26:2, 26:4, 26:11, 26:16, 26:21, 27:20, 28:18, 28:20, 28:24, 29:6, 29:9, 29:11, 29:13, 29:17, 29:19, 29:24, 30:1, 30:6, 30:16, 31:3, 31:9, 31:23, 32:2, 32:5, 32:12, 32:22, 32:24, 33:2, 33:6, 33:14, 34:9, 35:2, 35:8, 35:10, 35:12, 35:17, 36:13, 36:17, 36:24, 37:3, 37:5, 37:17, 38:5, 38:18, 38:25, 39:14, 39:24, 40:12, 40:23, 41:18, 41:21, 41:25, 44:8, 44:12, 45:3, 45:5, 45:7, 45:13, 45:16, 45:23, 45:25, 46:2, 46:6, 46:11, 46:18, 47:12, 48:16, 48:24, 49:15, 50:6, 52:4, 52:6, 53:2, 53:5, 53:13, 53:21, 56:21, 57:7, 57:9, 57:21, 58:3, 62:7, 63:7, 63:20</p> <p>court [35] - 5:20, 7:12, 8:11, 13:6, 14:10, 15:16, 16:20, 17:20, 20:13, 21:20, 22:13, 24:8, 27:23, 40:2, 40:19, 41:7, 42:9, 43:7, 44:2, 45:20, 45:21, 46:9, 50:18, 55:10, 56:18, 58:3, 58:5, 66:17, 68:7, 68:14, 69:2, 69:15, 69:25, 70:8</p> <p>Court's [3] - 12:5, 13:14, 21:17</p> <p>Courthouse [1] - 2:16</p> <p>Courts [4] - 8:17, 8:18, 28:1, 57:20</p> <p>courts [11] - 5:20, 21:24, 23:16, 27:21, 49:22, 49:25, 57:15, 60:6, 63:6, 67:10, 68:16</p> <p>cover [1] - 46:6</p>	<p>covers [1] - 46:2</p> <p>creations [1] - 45:4</p> <p>credible [1] - 66:11</p> <p>crime [1] - 27:15</p> <p>crimes [3] - 26:25, 27:5, 70:3</p> <p>criminal [10] - 16:12, 19:24, 19:25, 20:11, 23:19, 49:4, 58:20, 61:11, 67:22</p> <p>criteria [3] - 66:13, 66:15, 68:1</p> <p>crossed [1] - 18:18</p> <p>CRR [1] - 2:15</p> <p>CSRTs [1] - 33:18</p> <p>curiae [2] - 34:15, 34:21</p> <p>curious [1] - 28:8</p> <p>current [2] - 9:12, 61:1</p> <p>custodial [1] - 19:3</p>	<p>defendant [1] - 66:20</p> <p>Defendant [1] - 4:12</p> <p>Defense [11] - 15:20, 24:20, 25:6, 33:21, 43:24, 45:11, 45:16, 47:3, 51:18, 62:5, 68:6</p> <p>defer [3] - 16:22, 28:22, 29:5</p> <p>deference [1] - 63:5</p> <p>deferred [2] - 29:19, 29:21</p> <p>define [3] - 10:7, 15:11, 60:4</p> <p>degree [1] - 43:6</p> <p>deliberated [1] - 44:25</p> <p>deliberating [1] - 26:4</p> <p>deliberative [1] - 44:3</p> <p>demand [1] - 66:1</p> <p>demanding [1] - 52:14</p> <p>denial [1] - 12:23</p> <p>denied [1] - 29:23</p> <p>Denver [4] - 2:7, 2:10, 4:21, 5:1</p> <p>deny [2] - 34:2, 56:19</p> <p>DEPARTMENT [1] - 1:22</p> <p>Department [6] - 9:20, 15:1, 15:20, 30:10, 43:11, 44:21</p> <p>Department's [1] - 44:9</p> <p>deploy [1] - 61:4</p> <p>deportation [1] - 22:2</p> <p>DEPUTY [2] - 3:2, 70:16</p> <p>described [2] - 60:25, 61:1</p> <p>describes [1] - 61:7</p> <p>designated [2] - 42:11, 42:20</p> <p>designed [1] - 63:1</p> <p>despite [1] - 22:22</p> <p>destroyed [2] - 25:18, 37:7</p> <p>details [1] - 6:19</p> <p>detain [13] - 10:6, 16:14, 36:11, 38:3, 38:17, 40:5, 51:19, 54:7, 62:15, 63:2, 64:7, 64:16, 69:7</p> <p>detainable [3] - 24:9, 39:12, 51:2</p> <p>detained [14] - 9:5, 19:19, 27:4, 38:2, 38:6, 38:21, 39:9, 48:4, 50:25, 51:3, 59:18, 63:9, 70:1</p> <p>detainee [3] - 3:20, 43:12, 55:3</p>
D				
			<p>D.C [8] - 1:3, 12:25, 13:8, 13:23, 14:6, 34:16, 34:18, 57:4</p> <p>danger [1] - 61:20</p> <p>dangerous [2] - 24:8, 54:16</p> <p>dangerousness [1] - 54:17</p> <p>Darbi [2] - 26:18, 26:24</p> <p>Darold [2] - 2:5, 4:21</p> <p>date [6] - 24:18, 26:15, 43:1, 64:13, 70:7</p> <p>dated [1] - 24:19</p> <p>days [1] - 24:18</p> <p>DC [3] - 1:17, 1:24, 2:17</p> <p>de [1] - 46:19</p> <p>dealing [2] - 18:6, 18:16</p> <p>deals [1] - 12:14</p> <p>December [2] - 29:2, 55:12</p> <p>decide [2] - 22:16, 50:3</p> <p>decided [1] - 29:4</p> <p>decision [11] - 16:22, 28:22, 29:5, 35:5, 41:17, 42:21, 43:2, 49:12, 50:8, 51:4, 53:9</p> <p>decisions [1] - 36:4</p> <p>declaration [1] - 16:24</p> <p>declared [1] - 51:24</p> <p>dedicated [1] - 45:1</p> <p>defeated [1] - 37:19</p> <p>defend [1] - 61:12</p>	

<p>detainees [20] - 4:7, 9:10, 9:12, 9:15, 9:17, 10:24, 23:25, 25:15, 37:19, 43:14, 47:18, 48:16, 50:25, 52:19, 54:24, 55:23, 63:9, 67:17, 67:19, 68:18</p> <p>detainees' [1] - 68:9</p> <p>detaining [1] - 22:7</p> <p>detention [52] - 5:19, 6:24, 6:25, 7:8, 8:1, 9:12, 9:13, 9:23, 9:25, 10:12, 10:13, 10:25, 14:19, 14:21, 15:3, 16:13, 17:3, 17:12, 17:24, 18:1, 19:24, 19:25, 20:9, 21:13, 23:19, 23:20, 25:19, 36:5, 38:7, 39:4, 40:6, 47:16, 47:17, 53:16, 53:25, 54:15, 54:18, 54:19, 54:23, 55:17, 56:8, 56:9, 58:19, 59:20, 59:24, 60:8, 64:1, 64:3, 64:24, 68:22, 69:5</p> <p>detention-related [2] - 9:23, 9:25</p> <p>detentions [4] - 58:15, 59:10, 59:16, 64:20</p> <p>determination [10] - 16:21, 17:1, 23:16, 27:22, 28:7, 28:12, 28:21, 29:6, 29:14, 66:24</p> <p>determine [3] - 14:23, 16:25, 49:1</p> <p>determined [8] - 10:9, 21:16, 24:1, 39:3, 42:14, 52:17, 64:17, 68:19</p> <p>determining [1] - 21:18</p> <p>develop [2] - 9:9, 60:11</p> <p>development [1] - 64:11</p> <p>devise [1] - 56:8</p> <p>dicta [11] - 11:16, 11:17, 12:13, 12:18, 13:9, 14:5, 41:2, 41:7, 53:9, 57:15, 69:2</p> <p>difference [2] - 63:14, 63:24</p> <p>different [11] - 6:23, 13:12, 16:4, 31:24, 41:19, 52:16, 53:17,</p>	<p>57:23, 58:5, 58:8, 58:9</p> <p>differently [1] - 58:17</p> <p>direct [1] - 9:24</p> <p>directed [1] - 9:22</p> <p>directly [1] - 59:15</p> <p>Director [2] - 24:22, 61:2</p> <p>disagreed [1] - 8:16</p> <p>disavowed [1] - 17:20</p> <p>disconnected [1] - 15:18</p> <p>discretion [1] - 68:5</p> <p>discuss [5] - 65:10, 66:15, 66:21, 67:1, 68:4</p> <p>discussing [2] - 22:5, 53:7</p> <p>dismantled [2] - 9:16, 44:13</p> <p>dismissed [1] - 35:16</p> <p>disobeying [1] - 57:20</p> <p>disposes [1] - 56:19</p> <p>disposition [3] - 15:6, 24:24, 46:3</p> <p>dispositive [1] - 51:18</p> <p>dispute [2] - 65:3, 65:4</p> <p>dissented [1] - 12:23</p> <p>dissenting [1] - 65:12</p> <p>distinctly [1] - 41:11</p> <p>DISTRICT [3] - 1:1, 1:1, 1:9</p> <p>District [8] - 8:17, 8:18, 12:5, 22:14, 27:25, 57:20, 67:6, 67:7</p> <p>district [2] - 21:4, 36:4</p> <p>divide [1] - 59:3</p> <p>Doe [1] - 11:25</p> <p>Donald [1] - 3:3</p> <p>DONALD [1] - 1:5</p> <p>done [6] - 19:25, 25:5, 43:20, 44:18, 58:7, 70:9</p> <p>doubt [2] - 22:14, 67:10</p> <p>down [5] - 13:19, 27:25, 33:4, 63:3, 63:18</p> <p>drafted [1] - 21:22</p> <p>draw [1] - 48:3</p> <p>due [49] - 5:16, 6:19, 10:13, 10:15, 10:16, 10:25, 11:2, 11:5, 12:8, 13:21, 14:17, 16:11, 16:13, 17:23, 18:4, 19:17, 20:7, 23:8, 23:10, 23:11, 23:15, 23:18, 34:12,</p>	<p>36:7, 40:23, 41:1, 52:2, 52:21, 52:25, 53:13, 53:24, 54:7, 54:13, 54:14, 55:19, 57:10, 57:13, 58:17, 59:5, 64:24, 65:1, 65:6, 65:8, 65:18, 66:23, 67:2, 68:12, 68:17, 69:4</p> <p>duration [11] - 6:25, 20:9, 36:11, 36:13, 40:5, 40:21, 53:16, 57:25, 61:17, 64:7, 64:16</p> <p>durational [3] - 16:16, 19:18, 58:18</p> <p>during [3] - 26:19, 26:21, 54:25</p> <p>Durkin [4] - 1:18, 3:21, 28:16, 31:25</p> <p>DURKIN [14] - 1:19, 28:16, 28:19, 28:22, 29:1, 29:8, 29:10, 29:12, 29:18, 29:21, 29:25, 31:22, 31:25, 32:3</p> <p>dwindled [1] - 32:20</p>	<p>46:23, 48:8, 51:20, 54:5, 54:7, 54:23, 55:8, 62:15, 67:6</p> <p>ended [3] - 33:3, 36:16, 51:24</p> <p>ending [2] - 14:21, 25:18</p> <p>endorsed [1] - 51:19</p> <p>endorsing [1] - 56:12</p> <p>endured [1] - 6:23</p> <p>enemy [10] - 18:17, 54:19, 54:21, 54:24, 56:11, 56:12, 64:25, 65:3, 66:2, 66:13</p> <p>enemy-combat [1] - 65:3</p> <p>enemy-combatant [1] - 66:13</p> <p>engaged [7] - 37:15, 37:21, 39:9, 51:14, 64:18, 67:21, 69:9</p> <p>engagement [1] - 39:17</p> <p>engaging [1] - 67:8</p> <p>England [1] - 36:18</p> <p>English [2] - 21:23, 55:13</p> <p>enhanced [1] - 69:4</p> <p>enjoy [1] - 65:20</p> <p>enormously [1] - 34:1</p> <p>enter [2] - 12:14, 18:13</p> <p>entered [1] - 55:14</p> <p>entire [1] - 25:17</p> <p>entirely [4] - 10:8, 16:6, 49:18, 64:10</p> <p>entitled [4] - 47:6, 62:18, 65:19, 68:22</p> <p>entry [2] - 12:22, 52:25</p> <p>Envoy [1] - 44:9</p> <p>Envoy's [1] - 25:16</p> <p>equally [1] - 65:21</p> <p>equitable [1] - 59:2</p> <p>eroded [1] - 65:24</p> <p>erogate [1] - 62:20</p> <p>erogates [1] - 62:21</p> <p>especially [1] - 65:12</p> <p>Esq [11] - 1:11, 1:12, 1:12, 1:15, 1:18, 1:21, 1:22, 2:2, 2:5, 2:8, 2:12</p> <p>essential [3] - 63:14, 65:23, 67:13</p> <p>essentially [4] - 54:15, 56:4, 56:13, 60:23</p> <p>established [1] - 68:1</p> <p>establishes [1] - 64:19</p> <p>estimating [1] - 47:20</p>	<p>et [4] - 1:2, 1:5, 3:3</p> <p>etcetera [9] - 15:22, 17:9, 24:23, 25:3, 42:24, 44:17, 52:16, 60:16, 67:22</p> <p>eventually [4] - 33:2, 33:3, 45:9, 49:25</p> <p>evidence [30] - 7:3, 19:21, 20:14, 20:18, 20:21, 21:12, 22:3, 22:19, 22:21, 22:22, 23:23, 32:15, 37:20, 42:22, 51:10, 54:10, 54:11, 58:6, 58:9, 58:22, 58:24, 60:13, 66:6, 66:9, 66:11, 66:14, 66:19, 67:24</p> <p>evidentiary [5] - 5:23, 53:17, 55:20, 55:25, 68:10</p> <p>evolved [1] - 61:11</p> <p>ex [8] - 12:25, 13:7, 13:18, 13:21, 13:24, 14:7, 14:11, 52:8</p> <p>exact [1] - 26:14</p> <p>exactly [4] - 22:8, 30:8, 37:17, 39:21</p> <p>examination [1] - 65:4</p> <p>example [2] - 36:8, 66:5</p> <p>exceeded [1] - 16:17</p> <p>except [1] - 52:15</p> <p>execution [1] - 38:12</p> <p>executive [11] - 9:7, 24:12, 43:8, 44:3, 45:14, 47:1, 47:5, 49:9, 62:3, 68:1, 70:7</p> <p>Executive [9] - 24:14, 49:18, 49:20, 51:8, 62:25, 63:4, 66:4, 70:6</p> <p>Executive's [2] - 16:22, 63:1</p> <p>exercise [1] - 64:21</p> <p>exercised [1] - 35:21</p> <p>Exhibit-15 [1] - 61:9</p> <p>Exhibit-20 [1] - 61:2</p> <p>exhibits [2] - 16:2, 60:15</p> <p>exigencies [1] - 66:1</p> <p>exist [4] - 16:8, 44:10, 45:2, 45:8</p> <p>existed [2] - 21:21, 60:9</p> <p>existing [1] - 24:12</p> <p>exists [3] - 20:11, 23:8, 49:19</p> <p>expanding [1] - 39:5</p> <p>expect [1] - 44:12</p>
E				
<p>East [1] - 38:12</p> <p>EDWARDS [1] - 2:9</p> <p>eerily [1] - 62:16</p> <p>effect [4] - 24:16, 59:25, 68:3, 68:8</p> <p>effected [1] - 39:15</p> <p>effectiveness [1] - 61:4</p> <p>effectuate [1] - 25:14</p> <p>effort [1] - 9:14</p> <p>efforts [6] - 25:13, 42:20, 46:12, 46:15, 48:6, 48:8</p> <p>eight [4] - 3:16, 17:19, 27:10, 35:4</p> <p>either [2] - 6:9, 43:6</p> <p>election [1] - 46:22</p> <p>elements [2] - 38:13, 66:2</p> <p>elsewhere [1] - 50:11</p> <p>email [1] - 9:19</p> <p>embassies [2] - 44:22, 44:23</p> <p>emergency [1] - 29:22</p> <p>employ [1] - 65:5</p> <p>en [2] - 14:10, 17:19</p> <p>end [20] - 5:19, 6:25, 10:6, 10:7, 14:19, 15:11, 15:13, 18:4, 30:24, 36:16, 38:4,</p>				

<p>expense [1] - 47:22 expenses [1] - 48:1 explain [1] - 30:2 extend [1] - 53:11 extended [1] - 52:19 extension [1] - 41:14 extent [2] - 27:3, 50:10 Extent [1] - 21:15 extraterritorially [2] - 10:19, 41:15</p>	<p>40:9, 50:22, 50:23, 61:12 file [3] - 22:5, 39:1, 50:9 filed [3] - 29:22, 34:12, 51:11 files [1] - 48:20 finally [5] - 5:19, 25:23, 36:21, 67:5, 70:11 finish [1] - 32:9 first [7] - 4:17, 5:25, 51:21, 54:17, 55:5, 58:11, 65:20 five [3] - 13:6, 13:22, 14:10 floated [1] - 32:17 Floor [2] - 1:13, 2:3 flows [1] - 15:6 flying [1] - 15:17 focus [1] - 46:9 foes [1] - 37:23 follow [4] - 11:17, 13:14, 63:17, 69:2 following [2] - 52:10, 65:16 follows [1] - 64:23 FOR [2] - 1:1, 1:13 force [6] - 31:2, 42:12, 49:9, 53:15, 64:6, 64:21 Force [8] - 36:7, 36:10, 37:6, 38:16, 39:13, 40:10, 50:15, 68:20 forced [2] - 52:13, 52:15 forces [8] - 37:15, 37:19, 37:25, 38:20, 39:11, 50:24, 51:16, 69:9 FORDHAM [1] - 2:2 foreclosed [2] - 23:5, 70:5 foreign [3] - 43:12, 62:17, 62:18 foreseeable [1] - 48:9 forever [2] - 55:6, 60:3 forgive [2] - 26:17 form [3] - 48:10, 60:21, 61:1 formally [1] - 30:13 forth [1] - 66:11 forty [1] - 33:5 forward [5] - 3:5, 19:25, 20:12, 51:4, 58:20 forward-looking [3] - 19:25, 20:12, 58:20 four [5] - 9:4, 11:11,</p>	<p>11:12, 12:22, 57:17 frame [1] - 70:11 French [1] - 55:13 full [4] - 14:9, 15:21, 38:9, 39:1 functional [5] - 42:2, 44:10, 52:7, 52:18, 53:11 fundamental [1] - 65:21 future [9] - 39:23, 41:24, 44:5, 45:23, 45:24, 45:25, 46:1, 48:9, 48:12</p>	<p>48:6, 49:1, 49:23, 54:12, 58:21, 59:14, 60:1, 60:4, 61:17, 61:19, 62:20, 63:3, 63:5, 66:7, 66:11, 66:18, 66:21, 70:13 Government's [11] - 8:3, 8:15, 14:25, 15:19, 18:2, 25:13, 26:4, 39:14, 60:14, 66:9, 67:18 government's [3] - 40:4, 46:12, 62:14 governments [2] - 16:14, 43:12 grant [2] - 5:12, 64:5 granted [2] - 41:1, 65:22 granting [1] - 5:4 grapevine [1] - 30:12 GROSSMAN [1] - 2:9 ground [3] - 15:10, 15:21, 15:24 group [4] - 5:14, 34:14, 50:15, 61:1 groups [2] - 16:9, 37:8 grown [1] - 55:16 Guantanamo [28] - 6:4, 9:2, 9:23, 9:24, 9:25, 10:3, 10:11, 10:16, 13:25, 24:15, 25:1, 25:16, 25:17, 26:12, 27:13, 30:21, 43:9, 44:9, 45:19, 46:1, 46:20, 47:4, 47:6, 47:8, 47:15, 47:17, 48:5, 50:14 Guantanamo's [1] - 14:8 guess [1] - 38:11 guessing [1] - 50:8 guilty [1] - 26:25</p>	<p>handle [2] - 42:9, 70:10 Haqqani [1] - 15:25 hard [1] - 69:13 heads [1] - 24:22 hear [3] - 5:25, 6:7, 8:21 heard [8] - 5:5, 11:19, 27:14, 30:12, 30:22, 65:19, 65:22 hearing [4] - 7:12, 58:7, 58:10, 59:4 hearings [4] - 5:22, 57:14, 58:16 hearsay [1] - 66:5 Heather [1] - 9:19 heed [1] - 67:11 height [1] - 27:16 held [14] - 21:14, 21:18, 25:22, 33:8, 36:9, 36:20, 36:25, 38:1, 40:15, 47:15, 48:18, 57:25, 62:17, 67:20 HELD [1] - 1:8 Heldman [1] - 9:19 Henderson [3] - 13:10, 22:23, 40:24 Henry [2] - 1:22, 4:1 Hi [1] - 4:11 hide [1] - 60:23 hiding [1] - 55:2 high [3] - 6:25, 38:10, 54:11 High [1] - 2:10 high-level [1] - 38:10 highest [1] - 28:3 himself [2] - 17:5, 42:17 historically [1] - 41:12 history [2] - 18:10, 32:24 hmm [1] - 8:6 hockey [1] - 56:15 HOGAN [1] - 1:8 hold [10] - 10:23, 37:12, 37:18, 39:18, 40:17, 40:21, 66:22, 66:24, 68:16, 69:4 holding [2] - 12:21, 12:24 holdings [1] - 69:3 holds [1] - 64:15 Holland [2] - 2:8, 4:25 HOLLAND [3] - 2:9, 4:25 Homeland [1] - 24:21 Honor [110] - 3:2, 3:8, 3:12, 3:17, 3:24, 4:20, 5:1, 5:8, 6:18,</p>
<p style="text-align: center;">F</p>	<p style="text-align: center;">G</p>	<p style="text-align: center;">H</p>	<p style="text-align: center;">H</p>	
<p>F.3d [1] - 21:4 face [4] - 50:4, 50:6, 58:15, 64:13 faced [1] - 67:10 facial [2] - 56:4, 68:12 facilities [1] - 48:14 facing [1] - 52:16 fact [9] - 14:25, 20:2, 30:15, 48:3, 50:18, 53:8, 54:5, 61:15, 67:9 fact-finding [1] - 67:9 facto [8] - 13:1, 13:7, 13:18, 13:21, 13:24, 14:7, 14:11, 46:19 factor [1] - 17:6 factors [3] - 28:1, 42:16, 63:11 factos [1] - 52:8 facts [2] - 7:7, 57:17 factual [4] - 7:7, 8:1, 15:5, 22:6 failed [1] - 15:23 fair [1] - 66:10 fairly [1] - 69:20 fairness [1] - 38:25 faith [1] - 34:15 faith-based [1] - 34:15 falls [1] - 66:15 family [1] - 27:12 far [5] - 16:17, 19:13, 24:16, 29:15, 48:19 favor [3] - 8:3, 66:8, 66:21 February [1] - 9:19 Federal [1] - 1:23 felony [1] - 7:1 few [1] - 33:6 field [1] - 17:13 fields [1] - 61:8 Fifth [1] - 11:13 fight [5] - 18:13, 19:11, 37:24, 56:12, 56:17 fighters [1] - 64:14 fighting [6] - 36:22,</p>	<p>Garland [1] - 49:15 gathered [1] - 4:3 General [2] - 9:9, 24:21 general [2] - 20:23, 42:5 generals [2] - 50:20, 50:21 generis [1] - 54:1 geographic [1] - 37:15 George [4] - 1:15, 3:20, 30:4, 30:7 German [1] - 18:12 Germans [1] - 55:12 Germany [1] - 18:12 Ghaleb [1] - 57:5 Gibbons [1] - 34:13 Gitmo [2] - 9:11, 46:23 given [9] - 33:22, 33:23, 34:3, 34:6, 42:8, 45:11, 57:13, 64:10, 68:21 Gotshal [1] - 34:23 govern [1] - 22:11 governed [1] - 14:6 governing [2] - 25:1, 45:18 government [1] - 7:2 Government [62] - 3:25, 6:1, 6:8, 6:16, 9:13, 9:16, 10:4, 10:9, 10:24, 12:24, 13:16, 14:1, 14:19, 15:8, 15:15, 17:8, 18:11, 18:17, 19:7, 20:15, 20:22, 21:6, 21:11, 21:15, 22:2, 22:6, 22:8, 22:10, 22:18, 22:25, 24:1, 24:3, 26:8, 28:6, 31:10, 31:17, 32:6, 34:20, 42:10, 42:19, 43:1, 44:12, 47:24,</p>	<p>habeas [14] - 5:4, 5:12, 5:14, 5:22, 7:12, 10:23, 11:7, 21:25, 22:1, 34:22, 52:8, 52:19, 65:5, 66:12 Hajj [4] - 3:15, 3:18, 27:8, 33:25 half [1] - 15:24 Hamdi [10] - 36:8, 59:9, 59:13, 59:16, 60:8, 63:13, 63:15, 63:24, 64:1, 65:5 hand [2] - 24:4, 52:11 handful [1] - 32:21</p>		

7:13, 7:16, 7:24, 8:9, 8:13, 8:21, 9:1, 9:17, 10:11, 11:9, 11:18, 12:2, 13:13, 14:14, 15:4, 16:11, 17:18, 18:6, 18:16, 18:20, 19:12, 20:6, 23:9, 23:21, 24:2, 24:10, 25:8, 25:25, 26:6, 26:8, 26:18, 26:24, 27:9, 27:19, 29:15, 30:4, 30:20, 31:1, 31:21, 33:13, 34:8, 35:1, 35:3, 36:1, 36:2, 36:8, 36:15, 36:23, 37:2, 37:9, 37:21, 38:15, 39:8, 39:20, 40:2, 40:6, 40:9, 40:20, 41:4, 41:24, 43:5, 44:7, 44:11, 44:20, 45:12, 46:5, 46:7, 46:17, 46:25, 48:2, 48:23, 49:4, 49:11, 50:16, 51:2, 51:7, 52:2, 52:22, 52:24, 53:4, 53:8, 53:20, 53:23, 54:6, 55:4, 55:8, 55:11, 55:18, 55:22, 56:6, 56:10, 56:25, 57:8, 58:12, 58:14, 58:25, 60:10, 61:24, 62:12, 62:14, 70:15	Huvelle [2] - 12:6, 12:13 hypothetical [1] - 49:18	Indian [1] - 60:22 indicate [1] - 48:10 indicated [5] - 6:8, 25:22, 44:23, 48:7, 67:8 indicates [3] - 40:20, 43:17, 50:9 indicating [3] - 8:23, 42:1, 47:16 indicative [3] - 40:17, 40:18, 47:22 individual [7] - 5:18, 7:12, 19:19, 26:11, 58:11, 67:12, 67:17 individuals [34] - 4:9, 15:3, 16:15, 17:12, 23:23, 24:5, 24:24, 25:1, 27:4, 31:19, 43:4, 43:7, 45:18, 45:25, 46:3, 46:13, 47:4, 47:15, 47:19, 47:20, 48:4, 49:6, 51:19, 52:11, 57:23, 58:22, 62:6, 64:17, 67:25, 68:4, 68:23, 68:24, 69:1, 70:1 indulge [1] - 60:10 inform [4] - 15:15, 42:10, 59:23, 60:3 information [4] - 25:7, 39:2, 39:3, 47:16 informed [2] - 18:8, 64:11 informs [1] - 65:7 infrastructure [1] - 25:17 inherited [1] - 67:15 initial [3] - 49:9, 55:10, 55:15 injury [1] - 7:4 inquiries [2] - 9:25, 10:3 instance [1] - 65:8 instead [1] - 63:21 instructive [2] - 63:12, 63:23 instructs [1] - 47:3 instrumental [1] - 32:18 insurgency [1] - 61:11 intelligence [1] - 43:22 Intelligence [1] - 24:22 intends [2] - 42:11, 42:19 interagency [2] - 24:4, 43:21 interested [1] - 7:25 interesting [2] - 41:5,	49:15 interests [2] - 43:25, 67:18 interim [1] - 51:23 international [2] - 62:21, 62:25 interpret [1] - 69:16 interpreted [2] - 11:6, 11:21 interrogation [1] - 64:4 interrupt [1] - 8:19 interview [1] - 62:9 introduce [6] - 4:5, 4:10, 23:23, 28:14, 30:6, 31:23 involved [3] - 52:25, 64:20, 69:21 Iraq [1] - 69:1 irrelevant [1] - 55:16 ISIS [4] - 15:24, 16:7, 50:11, 50:13 Islamic [1] - 68:25 ISN [1] - 4:23 issue [6] - 31:11, 35:4, 40:14, 42:2, 62:10, 70:9 issued [3] - 9:7, 42:7, 47:1 issues [6] - 5:15, 5:17, 33:7, 56:19, 69:14, 69:21 Italians [1] - 55:13 itself [8] - 10:9, 12:19, 15:12, 37:7, 52:25, 59:13, 61:18, 62:21	12:10, 13:6, 13:22, 14:11, 36:4, 60:12, 69:17, 69:18, 70:10 judgment [2] - 14:23, 53:6 judicial [4] - 26:9, 27:17, 33:17, 65:6 judiciary [1] - 49:17 judiciary's [1] - 56:7 July [1] - 1:4 juncture [1] - 67:1 June [1] - 39:1 jurisprudence [1] - 19:23 JUSTICE [1] - 1:22 Justice [6] - 23:21, 59:17, 59:19, 60:6, 63:15, 65:12 justice [2] - 40:12, 69:25 justices [1] - 12:22 Justices [1] - 57:18 justified [1] - 17:3 justify [1] - 22:6
Honor's [2] - 20:25, 46:7 HONORABLE [1] - 1:8 Honorable [1] - 70:16 hope [3] - 34:4, 37:4, 37:13 hoped [2] - 44:4, 61:22 hopelessness [1] - 34:6 hospice [1] - 47:18 hostilities [27] - 10:7, 10:8, 15:9, 15:11, 16:21, 17:2, 18:3, 18:6, 34:2, 36:12, 36:16, 38:4, 48:8, 49:12, 50:25, 51:9, 51:20, 51:22, 51:24, 52:1, 54:5, 54:7, 54:24, 55:8, 62:16, 64:16, 69:9 hostility [1] - 23:22 human [2] - 62:21, 62:25 hundred [1] - 27:10 Hundred [1] - 36:17 hundreds [1] - 10:24	I idea [2] - 30:25, 59:16 identify [2] - 3:5, 13:15 ideological [1] - 61:13 ignore [1] - 33:22 ignores [1] - 59:14 II [2] - 12:19, 18:22 III [2] - 1:15, 12:19 IL [1] - 1:20 illegal [1] - 15:2 illuminating [1] - 22:8 imagine [1] - 47:21 implemented [1] - 44:25 implicates [1] - 18:4 implications [1] - 51:21 implied [1] - 51:25 important [4] - 7:24, 22:12, 23:13, 63:17 imposes [2] - 10:17, 58:18 impractical [1] - 6:5 improper [5] - 10:20, 10:22, 13:15, 13:17, 57:12 improperly [1] - 68:13 IN [1] - 1:1 inapposite [1] - 54:18 include [2] - 64:6, 68:25 includes [2] - 32:13, 43:22 including [11] - 7:1, 9:15, 12:18, 24:25, 25:15, 25:20, 42:16, 45:18, 47:18, 58:24, 68:2 inconsistent [1] - 14:12 incorrectly [1] - 11:20 increasingly [1] - 61:13 incremental [1] - 67:9 incumbent [1] - 50:3 indefinite [7] - 6:24, 14:19, 14:23, 64:1, 64:3, 69:4, 69:5 indefinite/perpetual [1] - 64:2 indefinitely [1] - 16:14 indeterminate [3] - 14:20, 14:24, 69:5	J January [7] - 24:19, 31:4, 42:7, 42:13, 42:21, 46:21, 47:13 Jewish [1] - 38:13 job [1] - 45:1 John [2] - 2:8, 4:25 joined [2] - 3:14, 22:22 Jonathan [1] - 34:17 JUDGE [1] - 1:9 judge [7] - 12:6, 21:1, 21:4, 31:22, 49:15, 50:3, 67:6 Judge [18] - 8:2, 12:12, 13:1, 13:3, 13:10, 14:7, 21:2, 22:22, 29:22, 40:2, 40:24, 41:18, 41:23, 42:7, 51:8, 51:17, 51:21, 54:9 judges [10] - 8:12,	K Kadidal [2] - 1:12, 3:19 Kalashnikov [1] - 59:21 Kavanaugh [6] - 13:1, 13:3, 14:7, 21:2, 22:23, 41:18 Kavanaugh's [1] - 41:24 Kazimi [1] - 4:12 Kebraiei [2] - 1:12, 3:18 keep [2] - 17:12, 49:20 Kenya [2] - 38:6, 38:13 kept [1] - 21:7 key [3] - 10:4, 63:15, 63:23 kill [1] - 56:15 Killmer [3] - 2:5, 4:21, 4:22 KILLMER [3] - 2:5, 4:20, 4:21 kind [4] - 9:18, 10:13, 15:5, 19:14 kindly [1] - 42:8 kinds [2] - 53:17, 63:5 Kiyemba [16] - 11:23, 11:24, 12:13, 12:19, 12:22, 13:7, 13:23, 14:5, 14:13, 41:12, 52:24, 53:8, 57:17 knows [2] - 19:12,	

<p>31:10 Kollar [1] - 29:22 Kollar-Kotelly [1] - 29:22 Kotelly [2] - 29:22, 42:7</p>	<p>51:17, 51:21 Letters [1] - 51:11 level [3] - 27:23, 38:10, 38:24 levels [1] - 60:2 liberties [1] - 67:14 Libya [1] - 50:12 license [1] - 63:2</p>	<p>1:23 material [1] - 7:1 materials [2] - 6:16, 7:11 matter [8] - 11:19, 16:23, 21:16, 24:13, 27:21, 48:3, 57:19, 69:11 matters [8] - 6:1, 6:15, 9:23, 21:10, 40:5, 42:5, 67:11 Mattis [5] - 9:9, 12:1, 25:8, 62:2, 62:9 McKENZIE [1] - 30:7 MCKENZIE [1] - 1:16 mean [16] - 11:22, 14:5, 14:22, 15:2, 17:13, 24:8, 30:19, 32:4, 33:8, 39:4, 44:17, 47:24, 49:1, 49:24, 58:6 meaning [1] - 65:17 meaningful [3] - 10:23, 65:22, 65:23 means [2] - 39:1, 43:18 meant [1] - 69:24 mechanism [2] - 65:5, 65:7 meets [1] - 66:12 member [1] - 38:22 members [2] - 38:11, 38:19 mentioned [6] - 16:1, 33:15, 33:25, 55:22, 60:18, 60:24 mentions [2] - 53:8, 57:14 mere [1] - 20:9 merely [2] - 19:20, 23:16 merits [11] - 35:7, 38:21, 38:24, 40:1, 51:4, 55:23, 56:1, 58:14, 58:15, 58:16, 59:4 message [1] - 9:21 method [1] - 67:4 mic [2] - 3:10, 8:23 might [2] - 39:23, 67:12 military [6] - 33:10, 33:20, 53:14, 66:5, 67:3, 67:22 Military [8] - 36:7, 36:10, 37:6, 38:16, 39:13, 40:10, 50:15, 68:20 Miller [1] - 2:15 minimize [1] - 43:19</p>	<p>minimized [1] - 43:15 minimum [1] - 21:21 minute [4] - 11:1, 30:3, 44:23, 47:13 miscast [2] - 54:14, 55:8 mischaracterization [1] - 37:10 misread [1] - 29:9 mistakes [1] - 61:23 Mombassa [1] - 38:13 moment [3] - 8:20, 39:21, 48:4 Monday [1] - 51:12 morning [5] - 3:2, 3:8, 3:12, 3:24, 4:20 Moroccan [1] - 19:6 Morocco [2] - 18:25, 29:1 morphed [1] - 55:9 most [5] - 27:23, 32:20, 38:8, 60:22, 66:6 motion [3] - 34:22, 35:6, 51:6 motions [1] - 5:3 moved [1] - 6:6 MR [129] - 3:8, 3:12, 3:24, 4:20, 4:25, 6:18, 7:13, 7:16, 7:18, 7:21, 7:24, 8:6, 8:9, 8:13, 8:18, 9:1, 11:4, 11:9, 11:14, 11:18, 11:23, 12:2, 12:12, 12:17, 12:21, 13:5, 13:13, 13:20, 14:4, 15:4, 17:15, 17:18, 18:15, 19:2, 19:5, 19:9, 20:18, 20:20, 20:25, 23:1, 23:4, 25:7, 25:12, 25:25, 26:3, 26:6, 26:13, 26:17, 26:24, 28:16, 28:19, 28:22, 29:1, 29:8, 29:10, 29:12, 29:15, 29:18, 29:21, 29:25, 30:4, 30:7, 30:18, 31:4, 31:21, 31:22, 31:25, 32:3, 32:10, 32:13, 32:23, 33:1, 33:5, 33:12, 33:15, 35:1, 35:3, 35:9, 35:11, 35:13, 36:1, 36:15, 36:23, 37:2, 37:4, 37:9, 37:18, 38:15, 38:19, 39:8, 39:20, 39:25, 40:16, 41:4, 41:20, 41:23, 43:5, 44:11, 44:20, 45:4,</p>	<p>45:6, 45:12, 45:15, 45:20, 45:24, 46:1, 46:5, 46:7, 46:17, 46:25, 48:2, 48:22, 49:3, 50:2, 50:16, 52:5, 52:22, 53:4, 53:7, 53:20, 53:23, 56:25, 57:8, 57:10, 58:2, 58:12, 62:8, 63:19, 70:15 MS [6] - 4:11, 4:15, 4:17, 5:8, 8:19, 8:25 multiple [1] - 5:13 Muslim [2] - 34:15, 34:17 must [6] - 21:19, 22:6, 22:18, 40:8, 65:20, 65:22</p>
L				
<p>land [1] - 31:15 LANE [1] - 2:5 Lane [1] - 4:22 language [1] - 63:22 last [9] - 26:11, 33:6, 33:13, 37:14, 40:3, 51:9, 51:12, 57:21, 60:2 lasted [1] - 37:12 lastly [1] - 55:18 Latif [1] - 3:21 Laura [1] - 34:23 LAW [1] - 2:2 law [29] - 11:17, 13:8, 13:23, 17:11, 18:12, 23:7, 24:12, 26:7, 40:6, 53:24, 53:25, 54:18, 56:10, 59:4, 59:10, 59:18, 62:21, 62:22, 62:24, 63:1, 63:3, 64:9, 64:11, 69:18, 69:19 lawful [2] - 14:21, 21:13 lawlessness [1] - 34:7 laws [8] - 15:15, 18:8, 36:6, 38:2, 40:9, 54:22, 59:24, 60:4 lawyer [1] - 31:24 lawyers [1] - 69:13 lead [1] - 52:9 leads [1] - 34:4 least [10] - 11:11, 12:5, 16:23, 31:13, 33:11, 35:21, 42:1, 47:1, 69:2, 69:20 leaves [1] - 68:15 left [6] - 13:3, 22:12, 24:16, 31:18, 47:20, 68:7 legal [2] - 7:7, 62:14 legality [1] - 9:2 legally [2] - 15:6, 64:25 legitimate [4] - 17:25, 20:1, 52:14, 68:22 legitimately [1] - 64:17 length [2] - 36:14, 56:9 Leon [4] - 40:3, 51:8,</p>	<p>lifetime [6] - 9:13, 10:12, 15:14, 18:4, 25:19, 59:18 light [3] - 28:2, 41:10, 41:12 lights [1] - 10:4 likely [2] - 24:5, 48:11 likewise [1] - 66:7 limbo [1] - 48:24 limit [6] - 39:23, 40:14, 40:15, 54:4, 59:9 limitation [1] - 59:14 limitations [3] - 10:17, 19:18, 67:13 limited [3] - 41:13, 41:14, 53:6 limits [7] - 10:25, 16:12, 16:16, 20:7, 24:9, 58:18, 61:20 line [2] - 4:4 listen [1] - 4:8 listening [1] - 4:7 LLP [1] - 2:5 local [1] - 50:12 locations [1] - 37:16 longstanding [1] - 64:8 look [2] - 7:22, 58:17 looked [1] - 58:17 looking [4] - 19:25, 20:11, 20:12, 58:20 looks [3] - 19:12, 60:14, 61:18 lose [1] - 56:1 lost [3] - 8:20, 35:9, 61:13 low [1] - 54:12 lower [2] - 41:7, 57:15</p>			
L	M			
<p>land [1] - 31:15 LANE [1] - 2:5 Lane [1] - 4:22 language [1] - 63:22 last [9] - 26:11, 33:6, 33:13, 37:14, 40:3, 51:9, 51:12, 57:21, 60:2 lasted [1] - 37:12 lastly [1] - 55:18 Latif [1] - 3:21 Laura [1] - 34:23 LAW [1] - 2:2 law [29] - 11:17, 13:8, 13:23, 17:11, 18:12, 23:7, 24:12, 26:7, 40:6, 53:24, 53:25, 54:18, 56:10, 59:4, 59:10, 59:18, 62:21, 62:22, 62:24, 63:1, 63:3, 64:9, 64:11, 69:18, 69:19 lawful [2] - 14:21, 21:13 lawlessness [1] - 34:7 laws [8] - 15:15, 18:8, 36:6, 38:2, 40:9, 54:22, 59:24, 60:4 lawyer [1] - 31:24 lawyers [1] - 69:13 lead [1] - 52:9 leads [1] - 34:4 least [10] - 11:11, 12:5, 16:23, 31:13, 33:11, 35:21, 42:1, 47:1, 69:2, 69:20 leaves [1] - 68:15 left [6] - 13:3, 22:12, 24:16, 31:18, 47:20, 68:7 legal [2] - 7:7, 62:14 legality [1] - 9:2 legally [2] - 15:6, 64:25 legitimate [4] - 17:25, 20:1, 52:14, 68:22 legitimately [1] - 64:17 length [2] - 36:14, 56:9 Leon [4] - 40:3, 51:8,</p>	<p>machine [1] - 2:19 majority [2] - 13:6, 40:18 Malik [2] - 5:10, 38:6 man's [1] - 31:14 manner [1] - 65:23 mantra [3] - 59:8, 62:15, 62:16 Martha [5] - 2:2, 4:11, 4:17, 8:20 Massachusetts [1] -</p>			
L	M			

N

N.W [1] - 1:16
name [2] - 4:13, 4:17
named [1] - 7:19
narco [1] - 61:11
narcotics [1] - 61:7
narrow [1] - 12:24
narrowly [1] - 57:17
Nasser [7] - 3:21, 19:5, 28:13, 31:11, 42:25, 48:17
national [3] - 43:25, 67:12, 67:18
National [3] - 24:22, 51:17, 61:2
nationals [1] - 62:17
nature [2] - 15:18, 18:5
naval [1] - 62:6
Navy [1] - 45:19
Nawar [1] - 11:25
necessarily [3] - 17:21, 41:2, 53:21
necessary [4] - 38:9, 64:6, 64:21, 67:8
need [11] - 27:17, 38:23, 43:21, 44:21, 45:1, 46:9, 48:14, 51:4, 58:10, 60:7, 66:5
needs [1] - 58:6
negotiated [6] - 18:25, 19:6, 25:14, 27:2, 28:25, 30:10
negotiating [1] - 15:1
negotiations [2] - 43:11, 43:13
network [1] - 15:25
never [5] - 18:4, 28:5, 36:21, 51:3, 51:23

<p>new [3] - 9:9, 39:2, 47:6</p> <p>New [4] - 1:14, 2:3, 2:13</p> <p>NEWMAN [1] - 2:5</p> <p>Newman [1] - 4:22</p> <p>news [2] - 16:4, 47:16</p> <p>next [3] - 4:19, 12:15, 13:12</p> <p>nice [1] - 28:19</p> <p>NJ [1] - 2:15</p> <p>NJ-CCR [1] - 2:15</p> <p>no-man's [1] - 31:14</p> <p>nobody's [1] - 44:6</p> <p>non [7] - 16:12, 19:24, 19:25, 23:19, 52:19, 65:2, 65:14</p> <p>non-citizen [1] - 65:14</p> <p>non-citizens [2] - 52:19, 65:2</p> <p>non-criminal [4] - 16:12, 19:24, 19:25, 23:19</p> <p>none [3] - 7:11, 25:25, 48:10</p> <p>norm [1] - 22:1</p> <p>note [3] - 12:22, 56:16, 69:23</p> <p>noted [1] - 51:8</p> <p>nothing [3] - 25:10, 27:6, 30:13</p> <p>Nothing [1] - 62:4</p> <p>notice [2] - 6:6, 65:21</p> <p>notified [1] - 65:20</p> <p>noting [1] - 57:11</p> <p>novel [1] - 56:8</p> <p>nowhere [1] - 16:1</p> <p>number [8] - 14:25, 15:10, 15:21, 15:25, 16:2, 32:13, 47:18, 57:3</p> <p>numbers [3] - 32:16, 32:20, 33:4</p> <p>NW [2] - 1:23, 2:17</p> <p>NY [2] - 1:14, 2:13</p>	<p>obviously [6] - 17:9, 43:11, 65:8, 65:11, 66:25, 67:3</p> <p>occur [1] - 44:5</p> <p>occurred [1] - 49:5</p> <p>October [1] - 51:15</p> <p>OF [4] - 1:1, 1:8, 1:22, 2:2</p> <p>offended [1] - 66:8</p> <p>offense [1] - 25:24</p> <p>offer [1] - 6:20</p> <p>office [7] - 9:21, 15:1, 25:16, 26:23, 44:13, 44:18, 44:21</p> <p>Office [2] - 9:23, 44:9</p> <p>offices [1] - 45:1</p> <p>Official [1] - 2:16</p> <p>official [2] - 33:20, 47:10</p> <p>officials [1] - 10:3</p> <p>old [2] - 27:8, 27:9</p> <p>once [5] - 33:19, 43:20, 55:2, 61:13, 66:11</p> <p>one [37] - 9:20, 12:3, 12:9, 16:22, 17:19, 18:2, 18:9, 18:11, 18:24, 19:2, 19:24, 20:21, 23:6, 23:14, 24:4, 26:16, 26:21, 27:10, 28:8, 28:11, 30:11, 31:8, 32:15, 33:13, 33:24, 35:4, 35:6, 35:15, 38:5, 44:8, 50:17, 51:12, 52:11, 55:12, 55:23, 57:1, 63:11</p> <p>ones [2] - 48:17, 67:23</p> <p>ongoing [18] - 14:22, 15:22, 18:3, 36:5, 37:24, 49:12, 49:24, 50:9, 51:1, 51:9, 51:22, 52:1, 55:15, 55:16, 64:15, 66:4, 68:23, 70:9</p> <p>onus [1] - 66:13</p> <p>open [2] - 13:4, 42:1</p> <p>opening [1] - 35:24</p> <p>operation [1] - 44:16</p> <p>Operation [2] - 60:20, 61:9</p> <p>operational [1] - 38:11</p> <p>operations [2] - 47:16, 64:14</p> <p>operatives [1] - 61:5</p> <p>opine [1] - 41:23</p> <p>opinion [19] - 9:2, 13:3, 13:6, 14:13, 16:23, 17:16, 20:25, 40:13, 40:17, 41:5,</p>	<p>41:21, 41:25, 52:23, 53:5, 54:9, 57:5, 57:19, 63:16, 65:11</p> <p>opinions [6] - 12:10, 13:12, 28:1, 41:3, 65:12, 69:20</p> <p>opportunity [2] - 65:22, 66:10</p> <p>opposed [4] - 14:24, 32:18, 52:15, 69:19</p> <p>opposition [1] - 15:23</p> <p>option [1] - 66:17</p> <p>oral [2] - 6:3, 22:4</p> <p>ORAL [1] - 1:8</p> <p>Order [1] - 24:14</p> <p>order [24] - 5:4, 5:12, 9:8, 19:10, 21:10, 21:13, 22:3, 24:15, 24:18, 24:19, 37:11, 42:7, 42:18, 43:8, 44:3, 45:14, 47:1, 47:5, 47:14, 62:3, 62:4, 62:11, 65:19</p> <p>ordered [5] - 8:8, 8:12, 11:3, 11:7, 22:4</p> <p>ordering [1] - 9:9</p> <p>orders [8] - 5:21, 22:2, 24:13, 24:17, 61:25, 68:2, 70:7</p> <p>organizations [1] - 34:16</p> <p>organized [2] - 61:1, 68:13</p> <p>organizes [1] - 44:13</p> <p>original [2] - 7:8, 8:1</p> <p>originally [1] - 63:10</p> <p>otherwise [1] - 51:24</p> <p>out-of-office [1] - 9:21</p> <p>outcome [1] - 56:3</p> <p>outright [1] - 67:25</p> <p>outside [1] - 66:15</p> <p>outstanding [2] - 24:13, 57:2</p> <p>overcome [2] - 20:15, 58:21</p> <p>overcoming [1] - 58:23</p> <p>overreading [1] - 14:12</p> <p>overrule [1] - 69:15</p> <p>oversees [1] - 44:15</p> <p>oversight [1] - 27:17</p> <p>overview [1] - 6:20</p> <p>owed [1] - 57:24</p> <p>own [1] - 59:14</p>	<p>Page [1] - 15:23</p> <p>pale [1] - 19:13</p> <p>panel [1] - 21:2</p> <p>panels [2] - 12:18, 57:16</p> <p>paper [2] - 10:5, 30:19</p> <p>paradigmatic [1] - 18:22</p> <p>Pardiss [2] - 1:12, 3:18</p> <p>pardon [1] - 29:11</p> <p>parse [1] - 52:11</p> <p>part [8] - 14:16, 20:23, 22:19, 24:15, 24:17, 54:17, 63:11, 64:21</p> <p>participating [1] - 34:4</p> <p>participation [1] - 38:12</p> <p>particular [3] - 60:9, 63:4, 67:23</p> <p>particularly [3] - 5:18, 13:10, 16:18</p> <p>particulars [1] - 42:4</p> <p>parties [5] - 3:5, 5:6, 18:10, 22:5, 65:18</p> <p>parts [1] - 43:10</p> <p>party [1] - 19:10</p> <p>passed [1] - 27:10</p> <p>past [6] - 9:4, 16:15, 46:6, 53:18, 58:19, 60:3</p> <p>path [1] - 56:3</p> <p>pay [2] - 41:7, 67:11</p> <p>peace [2] - 36:21, 39:15</p> <p>penalty [1] - 56:15</p> <p>pending [1] - 22:13</p> <p>people [16] - 17:9, 18:18, 27:5, 30:9, 31:5, 31:7, 32:25, 33:7, 33:9, 39:19, 46:6, 47:21, 47:24, 49:21, 50:14, 69:8</p> <p>percent [4] - 28:2, 28:3, 32:13</p> <p>perfectly [1] - 46:8</p> <p>perhaps [1] - 40:6</p> <p>period [3] - 29:4, 46:20</p> <p>periodic [3] - 25:2, 47:6, 49:7</p> <p>permanent [1] - 47:17</p> <p>permissible [1] - 59:20</p> <p>permit [1] - 58:18</p> <p>permits [2] - 38:16, 60:8</p> <p>permitted [2] - 36:5, 43:9</p>	<p>perpetual [5] - 9:12, 10:13, 54:15, 55:4, 59:16</p> <p>perpetuated [1] - 38:20</p> <p>perpetuity [2] - 14:24, 19:20</p> <p>person [1] - 29:19</p> <p>personal [1] - 7:4</p> <p>perspective [1] - 30:21</p> <p>persuasive [3] - 34:1, 36:3, 66:14</p> <p>petition [2] - 29:22, 34:13</p> <p>Petitioner [6] - 3:14, 3:18, 3:19, 3:20, 4:22, 27:7</p> <p>petitioner [8] - 3:21, 26:18, 40:5, 42:14, 42:17, 47:15, 66:12, 66:13</p> <p>petitioner's [1] - 21:12</p> <p>Petitioners [3] - 1:3, 1:11, 2:2</p> <p>petitioners [38] - 3:7, 3:16, 5:14, 5:16, 5:25, 6:4, 6:6, 6:22, 7:6, 7:11, 7:20, 9:4, 9:15, 17:10, 18:23, 18:24, 20:13, 25:15, 25:20, 26:1, 33:24, 34:3, 35:5, 36:11, 36:25, 37:10, 37:22, 38:1, 39:9, 42:11, 42:19, 54:16, 55:17, 56:13, 56:16, 58:25, 59:1, 69:12</p> <p>petitioners' [3] - 34:22, 36:5, 40:3</p> <p>ph [1] - 11:25</p> <p>phone [2] - 4:4, 5:7</p> <p>piece [3] - 30:19, 60:7, 61:20</p> <p>piecing [1] - 30:13</p> <p>place [1] - 6:22</p> <p>plans [1] - 38:11</p> <p>play [2] - 16:14, 55:11</p> <p>playback [1] - 6:9</p> <p>played [1] - 6:10</p> <p>pleadings [1] - 30:17</p> <p>pleased [1] - 63:12</p> <p>pled [1] - 26:25</p> <p>pledged [1] - 50:13</p> <p>plurality [1] - 65:11</p> <p>PO [1] - 2:13</p> <p>point [21] - 7:16, 16:17, 31:19, 33:13, 33:18, 37:20, 39:8, 39:21, 40:2, 46:25,</p>
<p style="text-align: center;">O</p> <p>O'Connor [5] - 23:21, 59:17, 59:19, 60:6, 63:16</p> <p>Obama [10] - 9:8, 21:3, 26:14, 28:11, 30:24, 32:18, 33:3, 45:6, 51:13, 68:2</p> <p>Obama's [2] - 24:15, 24:17</p> <p>objective [1] - 54:5</p> <p>observed [1] - 8:2</p> <p>obvious [1] - 67:19</p>	<p>onus [1] - 66:13</p> <p>open [2] - 13:4, 42:1</p> <p>opening [1] - 35:24</p> <p>operation [1] - 44:16</p> <p>Operation [2] - 60:20, 61:9</p> <p>operational [1] - 38:11</p> <p>operations [2] - 47:16, 64:14</p> <p>operatives [1] - 61:5</p> <p>opine [1] - 41:23</p> <p>opinion [19] - 9:2, 13:3, 13:6, 14:13, 16:23, 17:16, 20:25, 40:13, 40:17, 41:5,</p>	<p>41:21, 41:25, 52:23, 53:5, 54:9, 57:5, 57:19, 63:16, 65:11</p> <p>opinions [6] - 12:10, 13:12, 28:1, 41:3, 65:12, 69:20</p> <p>opportunity [2] - 65:22, 66:10</p> <p>opposed [4] - 14:24, 32:18, 52:15, 69:19</p> <p>opposition [1] - 15:23</p> <p>option [1] - 66:17</p> <p>oral [2] - 6:3, 22:4</p> <p>ORAL [1] - 1:8</p> <p>Order [1] - 24:14</p> <p>order [24] - 5:4, 5:12, 9:8, 19:10, 21:10, 21:13, 22:3, 24:15, 24:18, 24:19, 37:11, 42:7, 42:18, 43:8, 44:3, 45:14, 47:1, 47:5, 47:14, 62:3, 62:4, 62:11, 65:19</p> <p>ordered [5] - 8:8, 8:12, 11:3, 11:7, 22:4</p> <p>ordering [1] - 9:9</p> <p>orders [8] - 5:21, 22:2, 24:13, 24:17, 61:25, 68:2, 70:7</p> <p>organizations [1] - 34:16</p> <p>organized [2] - 61:1, 68:13</p> <p>organizes [1] - 44:13</p> <p>original [2] - 7:8, 8:1</p> <p>originally [1] - 63:10</p> <p>otherwise [1] - 51:24</p> <p>out-of-office [1] - 9:21</p> <p>outcome [1] - 56:3</p> <p>outright [1] - 67:25</p> <p>outside [1] - 66:15</p> <p>outstanding [2] - 24:13, 57:2</p> <p>overcome [2] - 20:15, 58:21</p> <p>overcoming [1] - 58:23</p> <p>overreading [1] - 14:12</p> <p>overrule [1] - 69:15</p> <p>oversees [1] - 44:15</p> <p>oversight [1] - 27:17</p> <p>overview [1] - 6:20</p> <p>owed [1] - 57:24</p> <p>own [1] - 59:14</p>	<p style="text-align: center;">P</p> <p>P.C [2] - 2:9, 34:14</p> <p>p.m [1] - 70:18</p>	

49:22, 50:2, 53:8, 55:18, 55:22, 57:21, 60:1, 61:19, 63:21, 65:14, 67:20 pointed [2] - 54:8, 55:9 points [1] - 62:3 policies [5] - 25:1, 44:2, 44:24, 45:18, 46:2 policy [5] - 10:5, 24:23, 33:22, 46:19, 47:25 political [8] - 16:21, 17:1, 19:14, 49:14, 49:22, 50:8, 51:7, 59:9 poppy [1] - 61:8 pose [2] - 37:14, 39:22 position [13] - 10:12, 10:15, 14:2, 14:4, 17:22, 17:23, 33:16, 37:10, 47:10, 47:12, 58:16, 62:19, 69:15 possibility [1] - 12:21 possibly [1] - 19:20 post [10] - 12:25, 13:7, 13:18, 13:21, 13:24, 14:7, 14:11, 44:17, 46:22, 52:8 post-election [1] - 46:22 post-transfer [1] - 44:17 potential [2] - 30:23, 66:4 potentially [1] - 30:23 pounds [1] - 27:10 power [3] - 50:3, 59:2, 62:22 Powers [1] - 51:11 POWs [1] - 18:12 practical [3] - 27:20, 59:22, 64:9 practices [2] - 44:3, 44:24 PRB [4] - 27:8, 31:1, 31:14, 42:12 PRBs [3] - 8:9, 33:15, 33:16 precedent [3] - 36:3, 40:20, 56:18 precedents [2] - 21:20, 21:23 prejudice [1] - 35:16 prepared [1] - 25:8 preparing [2] - 9:11, 10:12 preponderance [19] - 19:21, 20:10, 20:22,	21:5, 21:6, 21:12, 21:24, 22:10, 22:11, 22:16, 22:18, 22:21, 23:6, 23:15, 23:22, 32:15, 54:9, 54:11, 66:19 present [4] - 20:13, 50:20, 62:14, 68:8 presentation [2] - 22:12, 34:1 presented [2] - 38:24, 69:14 presently [2] - 17:4, 27:7 resents [1] - 59:17 President [15] - 24:14, 24:15, 24:17, 24:24, 25:6, 32:19, 43:8, 45:6, 45:11, 46:21, 47:2, 51:13, 68:2, 68:3, 70:6 President's [3] - 9:7, 47:10, 51:19 presidential [2] - 9:4, 68:1 Presidents [1] - 51:13 press [3] - 16:4, 60:16, 60:19 presuming [1] - 11:2 presumption [4] - 66:8, 66:9, 66:18, 66:20 presumptions [2] - 5:23, 53:18 prevent [5] - 18:1, 54:3, 54:16, 60:8, 62:5 preventative [1] - 20:1 preventing [1] - 59:12 preventive [2] - 17:25, 23:20 prevents [1] - 56:11 previously [3] - 42:11, 42:19, 46:13 primarily [1] - 60:21 primary [2] - 40:3, 61:16 principle [1] - 56:11 principles [1] - 64:9 prison [4] - 9:8, 34:7, 49:21, 58:1 prisoner [1] - 18:22 prisoner-of-war [1] - 18:22 prisoners [2] - 36:19, 55:13 problem [2] - 8:10, 52:16 problems [1] - 35:25 procedural [3] -	55:19, 65:7, 65:17 procedurally [1] - 33:19 procedure [2] - 20:23, 55:24 procedures [5] - 5:20, 9:9, 55:20, 55:25, 59:5 proceed [3] - 6:14, 43:2, 67:7 Proceedings [1] - 2:19 proceedings [7] - 6:13, 22:1, 65:15, 66:3, 66:7, 68:13, 70:18 process [63] - 5:16, 6:19, 10:13, 10:15, 10:16, 10:25, 11:2, 11:5, 12:8, 13:22, 14:17, 16:11, 16:13, 17:23, 18:5, 19:17, 20:7, 23:8, 23:10, 23:11, 23:15, 23:18, 24:4, 27:4, 31:19, 32:20, 34:13, 34:19, 36:7, 40:23, 41:1, 43:10, 43:22, 52:2, 52:21, 52:25, 53:13, 53:25, 54:8, 54:13, 54:14, 55:19, 57:10, 57:13, 57:24, 58:5, 58:18, 59:5, 61:21, 61:24, 64:24, 65:1, 65:6, 65:8, 65:18, 66:23, 67:2, 67:9, 68:12, 68:17, 68:18, 69:4 proclamation [2] - 10:5, 11:23 produce [2] - 22:2, 66:19 produced [1] - 2:20 profile [1] - 27:7 Programs [1] - 1:23 progress [1] - 44:17 prolonged [1] - 5:19 promise [1] - 39:16 promises [2] - 9:7, 65:24 pronouncements [2] - 27:11, 33:23 proof [4] - 7:4, 8:15, 20:3, 68:11 proper [5] - 49:17, 55:24, 56:3, 56:7, 67:11 properly [3] - 6:11, 38:24, 39:12 proposed [1] - 43:16	prosecute [1] - 51:5 prosecuted [1] - 48:25 prosecuting [1] - 35:14 prosecution [6] - 25:23, 38:7, 38:8, 48:19, 49:5, 49:10 prosecutions [1] - 48:20 prospects [1] - 41:22 protect [2] - 38:9, 47:19 protects [1] - 21:21 provide [2] - 36:4, 53:17 provided [2] - 53:18, 66:10 proving [1] - 21:12 provision [1] - 47:8 prudent [2] - 48:6, 67:9 public [1] - 4:8 Puerto [1] - 14:8 punishment [1] - 54:2 purporting [1] - 16:24 purpose [12] - 16:17, 17:11, 17:25, 18:1, 20:1, 23:19, 54:2, 59:11, 64:4, 69:7 pursuant [1] - 38:21 put [5] - 31:5, 31:7, 44:6, 50:14, 50:21 puts [2] - 20:7, 66:11	quote [9] - 9:12, 17:1, 21:11, 21:14, 21:19, 46:23, 46:24, 60:24, 62:9
R				
R-A-Y-N-E-R [1] - 4:15 Rabbani [3] - 5:1, 5:9, 9:21 raise [2] - 31:9, 32:6 raised [3] - 7:10, 49:15, 67:23 raising [2] - 5:15, 5:17 Randolph [2] - 21:1, 22:22 Randolph's [1] - 54:9 Rasul [4] - 41:8, 52:23, 53:2, 53:8 ratified [1] - 21:22 rationale [3] - 17:13, 21:7, 53:12 rationality [1] - 16:11 RAYNER [5] - 4:11, 4:15, 4:17, 8:19, 8:25 Rayner [5] - 2:2, 4:11, 4:12, 4:18, 8:20 re [2] - 3:3, 18:13 re-enter [1] - 18:13 reach [2] - 44:22, 44:23 reached [1] - 40:14 reaches [1] - 41:15 reaction [1] - 34:6 read [9] - 6:15, 7:10, 9:18, 29:6, 45:21, 57:17, 57:18, 57:19 readily [1] - 22:10 reading [3] - 31:17, 46:8, 68:14 ready [1] - 6:14 reality [1] - 18:19 really [1] - 63:13 reason [6] - 16:12, 32:18, 44:21, 52:13, 54:4, 67:10 reasonable [2] - 46:8, 70:11 reasonably [1] - 16:16 reasons [2] - 18:8, 22:14 rebut [1] - 66:14 rebuttable [1] - 66:10 rebuttal [2] - 56:24, 66:10 rebutted [1] - 66:20 received [2] - 22:7, 38:25 recent [1] - 38:8				
Q				
Qaeda [34] - 10:9, 15:11, 16:1, 16:7, 16:9, 22:19, 37:6, 37:24, 38:11, 38:12, 38:14, 38:19, 38:22, 38:23, 39:7, 39:10, 39:16, 39:17, 50:13, 50:20, 50:22, 51:15, 60:17, 60:19, 60:21, 60:22, 60:23, 60:24, 60:25, 63:11, 68:25, 69:8 Qaeda's [1] - 61:3 Qaeda/the [2] - 20:3, 51:10 Qahtani [1] - 15:25 quandary [1] - 59:17 questionable [1] - 22:24 questions [5] - 20:19, 24:11, 27:19, 35:25, 37:11 quite [2] - 18:15, 48:11				

<p>recently [2] - 6:5, 49:6 recess [1] - 70:13 recidivism [1] - 32:10 recidivists [1] - 28:4 recognize [2] - 12:18, 13:22 recognizes [1] - 12:13 recognizing [1] - 47:13 recommend [1] - 24:23 recommendation [1] - 33:21 recommended [2] - 38:7, 48:21 reconsider [1] - 41:11 reconsideration [1] - 41:10 record [12] - 3:6, 4:10, 9:18, 28:15, 28:16, 30:3, 32:11, 37:21, 50:21, 60:11, 64:19, 69:23 recorded [1] - 2:19 records [1] - 7:17 recruit [1] - 61:4 refer [2] - 41:8, 49:18 referrals [1] - 49:5 referred [4] - 35:5, 41:8, 43:10, 57:3 referring [2] - 45:22, 49:6 refugees [2] - 52:12, 52:16 refusal [1] - 67:25 refuse [1] - 30:15 regard [1] - 50:7 regarding [3] - 8:14, 9:2, 24:24 regional [2] - 10:1, 10:2 regrettably [2] - 8:2, 62:13 reinstate [1] - 53:9 reissued [1] - 53:5 rejected [2] - 40:3, 52:23 rejects [1] - 62:23 related [8] - 9:23, 9:25, 38:14, 39:6, 42:16, 50:11, 68:24, 69:7 relationship [1] - 38:10 release [14] - 19:15, 20:8, 25:21, 28:12, 28:24, 29:7, 34:3, 40:8, 47:14, 47:25, 53:1, 55:13, 67:25, 68:4</p>	<p>released [18] - 8:8, 8:12, 17:11, 25:10, 26:18, 26:21, 27:1, 27:24, 28:5, 31:16, 33:3, 33:11, 54:20, 54:21, 54:25, 57:5, 61:22, 70:4 releases [3] - 15:1, 46:23, 47:23 releasing [3] - 9:6, 9:17, 47:24 relevant [5] - 19:16, 39:2, 42:16, 64:7, 65:15 reliable [1] - 66:6 relief [2] - 11:7, 56:20 reluctance [1] - 67:24 rely [2] - 17:21, 60:15 remain [4] - 48:15, 51:14, 67:14, 68:2 remaining [1] - 24:16 remains [3] - 48:13, 64:25, 66:9 remand [1] - 59:4 remanded [1] - 53:2 remarkable [1] - 15:14 remember [2] - 35:10, 38:15 reminds [1] - 62:16 renouncing [1] - 27:11 repatriate [1] - 18:12 repealed [1] - 51:23 repeating [1] - 12:4 repeats [1] - 13:11 replenishing [1] - 18:17 reply [1] - 6:2 report [6] - 15:21, 25:6, 43:1, 45:9, 45:17, 46:10 REPORTER [1] - 13:19 Reporter [2] - 2:15, 2:16 reports [1] - 47:16 represented [2] - 28:9, 30:16 representing [4] - 4:6, 5:6, 5:9, 69:25 REPRIEVE [1] - 2:12 request [2] - 6:3, 14:17 requested [2] - 5:12, 24:18 require [1] - 23:9 required [4] - 21:15, 40:8, 42:9, 44:2 requires [8] - 16:11, 20:8, 22:15, 23:10,</p>	<p>23:18, 43:11, 47:5, 65:4 requiring [2] - 45:16, 68:16 resemble [1] - 60:3 Resolute [2] - 60:20, 61:10 resolution [1] - 65:3 Resolutions [1] - 51:11 resolved [2] - 33:11, 70:11 respect [8] - 10:15, 18:5, 57:15, 59:7, 60:19, 61:21, 62:2, 62:19 respectfully [4] - 12:2, 24:2, 27:19, 34:5 respond [1] - 6:1 Respondents [2] - 1:6, 1:21 responses [2] - 17:15, 17:18 rest [1] - 26:8 resting [1] - 61:15 result [3] - 25:4, 25:9, 67:15 resulted [1] - 38:8 results [1] - 25:5 retain [1] - 54:3 return [16] - 18:2, 20:4, 20:14, 23:21, 23:24, 34:2, 54:3, 54:20, 54:22, 54:25, 55:3, 56:15, 56:17, 58:23, 59:12, 60:8 returning [3] - 17:12, 43:15, 56:11 reveal [1] - 18:3 revealing [1] - 9:18 revenue [1] - 61:12 reverse [1] - 41:16 reversing [1] - 9:8 review [19] - 5:13, 7:9, 10:23, 25:22, 25:23, 26:9, 32:19, 33:17, 35:18, 38:8, 38:9, 39:1, 42:24, 47:7, 49:7, 65:6, 67:3, 70:8 reviewed [6] - 7:17, 31:14, 31:15, 34:14, 34:18, 39:2 reviewing [2] - 48:20, 60:12 reviews [2] - 25:3, 48:19 revisit [1] - 27:18 revisited [1] - 42:22 revoked [1] - 51:24</p>	<p>rhetoric [1] - 46:22 Rico [1] - 14:9 rightly [1] - 56:9 Rights [1] - 3:13 rights [20] - 10:19, 11:7, 11:13, 12:8, 14:17, 34:15, 35:21, 52:14, 52:19, 52:21, 53:13, 53:21, 62:18, 62:21, 63:1, 65:13, 65:18, 67:17, 68:21 RIGHTS [1] - 1:13 rigorous [2] - 24:5, 32:19 ripe [1] - 37:20 rise [2] - 47:18, 70:16 ROBERTS [1] - 1:19 Roderick [1] - 34:17 rogue [1] - 57:20 role [2] - 49:25, 56:7 Ronald [2] - 1:21, 3:25 room [1] - 6:7 Room [1] - 2:16 rotate [1] - 32:25 round [1] - 19:17 routed [1] - 43:21 RPR [1] - 2:15 rubber [1] - 34:2 rule [2] - 59:1, 59:4 rules [2] - 8:14, 20:23 ruling [1] - 21:17 rulings [4] - 5:23, 53:17, 55:20, 55:21 run [4] - 45:10, 56:13, 56:14, 63:4</p>	<p>secretary [1] - 28:10 Secretary [19] - 24:20, 24:21, 25:6, 25:8, 28:20, 29:3, 30:14, 33:21, 42:13, 42:21, 43:23, 45:11, 45:16, 47:3, 62:2, 62:5, 62:9, 68:5 section [1] - 52:20 Section [4] - 45:24, 52:8, 52:9, 62:3 secured [1] - 7:2 security [7] - 18:24, 19:9, 24:6, 43:25, 67:12, 67:14, 67:18 Security [1] - 24:21 see [4] - 7:23, 31:16, 48:25, 70:11 seek [1] - 56:20 seeking [2] - 33:17, 59:4 seeks [1] - 65:5 seized [1] - 66:25 self [2] - 10:8, 60:5 self-serving [2] - 10:8, 60:5 semi [1] - 51:11 semi-annual [1] - 51:11 Senate [1] - 61:9 sense [1] - 40:7 sensitive [1] - 67:11 sent [1] - 19:10 sentence [3] - 26:25, 27:1, 70:3 separate [2] - 53:14, 59:7 separately [2] - 58:25, 59:13 separating [2] - 48:17, 57:25 series [1] - 12:6 serious [3] - 59:19, 69:14, 70:3 served [1] - 26:25 servicing [2] - 10:8, 60:5 set [2] - 22:9, 24:14 setting [1] - 67:8 seven [3] - 13:6, 14:10, 55:24 several [6] - 4:4, 8:7, 17:15, 17:18, 27:23, 65:11 shall [3] - 24:23, 25:3, 62:4 shape [1] - 48:10 Sharabi [1] - 4:23 Sharqawi [4] - 3:14, 3:18, 27:8, 33:25</p>
S				
<p>sad [1] - 9:18 safeguarding [1] - 67:13 satisfied [2] - 22:8, 42:17 satisfies [1] - 66:16 Saudi [4] - 19:4, 19:11, 26:18, 27:2 Saudis [1] - 30:10 saw [1] - 30:21 Scalia [1] - 65:13 scenario [1] - 18:22 scheduled [1] - 28:24 scholars [1] - 34:13 SCHOOL [1] - 2:2 scope [1] - 21:18 second [7] - 23:13, 50:8, 51:22, 52:24, 54:17, 55:8, 60:23 second-guessing [1] - 50:8 secondary [1] - 20:8</p>				

<p>Shayana [2] - 1:12, 3:19</p> <p>Shelby [3] - 2:12, 5:9, 9:20</p> <p>shift [1] - 66:13</p> <p>shifting [1] - 47:17</p> <p>short [2] - 6:6, 56:23</p> <p>shorthand [1] - 2:19</p> <p>show [4] - 21:6, 22:18, 57:23, 58:6</p> <p>showing [2] - 21:15, 22:6</p> <p>shut [1] - 27:25</p> <p>sic [3] - 34:13, 46:19, 64:9</p> <p>sick [1] - 27:10</p> <p>side [1] - 49:4</p> <p>signed [1] - 36:21</p> <p>similar [1] - 30:25</p> <p>simply [2] - 34:3, 54:17</p> <p>single [1] - 15:16</p> <p>sit [1] - 63:18</p> <p>sitting [2] - 31:5, 31:8</p> <p>situation [3] - 42:6, 42:25, 64:13</p> <p>slow [1] - 13:19</p> <p>Smith [1] - 34:17</p> <p>soil [1] - 62:18</p> <p>Solange [1] - 34:17</p> <p>solely [1] - 54:2</p> <p>soliloquy [1] - 63:20</p> <p>someone [4] - 12:4, 19:21, 20:2, 23:17</p> <p>sometimes [1] - 41:6</p> <p>somewhat [1] - 42:25</p> <p>sorry [6] - 5:8, 7:7, 8:19, 13:20, 26:18, 31:25</p> <p>sort [6] - 15:5, 18:18, 18:21, 23:7, 27:17, 30:12</p> <p>sorties [4] - 15:10, 15:17, 15:21, 60:1</p> <p>sound [1] - 4:14</p> <p>source [2] - 32:15, 61:19</p> <p>sources [2] - 16:3, 16:6</p> <p>sourcing [1] - 61:6</p> <p>space [1] - 37:23</p> <p>speaking [2] - 28:15, 31:24</p> <p>speaks [1] - 59:15</p> <p>Special [2] - 25:16, 44:9</p> <p>specifically [2] - 47:2, 52:24</p> <p>spell [1] - 4:13</p>	<p>spinoff [1] - 16:9</p> <p>spun [1] - 16:10</p> <p>staff [2] - 9:11, 10:11</p> <p>staffed [1] - 9:24</p> <p>staffing [2] - 25:18, 25:19</p> <p>stamp [1] - 34:2</p> <p>stand [3] - 6:21, 50:18, 70:13</p> <p>standard [16] - 19:21, 20:21, 21:5, 21:24, 21:25, 22:9, 22:11, 22:16, 22:23, 23:6, 23:14, 23:22, 54:10, 54:11, 56:3, 56:8</p> <p>standards [1] - 68:10</p> <p>stands [1] - 70:17</p> <p>start [4] - 6:17, 35:3, 35:23, 52:22</p> <p>started [2] - 12:7, 55:15</p> <p>starting [1] - 3:7</p> <p>state [6] - 18:10, 19:10, 34:6, 34:7, 48:24, 53:10</p> <p>State [8] - 9:20, 15:1, 24:21, 30:10, 43:11, 44:8, 44:21, 68:25</p> <p>statement [9] - 14:7, 14:9, 14:12, 17:20, 35:24, 46:21, 46:22, 68:15, 68:17</p> <p>statements [5] - 12:11, 27:12, 40:24, 40:25, 50:21</p> <p>STATES [2] - 1:1, 1:9</p> <p>States [13] - 12:14, 18:11, 24:1, 24:3, 24:7, 36:11, 43:18, 53:1, 64:16, 64:18, 64:19, 69:10, 70:3</p> <p>States's [1] - 37:13</p> <p>stating [1] - 53:5</p> <p>station [1] - 45:19</p> <p>statistics [1] - 32:11</p> <p>status [6] - 5:18, 31:12, 46:10, 49:8, 49:9, 65:3</p> <p>statute [2] - 43:24, 53:15</p> <p>statutory [1] - 21:25</p> <p>stayed [1] - 35:15</p> <p>step [4] - 3:5, 49:22, 49:25, 50:4</p> <p>steps [1] - 44:1</p> <p>still [21] - 14:22, 26:4, 29:23, 31:4, 31:8, 37:8, 37:21, 42:2, 49:7, 49:20, 49:22, 49:23, 50:20, 50:22,</p>	<p>50:23, 51:25, 54:6, 57:6, 64:19, 68:22</p> <p>stops [1] - 40:9</p> <p>streams [1] - 61:12</p> <p>Street [4] - 1:19, 2:3, 2:6, 2:10</p> <p>stress [1] - 14:5</p> <p>strict [1] - 66:17</p> <p>strike [1] - 61:8</p> <p>strikes [1] - 62:20</p> <p>stripped [1] - 9:3</p> <p>strongly [1] - 11:20</p> <p>studied [1] - 16:2</p> <p>study [2] - 14:14, 25:5</p> <p>subcontinent [1] - 60:22</p> <p>subject [2] - 49:7, 64:1</p> <p>submission [2] - 9:10, 25:13</p> <p>submissions [2] - 15:20, 18:3</p> <p>submit [1] - 59:25</p> <p>submitted [1] - 6:16</p> <p>subsequent [3] - 12:18, 47:14, 57:16</p> <p>subsequently [1] - 17:20</p> <p>substantial [2] - 68:7, 69:12</p> <p>substantive [2] - 10:17, 42:15</p> <p>substitute [1] - 33:17</p> <p>successful [2] - 27:23, 27:24</p> <p>successful [3] - 20:3, 67:1, 68:11</p> <p>suggest [2] - 15:22, 55:24</p> <p>suggested [1] - 40:12</p> <p>suggests [1] - 15:12</p> <p>SUHAIL [1] - 1:2</p> <p>Suhail [2] - 3:3, 4:22</p> <p>sui [1] - 54:1</p> <p>Suite [1] - 2:6</p> <p>SULLIVAN [1] - 5:8</p> <p>Sullivan [3] - 2:12, 5:9, 9:20</p> <p>SULLIVAN-BENNIS [1] - 5:8</p> <p>Sullivan-Bennis [3] - 2:12, 5:9, 9:20</p> <p>sunset [1] - 59:15</p> <p>superfluous [1] - 47:9</p> <p>supplemental [3] - 9:10, 22:5, 22:7</p> <p>supplied [1] - 47:15</p> <p>support [9] - 7:1, 19:23, 21:13, 22:3, 34:13, 34:22, 39:16,</p>	<p>69:8, 69:13</p> <p>Support [2] - 60:20, 61:10</p> <p>Supreme [20] - 10:18, 10:21, 11:2, 13:14, 19:23, 21:17, 36:8, 41:2, 41:5, 41:9, 41:13, 52:18, 53:2, 57:15, 57:18, 63:25, 68:14, 68:19, 69:16, 69:17</p> <p>surrender [1] - 10:10</p> <p>surrenders [1] - 15:12</p> <p>suspect [1] - 17:14</p> <p>suspected [1] - 32:14</p> <p>suspension [6] - 10:23, 13:17, 22:15, 41:16, 53:12, 57:14</p> <p>sustain [1] - 54:12</p> <p>sympathy [1] - 67:19</p> <p>Syria [1] - 69:1</p> <p>system [3] - 56:12, 68:8, 69:25</p>	<p>1:8, 3:2, 3:7, 3:10, 3:22, 4:2, 4:13, 4:16, 4:18, 4:24, 5:2, 5:11, 7:9, 7:15, 7:17, 7:19, 7:22, 8:5, 8:7, 8:11, 8:16, 8:22, 11:1, 11:5, 11:10, 11:15, 11:22, 11:24, 12:3, 12:15, 12:20, 13:2, 13:9, 13:19, 14:1, 14:16, 16:19, 17:16, 18:14, 19:1, 19:4, 19:8, 20:17, 20:19, 20:21, 21:1, 23:3, 24:11, 25:10, 25:20, 26:2, 26:4, 26:11, 26:16, 26:21, 27:20, 28:18, 28:20, 28:24, 29:6, 29:9, 29:11, 29:13, 29:17, 29:19, 29:24, 30:1, 30:6, 30:16, 31:3, 31:9, 31:23, 32:2, 32:5, 32:12, 32:22, 32:24, 33:2, 33:6, 33:14, 34:9, 35:2, 35:8, 35:10, 35:12, 35:17, 36:13, 36:17, 36:24, 37:3, 37:5, 37:17, 38:5, 38:18, 38:25, 39:14, 39:24, 40:12, 40:23, 41:18, 41:21, 41:25, 44:8, 44:12, 45:3, 45:5, 45:7, 45:13, 45:16, 45:23, 45:25, 46:2, 46:6, 46:11, 46:18, 47:12, 48:16, 48:24, 49:15, 50:6, 52:4, 52:6, 53:2, 53:5, 53:13, 53:21, 56:21, 57:7, 57:9, 57:21, 58:3, 62:7, 63:7, 63:20, 70:16</p> <p>themselves [4] - 4:5, 4:10, 6:4, 51:5</p> <p>theory [3] - 36:19, 36:24, 38:5</p> <p>therefore [6] - 25:17, 27:1, 41:3, 41:16, 51:2, 64:22</p> <p>they've [5] - 5:17, 24:7, 32:17, 34:3, 58:17</p> <p>thin [1] - 7:3</p> <p>Thomas [2] - 1:18, 3:21</p> <p>THOMAS [1] - 1:8</p> <p>threat [6] - 24:2, 24:6, 43:14, 43:17, 43:19,</p>
T				
		<p>table [3] - 3:14, 3:17, 3:25</p> <p>tailored [1] - 66:3</p> <p>Taliban [15] - 16:6, 20:3, 37:24, 39:10, 39:16, 50:23, 51:10, 51:15, 61:6, 61:8, 61:11, 64:14, 64:17, 68:25, 69:9</p> <p>talks [2] - 18:17, 64:23</p> <p>task [3] - 31:2, 42:12, 49:9</p> <p>Tatel [1] - 8:2</p> <p>tea [1] - 68:14</p> <p>technical [1] - 57:1</p> <p>technicality [1] - 17:21</p> <p>TELECONFERENCE [1] - 2:1</p> <p>temporal [2] - 20:7, 40:13</p> <p>temporary [1] - 59:11</p> <p>term [1] - 33:3</p> <p>terminated [1] - 16:25</p> <p>terms [2] - 9:4, 27:1</p> <p>territorial [1] - 50:10</p> <p>terrorism [2] - 7:2, 67:22</p> <p>terrorists [1] - 50:11</p> <p>Terry [2] - 1:22, 4:1</p> <p>test [1] - 17:23</p> <p>testimony [3] - 16:4, 60:16, 61:9</p> <p>THE [137] - 1:1, 1:1,</p>		

<p>60:24 three [4] - 4:6, 12:10, 33:19, 35:13 threshold [1] - 18:19 thrown [1] - 10:4 tied [2] - 16:16, 23:21 timing [1] - 30:20 Timothy [1] - 2:15 today [12] - 4:3, 4:7, 4:9, 5:3, 6:13, 6:23, 28:9, 50:5, 50:6, 51:6, 55:15, 56:5 Tofiq [3] - 3:19, 5:10, 57:5 together [1] - 30:13 Tom [2] - 28:16, 31:25 tomorrow [1] - 44:6 torture [1] - 34:21 Torture [1] - 34:23 totally [4] - 14:12, 15:17, 16:10, 47:8 tout [1] - 24:4 towards [1] - 45:8 town [1] - 34:24 trace [1] - 69:22 train [1] - 61:4 TRANSCRIPT [1] - 1:8 transcript [3] - 2:19, 6:10, 60:12 transcription [1] - 2:20 transfer [24] - 25:1, 30:15, 31:12, 42:11, 42:12, 42:19, 42:20, 42:21, 43:3, 43:16, 43:17, 43:19, 43:20, 43:24, 44:13, 44:15, 44:17, 45:18, 46:12, 46:13, 46:15, 47:3, 49:8, 61:21 transferred [10] - 26:12, 30:23, 42:15, 43:7, 43:14, 44:6, 44:16, 48:11, 48:12, 48:14 transferring [1] - 62:5 transfers [8] - 25:14, 43:9, 44:4, 44:14, 46:1, 46:20, 47:7, 47:11 translated [1] - 6:11 treat [2] - 13:9, 13:13 treatment [1] - 68:9 treaty [1] - 36:21 trial [6] - 6:24, 8:11, 27:22, 35:20, 35:22, 57:22 trials [2] - 5:22, 7:15 tribunals [1] - 67:4 tried [1] - 35:8</p>	<p>tries [1] - 10:4 troop [1] - 60:1 troops [2] - 15:9, 64:19 true [2] - 38:1, 40:8 TRUMP [1] - 1:5 Trump [10] - 3:3, 19:15, 26:19, 26:22, 28:21, 28:23, 43:8, 47:2, 51:13 Trump's [3] - 24:14, 46:21, 68:3 try [1] - 27:22 trying [3] - 52:10, 60:23, 67:16 turn [1] - 52:2 turned [1] - 10:3 turning [1] - 49:11 Twitter [1] - 47:12 two [21] - 9:15, 13:12, 14:17, 18:5, 18:10, 18:23, 20:19, 23:4, 25:15, 25:21, 26:16, 27:14, 28:8, 33:24, 35:15, 43:4, 46:13, 51:20, 54:14, 59:21 typically [2] - 6:25, 7:4</p>	<p>56:10 undermine [1] - 17:11 underscores [1] - 27:3 understandable [1] - 34:6 understood [1] - 57:9 undertaken [2] - 33:19, 61:25 unfortunately [1] - 33:7 UNITED [2] - 1:1, 1:9 United [14] - 12:14, 18:11, 24:1, 24:3, 24:7, 36:11, 37:13, 43:18, 53:1, 64:15, 64:18, 64:19, 69:10, 70:3 UNIVERSITY [1] - 2:2 unlawful [1] - 58:15 unless [1] - 61:25 unlike [7] - 9:3, 15:14, 18:7, 18:21, 59:23, 61:18, 64:10 unlikely [1] - 20:14 unravel [1] - 64:12 unraveled [2] - 55:9, 59:25 unreason [1] - 34:7 unstated [1] - 21:7 unwilling [2] - 53:10, 53:11 up [9] - 3:10, 25:18, 28:2, 30:2, 33:8, 34:3, 36:22, 59:3, 67:20 update [1] - 43:4 upside [1] - 63:3 urge [1] - 56:17 uses [1] - 55:12</p>	<p>volunteer [1] - 69:24</p>	<p>53:4, 53:7, 53:20, 53:23, 62:8 Wiltsie [7] - 1:21, 3:25, 34:25, 56:21, 57:11, 61:22, 62:2 Wiltsie's [1] - 57:21 wish [2] - 41:23, 59:3 won [2] - 58:8, 58:10 words [1] - 57:24 works [2] - 20:6, 30:20 world [1] - 39:6 World [1] - 18:22 writ [6] - 5:4, 5:12, 21:19, 21:21, 23:7, 65:4 written [1] - 12:9 wrote [1] - 63:16</p>
				Y
	U			
	<p>U.S [6] - 1:22, 2:16, 18:10, 45:19, 60:25, 62:6 ultimately [1] - 43:23 unannounced [1] - 46:19 unaware [1] - 46:8 unbounded [1] - 62:25 unchecked [1] - 62:24 uncommon [1] - 66:3 unconditionally [2] - 10:10, 15:12 unconstitutional [1] - 69:6 uncontested [1] - 11:12 under [38] - 5:21, 14:1, 17:23, 23:7, 23:15, 26:6, 31:1, 32:18, 33:9, 33:20, 36:5, 36:7, 36:19, 36:24, 37:5, 38:2, 39:12, 40:9, 43:8, 44:3, 45:13, 47:4, 50:10, 50:14, 51:19, 52:20, 53:24, 53:25, 54:18, 59:10, 59:17, 67:25, 68:5, 68:20, 69:11 undercutting [1] -</p>	V		
		<p>variety [1] - 42:15 various [1] - 4:9 vary [1] - 56:8 veneer [1] - 9:2 VIA [1] - 2:1 viability [1] - 68:8 vibrant [1] - 67:14 victims [1] - 34:21 Victims [1] - 34:23 view [7] - 8:4, 26:7, 33:18, 41:14, 41:19, 58:21, 59:18 viewpoint [1] - 39:15 views [1] - 41:24 violates [1] - 10:13 violation [2] - 40:21, 69:6 violence [1] - 27:12</p>	<p>wait [5] - 11:1, 29:23, 49:1 waiting [1] - 48:25 waned [1] - 27:18 waning [1] - 26:13 wants [1] - 49:20 War [3] - 18:22, 36:18, 51:11 war [35] - 14:21, 15:15, 16:25, 17:5, 17:6, 17:10, 17:11, 18:8, 18:22, 26:25, 27:5, 27:15, 36:6, 36:19, 36:21, 38:2, 40:6, 40:10, 49:24, 50:11, 54:18, 54:19, 54:23, 55:4, 55:6, 55:7, 55:9, 55:14, 55:15, 56:10, 59:10, 59:24, 60:4, 64:9, 64:11 war-of-law [1] - 64:9 warlord [1] - 50:12 warranted [1] - 39:4 wars [4] - 50:8, 53:25, 54:1, 54:25 Washington [6] - 1:3, 1:17, 1:24, 2:17, 34:16, 34:18 ways [2] - 23:4, 54:14 weak [1] - 33:19 Wednesday [1] - 1:4 weeks [1] - 26:14 Weil [1] - 34:23 West [1] - 2:3 whatsoever [1] - 52:13 whole [3] - 27:3, 44:1, 68:12 Wilkinson [1] - 34:23 willing [1] - 27:21 WILTSIE [48] - 3:24, 35:1, 35:3, 35:9, 35:11, 35:13, 36:1, 36:15, 36:23, 37:2, 37:4, 37:9, 37:18, 38:15, 38:19, 39:8, 39:20, 39:25, 40:16, 41:4, 41:20, 41:23, 43:5, 44:11, 44:20, 45:4, 45:6, 45:12, 45:15, 45:20, 45:24, 46:1, 46:5, 46:7, 46:17, 46:25, 48:2, 48:22, 49:3, 50:2, 50:16, 52:5, 52:22,</p>	<p>year [8] - 15:16, 24:19, 40:3, 47:1, 51:9, 60:2 years [23] - 6:21, 6:23, 14:25, 17:19, 19:22, 20:3, 20:24, 22:1, 23:17, 23:18, 27:14, 33:20, 36:22, 36:25, 37:12, 37:13, 38:6, 59:21, 59:25, 62:13, 63:9, 67:20, 70:2 Years' [1] - 36:18 York [4] - 1:14, 2:3, 2:13 yourself [4] - 27:16, 28:14, 30:6, 31:23 yourselves [1] - 3:6</p>

EXHIBIT B

UNCLASSIFIED

Approved for Public Release

Unclassified Summary of Final Determination

<u>Date of Final Determination</u>	<u>Detainee Name</u>	<u>Detainee ISN</u>
11 JUL 2016	Abdul Latif Nasir	244

The Periodic Review Board, by consensus, determined that continued law of war detention of the detainee is no longer necessary to protect against a continuing significant threat to the security of the United States. The Board recognizes the detainee presents some level of threat in light of his past activities, skills, and associations; however, the Board found that in light of the factors and conditions of transfer identified below, the threat the detainee presents can be adequately mitigated.

In making this determination, the Board considered the detainee's candid responses to the Board's questions regarding his reasons for going to Afghanistan and activities while there. The Board also noted that the detainee has multiple avenues for support upon transfer, to include a well-established family with a willingness and ability to provide him with housing, realistic employment opportunities, and economic support. Finally, the Board considered the detainee's renunciation of violence, that the detainee has committed a low number of disciplinary infractions while in detention, the detainee's efforts to educate himself while at Guantanamo through classes and self-study, and that the detainee has had no contact with individuals involved in terrorism-related activities outside of Guantanamo.

The Board recommends transfer only to Morocco, with the appropriate security assurances as negotiated by the Special Envoys and agreed to by relevant USG departments and agencies.

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