UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J.G.G., et al.,
Plaintiffs,
vs.
DONALD J. TRUMP, et al.,
Defendants.

CASE NO. 1:25-cv-00766-JEB

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE JAMES E. BOASBERG, CHIEF DISTRICT JUDGE
Friday - March 21, 2025
2:31 p.m. - 3:47 p.m.
Washington, DC

FOR THE PLAINTIFFS:

American Civil Liberties Union
BY: LEE GELERNT and DANIEL A. GALINDO
125 Broad Street, 18th Floor
New York, New York 10004

ACLU of the District of Columbia
BY: ARTHUR B. SPITZER
529 14th Street, NW, Suite 722
Washington, DC 20045

Democracy Forward Foundation
BY: AUDREY J. WIGGINS, CHRISTINE COOGLE, SOMIL TRIVEDI, BRADLEY GIRARD, SKYE PERRYMAN and SARAH RICH
P.O. Box 34553
Washington, DC 20043

SONJA L. REEVES
Registered Diplomate Reporter
Certified Realtime Reporter
Federal Official Court Reporter
333 Constitution Avenue, NW
Washington, DC 20001
Transcript Produced from the Stenographic Record

FOR THE DEFENDANT:

U.S. Department of Justice
BY: DREW C. ENSIGN
950 Pennsylvania Avenue
Washington, DC 20004

DOJ-Civil Division
BY: AUGUST E. FLENTJE, BRIAN C. WARD and EREZ REUVENI
P.O. Box 868, Ben Franklin Station
Washington, DC 20044

(Call to Order of the Court at 2:31 p.m.)

DEPUTY CLERK: We're here today for a motion hearing in Civil Action 25-766, *J.G.G., et al. versus President Donald J. Trump, et al.*

Beginning with counsel for the plaintiff, if you could please approach the lectern and identify yourself for the record.

MR. GELERNT: Good afternoon, Your Honor. Lee Gelernt from the ACLU for plaintiffs.

THE COURT: Good afternoon.

MR. GALINDO: Good afternoon. Daniel Galindo from the ACLU for the plaintiffs.

THE COURT: Welcome.

MS. PERRYMAN: Your Honor, Skye Perryman of Democracy Forward Foundation for the plaintiffs.

MR. TRIVEDI: Afternoon, Your Honor. Somil Trivedi from Democracy Forward Foundation for the plaintiffs.

THE COURT: Thank you.

MS. COOGLE: Good afternoon, Your Honor. Christine Coogle from the Democracy Forward Foundation for plaintiffs.

MR. SPITZER: And Arthur Spitzer from the ACLU for the plaintiffs.

MS. WIGGINS: Good afternoon, Your Honor. Audrey Wiggins from Democracy Forward Foundation for the

plaintiffs.

THE COURT: Okay. Welcome to all of you.

Government?

MR. ENSIGN: Good afternoon, Your Honor. Drew Ensign, Deputy Assistant Attorney General, for the United States.

THE COURT: Good afternoon.

MR. FLENTJE: August Flentje, Department of Justice.

THE COURT: Thank you.

MR. REUVENI: Good afternoon, Your Honor. Erez Reuveni, Department of Justice.

THE COURT: Thank you.

MR. WARD: Good afternoon, Your Honor. Brian Ward for DOJ.

THE COURT: Welcome.

Okay. So who will be arguing for the government?

MR. ENSIGN: I will, Your Honor.

THE COURT: Okay. So, Mr. Ensign, I noticed that after signing all of the pleadings, including the ones claiming my oral ruling wasn't binding and using the kind of intemperate and disrespectful language that I can't remember seeing from the United States, that you didn't even show up for the hearing on Monday to argue the issue about compliance. Why was that?

MR. ENSIGN: Your Honor, I was working on the motion to dissolve the TRO, which was due at midnight that night.

THE COURT: Okay. It wasn't because when I said to

act on my TRO immediately, that you knew exactly what I meant?

MR. ENSIGN: No. That was not the reason, Your Honor.

THE COURT: Okay. And can I ask you now how you interpreted that statement when we had our conversation on Saturday in which I treated all parties with respect and politeness and made that clear without raising my voice, without having any edge? I made it very clear what you had do to do. Did you not understand my statements in that hearing?

MR. ENSIGN: Your Honor, I understood your statements and your directive to -- to relay your directives to the clients, which I have done.

THE COURT: So you did tell them that it was an order from me to turn the planes around, or however -- in whatever fashion you could, to bring back people to the United States? You understood that?

MR. ENSIGN: Your Honor, I can speak to my understanding.

THE COURT: That's what I'm asking.

MR. ENSIGN: As to the specifics of what I told my clients, that is potentially covered by attorney-client privilege.

THE COURT: I'm just asking what you understood. Did you think that that was hypothetical, not serious, that it was going to be modified, or did you understand that when I said "do that immediately" that I meant it?

MR. ENSIGN: Your Honor, I understood your intent, that you meant that to be effective at that time.

THE COURT: So then if your clients or if -- if the pleadings, which have now been filed, say that my oral ruling was not binding, that wouldn't be consistent, then, with what you understood on Saturday?

MR. ENSIGN: Your Honor, I -- as to my understanding in that moment of what you had instructed, I understood your intent to be that what you were pronouncing would be binding.

THE COURT: Okay. And so, therefore, any statement to the contrary that it wasn't wouldn't be consistent with your understanding?

MR. ENSIGN: Not in my understanding in that particular, you know, 30-minute window of time, Your Honor.

THE COURT: All right. So here's my other concern, Mr. Ensign, that in the hearing, you told me, the first part of the hearing, which was between 5:00 and 5:22, that you had no details on the plane flights. Do you remember that?

MR. ENSIGN: Yes, Your Honor.

THE COURT: Okay. And then we had a recess for 38 minutes for you to find details, and when you came back, even though the flights were in the air, which you all agree now, you still represented you had no details at all about those flights, correct?

MR. ENSIGN: That's correct, Your Honor. I did not

personally have knowledge of where the flights were or if there were flights at that moment.

THE COURT: And so either DHS sent someone to argue the hearing who knew nothing about the facts, not the law -- that's what you're saying, that they -- no one told you any of -- anything about those flights, so you knew nothing about those flights when you appeared during that whole two hours from 5:00 to 7:00 in which the argument took place?

MR. ENSIGN: Your Honor, I was aware that plaintiffs had submitted evidence to chambers that we were copied on identifying flights, but I didn't have any information from the government as to the status of them.

THE COURT: And so yet, your clients had you come argue this and kept you in the dark about all of that?

MR. ENSIGN: Your Honor, I sought the information in that window between the two hearings and was unable to secure it from my clients.

THE COURT: I'm going to -- I'll say one other thing, Mr. Ensign, before we resume, and that is that I often tell my clerks before they go out into the world to practice law that the most valuable treasure they possess is their reputation and their credibility, and I just would ask you to make sure that your team retains that lesson.

Okay. We're now going to move on. We're going to move from the compliance question into the legal questions that

surround the TRO.

So I first want to make clear that nobody contests, including me, that the law and the cases interpreting them make very clear that the President has wide latitude to make decisions in the areas of national security and foreign affairs, including under the AEA, and that he has had such ability since the end of the 18th century via the AEA.

It is also clear that individuals must have the chance to show that they are indeed members of a class that the AEA defines. And my job is to find out where the balance lies.

So I would just like you to confirm a few basic facts, which -- and the reason I'm asking this is because we have had unusual public interest in this case, I think it would be helpful for the general public to clarify a few basic facts, which I trust you won't have any dispute about.

So first of all, this case is not just about the people removed on the flights on Saturday, correct?

MR. ENSIGN: That's correct, Your Honor. You certified a nationwide class action.

THE COURT: Well, I disagree with your -- the way you describe that. But the point is, there are more people involved than who were on the planes, correct?

MR. ENSIGN: That's correct, Your Honor.

THE COURT: In addition -- and what I mean by that is there are more people potentially subject to removal via the

proclamation, correct?

MR. ENSIGN: That's correct, Your Honor.

THE COURT: You also understand that my TROs did not order anybody to be released into the United States, correct?

MR. ENSIGN: That's correct, Your Honor.

THE COURT: And they also did not order that the government could not deport anyone via regular INA procedures, correct?

MR. ENSIGN: That's correct, Your Honor.

THE COURT: They only ordered that the government could not summarily deport in-custody noncitizens subject to the proclamation. If the government wants to continue to deport them, it may do so, but not in reliance on the AEA. Correct?

MR. ENSIGN: That's what I recall your order saying, yes, Your Honor.

THE COURT: All right. So -- and I'm -- thank you. I think it's important for the public to make sure that those facts are clear.

Now, you have maintained throughout that DHS has been fully complying with the law during these deportations, right?

MR. ENSIGN: That's correct, Your Honor. We've started to present those arguments in the motion to continue Monday's hearing, I believe, and we will be setting them forth in additional detail in the Tuesday hearing, in response to

your order to show cause.

THE COURT: So -- and, again, I'm not even worried about my -- I'm not talking -- you may have -- my question may have not been clear. What I'm talking about, that you've been fully complying not with my orders, but with the law, generally, in the deportations?

I'm not saying you're ignoring my law. This isn't a trick question. I'm just saying, the government is complying with the law in its deportations, correct?

MR. ENSIGN: The government is complying with the law as it understands the law to be.

THE COURT: Exactly. I guess -- and maybe you don't have the answers to this, but what's concerning to me is, if that's so, why was this proclamation essentially signed in the dark on Friday, Friday night, or early Saturday morning, and then these people rushed onto planes? I mean, it seems to me the only reason to do that is if you know it's a problem and you want to get them out of the country before suit is filed.

Can you tell me a little bit about the timing of this?

MR. ENSIGN: Your Honor, I don't have knowledge of those operational details. Certainly, as to when the -- Your Honor asked the question previously when the proclamation was effective, and it's effective upon when being published.

THE COURT: Right. And that's 3:53 p.m. Saturday, right?

MR. ENSIGN: That's my understanding, Your Honor.

THE COURT: That's in the declaration by Mr. Cerna?

MR. ENSIGN: That's correct.

THE COURT: But yet -- and I'm not asking for specifics on times, but within a couple of hours, you have agreed because you say the planes cleared U.S. airspace by -- certainly by 7:00 p.m. So within a couple of hours, all these people were put on these flights, collected, put on these flights, and the flight has taken off, right?

MR. ENSIGN: That's my understanding of the record, Your Honor.

THE COURT: So in other words, it's certainly true that ICE had advanced notice of this proclamation because it's impossible that this could have happened within two hours?

MR. ENSIGN: Your Honor, I don't have specific knowledge, but that seems like a reasonable inference.

THE COURT: Okay. So now -- all right. Moving to the issue again that we're talking about today.

The question, as I've said, teed up is whether the government can summarily deport people without any individualized assessment of whether they actually fall into the category of the proclamation.

So again, the proclamation says, in relevant part in Section 1, "I proclaim that all Venezuelan citizens 14 years of age or older who are members of TdA, are within the

United States, and are not actually naturalized or lawful permanent residents of the United States, are liable to be apprehended, restrained, secured, and removed as alien enemies."

So what happens if someone is not a member of TdA or not a Venezuelan citizen or not a lawful permanent resident? How do they challenge their removal?

MR. ENSIGN: Your Honor, I think the SDNY's decision in the *Watkins* case suggest that review is available under habeas for those individualized determinations. While that court recognized that you couldn't bring facial challenges to the sufficiency of the President's determinations under the proclamation, the individualized applications of them may be reviewable in habeas. And that was --

THE COURT: But -- and that's a pre-1952 case, right?

MR. ENSIGN: That's correct, Your Honor. It was a 1946 case that was affirmed by the Second Circuit.

THE COURT: Right. And so you, of course, know that habeas was the only way to challenge detention prior to the 1952 INA, right?

MR. ENSIGN: Your Honor, I don't actually know that specifically. I mean, certainly, the INA is a more comprehensive immigration regulation statute, but there were other immigration statutes passed in the 1920s, and I am not sure how those might have interacted.

Certainly, even after the enactment of the INA, habeas continues to be available in some aspects of immigration law, as I know Your Honor has heard cases to that effect.

THE COURT: I agree. But the question, ultimately, which we will get to, is whether it's the sole basis to challenge. So I think they're very interesting questions and the plaintiffs spent a long time in their briefs, you spent a lot of time in your briefs, understandably, deciding whether the courts can adjudicate and whether the issues of terms in the AEA, like "invasion," "predatory incursion," or "foreign nation" or "government" can be reviewed.

And your contention is, those are not justiciable, that courts have held that -- that district courts like me cannot review the President's determination of those terms.

Is that correct?

MR. ENSIGN: Your Honor, as to whether or not the statutory preconditions of the AEA have been satisfied, that is correct, that is our position. There are other legal issues. For example, I think plaintiffs challenge that the INA essentially swallows the Alien Enemies Act, that that falls outside of that because that is not challenging the President's determinations, it's raising a separate legal argument that is outside of the sufficiency of the President's determinations.

THE COURT: But I guess -- but you do agree, and I think you just said it, that courts can challenge whether the

person is, in fact, an enemy alien covered by the proclamation, right?

MR. ENSIGN: Your Honor, I think that such challenges could potentially be brought in habeas, and certainly courts have recognized previously the ability to do so. The precise contours of that will depend on various doctrines, and indeed many people -- there have definitely already been habeas suits filed in Texas. I believe one is even set for trial next week.

So certainly, habeas is available to raise issues. The *Ludecke* case itself was a habeas challenge that, you know, notwithstanding the fact that the President's determinations were not reviewable, it did, in fact, review plaintiffs' constitutional challenges, but found them just simply and completely without merit.

THE COURT: But even more narrowly, *Ludecke* says at page 171, footnote 17, "The additional question as to whether the person restrained is, in fact, an alien enemy, 14 years of age or older, may also be reviewed by the courts."

And that's sort of a pretty clear statement that the question of whether you fall into the category that the proclamation covers is reviewable by the courts.

MR. ENSIGN: It is reviewable in the courts, is certainly what the *Watkins* case suggests. That's about all the precedent that we found on the subject. So, you know, it would be, of course, subject to other precedent that might be

developed by courts. But --

THE COURT: Well, so we've got -- I'm sorry. I didn't mean to interrupt.

MR. ENSIGN: No, Your Honor. I was just saying that the case law that's available shows that habeas is available for that.

THE COURT: Right. So, for example, *Clark* from the DC Circuit, the 1946 case, states at 294, quote, "The one question, whether the individual involved is or is not an alien enemy, is admitted by the attorney general to be open to judicial determination." And there are a number of other cases including, *Uhl*, U-h-l, a 1943 case from the Second Circuit that says the same thing. Right?

MR. ENSIGN: Your Honor, I believe that's correct. And I think there's an important distinction between that challenging the President's determinations that the statutory conditions have been met, which are not reviewable, and the rest, which are determinations of the executive in the context of sensitive foreign affairs and immigration, for which I think, you know, a very deferential review would be available, but it's not categorically barred as -- as in the case under *Ludecke* and *Citizens Protective League* for the President's determinations.

THE COURT: All right. And we will get to that standard in a minute. But just like the Guantanamo cases, you

agree that there the government also had to prove that detainees were members of Al-Qaeda, and that required robust judicial review, even though those people had never set foot in the United States. Fair?

MR. ENSIGN: Your Honor, certainly the Supreme Court in a series of cases made clear that habeas review was available. I think as to those challengers, they would dispute the idea that it was robust habeas review, but certainly something was available to them.

THE COURT: Let's talk about whether habeas is the sole avenue of review, because, as we know, the plaintiffs have, at least for now dismissed, without prejudice, their habeas claim, because there may well be a venue issue, which is what you raised in our hearing on Saturday, if they want to proceed in habeas.

But it seems that in these national security cases that while review is taking place in the habeas context, and, again, it had to prior to 1952, when the INA modern version was passed, the whole point in those cases is that the individuals were challenging their detention, right?

Name one of those cases in which the individual was not challenging their detention.

MR. ENSIGN: Well, Your Honor, I -- I think the Supreme Court's case in *Munaf versus Geren* is particularly instructive, and there it was people held in essentially U.S.

custody, alliance custody in Iraq, and they brought -- they brought a habeas challenge to prevent their challenge -- their transfer to the government of Iraq.

And the first issue that the Supreme Court resolved was that in that case they held that review was available, specifically in habeas, to consider such a challenge, but they recognized the somewhat odd nature of it, notwithstanding the fact that habeas was available, describing it as: "Here the last thing plaintiffs want is a simple relief -- or simple release. That would expose them to apprehension by Iraqi authorities by criminal prosecution, precisely what petitioners went to federal court to avoid. At the end of the day what plaintiffs are really after" --

THE COURT: Go slower. We have a --

MR. ENSIGN: Oh. I apologize, Your Honor.

-- "is a court order requiring the United States to shelter them from the sovereign government seeking to answer for the alleged crimes."

But it's that same sort of somewhat counterintuitive habeas claim where the person is actually using habeas in a way to stay in custody.

But I think the right way to understand why this is a core habeas claim is that it's a challenge to the entirety of the federal government's authority to exercise any custody over these particular individuals under the AEA.

THE COURT: But it's not -- they're in custody. They know they're in custody. They are not asking -- I mean, they would be happy to be released. But what they're simply saying is, don't remove me, particularly to a country that's going to torture me. And we'll get to that shortly. But that's their challenge, is you cannot remove me. They're not asking for release.

MR. ENSIGN: Your Honor, I agree that that's an aspect of the challenge, but I think that's not the whole of it, and that's one of the reasons that it sounds in habeas. If I may, here under the AEA, the AEA authorizes both expulsion and detention, and the inescapable conclusion of their challenges would be that the government is entirely without authority either to hold them in custody indefinitely or to exercise custody over them for long enough to effectuate a removal. They are bringing a categorical challenge to the government's --

THE COURT: They're being removed anyway, and they're subject to INA removal regardless. So how can you say that's the argument they're making?

MR. ENSIGN: Your Honor, at the end of the day, they are challenging and asserting that the government is entirely without authority under the AEA to exercise custody over their persons. That is a core habeas claim.

THE COURT: They don't want the government to exercise

removal authority over their persons, not custody over their persons. Yes, they have to be in custody in order to be removed, but I think that's semantic, truly.

But let's move to the standard question, which you, I think, alluded to earlier.

So if these folks are entitled to some sort of hearing, some sort of individualized process, as *Ludecke* and other courts talk about, so what's the standard of review for the executive evidence? This was not an issue that was briefed? And I'm not sure I need to make a definitive finding here one way or the other. But what do you contend should be the standard of review for that evidence?

MR. ENSIGN: And sorry, Your Honor. When you say "that evidence," as to which factual question?

THE COURT: Of whether they are, in fact, subject to the proclamation. In other words, whether they are members of -- essentially members of TdA, as well as being Venezuelan and not out of PRs.

MR. ENSIGN: Your Honor, there's a dearth of case law on that, so I think you have to look to sort of generalized principles because we don't have binding precedent that answers that question. But because of the sensitive foreign affairs and immigration context, and as well as the war powers aspect, all of which are areas where courts have recognized that where review is available in courts it's done deferentially, given

the expertise of the executive in these particular matters.

THE COURT: Let me --

MR. ENSIGN: And so --

THE COURT: I'm sorry. Go ahead. I didn't mean to interrupt. Go ahead.

MR. ENSIGN: So I think several cases provide general guidance as to how those factual determinations would be done. You know, for example, the DC Circuit in *Islamic American Relief Agency* said, "Our review in this area at the intersection of national security, foreign policy, and administrative law is extremely deferential." That's 477 F.3d at 734.

Humanitarian Law Project versus Holder, the Supreme Court provided, "When it comes to collecting evidence and drawing factual inferences in the national security area, the lack of competence within the part of courts is marked."

THE COURT: There are a few -- okay. But how about, for example, in Uhl, U-h-l, 137 F.2d at 900, which cites *Walker versus Johnson*, the Supreme Court case from 1941, which under the AEA, and *Walker*, of course, required the Court to hold a hearing and really sort of talked about more de novo review, same as *Bauer versus Watkins*, Second Circuit from 1948, and then even more importantly, although it's not under the AEA, is *Hamdi versus Rumsfeld*, our Supreme Court case from 2004, where the Court rejected deference to the executive's factual

determination that an American citizen was an enemy combatant, at least without adversarial testing before a neutral decision-maker, that there was more robust judicial factfinding in those matters, wasn't there?

MR. ENSIGN: Your Honor, I believe that's the case. I mean, I think you can certainly point to competing strains of cases that would need to be resolved in habeas, but most importantly here is that this Court does not have habeas jurisdiction, both because plaintiffs dropped their habeas claim and because venue was never appropriate here to begin with.

THE COURT: And I understand your point on that. But assuming that I find that that's not necessary, that there is jurisdiction under the APA, how is this going to work? In other words, are you going to tell each person who is presumably going to be deported that they have the right to challenge? Do they have to raise it? Is it good enough that the plaintiffs have raised the class? What's the role of the courts in ensuring that individuals are not erroneously classified as TdA members and removed to some El Salvadoran prison when they're not even part of the proclamation? How is this going to happen?

MR. ENSIGN: Your Honor, I think we're likely to discover answers rather soon in that there are courts exercising habeas jurisdiction in Texas that are wrestling with

these questions right now. And certainly, there is a robust history of AEA cases being raised, specifically in the habeas -- I apologize.

There's certainly a robust history of AEA claims being challenged in the habeas context. We've cited multiple cases where that is. And so certainly, you know, the history shows that the federal courts have a role to play with habeas claims to adjudicate various actions, including, for example, the constitutional claims in *Ludecke*, unlike the factual challenges to the President's determinations were reviewable. They just were wholly without merit.

THE COURT: And so -- and also, you're -- yeah, I haven't heard you raise the question that these proceedings would be difficult because of national security concerns.

You're not -- that's not a problem, correct?

MR. ENSIGN: Your Honor, I mean, this is not such a habeas proceeding. I'm not -- I'm not counsel to those habeas proceedings. I think, to the extent that some issues could arise, they would be needed -- they would need to be adjudicated by those habeas corpus courts. That is not an issue that I've thought through, to be candid.

THE COURT: In fact, Congress has an answer for us, doesn't it? Because they created the Alien Terrorist Removal Court, and under 8 U.S.C. Section 1533, the government can file ex parte and under seal there. So if there's a national

security concern with having these hearings, whether via habeas or otherwise, you can always go to the ATRC, which would be a first, but that's what it's there for, right?

MR. ENSIGN: That is my understanding, that it's never been used previously, unlike the AEA, which has only been used somewhat sparingly within our history. But just because the government has another tool in its arsenal does not mean that the AEA has been impliedly repealed or that it's no longer available as authority to the President.

THE COURT: Let me go move on to a couple of other areas for you.

I trust that you're not contesting that aliens present in the United States are entitled to due process?

MR. ENSIGN: Your Honor, there are -- due process rights of aliens within the United States are often quite limited, and typically limited to that which is provided by statute, but courts have recognized some such rights.

THE COURT: Including in deportation proceedings?

MR. ENSIGN: Including in deportation proceedings in some very limited context.

THE COURT: Well, for example, in *Reno versus Flores*, a 1993 case with the Supreme Court, the Court said, quote, "It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."

So you agree that's the --

MR. ENSIGN: Your Honor, I agree that's what the Supreme Court said. Although, as a practical matter, how those cases usually come out is whatever process Congress provided is sufficient to satisfy the process, and as a practical matter, the due process clause very rarely provides any sort of independent basis for setting aside or limiting the authority of the executive.

THE COURT: But if you determine that an alien is an alien enemy under the AEA, and may be summarily removed, then aren't you precluding this due process challenge? But, again, maybe that brings you back to your point, which is, you agree that aliens -- that folks under this proclamation have the right to challenge it, but it just has to be in a habeas proceeding?

MR. ENSIGN: Your Honor, I think as a factual matter, that has not been the case here. The five individual plaintiffs filed suit. They obtained a TRO. They are still in the United States. They were able to assert their constitutional claims. We are here today discussing those very constitutional claims.

THE COURT: Well, but we're not -- all we're doing today is deciding whether they have the right to do it. We're not discussing, are they, in fact, members of TdA and thereby deportable under the AEA in the proclamation. We're just -- you've been contesting that they even have the right to raise

that, correct?

MR. ENSIGN: As to some of the issues, that's correct, Your Honor. But we -- certainly, a couple things I would say. One is that we're here on facial challenges. Plaintiffs have not attempted to assert individualized challenges. And that's certainly not the basis under which they secured a TRO. And, you know, we're here on a motion to dissolve that TRO. So those individual claims are not before you.

As to the facial claims, that's part of the likelihood of success on the merits that's very much before this court today. So we are, in fact, now hearing plaintiffs' facial claims. As to individualized claims, those would need to be brought in habeas. Plaintiffs originally --

THE COURT: Go ahead.

MR. ENSIGN: Plaintiffs originally asserted habeas claims and elected to withdraw them. To the extent that those plaintiffs want to file habeas claims in an appropriate venue, they could raise such claims in an appropriate manner. This suit is not an appropriate manner, though.

THE COURT: So let's go back to, briefly, the cause of action.

So you said in your brief that the plaintiffs don't have an APA cause of action because they can't sue the President under the APA, right?

MR. ENSIGN: That's one of the multiple reasons they

don't have an APA claim, Your Honor.

THE COURT: Because you would agree that they could use the APA to sue other officials who are implementing the proclamation. The APA wouldn't bar that, right?

MR. ENSIGN: Here it does, Your Honor, I think in several ways. As we have cited in the *Tulare* case, actions that merely implement the President's directive are not reviewable under the APA. So we think that bars APA review.

But more fundamentally, the availability of habeas claims as a way of raising challenges to AEA applications means that there's an adequate alternative remedy and that, thus, 5 U.S.C. Section 702 precludes an APA claim because habeas is available.

THE COURT: But, for example, and this isn't a Supreme Court case, but a DC Circuit case, and they remind me frequently that I have to follow their holdings as well, so the *Reich* case, which is from 1996 there. So doesn't that hold that a nonstatutory ultra vires claim can proceed even if it's challenging the legality of a presidential executive order?

MR. ENSIGN: Your Honor, those implied causes of action and equity can in some instances be implied by the courts, but not -- courts have not implied them when alternative methods of review are available. And so because habeas review is available, an implied cause of action in equity is not here. And that's a rule that applies in general,

but it applies with special force as to the habeas context.

You know, for example, many prisoners have constitutional claims that readily fall within the four corners of the text of Section 1983, and so -- but if you were to look at 1983, an express cause of action, they should be able to bring their claims, but the Supreme Court has recognized that where habeas is available, you have to follow that and you can't follow even an express alternative cause of action. And so for that reason, an implied cause of action in equity is even more unavailable here.

THE COURT: Right. But the ultra vires claim against the executive proclamation, which you agree is essentially analogous to an executive order, right?

MR. ENSIGN: Your Honor, it has some differences, none of which are probably material here.

THE COURT: Right. So where it says that, "The executive's action here is essentially that the President does not insulate the entire executive branch from judicial review. We think it's well established that review of the legality of presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive." That's citing Judge Scalia's concurrence.

Further that, "Even if the Secretary were acting at the behest of the President, this does not leave the courts

without power to review the legality of the action, for courts have power to compel subordinate executive officials that disobey illegal presidential commands."

So that's why it seems that the plaintiffs can bring an APA or ultra vires claim here even without running afoul of the APA's prohibition on suing the president. But your answer is, only in a non-habeas circumstance?

MR. ENSIGN: Your Honor, I think two elements of that. I think, yes, in a very real sense, the habeas claim is a sort of ultra vires challenge. It's saying, you are without authority to exercise custody over my body. And in a very real way, it is an ultra vires claim of its own.

And then I'd also direct the Court to an aspect of *Ludecke* where they recognized that the determinations of the attorney general made implementing the President's AEA declaration were not reviewable. The --

THE COURT: Again, *Ludecke* sort of -- I agree with you entirely, and I said -- that's the first thing I said today, that *Ludecke* does prevent courts reviewing a number of decisions the President makes, such as whether the United States is at war. But I think footnote 17 is all the plaintiffs need to address -- to get the justiciability on whether their clients are members of the TdA.

I just have one brief other area, and I'll release you, Mr. Ensign, which is, I want to talk about Farra,

F-a-r-r-a, 's implementation of the Convention against Torture. And that says, at 8 U.S.C. 1231, "It shall be the policy of the United States not to expel any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States."

So we'll talk about the availability of a CAT claim, but certainly the plaintiffs have made out in their allegations that they would suffer torture in an El Salvadoran prison, correct? They've alleged that. And I actually have declarations to that effect, correct?

MR. ENSIGN: I agree they have alleged that.

THE COURT: So why can't they bring this claim, a CAT claim, under the APA?

MR. ENSIGN: Your Honor, because it would also sound in habeas. It would be a challenge to how the government was carrying out the AEA in the same sort of manner that has been reviewed in all the other AEA habeas claims. It would be, you cannot use the APA -- or, sorry, the AEA -- you lack authority to use it to exercise custody over me because the -- because CAT prevents you from doing so.

THE COURT: But in *Huisha-Huisha*, and that's spelled H-u-i-s-h-a, hyphen, H-u-i-s-h-a, against *Mayorkas*, the 2022 DC Circuit case where the circuit found that the executive could deport -- could legally deport migrants for public health

reasons under Title 42 during COVID, but had to provide them fair protections before doing so.

Why is that any different? There, they also had to hold the individuals, they had to have custody of them in order to deport them. So why wouldn't you be arguing they had to have brought that in habeas, too?

MR. ENSIGN: What is that? Why do they have to bring that in habeas? Because it, again, is a challenge to the government exercising custody over them on a particular legal basis. It's another form of saying, you may not use the AEA against me and against my person because I have a legal claim. You know, whether that be my conviction is invalid or other constitutional claims, all of them can be raised in habeas. And so I think a CAT claim could be raised in habeas. It can't be raised under the APA.

THE COURT: All right. Thank you very much, Mr. Ensign.

MR. ENSIGN: Thank you, Your Honor. If you don't mind, I would like to just clarify one thing from earlier, too.

We had an exchange about, you know, what my understanding was on Saturday.

THE COURT: Yes.

MR. ENSIGN: But certainly my own personal understanding of the law or aspects of the law that I may not have been aware of because my knowledge of law is limited

obviously does not limit the executive branch. And so --

THE COURT: And I wasn't asking about your knowledge of the law, and I don't expect you to know everything, and in fact for you to show up at that hearing with hours notice, I would not expect -- you knew far more law than I would have expected at that time.

I'm asking about the facts. What I'm concerned about is the facts you knew or didn't know, and more importantly, what you understood me to say, what you understood my order to say. That doesn't require any knowledge of the law. It just required common sense, listening to what I said and understanding what I said. And I think you made clear here today, which I appreciate, that you did understand what I said.

MR. ENSIGN: That's correct, Your Honor. But certainly, for example, we have set forth in our papers and will do why argument under Rule 65(d) that is not an argument that I was aware of at that time, which may --

THE COURT: Right. You talk about that it was not binding until it was in writing.

MR. ENSIGN: That's correct.

THE COURT: That's what you mean. But you didn't think -- we're going around in circles, but I think you have agreed you understood what I said when I told you to have this done immediately, and you intended to comply with that, I trust.

MR. ENSIGN: That was my understanding, Your Honor.

THE COURT: Okay. Thank you. Thank you, very much.

Mr. Gelernt. I mean, I know that you spent a lot of time, and we've all spent a lot of time on the justiciability of the AEA issues. I would rather spend my time where I did with Mr. Ensign.

So you're not forfeiting any of those arguments. You're not waiving them. I know you strongly pressed them, and I think they're tough arguments, both sides. I think they're hard, the legal issues. But what would be more helpful for me today, and then I'll give you a chance to say anything else you want, is to focus on the issues that I addressed with Mr. Ensign. And his principal argument, through response to many of my questions, was habeas, habeas, habeas. So let's hear you on that.

MR. GELERNT: So a few things, Your Honor. The first thing I would start off, and before we even get to that question, is that the government is obviously not giving people time to file habeas, so it's an illusory availability of habeas.

And I will tell the Court on information and belief, and I hope the Court will direct the government to provide this to you, we understand that the slip of paper that individuals are getting right before they're put on the plane says, "No review of this designation." And so I hope the government will

actually provide that to you. But that's our understanding --

THE COURT: But, again, you're not saying, I hope, that these are people who are being removed contrary to my order?

MR. GELERNT: Well, Your Honor, whether retroactively your order was violated is a separate question.

THE COURT: Right.

MR. GELERNT: I'm saying this is what the piece of paper the people got.

THE COURT: I'm sorry. They got previously, that are not getting currently? They're not getting prospectively?

MR. GELERNT: I assume they are not continuing to violate your order. But this is our understanding of what people got. Some of the people, as you know, the five named plaintiffs your TRO stopped, that was in the morning. But this is our understanding of the piece of paper. And even if it didn't say that, obviously they're rushing people onto a plane, so it's illusory. But let me just step back for a second.

I think the government is basically asking you to relook at now 50 years of law and several, several of your decisions. It's very clear, since *Prizer* in the early seventies, habeas, a core habeas, is when you're seeking release, as Your Honor has pointed out multiple times in this hearing and the prior hearing. We are not seeking release. We are not seeking to stop them from removing people under the

INA.

This is not a core habeas, and I think even the government concedes that if it's not a core habeas, the immediate custodian rule doesn't apply. Could it be brought in habeas? Yes, but that doesn't mean we can't bring it under other grounds. That's the *Aracelli* case we've cited, your cases. Even when it deals with detention, if the exact relief you're seeking is not release, you can bring it in a non-habeas way. And so that's IRLA case. That's your *Damus* case. And so I think we're just going over really well-tread ground here.

We could have brought it in habeas. We didn't have to. You know, I conceded at the Saturday night hearing, given the time pressure to stop those planes, that for purposes of that TRO, we would take our habeas off, and you said, you know, we can do it without prejudice. I mean, we would ask you to allow us to reinstate it now, but it's not necessary.

THE COURT: You can certainly amend your complaint to reinstate that. Again, there was an issue that you remember and the government remembers in the timeframe that you agreed to do that to moot any venue issue.

MR. GELERNT: Right. Right. Exactly. And so I think, you know, the government is basically saying, because it could have been brought in habeas, it has to be brought in habeas and that's the only way. And the law has been clear for a long time.

I would just address the government's, you know, what's essentially a descriptive point, that lots of the AEA cases were in brought in habeas. As Your Honor has pointed out, that's because it predates many of the current statutes. But there were cases that were not brought in habeas that were allowed, and that's the *Citizens Protective League v. Clark* in the DC Circuit. That's the *Clark v. Burn* case. And so those are cases that weren't brought in habeas.

I think that, to the extent the government is saying, well, AEA is completely different and doesn't follow any of the rules, I don't even think they're saying that, but if they were, they are AEA cases that were brought in a non-habeas forum.

THE COURT: So let me ask you a couple of questions about that, some of the things that I asked Mr. Ensign. And, again, as I said to him, I'm not sure we have to figure all of this out today in order for me to maintain or modify my TRO. But how do you expect this process to play out? In other words, what should the plaintiffs, members of the class have to do? Do they have to say, before they're being removed, "I challenge my removal, I'm not a member of TdA"? Does the government have to hold a hearing for everybody to say, you get a hearing, are you a member of TdA, you are, okay, next? Are you not?

Before we even talk about the standard of proof,

again, I don't expect you to have this nailed down chapter and verse, just like the government didn't, but can you give me some sense of how you think --

MR. GELERNT: That's a fair question, Your Honor, and we're in really uncharted territory, right? Because, as Your Honor knows well, it's only been used three times in the country's history, the Alien Enemies Act.

Our understanding is the first two times, the War of 1812 and World War I, there weren't even removals under those. So the only time there were removals was under World War II. And the government, even though we were in an actual war, because wherever, they set up a hearing board for people to be able to contest it, and then they could go to habeas. And so we don't know if the government is going to set up a hearing board. I think that might be the way to go. It might be that they're individual habeases.

Whether the government had to hold hearings without someone affirmatively asking, I think is a question that we would like to give a little more thought to and go back to some of the historical materials in World War II. But at a minimum, it has to be a meaningful chance. It can't be, you're going to be put on a plane in two hours, do you want a hearing, not be able to call a lawyer, anything like that.

So I would -- you know, and as Your Honor said, and I obviously recognize that's not directly at issue here, but we

would ask, if the Court ultimately upholds the TRO, that we would ask for a little more time to brief how that works. And I suspect the government is going to object to any type of procedure, meaningful procedure, but I don't know. Obviously, as Mr. Ensign said, we're not there yet.

THE COURT: When you say a hearing board, you're talking an administrative process?

MR. GELERNT: That's our understanding of how World War II worked, and so people got hearings, there was not these kind of summary removals.

THE COURT: And how about venue? Is that -- would claims be brought here in DC? Would there be -- would review be brought here? Would it remain if there is -- if our habeas claims are brought and they did get a hearing, then the habeas would be -- any follow-on habeas would be in Texas? Any thoughts on that?

MR. GELERNT: Yeah. I mean, those are all fair questions and hard questions. I still do not think they would have to be brought in habeas because they would not be seeking their release. They would simply be stopping their removal under the AEA. And it may be that the hearing board is set up here. It may be on video. I just don't know how the government would do it and whether the government would have an affirmative obligation to hold those hearings for everyone or whether the person would have to make a request.

THE COURT: But are you saying that an administrative hearing would be sufficient?

MR. GELERNT: No. And I apologize if I wasn't being clear. An administrative hearing could be the initial way it's done, but there would have to be some judicial review. Now, the standard of judicial review might depend on how full a hearing there was in the hearing board, whether there was a lawyer at the hearing board, all those types of things. And I think there's a lot of law about sort of how much judicial review there has to be of hearing boards, and we would want to brief it. But I think we are a long way from my understanding of the government being willing to provide people with this type of process.

THE COURT: And so would -- get a little more technical, and then I want to go back with some of the questions I asked Mr. Ensign.

So then if I believe that a TRO is warranted on the grounds that we have just talked about, which is that individualized hearings and some process are required for people who challenge that they are covered under the proclamation, then isn't the TRO that's issued right now too broad, and that shouldn't it be narrowed to say -- so right now, it says that "The government is enjoined from removing members of such class not otherwise subject to removal pursuant to the proclamation for 14 days." And, again, the class --

this may be a little harder in front of both of you. But the class, again, is all noncitizens in U.S. custody who are subject to the proclamation and its implementation.

So the question is, then, it would -- under the reasoning that I've talked about here, the government would not be enjoined from removing people who admit they're members of -- that they are covered by the proclamation or who don't challenge that.

MR. GELERNT: If there was a fair process for finding out whether they conceded it or weren't challenging it.

THE COURT: So, therefore, would the -- would the injunction have to be modified to include -- to refer to only people who have challenged their removal? In other words, the class would be something like -- I'm sorry. Injunction would cover, that the government is enjoined from removing members of such class not otherwise subject to removal and who have challenged their removal pursuant to the proclamation, blah, blah, blah, and so forth.

MR. GELERNT: Right. So let me make two points, the first directly responsive to what you're asking.

I think it would have to be a process that they would submit to you to see whether we all agree that that was providing meaningful process, so that they could actually -- so people could actually contest it, they understood it, they were being provided it in a language, they had time to ask their

lawyers what this means, all that. And so that would be my answer to that.

But if I could just step back for one second.

THE COURT: Yeah, go ahead. Well, let me -- I'm going to let you say that, but if -- you know, I'm also aware that the Court of Appeals has jurisdiction -- has the appeal, and that while I could deny a motion to vacate or motion for reconsideration, if I wanted to substantively modify the TRO, I would probably have to have an indicative ruling saying, if you returned this to me, I would modify it in the following fashion.

So what's your position on such -- you're saying the modification -- again, maybe the answer is you need to study the specific language of such modification.

MR. GELERNT: I mean, I probably would. And on the mechanical issue, I think, you know, we would probably say no, but I think it's more tied to the substantive point I would like to make, and then if you're not accepting that substantive point, I could circle back to the mechanical question of how you do this.

THE COURT: Go ahead.

MR. GELERNT: Fundamentally, there's two issues here, as Your Honor knows. The one we've been focusing on, I think, is the easy one. *Ludecke*, as you pointed out, footnote 17, could not have been clearer. You have to be able to contest

whether you fall within the Act; otherwise, anybody could just be taken off the street and removed under the AEA. That is absolutely true.

I think the government is really not, as I understand it, pushing against that. They're just simply saying, you have to bring it in habeas. And we've covered that ground. But the threshold questions about whether the Act can be used in this context, I think are absolutely reviewable and are critical because, otherwise, what we're looking at is the government being able to say, for any group in this country, any nationality, you have a gang and we don't think that's reviewable; so, therefore, we're going to remove anybody we can say is part of this gang under the Alien Enemies Act.

Again, to go back to where you started, that doesn't mean people are going to roam the streets. It doesn't mean people are going to get to stay in the country. They can be criminally prosecuted. They can be detained under the immigration laws. They can be removed.

There's the Alien Terrorist Court, but this is a very dangerous road we're going down where the Alien Enemies Act can be invoked against a gang and then anybody who is part of that gang -- and we don't even know what it means to be part of a gang if it's not a formal structure.

THE COURT: You mean the membership in the gang, how do you define membership?

MR. GELERNT: Exactly. I think as this case goes on, you're going to get a lot of experts saying that there is not all that formal a structure to TdA, probably less than other gangs.

THE COURT: I know they're certainly reporting, raising doubts about whether people are or are not members who are being deported.

MR. GELERNT: So let me try and just focus on the reviewability of the statutory predicates, and I'll start with the broader point that you made to start, which is, this statute gives the government extraordinary powers, gives the President. That's all the more reason why the statutory predicates have to be reviewable, to make sure the President is acting within the bounds that Congress sets. So it's ultimately a separation of powers question.

The government says those statutory predicates are not reviewable. Every case the government cites has broad language meant to say, once the statutory predicates are covered and found, then the President has broad power to decide who of that group are going to be removed.

But every case addressed statutory predicates or constitutionality. Because of the time, and I apologize, this is no excuse, but there are many, many, many Alien Enemies Act cases reviewing statutory predicates, and I can just, sort of if I could, just sort of list them for you and give you the

cites.

So just to start with, on the government's cases, the government cites *Schwarzkopf*. That reviewed the question of who was a citizen.

The government cites *ex parte Gilroy*. That reviewed who was a denizen within the Act.

The government cites *Citizens Protective League*. That consolidated three civil actions addressing multiple questions, including the constitutionality of the Act.

There are additional cases. There is the *D'Esquiva v. Uhl* case that addressed --

THE COURT: Why don't you spell that for the court reporter.

MR. GELERNT: Yes, I'm sorry. D, apostrophe, capital E-s-q-u-i-v-a, v. Uhl. And that's Second Circuit, 137 F.Circuit 903.

There's the *Von Heymann v. Watkins*. The government cites that. That also had reviewability.

There's the *Schlueter* case, S-c-h-l-u-e-t-e-r. That's also against Watkins.

There are just -- there is the *Jaegeler* case after *Ludecke*, J-a-e-g-e-l-e-r, *v. Carusi*. That's a SCOTUS case that said that the war was over.

In each one of those cases, the statutory predicates were reviewed, and the constitutionality.

And *Ludecke* itself could not have been clearer. It said, "The construction and validity," it made that point twice, "can be reviewed, but what can't be reviewed is, once someone is within the Act," and it was all German nationals, "who from those people who were subject," in that case German nationals, "could be considered dangerous and subject to removal." That's what was not reviewable.

But whether you were a German national was routinely reviewed. There were cases about whether an Austrian person could be considered German.

THE COURT: I still think those are similar to what we're talking about here, which is the individualized reviewability of whether you fall within the Act, not the reviewability of whether this is an invasion or incursion.

MR. GELERNT: No, but they were all statutory predicate questions. Are you a citizen within the Act? Are you -- the constitutionality of the Act, whether you were a denizen within the Act, whether you were a native within the Act. Each one of them addressed different types of statutory predicates.

The reason there was no case about whether there was a foreign government is because it would be unheard of to Congress to be doing what they are doing. And in that sense, I think the *Utility* Case *v. EPA* says the Court should be wary, very skeptical of a newfound power in a 200-plus-year-old

statute. I mean, that's why there's no cases about foreign governments. That's why there's no cases about invasion or incursion.

We are so far afield from what Congress intended. This was passed as a wartime measure in 1798, but I think if you look at those cases, you will see in every one of those cases, they weren't about whether the individual was dangerous. They were about whether they fell within the statutory terms of the Act.

And so I understand, Your Honor, that there is an easier path with this TRO, but what that means is that they are going to find people who are members of the gangs. They could be low-level people, whatever membership actually means, or an associate, and all of a sudden they're going to be in an El Salvadoran prison. And then the next time there's going to be another gang and another gang and another gang. Any nationality in this country has gangs, and all of a sudden they could be subjected.

THE COURT: I agree, the policy ramifications of this are incredibly troublesome and problematic and concerning, and this, I agree, is an unprecedented and expanded use of an Act that has been used, as we have discussed, in the War of 1812, World War I, and World War II, where there was no question of whether there was a declaration of war and who the enemy was.

And the idea that it's being used against certain

Venezuelans who have individually come over to the United States, not as members of their government, but ostensibly as a member of a gang that's a quasi-hybrid criminal state, I agree with you that this is a long way from the heartland of the Act.

There's still a lot of language in Supreme Court cases that give me pause that I can go ahead and say this isn't a foreign state, this isn't an invasion, it's not an incursion.

MR. GELERNT: Yeah. So, Your Honor, I guess in that sense, then, you know, we get that you are also under a quick timeframe here. Then we would ask that you leave the TRO in place and see how the circuit panel addresses that for now.

But the one thing I would say is, if Your Honor is even beginning to think about narrowing the injunction at some point down the line, I think if you didn't feel like you could address invasion or whether there is an incursion, which we, again, do think you can address because there is statutory terms, at a minimum, the proclamation doesn't name Venezuela. There is simply no way to say that that is a foreign government, that the TdA is a foreign government.

It's not saying -- like, in World War II, they said every German is an enemy alien, but the only ones we are going to act on and remove and detain are those that are dangerous. Here it doesn't say Venezuela is the object of the proclamation, or all Venezuelans. It says only TdA associates,

members. At a minimum, we think you have jurisdiction.

THE COURT: Venezuelan citizens who are members of TdA.

MR. GELERNT: Right. But that is, I think, understood. They're not going around and saying they can take any Venezuelan off the street and send them to El Salvador.

We would respectfully urge that, at a minimum, you go at least that far, because, otherwise, I think we are going to see person after person being sent there if they have -- if they can concoct any connection to a gang. And, obviously, then, it would depend a little on what standard is set for membership, but we're going to get into much more complicated questions that are of the government's doing by using this Act in such a different way.

THE COURT: Can I just ask you last if you want to respond to the government's response on my CAT questions. I mean, in other words, what I'm asking, again, is why if -- I understand that individuals cannot fight the administration's determinations of their CAT claims without a final removal order. But why can't they bring claims challenging the fact that the administration never gave them a chance to raise a CAT claim?

MR. GELERNT: They absolutely can, and Your Honor cited how we show that. I think that's one of the principal cases, because there also, the government wasn't using the

Immigration Act to remove someone. They were using the public health laws, Title 42, and the DC Circuit said, no, you have to at least give them screenings for -- not just CAT, but persecution, as well, under withholding.

So if the Alien Enemies Act can be used here, and if someone is found to fall within it, they absolutely have to be screened. And I think what Your Honor has already seen about what's happening in El Salvadoran prisons would give someone pause not to be doing these screenings.

If I could just say one other thing about your order on the third plane. I know that the government has said those removals were okay even though they took off after the Court's written order, and the government said they weren't solely based on the AEA, I take it from the government's careful language that they had final order, so maybe the other authority was the Immigration Act. I think that's implausible and we would ask the Court for clarification from the government.

The reason I say it's implausible is related to what you're asking me now. You have to, in your removal, not only have a final removal order, but it has to say where you're going to be sent to.

There is no way that these Venezuelans had final orders that said, you're going to be sent to El Salvador, unless after your Court's order during the hearing, they

crossed something out and changed it. There is very clear statutory language saying where someone can be sent, and it's a checklist where people can be sent. The Supreme Court has gone over that in the *Jama v. ICE* case.

There is no way that those Venezuelans could have been sent to El Salvador under any proper statutory interpretation of those provisions, and so we would really question how those people on the third flight were sent after your written order.

The other thing I would say, I'm not sure if Your Honor wants this, but we're going to put in an affidavit either tonight or over the weekend letting you know that people were -- who were on those planes were returned, that there were some people. They were not Venezuelan men, but it goes to the government's saying to you in their motion, well, it wasn't feasible to bring people back.

I can't really understand what the government is saying. Obviously, the Court wasn't saying, make a midair return even if you didn't have fuel. The government is saying, well, you didn't consider the lack of fuel. That sort of goes without saying.

But there were people who were brought back, and we will put in sworn declarations to show that some people landed but had to be brought back because the El Salvadoran government wouldn't take them because one was a mistake and they were not Venezuelan or El Salvadoran and the others weren't men and the

El Salvadoran President said, "I'm not taking women."

THE COURT: I assure you, Mr. Gelernt, the government is not being terribly cooperative at this point, but I will get to the bottom of whether they violated my order, who ordered this, and what the consequences will be.

All right. Thank you very much.

MR. GELERNT: Thank you, Your Honor.

THE COURT: Let me just -- Mr. Ensign, I just have a couple last questions, then, for you, and I'm happy if there is any final point or two you want to make.

So you want to give me your response to Mr. Gelernt's last point, which is there's a declaration saying that everybody on that plane, that third plane, was not subject -- was not being deported solely on the basis of the proclamation? In fact, let me get that.

(Pause)

THE COURT: I have every other piece of paper. I can pull it up. But that was -- he stated that -- under oath, that nobody on that plane was sent there via the AEA.

So what's your response to Mr. Gelernt's point that there's no way that people deported solely under the INA were being sent to El Salvador, that Venezuelans weren't?

MR. ENSIGN: Your Honor, my understanding is that everyone on that third plane had a final order of removal.

THE COURT: But does it -- and that Venezuelans were

being deported to El Salvador?

MR. ENSIGN: Your Honor, I don't know the details of what those orders said, but what I understand and what I have been told is that everyone on the third plane had final orders of removal.

THE COURT: Well, okay. Then I may -- as we go through this, I will likely require more specific information about that because Mr. Gelernt seems to be raising a reasonable concern about this.

Okay. I'm happy if there are any -- so I'm not sure I gave you this opportunity, but if I gave the government the opportunity to say that you will have individual hearings before you deport anyone to ensure that they are members, to be assured they are actually covered by the proclamation, in other words, members of TdA, Venezuelans, not LPRs, are you prepared to do that?

MR. ENSIGN: No, Your Honor. I don't have authorization to do that. The position of the United States is that habeas relief provides whatever due process is available in these circumstances.

THE COURT: Okay. If you want to make any last point, I would be happy to hear it.

MR. ENSIGN: Yes, Your Honor, two very quick points, if I may.

As to habeas, I understood opposing counsel to say

that just because we could bring it, that's not dispositive, and I believe he suggested that the law changed in the seventies.

Here is what the DC Circuit said in 1996: "The key to plaintiff's inability to pursue a suit here is jurisdictional, and it rests merely on the availability, not the actual seeking of habeas elsewhere," end quote.

And it went on to further explain: "The availability of a habeas remedy in another district ousted us of jurisdiction over an alien's effort to pose a constitutional attack."

THE COURT: That's in what case?

MR. ENSIGN: That's in *Lobue versus Christopher*, 82 F.3d --

THE COURT: I've got that cite. Thank you.

MR. ENSIGN: Second, Your Honor, as to the cases that opposing counsel cited suggesting that the preconditions were reviewable, we simply disagree with that. Both *Ludecke* and *Citizens Protective League* involve challenges specifically to whether or not a condition of the AEA were met.

In both cases, plaintiffs actually had very strong arguments that there was, in fact, no longer a war. As a factual matter, VE Day had been declared multiple years before, and Justice Black, in dissent, went on to explain that the idea that the war was still ongoing was pure fiction. But none of

that mattered because President Truman had determined that the war was still going, and that was the end of the matter for the courts.

Similarly, as the President's determination there's a war, as to whether or not there's an invasion or a predatory incursion, courts have no meaningful standards to adjudicate what constitutes an invasion. The Ninth Circuit has said as much in *California versus United States*. And, similarly, as to what qualifies as a state is a power that is entrusted to the President under Article II.

THE COURT: You would certainly agree that the hypotheticals Mr. Gelernt raises are awfully frightening, that if the courts can't review it, then the President could say that anybody is invading the United States, that if there were -- I think you cite a fishing vessel case, that if some fisherman from a foreign country comes into U.S. waters and the President says that's an invasion, nothing -- these fishing fleets, Chinese fishing fleets are an invasion of U.S. waters, any Chinese fisherman may be held and interned and deported, fair game, nothing we can do, right?

MR. ENSIGN: Your Honor, there could be individualized determinations, but --

THE COURT: If they're fishermen and if they're Chinese, but if they are concededly Chinese fishermen, they are out of luck, right?

MR. ENSIGN: I believe that's how Congress has set this up to be, and certainly what TdA is doing to --

THE COURT: Pretty alarming. Even you, I trust, would agree such a scenario would be pretty alarming?

MR. ENSIGN: Your Honor, it's entrusted to the political branches, and to the extent that that reaches outcomes that are unacceptable as a policy in political matter, the political branches exist to resolve that. Certainly, Congress could repeal or amend the AEA at any time.

THE COURT: Okay. Thank you, all. I appreciate it.

MR. GELERNT: Your Honor, just one housekeeping thing.

THE COURT: Yes.

MR. GELERNT: This is a small thing, but the government has made a big deal in the Court of Appeals that your class cert findings weren't reduced to writing, so we would respectfully ask that at some point you do that, certifying the class.

THE COURT: I think my minute order does. Just in terms of you mean on each numerosity to --

MR. GELERNT: The government seems to be suggesting that. I will leave it to you. But I'm just mentioning it as a cautionary matter.

THE COURT: All right. Thank you. Good weekend, everyone.

(Proceedings concluded at 3:47 p.m.)

CERTIFICATE

I, Sonja L. Reeves, Federal Official Court Reporter in and for the United States District Court of the District of Columbia, do hereby certify that the foregoing transcript is a true and accurate transcript from the original stenographic record in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 21st day of March, 2025.

/s/ Sonja L. Reeves
SONJA L. REEVES, RDR-CRR
FEDERAL OFFICIAL COURT REPORTER

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/s [1] - 55:8

1

1 [1] - 11:24
10004 [1] - 1:14
1231 [1] - 29:2
125 [1] - 1:13
137 [2] - 20:18, 43:15
14 [3] - 11:24, 14:17, 38:25
14th [1] - 1:16
1533 [1] - 22:24
17 [3] - 14:16, 28:21, 40:24
171 [1] - 14:16
1798 [1] - 45:5
1812 [2] - 36:9, 45:22
18th [2] - 1:13, 8:7
1920s [1] - 12:24
1941 [1] - 20:19
1943 [1] - 15:12
1946 [2] - 12:17, 15:8
1948 [1] - 20:22
1952 [2] - 12:20, 16:18
1983 [2] - 27:4, 27:5
1993 [1] - 23:22
1996 [2] - 26:17, 52:4
1:25-cv-00766-JEB [1] - 1:5

2

200-plus-year-old [1] - 44:25
20001 [1] - 1:24
20004 [1] - 2:3
2004 [1] - 20:24
20043 [1] - 1:20
20044 [1] - 2:5
20045 [1] - 1:16
2022 [1] - 29:23
2025 [2] - 1:10, 55:6
21 [1] - 1:10
21st [1] - 55:6
25-766 [1] - 3:3
294 [1] - 15:8
2:31 [2] - 1:10, 3:1

3

30-minute [1] - 6:14
333 [1] - 1:24
34553 [1] - 1:19
38 [1] - 6:21
3:47 [2] - 1:10, 54:25
3:53 [1] - 10:24b

4

42 [2] - 30:1, 48:2
477 [1] - 20:11

5

5 [1] - 26:11
50 [1] - 33:20
529 [1] - 1:16
5:00 [2] - 6:17, 7:8
5:22 [1] - 6:17

6

65(d [1] - 31:16

7

702 [1] - 26:12
722 [1] - 1:16
734 [1] - 20:12
7:00 [2] - 7:8, 11:7

8

8 [2] - 22:24, 29:2
82 [1] - 52:13
868 [1] - 2:5

9

900 [1] - 20:18
903 [1] - 43:16
950 [1] - 2:2

A

ability [2] - 8:7, 14:5
able [6] - 24:18, 27:5, 36:13, 36:23, 40:25, 41:10
above-entitled [1] - 55:4
absolutely [4] - 41:3, 41:8, 47:23, 48:6
accepting [1] - 40:18
accurate [1] - 55:3
ACLU [4] - 1:15, 3:9, 3:12, 3:22
act [2] - 5:1, 46:23
Act [22] - 13:20, 36:7, 41:1, 41:7, 41:13, 41:20, 42:23, 43:6, 43:9, 44:4, 44:13, 44:16, 44:17, 44:18, 44:19, 45:9, 45:21, 46:5, 47:13, 48:1, 48:5, 48:16
acting [2] - 27:24, 42:14
action [11] - 8:19, 25:21, 25:23, 26:21, 26:24, 27:5, 27:8, 27:9, 27:17, 27:20, 28:1
Action [1] - 3:3
actions [3] - 22:8, 26:6, 43:8
actual [2] - 36:11, 52:6
addition [1] - 8:24
additional [3] - 9:25, 14:16, 43:10
address [4] - 28:22, 35:1, 46:16, 46:17
addressed [4] - 32:12, 42:21, 43:11, 44:19
addresses [1] - 46:12
addressing [1] - 43:8
adequate [1] - 26:11
adjudicate [3] - 13:9, 22:8, 53:6
adjudicated [1] - 22:20
administration [1] - 47:21
administration's [1] - 47:18
administrative [4] - 20:11, 37:7, 38:1, 38:4
admit [1] - 39:6
admitted [1] - 15:10
advanced [1] - 11:13
adversarial [1] - 21:2
AEA [34] - 8:6, 8:7, 8:9, 9:13, 13:10, 13:17, 17:25, 18:11, 18:23, 20:20, 20:23, 22:2, 22:4, 23:5, 23:8, 24:9, 24:24, 26:10, 28:15, 29:17, 29:18, 29:19, 30:10, 32:5, 35:2, 35:10, 35:12, 37:21, 41:2, 48:14, 50:19, 52:20, 54:9
affairs [3] - 8:6, 15:19, 19:22
affidavit [1] - 49:10
affirmatively [1] - 36:18
affirmed [1] - 12:17
afield [1] - 45:4
afoul [1] - 28:5
afternoon [10] - 3:8, 3:10, 3:11, 3:16, 3:19, 3:24, 4:4, 4:6, 4:9, 4:12
age [2] - 11:25, 14:18
Agency [1] - 20:9
agree [18] - 6:22, 13:4, 13:24, 16:1, 18:8, 23:25, 24:1, 24:11, 26:2, 27:12, 28:17, 29:12, 39:22, 45:19, 45:21, 46:4, 53:11, 54:4
agreed [3] - 11:6, 31:23, 34:19
ahead [6] - 20:4, 20:5, 25:14, 40:4, 40:21, 46:7
air [1] - 6:22
airspace [1] - 11:6
al [4] - 1:3, 1:6, 3:3, 3:4
Al [1] - 16:2
Al-Qaeda [1] - 16:2
alarming [2] - 54:3, 54:4
alien [7] - 12:3, 14:1, 14:17, 15:9, 24:8, 24:9, 46:22
Alien [8] - 13:20, 22:23, 36:7, 41:13, 41:19, 41:20, 42:23, 48:5
alien's [1] - 52:10
aliens [4] - 23:12, 23:15, 23:23, 24:12
allegations [1] - 29:8
alleged [3] - 17:18, 29:10, 29:12
alliance [1] - 17:1
allow [1] - 34:16
allowed [1] - 35:6
alluded [1] - 19:5
alternative [3] - 26:11, 26:23, 27:8
amend [2] - 34:17, 54:9
Amendment [1] - 23:23
American [3] - 1:12, 20:8, 21:1
analogous [1] - 27:13
answer [5] - 17:17, 22:22, 28:6, 40:2, 40:13
answers [3] - 10:13, 19:21, 21:24
anyway [1] - 18:18
APA [13] - 21:14, 25:23, 25:24, 26:1, 26:3, 26:4, 26:8, 26:12, 28:5, 29:14, 29:19, 30:15
APA's [1] - 28:6
apologize [4] - 17:15, 22:3, 38:3, 42:22
apostrophe [1] - 43:14
appeal [1] - 40:6
Appeals [2] - 40:6, 54:14
appeared [1] - 7:7
applications [2] - 12:13, 26:10
applies [2] - 26:25, 27:1
apply [1] - 34:4
appreciate [2] - 31:13, 54:10
apprehended [1] - 12:3
apprehension [1] - 17:10
approach [1] - 3:6
appropriate [4] - 21:10, 25:17, 25:18, 25:19
Aracelli [1] - 34:6
area [3] - 20:9, 20:15, 28:24
areas [3] - 8:5, 19:24, 23:11
argue [3] - 4:22, 7:3, 7:14
arguing [2] - 4:15, 30:5
argument [6] - 7:8, 13:22, 18:20, 31:16, 32:13
arguments [4] - 9:23, 32:7, 32:9, 52:22
arise [1] - 22:19
arsenal [1] - 23:7
ARTHUR [1] - 1:15
Arthur [1] - 3:22
Article [1] - 53:10
aside [1] - 24:6
Aspect [3] - 18:8, 19:23, 28:13
aspects [2] - 13:2, 30:24
assert [2] - 24:18, 25:5
asserted [1] - 25:15
asserting [1] - 18:22
assessment [1] - 11:21
Assistant [1] - 4:5
associate [1] - 45:14
associates [1] -

46:25
assume [1] - 33:12
assuming [1] - 21:13
assure [1] - 50:2
assured [1] - 51:14
ATRC [1] - 23:2
attack [1] - 52:11
attempt [1] - 27:21
attempted [1] - 25:5
Attorney [1] - 4:5
attorney [3] - 5:20, 15:10, 28:15
attorney-client [1] - 5:20
Audrey [1] - 3:25
AUDREY [1] - 1:18
August [1] - 4:7
AUGUST [1] - 2:4
Austrian [1] - 44:9
authorities [1] - 17:11
authority [9] - 17:24, 18:13, 18:23, 19:1, 23:9, 24:6, 28:11, 29:19, 48:16
authorization [1] - 51:18
authorizes [1] - 18:11
availability [5] - 26:9, 29:7, 32:19, 52:6, 52:8
available [17] - 12:9, 13:2, 14:9, 15:5, 15:20, 16:7, 16:9, 17:5, 17:8, 19:25, 23:9, 26:13, 26:23, 26:24, 27:7, 51:19
Avenue [2] - 1:24, 2:2
avenue [1] - 16:11
avoid [1] - 17:12
aware [4] - 7:9, 30:25, 31:17, 40:5
awfully [1] - 53:12

B

balance [1] - 8:10
bar [1] - 26:4
barred [1] - 15:21
bars [1] - 26:8
based [1] - 48:14
basic [2] - 8:11, 8:14
basis [5] - 13:5, 24:6, 25:6, 30:10, 50:14
Bauer [1] - 20:22
BEFORE [1] - 1:9
begin [1] - 21:10
beginning [2] - 3:5, 46:14
behest [1] - 27:25
belief [1] - 32:21
Ben [1] - 2:5
between [3] - 6:17, 7:16, 15:15
big [1] - 54:14
binding [5] - 4:19, 6:5, 6:9, 19:21, 31:19
bit [1] - 10:19
Black [1] - 52:24
blah [3] - 39:17, 39:18
board [6] - 36:12, 36:15, 37:6, 37:21, 38:7, 38:8
boards [1] - 38:10
BOASBERG [1] - 1:9
body [1] - 28:11
bottom [1] - 50:4
bounds [1] - 42:14
Box [2] - 1:19, 2:5
BRADLEY [1] - 1:18
branch [2] - 27:18, 31:1
branches [2] - 54:6, 54:8
Brian [1] - 4:12
BRIAN [1] - 2:4
brief [4] - 25:22, 28:24, 37:2, 38:11
briefed [1] - 19:10
briefly [1] - 25:20
briefs [2] - 13:7, 13:8
bring [12] - 5:14, 12:11, 27:6, 28:4, 29:13, 30:7, 34:5, 34:8, 41:6, 47:20, 49:15, 52:1
bringing [1] - 18:16
brings [1] - 24:11
Broad [1] - 1:13
broad [3] - 38:22, 42:17, 42:19
broader [1] - 42:10
brought [19] - 14:4, 17:1, 17:2, 25:13, 30:6, 34:4, 34:11, 34:23, 35:3, 35:5, 35:8, 35:12, 37:12, 37:13, 37:14, 37:19, 49:21, 49:23
burn [1] - 35:7
BY [5] - 1:13, 1:15, 1:18, 2:2, 2:4

C

California [1] - 53:8
candid [1] - 22:21
cannot [4] - 13:14, 18:6, 29:19, 47:18
capital [1] - 43:14
careful [1] - 48:14
carrying [1] - 29:17
Carusi [1] - 43:22
case [40] - 8:13, 8:16, 12:9, 12:15, 12:17, 14:10, 14:23, 15:5, 15:8, 15:12, 15:21, 16:24, 17:5, 19:19, 20:19, 20:24, 21:5, 23:22, 24:16, 26:6, 26:15, 26:17, 29:24, 34:6, 34:9, 35:7, 42:1, 42:17, 42:21, 43:11, 43:19, 43:21, 43:22, 44:5, 44:21, 49:4, 52:12, 53:15
Case [1] - 44:24
CASE [1] - 1:5
cases [31] - 8:3, 13:3, 15:11, 15:25, 16:6, 16:16, 16:19, 16:21, 20:6, 21:7, 22:2, 22:5, 24:3, 34:7, 35:3, 35:5, 35:8, 35:12, 42:24, 43:2, 43:10, 43:24, 44:9, 45:1, 45:2, 45:6, 45:7, 46:6, 47:25, 52:16, 52:21
CAT [8] - 29:7, 29:13, 29:21, 30:14, 47:16, 47:19, 47:21, 48:3
categorical [1] - 18:16
categorically [1] - 15:21
category [2] - 11:22, 14:20
causes [1] - 26:20
cautionary [1] - 54:22
century [1] - 8:7
Cerna [1] - 11:2
cert [1] - 54:15
certain [1] - 45:25
certainly [24] - 10:21, 11:7, 11:12, 12:22, 13:1, 14:4, 14:9, 14:23, 16:5, 16:8, 21:6, 22:1, 22:4, 22:6, 25:3, 25:6, 29:8, 30:23, 31:15, 34:17, 42:5, 53:11, 54:2, 54:8
CERTIFICATE [1] - 55:1
certified [1] - 8:19
Certified [1] - 1:23
certify [1] - 55:3
certifying [1] - 54:17
challenge [22] - 12:7, 12:19, 13:6, 13:19, 13:25, 14:10, 17:2, 17:6, 17:23, 18:6, 18:9, 18:16, 21:17, 24:10, 24:13, 28:10, 29:16, 30:8, 35:21, 38:20, 39:8
challenged [3] - 22:5, 39:13, 39:17
challengers [1] - 16:7
challenges [9] - 12:11, 14:3, 14:13, 18:12, 22:9, 25:4, 25:5, 26:10, 52:19
challenging [8] - 13:21, 15:16, 16:20, 16:22, 18:22, 26:19, 39:10, 47:20
chambers [1] - 7:10
chance [4] - 8:8, 32:11, 36:21, 47:21
changed [2] - 49:1, 52:2
chapter [1] - 36:1
checklist [1] - 49:3
CHIEF [1] - 1:9
Chinese [4] - 53:18, 53:19, 53:24
CHRISTINE [1] - 1:18
Christine [1] - 3:20
Christopher [1] - 52:13
circle [1] - 40:19
circles [1] - 31:22
Circuit [12] - 12:17, 15:8, 15:12, 20:8, 20:22, 26:15, 29:24, 35:7, 43:15, 48:2, 52:4, 53:7
circuit [2] - 29:24, 46:12
circumstance [1] - 28:7
circumstances [1] - 51:20
cite [2] - 52:15, 53:15
cited [5] - 22:5, 26:6, 34:6, 47:24, 52:17
cites [7] - 20:18, 42:17, 43:1, 43:3, 43:5, 43:7, 43:18
citing [1] - 27:22
citizen [4] - 12:6, 21:1, 43:4, 44:16
Citizens [4] - 15:22, 35:6, 43:7, 52:19
citizens [2] - 11:24, 47:2
Civil [3] - 1:12, 2:4, 3:3
civil [1] - 43:8
claim [18] - 16:13, 17:20, 17:23, 18:24, 21:10, 26:1, 26:12, 26:18, 27:11, 28:5, 28:9, 28:12, 29:7, 29:13, 29:14, 30:11, 30:14, 47:22
claiming [1] - 4:18
claims [21] - 22:4, 22:7, 22:9, 24:19, 24:20, 25:8, 25:9, 25:12, 25:16, 25:17, 25:18, 26:10, 27:3, 27:6, 29:18, 30:13, 37:12, 37:14, 47:19, 47:20
clarification [1] - 48:17
clarify [2] - 8:14, 30:19
Clark [3] - 15:7, 35:6, 35:7
class [11] - 8:9, 8:19, 21:18, 35:19, 38:24, 38:25, 39:2, 39:14, 39:16, 54:15, 54:17
classified [1] - 21:20
clause [1] - 24:5
clear [14] - 5:6, 5:7, 8:2, 8:4, 8:8, 9:19, 10:4, 14:19, 16:6, 31:12, 33:21, 34:24, 38:4, 49:1
cleared [1] - 11:6
clearer [2] - 40:25, 44:1
CLERK [1] - 3:2
clerks [1] - 7:20
client [1] - 5:20
clients [6] - 5:11, 5:20, 6:3, 7:13, 7:17, 28:23
collected [1] - 11:8
collecting [1] - 20:14
COLUMBIA [1] - 1:1
Columbia [2] - 1:15, 55:3
combatant [1] - 21:1
commands [1] - 28:3
common [1] - 31:11
compel [1] - 28:2
competence [1] -

20:16
competing [1] - 21:6
complaint [1] - 34:17
completely [2] - 14:14, 35:10
compliance [2] - 4:22, 7:25
complicated [1] - 47:12
comply [1] - 31:24
complying [4] - 9:21, 10:5, 10:8, 10:10
comprehensive [1] - 12:23
conceded [2] - 34:12, 39:10
concededly [1] - 53:24
concedes [1] - 34:3
concern [3] - 6:15, 23:1, 51:9
concerned [1] - 31:7
concerning [2] - 10:13, 45:20
concerns [1] - 22:14
concluded [1] - 54:25
conclusion [1] - 18:12
concoct [1] - 47:10
concurrence [1] - 27:23
condition [1] - 52:20
conditions [1] - 15:17
Conference [1] - 55:5
confirm [1] - 8:11
conformance [1] - 55:4
Congress [7] - 22:22, 24:3, 42:14, 44:23, 45:4, 54:1, 54:9
connection [1] - 47:10
consequences [1] - 50:5
consider [2] - 17:6, 49:19
considered [2] - 44:6, 44:10
consistent [2] - 6:5, 6:11
consolidated [1] - 43:8
constitutes [1] - 53:7
Constitution [1] - 1:24
constitutional [7] - 14:13, 22:9, 24:19, 24:20, 27:3, 30:13, 52:10
constitutionality [4] - 42:22, 43:9, 43:25, 44:17
construction [1] - 44:2
contend [1] - 19:11
contention [1] - 13:12
contest [3] - 36:13, 39:24, 40:25
contesting [2] - 23:12, 24:25
contests [1] - 8:2
context [7] - 15:18, 16:17, 19:23, 22:5, 23:20, 27:1, 41:8
continue [2] - 9:12, 9:23
continues [1] - 13:2
continuing [1] - 33:12
contours [1] - 14:6
contrary [2] - 6:11, 33:3
Convention [1] - 29:1
conversation [1] - 5:4
conviction [1] - 30:12
Coogle [1] - 3:20
COOGLE [2] - 1:18, 3:19
cooperative [1] - 50:3
copied [1] - 7:10
core [5] - 17:23, 18:24, 33:22, 34:2, 34:3
corners [1] - 27:3
corpus [1] - 22:20
correct [27] - 6:24, 6:25, 8:17, 8:18, 8:22, 8:23, 9:1, 9:2, 9:4, 9:5, 9:8, 9:9, 9:14, 9:22, 10:9, 11:3, 12:16, 13:15, 13:18, 15:14, 22:15, 25:1, 25:2, 29:10, 29:11, 31:14, 31:20
counsel [4] - 3:5, 22:17, 51:25, 52:17
counterintuitive [1] - 17:19
country [7] - 10:18, 18:4, 29:3, 41:10, 41:16, 45:17, 53:16
country's [1] - 36:7
couple [6] - 11:5, 11:7, 23:10, 25:3, 35:14, 50:9
course [3] - 12:18, 14:25, 20:20
Court [30] - 1:23, 3:1, 16:5, 17:4, 20:14, 20:19, 20:20, 20:24, 20:25, 21:8, 22:24, 23:22, 24:2, 26:15, 27:6, 28:13, 32:21, 32:22, 37:1, 40:6, 41:19, 44:24, 46:6, 48:17, 49:3, 49:17, 54:14, 55:2, 55:2
COURT [110] - 1:1, 3:10, 3:13, 3:18, 4:2, 4:6, 4:8, 4:11, 4:14, 4:17, 4:25, 5:3, 5:12, 5:18, 5:22, 6:3, 6:10, 6:15, 6:20, 7:3, 7:13, 7:18, 8:20, 8:24, 9:3, 9:6, 9:10, 9:17, 10:2, 10:12, 10:24, 11:2, 11:4, 11:12, 11:17, 12:15, 12:18, 13:4, 13:24, 14:15, 15:2, 15:7, 15:24, 16:10, 17:14, 18:1, 18:18, 18:25, 19:15, 20:2, 20:4, 20:17, 21:12, 22:12, 22:22, 23:10, 23:18, 23:21, 24:8, 24:21, 25:14, 25:20, 26:2, 26:14, 27:11, 27:16, 28:17, 29:13, 29:22, 30:16, 30:22, 31:2, 31:18, 31:21, 32:2, 33:2, 33:7, 33:10, 34:17, 35:14, 37:6, 37:11, 38:1, 38:14, 39:11, 40:4, 40:21, 41:24, 42:5, 43:12, 44:11, 45:19, 47:2, 47:15, 50:2, 50:8, 50:17, 50:25, 51:6, 51:21, 52:12, 52:15, 53:11, 53:23, 54:3, 54:10, 54:12, 54:18, 54:23, 55:9
court [5] - 12:11, 17:12, 17:16, 25:10, 43:12
Court's [3] - 16:24, 48:12, 48:25
courts [26] - 13:9, 13:13, 13:25, 14:4, 14:18, 14:21, 14:22, 15:1, 19:8, 19:24, 19:25, 20:16, 21:19, 21:24, 22:7, 22:20, 23:17, 26:22, 27:25, 28:1, 28:19, 53:3, 53:6, 53:13
cover [1] - 39:15
covered [7] - 5:20, 14:1, 38:20, 39:7, 41:6, 42:18, 51:14
covers [1] - 14:21
COVID [1] - 30:1
created [1] - 22:23
credibility [1] - 7:22
crimes [1] - 17:18
criminal [2] - 17:11, 46:3
criminally [1] - 41:17
critical [1] - 41:8
crossed [1] - 49:1
CRR [1] - 55:8
current [1] - 35:4
custodian [1] - 34:4
custody [17] - 9:11, 17:1, 17:21, 17:24, 18:1, 18:2, 18:14, 18:15, 18:23, 19:1, 19:2, 28:11, 29:20, 30:4, 30:9, 39:2

D

D'Esquiva [1] - 43:10
Damus [1] - 34:9
danger [1] - 29:5
dangerous [4] - 41:20, 44:6, 45:7, 46:23
Daniel [1] - 3:11
DANIEL [1] - 1:13
dark [2] - 7:14, 10:15
Dated [1] - 55:6
days [1] - 38:25
DC [14] - 1:11, 1:16, 1:20, 1:24, 2:3, 2:5, 15:7, 20:8, 26:15, 29:23, 35:7, 37:12, 48:2, 52:4
de [1] - 20:21
deal [1] - 54:14
deals [1] - 34:7
dearth [1] - 19:19
decide [1] - 42:19
deciding [2] - 13:8, 24:22
decision [2] - 12:8, 21:3
decision-maker [1] - 21:3
decisions [3] - 8:5, 28:20, 33:21
declaration [4] - 11:2, 28:16, 45:24, 50:12
declarations [2] - 29:11, 49:22
declared [1] - 52:23
DEFENDANT [1] - 2:1
Defendants [1] - 1:7
deference [1] - 20:25
deferential [2] - 15:20, 20:11
deferentially [1] - 19:25
define [1] - 41:25
defines [1] - 8:10
definitely [1] - 14:7
definitive [1] - 19:10
Democracy [5] - 1:17, 3:14, 3:17, 3:20, 3:25
denizen [2] - 43:6, 44:18
deny [1] - 40:7
Department [3] - 2:1, 4:7, 4:10
deport [8] - 9:7, 9:11, 9:13, 11:20, 29:25, 30:5, 51:13
deportable [1] - 24:24
deportation [3] - 23:18, 23:19, 23:24
deportations [3] - 9:21, 10:6, 10:9
deported [6] - 21:16, 42:7, 50:14, 50:21, 51:1, 53:19
DEPUTY [1] - 3:2
Deputy [1] - 4:5
describe [1] - 8:21
describing [1] - 17:8
descriptive [1] - 35:2
designation [1] - 32:25
detail [1] - 9:25
details [5] - 6:18, 6:21, 6:23, 10:21, 51:2
detain [1] - 46:23
detained [1] - 41:17
detainees [1] - 16:2
detention [5] - 12:19, 16:20, 16:22, 18:12, 34:7
determination [4] - 13:14, 15:11, 21:1, 53:4
determinations [13] - 12:10, 12:12, 13:22,

13:23, 14:11, 15:16, 15:18, 15:23, 20:7, 22:10, 28:14, 47:19, 53:22
determine [1] - 24:8
determined [1] - 53:1
developed [1] - 15:1
DHS [2] - 7:3, 9:20
differences [1] - 27:14
different [4] - 30:3, 35:10, 44:19, 47:14
difficult [1] - 22:14
Diplomate [1] - 1:22
direct [2] - 28:13, 32:22
directive [3] - 5:10, 26:7, 27:22
directives [1] - 5:10
directly [2] - 36:25, 39:20
disagree [2] - 8:20, 52:18
discover [1] - 21:24
discussed [1] - 45:22
discussing [2] - 24:19, 24:23
dismissed [1] - 16:12
disobey [1] - 28:3
dispositive [1] - 52:1
dispute [2] - 8:15, 16:7
disrespectful [1] - 4:20
dissent [1] - 52:24
dissolve [2] - 4:24, 25:7
distinction [1] - 15:15
DISTRICT [3] - 1:1, 1:1, 1:9
district [2] - 13:13, 52:9
District [3] - 1:15, 55:2
Division [1] - 2:4
doctrines [1] - 14:6
DOJ [2] - 2:4, 4:13
DOJ-Civil [1] - 2:4
DONALD [1] - 1:6
Donald [1] - 3:3
done [5] - 5:11, 19:25, 20:7, 31:24, 38:5
doubts [1] - 42:6
down [3] - 36:1, 41:20, 46:15
drawing [1] - 20:15
DREW [1] - 2:2
Drew [1] - 4:4
dropped [1] - 21:9
due [7] - 4:24, 23:13, 23:14, 23:24, 24:5, 24:10, 51:19
during [4] - 7:7, 9:21, 30:1, 48:25

E

early [2] - 10:15, 33:21
easier [1] - 45:11
easy [1] - 40:24
edge [1] - 5:7
effect [2] - 13:3, 29:11
effective [3] - 6:2, 10:23
effectuate [1] - 18:15
effort [1] - 52:10
either [3] - 7:3, 18:14, 49:11
El [12] - 21:20, 29:9, 45:15, 47:6, 48:8, 48:24, 49:6, 49:23, 49:25, 50:1, 50:22, 51:1
elected [1] - 25:16
elements [1] - 28:8
elsewhere [1] - 52:7
enactment [1] - 13:1
end [5] - 8:7, 17:12, 18:21, 52:7, 53:2
enemies [1] - 12:4
Enemies [6] - 13:20, 36:7, 41:13, 41:20, 42:23, 48:5
enemy [7] - 14:1, 14:17, 15:10, 21:1, 24:9, 45:24, 46:22
enforce [1] - 27:21
enjoin [1] - 27:21
enjoined [3] - 38:23, 39:6, 39:15
ENSIGN [77] - 2:2, 4:4, 4:16, 4:23, 5:2, 5:9, 5:16, 5:19, 6:1, 6:7, 6:13, 6:19, 6:25, 7:9, 7:15, 8:18, 8:23, 9:2, 9:5, 9:9, 9:15, 9:22, 10:10, 10:20, 11:1, 11:3, 11:10, 11:15, 12:8, 12:16, 12:21, 13:16, 14:3, 14:22, 15:4, 15:14, 16:5, 16:23, 17:15, 18:8, 18:21, 19:13, 19:19, 20:3, 20:6, 21:5, 21:23, 22:16, 23:4, 23:14, 23:19, 24:1, 24:15, 25:2, 25:15, 25:25, 26:5, 26:20, 27:14, 28:8, 29:12, 29:15, 30:7, 30:18, 30:23, 31:14, 31:20, 32:1, 50:23, 51:2, 51:17, 51:23, 52:13, 52:16, 53:21, 54:1, 54:5
Ensign [12] - 4:4, 4:17, 6:16, 7:19, 28:25, 30:17, 32:6, 32:13, 35:15, 37:5, 38:16, 50:8
ensure [1] - 51:13
ensuring [1] - 21:19
entire [1] - 27:18
entirely [3] - 18:13, 18:22, 28:18
entirety [1] - 17:23
entitled [3] - 19:6, 23:13, 55:4
entitles [1] - 23:23
entrusted [2] - 53:9, 54:5
EPA [1] - 44:24
equity [3] - 26:21, 26:25, 27:9
EREZ [1] - 2:4
Erez [1] - 4:10
erroneously [1] - 21:19
ESQUIVA [1] - 43:15
essentially [7] - 10:14, 13:20, 16:25, 19:17, 27:12, 27:17, 35:2
established [2] - 23:23, 27:19
et [4] - 1:3, 1:6, 3:3, 3:4
evidence [5] - 7:10, 19:9, 19:12, 19:14, 20:14
ex [2] - 22:25, 43:5
exact [1] - 34:7
exactly [3] - 5:1, 10:12, 34:21
Exactly [1] - 42:1
example [9] - 13:19, 15:7, 20:8, 20:18, 22:8, 23:21, 26:14, 27:2, 31:15
exchange [1] - 30:20
excuse [1] - 42:23
executive [11] - 15:18, 19:9, 20:1, 24:7, 26:19, 27:12, 27:13, 27:18, 28:2, 29:24, 31:1
executive's [2] - 20:25, 27:17
exercise [6] - 17:24, 18:14, 18:23, 18:25, 28:11, 29:20
exercising [2] - 21:25, 30:9
exist [1] - 54:8
expanded [1] - 45:21
expect [4] - 31:3, 31:5, 35:18, 36:1
expected [1] - 31:6
expel [1] - 29:3
expertise [1] - 20:1
experts [1] - 42:2
explain [2] - 52:8, 52:24
expose [1] - 17:10
express [2] - 27:5, 27:8
expulsion [1] - 18:11
extent [4] - 22:18, 25:16, 35:9, 54:6
extraordinary [1] - 42:11
extremely [1] - 20:11

F

F.2d [1] - 20:18
F.3d [2] - 20:11, 52:14
F.Circuit [1] - 43:16
facial [4] - 12:11, 25:4, 25:9, 25:11
fact [13] - 14:1, 14:11, 14:12, 14:17, 17:8, 19:15, 22:22, 24:23, 25:11, 31:4, 47:20, 50:15, 52:22
factfinding [1] - 21:3
facts [6] - 7:4, 8:11, 8:14, 9:19, 31:7, 31:8
factual [7] - 19:14, 20:7, 20:15, 20:25, 22:9, 24:15, 52:23
fair [6] - 16:4, 30:2, 36:4, 37:17, 39:9, 53:20
fall [6] - 11:21, 14:20, 27:3, 41:1, 44:13, 48:6
falls [1] - 13:20
far [3] - 31:5, 45:4, 47:8
Farra [1] - 28:25
FARRA [1] - 29:1
fashion [2] - 5:14, 40:11
feasible [1] - 49:15
federal [4] - 1:23, 17:12, 17:24, 22:7
Federal [1] - 55:2
FEDERAL [1] - 55:9
fell [1] - 45:8
few [4] - 8:11, 8:14, 20:17, 32:16
fiction [1] - 52:25
Fifth [1] - 23:23
fight [1] - 47:18
figure [1] - 35:16
file [3] - 22:24, 25:17, 32:19
filed [4] - 6:4, 10:18, 14:8, 24:17
final [7] - 47:19, 48:15, 48:21, 48:23, 50:10, 50:24, 51:4
findings [1] - 54:15
first [9] - 6:16, 8:2, 8:16, 17:4, 23:3, 28:18, 32:16, 36:8, 39:20
fisherman [2] - 53:16, 53:19
fishermen [2] - 53:23, 53:24
fishing [3] - 53:15, 53:17, 53:18
five [2] - 24:16, 33:14
fleets [2] - 53:18
FLENTJE [2] - 2:4, 4:7
Flentje [1] - 4:7
flight [2] - 11:9, 49:8
flights [11] - 6:18, 6:22, 6:24, 7:1, 7:2, 7:6, 7:7, 7:11, 8:17, 11:8, 11:9
Floor [1] - 1:13
Flores [1] - 23:21
focus [2] - 32:12, 42:8
focusing [1] - 40:23
folks [2] - 19:6, 24:12
follow [5] - 26:16, 27:7, 27:8, 35:10, 37:15
follow-on [1] - 37:15
following [1] - 40:10
foot [1] - 16:3
footnote [3] - 14:16, 28:21, 40:24
FOR [3] - 1:1, 1:12, 2:1
force [1] - 27:1

foregoing [1] - 55:3
foreign [11] - 8:5, 13:10, 15:19, 19:22, 20:10, 44:22, 45:1, 46:8, 46:19, 46:20, 53:16
forfeiting [1] - 32:7
form [1] - 30:10
formal [2] - 41:23, 42:3
format [1] - 55:4
forth [3] - 9:24, 31:15, 39:18
forum [1] - 35:13
Forward [5] - 1:17, 3:15, 3:17, 3:20, 3:25
Foundation [5] - 1:17, 3:15, 3:17, 3:20, 3:25
four [1] - 27:3
Franklin [1] - 2:5
frequently [1] - 26:16
Friday [3] - 1:10, 10:15
frightening [1] - 53:12
front [1] - 39:1
fuel [2] - 49:18, 49:19
full [1] - 38:6
fully [2] - 9:21, 10:5
fundamentally [2] - 26:9, 40:22

G

GALINDO [2] - 1:13, 3:11
Galindo [1] - 3:11
game [1] - 53:20
gang [11] - 41:11, 41:13, 41:21, 41:22, 41:23, 41:24, 45:16, 46:3, 47:10
gangs [3] - 42:4, 45:12, 45:17
Gelernt [5] - 3:8, 32:3, 50:2, 51:8, 53:12
GELERNT [26] - 1:13, 3:8, 32:16, 33:5, 33:8, 33:12, 34:21, 36:4, 37:8, 37:17, 38:3, 39:9, 39:19, 40:15, 40:22, 42:1, 42:8, 43:14, 44:15, 46:9, 47:4, 47:23, 50:7, 54:11, 54:13, 54:20
Gelernt's [2] - 50:11, 50:20
general [5] - 8:14, 15:10, 20:6, 26:25, 28:15
General [1] - 4:5
generalized [1] - 19:20
generally [1] - 10:6
Geren [1] - 16:24
German [5] - 44:4, 44:5, 44:8, 44:10, 46:22
Gilroy [1] - 43:5
GIRARD [1] - 1:18
given [2] - 19:25, 34:12
government [64] - 4:3, 4:15, 7:12, 9:7, 9:10, 9:12, 10:8, 10:10, 11:20, 13:11, 16:1, 17:3, 17:17, 18:13, 18:22, 18:25, 22:24, 23:7, 29:16, 30:9, 32:18, 32:22, 32:25, 33:19, 34:3, 34:19, 34:22, 35:9, 35:22, 36:2, 36:11, 36:14, 36:17, 37:3, 37:23, 38:12, 38:23, 39:5, 39:15, 41:4, 41:9, 42:11, 42:16, 42:17, 43:3, 43:5, 43:7, 43:17, 44:22, 46:2, 46:20, 47:25, 48:11, 48:13, 48:18, 49:16, 49:18, 49:23, 50:2, 51:11, 54:14, 54:20
government's [8] - 17:24, 18:17, 35:1, 43:2, 47:13, 47:16, 48:14, 49:14
governments [1] - 45:2
ground [2] - 34:10, 41:6
grounds [3] - 29:4, 34:6, 38:18
group [2] - 41:10, 42:20
Guantanamo [1] - 15:25
guess [3] - 10:12, 13:24, 46:9
guidance [1] - 20:7

H

habeas [80] - 12:10, 12:14, 12:19, 13:1, 14:4, 14:7, 14:9, 14:10, 15:5, 16:6, 16:8, 16:10, 16:13, 16:15, 16:17, 17:2, 17:6, 17:8, 17:20, 17:23, 18:10, 18:24, 21:7, 21:8, 21:9, 21:25, 22:2, 22:5, 22:7, 22:17, 22:20, 23:1, 24:13, 25:13, 25:15, 25:17, 26:9, 26:12, 26:24, 27:1, 27:7, 28:7, 28:9, 29:16, 29:18, 30:6, 30:8, 30:13, 30:14, 32:14, 32:19, 32:20, 33:22, 34:2, 34:3, 34:5, 34:8, 34:11, 34:14, 34:23, 34:24, 35:3, 35:5, 35:8, 35:12, 36:13, 37:13, 37:14, 37:15, 37:19, 41:6, 51:19, 51:25, 52:7, 52:9
habeases [1] - 36:16
Hamdi [1] - 20:24
happy [4] - 18:3, 50:9, 51:10, 51:22
hard [2] - 32:10, 37:18
harder [1] - 39:1
health [2] - 29:25, 48:2
hear [2] - 32:15, 51:22
heard [2] - 13:3, 22:13
HEARING [1] - 1:9
hearing [31] - 3:2, 4:21, 5:8, 6:16, 6:17, 7:4, 9:24, 9:25, 16:14, 19:7, 20:21, 25:11, 31:4, 33:24, 34:12, 35:22, 35:23, 36:12, 36:14, 36:22, 37:6, 37:14, 37:21, 38:2, 38:4, 38:7, 38:8, 38:10, 48:25
hearings [7] - 7:16, 23:1, 36:17, 37:9, 37:24, 38:19, 51:12
heartland [1] - 46:5
held [4] - 13:13, 16:25, 17:5, 53:19
helpful [2] - 8:14, 32:10
hereby [1] - 55:3
Heymann [1] - 43:17
historical [1] - 36:20
history [5] - 22:2, 22:4, 22:6, 23:6, 36:7
hold [7] - 18:14, 20:20, 26:17, 30:4, 35:22, 36:17, 37:24
Holder [1] - 20:13
holdings [1] - 26:16
Honor [86] - 3:8, 3:14, 3:16, 3:19, 3:24, 4:4, 4:9, 4:12, 4:16, 4:23, 5:2, 5:9, 5:16, 6:1, 6:7, 6:14, 6:19, 6:25, 7:9, 7:15, 8:18, 8:23, 9:2, 9:5, 9:9, 9:16, 9:22, 10:20, 10:22, 11:1, 11:11, 11:15, 12:8, 12:16, 12:21, 13:3, 13:16, 14:3, 15:4, 15:14, 16:5, 16:23, 17:15, 18:8, 18:21, 19:13, 19:19, 21:5, 21:23, 22:16, 23:14, 24:1, 24:15, 25:3, 26:1, 26:5, 26:20, 27:14, 28:8, 29:15, 30:18, 31:14, 32:1, 32:16, 33:5, 33:23, 35:3, 36:4, 36:6, 36:24, 40:23, 45:10, 46:9, 46:13, 47:23, 48:7, 49:10, 50:7, 50:23, 51:2, 51:17, 51:23, 52:16, 53:21, 54:5, 54:11
HONORABLE [1] - 1:9
hope [3] - 32:22, 32:25, 33:2
hours [6] - 7:7, 11:5, 11:7, 11:14, 31:4, 36:22
housekeeping [1] - 54:11
Huisha [2] - 29:22
HUISHA [2] - 29:23
Huisha-Huisha [1] - 29:22
Humanitarian [1] - 20:13
hybrid [1] - 46:3
hyphen [1] - 29:23
hypothetical [1] - 5:23
hypotheticals [1] - 53:12

I

ICE [2] - 11:13, 49:4
idea [3] - 16:8, 45:25, 52:24
identify [1] - 3:6
identifying [1] - 7:11
ignoring [1] - 10:7
II [6] - 36:10, 36:20, 37:9, 45:23, 46:21, 53:10
illegal [1] - 28:3
illusory [2] - 32:19, 33:18
immediate [1] - 34:4
immediately [3] - 5:1, 5:25, 31:24
Immigration [2] - 48:1, 48:16
immigration [6] - 12:23, 12:24, 13:2, 15:19, 19:23, 41:18
implausible [2] - 48:16, 48:19
implement [1] - 26:7
implementation [2] - 29:1, 39:3
implementing [2] - 26:3, 28:15
implied [5] - 26:20, 26:21, 26:22, 26:24, 27:9
impliedly [1] - 23:8
important [2] - 9:18, 15:15
importantly [3] - 20:23, 21:8, 31:8
impossible [1] - 11:14
in-custody [1] - 9:11
INA [9] - 9:7, 12:20, 12:22, 13:1, 13:19, 16:18, 18:19, 34:1, 50:21
inability [1] - 52:5
include [1] - 39:12
including [8] - 4:18, 8:3, 8:6, 15:12, 22:8, 23:18, 23:19, 43:9
incredibly [1] - 45:20
incursion [6] - 13:10, 44:14, 45:3, 46:8, 46:16, 53:6
indeed [2] - 8:9, 14:6
indefinitely [1] - 18:14
independent [1] - 24:6
indicative [1] - 40:9
individual [7] - 15:9, 16:21, 24:16, 25:8, 36:16, 45:7, 51:12
individualized [9] -

11:21, 12:10, 12:13, 19:7, 25:5, 25:12, 38:19, 44:12, 53:21
individually [1] - 46:1
individuals [7] - 8:8, 16:19, 17:25, 21:19, 30:4, 32:23, 47:18
inescapable [1] - 18:12
inference [1] - 11:16
inferences [1] - 20:15
information [4] - 7:11, 7:15, 32:21, 51:7
initial [1] - 38:4
injunction [3] - 39:12, 39:14, 46:14
instances [1] - 26:21
instructed [1] - 6:8
instructive [1] - 16:25
insulate [1] - 27:18
intemperate [1] - 4:19
intended [2] - 31:24, 45:4
intent [2] - 6:1, 6:9
interacted [1] - 12:25
interest [1] - 8:13
interesting [1] - 13:6
interned [1] - 53:19
interpretation [1] - 49:6
interpreted [1] - 5:4
interpreting [1] - 8:3
interrupt [2] - 15:3, 20:5
intersection [1] - 20:10
invading [1] - 53:14
invalid [1] - 30:12
invasion [9] - 13:10, 44:14, 45:2, 46:8, 46:16, 53:5, 53:7, 53:17, 53:18
invoked [1] - 41:21
involve [1] - 52:19
involved [2] - 8:22, 15:9
Iraq [2] - 17:1, 17:3
Iraqi [1] - 17:10
IRLA [1] - 34:9
Islamic [1] - 20:8
issue [10] - 4:22, 11:18, 16:13, 17:4, 19:9, 22:21, 34:18, 34:20, 36:25, 40:16
issued [1] - 38:21
issues [9] - 13:9, 13:18, 14:9, 22:18, 25:2, 32:5, 32:10, 32:12, 40:22
itself [2] - 14:10, 44:1

J

J.G.G [2] - 1:3, 3:3
Jaegeler [1] - 43:21
JAEGELER [1] - 43:22
Jama [1] - 49:4
JAMES [1] - 1:9
job [1] - 8:10
Johnson [1] - 20:19
JUDGE [1] - 1:9
Judge [1] - 27:22
Judicial [1] - 55:5
judicial [7] - 15:11, 16:3, 21:3, 27:18, 38:5, 38:6, 38:9
jurisdiction [6] - 21:9, 21:14, 21:25, 40:6, 47:1, 52:10
jurisdictional [1] - 52:5
Justice [4] - 2:1, 4:7, 4:10, 52:24
justiciability [2] - 28:22, 32:4
justiciable [1] - 13:12

K

kept [1] - 7:14
key [1] - 52:4
kind [2] - 4:19, 37:10
knowledge [6] - 7:1, 10:20, 11:16, 30:25, 31:2, 31:10
knows [2] - 36:6, 40:23

L

lack [3] - 20:16, 29:19, 49:19
landed [1] - 49:22
language [7] - 4:20, 39:25, 40:14, 42:17, 46:6, 48:15, 49:2
last [5] - 17:9, 47:15, 50:9, 50:12, 51:21
latitude [1] - 8:4
law [24] - 7:4, 7:20, 8:3, 9:21, 10:5, 10:7, 10:9, 10:10, 10:11, 13:2, 15:5, 19:19, 20:11, 23:24, 30:24, 30:25, 31:3, 31:5, 31:10, 33:20, 34:24, 38:9, 52:2
Law [1] - 20:13
lawful [2] - 12:1, 12:6
laws [2] - 41:18, 48:2
lawyer [2] - 36:23, 38:8
lawyers [1] - 40:1
League [4] - 15:22, 35:6, 43:7, 52:19
least [4] - 16:12, 21:2, 47:8, 48:3
leave [3] - 27:25, 46:11, 54:21
lectern [1] - 3:6
lEE [1] - 1:13
Lee [1] - 3:8
legal [6] - 7:25, 13:18, 13:22, 30:9, 30:11, 32:10
legality [3] - 26:19, 27:19, 28:1
legally [1] - 29:25
less [1] - 42:3
lesson [1] - 7:23
letting [1] - 49:11
level [1] - 45:13
liable [1] - 12:2
Liberties [1] - 1:12
lies [1] - 8:10
likelihood [1] - 25:9
likely [2] - 21:23, 51:7
limit [1] - 31:1
limited [4] - 23:16, 23:20, 30:25
limiting [1] - 24:6
line [1] - 46:15
list [1] - 42:25
listening [1] - 31:11
Lobue [1] - 52:13
look [3] - 19:20, 27:4, 45:6
looking [1] - 41:9
low [1] - 45:13
low-level [1] - 45:13
LPRs [1] - 51:15
luck [1] - 53:25
Ludecke [12] - 14:10, 14:15, 15:22, 19:7, 22:9, 28:14, 28:17, 28:19, 40:24, 43:22, 44:1, 52:18

M

maintain [1] - 35:17
maintained [1] - 9:20
maker [1] - 21:3
manner [3] - 25:18, 25:19, 29:17
March [2] - 1:10, 55:6
marked [1] - 20:16
material [1] - 27:15
materials [1] - 36:20
matter [8] - 24:2, 24:4, 24:15, 52:23, 53:2, 54:7, 54:22, 55:4
mattered [1] - 53:1
matters [2] - 20:1, 21:4
Mayorkas [1] - 29:23
mean [21] - 8:24, 10:16, 12:22, 15:3, 18:2, 20:4, 21:6, 22:16, 23:7, 31:21, 32:3, 34:5, 34:15, 37:17, 40:15, 41:15, 41:24, 45:1, 47:17, 54:19
meaningful [4] - 36:21, 37:4, 39:23, 53:6
means [5] - 26:10, 40:1, 41:22, 45:11, 45:13
meant [4] - 5:1, 5:25, 6:2, 42:18
measure [1] - 45:5
mechanical [2] - 40:16, 40:19
member [4] - 12:5, 35:21, 35:23, 46:3
members [19] - 8:9, 11:25, 16:2, 19:16, 19:17, 21:20, 24:23, 28:23, 35:19, 38:24, 39:6, 39:15, 42:6, 45:12, 46:2, 47:1, 47:2, 51:13, 51:15
membership [4] - 41:24, 41:25, 45:13, 47:12
men [2] - 49:13, 49:25
mentioning [1] - 54:21
merely [2] - 26:7, 52:6
merit [2] - 14:14, 22:11
merits [1] - 25:10
met [2] - 15:17, 52:20
methods [1] - 26:23
midair [1] - 49:17
midnight [1] - 4:24
might [5] - 12:25, 14:25, 36:15, 38:6
migrants [1] - 29:25
mind [1] - 30:19
minimum [4] - 36:20, 46:18, 47:1, 47:7
minute [2] - 15:25, 54:18
minutes [1] - 6:21
mistake [1] - 49:24
modern [1] - 16:18
modification [2] - 40:13, 40:14
modified [2] - 5:24, 39:12
modify [3] - 35:17, 40:8, 40:10
moment [2] - 6:8, 7:2
Monday [1] - 4:22
Monday's [1] - 9:24
moot [1] - 34:20
morning [2] - 10:15, 33:15
most [2] - 7:21, 21:7
MOTION [1] - 1:9
motion [7] - 3:2, 4:23, 9:23, 25:7, 40:7, 49:14
move [4] - 7:24, 7:25, 19:4, 23:10
moving [1] - 11:17
MR [107] - 3:8, 3:11, 3:16, 3:22, 4:4, 4:7, 4:9, 4:12, 4:16, 4:23, 5:2, 5:9, 5:16, 5:19, 6:1, 6:7, 6:13, 6:19, 6:25, 7:9, 7:15, 8:18, 8:23, 9:2, 9:5, 9:9, 9:15, 9:22, 10:10, 10:20, 11:1, 11:3, 11:10, 11:15, 12:8, 12:16, 12:21, 13:16, 14:3, 14:22, 15:4, 15:14, 16:5, 16:23, 17:15, 18:8, 18:21, 19:13, 19:19, 20:3, 20:6, 21:5, 21:23, 22:16, 23:4, 23:14, 23:19, 24:1, 24:15, 25:2, 25:15, 25:25, 26:5, 26:20, 27:14, 28:8, 29:12, 29:15, 30:7, 30:18, 30:23, 31:14, 31:20, 32:1, 32:16, 33:5, 33:8, 33:12, 34:21, 36:4, 37:8, 37:17, 38:3, 39:9, 39:19, 40:15,

40:22, 42:1, 42:8, 43:14, 44:15, 46:9, 47:4, 47:23, 50:7, 50:23, 51:2, 51:17, 51:23, 52:13, 52:16, 53:21, 54:1, 54:5, 54:11, 54:13, 54:20
MS [3] - 3:14, 3:19, 3:24
multiple [5] - 22:5, 25:25, 33:23, 43:8, 52:23
Munaf [1] - 16:24
must [1] - 8:8

N

nailed [1] - 36:1
name [2] - 16:21, 46:18
named [1] - 33:14
narrowed [1] - 38:22
narrowing [1] - 46:14
narrowly [1] - 14:15
nation [1] - 13:11
national [7] - 8:5, 16:16, 20:10, 20:15, 22:14, 22:25, 44:8
nationality [2] - 41:11, 45:17
nationals [2] - 44:4, 44:6
nationwide [1] - 8:19
native [1] - 44:18
naturalized [1] - 12:1
nature [1] - 17:7
necessary [2] - 21:13, 34:16
need [6] - 19:10, 21:7, 22:19, 25:12, 28:22, 40:13
needed [1] - 22:19
neutral [1] - 21:2
never [4] - 16:3, 21:10, 23:4, 47:21
New [2] - 1:14
newfound [1] - 44:25
next [3] - 14:8, 35:23, 45:15
night [3] - 4:24, 10:15, 34:12
Ninth [1] - 53:7
NO [1] - 1:5
nobody [2] - 8:2, 50:19
non [3] - 28:7, 34:8, 35:12
non-habeas [3] - 28:7, 34:8, 35:12
noncitizens [2] - 9:11, 39:2
none [2] - 27:14, 52:25
nonstatutory [1] - 26:18
nothing [4] - 7:4, 7:6, 53:17, 53:20
notice [2] - 11:13, 31:4
noticed [1] - 4:17
notwithstanding [2] - 14:11, 17:7
novo [1] - 20:21
number [2] - 15:11, 28:19
numerosity [1] - 54:19
NW [2] - 1:16, 1:24

O

oath [1] - 50:18
object [2] - 37:3, 46:24
obligation [1] - 37:24
obtained [2] - 24:17, 27:20
obviously [7] - 31:1, 32:18, 33:17, 36:25, 37:4, 47:10, 49:17
odd [1] - 17:7
OF [2] - 1:1, 1:9
officers [1] - 27:21
Official [2] - 1:23, 55:2
OFFICIAL [1] - 55:9
officials [2] - 26:3, 28:2
often [2] - 7:19, 23:15
older [2] - 11:25, 14:18
once [2] - 42:18, 44:3
one [22] - 7:5, 7:18, 14:8, 15:8, 16:21, 18:10, 19:11, 25:4, 25:25, 28:24, 30:19, 40:3, 40:23, 40:24, 43:24, 44:19, 45:6, 46:13, 47:24, 48:10, 49:24, 54:11
ones [2] - 4:18, 46:22
ongoing [1] - 52:25
open [1] - 15:10
operational [1] - 10:21
opportunity [2] - 51:11, 51:12
opposing [2] - 51:25, 52:17
oral [2] - 4:19, 6:4
order [25] - 5:12, 9:4, 9:6, 9:15, 10:1, 17:16, 19:2, 26:19, 27:13, 30:4, 31:9, 33:4, 33:6, 33:13, 35:17, 47:20, 48:10, 48:13, 48:15, 48:21, 48:25, 49:8, 50:4, 50:24, 54:18
Order [1] - 3:1
ordered [2] - 9:10, 50:4
orders [4] - 10:5, 48:24, 51:3, 51:4
ordinarily [1] - 27:20
original [1] - 55:3
originally [2] - 25:13, 25:15
ostensibly [1] - 46:3
otherwise [6] - 23:2, 38:24, 39:16, 41:1, 41:9, 47:8
ousted [1] - 52:9
outcomes [1] - 54:7
outside [2] - 13:21, 13:23
own [2] - 28:12, 30:23

P

p.m [6] - 1:10, 3:1, 10:24, 11:7, 54:25
P.O [2] - 1:19, 2:5
page [2] - 14:16, 55:4
panel [1] - 46:12
paper [4] - 32:23, 33:9, 33:16, 50:17
papers [1] - 31:15
part [8] - 6:16, 11:23, 20:16, 21:21, 25:9, 41:13, 41:21, 41:22
parte [2] - 22:25, 43:5
particular [4] - 6:14, 17:25, 20:1, 30:9
particularly [2] - 16:24, 18:4
parties [1] - 5:5
passed [3] - 12:24, 16:19, 45:5
path [1] - 45:11
Pause [1] - 50:16
pause [2] - 46:7, 48:9
Pennsylvania [1] - 2:2
people [38] - 5:14, 8:17, 8:21, 8:25, 10:16, 11:8, 11:20, 14:7, 16:3, 16:25, 32:18, 33:3, 33:9, 33:14, 33:17, 33:25, 36:12, 37:9, 38:12, 38:20, 39:6, 39:13, 39:24, 41:15, 41:16, 42:6, 44:5, 45:12, 45:13, 49:3, 49:8, 49:11, 49:13, 49:15, 49:21, 49:22, 50:21
permanent [2] - 12:2, 12:6
Perryman [1] - 3:14
PERRYMAN [2] - 1:18, 3:14
persecution [1] - 48:4
person [12] - 14:1, 14:17, 17:20, 21:15, 29:3, 29:4, 29:6, 30:11, 37:25, 44:9, 47:9
personal [1] - 30:23
personally [1] - 7:1
persons [3] - 18:24, 19:1, 19:2
petitioners [1] - 17:11
physically [1] - 29:6
piece [3] - 33:8, 33:16, 50:17
place [3] - 7:8, 16:17, 46:12
plaintiff [1] - 3:5
plaintiff's [1] - 52:5
Plaintiffs [1] - 1:4
plaintiffs [27] - 3:9, 3:12, 3:15, 3:17, 3:21, 3:23, 4:1, 7:9, 13:7, 13:19, 16:11, 17:9, 17:13, 21:9, 21:18, 24:17, 25:4, 25:13, 25:15, 25:17, 25:22, 28:4, 28:22, 29:8, 33:15, 35:19, 52:21
PLAINTIFFS [1] - 1:12
plaintiffs' [2] - 14:12, 25:11
plane [10] - 6:18, 32:24, 33:17, 36:22, 48:11, 50:13, 50:19, 50:24, 51:4
planes [6] - 5:13, 8:22, 10:16, 11:6, 34:13, 49:12
play [2] - 22:7, 35:18
pleadings [2] - 4:18, 6:4
point [17] - 8:21, 16:19, 21:6, 21:12, 24:11, 35:2, 40:17, 40:19, 42:10, 44:2, 46:15, 50:3, 50:10, 50:12, 50:20, 51:21, 54:16
pointed [3] - 33:23, 35:3, 40:24
points [2] - 39:19, 51:23
policy [4] - 20:10, 29:2, 45:19, 54:7
politeness [1] - 5:6
political [3] - 54:6, 54:7, 54:8
pose [1] - 52:10
position [3] - 13:18, 40:12, 51:18
possess [1] - 7:21
potentially [3] - 5:20, 8:25, 14:4
power [5] - 28:1, 28:2, 42:19, 44:25, 53:9
powers [3] - 19:23, 42:11, 42:15
practical [2] - 24:2, 24:4
practice [1] - 7:20
pre-1952 [1] - 12:15
precedent [3] - 14:24, 14:25, 19:21
precise [1] - 14:5
precisely [1] - 17:11
precludes [1] - 26:12
precluding [1] - 24:10
preconditions [2] - 13:17, 52:17
predates [1] - 35:4
predatory [2] - 13:10, 53:5
predicate [1] - 44:16
predicates [8] - 42:9, 42:13, 42:16, 42:18, 42:21, 42:24, 43:24, 44:20
prejudice [2] - 16:12, 34:15
prepared [1] - 51:15
present [3] - 9:23, 23:12, 29:6
president [1] - 28:6
President [15] - 3:3, 8:4, 23:9, 25:24, 27:17, 27:25, 28:20,

42:12, 42:13, 42:19, 50:1, 53:1, 53:10, 53:13, 53:17
President's [12] - 12:12, 13:14, 13:21, 13:23, 14:11, 15:16, 15:22, 22:10, 26:7, 27:22, 28:15, 53:4
presidential [3] - 26:19, 27:20, 28:3
pressed [1] - 32:8
pressure [1] - 34:13
presumably [1] - 21:16
pretty [3] - 14:19, 54:3, 54:4
prevent [2] - 17:2, 28:19
prevents [1] - 29:21
previously [4] - 10:22, 14:5, 23:5, 33:10
principal [2] - 32:13, 47:24
principles [1] - 19:21
prison [3] - 21:21, 29:9, 45:15
prisoners [1] - 27:2
prisons [1] - 48:8
privilege [1] - 5:21
Prizer [1] - 33:21
problem [2] - 10:17, 22:15
problematic [1] - 45:20
procedure [2] - 37:4
procedures [1] - 9:7
proceed [2] - 16:15, 26:18
proceeding [2] - 22:17, 24:14
Proceedings [1] - 54:25
proceedings [5] - 22:13, 22:18, 23:18, 23:19, 23:24
process [16] - 19:7, 23:13, 23:14, 23:24, 24:3, 24:4, 24:5, 24:10, 35:18, 37:7, 38:13, 38:19, 39:9, 39:21, 39:23, 51:19
proclaim [1] - 11:24
proclamation [25] - 9:1, 9:12, 10:14, 10:22, 11:13, 11:22, 11:23, 12:13, 14:1, 14:21, 19:16, 21:21, 24:12, 24:24, 26:4, 27:12, 38:21, 38:25, 39:3, 39:7, 39:17, 46:18, 46:25, 50:14, 51:14
Produced [1] - 1:25
prohibition [1] - 28:6
Project [1] - 20:13
pronouncing [1] - 6:9
proof [1] - 35:25
proper [1] - 49:6
prosecuted [1] - 41:17
prosecution [1] - 17:11
prospectively [1] - 33:11
protections [1] - 30:2
Protective [4] - 15:22, 35:6, 43:7, 52:19
prove [1] - 16:1
provide [5] - 20:6, 30:1, 32:22, 33:1, 38:12
provided [4] - 20:14, 23:16, 24:3, 39:25
provides [2] - 24:5, 51:19
providing [1] - 39:23
provisions [1] - 49:7
PRs [1] - 19:18
public [5] - 8:13, 8:14, 9:18, 29:25, 48:1
published [1] - 10:23
pull [1] - 50:18
pure [1] - 52:25
purposes [1] - 34:13
pursuant [2] - 38:24, 39:17
pursue [1] - 52:5
pushing [1] - 41:5
put [6] - 11:8, 32:24, 36:22, 49:10, 49:22

Q

Qaeda [1] - 16:2
qualifies [1] - 53:9
quasi [1] - 46:3
quasi-hybrid [1] - 46:3
questions [14] - 7:25, 13:6, 22:1, 32:14, 35:14, 37:18, 38:16, 41:7, 43:8, 44:16, 47:13, 47:16, 50:9
quick [2] - 46:10, 51:23
quite [1] - 23:15
quote [3] - 15:8, 23:22, 52:7

R

raise [6] - 14:9, 21:17, 22:13, 24:25, 25:18, 47:21
raised [6] - 16:14, 21:18, 22:2, 30:13, 30:14, 30:15
raises [1] - 53:12
raising [5] - 5:6, 13:22, 26:10, 42:6, 51:8
ramifications [1] - 45:19
rarely [1] - 24:5
rather [2] - 21:24, 32:5
RDR [1] - 55:8
RDR-CRR [1] - 55:8
reaches [1] - 54:6
readily [1] - 27:3
real [2] - 28:9, 28:11
really [7] - 17:13, 20:21, 34:10, 36:5, 41:4, 49:7, 49:16
Realtime [1] - 1:23
reason [7] - 5:2, 8:12, 10:17, 27:9, 42:12, 44:21, 48:19
reasonable [2] - 11:16, 51:8
reasoning [1] - 39:5
reasons [3] - 18:10, 25:25, 30:1
recess [1] - 6:20
recognize [1] - 36:25
recognized [7] - 12:11, 14:5, 17:7, 19:24, 23:17, 27:6, 28:14
reconsideration [1] - 40:8
Record [1] - 1:25
record [3] - 3:7, 11:10, 55:4
reduced [1] - 54:15
REEVES [2] - 1:22, 55:8
Reeves [2] - 55:2, 55:8
refer [1] - 39:12
regardless [2] - 18:19, 29:5
Registered [1] - 1:22
regular [1] - 9:7
regulation [1] - 12:23
regulations [1] - 55:4
Reich [1] - 26:17
reinstate [2] - 34:16, 34:18
rejected [1] - 20:25
related [1] - 48:19
relay [1] - 5:10
release [7] - 17:10, 18:7, 28:24, 33:23, 33:24, 34:8, 37:20
released [2] - 9:4, 18:3
relevant [1] - 11:23
reliance [1] - 9:13
relief [3] - 17:9, 34:7, 51:19
Relief [1] - 20:9
relook [1] - 33:20
remain [1] - 37:13
remedy [2] - 26:11, 52:9
remember [3] - 4:20, 6:18, 34:18
remembers [1] - 34:19
remind [1] - 26:15
Removal [1] - 22:23
removal [17] - 8:25, 12:7, 18:15, 18:19, 19:1, 35:21, 37:20, 38:24, 39:13, 39:16, 39:17, 44:7, 47:19, 48:20, 48:21, 50:24, 51:5
removals [4] - 36:9, 36:10, 37:10, 48:12
remove [5] - 18:4, 18:6, 41:12, 46:23, 48:1
removed [11] - 8:17, 12:3, 18:18, 19:3, 21:20, 24:9, 33:3, 35:20, 41:2, 41:18, 42:20
removing [4] - 33:25, 38:23, 39:6, 39:15
Reno [1] - 23:21
repeal [1] - 54:9
repealed [1] - 23:8
Reporter [4] - 1:22, 1:23, 1:23, 55:2
reporter [1] - 43:13
REPORTER [1] - 55:9
reporting [1] - 42:5
represented [1] - 6:23
reputation [1] - 7:21
request [1] - 37:25
require [2] - 31:10, 51:7
required [4] - 16:2, 20:20, 31:11, 38:19
requiring [1] - 17:16
resident [1] - 12:6
residents [1] - 12:2
resolve [1] - 54:8
resolved [2] - 17:4, 21:7
respect [1] - 5:5
respectfully [2] - 47:7, 54:16
respond [1] - 47:16
response [5] - 9:25, 32:13, 47:16, 50:11, 50:20
responsive [1] - 39:20
rest [1] - 15:18
restrained [2] - 12:3, 14:17
rests [1] - 52:6
resume [1] - 7:19
retains [1] - 7:23
retroactively [1] - 33:5
return [1] - 49:18
returned [2] - 40:10, 49:12
Reuveni [1] - 4:10
REUVENI [2] - 2:4, 4:9
review [27] - 12:9, 13:14, 14:12, 15:20, 16:3, 16:6, 16:8, 16:11, 16:17, 17:5, 19:8, 19:12, 19:25, 20:9, 20:21, 26:8, 26:23, 26:24, 27:18, 27:19, 28:1, 32:25, 37:12, 38:5, 38:6, 38:10, 53:13
reviewability [4] - 42:9, 43:18, 44:13, 44:14
reviewable [14] - 12:14, 14:12, 14:21, 14:22, 15:17, 22:10, 26:8, 28:16, 41:8, 41:12, 42:13, 42:17, 44:7, 52:18
reviewed [9] - 13:11, 14:18, 29:18, 43:3, 43:5, 43:25, 44:3, 44:9
reviewing [2] - 28:19, 42:24

RICH [1] - 1:19
rights [2] - 23:15, 23:17
road [1] - 41:20
roam [1] - 41:15
robust [5] - 16:2, 16:8, 21:3, 22:1, 22:4
role [2] - 21:18, 22:7
routinely [1] - 44:8
rule [2] - 26:25, 34:4
Rule [1] - 31:16
rules [1] - 35:11
ruling [3] - 4:19, 6:4, 40:9
Rumsfeld [1] - 20:24
running [1] - 28:5
rushed [1] - 10:16
rushing [1] - 33:17

S

S-c-h-l-u-e-t-e-r [1] - 43:19
Salvador [5] - 47:6, 48:24, 49:6, 50:22, 51:1
Salvadoran [7] - 21:20, 29:9, 45:15, 48:8, 49:23, 49:25, 50:1
SARAH [1] - 1:19
satisfied [1] - 13:17
satisfy [1] - 24:4
Saturday [8] - 5:5, 6:6, 8:17, 10:15, 10:24, 16:14, 30:21, 34:12
Scalia's [1] - 27:22
scenario [1] - 54:4
Schlueter [1] - 43:19
Schwarzkopf [1] - 43:3
SCOTUS [1] - 43:22
screened [1] - 48:7
screenings [2] - 48:3, 48:9
SDNY's [1] - 12:8
seal [1] - 22:25
second [3] - 33:18, 40:3, 52:16
Second [4] - 12:17, 15:12, 20:22, 43:15
Secretary [1] - 27:24
Section [4] - 11:24, 22:24, 26:12, 27:4
secure [1] - 7:16
secured [2] - 12:3, 25:6
security [6] - 8:5, 16:16, 20:10, 20:15, 22:14, 23:1
see [4] - 39:22, 45:6, 46:12, 47:9
seeing [1] - 4:20
seeking [8] - 17:17, 27:21, 33:22, 33:24, 33:25, 34:8, 37:19, 52:6
semantic [1] - 19:3
send [1] - 47:6
sense [5] - 28:9, 31:11, 36:3, 44:23, 46:10
sensitive [2] - 15:19, 19:22
sent [10] - 7:3, 47:9, 48:22, 48:24, 49:2, 49:3, 49:6, 49:8, 50:19, 50:22
separate [2] - 13:22, 33:6
separation [1] - 42:15
series [1] - 16:6
serious [1] - 5:23
set [8] - 14:8, 16:3, 31:15, 36:12, 36:14, 37:21, 47:11, 54:1
sets [1] - 42:14
setting [2] - 9:24, 24:6
seventies [2] - 33:22, 52:3
several [4] - 20:6, 26:6, 33:20
shall [1] - 29:2
shelter [1] - 17:17
shortly [1] - 18:5
show [6] - 4:21, 8:9, 10:1, 31:4, 47:24, 49:22
shows [2] - 15:5, 22:6
sides [1] - 32:9
signed [1] - 10:14
signing [1] - 4:18
similar [1] - 44:11
similarly [2] - 53:4, 53:8
simple [2] - 17:9
simply [6] - 14:13, 18:3, 37:20, 41:5, 46:19, 52:18
skeptical [1] - 44:25
Skye [1] - 3:14
SKYE [1] - 1:18
slip [1] - 32:23
slower [1] - 17:14
small [1] - 54:13
sole [2] - 13:5, 16:11
solely [3] - 48:13, 50:14, 50:21
someone [8] - 7:3, 12:5, 36:18, 44:4, 48:1, 48:6, 48:8, 49:2
somewhat [3] - 17:7, 17:19, 23:6
SOMIL [1] - 1:18
Somil [1] - 3:16
Sonja [2] - 55:2, 55:8
SONJA [2] - 1:22, 55:8
soon [1] - 21:24
sorry [7] - 15:2, 19:13, 20:4, 29:19, 33:10, 39:14, 43:14
sort [14] - 14:19, 17:19, 19:6, 19:7, 19:20, 20:21, 24:5, 28:9, 28:17, 29:17, 38:9, 42:24, 42:25, 49:19
sought [1] - 7:15
sound [1] - 29:15
sounds [1] - 18:10
sovereign [1] - 17:17
sparingly [1] - 23:6
special [1] - 27:1
specific [3] - 11:15, 40:14, 51:7
specifically [4] - 12:22, 17:6, 22:2, 52:19
specifics [2] - 5:19, 11:5
spell [1] - 43:12
spelled [1] - 29:22
spend [1] - 32:5
spent [4] - 13:7, 32:3, 32:4
SPITZER [2] - 1:15, 3:22
Spitzer [1] - 3:22
standard [7] - 15:25, 19:4, 19:8, 19:12, 35:25, 38:6, 47:11
standards [1] - 53:6
start [4] - 32:17, 42:9, 42:10, 43:2
started [2] - 9:23, 41:14
state [3] - 46:4, 46:8, 53:9
statement [3] - 5:4, 6:10, 14:19
statements [2] - 5:8, 5:9
STATES [1] - 1:1
States [20] - 4:5, 4:21, 5:14, 9:4, 12:1, 12:2, 16:4, 17:16, 23:13, 23:15, 24:18, 28:21, 29:3, 29:6, 46:2, 51:18, 53:8, 53:14, 55:2, 55:5
states [1] - 15:8
Station [1] - 2:5
status [1] - 7:12
statute [4] - 12:23, 23:17, 42:11, 45:1
statutes [2] - 12:24, 35:4
statutory [15] - 13:17, 15:16, 42:9, 42:12, 42:16, 42:18, 42:21, 42:24, 43:24, 44:15, 44:19, 45:8, 46:17, 49:2, 49:6
stay [2] - 17:21, 41:16
stenographic [1] - 55:3
Stenographic [1] - 1:25
step [2] - 33:18, 40:3
still [7] - 6:23, 24:17, 37:18, 44:11, 46:6, 52:25, 53:2
stop [2] - 33:25, 34:13
stopped [1] - 33:15
stopping [1] - 37:20
strains [1] - 21:6
street [2] - 41:2, 47:6
Street [2] - 1:13, 1:16
streets [1] - 41:15
strong [1] - 52:21
strongly [1] - 32:8
structure [2] - 41:23, 42:3
study [1] - 40:13
subject [12] - 8:25, 9:11, 14:24, 14:25, 18:19, 19:15, 38:24, 39:3, 39:16, 44:5, 44:6, 50:13
subjected [2] - 29:5, 45:18
submit [1] - 39:22
submitted [1] - 7:10
subordinate [1] - 28:2
substantial [1] - 29:4
substantive [2] - 40:17, 40:18
substantively [1] - 40:8
success [1] - 25:10
sudden [2] - 45:14, 45:17
sue [2] - 25:23, 26:3
suffer [1] - 29:9
sufficiency [2] - 12:12, 13:23
sufficient [2] - 24:4, 38:2
suggest [1] - 12:9
suggested [1] - 52:2
suggesting [2] - 52:17, 54:20
suggests [1] - 14:23
suing [1] - 28:6
suit [5] - 10:18, 24:17, 25:19, 27:20, 52:5
Suite [1] - 1:16
suits [1] - 14:7
summarily [3] - 9:11, 11:20, 24:9
summary [1] - 37:10
Supreme [12] - 16:5, 16:24, 17:4, 20:13, 20:19, 20:24, 23:22, 24:2, 26:14, 27:6, 46:6, 49:3
surround [1] - 8:1
suspect [1] - 37:3
swallows [1] - 13:20
sworn [1] - 49:22

T

TdA [14] - 11:25, 12:5, 19:17, 21:20, 24:23, 28:23, 35:21, 35:23, 42:3, 46:20, 46:25, 47:3, 51:15, 54:2
team [1] - 7:23
technical [1] - 38:15
teed [1] - 11:19
terms [5] - 13:9, 13:14, 45:8, 46:18, 54:19
terribly [1] - 50:3
territory [1] - 36:5
Terrorist [2] - 22:23, 41:19
testing [1] - 21:2
Texas [3] - 14:8, 21:25, 37:15
text [1] - 27:4
THE [112] - 1:1, 1:9, 1:12, 2:1, 3:10, 3:13, 3:18, 4:2, 4:6, 4:8, 4:11, 4:14, 4:17, 4:25, 5:3, 5:12, 5:18, 5:22, 6:3, 6:10, 6:15, 6:20, 7:3, 7:13, 7:18, 8:20, 8:24, 9:3, 9:6, 9:10,

9:17, 10:2, 10:12, 10:24, 11:2, 11:4, 11:12, 11:17, 12:15, 12:18, 13:4, 13:24, 14:15, 15:2, 15:7, 15:24, 16:10, 17:14, 18:1, 18:18, 18:25, 19:15, 20:2, 20:4, 20:17, 21:12, 22:12, 22:22, 23:10, 23:18, 23:21, 24:8, 24:21, 25:14, 25:20, 26:2, 26:14, 27:11, 27:16, 28:17, 29:13, 29:22, 30:16, 30:22, 31:2, 31:18, 31:21, 32:2, 33:2, 33:7, 33:10, 34:17, 35:14, 37:6, 37:11, 38:1, 38:14, 39:11, 40:4, 40:21, 41:24, 42:5, 43:12, 44:11, 45:19, 47:2, 47:15, 50:2, 50:8, 50:17, 50:25, 51:6, 51:21, 52:12, 52:15, 53:11, 53:23, 54:3, 54:10, 54:12, 54:18, 54:23
thereby [1] - 24:23
therefore [3] - 6:10, 39:11, 41:12
they've [1] - 29:10
third [5] - 48:11, 49:8, 50:13, 50:24, 51:4
thoughts [1] - 37:16
three [2] - 36:6, 43:8
threshold [1] - 41:7
throughout [1] - 9:20
tied [1] - 40:17
timeframe [2] - 34:19, 46:11
timing [1] - 10:19
Title [2] - 30:1, 48:2
today [9] - 3:2, 11:18, 24:19, 24:22, 25:11, 28:18, 31:13, 32:11, 35:17
tonight [1] - 49:11
took [2] - 7:8, 48:12
tool [1] - 23:7
torture [3] - 18:5, 29:5, 29:9
Torture [1] - 29:1
tough [1] - 32:9
TRANSCRIPT [1] - 1:9
Transcript [1] - 1:25
transcript [3] - 55:3, 55:3, 55:4
transfer [1] - 17:3
tread [1] - 34:10
treasure [1] - 7:21
treated [1] - 5:5
trial [1] - 14:8
trick [1] - 10:8
Trivedi [1] - 3:16
TRIVEDI [2] - 1:18, 3:16
TRO [15] - 4:24, 5:1, 8:1, 24:17, 25:6, 25:7, 33:15, 34:14, 35:17, 37:1, 38:17, 38:21, 40:8, 45:11, 46:11
TROs [1] - 9:3
troublesome [1] - 45:20
true [3] - 11:12, 41:3, 55:3
truly [1] - 19:3
Truman [1] - 53:1
Trump [1] - 3:4
TRUMP [1] - 1:6
trust [4] - 8:15, 23:12, 31:25, 54:3
try [1] - 42:8
Tuesday [1] - 9:25
Tulare [1] - 26:6
turn [1] - 5:13
twice [1] - 44:3
two [10] - 7:7, 7:16, 11:14, 28:8, 36:8, 36:22, 39:19, 40:22, 50:10, 51:23
type [2] - 37:3, 38:13
types [2] - 38:8, 44:19
typically [1] - 23:16

U

U.S [6] - 2:1, 11:6, 16:25, 39:2, 53:16, 53:18
U.S.C [3] - 22:24, 26:12, 29:2
Uhl [4] - 15:12, 20:18, 43:11, 43:15
UHL [2] - 15:12, 20:18
ultimately [3] - 13:4, 37:1, 42:15
ultra [5] - 26:18, 27:11, 28:5, 28:10, 28:12
unable [1] - 7:16
unacceptable [1] - 54:7
unavailable [1] - 27:10
uncharted [1] - 36:5
under [38] - 8:6, 12:9, 12:12, 15:21, 17:25, 18:11, 18:23, 20:19, 20:23, 21:14, 22:24, 22:25, 24:9, 24:12, 24:24, 25:6, 25:24, 26:8, 29:14, 30:1, 30:15, 31:16, 33:25, 34:5, 36:9, 36:10, 37:21, 38:20, 39:4, 41:2, 41:13, 41:17, 46:10, 48:4, 49:6, 50:18, 50:21, 53:10
understandably [1] - 13:8
understood [12] - 5:9, 5:15, 5:22, 6:1, 6:6, 6:8, 31:9, 31:23, 39:24, 47:5, 51:25
unheard [1] - 44:22
Union [1] - 1:12
United [20] - 4:5, 4:21, 5:14, 9:4, 12:1, 12:2, 16:4, 17:16, 23:13, 23:15, 24:18, 28:21, 29:3, 29:6, 46:2, 51:18, 53:8, 53:14, 55:2, 55:5
UNITED [1] - 1:1
unless [1] - 48:25
unlike [2] - 22:9, 23:5
unprecedented [1] - 45:21
unusual [1] - 8:13
up [8] - 4:21, 11:19, 31:4, 36:12, 36:14, 37:21, 50:18, 54:2
upholds [1] - 37:1
urge [1] - 47:7
Utility [1] - 44:24

V

vacate [1] - 40:7
validity [1] - 44:2
valuable [1] - 7:21
various [2] - 14:6, 22:8
VE [1] - 52:23
Venezuela [2] - 46:18, 46:24
Venezuelan [7] - 11:24, 12:6, 19:17, 47:2, 47:6, 49:13, 49:25
Venezuelans [7] - 46:1, 46:25, 48:23, 49:5, 50:22, 50:25, 51:15
venue [5] - 16:13, 21:10, 25:17, 34:20, 37:11
verse [1] - 36:2
version [1] - 16:18
versus [9] - 3:3, 16:24, 20:13, 20:19, 20:22, 20:24, 23:21, 52:13, 53:8
vessel [1] - 53:15
via [5] - 8:7, 8:25, 9:7, 23:1, 50:19
video [1] - 37:22
violate [1] - 33:13
violated [2] - 33:6, 50:4
vires [5] - 26:18, 27:11, 28:5, 28:10, 28:12
voice [1] - 5:6
Von [1] - 43:17
vs [1] - 1:5

W

waiving [1] - 32:8
Walker [2] - 20:18, 20:20
wants [2] - 9:12, 49:10
War [9] - 36:8, 36:9, 36:10, 36:20, 37:9, 45:22, 45:23, 46:21
war [9] - 19:23, 28:21, 36:11, 43:23, 45:24, 52:22, 52:25, 53:2, 53:5
WARD [2] - 2:4, 4:12
Ward [1] - 4:12
warranted [1] - 38:17
wartime [1] - 45:5
wary [1] - 44:24
Washington [6] - 1:11, 1:16, 1:20, 1:24, 2:3, 2:5
waters [2] - 53:16, 53:18
Watkins [5] - 12:9, 14:23, 20:22, 43:17, 43:20
ways [1] - 26:6
week [1] - 14:8
weekend [2] - 49:11, 54:23
welcome [3] - 3:13, 4:2, 4:14
well-tread [1] - 34:10
whole [3] - 7:7, 16:19, 18:9
wholly [1] - 22:11
wide [1] - 8:4
WIGGINS [2] - 1:18, 3:24
Wiggins [1] - 3:25
willing [1] - 38:12
window [2] - 6:14, 7:16
withdraw [1] - 25:16
withholding [1] - 48:4
women [1] - 50:1
words [7] - 11:12, 19:16, 21:15, 35:19, 39:13, 47:17, 51:15
works [1] - 37:2
world [1] - 7:20
World [7] - 36:9, 36:10, 36:20, 37:8, 45:23, 46:21
worried [1] - 10:2
wrestling [1] - 21:25
writing [2] - 31:19, 54:15
written [2] - 48:13, 49:8

Y

years [4] - 11:24, 14:17, 33:20, 52:23
York [2] - 1:14
yourself [1] - 3:6