

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JAMES W. ZIGLAR, :

4 Petitioner : No. 15-1358

5 v. :

6 AHMER IQBAL ABBASI, ET AL., :

7 Respondents; :

8 - - - - - x

9 and

10 - - - - - x

11 JOHN D. ASHCROFT, FORMER :

12 ATTORNEY GENERAL, ET AL., :

13 Petitioners : No. 15-1359

14 v. :

15 AHMER IQBAL ABBASI, ET AL., :

16 Respondents; :

17 - - - - - x

18 and

19 - - - - - x

20 DENNIS HASTY, ET AL., :

21 Petitioners : No. 15-1363

22 v. :

23 AHMER IQBAL ABBASI, ET AL., :

24 Respondents. :

25 - - - - - x

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Washington, D.C.

Wednesday, January 18, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

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RACHEL MEEROPOL, ESQ., New York, N.Y.; on behalf of the Respondents.

	C O N T E N T S	
		PAGE
1		
2	ORAL ARGUMENT OF	
3	IAN H. GERSHENGORN, ESQ.	
4	On behalf of the Petitioners in	
5	Nos. 15-1358 and 15-1359	4
6	ORAL ARGUMENT OF	
7	JEFFREY A. LAMKEN, ESQ.	
8	On behalf of the Petitioners in	
9	No. 15-1363	18
10	ORAL ARGUMENT OF	
11	RACHEL MEEROPOL, ESQ.	
12	On behalf of the Respondents	27
13	REBUTTAL ARGUMENT OF	
14	IAN H. GERSHENGORN, ESQ.	
15	On behalf of the Petitioners in	
16	Nos. 15-1358 and 15-1359	48
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
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14
15
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18
19
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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in case 15-1358, Ziglar v. Abbasi.

Mr. Gershengorn.

ORAL ARGUMENT OF IAN H. GERSHENGORN

ON BEHALF OF THE PETITIONERS

IN NOS. 15-1358 AND 15-1359

GENERAL GERSHENGORN: Mr. Chief Justice, and may it please the Court:

This case marks the return of Iqbal as Plaintiffs seek to hold essentially the same defendants liable for the same actions arising in the same extraordinary circumstances in the wake of the September 11 terrorist attacks.

All of the judges below concluded that Plaintiffs' core theory is squarely foreclosed by Iqbal. But the Second Circuit majority then formulated its own list merger theory of liability, premising liability on the alleged decision of Attorney General Ashcroft to merge the New York list of detainees, which had not been fully vetted, with the INS list, thereby continuing the hold-until-cleared policy for detainees on both lists.

Bivens' liability does not attach here for at least three reasons.

1 First, the Bivens remedy should not be
2 extended to national security and immigration policy
3 decisions by senior officials in the wake of the
4 September 11 attacks. If the damages remedy is to be
5 imposed, it's for Congress, not this Court, to do so.

6 Second, the list merger theory suffers from
7 the same pleading deficiencies that this Court
8 identified in *Iqbal* itself. Among other things, there
9 is an obvious alternative and noninvidious explanation
10 of the list merger decision. Given the uncertainty
11 about the status of detainees on the New York list, the
12 list merger was undertaken to avoid the inadvertent or
13 premature release of a dangerous terrorist.

14 And third, the defendants here violated no
15 clearly established right. It would not have been clear
16 to every reasonable defendant that merging the lists in
17 the wake of the 9/11 attacks would be unconstitutional
18 rather than risking premature release of a detainee on
19 the New York list.

20 I think the easiest way for this Court to
21 resolve this case is through the *Iqbal* pleading theory.
22 But given this Court's admonition that the existence of
23 the Bivens remedy is an antecedent question that the
24 Court should address first, let me start there.

25 JUSTICE GINSBURG: But you -- you seem to be

1 assuming that the whole case is about the merging of the
2 New York list with the other list, but I thought that
3 this was -- this case was identified as a prison
4 conditions case.

5 GENERAL GERSHENGORN: So, Your Honor, that
6 broader theory was raised below. It was rejected by
7 every judge to consider it below, the district court and
8 the panel majority, and it -- it is also, I think,
9 beyond the -- it's not within the scope of the question
10 presented.

11 But even if -- if -- and I think the reason
12 that it was barred below is because it squarely
13 foreclosed by -- by Iqbal, both on the substantive due
14 process claim and on the equal protection claim.

15 On the substantive due process claim, what
16 we have is an -- a -- a facially-valid constitutional
17 policy to -- to -- that could be applied to individuals
18 with individualized suspicion of terrorism.

19 And if you look at the allegations in the
20 complaint, and these are paragraphs 61 and 65 of the
21 complaint, all that is alleged is that Ashcroft and
22 Mueller met regularly with a -- this is on page 274A of
23 the appendix to the petition -- that in the -- and this
24 is paragraph 61 -- that Ashcroft and Mueller met with a
25 small group of officials to exert maximum pressure on

1 the individuals arrested, and then in paragraph 65, on
2 the next page, that the punitive conditions in which the
3 MDC and class members were placed were the direct result
4 of the strategy.

5 There is no allegation that Ashcroft and
6 Mueller or Ziglar created the punitive conditions, or
7 that they required the putative conditions. They had
8 the right, as the Second Circuit itself held, and the
9 district court held, to presume that the policy would be
10 implemented lawfully.

11 The only real theory that survives, I think,
12 Your Honor, really is the list merger theory, and that
13 theory fails. I think it's critical to understand in
14 that context how the case -- how the situation looked to
15 the Attorney General -- to Attorney General Ashcroft
16 who's alleged to be the decisionmaker.

17 I'll come back to the -- to the failure of
18 the complaint to allege that he was the decisionmaker,
19 but even taking that, what he faced was the New York
20 list which involved aliens, all of whom were out of
21 status, and had been picked up in the course of the
22 Pent-Bomb investigation.

23 He knew that not all of those aliens had had
24 individualized suspicion determinations, but that some
25 may well have had ties nexus to terrorism, and he knew

1 that the conditions of confinement would be lawful. It
2 is not disputed that those would be lawful as to those
3 with individualized suspicion.

4 Faced with that situation, the Second
5 Circuit majority found that the list merger decision
6 could only explained by putative intent or by
7 discriminatory intent.

8 But there is an obvious alternative
9 explanation for the decision that Attorney General
10 Ashcroft would have faced in deciding to merger the
11 list, is that you couldn't tell who was and who was not
12 had -- who did and who did not have a potential link to
13 terrorism. And in that situation, a decision to hold
14 everyone until cleared, to apply the hold-until-cleared
15 policy is best explained, not by invidious intent, but
16 by the desire to avoid the premature and inadvertent
17 release of a dangerous terrorist.

18 JUSTICE BREYER: This went on for several
19 months, eight months.

20 GENERAL GERSHENGORN: I think the list
21 merger decision is early on in the --

22 JUSTICE BREYER: Yes, but weren't --

23 GENERAL GERSHENGORN: And that's where --

24 JUSTICE BREYER: -- weren't they held for
25 eight months?

1 GENERAL GERSHENGORN: They were held longer,
2 and there's no doubt that the clear --

3 JUSTICE BREYER: No I can --

4 GENERAL GERSHENGORN: -- longer than it
5 should.

6 JUSTICE BREYER: So I can understand after a
7 bomb attack. I can understand after a bomb attack and
8 3,000 people are killed. I can understand that the
9 first reaction of the law enforcement authorities is,
10 pick up anybody you might think is connected, and we'll
11 worry about the rest of it later.

12 Now, eight months? Now, what they do allege
13 is that Ashcroft and Mueller knew that the FBI had not
14 developed any reliable evidence -- that's
15 paragraph 67 -- tying the plaintiffs to terrorism, but
16 authorized their prolonged detention, in restrictive
17 conditions, and Mueller, it says, ordered that they be
18 kept in INS custody, and including the restrictive
19 conditions, even after local offices reported. Ah, they
20 don't say reported to whom, so that is a point in your
21 favor, but that there was no reason to suspect them of
22 terrorism.

23 But I think, fairly read, they are saying --
24 they -- okay. They authorized it. They knew that some
25 of these people had no information against them, but the

1 answer is pick up anybody who might have a connection,
2 and then just keep them there? I mean, that's what's
3 worrying me a lot. And why doesn't that at least state
4 an allegation?

5 Suppose it had been five years. Suppose it
6 had been ten years. I mean, we all know the problems
7 with that and -- and if you know it, I can see it for a
8 day, two days. Five years? Eight months? I mean, why
9 isn't that an allegation that at least you have to
10 real-deal with on discovery and so forth?

11 GENERAL GERSHENGORN: Your Honor, because I
12 think the core of the allegation against Ashcroft and
13 Mueller is not that they prolonged the -- prolonged the
14 detention. The policy that they adopted in the
15 list-merger decision was facially constitutional because
16 it -- and it -- because it adequately dealt with and
17 fully dealt with the dilemma that they faced.

18 JUSTICE BREYER: How long after 9/11 did
19 they adopt that policy?

20 GENERAL GERSHENGORN: I believe it was in
21 the -- within the first months after 9/11.

22 JUSTICE BREYER: First months.

23 GENERAL GERSHENGORN: Yeah.

24 JUSTICE BREYER: How many months?

25 GENERAL GERSHENGORN: Your Honor, I --

1 the -- I apologize. I don't have the exact --

2 JUSTICE BREYER: Was it more like eight
3 months or more like --

4 GENERAL GERSHENGORN: No, Your Honor. No.
5 It was in October -- I believe it's in October after
6 the -- in October after the -- after the -- after the
7 attacks. And so we're not talking -- this was not
8 something that was done eight months down the road.
9 This is something that was done as the officials are
10 trying to sort through how to respond to the very
11 difficult situation that the -- if you accept that the
12 attorney general made the decision that he found
13 themselves in. He had a list that was not fully vetted.
14 Some of the people on the list had ties to terrorism --
15 may have had ties to terrorism. Some of them may well
16 not have. And what -- what -- in that situation,
17 application of the hold until it cleared policy. Take a
18 breath. Let's figure out what's going on. Rather than
19 releasing everyone is -- was not -- not only doesn't
20 raise a discriminatory inference, but it does not
21 violate any clearly established right to have done that.

22 Now, the second --

23 JUSTICE GINSBURG: But what about --

24 GENERAL GERSHENGORN: -- the second --

25 JUSTICE GINSBURG: -- what about the -- it's

1 one thing, as Justice Breyer pointed out, to say you
2 initially hold these people. But you know from day one
3 that many of them have nothing to do with terrorists,
4 and yet you allow that system that might have been
5 justified in October to persist for months and months
6 when these people are being held in the worst possible
7 conditions of confinement.

8 GENERAL GERSHENGORN: Your Honor, they --
9 well, they are being held in restrictive conditions of
10 confinement, but those conditions are lawful as to folks
11 with individualized suspicion.

12 Now, the -- the -- there is -- the -- the
13 core of the claim that the Second Circuit saw against
14 Attorney General Ashcroft was the decision to submit the
15 individuals to the -- to the restrictive conditions in
16 the first place. And what I would say to that is, it --
17 it understated -- it attempts to impose a 20/20
18 hindsight requirement on the attorney general and on
19 Director Mueller and Ziglar, who are -- who are involved
20 only as having, quote, "condoned the policy" that just
21 doesn't exist.

22 The plaintiffs say, we had -- there were no
23 allegations of terrorism ties against us, but, of
24 course, the attorney general didn't know that at the
25 time. What he had was a list that had some with ties

1 and some after. And the policy to merge the list and
2 hold until cleared was facially constitutional if it
3 took -- if there was -- in some instances took too long
4 to clear. And certainly, the OIG report suggests that
5 was the case, that things did not run as smoothly as
6 they should have. That is not something that's
7 attributable to -- to Attorney General Ashcroft,
8 Director Mueller, or to -- to Commissioner Ziglar.

9 But --

10 CHIEF JUSTICE ROBERTS: Is the argument
11 you're presenting a -- a Bivens argument or a qualified
12 immunity argument?

13 GENERAL GERSHENGORN: So, Your Honor, the
14 argument we've been discussing now is the qualified
15 immunity, Iqbal argument. It's the personal
16 participation. But we do think the Bivens remedy should
17 not be extended here at all. It would be quite an
18 extension of Bivens, unprecedented, to apply this to
19 national security and immigration policy decisions, and
20 we think all three of those factors work together.

21 With respect to national security, what this
22 Court has recognized is national security is committed
23 to congressional authority, that Congress is better
24 placed to -- to decide the appropriate remedy. And the
25 reason for that is not only a matter of institutional

1 competence, but that the risk of overdeterrence in the
2 national security context is a real one. And it's one
3 that Congress should make. And that's, I think, the
4 core of this Court's decisions in Chappell and in
5 Stanley.

6 I think the same is true with respect to
7 policy decisions more broadly. Congress has provided a
8 remedy to challenge policy decisions in the APA. And in
9 addition to that, policy decisions are much more likely
10 to receive attention as this set of policy decisions did
11 from the OIG and from -- from Congress itself, and so --

12 CHIEF JUSTICE ROBERTS: Is -- is there --
13 the APA argument strikes me as -- as somewhat odd. I
14 mean, the idea that the -- the people in prison are
15 supposed to say, let's look at the Administrative
16 Procedures Act.

17 What about habeas? Is that an available
18 remedy for them?

19 GENERAL GERSHENGORN: It is an available
20 remedy, and indeed it was used here by -- invoked by
21 some and those folks were released. And it -- it
22 does -- because the core of the complaint was you're
23 holding us without bond; we should be essentially
24 deported for the illegal remedies.

25 And so I do think that the availability both

1 of habeas here -- and I take Your Honor's -- I take Your
2 Honor's admonition, but -- about the oddity of the APA
3 here -- but if the APA doesn't apply here, it's because
4 Congress provided it for policies and -- provided review
5 for some policies, but not for all policies. And that
6 is where -- that is the congressional judgment.

7 But it seems to me that --

8 JUSTICE GINSBURG: How could they have --
9 how could they have access to habeas when they were
10 locked up without access to a lawyer, without access to
11 a telephone?

12 GENERAL GERSHENGORN: So, Your Honor, there
13 were individuals who did file habeas petitions and --
14 and those individuals were largely released before the
15 claims could be adjudicated. But the point here is
16 that -- that the -- that Bivens -- the extension of
17 Bivens would really be quite extraordinary to a national
18 security and immigration policy context. The
19 immigration concerns, I think, do raise the exact same
20 concerns, Your Honor, as the national security ones.

21 JUSTICE BREYER: I suppose that in 1942,
22 there was a president or a secretary of defense who
23 decided let's take 140,000 people -- 60,000, 70,000
24 citizens and 60,000 noncitizens -- and lock them up for
25 ten years or five years or four years.

1 All right. You go with habeas right at the
2 time. You could understand how, in January of 1942, it
3 would be pretty tough for a judge in a district court to
4 start second-guessing people. But several years later,
5 people had the time to develop the information. They
6 understand what people knew then. And they might find,
7 that in some of those instances, there was no
8 justification whatsoever. And I look at the Bivens
9 remedy and say, one, it has a cautionary effect. It
10 doesn't deter where necessary, where necessary, and then
11 where a big mistake was made, it has the possibility of
12 compensation later. That's the whole argument, that
13 beware of cutting off Bivens, you never know what will
14 happen.

15 GENERAL GERSHENGORN: So, Your Honor, I
16 guess I would say a few things to that. First of all, I
17 recognize Your Honor is not suggesting that this is --

18 JUSTICE BREYER: No, not at all.

19 GENERAL GERSHENGORN: I --

20 JUSTICE BREYER: I used a historic example
21 and I'm not worried about this case.

22 GENERAL GERSHENGORN: -- arrested for an
23 immigration violation --

24 JUSTICE BREYER: Yeah, yeah.

25 GENERAL GERSHENGORN: -- in the context of a

1 specific investigation.

2 JUSTICE BREYER: Okay. I'm worried about --

3 GENERAL GERSHENGORN: Even with respect to
4 Your Honor's hypo, I think it actually points up the
5 problem with extending Bivens to national security
6 policy decisions and to policy decisions in general. It
7 should not be, in the national security policy context,
8 that this Court should be calibrating the -- the
9 deterrence and underdeterrence and overdeterrence in
10 that situation. That is a judgment for Congress. And
11 if Your Honor is serious about compensation -- and this
12 is the problem with policies -- it should -- it can't
13 really be the case that the right way to -- to get
14 effective compensation is to put the attorney general,
15 the director of the FBI, and the commissioner of the INS
16 personally on the hook for the whole class.

17 The secretary of the treasury --

18 JUSTICE KENNEDY: But wasn't -- what's the
19 best authority you have for saying that, assuming
20 there's a Bivens action that has to be cut off at the
21 lower level of officials, it can't be to the highest
22 officials? What -- what authority do we have?

23 GENERAL GERSHENGORN: It's not the highest
24 level of officials, Your Honor. It's when there's a
25 broad national security policy, and I think that is what

1 this Court said on page 74 of *Malesko*, that the way we
2 challenge policy decisions is not through *Bivens*. It's
3 ordinarily through an injunction -- injunctive action.

4 If I could reserve the balance of my time.

5 CHIEF JUSTICE ROBERTS: Thank you, General.

6 Mr. Lamken.

7 ORAL ARGUMENT OF JEFFREY A. LAMKEN

8 SUPPORTING PETITIONERS

9 IN NO. 15-1363

10 MR. LAMKEN: Thank you, Mr. Chief Justice,
11 and may it please -- please the Court:

12 On behalf of *Misters Hasty and Sherman*, I
13 wanted to begin with qualified immunity, in particular
14 with respect to the official conditions. This case asks
15 the Court to hold the individual jailers are responsible
16 in damages for failing to overturn FBI terrorism
17 classifications and the confinement conditions they
18 produce. But a reasonable jailer could have understood
19 and believed it lawful in the circumstances of this case
20 to do as the BOP directed them, which is to hold
21 detainees in restrictive conditions based on those FBI
22 designations until the FBI cleared --

23 JUSTICE GINSBURG: Who determined the level
24 of -- of restriction? This -- this was not just
25 restriction. This is --

1 MR. LAMKEN: Your Honor, the answer is that
2 the BOP directed that you would use the most restrictive
3 conditions permissible. The specific implementation was
4 left to Mr. Hasty and Sherman. But there's no
5 allegation that the difference between -- that there's
6 unconstitutional conduct based on the difference between
7 what the BOP directed and what the -- and what Mr. Hasty
8 and Sherman did.

9 The allegation here is that it was
10 impermissible to impose these highly restrictive
11 conditions because the FBI didn't actually have
12 information connecting these individuals to terrorism.
13 And as -- and Mr. Hasty and Sherman somehow knew that
14 and as a result, it was impermissible -- impermissible to
15 impose these conditions on these Respondents.

16 But that doesn't make any sense from a
17 plausibility perspective and it doesn't make any sense
18 from a qualified immunity perspective. Mr. Hasty and
19 Sherman are jailers. They're expert in ensuring secure
20 conditions. They are not trained in determining
21 security classifications or connections to international
22 terrorism. They cannot be held liable for failing to
23 overturn the FBI's determinations.

24 After all, just last week, this Court held
25 that there's no clearly established law that requires an

1 officer to overturn or second-guess the fellow officers'
2 decisions made in a particular context. That just goes
3 double when you're asking the jailers to overturn the
4 determinations made by the FBI. The jailers don't get
5 to release people because they decide the court system
6 got it wrong and that the people are actually innocent.
7 And --

8 JUSTICE GINSBURG: What about -- what about
9 all the conduct that was not directed by the attorney
10 general or the FBI?

11 MR. LAMKEN: Yes, Your Honor. I think that
12 that -- the most -- you're referring to the unofficial
13 conditions or the unauthorized abuses by individual
14 guards.

15 JUSTICE GINSBURG: Yes. Am I right that as
16 to those, the Second Circuit was unanimous?

17 MR. LAMKEN: Yeah. As to those, the Second
18 Circuit was unanimous. But they -- I think they
19 overlooked one critical thing, and they tended to read
20 this complaint as if it were a complaint for injunctive
21 relief. There are a lot of things wrong. They weren't
22 being redressed. They should be redressed by the
23 courts. But it's not. This is actually an action for
24 individual damages against Mr. Hasty for conduct
25 committed by others. In order to establish a plausible

1 claim to that sort of relief, liability that he pays
2 damages for what others did, they would have to show
3 that Mr. Hasty not only knew that there was this
4 misconduct, not only knew that he needed to intervene,
5 but that after he failed to intervene, then the
6 plaintiffs were injured as a result of the failure to
7 intervene; that their injuries were caused by what
8 Mr. Hasty failed to do.

9 And that's what's missing from the Second
10 Circuit's analysis and that's what's missing from the --
11 the -- the complaint. There's simply no temporal
12 connection, no connection whatsoever between the --

13 JUSTICE GINSBURG: You're -- you're in
14 charge of a detention facility, and all these things are
15 going on. Prisoners are being knocked against walls,
16 their arms are being twisted. There have been some
17 complaints and nothing is done. It continues to go on.

18 JUSTICE KENNEDY: And the allegation is that
19 he deliberately did not take a routine inspection of
20 that particular portion of the prison in order to be
21 willfully blind as to what was going on.

22 MR. LAMKEN: Well, there's -- there's no
23 doubt that misconduct occurred and there's no doubt that
24 Mr. Hasty actually sees the complaints, because that's
25 part of the grievance process. But what's missing from

1 this is these individual plaintiffs being injured after
2 this is brought to his attention. If you review the
3 complaint, it doesn't have a moment where it says, this
4 is when he learned and after that, we were injured.
5 It's more of a blunderbuss that says, because there were
6 a lot of bad things happening, Mr. Hasty must be liable
7 for all of them.

8 JUSTICE GINSBURG: How could that pinpoint
9 one particular moment in time when this is ongoing
10 behavior?

11 MR. LAMKEN: And I think the answer is that
12 you pinpoint his awareness and the injuries that these
13 Respondents are claiming damages for.

14 JUSTICE BREYER: And you say it in
15 paragraph -- in paragraph 74, it says, "Indeed, after a
16 few months of interacting with the plaintiffs, the MDC
17 defendants" -- I take it those are the people we're
18 talking about -- "realized that they were not
19 terrorists, but merely immigration detainees; yet the
20 restrictive conditions and harsh treatment continued."

21 So what is that but an allegation that they
22 did know about it and they did continue the harsh
23 treatment?

24 MR. LAMKEN: So, Justice Breyer, referring
25 specifically to the unofficial abuses by the guards as

1 opposed to the official conditions, temporarily, what's
2 missing there is what happened afterwards. What were
3 the -- what were the specific abuses he was aware of?
4 Is this guard misconduct, or was it tapping the bars at
5 night and keeping people awake? And in --

6 JUSTICE BREYER: It is their restrictive
7 conditions and harsh treatment. And elsewhere --

8 MR. LAMKEN: That's true.

9 JUSTICE BREYER: -- in the complaint they
10 have a list.

11 MR. LAMKEN: And that's exactly the
12 difficulty, is that he's aware of harsh treatment
13 generally and, therefore, he must be liable for all
14 harsh treatment that occurs after that awareness.

15 You cannot say that here there is abuses
16 generally with no particular time frame and then hold
17 him liable for every intentional tort that occurs in the
18 institution. And I think that paragraph 74 and 77,
19 which the Second Circuit described as detailed, actually
20 illustrate precisely the problem. They don't say which
21 abuse he's aware of. They don't say when, whether it
22 predates or postdates the claims that they have. They
23 must prove facts that show that Mr. Hasty is personally
24 responsible.

25 In fact, when they finally get to a date,

1 which is paragraph 110 of the complaint, they say
2 February 11, 2002. Well, by February 14, 2002, four of
3 the six Respondents are already outside of ad max. They
4 never explain why awareness on a time, after they're out
5 of the institution, is a basis for holding Mr. Hasty
6 liable.

7 If I could go back, however, to the official
8 conditions, Your Honor. With respect to the official
9 conditions, qualified immunity must be granted. There's
10 simply no basis for saying that it is -- that every
11 reasonable jailer would understand that they had to make
12 their own determination that these were not terrorism
13 detainees and overturn what the FBI was telling them.
14 And it's especially true given that the FBI was,
15 throughout this process, making determinations and
16 clearing people. There's no clearly established law
17 that requires jailers to be making those decisions for
18 the FBI. In fact, society would be ill served if we
19 asked jailers to do that. They're not experts in
20 international terrorism; they are experts in maintaining
21 security.

22 Finally, if I can end up where the acting
23 solicitor general began, and that is with respect to the
24 scope of Bivens. Special factors in this case, counsel
25 hesitation. Congress ran the court tested aside, what

1 are the consequences of saying that individual jailers,
2 somebody all the way at the bottom of that food chain,
3 must second-guess the FBI? What are the consequences
4 for the government's ability to have a coherent response
5 to a national terrorist attack? That is precisely the
6 type of thing that Congress, rather than the courts,
7 should decide.

8 In addition, the linchpin of the claims
9 against the -- against these individuals is that the FBI
10 had gotten these things wrong. That means that they're
11 going to need to prove, plaintiffs want to prove that
12 the FBI had things wrong. It implicates -- cases like
13 this implicate the need to access sensitive --

14 CHIEF JUSTICE ROBERTS: So if the official
15 policy that was adopted that we want to beat the
16 prisoners, you know, every day and that was the FBI
17 policy and it's communicated down, the prison
18 administrator has no choice but to carry out that
19 policy?

20 MR. LAMKEN: No, Your Honor. I think in
21 terms of there being a facially unlawful command, that
22 is where you don't have qualified immunity. But there's
23 nothing facially unlawful that says impose the most
24 restrictive conditions permissible based on FBI
25 designations until the individual is cleared by the FBI.

1 And, boy, we all wish the FBI had been acting faster and
2 these individuals could have been removed more quickly.
3 But that's not at the feet of the individual jailers.
4 Their job is to maintain secure conditions, and that's
5 what they were doing.

6 And with respect to Bivens, Your Honor, the
7 illegality or lawfulness of the conduct challenged isn't
8 the determination of whether or not Bivens should be
9 extended to a new location -- a new context or not.
10 What determines that is whether or not this Court has
11 the institutional competence to make the decision, or it
12 is the sort of decision that Congress should make. And
13 especially since cases like this one are turning on
14 whether or not the FBI was right or not in its terrorism
15 designations, that implicates potentially sensitive
16 intelligence information. If that is going to be pulled
17 into a lawsuit, courts should not be in the business of
18 creating those lawsuits and creating possible risks for
19 intelligence information. That is precisely the sort of
20 decision that Congress rather than the courts should --

21 JUSTICE BREYER: Anything about the
22 hypothetical I gave, of course, is a real one, not this
23 case. But if you cut Bivens off totally, what prevents
24 that from recurring?

25 MR. LAMKEN: Well --

1 JUSTICE BREYER: I mean --

2 MR. LAMKEN: I --

3 JUSTICE BREYER: -- that was a pure
4 hypothetical -- you get my point.

5 MR. LAMKEN: No, Your Honor. I think,
6 actually, this -- this case proves exactly what happens.
7 We have an OIG report --

8 JUSTICE BREYER: This -- sometimes in Bivens,
9 there are many, many remedies in the judicial system.

10 MR. LAMKEN: We have habeas, we have --
11 there's an FTCA claim that was brought by the
12 predecessors of these plaintiffs in which they recovered
13 money on in a settlement. There are lots of remedies
14 that occur. And, indeed, in this case with respect to
15 the individual guards, there was a lawsuit against them
16 and a third amended complaint. The OIG report
17 recommended discipline and discipline was meted out.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Ms. Meeropol.

21 ORAL ARGUMENT OF RACHEL MEEROPOL

22 ON BEHALF OF THE RESPONDENTS

23 MS. MEEROPOL: Mr. Chief Justice, and may it
24 please the court:

25 Under Petitioners' theory, any Muslim or
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1 Arab noncitizen present in this country could be placed
2 for months in solitary confinement for violating the
3 immigration law. But this Court has a historic role to
4 play in ensuring that race and religion do not take the
5 place of legitimate grounds for suspicion and in
6 deterring future Federal officials from creating
7 government policy to do the same. But what --

8 CHIEF JUSTICE ROBERTS: Does that role
9 include the shaping and an announcement, really, of
10 private damages remedies? We've been very explicit
11 about the restraint in extending the Bivens action
12 beyond its original contours.

13 MS. MEEROPOL: That's correct, Mr. Chief
14 Justice. And we don't believe that this requires any
15 extension of Bivens whatsoever. When this Court heard
16 Iqbal, the Court distinguished between Mr. Iqbal's claim
17 of religious discrimination, which the Court assumed
18 would have required an extension of Bivens, and the
19 Court assumed that it would be so extended because the
20 issue was not directly argued before the Court.

21 But the Court treated differently
22 Mr. Iqbal's claim for an equal protection violation,
23 noting that the Court had allowed Bivens claims for
24 equal protection violations under Davis. And there's no
25 way to read the distinction between those two claims in

1 Iqbal, other than that an equal protection claim, such
2 as the one these Respondents have, arises in a familiar
3 Bivens context. The Court has, in the past, allowed
4 prison conditions claims for -- under Bivens. There is
5 nothing new here.

6 Now, what Petitioners are --

7 JUSTICE KENNEDY: That -- that was -- that
8 was failure to give medical treatment.

9 MS. MEEROPOL: That's correct in Carlson.

10 JUSTICE KENNEDY: And there's -- there's
11 been Bivens, the gender discrimination case, and Coleman
12 v. Miller, I think, the -- the medical -- denial of
13 medical treatment.

14 MS. MEEROPOL: Carlson, yes.

15 JUSTICE KENNEDY: But the -- but -- yes.
16 But we've been very careful in subject and places to
17 say, we go no further. This is for the Congress.

18 I think you're asking us to go further. I
19 think what you're asking for is a legitimate argument
20 with many valid points to it, but you're asking for us
21 to create a new Bivens cause of action.

22 MS. MEEROPOL: Well, if it is a new Bivens
23 cause of action, Your Honor, I submit that it is an
24 appropriate one here.

25 Now, what the DOJ Petitioners argue is that

1 Bivens should not be extended because they were setting
2 national security and immigration policy. But the core
3 of our complaint is that there was no sensitive national
4 security judgments being exercised. No one was being
5 vetted. No one was determined to be a threat.

6 This is not a situation where the Court
7 would have to look into sensitive national security
8 determinations that were made. Rather, if there was
9 national security judgment exercised, it was the
10 judgment that, in this case, race or religion could play
11 the part of legitimate suspicion; could play a proxy,
12 and exploring that --

13 CHIEF JUSTICE ROBERTS: I'm not sure I
14 understand your point. It was -- it was the
15 implementation of national security policy in response
16 to the 9/11 attacks, and the -- it was to detain people.
17 Every one of the individuals detained was in violation
18 of their immigration status; right?

19 MS. MEEROPOL: That's correct, your Honor.

20 CHIEF JUSTICE ROBERTS: It was to detain
21 those individuals until they were properly cleared and
22 could be -- could be released. Now, you may disagree
23 with that approach to the policy, but what concerns me
24 and why the restraint is appropriate in the Bivens
25 context, is that it is a way of challenging national

1 policy through damages actions against the individuals
2 implementing it. And I think that is an extraordinary
3 departure from where we have recognized Bivens remedies
4 in the past.

5 MS. MEEROPOL: This does arise in a national
6 security context. Mitchell v. Forsyth also arose in a
7 national security context. The question is whether the
8 national security context of these detentions, the type
9 of determinations that were being made, are
10 determinations that are unsuited for Bivens because
11 either they should be left to Congress or they are
12 outside of this Court's core competence. And I would
13 submit that this is precisely the kind of examination
14 that is within this Court's core competence.

15 CHIEF JUSTICE ROBERTS: I guess my point
16 is -- is a different one. I understand the argument
17 that there are constitutional violations. But the
18 question that you're asking the Court to do is to shape
19 a remedy for that, a remedy that Congress has not
20 provided. And to look at it in the simplest terms, I
21 mean, it has been 40-whatever years since we adopted an
22 approach to implied rights of action under statutes
23 where we say if Congress wants people to be allowed to
24 bring individual damages actions, they pretty much have
25 to say so.

1 And it seems to me that it's the same
2 approach here except, of course, you're dealing with the
3 Constitution. And the idea that the Court lacks the
4 institutional competency, okay, there's -- there's a
5 constitutional claim against a national policy. We
6 think the best way to consider that constitutional
7 challenge is to allow people to sue individuals
8 responsible for implementing it for damages.

9 You shape the policy, the national
10 government in response to 9/11, therefore, you have to
11 pay money because it's been a determination that that
12 was unconstitutional.

13 MS. MEEROPOL: Well, it is certainly true
14 that the Court has stepped back from freely implying
15 private causes of action. But in every Bivens case that
16 has come before this Court, the Court has still engaged
17 in the two-step inquiry, looked to see whether there are
18 special factors that should keep the Court from staying
19 its hand and weighed the -- the interest on the other
20 side of the equation, too. And each time, the Court has
21 reemphasized that Bivens is about deterring individual
22 Federal officer misconduct.

23 Now, when a -- when a Federal official
24 creates an unconstitutional policy, he's creating
25 policy, but he is also acting as an individual to

1 violate what in this case would have to be
2 clearly-established constitutional norms.

3 CHIEF JUSTICE ROBERTS: I understand that.
4 But the point made by your friend on the other side,
5 though, of overdeterrence, when you have the attorney
6 general, the director of the FBI, the director of INS
7 sitting down and making -- what are we going to do to
8 respond to this crisis, and -- and people in the -- were
9 of -- old enough, 9/11, sort of have a better sense of
10 what that crisis was like.

11 And if you imply a Bivens actions, one of
12 the things they're going to enter into, what is best,
13 what is appropriate, and presumably also, what's
14 constitutional. They're going to say, well, gosh, if,
15 you know, I'm wrong, I'm going to -- I'm going to be
16 sued, not because I'm the attorney general, but as an --
17 as an individual. And -- and part of the policy that
18 we've announced is that we don't want people forming
19 policy to have to worry about they're going to have to
20 -- to pay if the -- if the policy is found infirm.

21 MS. MEEROPOL: I have two responses to that,
22 Mr. Chief Justice.

23 First of all, qualified immunity creates a
24 powerful protection for Federal officials who are
25 undertaking a good-faith effort to protect our national

1 security, which everyone agrees is of paramount concern,
2 but who do so believing their actions to be lawful, even
3 if they are mistaken. There is already that incredibly
4 substantial protection.

5 Second, I don't believe that it would be a
6 threat to the republic to provide the attorney general
7 with incentives to not create policy that violates
8 clearly-established law. I see the threat coming from
9 the other side.

10 I -- I would like to make sure to take the
11 time to correct --

12 JUSTICE BREYER: I'll ask you one other
13 thing, which is, has this been fully argued out below?
14 I mean, I think it is an enormously important and very
15 open question. And we can say on the one hand, just
16 what was said. I think everything the Chief Justice
17 said is true. There is a problem, in this time, of real
18 national emergency, to overdeter people from doing what
19 they reasonably think is necessary. And they have the
20 authority for security, not the judges.

21 At the same time, the law of this Court
22 correctly, I think is, but there's no blank check even
23 for the President. And if there's no blank check, that
24 means sometimes they can go too far. And if they have
25 gone too far, it is our job to say that.

1 Now, there are considerable advantages, as I
2 pointed out, saying, at the time they're going to say
3 yes, because there's a big frightening thing happening.
4 But maybe they went too far too fast, and then this
5 offers a remedy later and maybe the deterrence is good.
6 Okay? You see both sides.

7 MS. MEEROPOL: Uh-huh.

8 JUSTICE BREYER: Has that been fully argued
9 in this case? If I go and look in the record, can I
10 find a question that I have wondered about for quite a
11 long time fully answered?

12 MS. MEEROPOL: I -- I don't believe so.
13 I -- I think the question you're posing is whether
14 damages would actually be a less intrusive remedy in
15 this situation than allowing for an injunctive relief
16 claim at the outset, if I understand your -- your
17 question correctly.

18 JUSTICE BREYER: In a set of cases.

19 MS. MEEROPOL: And -- and yes. No. I don't
20 believe that that has been fully addressed below. The
21 circuit, of course, found that no extension of Bivens
22 was required. So the circuit didn't engage in the
23 analysis of whether, if an extension is required, one in
24 this situation would be called for.

25 My -- my friend argued, both on reply and

1 from the podium, that -- that even -- that -- that this
2 case cannot be distinguished from Iqbal. But what
3 distinguishes this case from Iqbal is that we --
4 Respondents have a factual allegation that the DOJ
5 Petitioners' policy was to target Muslims and Arabs for
6 harsh treatment, and that they imposed this treatment
7 knowing there was no reason to suspect Respondents of
8 ties to terrorism.

9 Now, my friend argued that even if
10 Petitioners, DOJ Petitioners, had known that there
11 was -- that -- had known that many were arrested without
12 an articulable tie to terrorism, that the Petitioners
13 had reason to believe that some among that group might
14 have potential ties to terrorism, and that explains the
15 harsh treatment without raising an inference of
16 discriminatory intent, but I don't believe that is a
17 fair reading of the complaint or the OIG report.

18 Respondents allege in paragraph
19 47 that Petitioners received detailed daily reports of
20 the arrests and the detentions, and that they learned
21 that the FBI had no basis to suspect Respondents and the
22 class of ties to terrorism. There was no reason to
23 think that any of these individuals were -- had an
24 articulate -- that there was an articulated basis to
25 suspect them of ties to terrorism.

1 JUSTICE KENNEDY: We're talking about
2 adequate remedies. Can you tell me, as Justice Ginsburg
3 pointed out, we didn't -- these detainees didn't have
4 access to the outside. Were there any legal proceedings
5 filed, injunctive proceedings, after say month 2, month
6 3, and were -- were those remedies completely added to
7 district courts to look at this and say that we're not
8 going to give relief?

9 MS. MEEROPOL: There were some habeas
10 petitions filed. In general, the government's response
11 to those petitions being filed was to move the detainee
12 up to the front of the list, to clear him so that he
13 could be removed from the country and from the
14 restrictive conditions of confinement before a court
15 could have the opportunity to rule on the legality of
16 the detention. And importantly, those habeas petitions
17 were about the -- the right to detain these people in
18 itself, not about conditions of confinement.

19 It is still not clear today that one can use
20 a habeas petition to challenge conditions of
21 confinement, and it wasn't clear in the Second Circuit
22 at the time either. So while habeas petitions were
23 filed eventually, when some detainees finally had access
24 to counsel, although restricted access, those -- those
25 petitions were not actually ruled on by a court. The

1 court -- no court had the opportunity to determine
2 whether what was happening to the detainees was lawful
3 or not, and that was part of DOJ Petitioners' entire
4 policy of harsh treatment. It was not just to impose
5 maximum pressure. It was also, as we allege in
6 paragraph 61, to keep the detainees from accessing the
7 outside world.

8 Now, my friend argued that the DOJ
9 Petitioners cannot be on the hook for the substantive
10 due process claim in this case, a claim which was not
11 presented in Iqbal. There was no conditions claim in
12 Iqbal, just the equal protection claim, because the --
13 because the DOJ Petitioners did not set all the details
14 of the restrictive conditions of confinement.

15 But their order itself, paragraph 61,
16 requires keeping individuals in solitary confinement, in
17 isolation. That is the way within the prison system
18 people are kept from accessing the outside world. It
19 cannot be done in a general population unit. So an
20 order that requires solitary confinement for individuals
21 who are arrested in connection with the terrorism
22 investigation, but whom the attorney general and the
23 other DOJ Petitioners know there is no nondiscriminatory
24 reason to suspect of any ties to terrorism, that states
25 the substantive due process claim. That is so excessive

1 as to be arbitrary and punitive.

2 This is what the panel found so compelling,
3 I believe, about the merger of the New York list and the
4 national list, that it was not a situation where some of
5 the men on that list perhaps hadn't been vetted.
6 Rather, the entire list, 300 men, were people for whom
7 the FBI had not stated any interest or lack of interest.
8 And it was this list of men who we allege Attorney
9 General Ashcroft ordered should be treated as of
10 interest to the 9/11 investigation.

11 JUSTICE KENNEDY: If -- if we -- if we hold
12 that our previous cases instruct that we should not go
13 further with Bivens, you still have Section 1985(3).
14 Can officials conspire with each other?

15 MS. MEEROPOL: Yes, absolutely.

16 JUSTICE KENNEDY: Is there -- is there -- I
17 was thinking of the -- is -- is there precedent on that
18 in your point?

19 MS. MEEROPOL: It -- in this case --

20 JUSTICE KENNEDY: In your favor?

21 MS. MEEROPOL: Yes. What the circuit held
22 as to that is that the question of whether officials can
23 conspire with each other is so fact-intensive and had
24 been so inconclusively briefed in the district court,
25 yet it was required to remand back to the district to

1 determine sort of how they might have conspired with
2 each other, whether -- what their positions were
3 vis-à-vis each other such that a 1985 claim would be
4 appropriate.

5 JUSTICE KENNEDY: Is there precedent in your
6 favor on this point that there can be this conspiracy
7 if -- if it's established by the facts?

8 MS. MEEROPOL: Yes. And I believe the case
9 is cited by the Second Circuit, by the panel, our
10 precedent in our favor for that.

11 CHIEF JUSTICE ROBERTS: What -- what is so
12 fact-intensive about the argument that government
13 officials -- the government is the entity and officials
14 within that same entity don't conspire among themselves,
15 they're just doing their -- doing their jobs?

16 MS. MEEROPOL: Well, I think it depends on
17 the role of the high-level officials vis-à-vis the
18 low-level officials at the Metropolitan Detention
19 Center. Certainly, we argue that officials at such
20 disparate levels of the federal government, which is
21 vast, could -- could be held to have conspired with each
22 other. But I don't think it is an argument that was
23 fully developed before the district court, and that was
24 what the circuit held, and that's why it should be
25 remanded to the circuit and that -- remanded to the

1 district.

2 I want to make sure to address the arguments
3 by the MDC Petitioners, because, really, their argument
4 about extending Bivens -- about not extending Bivens for
5 the claims against those officials is very different
6 from the argument by the DOJ Petitioners. Every judge
7 who has considered the issue has agreed that the claims
8 that Hasty and Sherman were deliberately indifferent to
9 months of physical and verbal abuse arise in a familiar
10 Bivens context and should be allowed to go forward.

11 JUSTICE KENNEDY: That's Carlson v. Green?

12 MS. MEEROPOL: Yes, exactly.

13 JUSTICE GINSBURG: I thought the -- the
14 Second Circuit majority said yes as to Hasty, Hasty,
15 deliberate indifference, but not as to Sherman.

16 MS. MEEROPOL: That's correct. I must have
17 misspoke. I apologize.

18 Yes. The deliberate indifference claim goes
19 forward against Hasty, and then there were the claims
20 against Hasty and Sherman for the official conditions of
21 confinement at the Metropolitan Detention Center. These
22 are claims that the men were held in solitary
23 confinement for months, deprived of sleep, deprived of
24 exercise. This is not just the MDC Petitioners in --
25 following the orders from their superiors in the Bureau

1 of Prisons. They created the actual conditions of
2 confinement.

3 There is nothing in the record to suggest
4 that the BOP ordered that all of the conditions that
5 Respondents were subjected to, lights on in their cells
6 24 hours a day while they were in solitary confinement,
7 that the solitary confinement continue without any
8 individualized review. There's nothing in the record.

9 JUSTICE ALITO: Well, would that -- were
10 they -- were those conditions constitutional as to
11 individuals about whom the FBI had reasonable suspicion
12 of a connection with terrorism?

13 MS. MEEROPOL: That would depend. Placement
14 in solitary confinement, if it is incredibly prolonged
15 and incredibly restrictive, may be unconstitutional for
16 anybody. We don't concede that the conditions --

17 JUSTICE ALITO: Is your argument dependent
18 on that?

19 MS. MEEROPOL: No --

20 JUSTICE ALITO: The proposition that it
21 would be unconstitutional even as to those who have --
22 with respect to whom the FBI had reasonable suspicion?

23 MS. MEEROPOL: No. And that brings up an
24 incredibly important point that I want to make sure to
25 get out, which is that we disagree with the MDC

1 Petitioners' statement that there was a terrorism
2 designation here, that there was reason to believe that
3 any of the 9/11 detainees had ties to terrorism.

4 There was no designation. What there was is
5 the fact that some men were arrested in connection to
6 the terrorism investigation.

7 JUSTICE ALITO: The whole position as I
8 understand it, the way it was presented today, was that
9 the FBI had a list and the -- there was no way they
10 could determine what degree of information the FBI had
11 as to any particular person.

12 MS. MEEROPOL: But they were told what
13 information the FBI was relying on. That's in
14 paragraph 70, it's 71 through 74 of our complaint, that
15 actually a liaison to the headquarters investigation was
16 providing the MDC with information about all the men.

17 JUSTICE ALITO: With all the information?
18 Do you -- you think that the FBI in a -- in a
19 sensitive -- investigation of something sensitive like
20 this about terrorism would necessarily have told people
21 at MDC every bit of information they had connecting
22 people with -- with terrorism?

23 MS. MEEROPOL: Well, our factual allegation
24 was that they were told all the information that was
25 relevant to the threat that the men posed to the

1 institution.

2 And also important here is what the OIG has
3 explained about the meaning of the -- of the of-interest
4 designation. Being determined by the FBI to be of
5 interest to the 9/11 investigation meant only that they
6 were not, not of interest. This is not just something
7 that was happening in New York. The OIG quotes the head
8 of the national security unit of the INS, who explains
9 that if the FBI could not state whether or not it had an
10 interest in an individual, that individual was held as
11 of interest to the 9/11 investigation.

12 So even if there is word being sent out
13 that, you know, these men are of interest to the
14 investigation, we have to be careful with them, what the
15 MDC Petitioners received was that of-interest
16 designation, which meant very little based on the policy
17 being applied here. And then they received the detailed
18 information; for example, that Ahmed Khalifa was
19 arrested -- was encountered by the FBI in the context of
20 the 9/11 investigation, had violated the immigration
21 law, and that the FBI might be interested in him. This
22 is the actual information that was provided that we have
23 made available in the complaint.

24 JUSTICE BREYER: The FBI goes into a rooming
25 house after having information there's a nuclear weapon

1 on the floor. They find it. And there might be
2 another. Would they be justified in taking into custody
3 every single person in that rooming house and looking
4 into it? I mean, for how long? Would you say to them,
5 no, you can't do it because we don't know, there are
6 people on the floor, they knew nothing about them,
7 actually. They admit it. We knew nothing about them.
8 All we know is they're in the rooming house.

9 MS. MEEROPOL: Well --

10 JUSTICE BREYER: And we also know there was
11 a nuclear weapon. And that isn't totally fanciful; it
12 could happen. And -- and so what are they supposed to
13 do and how long?

14 MS. MEEROPOL: Well, we don't challenge the
15 fact that these men were detained at all. And we don't
16 challenge that they were investigated while they were
17 detained. So even if they had been detained -- you
18 know, some of them were up to eight months, which is a
19 long period of time, and there's no challenge to that
20 detention in this case. The challenge is to the way
21 they were treated while they were detained. That if you
22 need to investigate after a national security emergency,
23 there are a lot of tools at the government's disposal to
24 do so.

25 What you cannot do is single out a group of
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1 people whom you know there is no basis to suspect them
2 of any ties to terrorism beyond sharing racial and
3 religious characteristics with the 9/11 hijackers, and
4 to decide that that group of people poses such a threat
5 that they must be placed in the most restrictive
6 conditions of confinement that exist in the Federal
7 system while we take the time, eight months, up to eight
8 months, to determine whether there actually is any basis
9 to suspect them of anything other than an immigration
10 violation. And at the end of the day, oh, actually,
11 there wasn't. Everybody was cleared and deported, as
12 one would expect from a policy that is not based on
13 investigating based on actual suspicion, but is rather a
14 blunderbuss attempt to gather all of the Muslim and Arab
15 noncitizens whom one has authority over by virtue of
16 their immigration detentions, and -- and hold them in
17 restrictive conditions of confinement while they are
18 treated as suspected terrorists.

19 If I could get back for a moment to one of
20 the Bivens questions, and that's about whether Bivens is
21 appropriate for altering policy. I don't know if I was
22 able to get this point out as well as I'd like to
23 before. To -- to explain, I don't think that there is
24 really any precedent for the idea that you can't use
25 Bivens to deter creation of a clearly unconstitutional

1 policy. And if -- if the Court did rule in that way,
2 what would there be to deter the creation of
3 unconstitutional policies in the future? Now, of
4 course, policies can be stopped as they are ongoing, but
5 that does not protect the individual against whom, you
6 know, potential serious law enforcement action has been
7 taken.

8 CHIEF JUSTICE ROBERTS: Well, I suppose one
9 answer would be the normal injunctive action would
10 challenge the constitutionality of the policy, which
11 would seem, at least at first blush, to be a more
12 appropriate way of doing it than to -- than individual
13 damages actions against officials responsible.

14 MS. MEEROPOL: But an injunctive -- an
15 injunctive claim, while it could stop, currently,
16 current unconstitutional conduct cannot deter future
17 unconstitutional conduct from occurring. It doesn't
18 deter the future attorney general from creating an
19 unconstitutional policy. And if national security
20 policy is somehow insulated from judicial review without
21 even a determination that this is the type of national
22 security policy where we could expect there could --
23 there should be sensitive judgments made, if -- if in
24 that situation there is no Bivens remedy, then there are
25 times when the Court will play no -- will be able to

1 play no role in reviewing what has occurred, because
2 the -- the individuals simply can't get into court fast
3 enough. Maybe in a situation like this, they're denied
4 from getting into court for a period of time. And then
5 when they finally do, the claim that the way that
6 they've been treated is stopped. You know, they're
7 released; someone else is picked up instead. There's
8 never a chance to actually undertake judicial analysis
9 of what has been occurring.

10 If qualified immunity justifies what was
11 done here, or if Petitioners have not plausibly alleged
12 a claim, those are bases to affirm the circuit. But if
13 there is no cause of action at all, if individuals who
14 are the subject of clearly unconstitutional national
15 security policy don't even have the opportunity to get
16 into the court, then there is nothing to deter even more
17 excessive exercises of government power in the future.

18 If there are no further questions.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 General Gershengorn, four minutes.

21 REBUTTAL ARGUMENT OF IAN H. GERSHENGORN

22 ON BEHALF OF THE PETITIONERS

23 IN NOS. 15-1358 AND 15-1359

24 GENERAL GERSHENGORN: Thank you, Mr. Chief
25 Justice.

1 A few quick points.

2 First, a few short corrections of the
3 record, although I apologize for the confusion about the
4 date. It's not in the complaint, the date of the
5 list-merger decision. The OIG report suggests it was on
6 November 2nd.

7 And then just, Justice Ginsburg, you had
8 asked about the warden visits. J.A. page 224, it says
9 on September 20, 2001, various wardens, including MDC
10 Warden Zenk, reestablished legal visits, legal telephone
11 calls, and legal mail for the September 11 detainees.

12 JUSTICE GINSBURG: What was --

13 GENERAL GERSHENGORN: I'd like to make --

14 JUSTICE GINSBURG: What was the date of
15 that?

16 GENERAL GERSHENGORN: That was September 20,
17 2001. And it's on page 224 of the Joint Appendix.

18 Three points on the law.

19 First, this would be a massive extension of
20 Bivens. Malesko said, Justice Kennedy, you had asked,
21 that unlike a Bivens remedy, which we have never
22 considered a proper vehicle for altering an entity's
23 policy, injunctive relief has long been recognized as
24 the proper means for doing so. That makes good sense.
25 It cannot be that the secretary of the treasury, who

1 promulgates a policy that's later found
2 unconstitutional, could be liable personally to all the
3 banks for the unconstitutional policy.

4 Bivens is not -- Justice Breyer, absence of
5 Bivens is not lawlessness. It is not a blank check, and
6 it is incorrect as -- to say that there's no way to get
7 into court. The way to get into court to challenge a
8 policy is through an APA; it's through injunctive
9 relief.

10 And although my friend on the other side
11 suggests that a damages remedy is not a threat to the
12 republic or a less-intrusive remedy, that's exactly
13 the -- the judgment that this Court is ill-equipped
14 to -- to make, and that Congress should make.

15 With respect to 1985(3), Justice Kennedy, I
16 want to make just one quick point, which is that the --
17 the -- the DOJ defendants would be -- and all the
18 defendants would be subject to qualified immunity for
19 1985(3) because it was not clear that officials within a
20 corporate unit could -- could conspire with each other.
21 There's case law suggesting they couldn't. And it was
22 unclear, specifically in the Second Circuit, whether
23 1985(3) applied at all to Federal officials. So
24 qualified immunity would eliminate the 1985(3) claim.

25 And then if I could close with the -- the --

1 the Iqbal pleading and what we're talking about here.
2 The -- the other side has made clear they're not talking
3 about the initial treatment and they're not even talking
4 about the length of time. They're talking about the
5 conditions of confinement and the fact that conditions
6 that could lawfully be imposed with people in
7 individualized suspicion were imposed on a much broader
8 group. But I submit that that ignores the perspective
9 that the attorney general, even assuming that he was the
10 person who made the policy decision, which, as Judge
11 Raggi suggested, we should not assume --

12 JUSTICE KENNEDY: Just one point on -- on
13 1985. The fact that it wasn't clear that there was a
14 remedy under 1985, it doesn't follow -- it wasn't clear
15 that there wasn't a right that was being violated.

16 GENERAL GERSHENGORN: That -- so --

17 JUSTICE KENNEDY: That's different.

18 GENERAL GERSHENGORN: With respect to the
19 interagency conspiracy, I think that suggests even the
20 right wasn't involved. And if the statute doesn't --
21 it's not clear the statute applies at all to them, we do
22 think that's a situation in which qualified immunity
23 would attach.

24 But just to close what -- with what the
25 attorney general knew. The attorney general knew that

1 he had aliens who were legally detained as out of status
2 and had been arrested in connection with Pent-Bomb, that
3 restrictive conditions of confinement -- not the
4 unlawful -- the unofficial conditions which have no
5 connection to my clients, but the restrictive conditions
6 of confinement were okay for some with individualized
7 suspicion, but he had no way to know which ones were and
8 which ones were not subject to that condition.

9 In that situation, he made the decision to
10 subject the whole group to a hold-until-cleared policy
11 until they could figure it out.

12 The idea that because in 20/20 hindsight we
13 can identify the particular individuals who were not --
14 had not -- were not connected at all to terrorism and
15 thus wrongly detained does not change the reasonableness
16 of his judge -- of his judgment. The fact that you
17 can't infer putative intent and discriminatory content
18 and the -- intent -- and the fact that it was not
19 clearly established at the list-merger decision, which
20 is what -- a core of what the Second Circuit decided,
21 that the list-merger decision was unconstitutional when
22 made.

23 If there are no further questions.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 General Gershengorn, before you leave the

1 podium, I'd like to note that the Court thanks you for
2 your service to the Court as acting Solicitor General
3 over the past many months.

4 GENERAL GERSHENGORN: Thank you.

5 CHIEF JUSTICE ROBERTS: The case is
6 submitted.

7 (Whereupon, at 12:02 p.m., the case in the
8 above-entitled matter was submitted.)

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A				
Abbasi 1:6,15 1:23 4:4	14:15 administrator 25:18	35:23 48:8 announced 33:18	18:7 27:21 29:19 31:16 40:12,22 41:3 41:6 42:17 48:21	22:2 attorney 1:12 4:20 7:15,15 8:9 11:12 12:14,18,24 13:7 17:14 20:9 33:5,16 34:6 38:22 39:8 47:18 51:9,25,25
ability 25:4	admit 45:7	announcement 28:9	arguments 41:2	attributable 13:7
able 46:22 47:25	admonition 5:22 15:2	answer 10:1 19:1 22:11 47:9	arises 29:2	authorities 9:9
above-entitled 2:4 53:8	adopt 10:19	answered 35:11	arising 4:13	authority 13:23 17:19,22 34:20 46:15
absence 50:4	adopted 10:14 25:15 31:21	antecedent 5:23	arms 21:16	authorized 9:16 9:24
absolutely 39:15	advantages 35:1	anybody 9:10 10:1 42:16	arose 31:6	availability 14:25
abuse 23:21 41:9	affirm 48:12	APA 14:8,13 15:2,3 50:8	arrested 7:1 16:22 36:11 38:21 43:5 44:19 52:2	available 14:17 14:19 44:23
abuses 20:13 22:25 23:3,15	agreed 41:7	apologize 11:1 41:17 49:3	arrests 36:20	avoid 5:12 8:16
accept 11:11	agrees 34:1	APPEARAN... 2:7	articulable 36:12	awake 23:5
access 15:9,10 15:10 25:13 37:4,23,24	Ah 9:19	appendix 6:23 49:17	articulate 36:24	aware 23:3,12 23:21
accessing 38:6 38:18	Ahmed 44:18	application 11:17	articulated 36:24	awareness 22:12 23:14 24:4
Act 14:16	AHMER 1:6,15 1:23	applied 6:17 44:17 50:23	Ashcroft 1:11 4:20 6:21,24 7:5,15 8:10 9:13 10:12 12:14 13:7 39:9	a.m 2:6 4:2
acting 2:8 24:22 26:1 32:25 53:2	AL 1:6,12,15,20 1:23	applies 51:21	asked 24:19 49:8,20	
action 17:20 18:3 20:23 28:11 29:21,23 31:22 32:15 47:6,9 48:13	ALI 1:6,12,15,20 1:23	apply 8:14 13:18 15:3	asking 20:3 29:18,19,20 31:18	B
actions 4:13 31:1,24 33:11 34:2 47:13	aliens 7:20,23 52:1	approach 30:23 31:22 32:2	asks 18:14	back 7:17 24:7 32:14 39:25 46:19
actual 42:1 44:22 46:13	ALITO 42:9,17 42:20 43:7,17	appropriate 13:24 29:24 30:24 33:13 40:4 46:21 47:12	assume 51:11	bad 22:6
ad 24:3	allegation 7:5 10:4,9,12 19:5 19:9 21:18 22:21 36:4 43:23	Arab 28:1 46:14	assumed 28:17 28:19	balance 18:4
added 37:6	allegations 6:19 12:23	Arabs 36:5	assuming 6:1 17:19 51:9	banks 50:3
addition 14:9 25:8	allege 7:18 9:12 36:18 38:5 39:8	arbitrary 39:1	attach 4:24 51:23	barred 6:12
address 5:24 41:2	alleged 4:20 6:21 7:16 48:11	argue 29:25 40:19	attack 9:7,7 25:5	bars 23:4
addressed 35:20	allowed 28:23 29:3 31:23 41:10	argued 28:20 34:13 35:8,25 36:9 38:8	attacks 4:15 5:4 5:17 11:7 30:16	based 18:21 19:6 25:24 44:16 46:12,13
adequate 37:2	allowing 35:15	argument 2:5 3:2,6,10,13 4:3 4:6 13:10,11 13:12,14,15 14:13 16:12	attempt 46:14	basis 24:5,10 36:21,24 46:1 46:8
adequately 10:16	altering 46:21 49:22		attempts 12:17	beat 25:15
adjudicated 15:15	alternative 5:9 8:8		attention 14:10	
Administrative	amended 27:16			
	analysis 21:10			

<p>began 24:23 behalf 2:9,11,13 3:4,8,12,15 4:7 18:12 27:22 48:22 behavior 22:10 believe 10:20 11:5 28:14 34:5 35:12,20 36:13,16 39:3 40:8 43:2 believed 18:19 believing 34:2 best 8:15 17:19 32:6 33:12 better 13:23 33:9 beware 16:13 beyond 6:9 28:12 46:2 big 16:11 35:3 bit 43:21 Bivens 4:24 5:1 5:23 13:11,16 13:18 15:16,17 16:8,13 17:5 17:20 18:2 24:24 26:6,8 26:23 27:8 28:11,15,18,23 29:3,4,11,21 29:22 30:1,24 31:3,10 32:15 32:21 33:11 35:21 39:13 41:4,4,10 46:20,20,25 47:24 49:20,21 50:4,5 blank 34:22,23 50:5 blind 21:21 blunderbuss 22:5 46:14 blush 47:11 bomb 9:7,7 bond 14:23</p>	<p>BOP 18:20 19:2 19:7 42:4 bottom 25:2 boy 26:1 breath 11:18 Breyer 8:18,22 8:24 9:3,6 10:18,22,24 11:2 12:1 15:21 16:18,20 16:24 17:2 22:14,24 23:6 23:9 26:21 27:1,3,8 34:12 35:8,18 44:24 45:10 50:4 briefed 39:24 bring 31:24 brings 42:23 broad 17:25 broader 6:6 51:7 broadly 14:7 brought 22:2 27:11 Bureau 41:25 business 26:17</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>C 3:1 4:1 calibrating 17:8 called 35:24 calls 49:11 careful 29:16 44:14 Carlson 29:9,14 41:11 carry 25:18 case 4:4,11 5:21 6:1,3,4 7:14 13:5 16:21 17:13 18:14,19 24:24 26:23 27:6,14 29:11 30:10 32:15 33:1 35:9 36:2 36:3 38:10</p>	<p>39:19 40:8 45:20 50:21 53:5,7 cases 25:12 26:13 35:18 39:12 cause 29:21,23 48:13 caused 21:7 causes 32:15 cautionary 16:9 cells 42:5 Center 40:19 41:21 certainly 13:4 32:13 40:19 chain 25:2 challenge 14:8 18:2 32:7 37:20 45:14,16 45:19,20 47:10 50:7 challenged 26:7 challenging 30:25 chance 48:8 change 52:15 Chappell 14:4 characteristics 46:3 charge 21:14 check 34:22,23 50:5 Chief 4:3,9 13:10 14:12 18:5,10 25:14 27:19,23 28:8 28:13 30:13,20 31:15 33:3,22 34:16 40:11 47:8 48:19,24 52:24 53:5 choice 25:18 circuit 4:18 7:8 8:5 12:13 20:16,18 23:19 35:21,22 37:21</p>	<p>39:21 40:9,24 40:25 41:14 48:12 50:22 52:20 Circuit's 21:10 circumstances 4:14 18:19 cited 40:9 citizens 15:24 claim 6:14,14,15 12:13 21:1 27:11 28:16,22 29:1 32:5 35:16 38:10,10 38:11,12,25 40:3 41:18 47:15 48:5,12 50:24 claiming 22:13 claims 15:15 23:22 25:8 28:23,25 29:4 41:5,7,19,22 class 7:3 17:16 36:22 classifications 18:17 19:21 clear 5:15 9:2 13:4 37:12,19 37:21 50:19 51:2,13,14,21 cleared 8:14 11:17 13:2 18:22 25:25 30:21 46:11 clearing 24:16 clearly 5:15 11:21 19:25 24:16 46:25 48:14 52:19 clearly-establi... 33:2 34:8 clients 52:5 close 50:25 51:24 coherent 25:4 Coleman 29:11</p>	<p>come 7:17 32:16 coming 34:8 command 25:21 commissioner 13:8 17:15 committed 13:22 20:25 communicated 25:17 compelling 39:2 compensation 16:12 17:11,14 competence 14:1 26:11 31:12,14 competency 32:4 complaint 6:20 6:21 7:18 14:22 20:20,20 21:11 22:3 23:9 24:1 27:16 30:3 36:17 43:14 44:23 49:4 complaints 21:17,24 completely 37:6 concede 42:16 concern 34:1 concerns 15:19 15:20 30:23 concluded 4:16 condition 52:8 conditions 6:4 7:2,6,7 8:1 9:17,19 12:7,9 12:10,15 18:14 18:17,21 19:3 19:11,15,20 20:13 22:20 23:1,7 24:8,9 25:24 26:4 29:4 37:14,18 37:20 38:11,14 41:20 42:1,4 42:10,16 46:6</p>
---	--	--	---	--

46:17 51:5,5 52:3,4,5 condoned 12:20 conduct 19:6 20:9,24 26:7 47:16,17 confinement 8:1 12:7,10 18:17 28:2 37:14,18 37:21 38:14,16 38:20 41:21,23 42:2,6,7,14 46:6,17 51:5 52:3,6 confusion 49:3 Congress 5:5 13:23 14:3,7 14:11 15:4 17:10 24:25 25:6 26:12,20 29:17 31:11,19 31:23 50:14 congressional 13:23 15:6 connected 9:10 52:14 connecting 19:12 43:21 connection 10:1 21:12,12 38:21 42:12 43:5 52:2,5 connections 19:21 consequences 25:1,3 consider 6:7 32:6 considerable 35:1 considered 41:7 49:22 conspiracy 40:6 51:19 conspire 39:14 39:23 40:14 50:20	conspired 40:1 40:21 Constitution 32:3 constitutional 6:16 10:15 13:2 31:17 32:5,6 33:2,14 42:10 constitutionali... 47:10 content 52:17 context 7:14 14:2 15:18 16:25 17:7 20:2 26:9 29:3 30:25 31:6,7,8 41:10 44:19 continue 22:22 42:7 continued 22:20 continues 21:17 continuing 4:22 contours 28:12 core 4:17 10:12 12:13 14:4,22 30:2 31:12,14 52:20 corporate 50:20 correct 28:13 29:9 30:19 34:11 41:16 corrections 49:2 correctly 34:22 35:17 counsel 24:24 27:19 37:24 48:19 52:24 country 28:1 37:13 course 7:21 12:24 26:22 32:2 35:21 47:4 court 1:1 2:5 4:10 5:5,7,20 5:24 6:7 7:9	13:22 16:3 17:8 18:1,11 18:15 19:24 20:5 24:25 26:10 27:24 28:3,15,16,17 28:19,20,21,23 29:3 30:6 31:18 32:3,14 32:16,16,18,20 34:21 37:14,25 38:1,1 39:24 40:23 47:1,25 48:2,4,16 50:7 50:7,13 53:1,2 courts 20:23 25:6 26:17,20 37:7 Court's 5:22 14:4 31:12,14 create 29:21 34:7 created 7:6 42:1 creates 32:24 33:23 creating 26:18 26:18 28:6 32:24 47:18 creation 46:25 47:2 crisis 33:8,10 critical 7:13 20:19 current 47:16 currently 47:15 custody 9:18 45:2 cut 17:20 26:23 cutting 16:13 <hr/> D D 1:11 4:1 daily 36:19 damages 5:4 18:16 20:24 21:2 22:13 28:10 31:1,24	32:8 35:14 47:13 50:11 dangerous 5:13 8:17 date 23:25 49:4 49:4,14 Davis 28:24 day 10:8 12:2 25:16 42:6 46:10 days 10:8 dealing 32:2 dealt 10:16,17 decide 13:24 20:5 25:7 46:4 decided 15:23 52:20 deciding 8:10 decision 4:20 5:10 8:5,9,13 8:21 10:15 11:12 12:14 26:11,12,20 49:5 51:10 52:9,19,21 decisionmaker 7:16,18 decisions 5:3 13:19 14:4,7,8 14:9,10 17:6,6 18:2 20:2 24:17 defendant 5:16 defendants 4:12 5:14 22:17 50:17,18 defense 15:22 deficiencies 5:7 degree 43:10 deliberate 41:15 41:18 deliberately 21:19 41:8 denial 29:12 denied 48:3 DENNIS 1:20 Department 2:9	departure 31:3 depend 42:13 dependent 42:17 depends 40:16 deported 14:24 46:11 deprived 41:23 41:23 described 23:19 designation 43:2 43:4 44:4,16 designations 18:22 25:25 26:15 desire 8:16 detailed 23:19 36:19 44:17 details 38:13 detain 30:16,20 37:17 detained 30:17 45:15,17,17,21 52:1,15 detainee 5:18 37:11 detainees 4:21 4:23 5:11 18:21 22:19 24:13 37:3,23 38:2,6 43:3 49:11 detention 9:16 10:14 21:14 37:16 40:18 41:21 45:20 detentions 31:8 36:20 46:16 deter 16:10 46:25 47:2,16 47:18 48:16 determination 24:12 26:8 32:11 47:21 determinations 7:24 19:23 20:4 24:15 30:8 31:9,10
---	---	--	--	---

determine 38:1 40:1 43:10 46:8	distinction 28:25	34:14	experts 24:19,20	29:8
determined 18:23 30:5 44:4	distinguished 28:16 36:2	ensuring 19:19	explain 24:4 46:23	fair 36:17
determines 26:10	distinguishes 36:3	enter 33:12	explained 8:6,15 44:3	fairly 9:23
determining 19:20	district 6:7 7:9 16:3 37:7 39:24,25 40:23 41:1	entire 38:3 39:6	explains 36:14 44:8	familiar 29:2 41:9
deterrence 17:9 35:5	doing 26:5 34:18 40:15,15 47:12 49:24	entity 40:13,14	explanation 5:9 8:9	fanciful 45:11
detering 28:6 32:21	DOJ 29:25 36:4 36:10 38:3,8 38:13,23 41:6 50:17	entity's 49:22	explicit 28:10	far 34:24,25 35:4
develop 16:5	double 20:3	equal 6:14 28:22 28:24 29:1 38:12	exploring 30:12	fast 35:4 48:2
developed 9:14 40:23	doubt 9:2 21:23 21:23	equation 32:20	extended 5:2 13:17 26:9	faster 26:1
difference 19:5 19:6	due 6:13,15 38:10,25	especially 24:14 26:13	extraordinary 4:14 15:17 31:2	favor 9:21 39:20 40:6,10
different 31:16 41:5 51:17	D.C 2:1,9,11	ESQ 2:8,11,13 3:3,7,11,14	extension 13:18 15:16 28:15,18 35:21,23 49:19	FBI 9:13 17:15 18:16,21,22 19:11 20:4,10 24:13,14,18 25:3,9,12,16 25:24,25 26:1 26:14 33:6 36:21 39:7 42:11,22 43:9 43:10,13,18 44:4,9,19,21 44:24
differently 28:21	E	essentially 4:12 14:23	extraordinary 4:14 15:17 31:2	FBI's 19:23
difficult 11:11	E 3:1 4:1,1	establish 20:25	extraordinary 4:14 15:17 31:2	February 24:2,2
difficulty 23:12	early 8:21	established 5:15 11:21 19:25 24:16 40:7 52:19	extraordinary 4:14 15:17 31:2	federal 28:6 32:22,23 33:24 40:20 46:6 50:23
dilemma 10:17	easiest 5:20	ET 1:6,12,15,20 1:23	extraordinary 4:14 15:17 31:2	feet 26:3
direct 7:3	effect 16:9	eventually 37:23	extraordinary 4:14 15:17 31:2	fellow 20:1
directed 18:20 19:2,7 20:9	effective 17:14	Everybody 46:11	extraordinary 4:14 15:17 31:2	figure 11:18 52:11
directly 28:20	effort 33:25	evidence 9:14	extraordinary 4:14 15:17 31:2	file 15:13
director 12:19 13:8 17:15 33:6,6	eight 8:19,25 9:12 10:8 11:2 11:8 45:18 46:7,7	exact 11:1 15:19	extraordinary 4:14 15:17 31:2	filed 37:5,10,11 37:23
disagree 30:22 42:25	either 31:11 37:22	exactly 23:11 27:6 41:12 50:12	extraordinary 4:14 15:17 31:2	finally 23:25 24:22 37:23 48:5
discipline 27:17 27:17	eliminate 50:24	examination 31:13	extraordinary 4:14 15:17 31:2	find 16:6 35:10 45:1
discovery 10:10	emergency 34:18 45:22	example 16:20 44:18	extraordinary 4:14 15:17 31:2	first 5:1,24 9:9 10:21,22 12:16 16:16 33:23 47:11 49:2,19
discrimination 28:17 29:11	encountered 44:19	excessive 38:25 48:17	extraordinary 4:14 15:17 31:2	five 10:5,8 15:25
discriminatory 8:7 11:20 36:16 52:17	enforcement 9:9 47:6	exercise 41:24	extraordinary 4:14 15:17 31:2	
discussing 13:14	engage 35:22	exercised 30:4,9	extraordinary 4:14 15:17 31:2	
disparate 40:20	engaged 32:16	exercises 48:17	extraordinary 4:14 15:17 31:2	
disposal 45:23	enormously	exert 6:25	extraordinary 4:14 15:17 31:2	
disputed 8:2		exist 12:21 46:6	extraordinary 4:14 15:17 31:2	
		existence 5:22 47:22	extraordinary 4:14 15:17 31:2	
		expert 19:19	extraordinary 4:14 15:17 31:2	

<p>floor 45:1,6 folks 12:10 14:21 follow 51:14 following 41:25 food 25:2 foreclosed 4:17 6:13 FORMER 1:11 forming 33:18 formulated 4:18 Forsyth 31:6 forth 10:10 forward 41:10 41:19 found 8:5 11:12 33:20 35:21 39:2 50:1 four 15:25 24:2 48:20 frame 23:16 freely 32:14 friend 33:4 35:25 36:9 38:8 50:10 frightening 35:3 front 37:12 FTCA 27:11 fully 4:22 10:17 11:13 34:13 35:8,11,20 40:23 further 29:17,18 39:13 48:18 52:23 future 28:6 47:3 47:16,18 48:17</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>G 4:1 gather 46:14 gender 29:11 general 1:12 2:8 4:9,20 6:5 7:15 7:15 8:9,20,23 9:1,4 10:11,20 10:23,25 11:4</p>	<p>11:12,24 12:8 12:14,18,24 13:7,13 14:19 15:12 16:15,19 16:22,25 17:3 17:6,14,23 18:5 20:10 24:23 33:6,16 34:6 37:10 38:19,22 39:9 47:18 48:20,24 49:13,16 51:9 51:16,18,25,25 52:25 53:2,4 generally 23:13 23:16 Gershengorn 2:8 3:3,14 4:5 4:6,9 6:5 8:20 8:23 9:1,4 10:11,20,23,25 11:4,24 12:8 13:13 14:19 15:12 16:15,19 16:22,25 17:3 17:23 48:20,21 48:24 49:13,16 51:16,18 52:25 53:4 getting 48:4 Ginsburg 5:25 11:23,25 15:8 18:23 20:8,15 21:13 22:8 37:2 41:13 49:7,12,14 give 29:8 37:8 given 5:10,22 24:14 go 16:1 21:17 24:7 29:17,18 34:24 35:9 39:12 41:10 goes 20:2 41:18 44:24 going 11:18 21:15,21 25:11</p>	<p>26:16 33:7,12 33:14,15,15,19 35:2 37:8 good 35:5 49:24 good-faith 33:25 gosh 33:14 gotten 25:10 government 28:7 32:10 40:12,13,20 48:17 government's 25:4 37:10 45:23 granted 24:9 Green 41:11 grievance 21:25 grounds 28:5 group 6:25 36:13 45:25 46:4 51:8 52:10 guard 23:4 guards 20:14 22:25 27:15 guess 16:16 31:15</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>H 2:8 3:3,14 4:6 48:21 habeas 14:17 15:1,9,13 16:1 27:10 37:9,16 37:20,22 hand 32:19 34:15 happen 16:14 45:12 happened 23:2 happening 22:6 35:3 38:2 44:7 happens 27:6 harsh 22:20,22 23:7,12,14 36:6,15 38:4 Hasty 1:20</p>	<p>18:12 19:4,7 19:13,18 20:24 21:3,8,24 22:6 23:23 24:5 41:8,14,14,19 41:20 head 44:7 headquarters 43:15 hear 4:3 heard 28:15 held 7:8,9 8:24 9:1 12:6,9 19:22,24 39:21 40:21,24 41:22 44:10 hesitation 24:25 highest 17:21,23 highly 19:10 high-level 40:17 hijackers 46:3 hindsight 12:18 52:12 historic 16:20 28:3 hold 4:12 8:13 11:17 12:2 13:2 18:15,20 23:16 39:11 46:16 holding 14:23 24:5 hold-until-cle... 4:23 8:14 52:10 Honor 6:5 7:12 10:11,25 11:4 12:8 13:13 15:12,20 16:15 16:17 17:11,24 19:1 20:11 24:8 25:20 26:6 27:5 29:23 30:19 Honor's 15:1,2 17:4 hook 17:16 38:9</p>	<p>hours 42:6 house 44:25 45:3,8 hypo 17:4 hypothetical 26:22 27:4</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>IAN 2:8 3:3,14 4:6 48:21 idea 14:14 32:3 46:24 52:12 identified 5:8 6:3 identify 52:13 ignores 51:8 ill 24:18 illegal 14:24 illegality 26:7 illustrate 23:20 ill-equipped 50:13 immigration 5:2 13:19 15:18,19 16:23 22:19 28:3 30:2,18 44:20 46:9,16 immunity 13:12 13:15 18:13 19:18 24:9 25:22 33:23 48:10 50:18,24 51:22 impermissible 19:10,14 impermissive 19:14 implementation 19:3 30:15 implemented 7:10 implementing 31:2 32:8 implicate 25:13 implicates 25:12 26:15 implied 31:22</p>
--	---	---	---	--

imply 33:11	infirm 33:20	interested 44:21	judge 6:7 16:3	J.A 49:8
implying 32:14	information	international	41:6 51:10	<hr/>
important 34:14	9:25 16:5	19:21 24:20	52:16	K
42:24 44:2	19:12 26:16,19	intervene 21:4,5	judges 4:16	keep 10:2 32:18
importantly	43:10,13,16,17	21:7	34:20	38:6
37:16	43:21,24 44:18	intrusive 35:14	judgment 15:6	keeping 23:5
impose 12:17	44:22,25	investigate	17:10 30:9,10	38:16
19:10,15 25:23	initial 51:3	45:22	50:13 52:16	Kennedy 17:18
38:4	initially 12:2	investigated	judgments 30:4	21:18 29:7,10
imposed 5:5	injunction 18:3	45:16	47:23	29:15 37:1
36:6 51:6,7	injunctive 18:3	investigating	judicial 27:9	39:11,16,20
inadvertent 5:12	20:20 35:15	46:13	47:20 48:8	40:5 41:11
8:16	37:5 47:9,14	investigation	Justice 2:9 4:3,9	49:20 50:15
incentives 34:7	47:15 49:23	7:22 17:1	5:25 8:18,22	51:12,17
include 28:9	50:8	38:22 39:10	8:24 9:3,6	kept 9:18 38:18
including 9:18	injured 21:6	43:6,15,19	10:18,22,24	Khalifa 44:18
49:9	22:1,4	44:5,11,14,20	11:2,23,25	killed 9:8
inconclusively	injuries 21:7	invidious 8:15	12:1 13:10	kind 31:13
39:24	22:12	invoked 14:20	14:12 15:8,21	knew 7:23,25
incorrect 50:6	innocent 20:6	involved 7:20	16:18,20,24	9:13,24 16:6
incredibly 34:3	inquiry 32:17	12:19 51:20	17:2,18 18:5	19:13 21:3,4
42:14,15,24	INS 4:22 9:18	Iqbal 1:6,15,23	18:10,23 20:8	45:6,7 51:25
indifference	17:15 33:6	4:11,17 5:8,21	20:15 21:13,18	51:25
41:15,18	44:8	6:13 13:15	22:8,14,24	knocked 21:15
indifferent 41:8	inspection 21:19	28:16 29:1	23:6,9 25:14	know 10:6,7
individual 18:15	instances 13:3	36:2,3 38:11	26:21 27:1,3,8	12:2,24 16:13
20:13,24 22:1	16:7	38:12 51:1	27:19,23 28:8	22:22 25:16
25:1,25 26:3	institution 23:18	Iqbal's 28:16,22	28:14 29:7,10	33:15 38:23
27:15 31:24	24:5 44:1	isolation 38:17	29:15 30:13,20	44:13 45:5,8
32:21,25 33:17	institutional	issue 28:20 41:7	31:15 33:3,22	45:10,18 46:1
44:10,10 47:5	13:25 26:11	<hr/>	34:12,16 35:8	46:21 47:6
47:12	32:4	J	35:18 37:1,2	48:6 52:7
individualized	instruct 39:12	jailer 18:18	39:11,16,20	knowing 36:7
6:18 7:24 8:3	insulated 47:20	24:11	40:5,11 41:11	known 36:10,11
12:11 42:8	intelligence	jailers 18:15	41:13 42:9,17	<hr/>
51:7 52:6	26:16,19	19:19 20:3,4	42:20 43:7,17	L
individuals 6:17	intent 8:6,7,15	24:17,19 25:1	44:24 45:10	lack 39:7
7:1 12:15	36:16 52:17,18	26:3	47:8 48:19,25	lacks 32:3
15:13,14 19:12	intentional	JAMES 1:3	49:7,12,14,20	Lamken 2:11
25:9 26:2	23:17	January 2:2	50:4,15 51:12	3:7 18:6,7,10
30:17,21 31:1	interacting	16:2	51:17 52:24	19:1 20:11,17
32:7 36:23	22:16	JEFFREY 2:11	53:5	21:22 22:11,24
38:16,20 42:11	interagency	3:7 18:7	justification	23:8,11 25:20
48:2,13 52:13	51:19	job 26:4 34:25	16:8	26:25 27:2,5
infer 52:17	interest 32:19	jobs 40:15	justified 12:5	27:10
inference 11:20	39:7,7,10 44:5	JOHN 1:11	45:2	largely 15:14
36:15	44:6,10,11,13	Joint 49:17	justifies 48:10	law 9:9 19:25

<p>24:16 28:3 34:8,21 44:21 47:6 49:18 50:21 lawful 8:1,2 12:10 18:19 34:2 38:2 lawfully 7:10 51:6 lawfulness 26:7 lawlessness 50:5 lawsuit 26:17 27:15 lawsuits 26:18 lawyer 15:10 learned 22:4 36:20 leave 52:25 left 19:4 31:11 legal 37:4 49:10 49:10,11 legality 37:15 legally 52:1 legitimate 28:5 29:19 30:11 length 51:4 less-intrusive 50:12 let's 11:18 14:15 15:23 level 17:21,24 18:23 levels 40:20 liability 4:19,19 4:24 21:1 liable 4:13 19:22 22:6 23:13,17 24:6 50:2 liaison 43:15 lights 42:5 linchpin 25:8 link 8:12 list 4:19,21,22 5:6,10,11,12 5:19 6:2,2 7:12 7:20 8:5,11,20 11:13,14 12:25</p>	<p>13:1 23:10 37:12 39:3,4,5 39:6,8 43:9 lists 4:23 5:16 list-merger 10:15 49:5 52:19,21 little 44:16 local 9:19 location 26:9 lock 15:24 locked 15:10 long 10:18 13:3 35:11 45:4,13 45:19 49:23 longer 9:1,4 look 6:19 14:15 16:8 30:7 31:20 35:9 37:7 looked 7:14 32:17 looking 45:3 lot 10:3 20:21 22:6 45:23 lots 27:13 lower 17:21 low-level 40:18</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>mail 49:11 maintain 26:4 maintaining 24:20 majority 4:18 6:8 8:5 41:14 making 24:15 24:17 33:7 Malesko 18:1 49:20 marks 4:11 massive 49:19 matter 2:4 13:25 53:8 max 24:3 maximum 6:25 38:5</p>	<p>MDC 7:3 22:16 41:3,24 42:25 43:16,21 44:15 49:9 mean 10:2,6,8 14:14 27:1 31:21 34:14 45:4 meaning 44:3 means 25:10 34:24 49:24 meant 44:5,16 medical 29:8,12 29:13 Meeropol 2:13 3:11 27:20,21 27:23 28:13 29:9,14,22 30:19 31:5 32:13 33:21 35:7,12,19 37:9 39:15,19 39:21 40:8,16 41:12,16 42:13 42:19,23 43:12 43:23 45:9,14 47:14 members 7:3 men 39:5,6,8 41:22 43:5,16 43:25 44:13 45:15 merely 22:19 merge 4:21 13:1 merger 4:19 5:6 5:10,12 7:12 8:5,10,21 39:3 merging 5:16 6:1 met 6:22,24 meted 27:17 Metropolitan 40:18 41:21 Miller 29:12 minutes 48:20 misconduct 21:4 21:23 23:4</p>	<p>32:22 missing 21:9,10 21:25 23:2 misspoke 41:17 mistake 16:11 mistaken 34:3 Misters 18:12 Mitchell 31:6 moment 22:3,9 46:19 money 27:13 32:11 month 37:5,5 months 8:19,19 8:25 9:12 10:8 10:21,22,24 11:3,8 12:5,5 22:16 28:2 41:9,23 45:18 46:7,8 53:3 morning 4:4 move 37:11 Mueller 6:22,24 7:6 9:13,17 10:13 12:19 13:8 Muslim 27:25 46:14 Muslims 36:5</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>N 3:1,1 4:1 national 5:2 13:19,21,22 14:2 15:17,20 17:5,7,25 25:5 30:2,3,7,9,15 30:25 31:5,7,8 32:5,9 33:25 34:18 39:4 44:8 45:22 47:19,21 48:14 necessarily 43:20 necessary 16:10 16:10 34:19 need 25:11,13</p>	<p>45:22 needed 21:4 never 16:13 24:4 48:8 49:21 new 2:13 4:21 5:11,19 6:2 7:19 26:9,9 29:5,21,22 39:3 44:7 nexus 7:25 night 23:5 noncitizen 28:1 noncitizens 15:24 46:15 nondiscrimin... 38:23 noninvidious 5:9 normal 47:9 norms 33:2 Nos 2:10 3:5,16 4:8 48:23 note 53:1 noting 28:23 November 49:6 nuclear 44:25 45:11 N.Y 2:13</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 3:1 4:1 obvious 5:9 8:8 occur 27:14 occurred 21:23 48:1 occurring 47:17 48:9 occurs 23:14,17 October 11:5,5 11:6 12:5 odd 14:13 oddity 15:2 offers 35:5 officer 20:1 32:22 officers 20:1 offices 9:19</p>
--	---	---	--	--

<p>official 18:14 23:1 24:7,8 25:14 32:23 41:20</p> <p>officials 5:3 6:25 11:9 17:21,22 17:24 28:6 33:24 39:14,22 40:13,13,17,18 40:19 41:5 47:13 50:19,23</p> <p>of-interest 44:3 44:15</p> <p>oh 46:10</p> <p>OIG 13:4 14:11 27:7,16 36:17 44:2,7 49:5</p> <p>okay 9:24 17:2 32:4 35:6 52:6</p> <p>old 33:9</p> <p>ones 15:20 52:7 52:8</p> <p>ongoing 22:9 47:4</p> <p>open 34:15</p> <p>opportunity 37:15 38:1 48:15</p> <p>opposed 23:1</p> <p>oral 2:4 3:2,6,10 4:6 18:7 27:21</p> <p>order 20:25 21:20 38:15,20</p> <p>ordered 9:17 39:9 42:4</p> <p>orders 41:25</p> <p>ordinarily 18:3</p> <p>original 28:12</p> <p>outset 35:16</p> <p>outside 24:3 31:12 37:4 38:7,18</p> <p>overdeter 34:18</p> <p>overdeterrence 14:1 17:9 33:5</p> <p>overlooked 20:19</p>	<p>overturn 18:16 19:23 20:1,3 24:13</p> <hr/> <p style="text-align: center;">P</p> <hr/> <p>P 4:1</p> <p>page 3:2 6:22 7:2 18:1 49:8 49:17</p> <p>panel 6:8 39:2 40:9</p> <p>paragraph 6:24 7:1 9:15 22:15 22:15 23:18 24:1 36:18 38:6,15 43:14</p> <p>paragraphs 6:20</p> <p>paramount 34:1</p> <p>part 21:25 30:11 33:17 38:3</p> <p>participation 13:16</p> <p>particular 18:13 20:2 21:20 22:9 23:16 43:11 52:13</p> <p>pay 32:11 33:20</p> <p>pays 21:1</p> <p>Pent-Bomb 7:22 52:2</p> <p>people 9:8,25 11:14 12:2,6 14:14 15:23 16:4,5,6 20:5,6 22:17 23:5 24:16 30:16 31:23 32:7 33:8,18 34:18 37:17 38:18 39:6 43:20,22 45:6 46:1,4 51:6</p> <p>period 45:19 48:4</p> <p>permissible 19:3 25:24</p> <p>persist 12:5</p>	<p>person 43:11 45:3 51:10</p> <p>personal 13:15</p> <p>personally 17:16 23:23 50:2</p> <p>perspective 19:17,18 51:8</p> <p>petition 6:23 37:20</p> <p>Petitioner 1:4</p> <p>Petitioners 1:13 1:21 2:10,12 3:4,8,15 4:7 18:8 27:25 29:6,25 36:5 36:10,10,12,19 38:3,9,13,23 41:3,6,24 43:1 44:15 48:11,22</p> <p>petitions 15:13 37:10,11,16,22 37:25</p> <p>physical 41:9</p> <p>pick 9:10 10:1</p> <p>picked 7:21 48:7</p> <p>pinpoint 22:8,12</p> <p>place 12:16 28:5</p> <p>placed 7:3 13:24 28:1 46:5</p> <p>Placement 42:13</p> <p>places 29:16</p> <p>plaintiffs 4:12 4:17 9:15 12:22 21:6 22:1,16 25:11 27:12</p> <p>plausibility 19:17</p> <p>plausible 20:25</p> <p>plausibly 48:11</p> <p>play 28:4 30:10 30:11 47:25 48:1</p> <p>pleading 5:7,21 51:1</p> <p>please 4:10 18:11,11 27:24</p>	<p>podium 36:1 53:1</p> <p>point 9:20 15:15 27:4 30:14 31:15 33:4 39:18 40:6 42:24 46:22 50:16 51:12</p> <p>pointed 12:1 35:2 37:3</p> <p>points 17:4 29:20 49:1,18</p> <p>policies 15:4,5,5 17:12 47:3,4</p> <p>policy 4:23 5:2 6:17 7:9 8:15 10:14,19 11:17 12:20 13:1,19 14:7,8,9,10 15:18 17:6,6,7 17:25 18:2 25:15,17,19 28:7 30:2,15 30:23 31:1 32:5,9,24,25 33:17,19,20 34:7 36:5 38:4 44:16 46:12,21 47:1,10,19,20 47:22 48:15 49:23 50:1,3,8 51:10 52:10</p> <p>population 38:19</p> <p>portion 21:20</p> <p>posed 43:25</p> <p>poses 46:4</p> <p>posing 35:13</p> <p>position 43:7</p> <p>positions 40:2</p> <p>possibility 16:11</p> <p>possible 12:6 26:18</p> <p>postdates 23:22</p> <p>potential 8:12 36:14 47:6</p> <p>potentially</p>	<p>26:15</p> <p>power 48:17</p> <p>powerful 33:24</p> <p>precedent 39:17 40:5,10 46:24</p> <p>precisely 23:20 25:5 26:19 31:13</p> <p>predates 23:22</p> <p>predecessors 27:12</p> <p>premature 5:13 5:18 8:16</p> <p>premising 4:19</p> <p>present 28:1</p> <p>presented 6:10 38:11 43:8</p> <p>presenting 13:11</p> <p>president 15:22 34:23</p> <p>pressure 6:25 38:5</p> <p>presumably 33:13</p> <p>presume 7:9</p> <p>pretty 16:3 31:24</p> <p>prevents 26:23</p> <p>previous 39:12</p> <p>prison 6:3 14:14 21:20 25:17 29:4 38:17</p> <p>prisoners 21:15 25:16</p> <p>Prisons 42:1</p> <p>private 28:10 32:15</p> <p>problem 17:5,12 23:20 34:17</p> <p>problems 10:6</p> <p>Procedures 14:16</p> <p>proceedings 37:4,5</p> <p>process 6:14,15 21:25 24:15</p>
---	--	--	---	---

38:10,25 produce 18:18 prolonged 9:16 10:13,13 42:14 promulgates 50:1 proper 49:22,24 properly 30:21 proposition 42:20 protect 33:25 47:5 protection 6:14 28:22,24 29:1 33:24 34:4 38:12 prove 23:23 25:11,11 proves 27:6 provide 34:6 provided 14:7 15:4,4 31:20 44:22 providing 43:16 proxy 30:11 pulled 26:16 punitive 7:2,6 39:1 pure 27:3 put 17:14 putative 7:7 8:6 52:17 p.m 53:7	quick 49:1 50:16 quickly 26:2 quite 13:17 15:17 35:10 quote 12:20 quotes 44:7	44:15,17 recognize 16:17 recognized 13:22 31:3 49:23 recommended 27:17 record 35:9 42:3 42:8 49:3 recovered 27:12 recurring 26:24 redressed 20:22 20:22 reemphasized 32:21 reestablished 49:10 referring 20:12 22:24 regularly 6:22 rejected 6:6 release 5:13,18 8:17 20:5 released 14:21 15:14 30:22 48:7 releasing 11:19 relevant 43:25 reliable 9:14 relief 20:21 21:1 35:15 37:8 49:23 50:9 religion 28:4 30:10 religious 28:17 46:3 relying 43:13 remand 39:25 remanded 40:25 40:25 remedies 14:24 27:9,13 28:10 31:3 37:2,6 remedy 5:1,4,23 13:16,24 14:8 14:18,20 16:9 31:19,19 35:5	35:14 47:24 49:21 50:11,12 51:14 removed 26:2 37:13 reply 35:25 report 13:4 27:7 27:16 36:17 49:5 reported 9:19 9:20 reports 36:19 republic 34:6 50:12 required 7:7 28:18 35:22,23 39:25 requirement 12:18 requires 19:25 24:17 28:14 38:16,20 reserve 18:4 resolve 5:21 respect 13:21 14:6 17:3 18:14 24:8,23 26:6 27:14 42:22 50:15 51:18 respond 11:10 33:8 Respondents 1:7 1:16,24 2:14 3:12 19:15 22:13 24:3 27:22 29:2 36:4,7,18,21 42:5 response 25:4 30:15 32:10 37:10 responses 33:21 responsible 18:15 23:24 32:8 47:13 rest 9:11	restraint 28:11 30:24 restricted 37:24 restriction 18:24 18:25 restrictive 9:16 9:18 12:9,15 18:21 19:2,10 22:20 23:6 25:24 37:14 38:14 42:15 46:5,17 52:3,5 result 7:3 19:14 21:6 return 4:11 review 15:4 22:2 42:8 47:20 reviewing 48:1 right 5:15 7:8 11:21 16:1,1 17:13 20:15 26:14 30:18 37:17 51:15,20 rights 31:22 risk 14:1 risking 5:18 risks 26:18 road 11:8 ROBERTS 4:3 13:10 14:12 18:5 25:14 27:19 28:8 30:13,20 31:15 33:3 40:11 47:8 48:19 52:24 53:5 role 28:3,8 40:17 48:1 rooming 44:24 45:3,8 routine 21:19 rule 37:15 47:1 ruled 37:25 run 13:5
<hr/> Q <hr/> qualified 13:11 13:14 18:13 19:18 24:9 25:22 33:23 48:10 50:18,24 51:22 question 5:23 6:9 31:7,18 34:15 35:10,13 35:17 39:22 questions 46:20 48:18 52:23	<hr/> R <hr/> R 4:1 race 28:4 30:10 RACHEL 2:13 3:11 27:21 racial 46:2 Raggi 51:11 raise 11:20 15:19 raised 6:6 raising 36:15 ran 24:25 reaction 9:9 read 9:23 20:19 28:25 reading 36:17 real 7:11 14:2 26:22 34:17 realized 22:18 really 7:12 15:17 17:13 28:9 41:3 46:24 real-deal 10:10 reason 6:11 9:21 13:25 36:7,13 36:22 38:24 43:2 reasonable 5:16 18:18 24:11 42:11,22 reasonableness 52:15 reasonably 34:19 reasons 4:25 REBUTTAL 3:13 48:21 receive 14:10 received 36:19	<hr/> S <hr/> S 3:1 4:1		

saw 12:13	5:4 49:9,11,16	26:12,19 33:9	suggests 13:4	tended 20:19
saying 9:23	serious 17:11	40:1	49:5 50:11	terms 25:21
17:19 24:10	47:6	special 24:24	51:19	31:20
25:1 35:2	served 24:18	32:18	superiors 41:25	terrorism 6:18
says 9:17 22:3,5	service 53:2	specific 17:1	SUPPORTING	7:25 8:13 9:15
22:15 25:23	set 14:10 35:18	19:3 23:3	18:8	9:22 11:14,15
49:8	38:13	specifically	suppose 10:5,5	12:23 18:16
scope 6:9 24:24	setting 30:1	22:25 50:22	15:21 47:8	19:12,22 24:12
second 4:18 5:6	settlement 27:13	squarely 4:17	supposed 14:15	24:20 26:14
7:8 8:4 11:22	shape 31:18	6:12	45:12	36:8,12,14,22
11:24 12:13	32:9	Stanley 14:5	Supreme 1:1 2:5	36:25 38:21,24
20:16,17 21:9	shaping 28:9	start 5:24 16:4	sure 30:13 34:10	42:12 43:1,3,6
23:19 34:5	sharing 46:2	state 10:3 44:9	41:2 42:24	43:20,22 46:2
37:21 40:9	Sherman 18:12	stated 39:7	survives 7:11	52:14
41:14 50:22	19:4,8,13,19	statement 43:1	suspect 9:21	terrorist 4:15
52:20	41:8,15,20	states 1:1 2:5	36:7,21,25	5:13 8:17 25:5
second-guess	short 49:2	38:24	38:24 46:1,9	terrorists 12:3
20:1 25:3	show 21:2 23:23	status 5:11 7:21	suspected 46:18	22:19 46:18
second-guessing	side 32:20 33:4	30:18 52:1	suspicion 6:18	tested 24:25
16:4	34:9 50:10	statute 51:20,21	7:24 8:3 12:11	Thank 18:5,10
secretary 15:22	51:2	statutes 31:22	28:5 30:11	27:18,19 48:19
17:17 49:25	sides 35:6	staying 32:18	42:11,22 46:13	48:24 52:24
Section 39:13	simplest 31:20	stepped 32:14	51:7 52:7	53:4
secure 19:19	simply 21:11	stop 47:15	system 12:4 20:5	thanks 53:1
26:4	24:10 48:2	stopped 47:4	27:9 38:17	theory 4:17,19
security 5:2	single 45:3,25	48:6	46:7	5:6,21 6:6 7:11
13:19,21,22	sitting 33:7	strategy 7:4		7:12,13 27:25
14:2 15:18,20	situation 7:14	strikes 14:13	T	thing 12:1 20:19
17:5,7,25	8:4,13 11:11	subject 29:16	T 3:1,1	25:6 34:13
19:21 24:21	11:16 17:10	48:14 50:18	take 11:17 15:1	35:3
30:2,4,7,9,15	30:6 35:15,24	52:8,10	15:1,23 21:19	things 5:8 13:5
31:6,7,8 34:1	39:4 47:24	subjected 42:5	22:17 28:4	16:16 20:21
34:20 44:8	48:3 51:22	submit 12:14	34:10 46:7	21:14 22:6
45:22 47:19,22	52:9	29:23 31:13	taken 47:7	25:10,12 33:12
48:15	six 24:3	51:8	talking 11:7	think 5:20 6:8
see 10:7 32:17	sleep 41:23	submitted 53:6	22:18 37:1	6:11 7:11,13
34:8 35:6	small 6:25	53:8	51:1,2,3,4	8:20 9:10,23
seek 4:12	smoothly 13:5	substantial 34:4	tapping 23:4	10:12 13:16,20
sees 21:24	society 24:18	substantive 6:13	target 36:5	14:3,6,25
senior 5:3	solicitor 2:8	6:15 38:9,25	telephone 15:11	15:19 17:4,25
sense 19:16,17	24:23 53:2	sue 32:7	49:10	20:11,18 22:11
33:9 49:24	solitary 28:2	sued 33:16	tell 8:11 37:2	23:18 25:20
sensitive 25:13	38:16,20 41:22	suffers 5:6	telling 24:13	27:5 29:12,18
26:15 30:3,7	42:6,7,14	suggest 42:3	temporal 21:11	29:19 31:2
43:19,19 47:23	somebody 25:2	suggested 51:11	temporarily	32:6 34:14,16
sent 44:12	somewhat 14:13	suggesting 16:17	23:1	34:19,22 35:13
September 4:15	sort 11:10 21:1	50:21	ten 10:6 15:25	36:23 40:16,22

43:18 46:23 51:19,22 thinking 39:17 third 5:14 27:16 thought 6:2 41:13 threat 30:5 34:6 34:8 43:25 46:4 50:11 three 4:25 13:20 49:18 tie 36:12 ties 7:25 11:14 11:15 12:23,25 36:8,14,22,25 38:24 43:3 46:2 time 12:25 16:2 16:5 18:4 22:9 23:16 24:4 32:20 34:11,17 34:21 35:2,11 37:22 45:19 46:7 48:4 51:4 times 47:25 today 37:19 43:8 told 43:12,20,24 tools 45:23 tort 23:17 totally 26:23 45:11 tough 16:3 trained 19:20 treasury 17:17 49:25 treated 28:21 39:9 45:21 46:18 48:6 treatment 22:20 22:23 23:7,12 23:14 29:8,13 36:6,6,15 38:4 51:3 true 14:6 23:8 24:14 32:13 34:17 trying 11:10	turning 26:13 twisted 21:16 two 10:8 28:25 33:21 two-step 32:17 tying 9:15 type 25:6 31:8 47:21 <hr/> U <hr/> Uh-huh 35:7 unanimous 20:16,18 unauthorized 20:13 uncertainty 5:10 unclear 50:22 unconstitutio... 5:17 19:6 32:12,24 42:15 42:21 46:25 47:3,16,17,19 48:14 50:2,3 52:21 underdeterre... 17:9 understand 7:13 9:6,7,8 16:2,6 24:11 30:14 31:16 33:3 35:16 43:8 understated 12:17 understood 18:18 undertake 48:8 undertaken 5:12 undertaking 33:25 unit 38:19 44:8 50:20 United 1:1 2:5 unlawful 25:21 25:23 52:4 unofficial 20:12 22:25 52:4 unprecedented	13:18 unsuited 31:10 use 19:2 37:19 46:24 <hr/> V <hr/> v 1:5,14,22 4:4 29:12 31:6 41:11 valid 29:20 various 49:9 vast 40:21 vehicle 49:22 verbal 41:9 vetted 4:22 11:13 30:5 39:5 violate 11:21 33:1 violated 5:14 44:20 51:15 violates 34:7 violating 28:2 violation 16:23 28:22 30:17 46:10 violations 28:24 31:17 virtue 46:15 visits 49:8,10 vis-à-vis 40:3,17 <hr/> W <hr/> W 1:3 wake 4:14 5:3 5:17 walls 21:15 want 25:11,15 33:18 41:2 42:24 50:16 wanted 18:13 wants 31:23 warden 49:8,10 wardens 49:9 Washington 2:1 2:9,11 wasn't 17:18	37:21 46:11 51:13,14,15,20 way 5:20 17:13 18:1 25:2 28:25 30:25 32:6 38:17 43:8,9 45:20 47:1,12 48:5 50:6,7 52:7 weapon 44:25 45:11 Wednesday 2:2 week 19:24 weighed 32:19 went 8:18 35:4 weren't 8:22,24 20:21 we'll 4:3 9:10 we're 11:7 22:17 37:1,7 51:1 we've 13:14 28:10 29:16 33:18 whatsoever 16:8 21:12 28:15 willfully 21:21 wish 26:1 wondered 35:10 word 44:12 work 13:20 world 38:7,18 worried 16:21 17:2 worry 9:11 33:19 worrying 10:3 worst 12:6 wrong 20:6,21 25:10,12 33:15 wrongly 52:15 <hr/> X <hr/> x 1:2,8,10,17,19 1:25 <hr/> Y <hr/> yeah 10:23	16:24,24 20:17 years 10:5,6,8 15:25,25,25 16:4 31:21 York 2:13 4:21 5:11,19 6:2 7:19 39:3 44:7 <hr/> Z <hr/> Zenk 49:10 Ziglar 1:3 4:4 7:6 12:19 13:8 <hr/> 1 <hr/> 11 4:15 5:4 24:2 49:11 11:05 2:6 4:2 110 24:1 12:02 53:7 14 24:2 140,000 15:23 15-1358 1:4 2:10 3:5,16 4:4,8 48:23 15-1359 1:13 2:10 3:5,16 4:8 48:23 15-1363 1:21 2:12 3:9 18:9 18 2:2 3:9 1942 15:21 16:2 1985 40:3 51:13 51:14 1985(3) 39:13 50:15,19,23,24 <hr/> 2 <hr/> 2 37:5 2nd 49:6 20 49:9,16 20/20 12:17 52:12 2001 49:9,17 2002 24:2,2 2017 2:2 224 49:8,17 24 42:6
---	---	---	--	--

<p>27 3:12 274A 6:22</p> <hr/> <p>3</p> <hr/> <p>3 37:6 3,000 9:8 300 39:6</p> <hr/> <p>4</p> <hr/> <p>4 3:5 40-whatever 31:21 47 36:19 48 3:16</p> <hr/> <p>6</p> <hr/> <p>60,000 15:23,24 61 6:20,24 38:6 38:15 65 6:20 7:1 67 9:15</p> <hr/> <p>7</p> <hr/> <p>70 43:14 70,000 15:23 71 43:14 74 18:1 22:15 23:18 43:14 77 23:18</p> <hr/> <p>9</p> <hr/> <p>9/11 5:17 10:18 10:21 30:16 32:10 33:9 39:10 43:3 44:5,11,20 46:3</p>				
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