



	C O N T E N T S	
1		
2	ORAL ARGUMENT OF	PAGE
3	EDWIN S. KNEEDLER, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	MARK E. HADDAD, ESQ.	
7	On behalf of the Respondent	25
8	REBUTTAL ARGUMENT OF	
9	EDWIN S. KNEEDLER, ESQ.	
10	On behalf of the Petitioner	50
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 13-1402, Kerry,  
5 Secretary of State, v. Fauzia Din.

6 Mr. Kneedler.

7 ORAL ARGUMENT OF EDWIN S. KNEEDLER

8 ON BEHALF OF PETITIONERS

9 MR. KNEEDLER: Mr. Chief Justice, and may it  
10 please the Court:

11 This Court has repeatedly held that the  
12 power to exclude aliens is inherent in sovereignty and  
13 necessary to defending the nation against encroachments  
14 and dangers. It is a power exercised by the political  
15 branches of government.

16 Respondent's husband was denied a visa by a  
17 consular officer because he was found to be inadmissible  
18 under the terrorism provisions of the Immigration and  
19 Nationality Act. It is firmly established that as an  
20 alien outside the United States, he had no right under  
21 the INA or the Constitution to seek judicial review of  
22 that determination or for a greater explanation of the  
23 grounds given.

24 JUSTICE SOTOMAYOR: Could I ask you a  
25 question? Assume the following hypothetical. You had

1 a erroneous name, meaning -- or there's a duplicate  
2 name, a terrorist and a non- -- and a non-terrorist  
3 alien. What you're telling us is that there's no remedy  
4 whatsoever for the alien to come in and try to show  
5 someone that he's not the guy who's the terrorist.

6 MR. KNEEDLER: At least two responses to  
7 that point. First of all, no one is excluded under the  
8 terrorism provisions of the Act because their name  
9 appears in a database. The databases are assembled as  
10 basically raising flags that might warrant further  
11 inquiry. I'm informed by the State Department, and as  
12 we say on page 49 of our brief, in any case in  
13 which an alien is going to be denied entry under the  
14 terrorism provisions, there is a request to the State  
15 Department in Washington for a security advisory  
16 opinion, which entails sending out notice to interested  
17 agencies who may have intelligence about the individual  
18 and report it back to the State Department for an  
19 advisory opinion.

20 And so it will not --

21 JUSTICE SOTOMAYOR: I asked -- I have a real  
22 problem, which is that's what we were told after  
23 September 11th, and we have evidence that people were  
24 kept for months and months and months, and some were  
25 released after there was further probing by the courts,

1 and it was determined that people had been erroneously  
2 identified.

3 So I'm not challenging good faith, but I'm  
4 just questioning how someone caught up in an  
5 administrative nightmare -- you're suggesting that the  
6 wife has absolutely no interest in -- in -- in her  
7 marriage in not having the government arbitrarily keep  
8 her spouse out.

9 MR. KNEEDLER: She obviously has an  
10 interest, but -- but she is affected only indirectly by  
11 the denial of the visa to her husband. That --

12 JUSTICE KENNEDY: Well, it -- it would seem  
13 to me that you're fighting the hypothetical you've  
14 basically said, well, that's not going to happen.  
15 Suppose it happened. There are two Mr. Smiths, or  
16 whatever the foreign name is, and they just get the  
17 wrong one. It seems to me your position is that the  
18 alien has no standing, period.

19 MR. KNEEDLER: The -- it -- I think it's  
20 clear under the doctrine of consular nonreviewability,  
21 which is one subset of the recognition of Congress'  
22 broad power over the exclusion of aliens, which includes  
23 conferring the power on executive officers. The Court  
24 has said --

25 JUSTICE GINSBURG: But the consular, you

1 have denied --

2 JUSTICE KENNEDY: And then we can -- and  
3 then we get to the question of whether -- of whether or  
4 not the wife, in this case, has at least a minimum right  
5 to make sure that the identification is correct. And  
6 you say as to that?

7 MR. KNEEDLER: There is no -- there is no  
8 right of judicial review because the consular -- the  
9 doctrine of consular nonreviewability applies equally to  
10 her. In fact, it would be quite -- it would be a  
11 license for circumvention of that doctrine to allow  
12 judicial review --

13 JUSTICE GINSBURG: Is there -- is there  
14 no -- is there no exception to the consular  
15 nonreviewability doctrine? That is, assuming people  
16 make mistakes, as Justice Sotomayor pointed out,  
17 bureaucrats -- some consulates -- consuls have been  
18 known to have a bureaucratic mentality and some may act  
19 for improper reasons. But you are sticking to the  
20 position that consular of determinations are not subject  
21 to judicial review under any -- any and all  
22 circumstances, no exceptions?

23 MR. KNEEDLER: That -- that is -- that is  
24 our position with respect to a consular officer having a  
25 bureaucratic point of view. I should point out that a

1 visa is not denied on a way that can't be corrected by  
2 additional evidence without it being approved by -- by a  
3 supervisor to the consular officer. So it's not --

4 JUSTICE SOTOMAYOR: Now, it's your position  
5 that the government could basically say to a wife in the  
6 United States, you have no rights whatsoever to  
7 challenge the arbitrary -- or a statement by the  
8 government. We believe your husband is a terrorist.  
9 You can't stay with him.

10 Only the husband could challenge them?

11 MR. KNEEDLER: Someone in the United States  
12 or --

13 JUSTICE SOTOMAYOR: Yes.

14 MR. KNEEDLER: In the United States, it  
15 would be different, although it would not confer rights  
16 on her but the -- but the husband --

17 JUSTICE SOTOMAYOR: Ah, so you're saying in  
18 that situation marriage has -- gives her no rights to  
19 say, you're interfering with my marriage by arbitrarily  
20 keeping my husband. Not talking if he's arrested or if  
21 he's -- but do -- you're just saying --

22 MR. KNEEDLER: I think that -- Well, the  
23 husband would have -- what -- whatever -- whatever action  
24 the government took against the husband, if he was in the  
25 United States, he would have his own due process rights.

1 This would be --

2 JUSTICE SCALIA: I suppose the wife would  
3 have standing to appeal a wrongful conviction of her  
4 husband, right?

5 MR. KNEEDLER: That is the point I was going  
6 to make. And in fact --

7 JUSTICE SCALIA: And in a regular criminal  
8 case, and he doesn't want to appeal, and she says, oh,  
9 I'm going to be deprived of my husband, so she has a  
10 right to appeal. Is that -- is that the law?

11 MR. KNEEDLER: It -- it's not the law. And  
12 in fact, the Court made exactly that point in the  
13 O'Bannon case that we cite in our briefs. It --  
14 O'Bannon arose in a different context, but the Court, in  
15 announcing its rule that someone indirectly affected is  
16 not deprived of liberties, used that very example.

17 JUSTICE KENNEDY: I understand -- excuse me.  
18 I understand the O'Bannon case. I think it's in point  
19 for you.

20 The Mandel case, you say in your brief in  
21 pages 38, 39, and 40 that the Court in Mandel simply  
22 assumed there was that right. I -- I'm not sure that's  
23 a fair reading of Justice Blackmun's opinion. He says  
24 recognition that First Amendment rights are implicated,  
25 however, is nondispositive. Then he goes on to find no



1 relief.

2 But I read that case as saying the  
3 professors had standing. You don't -- you don't read  
4 that?

5 MR. KNEEDLER: We're not saying they didn't  
6 have standing to make a First Amendment claim. They did  
7 and -- and we didn't argue -- or aren't arguing here  
8 that she doesn't have a right to go to court to make her  
9 constitutional claim. We're just saying it fails on the  
10 merits. She -- I -- I don't think it can seriously be  
11 contended that it would be unconstitutional.

12 JUSTICE KENNEDY: You -- you -- you say that  
13 she has the -- the right to contest the denial of the  
14 visa.

15 MR. KNEEDLER: No. No, we don't. All I'm  
16 saying -- all I'm saying is she's entitled to come into  
17 court to make the argument that she's making here.

18 We think her argument loses, and therefore,  
19 she has no right to challenge to have the Court review  
20 the consular's denial -- consul's denial of the visa  
21 abroad.

22 JUSTICE KENNEDY: Well, you always have the  
23 right to come into court to -- to say that you think  
24 you have -- have a right to contest, and the court says  
25 you don't, and you throw it out.

1 MR. KNEEDLER: Right. No. But -- but -- I  
2 think --

3 JUSTICE KENNEDY: But that's not -- I don't  
4 think that's the way you can read Mandel.

5 MR. KNEEDLER: Well, I think -- I think the  
6 predicate discussion of the First Amendment there was  
7 the government was arguing there's no -- there's no real  
8 First Amendment problem just on First Amendment terms  
9 because you could always hear the same information by  
10 reading a book or -- or the telephone or something like  
11 that, and the Court said the First Amendment interest --  
12 looking at First Amendment interest doesn't disappear in  
13 -- in that situation.

14 JUSTICE KENNEDY: Suppose I read the Mandel  
15 case to say that the professors have a right to contest  
16 the denial of the visa. Suppose I read it that way.  
17 And then the Court at the end of the day says the visa  
18 was properly denied. They lose on the merit, but they  
19 have the right to contest. They have a right for a  
20 reason -- to a reason. How is that different from this  
21 case if I read it that way?

22 MR. KNEEDLER: First of all --

23 JUSTICE KENNEDY: Then it -- then it seems  
24 to me that the wife here has the right to demand a  
25 reason.

1           MR. KNEEDLER:           First of all, Mandel involved  
2 the -- a decision on the waiver, not on -- not a  
3 decision by a consular officer abroad to deny a visa,  
4 which -- which is really right at the teeth of the  
5 consular --

6           JUSTICE KAGAN:           I don't see why that doesn't  
7 cut the other way, Mr. Kneedler. You make this argument  
8 several times in your briefs. But I would think that  
9 review would be at its nadir in the waiver authority  
10 because there, enormous amount of discretion is given to  
11 the executive official. Whereas with respect to  
12 consular decisions over visas, Congress has set out  
13 clear rules for what those consular officials are  
14 supposed to be doing. And it seems to me that the  
15 reason for review in that context where you're trying to  
16 figure out whether the consular official has, in fact,  
17 accorded with the congressional determination of who's  
18 entitled and who's not to a visa would be all the more  
19 important.

20           MR. KNEEDLER:           Well, I don't disagree -- we  
21 don't think there should be review in -- in either case.  
22 I think part of what might have been motivating the  
23 court in Mandel was that the discretionary denial of the  
24 waiver might have been based on the characteristics of  
25 the U.S. citizen seeking it.

1           There can't be any claim like that here.  
2   This -- this -- the terrorism grounds go entirely to  
3   the -- for a visa denial -- go entirely to the  
4   characteristics of the alien abroad.  But beyond --  
5   beyond that, what you're describing is the very thing  
6   that the doctrine of consular non-reviewability is  
7   designed to prohibit judicial review of.

8           JUSTICE BREYER:           So is it no matter what?  
9   Is that -- I mean, a woman is married -- an American  
10  woman is married to a foreign -- foreign person, asks  
11  for a visa.  She has undeniable proof, the most -- any  
12  proof you want that the reason it was denied is because  
13  the consular official believes that husbands and wives  
14  should live separately, or for racial reasons, or for  
15  First Amendment reasons.  Undeniable proof.

16           Is your position that it doesn't matter if  
17  they decide that -- the consulate -- that husbands and  
18  wives cannot live together, there is no review?  Is that  
19  your position?

20           MR. KNEEDLER:           Our position is that there is  
21  no judicial review.

22           JUSTICE BREYER:           Are you saying -- I want a  
23  clear answer to my question because what I'm trying to  
24  do, obviously, is make the most far out case I can think  
25  of, and -- and I want to know if the Government of the

1 United States thinks that if it is the policy even of  
2 the -- of the consulars of the United States that  
3 husbands and wives must live separately, there is no  
4 judicial review no matter what?

5 MR. KNEEDLER: Well --

6 JUSTICE BREYER: Is that the position or is  
7 it not?

8 MR. KNEEDLER: That is -- that would be our  
9 position.

10 JUSTICE BREYER: All right. Now, if that is  
11 your --

12 JUSTICE SCALIA: Let me give you an equally  
13 absurd hypothetical. Okay?

14 JUSTICE BREYER: Oh, I don't know if mine is  
15 so absurd.

16 JUSTICE SCALIA: Wait. No, no, no, no. I'm  
17 saying the -- the feeling that the law can't be that.  
18 Assuming the man is not married and there is no wife who  
19 comes in and can make these points. But assume,  
20 likewise, there is incontrovertible evidence that he was  
21 denied admission because of his race or because of some  
22 First Amendment statement he had made or for whatever  
23 other reasons Justice Breyer wants to bring forward.  
24 Your position would be -- right -- too bad.

25 JUSTICE BREYER: I'm not worried about that

1 case.

2 JUSTICE SCALIA: What?

3 JUSTICE BREYER: I'm worried about that case  
4 where there is an American citizen who is married and  
5 that the decision of the consular official will prevent  
6 her no matter how ridiculous, and take all of Justice  
7 Scalia's points to make it ridiculous as you want, but  
8 the result of this is that an American citizen either  
9 must live separately from her spouse forever or must  
10 give up her right as an American to live in her native  
11 land. Now, that seems to me to be the government's  
12 position, and I just want to be assured that it is.

13 MR. KNEEDLER: That is our position. Let --  
14 let me just say one thing.

15 JUSTICE SCALIA: I think he knew that.

16 JUSTICE BREYER: No. I didn't actually.

17 (Laughter.)

18 MR. KNEEDLER: If I may -- if I may add one  
19 point here. There is no claim that the ground for the  
20 denial of the visa is itself unconstitutional. The  
21 ground that was given here was that he had engaged in  
22 terrorist activities. There can't be any serious claim  
23 that it -- that it's permissible to exclude someone for  
24 engaging in terrorist activities.

25 JUSTICE BREYER: Well, terrorist activities

1 are defined in this statute to include such things as,  
2 let's say, you're in a -- a particular country where  
3 this could happen. You decide to keep overnight at your  
4 house and let him stay two people who sometimes go out  
5 and solicit funds for any one of the 40 organizations on  
6 the list. You've given material aid to two or more  
7 people, organized or not, who, in fact, themselves  
8 solicit funds for one of these 40 organizations.

9 Now, that isn't much, and there are about  
10 100 other words here or 200 words that seem --

11 JUSTICE SCALIA: Enough for me.

12 JUSTICE BREYER: Well, I'm just saying it  
13 isn't obvious to me that you can tell -- now deprive a  
14 person of even telling him what the reason is for saying  
15 he falls within this section.

16 MR. KNEEDLER: Well, on that -- on that  
17 point, now, first Shaughnessy and Musai are controlling.  
18 In those situations, aliens who had even reached our  
19 borders were -- were denied entry on the basis of  
20 confidential information that was deemed necessary for  
21 the security of the United States. A fortiori here  
22 where the aliens are outside the -- where the alien is  
23 outside the United States now requires the conclusion  
24 that -- that neither he nor his wife is entitled to a  
25 greater explanation than the -- than the executive officer

1 believes is appropriate --

2 JUSTICE ALITO: Can I come back to -- can I  
3 come back to Justice Breyer's earlier hypothetical.  
4 Suppose there were a case where there is  
5 incontrovertible proof that the consular officer denied  
6 the visa for some incredible ground based on racism or  
7 belief that husbands and wives shouldn't live together.  
8 Suppose there's a -- a tape -- a video recording or  
9 audio recording of the consular officer saying this is  
10 what I believe, and this is what I do when I pass on  
11 these visas.

12 Would there be no administrative avenue of  
13 relief if that information was submitted to the State  
14 Department? Would there be no opportunity to -- to get  
15 a correction of the visa denial in that way?

16 MR. KNEEDLER: Of course there would. And  
17 that's -- and that is what -- that is what Congress  
18 decided in 1952 by not establishing a centralized review  
19 of all visas which could lead to judicial review, which  
20 is what Congress was specifically concerned about.

21 JUSTICE BREYER: How can you get that relief  
22 if you don't tell the person what the reason is?

23 MR. KNEEDLER: It won't be denied. The  
24 visa -- as I said, the visa will not be denied under 42  
25 C.F.R. -- I mean, 22 C.F.R. 4261 unless it is reviewed



1 by a superior. So one individual consular officer's  
2 approach to a case is not going to be sustained, it  
3 will be reviewed by someone else.

4 JUSTICE GINSBURG: But that can't be. That  
5 process can't be initiated by the relative. That's an  
6 internal -- you have described an internal check. But  
7 as in this case, the wife, she won't know whether that  
8 check has gone.

9 MR. KNEEDLER: Well, as Justice Alito -- I  
10 think we have to assume the regularity that the  
11 supervising consular officer would be asked.

12 JUSTICE GINSBURG: Can the person -- the  
13 relative who's claiming preferential status -- can she  
14 initiate such a review? She can't. It's entirely  
15 internal.

16 MR. KNEEDLER: She has no -- she has no --  
17 there's no procedure that gives her an entitlement, and  
18 properly so because it's not about her, it's about him.  
19 But she could certainly bring the information to the  
20 attention of the State Department. And, in fact, in  
21 this case, she brought -- brought it to the attention of  
22 her representative in Congress, who, in turn, inquired  
23 to the State Department about it. She could have --

24 JUSTICE GINSBURG: And was given -- given  
25 the same -- the -- her representative was given the same

1 answer, citing the statute and saying we -- we don't  
2 disclose any particulars.

3 MR. KNEEDLER: Right, but that -- but that's  
4 the system Congress set up. Congress specifically said  
5 when it enacted this provision in 1996, it concluded  
6 that the executive should be entitled to withhold the  
7 grounds of the basis for denying a visa if that would  
8 adversely impact the national security and. That  
9 descends directly from Knauff --

10 JUSTICE SOTOMAYOR: Mr. Kneedler --

11 MR. KNEEDLER: -- and Musai .

12 JUSTICE SOTOMAYOR: If Mandel did control  
13 this case, what argument would you make -- or could you  
14 make an argument that you -- that you met the Mandel  
15 standard? And as I understood the Mandel standard, it  
16 wasn't that high. It was you have to provide a facially  
17 legitimate and bona fide reason for your decision.

18 MR. KNEEDLER: Okay. If I could -- if I  
19 could make two points with respect to Mandel  
20 controlling. The Court specifically said in Mandel that  
21 it was leaving open the question of whether there would be  
22 judicial review if the attorney general had not offered  
23 any explanation at all. It -- it concluded that the  
24 explanation that appeared in the record was sufficient  
25 if any -- if any explanation at all was required, but it

1 did not hold that it was necessary.

2 So if this case is controlled by Mandel,  
3 we're in exactly the same position. There is no  
4 precedent of this Court saying that an explanation to  
5 people in the U.S. is required. It was just found to be  
6 sufficient in that case.

7 Now, applying that test, we think that the  
8 reason given here plainly satisfies the facially  
9 legitimate standard. What the consular officer did was  
10 cite the statutory provision under which he was found to  
11 be inadmissible. Citing the statute is, by definition,  
12 facially legitimate because it is the -- it is the  
13 standard that -- that the consular officer is intended  
14 to apply. So even if we get that part out --

15 JUSTICE KAGAN: Well, do you have to -- I  
16 mean, what's the level of generality or specificity that  
17 you have to cite? Suppose they just said, well, you  
18 know, this was done under 1182. Would that be  
19 sufficient?

20 MR. KNEEDLER: As a constitutional matter,  
21 we think it would be sufficient, yes. And again --

22 JUSTICE KAGAN: We did this under the INA.  
23 Is that facially legitimate?

24 MR. KNEEDLER: Yes. I -- I -- I think it  
25 is, but here we have something that --

1 JUSTICE KAGAN: So really, it's a reason  
2 that's not a reason at all. At some point, I mean,  
3 that's nice, you did it under the INA. And that counts  
4 as facially legitimate?

5 MR. KNEEDLER: But -- but here we have the  
6 specific paragraph dealing with terrorism.

7 JUSTICE BREYER: It isn't -- this is -- this  
8 is actually a serious point ; I didn't mean it  
9 facetiously. And go ba  
10 ck to Justice Alito's point,  
11 which I think was quite a good point, frankly. The --  
12 the statute that you're talking about labeled terrorist  
13 activities is printed in your appendix from pages 7A to  
14 pages 14A. It covers everything from a person who is a  
15 member of an organization that's about to throw a bomb  
16 to somebody who says, as I said, once, has two members  
17 of some organization or different organizations sleep on  
18 his floor knowing that they solicit funds on other  
19 occasions for these people, the bad ones.

20 Now, he just wants to know what  
21 sub-provision they're using because he wants to say, as  
22 sometimes happens, to others in the State Department  
23 your consulate over here in X city gets a little carried  
24 away. They're overly risk-averse. They're interpreting  
25 one of these hundreds of words in a way that's really

1 wrong.

2 Now, all he needs to know is what subsection  
3 under this 7-page section is at issue so he can make the  
4 internal appeal that Justice Alito has described. Why  
5 not?

6 MR. KNEEDLER: I mean, that --

7 JUSTICE SCALIA: Does this fellow have a  
8 wife? Does this fellow have a wife or is this --

9 MR. KNEEDLER: Yes.

10 JUSTICE SCALIA: Oh, it's the wife that's --  
11 that's making the claim.

12 MR. KNEEDLER: I -- I -- I want to -- I want  
13 to make one thing very clear again with respect to  
14 exclusions under paragraph (b), it is not done by the  
15 consular officer alone. No one can be excluded under  
16 subparagraph (b) on terrorism activities without a  
17 reference to the State Department for a special -- or a  
18 security advisory opinion. And that review, since at  
19 least 2010, has included review by a lawyer. So this is  
20 not some -- a situation that could be decided by a rogue  
21 consular officer in -- in the field.

22 But what you --

23 JUSTICE GINSBURG: Mr. -- Mr. Kneedler,  
24 could you give us an idea, before you conclude, about  
25 what has been the consequence of a decision? The Ninth

1 Circuit in this Bustamante case -- that was 2008 -- what  
2 has happened in the Ninth Circuit between 2008 and 2014  
3 with respect to these relative applications? How have  
4 they fared?

5 MR. KNEEDLER: There -- there have been --  
6 there have been a number that -- that have arisen.  
7 There's the Ibrahim case that was -- that -- that is  
8 cited in the papers. There's -- there's a case called  
9 Goltra, which I think involves extending Din to a  
10 father. There -- there are other cases which -- which  
11 involve children, as I recall.

12 But if this Court were to hold that -- that  
13 a family member has a right to insert herself into  
14 removal -- or into proceedings involving an entirely  
15 independent human being responsible for his own conduct,  
16 then I think we could anticipate a number of cases --

17 JUSTICE GINSBURG: But in the cases that we  
18 have, you cited extending it to a child, but have any of  
19 them held that the government failed to show a facially  
20 legitimate bona fide reason?

21 MR. KNEEDLER: The Ibrahim case required the  
22 specification of a particular subsection based on Din,  
23 said that there had to be a particular subsection of  
24 (b).

25 And again, I want to step -- I want to step

1 back. In *Knauff v. Shaughnessy* and *Musai*, the Court  
2 held that someone could be excluded simply by the  
3 attorney general saying there's confidential information  
4 and there is no right to a hearing. There is no --  
5 there was no suggestion there that -- that the  
6 government was required to at least be somewhat specific  
7 in telling the person the basis for his removal.

8 JUSTICE KENNEDY: Do you -- do you think  
9 that in the instance, suppose that Justice Breyer asked  
10 this particular subsection has to be cited, that if the  
11 consular were to cite that, this might give some  
12 indication as to our intelligence-gathering capability  
13 and the information that we have?

14 MR. KNEEDLER: Absolutely. That's -- that's  
15 the very reason why Congress said that it's not  
16 necessary to give the particular subsection, or frankly,  
17 to cite paragraph (b) at all. It could just be under  
18 1182(a).

19 And then in here --

20 JUSTICE BREYER: But why not? If there  
21 is --

22 MR. KNEEDLER: Whatever -- whatever  
23 interests the wife has in this situation, they are  
24 derivative and indirect, even if this Court is going to  
25 credit them with some force here. They are derivative

1 and indirect as weighed against the powerful interests  
2 of the United States in protecting its borders, which is  
3 a core aspect of sovereignty, protecting against --

4 JUSTICE BREYER: Of course. So -- so in the  
5 situation that Justice Kennedy just mentioned where  
6 there's even a risk of harm to some  
7 intelligence-gathering or other national security  
8 interest, can't the government come to the judge and say  
9 just that? And aren't there methods by which you can  
10 allow a judge, even in camera if necessary --

11 MR. KNEEDLER: The case should --

12 JUSTICE BREYER: -- to review -- to review a  
13 matter where there is a national security interest at  
14 stake.

15 MR. KNEEDLER: It is exceedingly rare for  
16 the government to be put in a position where it has to  
17 submit classified information to a court. There are  
18 situations that arise in a domestic --

19 JUSTICE SCALIA: Courts are very good at  
20 this stuff, aren't they?

21 MR. KNEEDLER: Well, as --

22 JUSTICE BREYER: At assessing the -- the  
23 level of danger to -- to operatives.

24 MR. KNEEDLER: This Court has said that --  
25 that they're not and -- and in situations -- in



1 situations in the domestic context, it may be necessary  
2 to allow for some consideration of classified  
3 information because the person involved has due process  
4 rights and -- and can insist on some information.

5 Here we're in a situation where the person  
6 directly affected, the person involved, an alien abroad,  
7 has no rights of his own to know what the basis for the  
8 government's action is.

9 I'd like to reserve the balance of my time.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 Mr. Kneedler.

12 Mr. Haddad.

13 ORAL ARGUMENT OF MARK E. HADDAD

14 ON BEHALF OF RESPONDENT

15 MR. HADDAD: Mr. Chief Justice, and may it  
16 please the Court:

17 There was substantial discussion of the  
18 doctrine of consular non-reviewability thus far, but one  
19 point that did not emerge is that this Court has never  
20 articulated the doctrine in the way the government has  
21 presented it today. This Court has never said that the  
22 decisions of a group, a large group of officials of the  
23 Executive Branch are somehow immune from judicial review  
24 in every instance because they are the decisions of  
25 certain officials, consular officers in this case. And

1 the record is --

2 JUSTICE SCALIA: What would the basis be,  
3 the Administrative Procedure Act? It -- it has a  
4 provision exempting from review action committed to  
5 agency discretion by law. And I think what the  
6 government is arguing is that this -- you know, this law  
7 commits this stuff to the discretion of the consular  
8 officials and the State Department.

9 MR. HADDAD: I don't think the APA would get  
10 the government where it needs to go in this case,  
11 Justice Scalia, because ours is a constitutional claim.  
12 It's not raised under the APA. And as came out earlier  
13 in the discussion, as Justice Kagan pointed out, unlike  
14 the situation in Mandel, where all the Attorney General  
15 was doing was implementing a statute that gave him,  
16 quote/unquote, "discretion" to weigh the denial of a  
17 visa, here we have an extensive statutory set of  
18 exclusions, and the government has acknowledged in its  
19 reply brief that it does not view its consular officers  
20 as having discretion in how they apply and implement the  
21 specific terms that Congress has set forward.

22 CHIEF JUSTICE ROBERTS: But to get to your  
23 constitutional claim, explain to me the difference  
24 between the marital basis in this case and, say, a  
25 parental basis. I mean, if the individual here was a

1 child, would the parent in the United States have the  
2 same rights as the spouse?

3 MR. HADDAD: If the U.S. citizen parent were  
4 trying to get an immigration visa for his or her son or  
5 daughter, yes, in our understanding of the liberty  
6 interest that this Court has --

7 CHIEF JUSTICE ROBERTS: Okay. So it's  
8 spouses. It's parents. I suppose it's children as  
9 well, right? If the parent is -- is the one who's being  
10 denied access, a child in the United States to be able  
11 to get --

12 MR. HADDAD: Certainly a minor child, Your  
13 Honor, yes. If the Court looks to the grounding cases  
14 that we cite, the Meyer case, the Pierce case, Griswold,  
15 the cases the Court is very familiar with, those cases  
16 involve the right to marriage and to raise a family.

17 CHIEF JUSTICE ROBERTS: Brother -- a brother  
18 and sister?

19 MR. HADDAD: Brother and sister is -- I  
20 think the Court would look at, in all likelihood, for  
21 the constitutional right, would look at whether the  
22 brother and sister were part of a family unit that would  
23 be living together. That seems to be an important value  
24 that the Court looks at.

25 JUSTICE SCALIA: What about someone who

1 wanted to marry the immigrant? Not yet married, but say  
2 you're depriving me of marital bliss. I want to marry  
3 this person, and I can't do it. Would that be enough?

4 MR. HADDAD: I -- I don't know that that  
5 would be enough, Your Honor. But certainly in this  
6 case, where the United States has recognized that the  
7 respondent has a valid marriage and there's no question  
8 at all about the validity of the marriage, we are in the  
9 heartland of what this Court has recognized is an  
10 important constitutional right.

11 JUSTICE KAGAN: Mr. Haddad --

12 MR. HADDAD: Yes.

13 JUSTICE KAGAN: -- can -- can I ask you how  
14 exactly this case become this kind of constitutional  
15 case? Because I had thought that originally this case  
16 was brought as an APA challenge, and that it was kind of  
17 converted into this constitutional claim by the Ninth  
18 Circuit. Is -- is that an incorrect understanding?

19 MR. HADDAD: I wouldn't describe it that  
20 way, Justice Kagan. The complaint had three causes of  
21 action. The third was an APA cause of action, but the  
22 first two were not. And at the time the case was  
23 brought, the Bustamante decision had been decided by the  
24 Ninth Circuit, and so there was a basis for bringing the  
25 constitutional claims, as well as the APA claim. And,

1 indeed, it was the constitutional claim that we pressed  
2 in the Ninth Circuit.

3 JUSTICE GINSBURG: Can you explain how we  
4 get to the constitutional claim that she has a right to  
5 live in the United States with her husband? She has a  
6 right by statute to put him at the top of the queue,  
7 right? She -- she -- before he can apply, she has to  
8 get him the preferential status, right?

9 MR. HADDAD: That's correct as a matter of  
10 statutory law, Justice Ginsburg. But our claim is not  
11 that her right arises from the statute and from the  
12 rights conferred by statute. Our argument is that her  
13 rights arise as a constitutional matter from her  
14 marriage.

15 JUSTICE GINSBURG: So we have -- so she  
16 has -- she has marriage, and you rely on that the right  
17 to marry includes the right to live with one's spouse.  
18 What do you do with Turner against Safley? The Court  
19 held that the prisoner had a right to marry, but  
20 certainly not a right to live with his spouse.

21 MR. HADDAD: We believe we're right on point  
22 and consistent with Turner, because as we describe the  
23 right, it's not the right of entry, of having her  
24 husband admitted, any more than a petitioner in Turner's  
25 circumstance could say, I have a right to have my

1 husband released from prison.

2 All we're saying is, there's a liberty  
3 interest in not being arbitrarily denied the opportunity  
4 to live with your spouse through the erroneous  
5 application or interpretation of law by an executive  
6 decision.

7 JUSTICE KENNEDY: Well -- well, it's --

8 JUSTICE KAGAN: If it --

9 JUSTICE KENNEDY: -- it's odd to presume  
10 that there's a fundamental right and then say, well, all  
11 we're saying is that it can't be arbitrary. It's --  
12 you -- you can't measure arbitrariness until you first  
13 define the right. You just want us to skip over that  
14 critical step.

15 MR. HADDAD: Well, then, I --

16 JUSTICE KENNEDY: It seems to me you're  
17 reasoning backwards.

18 MR. HADDAD: Well, let me try to address it,  
19 then, Justice Kennedy, so that I don't skip that step.  
20 As we've laid out in our brief, there is a right that we  
21 believe is inherent in the right to marry and to raise a  
22 family, which this Court has recognized. Inherent in  
23 that right, for that right to have meaning, it  
24 presupposes that the husband and wife can live together.

25 JUSTICE SCALIA: It would be

1 unconstitutional, then, for Congress to eliminate the  
2 provisions of the current immigrations law which says  
3 that if -- if the wife or the husband is in this  
4 country, the spouse can come in. It would be  
5 unconstitutional for Congress to say we -- we have  
6 immigration quotas for certain countries for certain  
7 things, and whether you have a husband or wife in this  
8 country has nothing to do with whether you get in. That  
9 would be unconstitutional.

10 MR. HADDAD: The -- the Court would review  
11 such a law, were it ever passed, under the same standard  
12 it used in Fiallo, which is the facially legitimate and  
13 bona fide standard. There is -- and this Court has  
14 recognized that --

15 JUSTICE SCALIA: It's facially -- it --  
16 it -- you -- you would have to say it's  
17 unconstitutional, wouldn't you? If your argument in  
18 this case is correct, that would be unconstitutional.

19 MR. HADDAD: We would certainly argue that,  
20 Your Honor. The Court would review it under the Fiallo  
21 standard, and the Court would need to find, at least if  
22 it applied and followed Fiallo, just as there was a  
23 constitutional challenge to the lines Congress drew in  
24 that case --

25 JUSTICE KENNEDY: And you -- and you would

1 say the same thing if Congress did not give a visa  
2 preference, putting the spouse to the head of the line?  
3 You'd say the same thing?

4 MR. HADDAD: I -- I don't think we would  
5 advance that argument, Your Honor. We have conceded  
6 that Congress has broad latitude, broad latitude,  
7 plenary powers this Court has stated to set the terms  
8 and -- and define who comes in.

9 CHIEF JUSTICE ROBERTS: But it --

10 MR. HADDAD: It's the application, Mr. Chief  
11 Justice.

12 CHIEF JUSTICE ROBERTS: But -- but it can  
13 take a long time, depending upon the nature of the  
14 preference, for somebody to get to the front of line. I  
15 mean, under some preferences, it's 20 years after you  
16 apply. Then you get to the point where you can actually  
17 get a visa to come in. I would assume that that would  
18 not be satisfactory to you because the marital  
19 relationship would be interrupted for -- for 20 years.

20 MR. HADDAD: Were those the facts, Your  
21 Honor, at the time Congress passed such a law  
22 eliminating all spousal preference, then we may indeed  
23 have a strong claim, even as to the elimination or  
24 changing of the preference. But our point is -- is  
25 simply this: We are not dealing here with a challenge



1 to Congress's line-drawing. We're dealing with a  
2 challenge to the application.

3 CHIEF JUSTICE ROBERTS: Well, I -- I  
4 understand that. But my point is that the logic of your  
5 position gets to reordering the visa preferences. If  
6 you say the fact of the marital relationship gives these  
7 certain rights, then it would seem to me -- because they  
8 can't keep the husband and wife apart, it seems to me  
9 that goes to the length of -- that you have to wait for  
10 your -- your visa. So it does go to the -- the tiniest  
11 reordering of the immigration preferences.

12 MR. HADDAD: Your Honor, a tiny reordering  
13 we don't think would be difficult at all for this Court  
14 to accept under the facially legitimate and bona fide  
15 standard.

16 CHIEF JUSTICE ROBERTS: Well, okay. But I  
17 mean, my point is, it goes -- it goes to the big  
18 reordering as well.

19 MR. HADDAD: But --

20 CHIEF JUSTICE ROBERTS: I mean, you have  
21 change -- depending upon Congress's ordering of the  
22 preferences, you might have to change a great deal.

23 MR. HADDAD: Well, as -- as this Court  
24 recognized in *Fiallo*, the Court was unwilling -- as its  
25 footnotes 5 and 6 made very clear, the Court was

1 unwilling to say that there would be no check whatsoever  
2 by this Court in any -- of any change Congress might  
3 make.

4 Now, the Court was extraordinarily  
5 deferential to Congress in Fiallo, but it still  
6 exercised review.

7 JUSTICE ALITO: May I ask you how this would  
8 play out as a practical matter? I -- Congress  
9 apparently believed that requiring the government to  
10 specify the particular subsection under which the visa  
11 was denied had the potential of providing information  
12 that might be damaging to the security of the United  
13 States.

14 So let's -- let's say that the -- the  
15 government comes in and says that, that in this case  
16 they say, we can't -- we don't want to tell you which of  
17 these particular subsections this action was taken under  
18 because we believe that under the circumstances of this  
19 case, revealing that information will tell -- would tell  
20 the alien, if the information reached the alien, how  
21 much we know about him and possibly how we found that  
22 out.

23 So you say -- what? The information would  
24 have to be provided to the judge alone? Would the judge  
25 provide it to the alien? Would the judge provide it to

1 counsel? How would that work out?

2 MR. HADDAD: Well, I'll explain how it would  
3 work out as a practical matter. I do want to note that  
4 the government has had now the opportunity to file seven  
5 briefs at three levels of the court system and has yet  
6 to say that that is an issue in our case. But where  
7 does it say that --

8 JUSTICE ALITO: That is an issue in all of  
9 these cases, but tell me how it would work out.

10 MR. HADDAD: And so in the cases where it  
11 was an issue -- and the government has conceded it's not  
12 always, but where it is an issue, the government has --  
13 and we've laid it out in footnote 20 of our brief.

14 The government has memoranda that give  
15 guidelines for how the information is treated, because  
16 these same provisions come up and are justiciable in  
17 removal context and asylum context. So the government  
18 goes to the judge and says, We've got some confidential  
19 information here. We want to present it. We want to  
20 redact the confidential information, file it under a  
21 protective order, the court can review it. If counsel  
22 for the individual has a security clearance, then the  
23 counsel can review it. If the counsel doesn't then the  
24 court concludes ex parte review is necessary, then  
25 ex parte review happens.

1           Ultimately, we can't control, in a given  
2           circumstance, what the national security implications  
3           are. If there are significant national security  
4           implications, then that applicant may never find out the  
5           reason but --

6           JUSTICE ALITO:           But can the judge say, I'm  
7           not going to tell counsel? I believe the government  
8           that revealing this information would have an adverse  
9           effect on -- on national security, I am not going to  
10          tell counsel?

11          MR. HADDAD:           Yes. The court could do that.  
12          That what's the Ninth Circuit anticipated.

13          JUSTICE ALITO:           And that would be the end  
14          of it? All right. What if the  
15          government thinks that the court had made a -- I am  
16          going to tell counsel and I trust counsel. What if the  
17          government has a problem with that?

18          MR. HADDAD:           I imagine the government would  
19          press that argument both to the court and, if need be,  
20          would try to take an interlocutory appeal to have that  
21          decided.

22          JUSTICE BREYER:           Do we have to go into all  
23          that here? I mean, I thought -- I mean, taking the  
24          obvious thing, which would be most adverse to you or the  
25          second most adverse would be a possible answer, is to

1 say all the government has to do is to tell the judge,  
2 judge, if we tell you which of the 25 different  
3 subsections apply here, that will hurt national  
4 security. And that's the end of the case.

5 But your case, you say, is a case where the  
6 government won't say that because they are honest. When  
7 they get into court, they'll tell the truth; and if the  
8 truth is there is no adverse effect on national  
9 security, we at least would like to know that. That  
10 will help us.

11 But they won't give us any reason, none.  
12 And if you go back to King John and the rule of law  
13 itself, certainly part of that is when you take action  
14 that adversely and seriously affects the -- a citizen of  
15 the United States. The norm is you at least have to  
16 tell them why.

17 I mean, are you arguing for more than that  
18 minimal position in this case? Do we have to go beyond  
19 it?

20 MR. HADDAD: I don't think you do, Justice  
21 Breyer, because at page 52 of Petitioner's brief, they  
22 concede that some of these denials under 1182(a)(3)(B)  
23 do not involve sensitive, classified information. They  
24 admit that some cases fall in that.

25 JUSTICE KAGAN: Mr. Haddad, suppose -- you

1 know, suppose that I agree with you that the Mandel  
2 standard should apply, so it's facially legitimate and  
3 bona fide. Why isn't that met here?

4 Why hasn't the government actually come up  
5 with a facially legitimate reason when it said  
6 1182(a)(3)(B)?

7 MR. HADDAD: Well, I think, as your  
8 questions to my colleague illustrated earlier, Justice  
9 Kagan, all they have done is cite authority that  
10 Congress has given them to adjudicate and decide  
11 eligibility for a visa. They have not said why the  
12 statute applies to this particular applicant, and it  
13 can't be a facially legitimate application of the  
14 statute unless you know why it's being applied.

15 JUSTICE KAGAN: Well, gosh, I would have  
16 thought that it can't be a legitimate application of the  
17 statute unless you knew why it was being applied; but  
18 the facially legitimate actually is a lesser standard  
19 than that. It's just like, you know, on its face. On  
20 its face, it's legitimate because they are acting under  
21 the authority that the law gives them, according to  
22 them.

23 MR. HADDAD: Well, here's an example,  
24 Justice Kagan. If the Court looks, for example, at page  
25 13a of the government's opening brief where the statute

1 that was referred to earlier this morning, the Court  
2 will see that Congress wrote in to the eligibility  
3 criteria in certain circumstances an opportunity for the  
4 applicant, having received notice of the reason, to  
5 rebut with clear and convincing evidence the stated  
6 reason for the exclusion.

7 On its face, we have no idea whether that or  
8 one of the other provisions that allows a rebuttal was  
9 the one invoked here.

10 JUSTICE GINSBURG: I thought that the  
11 statute includes a provision that notice of the reason  
12 need not be given in the case of a national security.

13 MR. HADDAD: Yes, Justice Ginsburg. That  
14 was the status of the statute before Congress added  
15 these provisions that allow for a rebuttal. So, in our  
16 view, it makes -- it would make the statute nonsensical  
17 if one were to think that Congress was adding a right to  
18 rebuttal to a statute that barred notice.

19 All 1182(b)(3) does is say that it's not  
20 required in the normal course when you announce the  
21 decision to tell the applicant what the explanation is.

22 JUSTICE SOTOMAYOR: So would you please  
23 answer Justice Scalia's earlier point, which is, are we  
24 going to get a slew of lawsuits from wives saying that  
25 their husbands were treated -- had an unfair trial or were

1 unfairly accused?

2 MR. HADDAD: I can't imagine that you would,  
3 Justice Sotomayor. and here is the reason.

4 JUSTICE SOTOMAYOR: Now, don't tell me it  
5 won't happen cause it hasn't --

6 MR. HADDAD: Well --

7 JUSTICE SOTOMAYOR: -- because -- tell me  
8 what the argument would be as to why that case would not  
9 be sustainable.

10 MR. HADDAD: The case would not be sustained  
11 because in every case of a criminal conviction, to take  
12 that example, there will be a conviction. It will be  
13 according to the rules of due process that this Court  
14 has elaborated.

15 JUSTICE SCALIA: The husband may choose --

16 MR. HADDAD: And that will extinguish --

17 JUSTICE SCALIA: -- not to appeal. The  
18 husband may choose not to appeal. He has a death wish,  
19 or whatever, and he doesn't want to appeal. Why would  
20 the wife not be able to appeal?

21 MR. HADDAD: Because at the time of the  
22 conviction, whatever rights the wife may have had, would  
23 have been extinguished by the conviction, which was  
24 final --

25 JUSTICE SCALIA: Is that right?



1           MR. HADDAD:           It certainly is distinct from a  
2 situation like this where there is never any process at  
3 any time. There is no review at any time.

4           JUSTICE SCALIA:        A conviction eliminates  
5 your -- your marriage? Is that -- you don't have to get  
6 a divorce, you just have to get convicted? That's a  
7 good deal.

8           (Laughter.)

9           MR. HADDAD:           I think it's a better deal to  
10 go the other way. But I think that -- but I think, as a  
11 practical matter, Justice Scalia, it would be very  
12 straightforward for the court, were such a claim ever to  
13 be raised, to know that there is a much higher floor of  
14 due process, frankly, in the criminal arena that would  
15 be preconditioned --

16          JUSTICE SOTOMAYOR:       But she has been privy  
17 to it, and she has, as Justice Scalia said, a husband  
18 who's taking tactical steps that are against his  
19 interests. So this is a serious question. I very much  
20 am troubled by this part of your argument.

21           How do we announce, and what rule do we  
22 announce?

23          MR. HADDAD:           Your Honor, I think in this  
24 situation, you note that this is an exceptional area of  
25 the law where there is no process surrounding the

1 decision the government is making of any kind. I can't  
2 think of another area of law where there is a complete  
3 absence of process at any stage surrounding a decision  
4 that has such a profound --

5 JUSTICE KENNEDY: Well, there is process in  
6 that she was allowed to petition the visa be  
7 entertained. There was very substantial process. She  
8 was entitled and did file an application for visa on the  
9 husband's behalf.

10 MR. HADDAD: But that is --

11 JUSTICE KENNEDY: So to say that, oh,  
12 there's no process at all, that's not correct.

13 MR. HADDAD: Well, the part of the decision  
14 that matters, though, that we think -- and, really, that  
15 I'm pointing to here is the ultimate decision on the  
16 visa. And that's where there is a complete absence of  
17 process, where the entire decision-making is behind  
18 closed doors.

19 JUSTICE ALITO: Suppose a couple lived in  
20 New York and one is convicted of a crime and the spouse  
21 is convicted -- is convicted of a Federal crime, sent to  
22 an ultra-maximum security prison in Colorado.

23 Does -- can the other spouse contest that  
24 because that will have the effect of making it virtually  
25 impossible for there to be any communication between

1       them?

2               MR. HADDAD:               No, Your Honor.

3               JUSTICE ALITO:               What would be the  
4       difference?

5               MR. HADDAD:               The difference is that in the  
6       situation you described, there is process surrounding  
7       the conviction; and the Court has held that the Bureau  
8       of Prisons has extraordinary latitude and deference  
9       comporting with due process to deal with the assignment  
10      of prisoners.

11              CHIEF JUSTICE ROBERTS: Well what if there  
12      weren't? That just seems to me to be fighting the  
13      hypothetical. Let's say there is no process established  
14      to seek review of that.

15              MR. HADDAD:               Assuming -- my point, to be  
16      clear, is that either the prisoner in that case has  
17      additional due process interest or the prisoner doesn't.  
18      But at the time of the conviction which separates the  
19      husband and wife, there is process, and there is not in  
20      this case.

21              CHIEF JUSTICE ROBERTS:               Well, I know, but  
22      what if there weren't? In other words, does the marital  
23      relation entitle the wife to review of the decision to  
24      imprison the convicted husband in Colorado rather than  
25      in New York?

1           MR. HADDAD:           No, I don't think it does.  
2           Because the Court has addressed this, and frankly, the  
3           framers addressed this, with the due process clause,  
4           with the habeas requirement.   The -- the fact of --

5           CHIEF JUSTICE ROBERTS:           Those are rights  
6           that go to the prisoner.

7           MR. HADDAD:           Correct, Your Honor.

8           CHIEF JUSTICE ROBERTS:           So the spouse has no  
9           additional rights, even though her marital relationship  
10          will be affected.

11          MR. HADDAD:           That's correct, Your Honor,  
12          because of the rights that are there at the outset of  
13          the process.   There's no comparable --

14          JUSTICE KENNEDY:           Well, I'm not aware of  
15          rights to contest the placement of a prisoner after a  
16          conviction.   I'm trying to think of it.   I just don't  
17          think there is any.   So I think that hypothetical is  
18          very apt.

19          You indicate that there's no remedy where  
20          there are two citizens living in this country, and then  
21          you want us to apply that remedy to a person who's  
22          living out of the country.   When national security  
23          interests are involved.

24          MR. HADDAD:           The reason, Justice Kennedy, is  
25          that in the situation that we have here, and certainly

1 as it's put to the Court, the respondent is a United  
2 States citizen and she knows of no reason why her  
3 husband does not satisfy the eligibility requirements  
4 and there's been no window into it of any kind. So  
5 there is no process around the initial threshold  
6 decision that separates the couple.

7 JUSTICE KAGAN: Mr. Haddad, I would have thought  
8 that all these kind of parade of horrors could have been  
9 played out from the Mandel case as well, that you would  
10 have thought, oh, my gosh, we're giving all these  
11 professors a chance to complain about people going to  
12 prison because the professors want to be able to talk to  
13 them. And none of that, of course, ever happened. And  
14 I'm wondering, why do you think that is? Is there any  
15 difference between the two situations such that we need  
16 to worry about the parade of horrors in one but not in  
17 the other?

18 MR. HADDAD: I don't think there's any  
19 reason to worry about it, because the standard that  
20 Mandel set is very, very deferential and generous to the  
21 government. The only times that it's going to create an  
22 incentive for a lawsuit is where the plaintiffs are  
23 convinced that there has been a mistake or an abuse of  
24 the process --

25 JUSTICE SCALIA: Maybe there are more

1       incentivized spouses than there are incentivized law  
2       professors.   Don't you think that's possible?

3               JUSTICE KAGAN: No but law professors they're  
4       very, very insistent, you know?

5               JUSTICE BREYER:               But I think -- I think what  
6       you're saying, though I'm not certain, is simply --  
7       you're not saying that the wife should be able to sue to  
8       get her husband out of prison, et cetera, but she does  
9       have a constitutionally protected interest.   But to say  
10       a person has an interest is not to say how that  
11       protection goes.

12               If you say we have all the examples of what  
13       would happen, if you say there is an interest and none  
14       of them need happen, now try it the other way.   Suppose  
15       you say there is no interest.   Then I guess if there's  
16       no constitutionally protected interest in living  
17       together with your spouse -- you can make up a  
18       hypothetical -- Congress passes a law that says all  
19       husbands and wives have to live separately, period.   Is  
20       there anyone who thinks that there would be no court  
21       action in such a case?

22               I mean, you can say a person has an  
23       interest.   Then the next question is, what kind of  
24       protection does the law give to that interest?   And  
25       you're bringing a case where the answer is, virtually

1 none, and you want a little bit. But it has the real  
2 problems that people have raised. Now, is that -- is  
3 that a fair description of what you're saying?

4 MR. HADDAD: That's very fair, Your Honor.

5 CHIEF JUSTICE ROBERTS: Well, then, I  
6 thought you said no. So you now think that the spouse  
7 whose husband is convicted and sent to the maximum  
8 security prison far away has a constitutionally  
9 protected interest with respect to that separation?

10 MR. HADDAD: Your Honor, it's certainly not  
11 an interest that we are arguing for.

12 CHIEF JUSTICE ROBERTS: No, no. I know my  
13 hypothetical is different from your case.

14 MR. HADDAD: But the reason I point that out  
15 is, I think the Court, if it's truly concerned about  
16 this kind of floodgates problem -- which I don't think  
17 is realistic, for the reasons discussed -- the Court can  
18 address it fairly, I think, either through saying, yes,  
19 in the abstract, there's a liberty interest but one that  
20 would never be --

21 JUSTICE KENNEDY: It's not such a matter --  
22 it's not such a matter of floodgates. It's a matter of  
23 defining the basic right for constitutional purposes.

24 MR. HADDAD: And the basic right is the  
25 right to live together, but it is a right and not have

1 it be interfered with through an arbitrary --

2 JUSTICE GINSBURG: Does that -- would that  
3 apply even if she didn't -- she comes in because she has  
4 a right to apply for priority status for her spouse.  
5 Suppose there were no such right, but he's her husband.  
6 You seem to be arguing that the husband/wife  
7 relationship is the constitutionally protected  
8 relationship, so it wouldn't matter if there were no  
9 priority status involved. Or what do you get out of the  
10 statute that says the wife can apply for priority status  
11 for her husband?

12 MR. HADDAD: Well, certainly the statute and  
13 the preferences, which go back to 1907, reflect, I  
14 think, Congress's -- is consistent, certainly, with the  
15 constitutional value the Court has placed here. And so  
16 in that respect, it's helpful.

17 JUSTICE GINSBURG: But it's not necessary.  
18 You would say the marital relationship, citizen  
19 wife/alien husband, just by virtue of that relationship,  
20 she can contest the government's refusal to explain why  
21 this person was excluded.

22 MR. HADDAD: That's correct, Your Honor.  
23 And I think in terms of the concern about how far this  
24 case would go, I think it is meaningful that the Court  
25 does not have to deal with a situation, as it would in



1 these other circumstances, of a threshold finding that  
2 led to separation and that involved process.

3 And I -- it's actually interesting that the  
4 Court looks at Turner against Safley. Justice O'Connor  
5 recognized that there were spouses of these prisoners.  
6 They weren't before the Court, but she noted that their  
7 interest might be different or protected differently.

8 JUSTICE KAGAN: Can I ask, Mr. Haddad -- and  
9 this goes back to my earlier question about why this  
10 isn't an APA case -- it seems to me if it were an APA  
11 case, we wouldn't have to go through all this -- these  
12 troubles about defining the scope of the right. We  
13 could just say, this is a person aggrieved, for obvious  
14 reasons, that she can't live with her husband, and then  
15 sort of go on to ask what kind of process she would do  
16 under the APA. Why wouldn't that be an easier way to  
17 think about this case and to resolve this case?

18 MR. HADDAD: That is an attractive  
19 framework, although there are other legal issues that  
20 would have to be addressed. Congress has amended the  
21 INA to limit the right of action that would be available  
22 under the statute under the INA. So there's some  
23 indication that Congress did not want private parties to  
24 be able to sue the Agency as a statutory matter.

25 So the Court could certainly remand for

1 further consideration under the APA, but that has not  
2 been the case that we have brought, and we think the  
3 constitutional ground is the stronger ground.

4 If the Court has no further questions, we  
5 will submit.

6 CHIEF JUSTICE ROBERTS: Thank you, counsel.

7 Mr. Kneedler, you have four minutes  
8 remaining.

9 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

10 ON BEHALF OF THE PETITIONER

11 MR. KNEEDLER: Thank you, Mr. Chief Justice:

12 First of all, in terms of protections that  
13 have been afforded by the government, Congress enacted a  
14 statute, referred to in footnote 6 of our brief, that  
15 every denial under the security grounds for a visa has  
16 to be reported to Congress. So Congress has oversight  
17 of -- of what is going on here.

18 Secondly, respondent is proposing a radical  
19 departure in due process law, one that -- one that is  
20 entirely inconsistent with what this Court took as  
21 self-evident in the O'Bannon case, that where you have  
22 one spouse or one family member who engages in wrongful  
23 conduct or has characteristics that disentitle him to  
24 benefits or subject him to punishment, that is his  
25 problem, his issue, his to litigate --

1 JUSTICE KAGAN: You know, I think you're  
2 over-reading O'Bannon, Mr. Kneedler. I think O'Bannon  
3 makes it very clear that -- a large part of what's going  
4 on there is, it said the nursing home can do this  
5 itself. It was almost like a Prudential Standing kind  
6 of argument, that there's one party that has all this  
7 motivation and incentive to challenge this; we don't  
8 need all these other people doing it. And that's  
9 clearly not the case here. So I think O'Bannon is a  
10 very different factual circumstance.

11 MR. KNEEDLER: Well -- but the importance of  
12 O'Bannon is that it says that there's no constitutional  
13 deprivation of liberty through the indirect impact of  
14 action taken against one person by another.

15 JUSTICE KAGAN: Well, in those  
16 circumstances.

17 MR. KNEEDLER: Well but No, I think it was  
18 -- and they used the prison -- they used the prison  
19 circumstance. But if I could just pick up on what you  
20 said. This Court has said on a number of cases that  
21 when it comes to the exclusion of aliens, whatever  
22 process Congress provides is the process that is due.

23 And here we have process by Congress, but in  
24 addition, by the Executive. A fortiori that that is  
25 true with respect to aliens outside the United States.

1 As far as -- as the wife is concerned, whatever due  
2 process interest she has, has been satisfied by what  
3 Congress has afforded. That is the way the structure  
4 works under our Constitution. If Congress thinks that  
5 greater protection is required, it can do that.

6 JUSTICE SOTOMAYOR: That's too far a  
7 statement, Mr. Kneedler. I can imagine too many  
8 hypotheticals where the government could afford or could  
9 treat aliens that are in the United States in an  
10 unconstitutional way.

11 MR. KNEEDLER: I'm not saying in the United  
12 States. I'm saying the exclusion of aliens. And those  
13 statements were made where the alien had arrived at our  
14 shores. A fortiori it is true that with respect to an  
15 alien abroad, that -- that is correct. If there are  
16 additional rights to be afforded to spouses, it should  
17 be up to Congress to do it. As Justice Kennedy pointed  
18 out, spouses are entitled to petition for eligibility  
19 for a spouse to be considered for a visa. Once that  
20 petition is granted, the spouse's cognizable interest is  
21 completed. The alien, then, must satisfy on his own  
22 terms the -- the elements for admissibility and that  
23 applies whatever the basis for -- for his ability to  
24 apply for a visa, whether it's an employment petition, a  
25 spousal petition, a -- a tourist visa, whatever it is.

1           And I also wanted to respond to what Justice  
2 Kagan -- or pick up on what Justice Kagan said about  
3 facially legitimate. Nothing in -- in Mandel suggests  
4 -- even if we got to that point, even if the Court  
5 thought that there was a cognizable basis for the spouse  
6 here, nothing in Mandel suggests that you could look  
7 behind the stated reason. You would never get to  
8 classified information or other information underlying  
9 the denial. The Court made that perfectly clear. And  
10 here, we have a facially legitimate statement of the  
11 reason for the denial, which is an act of Congress  
12 identifying terrorism as the ground.

13           And Congress also decided that further  
14 notice is not required in that circumstance, picking up  
15 exactly on the point this Court made in *Knauff v.*  
16 *Shaughnessy*, that it is not necessary to give  
17 information to an alien about the basis for his excuse  
18 and -- and a spouse cannot get around that.

19           The history of consular non-reviewability is  
20 extensive and it is not limited just to the alien. I  
21 would point the Court to 8 U.S.C. 1201(i) and 6 U.S.C.  
22 236(f), both of which say -- indicate the consular  
23 officer decisions are not to be reviewed by anybody.

24           CHIEF JUSTICE ROBERTS:           Thank you, counsel.  
25 The case is submitted.

1           (Whereupon, at 11:04 a.m., the case in the  
2 above-entitled matter was submitted.)  
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18  
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<b>A</b>				
<b>ability</b> 52:23	<b>advance</b> 32:5	<b>anticipate</b> 22:16	<b>argument</b> 1:13 2:2	<b>backwards</b> 30:17
<b>able</b> 27:10 40:20	<b>adverse</b> 36:8,24,25	<b>anticipated</b> 36:12	2:5,8 3:4,7 9:17	<b>bad</b> 13:24 20:19
45:12 46:7 49:24	37:8	<b>anybody</b> 53:23	9:18 11:7 18:13	<b>balance</b> 25:9
<b>aboveentitled</b> 1:12	<b>adversely</b> 18:8	<b>apa</b> 26:9,12 28:16	18:14 25:13 29:12	<b>barred</b> 39:18
54:2	37:14	28:21,25 49:10,10	31:17 32:5 36:19	<b>based</b> 11:24 16:6
<b>abroad</b> 9:21 11:3	<b>advisory</b> 4:15,19	49:16 50:1	40:8 41:20 50:9	22:22
12:4 25:6 52:15	21:18	<b>apart</b> 33:8	51:6	<b>basic</b> 47:23,24
<b>absence</b> 42:3,16	<b>afford</b> 52:8	<b>apparently</b> 34:9	<b>arisen</b> 22:6	<b>basically</b> 4:10 5:14
<b>absolutely</b> 5:6	<b>afforded</b> 50:13	<b>appeal</b> 8:3,8,10	<b>arises</b> 29:11	7:5
23:14	52:3,16	21:4 36:20 40:17	<b>arose</b> 8:14	<b>basis</b> 15:19 18:7
<b>abstract</b> 47:19	<b>agencies</b> 4:17	40:18,19,20	<b>arrested</b> 7:20	23:7 25:7 26:2,24
<b>absurd</b> 13:13,15	<b>agency</b> 26:5 49:24	<b>appearances</b> 1:15	<b>arrived</b> 52:13	26:25 28:24 52:23
<b>abuse</b> 45:23	<b>aggrieved</b> 49:13	<b>appeared</b> 18:24	<b>articulated</b> 25:20	53:5,17
<b>accept</b> 33:14	<b>agree</b> 38:1	<b>appears</b> 4:9	<b>asked</b> 4:21 17:11	<b>behalf</b> 1:17,19 2:4
<b>access</b> 27:10	<b>ah</b> 7:17	<b>appendix</b> 20:13	23:9	2:7,10 3:8 25:14
<b>accorded</b> 11:17	<b>aid</b> 15:6	<b>applicant</b> 36:4	<b>asks</b> 12:10	42:9 50:10
<b>accused</b> 40:1	<b>al</b> 1:4	38:12 39:4,21	<b>aspect</b> 24:3	<b>belief</b> 16:7
<b>acknowledged</b>	<b>alien</b> 3:20 4:3,4,13	<b>application</b> 30:5	<b>assembled</b> 4:9	<b>believe</b> 7:8 16:10
26:18	5:18 12:4 15:22	32:10 33:2 38:13	<b>assessing</b> 24:22	29:21 30:21 34:18
<b>act</b> 3:19 4:8 6:18	25:6 34:20,20,25	38:16 42:8	<b>assignment</b> 43:9	36:7
26:3 53:11	48:19 52:13,15,21	<b>applications</b> 22:3	<b>assume</b> 3:25 13:19	<b>believed</b> 34:9
<b>acting</b> 38:20	53:17,20	<b>applied</b> 31:22	17:10 32:17	<b>believes</b> 12:13 16:1
<b>action</b> 7:23 25:8	<b>aliens</b> 3:12 5:22	38:14,17	<b>assumed</b> 8:22	<b>benefits</b> 50:24
26:4 28:21,21	15:18,22 51:21,25	<b>applies</b> 6:9 38:12	<b>assuming</b> 6:15	<b>better</b> 41:9
34:17 37:13 46:21	52:9,12	52:23	13:18 43:15	<b>beyond</b> 12:4,5
49:21 51:14	<b>alito</b> 16:2 17:9 21:4	<b>apply</b> 19:14 26:20	<b>assured</b> 14:12	37:18
<b>activities</b> 14:22,24	34:7 35:8 36:6,13	29:7 32:16 37:3	<b>asylum</b> 35:17	<b>big</b> 33:17
14:25 20:13 21:16	42:19 43:3	38:2 44:21 48:3,4	<b>attention</b> 17:20,21	<b>bit</b> 47:1
<b>add</b> 14:18	<b>alitos</b> 20:10	48:10 52:24	<b>attorney</b> 18:22 23:3	<b>blackmuns</b> 8:23
<b>added</b> 39:14	<b>allow</b> 6:11 24:10	<b>applying</b> 19:7	26:14	<b>bliss</b> 28:2
<b>adding</b> 39:17	25:2 39:15	<b>approach</b> 17:2	<b>attractive</b> 49:18	<b>bomb</b> 20:15
<b>addition</b> 51:24	<b>allowed</b> 42:6	<b>appropriate</b> 16:1	<b>audio</b> 16:9	<b>bona</b> 18:17 22:20
<b>additional</b> 7:2	<b>allows</b> 39:8	<b>approved</b> 7:2	<b>authority</b> 11:9 38:9	31:13 33:14 38:3
43:17 44:9 52:16	<b>amended</b> 49:20	<b>apt</b> 44:18	38:21	<b>book</b> 10:10
<b>address</b> 30:18	<b>amendment</b> 8:24	<b>arbitrarily</b> 5:7 7:19	<b>available</b> 49:21	<b>borders</b> 15:19 24:2
47:18	9:6 10:6,8,8,11,12	30:3	<b>avenue</b> 16:12	<b>branch</b> 25:23
<b>addressed</b> 44:2,3	12:15 13:22	<b>arbitrariness</b> 30:12	<b>aware</b> 44:14	<b>branches</b> 3:15
49:20	<b>american</b> 12:9 14:4	<b>arbitrary</b> 7:7 30:11		<b>breyer</b> 12:8,22 13:6
<b>adjudicate</b> 38:10	14:8,10	48:1	<b>B</b>	13:10,14,23,25
<b>administrative</b> 5:5	<b>amount</b> 11:10	<b>area</b> 41:24 42:2	<b>b</b> 21:14,16 22:24	14:3,16,25 15:12
16:12 26:3	<b>angeles</b> 1:19	<b>arena</b> 41:14	23:17 37:22 38:6	16:21 20:7 23:9
<b>admissibility</b> 52:22	<b>announce</b> 39:20	<b>arent</b> 9:7 24:9,20	39:19	23:20 24:4,12,22
<b>admission</b> 13:21	41:21,22	<b>argue</b> 9:7 31:19	<b>ba</b> 20:9	36:22 37:21 46:5
<b>admit</b> 37:24	<b>announcing</b> 8:15	<b>arguing</b> 9:7 10:7	<b>back</b> 4:18 16:2,3	<b>breyers</b> 16:3
<b>admitted</b> 29:24	<b>answer</b> 12:23 18:1	26:6 37:17 47:11	23:1 37:12 48:13	<b>brief</b> 4:12 8:20
	36:25 39:23 46:25	48:6	49:9	26:19 30:20 35:13

<p>37:21 38:25 50:14  <b>briefs</b> 8:13 11:8  35:5  <b>bring</b> 13:23 17:19  <b>bringing</b> 28:24  46:25  <b>broad</b> 5:22 32:6,6  <b>brother</b> 27:17,17  27:19,22  <b>brought</b> 17:21,21  28:16,23 50:2  <b>bureau</b> 43:7  <b>bureaucratic</b> 6:18  6:25  <b>bureaucrats</b> 6:17  <b>bustamante</b> 22:1  28:23</p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>c</b> 1:9,17 2:1 3:1  16:25,25 53:21,21  <b>ca</b> 1:19  <b>called</b> 22:8  <b>camera</b> 24:10  <b>cant</b> 7:1,9 12:1  13:17 14:22 17:4  17:5,14 24:8 28:3  30:11,12 33:8  34:16 36:1 38:13  38:16 40:2 42:1  49:14  <b>capability</b> 23:12  <b>carried</b> 20:23  <b>case</b> 3:4 4:12 6:4  8:8,13,18,20 9:2  10:15,21 11:21  12:24 14:1,3 16:4  17:2,7,21 18:13  19:2,6 22:1,7,8,21  24:11 25:25 26:10  26:24 27:14,14  28:6,14,15,15,22  31:18,24 34:15,19  35:6 37:4,5,5,18  39:12 40:8,10,11  43:16,20 45:9</p>	<p>46:21,25 47:13  48:24 49:10,11,17  49:17 50:2,21  51:9 53:25 54:1  <b>cases</b> 22:10,16,17  27:13,15,15 35:9  35:10 37:24 51:20  <b>caught</b> 5:4  <b>cause</b> 28:21 40:5  <b>causes</b> 28:20  <b>centralized</b> 16:18  <b>certain</b> 25:25 31:6  31:6 33:7 39:3  46:6  <b>certainly</b> 17:19  27:12 28:5 29:20  31:19 37:13 41:1  44:25 47:10 48:12  48:14 49:25  <b>cetera</b> 46:8  <b>challenge</b> 7:7,10  9:19 28:16 31:23  32:25 33:2 51:7  <b>challenging</b> 5:3  <b>chance</b> 45:11  <b>change</b> 33:21,22  34:2  <b>changing</b> 32:24  <b>characteristics</b>  11:24 12:4 50:23  <b>check</b> 17:6,8 34:1  <b>chief</b> 3:3,9 25:10,15  26:22 27:7,17  32:9,10,12 33:3  33:16,20 43:11,21  44:5,8 47:5,12  50:6,11 53:24  <b>child</b> 22:18 27:1,10  27:12  <b>children</b> 22:11 27:8  <b>choose</b> 40:15,18  <b>circuit</b> 22:1,2 28:18  28:24 29:2 36:12  <b>circumstance</b> 29:25  36:2 51:10,19  53:14</p>	<p><b>circumstances</b> 6:22  34:18 39:3 49:1  51:16  <b>circumvention</b> 6:11  <b>cite</b> 8:13 19:10,17  23:11,17 27:14  38:9  <b>cited</b> 22:8,18 23:10  <b>citing</b> 18:1 19:11  <b>citizen</b> 11:25 14:4,8  27:3 37:14 45:2  48:18  <b>citizens</b> 44:20  <b>city</b> 20:23  <b>ck</b> 20:10  <b>claim</b> 9:6,9 12:1  14:19,22 21:11  26:11,23 28:17,25  29:1,4,10 32:23  41:12  <b>claiming</b> 17:13  <b>claims</b> 28:25  <b>classified</b> 24:17  25:2 37:23 53:8  <b>clause</b> 44:3  <b>clear</b> 5:20 11:13  12:23 21:13 33:25  39:5 43:16 51:3  53:9  <b>clearance</b> 35:22  <b>clearly</b> 51:9  <b>closed</b> 42:18  <b>cognizable</b> 52:20  53:5  <b>colleague</b> 38:8  <b>colorado</b> 42:22  43:24  <b>come</b> 4:4 9:16,23  16:2,3 24:8 31:4  32:17 35:16 38:4  <b>comes</b> 13:19 32:8  34:15 48:3 51:21  <b>commits</b> 26:7  <b>committed</b> 26:4  <b>communication</b>  42:25</p>	<p><b>comparable</b> 44:13  <b>complain</b> 45:11  <b>complaint</b> 28:20  <b>complete</b> 42:2,16  <b>completed</b> 52:21  <b>comporting</b> 43:9  <b>concede</b> 37:22  <b>conceded</b> 32:5  35:11  <b>concern</b> 48:23  <b>concerned</b> 16:20  47:15 52:1  <b>conclude</b> 21:24  <b>concluded</b> 18:5,23  <b>concludes</b> 35:24  <b>conclusion</b> 15:23  <b>conduct</b> 22:15  50:23  <b>confer</b> 7:15  <b>conferred</b> 29:12  <b>conferring</b> 5:23  <b>confidential</b> 15:20  23:3 35:18,20  <b>congress</b> 5:21  11:12 16:17,20  17:22 18:4,4  23:15 26:21 31:1  31:5,23 32:1,6,21  34:2,5,8 38:10  39:2,14,17 46:18  49:20,23 50:13,16  50:16 51:22,23  52:3,4,17 53:11  53:13  <b>congressional</b>  11:17  <b>congresss</b> 33:1,21  48:14  <b>consequence</b> 21:25  <b>consideration</b> 25:2  50:1  <b>considered</b> 52:19  <b>consistent</b> 29:22  48:14  <b>constitution</b> 3:21  52:4</p>	<p><b>constitutional</b> 9:9  19:20 26:11,23  27:21 28:10,14,17  28:25 29:1,4,13  31:23 47:23 48:15  50:3 51:12  <b>constitutionally</b>  46:9,16 47:8 48:7  <b>consular</b> 3:17 5:20  5:25 6:8,9,14,20  6:24 7:3 11:3,5,12  11:13,16 12:6,13  14:5 16:5,9 17:1  17:11 19:9,13  21:15,21 23:11  25:18,25 26:7,19  53:19,22  <b>consulars</b> 9:20 13:2  <b>consulate</b> 12:17  20:23  <b>consulates</b> 6:17  <b>consuls</b> 6:17 9:20  <b>contended</b> 9:11  <b>contest</b> 9:13,24  10:15,19 42:23  44:15 48:20  <b>context</b> 8:14 11:15  25:1 35:17,17  <b>control</b> 18:12 36:1  <b>controlled</b> 19:2  <b>controlling</b> 15:17  18:20  <b>converted</b> 28:17  <b>convicted</b> 41:6  42:20,21,21 43:24  47:7  <b>conviction</b> 8:3  40:11,12,22,23  41:4 43:7,18  44:16  <b>convinced</b> 45:23  <b>convincing</b> 39:5  <b>core</b> 24:3  <b>correct</b> 6:5 29:9  31:18 42:12 44:7  44:11 48:22 52:15</p>
---	---	--	--	--



<p><b>corrected</b> 7:1  <b>correction</b> 16:15  <b>counsel</b> 35:1,21,23  35:23 36:7,10,16  36:16 50:6 53:24  <b>countries</b> 31:6  <b>country</b> 15:2 31:4,8  44:20,22  <b>counts</b> 20:3  <b>couple</b> 42:19 45:6  <b>course</b> 16:16 24:4  39:20 45:13  <b>court</b> 1:1,13 3:10  3:11 5:23 8:12,14  8:21 9:8,17,19,23  9:24 10:11,17  11:23 18:20 19:4  22:12 23:1,24  24:17,24 25:16,19  25:21 27:6,13,15  27:20,24 28:9  29:18 30:22 31:10  31:13,20,21 32:7  33:13,23,24,25  34:2,4 35:5,21,24  36:11,15,19 37:7  38:24 39:1 40:13  41:12 43:7 44:2  45:1 46:20 47:15  47:17 48:15,24  49:4,6,25 50:4,20  51:20 53:4,9,15  53:21  <b>courts</b> 4:25 24:19  <b>covers</b> 20:14  <b>create</b> 45:21  <b>credit</b> 23:25  <b>crime</b> 42:20,21  <b>criminal</b> 8:7 40:11  41:14  <b>criteria</b> 39:3  <b>critical</b> 30:14  <b>current</b> 31:2  <b>cut</b> 11:7</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/>	<p><b>d</b> 1:9,17 3:1  <b>damaging</b> 34:12  <b>danger</b> 24:23  <b>dangers</b> 3:14  <b>database</b> 4:9  <b>databases</b> 4:9  <b>daughter</b> 27:5  <b>day</b> 10:17  <b>deal</b> 33:22 41:7,9  43:9 48:25  <b>dealing</b> 20:6 32:25  33:1  <b>death</b> 40:18  <b>decide</b> 12:17 15:3  38:10  <b>decided</b> 16:18  21:20 28:23 36:21  53:13  <b>decision</b> 11:2,3  14:5 18:17 21:25  28:23 30:6 39:21  42:1,3,13,15  43:23 45:6  <b>decisionmaking</b>  42:17  <b>decisions</b> 11:12  25:22,24 53:23  <b>deemed</b> 15:20  <b>defending</b> 3:13  <b>deference</b> 43:8  <b>deferential</b> 34:5  45:20  <b>define</b> 30:13 32:8  <b>defined</b> 15:1  <b>defining</b> 47:23  49:12  <b>definition</b> 19:11  <b>demand</b> 10:24  <b>denial</b> 5:11 9:13,20  9:20 10:16 11:23  12:3 14:20 16:15  26:16 50:15 53:9  53:11  <b>denials</b> 37:22  <b>denied</b> 3:16 4:13  6:1 7:1 10:18</p>	<p>12:12 13:21 15:19  16:5,23,24 27:10  30:3 34:11  <b>deny</b> 11:3  <b>denying</b> 18:7  <b>department</b> 1:17  4:11,15,18 16:14  17:20,23 20:22  21:17 26:8  <b>departure</b> 50:19  <b>depending</b> 32:13  33:21  <b>deprivation</b> 51:13  <b>deprive</b> 15:13  <b>deprived</b> 8:9,16  <b>depriving</b> 28:2  <b>deputy</b> 1:16  <b>derivative</b> 23:24,25  <b>descends</b> 18:9  <b>describe</b> 28:19  29:22  <b>described</b> 17:6 21:4  43:6  <b>describing</b> 12:5  <b>description</b> 47:3  <b>designed</b> 12:7  <b>determination</b> 3:22  11:17  <b>determinations</b>  6:20  <b>determined</b> 5:1  <b>didnt</b> 9:5,7 14:16  20:8 48:3  <b>difference</b> 26:23  43:4,5 45:15  <b>different</b> 7:15 8:14  10:20 20:17 37:2  47:13 49:7 51:10  <b>differently</b> 49:7  <b>difficult</b> 33:13  <b>din</b> 1:7 3:5 22:9,22  <b>directly</b> 18:9 25:6  <b>disagree</b> 11:20  <b>disappear</b> 10:12  <b>disclose</b> 18:2  <b>discretion</b> 11:10</p>	<p>26:5,7,16,20  <b>discretionary</b>  11:23  <b>discussed</b> 47:17  <b>discussion</b> 10:6  25:17 26:13  <b>disentitle</b> 50:23  <b>distinct</b> 41:1  <b>divorce</b> 41:6  <b>doctrine</b> 5:20 6:9  6:11,15 12:6  25:18,20  <b>doesnt</b> 8:8 9:8  10:12 11:6 12:16  35:23 40:19 43:17  <b>doing</b> 11:14 26:15  51:8  <b>domestic</b> 24:18  25:1  <b>dont</b> 9:3,3,10,15,25  10:3 11:6,20,21  13:14 16:22 18:1  26:9 28:4 30:19  32:4 33:13 34:16  37:20 40:4 41:5  44:1,16 45:18  46:2 47:16 51:7  <b>doors</b> 42:18  <b>drew</b> 31:23  <b>due</b> 7:25 25:3 40:13  41:14 43:9,17  44:3 50:19 51:22  52:1  <b>duplicate</b> 4:1</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>e</b> 1:19 2:1,6 3:1,1  25:13  <b>earlier</b> 16:3 26:12  38:8 39:1,23 49:9  <b>easier</b> 49:16  <b>edwin</b> 1:16 2:3,9  3:7 50:9  <b>effect</b> 36:9 37:8  42:24  <b>either</b> 11:21 14:8</p>	<p>43:16 47:18  <b>elaborated</b> 40:14  <b>elements</b> 52:22  <b>eligibility</b> 38:11  39:2 45:3 52:18  <b>eliminate</b> 31:1  <b>eliminates</b> 41:4  <b>eliminating</b> 32:22  <b>elimination</b> 32:23  <b>emerge</b> 25:19  <b>employment</b> 52:24  <b>enacted</b> 18:5 50:13  <b>encroachments</b>  3:13  <b>engaged</b> 14:21  <b>engages</b> 50:22  <b>engaging</b> 14:24  <b>enormous</b> 11:10  <b>entails</b> 4:16  <b>entertained</b> 42:7  <b>entire</b> 42:17  <b>entirely</b> 12:2,3  17:14 22:14 50:20  <b>entitle</b> 43:23  <b>entitled</b> 9:16 11:18  15:24 18:6 42:8  52:18  <b>entitlement</b> 17:17  <b>entry</b> 4:13 15:19  29:23  <b>equally</b> 6:9 13:12  <b>erroneous</b> 4:1 30:4  <b>erroneously</b> 5:1  <b>esq</b> 1:16,19 2:3,6,9  <b>established</b> 3:19  43:13  <b>establishing</b> 16:18  <b>et</b> 1:4 46:8  <b>evidence</b> 4:23 7:2  13:20 39:5  <b>ex</b> 35:24,25  <b>exactly</b> 8:12 19:3  28:14 53:15  <b>example</b> 8:16 38:23  38:24 40:12  <b>examples</b> 46:12</p>
--	---	--	---	---

<p><b>exceedingly</b> 24:15  <b>exception</b> 6:14  <b>exceptional</b> 41:24  <b>exceptions</b> 6:22  <b>exclude</b> 3:12 14:23  <b>excluded</b> 4:7 21:15              23:2 48:21  <b>exclusion</b> 5:22 39:6              51:21 52:12  <b>exclusions</b> 21:14              26:18  <b>excuse</b> 8:17 53:17  <b>executive</b> 5:23              11:11 15:25 18:6              25:23 30:5 51:24  <b>exempting</b> 26:4  <b>exercised</b> 3:14 34:6  <b>explain</b> 26:23 29:3              35:2 48:20  <b>explanation</b> 3:22              15:25 18:23,24,25              19:4 39:21  <b>extending</b> 22:9,18  <b>extensive</b> 26:17              53:20  <b>extinguish</b> 40:16  <b>extinguished</b> 40:23  <b>extraordinarily</b>              34:4  <b>extraordinary</b> 43:8</p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p><b>f</b> 1:3 16:25,25 53:22  <b>face</b> 38:19,20 39:7  <b>facetiously</b> 20:9  <b>facially</b> 18:16 19:8              19:12,23 20:4              22:19 31:12,15              33:14 38:2,5,13              38:18 53:3,10  <b>fact</b> 6:10 8:6,12              11:16 15:7 17:20              33:6 44:4  <b>facts</b> 32:20  <b>factual</b> 51:10  <b>failed</b> 22:19</p>	<p><b>fails</b> 9:9  <b>fair</b> 8:23 47:3,4  <b>fairly</b> 47:18  <b>faith</b> 5:3  <b>fall</b> 37:24  <b>falls</b> 15:15  <b>familiar</b> 27:15  <b>family</b> 22:13 27:16              27:22 30:22 50:22  <b>far</b> 12:24 25:18              47:8 48:23 52:1,6  <b>fared</b> 22:4  <b>father</b> 22:10  <b>fauzia</b> 1:7 3:5  <b>february</b> 1:10  <b>federal</b> 42:21  <b>feeling</b> 13:17  <b>fellow</b> 21:7,8  <b>fiallo</b> 31:12,20,22              33:24 34:5  <b>fide</b> 18:17 22:20              31:13 33:14 38:3  <b>field</b> 21:21  <b>fighting</b> 5:13 43:12  <b>figure</b> 11:16  <b>file</b> 35:4,20 42:8  <b>final</b> 40:24  <b>find</b> 8:25 31:21              36:4  <b>finding</b> 49:1  <b>firmly</b> 3:19  <b>first</b> 3:4 4:7 8:24              9:6 10:6,8,8,11,12              10:22 11:1 12:15              13:22 15:17 28:22              30:12 50:12  <b>flags</b> 4:10  <b>floodgates</b> 47:16,22  <b>floor</b> 20:18 41:13  <b>followed</b> 31:22  <b>following</b> 3:25  <b>footnote</b> 35:13              50:14  <b>footnotes</b> 33:25  <b>force</b> 23:25  <b>foreign</b> 5:16 12:10</p>	<p>12:10  <b>forever</b> 14:9  <b>fortiori</b> 15:21 51:24              52:14  <b>forward</b> 13:23              26:21  <b>found</b> 3:17 19:5,10              34:21  <b>four</b> 50:7  <b>framers</b> 44:3  <b>framework</b> 49:19  <b>frankly</b> 20:11              23:16 41:14 44:2  <b>front</b> 32:14  <b>fundamental</b> 30:10  <b>funds</b> 15:5,8 20:18  <b>further</b> 4:10,25              50:1,4 53:13</p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>g</b> 3:1  <b>general</b> 1:16 18:22              23:3 26:14  <b>generality</b> 19:16  <b>generous</b> 45:20  <b>ginsburg</b> 5:25 6:13              17:4,12,24 21:23              22:17 29:3,10,15              39:10,13 48:2,17  <b>give</b> 13:12 14:10              21:24 23:11,16              32:1 35:14 37:11              46:24 53:16  <b>given</b> 3:23 11:10              14:21 15:6 17:24              17:24,25 19:8              36:1 38:10 39:12  <b>gives</b> 7:18 17:17              33:6 38:21  <b>giving</b> 45:10  <b>go</b> 9:8 12:2,3 15:4              20:9 26:10 33:10              36:22 37:12,18              41:10 44:6 48:13              48:24 49:11,15  <b>goes</b> 8:25 33:9,17</p>	<p>33:17 35:18 46:11              49:9  <b>going</b> 4:13 5:14 8:5              8:9 17:2 23:24              36:7,9,16 39:24              45:11,21 50:17              51:3  <b>goltra</b> 22:9  <b>good</b> 5:3 20:11              24:19 41:7  <b>gosh</b> 38:15 45:10  <b>government</b> 3:15              5:7 7:5,8,24 10:7              12:25 22:19 23:6              24:8,16 25:20              26:6,10,18 34:9              34:15 35:4,11,12              35:14,17 36:7,15              36:17,18 37:1,6              38:4 42:1 45:21              50:13 52:8  <b>governments</b> 14:11              25:8 38:25 48:20  <b>granted</b> 52:20  <b>great</b> 33:22  <b>greater</b> 3:22 15:25              52:5  <b>griswold</b> 27:14  <b>ground</b> 14:19,21              16:6 50:3,3 53:12  <b>grounding</b> 27:13  <b>grounds</b> 3:23 12:2              18:7 50:15  <b>group</b> 25:22,22  <b>guess</b> 46:15  <b>guidelines</b> 35:15  <b>guy</b> 4:5</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>habeas</b> 44:4  <b>haddad</b> 1:19 2:6              25:12,13,15 26:9              27:3,12,19 28:4              28:11,12,19 29:9              29:21 30:15,18              31:10,19 32:4,10</p>	<p>32:20 33:12,19,23              35:2,10 36:11,18              37:20,25 38:7,23              39:13 40:2,6,10              40:16,21 41:1,9              41:23 42:10,13              43:2,5,15 44:1,7              44:11,24 45:7,18              47:4,10,14,24              48:12,22 49:8,18  <b>happen</b> 5:14 15:3              40:5 46:13,14  <b>happened</b> 5:15              22:2 45:13  <b>happens</b> 20:22              35:25  <b>harm</b> 24:6  <b>hasnt</b> 38:4 40:5  <b>head</b> 32:2  <b>hear</b> 3:3 10:9  <b>hearing</b> 23:4  <b>heartland</b> 28:9  <b>held</b> 3:11 22:19              23:2 29:19 43:7  <b>help</b> 37:10  <b>helpful</b> 48:16  <b>heres</b> 38:23  <b>hes</b> 4:5 7:20,21              48:5  <b>high</b> 18:16  <b>higher</b> 41:13  <b>history</b> 53:19  <b>hold</b> 19:1 22:12  <b>home</b> 51:4  <b>honest</b> 37:6  <b>honor</b> 27:13 28:5              31:20 32:5,21              33:12 41:23 43:2              44:7,11 47:4,10              48:22  <b>horribles</b> 45:8,16  <b>house</b> 15:4  <b>human</b> 22:15  <b>hundreds</b> 20:25  <b>hurt</b> 37:3  <b>husband</b> 3:16 5:11</p>
---	--	---	--	--

<p>7:8,10,16,20,23 7:24 8:4,9 29:5,24 30:1,24 31:3,7 33:8 40:15,18 41:17 43:19,24 45:3 46:8 47:7 48:5,6,11,19 49:14</p> <p><b>husbands</b> 12:13,17 13:3 16:7 39:25 42:9 46:19</p> <p><b>hypothetical</b> 3:25 5:13 13:13 16:3 43:13 44:17 46:18 47:13</p> <p><b>hypotheticals</b> 52:8</p> <hr/> <p style="text-align: center;"><b>I</b></p> <p><b>ibrahim</b> 22:7,21</p> <p><b>id</b> 25:9</p> <p><b>idea</b> 21:24 39:7</p> <p><b>identification</b> 6:5</p> <p><b>identified</b> 5:2</p> <p><b>identifying</b> 53:12</p> <p><b>ill</b> 35:2</p> <p><b>illustrated</b> 38:8</p> <p><b>im</b> 4:11 5:3,3 8:9 8:22 9:15,16 12:23 13:16,25 14:3 15:12 36:6 42:15 44:14,16 45:14 46:6 52:11 52:12</p> <p><b>imagine</b> 36:18 40:2 52:7</p> <p><b>immigrant</b> 28:1</p> <p><b>immigration</b> 3:18 27:4 31:6 33:11</p> <p><b>immigrations</b> 31:2</p> <p><b>immune</b> 25:23</p> <p><b>impact</b> 18:8 51:13</p> <p><b>implement</b> 26:20</p> <p><b>implementing</b> 26:15</p> <p><b>implicated</b> 8:24</p> <p><b>implications</b> 36:2,4</p>	<p><b>importance</b> 51:11</p> <p><b>important</b> 11:19 27:23 28:10</p> <p><b>impossible</b> 42:25</p> <p><b>imprison</b> 43:24</p> <p><b>improper</b> 6:19</p> <p><b>ina</b> 3:21 19:22 20:3 49:21,22</p> <p><b>inadmissible</b> 3:17 19:11</p> <p><b>incentive</b> 45:22 51:7</p> <p><b>incentivized</b> 46:1,1</p> <p><b>include</b> 15:1</p> <p><b>included</b> 21:19</p> <p><b>includes</b> 5:22 29:17 39:11</p> <p><b>inconsistent</b> 50:20</p> <p><b>incontrovertible</b> 13:20 16:5</p> <p><b>incorrect</b> 28:18</p> <p><b>incredible</b> 16:6</p> <p><b>independent</b> 22:15</p> <p><b>indicate</b> 44:19 53:22</p> <p><b>indication</b> 23:12 49:23</p> <p><b>indirect</b> 23:24 24:1 51:13</p> <p><b>indirectly</b> 5:10 8:15</p> <p><b>individual</b> 4:17 17:1 26:25 35:22</p> <p><b>information</b> 10:9 15:20 16:13 17:19 23:3,13 24:17 25:3,4 34:11,19 34:20,23 35:15,19 35:20 36:8 37:23 53:8,8,17</p> <p><b>informed</b> 4:11</p> <p><b>inherent</b> 3:12 30:21 30:22</p> <p><b>initial</b> 45:5</p> <p><b>initiate</b> 17:14</p> <p><b>initiated</b> 17:5</p> <p><b>inquired</b> 17:22</p>	<p><b>inquiry</b> 4:11</p> <p><b>insert</b> 22:13</p> <p><b>insist</b> 25:4</p> <p><b>insistent</b> 46:4</p> <p><b>instance</b> 23:9 25:24</p> <p><b>intelligence</b> 4:17</p> <p><b>intelligencegathe...</b> 23:12 24:7</p> <p><b>intended</b> 19:13</p> <p><b>interest</b> 5:6,10 10:11,12 24:8,13 27:6 30:3 43:17 46:9,10,13,15,16 46:23,24 47:9,11 47:19 49:7 52:2 52:20</p> <p><b>interested</b> 4:16</p> <p><b>interesting</b> 49:3</p> <p><b>interests</b> 23:23 24:1 41:19 44:23</p> <p><b>interfered</b> 48:1</p> <p><b>interfering</b> 7:19</p> <p><b>interlocutory</b> 36:20</p> <p><b>internal</b> 17:6,6,15 21:4</p> <p><b>interpretation</b> 30:5</p> <p><b>interpreting</b> 20:24</p> <p><b>interrupted</b> 32:19</p> <p><b>invoked</b> 39:9</p> <p><b>involve</b> 22:11 27:16 37:23</p> <p><b>involved</b> 11:1 25:3 25:6 44:23 48:9 49:2</p> <p><b>involves</b> 22:9</p> <p><b>involving</b> 22:14</p> <p><b>isnt</b> 15:9,13 20:7 38:3 49:10</p> <p><b>issue</b> 21:3 35:6,8,11 35:12 50:25</p> <p><b>issues</b> 49:19</p> <hr/> <p style="text-align: center;"><b>J</b></p> <p><b>john</b> 1:3 37:12</p> <p><b>judge</b> 24:8,10 34:24,24,25 35:18</p>	<p>36:6 37:1,2</p> <p><b>judicial</b> 3:21 6:8,12 6:21 12:7,21 13:4 16:19 18:22 25:23</p> <p><b>justice</b> 1:17 3:3,9 3:24 4:21 5:12,25 6:2,13,16 7:4,13 7:17 8:2,7,17,23 9:12,22 10:3,14 10:23 11:6 12:8 12:22 13:6,10,12 13:14,16,23,25 14:2,3,6,15,16,25 15:11,12 16:2,3 16:21 17:4,9,12 17:24 18:10,12 19:15,22 20:1,7 20:10 21:4,7,10 21:23 22:17 23:8 23:9,20 24:4,5,12 24:19,22 25:10,15 26:2,11,13,22 27:7,17,25 28:11 28:13,20 29:3,10 29:15 30:7,8,9,16 30:19,25 31:15,25 32:9,11,12 33:3 33:16,20 34:7 35:8 36:6,13,22 37:20,25 38:8,15 38:24 39:10,13,22 39:23 40:3,4,7,15 40:17,25 41:4,11 41:16,17 42:5,11 42:19 43:3,11,21 44:5,8,14,24 45:7 45:25 46:3,5 47:5 47:12,21 48:2,17 49:4,8 50:6,11 51:1,15 52:6,17 53:1,2,24</p> <p><b>justiciable</b> 35:16</p> <hr/> <p style="text-align: center;"><b>K</b></p> <p><b>kagan</b> 11:6 19:15 19:22 20:1 26:13</p>	<p>28:11,13,20 30:8 37:25 38:9,15,24 45:7 46:3 49:8 51:1,15 53:2,2</p> <p><b>keep</b> 5:7 15:3 33:8</p> <p><b>keeping</b> 7:20</p> <p><b>kennedy</b> 5:12 6:2 8:17 9:12,22 10:3 10:14,23 23:8 24:5 30:7,9,16,19 31:25 42:5,11 44:14,24 47:21 52:17</p> <p><b>kept</b> 4:24</p> <p><b>kerry</b> 1:3 3:4</p> <p><b>kind</b> 28:14,16 42:1 45:4,8 46:23 47:16 49:15 51:5</p> <p><b>king</b> 37:12</p> <p><b>knauff</b> 18:9 23:1 53:15</p> <p><b>knedler</b> 1:16 2:3,9 3:6,7,9 4:6 5:9,19 6:7,23 7:11,14,22 8:5,11 9:5,15 10:1 10:5,22 11:1,7,20 12:20 13:5,8 14:13,18 15:16 16:16,23 17:9,16 18:3,10,11,18 19:20,24 20:5 21:6,9,12,23 22:5 22:21 23:14,22 24:11,15,21,24 25:11 50:7,9,11 51:2,11,17 52:7 52:11</p> <p><b>knew</b> 14:15 38:17</p> <p><b>know</b> 12:25 13:14 17:7 19:18 20:20 21:2 25:7 26:6 28:4 34:21 37:9 38:1,14,19 41:13 43:21 46:4 47:12 51:1</p> <p><b>knowing</b> 20:18</p>
---	---	---	--	--

<b>known</b> 6:18	<b>live</b> 12:14,18 13:3	<b>matters</b> 42:14	<b>native</b> 14:10	<b>oconnor</b> 49:4
<b>knows</b> 45:2	14:9,10 16:7 29:5	<b>maximum</b> 47:7	<b>nature</b> 32:13	<b>odd</b> 30:9
<hr/> <b>L</b> <hr/>	29:17,20 30:4,24	<b>mean</b> 12:9 16:25	<b>necessary</b> 3:13	<b>offered</b> 18:22
<b>labeled</b> 20:12	46:19 47:25 49:14	19:16 20:2,8 21:6	15:20 19:1 23:16	<b>officer</b> 3:17 6:24
<b>laid</b> 30:20 35:13	<b>lived</b> 42:19	26:25 32:15 33:17	24:10 25:1 35:24	7:3 11:3 15:25
<b>land</b> 14:11	<b>living</b> 27:23 44:20	33:20 36:23,23	48:17 53:16	16:5,9 17:11 19:9
<b>large</b> 25:22 51:3	44:22 46:16	37:17 46:22	<b>need</b> 31:21 36:19	19:13 21:15,21
<b>latitude</b> 32:6,6 43:8	<b>logic</b> 33:4	<b>meaning</b> 4:1 30:23	39:12 45:15 46:14	53:23
<b>laughter</b> 14:17 41:8	<b>long</b> 32:13	<b>meaningful</b> 48:24	51:8	<b>officers</b> 5:23 17:1
<b>law</b> 8:10,11 13:17	<b>look</b> 27:20,21 53:6	<b>measure</b> 30:12	<b>needs</b> 21:2 26:10	25:25 26:19
26:5,6 29:10 30:5	<b>looking</b> 10:12	<b>member</b> 20:15	<b>neither</b> 15:24	<b>official</b> 11:11,16
31:2,11 32:21	<b>looks</b> 27:13,24	22:13 50:22	<b>never</b> 25:19,21	12:13 14:5
37:12 38:21 41:25	38:24 49:4	<b>members</b> 20:16	36:4 41:2 47:20	<b>officials</b> 11:13
42:2 46:1,3,18,24	<b>los</b> 1:19	<b>memoranda</b> 35:14	53:7	25:22,25 26:8
50:19	<b>lose</b> 10:18	<b>mentality</b> 6:18	<b>new</b> 42:20 43:25	<b>oh</b> 8:8 13:14 21:10
<b>lawsuit</b> 45:22	<b>loses</b> 9:18	<b>mentioned</b> 24:5	<b>nice</b> 20:3	42:11 45:10
<b>lawsuits</b> 39:24	<hr/> <b>M</b> <hr/>	<b>merit</b> 10:18	<b>nightmare</b> 5:5	<b>okay</b> 13:13 18:18
<b>lawyer</b> 21:19	<b>m</b> 1:14 3:2 54:1	<b>merits</b> 9:10	<b>ninth</b> 21:25 22:2	27:7 33:16
<b>lead</b> 16:19	<b>making</b> 9:17 21:11	<b>met</b> 18:14 38:3	28:17,24 29:2	<b>once</b> 20:16 52:19
<b>leaving</b> 18:21	42:1,24	<b>methods</b> 24:9	36:12	<b>ones</b> 20:19 29:17
<b>led</b> 49:2	<b>man</b> 13:18	<b>meyer</b> 27:14	<b>non</b> 4:2	<b>open</b> 18:21
<b>legal</b> 49:19	<b>mandel</b> 8:20,21	<b>mine</b> 13:14	<b>nondispositive</b> 8:25	<b>opening</b> 38:25
<b>legitimate</b> 18:17	10:4,14 11:1,23	<b>minimal</b> 37:18	<b>nonreviewability</b>	<b>operatives</b> 24:23
19:9,12,23 20:4	18:12,14,15,19,20	<b>minimum</b> 6:4	5:20 6:9,15 12:6	<b>opinion</b> 4:16,19
22:20 31:12 33:14	19:2 26:14 38:1	<b>minor</b> 27:12	25:18 53:19	8:23 21:18
38:2,5,13,16,18	45:9,20 53:3,6	<b>minutes</b> 50:7	<b>nonsensical</b> 39:16	<b>opportunity</b> 16:14
38:20 53:3,10	<b>marital</b> 26:24 28:2	<b>mistake</b> 45:23	<b>nonterrorist</b> 4:2	30:3 35:4 39:3
<b>length</b> 33:9	32:18 33:6 43:22	<b>mistakes</b> 6:16	<b>norm</b> 37:15	<b>oral</b> 1:12 2:2,5 3:7
<b>lesser</b> 38:18	44:9 48:18	<b>monday</b> 1:10	<b>normal</b> 39:20	25:13
<b>level</b> 19:16 24:23	<b>mark</b> 1:19 2:6	<b>months</b> 4:24,24,24	<b>note</b> 35:3 41:24	<b>order</b> 35:21
<b>levels</b> 35:5	25:13	<b>morning</b> 3:4 39:1	<b>noted</b> 49:6	<b>ordering</b> 33:21
<b>liberties</b> 8:16	<b>marriage</b> 5:7 7:18	<b>motivating</b> 11:22	<b>notice</b> 4:16 39:4,11	<b>organization</b> 20:15
<b>liberty</b> 27:5 30:2	7:19 27:16 28:7,8	<b>motivation</b> 51:7	39:18 53:14	20:17
47:19 51:13	29:14,16 41:5	<b>musai</b> 15:17 18:11	<b>number</b> 22:6,16	<b>organizations</b> 15:5
<b>license</b> 6:11	<b>married</b> 12:9,10	23:1	51:20	15:8 20:17
<b>likelihood</b> 27:20	13:18 14:4 28:1	<hr/> <b>N</b> <hr/>	<b>nursing</b> 51:4	<b>organized</b> 15:7
<b>likewise</b> 13:20	<b>marry</b> 28:1,2 29:17	<b>n</b> 2:1,1 3:1	<hr/> <b>O</b> <hr/>	<b>originally</b> 28:15
<b>limit</b> 49:21	29:19 30:21	<b>nadir</b> 11:9	<b>o</b> 2:1 3:1	<b>outset</b> 44:12
<b>limited</b> 53:20	<b>material</b> 15:6	<b>name</b> 4:1,2,8 5:16	<b>obannon</b> 8:13,14	<b>outside</b> 3:20 15:22
<b>line</b> 32:2,14	<b>matter</b> 1:12 12:8,16	<b>nation</b> 3:13	8:18 50:21 51:2,2	15:23 51:25
<b>linedrawing</b> 33:1	13:4 14:6 19:20	<b>national</b> 18:8 24:7	51:9,12	<b>overly</b> 20:24
<b>lines</b> 31:23	24:13 29:9,13	24:13 36:2,3,9	<b>obvious</b> 15:13	<b>overnight</b> 15:3
<b>list</b> 15:6	34:8 35:3 41:11	37:3,8 39:12	36:24 49:13	<b>overreading</b> 51:2
<b>litigate</b> 50:25	47:21,22,22 48:8	44:22	<b>obviously</b> 5:9 12:24	<b>oversight</b> 50:16
<b>little</b> 20:23 47:1	49:24 54:2	<b>nationality</b> 3:19	<b>occasions</b> 20:19	<hr/> <b>P</b> <hr/>

<p><b>p</b> 3:1  <b>page</b> 2:2 4:12 37:21 38:24  <b>pages</b> 8:21 20:13 20:14  <b>papers</b> 22:8  <b>parade</b> 45:8,16  <b>paragraph</b> 20:6 21:14 23:17  <b>parent</b> 27:1,3,9  <b>parental</b> 26:25  <b>parents</b> 27:8  <b>part</b> 11:22 19:14 27:22 37:13 41:20 42:13 51:3  <b>parte</b> 35:24,25  <b>particular</b> 15:2 22:22,23 23:10,16 34:10,17 38:12  <b>particulars</b> 18:2  <b>parties</b> 49:23  <b>party</b> 51:6  <b>pass</b> 16:10  <b>passed</b> 31:11 32:21  <b>passes</b> 46:18  <b>people</b> 4:23 5:1 6:15 15:4,7 19:5 20:19 45:11 47:2 51:8  <b>perfectly</b> 53:9  <b>period</b> 5:18 46:19  <b>permissible</b> 14:23  <b>person</b> 12:10 15:14 16:22 17:12 20:14 23:7 25:3,5,6 28:3 44:21 46:10,22 48:21 49:13 51:14  <b>petition</b> 42:6 52:18 52:20,24,25  <b>petitioner</b> 2:10 29:24 50:10  <b>petitioners</b> 1:5,18 2:4 3:8 37:21  <b>pick</b> 51:19 53:2  <b>picking</b> 53:14  <b>pierce</b> 27:14</p>	<p><b>placed</b> 48:15  <b>placement</b> 44:15  <b>plainly</b> 19:8  <b>plaintiffs</b> 45:22  <b>play</b> 34:8  <b>played</b> 45:9  <b>please</b> 3:10 25:16 39:22  <b>plenary</b> 32:7  <b>point</b> 4:7 6:25,25 8:5,12,18 14:19 15:17 20:2,8,10 20:11 25:19 29:21 32:16,24 33:4,17 39:23 43:15 47:14 53:4,15,21  <b>pointed</b> 6:16 26:13 52:17  <b>pointing</b> 42:15  <b>points</b> 13:19 14:7 18:19  <b>policy</b> 13:1  <b>political</b> 3:14  <b>position</b> 5:17 6:20 6:24 7:4 12:16,19 12:20 13:6,9,24 14:12,13 19:3 24:16 33:5 37:18  <b>possible</b> 36:25 46:2  <b>possibly</b> 34:21  <b>potential</b> 34:11  <b>power</b> 3:12,14 5:22 5:23  <b>powerful</b> 24:1  <b>powers</b> 32:7  <b>practical</b> 34:8 35:3 41:11  <b>precedent</b> 19:4  <b>preconditioned</b> 41:15  <b>predicate</b> 10:6  <b>preference</b> 32:2,14 32:22,24  <b>preferences</b> 32:15 33:5,11,22 48:13  <b>preferential</b> 17:13</p>	<p>29:8  <b>present</b> 35:19  <b>presented</b> 25:21  <b>press</b> 36:19  <b>pressed</b> 29:1  <b>presume</b> 30:9  <b>presupposes</b> 30:24  <b>prevent</b> 14:5  <b>printed</b> 20:13  <b>priority</b> 48:4,9,10  <b>prison</b> 30:1 42:22 45:12 46:8 47:8 51:18,18  <b>prisoner</b> 29:19 43:16,17 44:6,15  <b>prisoners</b> 43:10 49:5  <b>prisons</b> 43:8  <b>private</b> 49:23  <b>privy</b> 41:16  <b>probing</b> 4:25  <b>problem</b> 4:22 10:8 36:17 47:16 50:25  <b>problems</b> 47:2  <b>procedure</b> 17:17 26:3  <b>proceedings</b> 22:14  <b>process</b> 7:25 17:5 25:3 40:13 41:2 41:14,25 42:3,5,7 42:12,17 43:6,9 43:13,17,19 44:3 44:13 45:5,24 49:2,15 50:19 51:22,22,23 52:2  <b>professors</b> 9:3 10:15 45:11,12 46:2,3  <b>profound</b> 42:4  <b>prohibit</b> 12:7  <b>proof</b> 12:11,12,15 16:5  <b>properly</b> 10:18 17:18  <b>proposing</b> 50:18  <b>protected</b> 46:9,16</p>	<p>47:9 48:7 49:7  <b>protecting</b> 24:2,3  <b>protection</b> 46:11,24 52:5  <b>protections</b> 50:12  <b>protective</b> 35:21  <b>provide</b> 18:16 34:25,25  <b>provided</b> 34:24  <b>provides</b> 51:22  <b>providing</b> 34:11  <b>provision</b> 18:5 19:10 26:4 39:11  <b>provisions</b> 3:18 4:8 4:14 31:2 35:16 39:8,15  <b>prudential</b> 51:5  <b>punishment</b> 50:24  <b>purposes</b> 47:23  <b>put</b> 24:16 29:6 45:1  <b>putting</b> 32:2</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>question</b> 3:25 6:3 12:23 18:21 28:7 41:19 46:23 49:9  <b>questioning</b> 5:4  <b>questions</b> 38:8 50:4  <b>queue</b> 29:6  <b>quite</b> 6:10 20:11  <b>quotas</b> 31:6  <b>quote</b> 26:16</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>r</b> 3:1 16:25,25  <b>race</b> 13:21  <b>racial</b> 12:14  <b>racism</b> 16:6  <b>radical</b> 50:18  <b>raise</b> 27:16 30:21  <b>raised</b> 26:12 41:13 47:2  <b>raising</b> 4:10  <b>rare</b> 24:15  <b>reached</b> 15:18 34:20</p>	<p><b>read</b> 9:2,3 10:4,14 10:16,21  <b>reading</b> 8:23 10:10  <b>real</b> 4:21 10:7 47:1  <b>realistic</b> 47:17  <b>really</b> 11:4 20:1,25 42:14  <b>reason</b> 10:20,20,25 11:15 12:12 15:14 16:22 18:17 19:8 20:1,2 22:20 23:15 36:5 37:11 38:5 39:4,6,11 40:3 44:24 45:2 45:19 47:14 53:7 53:11  <b>reasoning</b> 30:17  <b>reasons</b> 6:19 12:14 12:15 13:23 47:17 49:14  <b>rebut</b> 39:5  <b>rebuttal</b> 2:8 39:8 39:15,18 50:9  <b>recall</b> 22:11  <b>received</b> 39:4  <b>recognition</b> 5:21 8:24  <b>recognized</b> 28:6,9 30:22 31:14 33:24 49:5  <b>record</b> 18:24 26:1  <b>recording</b> 16:8,9  <b>redact</b> 35:20  <b>reference</b> 21:17  <b>referred</b> 39:1 50:14  <b>reflect</b> 48:13  <b>refusal</b> 48:20  <b>regular</b> 8:7  <b>regularity</b> 17:10  <b>relation</b> 43:23  <b>relationship</b> 32:19 33:6 44:9 48:7,8 48:18,19  <b>relative</b> 17:5,13 22:3  <b>released</b> 4:25 30:1</p>
--	--	---	--	--

<p><b>relief</b> 9:1 16:13,21  <b>rely</b> 29:16  <b>remaining</b> 50:8  <b>remand</b> 49:25  <b>remedy</b> 4:3 44:19 44:21  <b>removal</b> 22:14 23:7 35:17  <b>reordering</b> 33:5,11 33:12,18  <b>repeatedly</b> 3:11  <b>reply</b> 26:19  <b>report</b> 4:18  <b>reported</b> 50:16  <b>representative</b> 17:22,25  <b>request</b> 4:14  <b>required</b> 18:25 19:5 22:21 23:6 39:20 52:5 53:14  <b>requirement</b> 44:4  <b>requirements</b> 45:3  <b>requires</b> 15:23  <b>requiring</b> 34:9  <b>reserve</b> 25:9  <b>resolve</b> 49:17  <b>respect</b> 6:24 11:11 18:19 21:13 22:3 47:9 48:16 51:25 52:14  <b>respond</b> 53:1  <b>respondent</b> 1:20 2:7 25:14 28:7 45:1 50:18  <b>respondents</b> 3:16  <b>responses</b> 4:6  <b>responsible</b> 22:15  <b>result</b> 14:8  <b>revealing</b> 34:19 36:8  <b>review</b> 3:21 6:8,12 6:21 9:19 11:9,15 11:21 12:7,18,21 13:4 16:18,19 17:14 18:22 21:18 21:19 24:12,12</p>	<p>25:23 26:4 31:10 31:20 34:6 35:21 35:23,24,25 41:3 43:14,23  <b>reviewed</b> 16:25 17:3 53:23  <b>ridiculous</b> 14:6,7  <b>right</b> 3:20 6:4,8 8:4 8:10,22 9:8,13,19 9:23,24 10:1,15 10:19,19,24 11:4 13:10,24 14:10 18:3 22:13 23:4 27:9,16,21 28:10 29:4,6,7,8,11,16 29:17,19,20,21,23 29:23,25 30:10,13 30:20,21,23,23 36:14 39:17 40:25 47:23,24,25,25 48:4,5 49:12,21  <b>rights</b> 7:6,15,18,25 8:24 25:4,7 27:2 29:12,13 33:7 40:22 44:5,9,12 44:15 52:16  <b>risk</b> 24:6  <b>riskaverse</b> 20:24  <b>roberts</b> 3:3 25:10 26:22 27:7,17 32:9,12 33:3,16 33:20 43:11,21 44:5,8 47:5,12 50:6 53:24  <b>rogue</b> 21:20  <b>rule</b> 8:15 37:12 41:21  <b>rules</b> 11:13 40:13</p>	<p><b>satisfied</b> 52:2  <b>satisfies</b> 19:8  <b>satisfy</b> 45:3 52:21  <b>saying</b> 7:17,21 9:2 9:5,9,16,16 12:22 13:17 15:12,14 16:9 18:1 19:4 23:3 30:2,11 39:24 46:6,7 47:3 47:18 52:11,12  <b>says</b> 8:8,23 9:24 10:17 20:16 31:2 34:15 35:18 46:18 48:10 51:12  <b>scalia</b> 8:2,7 13:12 13:16 14:2,15 15:11 21:7,10 24:19 26:2,11 27:25 30:25 31:15 40:15,17,25 41:4 41:11,17 45:25  <b>scalias</b> 14:7 39:23  <b>scope</b> 49:12  <b>second</b> 36:25  <b>secondly</b> 50:18  <b>secretary</b> 1:4 3:5  <b>section</b> 15:15 21:3  <b>security</b> 4:15 15:21 18:8 21:18 24:7 24:13 34:12 35:22 36:2,3,9 37:4,9 39:12 42:22 44:22 47:8 50:15  <b>see</b> 11:6 39:2  <b>seek</b> 3:21 43:14  <b>seeking</b> 11:25  <b>selfevident</b> 50:21  <b>sending</b> 4:16  <b>sensitive</b> 37:23  <b>sent</b> 42:21 47:7  <b>separately</b> 12:14 13:3 14:9 46:19  <b>separates</b> 43:18 45:6  <b>separation</b> 47:9 49:2</p>	<p><b>september</b> 4:23  <b>serious</b> 14:22 20:8 41:19  <b>seriously</b> 9:10 37:14  <b>set</b> 11:12 18:4 26:17,21 32:7 45:20  <b>seven</b> 35:4  <b>shaughnessy</b> 15:17 23:1 53:16  <b>shes</b> 9:16,17  <b>shores</b> 52:14  <b>shouldnt</b> 16:7  <b>show</b> 4:4 22:19  <b>significant</b> 36:3  <b>simply</b> 8:21 23:2 32:25 46:6  <b>sister</b> 27:18,19,22  <b>situation</b> 7:18 10:13 21:20 23:23 24:5 25:5 26:14 41:2,24 43:6 44:25 48:25  <b>situations</b> 15:18 24:18,25 25:1 45:15  <b>skip</b> 30:13,19  <b>sleep</b> 20:17  <b>slew</b> 39:24  <b>smiths</b> 5:15  <b>solicit</b> 15:5,8 20:18  <b>solicitor</b> 1:16  <b>somebody</b> 20:16 32:14  <b>somewhat</b> 23:6  <b>son</b> 27:4  <b>sort</b> 49:15  <b>sotomayor</b> 3:24 4:21 6:16 7:4,13 7:17 18:10,12 39:22 40:3,4,7 41:16 52:6  <b>sovereignty</b> 3:12 24:3  <b>special</b> 21:17</p>	<p><b>specific</b> 20:6 23:6 26:21  <b>specifically</b> 16:20 18:4,20  <b>specification</b> 22:22  <b>specificity</b> 19:16  <b>specify</b> 34:10  <b>spousal</b> 32:22 52:25  <b>spouse</b> 5:8 14:9 27:2 29:17,20 30:4 31:4 32:2 42:20,23 44:8 46:17 47:6 48:4 50:22 52:19 53:5 53:18  <b>spouses</b> 27:8 46:1 49:5 52:16,18,20  <b>stage</b> 42:3  <b>stake</b> 24:14  <b>standard</b> 18:15,15 19:9,13 31:11,13 31:21 33:15 38:2 38:18 45:19  <b>standing</b> 5:18 8:3 9:3,6 51:5  <b>state</b> 1:4 3:5 4:11 4:14,18 16:13 17:20,23 20:22 21:17 26:8  <b>stated</b> 32:7 39:5 53:7  <b>statement</b> 7:7 13:22 52:7 53:10  <b>statements</b> 52:13  <b>states</b> 1:1,13 3:20 7:6,11,14,25 13:1 13:2 15:21,23 24:2 27:1,10 28:6 29:5 34:13 37:15 45:2 51:25 52:9 52:12  <b>status</b> 17:13 29:8 39:14 48:4,9,10  <b>statute</b> 15:1 18:1 19:11 20:12 26:15</p>
<p><b>S</b></p>				
<p><b>s</b> 1:16 2:1,3,9 3:1,7 11:25 19:5 27:3 43:13 50:9 53:21 53:21  <b>safley</b> 29:18 49:4  <b>satisfactory</b> 32:18</p>				

<p>29:6,11,12 38:12 38:14,17,25 39:11 39:14,16,18 48:10 48:12 49:22 50:14 <b>statutory</b> 19:10 26:17 29:10 49:24 <b>stay</b> 7:9 15:4 <b>step</b> 22:25,25 30:14 30:19 <b>steps</b> 41:18 <b>sticking</b> 6:19 <b>straightforward</b> 41:12 <b>strong</b> 32:23 <b>stronger</b> 50:3 <b>structure</b> 52:3 <b>stuff</b> 24:20 26:7 <b>subject</b> 6:20 50:24 <b>submit</b> 24:17 50:5 <b>submitted</b> 16:13 53:25 54:2 <b>subparagraph</b> 21:16 <b>subprovision</b> 20:21 <b>subsection</b> 21:2 22:22,23 23:10,16 34:10 <b>subsections</b> 34:17 37:3 <b>subset</b> 5:21 <b>substantial</b> 25:17 42:7 <b>sue</b> 46:7 49:24 <b>sufficient</b> 18:24 19:6,19,21 <b>suggesting</b> 5:5 <b>suggestion</b> 23:5 <b>suggests</b> 53:3,6 <b>superior</b> 17:1 <b>supervising</b> 17:11 <b>supervisor</b> 7:3 <b>suppose</b> 5:15 8:2 10:14,16 16:4,8 19:17 23:9 27:8 37:25 38:1 42:19 46:14 48:5</p>	<p><b>supposed</b> 11:14 <b>supreme</b> 1:1,13 <b>sure</b> 6:5 8:22 <b>surrounding</b> 41:25 42:3 43:6 <b>sustainable</b> 40:9 <b>sustained</b> 17:2 40:10 <b>system</b> 18:4 35:5</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>t</b> 2:1,1 <b>tactical</b> 41:18 <b>take</b> 14:6 32:13 36:20 37:13 40:11 <b>taken</b> 34:17 51:14 <b>talk</b> 45:12 <b>talking</b> 7:20 20:12 <b>tape</b> 16:8 <b>teeth</b> 11:4 <b>telephone</b> 10:10 <b>tell</b> 15:13 16:22 34:16,19,19 35:9 36:7,10,16 37:1,2 37:7,16 39:21 40:4,7 <b>telling</b> 4:3 15:14 23:7 <b>terms</b> 10:8 26:21 32:7 48:23 50:12 52:22 <b>terrorism</b> 3:18 4:8 4:14 12:2 20:6 21:16 53:12 <b>terrorist</b> 4:2,5 7:8 14:22,24,25 20:12 <b>test</b> 19:7 <b>thank</b> 25:10 50:6 50:11 53:24 <b>thats</b> 4:22 5:14 8:22 10:3,4 16:17 17:5 18:3 20:2,3 20:15,25 21:10,11 23:14,14 29:9 37:4 41:6 42:12 42:16 44:11 46:2</p>	<p>47:4 48:22 51:8 52:6 <b>theres</b> 4:1,3 10:7,7 16:8 17:17 22:7,8 22:8 23:3 24:6 28:7 30:2,10 42:12 44:13,19 45:4,18 46:15 47:19 49:22 51:6 51:12 <b>theyll</b> 37:7 <b>theyre</b> 20:21,24,24 24:25 <b>thing</b> 12:5 14:14 21:13 32:1,3 36:24 <b>things</b> 15:1 31:7 <b>think</b> 5:19 7:22 8:18 9:10,18,23 10:2,4,5,5 11:8,21 11:22 12:24 14:15 17:10 19:7,21,24 20:11 22:9,16 23:8 26:5,9 27:20 32:4 33:13 37:20 38:7 39:17 41:9 41:10,10,23 42:2 42:14 44:1,16,17 44:17 45:14,18 46:2,5,5 47:6,15 47:16,18 48:14,23 48:24 49:17 50:2 51:1,2,9,17 <b>thinks</b> 13:1 36:15 46:20 52:4 <b>third</b> 28:21 <b>thought</b> 28:15 36:23 38:16 39:10 45:7,10 47:6 53:5 <b>three</b> 28:20 35:5 <b>threshold</b> 45:5 49:1 <b>throw</b> 9:25 20:15 <b>time</b> 25:9 28:22 32:13,21 40:21 41:3,3 43:18 <b>times</b> 11:8 45:21</p>	<p><b>tiniest</b> 33:10 <b>tiny</b> 33:12 <b>today</b> 25:21 <b>told</b> 4:22 <b>top</b> 29:6 <b>tourist</b> 52:25 <b>treat</b> 52:9 <b>treated</b> 35:15 39:25 <b>trial</b> 39:25 <b>troubled</b> 41:20 <b>troubles</b> 49:12 <b>true</b> 51:25 52:14 <b>truly</b> 47:15 <b>trust</b> 36:16 <b>truth</b> 37:7,8 <b>try</b> 4:4 30:18 36:20 46:14 <b>trying</b> 11:15 12:23 27:4 44:16 <b>turn</b> 17:22 <b>turner</b> 29:18,22 49:4 <b>turners</b> 29:24 <b>two</b> 4:6 5:15 15:4,6 18:19 20:16 28:22 44:20 45:15</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>u</b> 11:25 19:5 27:3 53:21,21 <b>ultimate</b> 42:15 <b>ultimately</b> 36:1 <b>ultramaximum</b> 42:22 <b>unconstitutional</b> 9:11 14:20 31:1,5 31:9,17,18 52:10 <b>undeniable</b> 12:11 12:15 <b>underlying</b> 53:8 <b>understand</b> 8:17,18 33:4 <b>understanding</b> 27:5 28:18 <b>understood</b> 18:15 <b>unfair</b> 39:25</p>	<p><b>unfairly</b> 40:1 <b>unit</b> 27:22 <b>united</b> 1:1,13 3:20 7:6,11,14,25 13:1 13:2 15:21,23 24:2 27:1,10 28:6 29:5 34:12 37:15 45:1 51:25 52:9 52:11 <b>unquote</b> 26:16 <b>unwilling</b> 33:24 34:1</p> <hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>v</b> 1:6 3:5 23:1 53:15 <b>valid</b> 28:7 <b>validity</b> 28:8 <b>value</b> 27:23 48:15 <b>video</b> 16:8 <b>view</b> 6:25 26:19 39:16 <b>virtually</b> 42:24 46:25 <b>virtue</b> 48:19 <b>visa</b> 3:16 5:11 7:1 9:14,20 10:16,17 11:3,18 12:3,11 14:20 16:6,15,24 16:24 18:7 26:17 27:4 32:1,17 33:5 33:10 34:10 38:11 42:6,8,16 50:15 52:19,24,25 <b>visas</b> 11:12 16:11 16:19</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>wait</b> 13:16 33:9 <b>waiver</b> 11:2,9,24 <b>want</b> 8:8 12:12,22 12:25 14:7,12 21:12,12 22:25,25 28:2 30:13 34:16 35:3,19,19 40:19 44:21 45:12 47:1 49:23</p>
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<p><b>wanted</b> 28:1 53:1  <b>wants</b> 13:23 20:20                  20:21  <b>warrant</b> 4:10  <b>washington</b> 1:9,17                  4:15  <b>wasnt</b> 18:16  <b>way</b> 7:1 10:4,16,21                  11:7 16:15 20:25                  25:20 28:20 41:10                  46:14 49:16 52:3                  52:10  <b>weigh</b> 26:16  <b>weighed</b> 24:1  <b>weve</b> 30:20 35:13                  35:18  <b>whats</b> 19:16 36:12                  51:3  <b>whatsoever</b> 4:4 7:6                  34:1  <b>whos</b> 4:5 11:17,18                  17:13 27:9 41:18                  44:21  <b>wife</b> 5:6 6:4 7:5 8:2                  10:24 13:18 15:24                  17:7 21:8,8,10                  23:23 30:24 31:3                  31:7 33:8 40:20                  40:22 43:19,23                  46:7 48:6,10,19                  52:1  <b>window</b> 45:4  <b>wish</b> 40:18  <b>withhold</b> 18:6  <b>wives</b> 12:13,18 13:3                  16:7 39:24 46:19  <b>woman</b> 12:9,10  <b>wondering</b> 45:14  <b>wont</b> 16:23 17:7                  37:6,11 40:5  <b>words</b> 15:10,10                  20:25 43:22  <b>work</b> 35:1,3,9  <b>works</b> 52:4  <b>worried</b> 13:25 14:3  <b>worry</b> 45:16,19</p>	<p><b>wouldnt</b> 28:19                  31:17 48:8 49:11                  49:16  <b>wrong</b> 5:17 21:1  <b>wrongful</b> 8:3 50:22  <b>wrote</b> 39:2</p> <hr/> <p style="text-align: center;"><b>X</b></p> <hr/> <p><b>x</b> 1:2,8 20:23</p> <hr/> <p style="text-align: center;"><b>Y</b></p> <hr/> <p><b>years</b> 32:15,19  <b>york</b> 42:20 43:25  <b>youd</b> 32:3  <b>youre</b> 4:3 5:5,13                  7:17,19,21 11:15                  12:5 15:2 20:12                  28:2 30:16 46:6,7                  46:25 47:3 51:1  <b>youve</b> 5:13 15:6</p> <hr/> <p style="text-align: center;"><b>Z</b></p> <hr/> <p style="text-align: center;"><b>0</b></p> <hr/> <p><b>04</b> 54:1  <b>05</b> 1:14 3:2</p> <hr/> <p style="text-align: center;"><b>1</b></p> <hr/> <p><b>10</b> 1:14 3:2  <b>100</b> 15:10  <b>11</b> 54:1  <b>1182</b> 19:18 23:18                  37:22 38:6 39:19  <b>11th</b> 4:23  <b>1201</b> 53:21  <b>131402</b> 1:5 3:4  <b>13a</b> 38:25  <b>14a</b> 20:14  <b>1907</b> 48:13  <b>1952</b> 16:18  <b>1996</b> 18:5</p> <hr/> <p style="text-align: center;"><b>2</b></p> <hr/> <p><b>20</b> 32:15,19 35:13  <b>200</b> 15:10  <b>2008</b> 22:1,2  <b>2010</b> 21:19</p>	<p><b>2014</b> 22:2  <b>2015</b> 1:10  <b>22</b> 16:25  <b>23</b> 1:10  <b>236</b> 53:22  <b>25</b> 2:7 37:2</p> <hr/> <p style="text-align: center;"><b>3</b></p> <hr/> <p><b>3</b> 2:4 37:22 38:6                  39:19  <b>38</b> 8:21  <b>39</b> 8:21</p> <hr/> <p style="text-align: center;"><b>4</b></p> <hr/> <p><b>40</b> 8:21 15:5,8  <b>42</b> 16:24  <b>4261</b> 16:25  <b>49</b> 4:12</p> <hr/> <p style="text-align: center;"><b>5</b></p> <hr/> <p><b>5</b> 33:25  <b>50</b> 2:10  <b>52</b> 37:21</p> <hr/> <p style="text-align: center;"><b>6</b></p> <hr/> <p><b>6</b> 33:25 50:14 53:21</p> <hr/> <p style="text-align: center;"><b>7</b></p> <hr/> <p><b>7a</b> 20:13  <b>7page</b> 21:3</p> <hr/> <p style="text-align: center;"><b>8</b></p> <hr/> <p><b>8</b> 53:21</p> <hr/> <p style="text-align: center;"><b>9</b></p> <hr/>		
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