

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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| LARRY E. KLAYMAN, ET AL.     | : | Docket Nos. CA13-851 |
|                              | : | CA13-881 (RJL)       |
| Plaintiffs,                  | : |                      |
|                              | : | November 18, 2013    |
|                              | : |                      |
| v.                           | : | 11:30 a.m.           |
|                              | : |                      |
| BARACK HUSSEIN OBAMA, ET AL. | : |                      |
|                              | : |                      |
| Defendants.                  | : |                      |
| . . . . .                    |   |                      |

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING  
BEFORE THE HONORABLE RICHARD J. LEON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

|                           |  |
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| For the Plaintiff Pro Se: | LARRY E. KLAYMAN<br>Law Office of Larry E. Klayman<br>2020 Pennsylvania Avenue, NW<br>Washington, DC 20006 |
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| For the Defendants: | JAMES J. GILLIGAN<br>RODNEY PATTON<br>MARCIA BERMAN<br>BRYAN DEARINGER<br>U.S. Department of Justice<br>20 Massachusetts Avenue, NW<br>Washington, DC 20001 |
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| For the Defendant<br>Verizon Communications: | RANDOLPH D. MOSS<br>Wilmer Cutler Pickering Hale &<br>Dorr, LLP<br>1875 Pennsylvania Avenue, NW<br>Washington, DC 20006 |
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For the Defendant  
National Security Agency:

JAMES R. WHITMAN  
U.S. Department of Justice  
PO Box 7146  
Washington, DC 20044

Also Present:

Naveed Muboobian  
Mona Falah  
Charles and Mary Ann Strange

Court Reporter:

PATTY ARTRIP GELS, RMR  
Official Court Reporter  
Room 4700-A, U.S. Courthouse  
Washington, D.C. 20001  
(202) 962-0200

Proceedings reported by machine shorthand, transcript produced  
by computer-aided transcription.

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P R O C E E D I N G S

COURTROOM DEPUTY: I Honor, we have Civil Action 13-851 and Civil Action 13-881 Larry Klayman et al. versus Barack Hussein Obama, et al. I would ask that counsel please approach the lectern and identify yourself and those at your respective tables.

MR. KLAYMAN: Thank you, your Honor. Larry Klayman. Pleasure to be here.

THE COURT: Welcome.

MR. KLAYMAN: May I ask permission for my associates to sit at counsel table? They are members of the California Bar? They came with me.

THE COURT: Are they counsel of record in the case?

MR. KLAYMAN: They are not counsel of record. I am counsel of record.

THE COURT: What are the Courts are they members of?

MR. KLAYMAN: In California. Mr. Muboobian.

MR. MUBOOBIAN: California Supreme Court and Central District of California.

THE COURT: And who else?

MR. KLAYMAN: Miss Mona Falah.

THE COURT: What Courts?

MR. KLAYMAN: California Supreme Court.

THE COURT: All right. They can sit there.

MR. KLAYMAN: Thank you.

1           The COURT: Hold on now. We are just introducing  
2 ourselves. You can have a seat.

3           MR. KLAYMAN: Okay. Thank you.

4           THE COURT: Mr. Gilligan.

5           MR. GILLIGAN: Thank you, your Honor. James Gilligan  
6 with the Department of Justice for the Government Defendants.  
7 With me at counsel table are Marcia Berman, Bryan Dearing,   
8 Rodney Patton, Tony Coppalino and also joining us today is  
9 Elizabeth Shapiro.

10          THE COURT: Don't forget Mr. Moss.

11          MR. GILLIGAN: I thought he would introduce himself.

12          MR. MOSS: Good morning, your Honor, Randolph Moss on  
13 behalf of the Verizon Defendants.

14          THE COURT: Welcome. All right. Very good. Mr.  
15 Klayman.

16          MR. KLAYMAN: Thank you, your Honor. If I may address  
17 some preliminary matters with the Court.

18          THE COURT: Sure.

19          MR. KLAYMAN: I would like to approach the bench with a  
20 binder that we prepared about relevant documents that we  
21 referred to in our briefs and also with two requests that we  
22 made to the NSA through the Justice Department to authenticate  
23 those documents for purposes of any use that your Honor may  
24 decide to employ them for in this case.

25                 It is our understanding from Mr. Gilligan, we got an

1 e-mail that they would not produce anyone to authenticate the  
2 documents, nor would they deny or admit the authenticity of the  
3 documents. So we do have a tutor request pending. It is at  
4 Section 21 of this binder which I would like to provide to your  
5 Honor with it.

6 THE COURT: You can hold off on providing anything  
7 right now.

8 MR. KLAYMAN: Okay.

9 THE COURT: Let's see where this goes.

10 MR. KLAYMAN: The second matter is that we filed a  
11 Motion To Amend the Complaint, both of the different complaints.  
12 Within the original complaint, it was either implicit or  
13 otherwise that we were going under the APA by virtue of the  
14 nature are the of the relief we were requesting, but we thought  
15 we should make it clearer. So yesterday evening we filed a  
16 Motion For Leave To Amend the Complaints to add the APA remedy.

17 In addition, it sets forth the relief that we requested  
18 in the Preliminary Injunction Motions. Your Honor should have  
19 that on the Court's PACER system, but I have do have a hard copy  
20 if you would like to have it.

21 THE COURT: That's fine. Obviously the Government  
22 hasn't had a chance to respond yet so we will and see what the  
23 Government's response is.

24 MR. KLAYMAN: Yes. In addition, yesterday as we were  
25 preparing, we learned of additional information that bears on

1 our clients who are sitting at counsel table with us.

2 THE COURT: Welcome.

3 MR. KLAYMAN: Charles and May Ann Strange.

4 THE COURT: Welcome.

5 MR. KLAYMAN: Which bears on the Government intruding  
6 into their private communications with regard to computers and  
7 we filed a Motion For Leave to file this affidavit. It is the  
8 affidavit of David M. Syler. He is the computer expert who  
9 inspected that computer. We ask for leave to file that. I have  
10 a copy of that if your Honor would like a copy of that.

11 THE COURT: Any objection? Come on up, Mr. Gilligan.

12 MR. GILLIGAN: Regarding the Amended Complaints, your  
13 Honor, we would like to reserve judgment on those since we just  
14 received them last night, and we do object to the attempts to  
15 introduce new evidence that was only provided to us last night  
16 the evening before the argument in this matter.

17 THE COURT: Why don't we do this. You can have until  
18 the end of the week to file any objection you have to it and  
19 then I will take it under advisement.

20 MR. GILLIGAN: Very well, your Honor. Thank you.

21 MR. KLAYMAN: I think that does it for the preliminary  
22 matters your Honor. Thank you.

23 THE COURT: All right. You don't have to leave.

24 MR. KLAYMAN: Okay.

25 MR. KLAYMAN: I will get my binder. Now we will do the

1 argument.

2 THE COURT: You can stay.

3 MR. KLAYMAN: Okay. Does your Honor have any time  
4 limitation?

5 THE COURT: Yes. What I was thinking, as you will see  
6 in a minute, my focus is going to be essentially today two part;  
7 and I think a half an hour each side. I give you chance to  
8 split yours with a rebuttal, because you are the moving party.  
9 But the Government can have a half hour total and you can have a  
10 half hour total, but you can split it 20/10, however you want to  
11 split it. It is your choice.

12 But my focus today is really two part. First is the  
13 authority of this Court to handle this case by what authority  
14 and, secondly, what if any standing has been demonstrated on the  
15 part of the Plaintiffs to, if this Court has authority, to hear  
16 this case, what standing if any has been demonstrated by the  
17 Plaintiffs that would enable this Court to go forward in  
18 evaluating this case? So that's kind of where my focus is.

19 The problem, frankly, Mr. Klayman, is on the first  
20 issue, the briefs are very thin on both sides. Judge Pauly  
21 apparently in New York specifically asked for briefing on this  
22 issue and based on what my clerks could find, there wasn't a  
23 whole heck of a lot that was filed; and, to me, this is the  
24 overarching question: By what authority can this Court, Article  
25 III Court involve itself in evaluating decisions of a separate

1 Article III Court set by Congress with the very specific  
2 statutory framework that does not in any way, shape or form  
3 provide for jurisdiction in this Court?

4 By what authority can this Court do that? Statutory or  
5 constitutional and if you have got some analogies, that would be  
6 helpful because frankly I have been searching for it.

7 MR. KLAYMAN: Let me get right to it, your Honor.

8 THE COURT: Please.

9 MR. KLAYMAN: Because we thought you would ask that  
10 question. You raised that at the status conference.

11 THE COURT: Good.

12 MR. KLAYMAN: We prepared a bench brief on that. May I  
13 provide that to you? A very short brief bench brief but --

14 THE COURT: Make sure Mr. Gilligan gets that.

15 MR. GILLIGAN: Reserving my right to object, your  
16 Honor.

17 THE COURT: All right. That's fine.

18 MR. KLAYMAN: Okay. And a copy for your Clerk?

19 THE COURT: I can't listen and read at the same time so  
20 I will give them a copy. How is that? You go ahead.

21 MR. KLAYMAN: Let me just emphasize that there are two  
22 lawsuits here. One was a lawsuit filed with regard to Verizon  
23 where you have Judge Vincent's order which is at issue and that  
24 was the order of April 25, 2013. And in that order, as your  
25 Honor knows, it is incredibly overly broad. It allows for the

1 collection of any telephone records, metadata, et cetera on  
2 every Verizon customer of which I am one and of which all of our  
3 Plaintiffs are one as well.

4 THE COURT: The Government is prepared to concede that  
5 apparently based on their briefs.

6 MR. KLAYMAN: All right.

7 THE COURT: They make a distinction between different  
8 Verizon accounts.

9 MR. KLAYMAN: We are users and, of course, as users and  
10 subscribers, we are subject to having our telephone calls routed  
11 through Verizon. So we are affected with or without any kind of  
12 subscription with Verizon, but that is the case --

13 THE COURT: Okay.

14 MR. KLAYMAN: -- here and that's not in dispute and  
15 Verizon is here and they can confirm in fact that we are  
16 subscribers if they would like to.

17 Interestingly enough, that order was renewed later,  
18 okay, by Judge McLaughlin and that -- from our reading of that  
19 order, it is virtually the same order. Okay. It is overly  
20 broad. There is some redactions. We don't exactly what she has  
21 in there because it hasn't been released, but let us presume it  
22 is the same order.

23 That order will go out of effect on January 3, 2014.  
24 So there will be no order. So whatever I argue today as of  
25 January 3, 2014, there will be no Court Order unless it is

1 renewed; and your Honor could step in immediately at that time.  
2 However, you can step in now and here is why.

3           Number one, what happened at the FISA Court was all  
4 ex parte. We as Plaintiffs did not have the opportunity to  
5 participate in that proceeding. It was done ex parte.  
6 Information was provided to the Judge, Judge Vincent. There was  
7 a long history as we set forward in the briefs and as we  
8 documented in various Court Orders of the NSA lying to the FISA  
9 Court and lying to the U.S. Government about what's going on  
10 with regard to their metadata program.

11           In addition, there was an audit done just in 2012 which  
12 showed that were 2,712 approximately violations of Section 215  
13 and Section 702 of the Privacy Act. 2,712.

14           On top of that the Inspector General found 12  
15 instances where individuals at the NSA accessed actual  
16 conversations and other types of information to spy on their  
17 boyfriends, girlfriends, husbands and wives thinking that they  
18 were cheating on them at the time.

19           Now, if that can go on with the lower level employees,  
20 just think what the potential is with regard to upper level  
21 employees and big interests that are challenging this  
22 administration. I will let your Honor be the judge of whether  
23 we are a big interest or not. But, you know, we are quite  
24 adversarial towards the administration, and so is Mr. Strange  
25 whose son was an NSA cryptologist assigned to Navy Seal Team

1 Six. He went down tragically in a cash on August 6, 2011, in a  
2 raid where the mission was termed Extortion 17. It was  
3 retaliation by the Taliban because Seal Team Six had taken out  
4 Osama bin Ladin. He has lawsuits which I filed on his behalf.

5 We are in front of Congress in a Congressional inquiry  
6 and one of the issues there is is the administration and did the  
7 military, are they culpable for the deaths of these individuals  
8 either through negligence or otherwise?

9 So I am kind of answering the question combining it.  
10 There you have the standing and we have set forth in detail  
11 affidavits our standing. I will get to that.

12 THE COURT: Let's look at the question directly.

13 MR. KLAYMAN: Let's look at the first one.

14 THE COURT: Directly.

15 MR. KLAYMAN: Right.

16 THE COURT: Is there any doubt in your mind, any that  
17 when Congress devised the scheme it devised creating the FISA  
18 Court and providing within it for review by the review Court and  
19 then possible review by the U.S. Supreme Court that Congress  
20 intended in any way, shape or form for other Article III Courts  
21 to have a jurisdictional basis to review the decisions of those  
22 FISA orders? Is there any doubt in your mind about that?

23 MR. KLAYMAN: I have no doubt that you have the  
24 authority to review that order.

25 THE COURT: Hold on. If the answer to my question is

1 you have no doubt, I will see what Mr. Gilligan says.

2 MR. KLAYMAN: And I have more to add.

3 THE COURT: I know. No. I will see what Mr. Gilligan  
4 says, but assuming, and he can correct me if I am assuming  
5 incorrectly, that the Government's position will be no other  
6 Article III Court has any authority to second guess those  
7 decisions and to review those decisions of the FISA Court. I am  
8 assuming that's going to be his position. He might tell me  
9 otherwise.

10 If I go to the next step and start evaluating the  
11 jurisdictional question with regard to the Preliminary  
12 Injunction you are seeking, I can't do it without first deciding  
13 that I have the authority. I have to decide that first, Mr.  
14 Klayman. I have to make that decision and I have to make it  
15 unfortunately in a situation where Congress has made it pretty  
16 clear that they don't think I have that authority.

17 MR. KLAYMAN: Well, what's key about Congress' acts  
18 whether Section 215 or 702 or the entire panoply of the Patriot  
19 Act is that it does not exclude Article III Courts from  
20 reviewing issues with regard to individual litigants. Obviously  
21 that had to be intended because we don't live in a totalitarian  
22 state where the Government and the Courts don't give due process  
23 rights to the American people.

24 How is it that I would have no rights or Mr. Strange  
25 and his wife would have no rights and the other two Defendants

1 Michael Ferrari and Matt Garrison would have no rights. So,  
2 consequently, Congress not writing out any other review by an  
3 Article III Court which says that you can reach issues of  
4 constitutionality, that's right in the Constitution in Article  
5 III; and it is also in 1331, 18 USC 1331: The District Courts  
6 have the authority to rule upon constitutional matters.

7 We are challenging not just a violation --

8 THE COURT: Is it really that simple?

9 MR. KLAYMAN: It is that simple.

10 THE COURT: Is it really that simple? So, for example,  
11 let me give a hypothetical.

12 MR. KLAYMAN: Combined with other things I am going to  
13 add.

14 THE COURT: Let me give you a hypothetical, Mr.  
15 Klayman. If a Court, let's say a Tax Court Judge or a Claims  
16 Court Judge were to issue a subpoena that called for the  
17 production of records, a person of whose records would claim  
18 that it would violate their constitutional rights for those to  
19 be produced by the record holder. If in a Tax Court Judge or  
20 Claims Court Judge were to permit the production of those  
21 records in the face of a claim of a violation of their  
22 constitutional rights, do you think I could review that  
23 decision? Would I have the jurisdictional authority the review  
24 that decision?

25 MR. KLAYMAN: Here is the distinction. It was the fix

1 I am making initially. If an individual who is having their  
2 records subpoenaed by the IRS has the right to intervene in that  
3 proceeding of the Tax Court and oppose that subpoena.

4 THE COURT: Not the IRS. If there is a Motion To Quash  
5 the subpoena in the litigation, the litigation in the Tax Court  
6 or the Claims Court, if there was a Motion To Quash the subpoena  
7 by the person whose records they were, not the person who was  
8 holding the records, the person whose records they were, could  
9 the Article III Court, this Court, U.S. District Court in D.C.,  
10 would we have jurisdiction to either issue such an order or to  
11 review a denial of such a request that was made in the Tax Court  
12 or the Claims Court?

13 MR. KLAYMAN: Well, your Honor, I don't think that  
14 analogy in all due respect applies here.

15 THE COURT: Why not?

16 MR. KLAYMAN: It doesn't apply because, as I was  
17 saying, the individual whose records are being obtained has a  
18 right to intervene in the Tax Court action. I have no right,  
19 Mr. Strange and his wife have no right to intervene before the  
20 FISA Court, plus it is secret. No one even knows it is going  
21 on. It is a Star Chamber proceeding.

22 If you look at the statistics that are out there, the  
23 FISA Court, no lack of respect, rubber stamps what the  
24 Government wants. They have only ever turned down any request  
25 .03 percent of the time.

1 THE COURT: So if you are right and the Government is  
2 wrong, again I am assuming the Government is going to take the  
3 opposite position, we will find out in a few minutes --

4 MR. KLAYMAN: Well, I know they will.

5 THE COURT: If that's --

6 MR. KLAYMAN: I have been litigating with Mr. Gilligan  
7 for 20 some years.

8 THE COURT: If that's the Government's position, in  
9 effect you are asking me to find that the statutory framework  
10 that was designed for FISC review is unconstitutional.

11 MR. KLAYMAN: You are not overruling what FISC did. In  
12 this case, in the confines of this case, you can rule  
13 independently as to whether or not obtaining those records,  
14 which are ongoing by the way -- these aren't past records. This  
15 is going on today. As of today, records of myself and others,  
16 metadata records with regard to Verizon, and we are just talking  
17 about Verizon now, are in fact being acquired by the NSA and  
18 they have total ability to get into to them to determine who I  
19 associate with and who I deal with.

20 THE COURT: They are being produced pursuant to an  
21 order by a Federal Court, an Article III Judge who has found  
22 that doing so is consistent with the statute and constitutional.  
23 What you are in essence asking me to do is to at a minimum  
24 review, but you want me to more than review, you want me to  
25 overrule it effectively, superimpose this Court's authority into

1 the work of the FISA Court. That's what you are asking me to  
2 do.

3 MR. KLAYMAN: That's only with regard to lawsuit number  
4 one, but you can make a ruling here with regard to myself and  
5 the other Plaintiffs that pertain to what's going on with regard  
6 to us at a minimum. You can reach the constitutional issues.  
7 This is -- we did not have -- Judge Vincent's order is not  
8 entitled to collateral estoppel or res judicata effect. We had  
9 no ability to participate in that.

10 It is in no force and effect with regard to us, the  
11 Plaintiffs. And in this day and age, not to get too  
12 philosophical, as Jefferson said, our third President: When the  
13 people fear the Government, there is tyranny. The people are  
14 frightened to death. This is an issue that unites left, right  
15 and center. ACLU, liberal. Freedom Watch, conservative. We  
16 agree on these things.

17 You, your Honor, are the last step, the last bastion of  
18 protection for the American people and, if a Judge does  
19 something with regard to the original order which impacts us, we  
20 have a right to exercise our due process rights by going into  
21 the only Court that we can be in, and that's this Court.

22 And Congress did not say we can't be in this Court. In  
23 fact, Congress explicitly in the Constitution at Section 1331  
24 says you can reach the constitutional issues; and what we are in  
25 effectively going to ask to you do in a Preliminary Injunction

1 is simply hold the Government to the letter of the law. Just  
2 follow the law.

3 That doesn't contravene Judge Vincent's order if you  
4 enter a Preliminary Injunction following Section 215 of the  
5 Privacy Act and Section 702, start obeying the law. It doesn't  
6 presume anything with regard to Vincent, but in fact allows us  
7 to exercise our rights.

8 Now, with regard to case number two, there is no  
9 Vincent order there. They are doing what they want. This is  
10 like the Wild West but worse. We have never seen in the history  
11 of this country this kind of violation of the privacy rights of  
12 the American citizens. We live in an Orwellian state. Every  
13 time everyone picks up the phone, they believe they are being  
14 listened to. Every time someone calls their boyfriend or  
15 girlfriend or your girlfriend goes to the doctor or you go to  
16 the doctor, all these associational facts can be picked up  
17 through the metadata. You saw the expert Ed Felton's affidavits  
18 here, and the Government has the audacity to come back and say  
19 we can't do anything to correct that within six months when an  
20 expert says you can do it like that.

21 The Government has a history of lying here, and it has  
22 been confirmed by judges that sit on both courts, this Court and  
23 the FISA Court.

24 So, your Honor, you do have that authority and all you  
25 are, basically if you enjoin the Government and we respectfully

1 request that you do, is to enjoin them to follow the law. That  
2 doesn't contravene any Court Order.

3 THE COURT: Well, let's take Judge Vincent and Judge  
4 McLaughlin, they have issued orders that they believe are  
5 lawful, consistent with the Constitution and consistent with the  
6 statutory framework that Congress enacted 215. Now, if this  
7 Court were to issue an order to prohibit any further collection,  
8 the Court would effectively be countermanding their order.

9 MR. KLAYMAN: You know --

10 THE COURT: How can they look at it in any other way?  
11 The order is prospective in nature. It is for 90 days. It only  
12 lasts for 90 days and, of course, in that 90-day period right  
13 now at least for the most recent order. And I think it is 15  
14 separate Article III Judges on the FISA Court have issued these  
15 orders every 90 days for the last seven years roughly, 6,  
16 7 years.

17 So the point is that under the framework that was  
18 designed by Congress, Article III Judges have been consistently  
19 finding for a lengthy period of time every 90 days that the  
20 order being sought by the FBI with regard to the NSA's capacity  
21 is consistent with 215 and consistent with the Constitution.

22 MR. KLAYMAN: Your Honor, no disrespect to Judges of  
23 which I founded a group called Judicial Watch to honor judges  
24 and I gave awards to judges who did a good job and criticized  
25 those who did not, but the reality is King George had judges too

1 back in 1776 and those judges were ruling against the  
2 colonialists caused them to rise up and wage a revolution.

3           You are the safety valve to that happening. The  
4 potential for this is so extreme, no outrageous, so totalitarian  
5 that if there is no other way to have this reviewed, the  
6 American people will rise up because they are upset at what's  
7 going on; and that's why you -- and we thank you for giving us  
8 an opportunity to be heard and to do this timely, we appreciate  
9 that, but you cannot be in any way enslaved by the decisions of  
10 other judges in a Court where we had no right to make an  
11 argument, we have no right to make an appeal, it is done in  
12 secret, secret, Star Chamber and then on top of that --

13           THE COURT: Is it your position that that framework is  
14 unconstitutional?

15           MR. KLAYMAN: Yes, but I am not asking you to reach it  
16 at the Preliminary Injunction stage. It is my position.

17           THE COURT: Well --

18           MR. KLAYMAN: Not with regard, not with regard if  
19 there is some kind of nexus between an investigation -- there is  
20 no investigation here of any of the hundreds of millions of  
21 Americans or tens of millions of Americans that use Verizon,  
22 certainly not with regard to the 300 million that are affected  
23 by the Prizm program. There is no investigation.

24           There is no showing of a reasonable suspicion of any  
25 connection to terrorism or crime. It is not -- it is open

1 ended. It is not definite as to time which you have to have to  
2 satisfy the Fourth Amendment. You just can't have an open ended  
3 collection of records now and into the future and there is no  
4 predicate facts here that people have done anything wrong, that  
5 I have done anything wrong or Mr. Strange or the other  
6 Plaintiffs.

7 So Congress not having closed the door, if they had  
8 intended to cut off all of our rights, which they can't do, they  
9 would have said so in the legislation. They did not. And the  
10 fact that it is not in there does not preclude an alternative  
11 avenue for relief, and you are the person that the American  
12 people are depending on to protect us.

13 And that's why the only alternative is for the people  
14 to take matters into their own hands. That's why I respect the  
15 Courts. That's why I became a lawyer. That's why I am here and  
16 I am an idealist. Yes, I fight against Government corruption  
17 and tyranny, but I actually believe in the system. That's  
18 because -- that's why I do what I do.

19 So a Judge like you or a Judge like Royce Lamberth on  
20 this Court, okay, who made many decisions which were against the  
21 flow, he went upstream, who protects the American people,  
22 sometimes even against members of his own original political  
23 party like Gale Norton.

24 You guys are our only protection. We have no other  
25 protection, and that's why it is so important because the

1 American people need to know that you are here for us.

2 THE COURT: Well, if the statutory framework does not  
3 permit other courts to get involved in reviewing and evaluating  
4 or even posing itself in these orders, then it would seem to me  
5 the only way the Court could actually get to that is to rule it  
6 as unconstitutional. Do you see any other alternative?

7 MR. KLAYMAN: We are not challenging the Patriot Act if  
8 it is applied properly at this stage. What we are saying is it  
9 has to be relevant. The people that are being surveyed, there  
10 has to be an actual investigation --

11 THE COURT: Well, the relevance --

12 MR. KLAYMAN: -- based on predicate facts.

13 THE COURT: -- relevance decisions are decisions under  
14 the framework made by an Article III Judge. There is nothing in  
15 the statutory framework that permits other Article III Courts to  
16 second guess that decision. These judges all made relevant  
17 findings.

18 MR. KLAYMAN: That decision -- those decisions if they  
19 apply to the way the statute is written, the Patriot Act, and if  
20 it is some nexus between the individual who is having their  
21 information gathered and reviewed by the Government and  
22 terrorism or committing a crime, okay; but when other people are  
23 being subjected to this as we now know is the case by the  
24 admissions, forced admissions of the NSA after the director of  
25 NSA lied to Congress. Frankly, he should --

1           THE COURT: Let me ask you this. What is your basis to  
2 believe that the NSA has done any queries relating to either you  
3 or your client?

4           MR. KLAYMAN: Well, in our affidavits we submitted,  
5 that gets to the standing issue. My colleagues have received  
6 text messages that I never sent. I think they are messing with  
7 me. They are saying, Mr. Klayman, we have the ability to  
8 destroy you if we want to.

9           THE COURT: Text messages from whom?

10          MR. KLAYMAN: From me. From me to colleagues. Mr.  
11 Strange the affidavit set forth that he got text messages also  
12 that were inexplicable. He got e-mails from his dead son  
13 Michael that were sent to him, and this latest affidavit shows  
14 that a disk that was given to him that supposedly had a report  
15 dealing with the circumstances of Extortion 17's being shot  
16 down, that that was infected with spyware which now allows the  
17 Government to go into his computer.

18           It is not inconceivable, your Honor, it is not part of  
19 the record. As Mr. Gilligan knows, I objected during the years  
20 that we were fighting the Clinton's at Judicial Watch. I had  
21 people following me home. My staff. I had somebody come into  
22 the office and read -- bounce stuff off of my windows for  
23 wiretaps and things like that. This goes on in the Government  
24 and, unfortunately, we have to then turn to someone like  
25 yourself who has integrity who can step in and who has the

1 courage to protect the American people.

2 And that's why I am not one of those conservatives that  
3 thinks the judicial branch is a lesser branch of the other two.  
4 I think it is more important because you are the last guard, you  
5 are the last sentry to the tyranny in this country and, if you  
6 can't step in, then the alternatives are far worse.

7 And right now we live in what is in effect a police  
8 state because you can't pick the phone up without fear that it  
9 is going to be used against you. They can access your  
10 accountant. They can access your lawyer. They can access you.  
11 Ed Snowden said when he gave his interview, he could access your  
12 e-mail records. They could access your proctologist.

13 So we can't live in a country like that, and you have  
14 to be able to make a ruling at least with regard to us, and what  
15 we are saying here for purposes of the Preliminary Injunction we  
16 will make it simple for you. Just enjoin them to follow the  
17 laws that exist. You can deliberate further on the  
18 constitutional issues. Follow the Patriot Act. The Patriot Act  
19 does not provide that you can get all domestic calls, e-mails,  
20 social media, youtube, Skype, it doesn't provide for that, only  
21 if there is some connection to a foreign person and only if  
22 there is an issue of terrorism.

23 Admittedly by their own admissions which are suspect  
24 even what they wrote because they have been caught lying so many  
25 times by courts documented -- frankly I don't know why Clapper

1        isn't in prison by this time -- if I did it, I certainly would  
2        be there if I lied to Congress like that -- and that's the  
3        impression that you have to dispel, your Honor, is that there is  
4        a noble class in the United States that's above the law and the  
5        rest of the citizens they can burn in heck.

6                And that's why Congress did not exclude your review for  
7        particular citizens that were affected illegally. You would not  
8        be countermanding Vincent's order. You would simply be entering  
9        it yourself.

10               THE COURT: So would it be your position, Mr. Klayman,  
11        that in the absence of specific preclusion of Article III Courts  
12        from reviewing and second guessing the decisions of the FISC  
13        Judges, this Court does have authority under the Constitution to  
14        review it?

15               MR. KLAYMAN: You have authority under the  
16        Constitution, yes, your Honor, you do under the First, Fourth  
17        and Fifth Amendments as we laid out in our briefs. Under the  
18        First Amendment, associational. There is the NAACP case where  
19        the Supreme Court stepped in and said you just can't get the  
20        address books of the NAACP. You can't do that. And with the  
21        First Amendment rights of association with our clients and  
22        privileges, attorney-client privilege, work product privilege,  
23        they are being breached.

24               The Fifth Amendment you have a right of  
25        self-incrimination. The Government gets into our records and

1 listens to our telephone calls, there goes the right of  
2 self-incrimination in any criminal proceeding.

3 Fourth Amendment, no unreasonable searches and seizures  
4 are permitted, not just to property but to person as in the  
5 Supreme Court Katz case. And it is even more relevant today  
6 with cell phones and smart phones and that kind of thing where  
7 the Government can get everything they want about you.

8 So right now we live in a country where people  
9 genuinely believe -- it has only been diverted in the last few  
10 weeks because of Obamacare -- that they believe they are in a  
11 constant state of surveillance.

12 But the one other point I want to emphasize we are only  
13 dealing with Verizon in case one. All the other providers --  
14 Sprint, AT&T, Google, youtube, Yahoo, there was no order.  
15 Vincent issued no order, no Court issued an order. So you have  
16 got that one free and clear and that's the main stay. You don't  
17 have to contravene anyone's order in regard to case number two.

18 With regard to who I am and who my clients are, Charlie  
19 and Mary Ann Strange and the others, you have authority to make  
20 a ruling with regard to us; and that doesn't contravene anything  
21 that Vincent did. It is just with regard to us. That's what we  
22 are asking. If you look at the ACLU's briefs, they are same the  
23 same thing to Judge Pauley. We want a decision with regard to  
24 us.

25 Whether that's considered precedent in other areas, you

1 have a great opportunity to help Judge Vincent and Judge  
2 McLaughlin understand what the law is.

3 THE COURT: I view it more as a challenge.

4 MR. KLAYMAN: Yes, apparently they don't understand it  
5 too well, at least Judge Vincent. We don't about Judge  
6 McLaughlin because we can't see her entire order. It may be  
7 different. Maybe. But the point is that you have the ability  
8 to make a ruling with regard to us.

9 THE COURT: Now, you have used 25 minutes. Do you want  
10 to save five?

11 MR. KLAYMAN: I will save five, your Honor. Thank you  
12 for your time.

13 THE COURT: All right. Mr. Gilligan, am I assuming  
14 correctly or not?

15 MR. GILLIGAN: The answer that you have been waiting  
16 for, your Honor, is yes and no.

17 THE COURT: Oh, you want it both ways.

18 MR. GILLIGAN: What lawyer doesn't, your Honor.

19 THE COURT: The Department of Justice seems to like it  
20 both ways. Let's see how you are going to parse this one out.

21 MR. GILLIGAN: I think very simply, your Honor, and we  
22 attempted to parse it this way in our briefs and, if we weren't  
23 clear, I hope to clear the matter up now.

24 To the extent that the Plaintiffs are challenging the  
25 statutory authority of the Government to engage in the

1 intelligence gathering programs at issue here, the statutory  
2 authority, our position is that the Court lacks jurisdiction  
3 because the various provisions of the FISA at issue preclude  
4 review by third parties such as the Plaintiffs here in District  
5 Court.

6 We have not taken the same position with respect to the  
7 constitutional claims. We think the Court lacks authority to  
8 reach the constitutional claims because of the standing issue,  
9 but so far as preclusion goes, our position on preclusion is  
10 that that is limited to the claims that the Government lacks  
11 statutory authority to engage in these various intelligence  
12 gathering activities.

13 The reason for the distinction, if that's the question  
14 I see crossing your mind, your Honor, is Supreme Court's  
15 decision in Webster versus Doe. The Supreme Court has held  
16 many times in such cases as Block versus Community Nutrition  
17 Institute that a statute can implicitly preclude other types of  
18 review; but when it comes to precluding review of constitutional  
19 claims, the Court explained in Webster versus Doe that it  
20 insists on a clearer expression on the part of Congress to  
21 preclude review.

22 THE COURT: So in the absence of a specific preclusion  
23 of this Court and similar Article III Courts to deal with  
24 challenges of -- to violations of constitutional rights, because  
25 the Patriot Act didn't specifically preclude that this Court,

1 you believe has that authority?

2 MR. GILLIGAN: Yes, on behalf of a Plaintiff who has  
3 demonstrated his or her standing.

4 THE COURT: Standing.

5 MR. GILLIGAN: All right. So starting with the  
6 preclusion issue --

7 THE COURT: Where in the Constitution would that power  
8 come from?

9 MR. GILLIGAN: The power to review the --

10 THE COURT: For those who have proper standing. Just  
11 Article III?

12 MR. GILLIGAN: The Court said in Webster versus Doe,  
13 your Honor, that it would raise troublesome constitutional  
14 issues if Congress were to presume to preclude review of  
15 constitutional claims brought by parties with standing within  
16 the Federal jurisdiction of a District Court so we have not  
17 pressed that issue in this case.

18 But with respect to the arguments that the Government  
19 lacks statutory authority, we believe the Plaintiffs' claims are  
20 precluded by not just one, but two statutes. First there is  
21 Section 215 itself which your Honor alluded to earlier and, as  
22 your Honor said, it sets forth a detailed scheme for judicial  
23 review of FISA production orders that allows challenges by  
24 recipients of those orders that must be brought under seal and  
25 heard under seal in the FISC.

1           There is no provision made in Section 215 for  
2 challenges by third parties such as the Plaintiffs here in  
3 District Court, and we believe that reflects, as your Honor  
4 said, a Congressional intent that they should not be permitted  
5 to do so.

6           THE COURT: So when an Article III FISC Judge makes a  
7 decision that a request by the FBI is consistent with the  
8 authority given under 215, that decision by a FISC Court Article  
9 III Judge, if I understand your position correctly, is not  
10 reviewable by this Court?

11           MR. GILLIGAN: That's our position. That is correct,  
12 your Honor.

13           THE COURT: Not reviewable by any other Article III  
14 Court, only those that are in statutory framework, the review  
15 Court I think it is called shorthand name for it and then the  
16 Supreme Court ultimately?

17           MR. GILLIGAN: Correct, your Honor. As the Supreme  
18 Court said in Block versus Community Nutrition Institute,  
19 preclusion occurs when a statute provides a mechanism for  
20 judicial consideration of particular issues at the behest of  
21 particular persons but not others; and we believe that Section  
22 215 fits that description quite precisely.

23           The same is also true --

24           THE COURT: And that includes also relevance  
25 assessments?

1 MR. GILLIGAN: Absolutely.

2 THE COURT: So if a FISC Judge is making a relevance  
3 assessment as it relates to the request that's being made,  
4 which, of course, Judge Vincent made, Judge McLaughlin made,  
5 others, Judge Eagan, et cetera, again that's a decision  
6 exclusively within the purview of the review Court, not other  
7 Article III Courts?

8 MR. GILLIGAN: Correct, your Honor. And we believe the  
9 same is true with respect to Section 702. Mr. Klayman alluded  
10 to the second lawsuit, and he suggested that there are no FISC  
11 orders at issue there. That's not exactly right, your Honor.

12 Under Section 702 which involves the targeting of  
13 communications of non U.S. persons located overseas, that's the  
14 Prizm Program, the FISC must approve certifications provided by  
15 the Attorney General that identify the categories of individuals  
16 from whom foreign intelligence will be sought. FISC must  
17 approve the certifications that FISC must approve, the  
18 Government's targeting and minimization procedures.

19 So that involves FISC approval as well and so that  
20 statute also provides for review of directives from the Attorney  
21 General to provide information that are issued to  
22 telecommunications providers by those providers in the FISC but  
23 does not provide for any sort of review by any other parties in  
24 District Court. So we believe that the preclusion argument  
25 applies there as well.

1           The second statute that we would draw your Honor's  
2 attention to on the preclusion issue is 18 USC Section 2712, the  
3 provision that was discussed at length in the Jewel decision,  
4 the decision from the Northern District of California which is  
5 cited in our briefs.

6           Section 2712 creates cause of action against the  
7 Government, your Honor, for monetary damages for violations of  
8 three specific provisions of the FISA that restrict the use and  
9 disclosure of intelligence information that's acquired under  
10 authority of the FISA. Those three provisions that may form the  
11 basis of an action under 2712 do not include Section 215 and  
12 Section 2712 does not provide for injunctive relief.

13           And so as held by the District Court in Jewel, Section  
14 2712 also reflects an intent by Congress not to allow claims  
15 such as this one alleging use and improper -- I should say use  
16 and abuse of information obtained under FISA because that  
17 statute specifies a particular remedy, monetary damages, non  
18 injunctive relief; and it specifies the three provisions upon  
19 which an action can be based. They do not include Section 215.

20           So on these two bases we believe that the Court lacks  
21 jurisdiction under the APA or any other statute including  
22 Section 1331 that is not a provision of jurisdiction.

23           THE COURT: So what about an argument, Mr. Gilligan,  
24 where the Plaintiffs contend that the decision by a FISC Judge  
25 on relevance or a decision by a FISC Judge interpreting

1 authority under 215 has as a consequence a constitutional  
2 violation to one or more individuals?

3 If that's their argument, if their argument is this  
4 FISC Judge, his erroneous ruling, his erroneous interpretation  
5 of 215, his erroneous ruling on relevance has had as a  
6 consequence a violation of the constitutional rights of my  
7 client, under that circumstance, is it your position that a  
8 Court like mine can inject itself in that and assess and  
9 evaluate whether or not a Constitutional violation has occurred  
10 as a result of that erroneous ruling?

11 MR. GILLIGAN: Your Honor, as long as the Plaintiffs  
12 could in that hypothetical, it is not the case here, meet the  
13 requirements of Article III standing, we believe that -- or at  
14 least we have not contested in this case that the Court would  
15 have jurisdiction to review the constitutional claims. Now, the  
16 constitutional claims in this case have no likely success on the  
17 merits.

18 Smith forecloses the Fourth Amendment claim. The First  
19 Amendment claim is foreclosed by the principle as expressed by  
20 the D.C. Circuit and Reporters Committee that a good faith  
21 investigation conducted in observance of Fourth Amendment  
22 requirements without any intent to punish or deter First  
23 Amendment protected freedoms, gives rise to no First Amendment  
24 violation.

25 But I think before obviously you can get to the merits,

1 there is the standing issue in this case. And it does turn on  
2 the fact that the Plaintiffs have offered no proof whatsoever  
3 that any communications records of theirs, any information  
4 contained in any of their communications has been collected by  
5 the Government under any of the programs at issue here.

6 The Prizm Program, again, that involves the targeting  
7 of communications of non U.S. persons located outside the United  
8 States. The Plaintiffs have adduced no facts to demonstrate  
9 that communications of theirs could have been picked up under  
10 that program.

11 The --

12 THE COURT: Then let's focus on the first case. They  
13 are contending as Verizon customers that that data has been  
14 harvested as has the data of all Verizon customers, and it is  
15 sitting in storage somewhere in the Government up at Fort Meade  
16 and it may or may not have been used yet, but it is in the  
17 possession of the Government and the Government is in a position  
18 at a later time if the authority is provided by the FISA Court  
19 to query it and to determine, you know, whether or not it  
20 provides any relevant information of an investigation of a  
21 national security nature, right? That's their position, right?

22 MR. GILLIGAN: That is their position. There is  
23 several flaws in their position.

24 THE COURT: What are the flaws?

25 MR. GILLIGAN: The flaws are that -- to say that they

1 are customers of Verizon is sort of glossing over an important  
2 distinction. The order of Judge Vincent's that was unofficially  
3 disclosed but later officially acknowledged by the Government  
4 was directed to Verizon Business Network Services, Inc.

5 The Plaintiffs in this case claim to be customers of  
6 Verizon Wireless. As reflected in this Court's decision in the  
7 Shea case, also cited in our briefs, these are two separate  
8 business entities. We have acknowledged that at the time of the  
9 disclosed order by Judge Vincent, Verizon Business Network  
10 Services was a participant in the Section 215 telephony metadata  
11 program.

12 But the Government has not acknowledged the identities  
13 of any carriers who have before or since been participants in  
14 the program. There is no evidence, in other words, that Verizon  
15 Wireless Communications is a participating carrier in the  
16 program. Plaintiffs have not adduced any so it is only  
17 speculation on their part that their records have been collected  
18 as part of that program.

19 Even if it were --

20 THE COURT: How could that be determined? I mean if the  
21 Government holds all the cards, so to speak, there is no way  
22 they could -- if your theory of how they -- what they must do, I  
23 should say, to demonstrate standing is what I believe it is and  
24 the Government holds all the cards, they could never essentially  
25 unless the Government were to reveal the program as it has

1 acknowledged with the Judge Vincent's order for Verizon Business  
2 Services Network, Inc., they could never have standing, could  
3 they?

4 MR. GILLIGAN: Well, your Honor --

5 THE COURT: Established standing.

6 MR. GILLIGAN: That point was raised by the Plaintiffs  
7 in the Amnesty International case cited in our papers. It is  
8 very relevant to this case. They said that the question of  
9 their standing could be cleared up if the Government would  
10 simply advise the Courts whether or not any of the Plaintiffs  
11 communications in that case -- that was a challenge to  
12 collection under Section 702 --

13 THE COURT: Right.

14 MR. GILLIGAN: -- had been acquired under the authority  
15 of Section 702, and the Court responded, the Supreme Court  
16 responded in footnote four of that opinion that it is the  
17 Plaintiff's burden to come forth with proof of specific facts  
18 establishing their injuries, establishing their standing; and it  
19 is not the Government's burden to disprove their standing by  
20 revealing the details of its classified intelligence gathering  
21 programs. That principal holds true here.

22 THE COURT: Okay.

23 MR. GILLIGAN: Your Honor, I would just add a couple  
24 further points. The Plaintiffs seemed to have changed here in  
25 their reply brief the nature of the relief they are seeking from

1 the Court. They are now seeking what seems to be a classic obey  
2 the law injunction which does to the meet the specificity  
3 requirements of Rule 65(d)(1)(c) and we would submit that that  
4 is an improper form of relief for the Court to issue under any  
5 circumstances.

6 THE COURT: From the Government's point of view, could  
7 the Court resolve the Preliminary Injunction Motion simply on  
8 the grounds of finding that there is no jurisdiction? Once the  
9 Court, of course, finds that it has the authority to act,  
10 assuming that for the sake of discussion, an adequate basis for  
11 jurisdiction, therefore, doesn't have to parse out the imminence  
12 of harm, likely success on the merits?

13 MR. GILLIGAN: I am sorry, your Honor. I am not sure I  
14 am following the thrust of your question.

15 THE COURT: Is it your position that this Court could  
16 resolve this Preliminary Injunction request simply on the basis  
17 of no standing?

18 MR. GILLIGAN: Yes. If the Court found there was no  
19 standing, absolutely. That would dispose of -- the Court would  
20 have no jurisdiction even to assess the likelihood of success on  
21 the claims on the merits and certainly a finding on standing  
22 would mean that a fortiori there could be no showing of  
23 irreparable harm because even if the Plaintiffs could somehow  
24 have gotten over the line of showing standing, they have  
25 certainly not shown the kind of imminent, concrete injury that's

1 necessary for an immediate award of equitable relief by the  
2 Court.

3 THE COURT: All right. Now, what's the Government's  
4 position on the Plaintiffs' constitutional rights or interest in  
5 the documentation that's being held by Verizon?

6 MR. GILLIGAN: In the documentation that's being  
7 held --

8 THE COURT: Yes, the metadata information that is being  
9 held by Verizon. What constitutional interests do they have in  
10 that data?

11 MR. GILLIGAN: Without a showing that any of their  
12 metadata have been collected, none, your Honor.

13 THE COURT: All right.

14 MR. GILLIGAN: If the premise -- is the premise of your  
15 question hypothetically that we have collected metadata of their  
16 communications?

17 THE COURT: Yes.

18 MR. GILLIGAN: Smith versus Maryland holds quite  
19 clearly that there is no reasonable expectation of privacy in  
20 such data. It is non content information regarding the  
21 telephone number making a call, the telephone number receiving a  
22 call, the date and time of a call, information which even prior  
23 to Smith, the D.C. Circuit had held in Reporters Committee was  
24 of a kind not protected by the Fourth Amendment call detail  
25 records.

1           Courts before and since Smith have consistently held  
2 that there is no reasonable expectation of privacy in such --

3           THE COURT: That was '79, right?

4           MR. GILLIGAN: So it was, your Honor.

5           THE COURT: Things have changed a little since '79.

6           MR. GILLIGAN: So they have.

7           THE COURT: And in terms of computer technology, things  
8 have changed an awful lot since '79.

9           MR. GILLIGAN: So they have, your Honor.

10          THE COURT: Take a look at that recent GPS opinion the  
11 Court issued.

12          MR. GILLIGAN: Right.

13          THE COURT: The Supreme Court in that case certainly  
14 signalled a grave concern about protecting privacy interests of  
15 individuals even though suspected of committing crimes and those  
16 who the Government had reason to believe had committed crimes or  
17 were in the process of committing crimes; and the technology  
18 that was being used in that case I think it would be fair to say  
19 pales in comparison, pales in comparison to the technology that  
20 NSA has at its disposal to query hundreds of millions of  
21 records, maybe a billion records in matters of minutes or an  
22 hour.

23                 So the concerns that the Supreme Court echoed recently  
24 is a far cry from Smith V Maryland. What you can do now with  
25 computers to go through that data and construct a profile of an

1 individual's life, his whereabouts, his spending habits, his,  
2 you know, appointments that he has, whatever is so extraordinary  
3 that Smith's value may be very limited if at all in this case.

4 MR. GILLIGAN: Well, your Honor, I would like to make  
5 several points about that if I could.

6 THE COURT: Sure.

7 MR. GILLIGAN: Smith, of course, remains the law and it  
8 is controlling here. There were some questions raised in the  
9 concurrences, not the majority opinion, but in the concurrences  
10 in Smith and particularly in Justice Sotomayor's concurrence  
11 about whether the views expressed in cases such as Smith --

12 THE COURT: You don't mean in Smith. You meant in  
13 Jones?

14 MR. GILLIGAN: I am sorry. Smith versus Jones.  
15 Justice Sotomayor's concurrence in Jones.

16 THE COURT: Jones.

17 MR. GILLIGAN: Thank you, your Honor. Queried whether  
18 the so-called third party doctrine remains appropriate in the  
19 digital age. That doctrine being under the Fourth Amendment  
20 that once information is disclosed to a third party, you no  
21 longer have a reasonable expectation of privacy in it. That  
22 doctrine is the underpinning of Smith and also such cases as  
23 U.S. versus Miller which is cited in Smith.

24 But Smith remains controlling here and notably the  
25 dissenters in Smith made the very sort of argument that seemed

1 to be crossing the minds of the concurring Justices in Jones.

2 The dissenters pointed out that even in 1979 if you had  
3 a list of numbers that a person had called from his or her home,  
4 that could be very revealing of the identities of the persons  
5 called, the places called; and that could expose very intimate  
6 details about that person's life. That argument was made even  
7 in 1979.

8 Nevertheless, the majority held that there was no  
9 reasonable expectation of privacy in those non content data.

10 And I think it is worth noting here, your Honor, that  
11 even if we assumed strictly for purposes of argument that the  
12 Plaintiffs did have a reasonable expectation of privacy in  
13 information that could be gleaned from metadata about their  
14 communications, under the telephony metadata program, NSA  
15 analysts cannot access or review any records that may be in that  
16 database save those that are responsive to queries made under  
17 the reasonable articulable suspicion standard.

18 The database can only be queried using identifiers  
19 which is typically to say telephone numbers that are associated  
20 with foreign terrorist organizations. You can only query the  
21 database and retrieve records that are responsive to queries  
22 based on reasonable articulable suspicion that the number you  
23 are using to base your query on is associated with a foreign  
24 terrorist organization.

25 As set forth in our papers, including our declarations

1 as a result of that limitation, which is imposed by the FISC's  
2 orders, only a tiny fraction of the records in that database  
3 have ever been viewed by human eyes; and there is no evidence in  
4 this case, none, even if you assume that the Plaintiffs' records  
5 were in there, that any of the records have actually been  
6 reviewed subject to a query of that kind.

7 THE COURT: So the records that the NSA has in its  
8 possession are just numbers, right?

9 MR. GILLIGAN: Yes.

10 THE COURT: And in order for the NSA to get behind  
11 those numbers, so to speak, to see the names associated with  
12 them, the account and that, they would have to get a separate  
13 order?

14 MR. GILLIGAN: It is actually one step even beyond  
15 that, your Honor. The database doesn't even have names in it.  
16 It is just the metadata numbers called, numbers calling, time  
17 and date of the call, trunk lines, what are called --

18 THE COURT: Duration of call.

19 MR. GILLIGAN: Things like that. No names of any  
20 subscribers, no names of any parties to recall, just numbers.  
21 Even to get access to the numbers, you don't need a FISC order  
22 to get access, but there has to be a determination by a  
23 designated official under the terms of the FISC orders that you  
24 have reasonable articulable suspicion that the number you want  
25 to use as a search term is associated with foreign terrorist

1 organizations.

2           Only if that standard is met can you, so to speak, plug  
3 that number into the system and see what records, you know, what  
4 records there are of contact with that identifier.

5           And --

6           THE COURT: At that point if that were to happen, you  
7 still, the Government still does not have the names associated  
8 with those numbers?

9           MR. GILLIGAN: That's absolutely correct. Further  
10 inquiry would need to be made under whatever lawful authorities  
11 are available to the NSA or perhaps the FBI or another member of  
12 the intelligence community to find out, you know, who those  
13 numbers might belong to and to get further investigative leads.

14           THE COURT: So you need a third order from a FISC  
15 Judge?

16           MR. GILLIGAN: You would not need another order under  
17 the program. Once, once -- once the Court issues the order  
18 allowing the collection, then the Government under the terms of  
19 the order is allowed to make queries under the reasonable  
20 articulable standard, suspicion standard without getting further  
21 authority from the FISC. That said, there is a very intricate  
22 system of oversight to ensure compliance.

23           THE COURT: Oversight by whom?

24           MR. GILLIGAN: Oversight by -- well, first of all,  
25 there are technological and administrative safeguards.

1 THE COURT: You mean NSA.

2 MR. GILLIGAN: But not only at NSA.

3 THE COURT: FISC doesn't have the capacity or the  
4 manpower to oversee anything.

5 MR. GILLIGAN: But under the terms of the FISC's  
6 orders, the Government must report to the FISC periodically  
7 regarding its use of the -- I shorten it and call it the RAS R  
8 A S standard -- and all compliance incidents must be reported to  
9 the FISC. There is oversight by the NSA's Inspector General.  
10 There is oversight conducted with the Department of Justice and  
11 I believe the Office of the Director of National Intelligence to  
12 ensure that all the safeguards in the FISC's orders are being  
13 complied with; and if there is any failure to comply, that has  
14 been reported to the FISC.

15 That is the origin in fact of the orders cited in Mr.  
16 Klayman's briefs. The Government discovered those compliance  
17 problems, reported them to the FISC. The FISC took them very  
18 seriously.

19 THE COURT: What, that girlfriend issue where the NSA  
20 employee is using his -- misusing I should say -- his authority  
21 to check up on his girlfriend?

22 MR. GILLIGAN: Well, those were a different sort of  
23 compliance issue and I hasten to point out --

24 THE COURT: That's an issue.

25 MR. GILLIGAN: I hasten to point out that there were a

1 total of 12 such issues over a period spanning a decade and in  
2 each case it was determined by the IG as reported in a letter to  
3 Senator Grassley that those were unauthorized incidents, mostly  
4 involving the information of non U.S. persons and the  
5 individuals who committed these infractions were either  
6 disciplined or they retired or resigned before being  
7 disciplined.

8 THE COURT: I hope so.

9 MR. GILLIGAN: So I think what we have there is  
10 evidence of an oversight system that works. Coming back to your  
11 Honor's original point, no, there is no further FISC order  
12 needed to query the database once the data are collected, but  
13 there is an interlocking array of oversight mechanisms to ensure  
14 compliance.

15 THE COURT: How about to get -- let's assume they do  
16 the query. How about if they want to go to the next step and  
17 get the names associated with the phone numbers --

18 MR. GILLIGAN: Well, just --

19 THE COURT: -- do they need an order to get that from  
20 Verizon?

21 MR. GILLIGAN: Well, the FBI, for example, if the NSA  
22 provided the number to the FBI saying, here, you might find this  
23 number to be of interest to such and such investigation, the FBI  
24 can issue a national security letter, for example, to Verizon or  
25 whoever the carrier might be and say provide us subscriber

1 information behind this number.

2 The Government as a result of other investigative and  
3 intelligence efforts may already know who a particular number  
4 belongs to once it comes back as responsive to a query in the  
5 database.

6 THE COURT: It is possible.

7 MR. GILLIGAN: It is possible.

8 THE COURT: What if they don't? Do they need an order?

9 MR. GILLIGAN: Well, they have other legal procedures  
10 that they can follow in order to do that. As I say, if the  
11 information is given to the FBI, the FBI could issue a national  
12 security letter to the carrier asking for information about the  
13 subscriber to that number. But -- so to come back to the bottom  
14 line.

15 THE COURT: You have about two minutes left.

16 MR. GILLIGAN: I have got about two minutes left. Then  
17 I will say again, your Honor, that we believe that based on the  
18 showing that the Plaintiffs have made today, there is certainly  
19 insufficient demonstration of injuries certainly to show the  
20 kind of irreparable harm required for injunctive relief here,  
21 and we also submit an insufficient showing especially under the  
22 rigorous application of Article III's requirements that Amnesty  
23 International says must be applied to a case like this,  
24 insufficient evidence to establish their standing. In all  
25 events, the Court lacks jurisdiction to reach the statutory

1 claims that the Plaintiffs have presented. Thank you, your  
2 Honor.

3 THE COURT: Thank you, Mr. Gilligan. Mr. Klayman.

4 MR. KLAYMAN: Yes. Briefly, your Honor, with regard to  
5 what's at issue, the Government has been forced to admit despite  
6 a pattern of lying that it is collecting the metadata of 300  
7 plus million Americans. That's a fact. It is not in dispute.

8 Number two, Judge Bates -- and we have cited his order  
9 in our briefs -- has ruled that the monitoring system doesn't  
10 work. In fact, it is even worse than what's going on  
11 with Obamacare right now.

12 Number three, we have a situation here where if we are  
13 to accept what they say is true and the Government now has a  
14 history of lying, as your Honor pointed out at the status  
15 conference, we have got to go to discovery so let's go to  
16 discovery and find out what's going on here.

17 Number four, my clients have in affidavits, in original  
18 affidavits, supplemental affidavits set forth a real injury  
19 here. They have had their text messages, myself included messed  
20 with. They have had their computers tampered with susceptible  
21 to removing information. They are in the line of fire. I am in  
22 the line of fire. Not only am I the head of a public interest  
23 group, but I am a fierce advocate against this administrative.  
24 I have sued the NSA. Mr. Strange his son was an NSA  
25 cryptologist and extremely critical of the NSA and the military

1 for what happened to his son and has gone very public. I have a  
2 lawsuit for him in that regard. Attorney-client privilege, work  
3 product, other privileges are at stake.

4 With regard to Smith, your Honor has it right. Not  
5 only is it outmoded, but it severely limited to one little  
6 narrow part of data and the order was finite in time, it was  
7 only two days, and also it was limited to a criminal  
8 investigation. 300 million Americans are not subject to  
9 criminal investigation at this time. Who knows in the future  
10 with the way things are going?

11 But the reality is that the IG himself, the NSA's own  
12 IG, in that report and we gave you documents are in the record,  
13 the report finds 2,700 violations of these statutes since 2012  
14 is there, plus 12 violations that we know of people getting into  
15 the private affairs of their boyfriends and girlfriends and  
16 husbands and wives. Just think what the potential is for  
17 anything else.

18 Your Honor, with regard -- and this was overlooked. No  
19 one wants to talk about Mr. Snowden here for obvious reasons,  
20 but I have a bench brief. I would like to provide it to your  
21 Honor. Give a copy to Mr. Gilligan.

22 MR. GILLIGAN: Reserving again my right to object, your  
23 Honor.

24 MR. KLAYMAN: Of course.

25 THE COURT: You can reserve it.

1           MR. KLAYMAN: Thank you. Mr. Snowden made admissions  
2 against interest. By making these admissions, these statements  
3 against interest, he subjected himself to criminal prosecution.  
4 He is now a fugitive from justice, has to live in Russia for  
5 fear that he might be killed in this country.

6           And these allegations set forth -- they are not  
7 allegations, they are admissions -- that NSA did have access and  
8 does have access on an ongoing basis to the metadata of 300  
9 million Americans such that if the NSA wants to coerce and  
10 intimidate you, even you, a Federal Judge, they can get into it.

11           Consequently, Snowden's statements come into evidence.  
12 The binder has documents where admissions by the Government,  
13 they are public documents now, they don't even have the  
14 integrity to come forward and authenticate those documents.  
15 Heads I win. Tails you lose. We are the Government. You the  
16 people are nothing. You don't matter to us at all. We will do  
17 what we want and we have all the cards and heck with you, you  
18 take a hike.

19           Like Louis XIV "after me the flood." You know what  
20 that gave rise to. That kind of attitude why 90 percent of the  
21 people don't trust the Government, don't trust anybody. If this  
22 continues without your intervening, where are we as a nation?  
23 And it was Ronald Reagan that said 200 and some years after  
24 Thomas Jefferson "that if we lose our freedoms, we can lose them  
25 in a generation and we have to preserve them for our kids." The

1 potential for tyranny here which does exist is even greater into  
2 the future.

3           And there is not one American that can pick up his  
4 phone or send an e-mail message or go on Facebook, youtube or  
5 Skype and now not think he is being surveyed, but here we have  
6 standing because we set forth concrete information in affidavits  
7 of exactly what's going on. If the Government wants to refute  
8 it, let them take our depositions. We will be very happy to  
9 take theirs.

10           I was a Justice Department lawyer. I had a security  
11 clearance. I can easily get another security clearance I am  
12 sure and let them sit down and answer questions under oath. Let  
13 them this time answer them truthfully, not lie like they have  
14 been continuously lying for the last year. That's why I am  
15 getting emotional because when I listen to this as an American,  
16 I am not just embarrassed. I am horrified. This is not my  
17 Government if this kind of conduct is allowed to continue.

18           So we look to you, your Honor, to look into this, to  
19 make the ruling and we can, yes, given the number of violations  
20 that have occurred, given the information that we put forward,  
21 you can issue a Preliminary Injunction which says you are to  
22 obey the strictures of the law with regard to these Plaintiffs.  
23 You can set a monitoring mechanism into effect where they have  
24 to report to you with reports, sworn declarations that there is  
25 monitoring that's going on inside the agency; but, your Honor,

1 you are the person that ultimately will be in charge for a  
2 finite number of persons, just four Plaintiffs here, to see  
3 whether indeed there is compliance.

4 We should have the opportunity to test those reports  
5 through whatever discovery you may fashion -- depositions,  
6 document requests, whatever. We should also be able to proceed  
7 without a bond. There is no injury here to the Government to  
8 obey the law and if we are at the point where you can't enjoin  
9 the Government, in this case NSA, from obeying the law, then you  
10 might as well white out Section 65 with regard to the Government  
11 and we are completely defenseless.

12 So, your Honor, we are appreciative of your time but we  
13 look to you to protect not just Plaintiffs but the American  
14 people against the NSA which has frankly been out of control and  
15 is creating a situation where the American people feel that  
16 their Government is against them and can destroy them and will  
17 keep them submissive such that they can't even complain about  
18 their grievances and, in that respect, we are in worse shape  
19 than we were in 1775. Thank you, your Honor.

20 THE COURT: All right. Thank you, Mr. Klayman.

21 MR. KLAYMAN: Let me add one point in that regard. As  
22 we said in the briefs, if the NSA had been in existence and  
23 available to King George, the Founding Fathers would have never  
24 made it to Philadelphia for the Declaration of Independence.  
25 They would have been picked up, arrested and executed. Thank

1 you.

2 THE COURT: Well, I always thought when they signed  
3 that Declaration of Independence, they were signing their own  
4 death warrant there, Mr. Klayman. It was pretty well known that  
5 they were.

6 My experience has been, counsel, that in cases of this  
7 kind of this novelty and nuance and importance that it is always  
8 best to give counsel a week to submit any supplemental briefing  
9 they wish. They don't have to, but they are welcome to do it.

10 My experience was and has been as an advocate and as a  
11 Judge that it is invariable that this afternoon or tonight you  
12 would say I wish I had said X or Y or Z, and in the heat of the  
13 moment I didn't. So I will give you all until next week if you  
14 want to. I am not doing rounds of briefing here. I am just  
15 giving you a chance to supplement the briefing which you have  
16 already submitted which is, to say the least, extensive.

17 I am particularly, of course, concerned about and  
18 interested in the authority of this Court to interject itself.  
19 Mr. Gilligan has made his points. You have made your points on  
20 that issue and, if on reflection you want to supplement those or  
21 you want to put it in more detail, that's up to you. I am not  
22 telling you have to. I am just telling you you are welcome to  
23 if you wish to.

24 On the issue of standing, you have made your points and  
25 he has made his. If you want to put a little more on that or

1 articulate it in a little different way, you are welcome to do  
2 that. My principal focus at the moment are those two issues. I  
3 think those are critical to the resolution of this request for a  
4 PI.

5 I think the rest of the briefing on the other issues is  
6 pretty much intact in terms of what I need, but on the issue of  
7 this Court's authority or lack thereof to inject itself in this  
8 situation and on the issue of standing, I think those are the  
9 two issues that the Court after having read all the briefs has  
10 continued to struggle with to ensure that I get it right. I  
11 mean I am not kidding myself. I know what's going to happen  
12 here no matter how I rule. It is going to the Court of Appeals.  
13 It doesn't matter how I rule, it is going to the Court of  
14 Appeals and it probably will go to the Supreme Court after that,  
15 at least certainly one side or the other. It doesn't matter  
16 however I rule.

17 This is, at the moment anyway, this is the first  
18 hearing of this kind and depending upon how fast Judge Pauley is  
19 and how fast I am, this may be the first ruling, but it is going  
20 to be one of the first two rulings. I don't know how he is  
21 going to come out and, frankly, I am not sure how I am going to  
22 come out, but I will tell you one thing. However I come out, I  
23 know it is going upstairs.

24 So I will give you my best shot at it and I will try to  
25 do it expeditiously, but you can have until let's say next

1 Tuesday, COB. That's a little more than a week. I don't want  
2 you to have to worry about this over Thanksgiving. That  
3 wouldn't be fair.

4 MR. KLAYMAN: Can I say one thing, your Honor?

5 THE COURT: No more arguments.

6 MR. KLAYMAN: Okay.

7 THE COURT: I think I have given you plenty of argument  
8 time and I appreciate both sides argument. They are very  
9 helpful to me, but I think at this point, I have heard what I  
10 need to hear today. Get whatever else you want to get in.  
11 Again, no rounds. I am not doing rounds. If you want to  
12 supplement, you can supplement but that's it. No replies to the  
13 supplements and you have got until the closing business of next  
14 Tuesday to get it in if you want to do it.

15 And try to keep it, counsel, under 20 pages. I mean  
16 really I am not looking for 20, believe me. I was going to say  
17 keep it under ten but I know that some of these issues are novel  
18 and you may feel like you need to go a little longer than that  
19 and I would rather not have to field a Motion to, you know, get  
20 permission to write, but try to keep it limited. Don't go  
21 overboard. I have got plenty to read. I have had plenty to  
22 read.

23 MR. GILLIGAN: Thank you.

24 THE COURT: We will stand in recess.

25 (Whereupon, at 12:55 p.m., the proceedings were

1 concluded.)

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I, Patty A. Gels, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

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|--|--|--|
|  | <b>65(d)(1)(c)</b> [1] - 36:3  |  |
| <b>'79</b> [3] - 38:3, 38:5, 38:8  | <b>7</b>   |  |
| <b>0</b>   | <b>7</b> [1] - 18:16<br><b>702</b> [7] - 10:13, 12:18, 17:5, 30:9, 30:12, 35:12, 35:15<br><b>7146</b> [1] - 2:4  |  |
| <b>03</b> [1] - 14:25  |  |  |
| <b>1</b>   | <b>9</b>   |  |
| <b>11:30</b> [1] - 1:7<br><b>12</b> [3] - 10:14, 44:1, 47:14<br><b>12:55</b> [1] - 53:25<br><b>13-851</b> [1] - 3:2<br><b>13-881</b> [1] - 3:3<br><b>1331</b> [4] - 13:5, 16:23, 31:22<br><b>15</b> [1] - 18:13<br><b>17</b> [1] - 11:2<br><b>17's</b> [1] - 22:15<br><b>1775</b> [1] - 50:19<br><b>1776</b> [1] - 19:1<br><b>18</b> [3] - 1:6, 13:5, 31:2<br><b>1875</b> [1] - 1:25<br><b>1979</b> [2] - 40:2, 40:7   | <b>90</b> [5] - 18:11, 18:12, 18:15, 18:19, 48:20<br><b>90-day</b> [1] - 18:12<br><b>962-0200</b> [1] - 2:10   |  |
|  | <b>A</b>   |  |
|  | <b>a.m</b> [1] - 1:7<br><b>ability</b> [4] - 15:18, 16:9, 22:7, 26:7<br><b>able</b> [2] - 23:14, 50:6<br><b>above-entitled</b> [1] - 55:5<br><b>absence</b> [2] - 24:11, 27:22<br><b>absolutely</b> [3] - 30:1, 36:19, 42:9<br><b>abuse</b> [1] - 31:16<br><b>accept</b> [1] - 46:13<br><b>access</b> [10] - 23:9, 23:10, 23:11, 23:12, 40:15, 41:21, 41:22, 48:7, 48:8<br><b>accessed</b> [1] - 10:15<br><b>account</b> [1] - 41:12<br><b>accountant</b> [1] - 23:10<br><b>accounts</b> [1] - 9:8<br><b>acknowledged</b> [4] - 34:3, 34:8, 34:12, 35:1<br><b>ACLU</b> [1] - 16:15<br><b>ACLU's</b> [1] - 25:22<br><b>acquired</b> [3] - 15:17, 31:9, 35:14<br><b>act</b> [1] - 36:9<br><b>Act</b> [8] - 10:13, 12:19, 17:5, 21:7, 21:19, 23:18, 27:25<br><b>Action</b> [2] - 3:2, 3:3<br><b>action</b> [4] - 14:18, 31:6, 31:11, 31:19<br><b>activities</b> [1] - 27:12<br><b>acts</b> [1] - 12:17<br><b>actual</b> [2] - 10:15, 21:10<br><b>add</b> [5] - 5:16, 12:2, 13:13, 35:23, 50:21<br><b>addition</b> [3] - 5:17, 5:24, 10:11<br><b>additional</b> [1] - 5:25<br><b>address</b> [2] - 4:16, 24:20<br><b>adduced</b> [2] - 33:8, 34:16<br><b>adequate</b> [1] - 36:10<br><b>administration</b> [3] - 10:22, 10:24, 11:6<br><b>administrative</b> [2] - 42:25, 46:23<br><b>admissions</b> [7] - 21:24, 23:23, 48:1, 48:2, 48:7, 48:12<br><b>admit</b> [2] - 5:2, 46:5<br><b>admittedly</b> [1] - 23:23<br><b>adversarial</b> [1] - 10:24<br><b>advise</b> [1] - 35:10 | <b>advisement</b> [1] - 6:19<br><b>advocate</b> [2] - 46:23, 51:10<br><b>affairs</b> [1] - 47:15<br><b>affected</b> [3] - 9:11, 19:22, 24:7<br><b>affidavit</b> [4] - 6:7, 6:8, 22:11, 22:13<br><b>affidavits</b> [7] - 11:11, 17:17, 22:4, 46:17, 46:18, 49:6<br><b>afternoon</b> [1] - 51:11<br><b>age</b> [2] - 16:11, 39:19<br><b>agency</b> [1] - 49:25<br><b>Agency</b> [1] - 2:3<br><b>agree</b> [1] - 16:16<br><b>ahead</b> [1] - 8:20<br><b>aided</b> [1] - 2:12<br><b>AL</b> [2] - 1:4, 1:8<br><b>al</b> [2] - 3:3, 3:4<br><b>allegations</b> [2] - 48:6, 48:7<br><b>alleging</b> [1] - 31:15<br><b>allow</b> [1] - 31:14<br><b>allowed</b> [2] - 42:19, 49:17<br><b>allowing</b> [1] - 42:18<br><b>allows</b> [4] - 8:25, 17:6, 22:16, 28:23<br><b>alluded</b> [2] - 28:21, 30:9<br><b>alternative</b> [3] - 20:10, 20:13, 21:6<br><b>alternatives</b> [1] - 23:6<br><b>amend</b> [2] - 5:11, 5:16<br><b>Amended</b> [1] - 6:12<br><b>Amendment</b> [12] - 20:2, 24:18, 24:21, 24:24, 25:3, 32:18, 32:19, 32:21, 32:23, 37:24, 39:19<br><b>amendments</b> [1] - 24:17<br><b>American</b> [12] - 12:23, 16:18, 17:12, 19:6, 20:11, 20:21, 21:1, 23:1, 49:3, 49:15, 50:13, 50:15<br><b>Americans</b> [5] - 19:21, 46:7, 47:8, 48:9<br><b>Amnesty</b> [2] - 35:7, 45:22<br><b>analogies</b> [1] - 8:5<br><b>analogy</b> [1] - 14:14<br><b>analysts</b> [1] - 40:15<br><b>Ann</b> [3] - 2:6, 6:3, 25:19<br><b>answer</b> [4] - 11:25, 26:15, 49:12, 49:13<br><b>answering</b> [1] - 11:9<br><b>anyway</b> [1] - 52:17<br><b>APA</b> [3] - 5:13, 5:16, 31:21<br><b>appeal</b> [1] - 19:11<br><b>Appeals</b> [2] - 52:12, 52:14<br><b>APPEARANCES</b> [1] - 1:14<br><b>application</b> [1] - 45:22<br><b>applied</b> [2] - 21:8, 45:23<br><b>applies</b> [2] - 14:14, 30:25<br><b>apply</b> [2] - 14:16, 21:19<br><b>appointments</b> [1] - 39:2<br><b>appreciate</b> [2] - 19:8, 53:8<br><b>appreciative</b> [1] - 50:12<br><b>approach</b> [2] - 3:4, 4:19<br><b>appropriate</b> [1] - 39:18<br><b>approval</b> [1] - 30:19<br><b>approve</b> [3] - 30:14, 30:17<br><b>April</b> [1] - 8:24 |
| <b>2</b>   |  |  |
| <b>2,700</b> [1] - 47:13<br><b>2,712</b> [2] - 10:12, 10:13<br><b>20</b> [4] - 1:21, 15:7, 53:15, 53:16<br><b>20/10</b> [1] - 7:10<br><b>200</b> [1] - 48:23<br><b>20001</b> [2] - 1:21, 2:10<br><b>20006</b> [2] - 1:17, 1:25<br><b>20044</b> [1] - 2:4<br><b>2011</b> [1] - 11:1<br><b>2012</b> [2] - 10:11, 47:13<br><b>2013</b> [2] - 1:6, 8:24<br><b>2014</b> [2] - 9:23, 9:25<br><b>202</b> [1] - 2:10<br><b>2020</b> [1] - 1:17<br><b>21</b> [1] - 5:4<br><b>215</b> [14] - 10:12, 12:18, 17:4, 18:6, 18:21, 28:21, 29:1, 29:8, 29:22, 31:11, 31:19, 32:1, 32:5, 34:10<br><b>25</b> [2] - 8:24, 26:9<br><b>2712</b> [5] - 31:2, 31:6, 31:11, 31:12, 31:14 |  |  |
| <b>3</b>   |  |  |
| <b>3</b> [2] - 9:23, 9:25<br><b>300</b> [4] - 19:22, 46:6, 47:8, 48:8  |  |  |
| <b>4</b>   |  |  |
| <b>4700-A</b> [1] - 2:9  |  |  |
| <b>6</b>   |  |  |
| <b>6</b> [2] - 11:1, 18:15<br><b>65</b> [1] - 50:10  |  |  |

|   |   |   |
|---|---|---|
| <p><b>areas</b> [1] - 25:25</p> <p><b>argue</b> [1] - 9:24</p> <p><b>argument</b> [12] - 6:16, 7:1, 19:11, 30:24, 31:23, 32:3, 39:25, 40:6, 40:11, 53:7, 53:8</p> <p><b>arguments</b> [2] - 28:18, 53:5</p> <p><b>array</b> [1] - 44:13</p> <p><b>arrested</b> [1] - 50:25</p> <p><b>Article</b> [22] - 7:24, 8:1, 11:20, 12:6, 12:19, 13:3, 13:4, 14:9, 15:21, 18:14, 18:18, 21:14, 21:15, 24:11, 27:23, 28:11, 29:6, 29:8, 29:13, 30:7, 32:13, 45:22</p> <p><b>articulable</b> [4] - 40:17, 40:22, 41:24, 42:20</p> <p><b>articulate</b> [1] - 52:1</p> <p><b>ARTRIP</b> [1] - 2:8</p> <p><b>assess</b> [2] - 32:8, 36:20</p> <p><b>assessment</b> [1] - 30:3</p> <p><b>assessments</b> [1] - 29:25</p> <p><b>assigned</b> [1] - 10:25</p> <p><b>associate</b> [1] - 15:19</p> <p><b>associated</b> [6] - 40:19, 40:23, 41:11, 41:25, 42:7, 44:17</p> <p><b>associates</b> [1] - 3:10</p> <p><b>association</b> [1] - 24:21</p> <p><b>associational</b> [2] - 17:16, 24:18</p> <p><b>assume</b> [2] - 41:4, 44:15</p> <p><b>assumed</b> [1] - 40:11</p> <p><b>assuming</b> [6] - 12:4, 12:8, 15:2, 26:13, 36:10</p> <p><b>AT&amp;T</b> [1] - 25:14</p> <p><b>attempted</b> [1] - 26:22</p> <p><b>attempts</b> [1] - 6:14</p> <p><b>attention</b> [1] - 31:2</p> <p><b>attitude</b> [1] - 48:20</p> <p><b>attorney</b> [2] - 24:22, 47:2</p> <p><b>Attorney</b> [2] - 30:15, 30:20</p> <p><b>attorney-client</b> [2] - 24:22, 47:2</p> <p><b>audacity</b> [1] - 17:18</p> <p><b>audit</b> [1] - 10:11</p> <p><b>August</b> [1] - 11:1</p> <p><b>authenticate</b> [3] - 4:22, 5:1, 48:14</p> <p><b>authenticity</b> [1] - 5:2</p> <p><b>authorities</b> [1] - 42:10</p> <p><b>authority</b> [32] - 7:13, 7:15, 7:24, 8:4, 11:24, 12:6, 12:13, 12:16, 13:6, 13:23, 15:25, 17:24, 24:13, 24:15, 25:19, 26:25, 27:2, 27:7, 27:11, 28:1, 28:19, 29:8, 31:10, 32:1, 33:18, 35:14, 36:9, 42:21, 43:20, 51:18, 52:7</p> <p><b>available</b> [2] - 42:11, 50:23</p> <p><b>avenue</b> [1] - 20:11</p> <p><b>Avenue</b> [3] - 1:17, 1:21, 1:25</p> <p><b>award</b> [1] - 37:1</p> <p><b>awards</b> [1] - 18:24</p> <p><b>awful</b> [1] - 38:8</p> | <p style="text-align: center;"><b>B</b></p> <p><b>Bar</b> [1] - 3:11</p> <p><b>Barack</b> [1] - 3:3</p> <p><b>BARACK</b> [1] - 1:8</p> <p><b>base</b> [1] - 40:23</p> <p><b>based</b> [6] - 7:22, 9:5, 21:12, 31:19, 40:22, 45:17</p> <p><b>bases</b> [1] - 31:20</p> <p><b>basis</b> [6] - 11:21, 22:1, 31:11, 36:10, 36:16, 48:8</p> <p><b>bastion</b> [1] - 16:17</p> <p><b>Bates</b> [1] - 46:8</p> <p><b>bears</b> [2] - 5:25, 6:5</p> <p><b>became</b> [1] - 20:15</p> <p><b>BEFORE</b> [1] - 1:12</p> <p><b>behalf</b> [3] - 4:13, 11:4, 28:2</p> <p><b>behest</b> [1] - 29:20</p> <p><b>behind</b> [2] - 41:10, 45:1</p> <p><b>belong</b> [1] - 42:13</p> <p><b>belongs</b> [1] - 45:4</p> <p><b>bench</b> [4] - 4:19, 8:12, 8:13, 47:20</p> <p><b>BERMAN</b> [1] - 1:19</p> <p><b>Berman</b> [1] - 4:7</p> <p><b>best</b> [2] - 51:8, 52:24</p> <p><b>between</b> [3] - 9:7, 19:19, 21:20</p> <p><b>beyond</b> [1] - 41:14</p> <p><b>big</b> [2] - 10:21, 10:23</p> <p><b>billion</b> [1] - 38:21</p> <p><b>bin</b> [1] - 11:4</p> <p><b>binder</b> [4] - 4:20, 5:4, 6:25, 48:12</p> <p><b>Block</b> [2] - 27:16, 29:18</p> <p><b>bond</b> [1] - 50:7</p> <p><b>books</b> [1] - 24:20</p> <p><b>bottom</b> [1] - 45:13</p> <p><b>bounce</b> [1] - 22:22</p> <p><b>Box</b> [1] - 2:4</p> <p><b>boyfriend</b> [1] - 17:14</p> <p><b>boyfriends</b> [2] - 10:17, 47:15</p> <p><b>branch</b> [2] - 23:3</p> <p><b>breached</b> [1] - 24:23</p> <p><b>brief</b> [5] - 8:12, 8:13, 35:25, 47:20</p> <p><b>briefing</b> [5] - 7:21, 51:8, 51:14, 51:15, 52:5</p> <p><b>briefly</b> [1] - 46:4</p> <p><b>briefs</b> [13] - 4:21, 7:20, 9:5, 10:7, 24:17, 25:22, 26:22, 31:5, 34:7, 43:16, 46:9, 50:22, 52:9</p> <p><b>broad</b> [2] - 8:25, 9:20</p> <p><b>brought</b> [2] - 28:15, 28:24</p> <p><b>BRYAN</b> [1] - 1:20</p> <p><b>Bryan</b> [1] - 4:7</p> <p><b>burden</b> [2] - 35:17, 35:19</p> <p><b>burn</b> [1] - 24:5</p> <p><b>Business</b> [1] - 34:4</p> <p><b>business</b> [4] - 34:8, 34:9, 35:1, 53:13</p> <p style="text-align: center;"><b>C</b></p> <p><b>CA13-851</b> [1] - 1:4</p> | <p><b>CA13-881</b> [1] - 1:5</p> <p><b>California</b> [6] - 3:11, 3:17, 3:18, 3:19, 3:23, 31:4</p> <p><b>cannot</b> [2] - 19:9, 40:15</p> <p><b>capacity</b> [2] - 18:20, 43:3</p> <p><b>cards</b> [3] - 34:21, 34:24, 48:17</p> <p><b>carrier</b> [3] - 34:15, 44:25, 45:12</p> <p><b>carriers</b> [1] - 34:13</p> <p><b>case</b> [32] - 3:13, 4:24, 7:13, 7:16, 7:18, 9:12, 15:12, 17:8, 21:23, 24:18, 25:5, 25:13, 25:17, 28:17, 32:12, 32:14, 32:16, 33:1, 33:12, 34:5, 34:7, 35:7, 35:8, 35:11, 38:13, 38:18, 39:3, 41:4, 44:2, 45:23, 50:9</p> <p><b>cases</b> [4] - 27:16, 39:11, 39:22, 51:6</p> <p><b>cash</b> [1] - 11:1</p> <p><b>categories</b> [1] - 30:15</p> <p><b>caught</b> [1] - 23:24</p> <p><b>caused</b> [1] - 19:2</p> <p><b>cell</b> [1] - 25:6</p> <p><b>center</b> [1] - 16:15</p> <p><b>central</b> [1] - 3:18</p> <p><b>certainly</b> [8] - 19:22, 24:1, 36:21, 36:25, 38:13, 45:18, 45:19, 52:15</p> <p><b>CERTIFICATE</b> [1] - 55:1</p> <p><b>certifications</b> [2] - 30:14, 30:17</p> <p><b>certify</b> [1] - 55:3</p> <p><b>cetera</b> [2] - 9:1, 30:5</p> <p><b>challenge</b> [2] - 26:3, 35:11</p> <p><b>challenges</b> [3] - 27:24, 28:23, 29:2</p> <p><b>challenging</b> [4] - 10:21, 13:7, 21:7, 26:24</p> <p><b>Chamber</b> [2] - 14:21, 19:12</p> <p><b>chance</b> [3] - 5:22, 7:7, 51:15</p> <p><b>changed</b> [3] - 35:24, 38:5, 38:8</p> <p><b>charge</b> [1] - 50:1</p> <p><b>Charles</b> [2] - 2:6, 6:3</p> <p><b>Charlie</b> [1] - 25:18</p> <p><b>cheating</b> [1] - 10:18</p> <p><b>check</b> [1] - 43:21</p> <p><b>choice</b> [1] - 7:11</p> <p><b>Circuit</b> [2] - 32:20, 37:23</p> <p><b>circumstance</b> [1] - 32:7</p> <p><b>circumstances</b> [2] - 22:15, 36:5</p> <p><b>cited</b> [6] - 31:5, 34:7, 35:7, 39:23, 43:15, 46:8</p> <p><b>citizens</b> [3] - 17:12, 24:5, 24:7</p> <p><b>Civil</b> [2] - 3:2, 3:3</p> <p><b>claim</b> [5] - 13:17, 13:21, 32:18, 32:19, 34:5</p> <p><b>claims</b> [13] - 13:15, 13:20, 27:7, 27:8, 27:10, 27:19, 28:15, 28:19, 31:14, 32:15, 32:16, 36:21, 46:1</p> <p><b>Claims</b> [2] - 14:6, 14:12</p> <p><b>Clapper</b> [1] - 23:25</p> <p><b>class</b> [1] - 24:4</p> <p><b>classic</b> [1] - 36:1</p> <p><b>classified</b> [1] - 35:20</p> <p><b>clear</b> [4] - 12:16, 25:16, 26:23</p> |
|---|---|---|

|   |   |  |
|---|---|--|
| <p><b>clearance</b> [2] - 49:11<br/> <b>cleared</b> [1] - 35:9<br/> <b>clearer</b> [2] - 5:15, 27:20<br/> <b>clearly</b> [1] - 37:19<br/> <b>Clerk</b> [1] - 8:18<br/> <b>clerks</b> [1] - 7:22<br/> <b>client</b> [4] - 22:3, 24:22, 32:7, 47:2<br/> <b>clients</b> [4] - 6:1, 24:21, 25:18, 46:17<br/> <b>Clinton's</b> [1] - 22:20<br/> <b>closed</b> [1] - 20:7<br/> <b>closing</b> [1] - 53:13<br/> <b>COB</b> [1] - 53:1<br/> <b>coerce</b> [1] - 48:9<br/> <b>collateral</b> [1] - 16:8<br/> <b>colleagues</b> [2] - 22:5, 22:10<br/> <b>collected</b> [5] - 33:4, 34:17, 37:12, 37:15, 44:12<br/> <b>collecting</b> [1] - 46:6<br/> <b>collection</b> [5] - 9:1, 18:7, 20:3, 35:12, 42:18<br/> <b>colonialists</b> [1] - 19:2<br/> <b>COLUMBIA</b> [1] - 1:2<br/> <b>combined</b> [1] - 13:12<br/> <b>combining</b> [1] - 11:9<br/> <b>coming</b> [1] - 44:10<br/> <b>committed</b> [2] - 38:16, 44:5<br/> <b>committee</b> [2] - 32:20, 37:23<br/> <b>committing</b> [3] - 21:22, 38:15, 38:17<br/> <b>communications</b> [10] - 6:6, 30:13, 33:3, 33:4, 33:7, 33:9, 34:15, 35:11, 37:16, 40:14<br/> <b>Communications</b> [1] - 1:23<br/> <b>Community</b> [1] - 27:16<br/> <b>community</b> [2] - 29:18, 42:12<br/> <b>comparison</b> [2] - 38:19<br/> <b>complain</b> [1] - 50:17<br/> <b>complaint</b> [2] - 5:11, 5:12<br/> <b>Complaints</b> [1] - 6:12<br/> <b>complaints</b> [2] - 5:11, 5:16<br/> <b>completely</b> [1] - 50:11<br/> <b>compliance</b> [6] - 42:22, 43:8, 43:16, 43:23, 44:14, 50:3<br/> <b>complied</b> [1] - 43:13<br/> <b>comply</b> [1] - 43:13<br/> <b>computer</b> [5] - 2:12, 6:8, 6:9, 22:17, 38:7<br/> <b>computer-aided</b> [1] - 2:12<br/> <b>computers</b> [3] - 6:6, 38:25, 46:20<br/> <b>concede</b> [1] - 9:4<br/> <b>concern</b> [1] - 38:14<br/> <b>concerned</b> [1] - 51:17<br/> <b>concerns</b> [1] - 38:23<br/> <b>concluded</b> [1] - 54:1<br/> <b>concrete</b> [2] - 36:25, 49:6<br/> <b>concurrence</b> [2] - 39:10, 39:15<br/> <b>concurrences</b> [2] - 39:9<br/> <b>concurring</b> [1] - 40:1<br/> <b>conduct</b> [1] - 49:17<br/> <b>conducted</b> [2] - 32:21, 43:10</p> | <p><b>conference</b> [2] - 8:10, 46:15<br/> <b>confines</b> [1] - 15:12<br/> <b>confirm</b> [1] - 9:15<br/> <b>confirmed</b> [1] - 17:22<br/> <b>Congress</b> [17] - 8:1, 11:5, 11:17, 11:19, 12:15, 13:2, 16:22, 16:23, 18:6, 18:18, 20:7, 21:25, 24:2, 24:6, 27:20, 28:14, 31:14<br/> <b>Congress'</b> [1] - 12:17<br/> <b>Congressional</b> [2] - 11:5, 29:4<br/> <b>connection</b> [2] - 19:25, 23:21<br/> <b>consequence</b> [2] - 32:1, 32:6<br/> <b>consequently</b> [2] - 13:2, 48:11<br/> <b>conservative</b> [1] - 16:15<br/> <b>conservatives</b> [1] - 23:2<br/> <b>consideration</b> [1] - 29:20<br/> <b>considered</b> [1] - 25:25<br/> <b>consistent</b> [6] - 15:22, 18:5, 18:21, 29:7<br/> <b>consistently</b> [2] - 18:18, 38:1<br/> <b>constant</b> [1] - 25:11<br/> <b>Constitution</b> [7] - 13:4, 16:23, 18:5, 18:21, 24:13, 24:16, 28:7<br/> <b>Constitutional</b> [1] - 32:9<br/> <b>constitutional</b> [20] - 8:5, 13:6, 13:18, 13:22, 15:22, 16:6, 16:24, 23:18, 27:7, 27:8, 27:18, 27:24, 28:13, 28:15, 32:1, 32:6, 32:15, 32:16, 37:4, 37:9<br/> <b>constitutionality</b> [1] - 13:4<br/> <b>construct</b> [1] - 38:25<br/> <b>contact</b> [1] - 42:4<br/> <b>contained</b> [1] - 33:4<br/> <b>contend</b> [1] - 31:24<br/> <b>contending</b> [1] - 33:13<br/> <b>content</b> [2] - 37:20, 40:9<br/> <b>contested</b> [1] - 32:14<br/> <b>continue</b> [1] - 49:17<br/> <b>continued</b> [1] - 52:10<br/> <b>continues</b> [1] - 48:22<br/> <b>continuously</b> [1] - 49:14<br/> <b>contravene</b> [4] - 17:3, 18:2, 25:17, 25:20<br/> <b>control</b> [1] - 50:14<br/> <b>controlling</b> [2] - 39:8, 39:24<br/> <b>conversations</b> [1] - 10:16<br/> <b>Coppalino</b> [1] - 4:8<br/> <b>copy</b> [6] - 5:19, 6:10, 8:18, 8:20, 47:21<br/> <b>correct</b> [7] - 12:4, 17:19, 29:11, 29:17, 30:8, 42:9, 55:4<br/> <b>correctly</b> [2] - 26:14, 29:9<br/> <b>corruption</b> [1] - 20:16<br/> <b>counsel</b> [10] - 3:4, 3:11, 3:13, 3:14, 3:15, 4:7, 6:1, 51:6, 51:8, 53:15<br/> <b>countermanding</b> [2] - 18:8, 24:8<br/> <b>country</b> [5] - 17:11, 23:5, 23:13, 25:8, 48:5<br/> <b>couple</b> [1] - 35:23<br/> <b>courage</b> [1] - 23:1<br/> <b>course</b> [7] - 9:9, 18:12, 30:4, 36:9,</p> | <p>39:7, 47:24, 51:17<br/> <b>court</b> [1] - 18:7<br/> <b>COURT</b> [111] - 1:1, 3:9, 3:13, 3:16, 3:20, 3:22, 3:24, 4:1, 4:4, 4:10, 4:14, 4:18, 5:6, 5:9, 5:21, 6:2, 6:4, 6:11, 6:17, 6:23, 7:2, 7:5, 8:8, 8:11, 8:14, 8:17, 8:19, 9:4, 9:7, 9:13, 11:12, 11:14, 11:16, 11:25, 12:3, 13:8, 13:10, 13:14, 14:4, 14:15, 15:1, 15:5, 15:8, 15:20, 18:3, 18:10, 19:13, 19:17, 21:2, 21:11, 21:13, 22:1, 22:9, 24:10, 26:3, 26:9, 26:13, 26:17, 26:19, 27:22, 28:4, 28:7, 28:10, 29:6, 29:13, 29:24, 30:2, 31:23, 33:12, 33:24, 34:20, 35:5, 35:13, 35:22, 36:6, 36:15, 37:3, 37:8, 37:13, 37:17, 38:3, 38:5, 38:7, 38:10, 38:13, 39:6, 39:12, 39:16, 41:7, 41:10, 41:18, 42:6, 42:14, 42:23, 43:1, 43:3, 43:19, 43:24, 44:8, 44:15, 44:19, 45:6, 45:8, 45:15, 46:3, 47:25, 50:20, 51:2, 53:5, 53:7, 53:24<br/> <b>Court</b> [99] - 2:8, 2:9, 3:18, 3:23, 4:17, 7:13, 7:15, 7:17, 7:24, 7:25, 8:1, 8:3, 8:4, 9:25, 10:3, 10:8, 10:9, 11:18, 11:19, 12:6, 12:7, 13:3, 13:15, 13:16, 13:19, 13:20, 14:3, 14:5, 14:6, 14:9, 14:11, 14:12, 14:18, 14:20, 14:23, 15:21, 16:1, 16:21, 16:22, 17:22, 17:23, 18:2, 18:8, 18:14, 19:10, 20:20, 21:5, 24:13, 24:19, 25:5, 25:15, 27:2, 27:5, 27:7, 27:15, 27:19, 27:23, 27:25, 28:12, 28:16, 29:3, 29:8, 29:10, 29:14, 29:15, 29:16, 29:18, 30:6, 30:24, 31:13, 31:20, 32:8, 32:14, 33:18, 35:15, 36:1, 36:4, 36:7, 36:9, 36:15, 36:18, 36:19, 37:2, 38:11, 38:13, 38:23, 42:17, 45:25, 51:18, 52:9, 52:12, 52:13, 52:14<br/> <b>Court's</b> [5] - 5:19, 15:25, 27:14, 34:6, 52:7<br/> <b>Courthouse</b> [1] - 2:9<br/> <b>COURTROOM</b> [1] - 3:2<br/> <b>courts</b> [6] - 3:16, 11:20, 17:22, 21:3, 23:25, 38:1<br/> <b>Courts</b> [10] - 3:22, 12:19, 12:22, 13:5, 20:15, 21:15, 24:11, 27:23, 30:7, 35:10<br/> <b>creates</b> [1] - 31:6<br/> <b>creating</b> [2] - 11:17, 50:15<br/> <b>crime</b> [2] - 19:25, 21:22<br/> <b>crimes</b> [3] - 38:15, 38:16, 38:17<br/> <b>criminal</b> [4] - 25:2, 47:7, 47:9, 48:3<br/> <b>critical</b> [2] - 46:25, 52:3<br/> <b>criticized</b> [1] - 18:24<br/> <b>crossing</b> [2] - 27:14, 40:1<br/> <b>cry</b> [1] - 38:24<br/> <b>cryptologist</b> [2] - 10:25, 46:25<br/> <b>culpable</b> [1] - 11:7<br/> <b>customer</b> [1] - 9:2<br/> <b>customers</b> [4] - 33:13, 33:14, 34:1, 34:5<br/> <b>cut</b> [1] - 20:8</p> |
|---|---|--|

|   |   |  |
|---|---|--|
| <p><b>Cutler</b> [1] - 1:24</p>   | <p><b>different</b> [5] - 5:11, 9:7, 26:7, 43:22, 52:1</p>  | <p><b>either</b> [5] - 5:12, 11:8, 14:10, 22:2, 44:5</p>   |
| <p style="text-align: center;"><b>D</b></p>   | <p><b>digital</b> [1] - 39:19<br/> <b>directed</b> [1] - 34:4<br/> <b>directives</b> [1] - 30:20<br/> <b>directly</b> [2] - 11:12, 11:14<br/> <b>director</b> [2] - 21:24, 43:11<br/> <b>disciplined</b> [2] - 44:6, 44:7<br/> <b>disclosed</b> [3] - 34:3, 34:9, 39:20<br/> <b>disclosure</b> [1] - 31:9<br/> <b>discovered</b> [1] - 43:16<br/> <b>discovery</b> [3] - 46:15, 46:16, 50:5<br/> <b>discussed</b> [1] - 31:3<br/> <b>discussion</b> [1] - 36:10<br/> <b>disk</b> [1] - 22:14<br/> <b>dispel</b> [1] - 24:3<br/> <b>disposal</b> [1] - 38:20<br/> <b>dispose</b> [1] - 36:19<br/> <b>disprove</b> [1] - 35:19<br/> <b>dispute</b> [2] - 9:14, 46:7<br/> <b>disrespect</b> [1] - 18:22<br/> <b>dissenters</b> [2] - 39:25, 40:2<br/> <b>distinction</b> [4] - 9:7, 13:25, 27:13, 34:2<br/> <b>District</b> [9] - 3:19, 13:5, 14:9, 27:4, 28:16, 29:3, 30:24, 31:4, 31:13<br/> <b>DISTRICT</b> [3] - 1:1, 1:2, 1:12<br/> <b>diverted</b> [1] - 25:9<br/> <b>Docket</b> [1] - 1:4<br/> <b>doctor</b> [2] - 17:15, 17:16<br/> <b>doctrine</b> [3] - 39:18, 39:19, 39:22<br/> <b>document</b> [1] - 50:6<br/> <b>documentation</b> [2] - 37:5, 37:6<br/> <b>documented</b> [2] - 10:8, 23:25<br/> <b>documents</b> [8] - 4:20, 4:23, 5:2, 5:3, 47:12, 48:12, 48:13, 48:14<br/> <b>Doe</b> [3] - 27:15, 27:19, 28:12<br/> <b>domestic</b> [1] - 23:19<br/> <b>done</b> [6] - 10:5, 10:11, 19:11, 20:4, 20:5, 22:2<br/> <b>door</b> [1] - 20:7<br/> <b>Dorr</b> [1] - 1:24<br/> <b>doubt</b> [4] - 11:16, 11:22, 11:23, 12:1<br/> <b>down</b> [4] - 11:1, 14:24, 22:16, 49:12<br/> <b>draw</b> [1] - 31:1<br/> <b>due</b> [3] - 12:22, 14:14, 16:20<br/> <b>duration</b> [1] - 41:18<br/> <b>during</b> [1] - 22:19</p> | <p><b>Elizabeth</b> [1] - 4:9<br/> <b>embarrassed</b> [1] - 49:16<br/> <b>emotional</b> [1] - 49:15<br/> <b>emphasize</b> [2] - 8:21, 25:12<br/> <b>employ</b> [1] - 4:24<br/> <b>employee</b> [1] - 43:20<br/> <b>employees</b> [2] - 10:19, 10:21<br/> <b>enable</b> [1] - 7:17<br/> <b>enacted</b> [1] - 18:6<br/> <b>end</b> [1] - 6:18<br/> <b>ended</b> [2] - 20:1, 20:2<br/> <b>engage</b> [2] - 26:25, 27:11<br/> <b>enjoin</b> [4] - 17:25, 18:1, 23:16, 50:8<br/> <b>enslaved</b> [1] - 19:9<br/> <b>ensure</b> [4] - 42:22, 43:12, 44:13, 52:10<br/> <b>enter</b> [1] - 17:4<br/> <b>entering</b> [1] - 24:8<br/> <b>entire</b> [2] - 12:18, 26:6<br/> <b>entities</b> [1] - 34:8<br/> <b>entitled</b> [2] - 16:8, 55:5<br/> <b>equitable</b> [1] - 37:1<br/> <b>erroneous</b> [4] - 32:4, 32:5, 32:10<br/> <b>especially</b> [1] - 45:21<br/> <b>essence</b> [1] - 15:23<br/> <b>essentially</b> [2] - 7:6, 34:24<br/> <b>establish</b> [1] - 45:24<br/> <b>established</b> [1] - 35:5<br/> <b>establishing</b> [2] - 35:18<br/> <b>estoppel</b> [1] - 16:8<br/> <b>et</b> [4] - 3:3, 3:4, 9:1, 30:5<br/> <b>ET</b> [2] - 1:4, 1:8<br/> <b>evaluate</b> [1] - 32:9<br/> <b>evaluating</b> [4] - 7:18, 7:25, 12:10, 21:3<br/> <b>evening</b> [2] - 5:15, 6:16<br/> <b>events</b> [1] - 45:25<br/> <b>evidence</b> [6] - 6:15, 34:14, 41:3, 44:10, 45:24, 48:11<br/> <b>ex</b> [2] - 10:4, 10:5<br/> <b>exactly</b> [3] - 9:20, 30:11, 49:7<br/> <b>example</b> [3] - 13:10, 44:21, 44:24<br/> <b>exclude</b> [2] - 12:19, 24:6<br/> <b>exclusively</b> [1] - 30:6<br/> <b>executed</b> [1] - 50:25<br/> <b>exercise</b> [2] - 16:20, 17:7<br/> <b>exist</b> [2] - 23:17, 49:1<br/> <b>existence</b> [1] - 50:22<br/> <b>expectation</b> [5] - 37:19, 38:2, 39:21, 40:9, 40:12</p> |
| <p><b>D.C</b> [4] - 2:10, 14:9, 32:20, 37:23<br/> <b>damages</b> [2] - 31:7, 31:17<br/> <b>data</b> [8] - 33:13, 33:14, 37:10, 37:20, 38:25, 40:9, 44:12, 47:6<br/> <b>database</b> [7] - 40:16, 40:18, 40:21, 41:2, 41:15, 44:12, 45:5<br/> <b>date</b> [2] - 37:22, 41:17<br/> <b>David</b> [1] - 6:8<br/> <b>days</b> [5] - 18:11, 18:12, 18:15, 18:19, 47:7<br/> <b>DC</b> [4] - 1:17, 1:21, 1:25, 2:4<br/> <b>dead</b> [1] - 22:12<br/> <b>deal</b> [2] - 15:19, 27:23<br/> <b>dealing</b> [2] - 22:15, 25:13<br/> <b>DEARINGER</b> [1] - 1:20<br/> <b>Dearinger</b> [1] - 4:7<br/> <b>death</b> [2] - 16:14, 51:4<br/> <b>deaths</b> [1] - 11:7<br/> <b>decade</b> [1] - 44:1<br/> <b>decide</b> [2] - 4:24, 12:13<br/> <b>deciding</b> [1] - 12:12<br/> <b>decision</b> [15] - 12:14, 13:23, 13:24, 21:16, 21:18, 25:23, 27:15, 29:7, 29:8, 30:5, 31:3, 31:4, 31:24, 31:25, 34:6<br/> <b>decisions</b> [10] - 7:25, 11:21, 12:7, 19:9, 20:20, 21:13, 21:18, 24:12<br/> <b>Declaration</b> [2] - 50:24, 51:3<br/> <b>declarations</b> [2] - 40:25, 49:24<br/> <b>Defendant</b> [2] - 1:23, 2:2<br/> <b>Defendants</b> [5] - 1:9, 1:18, 4:6, 4:13, 12:25<br/> <b>defenseless</b> [1] - 50:11<br/> <b>definite</b> [1] - 20:1<br/> <b>deliberate</b> [1] - 23:17<br/> <b>demonstrate</b> [2] - 33:8, 34:23<br/> <b>demonstrated</b> [3] - 7:14, 7:16, 28:3<br/> <b>demonstration</b> [1] - 45:19<br/> <b>denial</b> [1] - 14:11<br/> <b>deny</b> [1] - 5:2<br/> <b>Department</b> [7] - 1:20, 2:3, 4:6, 4:22, 26:19, 43:10, 49:10<br/> <b>depositions</b> [2] - 49:8, 50:5<br/> <b>DEPUTY</b> [1] - 3:2<br/> <b>description</b> [1] - 29:22<br/> <b>designated</b> [1] - 41:23<br/> <b>designed</b> [2] - 15:10, 18:18<br/> <b>despite</b> [1] - 46:5<br/> <b>destroy</b> [2] - 22:8, 50:16<br/> <b>detail</b> [3] - 11:10, 37:24, 51:21<br/> <b>detailed</b> [1] - 28:22<br/> <b>details</b> [2] - 35:20, 40:6<br/> <b>deter</b> [1] - 32:22<br/> <b>determination</b> [1] - 41:22<br/> <b>determine</b> [2] - 15:18, 33:19<br/> <b>determined</b> [2] - 34:20, 44:2<br/> <b>devised</b> [2] - 11:17</p> | <p style="text-align: center;"><b>E</b></p> <p><b>e-mail</b> [3] - 5:1, 23:12, 49:4<br/> <b>e-mails</b> [2] - 22:12, 23:19<br/> <b>Eagan</b> [1] - 30:5<br/> <b>easily</b> [1] - 49:11<br/> <b>echoed</b> [1] - 38:23<br/> <b>Ed</b> [2] - 17:17, 23:11<br/> <b>effect</b> [6] - 9:23, 15:9, 16:8, 16:10, 23:7, 49:23<br/> <b>effectively</b> [3] - 15:25, 16:25, 18:8<br/> <b>efforts</b> [1] - 45:3</p>   | <p><b>expeditiously</b> [1] - 52:25<br/> <b>experience</b> [2] - 51:6, 51:10<br/> <b>expert</b> [3] - 6:8, 17:17, 17:20<br/> <b>explained</b> [1] - 27:19<br/> <b>explicitly</b> [1] - 16:23<br/> <b>expose</b> [1] - 40:5<br/> <b>expressed</b> [2] - 32:19, 39:11<br/> <b>expression</b> [1] - 27:20<br/> <b>extensive</b> [1] - 51:16</p>   |

|  |   |  |
|--|---|--|
| <p><b>extent</b> [1] - 26:24<br/> <b>Extortion</b> [1] - 22:15<br/> <b>extortion</b> [1] - 11:2<br/> <b>extraordinary</b> [1] - 39:2<br/> <b>extreme</b> [1] - 19:4<br/> <b>extremely</b> [1] - 46:25<br/> <b>eyes</b> [1] - 41:3</p>  | <p><b>fix</b> [1] - 13:25<br/> <b>flaws</b> [3] - 33:23, 33:24, 33:25<br/> <b>flood</b> [1] - 48:19<br/> <b>flow</b> [1] - 20:21<br/> <b>focus</b> [5] - 7:6, 7:12, 7:18, 33:12, 52:2<br/> <b>follow</b> [5] - 17:2, 18:1, 23:16, 23:18, 45:10<br/> <b>following</b> [3] - 17:4, 22:21, 36:14<br/> <b>footnote</b> [1] - 35:16<br/> <b>FOR</b> [1] - 1:2<br/> <b>force</b> [1] - 16:10<br/> <b>forced</b> [2] - 21:24, 46:5<br/> <b>foreclosed</b> [1] - 32:19<br/> <b>forecloses</b> [1] - 32:18<br/> <b>foregoing</b> [1] - 55:3<br/> <b>foreign</b> [5] - 23:21, 30:16, 40:20, 40:23, 41:25<br/> <b>forget</b> [1] - 4:10<br/> <b>form</b> [4] - 8:2, 11:20, 31:10, 36:4<br/> <b>Fort</b> [1] - 33:15<br/> <b>forth</b> [9] - 5:17, 11:10, 22:11, 28:22, 35:17, 40:25, 46:18, 48:6, 49:6<br/> <b>fortiori</b> [1] - 36:22<br/> <b>forward</b> [4] - 7:17, 10:7, 48:14, 49:20<br/> <b>founded</b> [1] - 18:23<br/> <b>Founding</b> [1] - 50:23<br/> <b>four</b> [3] - 35:16, 46:17, 50:2<br/> <b>fourth</b> [1] - 24:16<br/> <b>Fourth</b> [6] - 20:2, 25:3, 32:18, 32:21, 37:24, 39:19<br/> <b>fraction</b> [1] - 41:2<br/> <b>framework</b> [9] - 8:2, 15:9, 18:6, 18:17, 19:13, 21:2, 21:14, 21:15, 29:14<br/> <b>frankly</b> [6] - 7:19, 8:6, 21:25, 23:25, 50:14, 52:21<br/> <b>free</b> [1] - 25:16<br/> <b>Freedom</b> [1] - 16:15<br/> <b>freedoms</b> [2] - 32:23, 48:24<br/> <b>frightened</b> [1] - 16:14<br/> <b>front</b> [1] - 11:5<br/> <b>fugitive</b> [1] - 48:4<br/> <b>future</b> [3] - 20:3, 47:9, 49:2</p> | <p>37:14, 37:18, 38:4, 38:6, 38:9, 38:12, 39:4, 39:7, 39:14, 39:17, 41:9, 41:14, 41:19, 42:9, 42:16, 42:24, 43:2, 43:5, 43:22, 43:25, 44:9, 44:18, 44:21, 45:7, 45:9, 45:16, 47:22, 53:23<br/> <b>Gilligan</b> [14] - 4:4, 4:5, 4:25, 6:11, 8:14, 12:1, 12:3, 15:6, 22:19, 26:13, 31:23, 46:3, 47:21, 51:19<br/> <b>girlfriend</b> [4] - 17:15, 43:19, 43:21<br/> <b>girlfriends</b> [2] - 10:17, 47:15<br/> <b>given</b> [6] - 22:14, 29:8, 45:11, 49:19, 49:20, 53:7<br/> <b>gleaned</b> [1] - 40:13<br/> <b>glossing</b> [1] - 34:1<br/> <b>Google</b> [1] - 25:14<br/> <b>Government</b> [52] - 4:6, 5:21, 6:5, 7:9, 9:4, 10:9, 12:22, 14:24, 15:1, 15:2, 16:13, 17:1, 17:18, 17:21, 17:25, 20:16, 21:21, 22:17, 22:23, 24:25, 25:7, 26:25, 27:10, 28:18, 31:7, 33:5, 33:15, 33:17, 34:3, 34:12, 34:21, 34:24, 34:25, 35:9, 38:16, 42:7, 42:18, 43:6, 43:16, 45:2, 46:5, 46:13, 48:12, 48:15, 48:21, 49:7, 49:17, 50:7, 50:9, 50:10, 50:16<br/> <b>Government's</b> [7] - 5:23, 12:5, 15:8, 30:18, 35:19, 36:6, 37:3<br/> <b>GPS</b> [1] - 38:10<br/> <b>Grassley</b> [1] - 44:3<br/> <b>grave</b> [1] - 38:14<br/> <b>great</b> [1] - 26:1<br/> <b>greater</b> [1] - 49:1<br/> <b>grievances</b> [1] - 50:18<br/> <b>grounds</b> [1] - 36:8<br/> <b>group</b> [2] - 18:23, 46:23<br/> <b>guard</b> [1] - 23:4<br/> <b>guess</b> [2] - 12:6, 21:16<br/> <b>guessing</b> [1] - 24:12<br/> <b>guys</b> [1] - 20:24</p> |
| <b>F</b>   |   | <b>H</b>   |
| <p><b>face</b> [1] - 13:21<br/> <b>Facebook</b> [1] - 49:4<br/> <b>fact</b> [9] - 9:15, 15:17, 16:23, 17:6, 20:10, 33:2, 43:15, 46:7, 46:10<br/> <b>facts</b> [5] - 17:16, 20:4, 21:12, 33:8, 35:17<br/> <b>failure</b> [1] - 43:13<br/> <b>fair</b> [2] - 38:18, 53:3<br/> <b>faith</b> [1] - 32:20<br/> <b>Falah</b> [2] - 2:6, 3:21<br/> <b>far</b> [3] - 23:6, 27:9, 38:24<br/> <b>fashion</b> [1] - 50:5<br/> <b>fast</b> [2] - 52:18, 52:19<br/> <b>Fathers</b> [1] - 50:23<br/> <b>FBI</b> [8] - 18:20, 29:7, 42:11, 44:21, 44:22, 44:23, 45:11<br/> <b>fear</b> [3] - 16:13, 23:8, 48:5<br/> <b>Federal</b> [3] - 15:21, 28:16, 48:10<br/> <b>Felton's</b> [1] - 17:17<br/> <b>Ferrari</b> [1] - 13:1<br/> <b>few</b> [2] - 15:3, 25:9<br/> <b>field</b> [1] - 53:19<br/> <b>fierce</b> [1] - 46:23<br/> <b>fifth</b> [1] - 24:17<br/> <b>Fifth</b> [1] - 24:24<br/> <b>fight</b> [1] - 20:16<br/> <b>fighting</b> [1] - 22:20<br/> <b>file</b> [3] - 6:7, 6:9, 6:18<br/> <b>filed</b> [6] - 5:10, 5:15, 6:7, 7:23, 8:22, 11:4<br/> <b>findings</b> [1] - 21:17<br/> <b>fine</b> [2] - 5:21, 8:17<br/> <b>finite</b> [2] - 47:6, 50:2<br/> <b>fire</b> [2] - 46:21, 46:22<br/> <b>first</b> [12] - 7:12, 7:19, 11:13, 12:12, 12:13, 24:16, 28:20, 33:12, 42:24, 52:17, 52:19, 52:20<br/> <b>First</b> [5] - 24:18, 24:21, 32:18, 32:22, 32:23<br/> <b>FISA</b> [16] - 10:3, 10:8, 11:17, 11:22, 12:7, 14:20, 14:23, 16:1, 17:23, 18:14, 27:3, 28:23, 31:8, 31:10, 31:16, 33:18<br/> <b>FISC</b> [27] - 15:10, 15:11, 24:12, 28:25, 29:6, 29:8, 30:2, 30:10, 30:14, 30:16, 30:17, 30:19, 30:22, 31:24, 31:25, 32:4, 41:21, 41:23, 42:14, 42:21, 43:3, 43:6, 43:9, 43:14, 43:17, 44:11<br/> <b>FISC's</b> [3] - 41:1, 43:5, 43:12<br/> <b>fits</b> [1] - 29:22<br/> <b>five</b> [2] - 26:10, 26:11</p> | <p><b>G</b></p> <p><b>Gale</b> [1] - 20:23<br/> <b>Garrison</b> [1] - 13:1<br/> <b>gathered</b> [1] - 21:21<br/> <b>gathering</b> [3] - 27:1, 27:12, 35:20<br/> <b>GELS</b> [1] - 2:8<br/> <b>Gels</b> [1] - 55:3<br/> <b>General</b> [4] - 10:14, 30:15, 30:21, 43:9<br/> <b>generation</b> [1] - 48:25<br/> <b>genuinely</b> [1] - 25:9<br/> <b>George</b> [2] - 18:25, 50:23<br/> <b>GILLIGAN</b> [56] - 1:18, 4:5, 4:11, 6:12, 6:20, 8:15, 26:15, 26:18, 26:21, 28:2, 28:5, 28:9, 28:12, 29:11, 29:17, 30:1, 30:8, 32:11, 33:22, 33:25, 35:4, 35:6, 35:14, 35:23, 36:13, 36:18, 37:6, 37:11,</p>  | <p><b>habits</b> [1] - 39:1<br/> <b>Hale</b> [1] - 1:24<br/> <b>half</b> [3] - 7:7, 7:9, 7:10<br/> <b>handle</b> [1] - 7:13<br/> <b>hands</b> [1] - 20:14<br/> <b>happy</b> [1] - 49:8<br/> <b>hard</b> [1] - 5:19<br/> <b>harm</b> [3] - 36:12, 36:23, 45:20<br/> <b>harvested</b> [1] - 33:14<br/> <b>hasten</b> [2] - 43:23, 43:25<br/> <b>head</b> [1] - 46:22<br/> <b>heads</b> [1] - 48:15<br/> <b>hear</b> [2] - 7:15, 53:10<br/> <b>heard</b> [3] - 19:8, 28:25, 53:9<br/> <b>hearing</b> [1] - 52:18<br/> <b>HEARING</b> [1] - 1:11<br/> <b>heat</b> [1] - 51:12<br/> <b>heck</b> [3] - 7:23, 24:5, 48:17<br/> <b>held</b> [8] - 27:15, 31:13, 37:5, 37:7,</p>  |

|  |   |   |
|--|---|---|
| <p>37:9, 37:23, 38:1, 40:8<br/> <b>help</b> [1] - 26:1<br/> <b>helpful</b> [2] - 8:6, 53:9<br/> <b>hike</b> [1] - 48:18<br/> <b>himself</b> [3] - 4:11, 47:11, 48:3<br/> <b>history</b> [4] - 10:7, 17:10, 17:21, 46:14<br/> <b>hold</b> [4] - 4:1, 5:6, 11:25, 17:1<br/> <b>holder</b> [1] - 13:19<br/> <b>holding</b> [1] - 14:8<br/> <b>holds</b> [4] - 34:21, 34:24, 35:21, 37:18<br/> <b>home</b> [2] - 22:21, 40:3<br/> <b>Honor</b> [63] - 3:2, 3:7, 4:5, 4:12, 4:16, 4:23, 5:5, 5:18, 6:10, 6:13, 6:20, 6:22, 7:3, 8:7, 8:16, 8:25, 10:1, 10:22, 14:13, 16:17, 17:24, 18:22, 22:18, 24:3, 24:16, 26:11, 26:16, 26:18, 26:21, 27:14, 28:13, 28:21, 28:22, 29:3, 29:12, 29:17, 30:8, 30:11, 31:7, 32:11, 35:4, 35:23, 36:13, 37:12, 38:4, 38:9, 39:4, 39:17, 40:10, 41:15, 45:17, 46:2, 46:4, 46:14, 47:4, 47:18, 47:21, 47:23, 49:18, 49:25, 50:12, 50:19, 53:4<br/> <b>honor</b> [1] - 18:23<br/> <b>Honor's</b> [2] - 31:1, 44:11<br/> <b>HONORABLE</b> [1] - 1:12<br/> <b>hope</b> [2] - 26:23, 44:8<br/> <b>horrified</b> [1] - 49:16<br/> <b>hour</b> [4] - 7:7, 7:9, 7:10, 38:22<br/> <b>human</b> [1] - 41:3<br/> <b>hundreds</b> [2] - 19:20, 38:20<br/> <b>husbands</b> [2] - 10:17, 47:16<br/> <b>Hussein</b> [1] - 3:4<br/> <b>HUSSEIN</b> [1] - 1:8<br/> <b>hypothetical</b> [3] - 13:11, 13:14, 32:12<br/> <b>hypothetically</b> [1] - 37:15</p> | <p><b>impression</b> [1] - 24:3<br/> <b>improper</b> [2] - 31:15, 36:4<br/> <b>Inc</b> [2] - 34:4, 35:2<br/> <b>incidents</b> [2] - 43:8, 44:3<br/> <b>include</b> [2] - 31:11, 31:19<br/> <b>included</b> [1] - 46:19<br/> <b>includes</b> [1] - 29:24<br/> <b>including</b> [2] - 31:21, 40:25<br/> <b>inconceivable</b> [1] - 22:18<br/> <b>incorrectly</b> [1] - 12:5<br/> <b>incredibly</b> [1] - 8:25<br/> <b>incrimination</b> [2] - 24:25, 25:2<br/> <b>indeed</b> [1] - 50:3<br/> <b>Independence</b> [2] - 50:24, 51:3<br/> <b>independently</b> [1] - 15:13<br/> <b>individual</b> [4] - 12:20, 14:1, 14:17, 21:20<br/> <b>individual's</b> [1] - 39:1<br/> <b>individuals</b> [6] - 10:15, 11:7, 30:15, 32:2, 38:15, 44:5<br/> <b>inexplicable</b> [1] - 22:12<br/> <b>infected</b> [1] - 22:16<br/> <b>information</b> [21] - 5:25, 10:6, 10:16, 21:21, 30:21, 31:9, 31:16, 33:3, 33:20, 37:8, 37:20, 37:22, 39:20, 40:13, 44:4, 45:1, 45:11, 45:12, 46:21, 49:6, 49:20<br/> <b>infractions</b> [1] - 44:5<br/> <b>inject</b> [2] - 32:8, 52:7<br/> <b>Injunction</b> [7] - 5:18, 12:12, 16:25, 17:4, 23:15, 36:16, 49:21<br/> <b>injunction</b> [3] - 19:16, 36:2, 36:7<br/> <b>INJUNCTION</b> [1] - 1:11<br/> <b>injunctive</b> [3] - 31:12, 31:18, 45:20<br/> <b>injuries</b> [2] - 35:18, 45:19<br/> <b>injury</b> [3] - 36:25, 46:18, 50:7<br/> <b>inquiry</b> [2] - 11:5, 42:10<br/> <b>inside</b> [1] - 49:25<br/> <b>insists</b> [1] - 27:20<br/> <b>inspected</b> [1] - 6:9<br/> <b>Inspector</b> [2] - 10:14, 43:9<br/> <b>instances</b> [1] - 10:15<br/> <b>Institute</b> [2] - 27:17, 29:18<br/> <b>insufficient</b> [3] - 45:19, 45:21, 45:24<br/> <b>intact</b> [1] - 52:6<br/> <b>integrity</b> [2] - 22:25, 48:14<br/> <b>intelligence</b> [8] - 27:1, 27:11, 30:16, 31:9, 35:20, 42:12, 43:11, 45:3<br/> <b>intended</b> [3] - 11:20, 12:21, 20:8<br/> <b>intent</b> [3] - 29:4, 31:14, 32:22<br/> <b>interest</b> [6] - 10:23, 37:4, 44:23, 46:22, 48:2, 48:3<br/> <b>interested</b> [1] - 51:18<br/> <b>interestingly</b> [1] - 9:17<br/> <b>interests</b> [3] - 10:21, 37:9, 38:14<br/> <b>interject</b> [1] - 51:18<br/> <b>interlocking</b> [1] - 44:13<br/> <b>International</b> [2] - 35:7, 45:23<br/> <b>interpretation</b> [1] - 32:4<br/> <b>interpreting</b> [1] - 31:25</p> | <p><b>intervene</b> [3] - 14:2, 14:18, 14:19<br/> <b>intervening</b> [1] - 48:22<br/> <b>interview</b> [1] - 23:11<br/> <b>intimate</b> [1] - 40:5<br/> <b>intimidate</b> [1] - 48:10<br/> <b>intricate</b> [1] - 42:21<br/> <b>introduce</b> [2] - 4:11, 6:15<br/> <b>introducing</b> [1] - 4:1<br/> <b>intruding</b> [1] - 6:5<br/> <b>invariable</b> [1] - 51:11<br/> <b>investigation</b> [9] - 19:19, 19:20, 19:23, 21:10, 32:21, 33:20, 44:23, 47:8, 47:9<br/> <b>investigative</b> [2] - 42:13, 45:2<br/> <b>involve</b> [1] - 7:25<br/> <b>involved</b> [1] - 21:3<br/> <b>involves</b> [3] - 30:12, 30:19, 33:6<br/> <b>involving</b> [1] - 44:4<br/> <b>irreparable</b> [2] - 36:23, 45:20<br/> <b>IRS</b> [2] - 14:2, 14:4<br/> <b>issue</b> [30] - 7:20, 7:22, 8:23, 13:16, 14:10, 16:14, 18:7, 22:5, 23:22, 27:1, 27:3, 27:8, 28:6, 28:17, 30:11, 31:2, 33:1, 33:5, 36:4, 43:19, 43:23, 43:24, 44:24, 45:11, 46:5, 49:21, 51:20, 51:24, 52:6, 52:8<br/> <b>issued</b> [6] - 18:4, 18:14, 25:15, 30:21, 38:11<br/> <b>issues</b> [14] - 11:6, 12:20, 13:3, 16:6, 16:24, 23:18, 28:14, 29:20, 42:17, 44:1, 52:2, 52:5, 52:9, 53:17<br/> <b>itself</b> [6] - 7:25, 21:4, 28:21, 32:8, 51:18, 52:7</p> |
| <b>I</b>   |   | <b>J</b>  |
| <p><b>idealist</b> [1] - 20:16<br/> <b>identifier</b> [1] - 42:4<br/> <b>identifiers</b> [1] - 40:18<br/> <b>identify</b> [2] - 3:5, 30:15<br/> <b>identities</b> [2] - 34:12, 40:4<br/> <b>IG</b> [3] - 44:2, 47:11, 47:12<br/> <b>III</b> [21] - 7:25, 8:1, 11:20, 12:6, 12:19, 13:3, 13:5, 14:9, 15:21, 18:14, 18:18, 21:14, 21:15, 24:11, 27:23, 28:11, 29:6, 29:9, 29:13, 30:7, 32:13<br/> <b>III's</b> [1] - 45:22<br/> <b>illegally</b> [1] - 24:7<br/> <b>immediate</b> [1] - 37:1<br/> <b>immediately</b> [1] - 10:1<br/> <b>imminence</b> [1] - 36:11<br/> <b>imminent</b> [1] - 36:25<br/> <b>impacts</b> [1] - 16:19<br/> <b>implicit</b> [1] - 5:12<br/> <b>implicitly</b> [1] - 27:17<br/> <b>importance</b> [1] - 51:7<br/> <b>important</b> [3] - 20:25, 23:4, 34:1<br/> <b>imposed</b> [1] - 41:1</p>   |   | <p><b>JAMES</b> [2] - 1:18, 2:3<br/> <b>James</b> [1] - 4:5<br/> <b>January</b> [2] - 9:23, 9:25<br/> <b>Jefferson</b> [2] - 16:12, 48:24<br/> <b>Jewel</b> [2] - 31:3, 31:13<br/> <b>job</b> [1] - 18:24<br/> <b>joining</b> [1] - 4:8<br/> <b>Jones</b> [5] - 39:13, 39:14, 39:15, 39:16, 40:1<br/> <b>Judge</b> [40] - 7:20, 8:23, 9:18, 10:6, 13:15, 13:16, 13:19, 13:20, 15:21, 16:7, 16:18, 17:3, 18:3, 20:19, 21:14, 25:23, 26:1, 26:5, 29:6, 29:9, 30:2, 30:4, 30:5, 31:24, 31:25, 32:4, 34:2, 34:9, 35:1, 42:15, 46:8, 48:10, 51:11, 52:18<br/> <b>judge</b> [1] - 10:22<br/> <b>JUDGE</b> [1] - 1:12<br/> <b>judges</b> [10] - 17:22, 18:14, 18:22, 18:23, 18:24, 18:25, 19:1, 19:10, 21:16, 24:13<br/> <b>Judges</b> [1] - 18:18<br/> <b>judgment</b> [1] - 6:13<br/> <b>judicata</b> [1] - 16:8<br/> <b>judicial</b> [3] - 23:3, 28:22, 29:20<br/> <b>Judicial</b> [2] - 18:23, 22:20</p>   |

|  |   |   |
|--|---|---|
| <p><b>jurisdiction</b> <sup>[11]</sup> - 8:3, 14:10, 27:2, 28:16, 31:21, 31:22, 32:15, 36:8, 36:11, 36:20, 45:25</p> <p><b>jurisdictional</b> <sup>[3]</sup> - 11:21, 12:11, 13:23</p> <p><b>justice</b> <sup>[1]</sup> - 48:4</p> <p><b>Justice</b> <sup>[9]</sup> - 1:20, 2:3, 4:6, 4:22, 26:19, 39:10, 39:15, 43:10, 49:10</p> <p><b>Justices</b> <sup>[1]</sup> - 40:1</p>   | <p><b>leads</b> <sup>[1]</sup> - 42:13</p> <p><b>learned</b> <sup>[1]</sup> - 5:25</p> <p><b>least</b> <sup>[6]</sup> - 18:13, 23:14, 26:5, 32:14, 51:16, 52:15</p> <p><b>Leave</b> <sup>[2]</sup> - 5:16, 6:7</p> <p><b>leave</b> <sup>[2]</sup> - 6:9, 6:23</p> <p><b>lectern</b> <sup>[1]</sup> - 3:5</p> <p><b>left</b> <sup>[3]</sup> - 16:14, 45:15, 45:16</p> <p><b>legal</b> <sup>[1]</sup> - 45:9</p> <p><b>legislation</b> <sup>[1]</sup> - 20:9</p> <p><b>length</b> <sup>[1]</sup> - 31:3</p> <p><b>lengthy</b> <sup>[1]</sup> - 18:19</p> <p><b>LEON</b> <sup>[1]</sup> - 1:12</p> <p><b>lesser</b> <sup>[1]</sup> - 23:3</p> <p><b>letter</b> <sup>[4]</sup> - 17:1, 44:2, 44:24, 45:12</p> <p><b>level</b> <sup>[2]</sup> - 10:19, 10:20</p> <p><b>liberal</b> <sup>[1]</sup> - 16:15</p> <p><b>lie</b> <sup>[1]</sup> - 49:13</p> <p><b>lied</b> <sup>[2]</sup> - 21:25, 24:2</p> <p><b>life</b> <sup>[2]</sup> - 39:1, 40:6</p> <p><b>likelihood</b> <sup>[1]</sup> - 36:20</p> <p><b>likely</b> <sup>[2]</sup> - 32:16, 36:12</p> <p><b>limitation</b> <sup>[2]</sup> - 7:4, 41:1</p> <p><b>limited</b> <sup>[5]</sup> - 27:10, 39:3, 47:5, 47:7, 53:20</p> <p><b>line</b> <sup>[4]</sup> - 36:24, 45:14, 46:21, 46:22</p> <p><b>lines</b> <sup>[1]</sup> - 41:17</p> <p><b>list</b> <sup>[1]</sup> - 40:3</p> <p><b>listen</b> <sup>[2]</sup> - 8:19, 49:15</p> <p><b>listened</b> <sup>[1]</sup> - 17:14</p> <p><b>listens</b> <sup>[1]</sup> - 25:1</p> <p><b>litigants</b> <sup>[1]</sup> - 12:20</p> <p><b>litigating</b> <sup>[1]</sup> - 15:6</p> <p><b>litigation</b> <sup>[2]</sup> - 14:5</p> <p><b>live</b> <sup>[6]</sup> - 12:21, 17:12, 23:7, 23:13, 25:8, 48:4</p> <p><b>LLP</b> <sup>[1]</sup> - 1:24</p> <p><b>located</b> <sup>[2]</sup> - 30:13, 33:7</p> <p><b>look</b> <sup>[9]</sup> - 11:12, 11:13, 14:22, 18:10, 25:22, 38:10, 49:18, 50:13</p> <p><b>looking</b> <sup>[1]</sup> - 53:16</p> <p><b>lose</b> <sup>[3]</sup> - 48:15, 48:24</p> <p><b>Louis</b> <sup>[1]</sup> - 48:19</p> <p><b>lower</b> <sup>[1]</sup> - 10:19</p> <p><b>lying</b> <sup>[7]</sup> - 10:8, 10:9, 17:21, 23:24, 46:6, 46:14, 49:14</p> | <p><b>Matt</b> <sup>[1]</sup> - 13:1</p> <p><b>matter</b> <sup>[8]</sup> - 5:10, 6:16, 26:23, 48:16, 52:12, 52:13, 52:15, 55:5</p> <p><b>matters</b> <sup>[5]</sup> - 4:17, 6:22, 13:6, 20:14, 38:21</p> <p><b>McLaughlin</b> <sup>[5]</sup> - 9:18, 18:4, 26:2, 26:6, 30:4</p> <p><b>Meade</b> <sup>[1]</sup> - 33:15</p> <p><b>mean</b> <sup>[6]</sup> - 34:20, 36:22, 39:12, 43:1, 52:11, 53:15</p> <p><b>meant</b> <sup>[1]</sup> - 39:12</p> <p><b>mechanism</b> <sup>[2]</sup> - 29:19, 49:23</p> <p><b>mechanisms</b> <sup>[1]</sup> - 44:13</p> <p><b>media</b> <sup>[1]</sup> - 23:20</p> <p><b>meet</b> <sup>[2]</sup> - 32:12, 36:2</p> <p><b>member</b> <sup>[1]</sup> - 42:11</p> <p><b>members</b> <sup>[3]</sup> - 3:11, 3:16, 20:22</p> <p><b>merits</b> <sup>[4]</sup> - 32:17, 32:25, 36:12, 36:21</p> <p><b>message</b> <sup>[1]</sup> - 49:4</p> <p><b>messages</b> <sup>[4]</sup> - 22:6, 22:9, 22:11, 46:19</p> <p><b>messed</b> <sup>[1]</sup> - 46:19</p> <p><b>messing</b> <sup>[1]</sup> - 22:6</p> <p><b>met</b> <sup>[1]</sup> - 42:2</p> <p><b>metadata</b> <sup>[13]</sup> - 9:1, 10:10, 15:16, 17:17, 34:10, 37:8, 37:12, 37:15, 40:13, 40:14, 41:16, 46:6, 48:8</p> <p><b>Michael</b> <sup>[2]</sup> - 13:1, 22:13</p> <p><b>might</b> <sup>[6]</sup> - 12:8, 42:13, 44:22, 44:25, 48:5, 50:10</p> <p><b>military</b> <sup>[2]</sup> - 11:7, 46:25</p> <p><b>Miller</b> <sup>[1]</sup> - 39:23</p> <p><b>million</b> <sup>[4]</sup> - 19:22, 46:7, 47:8, 48:9</p> <p><b>millions</b> <sup>[3]</sup> - 19:20, 19:21, 38:20</p> <p><b>mind</b> <sup>[3]</sup> - 11:16, 11:22, 27:14</p> <p><b>minds</b> <sup>[1]</sup> - 40:1</p> <p><b>mine</b> <sup>[1]</sup> - 32:8</p> <p><b>minimization</b> <sup>[1]</sup> - 30:18</p> <p><b>minimum</b> <sup>[2]</sup> - 15:23, 16:6</p> <p><b>minute</b> <sup>[1]</sup> - 7:6</p> <p><b>minutes</b> <sup>[5]</sup> - 15:3, 26:9, 38:21, 45:15, 45:16</p> <p><b>miss</b> <sup>[1]</sup> - 3:21</p> <p><b>mission</b> <sup>[1]</sup> - 11:2</p> <p><b>misusing</b> <sup>[1]</sup> - 43:20</p> <p><b>moment</b> <sup>[3]</sup> - 51:13, 52:2, 52:17</p> <p><b>Mona</b> <sup>[2]</sup> - 2:6, 3:21</p> <p><b>monetary</b> <sup>[2]</sup> - 31:7, 31:17</p> <p><b>monitoring</b> <sup>[3]</sup> - 46:9, 49:23, 49:25</p> <p><b>months</b> <sup>[1]</sup> - 17:19</p> <p><b>morning</b> <sup>[1]</sup> - 4:12</p> <p><b>MOSS</b> <sup>[2]</sup> - 1:23, 4:12</p> <p><b>Moss</b> <sup>[2]</sup> - 4:10, 4:12</p> <p><b>most</b> <sup>[1]</sup> - 18:13</p> <p><b>mostly</b> <sup>[1]</sup> - 44:3</p> <p><b>Motion</b> <sup>[7]</sup> - 5:11, 5:16, 6:7, 14:4, 14:6, 36:7, 53:19</p> <p><b>Motions</b> <sup>[1]</sup> - 5:18</p> <p><b>moving</b> <sup>[1]</sup> - 7:8</p> |
| <b>K</b>   |   |   |
| <p><b>Katz</b> <sup>[1]</sup> - 25:5</p> <p><b>keep</b> <sup>[4]</sup> - 50:17, 53:15, 53:17, 53:20</p> <p><b>key</b> <sup>[1]</sup> - 12:17</p> <p><b>kidding</b> <sup>[1]</sup> - 52:11</p> <p><b>kids</b> <sup>[1]</sup> - 48:25</p> <p><b>killed</b> <sup>[1]</sup> - 48:5</p> <p><b>kind</b> <sup>[14]</sup> - 7:18, 9:11, 11:9, 17:11, 19:19, 25:6, 36:25, 37:24, 41:6, 45:20, 48:20, 49:17, 51:7, 52:18</p> <p><b>King</b> <sup>[2]</sup> - 18:25, 50:23</p> <p><b>KLAYMAN</b> <sup>[61]</sup> - 1:4, 1:16, 3:7, 3:10, 3:14, 3:17, 3:21, 3:23, 3:25, 4:3, 4:16, 4:19, 5:8, 5:10, 5:24, 6:3, 6:5, 6:21, 6:24, 6:25, 7:3, 8:7, 8:9, 8:12, 8:18, 8:21, 9:6, 9:9, 9:14, 11:13, 11:15, 11:23, 12:2, 12:17, 13:9, 13:12, 13:25, 14:13, 14:16, 15:4, 15:6, 15:11, 16:3, 18:9, 18:22, 19:15, 19:18, 21:7, 21:12, 21:18, 22:4, 22:10, 24:15, 26:4, 26:11, 46:4, 47:24, 48:1, 50:21, 53:4, 53:6</p> <p><b>Klayman</b> <sup>[13]</sup> - 1:16, 3:3, 3:7, 4:15, 7:19, 12:14, 13:15, 22:7, 24:10, 30:9, 46:3, 50:20, 51:4</p> <p><b>Klayman's</b> <sup>[1]</sup> - 43:16</p> <p><b>known</b> <sup>[1]</sup> - 51:4</p> <p><b>knows</b> <sup>[4]</sup> - 8:25, 14:20, 22:19, 47:9</p> | <p><b>leads</b> <sup>[1]</sup> - 42:13</p> <p><b>learned</b> <sup>[1]</sup> - 5:25</p> <p><b>least</b> <sup>[6]</sup> - 18:13, 23:14, 26:5, 32:14, 51:16, 52:15</p> <p><b>Leave</b> <sup>[2]</sup> - 5:16, 6:7</p> <p><b>leave</b> <sup>[2]</sup> - 6:9, 6:23</p> <p><b>lectern</b> <sup>[1]</sup> - 3:5</p> <p><b>left</b> <sup>[3]</sup> - 16:14, 45:15, 45:16</p> <p><b>legal</b> <sup>[1]</sup> - 45:9</p> <p><b>legislation</b> <sup>[1]</sup> - 20:9</p> <p><b>length</b> <sup>[1]</sup> - 31:3</p> <p><b>lengthy</b> <sup>[1]</sup> - 18:19</p> <p><b>LEON</b> <sup>[1]</sup> - 1:12</p> <p><b>lesser</b> <sup>[1]</sup> - 23:3</p> <p><b>letter</b> <sup>[4]</sup> - 17:1, 44:2, 44:24, 45:12</p> <p><b>level</b> <sup>[2]</sup> - 10:19, 10:20</p> <p><b>liberal</b> <sup>[1]</sup> - 16:15</p> <p><b>lie</b> <sup>[1]</sup> - 49:13</p> <p><b>lied</b> <sup>[2]</sup> - 21:25, 24:2</p> <p><b>life</b> <sup>[2]</sup> - 39:1, 40:6</p> <p><b>likelihood</b> <sup>[1]</sup> - 36:20</p> <p><b>likely</b> <sup>[2]</sup> - 32:16, 36:12</p> <p><b>limitation</b> <sup>[2]</sup> - 7:4, 41:1</p> <p><b>limited</b> <sup>[5]</sup> - 27:10, 39:3, 47:5, 47:7, 53:20</p> <p><b>line</b> <sup>[4]</sup> - 36:24, 45:14, 46:21, 46:22</p> <p><b>lines</b> <sup>[1]</sup> - 41:17</p> <p><b>list</b> <sup>[1]</sup> - 40:3</p> <p><b>listen</b> <sup>[2]</sup> - 8:19, 49:15</p> <p><b>listened</b> <sup>[1]</sup> - 17:14</p> <p><b>listens</b> <sup>[1]</sup> - 25:1</p> <p><b>litigants</b> <sup>[1]</sup> - 12:20</p> <p><b>litigating</b> <sup>[1]</sup> - 15:6</p> <p><b>litigation</b> <sup>[2]</sup> - 14:5</p> <p><b>live</b> <sup>[6]</sup> - 12:21, 17:12, 23:7, 23:13, 25:8, 48:4</p> <p><b>LLP</b> <sup>[1]</sup> - 1:24</p> <p><b>located</b> <sup>[2]</sup> - 30:13, 33:7</p> <p><b>look</b> <sup>[9]</sup> - 11:12, 11:13, 14:22, 18:10, 25:22, 38:10, 49:18, 50:13</p> <p><b>looking</b> <sup>[1]</sup> - 53:16</p> <p><b>lose</b> <sup>[3]</sup> - 48:15, 48:24</p> <p><b>Louis</b> <sup>[1]</sup> - 48:19</p> <p><b>lower</b> <sup>[1]</sup> - 10:19</p> <p><b>lying</b> <sup>[7]</sup> - 10:8, 10:9, 17:21, 23:24, 46:6, 46:14, 49:14</p> | <p><b>Matt</b> <sup>[1]</sup> - 13:1</p> <p><b>matter</b> <sup>[8]</sup> - 5:10, 6:16, 26:23, 48:16, 52:12, 52:13, 52:15, 55:5</p> <p><b>matters</b> <sup>[5]</sup> - 4:17, 6:22, 13:6, 20:14, 38:21</p> <p><b>McLaughlin</b> <sup>[5]</sup> - 9:18, 18:4, 26:2, 26:6, 30:4</p> <p><b>Meade</b> <sup>[1]</sup> - 33:15</p> <p><b>mean</b> <sup>[6]</sup> - 34:20, 36:22, 39:12, 43:1, 52:11, 53:15</p> <p><b>meant</b> <sup>[1]</sup> - 39:12</p> <p><b>mechanism</b> <sup>[2]</sup> - 29:19, 49:23</p> <p><b>mechanisms</b> <sup>[1]</sup> - 44:13</p> <p><b>media</b> <sup>[1]</sup> - 23:20</p> <p><b>meet</b> <sup>[2]</sup> - 32:12, 36:2</p> <p><b>member</b> <sup>[1]</sup> - 42:11</p> <p><b>members</b> <sup>[3]</sup> - 3:11, 3:16, 20:22</p> <p><b>merits</b> <sup>[4]</sup> - 32:17, 32:25, 36:12, 36:21</p> <p><b>message</b> <sup>[1]</sup> - 49:4</p> <p><b>messages</b> <sup>[4]</sup> - 22:6, 22:9, 22:11, 46:19</p> <p><b>messed</b> <sup>[1]</sup> - 46:19</p> <p><b>messing</b> <sup>[1]</sup> - 22:6</p> <p><b>met</b> <sup>[1]</sup> - 42:2</p> <p><b>metadata</b> <sup>[13]</sup> - 9:1, 10:10, 15:16, 17:17, 34:10, 37:8, 37:12, 37:15, 40:13, 40:14, 41:16, 46:6, 48:8</p> <p><b>Michael</b> <sup>[2]</sup> - 13:1, 22:13</p> <p><b>might</b> <sup>[6]</sup> - 12:8, 42:13, 44:22, 44:25, 48:5, 50:10</p> <p><b>military</b> <sup>[2]</sup> - 11:7, 46:25</p> <p><b>Miller</b> <sup>[1]</sup> - 39:23</p> <p><b>million</b> <sup>[4]</sup> - 19:22, 46:7, 47:8, 48:9</p> <p><b>millions</b> <sup>[3]</sup> - 19:20, 19:21, 38:20</p> <p><b>mind</b> <sup>[3]</sup> - 11:16, 11:22, 27:14</p> <p><b>minds</b> <sup>[1]</sup> - 40:1</p> <p><b>mine</b> <sup>[1]</sup> - 32:8</p> <p><b>minimization</b> <sup>[1]</sup> - 30:18</p> <p><b>minimum</b> <sup>[2]</sup> - 15:23, 16:6</p> <p><b>minute</b> <sup>[1]</sup> - 7:6</p> <p><b>minutes</b> <sup>[5]</sup> - 15:3, 26:9, 38:21, 45:15, 45:16</p> <p><b>miss</b> <sup>[1]</sup> - 3:21</p> <p><b>mission</b> <sup>[1]</sup> - 11:2</p> <p><b>misusing</b> <sup>[1]</sup> - 43:20</p> <p><b>moment</b> <sup>[3]</sup> - 51:13, 52:2, 52:17</p> <p><b>Mona</b> <sup>[2]</sup> - 2:6, 3:21</p> <p><b>monetary</b> <sup>[2]</sup> - 31:7, 31:17</p> <p><b>monitoring</b> <sup>[3]</sup> - 46:9, 49:23, 49:25</p> <p><b>months</b> <sup>[1]</sup> - 17:19</p> <p><b>morning</b> <sup>[1]</sup> - 4:12</p> <p><b>MOSS</b> <sup>[2]</sup> - 1:23, 4:12</p> <p><b>Moss</b> <sup>[2]</sup> - 4:10, 4:12</p> <p><b>most</b> <sup>[1]</sup> - 18:13</p> <p><b>mostly</b> <sup>[1]</sup> - 44:3</p> <p><b>Motion</b> <sup>[7]</sup> - 5:11, 5:16, 6:7, 14:4, 14:6, 36:7, 53:19</p> <p><b>Motions</b> <sup>[1]</sup> - 5:18</p> <p><b>moving</b> <sup>[1]</sup> - 7:8</p> |
| <b>L</b>   |   |   |
| <p><b>lack</b> <sup>[2]</sup> - 14:23, 52:7</p> <p><b>lacks</b> <sup>[6]</sup> - 27:2, 27:7, 27:10, 28:19, 31:20, 45:25</p> <p><b>Ladin</b> <sup>[1]</sup> - 11:4</p> <p><b>laid</b> <sup>[1]</sup> - 24:17</p> <p><b>Lamberth</b> <sup>[1]</sup> - 20:19</p> <p><b>LARRY</b> <sup>[2]</sup> - 1:4, 1:16</p> <p><b>Larry</b> <sup>[3]</sup> - 1:16, 3:3, 3:7</p> <p><b>last</b> <sup>[9]</sup> - 6:14, 6:15, 16:17, 18:15, 23:4, 23:5, 25:9, 49:14</p> <p><b>lasts</b> <sup>[1]</sup> - 18:12</p> <p><b>latest</b> <sup>[1]</sup> - 22:13</p> <p><b>law</b> <sup>[11]</sup> - 17:1, 17:2, 17:5, 18:1, 24:4, 26:2, 36:2, 39:7, 49:22, 50:8, 50:9</p> <p><b>Law</b> <sup>[1]</sup> - 1:16</p> <p><b>lawful</b> <sup>[2]</sup> - 18:5, 42:10</p> <p><b>laws</b> <sup>[1]</sup> - 23:17</p> <p><b>lawsuit</b> <sup>[4]</sup> - 8:22, 16:3, 30:10, 47:2</p> <p><b>lawsuits</b> <sup>[2]</sup> - 8:22, 11:4</p> <p><b>lawyer</b> <sup>[4]</sup> - 20:15, 23:10, 26:18, 49:10</p>   | <p><b>leads</b> <sup>[1]</sup> - 42:13</p> <p><b>learned</b> <sup>[1]</sup> - 5:25</p> <p><b>least</b> <sup>[6]</sup> - 18:13, 23:14, 26:5, 32:14, 51:16, 52:15</p> <p><b>Leave</b> <sup>[2]</sup> - 5:16, 6:7</p> <p><b>leave</b> <sup>[2]</sup> - 6:9, 6:23</p> <p><b>lectern</b> <sup>[1]</sup> - 3:5</p> <p><b>left</b> <sup>[3]</sup> - 16:14, 45:15, 45:16</p> <p><b>legal</b> <sup>[1]</sup> - 45:9</p> <p><b>legislation</b> <sup>[1]</sup> - 20:9</p> <p><b>length</b> <sup>[1]</sup> - 31:3</p> <p><b>lengthy</b> <sup>[1]</sup> - 18:19</p> <p><b>LEON</b> <sup>[1]</sup> - 1:12</p> <p><b>lesser</b> <sup>[1]</sup> - 23:3</p> <p><b>letter</b> <sup>[4]</sup> - 17:1, 44:2, 44:24, 45:12</p> <p><b>level</b> <sup>[2]</sup> - 10:19, 10:20</p> <p><b>liberal</b> <sup>[1]</sup> - 16:15</p> <p><b>lie</b> <sup>[1]</sup> - 49:13</p> <p><b>lied</b> <sup>[2]</sup> - 21:25, 24:2</p> <p><b>life</b> <sup>[2]</sup> - 39:1, 40:6</p> <p><b>likelihood</b> <sup>[1]</sup> - 36:20</p> <p><b>likely</b> <sup>[2]</sup> - 32:16, 36:12</p> <p><b>limitation</b> <sup>[2]</sup> - 7:4, 41:1</p> <p><b>limited</b> <sup>[5]</sup> - 27:10, 39:3, 47:5, 47:7, 53:20</p> <p><b>line</b> <sup>[4]</sup> - 36:24, 45:14, 46:21, 46:22</p> <p><b>lines</b> <sup>[1]</sup> - 41:17</p> <p><b>list</b> <sup>[1]</sup> - 40:3</p> <p><b>listen</b> <sup>[2]</sup> - 8:19, 49:15</p> <p><b>listened</b> <sup>[1]</sup> - 17:14</p> <p><b>listens</b> <sup>[1]</sup> - 25:1</p> <p><b>litigants</b> <sup>[1]</sup> - 12:20</p> <p><b>litigating</b> <sup>[1]</sup> - 15:6</p> <p><b>litigation</b> <sup>[2]</sup> - 14:5</p> <p><b>live</b> <sup>[6]</sup> - 12:21, 17:12, 23:7, 23:13, 25:8, 48:4</p> <p><b>LLP</b> <sup>[1]</sup> - 1:24</p> <p><b>located</b> <sup>[2]</sup> - 30:13, 33:7</p> <p><b>look</b> <sup>[9]</sup> - 11:12, 11:13, 14:22, 18:10, 25:22, 38:10, 49:18, 50:13</p> <p><b>looking</b> <sup>[1]</sup> - 53:16</p> <p><b>lose</b> <sup>[3]</sup> - 48:15, 48:24</p> <p><b>Louis</b> <sup>[1]</sup> - 48:19</p> <p><b>lower</b> <sup>[1]</sup> - 10:19</p> <p><b>lying</b> <sup>[7]</sup> - 10:8, 10:9, 17:21, 23:24, 46:6, 46:14, 49:14</p> | <p><b>Matt</b> <sup>[1]</sup> - 13:1</p> <p><b>matter</b> <sup>[8]</sup> - 5:10, 6:16, 26:23, 48:16, 52:12, 52:13, 52:15, 55:5</p> <p><b>matters</b> <sup>[5]</sup> - 4:17, 6:22, 13:6, 20:14, 38:21</p> <p><b>McLaughlin</b> <sup>[5]</sup> - 9:18, 18:4, 26:2, 26:6, 30:4</p> <p><b>Meade</b> <sup>[1]</sup> - 33:15</p> <p><b>mean</b> <sup>[6]</sup> - 34:20, 36:22, 39:12, 43:1, 52:11, 53:15</p> <p><b>meant</b> <sup>[1]</sup> - 39:12</p> <p><b>mechanism</b> <sup>[2]</sup> - 29:19, 49:23</p> <p><b>mechanisms</b> <sup>[1]</sup> - 44:13</p> <p><b>media</b> <sup>[1]</sup> - 23:20</p> <p><b>meet</b> <sup>[2]</sup> - 32:12, 36:2</p> <p><b>member</b> <sup>[1]</sup> - 42:11</p> <p><b>members</b> <sup>[3]</sup> - 3:11, 3:16, 20:22</p> <p><b>merits</b> <sup>[4]</sup> - 32:17, 32:25, 36:12, 36:21</p> <p><b>message</b> <sup>[1]</sup> - 49:4</p> <p><b>messages</b> <sup>[4]</sup> - 22:6, 22:9, 22:11, 46:19</p> <p><b>messed</b> <sup>[1]</sup> - 46:19</p> <p><b>messing</b> <sup>[1]</sup> - 22:6</p> <p><b>met</b> <sup>[1]</sup> - 42:2</p> <p><b>metadata</b> <sup>[13]</sup> - 9:1, 10:10, 15:16, 17:17, 34:10, 37:8, 37:12, 37:15, 40:13, 40:14, 41:16, 46:6, 48:8</p> <p><b>Michael</b> <sup>[2]</sup> - 13:1, 22:13</p> <p><b>might</b> <sup>[6]</sup> - 12:8, 42:13, 44:22, 44:25, 48:5, 50:10</p> <p><b>military</b> <sup>[2]</sup> - 11:7, 46:25</p> <p><b>Miller</b> <sup>[1]</sup> - 39:23</p> <p><b>million</b> <sup>[4]</sup> - 19:22, 46:7, 47:8, 48:9</p> <p><b>millions</b> <sup>[3]</sup> - 19:20, 19:21, 38:20</p> <p><b>mind</b> <sup>[3]</sup> - 11:16, 11:22, 27:14</p> <p><b>minds</b> <sup>[1]</sup> - 40:1</p> <p><b>mine</b> <sup>[1]</sup> - 32:8</p> <p><b>minimization</b> <sup>[1]</sup> - 30:18</p> <p><b>minimum</b> <sup>[2]</sup> - 15:23, 16:6</p> <p><b>minute</b> <sup>[1]</sup> - 7:6</p> <p><b>minutes</b> <sup>[5]</sup> - 15:3, 26:9, 38:21, 45:15, 45:16</p> <p><b>miss</b> <sup>[1]</sup> - 3:21</p> <p><b>mission</b> <sup>[1]</sup> - 11:2</p> <p><b>misusing</b> <sup>[1]</sup> - 43:20</p> <p><b>moment</b> <sup>[3]</sup> - 51:13, 52:2, 52:17</p> <p><b>Mona</b> <sup>[2]</sup> - 2:6, 3:21</p> <p><b>monetary</b> <sup>[2]</sup> - 31:7, 31:17</p> <p><b>monitoring</b> <sup>[3]</sup> - 46:9, 49:23, 49:25</p> <p><b>months</b> <sup>[1]</sup> - 17:19</p> <p><b>morning</b> <sup>[1]</sup> - 4:12</p> <p><b>MOSS</b> <sup>[2]</sup> - 1:23, 4:12</p> <p><b>Moss</b> <sup>[2]</sup> - 4:10, 4:12</p> <p><b>most</b> <sup>[1]</sup> - 18:13</p> <p><b>mostly</b> <sup>[1]</sup> - 44:3</p> <p><b>Motion</b> <sup>[7]</sup> - 5:11, 5:16, 6:7, 14:4, 14:6, 36:7, 53:19</p> <p><b>Motions</b> <sup>[1]</sup> - 5:18</p> <p><b>moving</b> <sup>[1]</sup> - 7:8</p> |
| <b>M</b>   |   |   |
| <p><b>lack</b> <sup>[2]</sup> - 14:23, 52:7</p> <p><b>lacks</b> <sup>[6]</sup> - 27:2, 27:7, 27:10, 28:19, 31:20, 45:25</p> <p><b>Ladin</b> <sup>[1]</sup> - 11:4</p> <p><b>laid</b> <sup>[1]</sup> - 24:17</p> <p><b>Lamberth</b> <sup>[1]</sup> - 20:19</p> <p><b>LARRY</b> <sup>[2]</sup> - 1:4, 1:16</p> <p><b>Larry</b> <sup>[3]</sup> - 1:16, 3:3, 3:7</p> <p><b>last</b> <sup>[9]</sup> - 6:14, 6:15, 16:17, 18:15, 23:4, 23:5, 25:9, 49:14</p> <p><b>lasts</b> <sup>[1]</sup> - 18:12</p> <p><b>latest</b> <sup>[1]</sup> - 22:13</p> <p><b>law</b> <sup>[11]</sup> - 17:1, 17:2, 17:5, 18:1, 24:4, 26:2, 36:2, 39:7, 49:22, 50:8, 50:9</p> <p><b>Law</b> <sup>[1]</sup> - 1:16</p> <p><b>lawful</b> <sup>[2]</sup> - 18:5, 42:10</p> <p><b>laws</b> <sup>[1]</sup> - 23:17</p> <p><b>lawsuit</b> <sup>[4]</sup> - 8:22, 16:3, 30:10, 47:2</p> <p><b>lawsuits</b> <sup>[2]</sup> - 8:22, 11:4</p> <p><b>lawyer</b> <sup>[4]</sup> - 20:15, 23:10, 26:18, 49:10</p>   | <p><b>machine</b> <sup>[1]</sup> - 2:12</p> <p><b>mail</b> <sup>[3]</sup> - 5:1, 23:12</p>  |   |

|  |   |   |
|--|---|---|
| <p><b>MR</b> <sup>[116]</sup> - 3:7, 3:10, 3:14, 3:17, 3:18, 3:21, 3:23, 3:25, 4:3, 4:5, 4:11, 4:12, 4:16, 4:19, 5:8, 5:10, 5:24, 6:3, 6:5, 6:12, 6:20, 6:21, 6:24, 6:25, 7:3, 8:7, 8:9, 8:12, 8:15, 8:18, 8:21, 9:6, 9:9, 9:14, 11:13, 11:15, 11:23, 12:2, 12:17, 13:9, 13:12, 13:25, 14:13, 14:16, 15:4, 15:6, 15:11, 16:3, 18:9, 18:22, 19:15, 19:18, 21:7, 21:12, 21:18, 22:4, 22:10, 24:15, 26:4, 26:11, 26:15, 26:18, 26:21, 28:2, 28:5, 28:9, 28:12, 29:11, 29:17, 30:1, 30:8, 32:11, 33:22, 33:25, 35:4, 35:6, 35:14, 35:23, 36:13, 36:18, 37:6, 37:11, 37:14, 37:18, 38:4, 38:6, 38:9, 38:12, 39:4, 39:7, 39:14, 39:17, 41:9, 41:14, 41:19, 42:9, 42:16, 42:24, 43:2, 43:5, 43:22, 43:25, 44:9, 44:18, 44:21, 45:7, 45:9, 45:16, 46:4, 47:22, 47:24, 48:1, 50:21, 53:4, 53:6, 53:23</p> <p><b>Muboobian</b> <sup>[2]</sup> - 2:5, 3:17</p> <p><b>MUBOOBIAN</b> <sup>[1]</sup> - 3:18</p> <p><b>must</b> <sup>[8]</sup> - 28:24, 30:14, 30:16, 30:17, 34:22, 43:6, 43:8, 45:23</p>   | <p><b>Nos</b> <sup>[1]</sup> - 1:4</p> <p><b>notably</b> <sup>[1]</sup> - 39:24</p> <p><b>nothing</b> <sup>[2]</sup> - 21:14, 48:16</p> <p><b>noting</b> <sup>[1]</sup> - 40:10</p> <p><b>novel</b> <sup>[1]</sup> - 53:17</p> <p><b>novelty</b> <sup>[1]</sup> - 51:7</p> <p><b>November</b> <sup>[1]</sup> - 1:6</p> <p><b>NSA</b> <sup>[25]</sup> - 4:22, 10:8, 10:15, 10:25, 15:17, 21:24, 21:25, 22:2, 38:20, 40:14, 41:7, 41:10, 42:11, 43:1, 43:2, 43:19, 44:21, 46:24, 46:25, 48:7, 48:9, 50:9, 50:14, 50:22</p> <p><b>NSA's</b> <sup>[3]</sup> - 18:20, 43:9, 47:11</p> <p><b>nuance</b> <sup>[1]</sup> - 51:7</p> <p><b>number</b> <sup>[19]</sup> - 10:3, 16:3, 17:8, 25:17, 37:21, 40:22, 41:24, 42:3, 44:22, 44:23, 45:1, 45:3, 45:13, 46:8, 46:12, 46:17, 49:19, 50:2</p> <p><b>numbers</b> <sup>[11]</sup> - 40:3, 40:19, 41:8, 41:11, 41:16, 41:20, 41:21, 42:8, 42:13, 44:17</p> <p><b>Nutrition</b> <sup>[1]</sup> - 27:16</p> <p><b>nutrition</b> <sup>[1]</sup> - 29:18</p> <p><b>NW</b> <sup>[3]</sup> - 1:17, 1:21, 1:25</p>  | <p><b>opportunity</b> <sup>[4]</sup> - 10:4, 19:8, 26:1, 50:4</p> <p><b>oppose</b> <sup>[1]</sup> - 14:3</p> <p><b>opposite</b> <sup>[1]</sup> - 15:3</p> <p><b>order</b> <sup>[43]</sup> - 8:23, 8:24, 9:17, 9:19, 9:22, 9:23, 9:24, 11:24, 14:10, 15:21, 16:7, 16:19, 17:3, 17:9, 18:7, 18:8, 18:11, 18:13, 18:20, 24:8, 25:14, 25:15, 25:17, 26:6, 34:2, 34:9, 35:1, 41:10, 41:13, 41:21, 42:14, 42:16, 42:17, 42:19, 44:11, 44:19, 45:8, 45:10, 46:8, 47:6</p> <p><b>Order</b> <sup>[2]</sup> - 9:25, 18:2</p> <p><b>orders</b> <sup>[12]</sup> - 11:22, 18:4, 18:15, 21:4, 28:23, 28:24, 30:11, 41:2, 41:23, 43:6, 43:12, 43:15</p> <p><b>Orders</b> <sup>[1]</sup> - 10:8</p> <p><b>organization</b> <sup>[1]</sup> - 40:24</p> <p><b>organizations</b> <sup>[2]</sup> - 40:20, 42:1</p> <p><b>origin</b> <sup>[1]</sup> - 43:15</p> <p><b>original</b> <sup>[5]</sup> - 5:12, 16:19, 20:22, 44:11, 46:17</p> <p><b>Orwellian</b> <sup>[1]</sup> - 17:12</p> <p><b>Osama</b> <sup>[1]</sup> - 11:4</p> <p><b>otherwise</b> <sup>[3]</sup> - 5:13, 11:8, 12:9</p> <p><b>ourselves</b> <sup>[1]</sup> - 4:2</p> <p><b>outmoded</b> <sup>[1]</sup> - 47:5</p> <p><b>outrageous</b> <sup>[1]</sup> - 19:4</p> <p><b>outside</b> <sup>[1]</sup> - 33:7</p> <p><b>overarching</b> <sup>[1]</sup> - 7:24</p> <p><b>overboard</b> <sup>[1]</sup> - 53:21</p> <p><b>overlooked</b> <sup>[1]</sup> - 47:18</p> <p><b>overly</b> <sup>[2]</sup> - 8:25, 9:19</p> <p><b>overrule</b> <sup>[1]</sup> - 15:25</p> <p><b>overruling</b> <sup>[1]</sup> - 15:11</p> <p><b>overseas</b> <sup>[1]</sup> - 30:13</p> <p><b>oversee</b> <sup>[1]</sup> - 43:4</p> <p><b>oversight</b> <sup>[7]</sup> - 42:22, 42:23, 42:24, 43:9, 43:10, 44:10, 44:13</p> <p><b>own</b> <sup>[5]</sup> - 20:14, 20:22, 23:23, 47:11, 51:3</p> |
| <b>N</b>   | <b>O</b>  | <b>P</b>  |
| <p><b>NAACP</b> <sup>[2]</sup> - 24:18, 24:20</p> <p><b>name</b> <sup>[1]</sup> - 29:15</p> <p><b>names</b> <sup>[6]</sup> - 41:11, 41:15, 41:19, 41:20, 42:7, 44:17</p> <p><b>narrow</b> <sup>[1]</sup> - 47:6</p> <p><b>nation</b> <sup>[1]</sup> - 48:22</p> <p><b>National</b> <sup>[1]</sup> - 2:3</p> <p><b>national</b> <sup>[4]</sup> - 33:21, 43:11, 44:24, 45:11</p> <p><b>nature</b> <sup>[4]</sup> - 5:14, 18:11, 33:21, 35:25</p> <p><b>Naveed</b> <sup>[1]</sup> - 2:5</p> <p><b>Navy</b> <sup>[1]</sup> - 10:25</p> <p><b>necessary</b> <sup>[1]</sup> - 37:1</p> <p><b>need</b> <sup>[10]</sup> - 21:1, 41:21, 42:10, 42:14, 42:16, 44:19, 45:8, 52:6, 53:10, 53:18</p> <p><b>needed</b> <sup>[1]</sup> - 44:12</p> <p><b>negligence</b> <sup>[1]</sup> - 11:8</p> <p><b>Network</b> <sup>[1]</sup> - 34:4</p> <p><b>network</b> <sup>[2]</sup> - 34:9, 35:2</p> <p><b>never</b> <sup>[5]</sup> - 17:10, 22:6, 34:24, 35:2, 50:23</p> <p><b>nevertheless</b> <sup>[1]</sup> - 40:8</p> <p><b>New</b> <sup>[1]</sup> - 7:21</p> <p><b>new</b> <sup>[1]</sup> - 6:15</p> <p><b>next</b> <sup>[5]</sup> - 12:10, 44:16, 51:13, 52:25, 53:13</p> <p><b>nexus</b> <sup>[2]</sup> - 19:19, 21:20</p> <p><b>night</b> <sup>[2]</sup> - 6:14, 6:15</p> <p><b>noble</b> <sup>[1]</sup> - 24:4</p> <p><b>non</b> <sup>[6]</sup> - 30:13, 31:17, 33:7, 37:20, 40:9, 44:4</p> <p><b>none</b> <sup>[2]</sup> - 37:12, 41:4</p> <p><b>Northern</b> <sup>[1]</sup> - 31:4</p> <p><b>Norton</b> <sup>[1]</sup> - 20:23</p> | <p><b>oath</b> <sup>[1]</sup> - 49:12</p> <p><b>Obama</b> <sup>[1]</sup> - 3:4</p> <p><b>OBAMA</b> <sup>[1]</sup> - 1:8</p> <p><b>obamacare</b> <sup>[2]</sup> - 25:10, 46:11</p> <p><b>obey</b> <sup>[3]</sup> - 36:1, 49:22, 50:8</p> <p><b>obeying</b> <sup>[2]</sup> - 17:5, 50:9</p> <p><b>object</b> <sup>[3]</sup> - 6:14, 8:15, 47:22</p> <p><b>objected</b> <sup>[1]</sup> - 22:19</p> <p><b>objection</b> <sup>[2]</sup> - 6:11, 6:18</p> <p><b>observance</b> <sup>[1]</sup> - 32:21</p> <p><b>obtained</b> <sup>[2]</sup> - 14:17, 31:16</p> <p><b>obtaining</b> <sup>[1]</sup> - 15:13</p> <p><b>obvious</b> <sup>[1]</sup> - 47:19</p> <p><b>obviously</b> <sup>[3]</sup> - 5:21, 12:20, 32:25</p> <p><b>occurred</b> <sup>[2]</sup> - 32:9, 49:20</p> <p><b>occurs</b> <sup>[1]</sup> - 29:19</p> <p><b>OF</b> <sup>[3]</sup> - 1:2, 1:11, 55:1</p> <p><b>offered</b> <sup>[1]</sup> - 33:2</p> <p><b>office</b> <sup>[2]</sup> - 22:22, 43:11</p> <p><b>Office</b> <sup>[1]</sup> - 1:16</p> <p><b>official</b> <sup>[1]</sup> - 41:23</p> <p><b>Official</b> <sup>[1]</sup> - 2:9</p> <p><b>officially</b> <sup>[1]</sup> - 34:3</p> <p><b>once</b> <sup>[7]</sup> - 36:8, 39:20, 42:17, 44:12, 45:4</p> <p><b>one</b> <sup>[25]</sup> - 8:22, 9:2, 9:3, 10:3, 11:6, 11:13, 14:20, 16:4, 23:2, 25:12, 25:13, 25:16, 26:20, 28:20, 31:15, 32:2, 41:14, 47:5, 47:19, 49:3, 50:21, 52:15, 52:20, 52:22, 53:4</p> <p><b>ongoing</b> <sup>[2]</sup> - 15:14, 48:8</p> <p><b>open</b> <sup>[2]</sup> - 19:25, 20:2</p> <p><b>opinion</b> <sup>[3]</sup> - 35:16, 38:10, 39:9</p> | <p><b>p.m</b> <sup>[1]</sup> - 53:25</p> <p><b>PACER</b> <sup>[1]</sup> - 5:19</p> <p><b>pages</b> <sup>[1]</sup> - 53:15</p> <p><b>pales</b> <sup>[2]</sup> - 38:19</p> <p><b>panoply</b> <sup>[1]</sup> - 12:18</p> <p><b>papers</b> <sup>[2]</sup> - 35:7, 40:25</p> <p><b>parse</b> <sup>[3]</sup> - 26:20, 26:22, 36:11</p> <p><b>part</b> <sup>[8]</sup> - 7:6, 7:12, 7:15, 22:18, 27:20, 34:17, 34:18, 47:6</p> <p><b>parte</b> <sup>[2]</sup> - 10:4, 10:5</p> <p><b>participant</b> <sup>[1]</sup> - 34:10</p> <p><b>participants</b> <sup>[1]</sup> - 34:13</p> <p><b>participate</b> <sup>[2]</sup> - 10:5, 16:9</p> <p><b>participating</b> <sup>[1]</sup> - 34:15</p> <p><b>particular</b> <sup>[5]</sup> - 24:7, 29:20, 29:21, 31:17, 45:3</p> <p><b>particularly</b> <sup>[2]</sup> - 39:10, 51:17</p>   |

|   |   |  |
|---|---|--|
| <p><b>parties</b> [5] - 27:4, 28:15, 29:2, 30:23, 41:20</p> <p><b>party</b> [4] - 7:8, 20:23, 39:18, 39:20</p> <p><b>past</b> [1] - 15:14</p> <p><b>Patriot</b> [6] - 12:18, 21:7, 21:19, 23:18, 27:25</p> <p><b>pattern</b> [1] - 46:6</p> <p><b>Patton</b> [1] - 4:8</p> <p><b>PATTON</b> [1] - 1:19</p> <p><b>PATTY</b> [1] - 2:8</p> <p><b>Patty</b> [1] - 55:3</p> <p><b>Pauley</b> [2] - 25:23, 52:18</p> <p><b>Pauly</b> [1] - 7:20</p> <p><b>pending</b> [1] - 5:3</p> <p><b>Pennsylvania</b> [2] - 1:17, 1:25</p> <p><b>people</b> [20] - 12:23, 16:13, 16:18, 19:6, 20:4, 20:12, 20:13, 20:21, 21:1, 21:9, 21:22, 22:21, 23:1, 25:8, 47:14, 48:16, 48:21, 50:14, 50:15</p> <p><b>percent</b> [2] - 14:25, 48:20</p> <p><b>perhaps</b> [1] - 42:11</p> <p><b>period</b> [3] - 18:12, 18:19, 44:1</p> <p><b>periodically</b> [1] - 43:6</p> <p><b>permission</b> [2] - 3:10, 53:20</p> <p><b>permit</b> [2] - 13:20, 21:3</p> <p><b>permits</b> [1] - 21:15</p> <p><b>permitted</b> [2] - 25:4, 29:4</p> <p><b>person</b> [9] - 13:17, 14:7, 14:8, 20:11, 23:21, 25:4, 40:3, 50:1</p> <p><b>person's</b> [1] - 40:6</p> <p><b>persons</b> [6] - 29:21, 30:13, 33:7, 40:4, 44:4, 50:2</p> <p><b>pertain</b> [1] - 16:5</p> <p><b>Philadelphia</b> [1] - 50:24</p> <p><b>philosophical</b> [1] - 16:12</p> <p><b>phone</b> [4] - 17:13, 23:8, 44:17, 49:4</p> <p><b>phones</b> [2] - 25:6</p> <p><b>PI</b> [1] - 52:4</p> <p><b>pick</b> [2] - 23:8, 49:3</p> <p><b>picked</b> [3] - 17:16, 33:9, 50:25</p> <p><b>Pickering</b> [1] - 1:24</p> <p><b>picks</b> [1] - 17:13</p> <p><b>places</b> [1] - 40:5</p> <p><b>Plaintiff</b> [2] - 1:16, 28:2</p> <p><b>Plaintiff's</b> [1] - 35:17</p> <p><b>Plaintiffs</b> [27] - 1:5, 7:15, 7:17, 9:3, 10:4, 16:5, 16:11, 20:6, 26:24, 27:4, 29:2, 31:24, 32:11, 33:2, 33:8, 34:5, 34:16, 35:6, 35:10, 35:24, 36:23, 40:12, 45:18, 46:1, 49:22, 50:2, 50:13</p> <p><b>Plaintiffs'</b> [3] - 28:19, 37:4, 41:4</p> <p><b>Pleasure</b> [1] - 3:8</p> <p><b>plenty</b> [3] - 53:7, 53:21</p> <p><b>plug</b> [1] - 42:2</p> <p><b>plus</b> [3] - 14:20, 46:7, 47:14</p> <p><b>PO</b> [1] - 2:4</p> <p><b>point</b> [12] - 18:17, 25:12, 26:7, 35:6, 36:6, 42:6, 43:23, 43:25, 44:11, 50:8, 50:21, 53:9</p> | <p><b>pointed</b> [2] - 40:2, 46:14</p> <p><b>points</b> [5] - 35:24, 39:5, 51:19, 51:24</p> <p><b>police</b> [1] - 23:7</p> <p><b>political</b> [1] - 20:22</p> <p><b>posing</b> [1] - 21:4</p> <p><b>position</b> [19] - 12:5, 12:8, 15:3, 15:8, 19:13, 19:16, 24:10, 27:2, 27:6, 27:9, 29:9, 29:11, 32:7, 33:17, 33:21, 33:22, 33:23, 36:15, 37:4</p> <p><b>possession</b> [2] - 33:17, 41:8</p> <p><b>possible</b> [3] - 11:19, 45:6, 45:7</p> <p><b>potential</b> [4] - 10:20, 19:4, 47:16, 49:1</p> <p><b>power</b> [2] - 28:7, 28:9</p> <p><b>precedent</b> [1] - 25:25</p> <p><b>precisely</b> [1] - 29:22</p> <p><b>preclude</b> [6] - 20:10, 27:3, 27:17, 27:21, 27:25, 28:14</p> <p><b>precluded</b> [1] - 28:20</p> <p><b>precluding</b> [1] - 27:18</p> <p><b>preclusion</b> [8] - 24:11, 27:9, 27:22, 28:6, 29:19, 30:24, 31:2</p> <p><b>predicate</b> [2] - 20:4, 21:12</p> <p><b>PRELIMINARY</b> [1] - 1:11</p> <p><b>Preliminary</b> [7] - 5:18, 12:11, 16:25, 17:4, 23:15, 36:16, 49:21</p> <p><b>preliminary</b> [4] - 4:17, 6:21, 19:16, 36:7</p> <p><b>premise</b> [2] - 37:14</p> <p><b>prepared</b> [3] - 4:20, 8:12, 9:4</p> <p><b>preparing</b> [1] - 5:25</p> <p><b>Present</b> [1] - 2:5</p> <p><b>presented</b> [1] - 46:1</p> <p><b>preserve</b> [1] - 48:25</p> <p><b>President</b> [1] - 16:12</p> <p><b>pressed</b> [1] - 28:17</p> <p><b>presume</b> [3] - 9:21, 17:6, 28:14</p> <p><b>pretty</b> [3] - 12:15, 51:4, 52:6</p> <p><b>principal</b> [2] - 35:21, 52:2</p> <p><b>principle</b> [1] - 32:19</p> <p><b>prison</b> [1] - 24:1</p> <p><b>privacy</b> [7] - 17:11, 37:19, 38:2, 38:14, 39:21, 40:9, 40:12</p> <p><b>Privacy</b> [2] - 10:13, 17:5</p> <p><b>private</b> [2] - 6:6, 47:15</p> <p><b>privilege</b> [3] - 24:22, 47:2</p> <p><b>privileges</b> [2] - 24:22, 47:3</p> <p><b>Prizm</b> [3] - 19:23, 30:14, 33:6</p> <p><b>Pro</b> [1] - 1:16</p> <p><b>problem</b> [1] - 7:19</p> <p><b>problems</b> [1] - 43:17</p> <p><b>procedures</b> [2] - 30:18, 45:9</p> <p><b>proceed</b> [1] - 50:6</p> <p><b>proceeding</b> [4] - 10:5, 14:3, 14:21, 25:2</p> <p><b>proceedings</b> [2] - 53:25, 55:4</p> <p><b>Proceedings</b> [1] - 2:12</p> <p><b>process</b> [3] - 12:22, 16:20, 38:17</p> <p><b>proctologist</b> [1] - 23:12</p> <p><b>produce</b> [1] - 5:1</p> | <p><b>produced</b> [3] - 2:12, 13:19, 15:20</p> <p><b>product</b> [2] - 24:22, 47:3</p> <p><b>production</b> [3] - 13:17, 13:20, 28:23</p> <p><b>profile</b> [1] - 38:25</p> <p><b>program</b> [10] - 10:10, 19:23, 33:10, 34:11, 34:14, 34:16, 34:18, 34:25, 40:14, 42:17</p> <p><b>Program</b> [2] - 30:14, 33:6</p> <p><b>programs</b> [3] - 27:1, 33:5, 35:21</p> <p><b>prohibit</b> [1] - 18:7</p> <p><b>proof</b> [2] - 33:2, 35:17</p> <p><b>proper</b> [1] - 28:10</p> <p><b>properly</b> [1] - 21:8</p> <p><b>property</b> [1] - 25:4</p> <p><b>prosecution</b> [1] - 48:3</p> <p><b>prospective</b> [1] - 18:11</p> <p><b>protect</b> [3] - 20:12, 23:1, 50:13</p> <p><b>protected</b> [2] - 32:23, 37:24</p> <p><b>protecting</b> [1] - 38:14</p> <p><b>protection</b> [3] - 16:18, 20:24, 20:25</p> <p><b>protects</b> [1] - 20:21</p> <p><b>provide</b> [10] - 5:4, 8:3, 8:13, 23:19, 23:20, 30:21, 30:23, 31:12, 44:25, 47:20</p> <p><b>provided</b> [5] - 6:15, 10:6, 30:14, 33:18, 44:22</p> <p><b>providers</b> [3] - 25:13, 30:22</p> <p><b>provides</b> [3] - 29:19, 30:20, 33:20</p> <p><b>providing</b> [2] - 5:6, 11:18</p> <p><b>provision</b> [3] - 29:1, 31:3, 31:22</p> <p><b>provisions</b> [4] - 27:3, 31:8, 31:10, 31:18</p> <p><b>public</b> [3] - 46:22, 47:1, 48:13</p> <p><b>punish</b> [1] - 32:22</p> <p><b>purposes</b> [3] - 4:23, 23:15, 40:11</p> <p><b>pursuant</b> [1] - 15:20</p> <p><b>purview</b> [1] - 30:6</p> <p><b>put</b> [3] - 49:20, 51:21, 51:25</p> |
| <b>Q</b>  |   |  |
| <p><b>Quash</b> [2] - 14:4, 14:6</p> <p><b>queried</b> [2] - 39:17, 40:18</p> <p><b>queries</b> [4] - 22:2, 40:16, 40:21, 42:19</p> <p><b>query</b> [8] - 33:19, 38:20, 40:20, 40:23, 41:6, 44:12, 44:16, 45:4</p> <p><b>questions</b> [2] - 39:8, 49:12</p> <p><b>quite</b> [3] - 10:23, 29:22, 37:18</p>  |   |  |
| <b>R</b>  |   |  |
| <p><b>raid</b> [1] - 11:2</p> <p><b>raise</b> [1] - 28:13</p> <p><b>raised</b> [3] - 8:10, 35:6, 39:8</p> <p><b>RANDOLPH</b> [1] - 1:23</p> <p><b>Randolph</b> [1] - 4:12</p> <p><b>RAS</b> [1] - 43:7</p> <p><b>rather</b> [1] - 53:19</p> <p><b>reach</b> [6] - 13:3, 16:6, 16:24, 19:15, 27:8, 45:25</p>   |   |  |

|   |  |  |
|---|--|--|
| <p><b>read</b> [5] - 8:19, 22:22, 52:9, 53:21, 53:22</p> <p><b>reading</b> [1] - 9:18</p> <p><b>Reagan</b> [1] - 48:23</p> <p><b>real</b> [1] - 46:18</p> <p><b>reality</b> [2] - 18:25, 47:11</p> <p><b>really</b> [4] - 7:12, 13:8, 13:10, 53:16</p> <p><b>reason</b> [2] - 27:13, 38:16</p> <p><b>reasonable</b> [10] - 19:24, 37:19, 38:2, 39:21, 40:9, 40:12, 40:17, 40:22, 41:24, 42:19</p> <p><b>reasons</b> [1] - 47:19</p> <p><b>rebuttal</b> [1] - 7:8</p> <p><b>received</b> [2] - 6:14, 22:5</p> <p><b>receiving</b> [1] - 37:21</p> <p><b>recent</b> [2] - 18:13, 38:10</p> <p><b>recently</b> [1] - 38:23</p> <p><b>recess</b> [1] - 53:24</p> <p><b>recipients</b> [1] - 28:24</p> <p><b>record</b> [7] - 3:13, 3:14, 3:15, 13:19, 22:19, 47:12, 55:4</p> <p><b>records</b> [29] - 9:1, 13:17, 13:21, 14:2, 14:7, 14:8, 14:17, 15:13, 15:14, 15:15, 15:16, 20:3, 23:12, 24:25, 33:3, 34:17, 37:25, 38:21, 40:15, 40:21, 41:2, 41:4, 41:5, 41:7, 42:3, 42:4</p> <p><b>redactions</b> [1] - 9:20</p> <p><b>referred</b> [1] - 4:21</p> <p><b>reflected</b> [1] - 34:6</p> <p><b>reflection</b> [1] - 51:20</p> <p><b>reflects</b> [2] - 29:3, 31:14</p> <p><b>refute</b> [1] - 49:7</p> <p><b>regard</b> [32] - 6:6, 8:22, 10:10, 10:20, 12:11, 12:20, 15:16, 16:3, 16:4, 16:5, 16:10, 16:19, 17:6, 17:8, 18:20, 19:18, 19:22, 23:14, 25:17, 25:18, 25:20, 25:21, 25:23, 26:8, 46:4, 47:2, 47:4, 47:18, 49:22, 50:10, 50:21</p> <p><b>regarding</b> [3] - 6:12, 37:20, 43:7</p> <p><b>relates</b> [1] - 30:3</p> <p><b>relating</b> [1] - 22:2</p> <p><b>released</b> [1] - 9:21</p> <p><b>relevance</b> [6] - 21:11, 21:13, 29:24, 30:2, 31:25, 32:5</p> <p><b>relevant</b> [6] - 4:20, 21:9, 21:16, 25:5, 33:20, 35:8</p> <p><b>relief</b> [9] - 5:14, 5:17, 20:11, 31:12, 31:18, 35:25, 36:4, 37:1, 45:20</p> <p><b>remains</b> [3] - 39:7, 39:18, 39:24</p> <p><b>remedy</b> [2] - 5:16, 31:17</p> <p><b>removing</b> [1] - 46:21</p> <p><b>renewed</b> [2] - 9:17, 10:1</p> <p><b>replies</b> [1] - 53:12</p> <p><b>reply</b> [1] - 35:25</p> <p><b>report</b> [5] - 22:14, 43:6, 47:12, 47:13, 49:24</p> <p><b>reported</b> [5] - 2:12, 43:8, 43:14, 43:17, 44:2</p> <p><b>REPORTER</b> [1] - 55:1</p> | <p><b>Reporter</b> [2] - 2:8, 2:9</p> <p><b>reporters</b> [2] - 32:20, 37:23</p> <p><b>reports</b> [2] - 49:24, 50:4</p> <p><b>request</b> [8] - 5:3, 14:11, 14:24, 18:1, 29:7, 30:3, 36:16, 52:3</p> <p><b>requested</b> [1] - 5:17</p> <p><b>requesting</b> [1] - 5:14</p> <p><b>requests</b> [2] - 4:21, 50:6</p> <p><b>required</b> [1] - 45:20</p> <p><b>requirements</b> [4] - 32:13, 32:22, 36:3, 45:22</p> <p><b>res</b> [1] - 16:8</p> <p><b>reserve</b> [2] - 6:13, 47:25</p> <p><b>reserving</b> [2] - 8:15, 47:22</p> <p><b>resigned</b> [1] - 44:6</p> <p><b>resolution</b> [1] - 52:3</p> <p><b>resolve</b> [2] - 36:7, 36:16</p> <p><b>respect</b> [7] - 14:14, 14:23, 20:14, 27:6, 28:18, 30:9, 50:18</p> <p><b>respectfully</b> [1] - 17:25</p> <p><b>respective</b> [1] - 3:5</p> <p><b>respond</b> [1] - 5:22</p> <p><b>responded</b> [2] - 35:15, 35:16</p> <p><b>response</b> [1] - 5:23</p> <p><b>responsive</b> [3] - 40:16, 40:21, 45:4</p> <p><b>rest</b> [2] - 24:5, 52:5</p> <p><b>restrict</b> [1] - 31:8</p> <p><b>result</b> [3] - 32:10, 41:1, 45:2</p> <p><b>retaliation</b> [1] - 11:3</p> <p><b>retired</b> [1] - 44:6</p> <p><b>retrieve</b> [1] - 40:21</p> <p><b>reveal</b> [1] - 34:25</p> <p><b>revealing</b> [2] - 35:20, 40:4</p> <p><b>review</b> [28] - 11:18, 11:19, 11:21, 11:24, 12:7, 13:2, 13:22, 13:23, 14:11, 15:10, 15:24, 24:6, 24:14, 27:4, 27:18, 27:21, 28:9, 28:14, 28:23, 29:14, 30:6, 30:20, 30:23, 32:15, 40:15</p> <p><b>reviewable</b> [2] - 29:10, 29:13</p> <p><b>reviewed</b> [3] - 19:5, 21:21, 41:6</p> <p><b>reviewing</b> [3] - 12:20, 21:3, 24:12</p> <p><b>revolution</b> [1] - 19:2</p> <p><b>RICHARD</b> [1] - 1:12</p> <p><b>rights</b> [14] - 12:23, 12:24, 12:25, 13:1, 13:18, 13:22, 16:20, 17:7, 17:11, 20:8, 24:21, 27:24, 32:6, 37:4</p> <p><b>rigorous</b> [1] - 45:22</p> <p><b>rise</b> [4] - 19:2, 19:6, 32:23, 48:20</p> <p><b>RJL</b> [1] - 1:5</p> <p><b>RMR</b> [1] - 2:8</p> <p><b>RODNEY</b> [1] - 1:19</p> <p><b>Rodney</b> [1] - 4:8</p> <p><b>Ronald</b> [1] - 48:23</p> <p><b>Room</b> [1] - 2:9</p> <p><b>roughly</b> [1] - 18:15</p> <p><b>rounds</b> [3] - 51:14, 53:11</p> <p><b>routed</b> [1] - 9:10</p> <p><b>Royce</b> [1] - 20:19</p> <p><b>rubber</b> [1] - 14:23</p> | <p><b>rule</b> [7] - 13:6, 15:12, 21:5, 36:3, 52:12, 52:13, 52:16</p> <p><b>ruled</b> [1] - 46:9</p> <p><b>ruling</b> [10] - 16:4, 19:1, 23:14, 25:20, 26:8, 32:4, 32:5, 32:10, 49:19, 52:19</p> <p><b>rulings</b> [1] - 52:20</p> <p><b>Russia</b> [1] - 48:4</p> |
| <b>S</b>  |  |  |
| <p><b>safeguards</b> [2] - 42:25, 43:12</p> <p><b>safety</b> [1] - 19:3</p> <p><b>sake</b> [1] - 36:10</p> <p><b>satisfy</b> [1] - 20:2</p> <p><b>save</b> [3] - 26:10, 26:11, 40:16</p> <p><b>saw</b> [1] - 17:17</p> <p><b>scheme</b> [2] - 11:17, 28:22</p> <p><b>Se</b> [1] - 1:16</p> <p><b>Seal</b> [2] - 10:25, 11:3</p> <p><b>seal</b> [2] - 28:24, 28:25</p> <p><b>search</b> [1] - 41:25</p> <p><b>searches</b> [1] - 25:3</p> <p><b>searching</b> [1] - 8:6</p> <p><b>seat</b> [1] - 4:2</p> <p><b>second</b> [6] - 5:10, 12:6, 21:16, 24:12, 30:10, 31:1</p> <p><b>secondly</b> [1] - 7:14</p> <p><b>secret</b> [3] - 14:20, 19:12</p> <p><b>section</b> [2] - 31:2, 31:6</p> <p><b>Section</b> [21] - 5:4, 10:12, 10:13, 12:18, 16:23, 17:4, 17:5, 28:21, 29:1, 29:21, 30:9, 30:12, 31:11, 31:12, 31:13, 31:19, 31:22, 34:10, 35:12, 35:15, 50:10</p> <p><b>Security</b> [1] - 2:3</p> <p><b>security</b> [5] - 33:21, 44:24, 45:12, 49:10, 49:11</p> <p><b>see</b> [12] - 5:9, 5:22, 7:5, 12:1, 12:3, 21:6, 26:6, 26:20, 27:14, 41:11, 42:3, 50:2</p> <p><b>seeking</b> [3] - 12:12, 35:25, 36:1</p> <p><b>seem</b> [1] - 21:4</p> <p><b>seizures</b> [1] - 25:3</p> <p><b>self</b> [2] - 24:25, 25:2</p> <p><b>self-incrimination</b> [2] - 24:25, 25:2</p> <p><b>Senator</b> [1] - 44:3</p> <p><b>send</b> [1] - 49:4</p> <p><b>sent</b> [2] - 22:6, 22:13</p> <p><b>sentry</b> [1] - 23:5</p> <p><b>separate</b> [4] - 7:25, 18:14, 34:7, 41:12</p> <p><b>seriously</b> [1] - 43:18</p> <p><b>Services</b> [2] - 34:4, 35:2</p> <p><b>services</b> [1] - 34:10</p> <p><b>set</b> [9] - 8:1, 10:7, 11:10, 22:11, 40:25, 46:18, 48:6, 49:6, 49:23</p> <p><b>sets</b> [2] - 5:17, 28:22</p> <p><b>seven</b> [1] - 18:15</p> <p><b>several</b> [2] - 33:23, 39:5</p> <p><b>severely</b> [1] - 47:5</p> <p><b>shape</b> [3] - 8:2, 11:20, 50:18</p> <p><b>Shapiro</b> [1] - 4:9</p>   |  |  |

|   |   |   |
|---|---|---|
| <p><b>Shea</b> [1] - 34:7<br/> <b>short</b> [1] - 8:13<br/> <b>shorten</b> [1] - 43:7<br/> <b>shorthand</b> [2] - 2:12, 29:15<br/> <b>shot</b> [2] - 22:15, 52:24<br/> <b>show</b> [1] - 45:19<br/> <b>showed</b> [1] - 10:12<br/> <b>showing</b> [6] - 19:24, 36:22, 36:24, 37:11, 45:18, 45:21<br/> <b>shown</b> [1] - 36:25<br/> <b>shows</b> [1] - 22:13<br/> <b>side</b> [2] - 7:7, 52:15<br/> <b>sides</b> [2] - 7:20, 53:8<br/> <b>signalled</b> [1] - 38:14<br/> <b>signed</b> [1] - 51:2<br/> <b>signing</b> [1] - 51:3<br/> <b>similar</b> [1] - 27:23<br/> <b>simple</b> [4] - 13:8, 13:9, 13:10, 23:16<br/> <b>simply</b> [6] - 17:1, 24:8, 26:21, 35:10, 36:7, 36:16<br/> <b>sit</b> [4] - 3:11, 3:24, 17:22, 49:12<br/> <b>sitting</b> [2] - 6:1, 33:15<br/> <b>situation</b> [4] - 12:15, 46:12, 50:15, 52:8<br/> <b>six</b> [1] - 17:19<br/> <b>Six</b> [2] - 11:1, 11:3<br/> <b>Skype</b> [2] - 23:20, 49:5<br/> <b>smart</b> [1] - 25:6<br/> <b>Smith</b> [15] - 32:18, 37:18, 37:23, 38:1, 38:24, 39:7, 39:10, 39:11, 39:12, 39:14, 39:22, 39:23, 39:24, 39:25, 47:4<br/> <b>Smith's</b> [1] - 39:3<br/> <b>Snowden</b> [3] - 23:11, 47:19, 48:1<br/> <b>Snowden's</b> [1] - 48:11<br/> <b>so-called</b> [1] - 39:18<br/> <b>social</b> [1] - 23:20<br/> <b>someone</b> [2] - 17:14, 22:24<br/> <b>sometimes</b> [1] - 20:22<br/> <b>somewhere</b> [1] - 33:15<br/> <b>son</b> [4] - 10:25, 22:12, 46:24, 47:1<br/> <b>sorry</b> [2] - 36:13, 39:14<br/> <b>sort</b> [4] - 30:23, 34:1, 39:25, 43:22<br/> <b>Sotomayor's</b> [2] - 39:10, 39:15<br/> <b>sought</b> [2] - 18:20, 30:16<br/> <b>spanning</b> [1] - 44:1<br/> <b>specific</b> [5] - 8:1, 24:11, 27:22, 31:8, 35:17<br/> <b>specifically</b> [2] - 7:21, 27:25<br/> <b>specificity</b> [1] - 36:2<br/> <b>specifies</b> [2] - 31:17, 31:18<br/> <b>speculation</b> [1] - 34:17<br/> <b>spending</b> [1] - 39:1<br/> <b>split</b> [3] - 7:8, 7:10, 7:11<br/> <b>sprint</b> [1] - 25:14<br/> <b>spy</b> [1] - 10:16<br/> <b>spyware</b> [1] - 22:16<br/> <b>staff</b> [1] - 22:21<br/> <b>stage</b> [2] - 19:16, 21:8<br/> <b>stake</b> [1] - 47:3</p> | <p><b>stamps</b> [1] - 14:23<br/> <b>stand</b> [1] - 53:24<br/> <b>standard</b> [5] - 40:17, 42:2, 42:20, 43:8<br/> <b>standing</b> [26] - 7:14, 7:16, 11:10, 11:11, 22:5, 27:8, 28:3, 28:4, 28:10, 28:15, 32:13, 33:1, 34:23, 35:2, 35:5, 35:9, 35:18, 35:19, 36:17, 36:19, 36:21, 36:24, 45:24, 49:6, 51:24, 52:8<br/> <b>Star</b> [2] - 14:21, 19:12<br/> <b>start</b> [2] - 12:10, 17:5<br/> <b>starting</b> [1] - 28:5<br/> <b>state</b> [4] - 12:22, 17:12, 23:8, 25:11<br/> <b>statements</b> [2] - 48:2, 48:11<br/> <b>STATES</b> [2] - 1:1, 1:12<br/> <b>States</b> [2] - 24:4, 33:8<br/> <b>statistics</b> [1] - 14:22<br/> <b>status</b> [2] - 8:10, 46:14<br/> <b>statute</b> [8] - 15:22, 21:19, 27:17, 29:19, 30:20, 31:1, 31:17, 31:21<br/> <b>statutes</b> [2] - 28:20, 47:13<br/> <b>statutory</b> [12] - 8:2, 8:4, 15:9, 18:6, 21:2, 21:15, 26:25, 27:1, 27:11, 28:19, 29:14, 45:25<br/> <b>stay</b> [2] - 7:2, 25:16<br/> <b>step</b> [8] - 10:1, 10:2, 12:10, 16:17, 22:25, 23:6, 41:14, 44:16<br/> <b>stepped</b> [1] - 24:19<br/> <b>still</b> [2] - 42:7<br/> <b>storage</b> [1] - 33:15<br/> <b>Strange</b> [4] - 2:6, 6:3, 25:19, 46:24<br/> <b>strange</b> [5] - 10:24, 12:24, 14:19, 20:5, 22:11<br/> <b>strictly</b> [1] - 40:11<br/> <b>strictures</b> [1] - 49:22<br/> <b>struggle</b> [1] - 52:10<br/> <b>stuff</b> [1] - 22:22<br/> <b>subject</b> [3] - 9:10, 41:6, 47:8<br/> <b>subjected</b> [2] - 21:23, 48:3<br/> <b>submissive</b> [1] - 50:17<br/> <b>submit</b> [3] - 36:3, 45:21, 51:8<br/> <b>submitted</b> [2] - 22:4, 51:16<br/> <b>subpoena</b> [4] - 13:16, 14:3, 14:5, 14:6<br/> <b>subpoenaed</b> [1] - 14:2<br/> <b>subscriber</b> [2] - 44:25, 45:13<br/> <b>subscribers</b> [3] - 9:10, 9:16, 41:20<br/> <b>subscription</b> [1] - 9:12<br/> <b>success</b> [3] - 32:16, 36:12, 36:20<br/> <b>sued</b> [1] - 46:24<br/> <b>suggested</b> [1] - 30:10<br/> <b>superimpose</b> [1] - 15:25<br/> <b>supplement</b> [4] - 51:15, 51:20, 53:12<br/> <b>supplemental</b> [2] - 46:18, 51:8<br/> <b>supplements</b> [1] - 53:13<br/> <b>supposedly</b> [1] - 22:14<br/> <b>Supreme</b> [13] - 3:18, 3:23, 11:19, 24:19, 25:5, 27:14, 27:15, 29:16, 29:17, 35:15, 38:13, 38:23, 52:14<br/> <b>surveillance</b> [1] - 25:11<br/> <b>surveyed</b> [2] - 21:9, 49:5</p> | <p><b>susceptible</b> [1] - 46:20<br/> <b>suspect</b> [1] - 23:23<br/> <b>suspected</b> [1] - 38:15<br/> <b>suspicion</b> [5] - 19:24, 40:17, 40:22, 41:24, 42:20<br/> <b>sworn</b> [1] - 49:24<br/> <b>Syler</b> [1] - 6:8<br/> <b>system</b> [6] - 5:19, 20:17, 42:3, 42:22, 44:10, 46:9</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p><b>table</b> [3] - 3:11, 4:7, 6:1<br/> <b>tables</b> [1] - 3:6<br/> <b>tails</b> [1] - 48:15<br/> <b>Taliban</b> [1] - 11:3<br/> <b>tampered</b> [1] - 46:20<br/> <b>targeting</b> [3] - 30:12, 30:18, 33:6<br/> <b>Tax</b> [6] - 13:15, 13:19, 14:3, 14:5, 14:11, 14:18<br/> <b>Team</b> [2] - 10:25, 11:3<br/> <b>technological</b> [1] - 42:25<br/> <b>technology</b> [3] - 38:7, 38:17, 38:19<br/> <b>telecommunications</b> [1] - 30:22<br/> <b>telephone</b> [6] - 9:1, 9:10, 25:1, 37:21, 40:19<br/> <b>telephony</b> [2] - 34:10, 40:14<br/> <b>ten</b> [1] - 53:17<br/> <b>tens</b> [1] - 19:21<br/> <b>term</b> [1] - 41:25<br/> <b>termed</b> [1] - 11:2<br/> <b>terms</b> [5] - 38:7, 41:23, 42:18, 43:5, 52:6<br/> <b>terrorism</b> [3] - 19:25, 21:22, 23:22<br/> <b>terrorist</b> [3] - 40:20, 40:24, 41:25<br/> <b>test</b> [1] - 50:4<br/> <b>text</b> [4] - 22:6, 22:9, 22:11, 46:19<br/> <b>Thanksgiving</b> [1] - 53:2<br/> <b>THE</b> [111] - 1:2, 1:12, 3:9, 3:13, 3:16, 3:20, 3:22, 3:24, 4:4, 4:10, 4:14, 4:18, 5:6, 5:9, 5:21, 6:2, 6:4, 6:11, 6:17, 6:23, 7:2, 7:5, 8:8, 8:11, 8:14, 8:17, 8:19, 9:4, 9:7, 9:13, 11:12, 11:14, 11:16, 11:25, 12:3, 13:8, 13:10, 13:14, 14:4, 14:15, 15:1, 15:5, 15:8, 15:20, 18:3, 18:10, 19:13, 19:17, 21:2, 21:11, 21:13, 22:1, 22:9, 24:10, 26:3, 26:9, 26:13, 26:17, 26:19, 27:22, 28:4, 28:7, 28:10, 29:6, 29:13, 29:24, 30:2, 31:23, 33:12, 33:24, 34:20, 35:5, 35:13, 35:22, 36:6, 36:15, 37:3, 37:8, 37:13, 37:17, 38:3, 38:5, 38:7, 38:10, 38:13, 39:6, 39:12, 39:16, 41:7, 41:10, 41:18, 42:6, 42:14, 42:23, 43:1, 43:3, 43:19, 43:24, 44:8, 44:15, 44:19, 45:6, 45:8, 45:15, 46:3, 47:25, 50:20, 51:2, 53:5, 53:7, 53:24<br/> <b>theirs</b> [3] - 33:3, 33:9, 49:9<br/> <b>theory</b> [1] - 34:22<br/> <b>therefore</b> [1] - 36:11<br/> <b>thereof</b> [1] - 52:7</p> |
|---|---|---|

|   |   |  |
|---|---|--|
| <p><b>thin</b> <sup>[1]</sup> - 7:20<br/> <b>thinking</b> <sup>[2]</sup> - 7:5, 10:17<br/> <b>thinks</b> <sup>[1]</sup> - 23:3<br/> <b>third</b> <sup>[6]</sup> - 16:12, 27:4, 29:2, 39:18, 39:20, 42:14<br/> <b>Thomas</b> <sup>[1]</sup> - 48:24<br/> <b>three</b> <sup>[4]</sup> - 31:8, 31:10, 31:18, 46:12<br/> <b>thrust</b> <sup>[1]</sup> - 36:14<br/> <b>timely</b> <sup>[1]</sup> - 19:8<br/> <b>tiny</b> <sup>[1]</sup> - 41:2<br/> <b>today</b> <sup>[9]</sup> - 4:8, 7:6, 7:12, 9:24, 15:15, 25:5, 45:18, 53:10<br/> <b>tonight</b> <sup>[1]</sup> - 51:11<br/> <b>Tony</b> <sup>[1]</sup> - 4:8<br/> <b>took</b> <sup>[1]</sup> - 43:17<br/> <b>top</b> <sup>[2]</sup> - 10:14, 19:12<br/> <b>total</b> <sup>[4]</sup> - 7:9, 7:10, 15:18, 44:1<br/> <b>totalitarian</b> <sup>[2]</sup> - 12:21, 19:4<br/> <b>towards</b> <sup>[1]</sup> - 10:24<br/> <b>tragically</b> <sup>[1]</sup> - 11:1<br/> <b>TRANSCRIPT</b> <sup>[1]</sup> - 1:11<br/> <b>transcript</b> <sup>[2]</sup> - 2:12, 55:4<br/> <b>transcription</b> <sup>[1]</sup> - 2:12<br/> <b>troublesome</b> <sup>[1]</sup> - 28:13<br/> <b>true</b> <sup>[4]</sup> - 29:23, 30:9, 35:21, 46:13<br/> <b>trunk</b> <sup>[1]</sup> - 41:17<br/> <b>trust</b> <sup>[2]</sup> - 48:21<br/> <b>truthfully</b> <sup>[1]</sup> - 49:13<br/> <b>try</b> <sup>[3]</sup> - 52:24, 53:15, 53:20<br/> <b>Tuesday</b> <sup>[2]</sup> - 53:1, 53:14<br/> <b>turn</b> <sup>[2]</sup> - 22:24, 33:1<br/> <b>turned</b> <sup>[1]</sup> - 14:24<br/> <b>tutor</b> <sup>[1]</sup> - 5:3<br/> <b>two</b> <sup>[18]</sup> - 4:21, 7:6, 7:12, 8:21, 12:25, 17:8, 23:3, 25:17, 28:20, 31:20, 34:7, 45:15, 45:16, 46:8, 47:7, 52:2, 52:9, 52:20<br/> <b>types</b> <sup>[2]</sup> - 10:16, 27:17<br/> <b>typically</b> <sup>[1]</sup> - 40:19<br/> <b>tyranny</b> <sup>[4]</sup> - 16:13, 20:17, 23:5, 49:1</p> | <p><b>unites</b> <sup>[1]</sup> - 16:14<br/> <b>unless</b> <sup>[2]</sup> - 9:25, 34:25<br/> <b>unofficially</b> <sup>[1]</sup> - 34:2<br/> <b>unreasonable</b> <sup>[1]</sup> - 25:3<br/> <b>up</b> <sup>[14]</sup> - 6:11, 17:13, 17:16, 19:2, 19:6, 23:8, 26:23, 33:9, 33:15, 35:9, 43:21, 49:3, 50:25, 51:21<br/> <b>upper</b> <sup>[1]</sup> - 10:20<br/> <b>upset</b> <sup>[1]</sup> - 19:6<br/> <b>upstairs</b> <sup>[1]</sup> - 52:23<br/> <b>upstream</b> <sup>[1]</sup> - 20:21<br/> <b>USC</b> <sup>[2]</sup> - 13:5, 31:2<br/> <b>users</b> <sup>[2]</sup> - 9:9</p>  | <p><b>WHITMAN</b> <sup>[1]</sup> - 2:3<br/> <b>whole</b> <sup>[1]</sup> - 7:23<br/> <b>wife</b> <sup>[2]</sup> - 12:25, 14:19<br/> <b>Wild</b> <sup>[1]</sup> - 17:10<br/> <b>Wilmer</b> <sup>[1]</sup> - 1:24<br/> <b>win</b> <sup>[1]</sup> - 48:15<br/> <b>windows</b> <sup>[1]</sup> - 22:22<br/> <b>Wireless</b> <sup>[2]</sup> - 34:6, 34:15<br/> <b>wiretaps</b> <sup>[1]</sup> - 22:23<br/> <b>wish</b> <sup>[3]</sup> - 51:9, 51:12, 51:23<br/> <b>wives</b> <sup>[2]</sup> - 10:17, 47:16<br/> <b>words</b> <sup>[1]</sup> - 34:14<br/> <b>works</b> <sup>[1]</sup> - 44:10<br/> <b>worry</b> <sup>[1]</sup> - 53:2<br/> <b>worse</b> <sup>[4]</sup> - 17:10, 23:6, 46:10, 50:18<br/> <b>worth</b> <sup>[1]</sup> - 40:10<br/> <b>write</b> <sup>[1]</sup> - 53:20<br/> <b>writing</b> <sup>[1]</sup> - 13:2<br/> <b>written</b> <sup>[1]</sup> - 21:19<br/> <b>wrote</b> <sup>[1]</sup> - 23:24</p> |
| <b>U</b>  | <b>V</b>  | <b>X</b>   |
| <p><b>U.S.</b> <sup>[10]</sup> - 1:20, 2:3, 2:9, 10:9, 11:19, 14:9, 30:13, 33:7, 39:23, 44:4<br/> <b>ultimately</b> <sup>[2]</sup> - 29:16, 50:1<br/> <b>unauthorized</b> <sup>[1]</sup> - 44:3<br/> <b>unconstitutional</b> <sup>[3]</sup> - 15:10, 19:14, 21:6<br/> <b>under</b> <sup>[36]</sup> - 5:13, 6:19, 18:17, 21:13, 24:13, 24:15, 24:16, 24:17, 28:24, 28:25, 29:8, 30:12, 31:9, 31:11, 31:16, 31:21, 32:1, 32:7, 33:5, 33:9, 35:12, 35:14, 36:4, 39:19, 40:14, 40:16, 41:23, 42:10, 42:16, 42:18, 42:19, 43:5, 45:21, 49:12, 53:15, 53:17<br/> <b>underpinning</b> <sup>[1]</sup> - 39:22<br/> <b>unfortunately</b> <sup>[2]</sup> - 12:15, 22:24<br/> <b>United</b> <sup>[2]</sup> - 24:4, 33:7<br/> <b>UNITED</b> <sup>[2]</sup> - 1:1, 1:12</p>  | <p><b>value</b> <sup>[1]</sup> - 39:3<br/> <b>valve</b> <sup>[1]</sup> - 19:3<br/> <b>various</b> <sup>[3]</sup> - 10:8, 27:3, 27:11<br/> <b>Verizon</b> <sup>[24]</sup> - 1:23, 4:13, 8:22, 9:2, 9:8, 9:11, 9:12, 9:15, 15:16, 15:17, 19:21, 25:13, 33:13, 33:14, 34:1, 34:4, 34:6, 34:9, 34:14, 35:1, 37:5, 37:9, 44:20, 44:24<br/> <b>versus</b> <sup>[9]</sup> - 3:3, 27:15, 27:16, 27:19, 28:12, 29:18, 37:18, 39:14, 39:23<br/> <b>view</b> <sup>[2]</sup> - 26:3, 36:6<br/> <b>viewed</b> <sup>[1]</sup> - 41:3<br/> <b>views</b> <sup>[1]</sup> - 39:11<br/> <b>Vincent</b> <sup>[10]</sup> - 10:6, 17:6, 17:9, 18:3, 25:15, 25:21, 26:1, 26:5, 30:4, 34:9<br/> <b>Vincent's</b> <sup>[6]</sup> - 8:23, 16:7, 17:3, 24:8, 34:2, 35:1<br/> <b>violate</b> <sup>[1]</sup> - 13:18<br/> <b>violation</b> <sup>[7]</sup> - 13:7, 13:21, 17:11, 32:2, 32:6, 32:9, 32:24<br/> <b>violations</b> <sup>[6]</sup> - 10:12, 27:24, 31:7, 47:13, 47:14, 49:19<br/> <b>virtually</b> <sup>[1]</sup> - 9:19<br/> <b>virtue</b> <sup>[1]</sup> - 5:13</p> | <b>XIV</b> <sup>[1]</sup> - 48:19  |
| <b>U</b>  | <b>W</b>  | <b>Y</b>   |
|   | <p><b>wage</b> <sup>[1]</sup> - 19:2<br/> <b>waiting</b> <sup>[1]</sup> - 26:15<br/> <b>wants</b> <sup>[4]</sup> - 14:24, 47:19, 48:9, 49:7<br/> <b>warrant</b> <sup>[1]</sup> - 51:4<br/> <b>Washington</b> <sup>[5]</sup> - 1:17, 1:21, 1:25, 2:4, 2:10<br/> <b>Watch</b> <sup>[3]</sup> - 16:15, 18:23, 22:20<br/> <b>ways</b> <sup>[2]</sup> - 26:17, 26:20<br/> <b>Webster</b> <sup>[3]</sup> - 27:15, 27:19, 28:12<br/> <b>week</b> <sup>[4]</sup> - 6:18, 51:8, 51:13, 53:1<br/> <b>weeks</b> <sup>[1]</sup> - 25:10<br/> <b>welcome</b> <sup>[7]</sup> - 3:9, 4:14, 6:2, 6:4, 51:9, 51:22, 52:1<br/> <b>West</b> <sup>[1]</sup> - 17:10<br/> <b>whatsoever</b> <sup>[1]</sup> - 33:2<br/> <b>whereabouts</b> <sup>[1]</sup> - 39:1<br/> <b>white</b> <sup>[1]</sup> - 50:10</p>   | <p><b>Yahoo</b> <sup>[1]</sup> - 25:14<br/> <b>year</b> <sup>[1]</sup> - 49:14<br/> <b>years</b> <sup>[5]</sup> - 15:7, 18:15, 18:16, 22:19, 48:23<br/> <b>yesterday</b> <sup>[2]</sup> - 5:15, 5:24<br/> <b>York</b> <sup>[1]</sup> - 7:21<br/> <b>yourself</b> <sup>[3]</sup> - 3:5, 22:25, 24:9<br/> <b>youtube</b> <sup>[3]</sup> - 23:20, 25:14, 49:4</p>   |