Zum Stand des *„criminal contempt“*-Verfahrens wegen der *Alien Enemies Act*- / *Tren de Aragua*-Abschiebungen am 15. März 2025

Wie berichtet, gelangte der *District Court* für den *District of Columbia* am Mittwoch, den 16.04. zu der Schlußfolgerung, *„that the Government's actions on that day [15. März 2025] demonstrate a willful disregard for its [*des *District Court] Order, sufficient for the Court to conclude that probable cause exists to find the Government in criminal contempt“*.

Es geht darum, daß der mit dem Fall befaßte *District Court*-Richter (Boasberg) am Samstag, den 15. März in der mündlichen Verhandlung in Bezug auf von der Regierung beabsichtigter Abschiebungen sagte:

> „particularly given the plaintiffs' information unrebutted by the government that flights are actively departing and plan to depart, I do not believe that I am able to wait any longer and that I am required to act immediately, which I have done so.
> So, Mr. Ensign, the first point is that I – that you shall inform your clients of this immediately, and that any plane containing these folks that is going to take off or is in the air needs to be returned to the United States, but those people need to be returned to the United States.
> However that's accomplished, whether turning around a plane or not embarking anyone on the plane or those people covered by this on the plane, I leave to you. But this is something that you need to make sure is complied with immediately.“
> (https://storage.courtlistener.com/recap/gov.uscourts.dcd.278436/gov.uscourts.dcd.278436.20.0_4.pdf, S. 43, Zeile 6 - 19)

und

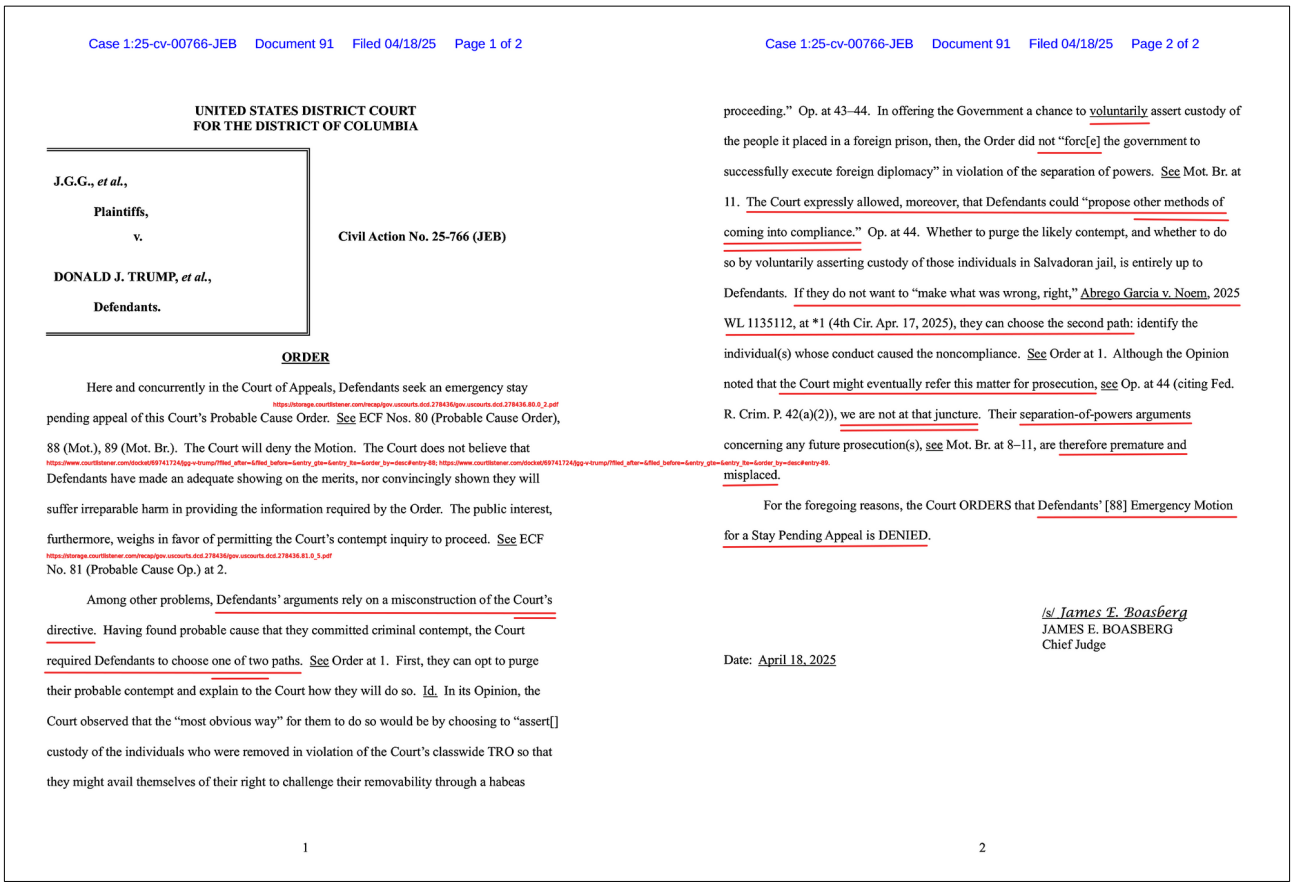
es dann in der schriftlichen Entscheidung hieß:

> „1) Plaintiffs' 4 Motion for Class Certification is GRANTED insofar as a class consisting of ‚All noncitizens in U.S. custody who are subject to the March 15, 2025, Presidential Proclamation entitled ›Invocation of the Alien Enemies Act Regarding the Invasion of The United States by Tren De Aragua‹ and its implementation' is provisionally certified; 2) The Government is ENJOINED from removing members of such class (not otherwise subject to removal) pursuant to the Proclamation for 14 days or until further Order of the Court; […].“
> (https://www.courtlistener.com/docket/69741724/jgg-v-trump/?filed_after=&filed_before=&entry_gte=&entry_lte=&order_by=desc#minute-entry-419399699),

die Regierung die Flugzeuge aber *nicht mit* den Betroffenen um- bzw. zurückkehren ließ, sondern diese nun in einem Hochsicherheitsknast in El Salvador schmoren.

Wie ebenfalls berichtet, hat die Trump-Regierung nach der Entscheidung von Mittwoch, den 16. April sowohl beim *District Court* für den *District of Columbia* als auch beim übergeordneten *Appeals Court*, der ebenfalls für den *District of Columbia* zuständig ist, die vorläufige Außer-Vollzug-Setzung der *District Court*-Entscheidung beantragt.

Die *District Court* lehnte die Außer-Vollzug-Setzung am Freitag, den 18.04. mit einem zweiseitigen Beschluß ab:



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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

J.G.G., *et al.*,
Plaintiffs,
v.
DONALD J. TRUMP, *et al.*,
Defendants.

Civil Action No. 25-766 (JEB)

ORDER

Here and concurrently in the Court of Appeals, Defendants seek an emergency stay pending appeal of this Court's Probable Cause Order. See ECF Nos. 80 (Probable Cause Order), 88 (Mot.), 89 (Mot. Br.). The Court will deny the Motion. The Court does not believe that Defendants have made an adequate showing on the merits, nor convincingly shown they will suffer irreparable harm in providing the information required by the Order. The public interest, furthermore, weighs in favor of permitting the Court's contempt inquiry to proceed. See ECF No. 81 (Probable Cause Op.) at 2.

Among other problems, Defendants' arguments rely on a misconstruction of the Court's directive. Having found probable cause that they committed criminal contempt, the Court required Defendants to choose one of two paths. See Order at 1. First, they can opt to purge their probable contempt and explain to the Court how they will do so. Id. In its Opinion, the Court observed that the "most obvious way" for them to do so would be by choosing to "assert[] custody of the individuals who were removed in violation of the Court's classwide TRO so that they might avail themselves of their right to challenge their removability through a habeas

1

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proceeding." Op. at 43–44. In offering the Government a chance to voluntarily assert custody of the people it placed in a foreign prison, then, the Order did not "forc[e] the government to successfully execute foreign diplomacy" in violation of the separation of powers. See Mot. Br. at 11. The Court expressly allowed, moreover, that Defendants could "propose other methods of coming into compliance." Op. at 44. Whether to purge the likely contempt, and whether to do so by voluntarily asserting custody of those individuals in Salvadoran jail, is entirely up to Defendants. If they do not want to "make what was wrong, right," Abrego Garcia v. Noem, 2025 WL 1135112, at *1 (4th Cir. Apr. 17, 2025), they can choose the second path: identify the individual(s) whose conduct caused the noncompliance. See Order at 1. Although the Opinion noted that the Court might eventually refer this matter for prosecution, see Op. at 44 (citing Fed. R. Crim. P. 42(a)(2)), we are not at that juncture. Their separation-of-powers arguments concerning any future prosecution(s), see Mot. Br. at 8–11, are therefore premature and misplaced.

For the foregoing reasons, the Court ORDERS that Defendants' [88] Emergency Motion for a Stay Pending Appeal is DENIED.

/s/ James E. Boasberg
JAMES E. BOASBERG
Chief Judge

Date: April 18, 2025

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Der *Appeals Court* gewährte (mit 2 : 1 Stimmen) am selben Tag einen kurzfristigen *stay* und setzte folgende Fristen:

> „appellees file a response to the emergency motion by 5:00 p.m. on Wednesday, April 23, 2025. Any reply is due by noon on Friday, April 25, 2025".
> (https://storage.courtlistener.com/recap/gov.uscourts.cadc.41957/gov.uscourts.cadc.41957.01208731821.0.pdf)

Richterin Pillard dissentierte:

> „Judge Pillard would not administratively stay the challenged order. In the absence of an appealable order or any clear and indisputable right to relief that would support mandamus, there is no ground for an administrative stay."

Die zwei anderen RichterInnen betonten ihrerseits:

> „The purpose of this administrative stay is to give the court sufficient opportunity to consider the emergency motion for a stay pending appeal or a writ of mandamus and should not be construed in any way as a ruling on the merits of that motion."

Inzwischen liegt die Antwort der erstinstanzlichen Kläger/Antragsteller auf den *stay*-Antrag der Regierung vor:

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INTRODUCTION

This Court should dismiss the government's appeal because it lacks jurisdiction. As the government acknowledges, the district court order at issue here merely "embarks on" contempt proceedings. Emergency Motion for a Stay Pending Appeal, or, in the Alternative, a Writ of Mandamus at 7, *J.G.G. v. Trump*, No. 25-5124 (D.C. Cir. Apr. 18, 2025) ("Mot."). But nothing is resolved yet. While the court found probable cause of criminal contempt, it is still developing the facts and has made no final determinations about how its inquiry will proceed, whether contempt was committed, if there was contempt, what options the government may have to purge the contempt, or what, if any, sanctions to impose, and upon whom. The federal courts of appeals primarily review "final decisions of the district courts," 28 U.S.C. § 1291, a policy that "discourage[s] undue litigiousness and leaden-footed administration of justice," *DiBella v. United States*, 369 U.S. 121, 124 (1962). They do not exist to test a party's abstract and sweeping structural constitutional theories at the earliest possible juncture.

This Court has already explained that criminal contempt orders are "final and hence appealable" once the district court identifies "specific, unavoidable penalties." *Salazar ex rel. Salazar v. District of Columbia*, 602 F.3d 431, 436 (D.C. Cir. 2010). Thus, recognizing that the district court's order was far from final, the government tries to shoehorn it into one of the exceptions to the final judgment rule. *See* 28

U.S.C. § 1292. It chiefly argues that the district court's order is tantamount to an appealable injunction because, among other things, the order "requested briefs from both parties" and "held an adversarial hearing." Mot. at 19. But to describe that argument is to refute it: if directing parties to file briefs and attend hearings were enough to transform district court orders into appealable injunctions, every case could be appealed dozens of times before final judgment, and courts of appeals would be awash in "the very sorts of piecemeal appeals and concomitant delays that the final judgment rule was designed to prevent." *Cunningham v. Hamilton Cty.*, 527 U.S. 198, 209 (1999).

The district court's order also does not fall within the collateral order doctrine, which provides a narrow pathway for interlocutory review of issues that otherwise "can never be reviewed at all," *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (internal quotations omitted). Virtually all the government's objections to the district court's order can be addressed through a regular appeal, once the district court reaches a final decision. The government makes a passing suggestion that the Executive Branch should be entirely insulated from judicial contempt proceedings, Mot. at 19, but it offers nothing in support, and binding circuit authority has foreclosed that remarkable proposition for well over half a century. *See Land v. Dollar*, 190 F.2d 623, 633–34 (D.C. Cir. 1951); *see also, e.g.*, *In re Contempt Finding in U.S. v. Stevens*, 663 F.3d 1270, 1271 (D.C. Cir. 2011) (upholding contempt finding

against DOJ lawyers). The government's request for mandamus fails for much the same reason: the government has no "clear and indisputable right to relief," *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016), much less a right it cannot vindicate through the "adequate alternative remedy," *id.*, of an appeal brought once contempt has been conclusively litigated in the district court.

At a minimum, the Court should decline to stay district court proceedings while any appeal is ongoing. The government is unlikely to succeed on the merits because, as the district court's methodical opinion makes plain, the government acted in knowing and willful—even "gleeful," Mem. Op., *J.G.G. v. Trump*, No. 25-cv-766 (D.D.C. Apr. 16, 2025), ECF No. 81 ("Order")—contempt of its restraining order. The government also faces no irreparable harm, because the district court has not resolved any issues yet and is merely investigating the likely contempt. By seeking to stop this process at the outset, the government would disable the district court from even determining whether contempt was committed and who committed it. That would have troubling implications for the court's ability to ensure that the government complies with judicial orders, and this Court should reject that effective call for effective executive branch immunity.

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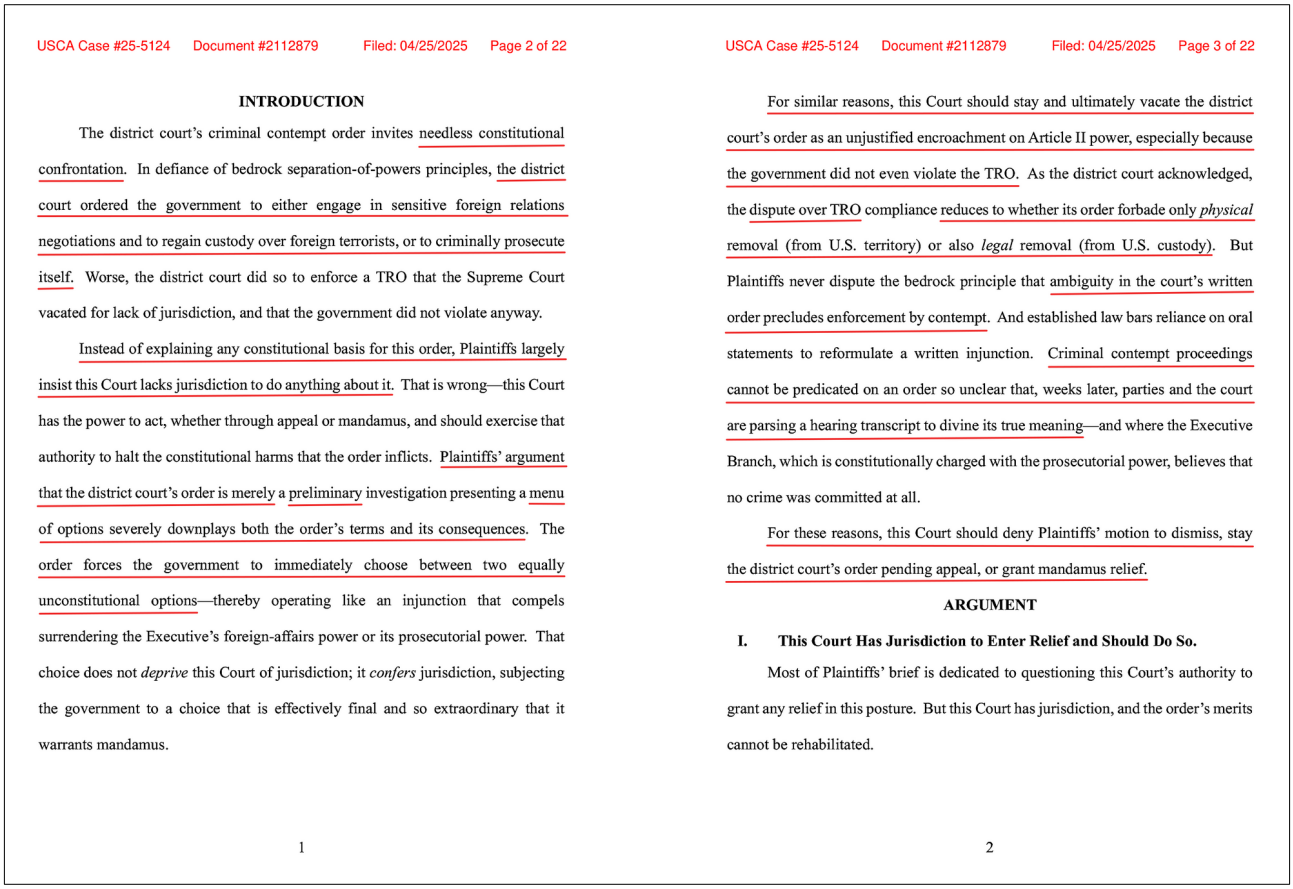
Da nicht nur die Ablehnung des *stay*-Antrages der Regierung, sondern auch bereits die Verwerfung des *appeal* der Regierung als unzulässig beantragt wurde, setzte der *Appeals Court* darauf hin zusätzliche Fristen fest. Es wurde angeordnet,

> „that appellants file a response to the motion to dismiss [2112443-2] and any reply in support of the emergency motion [2111641-2] by noon on Friday, April 25, 2025. Any reply in support of the motion to dismiss is due by 5:00 p.m. on Monday, April 28, 2025“ (https://www.courtlistener.com/docket/69905252/jgg-v-donald-trump/?filed_after=&filed_before=&entry_gte=&entry_lte=&order_by=desc#entry-1208733377)

Auch diese beiden Schriftsätze sind mittlerweile eingegangen.

Der Schriftsatz der Regierung von Freitag, den 25.04.2025:



INTRODUCTION

The district court's criminal contempt order invites needless constitutional confrontation. In defiance of bedrock separation-of-powers principles, the district court ordered the government to either engage in sensitive foreign relations negotiations and to regain custody over foreign terrorists, or to criminally prosecute itself. Worse, the district court did so to enforce a TRO that the Supreme Court vacated for lack of jurisdiction, and that the government did not violate anyway.

Instead of explaining any constitutional basis for this order, Plaintiffs largely insist this Court lacks jurisdiction to do anything about it. That is wrong—this Court has the power to act, whether through appeal or mandamus, and should exercise that authority to halt the constitutional harms that the order inflicts. Plaintiffs' argument that the district court's order is merely a preliminary investigation presenting a menu of options severely downplays both the order's terms and its consequences. The order forces the government to immediately choose between two equally unconstitutional options—thereby operating like an injunction that compels surrendering the Executive's foreign-affairs power or its prosecutorial power. That choice does not *deprive* this Court of jurisdiction; it *confers* jurisdiction, subjecting the government to a choice that is effectively final and so extraordinary that it warrants mandamus.

For similar reasons, this Court should stay and ultimately vacate the district court's order as an unjustified encroachment on Article II power, especially because the government did not even violate the TRO. As the district court acknowledged, the dispute over TRO compliance reduces to whether its order forbade only *physical* removal (from U.S. territory) or also *legal* removal (from U.S. custody). But Plaintiffs never dispute the bedrock principle that ambiguity in the court's written order precludes enforcement by contempt. And established law bars reliance on oral statements to reformulate a written injunction. Criminal contempt proceedings cannot be predicated on an order so unclear that, weeks later, parties and the court are parsing a hearing transcript to divine its true meaning—and where the Executive Branch, which is constitutionally charged with the prosecutorial power, believes that no crime was committed at all.

For these reasons, this Court should deny Plaintiffs' motion to dismiss, stay the district court's order pending appeal, or grant mandamus relief.

ARGUMENT

I. This Court Has Jurisdiction to Enter Relief and Should Do So.

Most of Plaintiffs' brief is dedicated to questioning this Court's authority to grant any relief in this posture. But this Court has jurisdiction, and the order's merits cannot be rehabilitated.

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Und der abschließende Schriftsatz der erstinstanzlichen Kläger/Antragsteller, der am Montag, den 28.04.2025 einging:

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INTRODUCTION

The basic premise underlying the government's arguments is wrong. It claims the district court ordered it "to comply with one of two unconstitutional options in just 7 days." Gov't Reply 3 (identifying these options as "regaining custody" or "face criminal prosecution"). But the district court has not ordered either of those things. Its order could not be clearer: "*If* Defendants opt to purge their contempt, they shall file by April 23, 2025, a *declaration* explaining the steps they have taken and will take to do so." Order ¶ 1, ECF No. 80 (D.D.C. Apr. 16, 2025) (emphasis added). Alternatively, "[i]f Defendants opt not to purge their contempt, they shall instead file by April 23, 2025, *declaration(s)* identifying the individual(s) who" chose to remove class members despite the court's unambiguous order. *Id.* ¶ 2 (emphasis added). That's it: One way or another, all the government must do is file a declaration, as the district court continues to investigate its likely contempt.

The government also incorrectly claims "the *only* 'purge' option" the district court gave was to "regain[] custody" of class members. Gov't Reply 4 (emphasis added). But again, the order is plain: "The Court will also give Defendants an opportunity to propose other methods of coming into compliance, which the Court will evaluate." Mem. Op. 43-44, ECF No. 81 (D.D.C. Apr. 16, 2025) ("Order"); Order 1-2, ECF No. 91 (D.D.C. Apr. 18, 2025) ("Apr. 18 Order") (emphasizing "voluntary" nature of these purge options).

Critically, the government concedes executive branch officials "can be sanctioned" for violating court orders and can be subject to "civil contempt" and "criminal contempt." Gov't Reply 5-6. Given that, the government barely disputes that the district court can require declarations and other fact-finding as it seeks to "identify the individual(s) whose conduct caused the noncompliance," Apr. 18 Order 2; *see* Mot. to Dismiss 18-19.

At bottom, the government is improperly seeking to pre-litigate issues that may or may not ever arise in this case. A series of steps remain between now and any prosecutorial referral, let alone an independent prosecutor. The government would have to refuse to purge the contempt, whether through the option the district court identified or one the government devises. Then—as the order here specifically contemplates—the court would need to investigate further to identify potentially contumacious officials, a process that may require additional fact development. *See* Order 44 (next step might require declarations, depositions, or live testimony). Once that process is complete, the district court would need to determine whether to pursue a criminal referral or other sanction. *See United States v. Latney's Funeral Home, Inc.*, 41 F.Supp.3d 24, 36 (D.D.C. 2014) (listing other possible sanctions).[1] After

[1] The government claims civil contempt is off the table, Gov't Reply 5 n.1, but civil contempt remedies can include "compensatory relief" for injured parties, *Landmark Legal Found. v. EPA*, 272 F. Supp. 2d 70, 76 (D.D.C. 2003) (collecting cases). Regardless, that uncertainty provides further reason why appellate review is premature.

that, the Department of Justice would have to make its own decision whether to prosecute. Then, and only then, does the possibility of an outside prosecutor under Rule 42(a)(2) come into view. *See* Apr. 18 Order 2 (While "the Court might eventually refer this matter for prosecution, we are not at that juncture.") (citation omitted). This Court should not review the final possible step in this process before any of these other steps have even occurred. *Cf. Pearson v. Callahan*, 555 U.S. 223, 241 (2009) (reiterating the "counsel not to pass on questions of constitutionality unless such adjudication is unavoidable") (cleaned up).

ARGUMENT

I. There is No Basis for Appellate Jurisdiction

"Plaintiffs' constant refrain is that appeal is premature." Gov't Reply 3. True. *See* Mot. to Dismiss 13-23; *cf. Salazar ex rel Salazar v. D.C.*, 602 F.3d 431, 436, 443 (D.C. Cir. 2010) (contempt appealable once court imposes "specific, unavoidable penalties"). The district court has not charged anyone with contempt or imposed any penalties, and basic factual investigation remains ongoing. There is accordingly no final order, no appealable injunction, no collateral order, and no basis for mandamus.

A. This order is not an appealable final judgment, injunction, or collateral order.

The district court's order does not mark the end of its contempt inquiry, let alone make conclusive liability determinations and impose "specific, unavoidable sanctions," *Salazar*, 602 F.3d at 436. Rather, the order merely continues the district

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Die erstinstanzlichen Kläger/Antragsteller argumentieren also in erster Linie, daß die *District Court*-Entscheidung, die die Regierung außer Vollzug gesetzt wissen möchte, keine endgültige Entscheidung sei und damit jedenfalls nicht zu den Entscheidungen gehöre, die normalerweise anfechtbar sind. Es liege darüber hinaus auch keiner der Ausnahmefälle vor, in denen ausnahmsweise eine Anfechtung vorläufiger Entscheidungen zulässig sei. Schließlich sei an der *District Court-Entscheidung* auch inhaltlich nicht zu bestanden:

> „The basic premise underlying the government's arguments is wrong. It claims the district court ordered it ‚to comply with one of two unconstitutional options in just 7 days.' Gov't Reply 3 (identifying these options as ‚regaining custody' or ‚face criminal prosecution'). But the district court has not ordered either of those things. […]. The district court has not charged anyone with contempt or imposed any penalties, and basic factual investigation remains ongoing. There is accordingly no final order, no appealable injunction, no collateral order, and no basis for mandamus."
> (https://storage.courtlistener.com/recap/gov.uscourts.cadc.41957/gov.uscourts.cadc.41957.01208734617.0.pdf, S. 1 und 3 der gedruckten bzw. 4 und 6 der digitalen Seitenzählung)

> „The government is unlikely to succeed on the merits because, as the district court's methodical opinion makes plain, the government acted in knowing and willful […] contempt of its restraining order. […]. By seeking to stop this process at the outset, the government would disable the district court from even determining whether contempt was committed and who committed it. That would have troubling implications for the court's ability to ensure that the government complies with judicial orders, and this Court should reject that effective call for effective executive branch immunity."
> (https://storage.courtlistener.com/recap/gov.uscourts.cadc.41957/gov.uscourts.cadc.41957.01208732963.0_1.pdf, S. 3 der gedruckten bzw. S. 6 der digitalen Seitenzählung)

Die Regierung ist dagegen der Ansicht, daß die *District Court*-Entscheidung unmittelbare verfassungswidrige Konsequenzen habe und die Entscheidung daher bereits anfechtbar sei:

> „The district court's criminal contempt order invites needless constitutional confrontation. In defiance of bedrock separation-of-powers principles, the district court ordered the government to either engage in sensitive foreign relations negotiations and to regain custody over foreign terrorists, or to criminally prosecute itself."
> (https://storage.courtlistener.com/recap/gov.uscourts.cadc.41957/gov.uscourts.cadc.41957.01208733712.0_2.pdf, S. 1 der gedruckten bzw. S. 2 der digitalen Seitenzählung)

Darüber hinaus liege auch kein Fall von *criminal contempt* vor, da die *District Court*-Entscheidung mehrdeutig gewesen sei:

> „As the district court acknowledged, the dispute over TRO compliance reduces to whether its order forbade only physical removal (from U.S. territory) or also legal removal (from U.S. custody). But Plaintiffs never dispute the bedrock principle that ambiguity in the court's written order precludes enforcement by contempt. […]. Criminal contempt proceedings cannot be predicated on an order so unclear that, weeks later, parties and the court are parsing a hearing transcript to divine its true meaning—and where the Executive Branch, which is constitutionally charged with the prosecutorial power, believes that no crime was committed at all." (ebd., S. 2 bzw. 3)