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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
WESTERN SECTION

Clayton Gordon, et al )  
 )  
 vs ) 13cv30146-MAP  
 )  
 Janet Napolitano, et al )  
 \_\_\_\_\_ )

Before The Honorable Michael A. Ponsor  
United States District Court Judge  
Status conference Held on  
April 11, 2017.

APPEARANCES:

For the petitioner: Matthew Segal, American Civil  
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1       **(Hearing commenced at 2:07.)**

2                   THE COURT: Good afternoon. Nice to see  
3 everybody. Please have a seat.

4                   THE CLERK: The matter before the court,  
5 13cv30146, Gordon, et al versus Napolitano, et al.

6                   THE COURT: I hope everything is well with Ms.  
7 Lafaille.

8                   MR. SEGAL: Yes, Your Honor. Good afternoon.  
9 Everything is well. Thank you.

10                   THE COURT: Good to know.

11                   Okay. I just wanted to do a quick summary of where  
12 we've come from and where we are today and then you all  
13 can tell me where we go from here.

14                   Let me start by having people introduce themselves  
15 for the record. I'll start with you, Ms. Fabian.

16                   MS. FABIAN: Sarah Fabian with the U.S.  
17 Department of Justice on behalf of the defendants.

18                   THE COURT: Very good.

19                   MR. SARASWAT: Anant Saraswat for the  
20 plaintiffs.

21                   THE COURT: Would you spell your last name?

22                   MR. SARASWAT: Yes, Your Honor. S, as in Sam,  
23 a-r-a-s-w-a-t.

24                   THE COURT: Thank you.

25                   MR. SEGAL: Good afternoon, Your Honor. Matt

1 Segal also on behalf of the plaintiffs.

2 THE COURT: Mr. Segal. Thank you.

3 Okay. So we are working through this issue of what  
4 happens to people who are coming off criminal sentences  
5 and who have immigration issues. I issued an order  
6 initially having to do with the individual plaintiff Mr.  
7 Gordon and that went up to the First Circuit where it was  
8 paired with a case called Castaneda and it was affirmed.

9 Both Judge Young and I had issued orders ordering the  
10 release of these individuals, the plaintiffs, and that was  
11 affirmed by the First Circuit on an evenly divided court.  
12 Following the wake of the Castaneda and Gordon decision  
13 was the issue of the class action in this case, which had  
14 been developing sort of independently as the First Circuit  
15 was continuing to weigh its decision with regard to the  
16 two individual defendants, and then on November 21st of  
17 last year the decision with regard to the class action  
18 portion of the case issued from the First Circuit written  
19 by Judge Lynch.

20 The upshot of the decision was that it vacated my  
21 summary judgment on the class issues, the declaratory  
22 judgment, and also the injunctive relief, but that  
23 decision was stayed by the First Circuit or the portion of  
24 the decision vacating my injunction was stayed by the  
25 First Circuit for 90 days and then the case was remanded

1 back to me.

2 We got right to work. I issued an order soliciting  
3 memorandum from you the day after the First Circuit's  
4 decision came out, and we saw you here on December 15th  
5 for a status conference at which I set a briefing schedule  
6 for some of the issues that were referred back by the  
7 First Circuit.

8 We had another conference and hearing on January 26th  
9 and I issued a follow-up order after that conference in  
10 which I indicated that my injunction would remain in place  
11 for the time being by the agreement of both sides. That a  
12 motion to the Court of Appeals might be filed seeking an  
13 extension of the 90-day stay and I also established a  
14 schedule for service of interrogatories upon the  
15 defendants by February 27th.

16 On February 8th there was an assented to or a joint  
17 motion for interim relief seeking to maintain the status  
18 quo for the time being, and the body of the motion laid  
19 out the parties' position with regard to the need to go  
20 back to the First Circuit for an extension and it was the  
21 parties' position that that was not necessary and it could  
22 be handled here through the order regarding interim  
23 relief.

24 That's pretty much where things have stood except for  
25 one thing which is on March 1st the mandate issued from

1 the First Circuit following up on its November 21st  
2 memorandum and so I've got a number of questions for you.  
3 The first is, what is the effect of the issuance of the  
4 mandate with regard to the injunction? Is it now just  
5 simply a voluntary interim order that you've agreed to?  
6 I'm not sure what effect that has on us, and with the  
7 issuance of the mandate back on March 1st I think the time  
8 period for taking an appeal may have passed for the  
9 plaintiffs. I think the government gets a little bit  
10 longer, but there's been no appeal filed or has a petition  
11 for cert. been filed or anything of that sort with regard  
12 to the First Circuit's opinion?

13 MR. SEGAL: No, Your Honor. We neither appealed  
14 nor sought cert.

15 THE COURT: Okay. So that's behind us and then  
16 I guess I wanted to know where things stand and what you  
17 think we should be doing now.

18 The question of discovery is of interest to me. I  
19 know that the defendants or the plaintiffs were going to  
20 be serving interrogatories. I don't know where that  
21 stands, and then there's this lingering question which the  
22 First Circuit asked me to address of the impact of Section  
23 1252(f)(1) on my ability to act here and I'm not sure I've  
24 formally or explicitly addressed that issue. If I have,  
25 I've forgotten.

1           So I think I'll start with the plaintiffs. You can  
2 tell me where things stand, what's happened since we were  
3 last here, and what you propose should happen from now.

4           Mr. Segal.

5           MR. SEGAL: Good afternoon.

6           THE COURT: Good afternoon.

7           MR. SEGAL: So I'll try to take these in  
8 order.

9           THE COURT: Sure.

10          MR. SEGAL: I think Your Honor's summary of the  
11 effect of the mandate is accurate if I understand it  
12 correctly, which is that as a consequence of the mandate  
13 issuing from the First Circuit that court no longer has  
14 the case in any respect. And it may be true as a  
15 consequence of the mandate that the May 20, '14 relief  
16 order from this court is not the widget that's providing  
17 bond hearings to people as we speak but it is instead the  
18 interim relief that the parties have assented to while we  
19 work out an appropriate remedial order for the future.

20          The second point I believe you raised was with  
21 respect to the appeal so I think that it would be  
22 reasonable for the court not to anticipate further  
23 appellate proceedings in this particular matter while the  
24 court -- while this court has the case.

25          THE COURT: All right.

1           MR. SEGAL: The third thing you mentioned is  
2 discovery. Attorney Saraswat can speak to that more than  
3 I can, but I will just say that we understood from the  
4 prior proceedings that there -- and by also from the  
5 defendants' characterization of the efforts that they have  
6 to undertake in order to generate documents, that there  
7 would be a substantial amount of work to do. And in order  
8 to do that work as expeditiously as possible we, having  
9 fewer personnel than the defendants, thought we --

10           THE COURT: I don't know if Ms. Fabian would  
11 agree with that as a practical matter.

12           MR. SEGAL: Maybe. I think we all agree that  
13 Attorney Fabian does the work of many.

14           THE COURT: Yes.

15           MR. SEGAL: But in terms of the document pieces  
16 of the case we felt that we would need more resources and  
17 so we've taken that step and Attorney Saraswat can sort of  
18 speak to where we are in discovery so I will maybe put a  
19 pin in that piece of this for right now and then skip  
20 ahead to your fourth point which was about the 1252 issue  
21 --

22           THE COURT: Yes.

23           MR. SEGAL: -- which I think Your Honor again  
24 has correctly summarized the state in play, which is that  
25 we have -- I think the parties feel like we have briefed

1 that issue. And although the Court of Appeals was  
2 interested to hear more from this court potentially on  
3 that issue, our view, given our view of the merits of that  
4 issue is that we see no particular urgency to seek a  
5 separate court order from Your Honor addressing that issue  
6 before things proceed.

7 We would be seeking only for us this is the part  
8 because we don't see the 1252 issue as sort of  
9 jurisdictional or as a bar for further proceedings in this  
10 case, so I think one thing we might talk about today is in  
11 light of how we see discovery going and the amount of time  
12 we think it might take I think the parties are imagining  
13 that down the road there would be briefing on the merits  
14 of further relief and the court may decide that it would  
15 be more efficient to issue say one decision down the road  
16 addressing the various legal issues that will be before  
17 the court.

18 THE COURT: All right. So the First Circuit's  
19 decision back in November was pretty skeptical, not  
20 absolutely dismissive, but pretty skeptical of the 48-hour  
21 rule but at the same time I think interested in some other  
22 perhaps more flexible rule.

23 I don't think that they completely discarded the  
24 possibility that further proceedings might result in a  
25 reasonable decision that embodied the 48-hour rule but



1 they were certainly looking at it with very much a cocked  
2 eyebrow. So what I see us doing in the fairly near future  
3 is moving forward towards a remedial order that is  
4 responsive to the concerns that the First Circuit had.

5 When you say down the road we might be looking at  
6 that, can you peer down the road and give me an idea of  
7 when you think you would be in a position to say, okay,  
8 judge, we've, you know, we've cooked and re-cooked the  
9 First Circuit's decision. We've looked at it and here's  
10 what we think is a remedial order that addresses the  
11 concerns that Judge Lynch voiced in her memorandum that is  
12 fair to both sides. When do you think you would be in a  
13 position to do that? Are we talking June, September?  
14 What would your speculative thought be?

15 MR. SEGAL: I think Attorney Saraswat is largely  
16 in possession of our crystal ball as to that, but I want  
17 to set that up before I turn it over to him why I think  
18 that is so.

19 I understand Your Honor's characterization of the  
20 First Circuit's opinion as carrying with it a cocked  
21 eyebrow, and on that point there are a few ways that I  
22 think the parties are attempting to generate -- to help  
23 this court generate a response. One of them is to address  
24 the legal issue of, okay, well, what does the when  
25 released period encompass in light of what the First

1 Circuit has said about it?

2 The second is to -- and this was another key part of  
3 the First Circuit's opinion was to address the factual  
4 underpinnings or assumptions that the First Circuit might  
5 have had in raising its eyebrow and that has to do with  
6 the factual problem.

7 So our sense is that in order to pursue both of those  
8 paths to their ends, the purely legal side of the argument  
9 and then the factual side, to the extent that they exist,  
10 to interrogate the facts underlying the First Circuit's  
11 viewpoint we think it's necessary to conclude discovery.  
12 Here's where I'm going to turn it over to Attorney  
13 Saraswat who can tell you more what has been done since  
14 we've last appeared before you and what we think remains  
15 to be done.

16 THE COURT: Okay. Thank you.

17 MR. SARASWAT: Thank you, Your Honor.

18 So with regard to discovery, as Your Honor ordered  
19 the plaintiffs served their requests for production and  
20 interrogatories on February 27th. We received responses  
21 from the defendants. You know, perhaps not surprisingly  
22 there has been some disagreements between the parties  
23 about the responses that we had a number of negotiations  
24 about and we're trying to work through them.

25 At a high level what I can tell Your Honor, and I'm

1 happy to go into details if you'd like, is that as Mr.  
2 Segal said what we're trying to sort of get at are the  
3 factual underpinnings of some of the things that the  
4 government's appellate counsel told the First Circuit and  
5 kind of led them to perhaps question the 48-hour rule. So  
6 what we're trying to get a sense of from the discovery is,  
7 you know, to the extent that the government thinks that 48  
8 hours isn't reasonable and maybe that some other time  
9 period might be reasonable, sort of what are the practical  
10 considerations that go into that?

11 We're also trying to get a better sense from that --  
12 a better sense of sort of some of the facts that go to the  
13 government's thinking about what the problems are with the  
14 remedial order. So to that end we've served discovery  
15 requests and we're trying to answer the question of sort  
16 of what are some of the internal policies and practices  
17 the government has? We're still in the process of  
18 negotiating with the government regarding sort of how this  
19 discovery will go.

20 My understanding from a recent conversation with Ms.  
21 Fabian, and maybe she can speak to this more, is that a  
22 sort of absolute worst case time frame for producing all  
23 the documents that we've requested will be roughly six  
24 months from now.

25 So I think if we were to have to go through that full

1 discovery process and get a full production of all the  
2 documents we would be requesting in order to answer the  
3 factual questions that we think are relevant to this case,  
4 then I think the schedule we'd be looking at is  
5 essentially a discovery cut off of roughly six months from  
6 now, and then in terms of the proceedings beyond the  
7 discovery cut off, you know, we would certainly handle  
8 that however Your Honor prefers.

9 Our thought was that we would basically have some  
10 sort of motion schedule that would start after the end of  
11 the discovery cut off period under which the two sides  
12 would basically present their arguments about, you know,  
13 some purely legal questions that are at issue in this case  
14 but also present their arguments regarding how the facts  
15 that we got in discovery sort of affect the ultimate legal  
16 questions that the First Circuit -- sort of affect the  
17 questions that the First Circuit asked Your Honor to  
18 reconsider in its remand which are sort of what is a  
19 reasonable time gap. Is it 48 hours or is it something  
20 else, and also what are the practical problems the  
21 government has encountered?

22 We think once we have all of those facts we can then,  
23 as Mr. Segal said, articulate a position on what a  
24 reasonable relief order might be with those facts once we  
25 have them. So I think if we were to give ourselves sort

1 of what we think right now is the kind of sort of worst  
2 case, you know, buffer time we need, for lack of a better  
3 term, I think the schedule would be discovery cut off  
4 roughly October 11th.

5 We haven't quite nailed down amongst ourselves  
6 whether it would be better to do some sort of cross motion  
7 proceeding or maybe have sequence motion, one side going  
8 first, but I think within roughly a month or so after the  
9 discovery cut off I think that we would anticipate the  
10 motion practice starting to resolve the ultimate issues.

11 THE COURT: Okay. Do you -- since you're the  
12 one who's got the crystal ball, I don't want to pass up  
13 the chance to ask you, have you looked at Jennings v.  
14 Rodriguez? We're waiting breathlessly to some extent for  
15 word from the Supreme Court on how that case is going to  
16 come out, and I have another case called Reid where the  
17 prospect of the Jennings -- is it Reid? Yes.

18 THE CLERK: Yes.

19 THE COURT: -- the decision might have a pretty  
20 direct impact.

21 I'm wondering whether the issues that the Supreme  
22 Court will be addressing in the Jennings case are likely  
23 to bear on things we are struggle with here.

24 MR. SARASWAT: Your Honor, we have looked at the  
25 Jennings case. I'm also actually counsel for the Reid

1 class so I looked at it, yeah.

2 You know, it's tough to predict exactly what the  
3 Supreme Court will do. I think our understanding of  
4 Jennings versus the issues that are at play in this case  
5 is that Jennings I don't think is likely to be dispositive  
6 of the issues in this case because of the different  
7 questions presented.

8 I mean Jennings is dealing with the same statute,  
9 1226(c), but the issue with regard to 1226(c) that  
10 Jennings is addressing is sort of on the other end of  
11 detention if you will. It's if somebody has been in  
12 detention without a bond hearing, is there a limit on how  
13 long they could be held in detention before they need a  
14 bond hearing?

15 Jennings doesn't address the issue that we're dealing  
16 with here which is, you know, does someone fall under the  
17 ambit of the mandatory detention rule of 1226(c) if  
18 they're not detained by ICE within a certain period after  
19 their release.

20 So, you know, I think we'll have to wait and see what  
21 the Supreme Court does in Jennings and it may be the case  
22 that it will be necessary for us to submit some sort of,  
23 you know, status report or supplemental brief to Your  
24 Honor after Jennings comes down, but right now my  
25 expectation is not that Jennings would resolve this

1 case.

2 THE COURT: One of the things that goes through  
3 my mind is that if Jennings were to hold -- which I don't  
4 think is beyond belief but it's certainly not certain --  
5 that indefinite detention of an individual is  
6 unconstitutional and at some point fairly early on a  
7 person is entitled at least to a bond hearing, one of the  
8 things that I keep coming around on is the issue here is  
9 not whether somebody should be released or not released.  
10 The issue is whether they will have a chance to make an  
11 argument for release and the immigration judge will make  
12 that decision.

13 So if the Supreme Court was to hold that everybody is  
14 entitled to a bond hearing after some reasonable period,  
15 then the somewhat horrific consequences of being detained  
16 after you've been imprisoned would be mooted because one  
17 of the things you were arguing was that it's unfair for  
18 somebody, particularly somebody who may have committed a  
19 relatively minor offense, to be detained indefinitely  
20 which is what the statute seems to say right now after  
21 they've been out and behaving well and being a law-abiding  
22 citizen sometimes for years.

23 If Jennings v. Rodriguez says that there's a  
24 constitutional right to a bond hearing, then people coming  
25 out of prison, just like anybody else, would have a right

1 to a bond hearing within some reasonable period of time  
2 and that takes an awful lot of the sting out of what your  
3 clients are facing right now.

4 Have I slide off the track with that analysis or what  
5 am I overlooking?

6 MR. SARASWAT: Your Honor, I don't think you've  
7 slid off the track in that some of the sting I think might  
8 be lessened but I don't think it's the case, and again  
9 we'll have to see what the Supreme Court says, I don't  
10 think it's the case that all of the sting would be  
11 lessened because one of the issues is that with Jennings  
12 at least as the way the class stands right now in the  
13 Ninth Circuit, if the Ninth Circuit's decision were to be  
14 upheld you get the bond hearing after six months.

15 THE COURT: Yes.

16 MR. SARASWAT: So some of that sting I think  
17 would go away but I think the issue is, and I'll let Mr.  
18 Segal speak more if he has anything to add, I mean, we are  
19 dealing with people who are dealing with I would say an  
20 extra layer of deprivation of liberty frankly.

21 So in Jennings we're dealing with people who have  
22 been in ICE custody for a certain amount of time and the  
23 question is after that amount of time do they get a bond  
24 hearing. In our case what you're dealing with, at least  
25 for some subset of the class, is people who would have



1 been out of jail potentially for quite a long time -- this  
2 is the case with many of our named plaintiffs -- who are  
3 then picked up and, you know, held potentially without a  
4 bond hearing.

5 So I think that even if Jennings were to affirm the  
6 Ninth Circuit's ruling that after six months of detention  
7 you get a bond hearing, I don't think that would  
8 necessarily eliminate the entitlement to relief that  
9 somebody might have under our theory if they had been out  
10 of custody for potentially a very long time before they  
11 were initially picked up by ICE. I think we would say  
12 that Jennings would still establish, you know, a floor on  
13 relief and there might be additional relief available to  
14 people who are out for a long time before being picked up.

15 THE COURT: One other question and then I'll  
16 hear from Ms. Fabian. This drifts over into the area of  
17 the super-heated political rhetoric which may or may not  
18 have any factual foundation, but you've got the Department  
19 of Justice taking initiatives to apprehend people and you  
20 have various communities declaring themselves sanctuary  
21 communities abstention over who will -- what sort of  
22 relationship some local authorities at least will have  
23 with the immigration officials.

24 Do you have any thoughts about how that's going to  
25 affect ultimately the sort of analysis that I may make

1 here? One of the instances where I think the First  
2 Circuit noted that the 48-hour rule might be really  
3 impractical is a situation where they just can't find  
4 somebody. They're released from custody and they vanished  
5 into the embrace of the sanctuary and I don't know if  
6 they're living in a tree house or whatever. In any event,  
7 they're hard to find. Maybe it's premature to speculate  
8 about that and maybe it's also distorted as a result of  
9 certain posturing that maybe different sides may be making  
10 right now. Any thoughts about that?

11 MR. SARASWAT: I think I'll let Mr. Segal speak  
12 to that point.

13 MR. SEGAL: Sorry to play whack a mole with you,  
14 but since we've crossed this bridge with Your Honor before  
15 --

16 THE COURT: You could have a seat, Mr. Saraswat.

17 MR. SARASWAT: Thank you, Your Honor.

18 MR. SEGAL: -- I can address that. I think Your  
19 Honor raises a fair question and I'll just make two points  
20 about it. One is this is why we think one -- although  
21 it's never an ideal situation to need a lot of time to  
22 come up with documents, is one of the reasons why we think  
23 it's important to brief these issues after there's been  
24 ample period to get the facts out on the table.

25 The government has said in some context, although not

1 in this case, that it matters whether a detainer is  
2 honored in the sense of somebody, a local or state  
3 official, taking custody of someone at the behest of the  
4 -- at the request of the federal government, but it may  
5 also be the case that what really matters is there's a  
6 notice and not the taking of in custody. Or it may turn  
7 out to be that it doesn't matter at all and that the  
8 government -- that the application 1226(c) really doesn't  
9 hinge in a serious way on the detainer issues so I think  
10 we will be in a better position, all of us, to decide that  
11 issue after discovery has concluded.

12 THE COURT: Okay.

13 MR. SEGAL: And second and related to that I  
14 think the same thing goes not only with respect to that  
15 issue but Your Honor's more recent question as it relates  
16 back to the Jennings question. Yes, it may be true that  
17 someone who is taken into mandatory custody under any  
18 circumstance after a long gap or not a long gap will have  
19 themselves a little bit less to worry about than they  
20 otherwise would if they knew for certain that they will  
21 get a bond hearing after six months. However, Your  
22 Honor's questions about the enforcement practices of the  
23 federal government raises other kinds of concerns that we  
24 have focused more on than the gap.

25 I think it's been mentioned in this case in the past

1 that people taken into custody and not given bond hearings  
2 immediately may face long-term detention, but I think that  
3 hasn't been the principal worst-case scenario that we have  
4 advanced in this court.

5 One of the more leading examples we've advanced is  
6 someone who's out living their life years or even decades  
7 after release from predicate custody and then being taken  
8 into immigration custody and the government's enforcement  
9 practices which Your Honor has just asked about bear  
10 directly on that kind of a scenario.

11 It may be that the case that over time the government  
12 will seek to pick up more or different kinds of people,  
13 and in addressing the First Circuit's question about what  
14 is a reasonable gap it may be helpful to understand who --  
15 you know, how often each type of gap exists.

16 Maybe some people, the vast majority of people, are  
17 taken into custody right away. Maybe over time, you know,  
18 some folks like Mr. Gordon may be in custody after a  
19 period of years. Maybe over time we will see enforcement  
20 practices changing that that population, the population  
21 where taken in custody after year-long gaps will increase  
22 and that would tend to make the concerns that we have  
23 relied upon in this case more accurate rather than less  
24 accurate notwithstanding whatever may happen in Jennings.

25 THE COURT: All right. So the focus of the

1 litigation I can imagine could perhaps be in a different  
2 direction, although I don't know what the legal basis for  
3 it, I can conceive of a situation post-Jennings where we  
4 have Mr. Smith or Ms. Jones a person who is here from  
5 another country who's an alien who several years ago got  
6 out of prison after serving a sentence and the immigration  
7 authorities could show up at their house and knock on the  
8 door and say we know you're living in this country.  
9 You've got three kids and we don't think you're going  
10 anywhere, but we want you to know we initiated a  
11 deportation proceeding against you and it's our intention  
12 to deport you.

13 We're not going to take you into custody. We don't  
14 think we need to. In fact, we think if we took you before  
15 an immigration judge, the immigration judge would probably  
16 let you out. Since we have to do that, why waste  
17 everybody's time. But be aware that if we get our way we  
18 think we've got a pretty good case. We think you've got a  
19 pretty lousy case for staying here, and we are going to  
20 send you back to the country from which you originated.  
21 That practice I take it would be off to the side. You may  
22 bring another lawsuit, but that practice is off to the  
23 side from what you're concerned about now.

24 Right now you're really focusing on somebody getting  
25 pulled over for speeding and getting snatched off the

1 street on their way to work and maybe not getting out for  
2 another six months. It's not as bad as five years but I  
3 wouldn't like it. I don't think very many people would.  
4 So have I got the two scenarios right?

5 MR. SEGAL: I think so although honestly what we  
6 are seeing from many class members is that it's not even  
7 speeding. It's sort of they're living their life.

8 THE COURT: Right.

9 MR. SEGAL: What I want to say stepping back  
10 from this is that again one of the virtues of what I think  
11 you'll hear from both parties today is that nobody  
12 anticipates that we're going to be ready right immediately  
13 to brief a next remedial order and for that very reason  
14 when that briefing happens I think the parties will have  
15 an opportunity to say if they think that Jennings disposes  
16 of the case one way or another or if some other factual  
17 developments bear on the answers to Your Honor's  
18 questions.

19 THE COURT: Okay.

20 So, Ms. Fabian, what I've got right now is a proposal  
21 that as a practical matter would have me giving you a date  
22 for completion of discovery. I don't know whether you are  
23 interested in reciprocal discovery, but the proposal from  
24 the plaintiff is a date for completion of discovery and  
25 then perhaps a status conference and a schedule for

1 briefing. Do you have a different proposal? If so, what  
2 is it and if not, what do you have to say?

3 MS. FABIAN: Your Honor, we've discussed this  
4 schedule right before the hearing today and we agree on  
5 that schedule. I agree with the sort of suggestion sort  
6 of the worst-case scenario in terms of plaintiffs  
7 propounded pretty extensive discovery. We're hoping that  
8 discussions will allow us to narrow that a little bit, but  
9 if we have to find and prepare and turn over everything  
10 that we're currently anticipating or start anticipating at  
11 the start, then the six months really is the outside time  
12 that that would take.

13 THE COURT: All right. So if I were to issue an  
14 order that said that the parties have until October 11th  
15 to complete discovery and I would like to see them back  
16 here for a status conference on October 18th and also said  
17 that if discovery was completed earlier than that the  
18 parties could ask for an earlier status conference, would  
19 that be satisfactory to the government?

20 MS. FABIAN: It would, Your Honor.

21 THE COURT: And in the meantime the interim  
22 order which I issued back on somewhere around February  
23 8th, that's when the motion for the interim order was  
24 filed, I might have actually issued the order on the 10th  
25 or something like that, that interim order would still

1 govern what's happening from your point of view?

2 MS. FABIAN: We agree to that, Your Honor.

3 THE COURT: All right. So that's what I'm  
4 going to do. Let me -- go ahead.

5 MS. FABIAN: I'd like to add a couple more  
6 points.

7 THE COURT: Please do.

8 MS. FABIAN: I wanted to say on the 1252(f)(1)  
9 issue I just would say on that Attorney Segal and I do  
10 disagree. Our position on 1252 -- I would agree that it's  
11 been fully briefed. We do agree on that. What I would  
12 say is I think our position is that what we've argued is  
13 that 1252(f)(1) would preclude the court from entering a  
14 remedial order that dictated how the government was to  
15 apply the reasonableness standard.

16 If the court were to agree with that, that might  
17 guide or agree in some sense -- or it's possible that the  
18 court's ruling on that issue would guide the parties  
19 certainly in discovery and in their ultimate briefing on  
20 the remedial issue. So if the court agreed with that or  
21 believed that any ruling on that or took a look at the  
22 issue and believed that any ruling on that would guide the  
23 parties, I think the government would suggest that it  
24 would be helpful to have that ruling sooner rather than  
25 later.



1           THE COURT:  If you hit a home run on your 1252  
2 argument, wouldn't that basically erase my interim order  
3 because I would be finding I didn't have the power to  
4 issue the interim order?  In other words, don't things  
5 come to a complete stop if you win on the 1252 issue?  
6 Maybe I'm over anticipating it.

7           MS. FABIAN:  I think if I hit a home run on that  
8 issue, I think that I would anticipate the court would  
9 issue an order saying essentially that reasonableness  
10 might be the standard and there may be further briefing to  
11 be had on that.

12           Whether plaintiffs would assert that actually  
13 reasonableness means 48 hours or it means something else,  
14 whether there was a bright line test that could still  
15 apply, but I think there is a possibility that if the  
16 court agreed with the government that the reasonableness  
17 standard set out by the First Circuit is what applies is  
18 the remedy in this case but that the court doesn't have  
19 the authority to lay out factors that would apply to  
20 reasonableness, then it certainly would I think state the  
21 need or obviate the need for the discovery and a  
22 substantial portion of what we're anticipating doing over  
23 the next six months.

24           THE COURT:  So what you're looking for from me  
25 on the 1252 issue would be one of a couple of things.  One

1 is I could say, okay, I've looked at the 1252 issue and I  
2 agree with you. Everybody's got to come back and tell me  
3 what we should do now.

4 Two, I've looked at the 1252 issue and I don't agree  
5 with you. I think the plaintiffs have the stronger  
6 argument and you gnash your teeth and on you go for the  
7 next six months. Or I say I've looked at it and I'd much  
8 prefer to deal with the 1252 issue at the same time that  
9 I'm dealing with the broader issue of what the remedy  
10 should be here and I'm not going to address the 1252  
11 issue. That would be disappointing to you, not as  
12 disappointing as an actual adverse ruling, but  
13 disappointing to you at least you know where you were and  
14 we could hold off. So I've got to pick one of those  
15 things.

16 MS. FABIAN: I think that's right, Your Honor.

17 THE COURT: All right. Anything else?

18 MS. FABIAN: I don't know if you're interested  
19 in hearing from the government on either the Rodriguez  
20 issue or any of the sort of political issues.

21 THE COURT: Yes, I'd love that. I would be  
22 happy to hear that.

23 MS. FABIAN: And I raise this because I think  
24 you asked me the same question the last time as far as  
25 would a decision in Rodriguez -- well, I'm not sure if it

1 was before the Supreme Court yet. I said before and I'll  
2 say this time I would love to say that that would resolve  
3 the case. I do, however, believe that -- I'm not sure I  
4 would say I've lost step with the arguments being made,  
5 but I do agree that it's a different issue that's being  
6 raised so there is a possibility that the Supreme Court's  
7 decision may weigh in some measure on what we're doing  
8 here with this case, but I don't anticipate that that  
9 would resolve the issue. Although I think it's an issue  
10 of statutory interpretation versus the constitutionality  
11 of the detention once someone is in 1226(c) detention  
12 which I think are necessarily separate questions.

13 THE COURT: That should be interesting. Of  
14 course, we may end up with a Jennings decision which has a  
15 three-person majority written by Justice Kennedy with two  
16 separate concurrences on entirely different grounds and a  
17 powerful dissent by another justice and one justice that  
18 agrees on parts 1, 4, and 7 but disagrees as to 2, et  
19 cetera, et cetera. So we'll have to see what comes out of  
20 Jennings and we will have to wait.

21 But I do want to say if I adopt this schedule and  
22 Jennings comes down and either one of you thinks that it  
23 has very significant bearing on the issues that we are  
24 trying to address here, you can request a status  
25 conference and we'll come in and talk about it.

1           So what do you make of all the excursions and alarms  
2 on the issue of detaining immigrants and executive orders  
3 and sanctuary cities and everybody getting into everybody  
4 else's face? What is that?

5           MS. FABIAN: I think for today I'll keep my  
6 thoughts on that narrow on --

7           THE COURT: Fair enough.

8           MS. FABIAN: -- the issue.

9           I think that it's absolutely accurate to say that a  
10 lot of these issues are going to bear on the idea of a  
11 remedy in this case. I don't think it's -- whether the  
12 practices will change certainly remains to be seen. I get  
13 some of my information from the news just like everyone  
14 else. There's certainly a wide variety of things that  
15 could happen and will happen.

16           I think the issues though underlying the matter here  
17 is the same we've argued in briefing already that where  
18 jurisdictions are not going to let ICE know that they have  
19 someone in their custody, that that's going to effect  
20 ICE's ability to meet the 48-hour rule and more recently  
21 we suggested that notice is going to be the primary issue  
22 as to if we have notice, we can 99 percent of the time  
23 meet the 48-hour rule. Where if we don't have notice,  
24 that is when a number of other factors are going to come  
25 into the play.

1           So I think as a basic matter whether notice is  
2 available and whether ICE's practices where they don't get  
3 notice may change, it's certainly something that remains  
4 to be seen and will be a matter that I think is discussed  
5 in discovery but I think the underlying issue is the same,  
6 it's what are the factors that cause ICE to be able to  
7 identify an individual who is removable on these criminal  
8 grounds and to pick up that individual immediately upon  
9 the conclusion of their criminal sentence.

10           So I guess I would agree that those factors are sort  
11 of at the forefront of things today and may come into play  
12 over the next few months of discovery, but I don't think  
13 that it changes the issues that we've been looking at  
14 from the beginning of this case.

15           THE COURT: I think that's certainly been in the  
16 background and was actually in the foreground even with  
17 the First Circuit. The issue is certainly from the  
18 defendants' point of view and the defendants have been  
19 very clear about this is problems with identification and  
20 notice and so on and I think that's something the  
21 plaintiffs are trying to explore through discovery and  
22 we'll be able to ventilate that more intelligently when I  
23 see you in October.

24           So what I'm going to do is I'm going to -- go ahead,  
25 please.

1 MS. FABIAN: I'm sorry, Your Honor.

2 THE COURT: No, no.

3 MS. FABIAN: I had one other issue that my  
4 clients asked me to raised and I thought while I was here,  
5 I've discussed it with opposing counsel. The court issued  
6 an order in the Reid case recently in which the court  
7 suggested that immigration judges sitting in Hartford who  
8 are under the Lora decision could apply the Lora decision  
9 to individuals appearing in the Hartford courts --

10 THE COURT: Correct.

11 MS. FABIAN: -- for purposes of providing a bond  
12 hearing.

13 THE COURT: Yes.

14 MS. FABIAN: That's created some confusion  
15 because the Lora decision also addresses the issues that  
16 are in our case in Gordon and came out obviously  
17 differently from this court in that context. And so the  
18 challenges for immigration judges sitting in Hartford if  
19 they're told they can apply Lora, one possibility is for  
20 them to then read that to say they can also apply it for  
21 the Gordon issues. That's not something that we've --  
22 that our client is moving forward or pushing at this point  
23 as their position, but it's definitely something that I  
24 think creates a little bit of inconsistency and it would  
25 be helpful to have some guidance from this court as to

1 whether that's something that permissible for the  
2 immigration judges to do.

3 I know that -- and I don't know if they want to speak  
4 to it now. If that's something that the court would like  
5 us to submit briefing on or if that's something the court  
6 could clarify on its own, we would ask for that because it  
7 does create an inconsistency that we don't want to resolve  
8 on our own.

9 THE COURT: So let me back up on that because  
10 right now I'm a little confused, but I think you can  
11 probably help me understand the issue more clearly.

12 The difference between my Reid order and the Lora  
13 order in that context if I recall correctly is two things,  
14 and I don't see how either of them actually work into the  
15 Gordon issues. The first is that the Lora court said that  
16 an immigration detainee is entitled to a bond hearing  
17 prior to six months. That you get your hearing prior to  
18 six months and then I said in mine that at the six-month  
19 deadline that's when you become entitled to your bond  
20 hearing so there's a little difference there.

21 The second thing I said was that the -- sorry, the  
22 Second Circuit seems to say in Lora was the burden of  
23 proof is on the government in the bond hearing to show  
24 that the particular detainee cannot be trusted if he's or  
25 she's released and I did not put that burden on the

1 government in the Reid case.

2           So what I said in Reid, what I said was two things:  
3 One was I said, gosh, if you're an immigration judge --  
4 and I really didn't say, gosh, in this kind of slightly  
5 dumb way. I said, you're an immigration judge. You're in  
6 Connecticut. You're in the Second Circuit. Do what the  
7 Second Circuit tells you to do. That's the first thing I  
8 said.

9           The second thing I said was there's nothing  
10 inconsistent with Reid in the Lora decision. Lora is just  
11 more generous to a detainee than the Reid decision is. I  
12 actually think I like the Reid decision and I'll be happy  
13 to happy if Lora carries the day, that's fine. But I'm  
14 not offended if people who are detained are getting  
15 additional rights beyond what I'm giving them.

16           If they're getting their bond hearings at five months  
17 and two weeks and they're putting the burden on the  
18 government to prove that they need to be detained, then  
19 I'm perfectly happy and there's nothing that transgresses  
20 the Reid decision if they're doing that.

21           So how does that -- is there something else that the  
22 Second Circuit said in the Lora decision that's different  
23 from what I'm saying here that's creating a headache for  
24 the immigration judges down in Hartford?

25           MS. FABIAN: I can't speak to whether anything



1 is creating a headache for them other than the potential  
2 inconsistency. The Lora decision found, first and  
3 foremost, for our purposes, and in fact I think it's the  
4 primary finding of the Lora decision, is that a gap in  
5 custody -- an individual with a gap in custody would still  
6 fall under 1226(c) at the outset and so that court did  
7 reach the issue that is sort of the underlying issue here  
8 which is, does a gap in custody take you outside the world  
9 of 1226(c)?

10 And so an individual who is 1226 -- that is then what  
11 led to the findings that were relevant to Your Honor in  
12 Reid which is then because you are then detained under  
13 1226(c) under Lora, then it is how long after that would  
14 you be entitled to a bond hearing. So it is the sort of  
15 fundamental question if in Lora first and foremost is the  
16 robust issue that we address here and that it came out  
17 differently in Lora.

18 I think the way Your Honor explained it is in this  
19 case Lora is inconsistent, unlike your finding in Reid.  
20 Here Lora is inconsistent with what this court has ordered  
21 in Gordon, but it does sort of create the challenge of an  
22 immigration judge being told you can go ahead and apply  
23 the Lora ruling in one context but not the other. And so  
24 the question is, is there a clarification from this court  
25 that could be used to answer that inconsistency for the

1 immigration judges?

2 THE COURT: Okay. So the discussion that we've  
3 had up to now convinces me that I'm going to have to be  
4 briefed on this. I don't want to do it on the fly. I  
5 don't have Lora memorized as I sit here right now.

6 So I think that one way to push this issue to the  
7 surface would be for the government to file a motion for  
8 clarification with memorandum spelling out exactly what  
9 you'd like me to do to make things clearer for the  
10 immigration judges.

11 I guess the plaintiffs here would be able to respond  
12 and oppose. I'm not sure whether these are your clients  
13 down there or exactly how that would work. These are  
14 people who are detained in Massachusetts but are having  
15 their hearings down in Hartford so I guess they are your  
16 clients and you would be in a position to respond. Is  
17 that right?

18 MR. SARASWAT: Yes, Your Honor. I mean, we  
19 would definitely want the opportunity to respond and  
20 oppose whatever the government files. I think we would --  
21 I think we would disagree that there is an inconsistency  
22 that creates a problem for our case.

23 Ms. Fabian is correct that on the gap issue Lora came  
24 out the other way, but the issue that Your Honor addressed  
25 in Reid with respect to how the Lora decision affects Reid

1 was do the additional procedural protections -- that's  
2 kind of how we think about it -- do the procedural  
3 protections granted by Lora, specifically shifting the  
4 burden onto the government for bond hearings, apply to  
5 Reid class members who have their immigration proceedings  
6 in the immigration courts in Connecticut? Your Honor said  
7 that, as you just said now, Lora provides additional  
8 protections and there's no reason why an immigration judge  
9 overseeing a Reid class member's case in Connecticut can't  
10 apply those extra protections.

11 THE COURT: Correct.

12 MR. SARASWAT: So I think that because of the  
13 way the Lora issue was presented to Your Honor in Reid,  
14 our position I think would be that the inconsistency that  
15 exists between Gordon and Lora on the gap issue doesn't  
16 really create a problem for how immigration judges in  
17 Connecticut apply Lora to Reid.

18 We don't think that inconsistency would be -- to the  
19 extent that inconsistency exists, we don't think that  
20 creates any problem in this case but again we would  
21 certainly want to see whatever the government says and  
22 respond.

23 THE COURT: I may be being thick headed and this  
24 may have already been spelled out to me and it just didn't  
25 take.

1           Could you articulate for me what the inconsistency is  
2 between the Gordon decision and the Lora decision on the  
3 gap issue? What position did the Lora court take that I  
4 haven't taken in Gordon, or what position am I taking in  
5 Gordon that the Lora court didn't take? Where are we?

6           MR. SARASWAT: My understanding at a high level  
7 and I don't remember the precise details is that Lora  
8 basically said that a gap between someone's release from  
9 predicate custody and their arrest by ICE doesn't create  
10 an entitlement to a bond hearing.

11           I apologize I don't remember if they sort of sliced  
12 that up into time periods, but my general understanding is  
13 what Lora said was prolonged detention, similar to what  
14 Your Honor dealt with in Reid, creates the entitlement to  
15 a bond hearing. A gap between release from predicate  
16 custody and arrest by ICE does not create entitlement.

17           So in that sense there is an inconsistency because  
18 Your Honor said here in Gordon that the gap does create  
19 entitlement. The Second Circuit said in Lora that it  
20 doesn't. But as I said, Your Honor, because of the  
21 specific issue that was presented to Your Honor in Lora --  
22 sorry, in Reid with regard to how Lora applies to Reid  
23 class members, our position would be that that  
24 inconsistency doesn't, you know, doesn't eliminate any  
25 rights that Gordon class members would have if their

1 immigration cases happen to be down in Connecticut because  
2 the way Your Honor applied Lora in Reid was just dealing  
3 with the question of procedural protections that apply to  
4 Reid class members who have cases in Connecticut.

5 THE COURT: So let me spell this out a little  
6 bit more. It's so interesting and I have the chance to  
7 educate myself.

8 Hypothetically, even in my case in Gordon, if there  
9 was only Gordon and there was no Reid and the immigration  
10 officials picked somebody up within 48-hour of release of  
11 their custody, they would go in indefinite detention  
12 because there's no Reid and there's no case.

13 Just the statute says that if you've committed a crime  
14 and you get picked up upon release, you're detained  
15 indefinitely, and the government has argued that Congress  
16 had the right to make that decision to single out a  
17 particular group of people for indefinite detention prior  
18 to deportation. So if there was no Reid and there was  
19 only Gordon, the 48 hours and they were picked up within  
20 48 hours, they could be indefinitely detained.

21 Now right now due to Reid they would be entitled to a  
22 bond hearing within a period of time and so that's okay,  
23 or maybe not okay but that's where we are right now. But  
24 the Second Circuit from what you're telling me has said  
25 that if somebody is released from custody and a year goes

1 by, the gap thing doesn't give anybody any further rights.  
2 They kick into the 1226(c), but from the Second Circuit's  
3 point of view they have a right to a bond hearing anyway  
4 because everybody has a right to a bond hearing. So the  
5 problem of a bond hearing is eliminated and whether or not  
6 there's a gap or there isn't a gap doesn't make any  
7 difference. Is that the way that you recall Lora being  
8 decided?

9 MR. SARASWAT: I think there's a little bit more  
10 complexity there in that what Lora was saying was that you  
11 get a -- that you have to get a bond hearing before the  
12 six-month mark. It's not quite that under Lora everybody  
13 gets a bond hearing. It's that under Lora everybody who  
14 reaches a certain period of prolonged detention gets a  
15 bond hearing, if that answers Your Honor's question.

16 THE COURT: I think that more or less was my  
17 question. I think all of this makes it clear to me that I  
18 need you to spell it out in writing.

19 Do you have anything that you wanted to add, Ms.  
20 Fabian, to this discussion?

21 MS. FABIAN: No, Your Honor. I think that I  
22 generally agree with the characterizations.

23 THE COURT: All right. So how long would you  
24 like to move for clarification with regard to the  
25 relationship between Lora and Gordon? You tell me what

1 works for you and you can have it.

2 MS. FABIAN: Two weeks would be great, Your  
3 Honor.

4 THE COURT: So today is April 11th I think, so  
5 April 25th. And then how long would you like to respond?

6 MR. SARASWAT: I think we'd be happy with two  
7 weeks.

8 THE COURT: So whatever two weeks is, two weeks  
9 for the plaintiff to respond, and then I will either reel  
10 you back in here for oral argument or I will make a  
11 decision based upon the papers and give you the  
12 clarification that way. I honestly don't know which route  
13 I will go. There we are then.

14 I'm going to put this scheduling order in writing  
15 here. I'm going to fold in a reference to the 1252 issue  
16 and give you the dates for discovery and a date for the  
17 next status conference and put it all in a scheduling  
18 order. Hopefully it will be a page or a page and a half  
19 and you can put it under your blotter and you know where  
20 we're going. All right.

21 If there's nothing further, I'll be in recess. All  
22 right. Thank you very much.

23 MS. FABIAN: Thank you.

24 MR. SARASWAT: Thank you, Your Honor.

25 **(Court recessed at 3:05.)**

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C E R T I F I C A T E

I, Alice Moran, RMR, RPR, CSR, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing transcript constitutes, to the best of my skill and ability, a true and accurate transcription of my stenotype notes taken in the above-entitled matter.

Date: May 1, 2017

/s/ Alice Moran

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