



-----  
 )  
 MANUEL JESUS PINGUIL LOJA, )  
 )  
 ) Petitioner, ) Civil Action  
 ) ) No. 18-10579-MLW  
 vs. )  
 )  
 )  
 STEVEN SOUZA, Superintendent of )  
 )  
 ) Bristol County Jail and House of )  
 )  
 ) Corrections, THOMAS M. HODGSON, )  
 )  
 ) Sheriff of Bristol County, )  
 ) Respondents. )  
 -----

BEFORE THE HONORABLE MARK L. WOLF  
 UNITED STATES DISTRICT JUDGE

STATUS CONFERENCE

May 1, 2018  
 10:27 a.m.

John J. Moakley United States Courthouse  
 Courtroom No. 10  
 One Courthouse Way  
 Boston, Massachusetts 02210

Kelly Mortellite, RMR, CRR  
 Official Court Reporter  
 John J. Moakley United States Courthouse  
 One Courthouse Way, Room 5200  
 Boston, Massachusetts 02210  
 mortellite@gmail.com

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

APPEARANCES:

Counsel on behalf of Petitioners Calderon and Pinguil:  
Adriana Lafaille  
Matthew Segal  
American Civil Liberties Union  
211 Congress Street  
Boston, MA 02110  
617-482-3170  
alafaille@aclum.org  
msegal@aclum.org

Counsel on behalf of Petitioner Calderon:  
Jonathan A. Cox  
Stephen Nicholas Provazza  
Wilmer Hale LLP  
60 State Street  
Boston, MA 02109  
617-526-6212  
stephen.provazza@wilmerhale.com  
jonathan.cox@wilmerhale.com

Counsel on behalf of Petitioners Junqueira and Dos Santos:  
Todd C. Pomerleau  
Rubin Pomerleau PC  
One Center Plaza  
Suite 230  
Boston, MA 02108  
617-367-0077  
tcp@rubinpom.com

Counsel on behalf of Petitioner Pinguil:  
Julio Cortes del Olmo  
Del Olmo Law  
251 Harvard Street  
Brookline, MA 02446  
617-391-0110  
julio@delolmolaw.com

(continued on next page)

1 APPEARANCES: (Cont.)

2 Counsel on behalf of Respondents:

3 Eve A. Piemonte

4 Michael P. Sady

5 Thomas E. Kanwit

6 United States Attorney's Office

7 Suite 9200

8 1 Courthouse Way

9 John Joseph Moakley Federal Courthouse

10 Boston, MA 02210

11 617-748-3271

12 eve.piemonte@usdoj.gov

13 michael.sady@usdoj.gov

14 thomas.kanwit@usdoj.gov

15 Mary Larakers

16 U.S. Department of Justice, Office of Immigration Litigation

17 District Court Section

18 P.O. Box 868

19 Washington, DC 20044

20 202-353-4419

21 mary.larakers@usdoj.gov

22

23

24

25

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

1  
2 (The following proceedings were held in open court  
3 before the Honorable Mark L. Wolf, United States  
4 District Judge, United States District Court, District of  
5 Massachusetts, at the John J. Moakley United States Courthouse,  
6 One Courthouse Way, Courtroom 10, Boston, Massachusetts, on May  
7 1, 2018.)

8 THE COURT: Good afternoon -- good morning. I  
9 apologize for the delay in starting. I'm trying to get  
10 organized to assure that we proceed in a fair and efficient  
11 manner. Would counsel in Calderon please identify themselves  
12 for the record.

13 MS. PIEMONTE: Good morning, Your Honor. Sorry. Go  
14 ahead.

15 MS. LAFAILLE: Good morning, Your Honor. Adriana  
16 Lafaille.

17 MR. SEGAL: Good morning, Your Honor. Matthew Segal.  
18 I have to also issue an apology. Depending on the --

19 THE COURT: I'm sorry, I'm having trouble hearing you.

20 MR. SEGAL: Sorry, Your Honor. I need to apologize in  
21 advance. Depending on the length of this hearing, I may need  
22 to leave to attend to a family medical situation, but I will  
23 stay as long as I can. Good morning.

24 THE COURT: Okay.

25 MR. COX: Jonathan Cox and Stephen Provazza of Wilmer

1 Hale on behalf of Calderon petitioners. Kevin Prussia, also of  
2 Wilmer Hale on behalf of the Calderon, conveys his apologies  
3 for not being able to attend in person.

4 THE COURT: Okay.

5 MS. LARAKERS: Good morning, Your Honor. Mary  
6 Larakers on behalf of the United States.

7 MS. PIEMONTE: Good morning, Your Honor. Eve Piemonte  
8 on behalf of the United States.

9 THE COURT: All right. And counsel in Junqueira,  
10 please.

11 MR. POMERLEAU: Good morning as well, Your Honor.  
12 Todd Pomerleau on behalf of Junqueira.

13 MS. LARAKERS: Mary Larakers on behalf of the United  
14 States.

15 MR. SADY: Michael Sady, Your Honor, on behalf of the  
16 United States.

17 THE COURT: All right. And Dos Santos?

18 MR. POMERLEAU: Good morning again, Your Honor. Todd  
19 Pomerleau on behalf of Mr. Dos Santos.

20 THE COURT: Still?

21 MR. POMERLEAU: Yes, still me. Thank you.

22 MR. SADY: Your Honor, Michael Sady.

23 THE COURT: And Pinguil?

24 MR. CORTES: Good morning, Your Honor. Julio Cortes  
25 del Olmo Torres on behalf of Mr. Pinguil.

1 MS. LAFAILLE: Good morning. Adriana Lafaille also on  
2 behalf of Mr. Pinguil.

3 MR. SEGAL: Good morning again, Your Honor. Matthew  
4 Segal also on behalf of Mr. Pinguil.

5 MR. KANWIT: Good morning, Your Honor. Thomas Kanwit  
6 on behalf of the respondents Steven Souza and Thomas Hodgson.

7 THE COURT: Thank you. As a threshold matter,  
8 pursuant to orders that I issued the parties have stated --  
9 well, let me take a step back.

10 As I've informed you in prior orders, Ms. Lafaille and  
11 Mr. Cox are among my legions of law clerks over the last 33  
12 years. And neither has worked for me for more than two years.  
13 So under my practices, they're permitted to appear before me,  
14 and the parties in response to the orders I issued agree that a  
15 reasonable person would not question my impartiality because  
16 each of them served as my law clerk. Therefore, my  
17 disqualification is not required under 28 United States Code,  
18 section 455(a). And in any event, the parties have waived any  
19 such ground for disqualification under section 455(e).

20 However, do I understand that correctly?

21 MS. LARAKERS: Yes, Your Honor.

22 MR. KANWIT: Yes, Your Honor.

23 MR. COX: Yes, Your Honor.

24 MS. LAFAILLE: Yes, Your Honor.

25 THE COURT: Okay. All right. Then just to put this

1 in context, each of the three cases -- each of the four cases,  
2 except for Pinguil, was assigned to me under Local Rule 40.1(g)  
3 as related to a civil case I had about one year ago, Arriaga  
4 Gil. They were properly characterized as related because at  
5 least one of the parties, essentially the respondent for the  
6 Department of Homeland Security, is the same and the cases  
7 involve one of the same or similar issue: That is, whether  
8 ICE, Immigration and Custom Enforcement, is required to give an  
9 alien previously ordered deported who was not detained and did  
10 not depart the United States in the 90-day removal period a  
11 bail hearing in effect under 8 CFR section 241.1.

12 Pinguil was randomly drawn to me and presents  
13 different issues regarding detention. I had been assigned  
14 another related case, De Oliveira, and I would say commendably  
15 the parties conferred and settled, and that case has been  
16 dismissed.

17 One other matter, when each of these cases was  
18 assigned to me, I issued an order directing that the  
19 petitioners not be transferred out of Massachusetts during the  
20 pendency of his or her case to assure that I had continued  
21 jurisdiction to decide the habeas petition. I said in the  
22 order that I could be asked to reconsider that direction.

23 In Calderon, the defendants have responded and since  
24 stated that ICE has been ordered not to remove the named alien  
25 petitioners from Massachusetts or the United States as long as



1 my order remains in effect. That's in docket number 38 in the  
2 Calderon case. Do I understand that correctly, though, with  
3 regard to the respondents?

4 MS. LARAKERS: Yes, Your Honor.

5 THE COURT: And has ICE received the same or similar  
6 direction with regard to the other petitioners?

7 MS. LARAKERS: I'm not sure, Your Honor. I only know  
8 in Calderon because we were talking with opposing counsel about  
9 it.

10 THE COURT: Okay. But basically, if there's a -- just  
11 to be very careful and clear, as long as my order remains in  
12 effect, they can't be moved out of Massachusetts. And if you  
13 move for reconsideration of that order, we'll set up some  
14 appropriate, deliberate schedule to reconsider it.

15 MS. LARAKERS: Yes, Your Honor. And I do know when  
16 the stay is issued, it is entered into the system that they  
17 shouldn't be moved out of Massachusetts; I do know that much.  
18 I just hadn't independently conferred with ICE if that's what  
19 has happened, but I will let them know.

20 THE COURT: And I think there had been earlier an  
21 undertaking by ICE not to detain Calderon again at least until  
22 May 12. Does this undertaking not to move her relate to that,  
23 or is May 12 still a possible date for her being put in  
24 detention again?

25 MS. LARAKERS: It's possible that she could be

1 re-detained on May 12. However, pursuant to the order, she  
2 won't be moved from Massachusetts. And we have told the  
3 petitioners to apply for an additional stay of removal, which  
4 ICE will adjudicate prior to May 12.

5 MS. LAFAILLE: So that has actually happened, Your  
6 Honor. She has applied for an extension of that stay, and it's  
7 been granted to August 18.

8 THE COURT: Okay. All right. And that, too, I'm  
9 particularly happy to hear. Part of the reason for today's  
10 hearing is I've got now four cases, and they raise a number of  
11 challenging, important issues. And I'd like to decide them, to  
12 the maximum extent possible, on a priority basis but  
13 particularly on a well-informed basis. And as we'll get to  
14 eventually, some of the issues aren't fully briefed yet.

15 All right. Let me clarify that again, though. So  
16 there's an extended stay of removal until a date -- August 18;  
17 is that right?

18 MS. LAFAILLE: Yes, Your Honor.

19 THE COURT: And is there any specific undertaking not  
20 to detain her again?

21 MS. LAFAILLE: Not to my knowledge. Of course we  
22 would certainly argue any detention, when someone has a stay of  
23 removal, it's not only not customary but also contrary to the  
24 due process clause certainly.

25 THE COURT: Okay.

1 MS. LARAKERS: ICE has indicated to me that they do  
2 not detain petitioners when they have stays of removal.

3 THE COURT: Okay. All right. Then before we get to  
4 setting the agenda and in identifying the overlapping and  
5 distinct legal issues, I think it would be helpful if I receive  
6 from you a brief overview of each of the four cases. I've  
7 tried to sort that out myself, but I also think it's important  
8 that none of these cases which have such profound human  
9 implications get lost in technicality.

10 So why don't we start with Calderon. Please remind me  
11 what this one is about and what the primary legal issues are,  
12 and then I'm very anxious to hear the same from the government.

13 MS. LAFAILLE: Certainly, Your Honor. So Calderon, as  
14 Your Honor knows, began as a petition for writ of habeas corpus  
15 filed on February 5 on behalf of a single petitioner, Lilian  
16 Calderon, who had been detained at the office of USCIS in  
17 Johnston, Rhode Island when she and her husband appeared for  
18 her I-130, essentially her marriage interview, as part of the  
19 process of seeking lawful status in the United States.

20 The government released Ms. Calderon from detention on  
21 February 13, and we have since amended the case into a class  
22 action lawsuit filed on behalf of ten petitioners now who are  
23 comprised of five U.S. citizens and five non-citizen spouses,  
24 all of whom have final orders of removal and are pursuing a  
25 path for lawful status that is set out in what we've described

1 in the complaint as the 2016 provisional waiver regulations,  
2 which essentially create a path for someone to remain in the  
3 United States while pursuing most of the process of seeking  
4 lawful status through their U.S. citizen spouse.

5 There are essentially two buckets of legal claims that  
6 arise in Calderon. The first bucket is claims relating to the  
7 argument that by detaining and removing people who are seeking  
8 lawful status through a process prescribed by these  
9 regulations, ICE is violating these regulations, and in doing  
10 that is also violating the Administrative Procedure Act and  
11 violating the due process interest that has been created by  
12 the -- that these noncitizen petitioners and their citizen  
13 spouses have in this process.

14 THE COURT: And one of the ten named plaintiffs, am I  
15 correct, is Lucimar De Souza?

16 MS. LAFAILLE: Yes.

17 THE COURT: And Ms. De Souza is detained now?

18 MS. LAFAILLE: Yes.

19 THE COURT: So her case is the one that most neatly  
20 presents the issue you're discussing?

21 MS. LAFAILLE: Well, I think all of them neatly  
22 present the issue, Your Honor, in that all of them are  
23 threatened with removal, in some cases very directly. All of  
24 them are in this pipeline at different stages.

25 THE COURT: Well, if we get to it, when we get to it,

1 one of the questions I'll have is whether -- I think I'll  
2 need -- I think there's going to be a question of whether all  
3 ten of them have standing or all five of the aliens have  
4 standing, whether the threat to them is sufficiently actual and  
5 imminent to give them standing on the detention issues. But  
6 anyway, keep going.

7 MS. LAFAILLE: Sure. So just to finish describing the  
8 legal issues, Your Honor, I would say that the first bucket are  
9 claims relating to essentially the interference with this  
10 process created by the 2016 provisional waiver regulations.

11 The second bucket are arguments that, even beyond its  
12 violation of the 2016 regulations, the detention of Ms. De  
13 Souza and any class members who are detained without any  
14 procedural protections violates the due process clause and the  
15 governing statutory and regulatory provisions.

16 THE COURT: Well, Calderon challenges detention,  
17 including Ms. De Souza's detention, right?

18 MS. LAFAILLE: Yes.

19 THE COURT: Does it also challenge the authority of  
20 the government to remove, let's say De Souza, or any of them?

21 MS. LAFAILLE: Yes, Your Honor, it does.

22 THE COURT: Which bucket does that fit in?

23 MS. LAFAILLE: So the first bucket that I've described  
24 is that both the detention and removal of any of these named  
25 petitioners violates the regulations because the purpose of

1 these regulations, Your Honor, was to ensure that families  
2 would stay together while seeking lawful status.

3 THE COURT: Instead of having to leave the United  
4 States to seek a provisional waiver, they could stay  
5 essentially until it was approved, and then they would leave  
6 for a short period of time, go to a consular office in their  
7 home country and come back perhaps in a couple of weeks.

8 MS. LAFAILLE: Right, exactly. As the supporting  
9 materials attached to our preliminary injunction memo describe,  
10 that process for someone detained and removed at an I-130  
11 interview would take about two years of seeking what would --  
12 at that point they wouldn't be provisional waivers. They would  
13 be the actual waivers themselves.

14 The 2016 regulations created a provisional -- well,  
15 the 2013 regulations created the process, and then the 2016  
16 regulations made available to the petitioners in this case a  
17 provisional waiver process which allowed families to stay  
18 together while pursuing lawful status in the United States.

19 And so the arguments there are that both when it  
20 separates families by detaining someone and when it separates  
21 families by removing someone in the middle of that process, the  
22 government violates those regulations, and in doing so it also  
23 violates the APA and the due process clause.

24 THE COURT: It violates the APA how?

25 MS. LAFAILLE: It violates the APA in two ways, Your

1 Honor. One, because this is an action that is so arbitrary and  
2 capricious, having created this process and then cutting off  
3 access to it for no good reason; and second, because  
4 effectively the government has attempted to wipe out its  
5 regulations without going through the notice and comment  
6 period.

7 THE COURT: Okay. And what are Ms. De Souza's  
8 personal circumstances? Where was she arrested? What does her  
9 family consist of?

10 MS. LAFAILLE: So she was arrested on January 30 at  
11 her I-130 interview. Her family consists of her husband and  
12 their ten-year-old son who has now been without his mom for  
13 three months. And in the show cause materials that the  
14 government has submitted, it's clear that the government does  
15 not view or has presented nothing to indicate that Ms. De Souza  
16 would pose any danger to the community. She has no criminal  
17 record whatsoever. And the government's process for detaining  
18 her was essentially running an algorithm that labeled her as a  
19 flight risk because of the fact that she had an order of  
20 removal and without regard for the fact that she was following  
21 a process to address that order of removal and seek lawful  
22 status and voluntarily appeared at a USCIS office.

23 THE COURT: All right. What should I know from the  
24 government's perspective about Ms. Calderon's case, or the  
25 Calderon cases? There's more than one at the moment.

1 MS. LARAKERS: The government's position is that the  
2 crux of what petitioners request here is a stay of removal, an  
3 injunction from being removed from the United States. And  
4 they, the petitioners, have no right to seek that stay of  
5 removal in the United States because they have no due process  
6 right, right under the regs, and section 1252(g) expressly  
7 precludes the court from interfering in ICE's decision to  
8 execute a removal order.

9 With regard to the due process violation, the First  
10 Circuit and many other courts across the country have made it  
11 clear that an alien who has been ordered removed has no right  
12 to remain in the United States with their family. And while it  
13 is unfortunate, the law is clear on that point.

14 With regard to petitioner's claim that the government  
15 is violating its own regulations, those regulations clearly  
16 state that a pending or approved provisional unlawful presence  
17 waiver is not a stay of removal. Therefore just because the  
18 process exists, that does not mean that they have a right to  
19 remain in the United States while they pursue it. Indeed, if  
20 the petitioners were ultimately removed, they would not be  
21 precluded from seeking that same unlawful presence waiver. The  
22 crux of the issue is where they get to seek it. And here the  
23 petitioners say that they have a right to seek it in the United  
24 States, and the government's position is that they do not.

25 With regard to the detention of any of the alien



1 petitioners, that detention would only be to execute their  
2 final orders of removal. And under Zadvydas, the government  
3 has six months presumptively reasonable --

4 THE COURT: Here, let's pause for a moment. One, I  
5 understand that the petitioner's argument before we get to  
6 Zadvydas is under the regulation 241.4, which is the issue I  
7 was addressing on a preliminary injunction a year ago. Am I  
8 mistaken about that?

9 MS. LARAKERS: No, Your Honor. You're correct, yes.

10 THE COURT: So I mean, with regard to detention, the  
11 regulation exists. The question that I was dealing with in  
12 Arriaga almost a year ago today, May 5 last year, was whether  
13 the removal period had expired and that the government  
14 eventually acknowledged that it had and then whether it  
15 applied.

16 Is that an issue here? I mean, whether the regulation  
17 applied, is that an issue in Calderon?

18 MS. LARAKERS: Yes, it is, the petitioners have raised  
19 that issue.

20 THE COURT: And I said it was -- I didn't know I was  
21 going to get a series of these cases, but I said as part of the  
22 colloquy -- have you looked at the transcript of what I said at  
23 the end of the Arriaga hearing? I mean, the parties settled  
24 the case after I pretty clearly signaled my tentative view.  
25 The merits and I think the arguments may be more refined now,

1 but I said on page 84 of docket number 26, the transcript, I  
2 was prepared to rule for the tentative purposes on the  
3 temporary restraining order that ICE is required to give  
4 somebody in these circumstances the hearing contemplated by 8  
5 CFR section 241.4 because admittedly the removal period ended.  
6 The case was proceeding under section 1231(a)(6). 8 CFR  
7 section 241.4(a) says the regulation applies, and essentially  
8 the procedures codified requirements of due process. So, you  
9 know, going very fast a year ago, that's where I was. You  
10 should know that and have it in mind.

11 In addition, with regard to the regulations, we've  
12 begun to do some work on this, and as far as I know neither  
13 party has cited the INS's explanation for the regulation when  
14 it was initially published in the Federal Register. Take a  
15 look at 65 Federal Register 80281-01, 80292. Should I say that  
16 again?

17 MS. LARAKERS: Yes, please, Your Honor.

18 THE COURT: 65 F.R. 80281-01 and 80292. It says,  
19 "This rule establishes a permanent review procedure applying to  
20 aliens who are detained following expiration of the 90-day  
21 removal period. It also applies to aliens released under the  
22 provisions of the final rule upon finding that they do not  
23 constitute a risk of flight, a risk to the community or flight  
24 risk." Then it says goes on to other language. "This  
25 permanent review procedure governs all post-order custody

1 reviews, inclusive of aliens who are the subjects of a final  
2 order of removal, deportation, exclusion, with the exception of  
3 inadmissible Mariel Cubans."

4 I'm saying that so you can address it because I  
5 understand that parts of the regulation talk about what happens  
6 after detention and giving notice that you -- requirement to  
7 give notice that you say wouldn't make any sense if somebody  
8 hasn't been detained, but there's also that explanation from  
9 the INS at the time.

10 If either of you want to submit anything further on  
11 this regulation or, you know, the implications of what I just  
12 quoted, the statement in the Federal Register, you should do  
13 that by May 5, which means by 6:00 p.m. The local rule  
14 provides the day ends for filing purposes at 6:00 p.m.

15 All right. What should I know about Dos Santos?

16 MR. POMERLEAU: Good morning as well, Your Honor. The  
17 issues in Dos Santos --

18 THE COURT: It might be helpful for the court  
19 reporter -- she's got your names, right?

20 MR. POMERLEAU: Attorney Todd Pomerleau on behalf  
21 of --

22 THE COURT: She knows. Go ahead.

23 MR. POMERLEAU: So the issue in Dos Santos is really  
24 twofold. He was engaged to be married, and his fiancé was  
25 waiting to graduate from college. He was also in the process

1 of vacating an OUI conviction which would have made him  
2 eligible for DACA. Our office was successful in vacating his  
3 OUI conviction. Around the same time, President Trump  
4 announced he was ending the DACA program. Additionally, he was  
5 detained at his place of employment, in our view outside of the  
6 90-day removal period. He worked in a liquor store. He was  
7 stocking shelves. A couple of ICE officers went in there,  
8 acted like they were trying to buy a bottle of wine, and they  
9 arrested him in front of co-workers and customers.

10 Since his detention, for nearly ten months, he's been  
11 trying to get married to his U.S. citizen fiancé. So one issue  
12 in that case is we've moved for a preliminary injunction to  
13 allow him to be married, because the issue here is he's a visa  
14 overstay, and if he's able to be married, he can file an I-130  
15 petition. Those are routinely approved within six months.  
16 He's already been detained nearly ten months, and he's not able  
17 to even take that first step without being allowed to be  
18 married. So we believe one issue here to the core is his  
19 fundamental right to be married, which is being denied day  
20 after day due to his ICE detention.

21 THE COURT: In reading the papers, you asked for a  
22 preliminary injunction, but I think I would be almost compelled  
23 to merge any hearing on a preliminary injunction with a trial  
24 on the merits, because if I granted what you characterize as a  
25 preliminary injunction and he got married, I don't think I

1 could reverse it.

2 MR. POMERLEAU: I understand.

3 THE COURT: So that may have some procedural  
4 implications, when we get to the issue.

5 MR. POMERLEAU: One issue, for example, if he is  
6 married, he can file an I-130, and then he has two tracks that  
7 he can fall under the regulatory scheme. In 2013, the  
8 provisional 601 waiver went into effect, and then in 2016 it  
9 was expanded to include provisional 212 waivers, so that's one  
10 option he can avail himself of. He could apply for a 601(a)  
11 waiver because his unlawful presence only was triggered upon  
12 turning the age of 18. And once he leaves the United States,  
13 that so-called ten-year bar goes into effect. That's what the  
14 601(a) waiver would cure.

15 THE COURT: It provides he doesn't have to leave the  
16 United States to initiate the process?

17 MR. POMERLEAU: Correct. And if you look at the  
18 regulatory scheme cited in the Federal Register, there's all  
19 this discussion in there about promoting family unity,  
20 promoting administrative efficiency, allowing for people to --  
21 encouraging people to actually go to their consular interviews.  
22 There's a lengthy discussion in there about who qualifies for  
23 the 601(a) waiver and in 2016 why they were expanded.

24 Before he does a 610(a), he has to do what's called an  
25 I-212 waiver. That would waive the old removal order.

1           Another step would be to file a motion to reopen. He  
2 could file a 212 and motion to reopen at the same time. If the  
3 Immigration Court reopens his case, because he's a visa  
4 overstay, he would be allowed to adjust status in the Boston  
5 Immigration Court. That's what he tried to do previously. He  
6 had another marriage, and about two months before his final  
7 immigration hearing he was arrested for the OUI.

8           The OUI has since been vacated due to a Padilla v.  
9 Kentucky violation, but the immigration judge noted in denying  
10 him the adjustment of status that the sole criteria for which  
11 she was denying him the adjustment was that he had a recent OUI  
12 arrest and she thought that looked unfavorably upon his  
13 application. That OUI arrest is now over six years old. There  
14 is no conviction anymore. And we believe if he was married, he  
15 would be on a better footing than he was previously as far as  
16 seeking adjustment.

17           So he really has two tracks. He could go through the  
18 consular to require a 601(a) waiver as well as a 212 waiver and  
19 attending a consular interview, which he has no problem doing;  
20 or, if his motion to reopen is allowed, he could seek  
21 readjustment from the Immigration Court. So he really has two  
22 pipelines, if you will, to achieve his green card. However,  
23 he's been denied access to this process through his detention,  
24 which we believe is unlawful. We believe it violates the due  
25 process clause. And we believe that -- you know, the key issue

1 really, for ten months he had been following every process  
2 available to him at South Bay, trying to get married. At his  
3 denial he was told the reason we're denying your marriage after  
4 not answering several of his applications for a marriage is  
5 because he's not cooperating with his own removal, which we  
6 believe is unlawful in the first place. Since his detention is  
7 unlawful, we don't believe he should be cooperating with his  
8 removal.

9 THE COURT: He's not cooperating now or he didn't  
10 cooperate previously?

11 MR. POMERLEAU: Now.

12 THE COURT: Now? I thought -- and this is why I want  
13 to get the overview. I thought the claim was that he didn't  
14 cooperate -- when was his order of removal?

15 MR. POMERLEAU: Order of removal is from 2015, I  
16 believe, Your Honor.

17 THE COURT: 2015.

18 MR. POMERLEAU: He lost an appeal before the Board of  
19 Immigration Appeals. And he was living at the same address,  
20 and ICE never went to execute the removal order. He hired our  
21 office. We were trying to do two things for him: vacate his  
22 conviction so he could apply for DACA, which was a new form of  
23 relief that wasn't available to him at the time he was placed  
24 in removal proceedings and ultimately ordered removed.

25 Another interesting wrinkle in the case is just last

1 week there was another order regarding these DACA cases to  
2 accept new applications. His issue was when we vacated the  
3 conviction, President Trump announced that DACA would end, so  
4 he couldn't apply for DACA. So his sole resource really was  
5 through marriage. But he was being detained and had been  
6 denied access to marriage. We believe he now would be eligible  
7 to apply for DACA. But there's a 90-day period right now --

8 THE COURT: This is Judge Bates's decision to be  
9 stayed for 90 days?

10 MR. POMERLEAU: Correct. Because now he could apply  
11 for a new application for DACA, but we won't know until 90 days  
12 are up how that litigation unfolds.

13 THE COURT: All right.

14 MR. POMERLEAU: So those are really the core issues  
15 with his case, Your Honor.

16 THE COURT: Am I correct you're challenging both his  
17 detention and his removal?

18 MR. POMERLEAU: That's correct. Because his removal,  
19 we believe, is unlawful in these circumstances because he's  
20 being denied his opportunity to be married, which is a  
21 fundamental constitutional right, which would allow him to  
22 apply for I-130 and apply for the various waivers or do the  
23 motion to reopen the process.

24 THE COURT: And he's been detained since June 14,  
25 2017?



1 MR. POMERLEAU: That's correct, Your Honor.

2 THE COURT: So am I correct there's also a Zadvydas  
3 issue?

4 MR. POMERLEAU: I don't think -- I guess there could  
5 be, but the government is claiming he is not cooperating with  
6 his removal because he's not signing all the documents  
7 necessary to get the travel documents for removal.

8 THE COURT: So is it undisputed that he's not now  
9 cooperating in the effort to remove him because he's not  
10 applying for those documents?

11 MR. POMERLEAU: I would say there's no dispute. What  
12 routinely happens, Your Honor -- and this is probably for  
13 another case -- but ICE approaches him at the jail, and they  
14 shove documents in front of him and ask him to sign them. I  
15 tell all my clients not to sign any document without me  
16 present. Then they leave the room and they say he failed to  
17 cooperate. Then they come back and do it again. My client  
18 speaks limited English. He's a Brazilian native citizen, and  
19 he has difficulty comprehending legal documents.

20 THE COURT: So the main issue here is not, as I  
21 perceived it, I think -- the immediate issue is not the  
22 Zadvydas issue as to whether his detention is prolonged, I  
23 mean, whether he's due a review of his detention because he's  
24 been detained more than ten months, but you view the main issue  
25 as being whether he should be allowed to be married?

1 MR. POMERLEAU: Married, and then with his marriage,  
2 he would be able to apply for the I-130. And we believe the  
3 other significant issue is he was detained outside of the  
4 removal period when he was arrested at his place of employment.

5 THE COURT: Why can't he be detained after the removal  
6 period if there's an order of deportation?

7 MR. POMERLEAU: We believe in the circumstances we're  
8 outside the 90 days. But even if he were able to be detained  
9 within the 90 days --

10 THE COURT: I thought -- I'm sorry. Keep going.

11 MR. POMERLEAU: I think it's a live issue in these  
12 cases. I think there's some ambiguity in that statute as to  
13 regarding the removal period. Because it doesn't seem -- I  
14 think a fair reading of it is if you're outside of the 90-day  
15 removal period, you can't arrest somebody.

16 THE COURT: Okay. This is very helpful because you  
17 all do this all the time. I was introduced to it a year ago  
18 for about two days, and here we are again. I thought the  
19 removal period, the 90-day removal period was the period in  
20 which an alien, if ordered deported, was detained, the  
21 government didn't have to provide a bail hearing, except that's  
22 one of the issues here.

23 MR. POMERLEAU: Right. I think another reading could  
24 be that when you have a final order of removal, there's a  
25 90-day period to go and detain a person to deport them, which

1 didn't happen in this case.

2 THE COURT: So are there any of these other four cases  
3 that raise that issue?

4 MR. POMERLEAU: I think it's an issue in Junqueira as  
5 well, if I may speak briefly about his case.

6 THE COURT: No. I want to hear from the government,  
7 the respondents, on Dos Santos, I think.

8 MR. SADY: Good morning, Your Honor. My understanding  
9 with regard to his client is it's not just been a recent  
10 failure to comply. It's been a failure to comply from the  
11 outset. And that is why his detention is continuing under  
12 Zadvydas and the case law that has followed as this court  
13 appropriately mentioned to Attorney Pomerleau is that you can't  
14 save yourself from removal and detention by failing to comply.  
15 As a matter of law you must comply once you have a final order  
16 of removal. And that's what's going on here, Your Honor.

17 With regard to the marriage, you don't have an  
18 absolute right as an alien subject to a detention order of  
19 getting married. There are conditions. And as  
20 Mr. Pomerleau mention -- I just received his preliminary  
21 injunction motion a couple of days ago -- there's national  
22 detention standards which provide for marriage of aliens who  
23 are detained. However, it's discretionary. And the  
24 discretionary part of it is if there's a compelling government  
25 interest not to allow the marriage to go forward, then the INS

1 can deny that, and that's what we have right here.

2 When you have an alien subject to a final order of  
3 removal who refuses to comply with his removal, there is a  
4 compelling government interest to deny his request to marry.  
5 And that is what the denial letter stated to Mr. Dos Santos  
6 when it was provided to him. That's with regard to the  
7 marriage.

8 THE COURT: The parties seem to agree this is an issue  
9 I can decide next week or soon after. I'd have to focus in on  
10 the briefing schedule and hearings, but it seems to me, A, this  
11 is an issue that you need to anticipate, and, B, I was  
12 concerned that there might be disputed material facts regarding  
13 cooperation. Maybe there aren't. I didn't know whether it  
14 really could be decided as a legal issue.

15 But Dos Santos in the -- well, just one second. So De  
16 Souza has been -- now I'm back to Ms. Lafaille. De Souza has  
17 been detained since when, last August?

18 MS. LAFAILLE: Since -- you're talking about  
19 petitioner Lucimar De Souza?

20 THE COURT: Yes.

21 MS. LAFAILLE: She has been detained since January 30.

22 THE COURT: January 30.

23 MS. LAFAILLE: Yes.

24 THE COURT: Okay. So that raises the issue of whether  
25 she's entitled to an opportunity to be heard, even though she

1 hasn't been held six months.

2 MS. LAFAILLE: Yes, Your Honor.

3 THE COURT: And I didn't say this earlier, but  
4 Zadvydas does say that detention is presumptively reasonable in  
5 the first six months. Usually when I hear presumptive, it  
6 means it's a rebuttable presumption, and it suggests it would  
7 be consistent with there being an opportunity to try to rebut  
8 the presumption if an alien wanted to attempt that. This is  
9 not -- again, I'm just telling you what my present, very  
10 tentative -- it's not even a position. It's just a question so  
11 you don't get it for the first time next Tuesday.

12 MS. LARAKERS: I understand, Your Honor. The  
13 presumption absolutely can be rebutted. It could be rebutted  
14 in a situation where ICE was making no movement to effectuate  
15 the removal of the alien. So where ICE isn't trying to get a  
16 travel document, where they're just -- where, in short, the  
17 alien is just sitting in detention with no movement on their  
18 case. That could be a situation that could be presented and  
19 where the presumption may be able to be rebutted. However,  
20 here we have Ms. De Souza, who has been detained for three  
21 months. ICE has applied -- she has applied for a travel  
22 document. Those steps are moving forward to remove her. And  
23 in that type of situation, the government's position would be  
24 that the presumption can't be rebutted.

25 THE COURT: All right. But then you're back to

1 section 241.4 in any event, I think.

2 MS. LARAKERS: Yes, Your Honor. And with regard to  
3 that, the detention statute, which all of these petitioners are  
4 detained under, is 1231(a)(6), that is what governs post-order  
5 detention. That's where the authority comes from.

6 8 CFR 241, that issue has been created by petitioners  
7 to say that there should be notice prior to being brought in  
8 detention. But the plain language of the statute makes it  
9 clear that those regulations were written to make sure that an  
10 alien isn't detained without any additional -- for a prolonged  
11 period of time without any additional process. However, they  
12 must initially have been detained. And it's the --

13 THE COURT: Well, Ms. De Souza is detained now?

14 MS. LARAKERS: Yes, Your Honor. And it's the  
15 government's position that after 90 days of being in detention,  
16 she will receive all of the procedures available in 8 CFR 241.  
17 We call those the poker regulations, is what they're generally  
18 referred to as. So the purpose of those regulations was to  
19 make sure that an alien sitting in detention knows the status  
20 of their removal and that if the government is having a hard  
21 time obtaining documents or being able to remove them, that  
22 they will receive notice that something is going on or they  
23 will be able to present evidence that they should be released.

24 However, all of that, all of those procedures are  
25 designed to give Zadvydas to aliens in detention, and that's

1 plain by the statute when it refers to the alien who is  
2 detained, continue in detention. It simply wouldn't make sense  
3 to give petitioners a notice to run.

4 THE COURT: Well, you ought to look at the Federal  
5 Register.

6 MS. LARAKERS: Absolutely, Your Honor.

7 THE COURT: The INS, as it was at the time, seems to  
8 have expressed a different view. But, no. This is helpful.  
9 When will the 90 days have run on De Souza, Lucimar De Souza?

10 MS. LAFAILLE: So Your Honor, I also want to address  
11 those Zadvydas issue. But to Your Honor's more direct  
12 question, the 90 days ran yesterday, and rather than receive  
13 the 30 days in advance notice of her post-order custody review  
14 and have that mailed to her attorney as those regulations  
15 provide, Ms. De Souza was hand-delivered with a notice of her  
16 post-order custody review one week before the post-order  
17 custody review, and it was not given to her attorney, so she  
18 then mailed it to her attorney, who received it on Friday, a  
19 notification of a custody review happening on Monday.

20 THE COURT: Last Monday, yesterday?

21 MS. LAFAILLE: Yesterday. It's on or around, so she  
22 has submitted these materials. To my knowledge there's been no  
23 decision that we're aware of on the custody review, but because  
24 her attorney is very committed and diligent --

25 THE COURT: That's you?

1 MS. LAFAILLE: No. Her immigration attorney, Your  
2 Honor. She made that work with one business day's notice and  
3 submitted materials to that review. But the requirements of  
4 the regulation, even as the government acknowledges, at the  
5 90-day mark were certainly not complied with.

6 THE COURT: Let me just pause. This could have some  
7 practical significance because if she's released now, let's say  
8 she's released before next Tuesday, would that moot the  
9 detention issue in her case?

10 MS. LAFAILLE: Your Honor, release of that sort does  
11 not moot detention claims. We think that's black letter law  
12 under the Supreme Court's decision in Clark v. Martinez, but it  
13 would certainly, I would agree, remove the urgency for this  
14 court to rule on some of the detention issues that affect the  
15 petitioners and class members in this case.

16 THE COURT: In Calderon?

17 MS. LAFAILLE: Yes.

18 THE COURT: Why wouldn't it moot it?

19 MS. LAFAILLE: Because as the Supreme Court states and  
20 as Judge Talwani has found in one of our cases here involving a  
21 petitioner released days after we filed a habeas petition, when  
22 the government does not disclaim the authority to re-detain,  
23 the detention issues are not mooted by voluntary release.  
24 Otherwise, the government could simply moot the habeas and then  
25 re-detain somebody the next day, violating the same provisions



1 of law again.

2 THE COURT: Well, I issued you an order a while back  
3 on my tentative thoughts on mootness. It would be a question.  
4 But I don't -- it would just be a question. And what did  
5 you -- sorry. Did you want to say something about mootness?

6 MS. LARAKERS: Just quickly on mootness, Your Honor.  
7 The government's position is that release in the immigration  
8 context does moot the claim because under the statutory scheme,  
9 the only power the court has in an immigration context is to  
10 order the release, therefore there is just simply no more  
11 remedy to give.

12 MS. LAFAILLE: In Clark v. Martinez --

13 THE COURT: What's that?

14 MS. LAFAILLE: Clark v. Martinez is an immigration  
15 case finding non-mootness after release. But with regards to  
16 the Zadvydas issue, if I might, Your Honor, I just want to be  
17 clear about the due process argument that we are advancing  
18 here. We are not claiming that Ms. De Souza's removal is not  
19 reasonably foreseeable because she cannot -- the government  
20 cannot secure her travel document to Brazil. In fact, as part  
21 of her stay application yesterday, she has turned over her  
22 travel document to ICE. But Zadvydas is not a blank check for  
23 the government to do whatever it wants for six months. There  
24 are other reasons why detention can violate the due process  
25 clause other than detention of someone for whom there's no

1 travel document. And that's clear from Zadvydas itself. What  
2 Zadvydas affirms is that detention has to be reasonably related  
3 to permissible purposes. Those purposes are to assure  
4 someone's appearance in proceedings or compliance with removal  
5 or to protect the community.

6 The government has had the opportunity through the  
7 motion -- through the order to show cause to present  
8 justifications for Ms. De Souza's detention, and the government  
9 has put forth nothing that could give this court any reason to  
10 allow Ms. De Souza to be continued in detention. Even the  
11 dissenters in Zadvydas agreed that arbitrary detention would  
12 violate the due process clause. This detention has all the  
13 hallmarks of arbitrariness, even without going for six  
14 months --

15 THE COURT: I think that's a -- I think that's a  
16 significant issue. I understood that was the argument, and I'm  
17 interested in hearing it amplified. Am I right that -- so you  
18 have an argument based on the regulation 241.4, and then you  
19 have the constitutional argument in effect. And it seems to me  
20 at the moment they're closely related because, if they're read  
21 together, if the regulation applies, say, to somebody in De  
22 Souza's situation, immediately, then that provides a form of  
23 due process or would satisfy the requirements of due process.

24 MS. LAFAILLE: So let me say about that, the Supreme  
25 Court in Zadvydas was pretty unimpressed with that form of

1 process. This is an administrative file review where the  
2 presumption is basically in favor of detention, the noncitizen  
3 bears a burden to overcome that presumption. We certainly  
4 don't believe that that is protective enough in this case.

5 THE COURT: So what process do you say is necessary to  
6 meet the constitutional requirement?

7 MS. LAFAILLE: So what Zadvydas makes clear is that  
8 when the regulations do not provide a sufficient process, the  
9 habeas court can decide the legality of detention. And I think  
10 that we are here fully briefed. The government has presented  
11 its argument. It's responded an order to show cause, it's  
12 provided an affidavit. Everything is already teed up. And  
13 this court can decide the legality of Ms. De Souza's custody by  
14 deciding whether that custody serves the purposes of preventing  
15 her flight and protecting the community. If the court doesn't  
16 want to do that, it could certainly also order a bond hearing  
17 which would provide a process again.

18 THE COURT: Bond hearing before whom?

19 MS. LAFAILLE: Well, this court could certainly  
20 conduct a bond hearing. I would argue it doesn't need to  
21 because the government has had the opportunity to put forth its  
22 evidence in support of detention.

23 THE COURT: Well, actually, I think there's a  
24 threshold question. I thought the issue was is Ms. De Souza  
25 entitled to a bond hearing before somebody under the regulation

1 or for some other reason. Then the next question would be  
2 would it be before the Department of Homeland Security, before  
3 an immigration judge or before this court. That's an issue I  
4 addressed in 2010 in Flores-Powell, 677 F. Supp. 2d 455.  
5 Nobody knows these things? You know it. They're writing it  
6 down.

7 I mean, I have had extensive discussion as to who  
8 should conduct the hearing, and I conducted it in that case.  
9 If we get that far, the government might want to argue somebody  
10 else should conduct it. Anyway. So basically, I want you to  
11 know what's on my mind for next week.

12 Generally speaking, the Supreme Court invoked the  
13 doctrine of constitutional avoidance, as I recall, in deciding  
14 Zadvydas -- however it's pronounced -- saying, you know, we'll  
15 read the statute to have a reasonableness requirement. And  
16 that could influence the way the regulation should be read. In  
17 other words, you'd have a whole -- arguably there's a whole  
18 unconstitutional scheme, but there's reason to believe that the  
19 regulation seeks to satisfy due process. So it should be  
20 interpreted the way the petitioners argue it should be  
21 interpreted.

22 I'm going to do -- my law clerk is going to do a lot  
23 of work on this before next Tuesday. In the cleanest case,  
24 this is the issue you agree should be taken up first, and that  
25 makes sense to me up to a point. But if there's a material,

1 possibly material change in circumstances because Ms. De Souza  
2 is let out before next Tuesday, I'd like to know it sooner  
3 rather than later.

4 Do you have any idea when a determination will be made  
5 as to whether Ms. De Souza is going to be released now that her  
6 90 days have expired?

7 MS. LARAKERS: I do not, Your Honor. I am in constant  
8 communication with ICE.

9 THE COURT: I'm ordering that you file a report on  
10 that on May 5, too. Then if the issues change, you need to  
11 tell me what you think the implications are because I don't  
12 have to hear that on May 8, but that seemed to be the cleanest  
13 case on the regulations at least, anyway. All right.

14 MS. LAFAILLE: Your Honor had mentioned May 5 a couple  
15 of times. I know that's a Saturday.

16 THE COURT: I'm sorry. I meant May 3. Today is May  
17 1?

18 MS. LAFAILLE: Yes.

19 THE COURT: I thought it was May 3. All right.  
20 Thursday, I want you to file it on Thursday before we -- May 3,  
21 Thursday. All right. Well, we went back from Dos Santos to  
22 Calderon. Mr. Pomerleau, what should I know about Junqueira?

23 MR. POMERLEAU: Yes, Your Honor. Regarding  
24 Mr. Junqueira, he too has a process, albeit a little more  
25 complicated, to getting a green card because he's a re-entry

1 after removal. He was removed in 2004 and re-entered a few  
2 months later in 2005. So he applied for an I-130, and he had  
3 an interview scheduled at the Hartford USCIS office. He  
4 resides in Connecticut. No criminal record, father of a 10 and  
5 12-year-old citizen children and a U.S. citizen wife he's been  
6 married to for nearly a decade. On his I-130 application, he  
7 disclosed the prior removal. Unfortunately for him, he was  
8 given some inaccurate advice from his immigration attorney  
9 about the --

10 THE COURT: Not you?

11 MR. POMERLEAU: -- straightforwardness of the process.

12 THE COURT: Not you?

13 MR. POMERLEAU: Not me, no, not me. But he's subject  
14 to the so-called lifetime bar. The lifetime bar essentially is  
15 for people who have re-entered the country with an order of  
16 removal after 1997 or people who have lived here with one year  
17 of unlawful presence after 1997 and then left and re-entered.  
18 You have to essentially leave the country and then apply for  
19 the 212 waiver but after waiting ten years.

20 That said, you're still eligible to apply for an  
21 I-130. So he applies for an I-130. He discloses on the I-130  
22 that he has an old removal order. He waits many months for a  
23 interview. He goes and gets fingerprinted as part of his I-130  
24 process. They gladly accept his filing fee. He goes there  
25 with his wife, and they don't even conduct the I-130 interview.

1 In our view, they used it as a ruse to get him to go in there  
2 when they knew where he lived and knew where he worked and knew  
3 where he had been for at least a year after he filed for this  
4 I-130. And he got arrested prior to even having the interview  
5 in front of his wife.

6 We think that that in and of itself is unlawful  
7 because there's no notice given to him that he's going to be  
8 arrested. There's no notice at all --

9 THE COURT: What creates the obligation to give a  
10 person notice that he's going to be arrested?

11 MR. POMERLEAU: Well, I think it's as interesting  
12 question, Your Honor, because you have these -- for example,  
13 you go to the USCIS website, and there's all this information  
14 that's supposed to be readily available for people to not even  
15 use lawyers. Here is how you apply for an I-130. Provide  
16 evidence that you have a bona fide marriage that you entered  
17 into in good faith. And you'll be fingerprinted, and you'll be  
18 asked to come in to an interview. Then he gets an interview  
19 notice that says, Wear your best clothes and show up and bring  
20 the documents with you. Then he goes to the interview and gets  
21 arrested before the interview is even conducted.

22 If he has his I-130 in hand, he can then utilize those  
23 other processes, albeit after waiting outside the country ten  
24 years. That's a process he was willing to take and still is.  
25 He still to this day has never even had his interview. He

1 applied for an I-130 and is still sitting in jail waiting for  
2 it to happen. The interview has never been conducted in this  
3 case.

4 THE COURT: Is he challenging his removal as well as  
5 his detention?

6 MR. POMERLEAU: No. The detention we believe is  
7 unlawful in these circumstances.

8 THE COURT: That was my understanding. He's not  
9 challenging his removal. And how long has he been detained?

10 MR. POMERLEAU: He's been detained now since --

11 THE COURT: August?

12 MR. POMERLEAU: I have the exact date here. February  
13 1, 2018.

14 THE COURT: So again, that's less than six months and  
15 probably less than 90 days?

16 MR. POMERLEAU: That's correct.

17 THE COURT: So this raises the detention issue of  
18 whether some notice and an opportunity to be heard is required  
19 before six months.

20 MR. POMERLEAU: Correct. And I think importantly it  
21 deals with the core issue. Numerous people that apply for  
22 I-130s either need a 601(a) or they need a 212, or they have  
23 prior removal or deportation orders just like him; and he goes  
24 to the interview and he gets arrested before the interview is  
25 conducted. So he's attempting to regularize his status in the



1 United States by following USCIS's own procedures.

2 THE COURT: Well, okay. What does the government say?

3 MS. LARAKERS: Well, first I'd like to say I think  
4 we're getting away from the true issue in Zadvydas and what the  
5 court was truly concerned with there. They were concerned with  
6 prolonged detention. And here they were concerned with  
7 prolonged detention with no likelihood of the person actually  
8 being removed, which was the purpose of their detention. And  
9 here that is not an issue in any of these cases. All detention  
10 is reasonably related to effectuate removal petitions.

11 THE COURT: Well, if the Supreme Court decided the  
12 precise issue, it would be very easy for me and for you.  
13 However, I recognize this is a different issue. As the Supreme  
14 Court often, almost always does, it's made statements about in  
15 this case essentially requirements of due process that applied  
16 beyond the particular facts of that case. So that's I think  
17 the issue, what are the implications of Zadvydas for the  
18 different factual circumstances in these cases that implicate  
19 that decision.

20 MS. LARAKERS: Yes, Your Honor. And so then we go  
21 back to the threshold issue, which you mentioned, is whether  
22 any of these petitioners have a due process right to remain in  
23 the United States despite their final orders of removal.  
24 That's the issue that needs deciding.

25 THE COURT: But it seems to me at the moment there are

1 two related issues. One, did they have a right under the  
2 regulations. It's possible that the regulations provide more  
3 for an alien than the Constitution requires. There's a line of  
4 cases, isn't there? The government is required to follow its  
5 regulations or revise them.

6 MS. LARAKERS: Yes, Your Honor, and I'm not sure which  
7 regulations we're speaking about.

8 THE COURT: I think 241.4.

9 MS. LARAKERS: So with regard to the poker  
10 regulations, yes, the government's position is that that would  
11 satisfy any due process.

12 THE COURT: Right.

13 MS. LARAKERS: However, with regard to the other --

14 THE COURT: But then it's your position it doesn't  
15 apply to Junqueira yet?

16 MS. LARAKERS: It certainly would apply to Junqueira  
17 at that 90-day mark as it has applied to Ms. De Souza. That's  
18 when the regulation kicks in to make sure that the agency is  
19 detaining with the purpose of removal under Zadvydas.

20 And with regard to the petitioner's argument that  
21 Junqueira is not challenging his order of removal, in effect he  
22 is, Your Honor, because here he's asking to be released which  
23 the purpose of the detention is to be removed.

24 THE COURT: No. But I mean, in criminal cases we  
25 release all the time people pending trial because there are

1 conditions that reasonably assure they'll appear for trial and  
2 they won't be dangerous. I mean, he's married, right?

3 MS. LARAKERS: Yes, he's married.

4 THE COURT: So he's married. And he's got a  
5 ten-year-old son, right?

6 MS. LARAKERS: Yes.

7 THE COURT: And I mean, where is he going to go? I  
8 mean, these are the issues if we're conducting a bail hearing.  
9 You put an electronic monitor on him. He pays for it. You  
10 don't have to pay to keep him in jail, and you know where he is  
11 when the paperwork is done.

12 MS. LARAKERS: Yes, Your Honor. And here, the  
13 statutory scheme that Congress has set in place is to have --  
14 they had their day in court in front of an immigration judge  
15 where they could have challenged their removal order. After  
16 that, ICE provides several administrative processes for them to  
17 remain here in the United States if they do want to seek relief  
18 from that removal again. Here, those processes are set forth  
19 in the form I-246, which is an administrative stay of removal,  
20 which Ms. Calderon has already received.

21 THE COURT: Now we're on Junqueira, right?

22 MS. LARAKERS: Yes. However, I wanted to show that  
23 the scheme, the statutory scheme and the regulatory scheme is  
24 in place and it works. And ICE can certainly take those  
25 factors into account, and there certainly is a process for ICE

1 to take those factors into account. And the government's only  
2 position is that those processes are available and they are  
3 adequate for all the petitioners in this case. And there is no  
4 need to say that there's a due process right, which many courts  
5 have already denied that there is, to remain in the United  
6 States, especially when there are these processes in place and  
7 that Congress anticipated the statutory scheme this way.

8 THE COURT: At the moment I don't understand the  
9 Junqueira case, though, to raise that issue. Junqueira is  
10 challenging his detention. This was the colloquy I had in  
11 Arriaga a year ago. I said, you know, I can decide the  
12 detention issue, but if you agree to let him out, I thought I  
13 had no further jurisdiction. I may not have been right. But  
14 because I can't make decisions relating to removal, I can make  
15 decisions relating to detention. So just off the top of my  
16 head, this is not an answer. I think if ICE released Junqueira  
17 the way it did De Oliveira, I think this case would be over as  
18 a habeas. Wouldn't have to deal with me anymore.

19 MS. LARAKERS: Your Honor, De Oliveira and Junqueira  
20 are two very different cases. The reason why ICE hasn't  
21 released Junqueira to this point and why his case isn't -- his  
22 for -- isn't as strong. This is not certainly precluding his  
23 ability to apply for a stay and for ICE to adjudicate it.  
24 However, the reason why his case isn't as strong is because he  
25 is subject to that ten-year bar because he illegally

1 re-entered. That means he must remain outside of the country  
2 for ten years. In that sort of situation, it doesn't make  
3 sense like it did for ICE in De Oliveira to release him and  
4 allow him to have the procedures available to the United  
5 States. Here it would make sense for ICE to remove him because  
6 he has to wait those ten years anyway. And that's the issue  
7 that we're in here.

8 THE COURT: And you heard Mr. Pomerleau say, and I  
9 still don't understand what the foundation for finding it  
10 unlawful was, and it would be -- unless it's some notion of  
11 substantive due process that, you know, it was just unlawful to  
12 arrest him while he was doing what the United States government  
13 encouraged him to do, which is go in and follow the legal  
14 process to try to obtain the right to stay with his wife and  
15 stay with his child.

16 MS. LARAKERS: Yes. And I think that's the due  
17 process, that argument that the detention and the removal is  
18 unlawful is under the due process clause. That's where the  
19 argument is coming from. With regard to their argument that  
20 the detention is unlawful --

21 THE COURT: No. But I just wanted sort of a preview  
22 of coming attractions. He argues that it's unconstitutional to  
23 arrest him when he went to follow the legal process to try to  
24 be authorized to stay with his wife and son.

25 MS. LARAKERS: Like in Calderon, the main argument

1 here, as I understand, is that the petitioner has a due process  
2 right to remain in the United States while he completes these  
3 processes. However, the reason why his case is different from  
4 Calderon and why I don't even think under their definition of  
5 the class at hand he wouldn't fall under it is because he's not  
6 even entitled to apply for those processes, unlike the Calderon  
7 petitioners here. That's what makes them distinct and  
8 separate. So any claim to due process Mr. Junqueira would have  
9 would certainly be less than any claim that the Calderon  
10 petitioners have. And that is what makes them truly distinct  
11 here.

12 THE COURT: And what about the Pinguil case, which is  
13 different?

14 MR. CORTES: Good morning, Your Honor. Julio  
15 Cortes --

16 THE COURT: Could you spell your name for us, please.

17 MR. CORTES: It's Julio, Cortes, C-o-r-t-e-s, and then  
18 del Olmo, d-e-l O-l-m-o. Thank you. It's kind of a long last  
19 name, Your Honor.

20 THE COURT: Go ahead.

21 MR. CORTES: Your Honor, we believe that Pinguil's  
22 case is more straightforward than the other cases, and that's  
23 why we are in agreement with the respondents that it should be  
24 perhaps decided before the other --

25 THE COURT: It's not going to be decided before. This

1 is not -- go ahead. Is it fully briefed?

2 MR. CORTES: Your Honor, we filed a traverse this  
3 morning, and we believe it's fully briefed.

4 THE COURT: I haven't even seen these. It's not over  
5 when you write it. I've got to read it. Anyway, keep going.  
6 I'm going to order that you confer on this case. Based on the  
7 little I know, I'm somewhat baffled about why it's such a  
8 contentious issue, and it may not be. And these things go very  
9 fast and the government doesn't have time sometimes to catch  
10 its breath and think about what it wants to do. Go ahead.

11 MR. CORTES: Thank you, Your Honor. Pinguil has been  
12 detained for nine months. And contrary to what my sister  
13 indicated in the Calderon case, he has a stay of removal  
14 granted by ICE, and he's still in detention. Although -- well,  
15 as my sister indicated in the Calderon case, ICE normally  
16 should not detain somebody who has a stay, and he has a stay  
17 granted until September 9, 2018. And that is based on the fact  
18 that he has shown that he's prima facie eligible for a U visa.

19 THE COURT: I believe it's public, I believe it's  
20 public that he previously cooperated with the U.S. government.

21 MR. CORTES: That is correct, Your Honor.

22 THE COURT: That is correct, so we can talk about that  
23 in court?

24 MR. CORTES: Yes, Your Honor.

25 THE COURT: So he previously cooperated with the U.S.

1 government, and then he was deported to Ecuador. And the  
2 information I have seems to show he keeps coming back to the  
3 United States because he's being persecuted or tortured in  
4 Ecuador because of his known cooperation with the U.S.  
5 government. Is that right?

6 MR. CORTES: Yes, Your Honor. He's been persecuted or  
7 he fears torture precisely because of the cooperation, his  
8 cooperation with the U.S. government in prosecuting a man who  
9 was involved in a vehicular homicide and fled the U.S. And he  
10 was able to help both the Milford police and ICE to find out  
11 where this person was. So now this person is making threats  
12 against his life, and that's why he is claiming, Your Honor,  
13 that he fears torture or persecution in his country.

14 Moreover, he has a pending U visa that he filed in  
15 February, and that can take months to adjudicate, and the  
16 government's position seems to be he has to remain for an  
17 indefinite period of time in detention while his U visa is  
18 being adjudicated, while he's withholding of removal and  
19 commencing to start a claim that's been --

20 THE COURT: Well, convention against torture claim,  
21 CAT.

22 MR. CORTES: Correct, Your Honor.

23 THE COURT: And did the first level of immigration  
24 review find that he appears to be eligible for asylum under the  
25 convention against torture?



1 MR. CORTES: Your Honor, that will be decided on May  
2 21. We had a hearing already where the immigration judge heard  
3 the petitioner's testimony, and that will be decided on May 21,  
4 Your Honor.

5 But even if the immigration judge decides -- whether  
6 he decides that he merits CAT relief or withholding relief or  
7 decides that he doesn't, he has a right to appeal that decision  
8 to the BIA as well as the government has the right to appeal  
9 that decision. So as a matter of fact, he already filed a --  
10 Mr. Pinguil filed two appeals of the two denials of his motions  
11 for bond hearing in Immigration Court. We filed those appeals  
12 in -- sorry, Your Honor -- in December and March, and we don't  
13 have a response yet. So his case could be pending for months  
14 or potentially for years.

15 THE COURT: When was he detained?

16 MR. CORTES: He was detained on August 8, 2017. He's  
17 coming up to the nine-month mark, Your Honor.

18 THE COURT: All right.

19 MR. CORTES: And we asked twice in Immigration Court  
20 for a bond hearing, and the immigration judge indicated that he  
21 has no jurisdiction to even hold a bond hearing where it could  
22 be determined whether he needs to remain in detention because  
23 of the government's security or flight risk concerns, Your  
24 Honor.

25 THE COURT: And what do you say is the basis for his

1 right to a bond hearing?

2 MR. CORTES: Your Honor, that's the statutory question  
3 that is underlying his habeas petition. Our position is that  
4 whether we are under 1226 or 1231 --

5 THE COURT: That means pre-removal or post-removal.

6 MR. CORTES: Yes, whether we are pre-removal or  
7 post-removal, whether we're in one situation or another, he  
8 clearly, because his detention has been so prolonged, he is  
9 clearly entitled to either release or a bond hearing.

10 THE COURT: So this would be the Zadvydas issue. And  
11 if you didn't look at my Flores-Powell decision, you'll want to  
12 do that. Mr. Kanwit.

13 MR. KANWIT: Yes, Your Honor. This is an individual  
14 who, as the court has suggested it's aware, has re-entered  
15 illegally three times, the last time after having been  
16 convicted of illegal re-entry. So there's every reason to  
17 believe that detention is necessary to secure his presence for  
18 further proceedings. It's the government's position that the  
19 Ninth Circuit got it right on the 1226 versus 1231  
20 applicability for purposes of someone who has been subject to a  
21 prior order of removal, clearly.

22 THE COURT: The Ninth Circuit, in which case?

23 MR. KANWIT: It's cited in my brief, Your Honor.

24 THE COURT: All right. But the Ninth Circuit treats  
25 this as, what, pre-removal or post-removal?

1           MR. KANWIT: Post-removal. And it's clear that under  
2 1231, 8 U.S.C. section 1231, the prior order of removal is  
3 reinstated. So there is a prior final order of removal. The  
4 fact that Mr. Pinguil Loja has a pending U visa application and  
5 a pending withholding application doesn't change the finality  
6 of that order of removal. So we think he's under 1231.

7           Now, I'm a little confused because in the original  
8 petition the petitioner argued that he was subject to 1226(a)  
9 and now in the filing that was made this morning they say we  
10 still think that's a better argument but we agree it can be  
11 analyzed under 1231. So I'm still reviewing it, but it  
12 certainly doesn't change our position that 1231 is applicable.

13          THE COURT: So, okay. If 1231 is applicable, then  
14 what?

15          MR. KANWIT: Then you look at whether the 90-day  
16 period has even begun. The 1231 itself sets out what the  
17 triggering events are to start that 90 days, and you have to  
18 have a final order of removal. There's a question if you have  
19 a final order of removal and you're removed but you come back,  
20 what starts the 90-day period again?

21          THE COURT: Well, let's say it wasn't -- it might have  
22 expired before he was removed, but let's say it didn't. Let's  
23 say it started again when he came back or even when he was  
24 detained. It's been more than 90 days.

25          MR. KANWIT: It has, and the delay in removal is a

1 result of actions he's taken by seeking a U visa and by seeking  
2 withholding of removal to Ecuador. Absent those things, he  
3 would have been removed back to Ecuador. So it cannot be that  
4 he gets released just because he's filed these actions when he  
5 keeps not obeying the orders of removal and keeps coming back,  
6 he claims now --

7 THE COURT: Yeah, but -- I'm sorry. Keep going. This  
8 is helpful.

9 MR. KANWIT: So I would take a step back and look at  
10 it a little bit more broadly, and I suspect --

11 THE COURT: Exactly.

12 MR. KANWIT: -- that's where the court might want me  
13 to go. That is from the government's point of view, Jennings  
14 changes the landscape, Jennings v. Rodriguez, and does so in  
15 important ways.

16 THE COURT: Jennings was decided within the last year?

17 MR. KANWIT: Yes, yes, Your Honor.

18 THE COURT: Go ahead.

19 MR. KANWIT: And the Jennings court basically said  
20 Zadvydas was based on 1231, and the case decided in Jennings  
21 was under 1226(a), but important for our discussion is the idea  
22 that what Jennings said was you can't graft onto the statute  
23 provisions that are not there for a bond hearing. You can't  
24 say this statute would be unconstitutional if it doesn't  
25 provide for a bond hearing solely because you want to avoid a

1 constitutional issue.

2 First, according to Jennings, you have to find that  
3 the statute is ambiguous. Constitutional avoidance does not  
4 come into play, according to Jennings, unless and until there's  
5 ambiguity, which is very important, given the positions taken  
6 by the petitioner.

7 If that's the case and we're under 1231, Zadvydas  
8 survives Jennings, although I think there's some question about  
9 how long, but right now it has survived, and the question is  
10 the six-month presumption. So it's been more than six months  
11 for Pinguil Loja. Clearly, under Zadvydas, six months isn't an  
12 absolute rule. It's a presumption that can be rebutted in  
13 either direction. The government can show that it has reasons  
14 to continue detention post six months, which is exactly the  
15 situation here with somebody who keeps re-entering and not  
16 following orders.

17 THE COURT: But I think -- you know, I would encourage  
18 you to take even a broader focus. And I'll decide this if I  
19 need to, although I don't think -- probably not next Tuesday.  
20 But now somebody in another area of the Department of Homeland  
21 Security has decided that this person may have had -- this  
22 person cooperated with law enforcement, helped in a homicide  
23 case, this is what I'm told, and may have a very good reason  
24 for continually fleeing Ecuador, which is a violent place  
25 anyway, but he has a reasonable fear of being tortured because

1 he cooperated with the U.S. government. So there's one branch  
2 of the Department of Homeland Security saying it's not a final  
3 decision. This person should be allowed to stay in the United  
4 States.

5 MR. KANWIT: May I be heard on that, Your Honor?

6 THE COURT: Yes, please.

7 MR. KANWIT: I would change the characterization a  
8 little bit. First, I think it's a very preliminary decision.  
9 Second, if it's a preliminary finding at all, it's that he has  
10 on a very, very basic level set forth facts which could show  
11 that he might be subject to torture or persecution in Ecuador.  
12 That doesn't mean he gets to come to the United States. He can  
13 leave Ecuador, and there are many other countries he could go  
14 to.

15 THE COURT: No, but here we're talking about -- that's  
16 right. And I don't think that's an issue for a United States  
17 district judge to decide as far as I know. We're talking about  
18 detention. That's an issue that would have to go through the  
19 immigration process, the asylum process, U visa process, which  
20 I'm not familiar with. The question is should he be detained  
21 while that's occurring or whether there's some set of  
22 reasonable conditions that would assure that if he doesn't  
23 eventually prove to be entitled to stay in the United States,  
24 allowed to stay in the United States, the government knows  
25 where he is so he can be deported.

1           And, you know, I'd encourage -- you can decide  
2 whatever you're going to decide, but I'm going to order that  
3 you confer on this because I've already heard today in the  
4 context of the other cases that ordinarily if somebody receives  
5 a stay of removal, they're permitted -- they're no longer  
6 detained.

7           Now, this person came back three times. If he came  
8 back three times because otherwise there was a good chance he  
9 was going to get killed or at least tortured in Ecuador, it  
10 might make him a more reliable person.

11           Anyway, you know, these are really intriguing issues,  
12 and I haven't read Jennings, and it may qualify what I said in  
13 Zadvydas. And the Supreme Court hasn't been very consistent on  
14 this. In Booker, I don't think the guidelines were  
15 particularly ambiguous. They said they were unconstitutional  
16 and then they rewrote them. So there's a kind of ebb and flow.  
17 And as far as I know, you're right. Well, I know you're right.  
18 I've written it, so I agree. There has to be some ambiguity  
19 before the doctrine of constitutional avoidance gets invoked,  
20 some certainly. They found it in Zadvydas. It's all very  
21 interesting.

22           But this is part of the reason I wanted to get the  
23 overview before setting the agenda. It's been very helpful to  
24 me at least because, you know, these are profoundly human  
25 issues. And if it's necessary to decide the parties' legal

1 rights, that's what the court is here for. But the idea that  
2 there's somebody from Ecuador who helped law enforcement in the  
3 United States solve a homicide, and, you know, there are  
4 preliminary indications that he may be entitled to stay here, I  
5 would think that the hope of staying here would give him a big  
6 incentive to obey any conditions of release. It would be  
7 monumentally stupid not to. He'll get caught. Which raises  
8 another question that I'm going to ask at the end, but do the  
9 petitioners' counsel want the petitioners here for the hearing  
10 next week?

11 MR. CORTES: Yes, Your Honor.

12 THE COURT: But this is a civil case. I can issue an  
13 order that they be brought here, but you would have to supply  
14 and pay for the interpreter. So you can let us know on May 3  
15 whether you want them here. We have interpreting equipment.  
16 We can put them someplace where it wouldn't be disruptive.  
17 They could sit in the jury box or something. But you'll have  
18 to bear that expense.

19 MR. CORTES: Thank you, Your Honor. I will talk to my  
20 client about that. Thank you.

21 THE COURT: And that applies to all of them. This is  
22 affecting their lives in a very serious way. So if they want  
23 to observe the proceedings, I think it's appropriate to  
24 facilitate that.

25 All right. Mr. Kanwit -- and I don't know if we're



1 going to get to Mr. -- we're going to get to Mr. Pinguil next  
2 week, although he does have a Zadvydas issue. Maybe we will.  
3 But you've got your positions, and they're well thought out.  
4 But this is a sort of constitutional avoidance. If there's a  
5 way to agree to a resolution of the case, then the court  
6 doesn't have to decide the constitutional issue.

7 So I think I'm going to order it with regard to  
8 Mr. Pinguil, that you confer and report to me by 12:00 noon on  
9 Friday, which will be the 4th, whether you've reached some  
10 agreement that moots, that takes care of his detention and  
11 think about whether there's some reasonable set of conditions  
12 that are feasible that would assure that he's not going to  
13 flee. Does that sound reasonable?

14 MR. CORTES: That's reasonable, Your Honor.

15 THE COURT: Does he have a place to live?

16 MR. CORTES: Yes, Your Honor. His wife and his  
17 children are waiting for him in Milford if he's released.

18 THE COURT: In Milford?

19 MR. CORTES: Milford, Massachusetts, yes, sir.

20 THE COURT: So he has a home. And we have -- could I  
21 ask the probation officer to identify herself, please.

22 U.S. PROBATION: Yes, Your Honor. Gina Affsa with  
23 U.S. Probation.

24 THE COURT: Because I did this previously in  
25 Flores-Powell, it was done before. I don't know whether any of

1 these petitioners are going to be entitled to detention  
2 hearings. I don't know whether I'll decide whether the court  
3 should conduct them and defer to immigration. Although -- I  
4 don't know. But if I were to conduct the hearings, I'd be  
5 considering, as we do in criminal cases, Mr. Kanwit is fully  
6 familiar with this, is there some reasonable accommodation or  
7 condition -- is there some combination of reasonable conditions  
8 that would reasonably assure the person is not going to run  
9 away.

10 I mean, his desire is to be with his wife and his son,  
11 and he's got a prospect of staying in the United States. So if  
12 this were a criminal case, he may have a good argument for  
13 getting released on electronic monitoring or something. So  
14 Ms. Affsa will participate in your discussions if the  
15 government is willing to discuss possible conditions.  
16 Otherwise, you each need to be developing conditions, and you  
17 can contact Ms. Affsa. She'll tell you how to do that after  
18 the hearing. Because if I'm going to conduct a hearing and,  
19 you know, it would eventually get to that issue, is there some  
20 combination of conditions, feasible conditions that would  
21 reasonably assure this person won't be dangerous, this person  
22 will appear as needed, including he'd be deported if that's  
23 where it ends up.

24 MR. KANWIT: Thank you, Your Honor. I appreciate you  
25 recognizing that I have a question about that. I'm not

1 prejudging what my discussion with my client will be or what  
2 the outcome of conferring will be, but I'm anticipating that  
3 one of the pieces of information that would be important in my  
4 client making a decision about whether it's willing to release  
5 Mr. Pinguil on conditions is the reliability of the home that  
6 has been suggested by counsel. So what would actually be  
7 helpful to the government, if the court asked probation to make  
8 a home visit and inquire about that.

9 THE COURT: Yes. I think that's terrific. Do you  
10 think it will be feasible to look into the suitability of the  
11 home in Milford before they have to report back to me on  
12 Friday, or you can report on that, probation could.

13 U.S. PROBATION: We'll do our best to get it done,  
14 Your Honor.

15 THE COURT: Friday is not a drop -- it's not  
16 necessarily a final deadline, but I've got this hearing next  
17 week, and if something is going to be moot, as you've seen,  
18 we've got plenty of other issues to focus on. All right. But  
19 the short answer is yes, they'll look at it.

20 MR. KANWIT: Thank you, Your Honor.

21 THE COURT: So you all should talk when we finish.  
22 All right. Now we need an agenda, and I'm not sure if this has  
23 all become more clear or more cloudy.

24 So your proposed agenda, docket number 42, pages 7 and  
25 8, you propose that the first issue would be whether De Souza

1 is lawfully detained, Ms. De Souza is lawfully detained under 8  
2 U.S.C. section 1231(a)(6) and the Constitution.

3 My intention for next -- I have all day next Tuesday.  
4 I'm not available, I'm not going to be in Massachusetts on  
5 Wednesday and Thursday. I have all day next Tuesday. I want  
6 to give you an ample opportunity to argue. My goal is to  
7 always decide things orally. That may not be possible or most  
8 appropriate with regard to these issues, but my intention --  
9 you want to listen to this. My intention is to focus on the  
10 detention issues next Tuesday. The other issues don't have the  
11 same urgency. And in fact, I don't think they're all fully  
12 briefed.

13 So does it still make sense in the parties' view to  
14 start with the questions of whether Ms. De Souza is lawfully  
15 detained under section 1231(a)(6) and the Constitution?

16 MS. LAFAILLE: Yes, Your Honor.

17 MS. LARAKERS: Yes, that's fine with us as well, Your  
18 Honor.

19 MS. LAFAILLE: Your Honor, if I could just point out  
20 one feature of this proposed agenda. When we compiled this  
21 agenda the parties all agreed that Mr. Pinguil's case could be  
22 resolved before, or perhaps not resolved but heard before this  
23 consolidated hearing because it was sufficiently distinct, so  
24 there's no plan in this proposed agenda for dealing with  
25 Mr. Pinguil's case, and I understand there's actually a

1 scheduling conflict for Tuesday morning as well with  
2 Mr. Pinguil's counsel.

3 THE COURT: Well, Mr. Pinguil's case, I can deal with  
4 it separately. A, it may be moot. B, I can deal with it  
5 separately but not before next Tuesday. So when you report  
6 12:00 noon on Friday -- in fact, I'm not going to deal with  
7 it -- 12:00 noon on Friday, if you haven't reached an  
8 agreement, identify the issues, identify -- do you think  
9 Pinguil is fully briefed now, as of perhaps this morning?

10 MR. KANWIT: I would like an opportunity to respond,  
11 and I would keep it -- unlike -- we often talk about briefs. I  
12 would like to keep it fairly brief, but I would like an  
13 opportunity for a short sur-reply.

14 THE COURT: All right. And how long will that take  
15 you?

16 MR. KANWIT: I have another immigration case on before  
17 Chief Judge Saris tomorrow, and I'm trying to get a final brief  
18 done on that, so I probably wouldn't be able to work on Pinguil  
19 until tomorrow afternoon.

20 THE COURT: Well, maybe you won't have to work on it  
21 at all. But would a week from Friday be sufficient time for  
22 you?

23 MR. KANWIT: Absolutely.

24 THE COURT: And actually, even better, would a week  
25 from Thursday be sufficient time for you?

1 MR. KANWIT: That would also be sufficient.

2 THE COURT: All right. So that's May 10, if I count  
3 right. You can file a reply if necessary by May 10, and you  
4 should confer and suggest some dates for a hearing. The  
5 problem is -- well, I have a trial scheduled the week of May  
6 21. If it settles, which it may, I'll have time that week. If  
7 it doesn't settle, things are pretty crowded. But we'll get it  
8 all done.

9 All right. So the first issue we'll take up next week  
10 is whether De Souza is lawfully detained after post-removal  
11 order under section 1231(a)(6) and the Constitution.

12 Then second question to be argued would be whether  
13 Junqueira, Dos Santos and Ms. De Souza are entitled to the  
14 benefit of the procedures in 8 CFR section 241.4. It appeared  
15 to me that perhaps these two issues boil down to the same legal  
16 question, whether section 241.4 applies to decisions to detain  
17 aliens who are arrested after the removal period expired; and  
18 if so, how.

19 So is your A2 -- how is your A2 distinct from A1, or  
20 do they overlap?

21 MS. LARAKERS: The government's position is that  
22 they're distinct because even if this court were to find that  
23 there was a violation of 241.4, the poker regs, the remedy  
24 would only be a new poker reg, new notice, new procedures. It  
25 wouldn't mean that their detention is any less lawful. So the

1 detention authority found in (a) (6) is distinct and separate  
2 from the procedures they receive during detention, which is  
3 241.4.

4 MS. LAFAILLE: And Your Honor, I would agree.  
5 Question two is a narrower and more specific question.  
6 Question one involves the arguments I was making earlier about  
7 whether Ms. De Souza's detention is reasonably related to its  
8 purposes. And that is both a constitutional question, and to  
9 the extent that the canon of constitutional avoidance applies,  
10 which Jennings has indicated that this provision is different  
11 than the mandatory detention provisions it was interpreting, it  
12 can be a statutory question as well, but that's the question in  
13 part one.

14 THE COURT: All right. So we'll go with your one and  
15 two. I don't intend next week, next Tuesday -- well, next  
16 week, to take up your B, the common issues presented in  
17 Junqueira and Dos Santos regarding whether 8 USC section 1252  
18 precludes the court from staying removal of them. I think that  
19 may not be fully briefed yet. Is there another brief coming in  
20 on May 3, or I confused about that?

21 MS. LARAKERS: We had a briefing schedule set up in  
22 Junqueira to respond to our motion to dismiss, and they, with  
23 leave of this court, filed a response to that motion to dismiss  
24 on Monday -- or Sunday -- sorry, yesterday and Sunday. So our  
25 position is that it is fully briefed and ready to go.

1 THE COURT: I think it may not be briefed in Calderon.

2 MS. LARAKERS: No. Your Honor, not in Calderon, but  
3 it is in Junqueira.

4 THE COURT: I'd rather have everything you want to  
5 tell me on an issue before I decide it in one case and then  
6 have to deal with it again in another case.

7 MS. LARAKERS: Sure.

8 THE COURT: Then C, a hearing on the unique issues in  
9 Junqueira. Remind me what the unique issues in Junqueira are.

10 MS. LARAKERS: What's unique about Junqueira's case is  
11 really how distinct it is from Calderon. So his due process  
12 question is different, and that's why we propose that that  
13 issue be heard first. Whether he has a due process right to  
14 remain in the United States should be heard first because it is  
15 so different from the Calderon petitioner is the same claim  
16 because the facts are so entirely different.

17 THE COURT: Remind me which one is Junqueira. I think  
18 I know, but I'm not confident.

19 MS. LARAKERS: He was ordered removed and then came,  
20 illegally re-entered, so he came back, so he would be unable to  
21 avail himself of the unlawful presence waiver, et cetera.  
22 That's the Calderon petitioner's claim is part of their due  
23 process right.

24 THE COURT: And would I be dealing with this issue in  
25 Calderon next Tuesday?



1 MS. LARAKERS: No, Your Honor. The due process issue  
2 in Calderon is not fully briefed. However, we thought still  
3 that the due process issue in Junqueira could be heard on  
4 Tuesday because it's just so different.

5 THE COURT: I think I'm going to take up Junqueira and  
6 Calderon together when Calderon is briefed. I think the  
7 contrast may help me understand the argument. And then the  
8 hearing on the unique issues in Dos Santos. The unique issues  
9 are what?

10 MR. SADY: Your Honor, I think the unique issue here  
11 is the effect of the denial of Mr. Dos Santos's marriage  
12 request. I think that's the only unique issue in this case.

13 MR. POMERLEAU: I would agree, Your Honor.

14 THE COURT: So that's not a detention issue, is it?

15 MR. POMERLEAU: No. Well, it is not.

16 THE COURT: All right.

17 MR. POMERLEAU: It does arguably deal with detention,  
18 because but for being able to apply for the I-130, he can't  
19 avail himself of that process and additional waivers, which is  
20 similar in Calderon and the other companion cases.

21 THE COURT: Well, you can prepare to argue it, but I  
22 at the moment don't anticipate that I'm going to hear that  
23 argument.

24 MR. POMERLEAU: All right. Thank you.

25 THE COURT: I may give you some further guidance on

1 Monday.

2 MR. POMERLEAU: Appreciate it. Thanks.

3 THE COURT: Mr. Pomerleau, let me ask you some  
4 questions about Dos Santos.

5 MR. POMERLEAU: Yes, Your Honor.

6 THE COURT: And this goes back to something we talked  
7 about some time ago. Do you agree -- you told me earlier that  
8 it's undisputed that Mr. Dos Santos is not cooperating with  
9 removal now. Do you agree with the government's contention  
10 that the removal period hasn't expired because of his failure  
11 to cooperate under section 1231(a)(1)(C)?

12 MR. POMERLEAU: Not necessarily. Because I think like  
13 sister counsel indicated earlier, with the Zadvydas case there  
14 are different -- there's distinctions in that case for the  
15 various purposes of detention. What's really at issue with Dos  
16 Santos is by not allowing him to be married, it's denying him  
17 the opportunity to avail himself of the regulatory scheme to  
18 get a green card. And the government's position is that he's  
19 not cooperating solely because he's not signing off for a  
20 travel document, but then if he signs off on the travel  
21 document, they'll let him get married. There's no assurance  
22 that that would actually occur because they could put him on a  
23 plane with a travel document, and then he'd be in Brazil and  
24 he'd have to get married, and it could be three or four years  
25 to get back to the United States, whereas the other process

1 could take him a year and a half start to finish.

2 I mean, the other issues I think that were discussed  
3 by Ms. Lafaille dealing with Zadvydas, I think the case does  
4 have more aspects of it than most people realize.

5 THE COURT: Well, I intended in that question to make  
6 a distinction between the regulations that require some  
7 discussion in Zadvydas and just a straight Zadvydas issue that  
8 this is unreasonably long. So I think I don't understand your  
9 response. Is it your position that the 90-day removal period  
10 has expired, or do you agree with the government that it has  
11 not expired?

12 MR. POMERLEAU: Our contention is that it expired in  
13 February of -- excuse me -- May of 2015 when the BIA decision  
14 became final. He wasn't detained for 37 months thereafter.

15 THE COURT: I'm sorry. It's the government's position  
16 that it hasn't expired, and it's your position that it has?

17 MR. POMERLEAU: That it expired, yes, in May of 2014,  
18 would be our position.

19 THE COURT: Am I going to -- is there going to be a  
20 dispute? You say it's undisputed he's not cooperating now,  
21 he's not applying for travel documents. Am I going to have --  
22 is there a dispute on which evidence might have to be taken as  
23 to whether he cooperated previously?

24 MR. SADY: I don't think so, Your Honor. I mean, I  
25 think it's rather clear that --

1 MR. POMERLEAU: This is the only time he was detained.  
2 He was originally out on bond before the Immigration Court.  
3 That process took four years, a little over four years before  
4 he had a final decision from the Board of Immigration Appeals.

5 THE COURT: So you're telling me this, but are you  
6 able to stipulate to these facts that you're now explaining to  
7 me?

8 MR. POMERLEAU: We could have that discussion.

9 THE COURT: So the record will be clear.

10 MR. SADY: Certainly we could definitely have the  
11 discussion.

12 THE COURT: Why don't you talk about whether you can  
13 stipulate to these facts that relate to whether he was  
14 cooperative and when. I'll give you until May 3 to give me a  
15 stipulation you can reach. Okay?

16 MR. SADY: Yes, Your Honor.

17 MR. POMERLEAU: Yes, Your Honor. Thank you.

18 THE COURT: All right. Then I'm going to have to look  
19 at the briefing schedule. Is the preliminary injunction,  
20 Calderon's preliminary injunction fully briefed yet?

21 MS. LAFAILLE: No, Your Honor. It was just filed  
22 around midnight last night.

23 THE COURT: That's what you filed last night?

24 MS. LAFAILLE: Yes.

25 THE COURT: And I haven't looked at that. In that

1 motion do you say what procedures the Fifth Amendment requires  
2 if section 2414 is not sufficient?

3 MS. LAFAILLE: Yes, Your Honor. There is a -- our  
4 contention of course is that the petitioners are receiving no  
5 procedures, and there is a remedy section discussing the  
6 proposed remedy.

7 MS. LARAKERS: Your Honor, the government thinks that  
8 this would be cleared up after the motion to dismiss is  
9 decided. I think we can really narrow the issues addressed in  
10 the PI after a motion to dismiss is litigated. Therefore, we  
11 would ask that the PI and class cert be held in abeyance until  
12 we can sufficiently narrow those issues. The government has  
13 had a motion to dismiss on file. They've known our position  
14 for over a month now.

15 THE COURT: So actually, this I guess is getting into  
16 the last thing on my -- before I move on, is there going to be  
17 a need to take evidence, possible need to take evidence on any  
18 of these issues next Tuesday?

19 MS. LARAKERS: No, Your Honor.

20 MS. LAFAILLE: I don't believe so, Your Honor.

21 THE COURT: All right. Okay. So the respondents have  
22 filed a motion to dismiss Calderon. The opposition is due May  
23 14, and I think there's a reply May 21, right?

24 MS. LARAKERS: Yes, Your Honor.

25 THE COURT: So that can't be dealt with soon. And

1 then your proposal is -- the motion for preliminary injunction  
2 wouldn't be completely briefed until May 31 in any event.

3 Ms. Lafaille, do you agree that -- ordinarily I would  
4 decide a motion to dismiss in connection with hearing a motion  
5 for preliminary injunction, because if the case is going to be  
6 dismissed, there's no reasonable likelihood of success on the  
7 merits, which is the sine qua non of preliminary injunctive  
8 relief. Does it make sense to take them up in tandem or  
9 address the motion to dismiss first?

10 MS. LAFAILLE: Well, we have proposed that those  
11 motions are heard together along with our motion for class  
12 certification, which we also filed yesterday. And one of our  
13 concerns, Your Honor, is Your Honor has taken some steps and  
14 the government has in part agreed that our named petitioners  
15 are not at risk of removal during the pendency of this case,  
16 but we have named class members out there. We have a couple in  
17 detention that we are aware of. And my understanding is that  
18 some of these individuals detained at their I-130 interviews  
19 who fall into our putative class are at risk of imminent  
20 removal. So to the extent that the government proposes to  
21 defer argument on preliminary injunctive relief, we also filed  
22 a TRO.

23 THE COURT: You filed a TRO?

24 MS. LAFAILLE: Yes. It's a motion for temporary  
25 restraining order and --

1           THE COURT: Well, I know what a TRO is. I didn't have  
2 that on my radar screen. When did you file the motion for a  
3 TRO?

4           MS. LAFAILLE: It's one motion, Your Honor.

5           THE COURT: Preliminary injunction and temporary  
6 restraining order?

7           MS. LAFAILLE: Yes.

8           THE COURT: But you agreed to a briefing schedule that  
9 doesn't have the matters briefed until May 31.

10          MS. LAFAILLE: Well, yes. The briefing schedule we  
11 envisioned was relating to the request for preliminary  
12 injunction. Since then we've become aware in the past few days  
13 of the risks that some of our class members are facing, and in  
14 light of the government's request especially, certainly if --

15          THE COURT: Did you confer with the government about  
16 filing a motion for a TRO as opposed to a motion for a  
17 preliminary injunction?

18          MS. LARAKERS: I think your email said PI/TRO that you  
19 were going to file.

20          THE COURT: Well, emails -- this is insufficient.  
21 You've got Local Rule 7.1. This is not the only case I have,  
22 and it's not the only substantial case that I have. I still  
23 don't know what you're proposing. What are you proposing?

24          MS. LAFAILLE: Well, certainly, Your Honor, if the  
25 government agrees not to remove our class members, putative

1 class members --

2 THE COURT: Do you have the names of all of your  
3 putative class members?

4 MS. LAFAILLE: No, I do not.

5 THE COURT: This is just a question, obviously, but I  
6 don't know how we'd even identify who is in the class.

7 MS. LARAKERS: Exactly, Your Honor, and I can tell you  
8 that would take ICE some time to run through their records and  
9 identify those class members. And essentially what they're  
10 asking for is us to agree with their PI. We simply can't do  
11 that. However, I really -- we really do think that hearing the  
12 issues laid out in the motion to dismiss will make everything a  
13 lot more clear moving forward, especially in the PI. And  
14 again, my arguments have not changed since -- have not changed  
15 substantially or even at all since I filed the first motion to  
16 dismiss when this was just a single habeas action and not a  
17 class. So we think it's fair that petitioners respond and give  
18 us an idea of what their arguments are going to be moving  
19 forward.

20 THE COURT: Yeah. And I think on this schedule, the  
21 motion to dismiss is not completely briefed until May 21 on a  
22 schedule you've agreed to and I've adopted. And I don't think  
23 I fully understand, you know, the issues that are being raised.  
24 But, you know, if there are unidentified people who, as I said,  
25 my authority -- is it your concern that these people in your



1 putative class are going to be detained or that they're going  
2 to be deported?

3 MS. LAFAILLE: So both, Your Honor. There are -- and  
4 I also want to apologize to the court for perhaps the  
5 consequences of this tension we're facing between wanting all  
6 of the issues to be fully briefed and to have time to brief  
7 them adequately and the reality of knowing that the people who  
8 we brought this case to protect will begin to face some of  
9 those consequences that we're trying to prevent while we  
10 litigate this case. But specifically I am aware of, for  
11 example, two detained individuals who I understand from their  
12 immigration counsel are at risk of imminent removal. And I  
13 assume there --

14 THE COURT: But isn't there a substantial question  
15 about the authority in this court to essentially enjoin a  
16 removal?

17 MS. LAFAILLE: Your Honor, it's certainly the normal  
18 breakdown of things that the -- petitions for review of final  
19 orders of removal of course go to the Courts of Appeals, and  
20 this court ordinarily hears issues relating to detention. Now,  
21 there are some issues that cannot be raised in petitions for  
22 review and for which the jurisdictional bars that have  
23 channelled many questions of review to the Courts of Appeals do  
24 not apply, and if they did apply would violate the suspension  
25 clause.

1           Judge Saris, for example, has a case in which she has  
2 enjoined the removal of Indonesian Christians not permanently  
3 but in order to allow them to take advantage of the motion to  
4 reopen process. This is similar in that we're not asking the  
5 court to finally decide removal but only to protect the ability  
6 of the petitioners here to avail themselves of this process,  
7 and that's a claim that cannot be brought on petition for  
8 review or in any other judicial forum.

9           THE COURT: And is that raised in the motion for  
10 preliminary injunction you filed this morning sometime after  
11 6:00 last night?

12           MS. LAFAILLE: Yes, it is.

13           MS. LARAKERS: The suspension clause issue? Because  
14 the suspension clause is not mentioned in their complaint,  
15 therefore that hasn't been addressed. However, Your Honor,  
16 what I'm hearing here is that we can at least hear the part of  
17 the motion to dismiss that deals with this court's jurisdiction  
18 regarding 1252, and perhaps then we can move on to the  
19 preliminary injunction.

20           The government would just like to narrow these issues  
21 as much as possible and as much as would speed this court.

22           THE COURT: I think all I can do now is -- I'm  
23 adopting your briefing schedule, and that's what I have in  
24 front of me. And this is not ready for a hearing when you file  
25 your briefs because my goal is to decide these matters orally

1 to at least study them beforehand. So if something is not  
2 briefed until May 21 or May 31, you're not going to get a  
3 hearing the next day, probably. You know, if you want to file  
4 some different motion for more urgent relief, Local Rule 7.1  
5 requires that you confer on it, and you can file it, and I'll  
6 deal with it.

7           You know, you have come back -- I used the word  
8 before. You've commendably agreed on a lot of things, and in  
9 some cases, like dismissal cases, it's led to people being  
10 released from detention. You can't agree on everything. But  
11 the process is not futile.

12           So I'll continue to take these cases, try to give  
13 these cases priorities because they raise issues of someone's  
14 liberty. However, they raise complex issues, and they're not  
15 the only cases I have that have some urgency to them either.  
16 So I'm ordering that you order the transcript of this hearing  
17 on an expedited basis. It's very helpful to me, but I think it  
18 may be helpful to you to consider in advance of next Tuesday.

19           Are there other things we should discuss that should  
20 have been on the agenda?

21           MS. LAFAILLE: Your Honor, this is not another thing.  
22 I apologize for returning to a discussion that I think Your  
23 Honor intended to close, but with regard to our two detained  
24 class members --

25           THE COURT: The two detained class members are?

1 MS. LAFAILLE: Their names? I don't have their names  
2 in front of me.

3 THE COURT: I just want to make sure I know who you're  
4 talking about.

5 MS. LAFAILLE: Yes.

6 THE COURT: De Souza?

7 MS. LAFAILLE: No. I'm sorry. I'm not referring to  
8 our named petitioners. I'm referring to members of our  
9 putative class who are detained. My understanding is that we  
10 may have to advise them to proceed as individuals and bring  
11 habeas cases.

12 THE COURT: That's exactly what was occurring to me,  
13 bring their own case. And if they raise -- if they're one of  
14 the same parties and raise related issues, I'll have two more  
15 cases.

16 MS. LAFAILLE: That's what I was trying to avoid, Your  
17 Honor.

18 THE COURT: No. Actually, if there are some people --  
19 I have a question. The question is not an answer. I have a  
20 question as to whether people who are not in detention and  
21 haven't been singled out as targets for detention would have  
22 standing as class members. You know, I have to decide actual  
23 cases and controversies. And it's a question, but it's a  
24 serious question. You'll make judgments in consultation with  
25 your clients or potential clients, but they may need to file --

1 you know, you might find it's prudent that they file their own  
2 cases.

3 And as we've seen today, cases that raise common  
4 issues can have very different facts, and that can affect  
5 whether the respondents will agree to a release, and it affects  
6 the arguments that they make. So even if there is standing,  
7 there would be a question, do common issues predominate, or are  
8 the facts so distinct that this couldn't be certified as a  
9 class.

10 MS. LARAKERS: Your Honor, I did have one just  
11 additional clarification. The briefing scheduling in here on  
12 the PI and the class cert, that wasn't agreed to by respondents  
13 because our request is that this court hold that in abeyance.  
14 We also recognize that this court may not want to hear all of  
15 the issues presented in the motion to dismiss. However, to the  
16 extent that we can even just limit it to the purely  
17 jurisdictional issues about 1252(g) and (b)(9) and the standing  
18 issues Your Honor raised, even that I think could be helpful  
19 moving forward.

20 THE COURT: Well, confer on that. But when will the  
21 motion to dismiss be briefed? May 21st did I say?

22 MS. LAFAILLE: Yes, Your Honor.

23 THE COURT: I mean on the proposed schedule.

24 MS. LARAKERS: Yes, May 21 our reply would be due, so  
25 yes.

1 THE COURT: Confer. And if you can identify issues  
2 that should be prioritized, if I decide this for the government  
3 it disposes of all the others, that would be helpful.

4 MS. LARAKERS: Yes, Your Honor, we can do that.

5 THE COURT: When do you want to do that by?

6 MS. LARAKERS: Since we're not hearing the motion to  
7 dismiss, if we could have -- we can do it the same day that we  
8 do the -- the 4th. Yeah, we could do it the 4th, Your Honor.

9 THE COURT: May 4?

10 MS. LARAKERS: May 4.

11 THE COURT: That's Friday.

12 MS. LARAKERS: Yes. Well, the government can at least  
13 identify issues --

14 THE COURT: You have to confer with each other and try  
15 to agree. Talk about everything you need to talk about that's  
16 emerged from this hearing. If they're going to file new cases,  
17 when are you going to file them by, things like that.

18 MS. LARAKERS: We can confer.

19 THE COURT: Anything further for today?

20 MS. LARAKERS: No, Your Honor.

21 MS. LAFAILLE: No, Your Honor.

22 THE COURT: Court is in recess.

23 (Adjourned, 12:41 p.m.)  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATE OF OFFICIAL REPORTER

I, Kelly Mortellite, Registered Merit Reporter and Certified Realtime Reporter, in and for the United States District Court for the District of Massachusetts, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 3rd day of May, 2018.

/s/ Kelly Mortellite

---

Kelly Mortellite, RMR, CRR

Official Court Reporter