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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 1:08-cv-11696-MLW

ERICK JOSEPH FLORES-POWELL,
Petitioner,

vs.

BRUCE CHADBOURNE, et al,
Respondents

For Hearing Before:
Chief Judge Mark L. Wolf

Motion For Habeas Corpus

United States District Court
District of Massachusetts (Boston.)
One Courthouse Way
Boston, Massachusetts 02210
Friday, November 6, 2009

REPORTER: RICHARD H. ROMANOW, RPR
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A P P E A R A N C E S

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

2 (Begins, 1:50 p.m.)

3 THE CLERK: Civil Action 08-11696, Eric Joseph
4 Flores-Powell versus Bruce Chadbourne, et al. The Court
5 is in session. You may be seated.

6 THE COURT: Good afternoon. Would those
7 present to participate please identify themselves for
8 the Court and for the record.

9 MS. PIEMONTE-STACEY: Good afternoon, your
10 Honor, Assistant United States Attorneys Eve Piemonte-
11 Stacey and Mark Grady, for the respondent.

12 MR. FLORES-POWELL: Erick Joseph Flores-
13 Powell, the petitioner.

14 THE COURT: And Mr. Flores-Powell, um, I've
15 had a Criminal Justice Act attorney come to monitor
16 these proceedings because one of the questions I'm going
17 to ask you is not whether you want a lawyer today -- I
18 didn't want to delay today's hearing to try to develop
19 that option, if it's of interest to you, but whether you
20 might want a lawyer to represent you after today. So
21 I'll ask the lawyer, who is sitting behind you, to
22 identify himself.

23 MR. TIPTON: Larry Tipton.

24 THE COURT: Okay. Thank you for coming,
25 Mr. Tipton.

1 MR. TIPTON: You're welcome.

2 THE COURT: You may be seated.

3 All right. Mr. Flores-Powell has filed a motion
4 for habeas corpus challenging his continued detention
5 under 8 United States Code, Section 1226(c). The
6 government has filed a motion to dismiss. Mr. Flores-
7 Powell has been detained, I think, 21 months, um, which
8 is what gives some urgency to this, although I gave the
9 government a number of extensions since this matter was
10 filed. It didn't seem to me to be appropriate to grant
11 the last request, about a month ago, for another 45 days
12 pending an anticipated decision by the Board of
13 Immigration Appeals, on the petitioner's appeal, that he
14 shouldn't be deemed deportable. He's had some success
15 so far in the immigration courts. I guess I have a
16 couple of observations.

17 First, I wonder if the parties have read Judge
18 Ponsor's October 30, 2009 decision in **Bourguignon**,
19 B-O-U-R-G-U-I-G-N-O-N. Has the government read this?

20 MS. PIEMONTE-STACEY: Yes, your Honor.

21 THE COURT: All right. Mr. Flores-Powell,
22 have you seen it?

23 MR. FLORES-POWELL: Yes, your Honor.

24 THE COURT: Okay. Good work. Because it
25 seems to me that this is a thoughtful decision by one of

1 my colleagues that addresses the legal issue presented
2 to me.

3 I have a practical question. About a month ago
4 the government asked for more time because it
5 anticipated that the Board of Immigration Appeals, the
6 BIA, might or would decide the pending appeal, which
7 could moot all of this, I think, within 45 days. Does
8 the government have any sense of when that decision is
9 likely to be rendered?

10 MS. PIEMONTE-STACEY: Your Honor, I have
11 attempted to get a better timeline through agency
12 counsel and without at all trying to make -- insert
13 myself into the BIA process, and I have been told that
14 generally while they had hoped 45 days would be enough
15 time, that it is not uncommon for a decision to take 6
16 to 8 weeks. After hearing that, I did not proceed any
17 further. I would certainly be willing to do so, if the
18 Court would like me to do so, but that's what I've been
19 informed is more common. But briefing is completed
20 before the BIA, your Honor.

21 THE COURT: Okay. And when would the 6 to 8
22 weeks to have started running?

23 MS. PIEMONTE-STACEY: Well, give me one
24 moment. I'll look at the date of the brief. So this
25 appears to have been filed October 2nd, 2009 and they

1 thought 6 to 8 weeks from the time briefing was
2 completed.

3 THE COURT: So was briefing --

4 MS. PIEMONTE-STACEY: So that's about mid
5 November.

6 THE COURT: Well, was briefing completed
7 October 2nd or was it filed October 2nd?

8 MS. PIEMONTE-STACEY: I was informed that this
9 brief of the Department of Homeland Security was the
10 final brief in this matter.

11 THE COURT: Okay. And, again, I'm just trying
12 to understand some practical things in an area that I
13 haven't addressed before.

14 If Mr. Flores-Powell prevails on his appeal, and
15 that means the Board of Immigration Appeals would have
16 determined, in effect, that he's not deportable, isn't
17 that right?

18 MS. PIEMONTE-STACEY: Yes, if he prevails on
19 the Board of Immigration's appeal, then that would be
20 the decision.

21 THE COURT: All right. And is the government
22 able to say whether it will or is likely to appeal a
23 decision adverse to the government to the Second
24 Circuit?

25 MS. PIEMONTE-STACEY: I don't have enough

1 information to answer the Court. I've made the
2 inquiry. Um, I think in large part it depends on what
3 the decision says.

4 THE COURT: A very foreseeable response. An
5 understandable response.

6 Am I correct that if an appeal is taken by either
7 party to the Second Circuit, the mandatory detention
8 provision no longer applies and they'll have to be an
9 individualized determination of whether detention is
10 justified?

11 MS. PIEMONTE-STACEY: May I have just a moment
12 to confer with my co-counsel?

13 THE COURT: Yes.

14 (Pause.)

15 MR. GRADY: Your Honor --

16 THE COURT: Hold on just one second.

17 MR. GRADY: Sure.

18 (Pause.)

19 THE COURT: I guess just to make clear where
20 that question is coming from, it's coming from the Ninth
21 Circuit's decision in **Casas-Castrillon**, 535 F. 3rd 942
22 at 951. And, of course, we're not in the Ninth Circuit.

23 MR. GRADY: Your Honor, if you would permit
24 the government to have more than one attorney answering
25 --

1 THE COURT: That's okay.

2 MR. GRADY: Mark Grady for the United States.
3 I think I have less knowledge of this specific case, but
4 perhaps more generalized knowledge of immigration law in
5 general. The easy answer to the Court's question is
6 that the -- upon the BIA's decision, the administrative
7 order becomes final and 1226(c) ceases to apply. The
8 alien then becomes subject to detention pursuant to 8
9 U.S.C. 1231(a), which provides for an initial 90-day
10 period of detention, for purposes of removal, which
11 could be stayed if the alien successfully obtains a stay
12 from the Second Circuit.

13 Um, adding layers of complexity --

14 THE COURT: Here, hold on just one second.

15 MR. GRADY: Sure.

16 (Pause.)

17 THE COURT: What can be stayed?

18 MR. GRADY: The detention under 1226(c), the
19 mandatory detention provision at issue here, ceases on
20 the end of the administrative procedures.

21 So the easy answer is if the BIA decides and finds
22 the alien to be nonremovable, he would be nonremovable
23 and therefore not detained under mandatory detention, or
24 if he's found to be removable, he would have the
25 opportunity to appeal to the Second Circuit Board of

1 Appeals. In either event, the administrative order
2 would be final and the prefinal order of detention
3 statute would cease to apply. That's the --

4 THE COURT: Yes. Okay. Let me just break it
5 up, because you're addressing what I'm interested in.

6 If Mr. Flores-Powell prevails on appeal, my
7 general impression, not having heard from you, is that
8 he's got a serious argument. The BIA decision would, in
9 effect, be a holding that he's not appealable, the
10 government could appeal -- well, why does it go to the
11 Second Circuit?

12 MR. GRADY: From the BIA?

13 THE COURT: Yes.

14 MR. GRADY: The only court with jurisdiction
15 over the BIA's decision of removability would be a
16 Circuit Court of Appeals.

17 THE COURT: Yes, but why is it the Second
18 Circuit and not the First Circuit?

19 MR. GRADY: Oh, because I thought -- I'm
20 sorry, your Honor, it would be the First Circuit. I
21 thought you had said the Second Circuit and I was
22 assuming that if --

23 THE COURT: Well, if I did, I misspoke. We're
24 in the First Circuit.

25 MR. GRADY: I apologize. It would be in the

1 First Circuit and we'd have a Boston IJ. The First
2 Circuit, your Honor. I apologize. That would be my
3 mistake.

4 THE COURT: All right. Then if the government
5 was taking the appeal, because it had lost at the BIA,
6 what does the statute provide in terms of the standards
7 and procedures for detention, as you understand it?

8 MR. GRADY: I am chagrined to admit that the
9 Court's stumped me on that. That has never arisen in
10 the years that I've practiced, that the U.S. government
11 has appealed from a BIA adverse decision to a Circuit
12 Court and then sought detention.

13 THE COURT: You see, this is of some practical
14 significance to me. And let me see if I understand it
15 right. And, Mr. Flores-Powell, I want to try to assure
16 that you understand it, too.

17 What I think the government is telling me now is
18 that if you -- that if this takes about the amount of
19 time it usually takes, you'll get a decision from the
20 Board of Immigration Appeals in the next couple of
21 weeks. If you win the appeal, it will mean you're not
22 deportable, there's no more a mandatory detention
23 provision operating, and even if the government appeals
24 to the First Circuit, if it follows its usual practice,
25 it won't seek to have you detained.

1 MR. GRADY: Your Honor, I was actually -- when
2 I said I was chagrined, I said I didn't know the answer
3 to that because it never occurred in my experience.

4 THE COURT: Well, I think that's why I said --

5 MR. GRADY: I don't know what ICE will do in
6 that situation, having never encountered it.

7 THE COURT: Um -- you never encountered it
8 because the BIA never rules in favor of the immigrant or
9 because, when the immigrant wins in the past, and every
10 case is unique, the government either hasn't appealed or
11 hasn't sought detention pending appeal?

12 MR. GRADY: I think that it is not the first
13 and it is perhaps the second. I am answering from a
14 generalized understanding of familiarity with the
15 statutes. 1226(c) would not apply to provide a basis
16 for detention, at that point, which would be a prefinal
17 order. 1231, which applies to detention after a final
18 entry of removal, would not apply as well. So it would
19 seem, in that situation, that the government would not
20 have a statutory basis for detention.

21 THE COURT: 12 -- why doesn't 1231 apply?

22 MR. GRADY: Because it applies to an alien who
23 has been found, by way of an administrative final order,
24 to be removable. If he prevails, he would not be an
25 alien subject to --

1 THE COURT: Oh, that's right. No, okay, but I
2 thought you were saying that if the government wins --

3 MR. GRADY: No. No.

4 THE COURT: Then what happens if the
5 government wins at the BIA?

6 MR. GRADY: If the government wins at the BIA
7 level, detention -- mandatory detention under 1226
8 ceases. There is, under 1231, an established procedure,
9 it's governed by the *Zadvydas* decision, with which this
10 Court is familiar, under which an alien is held -- there
11 are a few ways you can go, but generally speaking the
12 alien is held for 90 days during what's called "the
13 removal period," and if the alien is not removed within
14 90 days, it then shifts to a situation in which if the
15 alien is a criminal, he can continue to be held in the
16 discretion of the Attorney General or if the alien is a
17 a flight risk or is found to be dangerous, they can be
18 held for an additional period, but under the regulations
19 they have to have custody and a hearing with an
20 immigration officer.

21 THE COURT: And if the alien appeals to the
22 First Circuit, what happens to the 90-day period?

23 MR. GRADY: The period -- the removal period,
24 the 90-day-removal period will run unless the alien
25 obtains a stay of removal from the First Circuit Court

1 of Appeals. If the alien obtains a stay from the First
2 Circuit, pending the First Circuit's decision, the clock
3 stops by the statute.

4 THE COURT: And would the First Circuit
5 usually decide the matter within the 90 days so it
6 doesn't become moot by virtue of the removal?

7 MR. GRADY: I don't think that they are that
8 quick. I think that the claim that is pressed to this
9 court becomes moot on the entry of an administrative
10 order of removal -- the administrative final order of
11 removal, because the statute, which is currently being
12 challenged, ceases to apply.

13 THE COURT: That's helpful. Um, if the
14 government wins in the BIA, the defendant -- and you may
15 have answered this, and the defendant appealed, is it
16 your understanding under -- now, what is it, 1231? That
17 at least for that first 90-day period he has no right to
18 an individualized bail determination?

19 MR. GRADY: That is correct and that is
20 actually a situation that is applied to all aliens,
21 criminal or noncriminal, that essentially the final
22 order of removal is the due process -- or is the
23 individualized hearing that warrants that 90-day
24 detention for purposes of effecting removal. There was,
25 to my knowledge, no substantial challenge to that and no

1 real question of that period being legal once there is
2 an administratively final order of removal -- in the
3 Supreme Court's **Zadvydas** decision, which addressed post-
4 final-order custody.

5 In fact, I think that the **Zadvydas** -- I'm sorry,
6 your Honor. If I may, your Honor?

7 THE COURT: Yes. Sure.

8 MR. GRADY: In fact, if the **Zadvydas** decision
9 found that if you have a final order of removal and
10 you're talking about detention under 8 U.S.C. 1231,
11 detention is presumptively reasonable for 6 months,
12 which suggests to me that, in fact, that mandatory
13 detention is very different than prerule mandatory
14 detention and is presumptively constitutional.

15 THE COURT: Actually this is helping me a
16 lot. If I grant -- if I deny the motion to dismiss and
17 order an individualized bail determination, and conduct
18 one myself, and then the BIA finds that Mr. Flores-
19 Powell is deportable, my order would no longer have any
20 effect because the order only operates until the BIA
21 decides. Is that your understanding?

22 MR. GRADY: That's correct, your Honor. I
23 think that would be the government's position, yes. And
24 with respect to that, I won't go into the Court's
25 authority here until it asks about that.

1 THE COURT: My authority to do what?

2 MR. GRADY: To hold a bail hearing yourself,
3 your Honor. I would suggest that the statutory scheme
4 at issue -- and if one looks at --

5 THE COURT: Well, let me put it this way. We
6 don't have to go there now, because my present
7 inclination would be to order that an immigration judge
8 do it in the first instance and if the immigration judge
9 didn't do it, in the limited period of time I would
10 order, then I would do it.

11 MR. GRADY: And that would be, assuming all of
12 the other arguments the government may have in the
13 interim are rejected, that would be the remedy the
14 government would suggest as well, your Honor.

15 (Pause.)

16 THE COURT: All right. Let me tell you what
17 my tentative thinking is -- has been coming in and try
18 to get a sense of how to proceed. I think there are a
19 couple of issues.

20 One, the government says that I should imply an
21 exhaustion principle and find that Mr. Flores-Powell
22 hasn't exhausted through the immigration court process,
23 and so I shouldn't act on this. I don't think there's
24 generally an exhaustion requirement and I think that
25 Mr. Flores-Powell has done a lot to try to assert his

1 rights. There's other cases in which he might not. But
2 I think this is a prudential matter so it's -- well, I
3 know he hasn't appealed the decision to detain him, or
4 specifically appealed that, but by -- he's being
5 detained on the theory that his detention is mandatory
6 and he's appealed on the merits.

7 So -- well, let me just first tell you what I'm
8 thinking, okay? Have a seat.

9 (Mr. Grady is seated.)

10 THE COURT: But I phrase it a little
11 differently. Um, I usually -- while I generally
12 subscribe to Justice Brandeis's principle that a
13 constitutional issue shouldn't be decided unnecessarily,
14 I also believe that the courts generally shouldn't be
15 rewriting statutes. And I know it's been done by the
16 Supreme Court, in the immigration context, and in some
17 respects in the sentencing context with **Booker**, but --
18 so it's -- it's -- you know, if, one way or another,
19 this issue is going to be moot when the Board of
20 Immigration Appeals decides, and it's likely to decide
21 in the next couple of weeks, I wonder -- and this is a
22 question, it's not an answer, whether I should decide?

23 Second -- and I don't know if Mr. Powell-Flores
24 has a different position, but as a district judge, a
25 Federal trial judge, I don't have the power to decide

1 whether you're deportable. The Board of Immigration
2 Appeals has to decide that, in the first instance, and
3 then that has to be appealed, if you don't like the
4 decision, to the First Circuit, not to a district judge
5 like me. But the issue of whether the Board of
6 Immigration Appeals is likely to find you deportable, I
7 think is relevant to the third question.

8 I, in cases like **Ly**, L-Y, and Judge Ponsor's
9 decision last week in **Bourguignon**, um, at the moment I
10 think they're well-reasoned, and either there's an
11 implicit reasonableness requirement in the length of the
12 mandatory detention or it's unconstitutional. And I
13 also think, based on what I know now, and this is just a
14 tentative view, that the 21 months that Mr. Powell-
15 Flores has been detained is unreasonable. I distill
16 these factors from **Ly**. But I look at the length of the
17 detention and 21 months is a long time. The Supreme
18 Court contemplated that these matters would be over in a
19 few months, you know, not more than a third of that.

20 I've considered whether the civil detention is for
21 a longer period than a criminal sentence for the crimes
22 resulting in the deportable status. You know,
23 Mr. Flores-Powell wasn't incarcerated at all for the
24 drug offense at issue.

25 Whether actual removal is reasonably foreseeable?

1 I mean, I assume that Panama will take somebody who's
2 ordered deported. I haven't been told to the contrary.
3 It's not Vietnam, or what Vietnam was. But it seems to
4 me that this is where the strength of the evidence comes
5 in and, based on what I know, I think he's got a real
6 shot at winning the appeal.

7 Then I look at whether the immigration authority
8 acted promptly to advance its interest. By my
9 calculation, at least 7 of the 21 months he's been
10 locked up is because the immigration judge couldn't
11 conduct the proceedings correctly. The immigration
12 judge is in the Department of Justice, as far as I know,
13 and he hasn't been dilatory. I think he's -- except for
14 a couple of weeks when his first counsel was replaced,
15 his conduct hasn't contributed to any of this long
16 period of time.

17 So if I were going to decide the matter, what I
18 would probably do is order an immigration judge to
19 conduct an individualized determination of whether he
20 should be let out on bail. He came here when he was a
21 kid. I don't know what the evidence would be of risk of
22 flight, where's he's going to go and how much danger is
23 he going to be in the next couple of weeks. But I'd
24 give the immigration judge a couple of weeks to decide,
25 and you an opportunity to report. And, you know, if the

1 Board of Immigration Appeals decides, within 6 to 8
2 weeks, the whole thing would be moot before the
3 immigration judge is finished or I decide to review the
4 immigration judge's detention decision, if there is a
5 detention decision.

6 I didn't realize all of this when I scheduled the
7 hearing. I'm very concerned about the length of time
8 Mr. Flores-Powell has been locked up. But I do have
9 these prudential concerns about declaring a statute
10 unconstitutional or rewriting it and also concerns about
11 investing a lot of effort into something that, one way
12 or another, is going to be moot probably in the next
13 couple of weeks.

14 So I don't know exactly where all this takes us,
15 but some of it invites sort of a practical response.

16 MR. GRADY: Sure. And I'll run through the
17 issues and --

18 THE COURT: And, in fact, I'll tell you one
19 thing that just occurred to me as I went through that.
20 I could enter a conditional order that says that if the
21 Board of Immigration Appeals has not decided the case by
22 some date, say two weeks from today or three weeks from
23 today, then the immigration judge shall conduct an
24 individualized detention hearing within two weeks of
25 that date and the decision and the record have to be

1 delivered to me if Mr. Powell-Flores hasn't been
2 released. Does something like that make sense?

3 MR. GRADY: Absolutely, your Honor. If I
4 could turn back the clock a bit?

5 When you discussed the prudential nature of
6 exhaustion, you were absolutely correct that it's within
7 your discretion to look at it. If you are inclined to
8 do so, in your discretion, that is within the Court's
9 power. The government does not disagree with that. It
10 is only a prudential exhaustion requirement.

11 Um, coming back to the issue of length of
12 detention and the nature of the remedy, um, I think I'll
13 work a little bit backwards and I'll come back to the
14 issue of length.

15 With respect to the remedy that the Court may
16 order, the government would suggest that the remedy the
17 Court may order is limited to directing there should be
18 afforded a bail hearing under 1226(a), which is a bail
19 hearing in which the immigration judge can release the
20 alien unless he finds he's a risk of flight or dangerous
21 and, in fact, under which the immigration court had the
22 ability to pull him back into custody, at its
23 discretion, whenever it wishes. And the reason I would
24 suggest that the remedy is limited to that is because
25 Congress has explicitly provided in 1226(e) that the

1 district courts have no jurisdiction to review the
2 immigration judge's discretionary decision, whether to
3 grant bail, whether or not to allow it, and, in fact,
4 there is yet another provision, 8 U.S.C.
5 1252(a)(2)(B)(ii), in which, as part of the more recent
6 Real-ID Act, Congress has shielded from any review in
7 any court whatsoever certain discretionary
8 determinations of --

9 THE COURT: Well, I guess my reaction to that
10 is that the immigration judge doesn't have the
11 discretion to violate the alien's Fifth Amendment
12 rights. That all of that assumes that the decisions are
13 being made before a right to due process, substantive
14 due process has been violated.

15 MR. GRADY: That -- I don't dispute that, your
16 Honor, but I think that the -- if one were to come back
17 to that core question of what an alien is entitled to in
18 terms of due process, I think you could look to **Demore**
19 and Judge Kennedy's concurrence which talks to what is
20 actually the minimum required by the due process
21 clause. And if I were to look at that, at Page 531 and
22 532 of the opinion --

23 THE COURT: Hold on a second. I'll get the
24 decision.

25 MR. GRADY: Sure.

1 (Pause.)

2 MR. GRADY: Do we have an extra copy?

3 THE COURT: No, I have it.

4 MR. GRADY: Okay.

5 (Pause.)

6 THE COURT: Go ahead. What page?

7 MR. GRADY: Looking at Page 531 and 532 of the
8 opinion, which is Judge Kennedy's concurrence, and it
9 actually goes to 533, but it's a very small and short
10 concurrence, but it's very concise in how it describes
11 the due process that should be afforded the alien.
12 First, if mandatory detention is going to apply, there
13 needs to be some individualized hearing of the statute,
14 that the alien actually falls within the statute.
15 That's the first part at the end of Page 531. "As a
16 consequence, due process requires individualized
17 procedures to ensure there is some merit to the
18 Immigration and Naturalization Services's charge and
19 therefore a sufficient justification to detain a lawful
20 permanent resident, pending a more formal hearing."

21 So that at first, if mandatory detention applies,
22 you do have a right to an individualized determination
23 of whether you would be subject to that statute. But
24 assuming, um -- if the government cannot satisfy this
25 minimal threshold burden, that is, if mandatory

1 detention does not apply, and this is -- and that would
2 just apply to virtually any alien, "then the
3 permissibility of continued detention, pending
4 deportation proceedings, turn solely on the alien's
5 ability to satisfy the ordinary bond procedures, namely
6 whether a released alien would pose a risk of flight" --

7 THE COURT: Not too fast.

8 MR. GRADY: Sorry. -- "would pose a risk of
9 flight or a danger to the community."

10 And what that suggests to me, your Honor, and then
11 the Court may take it obviously as the Court reads it,
12 is that there is not a right to be free, during
13 detention procedures, and that there is a right to be
14 free if you are not a flight risk and you are not
15 dangerous.

16 THE COURT: Well, I -- yes.

17 MR. GRADY: And so, as a result, if this court
18 remands to the IJ for a discretionary determination of
19 whether the individual is a flight risk or dangerous,
20 that would not violate the Constitution if he were
21 continued to be held because he is a flight risk or
22 because he is dangerous.

23 THE COURT: Well, let's spin this out
24 because -- in particular -- well, let's spin this out
25 and I'll describe why. Once the IJ makes a decision, is

1 it the government's view that that decision is
2 reviewable or not reviewable by me?

3 MR. GRADY: The government's position would be
4 that if an IJ makes a discretionary determination under
5 1226(a), it is not reviewable pursuant to two statutes.
6 The first is 1226(e), which provides that the District
7 court shall have no -- or no court shall be -- there
8 shall be no judicial review of any action taken or, you
9 know, any discretionary determination made under this
10 statute. Give me a moment. I'll find the exact
11 language.

12 (Pause.)

13 MR. GRADY: It's the -- it's set forth at the
14 outset. It's the first thing addressed by the Court in,
15 um -- oh, here it is. "The Attorney General" --

16 THE COURT: What page?

17 MR. GRADY: Looking at Page 516, the first
18 Section 1 of the opinion.

19 (Pause.)

20 THE COURT: Well, there are cases that have
21 ordered individual decisions subject to later review by
22 the district court. And frankly, given the history of
23 this case and the immigration judge's continued failure
24 even to follow the familiar procedures, um -- and I'll
25 study this. And I'm always careful, you know, not to

1 exercise -- you know, not to exceed the authority, the
2 power that I have. But a habeas corpus proceeding is an
3 equitable remedy, um, and I really wonder whether, if I
4 decided not to conduct the bail proceeding myself,
5 because there are also cases I've seen that -- where the
6 district court has found that there should be an
7 individual determination that the Court has made in the
8 first instance. But if I thought that by sending it
9 back to the immigration judge I was losing all capacity
10 to consider whether that was done in good faith, whether
11 it was reasonable, whether it was -- well, perhaps
12 whether it was right, um, I'd have to be persuaded of
13 that to send it back. Because the general principle in,
14 say, 2241, as well as other forms of habeas, is it's an
15 equitable proceeding and the Court has a range of
16 equitable powers to fashion a remedy.

17 MR. GRADY: There's certainly no question
18 there, your Honor, and that's the first of the two
19 statutes. And, in fact, I would concede -- if one were
20 to look at **INS vs. St. Cyr** and some of the other
21 statutes in which the Supreme Court has construed the
22 Congress's ability to restrict habeas relief, that this
23 would be inadequate, that this does not explicitly say
24 that it restricts habeas relief.

25 The second statute to which I refer, however,

1 1252(a)(2)(B)(ii), does explicitly restrict the Court's
2 habeas authority to review a discretionary determination
3 of the BIA -- excuse me, of the IJ with respect to, um
4 -- and if you could just give me a moment to track it
5 down, your Honor. Um, referring to 8 U.S.C.

6 1252(a)(2)(B)(ii) --

7 THE COURT: Where are you reading?

8 MR. GRADY: 8 U.S.C. 1252(a), Subparagraph (2)
9 -- and this is where I start to get confused about
10 clauses and sub-subparagraphs --

11 THE COURT: You're not reading from the *Kim*
12 decision?

13 MR. GRADY: No, I'm reading from the statute
14 itself, 8 U.S.C. 1252, um, and the caption, the title of
15 the subsection being "Denials of Discretionary Relief."

16 THE COURT: Hold on a second. I'll get it.

17 MR. GRADY: Sure.

18 THE COURT: Say the citation, again, please.

19 MR. GRADY: 8 U.S.C. 1252(a)(2)(B)(ii).

20 (Pause.)

21 THE COURT: Well, it says: "Any other
22 decision or action of the Attorney General or the
23 Secretary of Homeland Security, the authority for which
24 is specified under this title, 8 U.S.C. Sections 1151,
25 et sec, would be in the discretion of the Attorney

1 General or the Secretary of Homeland Security."

2 My immediate reaction is that that doesn't apply
3 because they're not making -- the IJ wouldn't be making
4 the determination under the section, they're making a
5 determination pursuant to my order. It's to give the
6 executive branch a shot at curing a constitutional
7 violation before I fashion a remedy myself, which is
8 another form of judicial restraint.

9 MR. GRADY: True, your Honor, that's certainly
10 one take. But if I could, just for the record, say, um,
11 "Notwithstanding any other provision of law, statutory
12 or nonstatutory, including Section 2241, Title 28, or
13 any other habeas corpus provision" --

14 THE COURT: Where are you reading?

15 MR. GRADY: Um, this is Subsection B entitled
16 "Denials of Discretionary Relief." Um, I would first
17 like to read the statute and then explain to the Court
18 why I think that --

19 THE COURT: Hold on a second.

20 (Pause.)

21 THE COURT: Okay. Go ahead.

22 MR. GRADY: "Notwithstanding any other
23 provision of law, statutory or unstatutory, including
24 Section 2241, Title 28, or any other habeas corpus
25 provision in Sections 1361 and 1651 of such title, and

1 except as provided in Subparagraph (d), and regardless
2 of whether the judgment, decision or action is made in a
3 removal proceeding, no court shall have jurisdictional
4 review" -- and I'll skip over Subsection (1), "of any
5 other decision or action of the Attorney General or the
6 Secretary of Homeland Security, the authority for which
7 is specified under this subchapter to be in the
8 discretion of the Attorney General or the Secretary of
9 Homeland Security, other than the granting of relief
10 under" --

11 THE COURT: Yeah, I haven't parsed this out,
12 and perhaps it's not perfectly clear, but I don't think
13 it's a discretionary decision under this subsection. In
14 other words, if the -- you know, if Mr. Flores-Powell --
15 well, the immigration judge denied his argument that he
16 was entitled to bail because of the passage of time,
17 right?

18 MR. GRADY: Well --

19 THE COURT: I just want to know if that's --

20 MR. GRADY: I'm sorry, your Honor. If you
21 could ask that again, your Honor. I'm sorry.

22 THE COURT: Yeah. Did the immigration judge
23 reject his argument that he was entitled to a bail
24 hearing because of the passage of time?

25 MR. GRADY: No, your Honor, the IJ wouldn't

1 have jurisdiction to entertain that constitutional
2 claim.

3 THE COURT: Okay. The immigration judge --
4 well, what's the decision that he could say he hasn't
5 appealed?

6 MR. GRADY: The immigration judge has decided
7 that he has committed a crime that requires him to be
8 detained.

9 THE COURT: All right. And -- so it's
10 essentially the detention decision. I don't -- and he
11 had a right to appeal that to the Board of Immigration
12 Appeals?

13 MR. GRADY: Certainly, your Honor.

14 THE COURT: And he didn't do that, right?

15 MR. GRADY: I think that, in this case --

16 THE COURT: Or -- okay. He had a right to
17 appeal that to the Board of Immigration Appeals. I'll
18 stop there.

19 MR. GRADY: Yes.

20 THE COURT: All right. Now, if he had come to
21 me instead on a 2241 -- well, maybe that is what he's
22 done. But -- well, anyway.

23 MR. GRADY: If I could have an opportunity to
24 try to convince the Court of the government's position,
25 um, although I am certainly willing to answer any

1 additional questions.

2 THE COURT: Well, let me just --

3 MR. GRADY: Sure.

4 THE COURT: So it's your position that if I
5 were to say that if the Board of Immigration Appeals
6 hasn't acted in, say, two weeks, and today is the 6th,
7 so let's say the 20th, then the immigration judge has to
8 conduct a bail hearing and make an individualized
9 assessment of whether Mr. Flores-Powell presents a
10 danger to the community or a risk of flight that can't
11 be reasonably protected against by the imposition of
12 reasonable restrictions, and the immigration judges's
13 decision would be the end of it, and I wouldn't have the
14 power to review it?

15 MR. GRADY: Your Honor, I think that this is
16 where -- and I thought -- and I don't disagree with the
17 Court that Judge Ponsor reached a very well-reasoned
18 decision, um, and I wish to spring out into the notion
19 of whether there are constitutional limits to mandatory
20 detention. But context is important and the Supreme
21 Court has made clear that there is no timeliness limit
22 on detention for an individual who is likely to flee or
23 an individual who is dangerous, who receives an
24 individualized hearing. What distinguishes this case
25 and perhaps implicates a timeliness limit is the fact

1 that the individual is detained without such an
2 individualized hearing.

3 And the problem I would have with what the Court
4 proposes and with what Judge Ponsor did in the
5 ***Bourguignon*** -- I'm going to mangle that name, your
6 Honor, and I apologize, case is that essentially he has
7 created a standard for bail, or at least arguably has
8 done so, that is different from what Congress has
9 painstakingly crafted.

10 Now, where Congress has, with respect to aliens,
11 over whom it exerts very substantial constitutional
12 powers, specifically delegated to Congress and they have
13 crafted a system of bail, I do not think necessarily,
14 your Honor, that the courts should be coming in and
15 saying that a different standard of bail should apply to
16 this criminal alien that wouldn't apply to an alien who,
17 for instance, is simply a flight risk, but not a
18 criminal.

19 THE COURT: Well, actually -- and I'm doing
20 some of this more quickly than I ordinarily would. It
21 looks like Judge Ponsor just said: "The failure of the
22 immigration judge to conduct the bond hearing, as
23 ordered, will entitle the petitioner to request a bond
24 hearing before this court." Um, Judge Ponsor didn't say
25 whether or not he would review that determination.

1 MR. GRADY: I think if you look at the order
2 entered by Judge Ponsor in the case -- and I believe I
3 -- again, I'm going from memory. We both had only a few
4 days to look at the case, your Honor. He suggested, and
5 in very similar language to what you used, that "He must
6 be released unless there are no reasonable conditions."
7 That's not language coming from 1226(a). That's where I
8 think that I would --

9 THE COURT: I mean, that's a different point.

10 MR. GRADY: Okay, then I'll put that aside.

11 THE COURT: There's some discussion of that in
12 **Ly**. This is a civil matter, not a criminal matter,
13 but -- did Judge Ponsor say he would review or had the
14 power to review the immigration judge's decision?

15 MR. GRADY: I don't know if it was explicit.
16 I think that -- and I can't go into the government's,
17 you know, deliberations about the nature of the
18 decision, but I think a concern would be, for me -- not
19 necessarily the government, a concern for me would be
20 creating a standard of bail for -- in criminal aliens
21 it's different than in other aliens, where Congress has
22 fashioned a bail --

23 THE COURT: But right now I'm not talking
24 about the standard and, in fact, I suppose it could be
25 left open. If the immigration judge lets him out, then

1 you're not going to come back to district court and
2 neither is he. He's going to be happy with the answer.

3 MR. GRADY: Yes.

4 THE COURT: If the immigration judge doesn't
5 let him out, then he'll come back to me and you'll argue
6 what you're arguing now, that you don't have the power.

7 MR. GRADY: Absolutely, your Honor. Let me
8 spare myself from talking unnecessarily. I would agree
9 with the Court that, um, we could resolve the issue of
10 whether you would have power to review this down the
11 road.

12 (Pause.)

13 THE COURT: Hold on just a second.

14 MR. GRADY: Sure.

15 (Pause.)

16 THE COURT: All right. Well, I think -- I
17 think that the remedy of permitting the immigration
18 judge to take the first shot at it with possible --
19 well, with an appeal available, back to the district
20 court, was the nature of the order involved in **Ly vs.**
21 **Hanson**, 351 F. 3rd 263.

22 MR. GRADY: And --

23 THE COURT: Hold on. Hold on.

24 MR. GRADY: I'm sorry, your Honor. I
25 apologize.

1 THE COURT: And there have been cases where
2 the district court conducted the bond hearing or some
3 equivalent proceeding. I don't know how many of these
4 you've cited. **Madrane**, M-A-D-R-A-N-E, 520 F. Supp. 2nd
5 at 667 to 70. **Diomande**, D-I-O-M-A-N-D-E, 2005 Westlaw
6 3369498. The Ninth Circuit cases, including **Casas-**
7 **Castrillon**, C-A-S-A-S dash C-A-S-T-R-I-L-L-O-N, 535 F.
8 3rd at 952, ordered that the immigration judge conduct
9 the hearing, but contrary to the normal practice in the
10 immigration court, imposed the burden of proof on the
11 government.

12 So these issues are -- have been resolved in
13 different ways by different courts.

14 MR. GRADY: I would have one brief response to
15 that only, your Honor. To the extent those predate May,
16 2005, the effective date of the Real-ID Act and the
17 provision I've cited in 1252(a)(2)(B)(ii), they may have
18 been superseded by statute.

19 THE COURT: All right. So what would your
20 position be if I said, "Here's what I'm inclined to do.
21 I'm inclined to say that you're to report, say, in two
22 weeks whether the Board of Immigration Appeals has
23 decided the case, essentially mooting the issue before
24 me. If the Board of Immigration Appeals hasn't decided
25 the case, the immigration judge shall conduct a bond

1 hearing within two weeks afterwards and the result shall
2 be reported to me. And then if the BIA were to decide
3 before the immigration judge conducted the bond hearing,
4 you would report that to me, too." I'm concerned about
5 this drifting for a long time. What's your position on
6 that being the outcome of the hearing today?

7 MR. GRADY: Your Honor, the government would
8 object, for the record, for the reasons stated in its
9 briefs. In terms of that being the outcome as a result
10 of rejecting the government's arguments, as stated in
11 its briefs, that, I believe, would be an appropriate
12 remedy.

13 THE COURT: Okay. And the arguments in the
14 briefs that you rely on primarily are what?

15 MR. GRADY: The arguments we would rely upon,
16 um -- first, I think it's unquestionable the Court has
17 some subject matter jurisdiction here on habeas to
18 review the legality of the detention. The Court,
19 however, is limited in that whatever the Court
20 entertains here has to be independent of the merits of
21 the underlying rule and proceedings, and this I take
22 from both **Aguilar**, from **Hernandez**, and from the
23 legislative history of the Real-ID Act itself, which
24 said that detention claims, independent of the
25 underlying rule or proceedings, are actionable, because

1 otherwise there would be no point of having a Real-ID
2 Act, every habeas action challenges detention.

3 So that if the underlying claim involves the
4 merits, that is, "I'm not removable, therefore you
5 should release me," that's not something the district
6 court could hear. If the question is "I have been held
7 too long without the opportunity to be heard on the
8 issue of bail," that is a claim within the Court's
9 jurisdiction.

10 THE COURT: I agree with what you said, as far
11 as it goes, but I don't want to say it as a general
12 principle, but I agree with what you said. But, you
13 know, in some of these cases, the defendant has admitted
14 his deportability and that weighs, in my mind, in favor
15 of continued detention. Where, as here, it's contested
16 -- at least in the criminal context, we would look at
17 something about the strength of the evidence. If I
18 thought, "He's got a frivolous claim, he's going to be
19 deported," you know, "and deported to a country that
20 will take him, but for some reason it's just taking a
21 while," that would weigh in favor of detention.

22 If he -- you know, if there's the real chance that
23 somebody who's a resident alien, you know, has lived
24 here since he was a kid, is going to win this case, you
25 know, then keeping him locked up for 21 months or some

1 unknown number of months more, you know, weighs more
2 towards releasing him. But if that's not a cognizable
3 consideration, then it might not be material, it might
4 not make any difference, in my current conception,
5 because all those other factors I mentioned, at the
6 moment, to me weigh in favor of finding that the length
7 of detention hasn't been reasonable -- isn't reasonable
8 in this particular case.

9 MR. GRADY: I would note simply for the
10 record, again, your Honor, that I believe the
11 government's position would be that the consideration of
12 the merits of the underlying removal order are solely
13 and exclusively for the First Circuit. Just for the
14 record. But the government concedes, and readily so,
15 that the district court retains jurisdiction over the
16 challenge to detention inasmuch as it is independent,
17 for instance, if the detention were overly long.

18 THE COURT: Okay.

19 MR. GRADY: And, your Honor, one thing I keep
20 meaning to mention, but we're having such a discussion,
21 is we mentioned earlier that the BIA may decide it
22 within two weeks and it may moot it. I do wish to raise
23 the possibility, and it's certainly a possibility, that
24 the BIA may, as it has in the past, remand it to the IJ,
25 in which case we would be back here, and the overall

1 order would be given full effect.

2 THE COURT: Yeah, that's actually useful
3 because I discussed that earlier with my law clerk.
4 They might remand it. But hopefully the third time is a
5 charm, you know, and they got it right. And do those
6 time limits, um -- all right. All right. Let me talk
7 to Mr. Flores-Powell.

8 Wait a minute. Do you have handcuffs on?

9 MR. FLORES-POWELL: Yes, sir.

10 THE COURT: If I had realized that, I would
11 have had the marshals here and we would have gone
12 through whether that's necessary. But -- well, okay.
13 Some of this is pretty technical, but if you wrote those
14 papers you've been submitting to me, then you understand
15 some of this pretty well.

16 Here's what I'm thinking of doing right now. Um,
17 I'm thinking of the following. I'm thinking of giving
18 the Board of Immigration Appeals -- well, let me take a
19 step back. I'm thinking that you've been locked up too
20 long for this to be constitutionally -- well, let me put
21 it this way. I haven't made a final decision, but
22 you've got a number of things weighing in your favor,
23 that this 21 months is too long to be constitutionally
24 permissible, but that the immigration judge should, in
25 the first instance, at least, make the decision, you

1 know, whether you're dangerous or whether you're likely
2 to flee if you're released on certain conditions. That
3 if the Board of Immigration Appeals decides your case
4 and doesn't send it back to the immigration judge, the
5 claim that you've raised in the case before me is what
6 we call "moot," it's gone because once the Board of
7 Immigration Appeals decides, there's a different
8 statutory provision that applies to detention. But if
9 you win in the Board of Immigration Appeals, and you
10 might -- and it seems to me you raised a good question,
11 but this is not up to me, but if you win, I expect
12 you're going to be released even if the government
13 appeals. But in any event, we'd have to start all over
14 again here. If you lose, you have the right to appeal
15 to the Court of Appeals for the First Circuit and, if I
16 understand it right, get a bail hearing in connection
17 with that process.

18 So what I'm inclined to do is give -- you know,
19 wait two weeks to see if the Board of Immigration
20 Appeals decides. They tell me it usually takes about 6
21 to 8 weeks, and it's been about 5 weeks now, and they
22 know we're interested in this because the prosecutors or
23 the Department of Justice lawyers here have been making
24 some inquiries. And to say that if they haven't
25 decided, if maybe your case is particularly hard or

1 whatever, then I'm inclined to order an immigration
2 judge to make a decision, say, within two weeks after
3 that. So it would be within four weeks. Then it's
4 their position that you're stuck with the immigration
5 judge's decision, but you could come back to me and say
6 you want me to review it, and then I would decide if I
7 had the power to review it and make a different
8 decision, and if I had the power, I would decide. And
9 I'd keep this on a pretty high priority, what I've been
10 trying to do in the last six weeks or so.

11 Do you want to speak to -- do you want to say
12 anything about going ahead in that fashion?

13 MR. FLORES-POWELL: Yes, sir. First, I would
14 like to say that, um -- that I'm in a little
15 disagreeance with remanding the case back to the
16 immigration judge so that he could have an individual
17 decision on flight risk and danger to the community only
18 because I have evidence to show that the immigration
19 judge might not really like to have a pro se individual
20 trying to defend himself in the courtroom and speak
21 laws, and I have actually the transcript here which --
22 can I have it sent to you so you can briefly look at
23 it?

24 THE COURT: Sure.

25 (Hands up.)

1 THE COURT: Let me ask the guards to identify
2 themselves. Are you from Bristol County?

3 COURT OFFICER: No, sir, we're from Suffolk
4 County.

5 THE COURT: From Suffolk County. Okay. I
6 thought he was being held in Bristol.

7 Why is it necessary -- why do you think it's
8 necessary for him to be in handcuffs? Because I've been
9 conducting court proceedings for 24 years. I had Gary
10 Sampson, who murdered three people, Frank Salemmi and
11 Stevie Flemmi, and none of them had to be handcuffed,
12 and he's here for having 12 grams of marijuana. Can we
13 take the cuffs off of him?

14 COURT OFFICER: Sure. Whatever you would
15 like, your Honor.

16 THE COURT: Please do.

17 (Takes cuffs off.)

18 THE COURT: Okay?

19 MR. FLORES-POWELL: Thank you, Judge.

20 THE COURT: (Reads.) Okay. I'll let the
21 government -- well, do you need this back? Is this the
22 only copy you have?

23 MR. FLORES-POWELL: Um, yes.

24 THE COURT: Okay. We'll give it back. Here,
25 Mr. O'Leary will let the government lawyers look at it,

1 too.

2 MR. FLORES-POWELL: Thank you. You can make
3 copies if you would like.

4 THE COURT: It's okay for now. But one of
5 the, um -- but that's -- here, let's let them read
6 this.

7 (Government reads.)

8 THE COURT: Okay. We'll give it back to you.

9 (Hands back to defendant.)

10 THE COURT: That raises this point. Um, I had
11 a lawyer who's on our Criminal Justice Act panel, but
12 they're authorized to represent people in habeas cases.

13 Although, Dennis, there's a separate habeas list,
14 I'll remind you of that. Do you know about that?

15 (Pause.)

16 THE COURT: Well, anyway, if you had to go
17 back to the immigration judge, would you want a lawyer?

18 MR. FLORES-POWELL: Um, I would like a little
19 assistance. Just that, um, recent, I mean, in my
20 previous encounters with lawyers, your Honor, I have had
21 many lawyers tell me there was no relief to my
22 deportation and I was actually fortunate to find this
23 relief by myself. So I'm really kind of untrustworthy
24 of how certain lawyers, um, take an interest in my
25 freedom. So --

1 THE COURT: Well, let me ask you this, and I
2 think Mr. Tipton may have to be someplace at 3:00, which
3 is in 5 minutes. Is that right? Is that still the
4 case?

5 MR. TIPTON: That's correct, your Honor.
6 Judge Stearns.

7 THE COURT: Okay. And we'll give him a call
8 if you're still here in a minute, but --

9 MR. TIPTON: Thank you.

10 THE COURT: Is this something -- in fact,
11 Dennis, why don't you call upstairs.

12 Is this something -- I mean, the immigration law,
13 there's going to be a question what the standard is,
14 unless I order a standard and they follow the order, in
15 the immigration proceeding. But is this something you
16 feel you could and would assist Mr. Flores-Powell on?

17 MR. TIPTON: I can certainly make an effort
18 to, Judge. I mean, I don't have experience in either
19 immigration law or habeas and, um, it sounds to me like
20 he really does need somebody with that kind of
21 experience. But I would be more than happy to assist
22 him.

23 THE COURT: All right. This is a good point.
24 I might end up appointing somebody else for you. I
25 didn't know where this was going until I got into this,

1 very recently. But, you know, you always have a right
2 to represent yourself, but it's always advisable to have
3 a lawyer if the lawyer is knowledgeable and is going to
4 work hard for you. So -- well, anyway.

5 But what else would you like to tell me?

6 MR. FLORES-POWELL: I would like to say that,
7 um, mandatory detention is not constitutional at all,
8 under 8 U.S.C. 1226, because, um, that statute, um,
9 covers, um, people guilty of aggravated felonies or two
10 crimes of moral turpitude.

11 THE COURT: Hold on just one second. I think
12 I'm going to let Mr. Tipton go to Judge Stearns. Okay?

13 MR. TIPTON: Thank you, Judge.

14 THE COURT: All right.

15 (Mr. Tipton leaves.)

16 THE COURT: All right. Go ahead.

17 MR. FLORES-POWELL: Um, 8 U.S.C. 1226 covers,
18 um, aggravated felonies and like two crimes of moral
19 turpitude. And here today, before the Court, we only
20 have one misdemeanor conviction that shall be treated as
21 the simple possession of marijuana. The immigration
22 judge already sustained that this conviction shall be
23 treated as a misdemeanor under 21 U.S.C. 824, which
24 governs simple possession of penalties.

25 THE COURT: And is this the argument that

1 you're now making to the Board of Immigration Appeals?

2 MR. FLORES-POWELL: Um, the argument that I'm
3 making to the Board of Immigration Appeals is that --
4 yeah, it's similar, it's very, very similar to this, but
5 it's only slightly different because I'm not trying to
6 ask this honorable court to grant any removal relief in
7 any decision like that. More likely I'm just trying to
8 explain the statutory grounds that 1226 governs, which
9 is aggravated felonies.

10 And we don't -- and before the BIA, it's not the
11 issue of whether there's a misdemeanor or not because
12 the immigration judge already made that decision that it
13 is a misdemeanor at the Board of Immigrations Appeals's
14 December 24, 2008 decision sustaining, um, petitioner's
15 application for termination, which vacated an
16 immigration judge's decision finding the respondent
17 removable.

18 So right now, um, I'm just trying to, um,
19 interpret to the Court the constitutionality of how 8
20 U.S.C. 1226 would not hold no weight to a conviction
21 that's a misdemeanor.

22 THE COURT: Well, this is -- this gets into
23 the issue that I was discussing with Mr. Grady. The
24 question of whether you're deportable -- well, there's a
25 lot of overlap in these questions, but the issue of

1 whether you're deportable, as I understand it, first has
2 to be decided by the Board of Immigration Appeals and if
3 you're disappointed in that decision, you have to bring
4 -- you have to appeal to the First Circuit. A district
5 judge like me doesn't have the authority to answer it.
6 The idea -- the fact that it's taken 21 months and you
7 don't have a decision yet, and raising the question of
8 whether due process -- you have a due process right to
9 at least a hearing on whether you should be released,
10 even though you ordinarily wouldn't under the statute,
11 is an issue I can hear. But --

12 MR. FLORES-POWELL: If I may, your Honor? In
13 **Winkler**, um, the Court held that, um, **Demore vs. Kim**, a
14 Supreme Court case, stated that five months is
15 reasonable -- is a reasonable time to say, "Well, um,
16 mandatory detention has been going on for five months,"
17 because usually they say that's the time limit for the
18 Board of Immigration Appeals to make a decision. And in
19 **Winkler**, the petitioner has been held for 18 months.

20 In this present case, um, I have been held for 21
21 months. So the five-month period of a reasonable
22 mandatory detention, if the government was to even have,
23 um, constitutional grounds to hold petitioner, um, with
24 mandatory detention for a misdemeanor conviction, would
25 have exceeded after the five-months period was done,

1 according to the First Circuit case in *Winkler*.

2 THE COURT: I think *Winkler* is my colleague,
3 Judge Saris, and -- and we're in the First Circuit, but
4 we're not the First Circuit, we're the District of
5 Massachusetts, and it was a different, I think a
6 different provision of the statute.

7 But, I mean, here are some of the practical
8 points. If I don't decide this matter orally today,
9 then I've got to write a decision. It's going to take a
10 little while. And it's possible, within a week or two,
11 the Board of Immigration Appeals will have decided your
12 case, which will make what we're talking about now -- it
13 will be in a different situation. We won't any longer
14 be under 1226(c).

15 So I'm inclined not to have you all wait until I
16 can write something, even if it's brief, but issue an
17 order that says, you know: "If the Board of Immigration
18 Appeals doesn't decide in two weeks, then there's going
19 to be a bail review or a bail hearing." And you're
20 expressing concern about the fairness of the immigration
21 judge, right?

22 MR. FLORES-POWELL: Yes, sir.

23 (Pause.)

24 THE COURT: Well, maybe I would order -- if I
25 ordered an immigration judge to decide the matter, I

1 might order that it be some immigration judge that's not
2 acted in your case before. The First Circuit sometimes
3 does that with us. Because the government's position,
4 it's going to be their position that I can't review it,
5 and I might -- I'm really going to have to study that
6 one. But, you know, this is an immigration judge whose
7 mistakes have already cost this man seven months of his
8 freedom, and it might even be freedom in Panama, but
9 it's his freedom.

10 And in about an hour last month, about an hour
11 before their filing was due, the government's filing was
12 due, they say, "Well, we'd like another 45 days and he
13 won't be prejudiced." (Laughs.) Well, you know, I
14 think if somebody locked you up for 45 days, you'd feel
15 prejudiced. It's not where you'd want to be.

16 MR. GRADY: It depends on what I did, your
17 Honor.

18 THE COURT: What's that?

19 MR. GRADY: It depends on what I did.

20 (Pause.)

21 THE COURT: No, I think you'd feel
22 prejudiced. Don't you think there's any harm in being
23 locked up for 45 days?

24 MR. GRADY: I should not be so flippant, your
25 Honor. You're absolutely right.

1 THE COURT: I mean, it may not injure the
2 ability to make arguments, but, you know, that's the
3 reason we're doing this.

4 You know, Congress has broad authority to devise
5 some reasonable scheme. It's constitutional. But at
6 some point somebody's constitutional rights are
7 violated. And when he's got -- you know, when he's
8 locked up longer than people in some other cases where
9 constitutional violations have been found, adding
10 another 45 days is prejudicial.

11 And this is part of the problem. I'm going to
12 send this -- I mean, I'm going to send this -- you know,
13 I'm an Article III judge, I'm nominated by the
14 President, I'm confirmed by the Senate, and you're
15 asking me to send this to some judge in the Justice
16 Department who's demonstrated twice that he can't do
17 this right, um, even according to the Board of
18 Immigration Appeals, which is also in the Justice
19 Department, and you're telling me that I'm not going to
20 have any authority to review it. So maybe it ought to
21 get a fresh look by at least some immigration judge who
22 doesn't have a vested interest in the decisions that
23 he's made before.

24 Even if I have to send it back, I've -- and this
25 is what the First Circuit does with us, in fact, it's

1 the local rule here. Ordinarily if you were reversed,
2 on some matter of substance, it goes to a different
3 judge, and sometimes the First Circuit directs that it
4 go to a different judge.

5 Anyway, go ahead.

6 MR. FLORES-POWELL: Um, your Honor, I would
7 just humbly pray that this court please try to remedy
8 this situation as soon as possible because, at the end
9 of the day, um, the government asked that the Board of
10 Immigration -- that this be continued until the Board of
11 Immigration Appeals, um, made a decision, when they
12 asked for the 45-day extension. And, as of now, as of
13 now, um, my constitutional rights, my Sixth Amendment
14 constitutional rights of freedom and liberty have been
15 already violated. And so for the government to even ask
16 that there be any more continuances and that petitioner
17 not have an immediate bond hearing, as soon as possible,
18 would be a violation of the petitioner's constitutional
19 rights. Because, you know, we all have a right to be
20 free, to pursue happiness with our family, and this has
21 been happening for almost two years.

22 And, um, attached to the brief is the immigration
23 judge's decision. And the immigration judge never
24 stated any, any ground as to why he, um, would deny
25 petitioner his bond, he just said, um, "I stated

1 previously," something like this: "I stated previously,
2 um, the Court, um, did not -- does not agree that
3 petitioner is eligible for bond," not why, or under this
4 statute. And so the petitioner would never know what to
5 say, "Hey, excuse me, Board of Immigration Appeals, um,
6 this statute cannot hold me mandatorily," because the
7 immigration judge never presented any statute to hold
8 the petitioner without bond. It was just done without
9 any constitutional support. And in doing that, it just
10 created a domino effect to just continue to destroy
11 petitioner's liberty interest right, your Honor.

12 THE COURT: I'm going to take a break in a
13 minute and decide whether there's anything I can decide
14 today. But let me ask you a question. It doesn't have
15 anything to do with the merits of your case. And you
16 don't have to answer it, if you don't want to.

17 But if one way or another -- well, if you're not
18 deported -- let's say you win in the Board of
19 Immigration Appeals and you're not deported, what are
20 you going to do with your life?

21 MR. FLORES-POWELL: Um, your Honor, um, I
22 think I found my calling in law. I think I gained a
23 serious interest in law since I've been detained and I
24 would like to finish going through my schooling and
25 probably become a lawyer, if I'm fortunate, and take

1 this real serious. I used to like boxing, but I think I
2 like this a little more.

3 THE COURT: This is like boxing without
4 hitting anybody. It's for grownups.

5 (Laughter.)

6 MR. FLORES-POWELL: Yes, sir.

7 THE COURT: You know, seriously, you know, you
8 wouldn't be able to do such a good job if you were high
9 on marijuana, for example. Do you understand that?

10 MR. FLORES-POWELL: I understand, your Honor.

11 THE COURT: And, you know, if you have adult
12 convictions, you can't become a member of the bar, you
13 can't become a lawyer. Do you understand that?

14 MR. FLORES-POWELL: Yes, your Honor. Since
15 this conviction -- since -- would a probation conviction
16 that's been dismissed, would that bar you from studying
17 law?

18 THE COURT: No, I don't think so. Somebody
19 else would have to advise you. But I don't think this
20 is hopeless for you, if you end up in this country.

21 Did you learn anything in the 21 months you've
22 been locked up?

23 MR. FLORES-POWELL: Your Honor, I learned many
24 things, you know, and the greatest lesson I learned was
25 that I've seen a lot of things -- a lot of things --

1 I've seen that the momentary, you know what I'm saying,
2 satisfaction or thrill is not worth the long-term pain.
3 You know, whereas -- you know, you're there smoking a
4 little marijuana with a couple of friends or you're
5 there hanging out with a couple of friends and then you
6 get locked up and then you see your daughter through a
7 glass and she's keep hitting the glass, in trying to
8 hold you. You know what I'm saying? But you're telling
9 her, you know, "Pop is away. He's on a vacation right
10 now. He'll be home soon. You be a good girl for
11 Poppa." You know what I'm saying? You know, that
12 feeling right there is just something I would never want
13 to live through again, you know. So I just really want
14 to just be a family man, you know.

15 (Pause.)

16 THE COURT: All right. We're going to take a
17 break and then I'll come back and tell you where we're
18 going from here. The Court is in recess.

19 (Recess, 3:10 p.m.)

20 (Resumed, 3:25 p.m.)

21 THE COURT: All right. Here is how we're
22 going to proceed. (1) I'm taking the matter under
23 advisement. That means I'm not deciding anything
24 today. (2) I'm ordering the government to tell me by
25 12:00 noon each Friday, starting next Friday, whether

1 the Board of Immigration Appeals has decided the case
2 and, if so, what the decision is. (3) I'm ordering the
3 government by 12:00 noon on next Thursday, which would
4 be the 12th, to brief this issue that was being argued
5 today, but I believe has not been briefed, as to whether
6 -- what the government refers to as the provisions of
7 the Real-ID Act -- that would remove the power that I
8 would ordinarily have, in a 2241 case, to conduct the
9 bail review or the detention hearing myself, applies.

10 At least some of the cases I cited, like **Madrane**,
11 520 F. Supp. 2nd 654, come after what I think the
12 government said was the effective date of that
13 provision. **Madrane** is a 2007 decision and I'm not sure
14 the statute was referred to at all.

15 And, in fact, you can also think further -- and I
16 know it doesn't -- the decision doesn't just involve
17 consideration of this case, but institutional
18 consideration, but do you really want to press this
19 issue in this case? I mean, there are at least several
20 in which -- several cases, and I may have only cited two
21 of them, in which district judges have done it.

22 You know, the government -- because I'm inclined
23 to conduct -- if I have to -- if a detention hearing has
24 to be conducted, I'm inclined to conduct it myself. The
25 idea of an Article III judge, you know, sending

1 something to an immigration judge, particularly an
2 immigration judge who hasn't been able to do familiar
3 things right, is not intuitively appealing. In other
4 circumstances, including with the Immigration service,
5 you know, I'd be inclined to do it, but in this case I'm
6 not. And we've all heard from Mr. Flores-Powell. And
7 I'd give you each -- you know, you'd decide what your
8 positions are, we'd have to figure out what the standard
9 is, but it would just be all open. But we would do it.

10 Because maybe it's *Elrod vs. Burns*, you know, even
11 if it stands for the proposition that even the loss of a
12 constitutional right for a short period of time is a
13 form of irreparable harm. So it's a comparable
14 concept.

15 My able law clerk tells me that it's conceivable
16 that we'll be back under 1226, if there's an appeal to
17 the First Circuit, but we don't have to go through that
18 maze now.

19 You know, Mr. Flores-Powell -- and then I'll give
20 Mr. Flores-Powell a week after the 12th, if necessary,
21 until the 19th, if you want to respond to what they're
22 going to file next Thursday on whether I can conduct
23 your bail hearing or not. You'll have a week. But
24 basically if the Board of Immigration Appeals hasn't
25 decided your case within two weeks, um, I'll make a

1 final decision on whether you're being
2 unconstitutionally detained, because you haven't had a
3 hearing, and I'll decide if you are being
4 unconstitutionally detained, whether I have the power to
5 conduct the hearing, and if I find that I have the power
6 to conduct the hearing, then I'll conduct it. If I
7 don't have the power, then I can't do it.

8 So this sets up a schedule and I want to keep this
9 a high priority even though there are a lot of things
10 going on. But that's as much as can be done today.

11 Do you think you understand what I just said?

12 MR. FLORES-POWELL: Yes, your Honor.

13 THE COURT: Okay. We'll see. Maybe in a week
14 or two you'll have won in the Board of Immigration
15 Appeals and then all of this will be different, and
16 maybe there won't be anything left.

17 MS. PIEMONTE-STACEY: Your Honor, if I may?
18 In your clerk's point about briefing the issue of the
19 Real-ID Act after the removal and the power to conduct a
20 detention hearing, you asked if there's an institutional
21 matter, and I wanted to pursue this in this case, and
22 asked us to --

23 THE COURT: Yeah, but I didn't mean that you'd
24 answer it right now. I just said that you would think
25 about it.

1 MS. PIEMONTE-STACEY: Right. And what I'm
2 asking is -- at least the two things you set out, our
3 position, as well as the standard, in a detention
4 hearing, do you also want that briefed, by the 12th, or
5 is that something that you would like us to consider as
6 an ongoing matter?

7 THE COURT: I don't think I understand the
8 question.

9 MS. PIEMONTE-STACEY: And I sorry for being --

10 THE COURT: Say it again.

11 MS. PIEMONTE-STACEY: You had asked that the
12 government consider institutionally whether, in this
13 case, we want to press the issue of whether this court
14 can conduct a detention hearing in this case, um, and in
15 discussing how the immigration judge hadn't got it
16 right, and in discussing the fact that if you do conduct
17 the detention hearing, you would like to know our
18 position and what the standard would be. In fact, are
19 you looking for the parties to do any briefing?

20 THE COURT: I think that's a good question.
21 Yes. A couple of things. And I'll put some cases in my
22 order memorializing this.

23 I do -- if you decide that you don't object to my
24 conducting a detention hearing, you don't have to brief
25 anything, you'd just agree, as I think it's been done in

1 some cases, that the district judge can conduct the
2 detention hearing. If you wish to assert, respectfully,
3 and none of this is personal, but that the district
4 court lacks authority to do it, and you want to press
5 that argument in this case, um, you'll have to brief
6 it. And I'll cite for you some cases that have dealt
7 with this in different ways. As I mentioned, **Casas-**
8 **Castrillon** being the case where the matter was sent back
9 to the immigration judge, but the ordinary burden of
10 proof was shifted. So I think that responds to your
11 inquiry.

12 I'm not asking you to, to be colloquial, to
13 "trash" the particular immigration judge, but that you
14 should also brief -- if you assert that I don't have the
15 authority to direct that it go to an immigration judge
16 who hasn't participated in the previous decisions to
17 detain Mr. Flores-Powell, you'll have to brief that. In
18 other words, you know, there are some issues that came
19 into focus in the hearing that were not foreseeable and
20 were not briefed.

21 MS. PIEMONTE-STACEY: Thank you, your Honor.

22 THE COURT: Is there anything further for
23 today?

24 MR. GRADY: No, your Honor. Thank you.

25 THE COURT: All right. I thank the guards. I

