

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:08-cv-11696-MLW

4
5 ERICK JOSEPH FLORES-POWELL,
6 Petitioner,

7 vs.

8
9 BRUCE CHADBOURNE, et al,
10 Respondents

11
12 *****

13 For Hearing Before:
14 Chief Judge Mark L. Wolf

15 Motion For Habeas Corpus (Continued.)

16
17 United States District Court
18 District of Massachusetts (Boston.)
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Thursday, December 3, 2009

22 *****

23 REPORTER: RICHARD H. ROMANOW, RPR
24 Official Court Reporter
25 United States District Court
One Courthouse Way, Room 5200, Boston, MA 02210
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A P P E A R A N C E S

ERICK JOSEPH-FLORES POWELL

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

2 (Begins, 3:00 p.m.)

3 THE CLERK: Civil Action 08-11696, Erick
4 Joseph Flores-Powell versus Bruce Chadbourne, et al.
5 The Court 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. Eve Piemonte-Stacey and Mark Grady for the
11 United States, for the respondents.

12 MR. FLORES: Good afternoon, your Honor.
13 Erick Joseph Flores-Powell representing the pro se
14 petitioner.

15 THE COURT: Okay. Now, since I saw you on
16 November 6th, I believe the government asked the Board
17 of Immigration Appeals to expedite a decision on
18 Mr. Flores-Powell's appeal. But to my knowledge the
19 matter has not been decided. Is that right?

20 MS. PIEMONTE-STACEY: That's correct, your
21 Honor. And we checked again today and it remains
22 pending.

23 THE COURT: Okay. The government today gave
24 notice of Judge Gertner's November 24, 2009 decision in
25 **Vongsa**. When did you find that case?

1 MS. PIEMONTE-STACEY: Your Honor, I think it
2 was issued last week, um, and I was out of town
3 beginning of this week and filed it today, your Honor.

4 THE COURT: All right. Because I don't know
5 whether Mr. -- my law clerk found it previously, but I
6 don't know whether Mr. Flores-Powell has it.

7 Have you seen that decision?

8 MR. FLORES-POWELL: No, your Honor. You could
9 even check with the jail. They note down when we get
10 legal memos and --

11 THE COURT: Well, you wouldn't have got it in
12 the jail because the government just filed it today.

13 MR. FLORES-POWELL: Oh, all right.

14 THE COURT: It's a decision that's helpful to
15 you. I've read it.

16 MS. PIEMONTE-STACEY: I have an extra copy if
17 you would like me to give it to him.

18 THE COURT: Well, you're welcome to give it to
19 him, but I gave him the other case. I hope you got it.

20 Did you get a copy of the **Alice** case that -- did
21 you get a copy of the order I issued this morning, to
22 bring a case to your attention?

23 MR. FLORES-POWELL: No, your Honor.

24 (Pause.)

25 THE COURT: All right. Well, my law clerk

1 also found a case that's relevant that neither party had
2 cited, so I issued an order and I stapled the case to
3 the order and the marshals were directed to give it to
4 you. I understand that you arrived at about 2:00 in the
5 courthouse?

6 MR. FLORES-POWELL: Yes, sir.

7 THE COURT: Well, Mr. O'Leary will check and
8 get a report to me why they didn't give it to you. But
9 it's all right. I've read that one, too. Okay. You
10 can be seated.

11 (Mr. Flores-Powell is seated.)

12 THE COURT: Okay. And, Mr. Flores-Powell, at
13 the last hearing, said that he wanted to represent
14 himself through today at least. What I have is a
15 petition under Section 2241 for relief essentially based
16 on the contention that the relevant statute, 8 United
17 States Code, Section 1226(c), which provides for
18 mandatory detention in certain circumstances of an alien
19 subject to deportation, has an implicit requirement that
20 the period of detention be reasonable. It's contended
21 that the 22 months that Mr. Flores-Powell has been
22 detained is unreasonable. Um, and I know I'm skipping
23 some of the government's issues, but essentially if
24 that's demonstrated, um, Mr. Flores-Powell would be
25 entitled to an appropriate remedy, under Section 2241,

1 because he would be now being held in violation of the
2 laws of the United States.

3 Section 2241 provides for an equitable remedy and
4 a flexible remedy, like many other courts, including my
5 colleagues, Judges Ponsor and Judge Gertner, in the case
6 the government noted today, which was decided last week,
7 I think the appropriate remedy would be a bail hearing,
8 not the automatic release of the petitioner. Based on
9 the reasoning of the **Alice** case that I tried to
10 distribute to both parties earlier today, I believe that
11 if a person is unreasonably detained under Section
12 1226(c), it doesn't put the case under Section 1226(a),
13 in which the Attorney General would make the bail
14 decision, at least in the first instance, I believe it's
15 an open question. I mean, I believe it's an open
16 issue. It's one of the areas in which the Court could
17 exercise its equitable authority. And I find, at the
18 moment, the **Alice** case persuasive, so I believe I will
19 order a bail hearing before me in the near future. And
20 because, if that's where this ends up, Mr. Flores-Powell
21 might benefit from having counsel at the bail hearing, I
22 asked the Clerk to have the duty-day Criminal Justice
23 Act attorney be present today and I'll ask him to
24 introduce himself.

25 MR. OTERI: Joseph S. Oteri, your Honor.

1 Your Honor, May I have just a moment? I'm going
2 to be -- as I listen to you and I've read the case you
3 sent down, it's obviously a very complicated thing and
4 to do a bail for a person who has no connection to
5 America is going to be complicated. I'm getting
6 married, at my age, on January 2nd. I'm going to be
7 gone for two months. So if this --

8 THE COURT: Well, just sit here, but if I have
9 the hearing, it's going to be well before January 2nd.

10 MR. OTERI: Well, I just thought I would tell
11 the Court.

12 THE COURT: Right. But thank you. So why
13 don't you follow this closely and if counsel is required
14 and you're not the most appropriate, we'll -- you can
15 assist in a transition.

16 But as a practical matter, um, my present
17 tentative view is that Mr. Flores-Powell is entitled to
18 relief, um, relief in the form of a bail hearing, before
19 me. He's been detained 22 months. There's no explicit
20 exhaustion requirement. My general sense of judicial
21 restraint and comity weighs in favor of not deciding
22 this, but he hasn't contributed to that delay, and
23 because the immigration judge can't develop a record
24 that's sufficient for review by the Board of Immigration
25 Appeals, he's been held at least an extra seven months,

1 as I understand it. I think this has been up and down
2 four times already.

3 So I'm not inclined to require the exhaustion
4 of -- I do think the government is right that I lack
5 jurisdiction to review the immigration judge's decision
6 that detention is mandatory. But it strikes me as a
7 separate issue, um, whether Section 1226(c) has an
8 implicit requirement that the issue of deportability be
9 decided in a reasonable period of time and whether it
10 has been. I think that is reviewable by a district
11 court, in my current conception, based in part on the
12 First Circuit's discussion in **Aguilar**.

13 I think that, in the circumstances -- I think at
14 the moment, in the circumstance of this case, um, the
15 length of the detention has been unreasonable,
16 essentially for the reasons described in **Alice**. I
17 don't, at the moment, think that 1226(a) applies. I
18 think, rather, as the Supreme Court reminded us in
19 **Boumediene**, Section 2241 is a form of habeas relief and
20 the Court, sitting in habeas, has broad flexible
21 authority to do something equitable. And it seems to me
22 the most equitable thing would be to, as soon as
23 possible, on an informed basis, conduct a bail hearing
24 to see if there are conditions that would reasonably
25 assure that Mr. Flores-Powell won't flee or be a danger

1 to the community.

2 So I'm tentatively inclined really -- at least up
3 to the point of what the remedy is, to reason as Judge
4 Gertner reasoned last week and to -- for a bail
5 hearing. Since I'm inclined to rule against the
6 government, I think it might be helpful for me to hear
7 from the Government first and it may be that we should
8 do it in sort of bite-sized pieces, because there are a
9 number of steps along the way. And I'll give
10 Mr. Flores-Powell an opportunity to respond if I feel --
11 well, I'll give him a chance to respond to each of the
12 points.

13 MR. GRADY: Thank you, your Honor. I think,
14 your Honor, for the sake of expediency, I'll rest with
15 respect to the issues that come up to the issue of the
16 remedy and the appropriateness of 1226(a) and the
17 Government's filings and the prior arguments. But if we
18 are to be speaking today about what the appropriate
19 remedy ought to be, I think, for several reasons, that,
20 in fact, the appropriate remedy is to direct the
21 proceedings back to the immigration court under
22 1226(a). And the first reading is based -- and I will
23 attempt, as I can, to intersperse my opinion that the
24 **Ali** decision may not have gotten used correctly.

25 If one begins with rule -- excuse me, with 8

1 U.S.C. 1226(a), it sets out --

2 THE COURT: Hold on.

3 (Pause.)

4 MR. GRADY: It basically -- it sets out the
5 default position that the Attorney General shall, except
6 as provided in Subsection (c), exercise his discretion.
7 And I think that, your Honor, if what we're doing here
8 is exercising 1226(c) by virtue of saying it no longer
9 can be constitutionally applied, if we go back and look
10 at (a), in that context, I think that what we end up
11 with is 1226(a) applying because 1226(c) cannot
12 constitutionally. And certainly Congress would not want
13 -- so that would just be my first point.

14 THE COURT: Well, Congress would not want
15 what?

16 MR. GRADY: To apply 1226 unconstitutionally.
17 So presumably they would want 1226(a) to apply where
18 1226(c) cannot, because 1226(a) applies unless 1226(c)
19 does.

20 THE COURT: That -- and I've read that **Alli**
21 case today, as I'm sure you have.

22 Um, we're 22 months into this. My present sense
23 is, you know, on Day 1, neither (a) or (c) applied. Now
24 he's been held for an unreasonable length of time, under
25 (c), and the **Alli** case describes that if I put it back

1 to the executive branch under (a), there can be another
2 long process.

3 MR. GRADY: There are two responses to that.
4 First, your Honor, I think, generally speaking, the
5 general refrain I think I would add is the
6 constitutional violation at issue here is not that the
7 length of detention has been unreasonable. An
8 individual detained pursuant to 1226(a) may be detained
9 until the conclusion of the removal proceedings with no
10 review in District Court. That is, an alien who is not
11 a criminal, who has been held under 1226(a) as a
12 discretionary matter as either dangerous or as a flight
13 risk, is entitled to no district court review, either
14 habeas or otherwise.

15 THE COURT: And let me see if I can follow
16 this. Because under (a), he's received an
17 individualized determination.

18 MR. GRADY: Yes. And --

19 THE COURT: And --

20 MR. GRADY: I'm sorry.

21 THE COURT: Let me finish. It might be
22 helpful to you.

23 MR. GRADY: It will unquestionably be helpful
24 to me, your Honor.

25 THE COURT: Well, it would be helpful because

1 you at least know what I'm thinking, but I have to
2 figure out what I think and then tell you.

3 So since I'm saying that the -- you know, if
4 there's a constitutional violation as a result of the
5 passage of 22 months in the unique circumstances of this
6 case, the correct remedy would be an individualized
7 decision concerning bail. And then the question is who
8 should make that decision?

9 I -- I don't -- I don't think -- I don't know
10 whether you're arguing that, as a matter of law, it has
11 to be done under (a) or -- and you may be arguing both.
12 But even if it doesn't, it's most appropriate to do it
13 under (a), which is what Judges Ponsor and Gertner did,
14 in effect, but I think without explaining why they were
15 doing it.

16 MR. GRADY: I think it's both. But I want to
17 come back to crystallizing the issue for the Court.
18 What is unreasonably lengthy is detention without an
19 individualized hearing, not on detention pending the
20 final order. The detention could be much, much longer
21 without any right of review in the district court for an
22 individual who is not a criminal alien who is detained
23 pursuant to a discretionary determination that they are
24 either a flight risk or dangerous, because 1226(e)
25 states that no court shall have the authority to review

1 it and 12 -- 8 U.S.C. 1252(a)(2)(D)(ii) explicitly
2 prohibits habeas jurisdiction over that discretionary
3 determination.

4 So what I'm saying is that there is a system in
5 place where noncriminal aliens are not entitled to the
6 very review which you've proposed that criminal aliens
7 be entitled to in the district court. So you're
8 creating a system, on this interpretation, where
9 criminal aliens are treated better. And they're not
10 only treated better by virtue of being in the U.S.
11 District Court -- and I won't go into the relative
12 merits of that, your Honor, but they're treated better
13 because the proposed burdens of proof that were
14 suggested in **Alli**, and were suggested by this court --
15 for this court has reached a final determination, is
16 that the burden of proof will be on the government. So
17 for an individual who's not a criminal, who hasn't
18 committed a murder or a rape or a possession with
19 intent, which is obviously a much less serious offense,
20 but those others are also offenses within the mandatory
21 detention, you're creating for them a better process
22 than exists for criminal aliens -- for aliens who are
23 not criminals at all.

24 THE COURT: I -- I have a question. It's not
25 a --

1 MR. GRADY: Sure.

2 THE COURT: And I don't know if any cases have
3 addressed it or raised it. But I'm not sure that
4 somebody detained after an individual determination,
5 under 1226(a), at some point wouldn't have a valid
6 habeas claim. I know that the statute -- well, you can
7 call it a valid due process claim. I know everybody is
8 sort of playing up Justice Breyer and the -- you know,
9 once removal has been ordered and he's -- he rewrote the
10 statute. If I was writing on a clean slate, I'd maybe
11 -- I would articulate the reasoning that gets to the
12 result differently and say it's a due process
13 violation.

14 But the general reasoning, for example, of
15 **Salerno**, which upheld the bail review -- you know, the
16 Federal Detention Act, was it was going to be for a
17 limited period of time and that's why you didn't need
18 proof beyond a reasonable doubt and all of that. I
19 think that, um, there could be a due process challenge
20 to a detention under 1226(a) and if the circumstances
21 were such, you know, then the Court properly concluded
22 that it was just too long to comport with substantive
23 due process and the Constitution would trump 1226(e).

24 MR. GRADY: I do not say that I can't envision
25 some possibility where that would occur, but I think

1 this is not that case. And where Congress has spoken so
2 thoroughly and clearly to the issue of habeas discretion
3 and being eliminated -- plus, your Honor, let me back
4 that up, actually. You know what? It would not be a
5 problem with habeas because habeas does not and has
6 never encompassed review of discretionary
7 determinations. That is, if discretion is granted
8 through an agency -- and this was specifically stated by
9 the First Circuit in **Saint Fort vs. Ashcroft**, which was
10 one of the cases back before **INS vs. St. Cyr**, which
11 dealt with the elimination of certain relief for
12 criminal aliens who had pled guilty believing they could
13 keep that relief.

14 Um, let me just -- oh, yes. **Saint Fort** at 329 F.
15 3rd at Page 203, being the jump cite.

16 THE COURT: 203?

17 MR. GRADY: Yes, your Honor.

18 THE COURT: And what particularly on Page
19 203?

20 MR. GRADY: Um, I can't tell the Court where
21 in the case, because I don't have it in front of me, but
22 I have the quote, however. It says: "If a statute
23 makes an alien eligible to be considered for a certain
24 form of relief, he may rise in habeas the refusal of the
25 agency to even consider it, but he may not challenge the

1 agency's decision to exercise or not exercise its
2 discretion to grant relief."

3 THE COURT: You see, that's -- well, all
4 right.

5 MR. GRADY: I simply believe that, to be
6 consistent with what the government argues, is that
7 habeas did not traditionally encompass review of
8 discretionary determinations.

9 THE COURT: I know, but if this had been a
10 decision -- if he was being detained under 1226(a), I
11 wouldn't, every couple of weeks, have to drop everything
12 and try to catch up with what you know so well. But
13 he's under (c) and he hasn't had any discretionary
14 decision. And you might have mooted all of this by
15 saying he has no legal right to an individualized
16 determination, but we'll make one anyway, because we
17 keep reading these cases with these crazy judges in
18 Massachusetts and elsewhere --

19 MR. GRADY: Never crazy, Judge.

20 THE COURT: I know. But you could have -- in
21 this sense it could have been preempted, but here we
22 are.

23 MR. GRADY: If -- and you make -- it's so hard
24 to keep up, and the Court makes so many good points, but
25 what I was saying with respect to the discretionary

1 determination is coming back to my original argument,
2 which was that the remedy here or the issue here is not
3 lengthy detention, it's lengthy detention without that
4 individualized hearing.

5 THE COURT: Yeah, but -- and I agree with
6 that. But --

7 MR. GRADY: Okay.

8 THE COURT: And this -- let me just bring
9 something to your attention, because it influences my
10 current thinking, but it's not based on any cases that
11 you all cite. In fact, I'll tell you what I have in
12 mind.

13 As I said, if I reason the way that Judge Ponsor,
14 Judge Gertner and many other courts have reasoned, and I
15 say there's an implicit reasonableness requirement in
16 Subsection (c), and in the unique facts of this case the
17 detention has been unreasonable, then Section 2241, in
18 my conception, provides a remedy. It's a form of habeas
19 corpus remedy in **Boumediene**, 128 Supreme Court 2229 at
20 2267. This is one of the -- well, this is the most
21 recent Guantanamo case in 2008.

22 The Court, in a Section 2241 proceeding, quoted
23 **Schlup**, 513 U.S. 219 at 319: "A habeas, at its core, is
24 an equitable remedy." They cited **Jones**: "A habeas is
25 not a static, narrow, formalistic remedy. Its scope has

1 grown to achieve its grant purpose." The one time I can
2 recall that I had to write much about this was in
3 **Ferrara**, 384 F. Supp. 2nd at 454, it was a 2255, but
4 it's another form of habeas relief. It said: "The
5 First Circuit has emphasized the broad leeway
6 traditionally afforded district courts in the exercise
7 of their 2255 authority. A Section 2255 remedy is broad
8 and flexible and entrusts the courts the power to
9 fashion the appropriate remedy," citing a Fourth Circuit
10 decision. "This is so because a district court's power
11 under 2255 is derived from the equitable nature of
12 habeas corpus relief," and I cite **Schlup**.

13 So, um -- so that -- it seems to me, I need to
14 seriously consider your policy arguments for sending it
15 back to the executive branch, but there's not a
16 statutory requirement, in my current conception, to do
17 that.

18 MR. GRADY: And I would suggest to the Court,
19 first, that if the Court construes it as just policy,
20 that, first, it would be anomalous to creating a system
21 that is more favorable, in terms of release, for
22 criminal aliens than exists for noncriminal aliens.

23 THE COURT: Why is it anomalous, when
24 somebody's rights have been violated, to give them a
25 remedy that's efficient? In the **Alli** case, it described

1 all the things that could keep somebody, who's been
2 locked up for a long time without an individual
3 determination, from getting a quick and final individual
4 determination.

5 MR. GRADY: I wouldn't call it "inefficiency"
6 for the Court to follow the statutory scheme established
7 by Congress. So when **Alli** says it would be
8 "inefficient" to do this, I would simply say that it is
9 not inefficient, nor is it inconsistent with habeas, if
10 it is lawful. Habeas exists to remedy unlawful and
11 unconstitutional detention. If it is lawful to detain a
12 noncriminal alien, under 1226(a)(1), and it is lawful
13 that that not be reviewable in the district court, then
14 it is not inconsistent with habeas to direct them to a
15 lawful statutory scheme. It would be lawful detention.
16 It would not be inconsistent with habeas to direct that
17 he go to a statutory scheme that has been established by
18 Congress with respect to aliens, a power
19 constitutionally conferred upon the executive -- excuse
20 me, the legislative branch -- not exclusively obvious if
21 the Court retains the ability to review
22 constitutionality, but it is a specifically conferred
23 power upon Congress to establish these rules. And where
24 Congress has done so and has done so in the context of
25 its power, a naturalization power set forth in the

1 Constitution, the Court should not be stepping in and
2 creating a separate statutory scheme.

3 THE COURT: Well, it's not a separate
4 statutory scheme, it's an exercise of -- well, if I'm
5 referring to Section 3142, you know, the usual criminal
6 bail process, it's not because any statute requires it,
7 it's because I would say, "Well, this is a good
8 framework for me, in the unique circumstance of this
9 case, on a one-time-only basis, to fashion a remedy that
10 promises to provide equitable relief."

11 And, in fact, I mean, I -- I don't know whether
12 the burden of proof, for example, would make any
13 difference in this case with regard to the risk of
14 flight -- as I vaguely recall, and I may be
15 misremembering it, but he's lived here virtually all of
16 his life and then the question is what would the -- or
17 what danger might he present to the community if
18 released on certain conditions? And I would have the
19 equitable power to impose conditions if I decided to
20 release him at all. And I think you have some
21 information about his dangerousness. So, I mean, maybe
22 he wouldn't get out.

23 MR. GRADY: I don't want to get into the
24 merits of this, your Honor. I think what the
25 government's view is that Congress has set up a

1 generalized default, in 1226(a), which -- an exception
2 to which would be unless 1226(c) applies, and if 1226
3 can't constitutionally apply, the government's first
4 position would be that the general default provision of
5 1226(a) should apply.

6 The second would be a policy, as you indicated,
7 that in essence the Court would be creating a different
8 system for criminal aliens than exists for noncriminal
9 aliens and that system would likely be more favorable to
10 criminal aliens than a system that exists as to
11 noncriminal aliens, which is another reason for not
12 following that route.

13 THE COURT: Okay.

14 MR. GRADY: And -- and if I could just have a
15 moment, your Honor.

16 (Pause.)

17 MR. GRADY: And again I just want to come back
18 to the -- the fundamental premise is that -- the remedy
19 or the deficiency -- the constitutional deficiency here
20 is the absence of that hearing. And then that -- well,
21 the Court may harbor its doubts, but I have no reason to
22 believe that the IJ would not reach an appropriate
23 decision on bond similar to this court's.

24 THE COURT: You say "could not"?

25 MR. GRADY: Should it be remanded to the IJ.

1 THE COURT: All right. And this is a question
2 that was left open, I think, at the last hearing. Do I
3 have the power, in your view, to order that some
4 immigration judge, other than the immigration judge that
5 keeps making all these mistakes that prolong the BIA's
6 decision, to decide this matter?

7 MR. GRADY: Your Honor, I think we briefed
8 this, and I apologize for not being as up-to-speed on
9 that, but I -- and I also understand that I'm shooting
10 myself in the foot by arguing that you would not have
11 jurisdiction to review the discretionary determination,
12 but I don't think that I can argue consistently with the
13 statute and do otherwise. So I understand that if it
14 makes the bail hearing occur here, so be it, but I don't
15 think I can argue that you would have jurisdiction to
16 review that discretionary determination.

17 THE COURT: All right. Well, at the moment,
18 it's a different question, but it's a related one. In
19 other words, you know, sometimes the First Circuit
20 remands a case and says that it has to go to a different
21 judge. We also have local rules that say that if you've
22 been reversed on appeal after a trial, the case goes
23 back to -- it gets reassigned ordinarily to another
24 judge.

25 My view would be that -- again, with this

1 flexible, equitable authority that I have under 2241, I
2 could refer back to an immigration judge, but say it has
3 to be a different one. But if you've got a different
4 view and a reason for a different view, that's another
5 thing I'm interested in hearing.

6 MR. GRADY: I would think that the
7 government's position, consistent with what it wrote, is
8 that the Court could not order that a new immigration
9 judge hear it. However, in my experience, this Court's
10 suggestion largely has the force of an order, and if I
11 assume that to be the Court's suggestion, I have every
12 reason to expect that it would be carried out. But I
13 can't say that the government's view is in agreement
14 that the Court has the power to order that.

15 And if I could have a moment just to speak to
16 co-counsel?

17 THE COURT: Sure.

18 (Pause.)

19 THE COURT: Okay?

20 MR. GRADY: So I think, your Honor, that it
21 would not -- the government's view would be that the
22 Court could not order it. But the petitioner could also
23 ask that the hearing take place before a different IJ,
24 under the regulations, if he believes that there would
25 be prejudice. And, as I say, if this court strongly

1 urges it, suggests it, I have yet to see that type of,
2 even suggestion, not treated as the word of law, in my
3 experience.

4 THE COURT: Okay. Mr. Flores-Powell, would
5 you like to be heard on this?

6 MR. FLORES-POWELL: Yes, sir.

7 Your Honor, um, the last time we was before the
8 Court you said something very interesting, you said,
9 "One day" -- um, something to this extent, and correct
10 me if I'm wrong. "One day of a constitutional violation
11 is one day too many." And I believe that --

12 THE COURT: I think what I said is, um, "one
13 day of unconstitutional incarceration is a form of
14 irreparable harm." But go ahead.

15 MR. FLORES-POWELL: Thank you, your Honor.
16 And I believe that if the -- that the government is
17 mistaking the fact that courts have remanded the matter
18 back in front of an immigration judge as having the
19 constitutional force, instead of discretionary relief.
20 Meaning "Well" -- well, a court could say, "Well, I feel
21 that it is appropriate that a judge would do this, but
22 there's no constitutional law stating that this court
23 would not have jurisdiction once it seemed that -- once
24 is sees that, um, habeas relief is appropriate, to hear
25 the matter itself."

1 Um, there's many cases that that's supported in
2 the facts, that the Court heard the matter itself. I
3 believe **Rona**, um, I believe **Hyppolite**. You know, many
4 cases say that the Court itself could exercise the issue
5 of discretion.

6 THE COURT: Then let's say that remains my
7 view. Why should I decide it rather than letting an
8 immigration judge decide it?

9 MR. FLORES-POWELL: Your Honor, I believe you
10 should decide it rather than letting an immigration
11 judge decide it for a couple of reasons. Um, first,
12 your Honor, I believe that if it was to get remanded
13 back in front of the same immigration judge, um, I
14 don't -- I wouldn't feel that it would be, maybe, a fair
15 bond hearing. And if it was to get remanded before a
16 different immigration judge, I feel that that would take
17 time to appoint a new judge and to get a new judge
18 familiar with the case and it will just prolong the
19 constitutional harm that the detention has been too
20 long, your Honor.

21 So I feel that it would be right and appropriate
22 for this court to try to remedy this issue as soon as
23 the Court's calendar seems available.

24 THE COURT: Well, it's not just a question
25 of -- well, it wouldn't just be a question of my

1 availability, the parties would have to develop the
2 information out and present the information I would need
3 to decide whether there's conditions on which you could
4 reasonably be released. Okay?

5 MR. FLORES-POWELL: Um, the petitioner would
6 be able to present many, um, many reasons why he should
7 be released, why the Court would favorably grant relief
8 to either bail or just release on bond, on personal
9 recognizance, and the petitioner would also be able to
10 inform the Court, you know, just to have the Court just
11 have an open view of facts and allegations that the
12 government will be trying to present on their favor,
13 "Well, the petitioner is a danger here," or "a flight
14 risk here," and there's a difference between facts and
15 allegations and that's what, um, is also before, um, the
16 BIA.

17 But that's the -- it's kind of an issue that --
18 that interjects with this matter because that's what has
19 us here today, the difference between facts and
20 allegations and looking at facts and allegations and
21 saying, "Well, if this says 'not guilty,' why should
22 this be held against this young man?" Um, "If there's
23 no facts of this, um, why should we just believe that
24 this occurred?" You know, and that's where we would
25 just ask the Court to exercise its discretion and see

1 what's facts and what's allegations, what's set in stone
2 and what's an assumption.

3 And, you know, we don't believe that assumption
4 should -- and allegations that are not facts or are
5 proven should be able to hold enough weight to deprive
6 somebody of their liberty, you know. So we would just
7 be ready to approach the Court on that -- on that angle.

8 THE COURT: When you talk about there being a
9 difference between facts and allegations, you're talking
10 about in a bail hearing and whether you were involved in
11 gangs and things like that?

12 MR. FLORES-POWELL: Yes, sir. I'm talking
13 more in a bail hearing, because the government will say,
14 "Well, he's a danger to the community because of this,"
15 "He's a flight risk because of that." And then we'll
16 have to -- well, the Court will have to say, "Well, is
17 this true? Can this -- is this a fact?" You know what
18 I'm saying? Do you understand, your Honor?

19 THE COURT: I understand. Just like the
20 government, you're doing a good job.

21 MR. FLORES-POWELL: Thank you, your Honor.

22 (Pause.)

23 THE COURT: All right. We'll take a recess
24 and I expect I'll have an answer for you shortly. The
25 Court is in recess.

1 (Short recess, 4:00 p.m.)

2 (Resuming, 4:25 p.m.)

3 THE COURT: Here is what I have decided to
4 do. It is my present intention to, in the future, issue
5 an order granting the petition. However, I'm not doing
6 that now, although I am going to explain my present
7 thinking, both to capture it for myself and so I can
8 have a record of my present thinking. But it's my
9 intention to write something or use the transcript to be
10 the decision, if I don't change my mind, which sometimes
11 happens when I write.

12 If I ultimately issue an order, based on my
13 present analysis, um, a bail hearing will be required
14 and will be conducted by me. Although, at the moment, I
15 don't know whether it would strictly be under the
16 standards of Section 3142 or some tailored version of
17 it.

18 And part of the reason I'm not just taking this
19 under advisement is that given the fact that in my
20 current, but not necessarily final view, Mr. Flores-
21 Powell is being unlawfully detained, I do want to
22 schedule the detention hearing -- I'm sorry, the bail
23 hearing, so it can be conducted if I've issued an order
24 granting the petition and have the information I'll need
25 to conduct the bail hearing and decide the matter.

1 Essentially I'm not issuing an order on the merits yet,
2 I'm essentially establishing the option of the bail
3 hearing on a particular day.

4 I'll -- as I said, I can see two things that might
5 change what I'm about to say, and one would be a
6 decision by the Board of Immigration Appeals. So -- and
7 I know the government would do this anyway, but it's
8 essential that the parties bring to my attention
9 immediately any decision by the Board of Immigration
10 Appeals. I mean, if the Board of Immigration Appeals
11 should grant Mr. Flores-Powell's appeal, to the extent
12 it's possible, the government should tell me its
13 thinking on whether it's likely to appeal. It may take
14 time to finally decide that, but Mr. Flores-Powell may
15 not be the same man he was 22 months ago in terms of the
16 perceived danger, for example.

17 Anyway. And the other thing that could change --
18 that I could change my mind, which, as I say, sometimes
19 happens if I start writing.

20 Essentially, as I'll describe, up to the point of
21 the most appropriate remedy, my reasoning parallels that
22 of Judge Gertner in **Vongsa**. And in case I forget to say
23 this when I talk about the remedy, I think even -- I
24 believe that Judge Gertner, in **Vongsa**, and Judge Ponsor,
25 in **Bourguignon**, didn't order proceedings under 1226(a),

1 I believe they heightened the government's burden to
2 establish detention, which I believe would be a
3 justifiable exercise of a court's equitable authority
4 after it grants a 2241 petition. My thinking,
5 foreshadowed by what I said earlier, essentially now is
6 as follows.

7 Erick Joseph Flores-Powell, to whom I'll refer as
8 "Flores," is a lawful permanent resident of the United
9 States. On January 31, 2008, he was convicted in
10 Massachusetts state court for possession of a controlled
11 substance, marijuana, with the intent to distribute. On
12 February 26, 2008, he was taken into custody by
13 Immigrations and Customs Enforcement, or ICE. Since
14 that time, pursuant to 8 United States Code, Section
15 1226(c), Flores has been subject to mandatory detention
16 because he was deemed removable pursuant to 8 United
17 States Code 1227(a)(2)(B)(i), because he was convicted
18 of violating the law relating to a controlled
19 substance. Although he was initially also determined to
20 be removable pursuant to 8 United States Code, Section
21 1227(a)(2)(A)(iii), which relates to a conviction for an
22 aggravated felony, the immigration judge, or IJ,
23 subsequently concluded that the aggravated felony charge
24 could not be sustained because Flores's conviction fell
25 within the mitigating exception in 21 United States

1 Code, Section 841(b)(4).

2 Flores has appealed the immigration judge's order
3 of removal four times. The Board of Immigration
4 Appeals, or BIA, remanded the first and third appeals to
5 the immigration judge because the immigration judge or
6 the immigration court failed to adequately document the
7 proceeding. These remands resulted in approximately
8 seven months of delay. The BIA remanded the second
9 appeal to the immigration judge because the immigration
10 judge had failed to consider whether Flores fell within
11 the mitigating exception previously noted. Flores's
12 fourth appeal has been pending before the BIA for
13 approximately nine weeks. Flores has been detained
14 without a bond hearing and pending a final
15 administrative order of removal for almost 22 months.
16 Flores has petitioned this court for a writ of habeas
17 corpus pursuant to 28 United States Code, Section 2241.

18 The government, in its written submissions, argues
19 that the Court should dismiss the petition because
20 Flores has not exhausted administrative remedies. It
21 argues that he has not appealed the question of his
22 mandatory detention as opposed to the, essentially, the
23 merits of his case.

24 Where, as here, Congress does not require the
25 exhaustion of administrative remedies, the courts have

1 some latitude and may consider unexhausted claims in
2 circumstances where the plaintiff may suffer irreparable
3 harm or where there's substantial doubt that the agency
4 is empowered to grant meaningful relief, as the First
5 Circuit said in **Portela-Gonzalez**, 109 F. 3rd 74 at 77.
6 Here, Flores may suffer irreparable harm due to his
7 continued loss of liberty. See **Patton**, 806 F. 2nd 24 at
8 28.

9 In addition, it is settled that the immigration
10 judge of the Board of Immigration Appeals lacked
11 jurisdiction to rule on the constitutionality of the
12 Immigration and Nationality Act and related
13 regulations. The Second Circuit noted this in **Arango-**
14 **Aradondo**, 13 F. 3rd 610 at 614. Judge Gertner, last
15 week, noted this in **Vongsa**, at Pages 4 and 5 of the
16 Westlaw version. In these circumstances, I am
17 exercising my discretion to decide Mr. Flores's
18 unexhausted claim.

19 But Flores has taken the administrative
20 proceeding seriously. His detention has been lengthy.
21 In my current conception, it is unreasonably long. In
22 addition, adjudication of the detention will not prevent
23 the administrative agency, particularly the BIA, from
24 deciding the substantive question of Flores's
25 deportability.

1 I do find that the government is correct in its
2 contention that this court lacks jurisdiction to review
3 the immigration judge's decision that detention is
4 mandatory under Section 1226(c). But Flores makes a
5 colorable argument that his marijuana offense, which the
6 immigration judge has determined falls within the
7 mitigating exception to 21 United States Code, Section
8 841(b)(4), must necessarily also fall into the "for
9 one's own use" exception to 8 United States Code,
10 Section 1227(a)(2)(B)(i), which would render him not
11 deportable, as the Ninth Circuit explained in **Guevara**,
12 311 Fed Appendix 973 at 974.

13 Flores also argues that in determining the
14 nonapplicability of a "for one's own use" exception, the
15 immigration judge misapplied the burden of proof, an
16 issue noted in **McCarthy**, at 304 Fed Appendix 670 at
17 672. However, deciding these questions in the detention
18 context would also necessarily decide the issue of
19 Flores's deportability, over which this court lacks
20 jurisdiction, because it is not a question independent
21 of removal, as required by 8 United States Code, Section
22 1252(b)(9) and the First Circuit's decision in **Aguilar**,
23 510 F. 3d 1 at 11.

24 I find, as many other courts have found, that the
25 statute under which Flores is detained, Section 1226(c),

1 has an implicit requirement that the issue of
2 deportability be decided in a reasonable period of
3 time. A court, in a Section 2241 proceeding like this
4 one, has the power to decide if the time of detention
5 has been unreasonable and therefore the petitioner has
6 been -- is being held in violation of the laws of the
7 United States. So one provision for -- one basis for
8 habeas relief under Section 2241(c)(3).

9 In essence, I find this is the case, um, within
10 the meaning of the First Circuit's discussion concerning
11 8 United States Code, Section 1252(b)(9) in **Aguilar**, at
12 Page 11. The First Circuit wrote:

13 "Legislative history indicates that Congress
14 intended to create an exception for claims independent
15 of removal. Thus, when it passed the Real-ID Act,
16 Congress stated unequivocally that the channeling
17 provisions of Section 1252(b)(9) should not be read to
18 preclude habeas review over challenges to detention.
19 Congress indicated that detention claims are independent
20 of challenges to removal orders. In line with this
21 prescription, we, the First Circuit, have held that the
22 district courts retain jurisdiction over challenges to
23 the legality of detention in the immigration context.
24 This carve-out seemingly encompasses constitutional
25 challenges regarding the availability of bail, see e.g.

1 **Demore vs. Kim."**

2 Well, it is my present view that the defendant's
3 detention without an individualized decision concerning
4 bail is unreasonable and the implicit reasonableness
5 requirement of 8 United States Code, Section 1226(c) has
6 been violated. On this issue, prior Supreme Court
7 precedent is distinguishable because **Zadvydas** concerned
8 only detention during and after the removal period and
9 because **Kim's** holding is limited to circumstances where
10 a petitioner has conceded deportability and ordered
11 detention just for a brief period. I have in mind, **Kim**,
12 538 U.S. 513 at 531, and **Zadvydas**, 533 U.S. 678 at 688.

13 However, as held in **Ly**, L-Y, and consistent with
14 the holding of **Zadvydas** and with Justice Kennedy's
15 important concurrence in **Kim**, the Court recognizes that
16 the mandatory detention statute -- interprets the
17 mandatory detention statute as containing an implicit
18 requirement that removal proceedings be concluded within
19 a reasonable time. That's **Zadvydas** at 690 to 91 and **Kim**
20 at 538 U.S. at 532, Justice Kennedy concurring. **Ly** is
21 351 F. 3rd 263 at 270.

22 **Ly** sets forth a number of factors useful to
23 consider in determining reasonableness. In my present
24 view, Flores has made a showing that his detention is
25 unreasonable because (1) the overall length of detention

1 is 22 months. (2) the record does not reflect that
2 Flores spent time in prison for his criminal offense.

3 (3) the occasion for Flores's removal is not foreseeable
4 due to his plausible defense and the lack of reliable
5 information concerning the appellate proceedings. (4)
6 the immigration authority failed to act promptly to
7 advance its interest. And (5) Flores did not engage in
8 dilatory tactics.

9 I note that in **Vongsa**, the length of detention was
10 20 months. In **Bourguignon**, it was 27 months. There are
11 other cases consistent with my present view that 22
12 months, in the circumstances of this case, is an
13 unreasonable period of detention.

14 This conclusion, however, does not, as the
15 government argues, mean that detention must be decided
16 under -- well, decided by the executive branch under
17 Section 1226(a). In essence, I agree with the analysis
18 in **Alli vs. Decker**, 644 F. Supp. 2d 535 at 541 to 42,
19 that: "Detention authority does not transition to
20 Section 1226(a) because Congress intended to withdraw
21 the executive branch's discretion to make bond
22 determinations regarding classes of aliens generally
23 subject to the mandatory detention statute and
24 supervision of detention through the habeas process
25 protects the alien's liberty interest, promotes judicial

1 efficiency, and is consistent with the general
2 principles of habeas corpus relief."

3 There is a lengthy quote on Sections -- on Pages
4 541 to 42 of **Alice** that, as I said, I find persuasive.
5 It explains the intent to Congress -- well, I think I'll
6 just leave it right there, for the moment, in view of
7 the time.

8 Section 2241 is a form of habeas relief, as the
9 Supreme Court noted in **Boumediene**, 128 Supreme Court
10 2229 at 2267, a 2008 decision. "Habeas, at its core, is
11 an equitable remedy," quoting **Schlup**, 513 U.S. 298 at
12 319. As the First Circuit explained in the case -- in
13 **United States vs. Torres-Otoro**, 232 F. 3rd 24 at 30, um,
14 "There is broad leeway traditionally afforded district
15 courts in the exercise of their habeas authority," and
16 that was 2255, but it's analogous to 2241. "The remedy
17 is broad and flexible and entrusts the courts the power
18 to fashion an appropriate remedy." And this is so
19 because the district court's power under Section 2255
20 there, 2241 here, is derived from the equitable nature
21 of habeas corpus relief.

22 I find, essentially for the reasons described on
23 Pages 541 to 542 of **Alice**, that a bail hearing before
24 the district court is the most appropriate remedy.
25 Release is not the most appropriate remedy, nor is a

1 hearing before the -- before an immigration judge. As
2 the Court said in **Alice**: "The intent of Congress in
3 adopting 1226(c) was to severely limit, if not
4 eliminate, the discretion of the Attorney General to
5 release deportable criminal aliens pending removal
6 proceedings." "A decision by the habeas court
7 concerning continued detention addresses Congress's
8 concern that release decisions be based on traditional
9 bail considerations, such as risk of flight and danger
10 to the community. It also provides justified protection
11 of the alien's liberty interest. It conserves judicial
12 resources." As explained in **Alice**.

13 The many steps that might be taken if the bail
14 decision were now made under Section 1226(a), or a
15 comparable procedure, could foreseeably, in this case,
16 lead back to another habeas proceeding here. I made an
17 observation in the course of the argument about the
18 possibility that detention under 1226(a), or using a
19 1226(a) approach, particularly when stacked on top of an
20 unreasonably long detention under 1226(c), could violate
21 a right to due process.

22 As the Court noted in **Alli**: "Because
23 discretionary bond decisions are not subject to direct
24 judicial review under or pursuant to 1226(e), the only
25 recourse for an alien dissatisfied with the outcome of

1 his bond hearing would be to return to court again and
2 file another habeas action, as mentioned in **Ly**. A bond
3 hearing before the habeas court avoids a circuitous and
4 potentially lengthy process. The habeas court's
5 determining whether a petitioner is entitled to release
6 also serves the historic purpose of the writ, namely to
7 relieve detention by executive authorities without
8 judicial trial."

9 I note that the government argues that the Court,
10 having found unreasonable detention or when a court
11 finds unreasonable detention, it must refer the matter
12 back for a bail decision under 1226(a). The government
13 argues that the Court doesn't have the power to order
14 that it be before a different immigration judge. Given
15 the broad equitable powers once relief is justified
16 under 2241, I don't believe that argument is correct.
17 But if it were correct, it would get the petitioner back
18 before an immigration judge who's repeatedly made errors
19 that have unnecessarily prolonged his detention at least
20 seven months, or about seven months.

21 So, as I say, unless there's some material change
22 in facts or unless -- despite the good work, the great
23 work done by my law clerk and my efforts to understand
24 this and explain it orally, I change my mind, as I
25 memorialize this in the near future and enter an order,

1 which I'm not entering now, um, there's going to have to
2 be a bail hearing before me.

3 And I think I should say that while I regard this
4 as discretionary, and courts have gone different ways on
5 this, I seriously considered sending this back to the
6 executive branch. The Court has many responsibilities.
7 It has no discretion not to discharge. This is in an
8 area that's primarily the responsibility of the
9 executive branch, except in truly exceptional
10 circumstances. And I know that Judges Gertner and
11 Ponsor, my esteemed colleagues, sent their cases back.
12 But I just feel, at the moment, that in the unique
13 circumstances of this particular case, the most
14 appropriate exercise of my discretion is to conduct the
15 hearing myself. Should I ever get another one of these
16 cases, it will have unique facts and I think I'll
17 consider the same factors and perhaps exercise my
18 discretion to have the immigration judge make the
19 decision, under some standard.

20 So assuming that this decision isn't mooted before
21 there is a bail hearing, I propose to conduct that
22 hearing on the morning of December 18th.

23 Mr. Flores, do you want -- and I'm going to set up
24 a schedule where filings are going to have to be made in
25 about the next week regarding the factors that are -- I

1 mean, I'm going to use Section 3142 as a framework. I'm
2 not yet deciding burdens of proofs, for example. Again,
3 this is fashioning something equitable. And it may be
4 that the burdens don't matter. But my present
5 conception is that I'll use that as the framework.

6 Mr. Flores, would you like an attorney at this
7 point, somebody accustomed to handling bail matters in
8 Federal court?

9 MR. FLORES-POWELL: Your Honor, I would
10 appreciate an attorney at this time. Attorney Joseph,
11 um, right here next to me, he seems interested in -- he
12 gave me a genuine and sincere handshake and said he
13 would like to help me. So I would like to trust that he
14 would help me.

15 THE COURT: Okay. And, Mr. Oteri, you know, I
16 would conduct this hearing, I would make a pretty prompt
17 decision, I would expect, before Christmas, hopefully on
18 the 18th, and, you know, conceivably there could be some
19 appeal, but maybe, maybe not, and we could cross that
20 bridge if we came to it.

21 Are you available to represent Mr. Flores?

22 MR. OTERI: Absolutely, your Honor.

23 THE COURT: Okay.

24 MR. GRADY: Both of the government counsel, I
25 believe, may have preexisting plans to be out of state

1 on the 18th, your Honor.

2 THE COURT: Yeah, I want to get into this, but
3 I'm not going to interfere with that.

4 When are you leaving?

5 MS. PIEMONTE-STACEY: Your Honor, I'm leaving
6 on the morning of the 18th. But I will say that I am
7 here the 15th, the 16th, and the 17th.

8 THE COURT: All right. This is what I want to
9 get -- yeah, I'm not --

10 MR. GRADY: I'm driving to Cleveland.

11 THE COURT: What's that?

12 MR. GRADY: I have to drive to Cleveland.

13 THE COURT: You have to drive to Cleveland?
14 Do you want me to keep you here?

15 (Laughter.)

16 THE COURT: No, here --

17 MR. GRADY: Don't let me answer that, Judge.

18 THE COURT: Here, which -- all right. Why
19 don't we say the 16th at 10:00.

20 MR. GRADY: I have a dentist appointment. I
21 could change that. I'll cancel it, your Honor. I'll
22 move it.

23 THE COURT: Well, just don't tell anybody.
24 There's an urban myth that I ordered, um, Michael
25 Sullivan out of the dentist chair to come to court. I'm

1 not ordering you to change it.

2 MR. GRADY: If we could do the 17th or the
3 15th, it would be ideal.

4 (Pause.)

5 MR. GRADY: The government would be willing to
6 do it earlier, the 14th or the 15th.

7 (Pause.)

8 THE COURT: Here, we'll put it on the 15th.
9 Is that all right?

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

11 MR. GRADY: Thank you, your Honor.

12 THE COURT: No?

13 MR. OTERI: Your Honor, I'll change it if I
14 have to, but I have a longstanding urologist appointment
15 at 9:00 a.m. that morning.

16 THE COURT: It's probably more important, if
17 you're getting married, for you to go to the urologist
18 than Mr. Grady go to the dentist.

19 MR. OTERI: It's just a checkup, Judge, but
20 I've got to get the okay. I can change that, Judge.

21 THE COURT: Well -- can you?

22 MR. OTERI: Yeah, sure, I'll just call and
23 tell them I'm not coming.

24 (Pause.)

25 THE COURT: All right. The 15th at -- this,

1 of course, limits the amount of time I have to decide
2 this and for the BIA to do anything. Um -- all right.
3 The 15th at 10:00.

4 Now, today is the 3rd. I'm going to order, by the
5 10th, that the parties make filings and proffering
6 evidence directed at the Section 3142 factors. And
7 there's a possibility that we'll start on the 15th and
8 we won't end that morning. I have other matters
9 scheduled that afternoon. We might end up continuing on
10 the 16th. But let me see. (Pause.) Well, we may need
11 -- there's something else. (Pause.) Here, we'll start
12 at 9:30, but we may not finish that day.

13 It's Section 3142(g). And, for example,
14 Mr. Oteri, and I believe that I can use Pretrial
15 Services on this, I think, Mr. Cronin. Well, why
16 doesn't he identify himself.

17 PRETRIAL OFFICER: Basil Cronin for Pretrial
18 Services, your Honor.

19 THE COURT: All right. If, for example, I'm
20 going to want to know if Mr. Flores is released, where's
21 he proposed to live? And I want you to provide all of
22 this, both sides, to Pretrial Services, because I'm
23 going to ask Pretrial Services to check it out. Is this
24 a proper custodian? Is this a place that he could
25 appropriately live? The -- and Mr. Flores has got to

1 tell me what -- and the government, what conditions he
2 proposes he be released on, should it be electronic
3 monitoring? Should it be home detention? Should there
4 be bond? And if there's going to be a bond, what's the
5 proposed -- you know, who's proposing and to put up
6 what? Essentially all the things that --

7 MR. OTERI: You want a regular presentation,
8 Judge.

9 THE COURT: Right.

10 MR. OTERI: And I'll give you some
11 alternatives, some requests.

12 THE COURT: Right. And talk to the
13 government, too.

14 MR. OTERI: Sure.

15 MR. GRADY: And, if possible, your Honor --
16 and I have no idea whether this is the type of thing
17 that would be permitted, but if the parties could come
18 to some sort of proposal to the Court, could we submit
19 that to you?

20 THE COURT: I would love it.

21 MR. GRADY: All right.

22 THE COURT: I -- Mr. Grady, are you an
23 Assistant United States Attorney?

24 MR. GRADY: Yes, your Honor.

25 THE COURT: You all are doing a very good

1 job. But you haven't persuaded me yet.

2 MR. GRADY: Does that surprise you, that I'm
3 an Assistant U.S. Attorney, your Honor?

4 THE COURT: No, quite the opposite. But you
5 could have been with Immigration.

6 MR. GRADY: Oh, no.

7 THE COURT: No, it's not surprising at all.
8 There's a long tradition of excellent Assistant United
9 States Attorneys. There are many in your office.

10 MR. GRADY: There are.

11 THE COURT: They seem to need pats on the head
12 these days. They probably have to get them someplace
13 else. Except you just got one.

14 (Laughter.)

15 THE COURT: Um, no, this is exactly what you
16 should be doing. In other words --

17 Okay, I've made these decisions. They're
18 comparable -- but I haven't finalized it or issued an
19 order yet, but they're comparable to the reasoning of my
20 colleagues. You know, these are interesting and
21 challenging issues. But in the course of being here,
22 you know, we've had some exposure to Mr. Flores-Powell
23 and he -- the last time when he was -- well, it sounded
24 like he had learned something in the last 18 months. If
25 he was dangerous when he was arrested, and I don't know

1 if he was or he wasn't, maybe he's not dangerous or so
2 dangerous anymore.

3 Absolutely. I would welcome that. Because if
4 there's someplace that would reasonably assure that he
5 wouldn't run away -- he's working desperately hard to
6 stay here, so I don't -- I think it's going to be --
7 it's not like -- you know, I'm open-minded. You're
8 probably not going to persuade me he's going to run
9 away. And then the concern's going to be is he going to
10 be dangerous? Was he a gang member? And if he was a
11 gang member, do we have good reason to believe he's --
12 that if he gets out, he's not going to go back to that.

13 And, for example, you may want to -- you know, we
14 could make a list of people that he's not allowed to
15 talk to or associate with. He has to live at this
16 place. He can only go out at certain times approved by
17 Pretrial Services. Um, he can't talk to or be with, you
18 know, these dozen people. So, you know, look at this
19 and work with Mr. Cronin.

20 PRETRIAL OFFICER: Your Honor, do you want us
21 to interview Mr. Flores or should we just work with the
22 parties?

23 THE COURT: Well, I think if Mr. Oteri would
24 permit him to be interviewed, I'd like this to
25 essentially follow, you know, as closely as possible,

1 what's familiar to us as standard operating procedures
2 in bail matters, which are more frequently before the
3 magistrate judge.

4 MR. OTERI: Your Honor, I have no objection as
5 long as I'm present.

6 THE COURT: Okay. Sure. It sounds to me like
7 you may make progress on this.

8 You know, and then if there's some material change
9 in circumstance -- here, you all will want to listen to
10 this. If there's some material change in circumstance,
11 like the BIA decision, um, we'll have to figure out what
12 the implications of that are.

13 But I expect you all to do a good job. You
14 represent the United States, which has its choice of
15 lawyers, and it's a great opportunity to represent the
16 United States, so this is the opportunity to get good
17 lawyers, and it's a specialized area, so you know the
18 area, and, you know, I expect the government to make
19 honorable arguments, and you've done that. You've
20 zealously represented the United States and, you know,
21 also have been candid about the complexity of it.

22 And, you know, seeing where we are now, I think it
23 would be in the best traditions of the Department of
24 Justice to sit down and see whether you could hammer out
25 some mutually-agreeable terms for release that will give

1 us the required reasonable assurances.

2 And let me ask you a question. Mr. Flores-Powell,
3 do you understand that I haven't finally decided whether
4 to grant your petition for habeas corpus?

5 MR. FLORES-POWELL: Yes, your Honor, I
6 understand.

7 THE COURT: And do you understand that I
8 certainly haven't decided whether to release you?

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

10 THE COURT: And do you understand that there's
11 going to be discussions, now with your attorney,
12 Mr. Oteri, and he'll be talking to you about it, about
13 whether there are conditions on which the government
14 will agree to release you?

15 MR. FLORES-POWELL: Yes, sir.

16 THE COURT: And if you get released on some
17 set of reasonable conditions, are you going to obey
18 those conditions?

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

20 THE COURT: Are you going to run away?

21 MR. FLORES-POWELL: No, your Honor.

22 THE COURT: Are you going to be dangerous in
23 any way?

24 MR. FLORES-POWELL: No, sir.

25 THE COURT: Why not?

1 MR. FLORES-POWELL: Because, your Honor, I'm
2 trying to be a part of my -- I really have changed, your
3 Honor, in a lot of ways. What I am today is not who I
4 was, and who I was is not, in totality, in the picture
5 that the government would paint. But I was never a
6 saint either, your Honor. You know, I've made
7 mistakes. And that's just not who I am today and that's
8 not where I'm trying to, um --

9 THE COURT: He's all right. He's doing fine.

10 MR. OTERI: Okay.

11 THE COURT: But I want you to hear some of
12 this, because you heard a lot of --

13 MR. OTERI: I'm listening intently. I just
14 don't want him to overdo it do, though.

15 THE COURT: Do you -- do you still have the
16 hope of becoming a lawyer in the United States
17 yourself?

18 MR. FLORES-POWELL: Yes, sir.

19 MR. OTERI: Keep him in jail. Don't let him
20 do that yet.

21 (Laughter.)

22 THE COURT: Do you still want Mr. Oteri as
23 your lawyer?

24 (Laughter.)

25 THE COURT: All right. Is there anything else

1 we should be discussing?

2 MS. PIEMONTE-STACEY: Your Honor, it's just a
3 bit of housekeeping. We're still under that order that
4 requires a report by every noon every Friday. Do you
5 want us to still file a report tomorrow or just notify
6 the Court if there's a change in circumstances?

7 THE COURT: Just notify me if there's a change
8 in circumstances. I was hoping we wouldn't be spending
9 today together, but here we are.

10 MS. PIEMONTE-STACEY: Agreed, your Honor.
11 Thank you.

12 THE COURT: Okay. The Court is in recess.
13 (Adjourned, 5:00 p.m.)

14

15 C E R T I F I C A T E

16

17 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
18 do hereby certify that the foregoing record is a true
19 and accurate transcription of my stenographic notes,
20 before Chief Judge Mark L. Wolf, on Thursday, December
21 3, 2009, to the best of my skill and ability.

22

23

24 /s/ Richard H. Romanow 2-26-10

25 _____
RICHARD H. ROMANOW Date