UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

LILIAN PAHOLA CALDERON JIMENEZ, Petitioner, vs. KIRSTJEN M. NIELSEN, Secretary of Homeland Security, CHRISTOPHER CRONEN, Immigration and Customs Enforcement, Boston Field Office Director, YOLANDA SMITH, Superintendent of Suffolk County Correctional Facility, STEVEN W. TOMPKINS, Sheriff of Suffolk County, Respondents.	Civil Action No. 18-10225-MLW
EDUARDO RALPH JUNQUEIRA, Petitioner, vs. STEVE SOUZA, Superintendent of Bristol County House of Corrections, THOMAS M. HODGSON, Sheriff of Bristol County, Respondents.	Civil Action No. 18-10307-MLW
EDJANN HENRIQUE DOS SANTOS, Petitioner, vs. KIRSTJEN M. NIELSEN, Secretary of Homeland Security, CHRISTOPHER CRONEN, Immigration and Customs Enforcement, Boston Field Office Director, YOLANDA SMITH, Superintendent of Suffolk County House of Correction, STEVEN W. TOMPKINS, Sheriff of Suffolk County, Respondents.	Civil Action No. 18-10310-MLW

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

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE

HEARING

May 8, 2018

John J. Moakley United States Courthouse
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P R O C E E D I N G S

THE COURT: Good morning. Would counsel please identify themselves for the court and for the record; and if their clients are here, please say so.

MS. LAFAILLE: Good morning, Your Honor. Adriana Lafaille here for the Calderon --

THE INTERPRETER: Sorry, Your Honor. The interpreter can't hear.

THE COURT: I'll ask her to keep her voice up, but if the interpretation is going to be a problem, we'll just cease it. Go ahead.

MS. LAFAILLE: Good morning, Your Honor. Adriana Lafaille here for the Calderon petitioners.

MR. COX: Jonathan Cox here for the Calderon petitioners, including Lucimar De Souza, who is present in the courtroom.

MS. McCULLOUGH: Colleen McCullough here for the Calderon petitioners.

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

MS. PIEMONTE: Good morning, Your Honor. Eve Piemonte for the respondents.

MR. SADY: Your Honor, Michael Sady for the respondents.

THE COURT: Mr. Sady, are you in all of the cases, or

which one?

MR. SADY: Just one, Your Honor. Dos Santos.

THE COURT: And Ms. Piemonte?

MS. PIEMONTE: Calderon, Your Honor.

THE COURT: All right.

MS. LARAKERS: And Your Honor, I'm counsel of record for the Junqueira and Calderon case but not for Dos Santos.

THE COURT: Okay. That's Mr. Sady?

MS. LARAKERS: Yes, Your Honor.

THE COURT: Okay.

MR. POMERLEAU: Good morning as well, Your Honor. Todd Pomerleau. I'm here today on behalf of two petitioners: Edjann Dos Santos, who is present in yellow seated in the jury box, as well as Eduardo Junqueira, who is seated in white in the jury box. I have co-counsel as well.

MS. MARZOUK: Stephanie Marzouk on behalf of Mr. Dos Santos and Mr. Junqueira.

THE COURT: Thank you. The petitioners who have been named are here. Their liberty is at stake. In my view, this therefore has some features that are comparable in the criminal case. I believe it's in the interests of the administration of justice that they be permitted to observe the proceedings that affect their liberty, but I haven't had the court reporter -- the interpreter sworn because she actually is not a court reporter [sic] for these purposes. She's privately retained.

And if I understand correctly, it's only De Souza who needs interpretation.

On my agenda for today, I'll ask you if it's accurate and complete, are the following. The primary purpose of today's hearing is to address the detention issues regarding De Souza and Junqueira. There are other issues in those cases, but they're not yet fully briefed. Is that correct as far as it goes?

MR. COX: Yes, Your Honor.

MS. LARAKERS: Yes, Your Honor.

THE COURT: Okay. Then on Friday, May 4, I was compelled to issue an order concerning whether I should institute civil or criminal contempt proceedings against Mr. Pomerleau for failing to make the required filing in Dos Santos on May 3, 2018. He's responded to that, and I expect to address that relatively briefly later today.

I also have in Dos Santos respondents' assented-to motion for an extension to reply to the preliminary injunction that was filed yesterday, and it's my intention to allow it, and I am.

Then last Friday, May 4, Dos Santos filed a motion for meeting to permit marriage, essentially requesting that I find that he's entitled to be married and allow that to occur here in the courthouse or the courtroom today.

That motion raises the same issues as the motion for a

preliminary injunction, which is not yet briefed. And as I said last week, it really would be in the nature of a permanent injunction, so it's my present intention to deny this motion without prejudice and to take it up if and when it's fully briefed. Does anybody want to be heard on that?

MR. POMERLEAU: Just very briefly, if I could, Your Honor. In conference in this matter with my brother, Attorney Sady, on Friday, it's my understanding after him speaking to ICE they're no longer going to object to Mr. Dos Santos being married.

THE COURT: That's fine. If this matter becomes moot, you'll tell me, and there will be one less thing for me to do.

MR. POMERLEAU: Right. And it's my understanding as well that he wouldn't object to a marriage taking place at the courthouse sometime in the foreseeable future if Your Honor were going to permit that.

THE COURT: I'll cross that bridge if I come to it, but --

MR. POMERLEAU: Thank you.

THE COURT: You asked for more time, and I gave it to you. I really, given all the other issues, I don't think it's profitable to spend any time on matters that may become moot. So this motion for meeting to permit marriage today is denied without prejudice. But I assume that on or before May 17, the date to which I extended the response to preliminary

injunction, I'll either get a response to the motion for a preliminary injunction or a statement that the parties have agreed, reached an agreement to resolve the case. Okay?

MR. SADY: Yes, Your Honor, that's correct.

THE COURT: Thank you.

All right. Here you go, Christine.

All right. Then in Calderon, yesterday I received an amended joint statement, docket number 63, which informs me that the parties have conferred and agree that the respondents' motion to dismiss and the petitioners' motion for a preliminary injunction are intertwined and should be argued together and argued first at a hearing; and after that is decided, if the case isn't dismissed, there should be a hearing on the issues of class-wide injunctive relief and class certification. Is that the parties' agreement?

MS. LARAKERS: Yes, Your Honor.

MR. COX: Yes, Your Honor.

THE COURT: Well, that makes sense to me, and the briefing schedule is acceptable, so I'm adopting it. But you proposed certain dates for the hearings between June 6 and 12 and June 18 and 20, and I'm going to have to wait to determine whether I'm available then. I have a -- but once I get the briefing and my schedule clarifies, I will try to accommodate those dates, but I can't assure you that will be done.

So on the amended joint report, I've written, "The

proposed briefing schedule is hereby adopted. Hearing date or dates will be set after briefing is complete." Here you go.

All right. Then counsel for the government is not present in Pinguil nor is Pinguil's counsel, but I'll say for the record it's my understanding that the parties didn't reach an agreement to resolve the detention issue in Pinguil, and I will schedule a hearing and any needed additional briefing.

With regard to De Souza and Junqueira, as I understand it, the only individual issue regarding De Souza is the detention issue I'll be addressing today. De Souza is also part of the Calderon class regarding the preliminary injunction sought to prohibit detention and removal while petitioners and perhaps a class of petitioners pursue provisional waivers. Am I right in that understanding?

MR. COX: Yes, Your Honor.

MS. LARAKERS: Yes, Your Honor.

THE COURT: All right. And with regard to Junqueira, as far as I know, the only remaining issue is the detention issue to be addressed today and that Junqueira is not challenging removal?

MR. POMERLEAU: Correct, Your Honor.

THE COURT: Okay. Now, in reading Mr. Pomerleau's affidavit in response to the motion relating to possible contempt, I learned some things relating to Junqueira. And that is, according to the affidavit, that Mr. Junqueira was

brought to the ICE office to be released on May 3, last Thursday.

MR. POMERLEAU: That is correct, Your Honor.

THE COURT: And then you spoke to Ms. Larakers about that, and she said she didn't know about it.

MR. POMERLEAU: Correct.

THE COURT: Junqueira wasn't released on May 3 but was brought back to be released on May 4 but is still in detention, correct?

MR. POMERLEAU: That's still correct, Your Honor. And we added emails from -- Mr. Junqueira's wife is here. She received emails from Mr. Junqueira's caseworker at the Suffolk County House of Correction, basically relaying information that she had spoken to William Chambers, who works for ICE, he's at the jail, and he told the case officer that he's getting released today and go pick him up.

So she drove three hours from Connecticut. She informed both of her children that their father was coming home, and she went to pick him up. And she waited nearly four hours in Burlington for his release. And I didn't find out until quarter of 5:00 in the afternoon he was not actually getting out that day.

But she informed me he might get out the next day. He was brought again Friday again, and I was dealing with that again Friday morning thinking he was possibly getting released

and this case would become moot, and he was never released.

It's unclear to me why he was ever taken there in the first place, why this information was given to his wife, which obviously has caused her a lot of emotional harm, to say the least, and it did throw me off step a bit, too. That's why I greatly apologize to the court for missing that deadline.

THE COURT: I'm going to go through that with you later. I appreciate that, and I see you were doing a lot. Although, I'll go through the chronology with you, in the two cases you have before me, you missed many deadlines, and you need to seek leave of court to do that.

But right now, my able and exhausted law clerk and I have been working very hard on these cases because there's urgency to them; and, you know, if they're going to become quickly moot or if they're going to become moot, I'd like to know it.

But Ms. Larakers, what happened with regard to Mr. Junqueira?

MS. LARAKERS: Your Honor, it's my understanding that the first time he was brought to ICE he was brought to ICE to be served with his notice of Post-Order Custody Review.

THE COURT: Last Thursday?

MS. LARAKERS: Yes. And I'm not sure as to the second time. However, I can certainly investigate it. However, this court's order has not been violated. He has not been moved out

of Massachusetts, and he has not been ever in danger of being moved out of Massachusetts.

THE COURT: No. I see that, but, you know, I've had a series of cases that -- the goal with the petitioners, what the petitioners are seeking is release from detention. So I'm not -- you know, if ICE agrees that he should be released from detention, I'm not trying to discourage that. On the other hand, I've had three cases that shortly before hearings became moot. And, you know, if there's something foreseeable that may make it unnecessary to hear argument and decide some of these intriguing issues, I'd like to know it.

MS. LARAKERS: Absolutely, Your Honor. And I will keep this court informed as to whether that's ever a possibility and promptly informed. I did not know that -- I did not know what happened at ICE before I had reached out to determine the circumstances after Mr. Pomerleau reached out to me.

THE COURT: So you spoke to somebody or communicated with somebody on May 3?

MS. LARAKERS: Yes, the first time he was taken to ICE, and I confirmed that he was taken to ICE to be served with his Post-Order Custody Review. The reason why his wife was given that information, I was not able to ascertain.

THE COURT: Who did you speak to?

MS. LARAKERS: Todd Masters. He's an attorney for

ICE. But that's the extent of my knowledge, Your Honor.

THE COURT: All right. Well, in my current conception, we'll get back to this.

All right. With regard to the De Souza and Junqueira -- hold on just one second. With regard to the De Souza and Junqueira motions to be released from detention, essentially I want to compartmentalize the arguments somewhat. One, that the first thing I need to do because usually I know what the questions are and then it's challenging sometimes to figure out the answers. But here, it's not clear to me what the government's position is with regard to the applicable legal framework.

In the opening brief in Calderon, which is relevant to Ms. De Souza today, the government stated that 8 CFR Section 241.4 regulations do not apply to De Souza because the regulations do not apply to aliens not currently detained at the expiration of the removal period. In that view, it's reiterated I think in the Rutherford affidavit in opposition to a motion for dismiss that it was asserted that ICE could detain without individualized determination of dangerousness or flight in April 23. That's the April 23 affidavit of Rutherford.

But then last Thursday, in the May 3, 2018 supplemental brief regarding Junqueira, the government stated that the procedures in 8 CFR Section 241.4 apply to petitioners, which include De Souza, once they've been detained

for 90 days. And Ms. Larakers, you said essentially the same thing last Tuesday at the hearing, that the regulations would apply, 90 days.

What exactly is the government's position? Because I believe originally the government was arguing that it had, under Zadvydas, as it reads, that it had six months to decide what to do on detention and the regulations were not relevant, and the more recent statement is that the regulations are relevant. I just need that clarified.

MS. LARAKERS: Yes, Your Honor. And I apologize for the confusion. I think the confusion is arising from the complaints and the government trying to address all of the allegations in the complaints.

So the first question that we were trying to address in the first -- in our opening brief was do the regulations in 8 CFR 241.4 apply to petitioners prior to any detention. And that's the question we were trying to answer. And in that brief we were trying to answer that the -- the answer to that clearly based on this text of regulation is no, it doesn't apply to petitioners prior to any detention.

Then, once respondents realized that there was a second question before this court, at what point do those regulations apply to petitioners once they are in detention. And that is what we have cleared up in the supplemental briefing and before this court. The answer to that question is

that there are two prerequisites for the POCR regulations to apply to a detainee. First, the petitioner -- the detainee must be detained pursuant to 1231(a)(6). That's found in 241.4(a), and the second requirement is that the detainee must have been detained for 90 days. That's the government's position on that.

THE COURT: There's some ambiguity to that. Are you saying that -- well, Section 241.4 has certain deadlines, a document review decision on detention by about 90 days, right?

MS. LARAKERS: Yes.

THE COURT: And notice to the alien or, if the alien has an attorney, to the alien's attorney approximately 30 days before that, correct?

MS. LARAKERS: Yes, Your Honor. So about the 60-day mark of being detained.

THE COURT: So basically, this is what I thought you were getting at. If somebody has been subject to an order of removal but not detained, as the statute requires, the clock starts running for 241.4 purposes, in your view, when that person is detained.

MS. LARAKERS: Yes, Your Honor.

THE COURT: Okay. Then let me ask you a series of questions because when I said I'm going to bifurcate this argument, I'm not -- if I assume without finding -- we're going to have argument later about whether that interpretation of the

regulations is right -- I want to know the following.

So let me do this first with regard to De Souza and try to make a chronology. So Ms. De Souza was arrested when she was at the CIS office seeking a provisional waiver after she demonstrated to the satisfaction of CIS that she was really married, it wasn't a sham, on January 30, 2018, correct?

MS. LARAKERS: Yes, when she was seeking her I-130 to be approved.

THE COURT: The I-130, which is the first step in the provisional waiver process.

MS. LARAKERS: The first step.

THE COURT: All right. And then Section 241.4 (k)(1)(i) says that prior to the expiration of the removal period, which I think you argue is 90 days, DHS officials conduct a custody review, which is a record review, under Section 241.4(b); is that right?

MS. LARAKERS: Yes, Your Honor.

THE COURT: All right. And we just covered this. There is about -- so 90 days for Ms. De Souza would be about April 30, 2018, correct?

MS. LARAKERS: Yes, Your Honor.

THE COURT: And then we also covered this but a little less precisely. Under Section 241(h)(2), the Department of Homeland Security official must provide written notice approximately 30 days in advance of the pending record review

so the alien may submit information in writing in support of his or her release, correct?

MS. LARAKERS: Yes, Your Honor.

THE COURT: And Section 241(d)(3) provides that if the alien has an attorney, the notice must be mailed only to the attorney.

MS. LARAKERS: Yes, Your Honor.

THE COURT: Therefore, am I right in understanding that under your view of Section 241.4 the notice should have been mailed to De Souza's attorney by approximately March 30 of 2018?

MS. LARAKERS: Yes, Your Honor.

THE COURT: And the record -- is this correct -- the record indicates that on April 23, 2018, ICE mailed De Souza, not her attorney, a notice to the alien of a file custody review to be conducted on or about April 30, 2018, right?

MS. LARAKERS: Yes, Your Honor. However, that's not because ICE views the regulation in that way. ICE has identified that that was not the way the regulation should be complied with.

THE COURT: I'm getting there. I'm just trying to see if I've got this straight.

MS. LARAKERS: Yes, Your Honor.

THE COURT: So then the notice was not given on or approximately March 30, 2018, correct?

MS. LARAKERS: Yes, Your Honor.

THE COURT: And it wasn't sent to the attorney, as required by 241.4, right?

MS. LARAKERS: No, Your Honor.

THE COURT: And it wasn't approximately 30 days in advance of the scheduled record review; is that correct?

MS. LARAKERS: That is correct.

THE COURT: So ICE didn't give Ms. De Souza the process provided by Section 241.4 as of April 3, right?

MS. LARAKERS: Yes, Your Honor.

THE COURT: But on April 30, ICE decided to continue Ms. De Souza's detention, right?

MS. LARAKERS: Yes, Your Honor.

THE COURT: And ICE says it sent a copy of that decision to her on May 2, right?

MS. LARAKERS: Yes.

THE COURT: And then on May 3, ICE sent Ms. De Souza and her attorney a new notice of another post-custody review to be conducted on June 3, 2018 in order to provide -- I think this is what you were about to explain to me a minute ago -- the required 30 days' notice because of what ICE characterized as irregularities in the notice. That's a term that was used in the Brophy affidavit, docket number 56.1. Is that correct?

MS. LARAKERS: Yes, Your Honor.

THE COURT: And you were beginning to explain that to

me.

MS. LARAKERS: Yes. When it became aware to ICE that that wasn't done correctly, ICE attorneys and to the Justice Department, we attempted to remedy that. And that was our response to remedying the POCR notice. However, this is alluding to the question that you asked before, compliance with the POCR notice does not affect the legality of Ms. De Souza's detention.

THE COURT: Here. This is where I'm going. Okay. So and maybe you've just answered this, but do you agree with Justice Kennedy who wrote in his dissent in Zadvydas, 533 U.S. 678 at 725 in 2001 that removable aliens held pending deportation have a due process liberty right to have the INS, at that time, Department of Homeland Security now, conduct the review procedures in place. I'll break this up. Do you agree with that?

MS. LARAKERS: Your Honor, as a Justice employee, I can't agree with the dissent of Zadvydas. However, ICE does agree that they are entitled to the procedures in 241.4 because that's the law as written.

THE COURT: Okay. And then Justice Kennedy went on to say, "Were the INS," now DHS, "in an arbitrary or categorical manner to deny an alien access to the administrative process in place to review continued detention, habeas jurisdiction would lie to redress the due process violation caused by the denial

of the mandated procedures under 8 CFR Section 241.4." Do you agree with that?

MS. LARAKERS: No, Your Honor. Because the majority in Zadvydas, the question is whether -- the due process right recognized in Zadvydas was to protect against prolonged detention. And Zadvydas recognized that the POCR regulations in 241.4 aren't enough to protect against that prolonged detention, therefore, at Kennedy's dissent, he was really looking at, well, the POCR regs are enough; however with Zadvydas recognizing that they're not enough, ICE does recognize that the regulation -- that they should apply the regulations consistently. However, it does not affect the -- it should not affect the legality of the detention, especially when the whole point of the regulations is to protect against prolonged detention, and the petitioners here have not been subject to prolonged detention.

THE COURT: Well, A, that doesn't seem to be consistent with what you agreed is correct. Removable aliens held pending deportation have a due process liberty right to have INS conduct review procedures in place.

But it clarifies the position. In my view -- it's tentative. You're going to get a chance to argue it -- you misunderstand Zadvydas, and you're not the only one who has. Zadvydas is talking about judicial review of decisions, I believe, that are properly made by the Department of Homeland

Security now.

If the Department of Homeland Security follows its proper procedures -- this is a procedural due process point -- follows its proper procedures and reaches the conclusion that an alien should be detained while an effort is being made to effectuate his or her removal, then the court has to, out of comity -- this is what Justice Breyer was talking about -- comity and recognition of the authority and presumed expertise of the executive branch defer to that decision for six months and assume it's reasonable, and then after six months that presumption, which can be rebutted in my view at the moment, in the first six months, that presumption disappears.

But the majority didn't, as I read Zadvydas, disagree with Justice Kennedy on this. If the government doesn't follow the proper procedures, and you admit that DHS didn't follow the proper procedures, then I believe at the moment that habeas jurisdiction exists, the authority exists to remedy the due process violation. The question is what's the remedy? Do I send it back to DHS to conduct this review, which you're trying to do; you're trying to remedy it. But you probably never spent a day in jail, did you?

MS. LARAKERS: No, Your Honor.

THE COURT: But I bet you visited some.

MS. LARAKERS: Yes.

THE COURT: Yeah, sure. And, you know, there are

cases that confirm what I think is intuitively obvious to many people. It's a form of irreparable harm to be detained for even a day; nothing is going to repay you for that. And there should be some fair and efficient way to provide a remedy.

At the moment, and I'll listen to all of this, I don't think that, you know, even on your reading of the regulations, which I also think are not correct, and I do think -- but even starting on day one, because the chronology is essentially the same, I don't think -- I think I have the authority and the responsibility to assure that justice is served with regard to Ms. De Souza, which at the moment for reasons I can explain will be a bond hearing before me next week. And I think the chronology is comparable with regard to Mr. Junqueira. He was arrested at the CIS office on February 1, 2018, right?

MS. LARAKERS: Yes, Your Honor.

THE COURT: And so he would have been entitled to receive notice of a document review under the regulation on about April 1, right?

MS. LARAKERS: Yes, Your Honor. But what makes him different from Ms. De Souza is he's a reinstatement. He's under an order of reinstatement of removal.

THE COURT: He's not eligible for I-130.

MS. LARAKERS: Yes, Your Honor. But not only that, but for his first 90 days of detention he was under 1231(a)(2) detention, not 1231(a)(6), for his first 90 days.

THE COURT: Is this explained in your brief?

MS. LARAKERS: Yes, Your Honor. In the motion --

THE COURT: Have you told me that before just now?

MS. LARAKERS: No, Your Honor. We made it clear in the response to this court's order with regard to 141.4. We attempted to clear up how it applies differently in Junqueira than De Souza.

THE COURT: Where did you write about that? Docket number what?

MS. LARAKERS: 55.

THE COURT: Is that the filing last Thursday?

MS. LARAKERS: Yes. And we explained it on --

THE COURT: Hold on. Anyway. I guess we'll get to this but --

MS. LARAKERS: The long and short of it, Your Honor, is it still applies to Mr. Junqueira; however, it's important to note that he's slightly different. It would still apply to him on that 90-day mark, as Your Honor just said. I just wanted to make clear --

THE COURT: Well, I'm sorry. Do you agree with Mr. Junqueira -- I won't ask you if you agree. Did that 90-day clock start running the day that Mr. Junqueira was detained?

MS. LARAKERS: Yes, Your Honor, yes.

THE COURT: February 1. Okay. Then under the regulations at about 60 days, April 1, his attorney should have

received a notice that there would be a document review and he could submit documents, but the document-reviewing decision would be about May 1, right?

MS. LARAKERS: Yes, Your Honor.

THE COURT: And did he get any such notice? Was the notice sent?

MS. LARAKERS: No.

THE COURT: All right. So that's inconsistent with the regulations, right?

MS. LARAKERS: Yes.

THE COURT: A second instance in which ICE didn't follow its regulations, right?

MS. LARAKERS: Yes, Your Honor.

THE COURT: I mean, the second instance we discussed today.

MS. LARAKERS: Yes, Your Honor.

THE COURT: And then, though, did somebody write -- I mean, Mr. Pomerleau said that Mrs. Junqueira, not Mrs. -- well, that Mrs. Junqueira was told that Mr. Junqueira was going to be released from the Burlington ICE office on May 3, last Thursday. Did somebody write that to him?

MS. LARAKERS: Your Honor, I'm not aware. I haven't confirmed that with ICE. All I could confirm was that he was transported there to receive his POCR notice again in the attempt to remedy.

THE COURT: You're talking shorthand. That's P-O-C-R.

MS. LARAKERS: I'm sorry. The Post-Order Custody Review, instead of saying "241.4," but I can continue to say --

THE COURT: Post-Order Custody Review. I mean, I knew what you were talking about, but there are a lot of people interested in this might be confused in thinking --

MS. LARAKERS: However, the difference in Mr. Junqueira that's important for this court to know is that even under this court's current view of the POCR regulations --

THE COURT: I haven't expressed my current view yet. I'm saying under your view, under your view, neither De Souza nor Junqueira got the process that the regulations provide.

MS. LARAKERS: Yes. However, even under the petitioners', I guess the petitioners' view of the statute, of the regulation, Mr. Junqueira would not be entitled to -- would not in any way be entitled to pre-notice of that, to pre-notice of detention.

THE COURT: I'm accepting your view. And I think that all of this can be reconciled. But it's your position that Section 241.4 applies to both De Souza and Junqueira, right?

MS. LARAKERS: Yes, Your Honor.

THE COURT: And the process provided by that regulation neither of them received, correct?

MS. LARAKERS: Yes, Your Honor.

THE COURT: And do you accept the proposition -- there

are legions of cases on this -- that the government is obliged to follow its own regulations?

MS. LARAKERS: Yes, Your Honor, with the caveat that the due process right implicated here, the claim to the due process right that has been recognized in Zadvydas is not implicated here because these petitioners are not subject to prolonged detention. And Your Honor, they have put forth no such facts to show that their removal isn't foreseeable. And they can be removed, they can be removed imminently if this court lifted the stay. And since that's the only due process right implicated --

THE COURT: But this is the conversation I had with -- I don't know if he's still your colleague -- in Arriaga almost a year ago today. I said, I have the authority, the government doesn't dispute it, to decide detention issues, right?

MS. LARAKERS: Yes, Your Honor.

THE COURT: So if you let these people out, say particularly with regard to Junqueira because the only issue is detention, then assuming the law is followed, you can do what you want. But as I said, I think you've misread but you're not misunderstood what Zadvydas is about, and you're not the first to do that. And I want to hear your argument and I want to of course hear the petitioners' argument.

Neither of them received the process that was due, and you agree -- and I can lay this out in the cases. But you

agree that the government has an obligation to follow its procedures. And I think Justice Kennedy was right because he explained what kind of case habeas redress would exist for, that is, when the INS in an arbitrary categorical manner denied an alien access to the administrative process in that case, and he said Zadvydas wasn't that kind of case. The facts were materially different in his view than this case.

So I think on your interpretation -- I can listen to you more -- of the regulation, De Souza and Junqueira are entitled to a bond hearing. My present view, and I'll give you a chance to address it and the petitioners can address it too, it needs to be a bond hearing before me. The Department of Homeland Security has shown that it hasn't followed its proper procedures -- the proper procedures with regard to either Junqueira or De Souza. It has repeatedly made errors. We can go back to -- it was Mr. Wells who decided to detain De Souza originally; is that right?

MS. LARAKERS: Yes, I believe so, Your Honor.

THE COURT: And one of his stated reasons was that she had a removal order, right?

MS. LARAKERS: Yes, Your Honor.

THE COURT: And the other -- another reason was that she was ineligible for any possible relief from removal; is that right?

MS. LARAKERS: Yes, Your Honor. That they had the

authority to remove her under the statute, which gives them --

THE COURT: No, but isn't it true that she was eligible, you know, first -- well, I don't know how you would characterize this, but first to seek I-130 status and then seek a provisional waiver?

MS. LARAKERS: Your Honor, that is relief available to her whether she is within the United States or outside the United States, so the relief is not being limited.

THE COURT: No, but his reasoning was that she wasn't eligible.

MS. LARAKERS: Yes, Your Honor.

THE COURT: Was he correct that she was ineligible for that?

MS. LARAKERS: He is correct that she is not eligible for any benefit that would give her a right, due process or statutory, to remain in the United States, yes.

THE COURT: Was she eligible for I-130 status?

MS. LARAKERS: Your Honor, respectfully, I-130 isn't a status, but she was eligible to have an I-130 approved, yes, Your Honor.

THE COURT: Actually, was it approved?

MS. LARAKERS: Yes, I believe so.

THE COURT: It was approved right before she was arrested, wasn't it?

MS. LARAKERS: Yes.

THE COURT: Okay. And did that make her eligible to pursue either inside or outside the United States -- well, make her eligible to pursue a provisional waiver so she would only have to leave the United States for a couple of weeks if she got that waiver?

MS. LARAKERS: Yes. The 212 application to seek admission and then the provisional waiver, yes, which are two forms of discretionary relief for which she would have to show extreme hardship.

THE COURT: And she was eligible to pursue that relief, right?

MS. LARAKERS: Yes, from inside or outside of the United States.

THE COURT: I'm going to ask Mr. Wells this when he comes in next week because I'm going to make a detention decision on these people, and I want to understand the reasoning so I can give whatever weight it deserves to the reasoning, but it appears to me that he was mistaken when he said she was ineligible for any form of relief. She might not get it, but that's different than being eligible.

MS. LARAKERS: Your Honor, he wasn't mistaken. His belief was she's not eligible for any form of relief that would preclude ICE from effectuating her removal. Yes, Your Honor, you're absolutely correct that that's what the affidavit says.

THE COURT: It says she's ineligible. I can only

decide this case based on the evidence, and that's what I have right now. And it appears to me that that was wrong. If he had put in an affidavit that told me -- I mean, isn't that what he wrote in the records?

MS. LARAKERS: Yes, Your Honor. And if he were here before you today, he would tell you that she is not eligible for any relief that would preclude ICE from effectuating her removal, which was the question at hand in the affidavit.

If I may, Your Honor, very shortly, with regard to any bond hearing this court wishes to conduct, the detention question here is whether she could be removed in the reasonably foreseeable future. And if this court were to find there is a constitutional violation there, the constitutional violation articulated in Zadvydas is present here, the remedy would be release, or, if it was just a violation of the POCR regulations, it would be to redo the POCR regulations.

THE COURT: Why --

MS. LARAKERS: And the reasoning why is because of the recent decision in Jennings v. Rodriguez.

THE COURT: Okay. Actually, let's pause here.

MS. LARAKERS: Absolutely.

THE COURT: We'll come back to this. And I haven't given you -- I've given you sort of my tentative thoughts, and this is helpful. But putting aside what the remedy is -- I don't know. Is there more you want to say about what Zadvydas

means? Why don't you do that. This is not quite the way -- I didn't know how this was going to go, but this is very helpful, and so let me hear your argument on the meaning of Zadvydas.

MS. LARAKERS: Okay. So respondents agree with petitioners that the right implicated in Zadvydas is the right to detention that is connected with its purposes. And the purposes articulated in Zadvydas is to ensure the alien's presence at the time of removal. And that is the only right that this court has the authority to decide with regard to whether the detention is constitutional or not.

THE COURT: I don't have the right to decide whether the regulations have been followed?

MS. LARAKERS: Yes, Your Honor. However, that --

THE COURT: Yes, I do; or yes, I don't?

MS. LARAKERS: Yes, you do have the right to decide that under the due process right articulated in Zadvydas, which is that an alien has a right to be free from prolonged detention.

THE COURT: No. This is separate.

MS. LARAKERS: Yes, Your Honor.

THE COURT: Here. Excuse me.

MS. LARAKERS: Sorry.

THE COURT: I think I'm understanding you, but I don't think you're understanding me because you agreed with me earlier that, as Justice Kennedy said, removable aliens held

pending deportation have a due process liberty right to have the INS conduct the review procedures in place.

MS. LARAKERS: Your Honor, I think I said that I don't agree with that. I agree with the due process right articulated in Zadvydas, which is that the detention must be --

THE COURT: I thought you told me -- maybe I misunderstood.

MS. LARAKERS: Yes, I don't have the authority as a Justice employee to agree with the dissent.

THE COURT: The majority didn't disagree with that.

MS. LARAKERS: The majority --

THE COURT: Here. Let me tell you where I think some of this dispute comes in. I do want to listen to you. But, one, there's substantive due process and procedural due process, as the Supreme Court describes it, right?

MS. LARAKERS: Yes, Your Honor.

THE COURT: And detention can violate substantive due process, which has always struck me as an oxymoron. It can be fundamentally unfair if it's too long without a good reason, it's unreasonably long, right?

MS. LARAKERS: Yes, Your Honor.

THE COURT: That's a colloquial way of describing substantive due process. But there's also procedural due process that, like American citizens, aliens have a right to procedural due process, correct?

MS. LARAKERS: Yes, Your Honor.

THE COURT: And they have a right to have -- hold on a second.

So as I read them, and you tell me if you disagree with this and why, because it's important to my thinking. "The due process clause requires a federal agency to follow its own binding regulations before depriving someone of liberty even when those regulations provide greater protection than is constitutionally required," as the First Circuit wrote in Nelson v. INS, 232 F. 3d 258 at 262. I think Accardi, 347 U.S. 260 at 267-68 is consistent with that, a McCarthy era case, 1954.

As the Supreme Court wrote in United States v. Nixon, Richard Nixon, "So long as a regulation remains in force, the executive branch is bound by it and indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it." That's Nixon at 418 U.S. 683 at 695-96.

"When an immigration regulation is promulgated to protect a fundamental right derived from the Constitution or a federal statute," I would say like the opportunity of notice, to have notice and to be heard, "and ICE fails to adhere to it, the challenged action is invalid and may be reversed." That's what Judge Saris wrote recently in Souza, 2017 Westlaw 5178789 at page 4, citing Waldron, a Second Circuit case.

"In short, the government, as well as the governed, must follow the law and the habeas court may ensure that it does," which is a principle that was reiterated by the Supreme Court in Boumediene, 553 U.S. 723 at 741, one of the Guantanamo cases. Do you agree with that line of cases or not?

MS. LARAKERS: Yes, Your Honor, and I believe many of those cases are speaking correctly to the procedural due process procedures within removal proceedings, which all of these petitioners did receive. However, with regard to the POCR regulations, even if they're violated here, the government's position is they would receive the benefit of those POCR procedures and not a bond hearing because neither the statute nor the regulation provides for that.

THE COURT: What's the difference -- I'm calling this a bond hearing.

MS. LARAKERS: Sure, Your Honor. There is a difference. The standard in a POCR and a bond hearing I would be happy to brief for you.

THE COURT: Actually, I was going to give you until Friday to do that.

MS. LARAKERS: Yes, I can brief how those procedures would work. And ICE certainly is conducting a new POCR review. But if we look, if we zoom out a little bit and look at the purpose of the POCR regulations and look at the due process right as articulated in Zadvydas, what we find is that the

alien petitioners have --

THE COURT: Let's just stop. Do you think Zadvydas is talking in the majority decision about -- maybe in the whole decision -- in the dissent as well about substantive due process or procedural due process?

MS. LARAKERS: Your Honor, I think Zadvydas is talking about substantive due process, and I think they're talking about whether the procedures -- the POCR procedures were enough to protect that substantive due process, that substantive due process right to have their detention bear reasonable relation to the purpose of removal.

THE COURT: No. Then I -- but here you admit that for neither De Souza nor Junqueira has ICE observed what you call the POCR.

MS. LARAKERS: POCR --

THE COURT: It's easier for me to say 241.4 procedures.

MS. LARAKERS: Your Honor, I'll switch to that.

THE COURT: They haven't. This case doesn't attack -- well, at the moment, because I'm assuming, and I'm not finding, and I doubt I will find, that your interpretation is correct, I don't think you had 90 days and I can tell you how the regulations can be read sensibly to apply but not give you 90 days. But that's not where we are now.

Even on your reading, there's 90 days, you admit they

didn't get it, and then I think they're not the only ones who didn't get it. This seems to be categorical. With regard to Junqueira, they didn't send out a notice at all.

MS. LARAKERS: Yes, Your Honor. So the question is then, the ultimate question that this court has the authority to decide, whether their detention bears a reasonable relation to the purposes of removal.

THE COURT: Okay. We're going back. I understand your position, but it's not the only question. It may be that -- it may be, may or may not be, that substantive due process is violated, but I don't think I'm going to need to rely on that because I think it's quite clear that they've been denied procedural due process.

MS. LARAKERS: So even if the procedures aren't -- they weren't in Zadvydas's view and they aren't in this court's view right now sufficient to protect that --

THE COURT: No. The procedures -- I think in Zadvydas they assumed that the procedures were adequate, but you acknowledge that for these two people who have been locked up now for more than three months, separated from their spouses, separated from their children, the government didn't give them the process that it obligated itself to give them in the 241.4 regulations.

MS. LARAKERS: And if this court were to find that they're entitled to release based on not being provided those

regulations, that would mean that this court would have to find some other due process right to remain here because here, petitioners have not set forth --

THE COURT: No. I'm not talking about removal. If I order Mr. Junqueira's release, this is what I was clarifying, Mr. Pomerleau, I'm not even being asked to do anything about his removal, except essentially to keep him here so I can decide whether he should continue to be detained. If I order his removal, the case is over before me. And then, you know, you'll be in the immigration court or wherever you go, and it will go to the Court of Appeals if there's anything to go to the Court of Appeals.

Let me -- we've been going for about an hour and 15 minutes and we haven't heard from the petitioners yet. I think I understand your position.

MR. COX: One prefatory note, Your Honor, just to clarify the record, you mentioned the decision to continue detention was delivered to Ms. De Souza last Wednesday, May 2. We have a copy -- I don't know if you've already seen a copy of this.

THE COURT: No. I haven't seen the decision. Let's see. Does the government have this?

MS. LARAKERS: Yes, Your Honor.

THE COURT: I'll make it Exhibit 1 of today's date.

MR. COX: What I wanted to draw the court's attention

to, Your Honor, was the date on which Thomas Brophy had signed the decision to continue detention, April 27, which was only -- it was only four days after she was given the original notice. And this is the same date that Ms. De Souza's counsel, immigration counsel received the notice of record review. And this is also several days before the April 30 deadline or date on which she was expected to have the decision made.

THE COURT: Well, am I correct that the documents -- so the notice went to De Souza, not to her lawyer, right?

MR. COX: That's correct.

THE COURT: And there wasn't about 30 days' notice, but the lawyer filed some documents on April 27.

MR. COX: On April 30, Your Honor.

THE COURT: The documents were filed on April 30.

MR. COX: Yes, Your Honor. That was the date on which she was told the record review would occur.

THE COURT: So this decision was made before there was any opportunity to consider what she had submitted?

MR. COX: That's what it appears from the face of the document, yes.

THE COURT: Is April 27 also the day the motion to dismiss, I think, was filed?

MR. COX: I think that was April 23, Your Honor. I can confirm.

THE COURT: It was April 23, okay. Go ahead.

MR. COX: Well, I don't want to speak at great length about this because we agree with your reading.

THE COURT: Talk to me about Zadvydas. I think that would be most helpful. I told you my reading of it is that it assumes the proper procedures have been followed. Then it's a question of what should the role of the court be if the procedures have been followed and Department of Homeland Security has decided to detain somebody for six months or six months hasn't gone by. But here, just tell me as if I hadn't said that to you, explain Zadvydas.

MR. COX: That's right. Zadvydas was decided against the backdrop of the regulation. So as we mentioned in our brief last week, the 2000 final rule that enacted 241.4 says that the rule was, quote, "structured to afford," quote, "periodic and meaningful opportunity to seek release from custody as required under the Constitution." That was 65 Federal Register 80283.

Then in Zadvydas, the majority opinion at pages 683 through 684 sets out the 241.4 procedures and then proceeds to analyze the detainee's arguments against the backdrop of those procedural protections that were offered by 241.4. And then if you look, as you noted, in Justice Kennedy's dissent in Section 2, he mentions that --

THE COURT: Actually, does Zadvydas -- this isn't entirely rhetorical. Does the majority decision in Zadvydas

discuss the 241.4 regulations?

MR. COX: Yes, Your Honor. It's at pages 683 through 684, and it describes the initial record review.

THE COURT: Sorry. 682?

MR. COX: 683, Your Honor.

THE COURT: That's right, under Section A, primarily. And this actually this hasn't come up yet, but this whole issue exists because the government I think for understandable reasons hasn't followed the statutory mandate to detain people as soon as their orders of removal are final. If the government did that, the regulation -- the removal period would be 90 days and we'd go from there, but go ahead.

MR. COX: You know, as you mentioned, Justice Kennedy flagged the same provisions of Section 241.4 of his dissent, and I think the meaningful distinction there was that Justice Kennedy thought that because these regulations already existed to protect the rights of the detainees, you didn't need to go forward to have a habeas inquiry to determine whether the due process rights have been violated.

Obviously, the majority disagreed with that. But both sides of that were making their arguments against the backdrop of adhesion to the 241.4 procedures. In Zadvydas -- and it's also important to consider the posture in which the petitioners came to the court. Both of them had been detained continuously throughout the removal period, and then you have the transition

immediately into the 1231(a)(6) post-removal period detention. So they had the benefit of the 241.4 regulations. And even then the court said that extended detention beyond the six months is not presumptively reasonable. So we think that the 241.4 procedures are a predicate for the kind of rights that are -- well, a predicate for the application of even the deferential review the government might argue for under Zadvydas.

THE COURT: Zadvydas, as you call it, should be read as a substantive due process analysis decision?

MR. COX: We think it's both, Your Honor. I think it talks about making sure that -- it's not simply the procedure you go through but also ensuring that the detention is reasonably related to the underlying purposes. And the court identified -- in fact, the government identified to the court in Zadvydas the twin interests of ensuring that there wasn't going to be someone dangerous out in public and then also ensuring availability for removal in a timely manner.

So the court against the backdrop of 241.4 in those procedures was evaluating, you know, the amount of deference or leeway you should give to the government and enforcing those, enforcing those statutory purposes through detention. And so when you take away the 241.4 procedure, you're left with kind of a vacuum with Zadvydas where it still emphasizes the very strong constitutional and substantive rights guaranteed to

detainees, particularly because they're detainees in a civil proceeding. This is not punitive. They're given very strong substantive constitutional rights. And if you remove the 241.4 procedures, you've created an even more significant constitutional problem for those petitioners.

So our view is that 241.4 is an integral part of the Zadvydas decision, and removing those procedures creates a very significant constitutional problem that goes beyond simply giving a petitioner a right to do that on a delayed basis rather than -- again, the remedy didn't seem -- the remedy of kind of just allowing it in the future doesn't seem to correct, as you said, the irreparable harm of remaining in detention, especially when the government has not made any kind of requisite showing that there is a risk of flight, nor some kind of public danger.

THE COURT: So a couple of things. Do you think I characterized it correctly when I said essentially the majority -- well, the decision in Zadvydas is a decision about the role of the courts in presuming, you know, that in reviewing detention decisions, and that because of considerations of comity among other things, that for the first six months courts should presume that decisions that were made pursuant to the procedures, 241.4 in this case, are reasonable, and after that, that presumption disappears, but it's basically about how courts should review decisions if they're properly

made. Is that the way I should be viewing it?

MR. COX: Yes, I think so. We do want just to clarify that we don't think there's some kind of -- that presumption of reasonableness is kind of a categorical carte blanche before the six months.

THE COURT: I agree with that, too. The idea of a presumption is generally it can be rebutted. And, for example, in the case that Justice Breyer cited -- or one of the two cases, it's not perfectly clear. He says, "We think it practically necessary to recognize some presumptive reasonable period of detention," and then he cited Riverside v. McLaughlin, adopting a presumption that 48-hour delay in probable cause hearings is reasonable and hence constitutionally permissible. But in Riverside, they said that's not going to be true in every case. It still has the presumption, but it could be rebutted in some instances.

MR. COX: Yeah. We don't think you need to reach some decision on that basis, although we're happy to argue separate from the 241.4 arguments. But I think it's pretty clear from Zadvydas that they didn't pluck the six months out of thin air. It was taken from the initial 90-day removal period detention, the mandatory detention, and then the first 90 days of discretionary detention under 1231(a)(6). And it's very clearly connected, the period of their presumptive reasonableness is very clearly connected to the same periods

that are protected under 241.4. So we agree that the underlying constitutional reasoning of Zadvydas is contingent upon the prior application of 241.4 procedures.

THE COURT: Okay. I think maybe we'll just stay on this Zadvydas issue. Mr. Pomerleau, do you want to address it?

MR. POMERLEAU: Just briefly, Your Honor. I mean, I would agree that I think the case does implicate both procedural and substantive due process issues particularly here where the 241.4 regulations are not being followed by DHS. And we have a petitioner's liberty at stake, where they're sitting there, they're not getting their 30 days' notice at day 60 in advance of the 90-day hearing, like Mr. Junqueira's case and Mr. Dos Santos's case. So we have the confluence here of these due process considerations that are discussed in Zadvydas. And then additionally you have a lot of petitioners, in our view, detained well outside of the mandatory removal period.

So I think that everything that co-counsel have suggested, I would respectfully join. And I do agree with their assessment, as well as your view of this case. I think we are at the level of a constitutional violation that's occurring because these 241.4 regulations are not being followed. I would indicate this is commonplace. It's not just in these cases, but this is widespread at the Department of Homeland Security.

THE COURT: Well, I'm getting that impression.

MR. POMERLEAU: The only notice Mr. Junqueira received -- and I got this from him yesterday in a jail visit.

THE COURT: What is that?

MR. POMERLEAU: He got a notice May 3, 2018, so that's 93 days after he was detained. That's the only notice he received.

THE COURT: What did the notice say?

MR. POMERLEAU: It's titled Notice to Alien to File Custody Review. It's addressed to him at Suffolk County House of Correction.

THE COURT: Not addressed to you?

MR. POMERLEAU: I never received a copy of it, other than through him, meeting with him yesterday evening.

THE COURT: Is there any objection to making that part of the record? You've referenced it.

MR. POMERLEAU: Not at all, Your Honor.

THE COURT: I'm asking the government.

MS. LARAKERS: No, Your Honor. The decision -- the notice can come in. I was under the impression that it had been sent.

THE COURT: Had been sent to who?

MS. LARAKERS: Had been sent to Mr. Pomerleau, but I will certainly check.

THE COURT: Well, it was mailed May 3. Given the post office, it may be on its way. May I see it?

MR. POMERLEAU: Yes, Your Honor. May I approach?

THE COURT: Yes. So this gave him notice of a June 3 custody review. So this is like in effect a 60-day notice. Is that what --

MR. POMERLEAU: That's what it appears to be, Your Honor. Obviously, it should be given 30 days prior.

THE COURT: Well, they're giving it 30 days prior, but you're not getting a decision in 90 days on the government's interpretation.

MS. LARAKERS: Yes, Your Honor. And again, this was done to remedy any irregularities in the first POCR.

THE COURT: Any irregularities? You admit there were irregularities?

MS. LARAKERS: Yes, Your Honor. These new notices were given to give them the benefit of the regulation because it wasn't given to them in the first instance.

MR. POMERLEAU: Based on that notice, he'll be held roughly 123 days before he even gets his custody review determination made, which violates 241.4.

THE COURT: It's now 11:30. We'll take about a ten-minute break. And I've been conducting this discussion on the narrowest possible grounds, as if the government's interpretation of the regulation is correct. My tentative view is that it's incorrect; that for reasons I can explain -- I mean, I think the government agrees that the -- well, the

removal period as defined in the statute and regulations expired years ago for each of these petitioners because the removal period is the 90 days after their order of removal becomes final, right?

MS. LARAKERS: Yes, Your Honor.

THE COURT: But then they weren't detained, and you argue --

MS. LARAKERS: They weren't detained because we didn't know where they were until recently. With regard to Ms. De Souza, she was an abstention order. She didn't show up to immigration hearings. There would have been an opportunity there to detain her within the removal period.

THE COURT: And this will be helpful. When we come back, I want you to explain all of this to me.

MS. LARAKERS: Absolutely.

THE COURT: But basically -- and there are various provisions and I can point them out to you. But the way I would now read the regulations, because the removal period has expired, and I think you just agreed with that, as it's defined, and it's what your colleague acknowledged a year ago in Arriaga. And your argument is, well, it doesn't make sense to say we don't get the -- we can't use the regulations once we get somebody in detention. You can't give notice in advance if you don't know where somebody is, for example. And they might run away again. But I think --

Here. Think about this. Basically, there's language in the regulations -- I can point it out when I come back more easily -- that you have to do this within 60 days, this within 90 days, unless there is good cause, or, you know, emergency circumstances that make that not possible.

So I'm with you as far as it goes, and it makes sense not to be required to give notice before somebody is detained, but if that's considered good cause for not having done it within the way the law defines removal period, the good cause has disappeared when the detention has occurred. And the government could give a 30-day notice immediately upon detaining somebody and detaining them for maybe up to 30 days if it takes that long to get the information and make the decision, but that's different than 90 days. And every day is precious.

MS. LARAKERS: Yes, Your Honor. And the government would agree that that certainly could be a possibility. However, the reason why the government has interpreted the regulation the way it has and because that interpretation is reasonable, the reason why we've interpreted it that way is because the whole purpose of the regulation was to make sure that someone isn't detained indefinitely while we're trying to effectuate removal.

THE COURT: We'll come back to it.

MS. LARAKERS: But that's the reason for the 90 days,

Your Honor. The 90 days, the reason why we're interpreting it to be 90 days is because that's what Congress expected a reasonable period of time to be to remove a person.

THE COURT: Congress defined the removal period as 90 days after the final order. They didn't define it as 90 days after you get somebody in detention.

But here, we're going to come back on this. I told the court reporter I'd give her a break. All right. So when we come back, I want to hear your arguments. I think I'll start with the petitioner, why is the government's interpretation of 241.4 wrong; and even if it's right, why is there -- well, why is it wrong, and then also what's the substantive due process argument.

My present sense is that the case can be decided based on violation of procedural due process. I don't know if I'll decide the substantive due process issue. It won't be material to the upcoming case. All right. So catch your breath, and we'll resume at about 11:45 -- ten minutes of 12:00. Court will be in recess.

(Recess taken 11:37 a.m. - 12:03 p.m.)

THE COURT: Okay. All right. As I said, I'm interested in hearing your arguments, perhaps the arguments you planned to start with on what the proper interpretation of Section -- excuse me. No. That's too distracting. You're supposed to be in the jury box.

THE INTERPRETER: I'm sorry, Your Honor. The interpreter was just trying to hear better.

THE COURT: Well, they have no right to have this interpreted at all, and I can't deal with this distraction.

THE INTERPRETER: Okay. I apologize.

THE COURT: I've had interpreters who can do it quietly enough, but I don't think you're yet one of them. So just do your best.

THE INTERPRETER: Thank you.

THE COURT: Thank you.

Okay. I'm interested in your arguments, petitioners' arguments and the government's response, on what the proper interpretation of Section 241.4 is and the substantive due process argument as well.

I indicated before I left that my tentative view is that Section 241.4 can be sensibly interpreted to apply to people who are not detained during the removal period. Since there seemed to be a lot of them, it would be preferable to have a regulation that dealt with this directly, but the requirement that the review occur before the expiration of the removal period, is not under Section 241.4 absolute.

The regulation permits DHS to issue a 30-day notice and conduct a custody review as soon as possible after the removal period allowing for any unforeseen circumstances or emergent situation. That's 241.4(k)(2)(iv). It's not possible

to conduct a custody review concerning whether to continue an alien in custody as required by 241.4(d)(1) when the alien has not yet been detained.

As the explanatory note that I brought to your attention last week indicates or stated, Section 241.4 was intended to apply to all aliens who are detained following the expiration of the 90-day removal period, the INS said. But in promulgating the regulation, INS at the time evidently did not foresee that the government would be unable to detain every alien during the removal period. Neither the regulation nor the explanatory material explicitly addresses how the regulation applies in that circumstance.

But basically, as I said, I understand it wouldn't be practical to give notice to an alien who is not detained of a detention review in advance. The alien might flee. But the timing requirement at the moment I think would be satisfied if DHS gave notice and conducted a review as soon as possible after the arrest. DHS may postpone a review if there's good cause to do so, and the fact that the alien is not in custody may well be good cause under 241.4(k)(3). But Section 241.4(k)(3) also says that reasonable care must be exercised to ensure that the alien's case is reviewed once the reason for delay is remedied. Therefore, it may be not that DHS gets 90 days when they bring somebody into custody but approximately 30 days to give notice and to conduct a review when the removal

period is expired.

That's my tentative thinking as to how the regulation should be read, if it's not read the way the government asserts it should be read. So why don't we hear first from Calderon.

MR. COX: First of all, I'll address the government's interpretation and then move on to what we believe the correct one is.

THE COURT: I thought you already addressed the government's interpretation. Maybe I didn't let you. Talking about Zadvydas.

MR. COX: 241.4, the application --

THE COURT: All right. Go ahead.

MR. COX: So the basic issue is we understand why the government is interested in starting the clock at the moment of detention before the 90 days, but unfortunately, we don't see any textual basis for that in the language of 241.4. You know, we already discussed how the 2000 final rule makes it kind of a comprehensive regulation for implementation of 1231(a)(6). The regulations talk -- there's nothing in the regulations that starts the 90-day clock at any time other than the initial notice of removal. So if you look at 241.4(h)(1), it talks about the records review.

THE COURT: Hold on, (h)(1)?

MR. COX: Yes, Your Honor.

THE COURT: Go ahead.

MR. COX: That section discusses the records review prior to the expiration of removal period, so that would be within the first 90 days. Then it talks at 241.4(c)(1) and (c)(2) about a record review by HQPDU for those who have not been removed or released at the end of the three-month period after the removal period. Nowhere in that is there something that is connected with the start of detention to grant a 90-day review.

I think Your Honor's tentative interpretation better reflects the underlying text and purpose of 241.4, which is that as soon as the discretionary detention under 1231(a)(6) commences, the government is required to initiate a meaningful record review for the petitioner. And I think Your Honor's suggestion regarding looking at Section (k)(2)(iv) and (k)(3) reflects a reasonable balance of providing notice to the petitioners while not necessarily frustrating the underlying purposes of the removal statute.

I think that better reflects the need for a prompt custody review outside of the mandatory detention period under 1231(a)(2). And it also avoids, although the government doesn't need to be pressing this argument, it would be important to have -- we shouldn't -- I also just want to quickly state why it wouldn't be appropriate to have no application of 241.4 to those who are initially detained.

THE COURT: No. That's worth addressing because I did

consider whether maybe there's just no regulation that applies.

MR. COX: Right. And so I think there are two issues there. And I think what helps illustrate this is if you were to consider what the world would look like if 241.4 didn't apply to those who were initially detained outside of the removal period.

So first you'd have constitutional issues. You know, as we've already discussed, you have Justice Kennedy's dissent in Zadvydas which appears to share the same reasoning the majority had that the 241.4 procedures are an integral component of protecting due process rights for post-order detention, 1231(a)(6). And as I noted earlier, the rule itself is clear -- the 2000 final rule was clear that the procedures were implemented to provide constitutional protections. So if you pulled away those protections --

THE COURT: Where is that?

MR. COX: That's 65 Federal Register 80283.

THE COURT: Here, let me get that. Can you read the pertinent part of the rules, please?

MR. COX: Yes, Your Honor.

THE COURT: The pertinent part of the explanation.

MR. COX: Let's find it here. Yes. I'm looking, it's that paragraph that starts, "The Attorney General 's authority." It's referencing decisions from the Third, Fifth and Tenth Circuits and discussing the need for review,

constitutional review of detention under Section 1231(a)(6). And it says, "The final rule is structured to afford this type of review, and it has the procedural mechanisms that those courts have sustained against procedural due process challenges."

So it was intended to provide very meaningful constitutional protections. And as I explained earlier this morning, the Zadvydas decision was made against the background of those procedural protections being available to petitioners. So without those protections at all --

THE COURT: There's actually a Third Circuit case that stands for that proposition, too, but the parties didn't cite it. Alexander v. Attorney General, 495 Federal Appendix 274 at 277. Third Circuit said, "Zadvydas is not the only word on post-removal detention. A failure to satisfy Zadvydas," meaning by showing there's no significant likelihood of removal in the reasonably foreseeable future, "may not necessarily be fatal to an alien's ability to prevail on an alternative ground predicated on regulatory noncompliance," meaning with the Post-Order Custody Review procedures in Section 241.4.

MR. COX: I think we would agree with that, Your Honor.

THE COURT: I think you would, too.

MR. COX: So I think that's step one, where you have severe constitutional issues where if you didn't provide --

THE COURT: Constitutional issues meaning substantive due process issues?

MR. COX: Substantive and procedural. I think you can view them together in this instance. I think the second issue -- and we don't think the court needs to reach this point, but as we already discussed, our interpretation of the 2000 final rule is that it was designed to be a comprehensive regulatory solution for addressing the transition from the 90-day removal period to the post-removal detention or post-removal supervised release under either 1231(a)(6) or 1231 (a)(3). So those regulations are designed to provide structure for that. And we think they're comprehensive.

So I think our interpretation of those rules is that if it's authorized under 1231(a)(6), if that detention is authorized, you're going to need the regulatory framework under 123 -- sorry -- under 241.4 is going to need to address that scenario. If it were the case that those who were initially detained at the end of the removal period weren't covered by 241.4, that would raise some pretty significant questions about whether the statute even authorizes detention for those who are first initially detained after the close of the removal period.

Again, we're not asking the court -- we are very content with a ruling that is as narrow as possible. I will point out that there have been some courts that have found that under 1231(a)(6), once the removal period is expired, it's not

permissible to initiate detention of a petitioner after that point. Those are cases like --

THE COURT: Are these cases in your brief?

MR. COX: At least two of them, Your Honor, Farez-Espinoza v. Chertoff, which is 600 F. Supp. 2d 488. That's from the Southern District of New York. And there's also Ulysse v. Department of Homeland Security.

THE COURT: What is that called?

MR. COX: Ulysse v. Department of Homeland Security. That's 291 F. Supp. 2d 1318.

THE COURT: They provide there can be no detention after the removal period?

MR. COX: Yes. In Ulysse, for example, it says, "The courts find that the respondents are without statutory authority" --

THE COURT: Two things. One, not so fast, and two, do we have it? Did you cite Ulysse in your submission?

MR. COX: I believe we did. I know we cited Farez-Espinoza.

THE COURT: I know you did, too. Okay. So what does Ulysse say? Say it slowly, please.

MR. COX: Sure. The relevant part is on page 1326. It says, "The court finds that the respondents are without statutory authority to detain Ulysse because the 90-day removal period has expired."

Now, again, we don't necessarily need to press that line of argument. We understand that would be a much broader ruling than what would be necessary to resolve the claims in front of the court today. What we wanted to point out is that there could be in some significant tensions. We only raise it to point out that if 241.4 were read to exclude those who were initially detained after the removal period expired, that could create significant problems in terms of whether -- that would undermine the government's general view that 1231(a)(6) even authorizes that detention in the first place.

That's the point we wanted to make about that, is just to illustrate that 241.4, its application, if it didn't apply at all, there would be some pretty significant consequences both constitutionally and statutorily. So we think the better solution is something similar to what you had proposed, which is that, you know, once the detention commences, you must do some kind of relatively expedited review process. You wouldn't need to necessarily give notice in advance of the detention, but it would certainly need to be on an expedited basis and faster than the 90 days the government is advocating.

THE COURT: Why should it be faster? You know, the government was beginning to argue and they'll explain more that, you know, Mr. Calderon -- are you talking about Calderon or De Souza -- De Souza, maybe, didn't appear for her hearing, and they didn't know where she was, so although they knew where

she was before they arrested her, but for a period of time they didn't know where she was, why should she be subject to less, a shorter period of detention than presumptively is reasonable than somebody who is available to be detained?

MR. COX: I think, again, it comes back to just the -- well, first of all, I should say there really hasn't been anything established in the record that she wasn't available for apprehension before this. I mean, I think the government provided its explanation in response to your order to show cause, and it didn't say that, you know, January 30, 2018 was really the first opportunity they had that indicated that it made some decisions. We can disagree with those as being legitimate decisions, but it certainly didn't say that the reason it hadn't tried to remove her or detain her previously was that she was unavailable. I think her contact information would have been available through the I-130 applications, but certainly would have been in the system for longer than, you know, 90 days before ultimate detention.

And, you know, if the government were claiming that it had some inability to remove her appropriately, you know, within the first 90 days, it has the mechanism under 1231(a)(3)(c) I think where the statutory period is tolled. We haven't heard any argument along those lines.

THE COURT: 1231 --

MR. COX: I just want to make sure I have the citation

exactly right. I'm sorry, Your Honor. It's 1231(a)(1)(c).

THE COURT: Suspension of period.

MR. COX: I think even if that were --

THE COURT: Hold on.

MR. COX: Pardon me, Your Honor.

THE COURT: That actually may be helpful to the government. I mean, during the removal period, neither De Souza nor Junqueira were making good faith efforts to get the travel documents necessary, so maybe the removal period did start running when they were detained.

MR. COX: We would disagree with that. I only illustrated this to point out that the government has not done -- and I think number one, if that were the contention, that the removal period hasn't run, everything they've done in this case until now has contradicted that. They've been explicit, after the removal period --

THE COURT: And they acknowledged that in Arriaga a year ago, too.

MR. COX: Exactly. So just to be clear, I don't think anyone is contending that this provision would apply. And I think there are some cases, I belive that Farez-Espinoza is one of them, that discusses that it's something more than just being absent. It really requires active effort to avoid the removal process. And there's been absolutely no indication that is true here. So we don't think there's any basis to look

to 1231(a)(1)(C).

The reason I mentioned it, Your Honor, was to illustrate that if the government were concerned about, had a basis to believe that a petitioner should be detained because of flight risk or something like that for the first 90 days, then there is a statutory remedy that would allow them to extend the removal period and do it that way.

The problem is there's just nothing in the text that would permit the court to -- you know, to a presumption of reasonable detention for 90 days when everything else in the statutory literature points out that after the removal period, if it hasn't been tolled, is supposed to be by default a period of supervised release under 12(a)(3), and then if certain conditions are met under 241.4, the Attorney General could decide to keep someone in detention subject to the procedural rights in 241.4 and of course the constitutional rights that were explained in Zadvydas.

So we don't think there's a hook for allowing -- for effectively making detention mandatory for the full 90 days after initial capture because that's simply a different matter. Once you're out of the removal period, removal is discretionary, and the default is supervised release under 1231 (a)(2).

THE COURT: Okay. So that goes to the interpretation of the regulation. Is there -- should we stop there and then

should I leave some time for what I understand to be the substantive due process argument is just unreasonably long or --

MR. COX: Whatever procedure. If you'd like to hear the government on the statutory --

THE COURT: Mr. Pomerleau, would you like to be heard on this point, or do you adopt Mr. Cox's arguments?

MR. POMERLEAU: I adopt most of his argument. There's just one point I would like to make that I believe has not been addressed completely. Section 1231 has as a subpart -- just get it for you. It talks about the removal period. (a)(1) is the removal period, (a)(2) is detention. It just says, "During the removal period" --

THE COURT: (a)(2) --

MR. POMERLEAU: "Attorney General shall detain the alien," but then subpart 3 talks about supervision after the 90-day period. So if the alien does not leave or is not removed within this removal period, it says, "The alien pending removal shall be subject to supervision." Supervision is a non-detention mechanism. ICE routinely has people on orders of supervision with final orders of removal. They check into ICE, they're on GPS monitors, all different scenarios, but they're often told you have 30 days to leave the country, give us plane tickets or we have tickets for you. These are non-detention circumstances. So I believe when you're outside of this

removal period, ICE cannot detain somebody in these circumstances.

At least for Dos Santos, he was detained 37 months after his removal period had expired, and the government knew where he was. His address was in all the paperwork they had. He was in an immigration court proceeding. He had an appeal that became final in May of 2014, and he was arrested in June of 2017. In our view in that type of circumstance, he should have been subject to part 3, which is the order of supervision while the removal commences, and that had never been followed in this case.

THE COURT: Hold on just a second. I want to make a note and then clarify something. So actually (a)(3) indicates that, contrary to what I may have said in expressing some tentative views, Congress and the president anticipated that somebody ordered deported might not leave because, they're right, if the alien does not leave or is not removed --

MR. POMERLEAU: During the removal period.

THE COURT: During the removal period -- so then you say, "to be subject to supervision under regulations prescribed by the Attorney General." Do such regulations exist?

MR. POMERLEAU: Yes. They're routinely referred to as orders of supervision. Some people file a form I-246, which is a stay. Those are often coupled with orders of supervision.

THE COURT: So this is something -- is this part of

Section 241.4 or something else? I mean, is it the 241.4 factors that are to be considered that are in the notice to your client?

MR. POMERLEAU: Essentially, yes. What typically happens is when somebody's on an order of supervision, there's a form that they sign that says, for example, they won't associate with known criminals, they won't associate with gang members.

THE COURT: But what's the regulation? What's the regulation? Is it part of 241.4, or is there some other regulation?

MR. POMERLEAU: The form, if you look at Section 3, it has subparts, A, B, C.

THE COURT: Section 3 of what?

MR. POMERLEAU: 1231.

THE COURT: No, but it says, "shall be subject to supervision under regulations prescribed by the Attorney General." I want to know what regulations.

MR. POMERLEAU: It says, underneath it says, "The regulations shall include provisions requiring the alien (a), to appear before an immigration officer."

THE COURT: Okay. Stop.

MR. POMERLEAU: It lists various criteria.

THE COURT: That's the statute. Hold on. Well, it may be Section 241.5 but that applies to an alien released

under 241.4.

MR. POMERLEAU: Right. Those factors are largely similar to the letter that I handed forth, Your Honor, earlier that lists the various factors to be considered as part of the post-custody review, so-called POCR rights.

So the statutory scheme seems to suggest, and it's our contention, that an alien in these circumstances should not be arrested outside of the removal period. Rather what should go into effect is the order of supervision contemplated by subpart 3 that we just discussed. And Mr. Dos Santos was arrested 37 months outside of the removal period. Mr. Junqueira was arrested over a decade outside of the removal period. What's unique with him is he applied for an I-130 and he notified USCIS that he had a prior order of removal and he was applying for an I-130, and he went to a fingerprint -- his interview was held nearly a year later after he applied. So I just wish to make that additional point, Your Honor, for your consideration.

THE COURT: Thank you. It's helpful. So it's the government's position that there's a 90-day clock that starts running when an alien is detained after the removal period is defined in the statute and regulation are defined. And you've heard how the petitioners argue the law, the statute and regulation should be interpreted. How do you respond to that?

MS. LARAKERS: Yes, Your Honor. I think we have to start with the purpose of the regulation in view with the

Supreme Court's decision in Zadvydas. And the purpose of the regulation is to ensure that someone will not be subject to continued detention without any process.

Here, each and every one of these petitioners can be removed, and they have put no facts forward to show that they can't be removed in the reasonably foreseeable future. So that's the lens through which ICE interprets these regulations to make sure that both aliens are getting some sort of administrative review of their detention and to make sure that the Supreme Court's decision in Zadvydas is put -- is adopted by the agency. So that's the lens through which ICE is looking at this regulation.

And to the extent -- the first question before this court is whether that regulation applies to aliens prior to detention. And I think the statute is abundantly clear that it applies only to detainees. The title of the section states "Continued Detention," and throughout the regulation it states "continued detention" 11 times. And it continuously refers to the person receiving the process as the detainee. So as to the first question, there is no ambiguity. It definitely applies to someone after they are detained, as is I believe your tentative view.

With regard to the second question, ICE would recognize that it is a little bit more ambiguous. But to the extent that that is ambiguous, ICE's interpretation is a

reasonable interpretation of the statute. It certainly may not be the only permissible interpretation.

THE COURT: ICE's interpretation is reflected where?

MS. LARAKERS: It's reflected in the government's brief, Your Honor.

THE COURT: In the first brief or the second brief? This is part of the reason I started this. The first brief said that the regulation didn't apply at all.

MS. LARAKERS: Your Honor, it said -- and I apologize to the extent that I was unclear. However, it was the government's perception that what they were arguing in the first instance was that it applies prior to detention. We did not -- we were not aware that the second question was on the table yet. So we were just trying --

THE COURT: So the interpretation is in the government's brief.

MS. LARAKERS: Yes, and the brief --

THE COURT: It's not in the regulation itself, right?

MS. LARAKERS: The position comes from the regulation, from the text of the regulation.

THE COURT: Is it in the explanatory note that was issued by INS at the time of the regulation?

MS. LARAKERS: No, Your Honor, it is not. However, DHS's interpretation of the regulation is reasonable. The position of the government is set forth in the government's

brief and in response to this court's order in docket number 55. That expresses the view of the government. It should be given no less deference unless the petitioners show that it is an unreasoned judgment.

THE COURT: Actually, there's sort of a continuum of the degree of deference that is due to agency interpretations under the existing law. And, you know, if it was in the regulation, it would be one thing. If it was in some policy statement, it might be higher. I'm just looking for the --

MS. LARAKERS: Your Honor --

THE COURT: Just stop. I'm looking for something --

MS. LARAKERS: Sorry, Your Honor.

THE COURT: -- so I can give you a chance to address it.

The Supreme Court says that, "The court should defer to DHS's interpretation unless it's plainly erroneous or inconsistent with the regulation or there's reason to suspect that DHS's interpretation does not reflect the agency's fair and considered judgment of the matter in question or when it conflicts with a prior interpretation," Christopher, 567 U.S. 142 at 145. "Deference is particularly inappropriate if an alternative reading is compelled by indications of the agency's intent at the time of the regulation's promulgation." That's Caruso, a Third Circuit decision. And I think deference is released when it appears to be a sort of post hoc litigating

position.

The Department of Homeland Security -- you represent the Department of Homeland Security. You're the Department of Justice. I want to know how they interpret the regulation. They don't apply the regulation the way you're arguing it. They didn't give either of these two petitioners the process that you say is due. They're the agency. You're the lawyer.

I'm looking at their conduct, and their conduct communicates to me what your opening brief communicated to me. They don't have to do anything for six months, and if they can get them out of the country before they get to kiss their children again, you know, courts can't interfere with it.

I mean, I'm looking at their conduct. And, you know, what happened last week in Junqueira? They were prepared to let him out, and then his case would be over in front of me. If the immigration judge would let you, you could deport him next week. But it appears that Mr. Pomerleau calls you. You call an ICE lawyer. And all of a sudden -- you know, if the messages have been accurately characterized to me, you know, he doesn't get out. And now he gets 30 days' notice. But I think I can look at the way -- I think I can look at the conduct in deciding whether to give any deference to the argument that you're making, and I don't think that's their interpretation of it.

MS. LARAKERS: Your Honor, the conduct is also that

ICE recognized that they were supposed to. ICE did recognize they were supposed to do that. And if this court were to order -- DHS would have no problem with this court ordering compliance on that with regard to DHS's interpretation of it.

THE COURT: That goes down the line. I mean, this is part of what they want in their class action. So you would have no problem with my ordering that?

MS. LARAKERS: With ordering --

THE COURT: Ordering what?

MS. LARAKERS: Ordering ICE to comply with its interpretation.

THE COURT: They can't comply with regard to Junqueira and De Souza because the dates are past and they're suffering irreparable harm.

MS. LARAKERS: Your Honor, they can still provide them with the benefit of the regulation in regard to the purpose of the regulation to protect against prolonged detention. Your Honor, if we go back to the statutory text then, the regulatory text contemplates that these custody reviews should be done every 30 days for the first two 90-day time periods.

THE COURT: Wait.

MS. LARAKERS: Sorry. Every 90 days for the first two time periods.

THE COURT: Stop. What are you looking at?

MS. LARAKERS: 231.4(c)(1) explains that the procedure

should be done every three months following the expiration of the 90-day removal period. So right there, ICE looks at that part of the regulation and determines, okay, there is our three-month time period. There's our 90-day time period. It's reasonable for ICE to interpret that as meaning the clock starts on the day they're detained, and every three months they should have that custody review.

THE COURT: Why should I think that's the way they interpret it? They didn't do it with regard to either of these two -- I'm sorry. Let me just take a deep breath. Because I don't think this should get lost in technicality. I mean, this is -- you know this. Think about this, though. This is a profoundly human thing. People are being separated from their spouses, from their children. They may be separated for the rest of their lives if and when they get removed.

But the question is, does the Constitution of the United States essentially allow them to be locked up the way the Department of Homeland Security has had them locked up. And there were, I think I was told, eight people arrested while they were pursuing a legal process at Citizenship and Immigration Services in January and February in Rhode Island and in Massachusetts. Maybe there were seven. I've got two of them before me. Did I have any more of them before me in the two settled cases?

MS. LARAKERS: Yes. De Ollivierra was one of them.

THE COURT: So there are five others, five others who haven't come to court. And a year ago when I asked the Department of Justice, as I said, where are they? I mean, I asked why don't they come to court. And I was told by the petitioners' lawyer, not by the Justice Department, that the Department of Homeland Security wouldn't say where they were, wouldn't say where they were because that would invade the privacy of the people who are locked up. So they were deprived of access to lawyers who were willing to represent them.

You've admitted the Department of Homeland Security hasn't followed its procedures with regard to De Souza or Junqueira, the ones who came to court. Those are the two cases I would think where the Department of Homeland Security would be most likely to obey the law. Because that's what we're talking about here. These are people who disobeyed the law by coming to the United States illegally, but the Department of Homeland Security, based on your admission, violated the law, and this is the jurisprudence, by not following their own regulations.

And there are at least five other people who are -- if they're still in the United States -- I would guess -- it's only a guess, an inference, are not being provided the protection of 241.4 as the Department of Justice now argues it because it doesn't appear to me from the conduct in these cases that the Department of Homeland Security interprets a statute

the way you do. So it's a serious matter.

MS. LARAKERS: I understand, Your Honor, but even without the deference, if we can move forward from that, the text of the regulation is reasonable. It's a reasonable interpretation, and it makes sense in light of the purpose of the regulation and in light of what ICE is just trying to do here.

The statutory scheme Congress put in place is for ICE to effectuate final orders of removal. Here it would make sense for a person upon being detained, it would make sense for ICE to have at least a 90-day time period with which to effectuate that order of removal without a review because the regulation, the regulation contemplates that the purpose of the regulation is to provide review of prolonged detention. Therefore, it would make sense for ICE to have first that opportunity to remove them within a reasonable period, which DHS believes is 90 days, and which the regulation contemplates as 90 days, and 241.4 (c)(1), where it says that the review should be done every three months. So that's where ICE gets the 90 days from.

THE COURT: I mean, as I understand it -- I'm having a little trouble keeping the cases straight. Is it De Souza where Wells used the algorithm and decided that detention was appropriate? Or is that Calderon?

MS. LARAKERS: Yes.

THE COURT: It's De Souza?

MS. LARAKERS: Yes. I wouldn't characterize it as an algorithm. But yes. And I don't know much about it, Your Honor. I only know to the extent the affidavit says it is. It's important to --

THE COURT: I was going to say. I mean, you know, the argument, I think your argument is they do do some initial review. You know, they run some test, and then a person looks at it and makes a judgment, right?

MS. LARAKERS: Yes, Your Honor.

THE COURT: And so the judgment here, according to the affidavit, I think didn't come from Wells, but we're told that Wells made the decision and he noted two factors particularly. One, there was a removal order. That was one of them, right? But there's going to be a removal order in every case. We wouldn't be under 241.4 if there wasn't a removal order, so it seems to me that the existence of a removal order alone must not be enough. And then we go back again, and you're adding something to what's in the written record that, you know, he said, "and she's not eligible for any adjustment of status."

MS. LARAKERS: She's not, Your Honor.

THE COURT: Well, it appears to me that she's eligible. She may not be entitled, but she's eligible to pursue it whether she's inside the country or not. But she's eligible to pursue it. And is the provisional waiver -- I

think I know the answer to this -- embodied in a regulation?

MS. LARAKERS: Yes, Your Honor, it is.

THE COURT: Okay. And that's a regulation that was promulgated in the Obama administration, and it permitted certain people to stay in the United States longer with their spouses and not have to go abroad and ask to be reunited, except, once it was provisionally approved or conditionally approved, they could go abroad for a couple of weeks and be authorized to come back. Is that essentially the way it works?

MS. LARAKERS: Essentially, except for the regulation does also state that it's not a stayed removal. So it's independent from ICE's authority -- the eligibility is independent from ICE's authority.

THE COURT: Somebody has the discretion to let them stay here and try to prove that our country honors family values, and looking at all the circumstances, it's better to keep a man with his wife and children or a woman with her husband and American U.S. citizen children than separating them or force the departure of U.S. citizens.

So when we have -- and this is just a general observation. You know, when a new president is elected, he's entitled to have different priorities and policies. But if a policy is embodied in a regulation, generally speaking, it seems to me the way to change that is to change the regulation. And that's not at the heart of this case, but it's generally

applicable, there's a whole line of cases, you know, once the government -- because it still is the United States government -- adopts a policy and a regulation, it has a duty to follow the regulation.

I mean, what happened to the other five people who were arrested while they were at Citizenship and Immigration Services in February and January in Massachusetts and Rhode Island?

MS. LARAKERS: Your Honor, I'm not aware. I do know, what I am aware of is that their detention is discretionary and lawful under 1231(a)(6), and it is lawful under 1231(a)(6) until they can prove that their removal is no longer reasonably foreseeable. And here, they have final orders of removal; it is reasonably foreseeable; and yes, ICE is required to comply with those regulations. And certainly this court can order that they comply with the regulations. However, the purpose of that regulation is to make sure they're not subject to prolonged detention. And here that certainly isn't the case. They aren't subject to prolonged detention. And if it weren't for this court's order, they could be removed, and not only removed from the United States but also released from detention. With regard to the regulation, the provisional unlawful presence waiver --

THE COURT: So you can release them -- I haven't issued any order that prevents you from releasing them. I had

two other cases -- well, I've had three cases where ICE changed its mind and released them. Then that was the end of my cases. So, you know, to exercise the habeas authority with regard to detention, I have ordered that they not be removed, but they could have been released. And, you know, if Mr. Junqueira had been released last Thursday, as apparently somebody decided he should have been, then I'd have just one case here today. But anyway. I think I understand your argument.

MS. LARAKERS: Yes, Your Honor. The point here is that ICE has the authority to effectuate removal for people with final orders of removal. And there's no right under the regulation, under Zadvydas or otherwise, that gives any of these petitioners the right to remain in the United States. And for that simple reason, ICE is just trying to effectuate the removal order that is against them.

THE COURT: There is a difference between having a right to stay in the United States indefinitely, permanently, and a right to be with your family while those decisions are being made.

MS. LARAKERS: Certainly.

THE COURT: Look, I understand your argument. I'm not persuaded by it, but I understand it. Do you want to address the remaining issues, maybe the substantive due process?

MR. COX: Yes, Your Honor. So it's our view that even setting aside the 241.4 issues that, as the Supreme Court

explained in Zadvydas, the detention under these circumstances violates the Constitution, full stop.

The court in Zadvydas was clear that the purpose of detention under 1231(a) is to secure a petitioner's availability for removal. It's a civil rule. It's not a criminal one. And it's not punitive. That's what the court said at 533 U.S. at 690. And as has already been discussed, after the 90-day removal period has expired, the default is supervised release under 1231(a)(3). Detention is not supposed to be the automatic remedy or the automatic choice.

So the court recognized that because of that, against that background, there have to be strong protections for people facing that transition from the mandatory detention under 1231(a)(2) to the discretionary detention under 1231(a)(6), especially if there doesn't appear to be an end in sight to that detention.

So as we've already discussed about the dissent in Zadvydas, which I think illustrates exactly how strong the majority opinion was, that even Justice Kennedy in the dissent said that "both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious. And where detention is incident to removal, the detention cannot be justified as punishment" --

THE COURT: Hold on just one second. First of all, what did you say about the majority?

MR. COX: Well, I think the point I was trying to make, Your Honor, is that even Justice Kennedy in the dissent was recognizing this very strong baseline that both removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious.

Obviously the majority in Zadvydas went beyond that, but at a very minimum, you have the ability to be free from arbitrary and capricious detention, especially as Justice Kennedy said, "Where detention is incident to removal, the detention cannot be justified as punishment, nor can the confinement or its conditions be designed" --

THE COURT: Where are you reading?

MR. COX: 533 U.S. at 721.

THE COURT: Just one second. The first thing you quoted was talking about a liberty interest. Where is that?

MR. COX: It was saying that both removable -- it's also in the same page. I think it's part of the same paragraph, Your Honor, 721.

THE COURT: Okay. I don't see the reference to the liberty interest, but I'll find it.

MR. COX: That language that may not have been inside the quotation mark, Your Honor.

THE COURT: It's okay. Go ahead.

MR. COX: The general point is that he was saying that, you know, it is neither arbitrary nor capricious to

detain the aliens where necessary to avoid the risk of flight or danger to the community. But in general, if it is arbitrary and capricious, that represents a constitutional violation. Then on top of that, the majority went further. I think this is a very minimalist reading of the underlying due process guarantees. At a bare minimum I think Zadvydas illustrates that if it's an arbitrary and capricious detention, especially one that is disconnected from the goals of avoiding risk of flight or avoiding danger to the community, then you run into due process considerations.

And as we discussed earlier, Zadvydas did establish the six-month presumption. But again, that was against the backdrop of the procedural protections of 241.4. And again, that was because you have -- the government in Zadvydas admitted that the twin goals of 1231(a)(6) were, first, ensuring the appearance of aliens at future immigration proceedings, and number two, preventing danger to the community.

And the majority in Zadvydas pointed out that under the statute, the choice really isn't between letting a person go free or holding them in detention. You also have this middle ground, as very clearly explained in the statute, which is supervised release. That's what the court said at 533 U.S. at 696. "The choice, however, is not between imprisonment" --

THE COURT: Where is this, 696?

MR. COX: 696, Your Honor. "The choice is not between imprisonment" --

THE COURT: Well, here. Let me find it. So this is the majority decision?

MR. COX: Yes, Your Honor.

THE COURT: All right. I have it.

MR. COX: Just to illustrate the point that the majority was recognizing that there are other options to address the stated purposes of the removal statutes that aren't necessarily detention. And against that backdrop, I think it makes sense to look at the factual record about Ms. De Souza. She has no criminal history. Just for your reference, the clear summary of this is in the Andrade affidavit, which I think was submitted at docket number 50-5. But she has no criminal history. She has a U.S. citizen spouse and a U.S. citizen child. She's set down roots in the United States. And as we've already discussed, she is in the middle of this process to secure a lawful permanent resident status as a result of her husband's U.S. citizenship. It's highly likely that she will ultimately gain the ability to live permanently in the United States as a result of that.

You know, we can cabin the discussion of the 2016 regulations and how that fits into it. But the ultimate point is that it is highly likely, and the government has not put forth evidence to the contrary on this, that she's ultimately

going to be granted lawful permanent resident status. The question is how long it's going to take her and how frustrating that process is going to be.

Under Zadvydas and the Constitution, the government has to offer some kind of explanation for the detention that bears a meaningful relationship to the underlying statutory purposes. And we've already discussed it a little bit, the Rutherford affidavit that describes the stated reasons behind the detention decision. Your Honor pointed out the circularity of citing the final order of removal as evidence of a flight risk because that would apply to everybody. That's certainly not an individualized determination.

We also discussed a bit the fact that she is, quote, "not eligible" for immigration benefits that would allow her to remain in the United States. We obviously dispute that that's a factual matter.

THE COURT: I mean, is it your position she is eligible?

MR. COX: Yes, she's eligible for benefits that would ultimately entitle her to lawful permanent residency in the United States. Again, we don't want to veer too far down that because we don't think it's necessary.

THE COURT: I think, to me, the relevance of that stated reason for the detention after the initial review goes to whether, if I find a constitutional violation, I should let

DHS try to get it right when it hasn't got it right in the last three months, admittedly, for either of the petitioners or whether I should conduct it myself. It's my understanding the immigration judges think they don't have jurisdiction to do this. Is that your understanding?

MR. COX: That is my understanding as well. The one other thing I'd like to point out about that particular justification --

THE COURT: Go ahead.

MR. COX: -- it was listed as a justification as evidence of a flight risk. Now, you can talk about -- you know, we obviously disagree that it would generally be a reason to detain somebody. But we see absolutely no reason why, even if it were true that she weren't be eligible for immigration benefits, why that would be evidence of a flight risk. That seems like a completely disconnected reasoning. We can't discern any meaningful connection to the underlying statutory purposes. The other explanations --

THE COURT: Let's see. Remind me of her personal circumstances. She's married to an American citizen?

MR. COX: That's right. She's married to an American citizen. They were married in 2006, and they have a ten-year-old son.

THE COURT: And in which municipality do they live?

MR. COX: They're in Everett, Massachusetts.

THE COURT: Do they own a home or rent?

MR. COX: I'm afraid I don't know the answer.

THE COURT: Okay. Keep going.

MR. COX: Well, just to look at the last set of justifications that were mentioned in the Rutherford affidavit, it mentions the availability of bed space, lack of health issues and lack of dependent care issues. That seems like those concerns -- it's not at all clear why -- that kind of explains the kind of -- well, number one, they don't explain why those became salient concerns as of January 30, but it also doesn't tie it back to the underlying reasons for it.

THE COURT: I think -- you know, we're in a colloquy. When I read those things, I didn't think they reflected on risk of flight. But I actually was -- I think it's legitimate and may in particular cases be favorable to the alien to have the Department of Homeland Security consider those things because, something like a criminal sentence, there's a range of reason. So if there's no evidence whatsoever, it's not in my view reasonable to detain somebody, that they are a risk of flight or danger. But if, you know, there's some evidence, it's a discretionary decision. How do you exercise your discretion. So if somebody is the sole parent of a young child, you know, within the range of reason that would cause, I think most reasonable people to say that weighs in favor of releasing somebody when we're in this discretionary range. Or are they

taking care of, you know, a very ill parent.

I infer, because we do this at sentencing, that it didn't relate to risk of flight or risk of committing crimes, but if there was sufficient evidence to permit but not require detention in the judgment of the person making the judgment, I think those would be reasonable considerations.

MR. COX: We're certainly not arguing that -- I think the point I was trying to make is those considerations listing those presupposes that there is a justification for detention that could or could not be relaxed if you found other mitigating factors that would make detention unreasonable under those particular circumstances.

So our point is that the record really contains, you know, as far as we can tell, only two justifications of any risk of flight. One of them is not an individualized determination at all. And the other one, as far as we can tell, doesn't bear any relation to flight risk at all. So that's the record we're looking at for Ms. De Souza's detention. You know, our position is we just haven't heard anything from the government explaining why it needs to detain her, other than the fact that it wants her to be in custody. It seems very circular to us.

THE COURT: Well, they want to make sure they have her so when they're allowed to remove her she'll be available to go. But the question is whether there's evidence that she

wouldn't go back to Everett for precious time with her husband and son but instead they try to go someplace else, or she would try to go someplace else. But that would undermine, if not destroy, her effort to get the provisional waiver.

MR. COX: That's right, Your Honor.

THE COURT: I think she's got a very strong incentive to stay here.

MR. COX: Yes. And as the Supreme Court said, the choice is not letting somebody go free and hoping they're available for removal and putting them in detention. You have this clear statutory default of supervised release under 1231(a)(2) -- excuse me, 1231(a)(3). And, you know, the government may say that it wants to detain her for the purposes of effectively removing her, but I think under these circumstances the default option is supervised release. And given the liberty interests at stake here, there needs to be an explanation of why supervised release wouldn't be an appropriate way to secure her availability for removal if that's ultimately what ends up happening.

THE COURT: Okay.

MR. COX: So I think if we're -- I don't want to -- just looking back at the dangerousness of flight risk and that sort of thing, we haven't seen any showing there. And we also think that the court doesn't need to -- what I'm expecting to hear is that the Zadvydas framework says that the ultimate

inquiry is about whether removal is imminent. And I think what we've heard from -- what we've seen -- as a legal matter now in this case, removal cannot be imminent because of the order that you've entered. And additionally, Zadvydas did not make that the end of the inquiry regarding whether removal is --

THE COURT: All right. I mean, I've already indicated that I think Zadvydas assumed that the 241.4 procedures were properly employed, and, you know, an informed decision that deserves deference was made in a timely manner.

Do you have much more?

MR. COX: No, Your Honor. I think that's sufficient.

THE COURT: Mr. Pomerleau?

MR. POMERLEAU: I have nothing additional to add on those points, Your Honor.

THE COURT: All right.

MR. POMERLEAU: But if you wanted to know about danger or flight risk, Mr. Dos Santos has one criminal charge that was vacated.

THE COURT: Wait a minute. We're talking about Junqueira today.

MR. POMERLEAU: Mr. Junqueira has no criminal record at all. He has a 10 and 12-year-old U.S. citizen children, two boys, wife who is a U.S. citizen, been residing in Connecticut for 13 and a half years, had a job, was paying taxes. As far as flight risk, he attended his I-130 interview at the Hartford

USCIS office. He also went and had his fingerprints taken in the year after he applied. So he's not a risk of flight. He's actually coming forth to participate in this process that was authorized through regulatory schemes authorized by DHS.

THE COURT: Okay. Thank you.

MR. POMERLEAU: You're welcome.

MS. LARAKERS: Your Honor, the only thing that the government has to say is that Zadvydas only implicates one due process right, and that's the due process right to be free from detention that is unrelated to the purposes of removal. And it does not -- whatever Zadvydas says, it does not place that burden to prove otherwise on the government. It places that burden on the petitioner. The petitioner has the burden to prove that her removal is not reasonably foreseeable and is not foreseeable in the reasonable future. It does not say that the government has to prove that the person is a flight risk before putting them in detention. The statute doesn't say that, and therefore, the government's position is that this court cannot import those requirements on 1231(a)(6) when the statute does not require it. And that proposition --

THE COURT: Stop. Pause. There's a line of cases that says that even if a regulation provides more process or more protection than the Constitution would require, the agency is obligated to follow its regulations.

MS. LARAKERS: Yes, Your Honor, and ICE is willing to

conduct that.

THE COURT: It can't. I'm afraid the cafeteria is going to close in 20 minutes, and you'd probably rather eat than say the same thing again and hear me say it. You can't follow the regulations because, even as you interpret them, the time has passed.

MS. LARAKERS: Yes, Your Honor.

THE COURT: I hope your mother is still alive and you'll get to see her on Mother's Day. But that's not going to happen for Ms. De Souza because I don't anticipate concluding this today. But, you know, that's what we're talking about here. So that's what we've got.

Look, it's 1:15. I've got -- I'm going to give you a ruling orally when we come back, but it's going to be abbreviated. I'm going to write something that will not alter the conclusion but will explain it and amplify it, but for reasons I'll explain when we come back, the petitioners' rights to procedural due process has been violated. Habeas is an equitable remedy. It doesn't mean I can do anything I want. But given the inability or the unwillingness of the Department of Homeland Security to follow its own regulations, the number of times that the Department of Homeland Security in this case has broken the law, the most appropriate equitable thing is for me to conduct a bond hearing, which I'll do next week, next Tuesday morning. I'll tell you what you need to file before

that.

And it's not any kind of final relief because it's still an open question whether either petitioner will be released. But we'll go one step at a time. I'll explain all this to you when you come back, and I'll give you some work to do for the next few days while I'm out of the jurisdiction.

MS. LARAKERS: Just one minor point, Your Honor, in case it helps you with scheduling. I am required to be in court on that Tuesday in the Southern District of Texas.

THE COURT: You want to go home?

MS. LARAKERS: No. I'm actually required to be in court for a pretrial.

THE COURT: Are you from Texas?

MS. LARAKERS: I am, Your Honor.

THE COURT: What part of Texas?

MS. LARAKERS: I'm from a place called Beeville, which is about three hours from the border.

THE COURT: Is it in the district you're going to?

MS. LARAKERS: No. It's in the Western District technically.

THE COURT: Do you get to stop at home on the way there?

MS. LARAKERS: I hope to, yes.

THE COURT: Do you want to see your mother on Mother's Day?

MS. LARAKERS: I hope to, Your Honor. However, I am -- this district does require the lead attorney to be in court on Tuesday, and I am the lead attorney.

THE COURT: All right.

MS. LARAKERS: And I won't be back until -- I'm flying back very late on Tuesday, so it would preclude any morning on Wednesday as well, unfortunately.

THE COURT: Thank you for telling me that. This is challenging because I'm away the next couple of days. We'll figure it out.

MS. LARAKERS: Okay. I can certainly talk to the petitioners, and perhaps we can come to some agreement.

THE COURT: Well, these people are locked up. This is a problem. Why don't you also talk to your co-counsel, because you're under a court order to be there personally --

MS. LARAKERS: Yes, Your Honor.

THE COURT: -- in Texas. I haven't given you that order. If there's going to be a set of defined issues, and you're from the Department of Justice, which includes the U.S. Attorney's Office, maybe you're not indispensable.

MS. LARAKERS: Perhaps, Your Honor, the petitioners and I could come to some sort of agreement to do it on papers, the review on papers, but we can discuss that as well if that's a possibility.

THE COURT: That's actually not going to work because

I've got some questions to ask of people.

MS. LARAKERS: Okay, Your Honor.

THE COURT: I want to -- I think -- you know, you talk about deference -- and I believe in this very strongly. I'll probably decide this on the narrowest possible grounds, and then I'll get another case and have to do it all over again. But, no. I believe in that. But, like the Court of Appeals doesn't defer to trial judges who don't explain their reasons. And, you know, decisions were made to detain Mr. Junqueira. I want to understand them. So I don't think it would be possible to do it on the papers in my present conception. I'll think about it. But you're surrounded by two experienced, able lawyers. One of them has an appearance in this case already. As I said, you may not be indispensable. Although we'll miss you.

MS. LARAKERS: Thank you, Your Honor.

THE COURT: All right. Court is in recess. I'm sorry, I didn't say it. Come back at 3:00.

(Recess taken 1:17 p.m. - 3:25 p.m.)

THE COURT: I apologize for keeping you waiting. I guess I was ambitious in estimating how long it would take me to prepare my thoughts. As I indicated earlier and as I explained, the Department of Homeland Security has admittedly violated the applicable regulations in continuing to detain Ms. De Souza and Mr. Junqueira. Habeas corpus is an equitable

proceeding, and the remedy must be equitable for reasons I'll explain. They're entitled to a hearing to determine whether they should be released on conditions, and it's most appropriate that the court, rather than the Department of Homeland Security, conduct that hearing.

I will need some expedited briefing and affidavits. I've looked at my schedule, and I feel I really should conduct that hearing on May 15 at 10:00 a.m. And I will need certain witnesses here to testify, if necessary, from DHS, from ICE.

Have you decided who will represent DHS in that proceeding?

MS. LARAKERS: No, Your Honor. However, I did get a moment to speak to ICE, and they decided based on the particular circumstances here and your tentative view that ICE has violated Ms. De Souza's procedural due process rights. ICE made the decision to release her, and she will be released tonight, and she will be placed on conditions tomorrow. But that -- I haven't had time to speak with them about Mr. Junqueira as of yet, nor about who will be able to testify at any hearing. However, the petitioners and I, Calderon and petitioners and I have agreed that we wouldn't need a hearing immediately on Ms. De Souza's detention.

Is that correct? Am I representing that correctly?

MR. COX: That's correct, Your Honor.

THE COURT: Well, this is the fourth time this has

happened. I'm not going to impede her release. I'm not going to be here myself tomorrow, but you'll inform me. I may conduct this hearing next week anyway. I have a whole series of cases and issues that are related, and I've got some questions. But we'll see.

Okay. This is not an utterly unforeseen development, and I'm going to explain the outline of my reasoning. I'm going to issue a decision. I mean, I told you before lunch what I decided. This will let us proceed in a more deliberate way with regard to Ms. De Souza. ICE evidently, it appears, was poised to release Mr. Junqueira last week, maybe until the lawyers got involved, so you're working on it. I'll give you some more time to work on it. And actually, what I think I'll do is schedule the hearing for 10:00 on May 15, but if the urgency with regard to Mr. Junqueira as well as Ms. De Souza is eliminated, I'll be reasonable, okay? But otherwise, who is going to -- Mr. Sady has an appearance in Junqueira, and this will be manageable.

All right. Susan Walls from our Probation Office is here. In case I have to decide the suitability of the residence, for example, please give her the address for Mr. Junqueira so if she has to, she'll check it out. And is Ms. De Souza going to be released on some conditions?

MS. LARAKERS: Yes, Your Honor.

THE COURT: Okay. And who is going to supervise those

conditions?

MS. LARAKERS: ICE will supervise.

THE COURT: Well, maybe Probation should supervise. I don't know. Here. This is another thing the parties should discuss, okay? See if you're in agreement. If you're in disagreement, I'll decide, okay?

MS. LARAKERS: Yes, Your Honor.

THE COURT: But basically -- and you'll have to figure this out tomorrow because I'm traveling tomorrow morning and then I'm traveling someplace else on Thursday afternoon. So if there's going to be a hearing on May 15, by May 9, tomorrow, the parties shall each propose conditions of release and by May 11 file memos and the government at least affidavits regarding the burden of proof, and the factors to be considered may be Section 241(d)(1). There are also familiar factors to the court at least that are considered in criminal detention hearings under 18 United States Code, Section 3142.

In addition, in the affidavit to be filed on May 11, I'm ordering that ICE identify the official who decided to arrest De Souza and who decided to arrest Junqueira at the CIS office. I note that the petitioners have filed a USCIS field manual that says that arresting at the office is contrary to CIS policy at least. These are two branches of the Department of Homeland Security that seem to have different policies.

But anyway, I want to know in the affidavit the ICE

official who decided that each of the petitioners should be detained initially. I understand it was Officer Wells with regard to De Souza. I don't know who it was, I haven't been told who it was with regard to Junqueira. I want to know which ICE official decided on April 30 that De Souza should be -- should continue to be detained. I want to know who the ICE official was who decided to issue a new notice for De Souza scheduling a June 3 review. I want to know the ICE official who decided Junqueira should be released on May 3 or 4 or brought to the ICE office in Burlington on May 3 or 4. I want to know the ICE official who reversed any decision to release Junqueira on May 3 or 4. I want to know which ICE official decided to issue Junqueira notice of a review on June 3. And all of those individuals shall attend the May 15 hearing and be prepared to testify if necessary.

I'm ordering that the parties order the transcript of at least this afternoon's session on an expedited basis and the whole transcript. I think it will help all of us.

All right. As I told you, I'm going to issue a written memorandum and order in this matter, but I do want to explain the basic reasons for my decision, which will be amplified and perhaps extended because this analysis is based on the government's interpretation of Section 241.4, and as I'll reiterate, I have doubts as to whether that's the correct interpretation. However, I'll discuss this in the context of

Ms. De Souza. That's what I prepared to do. But the chronology with regard to Junqueira, which I'll also recite at the end, toward the end, leads to the same result.

So De Souza was ordered removed from the United States in 2002. She stayed here. She married a United States citizen in 2006. They have an 11-year-old son who is a United States citizen. Her husband filed a petition, an I-130 petition in order to seek a provisional waiver to apply for admission in the United States while in the United States, rather than abroad.

On January 30, 2018, Ms. De Souza and her husband were at the Citizenship and Immigration Services office for a hearing on the I-130 petition. CIS determined that their marriage was real, genuine, not a sham, and shortly afterwards another branch in the Department of Homeland Security, Immigration and Customs Enforcement, often referred to as ICE, arrested her.

Ms. De Souza has been detained since June 30, 2013. The Department of Homeland Security of these related cases first argued in the Calderon case in which De Souza is now a named plaintiff that 8 CFR Section 241.4 regulations do not apply to aliens like De Souza who are not removed within 90 days of their final order of removal. The Department of Homeland Security now argues that Section 241.4 does apply and its time limits begin running when an alien is detained.

In Zadvydas, 533 U.S. 678 at 690, the Supreme Court held that freedom from detention lies at the heart of the liberty that the Fifth Amendment due process clause protects. The due process clause applies to all persons, including aliens, as the Supreme Court said in Zadvydas at 693.

In issuing its Section 241.4 regulations, the immigration and naturalization service, INS, the predecessor to the Department of Homeland Security, DHS, said that Section 241.4 was promulgated to provide due process to detained aliens as required by the Fifth Amendment. That can be found at 65 Federal Register 80281-01 at page 4. INS also stated that Section 241.4, quote, "governs all post-order custody reviews inclusive of aliens who are the subjects of a final order of removal." That's at page 17.

In Zadvydas, the majority discussed Section 241.4 extensively, including at 533 U.S. at 684. The court implicitly assumed that Section 241.4 procedures had in that case been followed and generally were being followed. It held that prolonged detention could nevertheless violate the due process clause, quote, "irrespective of the procedures used." That's at page 695. And the majority specifically referenced there Justice Kennedy's dissent. The majority held that up to six months' detention would be presumed reasonable by the courts to allow or to facilitate removal. That's at page 669. And this is as a matter of comity, of deference by the courts

to immigration matters which are a form of foreign policy for which the executive branch has primary responsibility.

In his dissent, Justice Kennedy wrote at page 724, "removable aliens held pending deportation have a due process liberty right to have the INS conduct the review procedures in place. Were the INS in an arbitrary or categorical manner to deny an alien access to the administrative processes in place to review continued detention, habeas jurisdiction would lie to redress the due process violation caused by the denial of the mandated procedures under 8 CFR Section 241.4." Then he went on to say, "This is not the posture of the instant cases," the Zadvydas case or cases, "however. Neither Zadvydas nor Ma argues that the Attorney General has applied the procedures in an improper manner. They challenge only the Attorney General's authority to detain at all where removal is no longer foreseeable."

In Alexander v. Attorney General, 495 Federal Appendix, 274 at 277, the Third Circuit in essence agreed with Justice Kennedy. It wrote, "Zadvydas is not the only word on post-removal detention. A failure to satisfy Zadvydas by showing that there's no significant likelihood of removal in the reasonably foreseeable future may not necessarily be fatal to an alien's ability to prevail on an alternative ground predicated on regulatory compliance," meaning with the post-order custody review procedures in Section 241.4.

I agree with Justice Kennedy and the Third Circuit. This conclusion is consistent with the familiar general principle that any agency must follow its own regulations before depriving a person of liberty. More specifically, the due process clause requires a federal agency to follow its own regulations before depriving someone of liberty, even when those regulations provide greater protection than is constitutionally required, as the First Circuit wrote in Nelson v. INS, 232 F. 3d 258 at 262. This is consistent with the Supreme Court's 1954 holding in a Accardi, 347 U.S. 260 at 267-68.

As the Supreme Court wrote in United States v. Richard Nixon, so long as a regulation "remains in force, the executive branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it." That was written at 418 U.S. 683 at 695-96.

"When an immigration regulation is promulgated to protect a fundamental right derived from the constitution or a federal statute," like the opportunity to have notice and be heard, fundamental features of due process, "and ICE fails to adhere to it, the challenged action is invalid" and may be reversed, as Chief Judge Saris wrote in 2017 in Rombot v. Souza, 2017 Westlaw 5178789 at page 4, citing Waldron v. INS, 17 F. 3d 511 at 518.

In short, the government as well as the governed must

follow the law, and it is the duty of a habeas court to ensure that it does. This is a principle that the Supreme Court reiterated in one of the Guantanamo cases, Boumediene v. Bush, 553 U.S. 723 at 741, stating, "From an early date it was understood that the king, too, is subject to the law" and that by the 1600s habeas courts can ensure that he followed it when detaining free men and women.

28 United States Code Section 241.1(c)(3) provides for habeas relief for violations of the Constitution or laws of the United States regulations including Section 241.4, our laws of the United States. Although I have substantial questions as to whether this is the correct interpretation, assuming without deciding Section 241.4 is now properly interpreted by the government, it has been violated with regard to Ms. De Souza and also Mr. Junqueira.

As I said, the government now takes the position that the regulation applies to people such as Junqueira and De Souza and that the time limits in the regulation start running when they are detained.

De Souza was arrested at the CIS office and detained on January 30, 2018. The regulations provide that prior to the expiration of the removal period -- the respondents argue that means, despite the literal language of the statute and regulations, 90 days after detention -- a Department of Homeland Security official will conduct a custody review of

that Section 241.4(k)(1)(i). That review is a record review governed by section 241.4(b). 90 days for De Souza would be about April 30, 2018. The regulations, Section 241.4(h)(2), provide or require that written notice approximately 30 days -- well, they require written notice approximately 30 days in advance of the pending record review so that the alien may submit information in writing in support of his or her release. If the alien has an attorney, the notice must be mailed only to the attorney pursuant to Section 241.4 (d)(3). Therefore, the notice should have been mailed to De Souza's attorney by approximately March 30, 2018.

On April 23, 2018, ICE sent De Souza, not her attorney, a notice to alien of a file custody review to be conducted on or about April 3, 2018. The notice was not given on approximately March 30, 2018. It was not sent, as I said, to De Souza's attorney. It was not provided approximately 30 days in advance of the scheduled record review.

I believe the record shows -- can I have Exhibit 1? Exhibit 1 indicates that on April 27, 2018, someone with an unintelligible, by me, signature -- maybe it's Thomas Brophy, acting field office director, denied De Souza's -- well, decided to continue the detention. I believe it's been represented that De Souza provided documents on August 30. The unlawfully short notice basically prevented her from presenting evidence in support of her request to be released.

I understand that ICE says a copy of the decision was sent to De Souza on May 2. On May 3, 2018, ICE sent De Souza and her attorney a new notice of another post-custody review to be conducted on June 3, 2018 in order to provide the legally required 30 days' notice because of what ICE characterized as, quote, "irregularities" in the notice. That's in the Brophy affidavit docket number 56-1.

In view of the undisputed violations of Section 241.4, De Souza is entitled to relief under Section 2241. The Department of Homeland Security argues that the relief should be a decision by the Department of Homeland Security on about June 3 pursuant to the May 3 notice to De Souza. This I find would not be equitable, and a habeas corpus proceeding is an equitable proceeding.

As the Supreme Court more precisely has put it, habeas corpus is at its core an equitable remedy. That's Schlup, 513 U.S. 299 at 319. 28 U.S.C. Section 2243 provides that the court shall dispose of the matter as law and justice require. Historically common law was above all an adaptable remedy in which the court's role was most extensive in cases of pretrial and non-criminal detention, as the Supreme Court wrote in Boumediene, 128 Supreme Court at 2267. When the judicial power to issue habeas corpus properly is invoked, the judicial officer must have adequate authority to formulate and issue appropriate orders for relief, including, if necessary, an

order directing the prisoner's release.

As I wrote in Flores-Powell, 677 F. Supp. 2d at 474, "While the court's discretion to devise an equitable remedy is considerable, it is not unfettered." I said essentially the same in Ferrara, 384 F. Supp. 2d 384 at 434. "Rather the remedy should be tailored to the injury suffered and should not unnecessarily impinge upon competing interests," as I wrote in Flores-Powell, quoting Gordon, 156 F. 3d 376 at 381.

In this case, I find that it would be inequitable and foreseeably futile to allow -- let me put it this way. When I prepared this decision before coming into court, it was clear to me that it would be inequitable to rely on DHS to conduct the review. ICE has, until a few moments ago, twice decided that De Souza should remain in custody and I believe predetermined the issue as the Supreme Court said in McCarthy, 503 U.S. at 149. De Souza correctly asserts she's already being held without due process, and she suffers irreparable harm each day she remains incarcerated, again, as the Supreme Court recognized in McCarthy at 147 and as I discussed in Flores-Powell at 463, citing Marsh, 801 F. 2d 462 at 468.

I note that Junqueira has also been denied due process because of the violations of his rights under 241.4. And in Rombot, Judge Saris found that ICE had violated Section 241.4 in revoking the petitioner's release and then continuing his detention for an additional approximately three months, so she

held a bond hearing and ordered him released on certain conditions. Basically I find the repeated efforts make ICE untrustworthy.

The chronology leads to the same result with regard to Junqueira. He was arrested at the CIS office on February 1, 2018. And as I understand it, his removal period began running on that date because, in contrast to De Souza, he left the country and had come back, so his removal order was reinstated. However, he never got any notice -- as I explained, under the regulations, he should have received a notice of a document review in 90 days at about 60 days or about April 1, 2018. He never got any notice. He wasn't given a date for a document review decision, which should have been on about May 1.

His attorney's affidavit in Dos Santos, addressing a different issue, docket 46 in that case, states that on May 3, Mr. Junqueira's wife was told that he would be released from custody that day. She went to the Burlington, Massachusetts ICE office, driving several hours from Connecticut. Mr. Pomerleau spoke to counsel for the government in this case, Ms. Larakers, who did not know that Junqueira was told he was going to be released. Junqueira wasn't released on May 3. He was brought back to the ICE office on May 4 and understood that he was going to be released then. He was not. Instead he got a notice dated May 3 for a June 3 decision.

As I said and may write, we discussed this earlier

today, I have a substantial question as to whether the government's interpretation of Section 241.1 -- I would say the Department of Justice's interpretation of 241.4 is correct. The Department of Justice properly points out that the title of the regulation is Continued Detention, and that term is used throughout, that although the statute and regulations contemplate, statute, provides that after final order of removal, the alien will be detained, that doesn't always occur. It didn't happen with regard to De Souza or Junqueira or many others.

Giving somebody who is not detained notice of a custody review, I agree, would not make sense. But the requirement that review occur prior to the expiration of the removal period, which is defined by statute as 90 days after a final order of removal, is not absolute. Rather the regulations permit the Department of Homeland Security to issue the 30-day notice and conduct a custody review as soon as possible after the removal period, allowing for any unforeseen circumstances or emergent situation. That's Section 241.4 (k)(2)(iv).

It is not, as I said, possible to conduct a custody review concerning whether to continue an alien in custody as required by Section 241.4(d)(1) when the alien has not yet been arrested. However, as I explained earlier, Section 241.4, INS said when it promulgated it it was intended to apply to all

aliens who are detained following expiration of the 90-day removal period.

However, the regulation -- as I said, I understand that it would not be possible or practical to give an alien notice of anything before he's arrested or she's arrested. But the timing requirement of Section 241.4 would be satisfied if DHS gave notice and conducted the review, quote, "as soon as possible" after the arrest. That is provided by Section 241.4 (k)(2)(iv). In addition, DHS may postpone a review if there's good cause to do so. The fact that an alien is not in custody may well be good cause to postpone the review under the authority of Section 241.4(k)(3). In addition, when notice is not practicable before an arrest, there would be good cause to allow the alien up to 30 days to submit materials to assist in the review. However, as stated in Section 241.4(k)(3), reasonable care must be exercised to ensure that the alien's case is reviewed once the reason for the delay is remedied. Therefore, I may find, although I'm not reaching a conclusion on this now, that an alien arrested after the removal period -- for an alien arrested after the removal period, a review must ordinarily be conducted approximately 30 days after the arrest.

I had reached the conclusion, as I said, that it would be futile to defer this matter for a decision to DHS, and now DHS has agreed to the removal -- sorry -- to the release of Ms. De Souza and will seriously consider quickly the possible

release of Mr. Junqueira.

And with regard to their individual cases, you know, evidently I don't believe the -- DHS implicitly recognizes if there's a hearing, if I'm going to conduct a hearing, it's going to be very difficult to present evidence that Ms. De Souza, for example, is a risk of flight. Her desire is to hug her husband, hug her son, try to get her status regularized through the legal process. Her desire is to stay here, and there's no contention, I think, that she's dangerous. So this is the result I could have ordered in her particular case. But this is an -- and it sounds to me like there's a reasonable likelihood that by this time tomorrow there will be a similar result in Mr. Junqueira's case.

But as I explained at one of my earlier orders, I know that mootness is a nuanced doctrine. When -- if Mr. Junqueira is released, his case before me would be over. He's not challenging his removal. But this is a fourth case where the Department of Homeland Security didn't get any new information, except it knew how I was likely to decide the case. A year ago in Arriaga, right before lunch -- it was a motion for preliminary injunction -- I signaled, basically said I was going to tentatively decide that the petitioner wasn't being held properly under the regulation, and a settlement was reached that provided more relief than I could have ordered.

I have to say I'm concerned, although I haven't had a

chance to think about the legal consequences of this, and I don't say this to discourage DHS from agreeing to release people similarly situated to Ms. De Souza or Mr. Junqueira, but I'm concerned about the people who don't get their cases into Federal Court.

I was told in response to an order, if I remember it right, that there were eight aliens arrested at Citizenship and Immigration Service offices when they were there I think for their I-130 hearings, but they were there pursuing legal means to try to stay in the United States. And perhaps I've had the cases of two or three of them because under the District Court's related case rule if there's a same defendant and one of the same issues, it comes to the same judge for two years. So that's why I have a number of these cases with this particular issue.

You know, this shouldn't be a game of sort of hide and seek. If somebody can get into court in the District of Massachusetts before me, they can get relief, but that means that there's a larger universe of people who, you know, perhaps there's no jurisprudence out there to explain what this complicated law is, at least in the view of one judge.

And the regulation, Section 241.4, as I've just explained, is intended to provide due process to every person, including every alien who is detained in the United States, and it appears to me the Department of Homeland Security is not

interpreting or applying the regulation the way the Department of Justice has argued it. They didn't for Junqueira. They didn't for De Souza. They didn't for Rombot. And they settled the two other -- they agreed to at least two other cases right before I had hearings this year and another one last year.

I'm concerned that what the Supreme Court assumed in Zadvydas, that the Department of Homeland Security is following its regulations that ordinarily satisfy due process is not true. I would have thought that the Department of Homeland Security would be most likely to fastidiously follow the requirements of the law when it had been sued in a particular person's case, but they have been sued with regard to De Souza and Junqueira and utterly ignored their legal requirements. So that causes me concern about whether they're ignoring it in every other case, many other cases.

I don't know what the legal implications of that concern are, but there was a time when I represented the United States, too, when I worked for the Deputy Attorney General of the United States, Attorney General of the United States, when I was the Deputy United States Attorney in Massachusetts, and the Department of Justice has litigating authority rather than the agency's having it in part so it can present uniform arguments, but I think also so it can counsel its clients. There's a lot to think about.

So let's see where has this been left. I'll try to

get an order out today memorializing what I've directed you to do this week in connection with the hearing on May 15. But Ms. De Souza is going to be released when?

MS. LARAKERS: She'll be released tonight, Your Honor.

THE COURT: And the situation with Mr. Junqueira is what?

MS. LARAKERS: I have not spoken to ICE after -- I have not spoken to ICE about Mr. Junqueira after court today.

THE COURT: But you intend to do that?

MS. LARAKERS: Yes, Your Honor, I intend to speak to them again about it.

THE COURT: So I'm ordering that you report to me on the status of that tomorrow, and then if that relates -- if that makes the May 15 hearing less urgent, tell me if you agree on how to proceed with that. If I said that De Souza was detained since January 30, 2013, I meant January 30, 2018.

Oh, yes. And the record review is governed by Section 241.4(h) not (b). I can't read my own writing.

Sadly, there's one other matter. Mr. Pomerleau, I issued -- I ordered in the Dos Santos case that any opposition to the motion to dismiss the amended petition be filed on May 3 rather than May 5, a Saturday, as requested, because I needed time to study this. It's always my goal to decide things orally. And it wasn't filed at about 3:00 last Friday afternoon, so I issued that order directing you to file an

affidavit seeking to show cause why I shouldn't institute civil or criminal contempt proceedings. You filed the required memo at the time, about the time I was drafting that order. So the issue of civil contempt is moot.

Civil contempt is intended to compel somebody to obey a court order. And although you didn't obey it in a timely way, you made the filing. The issue of criminal contempt is punitive. Somebody can get locked up. You have two cases at least in front of me, Dos Santos and Junqueira, and you missed a lot of deadlines. On March 16, I ordered the government to file its motion to dismiss Dos Santos on March 26 and you to file the response on April 4.

The government filed a motion to dismiss late, on March 28, but you didn't file any response on April 4. You filed an amended complaint on April 5. On April 20, as I said, noting that I needed time to prepare for the May 8 hearing, I granted the government's motion to extend its previous deadline, April 23, to respond to the amended complaint until April 27 and ordered you to respond by May 3 rather than May 5. You filed that response on May 4 at about the time I issued my order.

In Junqueira, the government filed on April 6 the motion to dismiss. The deadline for you to respond was April 16, under my March 27 order. You didn't respond but on April 26 you filed an amended complaint. The parties agreed the

amended complaint raised no new claims. And on April 30 you requested leave to file a response late to the motion to dismiss, which I allowed.

I've read your response. I can see you were very busy last week, and you thought one of the things you were dealing with was the apparent decision to release Junqueira.

MR. POMERLEAU: That is correct, Your Honor.

THE COURT: But I don't -- I'm not going to institute criminal contempt proceedings against you this time. But I can see that you're very busy, that you're knowledgeable in this area, and you're devoted to your clients, but that doesn't permit you to file things on whatever schedule you want. And if you can't meet a deadline, it's your obligation to file a motion early enough so, if I deny it, you'll give priority to responding to the court's orders and meet the deadline.

When you file things late, you're injuring the interests of your clients. I've ordered that they remain in the jurisdiction, you know, during the pendency of this habeas proceedings. And I feel an obligation to give high priority to resolving these on a properly informed basis as efficiently as I can. And if the parties don't make filings at the required time, it injures my ability to do that. So maybe by this time tomorrow you'll have one fewer case in front of me.

MR. POMERLEAU: I hope so, Your Honor. I greatly apologize to the court. I think I misunderstood some of the

rules. I thought I could amend the complaint in lieu of filing a response to the government's motion to dismiss in each case we filed amended complaints. One of those circumstances I moved, asked the government if they would assent because when I resolved amended Junqueira complaint, I didn't raise any new issues. I just clarified the issues for purposes of these hearings. And regarding the deadline of last Thursday, again, my affidavit speaks to all the issues I was dealing with. Those are reasons; they're not excuses. And again, I apologize. I thank you for not finding me in contempt.

THE COURT: Well, if I was going to find you in criminal contempt, I would have had to have given you a notice under Federal Rule of Criminal Procedure 42. I've given you sort of more process than the rules require because I have neither much time or any interest in getting sidelined on that. But a court orders are court orders. They're not suggestions. And if you want relief from a court order, you have to ask for it and get it. You have to ask for it in time that, if the request is denied, you're going to meet the deadline. That applies to everybody, including the government and including the petitioners in other cases.

MR. POMERLEAU: Understood, Your Honor. Again, I apologize.

THE COURT: Well, I appreciate the apology, but none of this is personal. I'm just trying to administer my docket

in very consequential cases.

MR. POMERLEAU: Thank you, Your Honor.

THE COURT: All right. I'd like to see you all briefly in the lobby. All right. Court is in recess.

(Recess taken 4:22 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

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

Dated this 15th day of May, 2018.

/s/ Kelly Mortellite

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Kelly Mortellite, RMR, CRR

Official Court Reporter