

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION  
CASE NUMBER 19-20814-CV-KMW

ROBERTO ABDON ISAIAS DASSUM  
**WILLIAM ESTEBAN ISAIAS DASSUM**

**vs.**

Assistant Field Office Director of the  
**ICE Miami Field Office and Officer in Charge,  
Krome Service Processing Center, Miami, Florida**

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HEARING HELD 3-8-2019  
BEFORE THE HONORABLE KATHLEEN M. WILLIAMS  
UNITED STATES DISTRICT COURT JUDGE

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**APPEARANCES:**

FOR THE PLAINTIFFS: Ira Kurzban, Esq.  
Michael Tein, Esq.  
Linda Osberg Braun, Esq.  
**John Pratt, Esq.**  
**Kevin Gregg, Esq.**  
**Ian Shaw, Esq.**

FOR THE RESPONDENT: Karin Wherry, A. U. S. A  
**Troy Liggett, Esq.**

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1 THE COURTROOM DEPUTY: The Court calls Case No.

02:00 2 19-20814-CV-WMS; Isaias Dassum et al. versus Assistant Field  
02:00 3 Office Director.

02:00 4 Counsel, if you would please state your appearances  
02:00 5 for the record.

02:00 6 MR. KURZBAN: Good afternoon, my name is Ira Kurzban,  
02:00 7 and I am here representing the Isaias Brothers. With me is Mr.  
02:00 8 Tein who is on the phone. He was unable to make it because he  
02:01 9 had a conflict.

02:01 10 Here with me today is Linda Osberg Braun as my  
02:01 11 co-counsel in the case; and the three gentlemen to my right are  
02:01 12 John Pratt, Kevin Gregg and Ian Shaw from my firm.

02:01 13 THE COURT: Good afternoon, counsel.

02:01 14 MS. WHERRY: Good afternoon, Your Honor, Karin Wherry  
02:01 15 on behalf of the respondent the United States. Seated with me  
02:01 16 at counsel table is Troy Ligget who is counsel with the Office  
02:01 17 of Immigration Litigation in Washington.

02:01 18 THE COURT: Everyone may be seated. All right. We are  
02:01 19 here today on an emergency petition for writ of habeas corpus  
02:01 20 pursuant to 28 USC 2241 filed by the petitioners last Friday.

02:01 21 And briefly I am going to give some background before  
02:02 22 I turn to the parties. In the petition the petitioners, who are  
02:02 23 brothers, state that they are natives of Ecuador and have lived  
02:02 24 in the United States approximately 20 years.

02:02 25

02:02 1           And a little over three weeks ago on February 13th ICE  
02:02 2 arrested them and placed them in removal proceedings where they  
02:02 3 have remained, i.e. Krome, since that date.

02:02 4           In the removal proceedings, from the documents I have  
02:02 5 received, ICE has taken the position that the Messrs. Isaias  
02:02 6 are not eligible for release on bond pending the resolution of  
02:02 7 the removal because they are subject to mandatory detention  
02:03 8 under 8 USC 1226(c).

02:03 9           Specifically that non citizens are ineligible for  
02:03 10 release and subject to detention if they have been convicted of  
02:03 11 an aggravated felony and are taken into Immigration custody  
02:03 12 when they are released from their criminal custody.

02:03 13           According to what I have read the aggravated felony  
02:03 14 forming the basis for the Government's position on mandatory  
02:03 15 detention is a 2012 Ecuadorian judgment entered against the  
02:03 16 petitioners in absentia for peculation, which is a variation of  
02:03 17 embezzlement or abuse of public funds.

02:03 18           The petitioners advance several arguments as to why  
02:03 19 1226(c) does not apply, including that by its very terms it  
02:03 20 requires the non citizen to actually have been in criminal  
02:04 21 custody.

02:04 22           As everyone agrees the petitioners were never in  
02:04 23 custody for the Ecuadorian conviction and thus could not have  
02:04 24 been taken into custody when released into Immigration custody.

02:04 25

02:04 1           And, second, the petitioners indicate that the  
02:04 2 judgment is not an aggravated felony that could trigger  
02:04 3 mandatory detention for a number of reasons.

02:04 4           First, it does not categorically involve fraud or  
02:04 5 deceit. There's been no establishment of a loss in excess of  
02:04 6 \$10,000; and the conviction was obtained in violation of  
02:04 7 fundamental notions of due process.

02:05 8           At some point the petitioners advised the Court of  
02:05 9 their health issues; but I did receive today a supplemental  
02:05 10 notice with regard to both the brothers and their medical care.  
02:05 11 Although I imagine the petitioners are advancing the fact of  
02:05 12 their poor health as an additional reason.

02:05 13           And the original petition had asked that the Isaias --  
02:05 14 and am I pronouncing that correctly; Isaias?

02:05 15           MR. PRATT: I believe that is correct, Your Honor.

02:05 16           THE COURT: They ask for a Constitutional adequate  
02:05 17 bond hearing. The reply seemed to ask for release. And the  
02:06 18 Government responds that the conviction does qualify as an  
02:06 19 aggravated felony and that the petitioners are barred from a  
02:06 20 collateral attack or having the Court weigh in on whether it is  
02:06 21 an aggravated felony.

02:06 22           And that the "when released" language is superfluous  
02:06 23 and does not require either a "when" or a "released" to take  
02:06 24 effect. That the Court lacks jurisdiction to review the  
02:06 25 commencement of the expedited removal proceeding, the

02:06 1 adjudication -- although I think this is a non issue because  
02:06 2 the petitioners have not asked this Court to opine or rule upon  
02:07 3 Immigration's initiation of proceedings.

02:07 4 I have received and read all of the briefing by the  
02:07 5 parties, all of the exhibits attached, all of the cases cited;  
02:07 6 perhaps some others. I am now going to turn to the parties to  
02:07 7 discuss their respective positions and what they would like the  
02:07 8 Court to consider or focus on.

02:08 9 And I will start with the petitioners.

02:08 10 MR. KURZBAN: Thank you, Your Honor. May it please the  
02:08 11 Court. One thing I would like to clear up initially was we had  
02:08 12 asked in the alternative; for either a Constitutionally  
02:08 13 adequate hearing or immediate release.

02:08 14 Given their age and their condition we are inclined at  
02:08 15 this point to ask the Court for their immediate release. The  
02:08 16 brothers are in their mid seventies, they suffer from severe  
02:08 17 health problems, and their condition in the three weeks they  
02:08 18 have been there has deteriorated.

02:08 19 William has four occluded artery stints and recently  
02:08 20 had a cancerous tumor removed.

02:09 21 Roberto has un-controlled hypertension, which is  
02:09 22 spiking, because the replacement medication he has while he has  
02:09 23 been in Krome is not adequate.

02:09 24 And even the Government has acknowledged they do not  
02:09 25 have that medication because, quote, it is not available in the

02:09 1 Immigration Health Service pharmacy.

02:09 2 THE COURT: Well, it just means they are giving them a  
02:09 3 substitute.

02:09 4 MR. KURZBAN: Right.

02:09 5 THE COURT: Well, I don't always get what my doctor  
02:09 6 prescribes because my insurance will not cover it. But that  
02:09 7 does not mean inadequate medical care, it just means substitute  
02:09 8 in terms of the formulation of the particular pharmaceutical --

02:09 9 MR. KURZBAN: That is correct, Your Honor, but here the  
02:09 10 substitute is not working well; and his hypertension is going  
02:09 11 up and down erratically.

02:09 12 I think that is what Mr. Tein, in one of the recent  
02:09 13 declarations that were submitted, pointed out to the Court. The  
02:10 14 Government also acknowledges that these two men who were alert  
02:10 15 and intelligent businessmen just three weeks ago and are now  
02:10 16 being evaluated by a psychiatrist for anxiety.

02:10 17 I wanted to bring to Your Honor's attention something  
02:10 18 of a personal nature. In 2004 in this District we had a similar  
02:10 19 circumstance. I represented someone of advanced age.

02:10 20 We asked the Government, as Ms. Osberg has repeatedly  
02:10 21 asked them, to release the person, the Government declined and  
02:10 22 Joseph Dantica who is the uncle of a famous author, died in  
02:10 23 custody at Krome because his medication was not properly given  
02:10 24 to him.

02:10 25

02:10 1           So we are very concerned. When you are this age I  
02:11 2 think anything can happen, realistically. They should not be in  
02:11 3 detention at all.

02:11 4           I would like to go into what is the real issue for the  
02:11 5 Court, and that is whether a foreign decision can be used to  
02:11 6 mandatorily incarcerate someone without any independent review  
02:11 7 by a judicial officer.

02:11 8           I would say the issue here is even narrower, which is  
02:11 9 whether this 2012 infirm foreign decision can be used in that  
02:11 10 way without review by a judicial officer.

02:11 11           To my knowledge, I have checked with Ms. Osberg and my  
02:11 12 co-counsel, and 236(c) has never been used to incarcerate a  
02:12 13 person based upon a foreign conviction under the facts of this  
02:12 14 case -- this kind of case.

02:12 15           I have never heard of it being used before. The  
02:12 16 Government has not pointed to any case where, in fact, it has  
02:12 17 been used.

02:12 18           THE COURT: Just so I am clear -- and I will be asking  
02:12 19 both sides as you present these types of questions so I keep  
02:12 20 everything focused in my mind.

02:12 21           Your argument is the foreign conviction, as best you  
02:12 22 can tell from all of your research, has never been the basis  
02:12 23 for a mandatory detention, not that a foreign conviction has  
02:12 24 never been the basis for removal proceedings in some way?

02:12 25           MR. KURZBAN: Right. And it has never been used in

02:12 1 a 238(b) proceeding, which is the proceeding they are in now.  
02:13 2 Because even if a foreign conviction is used to mandatorily  
02:13 3 detain -- and this is very important -- in a normal proceeding,  
02:13 4 what we call a 240 proceeding, the Constitutionality of that  
02:13 5 has been saved under the Supreme Court decisions in Demore v.  
02:13 6 Kim and Jennings.

02:13 7 Because there was something called a Matter of Joseph  
02:13 8 hearing where you could actually go to the Immigration Judge  
02:13 9 and say, this is not an aggravated felony, Judge, release our  
02:13 10 client; in a regular 240 proceeding. There is no such thing in  
02:13 11 a 238(b) proceeding.

02:13 12 There may be cases where foreign convictions were used  
02:13 13 to detain someone; but the person can go and ask an Immigration  
02:13 14 Judge in a 240 proceeding for a matter of Joseph hearing.

02:14 15 And, Your Honor, the Supreme Court noted that in  
02:14 16 Demore v. Kim and in Jennings; particularly in Demore v. Kim  
02:14 17 when they determined the statute was Constitutional.

02:14 18 So, why in this case should there be some review and  
02:14 19 why should you immediately release them? The decision in  
02:14 20 Ecuador demonstrates why a no judicial review policy is so  
02:14 21 dangerous.

02:14 22 Our Department of State refused repeatedly Ecuador's  
02:14 23 request to extradite; stating bluntly there is no evidence that  
02:14 24 the Isaias Brothers participated in the alleged embezzlement or  
02:14 25 that they even diverted the money in a certain amount.



02:14 1           The conviction is in absentia, which is a red flag  
02:14 2 under any circumstances. There is a case called Matter  
02:14 3 \*Periano For the Board.

02:14 4           And even our own State Department -- which the  
02:14 5 Government ignored in their response -- even our own State  
02:15 6 Department does not consider in absentia convictions.

02:15 7           And, Your Honor, this is not even a final decision  
02:15 8 because you have an opinion letter from Jorge Ceballos that  
02:15 9 says it is not a final decision.

02:15 10           And you even have the Court's expert in Ecuador -- and  
02:15 11 in Ecuador apparently the Courts have legal experts. And one  
02:15 12 of those legal experts is Chumer Ruiz who concluded, quote,  
02:15 13 that there is no definitive effect of the so called 2012  
02:15 14 conviction until the Constitutional Court issues a  
02:15 15 pronouncement.

02:15 16           That, Your Honor, is at Exhibit 7 in our documents.  
02:15 17 So, it is not final because it is subject to review in Ecuador.

02:15 18           And there are other infirmities which raise serious  
02:16 19 concerns. The prosecutor in this case refused to charge the  
02:16 20 Isaias under the Peculation Statute, which is a statute that  
02:16 21 the Government now claims he was convicted of.

02:16 22           And when the Judges refused to proceed with the  
02:16 23 Peculation charge under 237 they were fired and criminally  
02:16 24 prosecuted.

02:16 25

02:16 1 Other politically charged events surrounding the  
02:16 2 brothers noted by the United Nation High Commission on -- Human  
02:16 3 Rights Commission recognized that the confiscation of their  
02:16 4 properties and subsequent mandate that prohibited any legal  
02:16 5 challenge to the confiscation was a violation of the  
02:16 6 International Covenant on Civil and Political Rights.

02:16 7 Their names in this 2012 so called conviction appear  
02:16 8 only three times in the document. First naming them as a  
02:16 9 defendant, once in the body of the opinion and once in the  
02:16 10 judgment.

02:16 11 Our law has recognized in Doe v. Gonzalez, Esposito  
02:17 12 versus INS -- all the cases that we cited and that Your Honor  
02:17 13 was good enough to read -- that whenever a foreign conviction  
02:17 14 is obtained in violation of basic principals of fairness and  
02:17 15 due process it does not constitute a conviction.

02:17 16 I know the Government has cited a number of cases --  
02:17 17 and there is Matter of F, Matter of B -- but the cases that  
02:17 18 were cited by the Government as of today there's only one of  
02:17 19 those cases that was an in absentia case.

02:17 20 And it did not have the constellation of infirmities  
02:17 21 we are talking about here. It was a drug trafficking crime that  
02:17 22 clearly would have been drug trafficking under our own law.

02:17 23 THE COURT: Osmany?

02:17 24 MR. KURZBAN: Yes.

02:17 25 THE COURT: The Immigration Court decided removability

02:18 1 on the basis that they were inadmissible at the time of entry  
02:18 2 and there was no discussion of custody or anything in that  
02:18 3 case.

02:18 4 MR. KURZBAN: That was the other point I was going to  
02:18 5 make; none of those cases have anything to do with custody.

02:18 6 THE COURT: All of the arguments about the viability  
02:18 7 of the conviction you are lending me your perspective as to why  
02:18 8 the detention is infirm at this juncture.

02:18 9 You are not asking the Court to actually wade into the  
02:18 10 conviction, talk about the conviction, the nature -- just as  
02:19 11 relates to the mandatory detention provision?

02:19 12 MR. KURZBAN: That's correct, Your Honor. It is just  
02:19 13 background as to why we think the conviction is infirm because  
02:19 14 Your Honor does not have to address those factual issues.

02:19 15 The Government has never contested that the Isaias  
02:19 16 Brothers are a risk of flight or a threat to the public, nor  
02:19 17 could they. They have been here 20 years. They entered on E-2  
02:19 18 Investor Visas. They have had a quiet and uneventful life until  
02:19 19 their detention.

02:19 20 They have U.S. citizen family members who have filed  
02:19 21 petitions that have been approved by the Immigration Service  
02:19 22 for them.

02:19 23 The Government has the burden of demonstrating that  
02:19 24 the petitioners should be detained. And the statutory issues,  
02:19 25 as Your Honor recounted, is pretty clear.

02:20 1           The Government claims that they are subject to  
02:20 2 mandatory detention because they are aggravated felons but they  
02:20 3 are not. The Government says they are subject to mandatory  
02:20 4 detention because they committed an aggravated felony of fraud  
02:20 5 or deceit where the loss to the victim is over \$10,000.

02:20 6           So, they have the burden to demonstrate -- to keep  
02:20 7 someone in custody -- the conviction must always involve fraud  
02:20 8 and deceit under Moncrieff.

02:20 9           And they have to demonstrate that the loss amount is  
02:20 10 in excess of \$10,000. They have the burden on both of those;  
02:20 11 assuming that there is a conviction.

02:20 12           Notwithstanding everything we have said about the  
02:20 13 infirmity of it, and assuming that you can even say it is a  
02:20 14 conviction under Section 257 of the Ecuadorian Criminal Code,  
02:21 15 it is absolutely clear that the least culpable conduct, which  
02:21 16 is the standard under Moncrieffe, for analyzing these types of  
02:21 17 convictions under the categorical approach that the least  
02:21 18 culpable conduct under this statute does not involve fraud or  
02:21 19 deceit but merely misapplication or abuse of funds.

02:21 20           And it is a strict liability crime that criminalizes  
02:21 21 abuse or arbitrary use; and that is what the Ceballa opinion  
02:21 22 says. And the Government has not come forward with anything to  
02:21 23 rebut that.

02:21 24           Secondly, the term of imprisonment was not completed  
02:21 25 within the last 15 years; and that's probably the easiest

02:21 1 argument here.

02:21 2 THE COURT: That's why I did not understand why more  
02:21 3 people weren't more focused on the penultimate sentence; why we  
02:21 4 have to get into Moncrieffe or the categorical approach when it  
02:21 5 is clear from that text that the term ag-felon applies to  
02:22 6 offenses described in this paragraph:

02:22 7 Whether Federal or State; and applies to such an  
02:22 8 offense in violation of the law of a foreign country for which  
02:22 9 the term of imprisonment was completed within the previous  
02:22 10 15 years.

02:22 11 So, again, a custodial period is contemplated. Why  
02:22 12 would I be wondering whether it is fulfilling fraud and deceit  
02:22 13 or moral turpitude, or any of that, when clearly a foreign  
02:22 14 conviction anticipates that 15-year completion of a term of  
02:22 15 imprisonment?

02:22 16 MR. KURZBAN: Your Honor is correct. And why did they  
02:22 17 do that in the statute? The reason they did that is simple;  
02:23 18 someone gets convicted in a foreign country where we don't know  
02:23 19 about it, they served their time in the foreign country, it  
02:23 20 happened within the past 15 years, they go to the Embassy, they  
02:23 21 lie about the conviction and they get a Visa to come into the  
02:23 22 United States.

02:23 23 And what we say is that those people are subject to  
02:23 24 deportation; even though they got in somehow they are subject  
02:23 25 to deportation.

02:23 1 It has never to my knowledge been applied in this kind  
02:23 2 of a context for the reason that Your Honor just pointed out  
02:23 3 which is you had to have actually served -- been convicted and  
02:23 4 served time and completed the time and then come to the United  
02:23 5 States within the 15-year period.

02:23 6 So, I think that is the easier way to resolve it. And  
02:24 7 the amount of loss, the Government has pointed to the Florida  
02:24 8 cases where --

02:24 9 THE COURT: Well, I don't even have to break it out  
02:24 10 into those components of comparison because the text tells me  
02:24 11 clearly the only foreign conviction I should be looking at or  
02:24 12 anyone should be looking at are those that have had a period of  
02:24 13 incarceration in the past 15 years; not this case.

02:24 14 MR. KURZBAN: I agree. And the other easy way to --  
02:24 15 the second easy way to resolve the case is the "when released"  
02:24 16 provision.

02:24 17 THE COURT: The Preap matter --

02:24 18 MR. KURZBAN: Well, this does not involve Preap.

02:24 19 THE COURT: Right; Preap everyone there had been in  
02:24 20 custody. The whole issue in Preap is defining or determining  
02:25 21 the "when".

02:25 22 MR. KURZBAN: Exactly.

02:25 23 THE COURT: At least in Preap there was both "when"  
02:25 24 and "released."

02:25 25 MR. KURZBAN: Exactly, Your Honor. And even the cases

02:25 1 the Government cites in their brief does not go to the issue  
02:25 2 here, which is you had to be in some kind of custody.

02:25 3 THE COURT: Right.

02:25 4 MR. KURZBAN: You either had to be arrested, in some  
02:25 5 kind of custody or convicted in some kind of custody, and then  
02:25 6 released. And then the question in Preap becomes when released.

02:25 7 THE COURT: I suppose there is some analogous -- well,  
02:25 8 I don't see the analogous rationale, at least in those many,  
02:25 9 many cases pending before the Supreme Court.

02:25 10 I think the oral argument was in October. And it  
02:25 11 focused on the period of time, whether it is immediate release  
02:26 12 or you could wait years, as apparently has been done here, and  
02:26 13 if that runs contrary to the intent of the statute, which was  
02:26 14 to prevent recidivism and fleeing; which does not seem to be  
02:26 15 the issue here.

02:26 16 MR. KURZBAN: The core is you had to be in criminal  
02:26 17 custody at some point.

02:26 18 THE COURT: Right.

02:26 19 MR. KURZBAN: The other issue I was going to leave to  
02:26 20 Mr. Tein --

02:26 21 THE COURT: Well, no, his motion specifically  
02:26 22 represented that he would not say anything.

02:26 23 MR. KURZBAN: I apologize. The other issues are the  
02:26 24 Constitutional issues. I think we have gone over that to some  
02:26 25 extent.

02:26 1           And those Constitutional issues involve whether or  
02:26 2 not consistent with the Fifth Amendment, given the kind of  
02:27 3 infirm conviction you have here, whether you could incarcerate  
02:27 4 someone without giving them an independent hearing before an  
02:27 5 independent judicial officer.

02:27 6           We believe that you cannot. Even though there are  
02:27 7 certain cases under certain circumstances -- this is not one of  
02:27 8 those circumstances.

02:27 9           Because the point here is we are dealing with a  
02:27 10 foreign conviction. I think the difference here is clear; that  
02:27 11 is if it is a U.S. conviction under 238(b), this expedited  
02:27 12 provision where they are now saying you can be incarcerated,  
02:27 13 the idea was to take somebody from a State or Federal prison  
02:27 14 and transfer them to an Immigration facility and hold them  
02:27 15 there until you have had this expedited provision.

02:27 16           Why? Because our State and our Federal convictions at  
02:28 17 least have a clear due process path; that is you can appeal,  
02:28 18 you can file a habeas petition, but with a foreign conviction  
02:28 19 you have none of that.

02:28 20           And so, Your Honor, the point that we wanted to make  
02:28 21 on the Constitutional issue is -- we are not challenging if  
02:28 22 this were a domestic conviction; we are saying when it involves  
02:28 23 a foreign conviction.

02:28 24           The real proof in this particular case is our own  
02:28 25 State Department, which reviews this before it goes to a



02:28 1 judicial officer in extradition, found there was not enough  
02:28 2 evidence to even warrant bringing this before a judicial  
02:28 3 officer.

02:28 4 Under a Fifth Amendment analysis, a due process  
02:28 5 analysis, under Mathews, if you balance all of the interests  
02:28 6 when it is a foreign conviction there has to be an independent  
02:28 7 judicial officer.

02:29 8 You can't leave it up to an Immigration and Customs  
02:29 9 Enforcement officer to make determinations about foreign  
02:29 10 convictions. And that is why we believe that Your Honor can  
02:29 11 also decide this case on Constitutional grounds.

02:29 12 Thank you.

02:29 13 THE COURT: Thank you, Mr. Kurzban.

02:29 14 On behalf of the United States.

02:29 15 MS. WHERRY: May I stand at counsel table, Your Honor.

02:29 16 THE COURT: As long as you speak into the microphone  
02:29 17 for Ms. Sanders, or you keep your voice up, that's fine.

02:29 18 MS. WHERRY: Thank you, Your Honor. There were a couple  
02:29 19 points that were made by petitioners' counsel I would like to  
02:29 20 clear up.

02:29 21 I would like to start out by reminding the Court that  
02:29 22 the Isaias Brothers were convicted in Ecuador in 2012. They  
02:30 23 were sentenced to eight years. And they were represented by  
02:30 24 counsel. There were two appeals that were taken within Ecuador.

02:30 25

02:30 1           And the case finally was put on -- the nomenclature  
02:30 2 escapes me -- due to their fugitive status.

02:30 3           THE COURT: Archive.

02:30 4           MS. WHERRY: Thank you very much. So, the idea that the  
02:30 5 petitioners start out -- by suggesting there is no form of  
02:30 6 appeal in a foreign government and that there is no way to  
02:30 7 challenge the conviction within a foreign Government is an  
02:30 8 allegation that is without proof.

02:30 9           And, moreover to Your Honor, it is not even relevant  
02:30 10 because we are here to simply present whether -- as the foreign  
02:30 11 government does -- as to a conviction.

02:30 12           And to really take this to its end; if you were to  
02:30 13 take every case, every conviction, and go back and hear a trial  
02:30 14 de nouveau reviewing it, there would be an insurmountable and  
02:31 15 unwieldily avalanche of additional work. And, Your Honor, that  
02:31 16 is not provided for in the Statute.

02:31 17           Because Congress defined what an aggravated felony is.  
02:31 18 Congress stated what it would -- what is needed for a mandatory  
02:31 19 detention; whether a petitioner or detainee would be considered  
02:31 20 for removal through the expedited process or through a regular  
02:31 21 appearance before an Immigration Judge.

02:31 22           And to say this is an infirm conviction is simply an  
02:31 23 allegation without any merit or foundation. It simply supports  
02:31 24 this idea that they wish to be released.

02:31 25           THE COURT: I agree with you in terms of this Court is

02:31 1 not going to go behind the conviction; but what about the  
02:32 2 Executive? Has the Executive not in fact admitted the 2012  
02:32 3 conviction is infirm by saying there is no probable cause?

02:32 4 Is that not a statement of the Executive? I don't  
02:32 5 think there is anything new that has been provided -- other  
02:32 6 than the documents that had been provided before.

02:32 7 I don't intend to at this juncture today -- I don't  
02:32 8 think it is appropriate for me to look to Ecuador -- but why  
02:32 9 can't I look to our own Executive?

02:32 10 MS. WHERRY: Well, Your Honor, there are two different  
02:32 11 forms of evaluation. One is for extradition, and that is of  
02:32 12 course within the province of the Department of State.

02:32 13 THE COURT: Right, the Executive Branch.

02:32 14 MS. WHERRY: That's correct.

02:33 15 THE COURT: Yes.

02:33 16 MS. WHERRY: And, Your Honor, for purposes of removal  
02:33 17 ICE and the Department of Homeland Security will make that --  
02:33 18 independent of any determination by the Department of State for  
02:33 19 determining extradition.

02:33 20 So, those are two different levels of consideration.  
02:33 21 One is based upon perhaps a treaty and certain considerations  
02:33 22 that the Department of State will look at for purposes of  
02:33 23 sending an individual back to a country to stand charges or  
02:33 24 appear pursuant to an extradition request.

02:33 25

02:33 1 I believe the extradition request that was made was  
02:33 2 pretrial. We now have a conviction after 2012.

02:33 3 THE COURT: Right.

02:33 4 MS. WHERRY: I understand as well that the Department  
02:33 5 of State has not rendered a final decision on the request from  
02:33 6 Ecuador for extradition.

02:33 7 THE COURT: Well, the note I looked at is dated  
02:34 8 June the 19th of 2013, which would have been a year after a  
02:34 9 conviction, as everybody has agreed in this case.

02:34 10 And there it recounts six diplomatic notes and the  
02:34 11 deficiencies in each that the probable cause standard has not  
02:34 12 been met. And it acknowledges even convicted in absentia.

02:34 13 I don't want to get into the State Department history  
02:34 14 either; but all I am saying is you are presenting on behalf of  
02:34 15 the Executive an analysis that the Executive has rejected in  
02:34 16 another context.

02:34 17 And it seems to me that is a start for me to say I am  
02:35 18 not as sanguine as you are that the aggravated felony is  
02:35 19 obvious.

02:35 20 MS. WHERRY: Your Honor, the Department of State is  
02:35 21 not applying the same standard -- does not have to apply the  
02:35 22 same standard -- for purposes of the extradition that the  
02:35 23 Immigration Court will be applying.

02:35 24 And, Your Honor, if there is an inconsistency it is  
02:35 25 one that may not have been intended; but again there are two

02:35 1 different considerations. In this particular case for purposes  
02:35 2 of detention and consideration of removal Congress has set  
02:35 3 forth the means by which the Immigration Judges -- or those  
02:35 4 that enforce the Immigration laws --

02:35 5 THE COURT: Not a Judge; just an officer. There has  
02:35 6 been no Immigration Judge involved.

02:35 7 MS. WHERRY: That is because this is -- that is within  
02:36 8 the inherent discretion of ICE.

02:36 9 THE COURT: Officer Garcia.

02:36 10 MS. WHERRY: Your Honor, Congress provided for that.

02:36 11 THE COURT: Congress provided in 1101(a) 43 that an  
02:36 12 aggravated felony in violation of a law of a foreign country  
02:36 13 for which the term of imprisonment was completed within the  
02:36 14 previous 15 years --

02:36 15 MS. WHERRY: Well, Your Honor --

02:36 16 THE COURT: There is a specific Congressional text  
02:36 17 outlining what ag-felony is; and it says custodial detention is  
02:36 18 a part of your analysis, and here that seems to have been  
02:36 19 ignored.

02:36 20 You are also going to tell me I don't need to take  
02:36 21 into account the "when released" of that statute. That is a  
02:36 22 lot of text I am being asked to ignore.

02:36 23 MS. WHERRY: Your Honor, the petitioners were charged,  
02:36 24 represented by counsel in Ecuador and did not appear for their  
02:37 25 trial.

02:37 1 They were found guilty and convicted, in absentia, but they  
02:37 2 were found guilty. And an Ecuadorian Court issued a conviction  
02:37 3 judgment, and that is the conviction judgment upon which  
02:37 4 Ecuador relied.

02:37 5 There were two appeals taken there -- and they of  
02:37 6 course do not want to go back to Ecuador to be sentenced and to  
02:37 7 serve the time they have been sentenced to -- for eight years.

02:37 8 And the reason they have not had the opportunity to  
02:37 9 serve that time is because they are in the United States and  
02:37 10 they want to stay here.

02:37 11 THE COURT: Right. In your briefing before the  
02:37 12 Supreme Court in the Preap case the Solicitor General of the  
02:37 13 United States said that 1226(c) embodies the values of  
02:38 14 cooperation and comity between the Federal Government and the  
02:38 15 State, allowing them to complete the basic punishment of a  
02:38 16 criminal alien for committing a State crime and also the  
02:38 17 Federal punishment being completed.

02:38 18 It seems the Solicitor General has acknowledged in  
02:38 19 their discussion in Preap that custody is in fact part of the  
02:38 20 analysis. So if the Solicitor has made that argument then --  
02:38 21 the whole point being that Immigration may decide the Isaias  
02:38 22 Brothers must be removed and that determination, as you say, is  
02:38 23 ongoing.

02:38 24 But the mandatory detention at this point seems to fly  
02:38 25 in the face of the statutory text, the Solicitor General's

02:38 1 analysis and the case law that has been burgeoning around the  
02:39 2 country. I want to understand how that can be reconciled.

02:39 3 MS. WHERRY: Your Honor, as to that inquiry, since my  
02:39 4 colleague has worked on that case with your indulgence I would  
02:39 5 like to invite him to address that issue.

02:39 6 THE COURT: Have you made an appearance in the case? I  
02:39 7 will of course allow you to address the issue, but if you could  
02:39 8 file an appearance in the case that would be a good thing as  
02:39 9 Martha would say.

02:39 10 MR. LIGGET: I will, Your Honor.

02:39 11 THE COURT: Very good.

02:39 12 MR. LIGGET: Troy Ligget, with the Department of  
02:39 13 Justice. I am one of the trial attorneys, Preap is my case,  
02:39 14 that was taken before the Supreme Court.

02:39 15 THE COURT: I thought I saw your name.

02:39 16 MR. LIGGET: Yes, Your Honor. At a basic level, Your  
02:39 17 Honor, the issue of whether someone had ever been in custody is  
02:39 18 not an issue in Preap.

02:40 19 THE COURT: Correct. It is the triggering versus -- it  
02:40 20 is either the triggering clause or a time limitation clause;  
02:40 21 that is the whole discussion.

02:40 22 MR. LIGGET: The gap.

02:40 23 THE COURT: Correct. But it seems to me if Courts are  
02:40 24 taking that much time and effort to discuss that portion, the  
02:40 25 flush clause of this statutory scheme, then it certainly has

02:40 1 some meaning. And I don't feel comfortable ignoring it all  
02:40 2 together. And I don't think any Court -- is it Olmos in the  
02:40 3 Tenth Circuit?

02:40 4 MR. LIGGET: Yes, Your Honor.

02:40 5 THE COURT: You know, basically, of course there's  
02:40 6 custody; why would we be talking about release if there  
02:40 7 weren't?

02:40 8 I think you and I are actually vehemently agreeing  
02:41 9 that Preap is focused on a different situation; but I think  
02:41 10 meaningful for us to discuss.

02:41 11 MR. LIGGET: I would suggest it is meaningful to  
02:41 12 discuss but it is not relevant to the whole when the "released"  
02:41 13 language is there.

02:41 14 THE COURT: Okay.

02:41 15 MR. LIGGET: A big part of the Government's argument is  
02:41 16 there is a separate statute that requires in general aliens who  
02:41 17 are convicted of crimes and have to serve time; they must serve  
02:41 18 that time before they can be removed.

02:41 19 THE COURT: That is the Federal scheme?

02:41 20 MR. LIGGET: Yes, ma'am, that is the Federal scheme.  
02:41 21 And so the Government's position is that when -- as to when  
02:41 22 they are released -- says that the Government has an obligation  
02:41 23 to get them after they are released from criminal custody  
02:41 24 because they have to serve their time first.

02:41 25 THE COURT: Right.



02:41 1 MR. LIGGET: It is the Government's position that if  
02:41 2 someone is convicted of one of the enumerated crimes in the A  
02:42 3 through D within 1226(c) that is the qualifier of when they are  
02:42 4 subject to mandatory detention.

02:42 5 THE COURT: Again, you are asking this Court at least  
02:42 6 to back out an entire statutory phrase; which if you were at  
02:42 7 the oral argument Justices Sotomayor and Kagan were a little  
02:42 8 concerned about that. They referred to DeMaio and Sessions and  
02:42 9 the previous cases.

02:42 10 But let's take the "when released". What about the  
02:42 11 fact it is again repeated in the listing of AG-felonies for  
02:42 12 which the term of imprisonment was completed within the last 15  
02:42 13 years?

02:42 14 In light of all that is there any case, Immigration,  
02:43 15 District Court, is there any case you can cite me to like this;  
02:43 16 foreign judgment after the people come to the United States  
02:43 17 where there is no custodial --

02:43 18 MR. LIGGET: Your Honor, I am not familiar; and I don't  
02:43 19 think the Government here today -- and last week -- has found a  
02:43 20 case like this one where someone does not appear for their  
02:43 21 criminal proceedings, is sentenced to serve time that fits  
02:43 22 within that period of time but absconds by not appearing for  
02:43 23 the proceedings.

02:43 24 And for the time served -- the 15 year period -- says  
02:43 25 that you can't go back before 15 years and consider that.

02:43 1 Here they were convicted to serve eight years.

02:43 2 THE COURT: Well, I don't think you abscond by not  
02:44 3 appearing -- that is another debate we will have at another  
02:44 4 time.

02:44 5 MR. LIGGET: If they would have been there in Ecuador  
02:44 6 and appeared for the proceedings and the Department of State  
02:44 7 still considered extradition for them to serve that time then  
02:44 8 they would qualify under that definition.

02:44 9 And we suggest the fact that they don't appear for it  
02:44 10 that should not excuse -- if that definition applies.

02:44 11 THE COURT: Okay. Ms. Wherry, is there anything else  
02:44 12 you wish to bring to the Court's attention?

02:44 13 MS. WHERRY: Just to highlight for the Court; the body  
02:44 14 of case law suggests that the Constitution of the United States  
02:44 15 does not apply world-wide, it applies in the United States.

02:44 16 And as the cases highlight, the fact that another  
02:44 17 country may not have satisfied due process the way we do here  
02:44 18 in the United States does not invalidate the conviction.

02:45 19 THE COURT: Right; but none of those cases talked  
02:45 20 about an aggravated felony requiring mandatory detention.  
02:45 21 Those had to do with the fact that a conviction could qualify  
02:45 22 even though it is not in conformance with what we consider to  
02:45 23 be Constitutional governance.

02:45 24 None of them, and correct me if I am wrong, none of  
02:45 25 them talked about the mandatory detention and the aggravated

02:45 1 felony issue we are speaking of today. The aggravated felony  
02:45 2 traverses in some way detention. I am looking at it only  
02:46 3 through the lens of the appropriateness of the detention.

02:46 4 MS. WHERRY: Your Honor, the posture this case is in --  
02:46 5 it is a habeas petition.

02:46 6 THE COURT: Correct.

02:46 7 MS. WHERRY: The sole function of the habeas petition  
02:46 8 is to test the legality of the Executive detention. And under  
02:46 9 1252(g) unless otherwise provided no other Court shall have  
02:46 10 jurisdiction to entertain a case arising out of DHS -- the  
02:46 11 Department of Homeland Security -- Secretary's decision or  
02:46 12 action to commence proceedings.

02:46 13 THE COURT: That's not what I am doing. I am not  
02:46 14 addressing that. And the otherwise provided is *Demore v. Kim*,  
02:46 15 *Jennings versus Rodriguez*, legion of cases, that talk about a  
02:46 16 District Court, a Federal Court's ability to address detention  
02:47 17 and the viability and legality and Constitutionality of the  
02:47 18 detention.

02:47 19 There are multiple dimensions on that. I am not  
02:47 20 talking about the Immigration process as to removal or that  
02:47 21 decision; I am talking about mandatory detention and how it  
02:47 22 applies.

02:47 23 Of course that is the whole discussion in *Preap*.  
02:47 24 Different discussion in terms of the focus; but it has gone to  
02:47 25 the Supreme Court through various Circuits as to whether the

02:47 1 mandatory detention is Constitutional.

02:47 2 MS. WHERRY: It appears to some extent the petitioners  
02:47 3 have decided to take an in-run around the process by filing a  
02:47 4 habeas and imposing upon you to make a decision on the  
02:48 5 detention.

02:48 6 Had the process continued administratively -- the  
02:48 7 petitioners had been given an extra ten days in which to  
02:48 8 respond to the proposed order of deportation.

02:48 9 And once that decision is made by a deportation  
02:48 10 officer -- or had it been made by an Immigration Judge -- but  
02:48 11 at the expiration of those ten days, which would be the 14th of  
02:48 12 March, if the petitioners had a problem or a challenge to the  
02:48 13 deportation -- excuse me -- removal and the consequential  
02:48 14 detention they take it directly to the 11th Circuit.

02:48 15 So, there is a method and process in place by which  
02:48 16 the petitioner can challenge that.

02:48 17 THE COURT: If there is a Constitutionally infirm  
02:49 18 detention the fact that someone is going to review the removal  
02:49 19 order does not cure that part of the process which is in  
02:49 20 violation of law and the Constitution.

02:49 21 And all of the Courts, from the Supreme Court down,  
02:49 22 everyone has agreed I can review that decision if it is in fact  
02:49 23 in violation of law and the Constitution.

02:49 24 MS. WHERRY: Well, Your Honor, the Statute requires --  
08:24 25 I think Congress' history of the -- with the Statute and the

08:24 1 way it is applied is they want the aliens who have come to the  
02:49 2 United States, committed crimes, to serve the time before we  
02:49 3 will deport or remove them from this country.

02:49 4 In this particular case to allow for that particular  
02:49 5 part of the statute -- say you need to complete your term of  
02:49 6 incarceration by 15 years before we will consider removal would  
02:50 7 applaud and reward someone for not serving the time and by not  
02:50 8 addressing it in the country where the charges are pending.

08:32 9 Even though you have an attorney, you stay away, you  
02:50 10 don't get to serve -- don't serve the sentence -- you will  
02:50 11 never satisfy the 15 years, ever, because you will never be  
02:50 12 there to serve the time. So we are going to reward you for not  
02:50 13 serving your time?

02:50 14 Because initially -- we are out here saying to an  
02:50 15 alien convicted of a crime in our country you need to serve  
02:50 16 your time first and then we will remove you.

02:50 17 In a situation like the instant case, and because it  
02:50 18 has not appeared in previous case law, does not render it a non  
02:50 19 event and take the traction away.

02:50 20 It would basically reward someone for never serving  
02:50 21 their time. You just stay away from that country that convicted  
02:50 22 you and we will allow you to stay here and never apply the  
02:50 23 statute.

08:34 24 Your crime that is considered an aggravated felony  
02:50 25 will never be satisfied because you will never serve the 15

02:51 1 years and you will never be --

02:51 2 THE COURT: I don't think that is what the petitioner  
02:51 3 is arguing. Certainly if I have articulated that -- I am not of  
02:51 4 that position.

02:51 5 What the petitioner is arguing, and what I am trying  
02:51 6 to ascertain here, in that instance you are not going to be  
02:51 7 mandatorily detained while the decision is being made by  
02:51 8 Immigration.

02:51 9 Because, gosh, what if there were say a dictator in  
02:51 10 another country who convicted people that had left the country  
02:51 11 of treason and then asked the United States to take up that  
02:51 12 conviction.

02:51 13 There would be all manner of issues with that. That's  
02:51 14 not to say that might not be the basis for removal; it's just  
02:51 15 to say that might not be the basis for mandatory detention and  
02:52 16 expedited removal.

02:52 17 But if I seemed to give the impression that I was  
02:52 18 saying there would be no redress by the Service I was not.  
02:52 19 Sometimes when I think out loud I wander; but that's not where  
02:52 20 I was going.

02:52 21 MS. WHERRY: Your Honor, my colleague would like to  
02:52 22 address the Court on another matter.

02:52 23 THE COURT: That's fine.

02:52 24 MR. LIGGET: Your Honor, I wanted to address something  
02:52 25 Mr. Kurzban started his argument with that is very relevant to

08:38 1 the issue we are discussing. The petitioners are in expedited  
08:39 2 removal proceedings and theoretically their brief is due by  
02:52 3 next Friday; and soon thereafter there will be a final removal  
02:52 4 order in their case --

02:52 5 THE COURT: Well, one hopes the briefs will be read  
02:53 6 but, okay.

02:53 7 MR. LIGGET: I'm sorry, there will be a decision. It  
02:53 8 is an expedited proceeding. And the issue in those expedited  
02:53 9 proceedings is whether they are convicted of an aggravated  
02:53 10 felony.

02:53 11 THE COURT: Okay.

02:53 12 MR. LIGGET: And if they were in regular removal  
02:53 13 proceedings, which takes months or years, it would be the exact  
02:53 14 same issue, whether they committed an aggravated felony.

02:53 15 In extended proceedings there is something called a  
02:53 16 matter of Joseph hearing --

02:53 17 THE COURT: But that is not available here.

02:53 18 MR. LIGGET: That's not available here, and there is a  
02:53 19 reason why, it is because it is an expedited proceeding.

02:53 20 THE COURT: So if we are making a mistake we are just  
02:53 21 going to hurry it along?

02:53 22 I am stuck on that, Mr. Ligget.

02:53 23 MR. LIGGET: It is the same issue here that will be  
02:53 24 subject to review in the removal order.

02:53 25 THE COURT: Excuse me. Counsel is arguing; I would

02:54 1 like to hear counsel.

02:54 2 MR. KURZBAN: I'm sorry.

02:54 3 THE COURT: Go ahead, sir.

02:54 4 MR. LIGGET: That is what our jurisdictional argument  
02:54 5 is about. The issue of whether they committed an aggravated  
02:54 6 felony will be resolved in an order that will be issued very  
02:54 7 soon.

02:54 8 And therefore it is the exact same issue. It is being  
02:54 9 reviewed in their current removal proceedings; the exact issues  
02:54 10 that you are talking about.

02:54 11 Whether or not it is a felony conviction, whether or  
02:54 12 not it applies under the definition, whether or not it is a  
02:54 13 final conviction, whether or not they committed aggravated  
02:54 14 felonies.

02:54 15 That is the issue in their removal proceedings; which  
02:54 16 is happening on an administrative level. Both parties are  
02:54 17 filing the exact same briefs in removal proceedings.

02:54 18 That is why there is not a matter of Joseph hearing  
02:54 19 here because there does not need to be because it is an  
02:54 20 expedited proceeding.

02:55 21 And all of the litigation we are doing in the habeas  
02:55 22 petition is the exact same issue they are litigating in removal  
02:55 23 proceedings.

02:55 24 That is why we, say respectfully, that this Court is  
02:55 25 precluded from reviewing this exact same issue under 1252(a)(5)



02:55 1 and (e) (9) because of the Zipper clause that Congress has said  
02:55 2 that one issue needs to be decided through removal proceedings  
02:55 3 and petition (inaudible)

02:55 4 So there is not this protection of a Matter of Joseph  
02:55 5 hearing in expedited removal proceedings because that exact  
02:55 6 issue is being litigated in the case itself. I think that is  
02:55 7 important to this discussion.

02:55 8 THE COURT: Thank you. Any rebuttal, Mr. Kurzban?

02:55 9 MR. KURZBAN: Thank you, Your Honor; and I apologize.  
02:55 10 Just one other point about relief. We are very concerned this  
02:56 11 not be remanded back to an Immigration Judge.

02:56 12 If it is remanded back to an Immigration Judge -- so  
02:56 13 the Court understands the full context -- and a Judge says,  
02:56 14 okay, I will give you a bond, the Government has the right in  
02:56 15 what I regard as an Unconstitutional procedure, but under 18  
02:56 16 CFR 1003.19(h) (1) to simply put a piece of paper in the Court  
02:56 17 and keep them in detention for 90 days until there is an appeal  
02:56 18 decided.

02:56 19 The second issue is that if they issue a final order  
02:56 20 they are going to come back here -- even if you were to release  
02:56 21 them -- they are going to come back.

02:57 22 If you send this to an Immigration Judge and they get  
02:57 23 a final order under 238 they are going to come back and say  
02:57 24 they are no longer subject to 236 they are subject to 240 and  
02:57 25 therefore -- 241 -- and therefore you cannot release them

02:57 1 because now they have a final order of removal. Given their  
02:57 2 condition, given their age, given the circumstances here, given  
02:57 3 what I think we have discussed here as kind of the clear legal  
02:57 4 issues, we would ask Your Honor to enter an order releasing  
02:57 5 them until all administrative and judicial proceedings are  
02:57 6 completed.

02:57 7 There is a possibility that they could decide this is  
02:57 8 an aggravated felony and if they do decide it is an aggravated  
02:58 9 felony that is not the end of the process actually.

02:58 10 Because then we have the right to ask for a reasonable  
02:58 11 fear determination with respect to whether or not they fear  
02:58 12 going back, and that can go on for weeks or months.

02:58 13 So they can remain in detention during that entire  
02:58 14 period unless the Court enters an order directing their  
02:58 15 release.

02:58 16 As counsel ably pointed out we could go to the 11th  
02:58 17 Circuit on the 238(B) proceeding and on the withholding  
02:58 18 proceeding and everything else and they could be in detention  
02:58 19 another year.

02:58 20 My concern is -- given the clarity of the statute  
02:58 21 here, they are not aggravated felons, the when released clearly  
02:59 22 applies. And Your Honor has the equitable power to direct they  
02:59 23 be released pending all administrative and judicial review.

02:59 24 I appreciate the efforts to try to mesh these two  
02:59 25 together, the merits and detention, but the truth is the

02:59 1 Supreme Court again and again -- and it started with Demore v.  
02:59 2 Kim, Jennings, and now the Preap case. There is no question  
02:59 3 that there is District Court jurisdiction over detention.

02:59 4 There is no question you as a Federal Judge have the  
02:59 5 authority to enter an order ordering their release and keeping  
02:59 6 their release until there is a final judicial decision on the  
02:59 7 underlying merits.

02:59 8 We would kindly ask you to consider that. I am  
03:00 9 concerned that even if you just release them now we are going  
03:00 10 to be back here in three weeks if they decide there is a final  
03:00 11 order; and they are going to argue there is a final order in a  
03:00 12 different proceeding.

03:00 13 I think by the way if they do that they are wrong, we  
03:00 14 will be fighting over that, but I think you have the equitable  
03:00 15 power to release them; and we kindly request you do that.

03:00 16 THE COURT: All right. I am going to take about five  
03:00 17 minutes and then come out and talk about next steps.

03:00 18 MS. WHERRY: Your Honor, I would just add; to ask for a  
03:00 19 release until everything is finished would fly in the face of  
03:00 20 the statute that provides otherwise in the Immigration law and  
03:01 21 process that takes it up to the 11th Circuit where the 11th  
03:01 22 Circuit will be making the decision.

03:01 23 There is a case that stands for the proposition that  
03:01 24 health care does no render confinement illegal. And so the  
08:43 25 Agency is monitoring their health and the Agency has given them

08:43 1 the benefit of their good health care. So the Agency is very  
03:01 2 concerned about the health of those in their custody.

03:01 3 But to say simply because they are in poor health we  
03:01 4 want you as a District Court to make a decision on releasing  
03:01 5 them until everything is finished exceeds the scope and flies  
03:01 6 in the face of what is Immigration process.

03:02 7 THE COURT: All right. I am going to take five minutes  
03:02 8 and come back and talk about next steps.

03:11 9 COURT IN RECESS

03:11 10 THE COURT: Everyone may be seated. First, in response  
03:11 11 to the matters that were brought up in the briefs, as well as  
03:11 12 what we discussed today as far as jurisdiction goes, there  
03:12 13 seemed to be a little confusion at some point today during our  
03:12 14 discussion.

03:12 15 I want to be clear, I believe that I clearly have  
03:12 16 jurisdiction in this matter pursuant to 2241. The petitioners  
03:12 17 are in custody under the authority of the United States.

03:12 18 They claim that their mandatory detention without an  
03:12 19 individualized bond hearing is not statutorily authorized and  
03:12 20 thus they are being detained in violation of their Federal  
08:49 21 right to due process.

08:49 22 The Government conceded in its response that the Court  
08:49 23 has jurisdiction to review whether the petitioners' detention  
03:12 24 was unlawful; and that is because the Supreme Court, Circuit  
03:13 25 Courts and District Courts have all acknowledged that habeas

08:50 1 petitions are appropriate in challenging the application of  
08:50 2 1226(c). We have all talked about about Demore v. Kim.

03:13 3 Jurisdiction existed to hear the challenge of whether  
03:13 4 1226(c) could Constitutionally authorize detention without  
03:13 5 bail. Jennings versus Rodriguez. The Court had jurisdiction to  
03:13 6 consider a habeas challenge, including the statutory claim of  
03:13 7 Government overreach.

03:13 8 As we discussed here today; most recently Federal  
03:13 9 Courts have had extensive discussion about the when released  
03:13 10 language of 1226(c) and the temporal limitation.

03:14 11 This issue is before the United States Supreme Court  
03:14 12 in the Preap case. And, in fact, the Preap decision was under  
03:14 13 the plain language of the statute.

03:14 14 The Government may detain without a bond hearing only  
03:14 15 those criminal aliens it takes into Immigration custody  
03:14 16 promptly upon their release from triggering criminal custody.

03:14 17 We have all discussed that case is involving the  
03:14 18 temporal parameters of that type of custodial reacquisition as  
03:15 19 it were.

03:15 20 So, I don't think there can be any doubt that I have  
08:52 21 jurisdiction to review a question of law challenging the  
08:52 22 Executive's interpretation of a certain law; that is the St.  
08:52 23 Cyr case I referenced earlier.

03:15 24 And this includes detentions based on error of laws  
03:15 25 stemming from erroneous application of the interpretation of

03:15 1 statutes. The case I have before me is a question of law  
03:15 2 regarding the reach of 8 USC 1226. I have jurisdiction to  
03:15 3 adjudicate this.

03:15 4 I would also refer the parties to -- and I am going to  
03:15 5 mispronounce this horribly -- Guo Xing Song.

03:15 6 So long as an alien does not challenge a final order  
03:15 7 of removal the District Court retains jurisdiction to review  
03:16 8 habeas petitions, including detention.

03:16 9 Any other arguments the Government may have raised  
03:16 10 with regard to my jurisdiction I don't believe are applicable.  
03:16 11 The petitioners do not seek a challenge to Immigration decision  
03:16 12 as to the status of petitioners.

03:16 13 That is not what we are talking about; we are talking  
03:16 14 about their mandatory detention under 1226(c).

03:17 15 And we have been discussing the aggravated felony  
08:57 16 definition and how that impacts the mandatory detention. And  
03:17 17 even as was just discussed, whether or not this then gives rise  
03:17 18 to the lack of a Joseph hearing, the expedited removal.

03:17 19 It is kind of self fulfilling and somewhat circular. I  
03:17 20 am a bit puzzled by the Government's position. Because, again,  
03:18 21 the idea behind this statutory provision and the identification  
09:18 22 of certain felonies, as the Solicitor General acknowledged in  
03:18 23 his brief and has been acknowledged in other cases, is to make  
03:18 24 certain that Immigration takes into custody persons who have  
03:18 25 served their time but have been given guarantees of process

03:18 1 throughout the litigation of their criminal conduct, trials,  
03:18 2 pleas, appeals, custodial periods and then release.

03:18 3 That is all part and parcel of not only the statutory  
03:18 4 scheme but the statutory language and the Congressional intent.

03:19 5 It seems the Government is making the argument that  
03:19 6 all of that can be set aside with a bald determination it is an  
03:19 7 aggravated felony.

03:19 8 I think there are significant problems with that; not  
03:19 9 the least of which is the fact that as aggravated felony is  
03:19 10 defined in 1101(a)(4)(3) it contemplates, yet again, just as  
03:19 11 1226(c) does, that with regard to an offense in violation of  
03:19 12 the law of a foreign country for which the term of imprisonment  
03:19 13 was completed within the previous 15 years.

03:19 14 Statutory construction, clear express language, that  
03:19 15 does not apply to the conviction at issue here.

03:20 16 But even if the Government goes for a more strained  
03:20 17 reading and wants to talk about whether it is a judgment  
03:20 18 involving fraud or deceit, there has to be that discussion of  
03:20 19 the Peculation statute.

03:20 20 Where there is an abuse of money and whether or not  
03:20 21 that qualifies. There was the discussion of whether or not the  
03:20 22 loss has been established relative to the Isaias Brothers.

03:20 23 There is a lot of discussion in the 326 page order of  
03:20 24 monies. But there was no direct connection between the  
03:20 25 activities and the petitioners.

03:21 1 I think, as petitioner points out, they are only named  
03:21 2 a few times. By my count the Magna Carta was cited at least  
03:21 3 three times.

03:21 4 Whether or not it's been vacated or is in Cassation,  
03:21 5 these are all very troubling issues. And I don't think they  
03:21 6 give the Government a clear basis for an Immigration officer to  
08:59 7 unilaterally determine that an aggravated felony has been in  
03:21 8 fact established.

03:21 9 But I am not taking that up. I am going to take up the  
03:22 10 issue of whether 1226(c) applies. And, again, the explicit  
03:22 11 statutory text says the Attorney General shall take into  
03:22 12 custody any alien when the alien is released for the same  
03:22 13 offenses.

03:22 14 The word released is not ambiguous. There is no  
03:22 15 requirement I give Chevron Deference to any BIA determination.  
03:22 16 All the practitioners here know the first question in Chevron  
03:22 17 is whether there is an ambiguity to the statutory provision.

03:22 18 There is not here.

03:22 19 I mentioned the Olmos case, Tenth Circuit case, which  
03:23 20 actually is in contradiction with Preap. It is one of the  
03:23 21 Circuit cases being discussed.

03:23 22 But even then that Court says physical custody is  
03:23 23 required to trigger 1226; otherwise how could the alien be, in  
03:23 24 quotes, the Court said released. So I think that physical  
03:23 25 custody of some kind needs to trigger the mandatory detention



09:01 1 and I need not look to any interpretation to determine that is  
03:23 2 the case.

03:23 3 I would note, however, that there is no case that I  
03:23 4 have found, the Government has not cited and I have not found  
03:23 5 any case, where 1226(c) applied even where the non citizen had  
03:24 6 never been in custody.

03:24 7 Again, the Preap case and the cases cited by the  
03:24 8 Government, focuses on the when released language, the temporal  
09:01 9 dimension, the starting point for when Homeland Security can  
03:24 10 take a qualifying alien into Immigration custody.

03:24 11 All of these cases, Olmos, and all of the cases I have  
03:24 12 reviewed assume that the non citizen was subjected to some  
03:24 13 custody.

03:24 14 And even if there were to be a Chevron analysis the  
09:03 15 Bureau of Immigration Appeals decisions support custody  
09:03 16 requirements.

03:24 17 Matter of West, 22 Immigration and Naturalization  
03:25 18 decision 1405. The Matter of Kotliar, 24 Immigration and  
03:25 19 Naturalization decision 124. The term release required some  
03:25 20 custody.

03:25 21 The Rojas matter, which was cited as something the  
03:25 22 Court needed to give Chevron deference to, again did not  
03:25 23 involve the fact that there had been no custody; it had to do  
03:25 24 with when the release was. I think it was two days after he was  
03:25 25 released from custody.

03:25 1 I might add with Rojas there is a dissent and there is  
09:04 2 a District Court opinion that believes even with regard to the  
09:04 3 temporal dimension Rojas should be afforded Chevron deference.

03:25 4 All that being said, there has been no custody here,  
03:25 5 and applying the statute in those circumstances would be  
03:25 6 contrary to unambiguous language and all authority providing  
03:26 7 it.

03:26 8 I reject the argument that the when released clause  
03:26 9 can be rejected in making my analysis. Even in Preap there is  
03:26 10 an underlying assumption that there is some criminal custody.

03:26 11 The discussion the Solicitor General makes about  
03:26 12 commodity between Federal and State systems. There is some  
03:26 13 custody even if the gap of time is under some scrutiny and  
03:26 14 examination.

03:26 15 And really to adopt the Government's position I have  
03:26 16 to ignore, as I said, the when released -- what the Solicitor  
03:26 17 General calls the flush clause -- in its entirety.

03:26 18 And I have to ignore the categorization of what types  
09:08 19 of aggravated felonies are to be used in this instance; a  
03:27 20 simple matter of statutory construction.

03:27 21 And that language could have been omitted if Congress  
03:27 22 was just identifying the who; but instead it is there. And I  
03:27 23 agree with the Ninth Circuit in Preap that this language was  
03:27 24 deliberately selected by Congress; meaning just what it says.

03:27 25

03:27 1 An alien who committed a covered offense and was  
03:27 2 taken into Immigration custody when released.

03:27 3 The Preap Court cited Castaneda, First Circuit case,  
03:27 4 Saysana versus Gillen, another First Circuit case.

03:27 5 So, I reject the Government's argument because I think  
03:27 6 it is asking the Court to rewrite clear statutory text and to  
03:28 7 ignore the plain text.

03:28 8 Because I am focused on the release requirement, the  
03:28 9 custodial, I don't really need to get into the when; what the  
03:28 10 Preap Court is grappling with.

03:28 11 I do want to note that clause, the when released, as  
03:28 12 counsel knows has been the subject of extensive litigation.

03:28 13 And two Circuits, the Preap Court and the Castaneda  
03:28 14 Court, say that mandatory detention must begin immediately or  
03:28 15 in a timely fashion.

03:28 16 I think Justice Sotomayor said; why would that  
03:28 17 language have been included in the statute at all if it had not  
03:28 18 meant what it said?

03:28 19 There was, in fact, a two year transitional period  
03:29 20 factored in so that language would have meaning.

03:29 21 And I don't think, as the Rojas concurrence seemed to  
03:29 22 suggest, that Congress was deliberately crafting a statutory  
03:29 23 scheme that posited the Service would not have to perform.

03:29 24 Basically it does not seem likely, this concurring  
03:29 25 Judge said, that Congress would have based the success of its

09:10 1 scheme on requirement that the Service perform at a very high  
09:11 2 level of efficiency. I think that that is exactly what Congress  
03:29 3 wanted and what the Courts are required to enforce.

03:30 4 Even if I were not looking at the custody requirement  
03:30 5 and I was looking at the when released, the statute still would  
03:30 6 not be being applied I think appropriately and in violation of  
03:30 7 the Constitution.

03:30 8 Because the Government here, as in those other cases,  
03:30 9 waited years after the conviction to bring the petitioners into  
03:30 10 Immigration custody.

03:30 11 I think the Government in this instance abrogated its  
03:30 12 duties to bring the petitioners into custody; and did so while  
03:30 13 in another office in another part of the Executive denying  
03:30 14 multiple requests for extradition.

03:30 15 There can be no suggestion that was discussed about a  
03:30 16 person who is here and the Government does not know about the  
03:30 17 person or the person's background.

03:30 18 The Government at every level knew about the Isaias  
03:31 19 Brothers and yet did nothing. So either under custody or time;  
03:31 20 I don't think 1226 applies, and I don't think the mandatory  
03:31 21 detention is appropriate in this instance.

03:31 22 And I am finding that it is not, and it is in  
03:31 23 violation of the law.

03:31 24 I understand the argument the Government is making  
03:31 25 about the expedited removal, but I don't think that relieves

03:31 1 the Court of identifying and redressing Constitutional  
09:12 2 infirmity. And I think the idea that somehow the compressed  
03:32 3 time actually provides the process which the denial of a bond  
03:32 4 hearing and the denial of a Joseph hearing and the position  
03:32 5 that the Court has no jurisdiction; I think just flies in the  
03:32 6 face of everything I have considered and so I reject that.

03:32 7 Now, having ruled the petitioners are not subject to  
03:32 8 mandatory detention I have to consider relief. I appreciate  
03:32 9 everything you have said, Mr. Kurzban, but I do not think it is  
03:32 10 appropriate for this Court to act as a bond court in this  
03:33 11 instance.

03:33 12 I understand your concern for your clients' health; I  
03:33 13 do think the Service has addressed that. I will make that a  
03:33 14 part of a continued monitoring.

03:33 15 But I do not believe it is my place to substitute  
03:33 16 myself for the Immigration Judge, and I must give them due  
03:33 17 consideration and deference.

09:13 18 So I am going to order that the petitioners be  
09:13 19 provided a Constitutionally adequate bond hearing. Within  
03:33 20 seven days of today's date they are to have that bond hearing.

03:33 21 I am going to order that while this litigation is  
03:33 22 pending -- I don't know what remains pending quite frankly --  
03:33 23 while it does that I be advised as to the medical condition of  
03:34 24 the petitioners.

03:34 25

03:34 1 That they are receiving the proper medication, that  
03:34 2 adjustments are being made, and they are being well monitored.

03:34 3 So, that's my ruling. Does anyone have any questions?  
03:34 4 And, Mr. Tein, you can ask a question; even though you said you  
03:34 5 would not say a word.

03:34 6 MR. TEIN: I want to thank you, Judge, and live up to  
03:34 7 my promise.

03:34 8 THE COURT: Mr. Kurzban, Ms. Osberg.

03:34 9 MR. KURZBAN: The one thing I would ask is that Your  
03:34 10 Honor keep the case open in the event that we wind up back  
03:35 11 here.

03:35 12 THE COURT: I don't know that there is anything left.  
03:35 13 There was that interlineation which seemed to ask that I make a  
03:35 14 finding about the entire statutory scheme's Constitutionality.

03:35 15 I am not sure if there is an amended complaint or  
03:35 16 whether -- let me say this; I believe that what we have done  
03:35 17 here today concludes what needs to be done.

03:36 18 If there are other matters that come up then they will  
03:36 19 have to be addressed; but I don't think there is any ongoing  
03:36 20 litigation.

03:36 21 I am not going to close this out. The bond hearing is  
03:36 22 to be held within seven days so I won't close it out today.

03:36 23 Perhaps that is something the parties could discuss.

03:36 24 But absent some real claim I can't just act as kind of  
03:36 25 a duty post.

03:36 1 MR. KURZBAN: There is always a possibility the  
03:36 2 Government could agree to a bond.

03:37 3 THE COURT: I would encourage, as I do any group of  
03:37 4 litigants, that there be communication about matters that you  
03:37 5 can agree to.

03:37 6 The ultimate issue as to status I don't know that that  
03:37 7 is capable of being resolved. Perhaps there is something the  
03:37 8 parties can come to an agreement on; but I will leave that up  
03:37 9 to you.

03:37 10 All right. Is there anything further on behalf of  
03:37 11 either of the parties?

03:37 12 MS. WHERRY: I was going to echo what you said; I was  
03:37 13 wondering what was left over.

03:37 14 THE COURT: All right. Unless I hear otherwise about  
03:37 15 the pendency of a discrete claim that has not been addressed  
03:37 16 today -- as I said I will keep the case open until end of next  
03:37 17 week -- I will consider that we have resolved our issues.

03:37 18 I know this is a significant matter for both sides and  
03:38 19 I know we were on a very compressed timeline, so I appreciate  
03:38 20 the efforts by everyone to respond and to give me all the  
03:38 21 information that I required.

03:38 22 So my thanks to all involved, and we are adjourned.

23 HEARING CONCLUDED.

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C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

/S/PATRICIA SANDERS

\_\_\_\_\_  
DATE FILED

\_\_\_\_\_  
PATRICIA SANDERS, RPR



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