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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MAHMOUD KHALIL,

Plaintiffs,

vs.

CIVIL ACTION NUMBER:

2:25-cv-1963-MEF

Deputy Director William P.
Joyce, in his official
capacity as Acting Field
Office Director of New York,
Immigration and Customs
Enforcement, et al.,

Motion Hearing

Defendants.

**Frank R. Lautenberg Post Office and Courthouse
Two Federal Square
Newark, New Jersey 07102
March 28, 2025**

B E F O R E:

**THE HONORABLE MICHAEL E. FARBIARZ,
UNITED STATES DISTRICT COURT JUDGE**

A P P E A R A N C E S:

CENTER FOR CONSTITUTIONAL RIGHTS
BY: BAHER AZMY, ESQ.
666 Broadway
7th Floor
New York, New York 10012

Lisa Larsen, RPR, RMR, CRR, FCRR
Official Court Reporter
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**Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.**

1 **A P P E A R A N C E S**: (Cont'd.)

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4 125 Broad Street
5 19th Floor
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7 AMERICAN CIVIL LIBERTIES UNION FOUNDATION
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9 ESHA BHANDARI, ESQ.
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12 IMMIGRATION RIGHTS CLINIC
13 BY: ALINA DAS, ESQ.
14 NYU School of Law
15 245 Sullivan Street
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17 New York, New York 10012

18 MAIN STREET LEGAL SERVICES
19 CLEAR PROJECT
20 BY: RAMZI KASSEM, ESQ.
21 CUNY School of Law
22 2 Court Square
23 Long Island City, New York 11101

24 appeared on behalf of Petitioner;

25 UNITED STATES DEPARTMENT OF JUSTICE, CIVIL DIVISION
BY: AUGUST E. FLENTJE, ACTING DIRECTOR
DHRUMAN Y. SAMPAT, SENIOR LITIGATION COUNSEL
P.O. Box 878
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Washington, D.C. 20044

appeared on behalf of Respondents.

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1 (PROCEEDINGS held in open court before the
2 HONORABLE MICHAEL E. FARBIARZ, United States
3 District Court Judge, on March 28, 2025.)

4 THE DEPUTY CLERK: All rise.

5 THE COURT: Folks, good morning. Let's all please have
6 a seat.

7 We are here for oral argument in *Mahmoud Khalil v.*
8 *Trump, et al.*

9 Appearances, please, for the record, beginning with the
10 Petitioner, Khalil.

11 MR. AZMY: Good morning, Your Honor. Baher Azmy,
12 A-Z-M-Y, for the Center For Constitutional Rights, for
13 Petitioner.

14 THE COURT: Mr. Azmy, stay there for just one moment,
15 if you might. I see a number of people here.

16 Are you going to be doing the talking this morning?

17 MR. AZMY: I will be primarily dealing with the venue
18 issue, but there are other people here, should you have other
19 questions.

20 THE COURT: I like how you worked in that it's a venue
21 issue, your theory; and I'm sure the United States will call
22 it a jurisdictional issue, but there we have it.

23 "Mr. Azmy" or "Mr. Azmy"?

24 MR. AZMY: Mr. Azmy.

25 THE COURT: Mr. Azmy. Thank you very much.

1 MS. DAS: Hello, Your Honor. My name is Alina Das.
2 I'm with Washington Square Legal Services, the NYU Immigrants
3 Rights Clinic. I'm prepared to address any questions
4 Your Honor may have about our bail application.

5 THE COURT: Thank you very much.

6 MR. KASSEM: Good morning, Your Honor. Ramzi Kassem
7 with the CLEAR Project, Main Street Legal Services, and I'm
8 prepared to address any questions you may have on the motion
9 to compel.

10 THE COURT: Thank you very much.

11 MS. BELSHER: Good morning, Your Honor. Amy Belsher
12 from the New York Civil Liberties Union on behalf of the
13 Petitioner. I'm here to address any questions Your Honor may
14 have about the motion for preliminary injunction.

15 THE COURT: Thank you.

16 MS. BHANDARI: Good morning, Your Honor. Esha Bhandari
17 from the American Civil Liberties Union, and I am not
18 intending to speak.

19 THE COURT: Good morning.

20 MR. JADWAT: Good morning, Your Honor. Omar Jadwat,
21 ACLU. Also not planning to speak.

22 THE COURT: Good morning.

23 All right, let's go to the Respondents.

24 MR. FLENTJE: August Flentje with the Justice
25 Department.

1 THE COURT: Are you going to be speaking, sir?

2 MR. FLENTJE: Yes.

3 THE COURT: Say your last name a little bit more
4 loudly, if you don't mind.

5 MR. FLENTJE: Sure. It's Flentje. It rhymes with
6 "Benji."

7 THE COURT: Thank you very much, Mr. Flentje.

8 MR. SAMPAT: Dhruman Sampat on behalf of the
9 United States.

10 THE COURT: Are you planning on speaking, or is it all
11 going to be Mr. Flentje?

12 MR. SAMPAT: If Mr. Flentje has questions and needs
13 assistance, I'm available.

14 THE COURT: Well, look, in terms of what is laid out
15 briefly and implicitly by the Petitioner with respect to the
16 various motions that are pending, got it. I appreciate that
17 of course in a case like this different people are more
18 focused on different things.

19 But we're going to be focused today on what the text
20 order said, which is to say the motion to transfer, to
21 dismiss, there's different arguments as to characterization,
22 venue or jurisdiction.

23 So we will be focused on you, Mr. Azmy.

24 And then, Mr. Flentje, on yourself.

25 It's the Respondent's motion so, Mr. Flentje, I'll hear

1 from you. And why don't you speak from the podium, if you
2 might.

3 MR. FLENTJE: Of course. Thank you. I'm August
4 Flentje with the Department of Justice, and I am here on
5 behalf of the United States.

6 I would urge this Court to apply established principles
7 to the habeas claim before it and dismiss or transfer to the
8 location of Mr. Khalil's custody.

9 This is what the Supreme Court decision in *Padilla*
10 calls for. It's black letter law, and there's no reason to
11 diverge from that in this case.

12 Indeed, when Judge Furman and SDNY enacted it, it
13 really made no good sense to transfer the case to this Court
14 where Mr. Khalil is not detained and thereby inject
15 jurisdictional uncertainty into the case.

16 The Supreme Court ruled in *Padilla*, jurisdiction lies
17 in only one district, the district of confinement. The
18 court --

19 THE COURT: Mr. Flentje, can I pause you for a second.

20 So there are -- in terms of localizing where habeas
21 cases go, there are obviously two rules. There's the district
22 of confinement rule and there's the immediate custodian rule.

23 You mentioned the Supreme Court. Obviously Chief
24 Justice Renquist's opinion in *Padilla* is the one you're
25 alluding to. Chief Justice Renquist there points out in most

1 cases the district of confinement rule and the immediate
2 custodian rule point in the same direction.

3 I'm trying to understand in my mind what role, if any,
4 an immediate custodian argument plays for you. And let me put
5 it this way:

6 I appreciate that your argument is that this case
7 should be dismissed and then it can be re-filed in Louisiana,
8 because that's where the Petitioner is. If I were to think
9 that, there would be a problem in terms of the district of
10 confinement and there also would be a problem, one might say,
11 in terms of the immediate custodian, because the warden of the
12 facility there is not named here.

13 But if I were to conclude that, for whatever reason,
14 the district of confinement in New Jersey is just fine, would
15 there still be an immediate custodian problem, from your
16 perspective?

17 MR. FLENTJE: We do think that is a fundamental problem
18 and why, in spite of the transfer statute, I think it's
19 important to look at the facts at that time. You know, habeas
20 works on the custodian. It is the power of Your Honor to
21 bring the custodian to account for the custody, the legality
22 of the custody.

23 And the Supreme Court was very clear in *Padilla* it's
24 the immediate custodian; it's not some high-level supervisory
25 official. You don't treat the United States --

1 THE COURT: I hear all that. I got it. But, look,
2 let's just get to it.

3 On New Jersey, the Petitioner is saying this is an *Endo*
4 case. So if this is an *Endo* case, there's a slightly
5 different role for the custodian. That's what *Endo* itself
6 says; that's what Chief Justice Renquist says.

7 So what I'm trying to understand from you is, let's
8 say -- I haven't decided but let's say I go the Petitioner's
9 way and decide that because this is an *Endo* case it's rightly
10 in New Jersey, what I'm asking is, if it's rightly in
11 New Jersey, do you still mean to have a problem with the
12 currently listed respondents?

13 Is there something wrong with any of them in terms of
14 the immediate or legal custodian rule if I decide, under *Endo*
15 or some other basis, that this case is rightly in New Jersey?

16 MR. FLENTJE: Yes, because the immediate custodian is
17 not named in the suit, and we don't think it's an *Endo* case
18 because *Endo* -- the case was properly filed against the
19 immediate custodian.

20 THE COURT: I completely understand your view. I
21 understand the words you're working from, right. There's a
22 couple words in Chief Justice Renquist's opinion, "properly
23 filed." And Mr. Azmy wants to say what he wants to say and
24 you want to say what you want to say about these words.

25 But my supposition is, if we hypothesize that this is

1 an *Endo* case that is properly in New Jersey, just on that
2 supposition, if that's our supposition, is there still a
3 problem with these listed Respondents from your perspective?
4 Is there still a problem with the custodial rules?

5 MR. FLENTJE: Absolutely.

6 THE COURT: Why?

7 MR. FLENTJE: Because the case was filed --

8 THE COURT: Just tell me why now.

9 MR. FLENTJE: Because the case was filed against the
10 custodian in New York. So if it was filed here against a
11 custodian in New York, it could not have been brought in that
12 way.

13 THE COURT: So who should have been the custodian -- if
14 this is an *Endo* case, which is to say -- I appreciate it's
15 not your position, but I'm trying -- you're invoking two
16 arguments, and I'm trying to understand when one of them has
17 independent analytic force.

18 If this is an *Endo* case and this is a case that,
19 because of *Endo*, ends up here in New Jersey, who, in your
20 judgment, should have been the custodian named?

21 MR. FLENTJE: I think the problem there is timing
22 because the case was filed after Mr. Khalil had left New York,
23 so it can't be an *Endo* case.

24 THE COURT: But in that sense you're fighting my
25 hypothetical, because I'm saying granted it's an *Endo* case and

1 you're saying but it can't be an *Endo* case. I appreciate
2 that's your position. I get it.

3 But I want to understand if it's an *Endo* case, who
4 should have been the named custodian, in your judgment?

5 MR. FLENTJE: When the case was filed? Is that your
6 question?

7 THE COURT: Yeah.

8 MR. FLENTJE: I think when the case was filed
9 Mr. Khalil was in New Jersey, so it would have been the
10 custodian at the Elizabeth detention center.

11 THE COURT: Right. But you understand in an *Endo* case
12 the immediate custodian rule is a little shifted. It's the
13 legal custodian, i.e., the person who has the supervisory
14 power to tell the immediate custodian what to do.

15 I assume that's the Secretary of Homeland Security
16 here. Am I right?

17 MR. FLENTJE: Well, that would be extraordinary to rule
18 in the face of *Padilla* that you can then call the supervisor
19 to account. *Endo* talks about --

20 THE COURT: Again, I completely understand that we're
21 having -- there's two different categories of analysis.
22 There's the *Padilla* category and the *Endo* category.

23 I'm asking you to speak with me about how this works if
24 we are in an *Endo* category.

25 MR. FLENTJE: Okay.

1 THE COURT: It doesn't mean we are. I appreciate your
2 perspective is that we're in *Padilla*. But the reason I'm not
3 asking you about that is, if this is a *Padilla* case, there's a
4 certain set of issues, and I think I have those pretty well in
5 hand from the papers.

6 If this is an *Endo* case, there's a separate set of
7 issues, which are a little bit less on the face of the page.
8 That's all.

9 So in terms of *Endo*, *Endo* is specifically about naming
10 a respondent, someone who is not the immediate custodian. And
11 what I'm asking is that if this were an *Endo* case, I trust you
12 would agree that the Secretary of Homeland Security has legal
13 authority over the ICE custodian in Louisiana, such that she
14 is an appropriate -- would be an appropriate respondent.

15 Do you agree with that?

16 MR. FLENTJE: No.

17 THE COURT: Why?

18 MR. FLENTJE: Not an appropriate respondent.

19 THE COURT: Why?

20 MR. FLENTJE: *Endo* does not say anything different.
21 *Endo* was filed against the proper immediate custodian when the
22 case was filed. I think the way I think about it, and I think
23 the way it was described is, the Court retains that authority
24 over that custodian in spite of the transfer.

25 Habeas is: I'm calling you for account and you can't

1 then transfer the person and not be called for account.

2 That's not possible here, because they never sued the proper
3 custodian who could be called to account for that custody.

4 I guess I'm still fighting the hypo, I guess.

5 THE COURT: You are. That's the problem. Look, I
6 appreciate where you're coming from. The felt danger of not
7 fighting the hypo is you worry that I have forgotten that
8 we're in the land of a hypo. I haven't forgotten.

9 I understand what your position is, but I am -- there
10 are two separate rules here. There's the district of
11 confinement rule and there's the immediate custodian rule.
12 They work differently in *Padilla* versus *Endo* situations.

13 I'm just not understanding from you here -- look, I can
14 think this through, but I want to, of course, get the benefit
15 of your thoughts and also understand your position.

16 What I'm not understanding fundamentally is, if I take
17 the step of deciding this is an *Endo* case, understanding that
18 you don't agree, do you have a custodian problem? You're
19 saying yes, but you're telling me the reason yes is because of
20 *Padilla*, which is something else entirely.

21 MR. FLENTJE: I don't think *Endo* suggested that the
22 proper custodian in that situation was the Secretary of
23 Defense or whatever Cabinet-level official was ultimately
24 responsible for the entire system that was set up there.

25 Instead, it said that there was jurisdiction over the

1 immediate custodian and then the person was moved out of the
2 district.

3 THE COURT: Yes, but --

4 MR. FLENTJE: I think --

5 THE COURT: I don't think that's quite right. What
6 happens in *Endo* is the California court has jurisdiction.
7 Ms. Endo is moved to Utah.

8 And what the Supreme Court says is, on the merits the
9 writ is granted. And on the process question, one of the
10 supervisory officials over the relocation authority, who is an
11 assistant secretary sitting in San Francisco, is someone as to
12 whom the Court retains jurisdiction.

13 So it's true that the person named is not the
14 secretary -- call it the secretary of war at the time. And
15 it's also, by the way, not a military function -- that's a
16 civil function there -- but one way or another, it's a senior
17 supervisory official.

18 I'm not sure I understand the distinction you're
19 drawing between the senior supervisory official the Supreme
20 Court is talking about in 1944 and the Secretary of Homeland
21 Security here.

22 MR. FLENTJE: I guess I understand where you're coming
23 from. I think we would resist that, and we would say that to
24 the extent that is the way *Endo* operates, it did not survive
25 *Padilla*. Again, *Padilla* talks about a narrow exception where

1 it's properly filed against the immediate custodian, and then
2 the case can continue.

3 I think that's kind of as broad as it goes and I think
4 *Padilla* is pretty definitive in rejecting the notion that you
5 can file suit against, quote, the Attorney General or some
6 other remote supervisory official. End quote.

7 THE COURT: Right. That's exactly what *Padilla* says.
8 But *Padilla* carves out the *Endo* situation and speaks there
9 about it not being the immediate custodian but says it's the
10 legal custodian, which is how *Endo* can survive with *Padilla*.

11 Let me ask you a different question. Obviously, habeas
12 is different in that this is a context in which I have merely
13 territorial jurisdiction. I don't have long-arm power as a
14 U.S. district court generally does in civil cases. I trust
15 you would concede that the Secretary of Homeland Security,
16 that I have territorial jurisdiction over her.

17 MR. FLENTJE: I would probably have to go back on that
18 but probably. Probably.

19 THE COURT: Okay. All right.

20 What is the nature of the facility in Louisiana? Is it
21 an ICE facility, or is it a facility where ICE has contracted
22 with a private entity or state entity?

23 MR. FLENTJE: I think it's a contract facility.

24 MR. SAMPAT: Yes, I believe it's a contract facility
25 but we can definitely confirm that for Your Honor.

1 THE COURT: But your position would be that the
2 appropriate -- so we're outside of *Endo-land*, but if we're in
3 *Padilla-land*, in your understanding, the custodian would be
4 not some sort of private official of course but it would,
5 rather, be the ICE official who has operational control over
6 that facility.

7 MR. FLENTJE: I think that's right. It might be some
8 complicated nuances there, but we have plenty of habeas cases
9 where that works.

10 THE COURT: And I want to ask you, there's a reference
11 in a footnote of your opponent's brief that says: Gee, let us
12 amend the petition to add a warden of the Elizabeth detention
13 facility.

14 Do you object to that, or do you say: Who cares if
15 they do it? It's immaterial anyway.

16 MR. FLENTJE: We would say it's immaterial at this
17 point because the custodian is no longer that person.

18 THE COURT: The first declaration from Mr. Joyce --
19 there have been a set of declarations from him. The first
20 declaration from Mr. Joyce that was filed in New York City, it
21 said something about Mr. Joyce having supervisory
22 responsibility in a certain AOR that included the greater
23 New York City area.

24 Does that greater New York City area include Elizabeth
25 and Newark?

1 MR. FLENTJE: I don't believe so, no.

2 MR. SAMPAT: No, I don't believe so, Your Honor.

3 THE COURT: Hang on for a second. What's the answer?

4 MR. SAMPAT: I don't believe so, Your Honor, but I need
5 to look at the declaration again.

6 THE COURT: The declaration doesn't say more, I think,
7 than what I just said, so I --

8 MR. FLENTJE: We could certainly find out.

9 THE COURT: I'm happy to take a representation from
10 counsel on it, but I also appreciate you being careful in
11 building in some wiggle room and saying you don't believe so.

12 Why don't you write me a one-sentence letter after this
13 proceeding just to let me know what the answer on that is. I
14 respect the desire for accuracy that you've built in with the
15 "I don't believe so," and I want to honor that by having you
16 send me a letter.

17 MR. SAMPAT: Sure. Just to clarify, Your Honor, you
18 want to know the area of responsibility that Mr. Joyce --

19 THE COURT: Yeah. Mr. Joyce's declaration says he is
20 responsible for the greater New York City area, and some
21 people, especially New Yorkers, think this is the greater
22 New York City area. I might disagree, but I don't know what
23 that declaration -- what it means.

24 Please continue. I didn't mean to cut you off. I want
25 to give you space.

1 MR. FLENTJE: Well, I have answered most of the
2 questions I thought we would discuss.

3 I do want to say that we don't think the venue transfer
4 statute does the work that plaintiffs are putting on it and
5 that Judge Furman did.

6 Again, it allows transfer to the district where the
7 case, quote, could have been brought but a case against -- as
8 a technical matter, a case against the warden in New York,
9 unless we could be wrong about what we just talked about,
10 could not have been brought in New Jersey.

11 So as a technical matter, the case couldn't have been
12 brought here, and then I think it goes to the power of the
13 Court, which we discussed a little bit.

14 The transfer court -- this Court really can't do
15 anything over the warden. The warden is in Louisiana. And
16 according to the habeas statute -- which specifies that you
17 would issue an Order to Show Cause directed at the person
18 having custody of the person detained, so that just wouldn't
19 work in this context.

20 My next point was that this is not an *Endo* situation.

21 THE COURT: The statute that you just read from, I
22 think you're reading from 2241.

23 MR. FLENTJE: I think that's 2243.

24 THE COURT: 2243. That is about who the respondent is.
25 The last couple words of that statute, it refers to the

1 custodian, if known.

2 MR. FLENTJE: That's 2242.

3 THE COURT: Right. What you are doing there is you're
4 folding together the application and the writ -- and the
5 remedy, excuse me. And we're in a zone that is pre-remedial,
6 just figuring out who -- the statute itself that Congress has
7 passed says "if known."

8 We're in a situation where there's at least some
9 argument that it was tricky to know who the correct respondent
10 was because of what happened on the evening that is in play.

11 What do you do with those words in the statute?

12 MR. FLENTJE: I think if -- I think that doesn't get
13 you past the immediate custodian and district of confinement
14 problem. If, again, they filed in New York, named the
15 custodian there, which was not the right custodian, I think
16 you could file in New York and say, "I don't know who the
17 custodian is in New York but here is my habeas writ," and if
18 the person was detained in New York, I think that would be
19 fine. There would not be a problem with the writ.

20 So I think that's what that "if known" means. You
21 don't need to know the custodian but you do need to file in
22 the district where the custody is happening.

23 As you said, there's two parts with *Padilla*. There's
24 the immediate custodian and then there's the district of
25 confinement. So both problems exist in the original case as

1 it was filed, and we think sending the case here kind of
2 maintains that jurisdictional flaw and would encourage the
3 Court to --

4 THE COURT: But it sounds like -- your answer to my
5 question I take to be essentially that the meaning of "if
6 known" is, if you don't know, you have to file in the right
7 district. That's the district of confinement rule. And then
8 you can fix it later.

9 MR. FLENTJE: Not so much fix it, but, yeah, you would
10 identify the custodian, who you would have named as, say,
11 warden.

12 THE COURT: Right. That's what I'm struggling with
13 here because the hypothetical that we have spoken about is, if
14 I hypothetically decide that this case is properly in
15 New Jersey, then I'm trying to figure out what to do about the
16 custodian and the words "if any."

17 I think what you've all but just told me is the answer
18 to my question, which is if I decide this case for whatever
19 reason is properly in New Jersey, then one would think, based
20 on the logic of what you just said, that the custodian issue
21 either disappears or is just quickly fixable in a ministerial
22 way.

23 MR. FLENTJE: I don't think that's quite right, given
24 the history; but I think we debated that on *Endo*, does *Endo*
25 apply, and we don't think it does.

1 We would say when they filed, the custodian was not in
2 this district so you could not have fixed it by just naming
3 the correct custodian because -- excuse me. I'm saying that
4 backwards.

5 When the case was filed, the custodian identified was
6 not in this district so you can't just fix that by changing
7 the title of the petitioner.

8 I think our view is that you have to, kind of -- for
9 jurisdictional certainty, the case belongs in Louisiana. I
10 think that's our bottom-line position. We think *Padilla* --
11 that's the main point of *Padilla*.

12 I want to stress that *Padilla* involved a dispute over
13 the proper district to file a case in, and it took two years
14 to resolve that.

15 Here, we have been very clear about where Mr. Khalil is
16 and the proper district. There's no disagreement that they
17 couldn't seek habeas relief in the Western District of
18 Louisiana. Both parties agree to that.

19 I think if you're considering things like law of the
20 case and --

21 THE COURT: Let me pause you for a second. I
22 appreciate the argument from jurisdictional clarity. I
23 get it. And what I would say is that's an argument that's
24 well directed to the people who make these rules.

25 Chief Justice Renquist wanted crisp rules in *Padilla*

1 and he formulated crisp rules. I don't make rules. I apply
2 them. That's it.

3 And so the fact that every case that comes in front of
4 me someone says something and someone says something else; and
5 if that were enough to say, well, the waters are muddy so I
6 better err on the side of one position, I wouldn't be choosing
7 between positions.

8 The idea that clarity is imported in the law is an
9 argument directed to those who make it, not to those who apply
10 it. I'm gonna try and apply the law as it sits as best I can,
11 by my likes.

12 The suggestion you make is that the fact that there is
13 any disagreement weighs in your favor, and litigants could
14 make that argument every day to me and it's not a winner,
15 because the reason I have a litigation is that people are
16 disagreeing.

17 MR. FLENTJE: Your Honor, that's totally fair. I was
18 only entering that point to the law of the case discretionary
19 arguments that plaintiff made that say even if you don't want
20 to look at the issue or you might think differently than
21 Judge Furman, there's a principle that you follow that ruling
22 in any event.

23 I would say that, in exercising that discretion, I
24 think it's important to think about the fact that this is a
25 jurisdictional flaw, in the Government's view, and that will

1 persist. And if there's law of the case in this Court, it
2 would not be present in the Court of Appeals.

3 And on to the clarity point, I think *Padilla* tried to
4 make this crystal clear. File in the district of confinement.
5 That's as clear as day.

6 We think that the non-clarity is happening because the
7 initial case was not filed in the district of confinement.
8 Then it was transferred to a place that was not the district
9 of confinement. Mr. Khalil was only here for a few hours.

10 And so Petitioners resist filing in the Western
11 District of Louisiana, I can understand it. They have
12 reasons. But I think that the injection of unclarity and how
13 the rules apply is coming from that, rather than from our
14 side.

15 We're trying to explain the clear rules. The safest
16 route is to send it to Louisiana where everyone agrees is the
17 proper habeas case to be heard.

18 We're not gonna talk about it today, but we think there
19 are real fundamental flaws with the habeas theory they have.
20 In fact, the Third Circuit law is quite powerful on that, in
21 favor of not hearing claims like this in habeas. But that
22 comes down the road, and I heard you say you didn't want to
23 talk about it.

24 THE COURT: I peeked ahead a little bit, but go on.

25 MR. FLENTJE: What?

1 THE COURT: I've peeked ahead a little bit.

2 MR. FLENTJE: It's not all fully briefed, so I guess we
3 just stress like we think the clearest route, the route called
4 for by *Padilla*, the route called for because the *Endo*
5 exception is a limited one and it doesn't apply here, we
6 dispute that it applies, is to have the case heard in
7 Louisiana.

8 THE COURT: I appreciate it. I said I peeked ahead.
9 What I mean is simply I have been attempting, as best I can,
10 to keep up with the briefs in realtime rather than wait for
11 them to be fully submitted, as you mentioned, in part.
12 Because if I decide this case goes forward here, I understand
13 there is a desire on the part of both sides to move quickly.

14 MR. FLENTJE: Absolutely.

15 THE COURT: Thank you very much.
16 Anything else you want to add?

17 MR. FLENTJE: No.

18 THE COURT: Mr. Azmy, over to you.

19 MR. AZMY: Thank you, Your Honor.

20 I eventually want to talk about how radical the
21 Government's novel jurisdictional rule is, but just to start
22 with the focus of your inquiry around who the proper custodian
23 is, the Government said that *Endo* doesn't survive *Padilla*.

24 I'm reading from 441 of *Padilla*. (Reading.)

25 Thus, *Endo* stands for the important but limited

1 proposition when the Government moves a habeas
2 Petitioner, the district court retains
3 jurisdiction and may direct the writ to any
4 respondent within its jurisdiction who has legal
5 authority to effectuate the prisoner's release.

6 That's the Secretary of Homeland Security. I
7 understood them to basically concede that if we didn't
8 properly name the Elizabeth field office director, this is a
9 ministerial process that we can -- courts do routinely.

10 And finally, Your Honor, we agree that 2242 suggests
11 that -- deep flexibility in habeas about who to name,
12 including if the person is not known.

13 And then I didn't hear much about Judge Furman's
14 decision which considered and rejected every one of the
15 Government's position is therefore law of the case. I take
16 their argument to mean that there's an exception to law of the
17 case where there's an absence of subject-matter jurisdiction.

18 THE COURT: I'm not sure I follow that exactly.

19 MR. AZMY: Okay.

20 THE COURT: The question raised by the Respondents'
21 motion is whether this Court has jurisdiction, and we all know
22 we're talking about something between personal jurisdiction
23 and venue.

24 MR. AZMY: Yes, Your Honor.

25 THE COURT: Subject-matter jurisdiction is not an issue

1 here.

2 MR. AZMY: Yes.

3 THE COURT: And I don't take your response to be taking
4 that position.

5 Where in Judge Furman's opinion -- which is careful and
6 long -- where does it talk about my jurisdiction?

7 MR. AZMY: Well, he speaks in terms of the fact that he
8 has jurisdiction -- subject-matter jurisdiction and therefore
9 can use the transfer statute to transfer as he would any other
10 case because, as you suggested --

11 THE COURT: The slippage there is you just inserted the
12 word "subject-matter jurisdiction." The problem here is not
13 one of subject-matter jurisdiction. That's something obvious.

14 The question -- the point that the Respondents are
15 making is I don't have jurisdiction, and you are saying back,
16 among many other things, Judge Furman already decided that.

17 I have read Judge Furman's opinion closely. Where does
18 he talk about my jurisdiction?

19 MR. AZMY: Forgive me, Your Honor. What I said is that
20 his decision is law of the case, and they say that there may
21 be an exception to law of the case where there is a question
22 of subject-matter jurisdiction.

23 THE COURT: No, no, no, I'm not misunderstanding.

24 MR. AZMY: Okay.

25 THE COURT: The point of law of the case is there needs

1 to be a decision at time one that is said to control time two.
2 I'm at time two; Judge Furman was at time one.

3 What did he say at time one about my jurisdiction
4 today?

5 MR. AZMY: He said that, under the immediate custodian
6 rule, jurisdiction lies when the petition is filed at the
7 place of confinement. That's the District of New Jersey.
8 That's the *Padilla* rule, that's the *Endo* rule, and they seek
9 to add --

10 THE COURT: That is simply to quote the background
11 rules. I don't see in that opinion a section called the
12 jurisdiction of the District Court for New Jersey. It's just
13 not there.

14 If you want to say it's so simple that the citation to
15 the immediate custodian rule in *Endo* says it, you can make
16 that argument and leave it there. But the trouble I think you
17 have is your brief is largely spent on law of the case.

18 But the issue here today is personal jurisdiction today
19 in this court. And I have read the Southern District opinion,
20 which I said is both careful and long, and I don't see a
21 discussion of that issue.

22 MR. AZMY: Well, Your Honor, let me then move to the
23 merits. Maybe that would be better, because under the merits,
24 *Padilla* applies the immediate custodian rule at the time of
25 filing. There's no exception to that.

1 What they seek to add is a new requirement. In
2 addition to the custodian at the time of filing, they add a
3 new requirement, that current place of detention requirement.

4 They have not cited any case in the 80 years since *Endo*
5 or the 20 years since *Padilla* that supports that position
6 because it's simply not the law.

7 Judge Furman did deal with this to the extent that he
8 cited the Supreme Court case in *Balaski* which says the
9 question on transfer is where the petition could have been
10 brought, might have been brought, not where it could be
11 re-brought with the consent of the defendants, which is what
12 they're asking for.

13 THE COURT: Here is the problem with that line of
14 argument, I think: What the Respondents are saying back to
15 you I think looks something like this: There's -- what I need
16 here is jurisdiction, not venue, and the Supreme Court's
17 decision in *Balaski* and 1404 and 1406 speak about whether a
18 venue transfer is okay.

19 Those statutes don't purport to speak about vesting
20 jurisdiction in the second court. So what your adversaries
21 are saying is Judge Furman may have made the right decision
22 with respect to a venue transfer and they are not quarrelling
23 with it. They are not trying to have me send it back to
24 New York. They're simply saying the statutes he cited and the
25 decision he made, it's about venue, and I need here

1 jurisdiction of a personal jurisdiction nature.

2 And so what they're saying is we all know the way it
3 works. Personal jurisdiction flows from a statute as
4 authoritatively read by the United States Supreme Court, and
5 they're saying that statute can't be a venue statute because
6 venue statutes don't purport to convert jurisdiction.

7 MR. AZMY: Okay, Your Honor, so we all agree that the
8 district court, Judge Furman has subject-matter jurisdiction
9 and then could transfer via the transfer statute. The
10 question is, was this a correct decision. And we submit under
11 *Padilla*, the immediate custodian rule --

12 THE COURT: No, no, no. The question was whether
13 Judge Furman purported to speak about my jurisdiction. He
14 certainly spoke about subject-matter jurisdiction, he
15 certainly spoke about a judgment that the case has been
16 transferred, and he certainly spoke about a judgment under
17 two venue statutes that the case is properly venued here in
18 New Jersey versus Louisiana.

19 But the problem is the issue before us might well be
20 characterized as one of personal jurisdiction in New Jersey,
21 yes or no. And Judge Furman doesn't seem to have spoken to
22 that precise question.

23 And so leaning on his decision through the guise of the
24 law-of-the-case doctrine, what I'm trying to figure out is how
25 does that advance your ball.

1 MR. AZMY: Your Honor, I'm moving away from this
2 decision now and suggesting that this Court has habeas
3 jurisdiction, territorial jurisdiction because of the
4 immediate custodian rule, and that the Government's decision
5 to add an additional requirement doesn't have any support in
6 the law.

7 I want to draw -- I think it's contrary to *Balaski*, and
8 I want to draw the Court's attention to the *Joseph* case on
9 page 13 of our brief. That is a similar situation where the
10 person was in North Carolina and the district court
11 nevertheless sent it back to the Middle District of
12 Pennsylvania.

13 Our immediate custodial rule is consistent with
14 *Padilla's* prohibition on forum shopping. It's a clean,
15 bright-line rule that freezes jurisdiction at a particular
16 point in time and locks it in.

17 Under their rule and contrary to the spirit of habeas,
18 they can move someone around. If you dismiss pursuant to
19 their rule before we get local counsel, they can move him to
20 Texas and then Alabama, and in legal sense keep passing along
21 the body in an almost Kafkaesque way.

22 Furthermore, if we accept their rule, it would lead to
23 absurd results, Your Honor. Then I think any petitioner would
24 probably want to file in five or six districts at once to
25 prevent that person from being moved around. And *Padilla*

1 speaks to forum shopping around both parties and the
2 flexibility of the writ.

3 So setting aside Judge Furman's decision, our rule is
4 clearly more consistent with the purpose of habeas, which is
5 flexible, and to prevent -- to restrain the executive from
6 manipulating the possibility of the court jurisdiction.

7 THE COURT: What is your position on -- there's a
8 little bit of slippage in the papers as between calling --
9 your argument would be a lot easier, Mr. Azmy, which is to say
10 the part of your argument that you're now a little bit
11 drifting away from, but the argument that says: Analysis
12 under 1404 and 1406, which is venue analysis, is controlling
13 here.

14 That argument would work in a somewhat easier way, I
15 would think, if there was consensus that what is at stake in,
16 call it the district court localization rules for habeas, that
17 those are venue rules and not jurisdictional rules.

18 Does your argument depend on that idea that those
19 district localization rules are venue rules, that the
20 immediate custodial rule is a venue rule, that the district of
21 confinement rule is a venue rule?

22 MR. AZMY: Well, *Padilla* speaks as a jurisdictional
23 rule in the habeas sense, but that's not in terms of
24 subject-matter jurisdiction which we've all established the
25 Court has on a 2241, the federal question. It is in the sense

1 of personal jurisdiction of venue. I think that's how Kennedy
2 put it.

3 So, you know, it's interesting that we brought up this
4 sort of routine application of the transfer statutes. There's
5 potentially a suspension clause problem here.

6 If this were an ordinary copyright case that started
7 before Judge Furman and were transferred here, we would have
8 no problem. The Government is sort of elevating the
9 obligations under the transfer statute, particularly for
10 habeas and therefore suggesting that Congress has made a
11 stricter venue rule for habeas than for a routine commercial
12 claim, which would be surprising given there are liberty
13 interests at stake.

14 So all of these equitable considerations suggest, and
15 clear doctrine, that the Court should stick with the rules in
16 *Endo* for 80 years.

17 THE COURT: But the problem with your copyright
18 argument here is the distinction here that is complex is it's
19 hard to imagine a copyright situation -- this is what's tricky
20 here -- is that it's hard to imagine a copyright situation
21 where you have forum A, and under the venue statutes, 1404 and
22 1406, there's venue in only one place, says forum A. But
23 there is a meaningful argument that at the time we're in right
24 this moment, on this date, there's no longer jurisdiction.

25 So the complexity is, you could imagine a copyright

1 situation like that. But to make the analogy work, which you
2 need it to work if you're going to bring up the suspension
3 clause and moving away from the normal civil law background,
4 the problem you're going to have is that you're gonna struggle
5 to find an example quite like this one where there's a smooth
6 argument for venue transfer but there's more complexity in the
7 present as to personal jurisdiction.

8 MR. AZMY: Respectfully, Your Honor, we don't think
9 there's complexity because of the immediate custodian rule. I
10 think that vests it. And whatever complexity our argument
11 loses with respect to a civil statute like copyright is
12 strengthened, because we're dealing with the great writ which
13 is designed to restrain the executive.

14 In a copyright case the defendant doesn't have the body
15 to try and move it around all over the country and prevent the
16 vesting of the jurisdiction of the court. So the argument is
17 really strengthened when comes to habeas. That's *Endo*.

18 *Endo* says the court should not in any way tolerate
19 manipulation of its jurisdiction, and that's the sort of --
20 that's the essence of habeas. They're trying to ally by
21 drafting an entirely new rule that's in the executive's
22 benefit consistently.

23 THE COURT: What I would ask you about on that is, does
24 that argument depend on my accepting the Kennedy-O'Connor
25 concurrence as the law of the land and then making findings?

1 MR. AZMY: Well, Your Honor, it depends on --
2 respectfully, it depends on the majority opinion and the
3 immediate custodian rule that Judge Furman said is applied in
4 legions of cases.

5 Be clear, they're adding a new requirement that is not
6 in *Padilla*. The part one of *Padilla* is the immediate
7 custodian rule, where was he confined at the time of filing.
8 440, he was in the District of New Jersey.

9 They move him, very expeditiously by the way, and in an
10 unorthodox way but we can set that to the side, and now they
11 want to add a requirement that, in addition, you should look
12 to the current place of custody.

13 Where is that? It's nowhere in the cases. It's a rule
14 that exclusively benefits the executive in a way that would
15 permit forum shopping that *Padilla* sought to prevent from both
16 sides and limit the power of this Court.

17 Executive claims to have the body, but this Court is
18 supposed to have authority over the body.

19 THE COURT: Why does the hypothesized rule that you're
20 ascribing to the Respondents systematically benefit the
21 executive?

22 MR. AZMY: Because they have control to move someone
23 around. Again, if you were to dismiss under their rule, we
24 would need to quickly try to re-file and find local counsel in
25 to Louisiana, they would move him again to Texas. With *Suri*

1 in the Georgetown suit, I believe he's been moved three or
2 four times.

3 *Anariba's* very clear about this. In *Anariba*, the
4 Third Circuit case, it's a case that actually extends *Endo* to
5 novel circumstances, again consistent with the flexibility of
6 the writ and the demand that we constrain the executor from
7 bad behavior.

8 And not even getting to the underlying substance of the
9 habeas claim which is, this is not a routine immigration case,
10 it's not a routine habeas transfer case. This is a case where
11 the Executive Branch is targeting this class of individuals
12 pursuant to a policy, and Mr. Khalil specifically, in order to
13 retaliate against his constitutionally protected speech.

14 And the moving around in this way only furthers the
15 retaliation. The longer we wait, Your Honor, the more chill,
16 the more message of retaliation gets out there.

17 Everyone knows about this case and is wondering if
18 they're going to be picked up off the street because they are
19 dissenting from the U.S. foreign policy.

20 The Executive Branch is taking a jurisdictional
21 argument that supports retaliation. I know you don't have to
22 decide that now but --

23 THE COURT: But there is the bigger problem, which is
24 from day one -- I mean, the argument from delay -- what I
25 would say is, from day one, the Respondents have said: We're

1 not trying to drag our feet, we want to move quickly. We just
2 think the jurisdiction is -- we're not in the right place.

3 That's point one. So in terms of the idea that this is
4 part of a larger chilling circumstance, your argument needs to
5 simply account for that one way or another.

6 The question about whether this is systematically
7 advantaging of the Executive -- I think is a trickier question
8 than that. I think it's a trickier question because the rule
9 you're describing will allow petitioners such as Mr. Khalil to
10 have jurisdiction in other places themselves that are not
11 unusual but that are distinct.

12 It's hard to know, without peeking, which of those
13 venues is gonna be more and less helpful to one side or
14 another. I would hope that none of them would be; that judges
15 are judges, they're gonna see things down the middle, the same
16 way in every place.

17 One of the challenges I think for your argument is that
18 everybody understands that there's a suspension clause in the
19 Constitution and that *Boumediene* and other cases is about the
20 flexibility of the habeas writ to ensure that there's judicial
21 review of detentions.

22 But the step you're taking is to evoke that flexibility
23 in the service of arguing that Judge No. 1 versus Judge No. 2
24 should do the judging.

25 So I appreciate, of course, that if there was no writ

1 we would be in a suspension clause zone, and that flexibility
2 matters.

3 But why does that flexibility matter in the service of
4 an argument that is not about federal court or no, but rather
5 is about Federal Judge No. 1 versus Federal Judge No. 2?

6 MR. AZMY: I think *Padilla* and *Endo* all make clear that
7 part of habeas is not just theoretically the availability of
8 the writ versus the non-writ as in *Guantanamo*. It is also the
9 flexibility to ensure that this Court prevents the possibility
10 of executive manipulation. I think *Anariba* couldn't be more
11 clear about not passing the body along from jurisdiction to
12 jurisdiction.

13 So, you know, just to boil it down, there is a clear
14 default rule, the immediate custodial rule that locks things
15 in time, that's predictable, and doesn't allow this type of
16 manipulation.

17 Second, there's no authority for their proposition. I
18 didn't see a case. I read their brief. This is a novel
19 proposition that they -- despite 80 years of *Endo*, they place
20 on page 2 of a seven-page reply brief. I mean, where does
21 this principle come from, Your Honor, given 80 years of *Endo*
22 and *Padilla*? It's, respectfully, I think a radical
23 reinterpretation of habeas.

24 THE COURT: Let's put that aside for just a moment.

25 MR. AZMY: Okay.

1 THE COURT: You don't have a clear, crisp case that
2 responds to their basic argument, either.

3 MR. AZMY: We do. Respectfully, first, Your Honor,
4 this argument has not been made as far as we can tell, but the
5 case is *Joseph* on -- I'm not saying the last name but --

6 THE COURT: You're citing to me a district court case
7 out of North Carolina.

8 MR. AZMY: No, no, it's from the Middle District of
9 Pennsylvania -- I'm sorry, North Carolina. It's sent back to
10 the Middle District of Pennsylvania.

11 Your Honor, the dearth of cases -- I think we're in
12 this difficult situation -- the dearth of cases bespeaks to
13 the fact that the Government hasn't tried this before. It
14 only supports the proposition --

15 THE COURT: That's a question for a sociologist in some
16 ways. Why there is not a lot of cases on this, I don't know.
17 The answer might be that petitioners in these settings -- it
18 might be that in these settings the respondent waives any
19 personal jurisdiction it might have.

20 It might be that petitioners in these settings are
21 indifferent to the different venues on the table. I don't
22 know the answer to that.

23 But what I do know is that you're chiding the
24 Respondents for having no case. When I say to you it doesn't
25 look like you have one either, you say, "But I have one from

1 North Carolina." What I take from that is that this is a
2 little bit less of a densely litigated area, for whatever
3 reason, for whatever reason.

4 And I think the hardest part for your argument -- I'll
5 just say it again because I want to give you another shot
6 at it, is there's a debate within public law about whether
7 it's venue or personal jurisdiction that tells us where habeas
8 cases go. We all understand that.

9 And what the Respondents are saying is a New Jersey
10 court can't be vested with personal jurisdiction based on a
11 venue statute. That's their simple and strong best argument.

12 And your argument back is what?

13 MR. AZMY: *Endo*.

14 THE COURT: Why does *Endo* cover that situation?

15 MR. AZMY: Well, the California court didn't have
16 personal jurisdiction in Utah.

17 Respectfully, Your Honor, I appreciate the sociological
18 question. I think -- given the abstractness of that question,
19 I still think the burden is on the Government for identifying
20 a departure from the clear, immediate custodian rule, given
21 that that's doctrinally the rule that's governed in legions of
22 cases and given the sort of dangerous possibilities of
23 executive manipulation that *Anariba* and *Padilla* warn us about.
24 So I think the burden is on them, not on us.

25 THE COURT: So you understand the answer they have at

1 least proffered as to *Endo*, which is -- I think they have a
2 couple answers, and I'm not saying they're persuasive or not,
3 but answer one is *Endo* applies when the time one filing is
4 proper. And here it wasn't because Mr. Khalil was no longer
5 present. Right? And that's a tricky issue for you.

6 MR. AZMY: Well, *Endo* is not limited to circumstances
7 when the executive thereafter moves them. I think still the
8 immediate custodian rule is what governs.

9 I mean, they seem to be taking this sort of factual
10 scenarios in *Endo* and *Padilla* and deriving from that a rule.
11 I think that's objectionable.

12 The rule is the immediate custodian rule at the time of
13 filing as applied by Judge Furman at 441, and the attorneys
14 reasonably relied on an expectation based on the Government's
15 representations that he was in New York, but nevertheless,
16 440, he was in New Jersey. *Padilla* says that's the rule. I
17 think it's their burden to show something else.

18 THE COURT: I hear that. But I don't think that that
19 is speaking directly to the problem. The problem is, I
20 understand you want to say that *Endo* reaches beyond its facts,
21 and it may well, but in *Endo* itself, the facts were that the
22 California court had both the petition and the petitioner at
23 the same time so it properly had jurisdiction.

24 The problem the Respondents are saying back is that's
25 actually not this case. In this case there was the petition

1 but not the petitioner so New York did not have jurisdiction
2 and so it's not an *Endo* case. I'm not saying what I think
3 about that, but I think that's a little bit of a wrinkle on
4 the *Endo* case itself.

5 And what you're saying is, well, don't limit the facts
6 to the *Endo* case. I got that argument. But now the question
7 is on what authority and why.

8 MR. AZMY: A combination of the plainly articulated
9 default rule that applies in dozens of cases, in combination
10 with the baseline equitable principles of habeas that *Anariba*
11 underscore that prevents executive manipulation.

12 Again, if you dismiss and we file in Louisiana before
13 our papers hit ECF, he could be in Texas. I think *Anariba*
14 very strongly counsels against that.

15 And given the clarity and definitiveness of the
16 immediate custodial rule, the Court should go with that rule
17 rather than create novel circumstances, Your Honor.

18 THE COURT: Why is part of the answer to the
19 skipping-around problem just that the first district judge who
20 gets the case might be asked by a petitioner's lawyer to enter
21 an order precluding further movement?

22 MR. AZMY: Can you repeat the question, make sure I
23 understand.

24 THE COURT: Sure. One thing you're saying is the
25 reason -- one reason that you're advocating for the rule that

1 you're advocating for is the danger of, if I were to dismiss
2 the case for want of jurisdiction, things could bounce around.

3 But isn't the answer to that that I could just enter an
4 order that says you can't move the person for 48 hours? Isn't
5 that -- isn't that a complete answer to what you're saying?

6 MR. AZMY: Well, not if you were to accept their
7 position and to dismiss. You know, there may be other sort of
8 curative measures, but fundamentally I think the combination
9 of the bright-line rule and the possibility of executive
10 manipulation writ in large suggests not departing from the
11 *Padilla* principle.

12 THE COURT: Anything you want to add, Mr. Azmy? Do you
13 want huddle with counsel for a second? Take your time.

14 (Brief pause.)

15 MR. AZMY: Just quickly, Your Honor.

16 THE COURT: Sure.

17 MR. AZMY: My co-counsel is reminding me, we did ask
18 for an injunction on transfer. And also, apparently in the
19 *Rumeysa* case, the Massachusetts Tuft student, an order was
20 issued and the Government nevertheless moved her around,
21 suggesting again a risk of executive manipulation that we want
22 the Court to be aware of.

23 THE COURT: Thank you very much.

24 Mr. Flentje, you want to add something?

25 MR. FLENTJE: If it would be possible just to make a

1 couple very --

2 THE COURT: Sure. Take your time.

3 MR. FLENTJE: On the manipulating court jurisdiction,
4 we submitted an affidavit that says there's no intention to
5 move Mr. Khalil, and so that's in the record. And the --

6 THE COURT: You mean to move him from Louisiana?

7 MR. FLENTJE: From Louisiana. That's where his
8 proceedings have began and they've been initiated.

9 On the notion of manipulating jurisdiction earlier,
10 Judge Furman didn't really accept that and understood that
11 this was pretty normal in immigration custody.

12 And we quickly identified the location in the first
13 document provided to Mr. Khalil indicating Louisiana for
14 proceedings. Then there was a quick -- he was transferred
15 there quickly, within about 24 hours, and we provided
16 relatively quick updates to his location.

17 On the discussion of orders not to move someone out of
18 the jurisdiction, that is actually something we see quite a
19 bit. We don't always agree to those. Sometimes we oppose
20 them. It happens.

21 THE COURT: Right. On the second point, I think the
22 challenge here, fundamentally, is that the argument that
23 Mr. Azmy is making is an argument that says to me: You don't
24 have to accept the Kennedy-O'Connor concurrence but you can
25 get to a similar place.

1 I'm not sure if his argument works without deciding
2 that the Kennedy-O'Connor concurrence is the law of the land.
3 That's a pretty close and hard question. Not whether it is
4 the law of the land, but rather whether or not there is real
5 daylight between the argument he's making about the
6 manipulation and the Kennedy-O'Connor concurrence which, on
7 its face, is about manipulation as well.

8 MR. FLENTJE: I agree. We don't think that standard is
9 even close to being met here as to law of the land. I would
10 say that was a concurrent opinion. Kennedy and O'Connor
11 joined the majority opinion in full, and then I think there
12 was some talk about these are some ideas maybe. I don't think
13 the court thought that was controlling.

14 The last thing is they talk about this is a new rule or
15 a novel proposition of --

16 THE COURT: Right. I just want to say on that, I mean,
17 there's a body of law of course on whether Supreme Court
18 opinions or concurrences control. The Mark jurisprudence
19 out of the Supreme Court is not in anyone's papers. It's an
20 enormously complex question as to whether a concurrence is or
21 is not part of the law.

22 I don't see either side taking it up very
23 energetically. I'm not knocking anyone. The papers are very
24 strong and also written under time pressures. Not throwing
25 stones. I was impressed and appreciate the papers.

1 But I think that -- I understand why I think both sides
2 are leaving alone that big question out there of whether
3 Kennedy and O'Connor is the law of the land. It's a pretty
4 hard question.

5 MR. FLENTJE: Understood.

6 THE COURT: It's a pretty hard question to say that
7 that concurrence is the law of the land.

8 MR. FLENTJE: I agree, it's complicated and we didn't
9 try and run away from those words of Justice Kennedy.

10 I'll just say, I want to talk about the novel
11 proposition point they raised. They said that a couple times.

12 We really think we're dealing with a novel question
13 because Judge Furman sent the case here to maintain the
14 separation between the court and the location of the
15 Petitioner, the location of the custody, and the location of
16 the warden. That's what makes this complicated.

17 Again, our position is it should be simple and there's
18 a place with clear jurisdiction. I don't know if you want to
19 hear more from me.

20 But the last thing I want to say is on my resistance to
21 *Endo* -- and I just want to read one quote from *Anariba* which
22 describes *Endo* and it says: (Reading.)

23 Where one has become subject to the
24 jurisdiction of the court, the jurisdiction
25 continues in all proceedings arising out of the

1 litigation.

2 So I think that kind of supports our read of *Endo* that
3 you at least have to start somewhere where there was proper
4 jurisdiction, personal venue, everything, and then you go from
5 there.

6 Thank you, Your Honor.

7 THE COURT: Stick with me for just one second. I asked
8 yourself and Mr. Sampat for a one-sentence letter that
9 confirms that ICE -- what the nature of the Louisiana facility
10 is. And I mean one sentence.

11 The other thing is, you made a reference earlier,
12 Mr. Flentje, to -- I don't want to put words in your mouth,
13 something like, "I assume but we need to check," or "I think
14 maybe but, we need to check," something like that, about
15 whether this Court, not functioning as a normal civil court
16 but functioning as a territorial habeas court with no long-arm
17 powers, whether this Court could exercise jurisdiction over
18 the Secretary of Homeland Security on a purely territorial
19 theory.

20 I assume the answer on reflection will be yes, but I
21 also know that you don't want to take a position from the
22 podium without having a chance to take a deep breath and think
23 about it.

24 I think the law is generally, I think, that the
25 Attorney General, for example, is present in every district in

1 the United States as a territorial matter. But, look, you'll
2 just have to let me know what your position is on that.

3 I'm not looking for a brief, but if you could, today,
4 send in a letter filing of course that has two sentences: one
5 that tells me what the status is of that ICE facility in
6 Louisiana, and, two, simply says to me, yes, we agree, or no,
7 we do not agree that the Secretary of Homeland Security could
8 be subject to jurisdiction within the District of New Jersey
9 with the New Jersey Court functioning solely on a territorial
10 habeas basis.

11 If the answer is yes, got it. If the answer is no, got
12 it. But it's something that you wanted more room to think
13 on it, and I'm going to let you write that letter so you can
14 do that.

15 I mean what I say about two sentences, though. Not
16 something to boil the issue with. I just want to know your
17 positions on both.

18 MR. FLENTJE: Just to clarify, I think we need a third
19 sentence on the scope of the New York operations, ICE
20 operation, New York region.

21 THE COURT: Yes. Third sentence.

22 MR. FLENTJE: We'll tell you what the New York region
23 is. Thank you.

24 THE COURT: Okay. Thank you.

25 Mr. Azmy, anything you want to add?

1 MR. AZMY: Just the briefest point, Your Honor.

2 THE COURT: Sure.

3 MR. AZMY: What I'm calling the *Padilla*
4 anti-forum-shopping argument is not relying on the
5 concurrence. I think it's from the majority opinion.

6 THE COURT: Right.

7 MR. AZMY: So I just wanted to clarify that.

8 THE COURT: Right. There's no doubt about that. I see
9 that. Justice Renquist speaks explicitly about forum shopping
10 as the basis for those localization rules, whether we call
11 them venue or we call them jurisdiction.

12 MR. AZMY: Thank you, Your Honor.

13 THE COURT: Thank you all very much. This is what's
14 going to happen. I'm not gonna rule from the bench. I'm
15 gonna endeavor to make a decision as quickly as I can do so in
16 a thoughtful and careful way.

17 As I said at the outset, I know there are other issues.
18 I know there are other motions. Some of them are fully
19 submitted. The most lengthy of them is the preliminary
20 injunction motion, which is the Respondent's response, is due
21 next week and the Petitioner's reply is due a week from today.

22 But I'm not gonna touch those things, aside from, as I
23 said, keeping up with the reading, until I have made a
24 decision on the current motion. I'll do that as quickly as I
25 can.

1 You want to add something?

2 MR. SAMPAT: Yes, Your Honor. I just wanted to say
3 that we're gonna be filing a second letter.

4 THE COURT: Stand up a little bit and speak up, if you
5 don't mind.

6 MR. SAMPAT: Sure. I'll be filing a second letter
7 today. The parties have agreed to a short extension of the
8 briefing deadlines for the preliminary injunction. We
9 unfortunately suffered some technical issues yesterday at the
10 office and didn't have access, so that will be filed.

11 THE COURT: Why don't you send it my way so that we can
12 all see that together.

13 MR. SAMPAT: Sure.

14 THE COURT: All right.

15 MR. AZMY: I can't resist, Your Honor. Just --

16 THE COURT: One more on *Padilla*?

17 MR. AZMY: No, no more *Padilla*. Just to underscore, I
18 think Your Honor knows we would love to be heard on the bail
19 motion as soon as possible.

20 THE COURT: Look, I hear that. This is --

21 MR. AZMY: We're prepared to argue it today.

22 THE COURT: I hear that, and I'm not surprised to hear
23 it. Here is what I would say to you on that: You know that
24 the Supreme Court quote is jurisdiction is, quote, the first
25 and fundamental thing.

1 The briefing on this jurisdictional motion was
2 submitted 35 hours ago. I view it as the first thing and also
3 something that I'm getting to quickly and that you all want to
4 get to quickly; in part, because I understand that until
5 jurisdiction is resolved, there are things that are waiting.

6 So I'm not gonna resolve a motion of any kind until and
7 unless I'm satisfied that I do have jurisdiction in this case.
8 So I'm gonna resolve the jurisdiction motion.

9 I appreciate that you're ready. I don't doubt that you
10 are. But I'm not gonna handle any motion until I know that
11 this is the Court that has the power to resolve it. There's
12 not a -- I'll leave it at that.

13 MR. AZMY: Understood, Your Honor. Thank you.

14 THE COURT: All right. Anything else?

15 (No response.)

16 THE COURT: We will adjourn, then, and I will file an
17 opinion as soon as I am ready to do so and I will look for the
18 United States' letter.

19 I'm not thinking of this letter, as I said, as anything
20 like a brief. I'm thinking of it as three sentences stating
21 your position.

22 I can't imagine the Petitioners will have something to
23 say about it; but if the Petitioners would like to be heard in
24 response, you have to file a letter asking for permission
25 because I'm not looking to induce here a legal brief writing.

1 These are small, factual-type questions of the kind that I
2 rely on counsel for and they have understandably wanted to
3 think a little bit more.

4 I'll look for your letter today, three sentences.

5 And to the extent the Petitioner wants to be heard in
6 response, you have to file a letter asking for permission.

7 Thank you, all. We are adjourned.

8 THE DEPUTY CLERK: All rise.

9 (Which were all the proceedings held in the
10 above-entitled matter on said date.)

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FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE

I, **Lisa A. Larsen, RPR, RMR, CRR, FCRR**, Official Court Reporter of the United States District Court for the District of New Jersey, do hereby certify that the foregoing proceedings are a true and accurate transcript from the record of proceedings in the above-entitled matter.

/S/Lisa A. Larsen, RPR, RMR, CRR, FCRR

Official U.S. District Court Reporter ~
District of New Jersey

DATED this March 31, 2025