

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

ARGHAVAN LOUHGHALAM AND MAZDAK .  
POURABDOLLAH TOOTKABONI, . CIVIL NO. 1:17-10154-NMG  
Petitioners .  
v. . BOSTON, MASSACHUSETTS  
. JANUARY 28 & 29, 2017  
. .  
DONALD J. TRUMP, PRESIDENT OF .  
THE UNITED STATES, et al, .  
Respondents .  
. . . . .

TRANSCRIPT OF HEARING REGARDING TEMPORARY RESTRAINING ORDER  
BEFORE THE HONORABLE JUDITH G. DEIN, U.S. MAGISTRATE JUDGE  
& THE HONORABLE ALLISON D. BURROUGHS, U.S. JUDGE

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23 Court Reporter:

24 Proceedings recorded by electronic sound recording,  
25 transcript produced by transcription service.

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1 COURT CALLED INTO SESSION

2 (11:34:45 P.M.)

3 THE CLERK: All rise. This Honorable Court is now  
4 in session. Please be seated.

5 Calling the case Arghavan -- nope, I have no idea  
6 -- Louhghalam and Mazdak Pourabdollah Tootkaboni versus  
7 Trump et al, Civil Action No. of 17-10154.

8 Could counsel please identify themselves for the  
9 record?

10 MS. CHURCH: Attorney Susan Church representing  
11 the plaintiffs.

12 MR. SEGAL: Matthew Segal also for the plaintiffs.  
13 Good evening, Your Honor.

14 MS. DOYLE: Good evening, Your Honor. It's Kerry  
15 Doyle.

16 MS. YOUNTZ: Heather Yountz (inaudible).

17 MR. FARQUHAR: Good morning, Your Honor. It's Ray  
18 Farquhar for the United States.

19 JUDGE BURROUGHS: It's not quite morning.

20 MAG. JUDGE DEIN: Are we recording? Yes? All  
21 right.

22 Just make sure that you speak into the mics so  
23 that our recording is clear.

24 JUDGE BURROUGHS: So Judge Dein and I decided to  
25 do this together. It's an important matter. We're both

1 here on the theory that two heads are better than one.

2 We're going to co-preside over there for the time being.

3           What is the status? We've read the petition.

4 We're both familiar with what's happened in New York. We

5 understand there's another order in Virginia. Where are we  
6 here?

7           MS. CHURCH: Okay. As to our two immediate  
8 plaintiffs, although they have been released, we are still  
9 asking this Court to rule on the grounds that -- and  
10 Attorney Segal's going to address the mootness issue, but on  
11 the grounds that, first of all, that this case was filed by  
12 the emergency phone call to this Court at 7:30 p.m. this  
13 afternoon when both of these individuals were still in  
14 custody; and second of all, on the grounds that there are  
15 many other flights scheduled to come into Logan tomorrow.  
16 There's Dubai flight at 7:30 a.m. There is another London  
17 flight coming in early in the morning.

18           And on the grounds that the national restraining  
19 order and the restraining order in Virginia -- which I'm not  
20 intimately familiar with, but I am familiar with the  
21 national restraining order -- do not completely solve the  
22 dilemma of -- our current clients, yes, probably -- but not  
23 two particular clients that we intend to amend the complaint  
24 to add. And those are a lawful permanent resident who is  
25 Attorney Doyle's client who's scheduled to fly in tomorrow

1 morning from Iran, and an F-1 medical student who is  
2 currently a Harvard Medical student who is scheduled to  
3 leave the country on Tuesday, already has a ticket, but has  
4 been advised by his attorney, Attorney Tony Dragle, that he  
5 cannot leave due to this executive order.

6           The national order. Our problem with the national  
7 order, is number, one, it only protects people from removal.  
8 So if the Court reviews the language of the national  
9 restraining order, it limits the process -- the protections  
10 to those facing removal.

11           Our second problem with the national order is that  
12 it specifically does not include lawful permanent residents.  
13 It uses language such as "visa," "immigrant visa holders,"  
14 but that doesn't quite clearly cover the grounds of people  
15 who are a lawful permanent resident who pursuant to 8 USC  
16 1101(a)(13)(C) are entitled to present themselves at the  
17 border and not seek admission.

18           So the only people who are lawful permanent  
19 residents who should be seeking admission are those with  
20 criminal convictions, those who have been gone for more than  
21 180 days. Neither of these two plaintiffs qualified under  
22 that; and therefore, should have been sent through quite  
23 easily.

24           So that's to start with. If the Court wants me to  
25 go further into the reasons we're seeking the restraining

1 order --

2           And in this case we're going to ask for -- maybe  
3 in a week or so we're going to amend our pleadings to ask  
4 for a declaratory judgment. I can do that at this time. .

5           JUDGE BURROUGHS: How were the two released? What  
6 were the circumstances of that?

7           MS. CHURCH: They were held for more than --

8           The first individual was held for more than three  
9 hours. The second individual was held for about two hours  
10 and 45 minutes. And they were released after what we  
11 consider to be extensive interrogation prompted by the Trump  
12 Administration executive order.

13           JUDGE BURROUGHS: Released with conditions or just  
14 released?

15           MS. CHURCH: That, we have not --

16           We've been trying to verify that. We have not  
17 been able to verify that.

18           JUDGE BURROUGHS: So they were released by?

19           MS. CHURCH: Customs And Border Protection.

20           JUDGE BURROUGHS: Mr. Farquhar?

21           MR. FARQUHAR: Yes, Your Honor?

22           JUDGE BURROUGHS: What's your view on all of this?  
23 Your official view.

24           MR. FARQUHAR: I'm not quite sure, Your Honor,  
25 what you mean by my "official view."

1           My personal view would be, one, it's extremely  
2 complicated; secondly and most importantly, I think what's  
3 before this Court, if we take a step back, is the petition  
4 for a writ for declaratory injunctive relief with regard to  
5 the two individuals, Mr. Tootkaboni and Louhghalam.

6           From speaking to Customs and Border Patrol, it's  
7 my understanding that both of these individuals after  
8 interrogation were, in fact, released. I confirmed that  
9 within the past half an hour.

10           The government's position at this point would be  
11 that the filing of this petition would be moot, given the  
12 fact that the filing asked for their release and, in fact,  
13 they were released.

14           Unfortunately, Your Honor, there is a larger issue  
15 here; and that is, any other individuals that may be coming  
16 forward, and it's also been brought to my attention that,  
17 mushrooming into a larger issue, you have individuals that  
18 are overseas at this time that are being potentially told --

19           It's my understanding from my brother and sisters  
20 at opposing counsel table that there are individuals that  
21 are being told that you can not board a plane going to the  
22 United States, because you're not going to be let in to the  
23 United States. I can't confirm that information at this  
24 point. I have not been able to contact the appropriate  
25 parties within the Custom and Border Patrol to confirm that

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1 this, in fact, is taking place.

2           And so at this point, Your Honor, I'm only able to  
3 address what is before the Court, and this is with regard to  
4 the detention of the two individuals that's cited in the  
5 petition that was filed.

6           JUDGE BURROUGHS: So it's your view that this  
7 petition is moot, and we should wait until tomorrow when  
8 other people are detained or other people are denied the  
9 ability to get on a plane?

10           MR. FARQUHAR: Your Honor, at this point I think  
11 what needs to take place is some type of a concerted effort  
12 by the United States to address the situation. I don't  
13 think that trying to address it piecemeal out of New York,  
14 Boston and Virginia is going to work.

15           I'm attempting -- or at least I was attempting  
16 until my phone died -- to reach some folks out of MAIN  
17 Justice to ascertain how we may be able to coordinate this  
18 through Washington, DC.

19           Right now, again, I'm unaware of specifically any  
20 petitioners or any plaintiffs that could be filing suit  
21 based on the fact that they attempted to board a plane  
22 overseas, and they were told they have to go home.

23           It is my understanding that -- from, again, my  
24 brother and my sisters at opposing counsel table -- that  
25 this has happened.

1           But I'm not in a position right now to address  
2 that. I do not know of any specific facts, and I don't know  
3 of any specific individuals.

4           JUDGE BURROUGHS: Ms. Church?

5           MS. CHURCH: Your Honor, we do know of at least  
6 one junior at MIT who's been in contact with us who  
7 attempted to board a plane, I believe in London -- I've  
8 talked to a lot of people today, so I'm not totally positive  
9 about the location -- who was denied.

10           We know from the Attorney General's Office --

11           A representative of the Attorney General's Office  
12 has told us that there are families currently in Egypt who  
13 all are lawful permanent residents who are all -- local  
14 Boston residents who were all sent back and not allowed to  
15 board a plane.

16           With some time I'm confident we can get affidavits  
17 or information at least to verify all of these people are  
18 put in this position.

19           And then Attorney Segal would like to address the  
20 other issues with regards to the mootness, if the Court  
21 would so allow.

22           JUDGE BURROUGHS: That's fine.

23           In terms of the people that are international and  
24 being denied access to a plane, what jurisdiction do we have  
25 over that, an international sort of order?

1 MS. CHURCH: Yeah. Attorney Segal's going to  
2 address that.

3 MAG. JUDGE DEIN: And who's not letting them on  
4 the plane? Is it --

5 MS. CHURCH: The airlines.

6 MAG. JUDGE DEIN: -- the airlines themselves, --

7 MS. DOYLE: It's the airlines themselves.

8 MAG. JUDGE DEIN: -- or is there a government  
9 official involved?

10 MS. CHURCH: The airlines --

11 We don't know the exact details, but we've been  
12 told that the airlines are not allowing it based on the  
13 executive order.

14 And those are my two examples. I'm tracking  
15 through national immigration lawyers thousands of examples.  
16 I mean, it's happening all over the world.

17 But those are two local examples that we've had  
18 direct contact with someone who's had direct contact about  
19 them.

20 MR. SEGAL: Good evening, Your Honors. So just to  
21 back up, I think what Ms. Church is talking about is what  
22 might happen in an amended complaint.

23 But I think just to address Mr. Farquhar is  
24 discussing, there's a question about whether this case is  
25 moot, and our submission is that it's not.

1           These two individuals, the petitioners, were  
2 detained. The allegation in the complaint is they were  
3 detained on the basis of the executive order, and the  
4 submission from counsel for the government is that they were  
5 released at some time within the last half hour.

6           And so the question really is does that make the  
7 case moot. It doesn't. They were not released, the  
8 government contends -- is not contending here tonight that  
9 they were released because the executive orders rescinded or  
10 because the CBP has disavowed enforcement of it. They were  
11 simply released, and that's all we know.

12           So under cases like Clark against Martinez and  
13 other cases on mootness, we don't even know if these  
14 particular defendants are out of -- I'm sorry -- petitioners  
15 are out of peril, let alone whether the case is moot  
16 entirely. Because the government has not given up the  
17 authority that they exercised. And the Courts have been  
18 pretty clear that just releasing somebody when a lawsuit's  
19 filed is not enough to make a case moot.

20           What I think the back and forth about the  
21 possibility of amendment and Mr. Farquhar's point goes to is  
22 whether their release bears on the relief that might be  
23 ordered. And it might. Mr. Farquhar makes the point that  
24 the government would like to take some time to sort this  
25 out.

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1 Well, the most appropriate way to sort this out  
2 would not be to leave thousands of people in peril of being  
3 detained, you know, all over the country, but also here in  
4 Boston when they arrive, including the folks who are set to  
5 arrive at 7:40 in the morning.

6 So if the Court is inclined to limit some of the  
7 relief that we requested --

8 For example, the number-one thing we requested was  
9 a writ of habeas corpus requiring the respondents to release  
10 the petitioners. Well, you know, given that they're not  
11 presently in custody, maybe it makes sense not to rule on  
12 that at the moment.

13 But the second thing we asked for was an  
14 injunction ordering the respondents not to detain and  
15 implicitly not to send across the globe people who are  
16 arriving, any individual, solely on the basis of the  
17 executive order.

18 And I think the case is not moot, and it is  
19 certainly appropriate to issue that kind of relief;  
20 particularly as the government, as it wants to do, sorts  
21 out, tries to create an even-handed approach, and as we  
22 look to see whether an amended complaint might be  
23 appropriate, whether on behalf of the people that Ms. Church  
24 mentioned or somebody else.

25 But either way, even if it's a time-limited

1 injunction, maybe even a temporary restraining order, that  
2 would be more appropriate than in a case that's not moot to  
3 send it into upheaval, to send Logan Airport into upheaval  
4 in the morning.

5 JUDGE BURROUGHS: Do you have a draft order that  
6 you're asking us to enter tonight?

7 MS. CHURCH: Yes, Your Honor. On the --  
8 Well, we can have it typed up.

9 But we have a prayer for relief that we can get  
10 emailed to you with that language if would you give us 15  
11 minutes.

12 JUDGE BURROUGHS: Mr. Farquhar, I take your point  
13 about there being some advantages to this being dealt with  
14 on a more national basis but your phone died. If you had a  
15 phone, would some additional time tonight make a difference,  
16 or are you going to stand on the mootness argument? What's  
17 your 'druthers for tonight?

18 MR. FARQUHAR: Well, Your Honor, as we speak, my  
19 phone is being charged, so that's the good news.

20 With regard to the mootness argument, I would  
21 actually stand on what I have stated with regard to the  
22 mootness argument.

23 I'm very much sensitive to the fact, Your Honor,  
24 that potentially that there are more individuals that could  
25 fall under this scenario. I don't know if that's the case.

1 The only individuals that have been brought to my attention  
2 were the two individuals that were mentioned here. That  
3 does not necessarily mean that if someone else comes in,  
4 they're going to be detained.

5 At this point, Your Honor, unfortunately given the  
6 fact that it is the weekend, it has been a little more  
7 difficult to get in touch with folks in DC that are high  
8 enough to, in fact, execute some type of an order for the  
9 rest of the country to react. And so we're moving as  
10 quickly as we can, but right now I can't state what the  
11 United States is going to do.

12 MAG. JUDGE DEIN: The individual that's supposed  
13 to land tomorrow morning, what are the details about that?

14 MS. CHURCH: It's tomorrow evening. Attorney  
15 Doyle will --

16 MR. SEGAL: I think we've been in touch separately  
17 throughout the day with her as people --

18 I know that our office has been in touch with  
19 someone or the family member of someone who's due to arrive  
20 at, I think, 7:40 in the morning.

21 And to Mr. Farquhar's point, I mean, the question  
22 really is whether --

23 I mean, we're all in favor of the government  
24 sorting this out; but I mean, the worry is that if it isn't  
25 sorted out by virtue of an order from this Court enjoining

1 action, then policy's going to be made by individual Customs  
2 and Border Patrol agents starting at 7:40 a.m. tomorrow.

3 MR. FARQUHAR: Your Honor, if I can just  
4 interject? I actually don't think that's going to be the  
5 case.

6 Certainly locally the Custom and Border Patrol is  
7 fully aware of this scenario. They're fully aware of what's  
8 happening nationwide. And my office is in direct contact  
9 with them including the SAC for the Boston area. So I do  
10 not think that's going to be the case.

11 At this point this Court is being asked to  
12 speculate on what might happen if someone comes in under  
13 this scenario, but it's my understanding at this point there  
14 is no guarantee that anyone's going to be detained at the  
15 airport who falls under this scenario.

16 JUDGE BURROUGHS: Well, have you spoken to them  
17 about what their intention is with regards to people that  
18 continue to land over the weekend?

19 MR. FARQUHAR: At this point, Your Honor, they  
20 were supposed to get back to me in about an hour's time, and  
21 that would put us well into the morning. So I do not have  
22 that answer right now.

23 My suggestion to them was that we continue to  
24 allow individuals that are lawful permanent residents to  
25 enter the United States while this is being sorted out

1 nationwide.

2 MS. CHURCH: Can I just chime in on the urgency  
3 issue?

4 I'm the chair of the American Immigration Lawyers  
5 Association. I'm on a national list served. I have  
6 received an email right after the -- about -- I want to say  
7 about an hour and a half after the national stay was issued  
8 indicating that the Dulles CBP office is not following the  
9 national stay, presumably because it wasn't issued out of  
10 Dulles.

11 So we feel it particularly important to have  
12 something that's local for that reason, so that it's easily  
13 understood by CBP, that it applies to them.

14 And then Attorney Doyle wanted to address the  
15 individual flying in tomorrow night.

16 MS. DOYLE: Your Honors, my client is Barmah  
17 Keshma (phonetic). He's a returning permanent resident.  
18 He's a citizen of Iran. He's scheduled to be flying in  
19 tomorrow evening, and we are concerned that he will end up  
20 being detained, as these other individuals were.

21 And I did want to point out to the Court that  
22 Customs and Border Patrol is of the position that  
23 individuals that arrive at the airport are not entitled to  
24 counsel; and so therefore, when people are coming in to the  
25 airports, things are happening that we are unaware of and

1 are unable to talk to our clients directly or to have any  
2 access to them, and that different port directors are on  
3 duty at different times of the day.

4           And we're very concerned that individuals that we  
5 haven't been able to reach at this point may be put back on  
6 a plane, because Customs and Border Patrol have the  
7 authority to deport somebody from the airport without any  
8 kind of judicial review even with an immigration court. So  
9 they have pretty broad authority that they tend to wield  
10 very broadly, and that is our concern, is that things can be  
11 happening that we're unaware of.

12           And again, in a short time today we were able to  
13 identify these two individuals. A.C.L.U. again, as Mr.  
14 Segal mentioned, is in touch with some other individuals  
15 that would be coming in tomorrow morning. I've been in  
16 touch with an individual coming in tomorrow evening.

17           But we are very limited in what we know of, and  
18 that is happening in Customs when people get off the  
19 airport.

20           And these particular individuals are returning  
21 permanent residents that are not even supposed to be subject  
22 to inspection at admission. Returning permanent residents  
23 are not subject to inspection at admission; yet nonetheless,  
24 they are still being detained for significant periods of  
25 time and put into secondary inspection despite the fact that

1 the U.S. Code specifically states that they are not subject  
2 to inspection at admission.

3 JUDGE BURROUGHS: Did you have access to the two  
4 named plaintiffs in this case before they were released?

5 MS. CHURCH: No. I personally went back to the  
6 CBP officers. I asked for -- I identified myself as an  
7 attorney. In fact, they know me. And I asked for access to  
8 my clients, indicated that I represented them, indicated  
9 that they were Iranian L.P.R. holders, and I was denied  
10 access.

11 JUDGE BURROUGHS: How did you become aware they  
12 were being held?

13 MS. CHURCH: I found -- I overheard family members  
14 using the words "case-by-case basis," and I approached them  
15 and asked them what was going on. And they were able to  
16 text their family member and got permission for me to  
17 represent them.

18 MS. DOYLE: And I can state that in the last week  
19 I actually had another individual who's a returning  
20 permanent resident who was stopped and put into secondary  
21 inspection for a different reason, not because of this; and  
22 I was able to find out just because he went into the  
23 bathroom and was able to text on his phone from the bathroom  
24 to his wife, and his wife called me. And so I was able to  
25 talk to the port -- one of the supervisors that Ms. Church

1 and I both know through our work with the American  
2 Immigration Lawyers Association.

3           But he can either admit or deny that he is there,  
4 and I certainly wasn't able to talk to my client. I just  
5 kind of let them know that I knew he was there, and that if  
6 they need anything, they should call me.

7           And from my client who I spoke to today, the  
8 Customs and Border Patrol agents were down there and got  
9 very upset at people, to make sure they turned off their  
10 phones, because they were very upset that the attorney even  
11 found out that someone was in secondary detention.

12           JUDGE BURROUGHS: What are the classifications of  
13 people that are not supposed to be put into secondary  
14 inspection?

15           MS. DOYLE: It would be U.S. citizens, and then  
16 returning permanent residents who -- other than those that  
17 are under 8 USC, Section 1101(a)(13)(C), which is  
18 specifically people who have been outside the country more  
19 than 180 days, persons with certain types of criminal  
20 convictions, persons who may have been engaged in unlawful  
21 criminal behavior during their time apart.

22           There's six specific conditions in which lawful  
23 permanent residents can be considered to be applicants for  
24 admission, but other than that, they are not.

25           JUDGE BURROUGHS: So you'll have to pardon me.

1 It's not an area of the law I'm hugely familiar with.

2           But are they allowed to put them in to secondary  
3 inspection to find out if they satisfy one of those six  
4 categories?

5           MS. DOYLE: They may be entitled to ask some  
6 questions to see if they're subject to these six items.

7           But the executive order that was issued by the  
8 president does not address any of those issues and, in fact,  
9 bring up specific grounds in which they wish to try to keep  
10 people from returning to the United States that are not even  
11 cited in the Immigration Act and are above and beyond those  
12 particular items.

13           So from our understanding, yeah, again, this is  
14 somewhat anecdotal at this point, that most people are being  
15 questioned as to their religions or religious beliefs and so  
16 forth as opposed to any of these specific things. We'll  
17 have to follow up with the people who've been released.

18           And also just to reiterate the fact that I know  
19 they're out of Customs and Border Patrol detention at this  
20 point, but we don't -- we haven't actually been able to  
21 verify whether they're even admitted as lawful permanent  
22 residents or may have been paroled. Because persons can be  
23 paroled under Immigration Act, as well.

24           MAG. JUDGE DEIN: So are you doing constitutional  
25 issues as well as statutory violations? What's the base --

1 on the merits.

2 MS. CHURCH: Yes, Your Honor. In our complaint  
3 there are multiple constitutional grounds cited. One ground  
4 that is important is that this executive order is premised  
5 upon and animus against the people of a Muslim religion. It  
6 targets people only from countries that are predominantly  
7 Muslim. People are -- and that's cited as ground 1 in our  
8 petition.

9 Ground 2 is due process grounds, that these  
10 individuals are being held, detained, interrogated and  
11 excluded without procedural due process.

12 Oops, I got those reversed. So Count 2 is the --

13 Thank you, Matt.

14 Count 2 is the religious establishment clause.

15 Count 1 is due process of law.

16 Count 3 is Fifth Amendment equal protection law  
17 that a lawful permanent resident returning from England or  
18 Canada is treated substantially different from a lawful  
19 permanent resident returning from Syria, Iran or Iraq; and  
20 that that difference in treatment is premised solely upon  
21 their religious and the country that they came from.

22 And these are explained much further in the  
23 complaint.

24 Count 4 is under the Administrative Procedures  
25 Act, that the Immigration Nationality Act itself prohibits

1 discrimination based on race, nationality, place of birth or  
2 place of residence; and that the detaining and mistreating  
3 of these individuals based on their nationality alone, their  
4 nationality and religion, violated due process of law and  
5 the Administrative Procedures Act.

6           Finally, Count 5 is the Religious Freedom  
7 Restoration Act. That these individuals have been placed a  
8 special disability upon them based on their religious  
9 beliefs and their country of origin.

10           Those are the five complaints.

11           JUDGE BURROUGHS: Mr. Segal, do you have a copy of  
12 Clark vs. Martinez?

13           MR. SEGAL: Your Honor, I do not. I apologize for  
14 that. But I could tell that you when I mentioned it, I was  
15 referring to -- the case is 543 U.S. 371, and I was  
16 discussing footnote 3.

17           And just to relate that point to what we're  
18 discussing now, the question, I think, when we talk about  
19 these people coming back on flights tomorrow, is whether it  
20 is more appropriate for their situation to be addressed  
21 through a possible amendment of this case, through a  
22 possible motion for a class certification, so that we  
23 wouldn't have to continue dealing with mootness questions;  
24 or whether it is more appropriately dealt with in a kind of  
25 haphazard way where people will be coming to this Court

1 presumably in substantial numbers in the morning.

2           And, you know, our submission is that,  
3 notwithstanding the release for reasons that nobody in this  
4 courtroom knows of our clients within the last half hour,  
5 maybe now it's an hour, there's a perfectly good case in  
6 front of the Court in which it can begin by issuing perhaps  
7 temporary relief and give everyone -- give the government  
8 some time to sort it out, make sure that the Customs and  
9 Border Patrol agents are not going to be freelancing  
10 starting tomorrow morning, and also giving the petitioner  
11 some time to bring additional plaintiffs or a motion for  
12 class certification to the Court, if that seems like the  
13 appropriate next step in this case.

14           JUDGE BURROUGHS: Hold on. I just pulled up the  
15 case. Just let me take a look at the footnote.

16           MR. SEGAL: While Your Honors are reviewing, I  
17 should say that that's sort of one aspect of the mootness  
18 doctrine is when there's a voluntary release by a defendant.

19           Of course, we're dealing with other issues here,  
20 as well, such as the potentially short time period, which  
21 makes the harm that we're talking about capable of  
22 repetition. We expect repetition as soon as the morning.

23           And, you know, there's a reasonable expectation  
24 that this is going to keep happening.

25           MAG. JUDGE DEIN: Well, I think the bigger

1 problem, though, is that you have two named plaintiffs, and  
2 then you don't have a class allegation here; do you?

3 MR. SEGAL: Well, not as of yet. But I anticipate  
4 that we --

5 We might need some time to confer, but we could  
6 have a motion for class certification on file tomorrow. You  
7 know, I don't think that is the major hold up at the moment,  
8 and it may be just a matter of deciding --

9 MAG. JUDGE DEIN: Well, it sounds like you have  
10 different plaintiffs with different statuses.

11 MR. SEGAL: Well, that's right, and so --

12 Your Honor's right. We have decisions to make  
13 about what the class would be and whether every plaintiff  
14 that we've mentioned to you tonight is going to be in that  
15 putative class.

16 But I think the larger point is that the fact that  
17 some of those plaintiffs might have to be separately  
18 represented wouldn't be a reason to dismiss this case where  
19 there's a non-moot case before the Court and an opportunity  
20 to certify -- to seek to certify a class of  
21 similarly-situated petitioners in the morning.

22 MS. DOYLE: And I would point out that my client  
23 that's returning tomorrow is in exactly the same position as  
24 these two individuals; in that, he's a permanent resident,  
25 returning permanent resident.

1           And I did also want to just give you the cite so  
2 you have it for the parole section which is 8 USC Section  
3 1182(d)(5).

4           And as you'll see, if you look at that, the  
5 persons that are paroled are subject to re-detention at any  
6 point.

7           JUDGE BURROUGHS: Do you have a proposed order  
8 that you could email us now?

9           MS. CHURCH: We're working on that.

10          MS. DOYLE: We're having someone write that now.

11          MS. CHURCH: We hope we can do it in like 5, 10  
12 minutes. But one of us may have to leave and make a phone  
13 call. We also hope he's still awake.

14          MS. DOYLE: He's awake. Can I be excused, Your  
15 Honor?

16          JUDGE BURROUGHS: Mr. Farquhar?

17          MR. FARQUHAR: Thank you, Your Honor. Your Honor,  
18 as I told my brothers and sisters this evening, I understand  
19 where they're coming from. I'm trying to think of some type  
20 of solution within the authority that I currently have.

21                 The main concern at this point, Your Honor, would  
22 fall, in my opinion, on individuals that are arriving at  
23 Logan Airport that may fall into the category of what  
24 counsel has described, being turned back and having to go  
25 back wherever they -- the port wherever arrived from.

1           Perhaps an order from this Court instructing the  
2 Custom and Border Patrol that no individual can, in fact, be  
3 deported or returned to where they came from without first  
4 contacting the U.S. Attorney's Office, which would give us  
5 an opportunity at least to address the matter and bring it  
6 before this Court.

7           That way we make sure that no one slips between  
8 the cracks. I'm sure with this very able legal team in  
9 front of Your Honor that's not going to be the case, but  
10 this will certainly reassure anything happening of that  
11 nature.

12           In the interim, the United States certainly, Your  
13 Honor, between today and tomorrow, I'm sure we're going to  
14 have many conversations with DC to try to figure out a  
15 national approach to try to solve this problem for now.

16           Internationally, Your Honor, I don't have a  
17 solution as to what we can do with regard to airlines  
18 preventing people from boarding planes overseas. I don't  
19 think that this Court has jurisdiction with regard to that  
20 issue, but I will also try to address that, as well.

21           MS. CHURCH: We do have a proposed solution for  
22 that, Your Honor; and that would be to order Customs and  
23 Borders Protection to send an email or a notice to the  
24 airlines that they are no longer allowed to exclude people.  
25 So our prayer for relief that we're going to be asking for

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1 is going to include that.

2 JUDGE BURROUGHS: Do we have jurisdiction to do  
3 that?

4 MS. CHURCH: We have jurisdiction over CBP, so I  
5 would think that we would have jurisdiction over CBP sending  
6 out notices to the airlines that they regularly interface  
7 with.

8 JUDGE BURROUGHS: Mr. Farquhar?

9 MR. FARQUHAR: I don't know, Your Honor, if CBP  
10 can, in fact, instruct overseas airlines on how they manage  
11 their business. They certainly, I think, try to follow what  
12 CBP says with regard to the policy here in the United  
13 States.

14 But I'm not in a position, Your Honor, to be able  
15 to tell this Court what will be the result of that type of  
16 an order internationally.

17 MS. CHURCH: CBP sets rules and regulations for  
18 these airlines to follow when they're admitting people  
19 overseas, so the airlines are required to check visas, to  
20 check Green cards. They won't allow anybody on the plane.  
21 That is United States law that these airlines follow.

22 So if they are instructed that the current law in  
23 Boston is that they must allow these individuals on the  
24 plane, I think that's well within this Court's jurisdiction  
25 to order, and that these airlines would follow.

1 MR. FARQUHAR: Your Honor, what confounds me then,  
2 if that is the case, is how we got to this situation in the  
3 first place. And unless Customs and Border Patrol sent out  
4 a notice stating that individuals will not be allowed in the  
5 United States, then the two individuals that are, in fact,  
6 here in Logan Airport that were, in fact, released, they  
7 wouldn't have come through in the first place. So clearly,  
8 that's not the case. I think that what's happening overseas  
9 is that the executive order's being interpreted without  
10 necessarily guidance from CBP.

11 JUDGE BURROUGHS: Is the situation with  
12 jurisdiction, does anybody know, different based on domestic  
13 carriers here versus carriers that are internationally  
14 based?

15 MR. FARQUHAR: I don't know, Your Honor. There  
16 are specialists in DC that would know that.

17 But some of these carriers that are here in the  
18 United States may, in fact, be incorporated overseas, and so  
19 it's far more complicated than I think what's being stated  
20 to the Court at this point.

21 MR. SEGAL: Your Honors, I think there's one thing  
22 we can grant, it's that this is complicated.

23 So but I think that points to a particular type of  
24 relief, which is that if it's true, as it may well be, that  
25 there's nothing that this Court can order an airline to do,

1 the best way to handle this is to provide the maximum amount  
2 of clarity.

3           So an order, you know, saying to the CBP that it's  
4 got to confer with the U.S. Attorney leaves airlines in the  
5 dark. I mean, who's supposed to get on a plane in that  
6 circumstance? How do you know if your passenger is going to  
7 be sent right back on the plane?

8           So that's why if it's really that complicated and  
9 if it's really that unclear, the way to bring clarity is to  
10 enter a clear order, maybe limited in time, that prohibits  
11 the CBP from enforcing the order -- the executive order,  
12 from detaining people or sending them back at all.

13           Because then the airlines would know that that is  
14 the law that applies to the CBP on people that it sends to  
15 Boston.

16           JUDGE BURROUGHS: The detaining and sending back  
17 seems easier to manage than the issue of whether or not  
18 people get on planes in foreign jurisdictions.

19           Are you now limiting your request to that?

20           MR. SEGAL: Well, I'm saying --

21           I anticipate, and this is easy for me to say,  
22 because the people writing the proposed order are not even  
23 in the room. So I anticipate that the proposed order is  
24 going to contain language about instructing -- ordering the  
25 CBP to communicate this information or instruct the

1 airlines.

2 I think it is within the Court's jurisdiction to  
3 order CBP to make that instruction.

4 But I'm saying even if the Court has reservations  
5 about that, it may well be able to achieve a similar result  
6 simply by being very clear in the remainder of the relief  
7 that the CBP is not entitled to enforce the executive order  
8 at all, because that may give the airlines at least the  
9 clarity and the comfort that they would need to know who can  
10 get on a plane and who can't.

11 MAG. JUDGE DEIN: Well, under either of those  
12 scenarios what you're saying, though, is that we shouldn't  
13 at this juncture issue an order against the foreign  
14 entities. It's here, and then they can choose whether or  
15 not they're going to listen. And that goes to Mr.  
16 Farquhar's argument that they're interpreting the executive  
17 order on their own.

18 MR. SEGAL: Yes. I'm being told that you're  
19 exactly right, Your Honor.

20 MAG. JUDGE DEIN: Well, then good.

21 I do have a question, though. And I know you're  
22 on the spot, Mr. Farquhar, but there's sort of an assumption  
23 that the complaint is valid -- that the arguments raised in  
24 the complaint are correct, as a matter of law.

25 Is there anything that you want to address on the

1 merits that this executive order is illegal?

2 MR. FARQUHAR: Your Honor, I am not prepared at  
3 this point. I first got wind of this at about ten o'clock  
4 at an engagement party. That glass of wine quickly went  
5 sour, because I had to put that away. So I am not,  
6 unfortunately, as up to speed as my brothers and sisters are  
7 here. I wish I was, but I'm just not.

8 There are people in the United States Government  
9 right now that are sifting through this and trying to make  
10 heads or tails of what's going on and trying to figure out  
11 some kind of a solution before tomorrow. But we're just not  
12 in that position at this point.

13 All we know is that we have an executive order.  
14 At this point we're bound by the executive order. And what  
15 I'm trying to do, Your Honor, is trying to prevent what has  
16 happened this evening from happening again tomorrow morning,  
17 tomorrow afternoon.

18 I am not prepared to deal with the larger picture,  
19 which is what is happening overseas internationally because  
20 of this executive order.

21 MAG. JUDGE DEIN: Thank you.

22 MR. FARQUHAR: Thank you.

23 MAG. JUDGE DEIN: And what's the schedule set by  
24 the other courts?

25 First of all, did anybody get ahold of the

1 Virginia order? I understand --

2 MS. CHURCH: We found it on the New York Times --  
3 all of our -- all of our phones, our iPads, they're all  
4 dead, because this has been going on all day. But we know  
5 it's attached to a New York Times article, but none of us  
6 could get it pdf'ed for the Court. I'm sure by tomorrow we  
7 could figure that out.

8 MAG. JUDGE DEIN: And what's the schedule that was  
9 set in New York for the next hearing? Do you know?

10 MR. SEGAL: It didn't say, Your Honor.

11 MS. CHURCH: That actually happened while we were  
12 driving to the courthouse.

13 MR. SEGAL: Your Honor, I think that the  
14 difference is that there's no schedule in New York, but  
15 there's this injunction that's in place and is indefinite;  
16 whereas, in Virginia my understanding is that it's a  
17 temporary seven-day order.

18 MAG. JUDGE DEIN: Okay.

19 JUDGE BURROUGHS: So I think our suggestion at the  
20 moment is that we take a short recess, we confer amongst  
21 ourselves. You all get your draft order in draft, show it  
22 to Mr. Farquhar, and we'll reconvene in however long that  
23 takes.

24 MAG. JUDGE DEIN: I think it will be better to be  
25 able to work off of what your proposed language is.

1 MS. CHURCH: Right. Hopefully that will be done

2 --

3 MAG. JUDGE DEIN: It makes more sense.

4 MS. CHURCH: Right. Thank you.

5 MAG. JUDGE DEIN: All right. We're in recess.

6 MS. CHURCH: Thank you.

7 THE CLERK: All rise.

8 (Court recessed from 12:12:41 a.m. to 1:48:11 a.m.)

9 AFTER RECESS

10 THE CLERK: All rise. This Honorable Court is now  
11 in session. Please be seated.

12 JUDGE BURROUGHS: So this is the order we intend  
13 to issue under both of our signatures. We wanted to give  
14 you an opportunity to comment before we did and check it for  
15 accuracy given that it's 1:50 in the morning. We typed it  
16 ourselves from scratch. So anything that any of you want to  
17 say or comment about it before we go ahead and issue it?

18 MR. SEGAL: Two things, Your Honors. First of  
19 all, in the case caption it looked like the word "Donald" is  
20 spelled --

21 JUDGE BURROUGHS: That's been corrected.

22 MR. SEGAL: Okay. So perhaps more importantly, we  
23 assume that the Court has in mind certain proceedings that  
24 might come after their order, and particularly given Mr.  
25 Farquhar's argument as to mootness. If the Court has any

1 instructions for us as to how it wishes the case to proceed  
2 between now and seven days from now in light of the status  
3 of the petitioners, we would welcome that guidance.  
4 Otherwise, we'll huddle up and look at our next steps in  
5 light of that.

6 JUDGE BURROUGHS: Well, the order includes a  
7 provision that you need to file an amended complaint by  
8 close of business on Monday.

9 MR. SEGAL: Yes, Your Honor. If Your Honors'  
10 order is followed, however, between now and close of  
11 business on Monday, we don't it exactly know if people will  
12 be detained.

13 I take it then the Court would be open to sort of  
14 a variety of different potential plaintiffs in that  
15 circumstance.

16 JUDGE BURROUGHS: Yes. But you'll file a draft  
17 complaint, and they'll have an opportunity to respond to it  
18 at the hearing.

19 MAG. JUDGE DEIN: It would be the plaintiffs who  
20 would be potentially detained under the executive order.

21 MR. SEGAL: Perhaps so, Your Honor. Perhaps so,  
22 yes.

23 JUDGE BURROUGHS: Mr. Farquhar?

24 MR. FARQUHAR: Your Honor, there's no objection  
25 from the United States.

1 JUDGE BURROUGHS: Okay. Then we will go ahead and  
2 issue this order as it's currently drafted. You'll file  
3 your amended complaint sometime on Monday, and we'll  
4 schedule a hearing for sometime within the next seven days.  
5 Okay?

6 MS. CHURCH: Yes, Your Honor.

7 MR. SEGAL: Thank you, Your Honor.

8 JUDGE BURROUGHS: Anything else tonight?

9 MS. CHURCH: Thank you Your Honors.

10 MR. SEGAL: Thank you very much, Your Honor.

11 MS. DOYLE: Thank you so much for coming in.

12 THE CLERK: All rise. This hearing is in recess.

13 (Court adjourned at 1:51:53 a.m.)  
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I, Judy Bond Gonsalves, a court approved transcriber,  
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Judy Bond

January 30, 2017

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