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OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: UNITED STATES, Petitioner V.

GUADALUPE MONTALVO-MURILLO

CASE NO: 89-163

PLACE: Washington, D.C.

DATE: January 9, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :  
Petitioner :  
V. : No. 89-163  
GUADALUPE MONTALVO-MURILLO :  
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Washington, D. C.

Tuesday, January 9, 1990

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
2:01 p.m.

APPEARANCES:

WILLIAM C. BRYSON, ESQ., Deputy Solicitor General,  
Department of Justice, Washington, D.C.; on behalf of  
the Petitioner.

BERNARD J. PANETTA II, ESQ., El Paso, Texas; on  
behalf of the Respondent.

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1 that time and agreed to participate in a continuation of  
2 the investigation -- the so-called "controlled" delivery  
3 in Chicago.

4 He was flown to Chicago to participate in the  
5 controlled delivery. The idea, of course, being to try to  
6 capture the people who were buying the cocaine from him.

7 And the agents -- one of the agents drove the  
8 truck. The controlled delivery failed. The buyers did  
9 not show up and Mr. Montalvo was immediately taken into  
10 district court. A complaint and warrant were filed, and  
11 he was ordered to -- transferred back to New Mexico.

12 In New Mexico a detention hearing was set and  
13 held. The day of that detention hearing was February  
14 16th.

15 He had been initially arrested on February 8th,  
16 and the transfer hearing had occurred on February 10th.

17 At the detention hearing, the magistrate, noting  
18 that no pre-trial services report had been made and that  
19 Mr. Montalvo's counsel had just been hired about three  
20 hours before the hearing, granted a continuance, which --  
21 the magistrate was apparently under a misapprehension had  
22 been requested by the government, but in fact there's  
23 nothing in the record that reflects it was requested by  
24 the government, until February 21st, which was two working  
25 days later. This was over the President's Day holiday

1 weekend.

2 At that hearing the magistrate then took  
3 evidence and decided that Mr. Montalvo was releasable.

4 The government immediately took an appeal, and  
5 two days later the district court took evidence in a much  
6 longer hearing and decided that Mr. Montalvo was in fact  
7 not releasable under the pretrial detention standards of  
8 the act because he was both a risk of flight and also he  
9 presented a case of dangerousness to the community that  
10 could not be disposed of by any conditions placed on his  
11 liberty.

12 QUESTION: Mr. Bryson, do you concede that the  
13 government failed to comply with the statute here? You  
14 want us to consider the case in that posture?

15 MR. BRYSON: We do. We have brought the case to  
16 this Court without contesting the question of whether  
17 there was a violation. As we've indicated --

18 QUESTION: Certainly it might have been  
19 contested, might it not --

20 MR. BRYSON: It was contested in the district  
21 court.

22 QUESTION: -- that there was waiver or one thing  
23 and another.

24 MR. BRYSON: There are a number of grounds on  
25 which it could be contested, and in fact we did contest it

1 both in the district court and in the court of appeals,  
2 but we lost.

3 And we think the more important question is,  
4 assuming a violation, what follows from that?

5 Now, the district court, having found that Mr.  
6 Montalvo was detainable both on risk of flight and on  
7 dangerousness, nonetheless said that there was no legal  
8 way that the court could detain him because the court  
9 found there had been a violation of the time limits of the  
10 act, principally because the waiver in Chicago of his  
11 right to a detention hearing had not been adequate under  
12 Johnson against Zerbst.

13 And that the magistrate, on February 16th, had  
14 failed to -- what the magistrate had done that was wrong  
15 is that he had a granted a sua sponte continuance rather  
16 than having a motion made by one of the parties for a  
17 continuance.

18 QUESTION: You were going to tell us of what  
19 other possibilities than release are available.

20 MR. BRYSON: Yes, Your Honor -- Your Honor.

21 Just very briefly, the court of appeals affirmed  
22 on what amount, for our purposes, to essentially the same  
23 grounds as the district court, saying that simply the fact  
24 that there was a time violation meant that he had to be  
25 released on conditions.

1           Now, our position is that the -- once there has  
2 been a violation, that the language and purposes of the  
3 pretrial detention statute do not require automatic  
4 release.

5           In fact we look to both the language of the  
6 statute and the purposes underlying the statute. And we  
7 suggest that what the statute is really about is it  
8 provides a limited period within which somebody can be  
9 held prior to a detention hearing. It does not provide or  
10 suggest and shouldn't be held to provide that a detention  
11 hearing must be held within a specific period of time, and  
12 if it is not held within that period of time that the  
13 defendant may not, for any purpose thereafter, be  
14 detained.

15           The language of the statute does not specify, as  
16 the court of appeals noted, what the consequences of a  
17 violation are. The language is simply that a hearing  
18 shall be held immediately upon the person's first  
19 appearance before the judicial officer, absent a  
20 continuance for a period of three days or five days or  
21 longer if there's good cause found.

22           QUESTION: Well, is this a violation without  
23 relief or a remedy?

24           MR. BRYSON: Well, I don't think so, Your Honor.  
25 The relief is -- is a form of relief that the defendant



1 can see prospectively, if he is in fact held for longer  
2 than the period that the statute permits. Let me give an  
3 example.

4 Suppose Mr. Montalvo had decided on February  
5 13th, before the detention hearing, that in fact he had  
6 already been held for as long as he could lawfully be  
7 held. He could have moved in the district court for  
8 release at that point or, in the alternative, a prompt  
9 hearing immediately.

10 And because the statute provides a period of  
11 lawful, pretrial relief -- pretrial detention prior to the  
12 holding of a hearing, which is confined to a period of  
13 three days or two days -- excuse me -- three days or five  
14 days, depending on who moves for the continuance, he might  
15 very well have been able to persuade the magistrate at  
16 that point that the government no longer had a right to  
17 detain him, absent a hearing. So he would have been able  
18 to obtain either a hearing right then or release right  
19 then.

20 But once he's past that, once he has failed to  
21 raise that point, and we are on into the detention period  
22 and we're -- well, a hearing has occurred, and he has been  
23 found to be detainable, then you can't go back and say,  
24 well, he shouldn't have been held for that period of time  
25 between the expiration of the period that the statute

1 permits and the time that the detention hearing was  
2 actually held. And because he shouldn't have been held  
3 for that two- or three-day period, he can't be detained  
4 forever at -- ever. That the statute simply doesn't  
5 suggest that that kind of remedy is appropriate, looking  
6 retrospectively for that kind of violation.

7 QUESTION: Is the only authority to hold the  
8 authority that's set forth in the act?

9 MR. BRYSON: Well --

10 QUESTION: Does the court have some inherent  
11 authority to hold --

12 MR. BRYSON: I think the court does have  
13 inherent authority, but the act provides a limitation on  
14 the period for normal court cases.

15 There may be extraordinary cases in which a  
16 court can hold without proceeding under the act. But  
17 normally, what the act provides is this is a period of  
18 lawful detention. It doesn't necessarily mean that  
19 anything beyond this is necessarily unlawful because they  
20 may be circumstances in which the inherent authority of  
21 the court comes into play.

22 In fact there's a case --

23 QUESTION: Well, but before there was statute,  
24 was the holding deemed to be by the sheriff or the United  
25 States Marshal, or was the holding -- is the holding by

1 the court?

2 MR. BRYSON: No. It would be under the  
3 authority of an arrest warrant, so it would be the -- it  
4 would be the marshal who would hold the person but the  
5 authority would be granted by the arrest warrant under  
6 which the person was arrested.

7 And there would have to be, for example, a  
8 preliminary examination within a period of ten days if the  
9 individual was in custody. And at the expiration of that  
10 period, a hearing would have to be held to determine  
11 probable cause.

12 But -- what I think the statute does, to answer  
13 your question, is the statute provides for an area of  
14 lawfulness to hold, pending a hearing, but doesn't  
15 necessarily mean that, in extraordinary circumstances,  
16 holding a person for some other purpose, may be unlawful.  
17 This just gives us a safe ground for the --

18 QUESTION: If the power -- if the inherent power  
19 is there anyway, why would you need a statute to provide  
20 for a period for when you're going to be held?

21 MR. BRYSON: Well, I think the inherent power  
22 really has to be limited to extraordinary cases.

23 The statute provides for the ordinary case in  
24 which a motion is made.

25 The extraordinary cases, let me point out,

1 really, in the cases that come before the statute that are  
2 discussed in the Senate report on this - on this act, make  
3 the point that these are really are exceptional cases.

4 They are cases, for example, in which an  
5 individual has made very clear threats against witnesses,  
6 where the court simply has no other option but to hold the  
7 individual under the inherent authority of the court.

8 I'm not suggesting that in the ordinary run-of-  
9 the-mine case, the court can simply hold somebody in  
10 disregard of the limitations in the statute. Ordinarily,  
11 the statute would provide the outer limit on the period  
12 that you could be held without a detention hearing.

13 But again, that does not mean that the remedy  
14 for holding longer than that period is that you  
15 automatically say no detention hearing can be held and no  
16 detention can be ordered.

17 QUESTION: Mr. Bryson, on this period when he  
18 should have made the motion, was that -- what time is that  
19 in relation to this trip to Chicago?

20 MR. BRYSON: Well, he was sent to Chicago on the  
21 8th. He had his initial appearance in court in Chicago on  
22 the 10th. So that if you regard that as being the initial  
23 -- the initial appearance --

24 QUESTION: Didn't you say the waiver --

25 MR. BRYSON: -- and you say that his waiver was

1       invalid at that point --

2               QUESTION: He should have made the motion in  
3 Chicago?

4               MR. BRYSON: He could have made a motion in  
5 Chicago for -- he certainly could have requested an  
6 immediate hearing. The government was prepared to give  
7 him a hearing right then and there.

8               QUESTION: But I mean --

9               MR. BRYSON: His counsel waived it.

10              QUESTION: -- he wasn't settled down. He was in  
11 transit, wasn't he?

12              QUESTION: He was -- well, no, he was flown.  
13 Sometimes they put them on the bus and it can take awhile.  
14 He was actually flown back to New Mexico, and he got back  
15 that night. So he was back in New Mexico on Friday night,  
16 on the 10th.

17              QUESTION: But I mean, I don't think he should  
18 be responsible for the time that the government was  
19 carrying him around the country.

20              MR. BRYSON: Well, there wasn't very much time  
21 following his --

22              QUESTION: That's what I wanted to know, how  
23 much time?

24              MR. BRYSON: -- his appearance. Only a few  
25 hours. He appeared in court on the afternoon of Friday,

1 February 10th. And he was back in New Mexico at about 11  
2 o'clock that night. So he was back the same day that he  
3 had his hearing. Now, a weekend intervened, so it wasn't  
4 until Monday morning that the government called the  
5 magistrate's office and asked for a hearing.

6 QUESTION: Could he have made the motion the  
7 week before?

8 MR. BRYSON: I'm sorry, Your Honor.

9 QUESTION: Could he have made that motion the  
10 week while he was waiting to go to Chicago?

11 MR. BRYSON: Well, there were only two days; he  
12 was arrested on the 8th, and he was up in Chicago by the  
13 10th and back on the 10th. So there was really only a  
14 two-day period.

15 He could have asked at the time; he could have  
16 insisted on an initial appearance in New Mexico, I think.  
17 He agreed instead to cooperate, but there's no reason that  
18 he couldn't have said, I'm not cooperating with you  
19 fellows. I want to stay right here and have an initial  
20 appearance here. But he didn't.

21 He agreed to cooperate; he went to Chicago. In  
22 Chicago he -- his counsel, and the question of the  
23 validity of the waiver, of course, is -- was not resolved  
24 by the court of appeals. But his counsel sought to waive  
25 a detention hearing at that time, and that's why it was

1 agreed that he could go back to New Mexico. Where, on the  
2 13th, he was -- the government made a request that a  
3 detention hearing be set, and the detention hearing was  
4 set for that -- the next available date, which was the  
5 16th.

6 Now, at that point, he might have said, stop, I  
7 want a detention hearing right now. And if the magistrate  
8 in the district court had concluded that the time had  
9 already run or was running --

10 QUESTION: Well, who told him that? Nobody told  
11 him that?

12 MR. BRYSON: No. No. He retained counsel --

13 QUESTION: Well, was anybody required to tell  
14 him that?

15 MR. BRYSON: No one was required to tell him  
16 that, Your Honor. He retained counsel.

17 QUESTION: So that's sort of a vague right,  
18 isn't it?

19 MR. BRYSON: Well, there are lots of rights, as  
20 Your Honor well knows, that one can exercise more  
21 effectively with counsel than without.

22 He did hire counsel. He was eligible to hire  
23 counsel. And in fact, counsel was appointed for him in  
24 spite of the fact that he wasn't eligible for appointment.  
25 The district court magistrate appointed counsel in advance

1 of the hearing.

2 He then retained counsel. But that didn't occur  
3 until the 16th. He, for whatever reason, did not obtain  
4 counsel until then. At that point, counsel sought to  
5 protect his rights. But significantly, we believe, did  
6 not seek to do so by opposing the continuance that the  
7 magistrate granted.

8 QUESTION: Did he have retained counsel here and  
9 there?

10 MR. BRYSON: I'm sorry, Your Honor?

11 QUESTION: Did he have retained counsel?

12 MR. BRYSON: He did. At the hearing he had both  
13 retained counsel and the counsel who had been appointed  
14 the previous day for him. Retained counsel had only been  
15 retained that day, the day of the hearing.

16 QUESTION: Did he have retained counsel in  
17 Chicago?

18 MR. BRYSON: He had appointed counsel in  
19 Chicago, Your Honor -- a public defender.

20 QUESTION: May I just ask you -- on February  
21 16th, when the hearing was first set, and they didn't go  
22 ahead or -- was that when it was set or when they agreed  
23 to have it four or five days later?

24 MR. BRYSON: Well, the hearing in New Mexico --

25 QUESTION: Yes. When we're back in New Mexico.



1 MR. BRYSON: Let me back up and give the  
2 chronology because it gets a little bit complicated.

3 On the 13th, which is a Monday, the government  
4 asked for a hearing to be set.

5 QUESTION: But that was not in his presence?

6 MR. BRYSON: No. That was a telephone call from  
7 the --

8 QUESTION: That was just between the Drug  
9 Enforcement agent and the magistrate?

10 MR. BRYSON: Exactly.

11 And then on the 16th, that hearing was held.  
12 That was a very brief hearing in which the magistrate,  
13 discovering that there had been no pretrial services  
14 report prepared, and that counsel had only been retained  
15 that day --

16 QUESTION: And the magistrate suggested we put  
17 it over until the 21st?

18 MR. BRYSON: Kicked it over to the 21st.

19 QUESTION: Now, if on that date --

20 MR. BRYSON: Yes.

21 QUESTION: -- he had said, I want a hearing now,  
22 would they have had to give him -- either give him the  
23 hearing and let him go?

24 MR. BRYSON: Well, they would either have to  
25 give him a hearing or, I submit, the magistrate could have

1 granted a continuance if the government, at that point,  
2 had moved for it because --

3 QUESTION: But they could not have granted a  
4 continuance for five days, if the government had asked for  
5 it.

6 MR. BRYSON: Well --

7 QUESTION: And he went from the 16th to the  
8 21st, and say the magistrate says, I cannot decide this  
9 until I get a report, which is up in Chicago or someplace,  
10 which cannot be produced until the 21st. We're just  
11 handcuffed until then. Could he have insisted -- would he  
12 have had a statutory right to release?

13 MR. BRYSON: I think he would not because in --  
14 at that -- at that point because -- well --

15 QUESTION: Well, I thought you told Justice  
16 Blackmun he would, that that's exactly the remedy.

17 MR. BRYSON: Well -- no, no. He wouldn't have  
18 the right to release. It depends on whether you regard  
19 the initial appearance in Chicago as having been the first  
20 appearance that triggers the statute.

21 If you do, and if you further regard there as  
22 having been either no continuance granted at that time or  
23 a continuance on the motion of the government for five  
24 days, then yes, the answer to your question is yes. On  
25 the 16th he would have been entitled to a hearing right

1 now.

2 Now, what the magistrate could have done, of  
3 course, at that point under the statute, would be to have  
4 begun the hearing at that point and simply said, we will  
5 hear, we will begin the hearing and we will resume when we  
6 get --

7 QUESTION: And then he could continue the  
8 hearing for five days?

9 MR. BRYSON: Well, there are -- some of these  
10 hearings go on for quite a while. And the statute  
11 provides --

12 QUESTION: And he couldn't have demanded that  
13 the hearing be started and conducted continuously?

14 MR. BRYSON: I think it's bad practice, but the  
15 statute would not prohibit it.

16 QUESTION: I see.

17 MR. BRYSON: Also, Your Honor, there's lots of  
18 room, you know, flexibility that the --

19 QUESTION: I'm trying to get -- to think through  
20 your answer to Justice Blackmun that, really, there are  
21 lots of good remedies here. It seems to me that there are  
22 lots of good ways to avoid letting him go. Now, maybe  
23 that makes good sense and that's --

24 MR. BRYSON: That's right. There are a lot of  
25 ways which, if you play your cards right, you can extend

1 the period of detention. I think, ordinarily, people  
2 don't do that, because people are trying to get these  
3 things decided very quickly.

4 But if you want to be cute about it, you can  
5 start -- you can stop the time from running in a lot of  
6 ways, including simply making a finding of good cause for  
7 a long continuance.

8 If you start the hearing, you can have the  
9 hearing and then just simply take a long time to decide  
10 the question of detention. He can be held during that  
11 period. I think that's not -- that's not consistent with  
12 the spirit of the act.

13 But to the technical legal answer to the  
14 question is yes, it could be done that way. But we don't  
15 typically do it that way. There may be instances in which  
16 those kinds of instances, things have happened, but not  
17 simply in order to hold the person.

18 The -- as I say, the purpose of this statute is  
19 not to serve the kinds of interests that a statute of  
20 limitations serves or Rule 4 of the Federal Rules of  
21 Appellate Procedure, or for that matter, 28 U.S.C. 2101  
22 that governs the time for petitioning for certiorari in  
23 this case, all of which are statutes and rules that embody  
24 principles of repose.

25 In this case, what -- the interest that's really

1 being protected by the time limits, as I say, is the  
2 interest in avoiding the temporary detention without due  
3 process.

4 Now, the --

5 QUESTION: But under your view, Mr. Bryson, if a  
6 defendant is held beyond this time, that there is a  
7 violation of the first-appearance rule. And it later  
8 turns out at a hearing he should have been held --

9 MR. BRYSON: Right.

10 QUESTION: -- he has suffered no injury.

11 MR. BRYSON: That's right.

12 QUESTION: But if it turns out he shouldn't have  
13 been held, then he has suffered injury. He has been  
14 confined a certain number of days that he shouldn't.

15 MR. BRYSON: That's right.

16 QUESTION: And I take it, the government's  
17 answer is there's just no remedy for this.

18 MR. BRYSON: Well, it's conceivable that he  
19 could have -- assuming that he was confined by the  
20 government acting in clear violation of his constitutional  
21 rights, it's conceivable that he might have a civil  
22 action. And I think he -- to be frank about it now, the -  
23 - he would have some problems with immunity and so forth.  
24 But it's conceivable there could be a Bivins action,  
25 assuming that there is a constitutional violation in this

1 interim period of holding. But --

2 QUESTION: It would also be true if he were  
3 innocent, wouldn't it?

4 MR. BRYSON: Yes. This has the ironic effect,  
5 of course, of saying that anyone who is not detained and,  
6 indeed, anybody who's not detained and is subsequently  
7 vindicated in court, is the person without a remedy.

8 But of course, the remedy that is proposed here  
9 by Mr. Montalvo doesn't help that person either. Mr.  
10 Montalvo's remedy only helps people like Mr. Montalvo, who  
11 in fact are found to be subject to detention.

12 So his remedy isn't -- in that respect, doesn't  
13 help the non-detained person.

14 QUESTION: May I ask one other question about  
15 the sequence?

16 The magistrate -- and am I correct, the  
17 magistrate originally determined that he should be  
18 released on bond?

19 MR. BRYSON: That's right. On the 21st.

20 QUESTION: And then there was a couple of days  
21 taken to take the matter to the district court.

22 MR. BRYSON: That's correct.

23 QUESTION: Could he be detained during the two-  
24 day appeal to the district court?

25 MR. BRYSON: He can be and he was. That's

1 right. Lawfully, he can be detained during the appeal.

2 QUESTION: I see.

3 MR. BRYSON: This case, we think, to follow up  
4 on Justice Rehnquist's question is, in a sense, like the  
5 Mechanik case decided by this Court relating to errors  
6 before the grand jury, where the -- any error in the  
7 process leading to a finding of probable cause, is deemed  
8 to be harmless when it's followed by a judgment of  
9 conviction.

10 Here, by the same token, the error in temporary  
11 detention is rendered, in a sense, harmless by the fact  
12 that he is later found to be detainable.

13 Even if a remedy would be appropriate in some  
14 instances, though, for cases in which somebody is held  
15 during this temporary period and is later held to be  
16 detained -- even if there would be a remedy that would be  
17 -- if the remedy of barring the government from ever  
18 obtaining detention would be appropriate in some  
19 instances, it's not here.

20 First of all, there was no assertion by the  
21 defendant of his rights at any point in this process. He  
22 didn't object to the continuances. He -- and indeed he  
23 sought to waive objection in Chicago to the postponement  
24 of the hearing there.

25 And second, this is a case in which, as the

1 district court found, and the district court made very  
2 thorough findings on these points, was a very strong case,  
3 both for detention and a very strong case on the merits of  
4 the case against him.

5 There -- Mr. Montalvo had extremely strong ties  
6 to Mexico; he had lived there for two of the previous  
7 three years, as the district court found, and had a  
8 business -- had two businesses down there which he had  
9 only recently sold. He had a house down there which he  
10 had recently sold.

11 QUESTION: But, Mr. Bryson, you talk about how  
12 the strong case is. Apparently it didn't persuade the  
13 magistrate.

14 MR. BRYSON: Well, it didn't, but the hearing  
15 before the magistrate was extremely brief.

16 QUESTION: So I mean, we have to kind of assume  
17 it must be -- reasonable judges could have decided it  
18 either way.

19 MR. BRYSON: Well, with all respect to the  
20 magistrate, I think the magistrate was way off base in  
21 this case. And the district court essentially reached the  
22 same conclusion.

23 The magistrate -- the presentation before the  
24 magistrate was extremely brief, and the presentation  
25 before the district court was much longer.



1           And before the district court, the district  
2 court concluded that, based on a lot of evidence, that  
3 this was an extremely strong case for detention.

4           And in fact there is -- the argument in favor of  
5 becoming a fugitive, in this case, must have seemed to Mr.  
6 Montalvo, an extremely strong one. He was facing ten  
7 years, minimum, in prison upon a case in which there was  
8 virtually no chance of acquittal. The suppression motion  
9 would have been hopeless under the circumstances.

10           QUESTION: I wonder what he would have gotten if  
11 they'd delivered the drugs in Chicago.

12           MR. BRYSON: Well, the government would have  
13 been in the position to make a motion to reduce below the  
14 ten-year minimum for cooperation, and might well have  
15 done. But that never happened.

16           In any event, this was a case in which if there  
17 ever is a case in which the remedy of precluding detention  
18 is appropriate, this is not that case.

19           Now, I would point out that the argument that's  
20 being made on the other side, as I understand it, is  
21 essentially that the hearing time limits established, in  
22 essence, a condition precedent for detention. But that  
23 argument is an extremely sweeping one.

24           If you say that any statute that says that  
25 something shall be done according to the following

1 provisions, and that's what this statute says, means that  
2 it may not, in any event -- that the hearing is in this  
3 case -- may not be held unless those procedures are  
4 followed, would suggest that all of the procedures that  
5 are found in Section F are conditions precedent to  
6 detention.

7           And yet there are a lot of procedures in which  
8 there may be a minor error here or there among the  
9 procedures in Subsection F, just as there are many  
10 provisions in Title 18, as to which there may be a minor  
11 error here and there without undercutting a defendant's  
12 conviction.

13           Under Subsection F, there may be a variety of  
14 errors that could be made, none of which end up being  
15 prejudicial. And you would not say that the hearing  
16 simply cannot be held or that the detention cannot be  
17 ordered because of those kinds of orders, assuming that  
18 you conclude that they really didn't prejudice the  
19 defendant.

20           I'll reserve the rest of my time.

21           QUESTION: Thank you, Mr. Bryson.

22           Mr. Panetta, we'll hear now from you.

23           ORAL ARGUMENT OF BERNARD J. PANETTA II

24                   ON BEHALF OF THE RESPONDENT

25           MR. PANETTA: Mr. Chief Justice, and may it

1 please the Court:

2 It is Respondent's position that this statute,  
3 as a text, that the intent of Congress is manifest in the  
4 text of the statute, that the language is clear and  
5 unambiguous. If the government had followed it in this  
6 case, we wouldn't be here today. And the problems that  
7 the government suggest arises, when the statute is not  
8 followed.

9 If this Court tells other courts, tells the  
10 government, tells defendants that the language is manifest  
11 -- is mandatory, the problems won't arise.

12 If the government in Chicago, at Mr. Montalvo's  
13 initial appearance, had moved for a continuance, stating  
14 that it needed to remove Mr. Montalvo back to New Mexico,  
15 that more time than three days would have been required to  
16 hold the hearing, and the court there would have been  
17 satisfied that the government had established good cause,  
18 we wouldn't be here.

19 The government did not choose to do that. The  
20 government did not choose to bring Mr. Montalvo before a  
21 magistrate in New Mexico, which is probably the primary  
22 source of the confusion.

23 He's arrested on the 8th; he is taken to the  
24 very building in Las Cruces where the magistrate's  
25 courtroom is, to talk with the DEA for a period of time

1 about his cooperation.

2 QUESTION: Is there a resident judge in Las  
3 Cruces at all times, Mr. Panetta?

4 MR. PANETTA: The magistrate is a resident of  
5 Las Cruces and he is always there. When the government  
6 needs to get a search warrant, it calls the magistrate's  
7 office. The magistrate makes himself available to sign  
8 those warrants. So there is someone there that is  
9 available if the government requests that they be  
10 available and explains that there is a necessity for it.

11 QUESTION: If you want to ask the district court  
12 to review something -- the magistrate's -- don't you --  
13 what? You go to Albuquerque?

14 MR. PANETTA: Chief Judge Bratton used to live  
15 in Albuquerque. He lives in Las Cruces, and he has moved  
16 to Las Cruces. So Chief Judge Bratton is available. If  
17 it were an emergency, if the government needed to go  
18 before a district court judge, Chief Judge Bratton lives  
19 in Las Cruces.

20 In this instance, the government chose to take  
21 Mr. Montalvo to Chicago. There's no dispute that the  
22 government moved to detain him. All they had to do at  
23 that time was say we need more time.

24 The government, to suggest that the burden  
25 should shift to Mr. Montalvo, to announce to the court

1 that I need a swift hearing, seems to me to be a bit  
2 ludicrous in the sense that Mr. Montalvo is unrepresented,  
3 sitting in jail in Las Cruces, New Mexico. Now, just  
4 exactly how was he supposed to notify the court that he is  
5 entitled to a speedy hearing?

6 Counsel was appointed finally on the 15th; our  
7 office is retained on the 16th.

8 The magistrate in Las Cruces and my office was  
9 unaware that the government had moved to detain Mr.  
10 Montalvo in Chicago.

11 We objected to the court holding any detention  
12 hearing at all because the government had not complied  
13 with the statute as far as we understood. The United  
14 States attorney, there in court, never advised the court -  
15 - never advised us that such was the case.

16 To suggest --

17 QUESTION: Mr. Panetta, what do you say to the  
18 government's main argument? I don't think they're  
19 contesting that they made a mistake here; that they didn't  
20 follow the proper procedures. But I think their basic  
21 argument is no harm, no foul. That had there been a  
22 prompt hearing, the result of that hearing would have been  
23 exactly what happened anyway. He was held.

24 So your client is now coming in and saying, oh,  
25 you know, I've been harmed because I've been held. And

1 the government is saying, even if you had gotten your  
2 hearing, you would have been held. So what harm has been  
3 done to your client?

4 MR. PANETTA: Most respectfully, I don't think  
5 that's the issue at all, as to what harm was done.

6 The issue is whether or not, if you follow the  
7 government's position, you're telling Congress you've made  
8 mandatory language here. We don't have to follow it.

9 If you're going to use a harmless error  
10 analysis, you're telling Congress when you told us that  
11 the hearing had to be held at the initial appearance, you  
12 didn't mean that because it doesn't have to be held at the  
13 initial appearance.

14 QUESTION: You're not seeking relief for your  
15 client? You're not seeking to get something for your  
16 client that he was entitled to? You're rather seeking  
17 just a rule that will cause the act to be enforced more  
18 rigorously?

19 MR. PANETTA: If the act is enforced according  
20 to its plain meaning, my client has the relief that he  
21 requested. He cannot be detained --

22 QUESTION: No. Your client would have been in  
23 exactly the same position he's in now. He would have been  
24 -- well, I mean except for the fact that he's, you know,  
25 not been held. But he would have been held.

1 MR. PANETTA: Had the facts changed and had the  
2 government had the hearing in a timely fashion, my client  
3 would have been held.

4 QUESTION: Right.

5 MR. PANETTA: There are lots of other people  
6 though that have been held for a longer period of time  
7 that would not be held.

8 QUESTION: Well, what if the government knew it  
9 was violating the rule and just turned your client loose  
10 and then rearrested him in a couple of days?

11 MR. PANETTA: If I understand your question, if  
12 the government -- to dismiss the complaint --

13 QUESTION: I mean, if you want -- you say he  
14 should be released?

15 MR. PANETTA: Yes, sir.

16 QUESTION: And forever? Is he free of the  
17 charge that might have been brought against him?

18 MR. PANETTA: I misspoke. I am not saying that  
19 Mr. Montalvo should have been released. What I am saying  
20 is, that he could not have been preventively detained.

21 The courts could have said, you have to remain  
22 in a halfway house, you have a curfew, you have a \$100,000  
23 bond. Mr. Montalvo couldn't make the bond; he has to stay  
24 in jail. There are lots of conditions that the court  
25 could have set.

1                   What I am saying is --

2                   QUESTION: Well, what did the court do? What  
3 did the court of appeals rule -- what?

4                   MR. PANETTA: The court of appeals ruled that  
5 because the government had not complied, Mr. Montalvo had  
6 to be released, if he could meet the conditions set by the  
7 district court. The district court increased Mr.  
8 Montalvo's bond from the \$50,000 bond set by the  
9 magistrate to an \$88,000 bond and imposed other  
10 conditions. And if he could meet -- comply with those  
11 conditions he was to be released.

12                   The district court could have imposed other  
13 conditions. Mr. Montalvo may not have been able to make  
14 the \$88,000 bond. In this case, he was able to meet the  
15 conditions set by the district court, and he was released.

16                   QUESTION: Well, Mr. Panetta, you say that the  
17 statute ought to be enforced as it's written, but it  
18 doesn't provide what should be the remedy if the  
19 government doesn't comply with the statute.

20                   So -- according has obviously got to contribute  
21 something to the solution.

22                   MR. PANETTA: I suggest that the remedy is  
23 implicit in the mandatory language, as we've tried to  
24 analogize to Rule 4 of the Appellate Rules of Procedure.

25                   There's no remedy if you're untimely in filing



1 your appeal. You just can't file the appeal. Just as  
2 here, there's no remedy, per se. If the government  
3 doesn't file timely, it cannot move to detain. It's not a  
4 question of remedy; it's a question of meeting the  
5 requirements of the statute -- just as it's a question of  
6 meeting the requirements of Rule 4.

7 QUESTION: You can no longer move to retain  
8 without bond?

9 MR. PANETTA: When?

10 QUESTION: Well, the (inaudible).

11 MR. PANETTA: The government, in this case,  
12 since it did not comply with the statute, cannot move to  
13 detain without bond. It can move to amend the conditions  
14 of release. If Mr. Montalvo violates conditions of  
15 release, it can move to revoke. But in this instance, it  
16 cannot.

17 In the removal cases, where --

18 QUESTION: It can move -- it can say, we can't  
19 move to hold without bond, but we can certainly ask for  
20 severe restraints if he's released.

21 MR. PANETTA: It could have asked for more  
22 serious conditions. That's another point.

23 Mr. Bryson says, well, the magistrate conducted  
24 a very brief hearing. Well, the magistrate wasn't  
25 presenting the government's case; the government was

1 presenting its case as to what the facts were. And if the  
2 government chose not to put on a strong enough case to  
3 detain Mr. Montalvo, that was the government's choosing.  
4 It wasn't the magistrate that was presenting evidence at  
5 that hearing.

6 In cases that are cited in both briefs that talk  
7 about waiver and that talk about removal and talk about  
8 whether or not you have to move to detain in the district  
9 of arrest or in the charging district, if this court tells  
10 other courts that the language is mandatory and has to be  
11 followed, those problems no longer exist.

12 If he's arrested in a district other than the  
13 charging district, the government moves to detain at the  
14 initial appearance and files a motion for a continuance  
15 beyond the three days for good cause, because he's got to  
16 be removed.

17 If someone comes in -- the government suggested  
18 you could sandbag a court. And says, don't worry, bond's  
19 not an issue here; we're not concerned about bond.

20 The government moves to detain, makes a proffer,  
21 as it can rightly do of what its evidence is. If there's  
22 no question about bond, the defense attorney doesn't say  
23 anything, the magistrate finds that the statute has been  
24 complied with, the government has met his burden and the  
25 man is detained.

1                   There's no confusion, if the statute is read the  
2 way Congress has written it.

3                   QUESTION: Well, it's not clear to me the  
4 government is saying that this isn't mandatory. It's just  
5 saying that there's no remedy if the mandatory -- that  
6 there's no remedy of relief -- release, if the mandatory  
7 provisions are violated.

8                   If there's refusal to hold a hearing, you go to  
9 a district judge, a circuit judge, get a writ of habeas  
10 corpus. Tell the judges to follow the law.

11                   MR. PANETTA: What the government is saying,  
12 most respectfully, is that we don't have to do what  
13 Congress said. And when we don't do what Congress said,  
14 say it's harmless error and forgive us. That's what  
15 they're saying.

16                   QUESTION: But that's different from saying the  
17 language is not mandatory. The government's -- the judge,  
18 if he refuses to hold a hearing within the time prescribed  
19 is in violation of the statute.

20                   MR. PANETTA: He is. But if the language is  
21 mandatory, there isn't a remedy. You cannot remedy an  
22 untimely hearing. If the hearing hasn't been held in a  
23 timely fashion, you cannot go back and hold it in a timely  
24 fashion.

25                   If he didn't have an attorney, one of the other

1 things that they talk about in the statute -- you can go  
2 back and give him an attorney and rehold the hearing. But  
3 there's no way to remedy the untimely hearing, just as if  
4 an appeal is filed out of time, as in *Andre v. Guste*, a  
5 case that we talk about where the petitioner filed a writ  
6 of habeas corpus, he did not appeal. He then refiled the  
7 same writ and sought to appeal. The Fifth Circuit said,  
8 you can't get around the time requirements that way.

9 QUESTION: Time requirements in connection with  
10 an appeal have been construed by -- excuse me, construed  
11 by the courts as "jurisdictional." There are an awful lot  
12 of other time requirements in the law that aren't  
13 construed as jurisdictional. That you have fallen short  
14 of a statutory standard, but the remedy is not necessarily  
15 that you simply evaporate into thin air.

16 MR. PANETTA: You're absolutely right.

17 Mr. Bryson informed me of a case that is not  
18 cited in his brief, which is *Brock v. Pierce County*, which  
19 had to do with some mandatory language to an agency's  
20 secretary that you shall act on complaints involving CETA  
21 funds within 120 days. And he didn't act in 120 days.  
22 And someone was saying -- coming in and saying, well, you  
23 no longer have the power to act.

24 The language was shall. This court said, well,  
25 that didn't mean that he had to decide within the 120

1 days.

2 There, I think, there were a couple of  
3 differences. In that statute there was no escape valve,  
4 if you will. There was no excusable neglect like in the  
5 appellate statute. There was no good cause like in our  
6 statute.

7 Also, in the legislative history of that act,  
8 when the sponsor of the bill was being questioned by one  
9 of the congressmen, he was asked, well, does this mean  
10 that the Secretary has to rule within that 120 days? He  
11 said, no.

12 Here, I believe, the legislative history is  
13 clear. The Congress had the District of Columbia's  
14 preventive detention statute before it.

15 The preventive detention statute in the District  
16 of Columbia allows the government to move at any time to  
17 detain, not at an individual's initial appearance but when  
18 the government believes it should move to detain.

19 The second part of that statute is the same as  
20 the one that we have here, that when they move to detain,  
21 the government may get a continuance of three days, the  
22 defendant of five or, if you can show good cause, a  
23 further amount of time.

24 Clearly, the Congress was aware of that statute.  
25 and could have provided that the government could move to

1 detain at any time. It didn't. *ambiguously.*

2 This Court, in Salerno, in upholding the  
3 constitutionality of this statute, looked to the *provisions*  
4 protections that Congress had put in to find that  
5 preventive detention was constitutional. *etc.*

6 This is one of the very protections. If we say  
7 that it's harmless not to abide by them, does that  
8 challenge the issue of whether or not it's still  
9 constitutional, if you don't have to comply with those  
10 conditions?

11 QUESTION: I don't know. *an analogy to the case*

12 MR. PANETTA: But Congress had an opportunity to  
13 do otherwise; it chose not to do otherwise. *remedy that*

14 *results in* It seems if the government reads the clear *is*  
15 language of the statute and complies with it, that this  
16 problem is not going to reoccur. That the government can  
17 move to detain. And if there are exceptional *upon arrest*  
18 circumstances that arise that require the government to  
19 have more time, they can request more time. *at which is*

20 *taken from* The analogy, I think, to Rule 4 is an apt one.  
21 I believe that the time limits within the statute are *of*  
22 jurisdictional and mandatory and should be so held by this  
23 court. To do otherwise, I believe, would be to eviscerate  
24 the clear language of the statute and to substitute this  
25 court's view rather than the legislature, which has

1 already spoken clearly and unambiguously.

2 If there are no further questions, I would  
3 respectfully request that this Court affirm the decision  
4 of the Tenth Circuit.

5 QUESTION: Thank you, Mr. Panetta.

6 Mr. Bryson, do you have rebuttal?

7 REBUTTAL ARGUMENT OF WILLIAM C. BRYSON

8 ON BEHALF OF THE PETITIONER

9 MR. BRYSON: Only a couple of points, Your  
10 Honor.

11 First, I think the closest analogy to the case  
12 of a statute or rule that has mandatory language that does  
13 not typically result in any sanctions or any remedy that  
14 results in disabling the government from proceeding, is  
15 the initial appearance rule which is closely related to  
16 the pretrial detention rule, and that's Rule 5 which says  
17 that someone shall be taken to a magistrate upon arrest  
18 without unnecessary delay.

19 Assume that there isn't a statement which is  
20 taken from the individual and subject to suppression  
21 during the period of unnecessary delay -- the mere fact of  
22 delay has never been held or thought to result in the  
23 dismissal of the proceedings against the defendant.

24 It -- and yet I think it's interesting to note  
25 that in fact, despite the absence of any remedy,

1 compliance with this statute, with this -- excuse me, with  
2 this rule, is quite good. I mean, the agents are trained  
3 and they do follow their training to bring people before  
4 magistrates without unnecessary delay.

5           There are exceptional cases and, indeed, this  
6 one may be one in which, shortly after arrest, there's an  
7 agreement to cooperate, but -- in which the appearance  
8 does not occur immediately. But typically it occurs  
9 within a matter of hours.

10           The second point is that -- it's important to  
11 keep in mind, I think, when you look at the argument made  
12 by Respondent with respect to the contention that the --  
13 it's no real harm to the government to be put back in the  
14 position of simply having to ask for conditions on  
15 release. Because, after all, that was the system before  
16 1984.

17           But there's been a very big and important change  
18 in this statute from the pre-1984 system.

19           What Congress did in '84 was to make essentially  
20 a bargain in favor of candor and fairness. And the  
21 bargain was this: there would be a pretrial detention  
22 provision in which pretrial detention could be ordered  
23 directly, candidly; where this is what we're doing. But  
24 there was a provision that said, you cannot hold somebody  
25 on unrealistically high bail. If you're going to set



1 bail, it's got to be bail that that person can meet.

2 That's the reason that bail in this case, when  
3 it way set, was set at \$88,000 instead of half a million.

4 If it had been under the old system, it would  
5 have been simple. They wouldn't have had a hearing at  
6 all, or not much of one.

7 QUESTION: Well, is it a requirement now that if  
8 bail is set it must be bail that the defendant can meet?

9 MR. BRYSON: Exactly. That's 3142(c)(2), Your  
10 Honor.

11 QUESTION: Well, that's a dramatic change.

12 MR. BRYSON: It's a huge change. And what it  
13 means is, people like Mr. Montalvo, who somehow manage to  
14 avoid the detention statute, even though they should be  
15 detained, are given a free pass. Under the old statute,  
16 bail would have been set at a very high level, and he  
17 would never have gotten out.

18 QUESTION: (Inaudible) \$88,000 --

19 QUESTION: That's not free -- I mean, \$88,000.

20 MR. BRYSON: Well, it's not free, but if he is  
21 in fact carrying a million dollars of cocaine -- but he's  
22 carrying a million dollars of cocaine, I submit that he  
23 probably has access to \$88,000. And if he's facing ten  
24 years in jail, he may well think the bargain is well worth  
25 it. He certainly did in this case, for all that appears.

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Thank you.

CHIEF JUSTICE REHNQUIST: Thank you.

The case is submitted.

(Whereupon, at 2:45 p.m., the case in the above-entitled matter was submitted.)

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

#89-163 - UNITED STATES, Petitioner V. GUADALUPE MONTALVO-MURILLO

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*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Lona M. May*

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