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IN THE SUPREME COURT OF THE UNITED STATES

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DEBORIS CALCANO-MARTINEZ, :
ET AL., :
Petitioners :
v. : No.00-1011
IMMIGRATION AND NATURALIZATION :
SERVICE. :

Washington, D.C.
Tuesday, April 24, 2001

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
10:17 a.m.

APPEARANCES:

LUCAS GUTTENTAG, ESQ., New York, New York; on behalf of
the Petitioners.
EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Respondent.

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C O N T E N T S

	PAGE
ORAL ARGUMENT OF LUCAS GUTTENTAG, ESQ. On behalf of the Petitioner	3
ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ. On behalf of the Respondent	25
REBUTTAL ARGUMENT OF LUCAS GUTTENTAG, ESQ. On behalf of the Petitioner	51

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 00-1011, Deboris Calcano-Martinez v. The Immigration and Naturalization Service.

Mr. Guttentag.

ORAL ARGUMENT OF LUCAS GUTTENTAG

ON BEHALF OF THE PETITIONER

MR. GUTTENTAG: Mr. Chief Justice, and may it please the Court:

The jurisdictional issue presented in this case is whether a legal ruling by the Attorney General on a pure question of law compelling the deportation of long-time legal permanent residents is reviewable in any court. Never in our country's history has an alien been subject to deportation without the judicial branch determining the legal validity of the administrative deportation order.

We submit that the Constitution does not permit denying judicial scrutiny of the Attorney General's ruling, and that the statute did not deprive this Court and the district court and the courts of appeals of considering the pure question of law presented in this case.

QUESTION: You say the legal validity of his deportation is at issue. In what respect to you claim he

1 is not properly deportable?

2 MR. GUTTENTAG: Your Honor --

3 QUESTION: As I understood it, it is conceded
4 that he met the qualifications for deportation.

5 MR. GUTTENTAG: He is -- our clients are subject
6 to the deportability grounds, but they are not subject to
7 deportation without an adjudication of the application for
8 discretionary relief. The final order of deportation --

9 QUESTION: What you're complaining about is that
10 the Attorney General did not accord them discretionary
11 relief, but all of your grounds for asserting that you're
12 not deportable you had an opportunity to challenge in
13 court, didn't you?

14 MR. GUTTENTAG: Well, Your Honor, the question
15 is whether the final order of deportation was properly
16 entered and, under this Court's case law --

17 QUESTION: It was properly entered if all of the
18 qualifications for deportation existed. Your complaint is
19 that the Attorney General did not exercise his discretion
20 to let your client stay in the country nonetheless.

21 MR. GUTTENTAG: No, Your Honor, we disagree with
22 that, respectfully. The final order of deportation cannot
23 be entered until there is an adjudication on the
24 application for discretionary relief if the person is
25 eligible to apply. In this case, the Attorney General --

1 QUESTION: What is your authority for that
2 proposition, Mr. Guttentag, your case authority?

3 MR. GUTTENTAG: The Chadha case, Your Honor, the
4 Foti case, all said that the final order of deportation is
5 contingent on --

6 QUESTION: But that was not talking about the
7 Attorney General's discretion, was it?

8 MR. GUTTENTAG: Yes. In all those cases, Your
9 Honor, the question was whether a final order of
10 deportation, and whether the discretionary element
11 that's -- on which the final order is contingent was
12 reviewable in court, and the way the Immigration Act is --

13 QUESTION: Well, that was before the IIRIRA, or
14 however you pronounce it.

15 MR. GUTTENTAG: Yes, but the IIRIRA has not
16 changed that element, Your Honor. Under the Immigration
17 Act, both before and after, there is a two-part process
18 for issuing a final order of deportation. There's the
19 question of deportability, and that's the question of
20 whether a person falls within the grounds enumerated in
21 the statute.

22 QUESTION: And you concede those have been met
23 here?

24 MR. GUTTENTAG: We do concede that, Your Honor.
25 There's no question that our clients conceded that they

1 fit within the grounds of deportation. Then the second
2 question --

3 QUESTION: And also that all of those grounds
4 can be challenged in court, that IIRIRA does not prevent
5 judicial review of all of those grounds of deportation,
6 right?

7 MR. GUTTENTAG: Well, that's a construction of
8 the statute, Your Honor, that the Government's offered.
9 We don't dispute that, although we come to that conclusion
10 for different reasons, but the question is whether the
11 final order of deportation itself is reviewable, and the
12 final order cannot be entered -- and I believe the
13 Government will concede this, Your Honor --

14 QUESTION: Could I just interrupt you with one
15 quick -- do you concede that a conviction prior to the
16 date of the enactment of the statute is proper ground for
17 deportation without having an opportunity for
18 discretionary review?

19 MR. GUTTENTAG: Well, the conviction itself is a
20 basis for triggering the grounds of deportability.

21 QUESTION: Well, I understand, but are you
22 conceding convictions prior to the enactment of the
23 statute have the same legal effect as convictions after
24 the enactment of the statute?

25 MR. GUTTENTAG: Not for purposes of

1 discretionary relief, Your Honor. That's our claim on the
2 merits in the St. Cyr case.

3 QUESTION: But your claim is that you are
4 entitled to an adjudication at the administrative level,
5 ultimately by the Attorney General, under a statute that
6 contains this discretion. That's -- isn't that your basic
7 claim?

8 MR. GUTTENTAG: Yes. Our basic claim, Your
9 Honor, is --

10 QUESTION: Now -- okay. Let me ask you part 2
11 of my question. Do you also claim that if you are, or if
12 your client in this case is entitled to an exercise of
13 discretion, that the exercise of discretion itself is
14 reviewable for abuse of discretion?

15 MR. GUTTENTAG: No, we do not, Your Honor.

16 QUESTION: Okay.

17 MR. GUTTENTAG: Our claim is that the question
18 of legal eligibility to apply for the discretionary relief
19 is reviewable. The Attorney General --

20 QUESTION: Mr. Guttentag, may I just add a post
21 script on that question to -- suppose the Attorney General
22 were to say, in light of AEDPA, and however you pronounce
23 the other statute, I have decided that henceforth I will
24 exercise my discretion never to be gracious, and I will
25 simply deny these applications. It is as an exercise of

1 discretion, and it's in tune with what I think is the
2 current climate in the legislature.

3 You just answered Justice Souter that you would
4 not challenge an exercise of discretion.

5 MR. GUTTENTAG: Your Honor, we believe that the
6 question of a categorical denial raises a different issue,
7 and whether that's permissible or not, raises a distinct
8 question.

9 But just to be clear, the Attorney General has
10 not done that in this case. What the Attorney General has
11 said is that he lacks the legal authority to exercise
12 discretion, on a pure question of interpreting the statute
13 that Congress has divested him of the legal authority to
14 consider applications for discretionary relief.

15 We do not believe that the Attorney General, if
16 he interpreted this statute correctly, would adopt a
17 categorical rule. There's no reason to believe that. He
18 has determined that he lacks any discretionary authority.
19 How he exercises that authority would be a separate and
20 distinct question.

21 QUESTION: Suppose there's a case in which it's
22 conceded that the Attorney General has discretionary
23 authority. Before he exercises -- and the immigration
24 judge has found that the person is deportable. Before the
25 Attorney General exercises that discretion, is there a

1 final order of deportation?

2 MR. GUTTENTAG: No, there's not, Your Honor.

3 QUESTION: Why do you concede there's a final
4 order of deportation here, or do you?

5 MR. GUTTENTAG: Well, we do not --

6 QUESTION: Because it seems to me that may be
7 important under the interpretation of the statute. It
8 seems to me you can argue that where, as in your case,
9 the alien requests the Attorney General to exercise the
10 Attorney General's discretion, there is no final order of
11 deportability until he does so.

12 MR. GUTTENTAG: Well, we certainly agree that
13 there's not a legally valid final order of deportation.
14 There was an order issued by the Board of Immigration
15 Appeals, so in that sense there's a piece of paper that
16 constitutes a final order, but we agree that there's not a
17 legally valid final order.

18 QUESTION: Well, do you think there's a final
19 order under the statute, 1252?

20 MR. GUTTENTAG: The (a)(2) -- well, we believe
21 there's a final order for purposes of seeking judicial
22 review of the BIA's decision. We do believe that that
23 constitutes a final order. We believe that it is not a
24 legally valid final order because of the Attorney
25 General's ruling.

1 QUESTION: Do you think this is a final order of
2 removal against an alien who is removable?

3 MR. GUTTENTAG: Well, Your Honor, we believe
4 that the statute, the (a)(2)(C) does not apply to bar
5 review of this claim. What the -- we believe that the
6 provision barring review does not apply. Whether it's
7 because it doesn't constitute a final order within the
8 meaning of the statute as intended, because there's a
9 legal error underlying the adjudication, or whether there
10 is a final order but it's reviewable nonetheless for that
11 legal -- because it lacks legal validity, either way
12 there's review of that determination.

13 QUESTION: Well, I'm just -- in just looking at
14 this statute, it seems to me that the Attorney General
15 does not give much force to the phrase, who is removable.

16 MR. GUTTENTAG: Right, and that is an --

17 QUESTION: It makes for an awkward statute,
18 frankly, if you take it out, but it's -- I thought that
19 your argument might be that this -- your client is not an
20 alien who is removable under a final order.

21 MR. GUTTENTAG: We would certainly accept that
22 interpretation, Your Honor, if removable is not the term
23 that normally appears in the Immigration Act, because the
24 technical term would be deportable.

25 QUESTION: But you're saying that because

1 removable means a person who is potentially deportable,
2 that your client is removable?

3 MR. GUTTENTAG: No. We would -- I -- Your
4 Honor, we believe that it's very difficult to interpret
5 this statute, that --

6 (Laughter.)

7 MR. GUTTENTAG: That the one thing it doesn't do
8 is preclude review of the legal claim presented here.
9 Whether that's because the term is removable --

10 QUESTION: Well, I'm asking if you could make
11 the argument that your client is not removable because the
12 statute does not prevent discretion being exercised as to
13 him, you've asked for discretion, it hasn't been
14 exercised, so there is no final order against an alien who
15 is removable.

16 MR. GUTTENTAG: We would certainly accept that
17 interpretation.

18 QUESTION: But you didn't -- you don't --

19 QUESTION: I'm sure you would, but
20 unfortunately --

21 QUESTION: But did you argue -- you don't argue
22 that?

23 MR. GUTTENTAG: We've argued principally that
24 the term review does not preclude the scope of inquiry
25 that's traditionally be encompassed by habeas corpus

1 because of the constitutional problems that would be
2 raised by barring all review. We believe that --

3 QUESTION: Well, under my submission, and
4 frankly I don't think this works, because the statute is
5 pretty awkward and because of what you've already said
6 about removal, but under -- if there was some merit to
7 this interpretation and it could be adopted to avoid the
8 constitutional problem, then the review wouldn't even be
9 by habeas, it would be just under the review mechanisms of
10 the statute.

11 MR. GUTTENTAG: And we --

12 QUESTION: You don't seem to be too happy with
13 that.

14 MR. GUTTENTAG: No, we absolutely will accept
15 that, Your Honor --

16 QUESTION: Well --

17 MR. GUTTENTAG: -- because we believe that there
18 can be review in the court of appeals, and that if the
19 term removable means only a properly entered final order
20 of removable -- removal, then our clients are not
21 removable.

22 QUESTION: Mr. Guttentag, may I --

23 MR. GUTTENTAG: They are subject to --

24 QUESTION: -- suggest that the reason you didn't
25 make that argument is that it's not a very good one,

1 because there is more than one section which excludes the
2 judicial review that you're seeking. Not all of them
3 contain that phrase, who is removable. Subsection (g),
4 entitled, Exclusive Jurisdiction, does not use the term.
5 It says, except as provided in this section, and
6 notwithstanding any other provision of law, no court shall
7 have jurisdiction to hear any cause or claim by or on
8 behalf of any alien arising from the decision or action by
9 the Attorney General to commence proceedings, adjudicate
10 cases, or execute removal orders against any alien under
11 this Act. It does not contain the language that you now
12 want to rely upon.

13 MR. GUTTENTAG: But Your Honor, we don't -- that
14 language does not preclude review of our claim, because
15 what 242(g) does is place all review in the court of
16 appeals, and we agree that review can be in the court of
17 appeals. We have no -- our construction of the statute
18 permits that, because we agree that the final order of
19 removal is reviewable in the court of appeals. The only
20 question that bars review of that order in the court of
21 appeals is (a)(2)(C).

22 QUESTION: Well, do you say there's also then
23 habeas review in the district court?

24 MR. GUTTENTAG: No, Your Honor. We -- our
25 contention is only that there would be review in the

1 district court as a fail-safe mechanism if review in the
2 court of appeals is not possible.

3 QUESTION: Well --

4 MR. GUTTENTAG: We recognize that the --

5 QUESTION: Under what -- but not under habeas,
6 you just said, as I understood. Do you or do you not
7 think habeas review in the district court is available?

8 MR. GUTTENTAG: We believe that district court
9 review in the -- excuse me. We believe that habeas corpus
10 review in the district courts is not barred by the
11 language of this statute, but that the scope of review
12 that would be heard in the district courts can certainly
13 be placed in the court of appeals, as this Court has
14 always said that the --

15 QUESTION: Well then, you don't agree with the
16 Second Circuit's decision here.

17 MR. GUTTENTAG: We -- the Second Circuit held
18 that there was district court habeas corpus jurisdiction
19 because it first concluded that there was no review
20 possible in the court of appeals. We believe that if
21 review is possible in the court of appeals, and we believe
22 that it is, because (a) (2) (C) should be construed as to
23 permit review in the court of appeals, then the district
24 court habeas corpus procedure need not be available.

25 QUESTION: Well, what do you think the term,

1 removable, in (a)(2)(C) means?

2 MR. GUTTENTAG: Your Honor, I think the term is
3 ambiguous, because it is not the term, deportable, which
4 is what the immigration statute uses to determine what --
5 to say that someone is subject to deportation. It does
6 not say, subject to a final order of removal, which is --

7 QUESTION: So what do you -- what do you -- how
8 do you interpret it?

9 MR. GUTTENTAG: Your Honor, we believe it means
10 that someone who could be removable, but is not subject to
11 final order of removal, so therefore the statute would not
12 apply to that individual.

13 It's a term that appears in various places in
14 the Immigration Act. And it doesn't have, as far as we
15 can tell, a consistent meaning throughout the Act.

16 QUESTION: Was it adopted just in connection
17 with this provision that provided an alien who was
18 convicted of a felony should be deported?

19 MR. GUTTENTAG: I believe it appears in other
20 places in the Act. It appears in relation to detention
21 provisions and other places. It's not in other places in
22 the --

23 QUESTION: Let me ask this, if who is removable,
24 if that embraces the requirement that the Attorney General
25 first have exercised his discretion, why doesn't it also,

1 under that kind of a reading, embrace the requirement that
2 he actually committed a criminal offense covered in
3 section 1182(a)(2)?

4 I mean, if you're going to read removable, who
5 is removable that broadly, that is to say that any defect
6 in the proceedings which rendered the order of removal
7 invalid causes him not to be removable, you simply open up
8 the whole statute. You say any defect which causes him
9 not to be removable takes him out of (a)(2)(C). I mean,
10 it just cuts a swath through the entire statute.

11 MR. GUTTENTAG: Well, we don't believe it does,
12 Your Honor, but the critical question is whether this
13 claim must be reviewed in some court, and we believe that
14 the answer to that question is clear.

15 QUESTION: That's your constitutional argument,
16 but we're trying to discuss first a proposed statutory
17 argument which would avoid our reaching that, and I'm
18 suggesting that if you read who is removable to embrace --
19 to make a person unremovable where anything that should
20 have been done has not been done, you open up the whole
21 prior proceedings.

22 MR. GUTTENTAG: Well, but I believe it's
23 possible to read it, Your Honor, providing a properly
24 entered final order of removal, and that would include the
25 proper, legally authorized exercise of discretionary

1 relief, that if the statute entitles --

2 QUESTION: But, of course, the discretionary
3 relief provision was changed, too, wasn't it, and doesn't
4 afford it now for people convicted of this type of crime.

5 MR. GUTTENTAG: Right, but our contention on the
6 merits, Your Honor, is that our clients are eligible for
7 the discretionary relief as it existed at the time of the
8 preenactment event. That's a pure legal question. The
9 Attorney General has determined that they're not eligible.
10 The question of eligibility for that relief was decided by
11 a legal ruling of the Attorney General that -- and that
12 determines whether or not it was a properly entered final
13 order of removal.

14 When that question is resolved, then -- one way
15 or the other on the merits, then there'll be a decision on
16 whether it was a properly entered order.

17 QUESTION: Getting back to the statute, and
18 Justice Scalia's question, the question was, well, suppose
19 he hadn't committed a criminal offense, would that be
20 grounds for saying that the statute doesn't apply? I
21 thought your answer would be yes, even the Government
22 concedes that --

23 MR. GUTTENTAG: Right, and that --

24 QUESTION: -- in the habeas portion of the
25 case.

1 MR. GUTTENTAG: Yes, and that whether or not the
2 person actually committed the offense is a question of
3 whether they fit within one of the enumerated categories
4 that are set forth in the statute, and I believe the
5 Government does concede that.

6 QUESTION: Well, are you saying you could go
7 behind a judgment of conviction?

8 MR. GUTTENTAG: No, absolutely not, Your Honor.
9 That's a determination that's made in the criminal
10 procedure, and when that certified conviction is brought
11 before the immigration judge, that's dispositive on the
12 question of whether or not there's a disqualifying
13 conviction.

14 But then the question is whether that conviction
15 constitutes a deportable offense within the meaning of the
16 Immigration Act, and that's a question that the Government
17 agrees is reviewable and, as I indicated, that the
18 question of whether or not the final order of removal was
19 properly entered must be reviewable as well, and if
20 there's been a failure to allow the person to apply for
21 the discretionary relief for which they are entitled by
22 statute, then that cannot be a legally valid order of
23 removal, and again I --

24 QUESTION: But the one difference, then, that
25 has been made, that as I understand it that you concede,

1 is that on your view, once it is determined that the
2 Attorney General did apply the statute that authorizes
3 discretion, that would be the end of the review. There
4 could not be a further step in which you say, the refusal
5 to exercise it in favor of my client was an abuse of
6 discretion. You concede that, I take it?

7 MR. GUTTENTAG: Yes, we do, Your Honor.

8 QUESTION: Okay.

9 MR. GUTTENTAG: We believe that Congress did
10 significantly restrict the scope of judicial review of
11 final orders issued against so-called criminal aliens. We
12 recognize that.

13 Our contention is only that the core review that
14 has always existed and that has never been prohibited as
15 to questions of law and as to the legal validity of the
16 deportation order, that that issue must remain reviewable;
17 that there's never been a time during the entire period
18 when review was severely curtailed under the finality
19 provisions that we detail in our brief at some length;
20 that there was a long period of time when there was no
21 review of orders of deportation except in habeas corpus
22 proceedings, and what this Court repeatedly recognized is
23 that that scope of review is extremely narrow, but it does
24 encompass a question of the legal validity of the order,
25 and questions of the construction of the Immigration Act,

1 and that's what's at issue here.

2 The Attorney General has construed the
3 Immigration Act to say that our clients are not eligible
4 to apply for the exercise of discretion to which the
5 statute entitles them. That question must be reviewable
6 in a court to determine whether the Attorney General
7 improperly excluded an entire class of people from
8 eligibility for discretionary relief, and this Court's
9 decision in Foti and in Chadha and in other cases
10 recognized that the final order is contingent on the
11 issuance -- the adjudication of discretionary relief, and
12 that means two questions. One is --

13 QUESTION: Again, does that mean there is no
14 final order here, or is it a contingent final order,
15 because this is very important for the statutory argument.

16 MR. GUTTENTAG: Your Honor, if there is no
17 legally issued adjudication, then I suppose it's accurate
18 to say there's no legally valid order, and so therefore
19 there isn't a final order.

20 QUESTION: But that -- but then Justice Souter's
21 question is, suppose the discretion was just abused.

22 MR. GUTTENTAG: Well, we don't --

23 QUESTION: Would there then be a final order?

24 MR. GUTTENTAG: It depends on if the final order
25 is a question of a piece of paper that the Board of

1 Immigration Appeals issues, in which case there is a final
2 order, or whether the -- there's a legally valid final
3 order --

4 QUESTION: Well, I think you're --

5 QUESTION: Don't you need a final order to go to
6 the court of appeals in the first place?

7 MR. GUTTENTAG: Yes, Your Honor. As I
8 indicated, there must be that piece of paper from the
9 Board of Immigration Appeals saying this person is ordered
10 removed from the United States. That's what triggers
11 section 1252.

12 QUESTION: So you've got a final order for
13 purposes of seeking review, but if you get the review, you
14 say, well, it is not a valid final order because it was
15 entered without application of the authority to grant
16 discretion.

17 MR. GUTTENTAG: That's correct, Your Honor.

18 QUESTION: Yes.

19 MR. GUTTENTAG: That's exactly our -- and the
20 question of eligibility for relief is entirely distinct
21 from the exercise of discretion. Once the Attorney
22 General makes an accurate decision, a legally valid
23 decision as to eligibility for discretionary relief, then
24 the exercise of discretion follows.

25 QUESTION: If this is a final order, as you're

1 talking about, 1252 says no court shall have jurisdiction
2 to review any final order of this sort. I mean, are you
3 using final order in two different senses?

4 MR. GUTTENTAG: No, Your Honor, we're not, and
5 we're certainly not intending to. We believe that there's
6 ambiguity in the statute, given the severe constitutional
7 questions that would be raised if there were no review at
8 all of this pure question of law, the Attorney General's
9 decision, and that ambiguity can come from the term,
10 removable.

11 We set forth in our brief the reason why we
12 think the term, review, is not sufficiently clear to bar
13 the scope of inquiry that's always been available to
14 review a final order.

15 QUESTION: So you're got three different
16 ambiguities in one sentence that you've focused on?

17 MR. GUTTENTAG: We think there are many
18 ambiguities. I believe the Government as well is finding
19 ambiguities in this statute. It is a statute that seeks
20 to limit the role of the courts, and our contention is
21 that it can do that, but it cannot preclude the courts
22 from reviewing and determining the legal validity of the
23 order, and that that is a question that is, whether there
24 are legal -- in this case, that is a question of whether
25 there is a legal eligibility determination.

1 We think the Accardi case is very significant in
2 this respect, because in the Accardi case, this Court
3 confronted the question of the scope of habeas corpus
4 inquiry to review a final order of deportation. It was a
5 case of an alien who was admittedly deportable, there was
6 no issue about that, and claimed that he had not gotten a
7 lawful exercise of discretion because the Attorney General
8 had refused to exercise his discretion, as was required.

9 In this case -- and the Court held that that was
10 reviewable in habeas corpus during the period when the
11 review was as restricted as it could possibly be, the year
12 after this Court said in the Heikkila case that the only
13 review that was available was that which was
14 constitutionally required. Now, this claim is even more
15 fundamental.

16 QUESTION: Did Accardi say that review was
17 constitutionally required?

18 MR. GUTTENTAG: Accardi exercised review. It
19 did not --

20 QUESTION: I understand that, and I don't know
21 the basis on which it exercised jurisdiction, and our
22 cases are clear that cases which do not address the
23 jurisdictional question are not authority for the
24 existence of jurisdiction. I don't know on what basis
25 Accardi took the case --

1 MR. GUTTENTAG: I --

2 QUESTION: -- but it certainly didn't say that
3 there had been a constitutional violation.

4 MR. GUTTENTAG: I think, Your Honor -- it did
5 not specifically say that, but I think there's two points
6 that are important. One, it was a habeas corpus
7 proceeding decided the term after this Court said in the
8 Heikkila case that the only review that was available was
9 that which was required by the Constitution.

10 QUESTION: Did Accardi cite Heikkila?

11 MR. GUTTENTAG: I don't believe it did, Your
12 Honor.

13 QUESTION: It didn't. It didn't. I have no
14 idea on what basis Accardi --

15 MR. GUTTENTAG: But may I point out --

16 QUESTION: -- took jurisdiction.

17 MR. GUTTENTAG: May I point out what the dissent
18 said in Accardi, Your Honor, which is that it specifically
19 objected to the Court's exercise of jurisdiction on the
20 ground that habeas corpus did not encompass the claim
21 raised in that case, and it objected to the exercise of
22 jurisdiction on precisely the same grounds that the
23 Government argues here, that a person is deportable, that
24 it concerns discretionary relief.

25 And the Court rejected that, and exercised

1 discretion, and said there's a fundamental difference
2 between reviewing the exercise of discretion and reviewing
3 the refusal to exercise discretion, and this is a case
4 about the refusal to exercise discretion based on the
5 Attorney General's legal ruling that an entire class of
6 individuals is not eligible for relief.

7 And it's our -- our only challenge is to that
8 determination by the Attorney General, that his legal
9 determination as to who is eligible to apply and who is
10 not is legally incorrect, and we believe that claim must
11 be reviewable in a court. It can be the court of appeals,
12 and we set forth why we believe that is entirely possible
13 and appropriate, but it must be reviewable in a court.

14 I'd like to save --

15 QUESTION: Very well, Mr. Guttentag.

16 Mr. Kneedler, we'll hear from you.

17 ORAL ARGUMENT OF EDWIN S. KNEEDLER

18 ON BEHALF OF THE RESPONDENT

19 MR. KNEEDLER: Mr. Chief Justice, and may it
20 please the Court:

21 In 1996, in two separate statutes, Congress
22 fundamentally restructured the Nation's immigration laws.
23 There are amendments of general applicability, and also
24 ones specifically dealing with criminal aliens to ensure
25 that criminal aliens were expeditiously removed from the

1 United States.

2 Briefly, the three amendments of general
3 applicability that are most relevant to these two cases
4 this morning are Congress's elimination of deportation and
5 exclusion proceedings, and replacing them with a single
6 proceeding called removal. Secondly, Congress repealed
7 the prior 1182(c) under which petitioners here seek
8 relief, and replaced it with a new proceeding, or form of
9 discretionary relief called cancellation of removal, and
10 third, Congress reenacted, or enacted a new judicial
11 review provision which channeled judicial review, if it's
12 to be had at all, to the courts of appeals.

13 The two amendments specifically dealing with
14 criminal aliens that are relevant here is that Congress
15 not only repealed the prior 1182(c), but rendered
16 aggravated felons and in some cases other criminal aliens
17 altogether ineligible for cancellation of removal, and
18 secondly, Congress provided in section 1252(a)(2)(C) of
19 the Act that no court, which includes both the court of
20 appeals and the district court, shall have jurisdiction to
21 remove -- to review an order of removal entered against an
22 alien who had committed one of the specified criminal
23 offenses.

24 The theory was that an alien, just like a
25 citizen, would have full access to the courts to contest

1 the criminal conviction in the criminal proceedings, both
2 direct review and collateral attack, but once that was
3 done, the validity of the conviction was established, and
4 therefore, with respect to access to the courts, there was
5 really no further need to test the central basis on which
6 the alien was to be removed.

7 QUESTION: Could you just remind me, what
8 happens if a collateral attack is underway and the Justice
9 Department institutes deportation proceedings?

10 MR. KNEEDLER: Unless and until the criminal
11 conviction was set aside, it would be a conviction on
12 which the removal order could be based.

13 QUESTION: Suppose there were a very strong
14 showing of deficiency in the conviction, a Brady
15 violation, Gideon violation, would the collateral review
16 court have the authority to stay the deportation?

17 MR. KNEEDLER: I wouldn't think that would be
18 true, but I think typically what would happen is the
19 immigration judge would stay the removal proceedings. I
20 think that happens. I'm aware of some cases where that
21 has happened. What the alien should do is --

22 QUESTION: Suppose it didn't. Would an Article
23 III court have that authority?

24 MR. KNEEDLER: There would be, I think,
25 probably -- I'm not certain about that, but there may be

1 access to the court to stay the removal. Ordinarily you
2 couldn't go to the court of appeals on the direct --

3 QUESTION: To which court, the collateral review
4 court in the criminal proceeding?

5 MR. KNEEDLER: No, I meant the -- I meant the
6 review in the immigration proceedings going to the court
7 of appeals. I'm not certain which avenue --

8 QUESTION: Oh, but I thought there was no
9 review --

10 MR. KNEEDLER: Right. There is -- if the claim
11 was -- if the alien was in a position that the substantive
12 ground for removal may be invalid, and that's -- not the
13 eligibility for discretionary relief, but the substantive
14 ground of removal may be invalid because there's an
15 ongoing collateral attack, then I -- my assumption is that
16 some court -- first of all, I think the immigration court
17 would stop it, or the BIA could prevent the proceedings
18 from going forward, either one, or the Attorney General,
19 but failing that, I'm confident that some court would
20 probably have review.

21 I'm not sure whether -- perhaps the collateral
22 review court, although I'm not sure why that would be so,
23 because it could be a State collateral proceeding that the
24 alien was trying to have his conviction, State court
25 conviction set aside in, and I wouldn't think that court

1 would have any authority to enjoin a removal under Federal
2 immigration law, so it may be that the alien could apply
3 to the district director and perhaps --

4 QUESTION: Mr. Kneedler --

5 MR. KNEEDLER: -- seek a stay of removal in that
6 way.

7 QUESTION: -- this suggestion, because Justice
8 Kennedy poses a case that, you know, right on the brink of
9 deciding that he's going to have his earlier conviction
10 set aside. What if he's just filed his habeas corpus
11 petition in State court, and it's going to -- on the
12 docket, and it's going to sit there for 3 years before
13 it's decided? Would the immigration judge have authority
14 to say, I think I want to wait to see what happens in that
15 case?

16 MR. KNEEDLER: Sure. The immigration judge
17 would have the authority to stay the proceedings. That
18 was the answer that I --

19 QUESTION: I see.

20 MR. KNEEDLER: -- thought I was giving. But
21 the more fundamental point is, the alien wouldn't be
22 removed until there was a final order of removal entered
23 against him by the BIA. If at that point the alien was
24 saying, wait a minute, I'm seeking to have my criminal
25 conviction set aside, don't execute the order of removal,

1 while there may be an invalidity here, the alien could
2 seek a stay of removal in the court of appeals, could move
3 to reopen the proceedings --

4 QUESTION: Well, what if the alien has already
5 had a couple of habeas petitions challenging his criminal
6 conviction, which have decided against him, he now gets a
7 final order, and he says, well, I just filed a third
8 habeas application?

9 MR. KNEEDLER: The court of appeals would not be
10 required to issue a stay of removal, but if it was the
11 first -- I was just addressing the question of power, not
12 whether it should be --

13 QUESTION: Well, yes, but ordinarily you don't
14 need a habeas review or collateral review to establish the
15 validity of a conviction.

16 MR. KNEEDLER: That is --

17 QUESTION: That's done on direct review, and
18 when that judgment becomes final, the conviction is --

19 MR. KNEEDLER: Right, no, absolutely, and I
20 think as a general rule there would be no question. I was
21 just addressing there might, in an extreme case, be some
22 cases --

23 QUESTION: Well, if the court of appeals has
24 authority to stay the removal in that case, why doesn't it
25 have the authority to stay the removal here, when it says,

1 I'm in a class of persons to whom this statute simply
2 doesn't apply?

3 MR. KNEEDLER: There's a fundamental difference
4 between the case I think you were positing and this one.
5 That case had to do with the substantive ground for
6 removability. In other words, is the person removable for
7 having committed an aggravated felony?

8 Here, the question is quite different. As
9 counsel for petitioners has said, petitioners concede that
10 they are removable. The only question here is whether the
11 Attorney General properly denied --

12 QUESTION: They don't concede that they're
13 removable any more. They concede that they are removable
14 but for the fact that the Attorney General didn't take the
15 final step of exercising his discretion. What's your
16 response to that argument?

17 MR. KNEEDLER: Well --

18 QUESTION: That they are not removable within
19 the meaning of that statute because the last step hasn't
20 been taken?

21 MR. KNEEDLER: Well, the last step was taken.
22 There was a final order of removal entered against the
23 aliens.

24 QUESTION: No, but they're saying the last step
25 is the exercise -- they're saying, the statute that

1 invests him with discretion still applies to my case.
2 He's not applying that statute. He is categorically
3 refusing to exercise discretion because he says he doesn't
4 have it, and he's wrong. That's what they mean by the
5 last step.

6 MR. KNEEDLER: Right. If I could just give two
7 responses to that. The preclusion of review under
8 1252(a)(2)(C), which was set out at 106(a) of our
9 certiorari petition, it refers to an alien who is
10 removable by reason of having committed a criminal offense
11 covered in certain sections of the Act. The word
12 removable doesn't stand alone there. It is removable by
13 reason of having committed an offense. It is identifying
14 the aliens who --

15 QUESTION: But under your reading the statute is
16 the same as if who is removable isn't even there. There's
17 kind of a missing pronoun. It's awkward. But you give no
18 effect to who is removable.

19 MR. KNEEDLER: Well, I think this would only --

20 QUESTION: Because your position is, there's a
21 final order of removal against an alien by reason of
22 having committed a criminal offense. That's your
23 position, so under your position the who is removable has
24 no force.

25 MR. KNEEDLER: Well, it's identifying the subset

1 of aliens against whom a final order has been entered, to
2 whom this preclusion of review applies, and it's --

3 QUESTION: Oh, but the statute identifies them
4 by reference to what may be done to them. I mean, I think
5 I'm bothered by the same thing that Justice Kennedy is
6 getting at. The word removable refers not merely to their
7 alien status, and not merely to their conviction. It
8 refers necessarily to a statute which makes them
9 removable, and if, as you concede, they can challenge the
10 alien status, they can challenge the fact of the
11 conviction, why, by a parity of reasoning, may they not
12 also challenge the fact that the statute that the Attorney
13 General is operating under doesn't make them removable
14 until discretion has been exercised? How do you draw that
15 line?

16 MR. KNEEDLER: Well, this was a preclusion of
17 review that was obviously intended to accomplish
18 something, and petitioners --

19 QUESTION: And their answer is, what it
20 accomplished is, no more review of the exercise of
21 discretion when the discretion is exercised.

22 MR. KNEEDLER: That is not governed by paragraph
23 (C). That is governed by the preceding paragraph,
24 1252(a)(2)(B) on the same page, which independently bars
25 any judgment regarding the granting of relief under

1 certain specified sections, or any other decision that is
2 vested in the discretion of the Attorney General, so that
3 category of decisions that are -- that petitioners are
4 conceding is not even addressed by this provision.

5 This provision must mean something else, and we
6 think it quite clearly encompasses denial of discretionary
7 relief by the Attorney General, whether that denial is
8 based on an exercise of discretion or the Attorney
9 General's determination that Congress has not conferred on
10 him the power to exercise discretion. In either event,
11 the alien has been denied relief that Congress has
12 specified is discretionary, and as that --

13 QUESTION: What Justice Kennedy started out
14 with, I thought, was that their claim here is, there is a
15 section of a new statute, and that section doesn't apply,
16 because it isn't retroactive. Now, that's like saying,
17 this Court doesn't have jurisdiction to adjudicate a claim
18 under that section because it doesn't apply.

19 Now, maybe they're right, maybe they're wrong,
20 but it sounds as if they're making a claim that is a claim
21 of jurisdiction, or very similar to one, and how do you
22 distinguish that very basic claim that there is no
23 jurisdiction because there is no applicable law from the
24 claims that you admit you could hear, which include, I am
25 not the alien, I am not removable -- you say in your brief

1 they could hear whether the alien is removable, whether
2 the ground of removal is one which precludes judicial
3 review, whether the statute is unconstitutional, and
4 whether the proceeding is fundamentally unfair. All of
5 those, you say, could be heard under this statute --

6 MR. KNEEDLER: Because they --

7 QUESTION: -- and I want to know what is
8 different about a claim, there is no jurisdiction because
9 this whole section of the new statute simply doesn't
10 apply.

11 MR. KNEEDLER: Well, The Attorney General
12 certainly has jurisdiction to decide whether to grant
13 discretionary relief.

14 The Attorney General can decide that on a
15 variety of factors, including the Attorney General's
16 understanding of the statute, just as a discretionary
17 determination to exercise prosecutorial discretion not to
18 bring an administrative proceeding that was before this
19 Court in Food and Nutrition Workers you could decide, the
20 agency could decide not to bring the case because they
21 didn't think the equities warranted it, or because of an
22 interpretation of the statute.

23 That interpretation may be wrong, but when
24 something -- when Congress intends to vest something in
25 the discretion of an administrative officer, that includes

1 legal issues that may bear on the exercise of
2 discretion --

3 QUESTION: And that includes saying you didn't
4 intend us to have discretion? That seems to me very odd.
5 If the question is, is there discretion, then how is it
6 compatible with that scheme for the secretary to say, I'm
7 going to determine as a matter of administrative fiat that
8 there is no discretion.

9 MR. KNEEDLER: No, what Congress has done is
10 vest in the Attorney General of the United States the
11 responsibility for interpreting and administering the
12 immigration laws, and in section 1103, that this Court
13 relied upon in the Ageri-Ageri case, this Court said that
14 the Attorney General's interpretation of the immigration
15 laws is controlling.

16 Congress -- in other words, what Congress did
17 with respect to the question at issue here was to vest the
18 final determination whether to grant discretionary relief
19 in the Attorney General, whether that is based on an
20 interpretation of the statute, or the exercise of
21 discretion, or sometimes a combination of the two.

22 QUESTION: But this claim comes very close to
23 being covered by the combination of the Heikkila and
24 Accardi cases, which together indicate that the
25 Constitution requires some kind of judicial review over a

1 claim that an executive actor unlawfully failed to
2 exercise any discretion.

3 MR. KNEEDLER: Well, in Accardi, as Justice
4 Scalia pointed out, it's difficult to figure out exactly
5 on what basis jurisdiction was exercised in Accardi. The
6 Supreme Court -- this Court --

7 QUESTION: True, it didn't spell it out, but if
8 you look at Heikkila and Accardi together, there's some
9 indication of support for the position of your opposing
10 counsel.

11 MR. KNEEDLER: Well, one thing to bear in mind
12 is that the petitioner in Accardi argued the case in terms
13 of a due process violation. What was alleged there was
14 that the Attorney General had engaged in prejudgment and
15 had deliberately subverted an administrative scheme for
16 adjudicating discretionary applications, and the
17 petitioner argued that that was a violation of due
18 process.

19 Now, this Court subsequently has said in the
20 University of Missouri, in 435 U.S., that Accardi did not
21 state a rule of constitutional law binding on the States,
22 so in light of subsequent understandings of what Accardi
23 stood for, it would seem odd that if it didn't state a
24 fundamental rule of constitutional law that is binding on
25 the States, that it would nonetheless be the sort of thing

1 that Congress would be compelled to provide judicial
2 review of under the immigration laws.

3 I wanted to respond to two statutory questions,
4 and then perhaps explore this point further. Petitioners
5 have relied on the Foti and Chadha cases with respect to
6 the final order of removal being contingent upon the
7 exercise of discretion, in those cases suspension of
8 deportation.

9 That -- the Court explored that, though, solely
10 for purposes of deciding which court would, as a statutory
11 matter, have jurisdiction over the particular claim there,
12 and what the Court said is, sensibly it only -- it makes
13 sense for suspension of deportation claims to be heard in
14 the courts of appeals because the Attorney General has
15 chosen to adjudicate applications for suspension of
16 deportation together with the substantive basis for
17 deportation in one single proceeding.

18 But the Court made pretty clear in Foti that the
19 Attorney General was not required to do that, and it would
20 have been equally consistent with the Act for the Attorney
21 General to determine whether to grant relief to particular
22 aliens outside of the affirmative removal proceeding as a
23 matter of discretion, maybe on a sort of certiorari
24 jurisdiction to the Attorney General to decide at the
25 close of the case whether to do that or not, and that

1 remains the case under the current law.

2 Nothing in the Act requires that the Attorney
3 General adjudicate an application for 1182(c) relief, or
4 for cancellation of removal before entering a final order
5 of removal.

6 The regulations provide that method of
7 adjudication, but nothing in the Act does, and the
8 question, I think, for purposes of whether judicial review
9 is compelled is whether there is a statutory right,
10 because after all, Congress has plenary power over
11 immigration, over the jurisdiction of the lower Federal
12 courts, and broad power over the fashioning of the writ of
13 habeas corpus, as this Court said in *Felker*, and Congress
14 could legitimately decide if there is not a statutory
15 right to have an application for cancellation or 1182(c)
16 relief adjudicated in a particular --

17 QUESTION: But there are five, five instances in
18 this case in which, despite the language, you think
19 Congress has decided to permit the very review that the
20 language seems to forbid.

21 MR. KNEEDLER: Well, but in this respect,
22 what -- with respect to whether the person is an alien,
23 and with respect to whether he is removable --

24 QUESTION: Yes.

25 MR. KNEEDLER: -- by reason of having committed

1 an offense. A reviewing court has to decide those
2 questions in deciding whether the statutory preclusion --

3 QUESTION: Fine, then why wouldn't they also
4 have to decide the question of whether they have
5 jurisdiction at all because this major section of the new
6 statute just doesn't apply?

7 MR. KNEEDLER: For the reasons that I said,
8 that -- for the reason that I said, is that the Act does
9 not require that. All 1182(c) said is the Attorney
10 General may admit an alien. It doesn't say anything about
11 what proceeding that will be held in.

12 QUESTION: If she -- he exercised his discretion
13 in a totally arbitrary way to say, admitting people,
14 setting grace on people of one race or one religion, even
15 so, that's just not reviewable?

16 MR. KNEEDLER: Well, whether or not there would
17 be -- whether or not there would be a review of a
18 constitutional claim we think would be a different matter.
19 For example, in Chadha, Chadha was a constitutional
20 challenge to the statute governing suspension of
21 deportation. It may be that Congress would have intended
22 that a constitutional challenge to the statute under which
23 the Attorney General was granting or denying --

24 QUESTION: What about the argument that Congress
25 never gave the Attorney General such authority? We don't

1 get to any grand constitutional issue, but discretion must
2 be exercised reasonably.

3 MR. KNEEDLER: Well, the -- all the Act says is
4 that the Attorney General may admit an alien and, with
5 that sort of discretionary grant of authority, this Court
6 has said in cases like Jay v. Boyd, and maybe five terms
7 ago, I think it was, in the Yang case, that that is like
8 the power of pardon. It's a power of dispensation. It is
9 a power of the Attorney General to relieve an alien of the
10 admitted consequences of an order of removal, to lift the
11 consequence of removal and allow the alien to remain here.
12 It is a matter of grace, in no sense a matter of right.

13 QUESTION: But is the concept of abuse of
14 discretion -- his authority to exercise discretion,
15 there's lots of discretion in Federal agencies, but
16 there's also a concept of abuse of discretion, and you
17 seem to be saying no, there isn't.

18 MR. KNEEDLER: Well, not every situation in
19 which someone, an administrator officer has been afforded
20 a right to exercise discretion, is there judicial review
21 of that. I mean, this Court has on a number of occasions,
22 like Heikkila v. Cheney, and like Food and Nutrition
23 Workers, and with respect to the census, an issue of major
24 magnitude, this Court held that there was no review of
25 statutory questions or discretionary issues in that

1 situation.

2 QUESTION: The refusal to grant a pardon, since
3 you're analogizing this --

4 MR. KNEEDLER: Yes.

5 MR. KNEEDLER: -- to the pardon power. I assume
6 we wouldn't review the President's refusal to exercise the
7 pardon power for abuse of discretion.

8 MR. KNEEDLER: Absolutely, and this isn't to say
9 that the Attorney General may not -- or the President at
10 some point may decline to exercise the pardon power for a
11 reason that would be thought contrary to law, but that
12 doesn't mean that the possibility of getting a pardon, or
13 in this case a discretionary dispensation from removal,
14 gives right to a personal right that the Constitution
15 requires Congress to provide access to the courts to
16 litigate.

17 And Congress enacted IIRIRA against the
18 background of great frustration with the inability of the
19 system to remove criminal aliens from the United States,
20 and because of the potential for criminal aliens to tie up
21 the courts in trying to stave off the removal. This is an
22 example of this in this very case, that these aliens
23 unquestionably are removal -- removable, have conceded it,
24 and yet we are litigating a number of years later on the
25 question of whether the --

1 QUESTION: May I just interrupt you, Mr.
2 Kneedler, with this question. They are unquestionably
3 removable, and there's no right to discretion if your
4 construction of the statute is right, but sort of in the
5 background of this case is the question whether
6 convictions obtained before the enactment of this statute
7 have the same legal significance as convictions obtained
8 afterwards, and am I correct in understanding that the
9 Government's position is there's no way in which a Federal
10 court can decide whether that's correct or not?

11 MR. KNEEDLER: That is true, because again, what
12 Congress has done has granted a discretionary authority to
13 the Attorney General to decide whether to dispense with
14 removal or not, and let me --

15 QUESTION: What you are doing when you say that,
16 it seems to me, is reading the words of the statute that
17 says, removable by virtue of the criminal convictions and
18 so on, to mean not removable, but to mean ordered removed
19 by the Attorney General. You are taking a statute that
20 says removable, and you are reading it to say, ordered
21 removed, thereby insulating the courts, or the alien from
22 the possibility of challenging the correctness of the
23 statute under which the Attorney General is acting.

24 MR. KNEEDLER: Well, again, going back to the
25 language of paragraph (c), there are two different

1 clauses. One says, review any final order, so that's the
2 passage that deals with there having been an order
3 entered, and then it says, against an alien who is
4 removable by reason of having committed a criminal
5 offense. That is simply identifying which aliens, which
6 ground of removal triggers the preclusion of review --

7 QUESTION: No, but that's -- no, but that's the
8 question in the case.

9 MR. KNEEDLER: No, the question --

10 QUESTION: Is it doing anything other than
11 identifying the kind of order by the Attorney General, or
12 is it doing something more? Is it saying, the Attorney
13 General must be acting under a statute under which it is
14 proper for him to make an order of removal without
15 admitting any discretion. That's --

16 MR. KNEEDLER: Well, I --

17 QUESTION: That's the issue in the case.

18 MR. KNEEDLER: Well, but again, I -- removable
19 does not stand alone. It says, removable by reason of
20 having committed the offense. I think it does no more
21 than identify the -- if I could mention one other thing.

22 The word removable is defined in the Act, but
23 for -- this is in 8 U.S.C. 1229a(e)(2), which is not
24 reproduced in the papers, but since the question was
25 raised, it is part of the provision that deals with

1 removal proceedings, and it says -- now, again, it says in
2 this section, meaning the section dealing with removal,
3 and the next section, which deals with cancellation of
4 removal, the statute says, the term removable means, in
5 the case of an alien who hasn't been admitted, that the
6 alien is inadmissible under 1182 of the Act, or, in the
7 case of an alien admitted to the United States, such as
8 the aliens here, that the alien is deportable under
9 section 1227 of this title. In other words, the term is
10 meant to identify the substantive ground on removal
11 that --

12 QUESTION: Well, the term requires two things.
13 It requires a substantive ground. It also requires a
14 statute under which the substantive ground is sufficient
15 by the Attorney General operating under the statute --

16 MR. KNEEDLER: But a --

17 QUESTION: -- and they're saying -- they're not
18 challenging the ground that says, I'm an alien, or the
19 ground that says, I have a conviction. They're
20 challenging the Attorney General's operation under a
21 statute that they say doesn't apply, and removable can
22 cover that just as well as it can cover the substantive
23 grounds relied upon for the removal.

24 MR. KNEEDLER: But the paragraph (c) goes on to
25 identify the specific statutory provisions that it is

1 referring to, and they are all substantive grounds of
2 removal. They are not --

3 QUESTION: Nobody is removable by reason of that
4 alone. I mean, if you take removable in the broad sense
5 to mean all of the conditions have been complied with to
6 make the removal proper, if you take it in that broad
7 sense, this provision makes no sense, because in that
8 broad sense, nobody is removable solely by reason of
9 having committed a criminal offense.

10 MR. KNEEDLER: That's true. I mean, as you
11 pointed out, read expansively it could go to any question
12 that might be thought to call into question the propriety
13 of the Attorney General's action.

14 QUESTION: So if Congress wanted to make that
15 point, clearly, Congress would have said, anybody who is
16 ordered removed by reason of being an alien with a
17 criminal conviction. That's not what Congress --

18 MR. KNEEDLER: But it separately addresses that
19 in the preceding line by saying, review of a final order,
20 and then it's which final order, so I think it's
21 already -- I think Congress has already spoken to that
22 question. I --

23 QUESTION: Mr. Kneedler, may I ask you just to
24 clarify what you -- you say there are a number of
25 categories where there is court review before the person

1 is removed, and one of them is a substantial
2 constitutional challenge to an aggravated felony, removal
3 order.

4 I was trying to envision what such a challenge
5 would be, given the tightness of the statute.

6 MR. KNEEDLER: Well, I suppose there could be --
7 we don't think it would fail, but I mean -- we don't think
8 it would succeed, but if there were some argument that it
9 would be constitutionally impermissible to apply a ground
10 of deportation to conduct that arose before the statute
11 was passed, or that there was some sort of equal
12 protection violation in singling out one ground of removal
13 over another in providing a ground for removal, that could
14 be a constitutional challenge to the statute under which
15 the person is being ordered removed.

16 QUESTION: If you concede that, why couldn't the
17 litigants in this case say, we make that constitutional
18 argument and, secondly, we say you should construe the
19 statute to avoid that constitutional question, so now
20 we're in court --

21 MR. KNEEDLER: They have not made a
22 constitutional --

23 QUESTION: But if they did that, do you think we
24 could then decide the question?

25 MR. KNEEDLER: We -- I think not. I think that

1 the -- I think the only thing that could be done would be
2 to challenge the constitutional ground of removal.

3 Congress -- as we point out in our brief, the
4 one thing that is clear from the legislative background of
5 the passage of IIRIRA and AEDPA is that Congress wanted to
6 expeditiously remove criminal aliens from the United
7 States, and it regarded the entry of the judgment of
8 conviction as a sufficient ground for doing so. It did
9 not want to provide -- first, in our view, we believe
10 Congress eliminated discretionary grounds for removal, but
11 it surely would not have intended to have litigation over
12 that.

13 QUESTION: Yes, but that's all perfectly clear
14 with respect to convictions after the statute is passed,
15 but the problem is, it's not quite as clear, as least, as
16 to convictions before the statute was passed, and that's
17 why we have the problem.

18 MR. KNEEDLER: It is, but it wouldn't be at all
19 surprising that in the climate in which Congress acted,
20 what Congress wanted to do was to vest the final
21 determination on questions such as that in the Attorney
22 General.

23 As Justice Ginsburg pointed out, the Attorney
24 General could have just decided, taking into account the
25 recent legislative enactment, simply, even if the Act

1 applied, to say, I'm not granting relief to anyone whom
2 Congress has identified as an unworthy to remain here, and
3 there's no question that that would be a permissible
4 exercise of discretion, which shows that it can't be a
5 fundamental right --

6 QUESTION: Well, I have some question about
7 that.

8 MR. KNEEDLER: Well, this Court held in the
9 Lopez case --

10 QUESTION: I thought the Chennary case, which I
11 never fully understood, says that if the exercise of
12 discretion is committed to an official, the official must
13 exercise that discretion in some instances.

14 MR. KNEEDLER: Well, this is a statute -- again,
15 looking at the statute, in which Congress has given the
16 power to the Attorney General, but unlike, for example,
17 the asylum provision, the asylum provision says in section
18 208, the Attorney General shall establish a procedure for
19 aliens to file applications for asylum, meaning that the
20 Attorney General has to at least be in a position to
21 receive an application and do something with it.

22 There is no such provision in this Act that
23 requires the Attorney General to receive and consider a
24 particular application for relief from deportation, just
25 as there is nothing to require the President to actually

1 entertain and pass upon an application for a pardon, and
2 this Court said in Jay v. Boyd that this relief is to be
3 regarded much as the application for a pardon to the
4 President of the United States.

5 One final point I want to make clear is that,
6 whatever else may be true with respect to judicial review,
7 the court of appeals was certainly wrong to say that
8 judicial review would be in the district court. It would
9 stand this Act on its head to suggest that criminal aliens
10 whom Congress wanted to remove from the country with
11 particular emphasis would be able to go to the district
12 courts, get a level of review there, go to the court of
13 appeals, and then perhaps to this Court.

14 QUESTION: Well, what was wrong with the court
15 of appeals saying, if there's nothing else, there's always
16 the general habeas, unless Congress says specifically --
17 mentioning the statutory provision by number or name.
18 That essentially was the Second Circuit's position, was it
19 not?

20 MR. KNEEDLER: Well, there's no requirement that
21 Congress, in order to channel all review to a court of
22 appeals, has to specifically mention 2241, but --

23 QUESTION: Yes, but the answer -- the Second
24 Circuit was saying, we accept what the Government tells
25 us, there's no review in the court of appeals, but

1 Congress has not deleted the general habeas authority.

2 MR. KNEEDLER: Congress did two things before
3 IIRIRA was enacted in section 401(e), in a provision
4 called, Elimination of Habeas Corpus, Congress repealed
5 the prior provision for habeas corpus relief and secondly,
6 in the provision enacted here, it channeled all review to
7 the courts of appeals.

8 QUESTION: Thank you, Mr. Kneedler.

9 Mr. Guttentag, you have 4 minutes remaining.

10 REBUTTAL ARGUMENT OF LUCAS GUTTENTAG

11 ON BEHALF OF THE PETITIONERS

12 MR. GUTTENTAG: Thank you.

13 I want to be clear that, under the statute,
14 there's no final order of deportation until the
15 application for discretionary relief is adjudicated. That
16 has been the case since these statutes were first enacted
17 in 1917, when discretionary --

18 QUESTION: Can you give me some authority for
19 that proposition, either under the statute, or under our
20 cases?

21 MR. GUTTENTAG: The Chadha case stands for that
22 proposition, Your Honor. The Foti case clearly stands for
23 that proposition.

24 QUESTION: The Government says that those cases
25 came out that way simply because the Attorney General had,

1 as a discretionary matter, decided to determine the
2 discretionary element together with the merits
3 determination, so as a matter of fact, it happened to have
4 been preceding the order of deportation, but that there
5 was no legal requirement that that be the case.

6 MR. GUTTENTAG: There continues to be the case
7 that the regulations require that, Your Honor. There's no
8 doubt about that, that the regulations require the
9 immigration judge to adjudicate an application for relief.
10 That, in and of itself, is a duty.

11 Secondly, the cases do say that the final order
12 is contingent on the determination, and this is not about
13 the exercise --

14 QUESTION: Do you have a regulation number for
15 that, or --

16 MR. GUTTENTAG: It's 212 -- it was 212e(b)(2), I
17 believe, and it's currently also the regulation governing
18 the current version of that, which is the cancellation of
19 removal, and I'd be happy to provide it at the next case,
20 if that's -- that that final order -- and I don't believe
21 the Government would actually contend that under the
22 statute as it's currently implemented, and as it has been
23 since 1917, and under the regulations that govern, that a
24 final order could be entered with the immigration judge or
25 the Board of Immigration Appeals and the Attorney General

1 simply say, I refuse to adjudicate your application for
2 relief.

3 If the Attorney General determines that the
4 individual is not legally eligible, then so be it, but
5 that claim is reviewable. If the Attorney General
6 exercises discretion, then that is not reviewable, and we
7 concede that.

8 The -- what the -- what this Court has said
9 about the pardon analogy to the discretionary decision
10 goes to the exercise of discretion. That's very clear
11 from the Jay v. Boyd case. It's clear from the Yang case,
12 Your Honor, where the exercise of discretion is not
13 reviewable, but the question of whether the Attorney
14 General has properly construed who is eligible, the
15 Attorney General in this case has said that an entire
16 class of individuals is ineligible because I determined
17 that, Congress instructed me to apply this law
18 retroactively.

19 Whether the statute applies retroactively or not
20 is a question that the courts must decide. That's what
21 Landgraf said, and it's for Congress to legislate clearly
22 and specifically what the temporal scope of the statute
23 is, and that's not for the Attorney General to determine.

24 I also, in regard to the particular provision
25 governing the review of discretionary decisions that

1 Mr. Kneedler referred to, that refers to particular
2 determinations there in the -- that are in the discretion
3 of the Attorney General. For example, asylum claims
4 remain reviewable, so it's clear that the preclusion
5 provision here still would do a significant amount of
6 work, and as far as the definition of what constitute --
7 of what removable means, that definition does not
8 specifically apply to the term in section 1252, in the
9 judicial review provision. It is a definition, but it
10 does not specifically apply to what we have at issue here.

11 And finally, in terms of the Government arguing
12 that the Attorney General could simply decide to deny any
13 exercise of discretion, that is the Chennary principle,
14 that the decision of the Attorney General must be, correct
15 or not --

16 CHIEF JUSTICE REHNQUIST: Thank you,
17 Mr. Guttentag. The case is submitted.

18 (Whereupon, at 11:17 a.m., the case in the
19 above-entitled matter was submitted.)

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