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IN THE SUPREME COURT OF THE UNITED STATES

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IMMIGRATION AND :
NATURALIZATION SERVICE, :
Petitioner :
v. : No.00-767
ENRICO ST. CYR :
- - - - -X

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
11:18 a.m.

APPEARANCES:

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

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CHIEF JUSTICE REHNQUIST: We will hear argument next in number 00767, the Immigration and Naturalization Service versus Enrico St. Cyr.

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

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONER

MR. KNEEDLER: Thank you, Mr. Chief Justice.

In this case, there are questions both of jurisdiction and of the merits of whether the Attorney General reasonably construed the act to conclude that petitioner in this case, oh, excuse me, respondent in this case is ineligible for discretionary relief under the repeal of 1182(c).

I do want to make sure that I'm able to address the merits question, but I did have a few things that I wanted to address with respect to habeas corpus and the constitutional question here.

One recent decision of this Court which I think is instructive on the question of when, what sorts of claims Congress must make a judicial forum available to, is the Court's decision two terms ago in American-Arab Anti-Discrimination Committee v. Reno in which the Court concluded that a constitutional claim of selective

1 enforcement was not a judicially cognizable defense to a
2 final order of removal, and in our view, if Congress could
3 provide under the immigration laws that that sort of claim
4 does not give right to a personal right to have a final
5 order of removal set aside, then it follows a fortiori
6 that Congress is not required to provide a judicial forum
7 for a failure by the Attorney General to grant
8 discretionary relief from removal that is purely statutory
9 in form and particularly here where the objection is a
10 non-constitutional objection to the failure to grant
11 discretionary relief.

12 QUESTION: -- forum, the law doesn't apply to me
13 because it doesn't take effect until the year 2004.

14 MR. KNEEDLER: If it is an application for
15 discretionary --.

16 QUESTION: No, no, no. Just say that this whole
17 statute doesn't apply to me because the whole statute
18 doesn't take effect until 2004. It's fanciful in this
19 circumstance but you can see where I am going.

20 MR. KNEEDLER: If the claim is that I am not
21 subject to deportation or removal because the statute
22 doesn't apply, that is subject to judicial review under
23 this statute and we think that the suspension of habeas
24 corpus clause probably does require that a court be
25 available to entertain a claim that the person who is

1 subject to removal is not an alien and is not subject to
2 removal because in those cases, we will assume, this
3 certainly for purposes of this case, the executive would
4 be acting beyond any authority granted to the Attorney
5 General.

6 QUESTION: Would you need habeas corpus to
7 review those things? I thought they'd be reviewable under
8 the legislation?

9 MR. KNEEDLER: Oh yes, no, yes, no, I'm sorry.
10 I was going to the constitutional claims that the
11 statutory judicial review procedures are inadequate
12 because they don't cover more things. No, you certainly -
13 -

14 QUESTION: Things are covered anyway.?

15 MR. KNEEDLER: Right. That's absolutely right.
16 We think that the statute provides for judicial review of
17 the two fundamental points at issue in a removal
18 proceeding. Is the person an alien and is the person
19 subject to removal? The statute provides for that. The
20 Zipper clause that this Court referred to in the AADC v.
21 Reno provides that all questions of law and fact,
22 including statutory interpretation and constitutional
23 interpretation can be heard only on judicial review of a
24 final order of removal in the Court of Appeals.

25 QUESTION: Well, you go ahead.

1 QUESTION: With respect to habeas corpus, it is
2 not at all the case that Congress overlooked even in
3 Section 1252 the possibility of habeas corpus relief.
4 Subsection (A)(1) of Section 1252 establishes the general
5 rule of Court of Appeals review but it specifically carves
6 out an exception for situations in which an alien is in
7 expedited removal proceedings and as to that, Subsection
8 (e) of 1252 specifically provides for judicial review by
9 habeas corpus.

10 So Congress knew when to provide and preserve
11 habeas corpus by name in this statute. It did it for that
12 limited category and did it in no other and 1252(b)(9),
13 the Zipper clause says that unless that it's specifically
14 provided for in 1252, the review is not available. And if
15 there could be any doubt as I mentioned even before
16 IIRIRA, Congress in AEDPA had repealed the provision of
17 the prior judicial review provision in Section
18 1105a(a)(10) that said that, provided for custody review
19 of aliens of their deportation orders, that that was
20 specifically eliminated. So Congress knew very well what
21 it was doing in eliminating habeas corpus as such but
22 providing a fully adequate substitute, constitutionally
23 adequate substitute in the court of appeals, something
24 that this Court said in Swain Congress can do.

25 QUESTION: I have a question that perhaps the

1 statute answers. I just don't have it clearly in mind.
2 If there had not been the provision, the specific
3 provision for habeas in the accelerated review cases,
4 would habeas review have been necessarily postponed in
5 those cases until after the court of appeals had finished?
6 In other words, I guess my question is was the provision
7 for habeas review in the accelerated cases in effect the
8 provision of kind of an alternative forum that otherwise
9 wouldn't have been available until the conclusion of the -
10 -

11 MR. KNEEDLER: Do you mean, in the current law
12 or the prior law?

13 QUESTION: The current law.

14 MR. KNEEDLER: The current law. No, it's a
15 substitute for, an expedited, a substitute for a court of
16 appeals review. People in that category, their orders of
17 removal are reviewed only in the district courts, not in
18 the courts of appeal.

19 QUESTION: Okay, what the prior law?

20 MR. KNEEDLER: In the prior law, it was frankly
21 unclear to what extent habeas overlapped with court of
22 appeals review, and this was I think part of the problem.
23 Some courts have held that in habeas the alien could not
24 get review of the merits of the deportation order but
25 could just challenge the detention. Some courts have

1 allowed some review of the deportation order, which, of
2 course, would have provided for duplicative review in the
3 courts of appeals and the district courts.

4 QUESTION: Might that have been the reason for
5 the specific provision under the new law?

6 MR. KNEEDLER: No, I think the reason under the
7 new law was one of expedition , to not have two stops in
8 the court but only one petition for review in the courts
9 of appeals.

10 QUESTION: Mr. Kneedler, the competing habeas
11 provision in this period of uncertainty, whether you could
12 go to both places, that was in the Immigration and
13 Nationality Act itself. It wasn't 1143, was it?

14 MR. KNEEDLER: It wasn't? I'm sorry.

15 QUESTION: It wasn't the general habeas statute.

16 MR. KNEEDLER: Well, as we explain in our brief,
17 the provision in the INA was necessary to preserve that
18 habeas corpus because the prior act was worded, the
19 judicial review is in the courts of appeals under the
20 Hobbs Act except, and as this Court said in Stone there
21 were a series of exceptions that follow that, one of which
22 was the specific exception for district court habeas.
23 Now, whether one views that exception as itself a grant of
24 habeas or a preservation of habeas under 2241, we think is
25 essentially irrelevant. In either event, the expressed

1 exception to seek, to preserve that was necessary and to
2 our knowledge no court held --

3 QUESTION: That wasn't my question. My question
4 was you referred to, was it 11? The one that was
5 repealed?

6 MR. KNEEDLER: 1105(a)(10).

7 QUESTION: Yes, yes. And so, in the period of
8 when you could go one place or the other, wasn't it the
9 1105 that was used to get into the district court?

10 MR. KNEEDLER: Some courts said it was 2241.
11 Some said it was 1105(a). Some courts didn't explain it
12 and there was really no reason to. In our view, probably
13 the best way to look at it is that 1105(a) preserved
14 general habeas jurisdiction but you could look at 1105(a)
15 as a specific grant, but in either event, it was an
16 express exception to what otherwise would have been an
17 exclusive court of appeals jurisdiction which the
18 legislative history we set out in our brief of the 61 Act
19 shows that Congress was aware that habeas corpus would
20 have been precluded if the statute had been permitted
21 toward - to be worded that way.

22 I also want to just briefly just touch on the
23 notion that there is an unconstitutional suspension of
24 habeas corpus if the Act operates in the way that we
25 describe. And we think that that is clearly not correct.

1 As this Court said in *Felker*, first of all, habeas corpus
2 is available only insofar as it's provided by law. The
3 courts are not free at large to address that question and
4 the Court also reiterated in *Felker* that Congress, that
5 it's essentially up to Congress, at least in the first
6 instance, to exercise the judgment as to what the scope of
7 the writ should be. Beyond that, in this context we think
8 that's especially so because Congress has plenary power
9 over immigration and has to be able to balance the need
10 for access to the courts against, in this situation, what
11 Congress saw to be a critical need for expeditious removal
12 of criminal aliens who have already had a chance to test
13 their criminal convictions.

14 And finally, this Court has also said that
15 Congress, deference is owed to Congress with respect to
16 what due process procedures are appropriate for people
17 generally, and again, that's something where deference we
18 think is especially appropriate in the immigration
19 context.

20 For all of these reasons, we think Congress's
21 judgment as to what sorts of things should be subject to
22 review and what should not is due extraordinary deference
23 by this, by this Court. And, in particular, we do not
24 believe that Congress is required to provide for judicial
25 review of a power that it has granted in the discretion of

1 the Attorney General. This is not worded as a personal
2 right of the alien, much less a personal right that is so
3 fundamental that an alien should have access to courts,
4 must have access to courts, to litigate it.

5 Congress should not be put to the choice or put
6 in the all or nothing position of granting discretionary
7 powers to the Attorney General only at the cost of buying
8 into a system of judicial review. As this Court said in
9 AADC v. Reno, there are a number of discretionary
10 determinations the Attorney General makes all the time
11 with respect to whether to institute proceedings in the
12 first place, whether to drop them along the way, whether
13 to perhaps not execute the order of removal at the end of
14 the day. Those are all discretionary and surely Congress
15 is not required to provide for judicial review of that.
16 Congress could conclude that this should be regarded in
17 the same way.

18 QUESTION: Could you just advise me, is it the
19 Attorney General's position, the Justice Department's
20 position, that anybody who is removable under this statute
21 will be removed?

22 MR. KNEEDLER: Well, the Attorney General has
23 the authority not to execute an order of removal if there
24 was - -

25 QUESTION: And does he have regulations as to

1 how that, what is the present position is, I guess my
2 question.

3 MR. KNEEDLER: Well, there's certainly a general
4 rule that final orders of removal will be carried out
5 because that's what Congress had in mind, but Congress--

6 QUESTION: Does the Attorney General bring
7 removal, removal proceedings under anybody that's within
8 the purview of this statute?

9 MR. KNEEDLER: I, I can't represent that every,
10 that every case has been brought but one of the things to
11 bear in mind is that when Congress passed IIRIRA and
12 expanded the definition of aggravated felony, it made that
13 definition applicable to offenses that occurred before
14 1996 and in INS's view, that meant that Congress wanted
15 INS to do something about people who had previously
16 committed offenses and may not have been aggravated felons
17 before.

18 So, the general thrust of the INS's enforcement
19 efforts has been that but I certainly can't represent that
20 it would never decline to remove someone. And the fact
21 that in Accardi again an unexplained decision, this power
22 may well once have been exercised should not prevent
23 Congress from revisiting the question, revisiting the
24 question of how discretionary relief should be thought of
25 in saying for these purposes, it is constitutionally

1 equivalent to the sort of discretion to institute
2 proceedings in the first place that was unreviewable in
3 AADC v. Reno even for constitutional grounds and has been
4 held unreviewable in other situations as well.

5 Now, to the merits of the question.

6 QUESTION: Mr. Kneedler, Would you clarify one
7 thing? You said that there is no more discretion under
8 the new statute, but you just answered a question that
9 says well there is discretion, but it goes on outside the
10 statute. The Attorney General, is not required, even with
11 knowledge that there is a person who is qualified to be
12 removed, is not required to remove anyone. The discretion
13 is there but it's kind of a lawless discretion. Is that
14 what you're telling us?

15 MR. KNEEDLER: Well, it's, the fact that it's
16 not judicially reviewable doesn't make it lawless. There
17 are, there are either formal standards as --

18 QUESTION: That's what you were asked. You said
19 there aren't any.. You said that --

20 MR. KNEEDLER: I don't, I don't, I don't believe
21 there are and this Court pointed out in AADC v. Reno that
22 there were internal guidelines for the exercise of that
23 discretion in the past and the INS --

24 QUESTION: But you're not aware of any?

25 MR. KNEEDLER: I am not aware of, but Congress

1 could reasonably conclude that the statutory provisions
2 for cancellation of removal sets up a similar, or allows
3 the Attorney General to set up a similar regime but
4 doesn't in the process require judicial review of that in
5 the courts.

6 If I could turn to the merits question of
7 whether the Attorney General reasonably determined that
8 the repeal of 1182(c) does not provide a basis for relief
9 in this case. First of all, Congress specifically
10 addressed the temporal applicability of all of Title III-
11 A of IIRIRA of which this repeal is a part in Section
12 309 of the act. In 309(a) Congress specified what it
13 called a Title III-A effective date, which was six months
14 after IIRIRA was enacted, the delay obviously being put in
15 place to allow the Attorney General to set up the new
16 procedures.

17 And then Congress, in 309(c) specified what is
18 the operative event for applying that effective date.

19 MR. KNEEDLER: What it said was that for people
20 in exclusion or deportation proceedings, not removal
21 proceedings, an exclusion or a deportation proceedings as
22 of the Title III effective date, the amendments made by
23 Title III shall not apply but instead, the prior law, the
24 INA as in effect prior to Title III-A shall apply. It
25 follows for people like the petitioner here, excuse me,

1 the respondent here, who was put in removal proceedings
2 after the Title III-A effective date that Congress
3 intended that the Title III-A provisions would be applied
4 and Congress enacted them as a package. As I mentioned,
5 it eliminated deportation and exclusion and replaced it
6 with removal. It repealed specifically 1182(c) and
7 replaced it with cancellation of removal and it provided a
8 new system of judicial review.

9 QUESTION: Just in case. Imagine I've read this
10 and it reminds me of these brain teasers in the
11 newspapers, it's very complex. And suppose after I got
12 through reading all these complex arguments technically on
13 both sides, I got to the situation where I thought I want
14 to assume Congress would have wanted to do what was
15 basically fair in terms of retroactivity. All right.
16 Then I thought there'd be, what's gone is the Attorney
17 General's discretion to deal with a sympathetic case.
18 I've thought of one. A man, 40, 45 years old, had several
19 children, the bread-earner of the family when, in his
20 youth, once stole a pair of tennis shoes in Massachusetts
21 - an aggravated felony under this statute, I think.

22 Another time, on another occasion he stole some
23 fruit from a passing train. All right? Now, what would
24 seem to be the fair thing is at least you give him a shot
25 so that we he was 20 years old and was going to steal the

1 fruit from the train, he would know that that might mean
2 deportation. And so, if we're going to assume Congress
3 would have wanted to do the fair thing, why wouldn't we
4 assume that at least it would give these people a shot so
5 that the second time they know the likely consequence.
6 Hence, we would apply this so that it applies to people
7 whose second felony, aggravated felony like stealing a
8 pair of tennis shoes, I say slightly sarcastically but
9 it's within that, I think. So that they'd at least know
10 when they did that what's going to happen.

11 Well, that's what I call the basic

12 MR. KNEEDLER: Well, with respect to the notice
13 point, Congress specifically made the definition of
14 aggravated felony applicable to offenses that occurred
15 before that enactment and that includes situations in
16 which someone might be rendered removable.

17 QUESTION: Certainly the first one but let's say
18 the second one, so that now he knows what's going to
19 happen and, you see, that's what I call --. Now, maybe
20 you can't even get to that because you go through all the
21 technical arguments.

22 We're at that point. Is there any answer? Is
23 there any answer to that which suggests that the
24 application of the way you're doing it, and indeed, I
25 mean, you know, you go pick up people who are 60 years

1 old. They have families. In their youth, they committed
2 a few indiscretions and without any hope of mercy through
3 any kind of discretion, they're gone.

4 MR. KNEEDLER: Well, several things. First of
5 all, we don't think it's technical. We think the
6 statutory specification of an effective date and what
7 events that effective date attaches to couldn't be clearer
8 from looking at Section 309 of the Act. Congress
9 identified the commencement of proceedings as the
10 operative event and that makes sense because what
11 cancellation of removal as it's now called is something
12 that is a forgiveness of a ground of removal. It's
13 something that only arises after the removal proceedings
14 have been brought. So, we think the statutory answer is
15 clear.

16 With respect to fairness, it depends. Congress
17 is looking at fairness from a broader perspective. It was
18 looking at fairness from the perspective of a large number
19 of criminal aliens in this country who had not obeyed our
20 laws and it wanted to do something about it and Congress
21 also, and importantly, concluded, made the judgment that
22 the Executive Branch was granting far too many
23 applications for discretionary relief under 1182(c).

24 What Congress did here spoke to the Attorney
25 General. It did not speak to any supposed rights of

1 individual aliens. It was responding to what it regarded
2 as excessive, and even referred to as abuse of the power
3 that was granted by the Attorney General and they wanted
4 to take that away, and they wanted to take that away now.
5 The only effective way they could do that was to stop now.
6 It wouldn't have made any sense to grandfather in people
7 who may have committed crimes 10 or 20 years ago if what
8 they wanted to do was to stop the Executive Branch from
9 granting too many applications.

10 At the close of our reply brief, we had
11 citations to a colloquy between Senator Abraham and
12 Senator Hatch and if you read that colloquy, it responds
13 directly to your point, Justice Breyer. We don't set it
14 out at length. But, importantly, in IIRIRA Congress
15 actually drew back a little bit on the disqualification
16 for discretionary relief. Under AEDPA the
17 disqualification under 1182(c) for criminal aliens was
18 broader. In IIRIRA for a permanent resident alien,
19 Congress confined it to aggravated felony.

20 QUESTION: I didn't see anything. I read the
21 colloquy and I didn't see anything in that that suggests
22 that the Senators who were for this provision that became
23 law wouldn't want to give the alien at least the knowledge
24 of what was going to happen.

25 MR. KNEEDLER: But what Senator Hatch said as in

1 explaining one of the reasons for having done this was
2 that in the category that Congress allowed to get relief
3 under cancellation of removal, which was a category that
4 was barred under AEDPA, those might have included people
5 who committed their crimes a long time ago and those were
6 the minor crimes that Congress identified as saying those
7 people should be eligible not for 1182 --

8 QUESTION: Did he say first or both?

9 MR. KNEEDLER: Pardon me?

10 QUESTION: Did he say first or both? Of course
11 they could have included somebody whose first crime was a
12 long time ago. Did he say first or both?

13 MR. KNEEDLER: He was referring to any crime
14 that might have been a long time ago. Well, that's the
15 important thing. But even then, what Congress, what he
16 explained is that Congress made them eligible for
17 cancellation of removal. He didn't say that Congress had
18 somehow carried forward 1182(c) relief, which, as we point
19 out, was expressly repealed in Section 304(b) of IIRIRA,
20 and it was repealed because it had been replaced with the
21 provision for the cancellation of removal which Congress
22 intended to be applied as part of a package dealing with
23 the institution of removal proceedings and then the
24 cancellation of removal proceedings.

25 Congress did not intend a hybrid sort of thing

1 where discretionary relief from inadmissibility could
2 somehow be applied in the proceeding where that didn't
3 even make sense. But beyond the statutory answer to the
4 question that we think Congress supplied in Section 309,
5 this change in the law is not retroactive within the
6 meaning of this Court's retroactivity jurisprudence and
7 there are a variety of ways in which that could be
8 understood but they all point in the same direction.

9 And I would like to identify them because
10 they're different ways of coming at them. First of all,
11 this Court has said in Lopez-Mendoza and most recently
12 again in the AADC case that the enforcement of the
13 immigration laws is inherently prospective. It looks to
14 the question of whether aliens will be permitted to remain
15 in the United States in the future, whereas the Court said
16 in AADC, deportation is necessary in order to bring to an
17 end an ongoing violation of the law. And the reason why
18 this is so is that part of the justification for
19 Congress's plenary power over immigration is as this Court
20 said in the Harisiades case, that Congress has to take
21 into account the contemporaneous policies with respect to
22 aliens. It has to decide at any particular moment in time
23 who that is an alien in this country should be permitted
24 to remain and who should not.

25 Removal is not punishment or regulation of past

1 conduct. It is a determination of who should be permitted
2 to stay in the United States in the future. Another point
3 that can be made about 1182(c) and Congress's repeal of it
4 is that it operates much like the repeal of the authority
5 to grant injunctive relief. When the Attorney General
6 grants, under the prior law, granted 1182(c) relief, it
7 was essentially an injunction against carrying out an
8 order of deportation.

9 Well, this Court has made clear than when
10 Congress most recently in Miller v. French that when
11 Congress changes the authority for granting prospective
12 relief, that that change in the authority for granting
13 prospective relief has to be applied by the Courts at the
14 time that it is applied, that it arises.

15 Another point is that this statute speaks to the
16 power of the Attorney General not to any rights of the
17 alien. This provision has never been worded as a right of
18 the alien. It is again an act of grace or like a pardon
19 as this Court has said. And this Court has made clear in
20 its retroactivity jurisprudence and in Kansas v.
21 Hendricks, for example, even in considering the ex post
22 facto clause, that a statute is not retroactive simply
23 because it arises in a case that is based on antecedent
24 conduct. You have to look to see whether it is punishment
25 or a penalty for the past conduct or whether what's going

1 on is simply regulating someone's current ability and in
2 Kansas v. Hendricks it was a current ability to be at
3 large. The statute, though, was triggered on the basis of
4 prior conviction.

5 QUESTION: I believe the Court also said in
6 Landgraf that if Congress hasn't clearly answered the
7 question, then the Court, taking into account familiar
8 considerations of fair notice, reasonable reliance,
9 settled expectations asks whether the law attaches new
10 legal consequences to events completed before its
11 enactment. Now, that particular phase would certainly
12 seem satisfied here.

13 MR. KNEEDLER: I don't think so. I don't
14 believe it would. It does not attach new legal
15 consequences in the sense relevant to retroactivity
16 analysis.

17 QUESTION: With a new legal consequence to the
18 second theft of the tennis shoes, or whatever, is without
19 knowing it, the consequence is goodbye. Deportation.

20 MR. KNEEDLER: Well, for example, if there is an
21 enhanced penalty provision for a second offense based on
22 having committed a prior offense, that's not considered to
23 be retroactive under ex post facto.

24 QUESTION: There's a legal consequence in this
25 sense in that there are many plea bargains and plea

1 bargains I'm sure have been influenced by the fact that
2 the alien who pleads guilty, and knows, or thought he
3 could, apply for discretionary relief. That's a legal
4 consequence that's been changed.

5 MR. KNEEDLER: It is, well, it's not a legal
6 consequence of a guilty plea. This statute does not
7 regulate past criminal conduct and it much less regulates
8 guilty pleas. It provides deciding whether somebody will
9 currently remain in the country on the basis of their past
10 conduct. A guilty plea is not primary conduct of the sort
11 that sometimes gives rise to retroactivity analysis in
12 other settings.

13 QUESTION: Well, but it's not a clear case
14 either way, I suppose. Wasn't that the point of Judge
15 Easterbrook's opinion. I forget the case. It was cited,
16 I guess, in the government's brief in which he suggested
17 what has been suggested here that your, number one, the
18 consequence does not depend, need not depend, on anything
19 that happened since the guilty plea. And the guilty plea
20 may very well have been entered on the ground that
21 whatever the immigration consequence may be, it was a
22 consequence that it was at least subject to mitigation by
23 the exercise of discretion and the alien may very well
24 have said, my best shot is with discretion and therefore
25 I'm going to enter the plea on that basis. Now, since

1 there's no intervening event upon which the immigration is
2 going to be predicated, it certainly is adding a
3 consequence that was not there when the immigrant entered
4 the guilty plea.

5 MR. KNEEDLER: It has not added the consequence
6 to a guilty plea. It may have undermined the alien's
7 expectation but this Court made clear in Landgraf that a
8 law that affects someone's pre-existing expectations does
9 not itself give rise to retroactivity analysis. There's
10 not the slightest suggestion in this act that Congress
11 intended the application of the various provisions to turn
12 on whether someone pleaded guilty to the offense or did
13 not. If I could reserve the balance - -

14 QUESTION: Even apart from the guilty plea
15 cases, it does attach additional legal consequences to the
16 conviction whether by guilty plea or not.

17 MR. KNEEDLER: Every court of appeals that has
18 looked at that question has concluded that this statute
19 does not raise retroactivity concerns on that basis
20 because it goes to the prospective --

21 QUESTION: Even though the courts of appeals
22 have said that, is it not correct that it did add
23 significant legal consequences to the past crime?

24 MR. KNEEDLER: Not in the sense used in this
25 Court's retroactivity analysis because again this is a

1 situation that looks to current status --

2 QUESTION: Which of our cases are you relying on
3 for that proposition?

4 MR. KNEEDLER: I rely on the discussion in
5 Landgraf and --

6 QUESTION: Landgraf, which uses the terms
7 additional legal consequences, something like that.

8 MR. KNEEDLER: In direct. This is not
9 regulating criminal conduct. This is regulating status in
10 the United States.

11 QUESTION: No, it's attaching new consequences
12 to the criminal conduct. That much seems to be perfectly
13 clear.

14 MR. KNEEDLER: It has undermined expectations
15 but we do not believe it is attaching new legal
16 consequences in the relevant sense.

17 QUESTION: But the Second Circuit said it's
18 absurd to measure it in terms of what the criminal
19 wrongdoer expected to happen in that sense. But
20 nevertheless it does attach a very serious additional
21 consequence. But you just said in Landgraf we didn't mean
22 to --

23 MR. KNEEDLER: Not in that sense. In AADC v.
24 Reno, again, the Court said that immigration law is
25 prospective and retroactivity analysis we think just

1 doesn't apply for that reason.

2 QUESTION: Thank you, Mr. Kneedler. Mr.
3 Guttentag, we'll hear from you.

4 ORAL ARGUMENT OF LUCAS GUTTENTAG
5 ON BEHALF OF THE RESPONDENT

6 MR. GUTTENTAG: Thank you, Mr. Chief Justice,
7 and may it please the Court:

8 I want to address first a few remaining issues
9 on the jurisdictional question before I turn to
10 retroactivity. Again, an analogy to the exercise of the
11 pardon power is simply not applicable here because that
12 deals with the exercise of discretion, not with the
13 question of legal eligibility. We raise no claim
14 regarding the exercise of discretion. Our claim is
15 regarding the Attorney General's decision to exclude from
16 eligibility an entire class of individuals based on the
17 Attorney General's decision to apply the new statute
18 retroactively.

19 That question of whether the new statute applies
20 retroactively is a pure question of law and is one that's
21 governed by the Landgraf principles and they're for courts
22 to decide. By the very nature of the inquiry, it's an
23 inquiry that must be decided by a court because it turns
24 to what Congress intended pursuant to the default rules
25 that this Court enunciated.

1 Secondly, the American Arab case, we think,
2 doesn't speak to the question here because the American
3 Arab case dealt with whether claims could be raised in the
4 District Court or in the Court of Appeals or whether an
5 issue had to await resolution until there was a final
6 order of deportation. There is a final order. This is
7 not about the fragmentation of procedures. This is a
8 question about whether any court at any time will be able
9 to review this claim. And as we've indicated in our
10 briefs, we believe it's appropriate to construe the
11 statute to allow review in the Court of Appeals of this
12 pure question of law. That does not lead to delay of
13 proceedings or delay of removal; it's a pure question of
14 law that needs to be interpreted as to what the statute
15 means.

16 QUESTION: Now I take it your point is it only
17 has to be interpreted once. This is not an issue once
18 it's settled that's going to come up in case after case
19 after case?

20 MR. GUTTENTAG: That's exactly right, Your
21 Honor. And this is not a question of repetitive review of
22 exercises of discretion, or anything like that.

23 QUESTION: Well, how is it that we can confine
24 the decision? You think this would be a very rare
25 instance in which there would be an application for review

1 under your theory of the case?

2 MR. GUTTENTAG: Yes, I think --

3 QUESTION: It involves a class of eligibility,
4 then there might be people who say they in fact are
5 citizens or they were never convicted and that would be
6 about it?

7 MR. GUTTENTAG: Yes, I think it's an extremely
8 narrow group of cases, Your Honor, and that's really what
9 this Court's decisions during the finality era when the
10 only review that was in habeas corpus established that
11 during that period of time there was a very limited class
12 of claims that were reviewable and they went to either
13 constitutional claims or claims that the Attorney General
14 had misconstrued the statute. When there's an error of
15 law going to the construction of the statute, that's
16 reviewable.

17 QUESTION: Can you narrow that further, which
18 you may not want to do? But this particular claim I was
19 thinking of is like a claim of no jurisdiction because
20 it's saying there's a provision of the statute, a whole
21 big section, that just doesn't apply because the time
22 hasn't come yet for it to apply.

23 MR. GUTTENTAG: Right.

24 QUESTION: And now is that like jurisdiction or
25 is it --, I mean, it's not literally jurisdiction in a

1 12(b)(2) sense or something but what is --

2 MR. GUTTENTAG: It certainly is analogous in the
3 sense that the Attorney General has decided what issue he
4 has jurisdiction over and he's decided that he has no
5 power to even consider these claims for relief. So, in
6 that sense, it certainly goes to the Attorney General's
7 determination of what the statute means and what class of
8 cases he has jurisdiction to consider discretion and in
9 that respect it's certainly similar.

10 I just want to note that the final order
11 continues to be contingent on the adjudication of
12 discretionary relief. It has been like that since 1917.
13 It continues to be like that. The new cancellation
14 provision is still the same. The regulation that I
15 referred to earlier is at 212.3, I believe it is, and
16 there is also a regulation at 1229 under the regulations
17 implementing 1229(b) of the statute. One goes to the
18 1182(c) form of relief that we're asserting here. The
19 other one goes to the existing cancellation of relief
20 that's available for people whose convictions occur after
21 the effective date but it continues to be the case that
22 these applications for relief have to be adjudicated
23 before a final order of deportation can be entered.

24 And I want to go back to the Accardi case for
25 another moment because it is the case that Accardi was

1 decided by this Court in the term immediately following
2 the Heikkila decision and in Heikkila the court went back
3 and reviewed the entire sweep of decisions that this court
4 had decided in relation to review of deportation orders
5 during the time when the review was extremely limited and
6 was limited to that that was available in habeas corpus
7 and Heikkila reviewed all of that and it did it in detail
8 and at the conclusion of that review, it said that the
9 only scrutiny that was available was that which was
10 required by the Constitution and the very next year this
11 Court looked at the Accardi claim and in that context held
12 that the claim raised there, a claim regarding
13 discretionary relief, was reviewable and the dissent went
14 back and cited the very same case that the court in
15 Heikkila had said restricted review to the minimum, the
16 Ecker case, and said that's the scope of review that we
17 think is appropriate and habeas should not cover that
18 claim and the Court rejected that and exercised
19 jurisdiction over the claim. So, Heikkila and Accardi
20 together, I think, establish that this claim is reviewable
21 if it falls within that and it clearly does. The fact
22 that Congress could --

23 QUESTION: The cases that Heikkila actually
24 cited after it said that we conclude that review is
25 available only as required by the Constitution, and there

1 are three or four of them, did any of those involve a
2 situation like Accardi.

3 MR. GUTTENTAG: Those cases did not so far as I
4 know, Your Honor. The Accardi case came the following
5 term. There are numerous --

6 QUESTION: And there's no discussion of the
7 basis of review in Accardi, is there?

8 MR. GUTTENTAG: But there is in terms of the
9 distinction between the majority and the dissent.

10 QUESTION: Well, in the majority opinion, do
11 they say exactly what the basis for review is?

12 MR. GUTTENTAG: It's a habeas corpus proceeding,
13 Your Honor. It says that we review the failure to
14 exercise discretion and it distinguishes that between the
15 exercise of discretion.

16 QUESTION: I would think that if they're
17 relying, we're relying on the Constitutional line that, as
18 you say Heikkila set forth so clearly, they would have
19 cited Heikkila. I mean, the failure to cite it, it seems
20 to me, is so significant that I find it hard to believe
21 that, - - regard that case as a holding that this is a
22 Constitutional defect.

23 MR. GUTTENTAG: Well, in any event, at a
24 minimum, Your Honor, it certainly established the very
25 serious constitutional question --

1 QUESTION: Well, Accardi's also a five to four
2 decision.

3 MR. GUTTENTAG: Yes, it was, Your Honor. It was
4 a decision of this Court and specifically rejecting the
5 dissent's view of the scope of habeas corpus. It was a
6 five to four decision. But in any event, it certainly
7 demonstrates the profound constitutional question that
8 would arise if this statute were construed to bar review
9 of the claims that have historically been reviewed and
10 there is a long series of courts of appeals decisions
11 reviewing precisely the same kinds of legal eligibility
12 claims. We cite those in our brief in footnote 10, I
13 believe it is, so that it was not there was a unique
14 circumstance where legal eligibility claims in relation to
15 discretionary relief reached the courts. It's just that
16 they didn't reach this Court until the Accardi case. Now,
17 I do want to recognize Congress could --

18 QUESTION: There are cases of this Court
19 denying habeas relief in such circumstances, aren't there?
20 I mean, they're old cases but they're cases.

21 MR. GUTTENTAG: Not that I'm aware of, Your
22 Honor. I'm not aware of any where the court said that it
23 lacked jurisdiction to hear the kind of claim that's
24 presented here. Now, it is true that Congress could
25 change the eligibility criteria and Congress could

1 eliminate discretionary relief. We don't dispute that.
2 It's our contention Congress hasn't done that and the
3 availability of discretionary relief has to be based on
4 what the statute says. And the statute has to be
5 interpreted in light of this Court's decisions in Landgraf
6 and other decisions as to whether the new statute
7 eliminates relief retroactively or not. But that question
8 is a legal question that the Court must decide.

9 If Congress were to change the statute, that
10 would be a different situation and in terms of the general
11 principle of Chenery and administrative law, the Attorney
12 General has not said I would adopt a general rule denying
13 eligibility to everyone. He hasn't done that and there's
14 no reason to believe that he would. Historically, fifty
15 percent of the applicants received the relief if they were
16 eligible.

17 QUESTION: But, isn't that one thing Congress
18 was trying to correct here? They thought that the
19 Attorney General has granted far too much discretionary
20 relief.

21 MR. GUTTENTAG: That may be so, Your Honor, and
22 that's what Congress did prospectively. We don't believe
23 it did it retroactively and there's no reason to believe
24 that the Attorney General, if he understood that he had
25 the authority, would apply the new statute retroactively

1 to bar relief to the most compelling cases.

2 The very fact of applying this retroactively
3 means that the kinds of individuals who are the most
4 qualified for the relief are those who are rendered
5 ineligible. A person, and this is, there are numerous
6 examples set forth in one of the green briefs from the
7 Florida Immigrant Advocacy Center, numerous individuals
8 who committed offenses 20, 15, 10 years ago, minor
9 offenses - theft of a car radio, a single drug offense for
10 which a person received only probation, a theft offense.

11 QUESTION: These are all aggravated felonies
12 under the statute?

13 MR. GUTTENTAG: They are now because Congress
14 explicitly rendered them aggravated felonies by specific
15 legislation specifically saying that this applies
16 retroactively to old convictions. What Congress did not
17 do, and we think it's a very different inquiry, it did not
18 say that the eligibility for relief that that is
19 eliminated retroactively. And in our view that's a
20 significant distinction because Congress may and clearly
21 did want to sweep a wide range of convictions into the new
22 procedures. But it did not say that it wanted to
23 eliminate relief particularly for those individuals whose
24 offenses occurred so long ago.

25 QUESTION: What about the colloquy, the

1 colloquy that they're talking about in the history?

2 MR. GUTTENTAG: Well, I would note that that
3 occurred after the legislation was passed. So, to the
4 extent that it says anything about it, and I don't know
5 that it's relevant given that that colloquy occurred after
6 the statute passed, but what's important is to look at
7 what the statute indicates. And we believe you can work
8 your way through the incredibly detailed and nuanced
9 provisions in great detail and never find anything that
10 says the eligibility for relief is repealed as to
11 convictions that preceded this date. There is nothing
12 there. The only thing that's there is an effective date
13 that says that the new statute goes into effect on a
14 certain date, including the repeal of section 1182(c). We
15 recognize that and there's a provision that governs
16 transitional rule cases and that says that those cases
17 that are already in the pipeline shall continue to be
18 governed by the old rules. But what this Court said
19 repeatedly in both the *Martin v. Hadix* and in *Lindh v.*
20 *Murphy*, and I'm reading from page 22 of our brief and
21 quoting from the case, the only thing that's sufficient is
22 an unambiguous directive or expressed command that the
23 statute is to be applied retroactively. Language is so
24 clear that it can sustain only one interpretation. There
25 is no language in IIRIRA that can sustain only one

1 interpretation to apply this retroactively. What the
2 statute does is say that new cases will be governed by new
3 rules. We understand that but it doesn't say that the
4 eligibility for --

5 QUESTION: Mr. Guttentag, what do you say about
6 Mr. Kneedler's reliance on section 309?

7 MR. GUTTENTAG: 309 says only that, excuse me,
8 that cases that were already in the pipeline shall
9 continue to be governed by the rules in place at that
10 time. And we agree with that. And presumably it means
11 the cases initiated after that time will be governed by
12 new rules. But what Lindh said is that even when a new
13 statute goes into effect, in even language, it says a new
14 statute shall apply to new cases. And that's at best an
15 inference to be drawn from the 309 language, because it
16 doesn't say it directly. But even if that inference could
17 be drawn, what this Court said in Lindh is that inference
18 is not in, or cautioned that that inference in and of
19 itself is not sufficient to infer a retroactive effect.
20 It's not sufficiently --

21 QUESTION: Of course, what you're talking about
22 is something in Lindh where there is a different situation
23 than here. Do you think that Congress has to make the
24 same sort of showing that you say when we're basically
25 with aliens over which Congress has plenary power and who

1 do not have vested rights?

2 MR. GUTTENTAG: Yes, I do, Your Honor.

3 QUESTION: Why. What's the authority for that?

4 MR. GUTTENTAG: I think the Chew Heong case most
5 significantly, the original case in which this Court held
6 that retroactive analysis does apply and held that the
7 provision did not apply and the government sought to
8 distinguish that case on the ground that it involved
9 treaty rights and so on. But that Court applied
10 retroactivity analysis - this Court, excuse me - applied
11 retroactivity analysis. It cited the same cases, U.S. v.
12 Heth, and others, saying that retroactivity analysis
13 applies in the immigration context. It's done it
14 consistently since --

15 QUESTION: But what about the government's
16 distinction that we're talking about treaty rights there?

17 MR. GUTTENTAG: I don't think, I think that's a
18 false distinction, Your Honor. What we have here is legal
19 permanent residents who are asserting rights under the
20 statute. The treaty in Chew Heong had the effect of a
21 statute and that's what the Court said. It had an
22 entirely distinct part of that opinion talked about
23 retroactive legislation in the immigration area. Here we
24 have legal permanent residents who are asserting a
25 statutory right and based on the fact that Congress didn't

1 legislate with sufficient specificity.

2 QUESTION: Suppose Congress just changes its
3 immigration laws and says that a whole large category of
4 people who previously had been admissible as permanent
5 resident aliens are no longer admissible. They have to
6 pack up and go home. Can Congress do that?

7 MR. GUTTENTAG: Congress can do it if it does it
8 explicitly, Your Honor, but it can't --

9 QUESTION: Okay.

10 MR. GUTTENTAG: Do it inferentially.

11 QUESTION: That's fine. But if Congress does
12 it, is that retroactive? It's eliminating a qualification
13 that used to be valid and they're saying for future
14 residents in the United States, it's no longer valid.

15 MR. GUTTENTAG: Right. It depends on what it's
16 based on, Your Honor. What this Court said is that
17 retroactivity analysis is a practical look at the legal
18 consequences of a past event. If Congress says every
19 immigrant who did something in the past shall now be
20 deported, that's a retroactive effect because we look at
21 practical consequences and irrevocable --

22 QUESTION: What's the closest case you have for
23 that kind of thing, that kind of a definition of
24 retroactivity?

25 MR. GUTTENTAG: Well, I think that's exactly

1 what the Court said in Lindh v. Murphy and that's what it
2 said in Martin v. Hadix and I'd be happy to, but when it
3 imposes. What the Court said in Martin v. Hadix is a
4 common sense functional judgment about whether a new
5 provision attaches new legal consequences to events
6 completed before the enactment. And as I believe Justice
7 Stevens said whether it increases a party's liability for
8 past conduct, attaches a new disability or sweeps away
9 settled expectations and that's all language from Landgraf
10 and from Martin v. Hadix and that's what occurred here.
11 Individuals pled guilty based on the law as it existed at
12 that time and now as a result of that are ineligible for -
13 -

14 QUESTION: Well, you would draw distinction,
15 using Justice Scalia's example to a new statute that said
16 all aliens who are citizens of the United Kingdom shall
17 now be deported. That wouldn't attach any legal
18 consequences to past conduct. That they could do, I
19 suppose.

20 MR. GUTTENTAG: I suppose they could, Your
21 Honor.

22 QUESTION: Well, what if they were naturalized
23 citizens of Great Britain. Certainly that would attach it
24 to past conduct.

25 MR. GUTTENTAG: It may, Your Honor, but I think

1 the critical inquiry is whether it's an irrevocable act
2 that was based and it sweeps away settled expectations and
3 attaches new legal consequences. And if Congress chooses
4 to do that, and I think this is the important distinction,
5 if Congress chooses to do that, it has enormous power.
6 But it has to do it explicitly. And it can't do it by
7 inference. And that's why Landgraf laid down the rule.
8 Congress is obligated to look at the consequences of what
9 retroactive legislation --

10 QUESTION: What was the consequence involved in
11 Landgraf? What was the consequence of Landgraf of
12 applying it in prior conduct?

13 MR. GUTTENTAG: To the employer? I'm sorry.
14 That an employer would have been subject to punitive
15 damages based on a discriminatory act that occurred before
16 the law change.

17 QUESTION: So, you're talking about the
18 imposition of criminal penalties or penalties for a past
19 act. Here you are talking about who can stay in the
20 United States. It seems to me it's a totally different
21 category, I think. It doesn't make sense to me to talk
22 about making the statute retroactive.

23 MR. GUTTENTAG: Well that would suggest, Your
24 Honor, that if the employer in the Landgraf case were an
25 immigrant, that imposing punitive damages on that

1 individual for their discriminatory conduct would be
2 retroactive but passing a law now that says an immigrant
3 will be deported based on that past discriminatory act is
4 not retroactive.

5 QUESTION: That's exactly what I think it would
6 suggest.

7 MR. GUTTENTAG: This Court has applied the same
8 principles that Congress must legislate explicitly in the
9 immigration context, not the Chew Heong case. It did it
10 in Kessler v. Strecker. It did it in Mahler v. Eby.
11 Again and again, it's precisely because the consequences
12 are so severe and I think that the consequences for an
13 immigrant to be deported on any real life practical
14 consequence are far greater than the imposition of damages
15 on an employer and there's a protected, as well as this
16 Court having recognized again and again that a permanent
17 resident has a protected liberty interest in being here.

18 It doesn't mean that Congress doesn't have the
19 power but it must do it explicitly. And, again, as I say,
20 I don't think that there's anything in this statute, the
21 various provisions, there is not a specific provision that
22 says that even though the new definition of aggravated
23 felony sweeps very broadly, we acknowledge that and we
24 recognize that. Congress has cast the net very wide but
25 it's precisely because of that that the elimination of

1 discretionary relief is so devastating and that if
2 Congress intended not only to sweep everyone in, but then
3 also to eliminate any eligibility for discretionary relief
4 that existed at the time.

5 QUESTION: The Court below seemed to have
6 applied its rule only to guilty pleas and not to an actual
7 conviction on trial, didn't it?

8 MR. GUTTENTAG: Yes.

9 QUESTION: Do you defend that distinction?

10 MR. GUTTENTAG: Well, we believe the guilty plea
11 represents the most compelling example of where the
12 greatest reliance occurs, but we think anything - new
13 consequences --

14 QUESTION: Do you defend the distinction?

15 MR. GUTTENTAG: No, we believe that the
16 distinction should apply equally to a conviction but the
17 court need not decide that here because this individual
18 pled guilty.

19 QUESTION: What was in your complaint. What
20 was the category in your complaint?

21 MR. GUTTENTAG: Mr. St. Cyr pled guilty and so
22 that was the challenge that was brought in his case so far
23 as I recall.

24 QUESTION: That's what I thought - that your
25 case was in fact centered on the guilty plea.

1 MR. GUTTENTAG: Yes, it was, Your Honor.

2 QUESTION: So that whatever would apply in
3 another case involving a trial and conviction is not
4 before us now.

5 MR. GUTTENTAG: That's right, Your Honor.
6 That's not directly presented by this case and I might
7 note that when this Court decided the Hughes Aircraft
8 case, it didn't pick the particular retroactive past
9 event. There was the, it was the final determination.
10 Since all the relevant events occurred prior to the change
11 in law, this has a retroactive effect and we will leave
12 for another day.

13 QUESTION: I must confess I find it hard to,
14 just as a matter of interpreting statutes, to say it's
15 retroactive to some people convicted of a crime or not as
16 to others. Just as a matter of pure logic, I think it's
17 pretty hard to swallow for me.

18 MR. GUTTENTAG: It would ultimately go back to
19 the commission of the offense because that's the point at
20 which the irrevocable act occurs and new consequence --

21 QUESTION: That is an event to which additional
22 legal consequences are attached.

23 MR. GUTTENTAG: That's right, Your Honor, we --
24

25 QUESTION: And that would mean there's no

1 distinction as to, you know, whether he got caught or
2 whether he was sentenced heavily or pleaded guilty. Those
3 aren't relevant, really.

4 MR. GUTTENTAG: That would be - - and that's
5 consistent with what the Court does of course in the ex
6 post facto context.

7 QUESTION: Suppose you have a statute that
8 eliminates or narrows the circumstances in which a
9 governor or the President, for that matter, can grant a
10 pardon. That statute is passed and is framed in a way
11 that it covers all crimes - all people currently in
12 prison. Would you say that under our retroactivity law,
13 you would have to interpret that statute to apply only to
14 crimes committed after its passed and that people who
15 committed crimes before that in reliance upon the fact
16 that if I stole these sneakers, the Attorney General might
17 let me stay in the country anyway? I mean, you know, this
18 is not a very substantial reliance.

19 MR. GUTTENTAG: But reliance --

20 QUESTION: And if I stole the sneakers, the
21 Attorney General just might let me stay in the country.
22 This is the kind of reliance we're protecting. If you do
23 the same thing in the pardon context, do you think that we
24 would interpret to be prospective only a statute that
25 narrowed the ability of a governor or of the President to

1 grant mitigation of a criminal penalty?

2 MR. GUTTENTAG: Your Honor, first the critical
3 inquiry is not reliance and this Court has not said that
4 reliance is the test for retroactivity. It's new legal
5 consequences. Whether that would apply to a pardon or
6 not, I'm not sure, but it is the case that this Court has
7 said that in the context of game time credits in the, I
8 believe it was the Weaver case, although I may be wrong,
9 it said that the eligibility for relief from sentencing
10 that is discretionary - there was an act of grace with the
11 board of parole that has a retroactive effect and hence
12 violates --

13 QUESTION: Wait, it was discretionary whether
14 they had to grant it, but they had granted it and there
15 was an entitlement to it as it was described. Whereas,
16 here you have nothing but this off-the-wall hope that the
17 Attorney General might let you stay in the country.

18 MR. GUTTENTAG: No, I disagree with that, Your
19 Honor, because what's here is the legal entitlement to
20 apply. That's --

21 QUESTION: Let me just interrupt. We're not
22 arguing whether it's an ex post facto law and therefore
23 unconstitutional. You're only point is that they have to
24 be clear about it.

25 MR. GUTTENTAG: That's absolutely right, Your

1 Honor.

2 QUESTION: So your answer to his question
3 should be depends how clear the statute is.

4 MR. GUTTENTAG: That's right. That is right and
5 I --

6 QUESTION: I told you what the statute said.
7 All it said is that this eliminated - this discretion is
8 eliminated and it applies to all crimes, which is what the
9 statute here says. And I don't think there's a chance in
10 the world. I'm not talking about ex post facto. I don't
11 think there's a chance in the world that we would, that
12 any sensible court would interpret a statute like that to
13 apply only to crimes committed in the future because all
14 the people who committed those crimes in the past may have
15 hoped that the governor would grand them a pardon.

16 MR. GUTTENTAG: The obligation --.

17 QUESTION: And that's just not the kind. Yes,
18 we haven't made reliance the test for our retroactivity
19 but basically what retroactivity law seeks to protect is
20 reliance. And I find the reliance that we're arguing
21 about here - such an insubstantial thing.

22 MR. GUTTENTAG: But, Your Honor, in that
23 respect, that's where the ex post facto cases are relevant
24 because the ex post facto cases, which this Court has
25 cited in the civil retroactivity context is what

1 constitutes a retroactive effect. Look not to what the
2 individual relied on in any sort of sense that we're
3 talking about right now but rather whether it attaches new
4 legal consequences. If it does that in the criminal
5 context, it violates the ex post facto. If it does in the
6 civil context, Congress has to be clear to achieve that
7 effect and here because of the circumstances in which this
8 applies it is particularly evident what the new legal
9 consequences are.

10 QUESTION: I'm suggesting that eliminating an
11 act of grace is not a substantial legal consequence of the
12 sort that would invoke that rule neither in the pardon
13 situation nor here.

14 MR. GUTTENTAG: The cases, I think, support the
15 view that the fact that it is discretion, in fact in
16 Hughes Aircraft itself --

17 QUESTION: I suppose Congress thought that by
18 passing this very harsh law they would discourage people
19 from committing new crimes, didn't they?

20 MR. GUTTENTAG: It certainly is one of the
21 purposes.

22 QUESTION: That's one of the purposes, I guess,
23 they must have thought it would have had an effect had it
24 been in effect earlier on the old crime scene.

25 MR. GUTTENTAG: Right, that's certainly one of

1 the elements. And it's not analogous to an injunction
2 because this is not an ongoing prohibition against
3 deportation. And that's, this is a one time negating the
4 immigration consequences of a prior criminal conviction.
5 That's what the waiver does. It is not an ongoing
6 injunction against deportation and that also distinguishes
7 this circumstance from the other cases that the government
8 was speaking about that were discussed in AADC -
9 prosecutorial discretion, an after the fact decision by
10 the Attorney General not to actually implement the
11 deportation or something like that. Those are
12 discretionary acts and we recognize that. And those are
13 not in the same category as this particular form of relief
14 from deportation which has been in the statute since 1917
15 and upon which the final order of deportation is
16 contingent. So, deferred action, and prosecutorial
17 discretion, those other kinds of things are very different
18 and that might be a unilateral hope but eligibility for a
19 waiver of deportation is not.

20 I believe that the question this Court faces is
21 whether a pure question of law decided by the Attorney
22 General that will determine whether deportation becomes
23 mandatory for persons who committed offenses many, many
24 years ago at a time when the eligibility for relief was in
25 the law and their likelihood of receiving it was at least

1 fifty-fifty, whether that pure question is reviewable in
2 any court.

3 The Attorney General has decided that he lacks
4 all authority, not because he doesn't want to grant
5 relief, not because he thinks it might not be appropriate
6 in many, many cases but because the Attorney General
7 determined that he lacks the statutory authority because
8 Congress took it away from it. We believe that legal
9 ruling is wrong and that there is nothing in the statute
10 that manifests the clear and unambiguous intent that this
11 Court has repeatedly held in the retroactivity context is
12 mandatory to impose those kinds of drastic new legal
13 consequences on long time legal permanent residents who
14 have made their lives, who have established their
15 families, and who have done nothing wrong but that one
16 offense, one time in the past and ever since complied with
17 the law and are now swept up in this change and subject to
18 mandatory deportation.

19 QUESTION: Thank you, Mr. Guttentag.

20 Mr. Kneedler, you have one minute remaining.

21 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

22 ON BEHALF OF THE PETITIONER

23 MR. KNEEDLER Yes, with respect to the cases
24 that I would rely on for nonretroactivity, Justice
25 Stevens, I would mention *Kansas v. Hendricks* where the

1 Court said there was no ex post facto violation because
2 the act wasn't retroactive even though it operated. One
3 of the triggers was a prior conviction, but it looked to
4 current and future of status. Also, the Cox case
5 mentioned in Landgraf itself gives a description of some
6 such cases.

7 With respect to attaching new legal
8 consequences, that has to be proximate legal consequences
9 in the sense of the statute like Title VII itself imposing
10 penalties on prior conduct. The immigration laws do not
11 regulate and penalize prior conduct. They look to
12 someone's current status and decide whether he shall
13 remain in the United States. There's no pre-existing
14 right to remain in the United States so a new ground of
15 removal does not interfere with any pre-existing rights.
16 In particular, there was no right to expect to be granted
17 relief from deportation. So, even if a new ground,
18 substantive ground, for removal would be retroactive, and
19 this Court's opinions would refute that, certainly taking
20 away a discretionary power in the Attorney General to
21 grant relief in the future is in no way retroactive. We
22 think this case comes down to a question of deference to
23 the Attorney General under this Court's decision in
24 Aguirre and Aguirre and Chevron and the Attorney General
25 has reasonably construed the act not to allow

1 discretionary relief. With respect to jurisdiction,
2 Congress was not required to recognize this form of relief
3 as the sort of fundamental personal right that habeas has
4 to be available for.

5 QUESTION: Thank you, Mr. Kneedler. The case is
6 submitted.

7 (Whereupon, at 12:16 p.m., the case in the
8 above-entitled matter was submitted.)

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