

169

Supreme Court of the United States

October Term, 1968

In the Matter of:

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IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

vs.

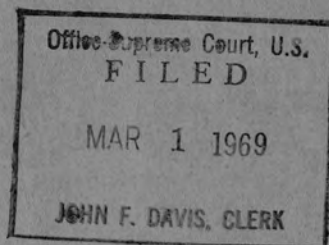
VELJKO STANISIC,

Respondent.

-----X

Docket No.

297



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Place Washington, D. C.

Date February 25, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

ORAL ARGUMENT OF:

P A G E

Joseph J. Connolly, Esq.
on behalf of Petitioner 2

G. Bernhard Fedde, Esq.
on behalf of Respondent 19

REBUTTAL ARGUMENT OF:

Joseph J. Connolly, Esq.
on behalf of Petitioner 40

FURTHER ORAL ARGUMENT OF:

G. Bernhard Fedde, Esq.
on behalf of Respondent 51

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 - - - - -X
4 Immigration and Naturalization Service, :

5 Petitioner, :

6 v. :

No. 297

7 Veljko Stanisic, :

8 Respondent. :

9 - - - - -X
10 Washington, D. C.

Tuesday, February 25, 1969.

11 The above-entitled matter came on for argument at
12 10:17 a.m.

13 BEFORE:

14 EARL WARREN, Chief Justice
15 HUGO L. BLACK, Associate Justice
16 WILLIAM O. DOUGLAS, Associate Justice
17 JOHN M. HARLAN, Associate Justice
18 WILLIAM J. BRENNAN, Jr., Associate Justice
19 POTTER STEWART, Associate Justice
20 BYRON R. WHITE, Associate Justice
21 ABE FORTAS, Associate Justice
22 THURGOOD MARSHALL, Associate Justice

23 APPEARANCES:

24 JOSEPH J. CONNOLLY, Esq.
25 Office of the Solicitor General
Department of Justice
Washington, D. C. (pro hac vice)

G. BERNHARD FEDDE, Esq.
Portland, Oregon
(appointed by this Court)

* * *

1 P R O C E E D I N G S

2 THE CLERK: Counsel are present.

3 MR. CHIEF JUSTICE WARREN: No. 297, Immigration and
4 Naturalization Service, Petitioner, versus Veljko Stanisic.

5 Mr. Solicitor General.

6 MR. GRISWOLD: I move the admission of Joseph J.
7 Connolly, a member of my staff, a member of the Bar of the
8 Supreme Court of Pennsylvania to present the argument for the
9 Immigration and Naturalization Service in this case.

10 MR. CHIEF JUSTICE WARREN: The motion is granted.

11 MR. GRISWOLD: Thank you.

12 ORAL ARGUMENT OF JOSEPH J. CONNOLLY, ESQ.

13 ON BEHALF OF PETITIONER

14 MR. CONNOLLY: Thank you, Mr. Chief Justice.

15 Thank you, Mr. Solicitor General.

16 If it please the Court, this case arises under the
17 Immigration and Nationality Act of 1952. The case is here in
18 writ of certiorari for the Court of Appeals for the 9th Circuit
19 to review that court's interpretation of the Act's provisions
20 governing the temporary landing of alien crewmen for shore
21 leave while their vessels call United States ports.

22 Before setting forth the facts of this case I would
23 like briefly to outline the statutory provisions which this
24 case involves.

25 In parts 4 and 5 of the Immigration and Nationality

1 political opinion.

2 Under the regulations issued by the Attorney General
3 that determination under Section 243(h) is initially made by
4 the special inquiry officer who conducts the deportation pro-
5 ceeding under Section 242.

6 In Part 6 of the Immigration and Nationality Act
7 Congress established special procedures for the admission and
8 in some cases for the expulsion of alien crewmen. Under
9 Section 252(a) of the Act, which is the exclusive procedure
10 for the temporary admission of alien crewmen, Congress provided
11 that an immigration officer may in his discretion issue a
12 temporary permit for the alien crewmen to land, if he finds that
13 the alien is a bona fide crewman and if he finds under sub-
14 section A.1 of 252 that the alien intends to depart on the
15 vessel in which he arrives, and the permit issued under sub-
16 section A.1 is good for the period during which the alien
17 crewman's vessel is in port.

18 The section further provides that the alien crewman
19 must agree to accept such a permit which is conditioned upon
20 his being deported from the United States as provided in
21 subsection B of the statute. That section, subsection B,
22 provides that if an immigration officer determines that the
23 alien no longer intends to depart on the vessel in which he
24 arrived the immigration officer may take up and revoke the
25 permit, take the crewmen into custody and if practicable,

1 remove him to the vessel in which he arrived for removal from
2 the United States on board that vessel.

3 The Act provides that the alien crewman shall be
4 deported from the United States at the expense of the transpor-
5 tation law which brought him.

6 The last section of Section 252(b) is particularly
7 important in this case. It provides that nothing in this
8 section shall be construed to require the procedure prescribed
9 in Section 242 of the Act the hearing before a special inquiry
10 officer to cases falling within the provisions of this sub-
11 section.

12 Section 252(a) and (b) are set out on page 41 and 42
13 of the Government's brief.

14 Regulations issued by the Attorney General dealing
15 with alien crewmen also provide for the parole of an alien
16 crewman who alleges that he may be persecuted if he returns to
17 his homeland, thus reflecting the discretionary relief available
18 under Section 243(h) of the Act.

19 In this case, Respondent, a native and citizen of
20 Yugoslavia arrived in this country shortly before Christmas
21 in 1964, as the member of a crew, radio officer, of a Yugoslavian
22 vessel.

23 He was issued a conditional landing permit under
24 Section 252(a) of the Act good through the time that his vessel
25 remained in the Port in Oregon and on condition that Respondent

1 leave the United States with the ship.

2 He went ashore on January 4th, 1965, and he went
3 directly to the home of a cousin in the company of another
4 crewman on board that ship and a day later they both returned
5 to the Immigration Office in Portland, Oregon, I believe, and
6 claimed -- sought asylum in the United States on the ground
7 that they would be persecuted if they were returned to Yugoslavia

8 On representations which Respondent made to the
9 Immigration Officer at that time that he would not under any
10 circumstances return to his ship, his conditional landing
11 permit was revoked and he was detained at the Office.

12 On the following day the District Director gave
13 Respondent an opportunity to present a statement and evidence
14 in support of his claim that he would be persecuted if he were
15 returned to Yugoslavia. This was under the regulation which is
16 set out, it is Regulation 253.1(f) now and it is set out on
17 page 46 of the Government's brief.

18 Upon advice of counsel, Respondent refused to give
19 any evidence or make any statement in support of his claim. He
20 contended that he had a right to a hearing before a special
21 inquiry officer under 242(b) for his claim of anticipated
22 persecution under 243(h) and he said that he wouldn't give any
23 evidence to the District Director at that time.

24 Consequently, the District Director, without any
25 evidence in support of the claim denied the application for

1 parole and ordered that Respondent be removed to his ship.

2 Respondent then brought suit into the District Court
3 of Oregon to enjoin the District Director from removing him
4 to his ship.

5 Q What was the grounds for the District Director's
6 action?

7 A The ground that the District Director's action
8 in denying parole?

9 Q Yes.

10 A Under the regulation?

11 Q Yes.

12 A There was no evidence at all, Mr. Justice.
13 Respondent refused to give any evidence claiming that he had a
14 right to a different procedure.

15 Q I see. Well then that was the ground for the
16 District Director's action. There was just no showing.

17 A There was no showing.

18 Q Does that appear that that was his ground?

19 A Yes.

20 His memorandum of January 7th is set out in the
21 Appendix on page 5.

22 Q Mr. Connolly, what was the basis for the
23 Respondent's claim to the right to a different proceeding of
24 the regulation?

25 A Mr. Justice, it doesn't really appear from the

1 record exactly what the basis is.

2 Q Was the ship still in port at that time?

3 A His ship was still in port at that time. His
4 ship was still in port at the time that he claimed asylum in
5 the United States. It was still in port at the time the
6 landing permit was revoked and it was still in port the
7 following day when he refused to give any evidence in support
8 of his claim.

9 I will touch upon that issue in just a second because
10 in order to refine the issue before the court which is not
11 altogether sure the nature of the claim to the hearing under
12 242(b).

13 Q Mr. Connolly, what kind of hearing did he
14 demand?

15 A He demanded a hearing before a special inquiry
16 officer pursuant to Section 242(b) which is set out in the
17 Government's brief on pages 39 and 40. That is what he claimed,
18 he said that under 243(h) which authorized discretionary relief
19 he had the right to a hearing under 242(b).

20 Q And is that the kind of a hearing that would be
21 time-consuming? Was it a hearing that could be given immedi-
22 ately or one that would take time?

23 A The record doesn't disclose, Mr. Justice, whether
24 there were any special inquiry officers in Oregon at the time.
25 It doesn't disclose exactly what the nature of the evidence he

1 intended to present.

2 We can assume that it would be somewhat of a time-
3 consuming procedure, how long I can't estimate.

4 Q Would it be enough time so it would not be
5 possible to get him back on his own ship?

6 A Conceivably it would be.

7 The supplement the Government provided the record
8 shows his ship sailed from Oregon some time after the 7th and
9 sailed from somewhere in California for Italy around the 16th.
10 So we just don't really know whether it would have been possible
11 to hold such a hearing.

12 Q May I ask, Mr. Connolly, if he had not had a
13 permit but had jumped ship and his ship was still in the harbor
14 when they picked him up, in that circumstance if he had made
15 this persecution claim would he have been entitled to a
16 hearing before a hearing examiner, rather than before the
17 District Director?

18 A My understanding, Mr. Justice, would be that
19 under the Act he would not be subject to Section 252(b), but
20 that he must be proceeded against on the grounds stated in 241
21 and under the proceeding in Section 242(b).

22 Q So that getting the permit he gets only a summary
23 hearing on the persecution claim whereas if he hadn't gotten
24 the permit he would have had the hearing before the hearing
25 examiner, is that right?

1 A That is right, Mr. Justice.

2 I intend to deal with that question later on as to
3 whether the discrimination between a crewman who gets a permit
4 and a crewman who jumps ship makes any sense at all.

5 Q Isn't it also true if he says he is going back
6 on another ship, he gets a full hearing?

7 A That is right, Mr. Justice. And I also intend
8 to deal with that form of discrimination.

9 To continue on with the facts, after the District
10 Director denied his claim for parole he sued to enjoin the
11 District Director from removing him to his ship. The District
12 Court -- and claimed at that time also that he had the right to
13 a hearing before a special inquiry officer -- the District
14 Court denied his claim that he had a right to a hearing before
15 a special inquiry officer but remanded the case back to the
16 District Director for the taking of evidence, an opportunity
17 which Respondent accepted at this time, presented his evidence.

18 The evidence presented the District Director found
19 that there wasn't a sufficient showing of a sufficient likeli-
20 hood of persecution to justify granting the parole, the
21 discretionary relief and ordered and denied the application
22 again.

23 On review the District Court found that the District
24 Director's determination was not in the use of discretion and
25 agreed with the District Director that there had not been a

1 showing made of any sufficient likelihood of persecution.

2 Respondent did not appeal that determination by the
3 District Court, instead he sought relief by private bill in
4 Congress. When that bill was adversely acted upon the following
5 year in 1966, he again petitioned for parole for withholding
6 of deportation, administratively, again claiming a hearing
7 under Section 242; that relief was denied by the District
8 Director on the ground that the prior proceeding was a fully
9 adequate hearing and that the determination had been made
10 adversely to Respondent.

11 He sued again in the District Court to enjoin the
12 District Director from deporting him. The Court found that the
13 prior proceedings were fully adequate, denied the relief. On
14 appeal to the Court of Appeals for the Ninth Circuit the Court
15 held that in view of the fact that Respondent's ship had sailed
16 during the pendency of the administrative proceedings on his
17 claim of anticipated persecution that the revocation of the
18 conditional landing permit under Section 252(b) was no longer
19 proper basis for the deportation of Respondent.

20 The Court held that in effect unless the alien crewman
21 is in fact removed on his ship, the revocation, the expulsion
22 proceeding under Section 252 must abort and the alien crewman
23 is entitled in all matters respecting his deportation, in all
24 matters of discretionary relief to a hearing under Section
25 242(b).

1 We disagree with the holding of the Court of Appeals.
2 We believe so long as the alien crewman's conditional landing
3 permit is revoked during the time it is in effect, that is
4 during the time that the alien's ship is still in port, that
5 it presents a fully adequate basis for removal of the crewman
6 from the United States, a determination of any administrative
7 or judicial proceedings that he might invoke on the question
8 of his deportability or on the question of discretionary relief.

9 Mr. Justice Brennan asked the question earlier, what
10 was the basis for his prior claim that he had a right to a
11 hearing under Section 242(b).

12 We really don't know. We assume that by Respondent's
13 position in this court, in defending the judgment of the Court
14 of Appeals, is that he has a right to a hearing before a
15 special inquiry officer under 242(b) because that is the way
16 such claims are handled in regular 242(b) proceedings which the
17 Court of Appeals held he now has a right to.

18 I have been unable to find any basis upon which it
19 could be inferred merely from Section 243(h) itself that there
20 is a right to a hearing before a special inquiry officer. It
21 would seem that the Court of Appeals took the only statutory
22 approach that can be made in this case, and that is to find the
23 right to a hearing before a special inquiry officer in the right
24 to a hearing before a special inquiry officer on all claims,
25 and all grounds of deportation in this case.

1 We begin our consideration of the statutory issue in
2 this case and Respondent also raises constitutional things but
3 the statutory issue with a hypothetical.

4 Suppose an alien crewman is issued a conditional
5 landing permit under Section 252(a) good for the time that his
6 ship is to remain in port. He immediately leaves his ship and
7 goes several hundred miles inland where he obtains employment
8 in the training program of a manufacturing plant and enters into
9 a long-term lease, year's lease on an apartment.

10 During the time that his ship is still in port he is
11 found by an immigration officer and on the evidence of his
12 conduct his landing permit is revoked, he is brought back to the
13 Port city and without objection placed on board his ship which
14 sails the next day for a foreign port.

15 As our research reveals that all courts which have
16 considered the question of interpreting Section 252(a) and (b)
17 including the Court below in the instant case would agree that
18 the immigration officer in that case acted properly.

19 But the difficulty is, of course, that in the hypo-
20 thetical which is presented the alien's voluntary departure
21 from this country, voluntary in the sense that uncontested
22 departure moots any challenge to the conduct of the immigration
23 officer.

24 We don't believe that Congress enacted Section 252
25 merely to provide a basis or direction for conduct by an

1 immigration officer in a situation that it couldn't be chal-
2 lenged in court. We believe Congress envisioned that alien
3 crewmen would exercise their rights for judicial review certainly
4 of the conduct of immigration officers under the statute.

5 Congress presumably recognized that in those cases
6 it is unlikely that the alien ship would wait for him until the
7 expiration, until the judicial proceedings were terminated.

8 Now Respondent adopts the reasoning of the Court of
9 Appeals and approaches the problem from the other side.

10 Respondent says, "Well, the Section 252(b) procedure do not
11 apply to the case where an alien crewman jumps his ship and
12 enters the United States without a permit or the case where he
13 gets a permit to ship out on another ship or a case in which his
14 permit is not revoked while his ship is still in port."

15 But he stays on longer than that and they say, "Well,
16 since the statute is thus narrowly designed it ought to be
17 construed more strictly to apply only in the case where the
18 alien is in fact deported on his ship."

19 We disagree with that proposition. We admit that
20 from the face of the statute, Congress apparently contemplated
21 the alien crewman's ship would be one of if not the primary
22 means for removing him from the United States.

23 But if Congress had wanted that to be the sole basis,
24 the sole means for removing him from the United States, if
25 Congress had wanted to limit the statute only to situations

1 where the alien is in fact removed on his ship it could have
2 done so.

3 We believe that it begs the question in this case,
4 to say as the Court of Appeals did that the necessity -- that
5 the justification for prompt removal, the justification for
6 quick resolution departs with the vessel.

7 That, it seems, that Congress contemplated only that
8 alien crewmen would be deported on their ships. We don't
9 believe that that was their contemplation at all.

10 They determined on the basis -- Congress determined
11 on the basis of evidence, that there was a severe problem of
12 alien crewmen deserting their ships that there would be a
13 special class of alien crewmen who would be granted conditional
14 landing permits only on their agreement to depart with their
15 ship and if they failed of that agreement during the time that
16 their ships were still in port they were immediately deportable,
17 whether on their ships, whether on another ship of the same
18 line or whether after determination of any administrative or
19 judicial proceedings.

20 Now the question has been raised, could Congress
21 rationally have made this determination when it exempted from
22 such procedures the crewman who jumped their ships or crewmen
23 who were admitted to ship out on another vessel.

24 Although the legislative history provides no guidance
25 on this question we believe that Congress rationally would have

1 made such a determination. The alien crewman who jumps his
2 ship and enters without a permit at all or the alien crewman
3 who overstays his conditional landing permit without it being
4 revoked may be found 10 days, 3 months, or 10 years later and
5 the 10 years later issue is the one I think that provides a
6 basis for distinction between the two cases.

7 Because unlike an alien who may have been in this
8 country for 10 years albeit illegally and had established
9 family relationships and other relationships which presents
10 some equities in this case, the alien crewman whose conditional
11 landing permit is revoked under Section 252(b) has been here at
12 the most for less than 29 days.

13 At the most for the time that his ship has been in
14 port.

15 Q Suppose he stayed two months?

16 A Suppose he stayed two months? Well, I think that
17 the argument that I am making does not require that we draw
18 the lines between two months and three months, three months
19 and four months, without in effect the statutory limitations
20 period of Section 252(b).

21 Q Two months he would get the same summary treat-
22 ment?

23 A No. No, sir, if he is here for 2 months or
24 10 years, he gets a proceeding under Section 242(b).

25 Q Suppose he is here 1 hour after the ship leaves?

1 A It is the same thing, Mr. Justice.

2 Q Same thing?

3 A Because we can't impose any other statutory
4 limitation.

5 Q So his rights are determined by how long the
6 ship hangs around?

7 A That is right.

8 Q You think that is what Congress meant?

9 A Yes, sir, I do.

10 I would like to turn in the very little time that I
11 have left to Respondent's challenge that the statute is inter-
12 preted by the United States violates his right to due process
13 under the Fifth Amendment and also the Government's obligations
14 under the protocol of relating to the status of refugees.

15 I think that both claims can be comprised into a
16 single Federal due process claim. The protocol incorporates by
17 reference certain provisions of international convention on
18 same subject. Respondent in Amicus cite certain provisions
19 of that convention which relate to expulsion of refugees on
20 the assumption that respondent is a refugee.

21 But the accepted international construction of the
22 convention as the State Department advised the Senate when it
23 was considering protocol is that each of the contracting states
24 reserves the right to interpret the convention to make the
25 determination whether an individual is a refugee.

1 In this case after a hearing in which he was entitled
2 to present and which he did present evidence and was repre-
3 sented by counsel, the District Director found that Respondent
4 was not a refugee.

5 Now, on Respondent's Federal due process claim, we
6 note first that Respondent does not here and has not as far as
7 we know at any time during these proceedings, challenged the
8 revocation of his conditional landing permit as being anything
9 other than a fully adequate constitutional basis for his removal
10 from the United States, nor does he contend that the revocation
11 of the conditional landing permit was arbitrary.

12 It hardly can be contended in light of his represen-
13 tation to the immigration officer that it was arbitrary in this
14 case.

15 Respondent's request for asylum, therefore, was the
16 request of an alien in whose deportability had been properly
17 determined in a proceeding -- in an unchallenged proceeding.

18 Furthermore, it was a request for discretionary relief.
19 A case somewhat analogous to the situation before the Court in
20 Jabers and Boyd in 351 U.S. in a case in which Respondent had
21 the burden of showing that in his case he would be subject to
22 persecution.

23 As I said before, he was given a hearing before a
24 Deputy District Director of the Immigration Service in which he
25 was represented by counsel, was permitted to testify himself

1 and presented two other witnesses and the District Director
2 found that there was not a sufficient showing of a likelihood
3 of persecution and that finding was upheld by the District
4 Court.

5 The only difference between the procedure which
6 Respondent received in this case and the procedure which he
7 would have received under Section 242(b) under 243(h) claim,
8 is that the determination was made by the District Director
9 rather than a special inquiry officer.

10 So the question is in a case of an admittedly deport-
11 able alien seeking discretionary relief on the ground of
12 anticipated persecution whether it is consistent with due
13 process to have that discretion exercised by the District
14 Director rather than special inquiry officer.

15 We do not believe that in the circumstances of this
16 case fundamental fairness required that in a case in which all
17 other contentions were to be adjudicated by the District
18 Director that it was necessary constitutionally to summon a
19 special inquiry officer to determine this claim.

20 I would like to reserve what time is remaining for
21 rebuttal.

22 MR. CHIEF JUSTICE WARREN: Mr. Fedde.

23 ORAL ARGUMENT OF G. BERNHARD FEDDE, ESQ.

24 ON BEHALF OF RESPONDENT

25 MR. FEDDE: Mr. Chief Justice and may it please the

1 Court, my name is Bernhard Fedde of Portland, Oregon.

2 This story, this case is the story of a seaman who
3 is trying to comply with the law. He is not a deserting seaman
4 trying to evade the law. I think that makes a major difference
5 in this case.

6 The question which I believe is before this Court is
7 whether an alien merchant seaman who enters this country on a
8 D-1 landing permit is entitled to an impartial hearing before
9 an independent and impartial and administrative judge on his
10 bona fide claim of right to stay here to escape persecution.

11 Now as I originally phrased this question I inserted
12 the words 'after his ship sails.' I am not sure now.

13 After reading the brief of Mr. Ennis, Amicus of the
14 American Civil Liberties Union, whether I need to insert that
15 any longer. In light of the treaty which protects refugees
16 and deserting seamen, although the deserting seaman chapter
17 applies only in that treaty or protocol applies only to seamen,
18 foreign seamen, flying in our case under the American flag.

19 I believe, therefore, that the question really boils
20 down to this, and our theory is that a seaman with a bona fide
21 claim of right is entitled to a plenary hearing with full right
22 of appeal under Section 242 in light of the new treaty and of
23 the Constitution and laws and cases.

24 That is our position.

25 I would like to state briefly ---

1 Q That wasn't the basis on which we granted the
2 writ of certiorari was it?

3 A No. It was on the ground that he had, I believe
4 it was, the question of statutory interpretation after the
5 ship had sailed. That was the narrower question which was
6 presented. I believe that, as I have stated, that is a broader
7 question, Mr. Chief Justice, and that this would, as I have
8 stated now, it may not be necessary for my case, but I believe
9 that it is necessary for the Kordic case which is the one which
10 Mr. Ennis in the Amicus brief is supporting.

11 But I believe that as stated now it would be adequate
12 to cover both. And I have grown to this conclusion as I have
13 been pondering the statute and the cases.

14 Now first of all, the Government has argued that we
15 have not protested the revocation of the landing permit. The
16 facts are that Stanisic with a valid landing permit on
17 January 6, 1965, sought out the Immigration Service and pre-
18 sented to the Immigration Service a claim of asylum before his
19 landing permit had been revoked.

20 In other words, he was making and he had ten days to
21 go really as far as his ship was concerned -- his ship was
22 around for another 10 or more days. He sought asylum. Did he
23 have reason?

24 Yes. Thirty out of forty-five members of his family
25 which was a Czech-nic Yugoslav family had been executed or

1 killed in the course of World War II and the wars in the years
2 immediately following.

3 His own father who was an Orthodox Priest Assistant,
4 had been deprived of his church function and had been deprived
5 of his pension rights and was living a borderline starvation
6 life in Yugoslavia.

7 He, himself, Stanasic in 1957 tried to escape from
8 Yugoslavia. He was caught by some fishermen just outside of
9 Trieste and was brought back and then was threatened with life
10 imprisonment, by a court mind you.

11 Now, this does not comport with my idea of fairness
12 and due process when a court, in advance of the next offense,
13 announces what it is going to do. They said, "You are going
14 to get life imprisonment the next time you appear before this
15 court."

16 This, in my opinion, is a serious of a plain bona
17 fide right of asylum. I think this makes every difference in
18 the world.

19 Q Were those facts raised before the Deputy
20 Commissioner when he gave him his original hearing?

21 A No.

22 Q Why were they not?

23 A We had 15 minutes' notice.

24 On the bottom of page 3 of my brief, Respondent's
25 brief, is an excerpt from the affidavit of Mr. Robinson who

1 was at that time counsel for Stanisic.

2 To outline the exact chronology of events, Stanisic
3 appeared on January 6, and asked for asylum. He was taken to
4 Rocky Butte Jail in Portland. On January 7, he was told that
5 he was asked by the immigration officials without benefit of
6 any counsel, "Do you intend to return to your ship?"

7 This, of course, is the trick question. He didn't
8 know what -- he just answered honestly, "No, I don't."

9 Then they said, "Your landing permit is revoked."
10 He had announced he was coming there for asylum, then subse-
11 quently his landing permit was revoked and then it was at
12 11 o'clock, remember this is on January 7, the day after he had
13 appealed for asylum, members of his family, Toskovich actually,
14 came to Mr. Robinson's office and said we need help.

15 Mr. Robinson was in another court at the time.
16 However, he filed a formal appearance about 12 o'clock that day,
17 one hour later.

18 Q That was what day?

19 A January 7, still the same day, but now 45
20 minutes later. This is all working on split-second timing.

21 Q I thought this was the day after.

22 A January 7 the day after he first made his claim,
23 yes. That is right.

24 Q Yes.

25 A He had still not seen any lawyer until -- no,

1 Stanasic had not seen any lawyer but his uncle or cousin
2 Toskovich had on the following day, January 7, about 11 a.m.
3 Twelve o'clock Robinson filed his appearance and went to another
4 court where he had to be at 1:30.

5 At 3 o'clock that day he got a telephone call from
6 the Immigration Service saying you are due to have your hearing
7 on the question of asylum in 15 minutes.

8 Robinson couldn't prepare any case in that short
9 order and Mr. Abano who was then the District Director, simply
10 insisted that the matter proceed at once and it was then that
11 Mr. Robinson said we can't proceed and we are not going to
12 present any evidence; in fact we demand a 242 hearing.

13 Q Is this all in the record?

14 A Yes, sir, it is. Yes, it is. It is in the
15 record it is, I don't know if I can find it on the spur of the
16 moment like this. It is on page 3 in the affidavit of
17 Mr. Robinson, where some of this appears.

18 Q Well, that isn't part of the record, is it?

19 A Yes, I think it is.

20 Perhaps not. I should perhaps move to have the
21 record extended to include this affidavit of Mr. Robinson. I
22 believe the affidavit appears in the proceedings in the entire
23 file which was sent up to the court.

24 Q Where was the affidavit first filed?

25 A It was filed January 7, 1965, in connection with

1 the petition or restraining order which Mr. Robinson then
2 prepared that same day. I am sure it is in the record. Yes,
3 it is. It is in connection with petition for restraining order.

4 About two hours later Mr. Robinson had delivered to
5 the Clerk of the Court. of the District Court, a request for a
6 restraining order and then for a hearing under 242.

7 Q Did the lawyer ever go to the Immigration
8 authorities that day?

9 A At 3 o'clock. Yes, he did at 3 o'clock, 3:15
10 he came there on January 7. Yes.

11 Q What happened then? He said he wouldn't go
12 through with the hearing?

13 A He said he would not go through with the hearing
14 on such short notice. One, he hadn't prepared, and two, he
15 was entitled to a fairer hearing than this hearing.

16 Q Where do you find that in the record?

17 A That would be in connection with the application
18 for the restraining order. I believe page 3 and 4, I believe,
19 of the petition for injunctive relief and then the amended --

20 Q Where?

21 A Yes, page 5 -- 6, 7 and 8 of the amended petition
22 for injunctive relief.

23 Q What pages?

24 A Of the appendix, 6, 7 and 8 of the appendix as
25 a more detailed and amended statement in which he sets forth

1 that he had only 15 minutes' notice and really had no oppor-
2 tunity to consult with his client.

3 Q What worries me is that admittedly I would
4 assume the lawyer was in trouble, but the petitioner here,
5 rather Respondent didn't need 15 minutes, he knew what he --
6 what his complaint was.

7 I would assume that he had been thinking about this
8 for quite a while.

9 A As far as I know ---

10 Q Well, I would say that he had been thinking about
11 it since the time they threatened him with life imprisonment,
12 at least. But what worries me is that nobody gave the officer
13 any indication of what the facts were that they wanted a
14 hearing to develop.

15 Is that true?

16 A I believe that is true, Mr. Justice. I believe
17 that is true in the initial hearing, partly because we were,
18 and I identify myself with Stanasic -- I can't help it, we were
19 getting what amounted to a hustling process.

20 Under the circumstances all we could do was just ask
21 for a full hearing. It was apparent to us that Mr. Abono and
22 Mr. Petillo, his assistant, were biased and prejudiced. The
23 deposition, by the way, of Mr. Abono and Mr. Petillo appears in
24 the files of this case which are before this court and I think
25 the bias and prejudice are quite apparent.

1 It appeared again and again, even in the subsequent
2 hearings held January 25 and 26 at which time Mr. Abono and
3 Petillo, or Mr. Abono particularly took official, not judicial,
4 but official notice that conditions in Yugoslavia were fine
5 and that there was a relaxation of tensions toward political
6 refugees.

7 In that deposition it appears that there was no
8 basis in fact whatever for this finding. In other words they
9 took judicial notice of nothing and yet came up with the
10 opposite of what Stanisic had been able to show at that hearing
11 on January 25 and 26.

12 It is in the course of these -- well, if I may move
13 on to a statement of the case, the District Court referred the
14 case back to the District Director for a summary hearing on
15 physical persecution under Section 243(h).

16 The District Director found no physical persecution.
17 I underscore the word 'physical' here which are, of course, the
18 exact language of 243(h).

19 But he treated it as a matter of seeking or of a
20 request for parole under 253.1(e) and denied parole.

21 Well, Stanisic then asked the court to review because
22 of the bias and prejudice of the District Director. The
23 District Court, Judge East, refused to change the order of the
24 District Director and then the matter died at that point.

25 Mr. Stanisic and his companion, Buchnich applied for a

1 private bill in Congress and it failed June 1966. Then at
2 that point the District Director ordered Stanasic deported under,
3 and also Buchnich deported and gave them 70 hour's notice to
4 present themselves to the District Director for deportation
5 to Yugoslavia, and as I understand it, they were to be sent
6 there in handcuffs.

7 In the meantime, however, Section 243(h) of the
8 statute had been changed. In other words the goalposts had
9 been moved and no longer was it physical persecution, now it
10 was persecution on account of race, religion or political
11 opinion. It had been broadened.

12 We claim that, therefore, the goalposts had been
13 widened and we, therefore, had a greater right than we had under
14 the question of physical persecution.

15 The District Director in the earlier proceedings used
16 always the word physical persecution and we claimed that the
17 persecution that we were facing was persecution by reason of
18 religion, Orthodox, and political opinion, namely Chetnik
19 sympathies, anti-Yugoslav and government views.

20 And whether physical persecution would result is hard
21 to say although we have in our briefs pointed out some ten
22 different grounds upon which this man could face anything and
23 it is a very vague position he faces if he goes back, if he is
24 sent back. He could face anything up to the death sentence
25 back there and has been promised a life imprisonment.

1 We claim that, therefore, that he has now or had now
2 under the amended statute a broader claim than he had under the
3 earlier statute.

4 Q When was the statute amended?

5 A October 3, 1965, I believe.

6 Q Some months after ---

7 A After the first hearing and before this second
8 matter arose, yes.

9 Q Really, are all these, the substantive issues
10 which his claim raises are really not before us at all, are they?
11 Or, isn't the only question whether or not the procedures of
12 252(b) were available and continued to be available even though
13 the ship had left the shores of the United States or whether
14 after the ship left the Government was required to bring a 242
15 proceeding and you were entitled to a 242 proceeding. Isn't
16 that the only issue?

17 A That is the issue in my case.

18 Q Isn't that the only issue, A, on which we
19 granted certiorari and the only issue really presented here?

20 A Yes.

21 Q Not the substance of your client's claim?

22 A That is right.

23 That is right, your Honor.

24 On the second proceeding he petitioned for parole
25 under Section 243(h). This was denied by again the same

1 District Director Abono. He then presented it through me. Now
2 I appear in the case at this point.

3 I then approached the United States District Court
4 asking for a restraining order and cited a number of grounds,
5 pointing out among other things that the ship had long since
6 left the shores and that he should be entitled to have a 242
7 hearing before a Special Inquiry Officer.

8 The District Court rejected on the grounds of
9 res adjudicata. The Court of Appeals in the Ninth Circuit
10 reversed on the ground that basically, and interpret the
11 statute, that when the ship departs the need for haste ends
12 and that he is therefore entitled to a full hearing on the
13 merits of the case.

14 Q That is the real issue that we are deciding here?

15 A That is the real issue in this case, yes.

16 That is correct, your Honor.

17 The point that I think is critical in this case which
18 strengthens my position is that protocol related to status of
19 refugees which was ratified November 1, 1968, about 90 days ago.
20 And this, I believe, applies to Stanisic and to all other
21 refugee seamen as well as refugees in general.

22 No longer can they be sent back on the ship that
23 brought them. In fact, they cannot be sent back to the country
24 from which they are seeking refuge, or from which they are
25 seeking asylum.

1 In fact, no political refugee under this protocol as
2 I understand it can be sent back at all to the country of
3 origin or the country that is threatening to persecute him.
4 And, therefore, under the circumstances of this case it appears
5 to me that Stanasic in no event would be sent back to Yugoslavia,
6 in no event, of course, back on the ship that brought him.

7 Q Was that ratified by the Senate?

8 A Yes, yes, it has, Mr. Chief Justice.

9 So, this is our position.

10 That the summary expulsion proceedings should be
11 limited to the absconding seaman who has no claim of right.
12 Where there is, however, a claim of right as in this case, he
13 is entitled to a full and fair hearing on the facts with full
14 right of appeal.

15 This is the minimum of due process in my opinion
16 under the Treaty and the Constitution and the cases.

17 If Stanasic is denied this he faces a severe punish-
18 ment, probably life imprisonment. All we ask is fairness.

19 Q Well, do I understand that you no longer con-
20 tend that the statute entitles you to this?

21 A Oh, yes, I do believe the statute also entitles
22 us to this but I simply say that protocol has reinforced our
23 position that it says refugees shall be given due process.

24 Q Then the question is to who is a refugee,
25 whether he is a refugee and whether a -- and what procedures

1 have to be followed to establish that he belongs in that
2 category, don't you?

3 A There is, of course, the first factual question,
4 that is the claim of right. That is true, your Honor.

5 Q Now does that depend on the statute?

6 As I understand it the United States has reserved to
7 itself the right to determine who is a refugee, then presumably
8 in the statute the United States has prescribed a procedure
9 by which in cases of this sort it will make a judgment as to
10 who is a refugee.

11 Now you are claiming one sort of procedure and your
12 client was given another kind of procedure. I will be interested
13 in what you have to say about the statute and what light the
14 statute sheds upon whether you are correct in your contention
15 or the Government is correct in its contention as to the
16 prescribed procedure, prescribed formal proceeding.

17 I was interested in your argument, and thus far you
18 seem to have dropped out reference to statute and perhaps that
19 was just the order of argument.

20 A Well, perhaps I have been unduly impressed by
21 the protocol. That may be part of the point. And the protocol
22 came quite a bit later in terms of statutory enactment and so on
23 in the chronology of events.

24 Q Are you arguing on the basis of protocol that
25 whatever the statute may have originally required or permitted,

1 this case has to be determined now within the four corners of
2 the protocol?

3 A I would say that protocol reinforces our position.

4 Q I don't follow this. You told us that the
5 protocol no longer permits deportation to the country of
6 origin, in the case of the political refugee or whatever he may
7 be.

8 A Yes, sir.

9 Q Then I don't understand. If that is so, what
10 relevance has the statute?

11 A It may be that the statute will have to be de-
12 clared or at least modified or declared unconstitutional to
13 the extent that it conflicts with the protocol. This may be
14 the position.

15 But even if we stay under 242 and the statute and I
16 am perfectly willing to stay under that as well, the point there
17 that he is entitled to a full 242 hearing because he ---

18 Q Well, suppose he gets it. Suppose it is con-
19 cluded that he is deported, then what happens to him?

20 What controls then, protocol?

21 A Yes, I believe the protocol would control. So
22 he could not be deported to Yugoslavia.

23 Q Yugoslavia.

24 A That is right, your Honor. I believe that is
25 correct. That is something that has come into being in the last

1 90 days.

2 Q Why does that require you to argue the
3 constitutionality then? If the protocol controls and as you ---

4 A Well, I believe that even without the protocol
5 my whole ---

6 Q I am not talking about without it, assuming you
7 have it. If you say it is controlling, why do you have to go
8 to any constitutional argument?

9 A Perhaps I don't. I just, out of an abundance
10 of caution I ---

11 Q Do you have to out of an abundance of caution
12 raise a constitutional point if you have it decided by protocol
13 what you say is controlling?

14 A Yes, I think that the protocol requires that he
15 be given due process. I think 242 provides due process and
16 this is what we are asking, that when the protocol refers to
17 due process I believe that this in turn requires a due process,
18 242 hearing which is ---

19 Q How do we know what they meant by due process
20 there?

21 A I can just cite the court back to the -- well
22 to the various cases of this court and the, I think for
23 instance of the Woodby case in which the court said that no
24 deportation order -- this is Woodby versus U.S. -- I have cited
25 it at pages 13 and 14 of my brief -- no deportation order may

1 be entered unless it is found by clear, unequivocal, and
2 convincing evidence that the facts alleged as grounds for
3 deportation are true and that this standard of proof applies
4 to all deportation cases, regardless of the length of time the
5 alien has resided in this country.

6 Q That is the challenge to the findings isn't it?

7 A Yes, we also challenge the findings of the
8 District Director, we do that. Because the depositions of
9 Abono and Petillo which are in the record indicate that they,
10 in our opinion, that they came to this whole question with
11 prejudice. There is no evidence at all contradicting ---

12 Q That is a different question than challenging
13 the findings?

14 A Yes, we are. We challenge the findings also not
15 only the question of -- we believe this would come out better
16 in a 242 hearing on the merits of the case.

17 Q Basically do you stand on what the court held
18 that when the ship is gone they are entitled to a hearing?

19 A That is correct, your Honor.

20 Q Two-forty -- what is that?

21 A 242(b) I believe it is.

22 Q That is your basis?

23 A That is correct, your Honor.

24 Q Regardless of what happened during the 29 days
25 that he is ashore in relation to wanting to stay. Let me put

1 it this way. Suppose instead of coming in on the 5th of
2 January as he did he came in on the last day or the next
3 to the last day before the ship was due to leave, would you
4 still contend that they had to have a hearing before the ship
5 left?

6 A If possible have a hearing before the ship left
7 but in any event in a question of a bona fide claim of right,
8 I think he is entitled to a 242 hearing if the SIO, Special
9 Inquiry Officer is on hand at the time he could have it right
10 then, although I don't see how one could prepare a case like
11 this which would require witnesses and written records and other
12 things to sustain his position.

13 I don't see how you could get that up in 24 hours.

14 Q Well, I don't either, but wouldn't we then be
15 writing out of existence this statute which says that he can be
16 sent back if the ship is still there?

17 A Regulation 253?

18 Q Yes.

19 A Yes.

20 Q If he comes in the last day or the next to the
21 last day and says, "I am not going back and I refuse to tell you
22 why, but I am not going back." And then the ship goes out.

23 Do you say that that entitles him to stay here and
24 have a hearing as you claim he is entitled to have?

25 A Well, where he has a claim of right, yes.

1 Although as the Court has worded it he wouldn't have stated any
2 claim of right as I understand the question. Is that right?

3 Q Well, they say we will give you a hearing. And
4 he says, "I won't take a hearing now. I won't put on my case;
5 I won't tell you anything."

6 Is that what he did in this instance? You put it on
7 the basis that he only had 15 minutes but I suppose he had been
8 thinking about this before and knew why he didn't want to go
9 back. Couldn't he at least have stated to the officer at that
10 time why he didn't want to go back?

11 A I believe he did in just that many sentences. He
12 couldn't go back for reasons of religion and political perse-
13 cution.

14 Q Does the record show that?

15 A I believe it does, your Honor.

16 Q I read the early part of it. I don't find that.
17 It may be there. I thought he refused to ---

18 A He refused to put on any evidence; that is true.

19 Q Was the ship gone then?

20 A No. About the 16th of January was when the ship
21 went. I would like to say -- I see that the light is lit and
22 I just want to take a minute to explain the 253 matter.

23 Q You have five minutes.

24 I am going to give you five minutes more because I
25 want to give the Government five minutes more and ask them some

1 questions, too.

2 A The 253 is a regulation. It is set forth at the
3 end of the Government's brief, page 46 of the Government's
4 brief. The history of this is set forth rather neatly in the
5 brief of the Amicus.

6 And particularly, well beginning with page 5 and
7 following on the brief of Mr. Ennis.

8 The gist of the argument is that 253 is a regulatory
9 or Immigration Service floss and is not required by the statute
10 and under 243(h) as Government counsel have indicated, there is
11 no procedure set forth. We claim that 242 proceedings apply,
12 namely, a Special Inquiry Officer hearing.

13 And for that reason the regulatory, that is the regu-
14 lations 253 hearing should be stricken. They are not necessary
15 at all. And it is this which is doing the damage in the case.

16 One point also I want to bring up and that is the
17 point that we are talking about a de minimus matter here. As
18 far as over the last ten years there have been only 276
19 Yugoslav seamen involved.

20 I pick up Yugoslav seamen because they are the primary
21 ones from refugee countries, that is countries where they might
22 have persecution. There may be seamen from England and other
23 but they are not seeking political asylum.

24 There are 276 over a 10-year period; 27.6 men per
25 year on an average. That is the only add-tional burden that

1 would be inflicted upon the staff of the Special Inquiry
2 Officer if the court throws out 253 as a regulatory provision
3 and then permits these refugee seamen to have a full hearing.

4 Q Even if the ship is still in port?

5 A Even if the ship is still in port, but in my
6 case we don't have that question.

7 Q I think you do. You filed a case in the District
8 Court for a restraining order while the ship was still in port,
9 didn't you?

10 A Yes, sir.

11 Q That is what you meant that at any time he is
12 entitled to a 242 hearing?

13 A Yes.

14 Q At any time?

15 A Yes, although there is a question further added,
16 may it please the Court, that after the ship has gone the
17 hearings should shift from a 253 hearing to a 242 hearing and
18 before a Special Inquiry Officer. Because now the need for
19 haste is gone.

20 Q But in your application for a restraining order
21 didn't you ask for a 242 hearing?

22 A Yes, we did.

23 Q While the ship was still in port?

24 A Yes, we did.

25 Q You change that position now?

1 A No, your Honor, we still stand on the 242
2 hearing. We still think that is the only correct procedure.
3 Thank you, your Honor.

4 MR. CHIEF JUSTICE WARREN: Mr. Connolly.

5 REBUTTAL ARGUMENT OF JOSEPH J. CONNOLLY, ESQ.

6 ON BEHALF OF PETITIONER

7 MR. CONNOLLY: Mr. Chief Justice, the Chief Justice
8 is very kind in extending the Government's time which probably
9 was terminated in the opening statement, because there are some
10 matters of some importance, of great importance, in this case
11 in which the Government and Respondent strongly disagree.

12 In the first place Respondent's counsel has painted
13 the picture of an individual who in good conscience after coming
14 ashore rather than trying to fade into the population presents
15 himself in an Immigration Office to claim asylum under the
16 statute.

17 I would like to call, to invite the court's attention
18 to Respondent's testimony before the Deputy District Director
19 on remand from the District Court to pages 12, 14, 20 to 22,
20 29 and 30 of his testimony which is in the record in the court
21 filed in a little Manila folder.

22 Q I have it here.

23 A It is not printed.

24 It is the Government's position that that testimony
25 gives persuasive evidence that Respondent entertained the idea

1 and the intention well before he came into Oregon at that time
2 to desert his ship and to remain permanently in the United
3 States.

4 At the time he came into Oregon he obtained a con-
5 ditional landing permit from an immigration officer on his
6 agreement to return with his ship and his representation to the
7 immigration officer that he was going to return with his ship
8 and that he was not going to desert the ship.

9 I think the best thing you can say on the basis of
10 this evidence is that the position of the Respondent finds
11 himself now is the scheme that was initially conceived in mis-
12 representation.

13 If he had been honest with the immigration officer
14 and told him that he was claiming political asylum because of
15 anticipated persecution he clearly would not have been entitled
16 to a temporary landing permit under 252. He would have been
17 given a hearing under regulation as to whether he may be
18 paroled in the United States but in such a case that determi-
19 nation would be made by the District Director as it was
20 actually in the present case and he would have had no claim
21 to a hearing before a Special Inquiry Officer.

22 So, on the basis of initial misrepresentation he has
23 pyramided his status into a situation where it has completely
24 made a shambles of the whole statutory scheme.

25 And the next point I would like to bring out ---

1 Q Another way of looking at it is that a person off
2 a ship from Yugoslavia coming to a strange country worked out
3 pretty well to get even to the place where he might get justice.
4 Think of an American landing in Yugoslavia and trying to work
5 his way through all the Yugoslavia law -- I don't get this
6 argument at all.

7 Do we assume that every person that walks in has an
8 L.L.B. from Harvard, he has A's in all his courses, he knows
9 all the intricacies of all these sections?

10 A Well, I think after Mr. Stanisic got on shore
11 he did miraculously well against what Congress directed in the
12 statute. The only point that I am trying -- the essential
13 point that I am trying to make is that he was asked one question
14 by the immigration officer when the immigration officer came
15 aboard the ship and that is, "Do you intend to depart with your
16 ship" and he said, "Yes," and that is how he got a conditional
17 landing permit.

18 And the evidence in the record we believe discloses
19 that he didnot intend to deport with the ship.

20 Q What is the net of what he said, what you said?

21 A The net of what he said is that he delayed,
22 he said he delayed getting married and jumping ship until he
23 could get to the United States because he saw that -- he had
24 been to the United States six times -- and he delayed jumping
25 ship until he got to Oregon because he had a cousin in Oregon

1 that could help him.

2 Q Suppose it be true that he did say, "I intend
3 to go back with the ship." He stayed here, you had some
4 proceedings and the ship left. His lawyer then came to the
5 examiner, the department, and says "Now, I have -- I will be
6 persecuted if I go back here. I want a hearing."

7 Would he then have been entitled to a hearing on the
8 ground that his ship had gone?

9 A He would have been entitled to a hearing under
10 Section 242 and because of the pronoun in Section 252 there
11 would have been no exemption from that hearing requirement. He
12 would have gotten a 242 hearing.

13 Q But I understood the lawyer to say that he did
14 go and tell the story.

15 A Yes, he did go.

16 Q And the ship had already gone?

17 A No, sir.

18 Q I understood you to say that.

19 Does the record not show that?

20 A The record, we believe, as supplemented by the
21 Government shows that at the time that he presented himself to
22 the immigration officer ---

23 Q I mean the lawyer presented the facts. I under-
24 stood him to say that the lawyer, after the ship had gone,
25 presented it to him and told him the facts.

1 A No, sir, that is not what happened in this case.

2 Q That is not in the record?

3 A The ship was here when he presented himself to
4 the immigration officer.

5 Q Suppose that had been done?

6 A Under the statute, Mr. Justice, unless the
7 landing permit is revoked while the ship is in port, unless you
8 get ahold of the alien and revoke his permit while the ship is
9 in port he must be proceeded against under the full procedures,
10 so we wouldn't have had this case if the ship had been ---

11 Q That would have been in a different attitude?

12 A Yes, sir.

13 Q Then it all depends on whether the lawyer -- that
14 point depends on whether the lawyer did that, doesn't it?

15 A Well ---

16 Q I understood him to say the lawyer did. Maybe
17 I am wrong. Did you understand that?

18 A No, I didn't. I didn't hear it.

19 Q You didn't?

20 A Now the next and I think more important point I
21 would like to make is that the Respondent relies quite heavily
22 on the statement of brief of the Amicus of The American Civil
23 Liberties Union to the effect that the hearing which the
24 service offers to alien seamen under 253.1(f) of the regulation
25 is a rather pro forma hearing which results in a fast shuffle

1 back to the ship.

2 They cite three cases for that. The first case they
3 cite is the instant case in which when an opportunity was given
4 to Respondent to present evidence, he completely refused to
5 give any evidence at all.

6 The second case ---

7 Q You don't think that is a totally unfair charac-
8 terization if it is true that he was given 15 minutes' notice?

9 A Well, Mr. Justice ---

10 Q I can readily understand that a lawyer faced with
11 that might quickly find his way over to the United States
12 District Court and file a bill and, because lawyers after all
13 under our system are supposed to have some time to get a pre-
14 pared case for their client and you can't expect a Yugoslav
15 seaman or any layman to go over in 15 minutes and present the
16 facts in support of his claim of religious or political
17 persecution?

18 A That is right, Mr. Justice, and the remedy that
19 is available to a lawyer in that type of case as in any adminis-
20 trative procedure and any judicial procedure is to ask for a
21 continuance. And that is what the lawyer here didn't do.

22 The lawyer said that he had a right to a hearing
23 before a Special Inquiry Officer, under Section 242, and on the
24 face of the record it wouldn't have made any difference if he
25 had 15 minutes or 15 hours or 15 days to prepare for it.

1 What he claimed was a different type of a hearing.

2 It didn't make any difference how much time he had gotten.

3 The other two cases and I won't go into them now
4 because the time is running out were also cases. The Kordic
5 cases in the Second Circuit and the Glavic case in the Fifth
6 Circuit, cases in which the hearing was impeded by a claim that
7 there was a right to a hearing under Section 242.

8 But more than that, I was worried by this point, and
9 I checked with the Immigration Service and the Immigration
10 Service advised me that asking to represent to the court that
11 in the hearings under the regulation of an alien seaman who
12 claims persecution if he is returned he gets the exact same type
13 of hearing as he would have gotten under the full scale 242
14 proceeding.

15 He is entitled to have counsel, he is entitled to
16 have the assistance of counsel, he is entitled to present any
17 evidence which is readily available to him.

18 Q Are you saying that it makes no difference
19 whether there is a hearing before a District Director or before
20 a hearing officer?

21 A No, sir.

22 Q I don't assume you are saying that, Mr. Connolly.

23 A The constitutional issue comprises that dif-
24 ference but it comprises only that difference and it is not a
25 difference in either the availability of counsel, the

1 availability of time or the availability of witnesses. In
2 all those situations the proceeding is exactly the same.

3 Q Do you also suggest that you tell us that they
4 give them more than 15 minutes to get ready?

5 A Mr. Justice, I would assume that any proceeding
6 in which you have a right to counsel you have a right to
7 present evidence that is readily available, you also have a
8 right to a continuance if you ask for it and no continuance
9 was asked for.

10 Q Well, there is a very important point, a par-
11 ticularly important point in my mind as to whether this
12 Respondent or his counsel should have presented some statement
13 as to the basis for his claim of right to stay in this country.

14 A Well, certainly.

15 Q But, that meets to what, to my mind, is a very
16 powerful obstacle when you get this pre-emptory and unexplained
17 statement that he is to come over and have a hearing in 15
18 minutes.

19 Was there any reason for that? Is there any reason
20 for saying 15 minutes?

21 A Mr. Justice, the record doesn't disclose that.

22 Q No, it doesn't and it was the same afternoon
23 that the lawyer went over to the United States District Court
24 and filed his papers. Is that right?

25 A That is right.

1 Q The same day, the same day those two things
2 happened. It doesn't take much imagination to understand what
3 happened here, Mr. Connolly.

4 A Well, Mr. Justice, I think an alternative ex-
5 planation on a cold record that doesn't disclose anything is
6 that it was perhaps in the nature of preliminary examination
7 to find out exactly what nature of claim Mr. Stanisic was
8 raising.

9 Q I spoke sharply to you. I did not mean to speak
10 sharply to you.

11 A I understand, sir.

12 Q But to any lawyer, this really is kind of a
13 startling situation.

14 A But before we presume -- I think it is unfair
15 to presume in a cold record that the Immigration Service was
16 willing to give him only what he could have gotten in 15 minutes
17 and if I may also add to my answer, the Justice used the term,
18 'a claim of right,' perhaps adopting it from what Mr. Fedde
19 had argued.

20 The Government fails to see how under either the
21 Constitution or the International Protocol what is under
22 American law a discretionary relief entrusted to the Attorney
23 General somehow becomes a claim of right in this case.

24 Q You mean the statute, the congressional direction
25 here is not with respect to danger as it was then, danger of

1 physical persecution as it is now, a claim based upon religious
2 or political persecution, you mean those are meaningless so far
3 as Immigration and Naturalization Service is concerned?

4 A No, sir. Far from it.

5 Q I thought the Service was subject to congressional
6 direction and required to follow the congressional direction,
7 isn't it?

8 A All I am saying is ---

9 Q And required to follow the congressional
10 direction, isn't it?

11 A Yes, sir.

12 Q And isn't that a claim of right? Doesn't a
13 person have a right that the Immigration and Naturalization
14 Service like all other agencies of the Government follow the
15 law as enacted by the Congress?

16 A Certainly, Mr. Justice, it does, but the question
17 is, does he have a right to the relief? He has a full right
18 to claim the relief, he has a full right to present evidence in
19 support of his claim. But the relief is discretionary.

20 Q His right is to have clear communication with
21 both the discretion of the Attorney General, is that it?

22 A Yes, sir.

23 Q Mr. Connolly, what affect did the protocol have
24 on this statute, if any?

25 A Mr. Chief Justice, I implicitly assume for the

1 purpose of this argument that the protocol imposes on the
2 Government a right, an obligation to allow an alien seamen in
3 this country a fair opportunity to claim that he is a refugee
4 and a fair determination of his refugee status.

5 We have also assumed that that was the alien seaman's
6 right under the statute so insofar as the Government's approach
7 to handling persecution claims the treaty, the International
8 Protocol has not affected the Government's attitude at all.

9 We have always assumed that 243(h) is available to
10 aliens, the discretionary relief is available to alien seamen
11 under the statute and we promulgated a regulation which gives
12 the alien crewman a right to claim such relief.

13 So, it hasn't had any effect at all. That is the --
14 assuming at the best that the protocol has the effect of
15 opposing that obligation of the Government, it has no change
16 in our procedure.

17 Q Well, as I understood Mr. Fedde, he thought the
18 protocol prevented the Government now from sending the men back
19 under this 252(b) before his ship left.

20 A Mr. Justice, no; Mr. Chief Justice, I think the
21 only way you could get to that is if you assume that the man
22 is a refugee and under the Government's, the United States
23 agreement to the protocol reserved to the Government the right
24 to determine whether the man is a refugee or not.

25 Q I see.

1 A So if the Government determines that he is not
2 a refugee then by that fact, by that fact the substantive pro-
3 visions of the Convention don't apply to him. If the Government
4 determines that he is a refugee then he is entitled to dis-
5 cretionary relief and the Government will give him the dis-
6 cretionary relief.

7 Q I see.

8 Mr. Fedde, Mr. Justice Black would like to ask you a
9 question.

10 Q What I wanted to ask you about was this.

11 I understood you to say that after the boat left you
12 or some other lawyer for the Respondent went to the Immigration
13 Department and told them that you did have this bona fide claim
14 and asked for a hearing.

15 Was I wrong?

16 FURTHER ORAL ARGUMENT OF G. BERNHARD FEDDE, ESQ.

17 ON BEHALF OF RESPONDENT

18 MR. FEDDE: Yes and no. We asked initially for a
19 hearing.

20 Q I am talking about after the boat left.

21 A The request was made for hearing both before
22 and after the boat had left. The request was made on January 7
23 for a 242 hearing. The District Court referred the case on this
24 petition for injunctive relief, referred the case back to the
25 same District Director for a hearing under 253 on physical

1 persecution and it was 253 hearing, not a 242 hearing held
2 about 10 days after the ship had left. And this was ordered
3 some 10 days after the ship had left.

4 So the timing is, or the hearing itself was held
5 after the ship had left.

6 Q But the request was made while the ship was still
7 in port?in the United States? Is that right?

8 A Yes.

9 I might add. May I?

10 MR. CHIEF JUSTICE WARREN: You may have just a moment
11 if you wish.

12 MR. FEDDE: Just one point in the protocol that has
13 been referred to by -- just points out with reference to who is
14 a refugee, I refer the court to page 30 of the brief of
15 Respondent in the terms of protocol.

16 Q Mr. Fedde, in this case, the Court appointed you
17 to represent this indigent and we appreciate the fact that you
18 have done so with diligence and fairness, and Mr. Connolly, we
19 appreciate the fairness and vigor with which you represent the
20 interest of the United States.

21 A Thank you, Mr. Chief Justice.

22 A Thank you, your Honors.

23 (Whereupon, at 11:35 a.m. the oral argument in the
24 above-entitled matter was concluded.)
25