In the

Supreme Court of the United States

WILLIAM B. SAXBE, Attorney General, et al., Petitioners, v. ROBERT BUSTOS, et al., Respondents.	)	No. 73-300
CRISTOBAL CARDONA, et al., Petitioners, v. WILLIAM B. SAXBE, Attorney General, et al., Respondents.	)	No. 73-480

Washington, D.C.
October 17, 1974

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Washington, D. C.,

Thursday, October 17, 1974.

The above-entitled matters came on for argument at 1:52 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MARK L. EVANS, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; for the Federal Parties.

BRUCE J. TERRIS, ESQ., 1908 Sunderland Place, N.W., Washington, D. C. 20036; for Respondents in 73-300 and Petitioners in 73-480.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Nos. 73-300 and 73-480, Saxbe v. Bustos and Cardona v. Saxbe.

Mr. Evans.

ORAL ARGUMENT OF MARK L. EVANS, ESQ.,

ON BEHALF OF THE FEDERAL PARTIES

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

The issue in this case concerns the proper treatment under the Immigration laws of that class of aliens known as "green-card" commuters. A "commuter" is an alien who has been legally admitted to the United States as an immigrant, with the attendant privilege of residing permanently in this country. He has chosen, however, not to exercise that privilege, at least for the time being. Instead he maintains his residence in Mexico or Canada, he commutes to work in this country, entering each time on the basis of what used to be a green-colored border crosser's identification card, which, like the bluebook that some of us know of, has changed colors but not name. It is now a blue card that looks very much like a driver's license, but it's still called the green card.

This is the immigrant's alien registration receipt card which is issued to every immigrant shortly after he enters this country.

There are two general classes of commuters, although the lines are not always easy to draw. First, some immigrants commute on a daily basis to jobs in this country, returning each night to their home, much in the same way that a Maryland or Virginia resident would commute to the District of Columbia.

Second, some commute on a seasonal basis, coming to this country for longer stretches of time, usually to work in agricultural labor, and then returning to their homes across the border, usually at the end of the planting or growing season.

QUESTION: And those latter people could work for one employer, but more usually would work for many employers during the year?

MR. EVANS: Usually, that's right.

QUESTION: During the period of their presence in the United States.

MR. EVANS: That's right. They usually will follow the crops.

QUESTION: Follow the -- yes.

MR. EVANS: According to the current statistics that have been provided to me by the Immigration and Naturalization Service, there are a total of approximately 50,000 daily commuters, of whom 42,000 are Mexican aliens and 8,000 are Canadians.

QUESTION: Canada is mentioned there, is that a very significant factor?

MR. EVANS: Is Canada a significant factor? Indeed it is, because --

QUESTION: What are the figures there?

MR. EVANS: There are 8,000 daily commuters from Canada. There are no seasonal commuters from Canada, but in so far --

QUESTION: That would mostly be in the Windsor-Detroit area, and in the Niagara Falls area, wouldn't it?

MR. EVANS: That's right. Mostly -- the majority, I believe, are in the Windsor-Detroit area, but there are, spread out over the northwest and northeast as well, some daily commuters.

Of the 42,000 Mexican daily commuters, about 15,000 -- or a little less than one-third -- are employed as farm laborers. The rest are engaged in industrial labor, or building and construction work, or in sales and service work.

Of the 8,000 Canadians, less than 200 are agricultural workers. Most, as I have indicated, commute from the Windsor, Ontario, area to the Detroit, Michigan, area.

In addition to these 50,000 daily commuters, there are about 9,000 seasonal workers, all of them currently are from Mexico; most of them involved in agricultural work.

The legal issue here is whether these daily and

seasonal commuters, each of whom has been previously admitted to this country lawfully as an immigrant, may cross the border to work each day or each season without applying each time for a new immigrant visa, which is the formal document ordinarily required for entry to this country as an immigrant.

If a new visa were required for each entry, the commuter practice could not continue. Even if it were physically possible to process 50,000 applications for visas per day, the entire annual limitation upon the issuance of immigrant visas to Western Hemisphere immigrants since 1968 is 120,000, which of course would be exhausted in less than three days.

The Immigration authorities have followed the practice for 47 years of permitting commuters to enter as immigrants with informal border crossing documents, after their initial entry -- after their initial entry with an immigrant visa.

The lawfulness of that practice under the present Act is determined by Section 211 of the Act, which is set forth at page 80 of our brief, and it may be worth referring to it because the language -- the case really turns on the precise language of these sections.

Page 80, in the middle, is where 211 is set forth. Part (a) of 211 establishes the general rule that an -- page 80, I feel bad about that, after --. But this is the

Appendix.

Section --

QUESTION: It happens every six months.

[Laughter.]

MR. EVANS: Section 211(a) establishes the general rule that an immigrant visa is required for entry as an immigrant.

211(b) establishes the sole exception to that requirement, which permits the Attorney General to dispense with formal documents for, quote, "returning resident immigrants defined in Section 101(a)(27)(B)."

It is therefore the language of that section, 101(a)(27)(B), upon which this case, in our view, turns. That language appears just above Section 211, at the top of page 80. It is one of the definitions, as you can see, of "special immigrant".

When it is read together with section 211(b), it provides that a visa is not required for entry by, quote, "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad".

QUESTION: So it gets down to whether he's lawfully admitted for permanent residence, when he has a permanent residence abroad?

MR. EVANS: That's one of the issues. There are actually two others, because the plaintiffs in this case also

argue that he's not an immigrant and that he's not returning from a temporary visit abroad. But it basically comes down to whether actual residence is implied in this definition of a person who can enter on informal documentation.

QUESTION: I suppose we would all be more comfortable if we had a more specific, newer, statute. Is there something pending in Congress to clarify this general area?

MR. EVANS: Well, there are a handful, six or so bills pending, which would have some impact, in one fashion or another, upon the commuter practice.

So far as I know there has not been any reports by the relevant committees that have been submitted as of yet.

QUESTION: Is the Service sponsoring anything over there for better clarification?

MR. EVANS: But I'm not sure that clarification is needed, Mr. Justice Blackmun. The phrase defined in Section 101(a)(27)(B), that we just looked at, and the crucial phrase upon which you -- to which you pointed, is itself a term of art, which is defined in Section (a)(20), which is on the prior page, at the bottom of the prior page and the top of the next.

Now, that says precisely what "lawfully admitted for permanent residence" means. It means "the status of having been lawfully accorded the privilge of residing permanently in the United States as an immigrant, such status not having

changed."

There's no requirement in that definition, and there's no requirement anywhere else in the Act, that that privilege be exercised in order to maintain the status of a lawfully admitted permanent resident, or, indeed, to become -- to acquire the privileges that go with being a lawfully admitted -- a person lawfully admitted for permanent residence.

QUESTION: Do you think that takes care of the next phrase, "who is returning from a temporary visit abroad"?

MR. EVANS: No, that doesn't take care of it. I think it certainly bears on it, because --

QUESTION: Well, that language -- doesn't that language sound like someone who has gone to the South of France for the winter and returns in the spring?

MR. EVANS: Yes. No question, at first blush, it appears to refer to someone --

QUESTION: Who is permanently residing in this country.

MR. EVANS: -- who is permanently residing here and has been out of the country temporarily.

QUESTION: Who doesn't have a status or a privilege, but one who's actually exercising it?

MR. EVANS: Well, that's what it would seem, but when you analyse it, you've got three words: temporary, visit, and abroad.

Now, "temporary" clearly applies in all -- in both, a commuter, whether he's residing here or in Mexico or in Canada. "Abroad" is also without question. The only word that really carries this superficial implication is "visit".

And in the context of a commuter, who is not a resident here, there's nothing that really strains the language to say that he's visiting when he goes home to sleep or goes home for part of the season.

What's implied in the word "visit", I think, is the intention to come back to this country, that it's a departure for temporary purposes, with intention to return.

And I think that that, while it's -- as the Ninth Circuit said, there is some strain on the language, I don't think it's so severe that we should read the rest of the statute as having been intended to abolish this practice that has been going on for so long.

Let me add also that there is -- I mean, this all seems a little strange, I confess. But the legislative history that underlies the Act itself makes it quite plain that Congress was fully aware that the Service was treating -- had a class of commuters that were treated as lawfully admitted permanent residents, although they were residing in foreign contiguous territory.

And on pages 52 through 54 of our brief, we have set forth the crucial language in the report.

The report that I'm referring to is one that was a product of an exhaustive study by the Senate Judiciary Committee, that was the basis upon which the 1952 Act was developed and ultimately enacted.

This was a 900-page report, in which the entire field of immigration and nationality law and practice was thoroughly examined; practices that were inconsistent with what the committee thought was good policy were plainly and obviously branded as improper, or that they shouldn't be continued. The committee regularly made recommendations throughout the report for legislation to correct what they thought was an improper practice.

It clearly and plainly recognizes the commuter practice. It starts off --

QUESTION: What's the date of the report?

MR. EVANS: This is a 1950 report, as I understand it.

QUESTION: 1950?

MR. EVANS: '50. But it was on the basis of that report the initial bill, which ultimately became the '52 Act, was -- and the provisions are basically the same. I mean it's an important part of the legislative history.

No mention after this report was made of commuters in any of the subsequent reports.

At the top of page 53, we've italicized the phrase

"A resident alien's border-crossing identification card". It's the resident alien's border-crossing identification card that is issued to an alien, so-called commuter, who has been admitted for lawful permanent residence, but who resides in foreign contiguous territory and is employed in the United States.

Down further again the same point is made.

QUESTION: Do you think this takes care of the South of France hypothetical that I asked about?

MR. EVANS: Well, this doesn't address itself, obviously, to the "temporary visit abroad". But I think it recognizes that this practice has been in existence, that it's not necessarily inconsistent with the language that was ultimately adopted by the Congress in the 1952 Act. And I think it's only proper to read the "temporary visit abroad" consistent with Congress's awareness of this practice going on, and its refusal to abolish it, or even to suggest, anywhere in its 900-page report, that the practice was improper.

QUESTION: Now, let me be sure I have it. Section (b) that we're talking about was enacted when? In what year?

MR. EVANS: 211(b)?

QUESTION: Yes.

MR. EVANS: Well, the original language of 211(b) was enacted in 1952, but it has been amended, and the

plaintiffs -- in 1965, and the plaintiffs -- I refer to Mr. Terris's clients as plaintiffs, because we're cross-petitioners here -- the plaintiffs attach some significance to the change.

Originally, the language had read -- I'm looking now at 211(b), where the language appears, "returning resident immigrants, defined in section 101(a)(27)(B)".

Originally, the language read "aliens lawfully admitted for permanent residence, who depart from the United States temporarily."

And the plaintiffs have argued that the change from that language to the present language reflected Congress's determination that actual residence was required.

In fact, no such -- no such purpose can be found anywhere in the legislative history of this amendment. The plaintiffs argue that a brief exchange, "obscure colloquy" is what the Ninth Circuit referred to it as, between the General Counsel of the Immigration Service and a staff member of the House Judiciary Committee, in which the staff member was asking certain questions about the commuter practice and was getting responses from the General Counsel. They draw from this the inference that two years later, in a bill that wasn't even before Congress at the time the hearings, in which this exchange took place, were commenced, was intended to be a response to the service's practice with respect to commuters.

Well, it's very hard to accept that, when you look

at the reports that are associated with this 1965 amendment, which was a very major piece of legislation. Nowhere in the report is there any mention of commuters.

The reports of the House and the Senate each list nine or twelve, what they call, basic changes that are going to be made in the Immigration Act by this amendment. No mention is made there of commuters.

The House or Senate Report -- I forget which -- says that the rest are minor and technical. And it's difficult for me to comprehend that the relevant committees of the House and Senate would, with the stroke of a pen, abolish a commuter practice that's been going on for 47 years -- or, at that time, not quite that long, but for quite a long time -- without mentioning that it was doing it, or without specifying that it had any intention to do so.

And I can't believe that it would be viewed as a minor or technical change.

There's a contention made here, also, that the commuters fail to satisfy the definition because they are not immigrants, but, rather, nonimmigrants.

An immigrant is defined by the Act as "any alien who is not a nonimmigrant", and it is, in that sense, a negative definition. If you're not a nonimmigrant, you're automatically an immigrant.

The nonimmigrants are defined in -- which is

relevant to this case -- in Section 101(a)(15)(H)(ii), which is set forth on page 79 of the brief.

And that states that you are a nonimmigrant if you're "an alien having a residence in a foreign country which" -- who has no intention of abandoning it, "who is coming temporarily to the United States to perform temporary services or labor."

Plaintiffs contend that this fits precisely what -- the situation with respect to commuters.

What they neglect, what they overlook, however, is that there is an additional requirement associated with that category of nonimmigrants, namely,"if unemployed persons capable of performing such service or labor cannot be found in this country". Well, this is part of the definition. If you can't satisfy that definition by virtue of the Act's language at the top of the page here, you are an immigrant.

And the Act, in fact, in other sections, in section 214, presumes that you are an immigrant unless you establish that you're a nonimmigrant.

The plaintiffs that this means -- this failure -- they con't contend, let me start there, that there are people in this country who cannot be found to perform the labor that the commuters perform, they claim that the availability of this labor simply means that these nonimmigrants can't enter. They fall into a netherland. They're neither nonimmigrants nor

are they immigrants, because if they were nonimmigrants they could come in with nonimmigrant visas, unless they were otherwise excluded.

They read this as an exclusion, when it appears in the definitional section as part of the definition; and the whole structure of the Act is designed to make it difficult, unless you comply specifically with the language of the definitional statutes, to enter as nonimmigrant. It's nonimmigrants who can enter without regard to numerical limitations.

And for that reason, most often aliens seek to enter as nonimmigrants, because it's difficult to obtain immigrant visas.

And for that reason the Act starts with a presumption that you're an immigrant, and if you can't satisfy the non-immigrant definition, you're an immigrant. And sometimes that means you can't come in at all.

Well, in this case, the plaintiffs have argued that this is an exclusionary provision. It's not at all, and it wasn't intended to be.

The Act very clearly -- excuse me, the legislative history, to which I referred before, very clearly distinguished between commuters on the one hand, whom they recognized the Service was treating as resident aliens, and what they call temporary agricultural labor on the other hand.

That referred to the labor that had been brought in under a series of special legislation, legislative provisions to relieve manpower shortages during critical times, for harvesting and so forth.

And the determination was made that there should be some permanent provision in legislation to permit this kind of relief of manpower shortages.

But there was no suggestion that commuters were to be put into that category, because the Committee that was examining the immigration practice realized that commuters were not -- were part of the stable labor pool. They were here, and they came in regularly. And they were treated under the prior Act as having been "lawfully admitted for permanent residence".

It was to expand the existing labor pool that they made this provision of subsection (H)(ii), and it was not in any way an effort to exclude aliens -- to exclude commuters.

QUESTION: Mr. Evans, this legislative history that you cover on pages 52 and 53 of your brief, where there is an express reference to the "so-called commuter", is there any indication, reading that, in its context that it referred to both seasonal and daily commuters?

MR. EVANS: No, there's nothing in there that suggests -- as a matter of fact, I don't think the Service at that time had any clear notion of there being a distinction.

It's not -- it's not clear from the record the Service has kept, because in those days they were not -- there was no distinction made, that there were any seasonal commuter. There may have been, there may not have been. But there is nothing in the practice or in the history that suggests that seasonal commuters would have been treated any differently than daily commuters.

Daily commuters -- as I said, the lines are difficult to draw. Some seasonal commuters stay in the country for some seasons and then they go back home and commute daily for a while. And it's a kind of a spectrum, and --

QUESTION: Well, does a typical seasonal commuter come in, say, in March or April and stay until October or November, or does he begin commuting on a daily basis for only part of the season?

MR. EVANS: Well, again, there's a spectrum involved. Some commuters only make, say, an average of two entries and exits in the course of a calendar year. They will be -- a planting season and a harvesting season, for example. And in the interim they will be back -- back on their farm in Mexico.

Others may stay for shorter periods, a week at a time, maybe, and back for a week. But there's no set -- I can't give you a typical example. There are occasions that

are occasions that I've seen in reading through the materials that have been --

QUESTION: Is it the regularity of the thing that makes them a commuter?

MR. EVANS: Right. It's their -- the regularity of their entry. If -- under the Immigration Service's practice, if a commuter is out of employment in this country for a period of six months or more, he is -- he loses his commuter status; his status has changed, in other words, and he loses his status as a "lawfully" -- as a person "lawfully admitted for permanent residence".

QUESTION: Now, what's the statutory justification for that?

MR. EVANS: Well, that's not a statute -- that's a matter of practice, a matter of -- the theory has been --

QUESTION: But if you're right on your statutory argument, then the -- that's wholly unwarranted, isn't it?

MR. EVANS: Well, such status having been changed is where it comes from within the statute.

QUESTION: What status? The status is that he's a resident alien -- eligible to be a resident alien.

Isn't that it?

MR. EVANS: That's right.

QUESTION: And if he is he is. Under your argument.

MR. EVANS: Well, eligible -- he has the privilege

of establishing permanent residence in this country.

QUESTION: Yes.

MR. EVANS: The Immigration Service, through its Board of Immigration Appeals, early on concluded that the touchstone of a commuter's privilege is his employment in this country. That's what -- that may even be the language they use.

And therefore if that touchstone disappears, their status disappears. It has grown up as the practice within the Service, and I don't know whether the Courts have ever considered it or not, but that is the way it's operated for --

QUESTION: But your whole argument, as I understand it, is that a resident alien doesn't mean that, it means somebody eligible to be a resident alien, in that status? That's the keystone, isn't it, of your argument?

MR. EVANS: Yes. Well, eligible to reside permanently in the United States.

QUESTION: Yes. That's what I mean.

MR. EVANS: Right.

QUESTION: Well, that's what I call a resident alien, rightly or wrongly, eligible to be a resident alien.

MR. EVANS: Yes. Well, that eligibility is not -- is not permanent.

QUESTION: And if he is he -- hunh?

MR. EVANS: That eligibility is not permanent, even for those who reside in this country permanently. Those come as immigrants and reside for ten years.

QUESTION: Unh-hunh.

MR. EVANS: And leave for five years, as aliens, lose their status and their ability to come back in on informal documents.

QUESTION: That is a matter of statute, is it not?

MR. EVANS: I don't believe so. I believe it's implemented by the regulations.

The regulations are an 8 C.F.R. 211(b), and they specify what you have to do if you are a resident alien, who leaves --

QUESTION: In order to maintain your status, isn't it?

MR. EVANS: If you're leaving for a period of more than a year, you are -- I guess it's up to a year, you have to obtain a re-entry permit. At least that's what the regulations say.

As a matter of fact, the re-entry permit, if you're leaving for that short a time, is the green card.

But -- 211(b), by the way, is set forth in the back of brief.

QUESTION: Yes, at page 80.

MR. EVANS: But this is the administrative interpreta-

tion, implementation of the phrase in the statute, "such status not having changed".

If a resident alien is out of the country for longer than the period established by these regulations, he loses his privilege of returning to the country, on the basis of informal documentation. That is, a re-entry permit or a green card, as opposed to a new immigrant visa.

QUESTION: Mr. Evans, as a practical matter, how does the Service stay on top of this continuing employment?

MR. EVANS: Well, I satisfied my curiosity about that myself, and apparently the commuters are -- are identified by certain markings on the green card, and to the green card is attached a form upon which information is listed concerning the last entry, and concerning -- well, I gather that what is done is that there are indications in code made on these attachments, that indicate when it was he was last -- exhibited evidence of employment.

And when the appropriate period of time has expired, they warn him that the next entry will require new evidence of employment. And if he fails to present that evidence the next time, he is not permitted to enter.

QUESTION: Well, take a seasonal worker, moving north during the season, he gets up to the State of Washington, and the apple crop for some reason is late, so he sits around for a month. Does he become ineligible because of that?

MR. EVANS: It's only absence from the country without employment. That's the key to ineligibility. He could stay in the country forever, for his life, at that point.

QUESTION: Well, certainly at the end of the season, a seasonal commuter, when he goes back to Mexico, is without employment, is he not?

MR. EVANS: When he goes back to Mexico?

QUESTION: Yes.

MR. EVANS: Yes. But if he's out of employment for longer than six months, he cannot re-enter as a commuter. He must, if he enters at all, enter with a new immigrant visa.

It's only those seasonal commuters whose absence from this country is less than -- for less than six months at a time. That is, as I indicated, there may be two season, a planting season and a harvesting season. They may be here for several months on each occasion. But they may -- they will fall at periods of less than six months between entries.

QUESTION: Somewhere in the briefs here there seems to be some reliance, and I think in the Court of Appeals opinion, on the fact that certain interpretations of these regulations and practices might jeopardize our relations with Mexico and Canada.

Did the State -- does this recofd show that the

State Department took any position on that?

MR. EVANS: Yes. The record contains an affidavit by Secretary of State Rogers, which appears in the Appendix to the Petition, at pages 38 through 40.

QUESTION: Not in the --

MR. EVANS: That is in the record.

QUESTION: Yes. Not in the Appendix to the brief, but to the Petition?

MR.EVANS: It's in the Appendix to the Petition.

QUESTION: When was that affidavit?

MR. EVANS: It was sworn to on the 21st of April 1970. We indicate in our brief that we have consulted with the State Department at the time we prepared the brief, and we're told that if the matter became important at some point, that they would consider submitting a fresh affidavit.

The same --

QUESTION: Which way?

MR. EVANS: The same way -- reaching the same conclusions.

The same conclusions, the same concerns of the State Department have been expressed for many, many years, whenever the issue has come up. As long ago, I remember in the -- at some point in the legislative history of some section, an affidavit or a letter from Secretary of State Cordell Hull. In the earlier litigation in the Ninth Circuit, there was a

-- an affidavit there, too. There was also an affidavit in 1964, when a case was brought challenging the same practice, but was dismissed on the basis of standing.

There, too, an affidavit was submitted. I believe by Secretary of State Rusk.

So it's not -- it's not something that has varied, it's something that has been consistent. It's not -- it's not necessarily an utter opposing, an opposition to any change in the practice. What it is is a strong feeling that a sudden, as this affidavit states, a sudden judicial termination of the practice which would affect existing commuters, could have a severe impact on our relations with our neighbors.

QUESTION: Of course, that's four years old now, so it isn't so sudden, is it, necessarily?

MR. EVANS: Well, it isn't so sudden, but it would be sudden in the sense there would be no phase-out period, which is one of the proposals that is before Congress.

QUESTION: I take it that even though this affidavit is four years old, it's still the position of the State Department?

MR. EVANS: That is our information, yes. As of the time that the brief was prepared.

QUESTION: Was the decision below stayed with respect to seasonal --

MR. EVANS: I believe the -- there's no stay that I know of, but I believe --

QUESTION: So the practice was terminated, then?

MR. EVANS: No, I don't -- the opinion --

QUESTION: I mean the Service isn't obeying it.

MR. EVANS: Well, the Court of Appeals judgment remanded the case to the District Court for further proceeding, not inconsistent with the opinion. As far as I know, no further proceedings were instituted, because of the pendency of this case in this Court.

So there's been no final judgment entered, directing the Service to pick up the green cards of the seasonal commuters.

QUESTION: Even without a stay?

MR. EVANS: Even without a stay.

QUESTION: Although the mandate issued, I suppose?

MR. EVANS: I believe the mandate has, but, you know, I believe that it's not improper for a district judge, under these circumstances, to wait until the litigation has come to its final conclusion, when there is -- litigation is pending in this Court.

MR. CHIEF JUSTICE BURGER: Mr. Terris.

ORAL ARGUMENT OF BRUCE J. TERRIS, ESQ.,

ON BEHALF OF RESPONDENTS IN 73-300 AND

PETITIONERS IN 73-480.

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

Perhaps the most important purpose of the immigration laws is to protect domestic labor, and if either commuters are nonimmigrants, or they are immigrants who need immigrant visas, it is undisputed they cannot come into the United States.

And the reason they can't come into the United States is because, in either of those eventualities, they need a certification by the Department of Labor which states that there are not domestic workers available to carry out that work. And, in fact, the Department of Labor has determined there is domestic labor available to carry out the work of agricultural labor.

Now, it is possible that automobile workers, or workers in other kinds of jobs could come into the United States, either as nonimmigrants or as immigrants needing immigrant visas, if in fact there were not -- there was not domestic labor availble to do the work that they were seeking to do.

But this case involves agricultural labor, and it is undisputed there is ample domestic agricultural labor.

Our basic position in this case is that the statutory

language is absolutely clear. We do not rely on the legislative history.

What we do argue is that such legislative history as there is supports our position.

The legislative history is very scant. The 1950 Report is not an affirmation that the commuter practice was legal. It is part of a lengthy description of existing immigration practices, and so what it did was describe and describe accurately that commuters were entering the United States.

I might say daily commuters at that time, there were no appreciable number of seasonal commuters.

QUESTION: Well, if it doesn't have that effect, is there something in the nature of acquiescence here?

MR. TERRIS: Your Honor, --

QUESTION: In the practice -- it having been described by the committee to the Congress?

MR. TERRIS: I think that is really the government's position, Your Honor, when --

QUESTION: They didn't describe it that way, though, did they?

MR. TERRIS: No, they didn't. But I think that's -- I think that that's the heart of the government's argument. It's -- let me come back to that in a moment.

The government, in its lengthy brief, and in its

submission here, doesn't address the Service's own description of what the commuter practice is all about.

The Service admits that the commuter practice is an amiable fiction, it does not fit within statutory language. It has said that over and over again, and it's cited on pages 45 to 47 of our brief.

Their description of what the commuter practice is about.

And so, despite the effort now to try to fit it within some statutory language, I think it's a fair statement that it doesn't fit very well, if at all, within any statute.

The basic argument of the government is that this has gone on for a long time. Congress has not changed it. There have been various bills before Congress at different times to change it, and that that ought to be reason enough to allow the practice to continue.

QUESTION: What page was that, Mr. Terris? 140, you say?

MR. TERRIS: No, no, 45.

QUESTION: We were just counting your pages, too.

MR. TERRIS: Yes.

For example, Mr. Gordon, the General Counsel of the Service, says, the commuter status -- and I'm quoting -- "a device of convenience", end of quote; quote, "never specifically authorized by statute", end of quote.

There are lots and -- there are lots of other statements of that kind, and the most frequent description, short form, is that it's an "amiable fiction".

Of course, how amiable it is really depends on one's point of view in the litigation.

Let me go briefly through what our statutory argument is. Using the same, the back of the government's brief, starting on page 79.

First of all, we contend, under section 211(b) -- and that's the starting point. If they cannot come within section 211(b), then they have to have immigrant visas.

Now, 211(b) starts out by saying that they have to be, quote, "returning resident immigrants", end of quote.

Now, the government admits they're not residents.

Now, it's interesting what the government does to -- let me just state briefly what the statute says about residence.

"Residence" is defined in the Act, and I quote, "as the principal, actual dwelling place in fact, without regard to intent."

Now, --

QUESTION: When you say "returning resident immigrants", quoting from section 211, immediately afterwards it's defined in section 101(a)(27)(B).

MR. TERRIS: Yes, I was coming immediately to that,

Your Honor.

QUESTION: Okay. Go ahead.

MR. TERRIS: The government argues that "defined in section 101(a)(27)(B)" means that you look solely to section 101(a)(27)(B) and that that definition becomes the only -- the only specification that has to be satisfied.

I suggest that at the very least 211(b) means that section 101(a)(27)(B) is intended to be a definition of "returning resident immigrants", and that it makes extremely little sense to then read section 101(a)(27)(B) to included nonresidents.

That what they have in effect done is read out of the statute entirely the phrase "resident" in 211(b).

Now, the Court of Appeals agreed with this -- with our position, in so far as it was dealing with daily commuters -- I mean seasonal commuters. But it said as to daily commuters, that daily commuters might -- could treat their place of employment as their place of residence.

We submit that that is directly inconsistent with the definition of "residence" in the statute. And "residence" is explicitly defined, as I've said, to be "principal, actual dwelling place in fact without regard to intent".

Now, it seems to me very clear that a place of employment is not a principal actual dwelling place in fact.

The Court of Appeals also said that some of these

commuters had associations and interests in the United States.

QUESTION: Are you addressing that now to the seasonal or to the daily or to both?

MR. TERRIS: I'm addressing daily, because the Court of Appeals, for some reason which isn't entirely clear, did not make the same type of argument for seasonals.

QUESTION: You think the Court of Appeals cut the baby in half, do you?

MR. TERRIS: I think that - - I think that's fair, Your Honor. I think the argument, to be frank about it, I think the arguments in favor of seasonals may, if anything, be stronger than for dailies.

Because the daily commuter never even puts down his hat in a dwelling place for a moment in the United States. The seasonal, at least, spends a few months in the United States, with a place which might be called a temporary residence in some form.

Now, I don't think that comes close to meeting the statutory definition of a "principal, actual dwelling place in fact", but it at least comes a little closer to it than the daily commuter.

QUESTION: And part of it here is that the fellow never paid any taxes of any kind.

MR. TERRIS: Well, the daily -- no, the daily commuter, Your Honor, has to pay taxes, in so far as he earns

money in the United States, but not --

QUESTION: Well, I mean aside from that. I mean he doesn't pay anything else.

MR. TERRIS: That's exactly right. And they're most -- and the commuters --

QUESTION: Is not a part of the community.

MR. TERRIS: He is not -- they are not eligible for naturalization, which is of course the basic reason to have an immigrant visa. They are rarely subject to the draft over the last few years. They cannot vote, they cannot hold office.

They are essentially, for all other purposes, treated as -- totally as aliens from outside the country, and the Service, for this one purpose, has treated them as if they are residents of this country.

QUESTION: But do I understand there's one thing on which you agree with the government, and only one, that daily commuters and seasonal commuters are really -- stand or fall together in this case?

MR. TERRIS: I think that's probably right, Your Honor.

The only thing I think that can be said that distinguishes them in the way the Court of Appeals distinguished them is the different in the practice, in the length of the practice.

QUESTION: Unh-hunh.

MR. TERRIS: The seasonal commuter practice, as the Service has admitted, --

QUESTION: Is much more recent.

MR. TERRIS: -- is -- up until -- it was in the early Sixties. There's some dispute whether --

QUESTION: At the termination of the bracero program.

MR. TERRIS: That's right.

QUESTION: Except for some few.

MR. TERRIS: Except for a few that existed before that, and the Service, I think, has admitted that, and those quotations are in our brief.

The daily commuter practice --

QUESTION: Your position, then, is that if the Court of Appeals was right about the dailies, it was necessarily wrong about the seasonals?

QUESTION: Unh-hunh.

QUESTION: A fortiori, wrong about the seasonals.

MR. TERRIS: Well, --

QUESTION: Or do you want to keep that --

MR. TERRIS: Well, it depends on one's -- it depends on why one decides the Court of Appeals was wrong, Your Honor.

If -- if the practice, the length of the practice is the crucial question, then the Court of Appeals determination

is correct, because there is no --

QUESTION: Isn't the length of the practice, relating to administrative interpretation of its powers, rather weighty in the legislative acquiescence doctrine?

MR. TERRIS: Yes, it is. And I would like to address myself, though, to the weight of how long the daily commuter practice has been in existence.

The daily commuter practice, there isn't any doubt, in form has been in existence since the 1920's. Now, the reason I say "in form" is that up until 1952, and really up until 1968, it was a -- it was genuinely a pure matter of convenience.

The government -- the government relies very heavily on an order, and I think it's quoted in the back of its brief -- it's Service's General Order -- oh, I guess maybe it's in the Petition, but it's -- no, it's in the back of their brief. General Order No. 86, page 83.

That was an order in 1927, which authorized the daily commuter practice.

It authorized it only for nonquota immigrants. Now, that was critical, because what it meant was this was a pure matter of convenience in the 1920's. Mexican and Canadian workers had the right to come into the United States as immigrants on a daily basis. There was no quota, there was no labor certification necessary.

If they had been required to get an immigrant visa every day, that would have been an obvious burden on them, and on the Service, and it made no point, because they were entitled to one every day.

In 1952, for the first time, there were substantive requirements put on Mexican and Canadian immigrants coming into the country. For the first time, the Department of Labor could certify that there were ample workers available, and therefore the immigrant couldn't come to the United States.

In 1965, that was tightened further by saying "unless he found that there were no workers available" then you couldn't come into the United States.

In 1968, for the first time, a quota was imposed on Mexican aliens. Now, that's the time, this period, whether it's 1968 or '65 or '52, one could debate is the crucial date. But it's one of those dates, anyway, that is the crucial time when this practice meant something.

Because what it meant at that time, for the first time, was that this practice was allowed, was being used to evade substantive provisions of the Act, and that's when, in our view, one should start to date the commuter practice. Because, up to then, it was a matter of convenience. Up to then, it could be called an amiable fiction.

After 1952 is when it had substantive ramifications.

QUESTION: Well, these figures that have been mentioned

about the numbers of people involved, of course don't take into account the illegals that are coming across the southern border particularly, do they?

MR. TERRIS: This case does not involve them in any way, Your Honor.

QUESTION: Well, do the number of the illegals, over the years, have any bearing on what the Service did, or how Congress reacted or failed to react?

MR. TERRIS: Your Honor, in all the reading I've done on the subject, the illegals have never been considered at the same time as this. I don't believe it's part of the -- that it's been considered at any time as part of the same subject matter.

I might say on the question of the numbers, the numbers particularly of seasonals is very hotly disputed. The government's figures of 8,000 coming across the southwest border, there's an amicus brief, for example, which has been submitted by the Farm Bureau Federation in this case, which has an estimate, I think, in the hundreds of thousands. It's a matter of very great dispute, and the government believes that it has very firm controls on the border and knows how many are coming across, and both the farm workers and the farmers apparently believe those controls don't really exist, and the government doesn't know how many are coming across.

Let me go back to section 101(a)(27)(B).

There is one bit of legislative history, which the government has referred to, and the Court of Appeals in the Ninth Circuit referred to, as being an obscure bit of legislative history.

In 1963 there was a colloquy on that between the General Counsel of the Service and a staff member before a Subcommittee of the House Judiciary Committee.

The General Counsel of the Service said the commuter practice was not based on section 101(a)(27)(B). He said it did not come within that section, because it was not a "temporary visit abroad".

He said it came within section 211(b).

QUESTION: That colloquy, I know, is in your brief or somewhere --

MR. TERRIS: That's right, it's cited on page 33.

QUESTION: 33.

MR. TERRIS: Of our brief.

He said he was relying on section 211(b).

In 1965, two years later, in a bill that obviously came through the House Judiciary Committee, the phraseology of section 211(b) was changed, and 211(b) was modified to refer deliberately and directly to section 101(a)(27)(B), which had previously been said not to allow the commuter practice.

Of course subsequently to that the Service now says that the language in section 101(a)(27)(B) does allow it.

Now, we submit that in fact what the Service has done, although its practice may have continued unbroken, its basic legal position has changed competely.

QUESTION: What does the record show about the standing of your clients in this case, Mr. Terris?

MR. TERRIS: Standing was litigated, Your Honor, and the District Court found that they did have standing.

QUESTION: What does the record show factually?

MR. TERRIS: The only -- the only -- since there was no trial of any kind, either on the merits or on the -- or on any jurisdictional question, all it has is the allegations that --

QUESTION: Well, those are taken as true, I take it, since it was on a motion to dismiss.

MR. TERRIS: That's right, that's what they alleged.

QUESTION: What did they allege?

MR. TERRIS: Well, there were two individual plaintiffs and the Farm Workers Organizing Committee. The Farm Workers Organizing Committee, of course, represents domestic farm workers in the Southwest. The two individual people were farm workers, one was a U. S. citizen and one was an actual resident alien of the Southwest.

The intervenors were -- those people were all from California. The intervenors were farm workers, domestic farm workers in Texas.

QUESTION: All of them employed?

MR. TERRIS: Yes, they were all -- well, there was no specific allegation, Your Honor, they alleged that they were farm workers.

QUESTION: And it was a class action?

MR. TERRIS: Yes, but there was never any --

QUESTION: Never any determination. A class action on behalf of all citizens, was it?

MR. TERRIS: It was on farm workers, originally it was farm workers in California, and then the intervenors, it was farm workers in Texas.

Now, in order to fit within section 101(a)(2&)(B), the commuters have to be lawfully admitted for permanent residence.

The phrase "lawfully admitted for permanent residence" is used in a number of other sections of the Act. In all the other sections of the Act, I think it's fair to say that it would be almost incredible for Congress to have intended to have included commuters.

Let me just give one example.

If commuters are lawfully admitted for permanent residence, it comes within a provision which states that "a

spouse, parent, or child of a citizen, or of an alien lawfully admitted for permanent residence, can enter the United States without a Department of Labor certification that no domestic workers are available."

Now, what this would mean is that these commuters could bring in any of their relatives, including their children, and one would have built into this system a permanent exemption from the labor certification requirements, because the exemption could be passed on from generation to generation.

Now, the government says those issues as to the other sections can be put aside for the purposes of this litigation, and they can be determined some other time.

But the statute says that this definition of "lawfully admitted for permanent residence" is a definition for the entire statute. And the House Report says that's why this very definition is so important. Because it does have many ramifications.

And we submit that whatever rule is adopted in this case, it's got to be a rule that will apply to "lawfully admitted for permanent residence" for all of its uses in the statute.

Let me go to the second part of section 101(a)(27)(B), which relates to returning from a "temporary visit abroad", and the Chief Justice had a colloquy with counsel about whether it goes to a visit into southern France.

That phrase actually dates back in the statute until 1921, and there have been several cases decided under it. And they're cited in our brief.

And those cases make clear that that visit to southern France is exactly what the intent was, of that kind -- of that provision.

It was intended -- and this is what the Secretary of Labor determined back in 1924, and that was the time when he was the enforcer of the Immigration laws -- and by a number of other courts, to apply only to persons with domiciles in this country, not just residence; domicile.

Now, it's obvious that commuters not only don't have residences, but they clearly don't have domiciles here, either.

Let me turn now to the regulations.

We submit that even if -- and of course we argue that they don't, but even if they came within section 211(b), and section 101(a)(27)(B), they still wouldn't be admissible.

The regulations somehow are even stronger than the statute. They allow a person to come -- an alien to come in without an immigrant visa, and I'm quoting, "only if they are returning to an unrelinquished" -- unrelinquished -- "lawful permanent residence in the United States after a temporary absence abroad", end of quote.

Now, it's hard to imagine how anybody could write language which is more clear that you've got to have residence

in this country.

QUESTION: What's the -- what was the date of those?

MR. TERRIS: 1957.

QUESTION: '57.

MR. TERRIS: They came after the 1952 statute.

The interesting thing is, Your Honor, --

QUESTION: So the prior regulations were revoked?

MR. TERRIS: Until 1952, there were regulations specifically allowing commuters to come in without an immigration visa. Those were revoked after the '52 statute. There was no clear replacement as to commuters.

Then in 1957 this language was adopted.

QUESTION: Where can we find this language in the papers -- is it on the back of the government's brief?

QUESTION: That's the statute, but you've got it in --

MR. TERRIS: It's in --

QUESTION: -- in your brief.

MR. TERRIS: -- in our -- It's in our brief, I know, maybe in the government's too; it's at the bottom of page 5 of our brief.

And that phrase, by the way, occurs seven separate times in that section and the following section of the regulations.

QUESTION: What? "Unrelinquished lawful permanent

residence"?

MR. TERRIS: Yes. It's obviously not an inadvertence.

QUESTION: It's from a -- that's from a Court opinion, I think, isn't it?

"Unrelinquished" --

MR. TERRIS: No, I think that was actually first composed by the -- in the regulations, Your Honor. At least, I don't know of a previous use of that phrase.

Now, up until this Court, the government has consistently contended that -- has consistently admitted that commuters don't come within that language. They admitted that in the courts below in this case, and in Gooch v. Clark, which is the Ninth Circuit case on this subject, they not only admitted it but the Court of Appeals agreed with them.

The government argued up to now that it didn't matter whether they came within the regulations. It said that that regulation was only just permissive of what -- of when people could come in, that outside of any regulations they could allow people into the country under the practice.

Now, that position, I think, is so flagrantly wrong, that's why it's been abandoned. It's wrong because section 211(b) makes very clear that the only basis for coming into the country without an immigrant visa is pursuant

to regulations.

And I think that is clearly right, and I think that's the government's position today.

Now, the government therefore goes back to the language of the regulations, and what it says is: despite that language of "unrelinquished lawful permanent residence", it doesn't mean that. It says it's not artfully drawn.

That what the regulations -- and that's their word -- that what the regulations really mean is the status of coming into the United States.

But we submit that that's -- that's simply rewriting the regulations, that the regulations are clear on their face.

Let me turn now to our argument that most of these commuters are really nonimmigrants. When I say "most", the commuters who come to this country to permanent employment are not nonimmigrants.

And when I say that I'm now talking essentially of nonagricultural commuters. Nonagricultural commuters, who come to an automobile plant in Detroit, or some other plant all through the year, to permanent employment, are not non-immigrants. That is clear under the statute.

QUESTION: Well, how about an agricultural worker who goes from Mexicali to Calixco, isn't he in the same spot?

QUESTION: No.

MR. TERRIS: Agricultural workers, I think, would

-- perhaps some rare exception -- do not have permanent employment in this country. They come for a few months, and generally not even to the same employer, as has been described before.

They have a lot of different employers. They only come for a few months a year, then maybe a few months later on. I think it's very clear that what they are doing -- they come to the United States temporarily. They do not come for permanent employment.

QUESTION: Unh-hunh.

MR. TERRIS: Now, section 101(a)(15)(H) --

QUESTION: Where do you find in the regulations, or the statute, the support for the distinction you make between a fellow who works for the Ford Motor Company, let us say, in Michigan, coming from across the border, and some other kind of a worker?

MR. TERRIS: Mr. Chief Justice, our argument as to -- as to if they're an immigrant, there is no distinction. I want to be clear about that. The argument I've made --

QUESTION: The argument you've just been making would apply to both of them?

MR. TERRIS: Yes, sir. Yes, sir. The only -- the only difference that would apply to them is that an automobile worker might -- and I don't know the answer to this -- might be able to come into the United States --

QUESTION: As a nonimmigrant.

MR. TERRIS: No, as an immigrant, because he may be able to get a Department of Labor certification.

QUESTION: Oh, I see.

QUESTION: The shortage certification.

MR. TERRIS: That's right.

So that's the only difference, if we assume that they are immigrants.

If they are nonimmigrants, my argument is based squarely on the language of subsection (H), and let me just --

QUESTION: Which is what?

MR. TERRIS: Well, let me get the exact citation. It's on page 79 of the government's brief.

It's 101(a)(15)(H).

QUESTION: Okay. Okay.

MR. TERRIS: That states that a person is a nonimmigrant, that "an alien having a residence in a foreign country" -- that's obviously a commuter --

QUESTION: Well, let us spot your exact place that we'll find your --

MR. TERRIS: It's right about in the middle of the page; I'm sorry.

QUESTION: All right.

MR. TERRIS: "An alien having a residence in a foreign country which he has no intention of abandoning" --

that so far is a commuter.

QUESTION: Unh-hunh.

MR. TERRIS: Then we drop down to double-i, "who is coming temporarily to the United States" -- he certainly is coming just temporarily -- "to perform temporary services or labor".

Now, that requires both that you come temporarily and that the services or labor be temporary. It's been interpreted by the Service, and we do agree with this, that if a person comes to the United States temporarily but to carry out permanent services or labor, he is not a nonimmigrant.

So a daily commuter, who comes across the border daily, and that his visit is temporary, but if he works in an automobile plant on a permanent basis, is not a nonimmigrant.

I think we --

QUESTION: Well, how can you come temporarily to perform permanent services?

MR. TERRIS: Well, you come -- you come many times temporarily, but the job is a permanent one, Your Honor. That is the Service's interpretation of that phrase, too, and we do agree with it.

Now, what the Service says, however, is that's not the end of the definition, that the end of the definition is "if unemployed persons capable of performing such service or labor cannot be found in this country."

Now, we submit that isn't part of the definition, that the definition is the description of the people themselves, and not the rule which is clearly -- which is really analogous to the rule for immigrants, which is in section 212(a)(14), which says to an immigrant that if you can't get a Department of Labor certification you can't come into this country.

That -- this is the analogous provision for non-immigrants.

If the Service's position were correct, it would mean that different kinds of people coming in the same way, same temporary basis, some of them could come in as non-immigrants -- some of them would be nonimmigrants, some of them would not be nonimmigrants. Purely depending on the kind of occupation that was involved, and even the time of year.

There would be no -- in effect, it would be no general classification of nonimmigrants.

And we submit that the definition is the beginning of this phrase, the latter is the condition upon which you can enter.

QUESTION: Your argument, if I've followed you, and I won't vouch for that at all, if I followed it, there are really three categories: the daily commuter, the seasonal fellow, and then the man who comes every day on a substantially

permanent basis?

MR. TERRIS: I think that's correct.

QUESTION: Three different categories.

MR. TERRIS: I think that's really correct.

QUESTION: And you think the first two categories must stand or fall together, and the third is outside the reach of this holding; is that correct?

Is the third within the Court of Appeals holding?

MR. TERRIS: The reason the third -- the third is -- I think it's fair to say that the third is like all other daily commuters allowed to keep coming into the United States.

The only -- the third category that Your Honor stated correctly, is part of the daily commuter category. There are no seasonal commuters that come -- by definition, a seasonal commuter isn't a -- can't be permanent.

And so it's part of the dailies.

We have never litigated anybody, of course, but the agricultural workers.

And so --

QUESTION: So this third category is outside the vale?

MR. TERRIS: The litigation. I think it's really fair to say it's outside the litigation.

Now, I don't want to, however, ignore it such that

it might say that I don't think about it.

QUESTION: Did the Court of Appeals deal with it?

MR. TERRIS: No, Your Honor. Let me -- let me tell you -- let me explain what happened on that.

The Court of Appeals only dealt with these first two categories, seasonal and daily.

We then said we thought, based on their wording in describing dailies, we thought that what -- the way they described dailies, that they meant the dailies who have permanent jobs could continue to enter the United States, but that they didn't mean to allow dailies who were agricultural workers to do so.

And we asked for clarification in a motion after the judgment.

The Court of Appeals refused to give clarification and said that it had given -- it had explained itself enough, and that the District Court could deal with that question on remand, on the basis of the Court of Appeals opinion.

QUESTION: In other words, "we write them; we don't explain them".

MR. TERRIS: Well, I'd rather not characterize that, Your Honor.

[Laughter.]

MR. TERRIS: Thank you.

MR. CHIEF JUSTICE BURGER: Very well. Thank you.

You've got about three minutes -- do you think you can clear this all up in three minutes for us?

REBUTTAL ARGUMENT OF MARK L. EVANS, ESQ.,

ON BEHALF OF THE FEDERAL PARTIES

MR. EVANS: Surely. I thought I had done that originally.

[Laughter]

QUESTION: Well, then perhaps your brother confused us.

MR. EVANS: There is -- addressing this last issue first -- no legal difference between any of these categories, call them three or call them two. I understand there to be two.

A daily commuter is someone who comes to this country regularly on a day-by-day basis. As I say, the lines are frequently hard to draw, sometimes they come twice a week or three times a week rather than daily; but they are regular commuters.

Some of them come to permanent jobs. Some of them come to look for employment every day, or to look for temporary employment. It matters not, because the only reason that would make any difference is, if you agree with the plaintiffs' contention here, that these people must be treated as nonimmigrants if they're coming to perform

temporary service. It just doesn't work.

The definition includes what Mr. Terris would like to read as an exclusion. It is part of the definition that if there are people available to perform this labor, these people are not nonimmigrants, they are immigrants. And the only way they can come into this country is either with an immigrant visa or with an informal documentation like a green card.

So there are two classes, as I see it. I think they are indistinguishable. The government's position, as I understood Mr. Terris's to be, is that they stand or fall together.

The only conceivable distinction, aside from the notion that one class is nonimmigrants and the other isn't, is that the one practice has lasted longer. But the practice is not -- the seasonal commuter practice grew up, really, at a time after a series of temporary measures for bringing temporary labor into the country had expired, and it was not a new legal theory, it was just a new category of workers who took advantage of what was already there, for their benefit, already.

And I should address briefly also --

QUESTION: Well, your view is that if the Court of Appeals was right about the seasonals, they were wrong about the dailies?

MR. EVANS: That's right. If they are correct on one, I think they're wrong on the other.

I think the decision cannot be reconciled to the two categories.

QUESTION: You have to reject the idea of a third category?

MR. EVANS: That's right.

QUESTION: You say the third category belongs, really, in the first.

MR. EVANS: Yes. The daily -- a daily commuter is a daily commuter, whether he has a permanent job here or whether he comes every day looking for a job, looking for work.

QUESTION: And in your view he's a daily commuter if he comes over to sell some merchandise for three days a week in the United States, and three days a week in Canada?

MR. EVANS: That's right.

QUESTION: A regular commuter might be a better name for him, then.

MR. EVANS: Well, I suppose if, you know, now that the problem has been explored, through litigation, that the regulations about which we have some reason to be embarrassed might well be amended. And the Service would like to amend those regulations --

QUESTION: And you wish to defer our decision until you've had that opportunity?

MR. EVANS: Well, I must say that it was at one point considered whether -- whether the regulations should be amended to correct the ambiguity. But it was determined, I think quite rightly, that it would be improper to make such an amendment while the case is in litigation. And there has been litigation over this issue ever since 1966, when the case was instituted in the Ninth Circuit, Gooch v. Clark.

There's never been a time when we've had a chance to make any amendments without interfering with on-going litigation.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 2:56 p.m., the case in the above-entitled matter was submitted.]

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