

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

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DKT/CASE NO. 83-2032

TITLE IMMIGRATION AND NATURALIZATION SERVICE, Petitioner
v. BERNARDO RIOS-PINEDA AND ESTARNILADA RIOS-PINEDA
DE RIOS

PLACE Washington, D. C.

DATE March 20, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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IMMIGRATION AND NATURALIZA- :
 TICN SERVICE, :
 Petitioner : No. 83-2032

v. :

BERNARDO RIOS-PINEDA AND :
 ESTARNILADA RIOS-PINEDA DE RIOS :

-----x

Washington, D.C.
 Wednesday, March 20, 1985

The above-entitled matter came on for oral
 argument before the Supreme Court of the United States
 at 2:11 o'clock p.m.

APPEARANCES:

ALAN IRA HOROWITZ, ESQ., Assistant to the Solicitor
 General, Department of Justice; on behalf of
 Petitioner.

LAWRENCE H. RUDNICK, ESQ., Philadelphia, Pa. ;
 on behalf of Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Horowitz, I think you may proceed when you're ready.

ORAL ARGUMENT OF ALAN IRA HOROWITZ, ESQ.

ON BEHALF OF THE PETITIONER

MR. HOROWITZ: Thank you, Mr. Chief Justice, and may it please the Court:

The Attorney General has provided by regulation that completed deportation proceedings may be reopened in his discretion to account for new circumstances.

QUESTION: Mr. Horowitz, that's by regulation, isn't it?

MR. HOROWITZ: Yes. There's nothing in the statute.

QUESTION: And I suppose the Service could -- the Attorney General could revoke that regulation if he wanted to?

MR. HOROWITZ: That's right.

QUESTION: Withdraw it?

MR. HOROWITZ: It's possible that Congress might want to do something about it at that point, but certainly it's within the Attorney General's authority to revoke the regulation, and the fact that he himself promulgated it suggests that the Attorney General is the

1 one who knows what it means and that he has considerable
2 discretion in how it is to be applied.

3 In addition, Congress has granted the Attorney
4 General discretion to suspend the deportation of a
5 deportable alien who meets certain threshold criteria.
6 In this case, Respondents have sought to reopen their
7 deportation proceedings in order to seek suspension of
8 deportation.

9 The question in this case is whether in
10 exercising his twin discretion that I have described the
11 Attorney General could take into account the fact that
12 Respondents achieved eligibility, this threshold
13 eligibility, for suspension of deportation only by
14 filing frivolous appeals and engaged in other conduct
15 flouting our immigration laws.

16 The Court of Appeals found that the Attorney
17 General abused his discretion by taking these factors
18 into account. We have sought certiorari here because
19 this ruling threatens substantial disruption of our
20 immigration processes.

21 QUESTION: Mr. Horowitz, you agree that the
22 proper standard for review is the abuse of discretion
23 standard?

24 MR. HOROWITZ: I would agree that that is the
25 proper standard of review. We think that it is quite --

1 QUESTION: You just think it wasn't applied
2 properly here?

3 MR. HOROWITZ: We think if the Court of
4 Appeals' decision is correct here, there's really no
5 room left at all for the Attorney General to apply any
6 discretion, and that to the extent the opinion suggests
7 that abuse of discretion is the correct standard the
8 court was really only playing lip service to that but in
9 fact was not applying it.

10 In 1974, with the assistance of a professional
11 smuggler, both Respondents entered the United States
12 without inspection. In 1978, Mr. Rios-Pineda was
13 discovered by Immigration officials and was granted the
14 privilege of voluntary departure. But he did not depart
15 as promised and deportation proceedings were instituted
16 against both Respondents.

17 Respondents conceded deportability at their
18 deportation hearing and in December 1978 they were
19 ordered deported. Because they had been in the country
20 for only four and a half years and the suspension of
21 deportation relief requires seven years continuous
22 presence in the United States, Respondents were not
23 eligible for that relief and their request for that
24 relief was denied at the deportation hearing.

25 Respondents took an immediate appeal to the

1 Board of Immigration Appeals, raising several wholly
2 unmeritorious contentions. And I should perhaps note
3 here that both Respondents' brief to the Board of
4 Immigration Appeals and their later brief to the Eighth
5 Circuit are reprinted in the joint appendix.

6 In accordance with agency regulations, this
7 appeal automatically stayed Respondents' deportation
8 order. When the Board dismissed the appeal, Respondents
9 filed a petition for review with the Court of Appeals
10 raising essentially the same contentions. That appeal
11 also stayed, automatically stayed their deportation
12 pursuant to statute.

13 QUESTION: Now is that the '82, the one that
14 resulted in the '82 decision, Mr. Horowitz?

15 MR. HOROWITZ: That's right.

16 By March of 1982 --

17 QUESTION: I notice your brief doesn't say
18 much about that '82 decision. Isn't that relevant to
19 this thing we have to decide?

20 MR. HOROWITZ: Well, I think the question here
21 is whether the Court of Appeals erred in its later
22 decision in 1983.

23 QUESTION: Well, I know, but as I read their
24 later opinion what they said is that the law of the case
25 was the '82 decision. They did order, in effect they

1 did order reopening, didn't they, in '82?

2 MR. HOROWITZ: Well, they ordered --

3 QUESTION: And the Government -- am I right
4 about that?

5 MR. HOROWITZ: Well, no, I would disagree that
6 they ordered a reopening. They ordered the Board to
7 consider a petition to reopen, a motion to reopen,
8 rather. The Board considered it, denied it for various
9 reasons.

10 QUESTION: But the Government never appealed
11 the '82 decision, did it?

12 MR. HOROWITZ: No, there was no reason to
13 appeal, because all they had done was given the
14 Respondents the opportunity to file a motion to reopen,
15 which the Board is usually willing to consider, and it
16 asked the Board to consider it.

17 QUESTION: It didn't ask it, Mr. Horowitz. It
18 said the Board shall promptly consider and rule upon, is
19 the language at the end of the opinion.

20 MR. HOROWITZ: All right, ordered the Board to
21 consider it and rule upon it. But that is what the
22 Board --

23 QUESTION: Did the Board do that? Did the
24 Board carry out that mandate?

25 MR. HOROWITZ: We think the Board carried out

1 that mandate. It considered the petition -- the motion,
2 excuse me. It denied it for several reasons. It found
3 it was filed in an untimely fashion, an issue that has
4 disappeared from the case.

5 It also found that the motion did not make a
6 prima facie case of extreme hardship. And I think this
7 is the point where the Court of Appeals in its second
8 opinion disagreed and found that in its view the first
9 opinion had stated that the Respondents had already made
10 a prima facie case.

11 QUESTION: But the Board in this Court isn't
12 bound by any law of the case doctrine of the Eighth
13 Circuit, is it?

14 MR. HOROWITZ: No, the Board's not bound by a
15 law of the case doctrine in this Court. But I don't
16 think the law of the case really applies at all to the
17 issue that's presented here, even in the Eighth
18 Circuit.

19 QUESTION: Do I understand what you said, Mr.
20 Horowitz, that the Government has no quarrel at all with
21 the 1982 decision?

22 MR. HOROWITZ: I think that's fair to say. We
23 did not think it was inappropriate that we be asked
24 to --

25 QUESTION: I suppose the Attorney General

1 should be free to think it was wholly unnecessary for
2 them to do what they did in 1982, but out of deference
3 to the judicial branch he complied with it rather than
4 appealing.

5 MR. HOROWITZ: Well, in general, when
6 something new comes up and the Court of Appeals just
7 asks the Board to consider it, normally the Board is
8 willing to do that, unless it considers it completely
9 unreasonable. And I would say they did not consider the
10 1982 decision completely unreasonable.

11 I think, just to clarify this law of the case
12 question, there are two grounds for the Board's later
13 denial of the motion to reopen. One was that no extreme
14 hardship has been shown. The Court of Appeals disagreed
15 on the second appeal and found that it had found extreme
16 hardship. That's not really an issue in the case any
17 more in this Court.

18 But the Board separately -- an independent
19 ground for its decision denying the motion to reopen was
20 that, regardless of whether extreme hardship had been
21 shown, it was going to deny the motion to reopen in its
22 discretion because: A, the Respondents had achieved
23 their threshold eligibility for suspense remedy only by
24 filing frivolous appeals; and B, because they had in
25 other ways showed their disregard for the immigration

1 laws, because of their use of a smuggler and because
2 they had --

3 QUESTION: Did I understand you to say that if
4 the Eighth Circuit ordered the Board to do something, if
5 the Board were to do it, it would do it merely out of
6 deference to the Eighth Circuit and not because it was
7 required to comply with any direction of the Eighth
8 Circuit?

9 MR. HOROWITZ: I'm sorry, Justice Brennan, I
10 did not mean to give that impression.

11 QUESTION: I see. That's what I thought you
12 answered Justice Stevens.

13 MR. HOROWITZ: The Board had to be complying
14 with the mandate of the Eighth Circuit, and I think any
15 fair reading of the first Eighth Circuit decision --
16 this is discussed in our petition more than actually in
17 our merits brief -- is that the Board did comply with
18 the mandate of the Eighth Circuit.

19 QUESTION: Well, they have only two choices:
20 either to comply with it or petition for cert. Isn't
21 that so?

22 MR. HOROWITZ: That's right. But the mandate
23 of the Eighth Circuit was just to allow Respondents to
24 file this motion to reopen and then to consider the
25 motion to reopen. And as I said at the outset, the

1 Attorney General has considerable discretion in deciding
2 whether to reopen deportation proceedings.

3 He allowed them to file the motion to reopen,
4 he considered it. He denied it for several reasons that
5 were stated in an opinion. That's all the Eighth
6 Circuit asked him to do.

7 To the extent the Eighth Circuit later decided
8 that it had decided the extreme hardship the first time
9 around, it was really reaching well beyond its powers,
10 since extreme hardship is committed to the Attorney
11 General to decide in the first instance.

12 QUESTION: May I just ask you -- I'm sorry --
13 if the grounds on which it denied the reopening after
14 the Court of Appeals decision relied on anything that
15 was not before the Court of Appeals at the time of its
16 decision? They knew about the time that had been taken,
17 they knew about the smuggling.

18 MR. HOROWITZ: Well, none of those reasons had
19 been given by the Board before. So although the events
20 that served as the basis for the Board's later denial --
21 that is, the filing of the frivolous appeals and the
22 disregard for the immigration laws -- while those had as
23 a chronological matter already happened, there was no
24 reason to think that the Eighth Circuit was thinking
25 about them.

1 They had not been given as a reason for any
2 action by the Attorney General, and it was only later
3 that this became an issue.

4 QUESTION: How much time elapsed because of
5 the filing? I kind of lost track, the filing of the
6 frivolous appeals. Almost three years, wasn't it? Why
7 does it take so long -- why did it take so long to
8 dispose of the appeals?

9 Is that time all chargeable to the Respondents
10 or has the Government got to share some responsibility
11 for that?

12 MR. HOROWITZ: Well, most of it is chargeable
13 to the Court of Appeals for the Eighth Circuit. It was
14 about a year from the time this case was argued in the
15 Eighth Circuit to the time the decision came down
16 sending it back.

17 QUESTION: It takes them that long to decide
18 frivolous cases?

19 MR. HOROWITZ: Well, they didn't even rule on
20 the issues that were before them. All they did was send
21 it back for further consideration. They may have been
22 holding it in order to allow the seven years to elapse.
23 But there were delays, I think, just throughout the
24 administrative and judicial system.

25 QUESTION: Can you in short order tell me the

1 difference between the first and the second Court of
2 Appeals? I mean, why was one time it was good and the
3 next time it wasn't?

4 MR. HOROWITZ: The first time --

5 QUESTION: One time you liked it, the other
6 time you didn't.

7 MR. HOROWITZ: Well, I wouldn't go so far as
8 to say we liked it, but we would not consider it a
9 serious threat to the immigration system. The first
10 appeal to the Court of Appeals simply raised several
11 contentions by Respondents that we think were frivolous
12 as to why their deportation order was incorrect. They
13 had not been able to apply for suspension of deportation
14 earlier because they had not met the seven year
15 requirement.

16 The second -- at the first appeal, the Court
17 of Appeals decided that it would give Respondents an
18 opportunity to apply for this relief, now that the seven
19 years had passed. So it simply sent the case back to
20 the Board to consider an application, something that had
21 never been ruled on before.

22 QUESTION: On the seven year basis?

23 MR. HOROWITZ: Well, the seven years had been
24 satisfied at that point. The Board denied the motion
25 for other reasons, the main reasons the ones that are at

1 issue here, that the eligibility had been achieved only
2 through these dilatory tactics, filing frivolous
3 appeals, and because of the other disregard for the
4 immigration laws.

5 QUESTION: Well now, that's what I want, the
6 difference between that and this one.

7 MR. HOROWITZ: Well, that is the second Board
8 decision. That decision was then appealed to the Court
9 of Appeals, and the Court of Appeals on the second time
10 around, addressing this decision of the Board for the
11 first time, said that it was an abuse of discretion for
12 the Board to rely on those two factors, that the fact
13 that these appeals which completely lacked any
14 substantive merit were the only way in which Respondents
15 had become eligible for this relief.

16 That, the Court of Appeals found, was
17 irrelevant and an improper factor to be relied on. The
18 Board couldn't rely on it.

19 Second, the fact that Respondents had agreed
20 to depart voluntarily but then not shown up for
21 voluntary departure, the fact that they hired a smuggler
22 to bring them into the country, these were also
23 considered by the Court of Appeals to be improper
24 factors on which the Board could not rely.

25 The Government has serious problems with that

1 decision because in fact it completely eliminates any
2 discretion for the Attorney General in ruling on these
3 things. There just aren't other factors. These are the
4 kinds of factors that the Attorney General ought to be
5 relying on.

6 QUESTION: You mean, the order was different
7 from the first order?

8 MR. HOROWITZ: Well, the order was broader.
9 The order of the Court of Appeals on the second time --

10 QUESTION: You're not just talking about the
11 language, are you?

12 MR. HOROWITZ: Well, the issue before the
13 Court of Appeals was different. The Court of Appeals
14 didn't really hold anything the first time around. All
15 it did was ask the Board -- or order the Board to afford
16 Respondents an opportunity to seek administrative
17 relief.

18 On the second go-around, the Court of Appeals
19 said that the Board had erred and had abused its
20 discretion.

21 QUESTION: Well, how can the Court of Appeals
22 vacate a decision of the Immigration and Naturalization
23 Service without holding anything? It's not easy, at any
24 rate.

25 MR. HOROWITZ: Well, I wouldn't necessarily

1 say that they vacated the decision, because the premise
2 of filing a motion to reopen deportation proceedings is
3 that there is an order of deportation outstanding.

4 QUESTION: Well, but there was a petition to
5 review the decision of the INS in the first Court of
6 Appeals case, and you say the Court of Appeals didn't
7 hold anything but simply directed the INS to consider a
8 petition to reopen.

9 Well, they have to hold that something the INS
10 did was improper, don't they, to come to that
11 conclusion? Otherwise they'd have to affirm it.

12 MR. HOROWITZ: Well, I don't think they have
13 to hold that anything the Board had done was improper,
14 and they did not, certainly did not hold that anything
15 the Board had done was improper.

16 Perhaps what -- I'm not sure what you're
17 driving at, Justice Rehnquist, but it is true that the
18 Court of Appeals, I think, did make a mistake in the
19 first appeal in that they did not really rule on
20 Respondents' appeal, the contentions that they had
21 made.

22 These contentions were that the deportation
23 order was wrong, and the Court of Appeals should have
24 ruled on those because that was really -- the
25 Respondents were asking for more relief there than what

1 they got from the Court of Appeals. So they should have
2 ruled on those and rejected them.

3 QUESTION: Well, Mr. Horowitz, what do you
4 think the Respondent won in the Court of Appeals, in the
5 first go-around in that court?

6 MR. HOROWITZ: All he won --

7 QUESTION: Did he win the appeal?

8 MR. HOROWITZ: He didn't win the appeal.
9 Nothing was decided on the appeal. He just obtained the
10 opportunity to go back for further relief.

11 QUESTION: Something he did not have without
12 the Court of Appeals' judgment, did he?

13 MR. HOROWITZ: Well, I think we're really
14 getting to the crux of the case. All that happened
15 during the course of the appeal to the Ninth Circuit was
16 that time passed, three and a half years passed. And
17 this enabled, because the relief that the Respondent
18 wants ultimately, which is suspension of deportation, is
19 relief that is not available to him until he's been in
20 the country for seven years, what he got was managing to
21 stay in this country until the seven-year period had
22 passed.

23 At that point it didn't matter what the Court
24 of Appeals said. He then had the opportunity to file
25 this motion to reopen. And that's exactly the point

1 here, is that by filing appeals that had absolutely no
2 merit he's just been able to hold up the system long
3 enough to achieve eligibility for relief.

4 QUESTION: Well, the short answer is that what
5 he got out of it was time, isn't it?

6 MR. HOROWITZ: Absolutely. He took these
7 appeals to buy time and he succeeded very well.

8 QUESTION: Well, does the Board --

9 QUESTION: Explaining it in those terms, the
10 Court of Appeals appears to have simply not liked the
11 way the Attorney General exercised his Attorney
12 General.

13 MR. HOROWITZ: On the second appeal, the court
14 said that the Attorney General was not allowed to rely
15 on the fact that these appeals were taken to buy time.

16 QUESTION: Well, does the Board have any flat
17 policy as to when the necessary seven-year period stops
18 running? I mean, could the Board take the position
19 under the statute that at the time the deportation
20 proceedings is brought that's the end of the seven-year
21 period? Any time after that engaged in litigation
22 simply can't be counted towards the seven years?

23 MR. HOROWITZ: I think the Board could take
24 that position. I think it would not be an abuse of
25 discretion for the Board to take that position. In

1 fact, however, the Board has not taken that position,
2 and they will entertain these motions to reopen.

3 QUESTION: Even though part of the time
4 results from litigation by the deportee?

5 MR. HOROWITZ: Yes, even though part of the
6 time was. Now --

7 QUESTION: I'm sorry. Had you finished your
8 answer? I did have -- I wanted to just think through
9 this one thing.

10 You rely on the frivolous character of the
11 appeals in your brief, and one of the issues I guess is
12 whether the fact that the two children are American
13 citizens would somehow give them some kind of a legal
14 argument.

15 I gather your position is, even if the appeals
16 raised very close constitutional, important questions,
17 you'd still have the same discretion?

18 MR. HOROWITZ: We'd still have the same
19 discretion. That would be a closer question.

20 QUESTION: And therefore you could say, well,
21 the time was accumulated by litigation, even though
22 prosecuted in good faith and with substantial questions
23 raised.

24 MR. HOROWITZ: Yes. I would say, getting back
25 to Justice Rehnquist's point, I think the Board could

1 say that the time -- from the Board's perspective, they
2 are not going to reopen deportation proceedings just
3 because further time has now run after the deportation
4 proceedings have closed, just because appeals were
5 taken.

6 I think they could take a flat rule. They
7 have not done that. They are willing to consider these
8 applications. But I think, given that, at a minimum, at
9 a minimum, the Board is not abusing its discretion
10 unless the appeals have been taken for good reason,
11 unless a case like you posit, where the appeal -- we
12 described this in our reply brief -- where it would be
13 reasonable for Respondents to have taken an appeal quite
14 apart from the delay that they were going to gain from
15 it, but rather to take the appeal on their own merits.

16 QUESTION: Well, that's true in this case,
17 though, that this issue about the American children had
18 never been decided by this Court, at least. I guess it
19 had been decided a couple of times by lower courts.

20 MR. HOROWITZ: Well, I think it's hard to -- I
21 find it hard to say that that claim was not frivolous.
22 It was frivolous. It had been rejected by several
23 courts, including the Eighth Circuit. There was no
24 argument made in any of the briefs suggesting why the
25 claim had any merit, no case citation, nothing

1 suggesting why the cases were wrong.

2 And I think on its face, although it is true
3 that one district court had once accepted this, the
4 claim is really quite ridiculous, because it means that
5 anyone could come into this country and all they have to
6 do is run and have a baby as soon as they can and then
7 they can't be deported, and that's clear.

8 QUESTION: Let me ask you about the other half
9 of your abuse of discretion argument, the fact that they
10 had violated the immigration laws when they came in,
11 which I guess is the -- that plus the delay are your two
12 factors.

13 Isn't that always true in deportation cases,
14 and if so, is it a fair factor to use, because doesn't
15 it just mean you can use it when you want to and you
16 don't use it when you don't want to?

17 MR. HOROWITZ: Well, no, that -- you're right
18 about that, that is not what we relied on, that they
19 violated the immigration laws when they came in. That
20 is true of everyone who applies for suspense, suspension
21 of deportation.

22 QUESTION: Well, but everyone didn't come in
23 by smuggler.

24 MR. HOROWITZ: That's correct, Justice
25 Marshall. Not everyone came in through use of a

1 smuggler, which indicates a greater degree of
2 premeditation and flouting of the Government immigration
3 laws.

4 In other words, I think the Board --

5 QUESTION: You mean that's worse than swimming
6 across the river?

7 MR. HOROWITZ: Well, I think the Board is
8 entitled to draw some distinctions between a person who
9 maybe works in a field near the U.S. border and he never
10 sees any Border Patrol agents or anything and figures,
11 well, the United States must not really care whether I
12 go.

13 QUESTION: But there's surely premeditation in
14 both cases.

15 MR. HOROWITZ: Well, no; he may just walk
16 across because he sees no one stopping him.

17 I think the more important factor here,
18 though, other than the use of a smuggler, is that the
19 Respondent here deceived the Immigration Service even
20 after he had been apprehended. They offered him
21 administrative voluntary departure. He accepted that.
22 He asked for extensions of time because his wife is
23 pregnant, and then when they finally told him there was
24 going to be no further extensions he just didn't show up
25 for voluntary departure.

1 And in fact the record I think strongly
2 suggests that he never had any intention of voluntarily
3 departing. In fact, at the Immigration Judge's hearing
4 where the judge asked him whether he wanted to apply for
5 voluntary departure, a prerequisite to applying is
6 stating at the hearing that you will in fact depart if
7 you're granted voluntary departure. And if you look at
8 the transcript of the hearing you'll see that it took
9 several minutes for the Immigration Judge to coax this
10 statement out of him, because he said several times that
11 he was not going to leave no matter what.

12 And once someone is caught by the immigration
13 system, I think the Attorney General is entitled to take
14 into account whether that person is going to comply,
15 sort of play by the rules of the game at that point. I
16 mean, here is someone who has really taken, every step
17 of the way has taken whatever steps he can, even if it
18 includes deceiving the immigration authorities, to
19 escape deportation.

20 QUESTION: Well, what again would be the basis
21 for the Attorney General's suspending deportation in
22 this case? What does the regulation say? Is it
23 hardship?

24 MR. HOROWITZ: Well, the statute says that the
25 alien has to meet three threshold criteria: seven years

1 continuous presence; he must be of good moral character;
2 and he has to show extreme hardship. Once he meets
3 those three criteria, at that point the Attorney General
4 then has discretion to decide whether he should stay or
5 not.

6 Some of the thing she would take into account
7 I think are the degree of the hardship, even if it meets
8 the extreme hardship.

9 QUESTION: And this is just totally a matter
10 of discretion, is it not, with the Attorney General?

11 MR. HOROWITZ: Well, the Court has described
12 it as unfettered discretion.

13 QUESTION: Well then, why does the Court of
14 Appeals have the right to review it at all? Why do you
15 say it's an abuse of discretion standard when there are
16 no standards for the exercise of the discretion in the
17 first place?

18 MR. HOROWITZ: Well, the statute gives the
19 alien an opportunity to appeal to the Court of Appeals.
20 I think it's a loose, very deferential standard of
21 review, but there are -- for example, if the Board were
22 to rely on some factor that clearly could not have been
23 within the contemplation of Congress in setting up the
24 remedy, I think the court might be justified in finding
25 an abuse of discretion, if they said, we're going to

1 grant it to everybody who's name starts with A, but
2 nobody whose name starts with J.

3 QUESTION: But here Congress hasn't even set
4 up the remedy. The Attorney General has set up the
5 remedy.

6 MR. HOROWITZ: Well, no, the remedy of
7 suspension of deportation is set up by Congress.

8 QUESTION: Yes, but the petition to reopen is
9 set up by the Attorney General.

10 MR. HOROWITZ: I agree, I agree.

11 QUESTION: Why shouldn't that be totally
12 within his discretion?

13 MR. HOROWITZ: Well, I think it could be
14 argued that it is totally within his discretion. But it
15 has been found that -- courts have found that they have
16 jurisdiction to review these.

17 QUESTION: What courts have found that?

18 MR. HOROWITZ: Every court that reviews these
19 petitions. I don't know that it's really been
20 litigated.

21 QUESTION: Well, hasn't this Court spoken of
22 unfettered discretion?

23 MR. HOROWITZ: The Court spoke of unfettered
24 discretion actually in connection with the suspension
25 remedy, and I understood that to be an expression of

1 very broad discretion, but not necessarily unreviewable
2 discretion, because the suspension remedy is clearly
3 subject to review.

4 QUESTION: Well, but review under what
5 standard? I mean, I wonder whether the Government isn't
6 conceding more than it ought to in this case.

7 MR. HOROWITZ: Well, I think the standard of
8 review -- I think the Court of Appeals is entitled to
9 find an abuse of discretion if the reasons --

10 QUESTION: Well, what cases from this Court do
11 you rely on for that proposition?

12 You said unfettered discretion is what this
13 Court has said. Now, the Court of Appeals said abuse of
14 discretion. Where does the Court of Appeals derive
15 that, what authority?

16 MR. HOROWITZ: Well, the Court said unfettered
17 discretion in the case of Jay versus Boyd, but the Court
18 went on in that case to decide whether the Attorney
19 General had in fact abused his discretion there. So I
20 think it was sort of implicit in the Court's decision
21 that there is some -- there could be conceivable
22 circumstances under which it would be legitimate to find
23 abuse of discretion. I think there are not many.

24 QUESTION: Are you saying that even if the
25 standard is unfettered discretion, there can be an abuse

1 of discretion?

2 MR. HOROWITZ: Well, the statute doesn't say
3 unfettered discretion, and I would understand the
4 Court's statement to that effect to mean that --

5 QUESTION: Courts of Appeals have generally
6 referred to it as discretion with a wide latitude and
7 terms of that kind, have they not?

8 MR. HOROWITZ: The Courts of Appeals have
9 referred to it that way. The Courts of Appeals,
10 particularly this circuit and the Ninth Circuit, have
11 not necessarily applied it that way, and that's really
12 our concern.

13 We think a real abuse -- the Government could
14 certainly live with a real abuse of discretion
15 standard. We make, the Board makes these decisions,
16 gives reasons for these decisions, and we think they're
17 legitimate reasons, as long as courts are willing to
18 defer --

19 QUESTION: Well, I suppose if the decision was
20 made purely on the basis of race there would be some
21 problem.

22 MR. HOROWITZ: Yes, purely on the basis of
23 race, or even if it was made for some completely
24 arbitrary reason that was placed on the record, and it
25 could be not conceivable that Congress contemplated that

1 as within the scope of the discretion it was conferring
2 on the Attorney General, I think that would be grounds.

3 QUESTION: Well, is it even clear if it were
4 made on the basis of race it couldn't be done? At one
5 time immigration policy did divide people up by
6 nationality and different parts of the world. Say they
7 decided to exclude all Orientals, for example.

8 MR. HOROWITZ: I spoke too hastily there, I
9 think. I mean, in the immigration area there certainly
10 is reason to draw distinctions on the basis of race.
11 But I think it would be subject to --

12 QUESTION: I just wonder if your position
13 really isn't, just as Justice Rehnquist suggested,
14 there's absolutely no limit on this discretion?

15 MR. HOROWITZ: I don't think that is our
16 position.

17 QUESTION: It would fit the statute.

18 MR. HOROWITZ: The Attorney General is willing
19 to have his discretion reviewed, as long as it is
20 reviewed on the basis of abuse of discretion.

21 QUESTION: Would it be an abuse to have a
22 policy, no more Mexican nationals? We deport all
23 Mexican nationals; we've got too many in this country.

24 MR. HOROWITZ: By the Attorney General?

25 QUESTION: Yes.

1 MR. HOROWITZ: I'm not sure. I think that it
2 would be arguable at least that Congress did not -- that
3 that was contrary to the will of Congress. Congress is
4 the one that sets up quotas.

5 I'd reserve the remainder of my time.

6 CHIEF JUSTICE BURGER: Mr. Rudnick.

7 ORAL ARGUMENT OF LAWRENCE H. RUDNICK, ESQ.,
8 ON BEHALF OF RESPONDENTS

9 MR. RUDNICK: Mr. Chief Justice and may it
10 please the Court:

11 I'd like to initially focus on what the Court
12 of Appeals actually decided, rather than --

13 QUESTION: Which time? Which time, the first
14 or the second?

15 MR. RUDNICK: In the second decision, the
16 decision that's the subject of this petition. I'd like
17 to focus on what the Court of Appeals actually decided,
18 rather than the Government's characterization of it.

19 The Court of Appeals never held that the
20 Government could not consider, that INS could not
21 consider, that the Board could not deny motions to
22 reopen where the seven years of continuous physical
23 presence were obtained by frivolous appeals. To the
24 contrary, the Eighth Circuit Court of Appeals considered
25 decisions from the Ninth Circuit which had basically

1 said there could not be discretionary denials where the
2 three threshold requirements had been met and it
3 rejected that.

4 It said, we assume that the Board has this
5 power, but we reverse the Board here because the
6 decision isn't rational because the petitions and
7 appeals were not themselves frivolous. That's what the
8 court held.

9 As to the disregard of the immigration laws,
10 they said disregard of the immigration laws might well
11 be a factor to be considered by the Board, but the Board
12 hasn't explained why the disregard in this case is any
13 different from any other deportable alien. The remedy
14 of suspension of deportation only applies to deportable
15 aliens.

16 It's a statutory prerequisite, so we can't
17 find them not entitled because they're deportable. The
18 Board didn't explain why anything that these aliens had
19 done --

20 QUESTION: Well, did the Board say that it was
21 considering simply the fact that they were deportable or
22 the fact that they had been smuggled in illegally?

23 MR. RUDNICK: They said that they considered
24 -- in their summary of what they considered, in addition
25 to the frivolous appeals -- and it did say "in addition

1 to" -- that they had used a paid smuggler and had failed
2 to depart voluntarily.

3 QUESTION: And the Court of Appeals said that
4 was not a permissible exercise of the Attorney General's
5 discretion?

6 MR. RUDNICK: No, what the Court of Appeals
7 said, that the Board hasn't explained why these facts
8 are a peculiar problem under the immigration laws. The
9 Board hasn't used its expertise to explain to us.

10 QUESTION: When you're dealing with unfettered
11 discretion, why should the Board have to explain
12 anything to the Court of Appeals?

13 MR. RUDNICK: The derivation of the term
14 "unfettered discretion" is from the 1956 decision of
15 this Court in Jay versus Boyd. On the previous --
16 that's on page 354. On page 353 of that decision, the
17 Court talks about the sound discretion of the Attorney
18 General.

19 And since Jay this Court has of course decided
20 INS versus Wang. In INS versus Wang, footnote 5 talks
21 about the discretion of the Attorney General and it
22 doesn't talk about the unfettered discretion.

23 QUESTION: Last term in Phinpathya, the Court
24 said it was entirely within the Board's discretion.

25 MR. RUDNICK: That's correct.

1 QUESTION: So I think the language has been
2 very broad and makes it very difficult to justify the
3 Eighth Circuit's approach.

4 MR. RUDNICK: The language -- that's footnote
5 6 in Phinpathya, which of course you wrote. If it were
6 entirely within the discretion, then there'd be no
7 jurisdiction in the Court because there'd be no purpose
8 to have jurisdiction.

9 But Congress has provided for jurisdiction,
10 and this Court in Jehovah versus Rosenberg in 1964 found
11 that there was jurisdiction by petition for review in
12 the Courts of Appeals to review motions to reopen to
13 assert a suspension of deportation claim. So there is
14 jurisdiction.

15 QUESTION: Well, but it's not so much a
16 jurisdictional question I was asking about, but your
17 suggestion, based on the Court of Appeals' opinion I
18 realize, that the Board not only must state reasons why
19 it chooses not to reopen the case, but has to explain to
20 the satisfaction of the Court of Appeals why these
21 reasons make the case different from some other case. I
22 mean, you can play that game for 20 years.

23 MR. RUDNICK: No, I don't think that the Court
24 of Appeals was -- I think what the Court of Appeals was
25 applying was an arbitrary and capricious standard, and

1 saying there's a range of decisions that we might
2 disagree with, that we have to uphold, we must affirm,
3 because you are the primary enforcer of the immigration
4 laws; but we as a Court of Appeals have a duty to make
5 you make those decisions in a rational way.

6 You have to explain why you treat A
7 differently from B, and that has been the thrust of the
8 post-Wang Court of Appeals decisions. In Ramos versus
9 INS, which is a Fifth Circuit case cited in both briefs
10 -- that's the thrust of virtually all of the Court of
11 Appeals decisions since Wang.

12 QUESTION: But there's a presumption of
13 regularity in any administrative proceeding, and surely
14 the burden is on the party that wants to upset the
15 decision to show that these people have been treated
16 differently from somebody else.

17 But the Court of Appeals didn't indicate, we
18 see other cases where you have treated people
19 different. They said you have to explain why this makes
20 cases different from other factual cases. And it seems
21 to me that just reverses the ordinary presumption.

22 MR. RUDNICK: I don't think that the Court of
23 Appeals was saying that there is a presumption that the
24 Board did anything wrong. I don't think they're
25 reversing that presumption. I think they're saying:

1 Board, you just have to give us some rational reasons;
2 these reasons don't make any sense to us.

3 QUESTION: But can a rational Court of Appeals
4 fairly say that the reasons given by the Board here
5 don't make any sense to us -- smuggled in, illegally
6 entered the country, frivolous appeals? It seems to me,
7 I thought the Court of Appeals was expressing kind of an
8 equal protection idea, that you may have let other
9 people stay about whom these same things could be said.

10 But now you suggest that it's kind of a due
11 process thing, that no rational Attorney General could
12 refuse to reopen just on these facts. I doubt that even
13 this Court of Appeals said that.

14 MR. RUDNICK: I think it's more a matter of
15 what they were imposing was a matter of administrative
16 fairness.

17 QUESTION: Well, where did they get the right
18 to impose that?

19 MR. RUDNICK: I think it's what Congress
20 intended.

21 QUESTION: Well, where do you get -- at what
22 part of the Act do you find that?

23 MR. RUDNICK: Congress provided for suspension
24 remedy, and I think what the Court of Appeals assumed is
25 that Congress intended that remedy be evenhandedly

1 administered.

2 QUESTION: But Congress didn't even require
3 motions for rehearing to be granted or considered. So
4 it's just, you're a step removed from that.

5 MR. RUDNICK: The Board's been provided --
6 well, the motion process is provided by the Attorney
7 General. It's interesting that if you look at the
8 regulations, the old regulation, the predecessor to the
9 current one, 8 CFR 3.2, used to say that the decision
10 was solely within the discretion of the Attorney
11 General.

12 The present regulation doesn't say that. It's
13 framed in the negative. And this Court in Wang says
14 because it's framed in the negative that gives the
15 Attorney General broad discretion, but not unfettered
16 discretion.

17 QUESTION: Well, in Wang it said broad
18 discretion. Jay against Boyd said unfettered
19 discretion. You seek to draw from Wang the inference
20 that, because the term "broad discretion" was used, the
21 term "unfettered discretion" has been disapproved, and
22 that really stretches things.

23 MR. RUDNICK: Jay is inconsistent in its
24 usage. It also uses the term "sound discretion of the
25 Attorney General," and that would imply certainly that

1 it was reviewable as to unsoundness, irrationality,
2 arbitrariness.

3 QUESTION: Did Congress say "sound
4 discretion"?

5 MR. RUDNICK: In the Section 244 in the Act
6 itself, it says "in the discretion of the Attorney
7 General." It doesn't say "sound."

8 QUESTION: They didn't modify it with any
9 adjectives, then?

10 MR. RUDNICK: That's correct.

11 As to the question from Mr. Justice Stevens as
12 to delays, a lot of the delays in this case can be laid
13 at the feet of the Immigration Service and not at the
14 feet of the alien. Just to note that the appeal was
15 taken in December of 1978 and there wasn't any decision
16 from the Board until May of 1980. That's not time
17 chargeable to the alien. He didn't do anything to bring
18 that about.

19 QUESTION: And then the Eighth Circuit on the
20 first go-around sat on it for a solid year. Do you know
21 why?

22 MR. RUDNICK: I don't know why. I know the
23 Government moved to dismiss. They moved to vacate the
24 stay and dismiss the appeal, from the docket entries,
25 and I know that that was denied by the Eighth Circuit,

1 and then they then scheduled the case for argument, and
2 it was argued and decided.

3 I can't know why it took the Eighth Circuit
4 that long to decide.

5 QUESTION: And a three or four-page opinion
6 for a whole year.

7 In the second go-around they sat on it for
8 eight months.

9 MR. RUDNICK: Yes, I think that's correct.

10 QUESTION: Are they that far behind? It's not
11 your part of the country.

12 MR. RUDNICK: I'm not that familiar with the
13 practice of the Eighth Circuit, Mr. Justice Black.

14 QUESTION: What did your client get out of the
15 first go-around?

16 MR. RUDNICK: He got a chance to apply for
17 suspension.

18 QUESTION: That was all? That was all?

19 MR. RUDNICK: Well, it's possible, and the
20 Court of Appeals did read their previous opinion the
21 second time around as mandating that the motion to
22 reopen be granted. It is -- frankly, I must say I find
23 the first decision equivocal. There are parts of it --

24 QUESTION: Well, what did the Court of Appeals
25 mean by law of the case?

1 MR. RUDNICK: I think they felt that, when
2 they considered it the second time, that the first time
3 they had ordered the Board to reopen and that the Board
4 wasn't free to deny the motion.

5 QUESTION: Well, are you arguing that the
6 second gave them nothing that the first hadn't already
7 given?

8 MR. RUDNICK: Oh, no. I think the -- our
9 position is not that the first -- we don't adopt the law
10 of the case argument. I just cannot read the -- in
11 fairness to the Government, I don't think that the first
12 opinion is unequivocal. In fact, I think it's perfectly
13 ambiguous.

14 What the second opinion gave, the second
15 opinion orders the Board to grant the motion to reopen.
16 The first opinion arguably did. The court felt that it
17 had. It's arguable, but it's not -- it wasn't well
18 established.

19 Now, the Attorney General clearly continues to
20 have the discretion to -- I use the word -- sanction, to
21 pretermite or to cut off applications for suspension of
22 deportation where the seven years have been improperly
23 gained. The Court of Appeals didn't say they couldn't
24 do that.

25 What the Court of Appeals said is: You said

1 it was frivolous; we've taken a look at it and most of
2 what, the conduct that was alleged to be frivolous, took
3 place in front of us, and we have looked at it and we
4 have determined that it's not frivolous.

5 They're not saying that the Attorney General
6 can't utilize that authority. They're just saying that
7 in this particular case, as applied to the facts of this
8 case and as applied to the law of this case, that it's
9 not frivolous.

10 QUESTION: By what standard should we review
11 the Court of Appeals' conclusion that the conduct before
12 them and by them wasn't frivolous?

13 MR. RUDNICK: I think some deference is due
14 the decision of the Court of Appeals, since the activity
15 talked about took place in front of them. I wouldn't
16 say it's an abuse of discretion standard. I think that
17 would be an overbroad argument.

18 I think some deference is due, since it did
19 take place in front of them. Not as much deference as
20 due to the Attorney General by the Court of Appeals.

21 As to the -- I want to stress again on the
22 issue of disregard, the Court of Appeals didn't say the
23 Board couldn't apply that rule, but that, as we've gone
24 into, that they only had to apply it in a manner that
25 made sense, that was rational, that wasn't arbitrary and

1 capricious.

2 I have nothing else, unless there are other
3 questions.

4 QUESTION: May I ask you a question about Jay
5 against Boyd, which I hadn't read before the argument
6 and I've just read it, and the scope of the discretion
7 in the case. The analogy that the Court made in that
8 case, which is quite interesting, is to the probation
9 proceedings, which in 1955 were proceedings in which
10 there was total discretion by the authority that had
11 discretion to grant or revoke probation or parole.

12 Has anybody ever argued that, just as the law
13 of parole has changed, that maybe the rules here also
14 require the same kind of procedures?

15 MR. RUDNICK: I think that's what we're
16 arguing, is there's been an evolution in the practice of
17 administrative law and there has been an evolution in
18 this Court's decisions.

19 QUESTION: If you make that argument, then
20 you're basically -- it's basically a procedural
21 argument.

22 MR. RUDNICK: Yes, i think essentially --

23 QUESTION: And then what's wrong with the
24 procedure that the Attorney General did follow? Because
25 maybe you don't like his reasons, but he did tell us

1 what they were. And maybe they're pretty weak, but you
2 can't say it's totally arbitrary to say somebody who
3 gets extra time by litigating to get it is --

4 MR. RUDNICK: We're not arguing that that
5 class of behavior can't be sanctioned. We're not saying
6 that the Attorney General can't deny motions to reopen
7 where frivolous appeals have gained the seven years.
8 All the Court of Appeals held here, and that's what the
9 Court of Appeals said -- all the Court of Appeals said
10 is this appeal, these appeals weren't frivolous.

11 QUESTION: But why can't he say that the time
12 that's gained by appeals that we think are frivolous are
13 enough? Why can't they define their own standard of
14 frivolity, frivolousness, whatever the right word is?

15 MR. RUDNICK: I think in terms of expertise,
16 this isn't something that the agency was set up to
17 decide. They're no set up to decide what are frivolous
18 appeals. That's more of a judgment that courts make. I
19 think less deference is due a decider, an administrative
20 agency, when they decide something that's not within
21 their expertise than something that's within.

22 When the Board makes a decision as to what
23 category of conduct raises peculiar problems under the
24 immigration laws, that's where deference should be
25 high. That's what they're set up to do. They're set up

1 to be experts.

2 But where they say a petition for review to
3 the Court of Appeals was frivolous, that's not something
4 within their expertise.

5 Thank you.

6 CHIEF JUSTICE BURGER: Anything further, Mr.
7 Horowitz?

8 REBUTTAL ARGUMENT OF ALAN IRA HOROWITZ, ESQ.

9 ON BEHALF OF PETITIONER

10 MR. HOROWITZ: A couple points. I think
11 there's a little bit of confusion here about exactly
12 what's been held. The Government does not dispute, the
13 Board did not dispute in its remand, that the seven year
14 standard has been satisfied. It doesn't really matter
15 whose fault the delay is, because this is not like a
16 speedy trial case, where parts of the delay are being
17 excluded.

18 We agree that they met the seven year
19 standard. What the Board held was that, because the
20 standard was met only because they took these frivolous
21 appeals, thereby bringing these automatic stay
22 provisions into effect, the Board in its discretion was
23 not going to exercise its discretion favorably towards
24 the Respondents to reopen the deportation proceedings
25 that had already been closed.

1 I think it's important to remember that they
2 were found deportable back in 1978. Nothing that has
3 happened in this case since then has suggested that that
4 determination was in error at all. With hindsight, it
5 is clear that they should have been deported in December
6 of 1978.

7 The Respondents have already gotten -- even at
8 the time that the Board ruled, they had gotten three and
9 a half years of an additional windfall of being in this
10 country, just because they filed these appeals and
11 invoked the stay.

12 What the Board has said that, in addition to
13 that windfall, we're not also going to let you achieve
14 eligibility for relief that would let you stay in this
15 country permanently just because you filed these
16 appeals. If they do that, it's going to create a
17 tremendous incentive for everybody to file whatever kind
18 of papers they can to delay things until they meet the
19 statutory requirements.

20 If the Board takes the position that it did
21 take here, then at least a person knows that by taking
22 these sorts of dilatory tactics he's not going to put
23 himself in a position to create new equities that is
24 going to give him relief to which he was not entitled.

25 And one more point about the Court of Appeals'

1 statement about the appeals not being frivolous. I just
2 don't think the Court of Appeals disagreed with what the
3 Board said about the merit of the appeals. They said
4 the appeals were not frivolous. The only reason they
5 gave is that they had enabled the Respondents to get
6 relief, that is, that they enabled them to gum up the
7 works for long enough that the seven years passed.

8 That's not -- in our judgment, that is not
9 something that --

10 QUESTION: That doesn't go to the merits.

11 MR. HOROWITZ: -- makes them not frivolous.

12 And the Board in fact -- I'm sorry. The Court of
13 Appeals, if it didn't think the appeals were frivolous,
14 it should have ruled on them, because what they were
15 asking for in the Court of Appeals was relief from
16 deportation, not this discretion relief.

17 QUESTION: Can I ask you just one quick
18 question. Do you think the Jay against Boyd case is
19 good law, if it relies on a parole analogy and if the
20 facts of that case were they could rely on ex parte
21 evidence for their decision, which I wonder if it could
22 be done by a parole board now?

23 QUESTION: Well, it isn't good law under what
24 the Attorney General has done. You agree that you've
25 provided for reopenings and you've provided for

1 discretion and you think your discretion is reviewable.

2 MR. HOROWITZ: Reviewable under a standard of
3 abuse of discretion.

4 QUESTION: Under a closer standard than the
5 Boyd case, though.

6 MR. HOROWITZ: Well, I'm not sure. I guess I
7 don't want to go on a limb with that. I don't recall
8 that the standard there was very different.

9 Let me just say one more thing. This was
10 really not a procedural decision by the Eighth Circuit.
11 They didn't complain that the Board didn't give its
12 reasons good enough. They didn't send this case back to
13 the Board for a foolish statement of reasons, as to what
14 the reason was for the Board's decision.

15 They sent it back to hold a hearing and
16 basically to grant the suspension relief.

17 QUESTION: That's really what I was asking
18 your opponent. I wonder what your view is. If you
19 comply with all the procedures that are required for a
20 fair hearing comparable to a parole proceeding, would
21 you say you've done everything that would be reviewable,
22 that the only thing that's reviewable is procedural
23 fairness?

24 MR. HOROWITZ: Well, we've never taken that
25 position. I think if the Board gave as a statement of

1 reasons something that the court could in good
2 conscience say was something that was not within the
3 contemplation of Congress and really contrary to the
4 will of Congress, that --

5 QUESTION: We don't like the color of your
6 eyes.

7 MR. RUDNICK: -- could be an abuse of
8 discretion.

9 Yes, or the length of your name or something
10 like that.

11 If there are no further questions.

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

14 (Whereupon, at 2:56 p.m., oral argument in the
15 above-entitled case was submitted.)

16 * * *

CERTIFICATION

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

#83-2032 - IMMIGRATION AND NATURALIZATION SERVICE, Petitioner v. BERNARDO

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