OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-5240

TITLE MARIE LUCIE JEAN, ET AL., Petitioners V. ALAN NELSON, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

PLACE Washington, D. C.

DATE March 25, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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MARIE LUCIE JEAN, ET AL., :

Petitioners, :

V. : No. 84-5240

ALAN NELSON, COMMISSIONER, :

IMMIGRATION AND NATURALIZA- :

TION SERVICE, ET AL. :

- -x

Washington, D.C.

Monday, March 25, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 o'clock p.m.

APPEARANCES:

IRA JAY KURZBAN, ESQ., Miami, Florida; on behalf of the petitioners.

REX E. LEE, ESQ., Solicitor General of the United States, Department of Justice, Washington, D.C.; on behalf of the respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Jean against the Commissioner of Immigration.

Mr. Kurzban, you may proceed whenever you are ready.

ORAL ARGUMENT OF IRA JAY KURZBAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. KURZBAN: Mr. Chief Justice and may it please the Court, this is a case about invidious discrimination in enforcement of the immigration laws of the United States against black Haitian refugees who were seeking political asylum in the United States.

For over ten years, immigration enforcement officials in south Florida have applied the law with an unequal hand and an evil eye, as this Court said in Yick Wo v. Hopkins, against Haitians seeking political asylum as is their right under the statutes and treaties of the United States.

Although it has occurred in a variety of contexts, this case raises the issue with respect to detention and parole and discrimination in that detention and parole.

In the spring of 1981, approximately 1,700 Haitians came to the United States fleeing the politically repressive conditions and the persecution of

their homeland in Haiti. Unlike refugees such as Nicaraguan refugees, such as Cuban refugees, who entered south Florida at the same time, under the same circumstances, and indeed, unlike other excludable aliens who entered the United States at the same time, Haitians and Haitians alone were incarcerated.

QUESTION: Mr. Kurzban, are any of the people detained who constituted the member class still detained? Or have they been paroled?

MR. KURZBAN: Yes, Your Honor, although it is not in the record directly, there are 400, approximately 400 Haitians who are presently detained, and they constitute 70 percent of the population incarcerated at the present time in south Florida.

QUESTION: The court below remanded the case, did it not?

MR. KURZBAN: Yes, Your Honor.

QUESTION: For findings of the District Court? Now, what findings are open to the District Court on remand? Is it compliance with the government's regulations?

MR. KURZBAN: I think it is very unclear, to be quite frank, Your Honor, about what the standard is on remand and what the en banc would say. They said that it should be remanded on a facially legitimate and

bona fide standard. That --

QUESTION: The question of whether the neutral standards since adopted by regulation by the government were complied with and as applied kind of a compliance standard, is that what you understand?

MR. KURZBAN: Well, again, I honestly think it is unclear. I think they remanded it back to determine whether or not it was discrimination with respect to the 400 people, but they paid lip service to that discrimination because they did it under a standard which in effect is a narrow standard, appropriate in other contexts such as the substantive review of a decision, as Justice Blackmun found in Kleindienst versus Mandel, of the Attorney General.

But it is not clear what the ultimate outcome of that review would be, and in addition they gave no relief to the 1,700 class members who have been released and at the same time they lifted the injunction that prevented the government from reincarcerating those 1,700.

So those 1,700 petitioners that are still part of this class are subject tc being incarcerated again, and we have no reason to believe, based on the continuing pattern and practice of discrimination, that Haitians who have suffered in south Florida based on

that continuing pattern, that these Haitians will not be redetained in a discriminatory manner.

QUESTION: I guess the difference is that when you started the action there were no government regulations in effect governing the detention and parole.

MR. KURZBAN: But there was a statute, Your Honor, that said -- there was a facially neutral statute, 1182(d)(5), and low-level immigration officials enforced that statute in a discriminatory way. We have no reason to believe today and in fact we believe that they are enforcing their present policy in the same discriminatory manner, and unless this Court makes it clear that the Immigration Service cannot enforce a neutral statute or regulation --

QUESTION: Well, do we have the cart before the horse a little bit, trying to decide the constitutional issue before we know whether in fact it is being discriminatorily applied? Normally don't we wait until that is decided before going off on the constitutional ground?

MR. KURZBAN: Well, Your Honor, I think in some circumstances that is correct, but not in this circumstance, for several reasons. First, the remand standard offers no relief for the 1,700 petitioners, as

I said. Secondly, with respect to the grounds on which the Court of Appeals remanded the case, they remanded it under a facially legitimate and bona fide standard.

That standard is not sufficient to protect against race and nationality discrimination, because that standard, while appropriate in the context of such cases as Fiallo versus Bell and in Kleindienst versus Mandel, where the Court paid great deference to the decisions of Congress and the Attorney General, is inappropriate where Congress has spoken, where the President and the Attorney General have spoken, and where low-level officials have discriminated anyway.

QUESTION: Mr. Kurzban, is it your position that the government may not discriminate in administering the immigration laws on the basis of nationality?

MR. KURZBAN: Well, Your Honor, I think it depends on who we are talking about. Here, on the facts of this record, where Congress required a facially neutral statute and had one under 1182(d)(5), where the President and the Attorney General both made it clear that it should be an even-handed policy, where Congress has specifically only given the authority to the President under 1182(f) and under 1185 to make distinctions under classes of aliens, on the facts of

this case I think that immigration officials do not have the right to make that distinction based on nationality.

QUESTION: Is that because of the regulations and the statute?

MR. KURZBAN: No, it is because this Court has always recognized that race and national origin discrimination are suspect --

QUESTION: We've got two separate questions, I think. The first is perhaps the abstract one, can Congress pass a statute that discriminates in the administration of the immigration laws on the basis of national origin, but I thought from your answer perhaps it is the second one raised here, where Congress and the President have taken the position that there will not be discrimination on the basis of national origin. Then you don't get to the constitutional issue because the low-level people are bound either by the administrative regulations or by the statute.

MR. KURZBAN: I do not know that that follows, Your Honor, because on the record in this case, they remanded it back on a standard that masks discrimination. The standard here is not an arbitrary and capricious standard. The standard here is facially legitimate and bona fide.

Moreover, when the en banc court of the Elevent Circuit has made it clear that the United States Constitution is irrelevant, they said no constitutional review is irrelevant to race and nationality discrimination. I think that the moral force of stating that the Constitution applies in this circumstance is important.

QUESTION: We ordinarily require something more of a controversy than just a debte about moral force.

MR. KURZBAN: That's correct, Your Honor, but there is a very live controversy here, with the 1,700 people who have been released and for whom the injunction has now been lifted by the en banc court's decision, who are subjected to being redetained, and in Footnote 10 of the government's brief, they indicate that they may very well redetain them.

And this Court has also recognized that the mere cessation of illegal conduct, which we believe, by the way, has not occurred here -- we believe the government is continuing to discriminate, as they have for ten years.

But the mere cessation of that conduct, they are getting up here today and saying, we will not redetain these people based on national origin, based on

the history of the Service's discriminatory actions, is not enough to moot this case out.

When the Haitians arrived in the United States, they represented less than 2 percent of the --

QUESTION: Well, it may not be -- even if it isn't moot, it may not be ripe, the constitutional issue. You really don't know what is going to happen to these 400 people until your remand is completed.

MR. KURZBAN: Well, Your Honor, we believe it is right because we are dealing with this case from the standpoint of a continuing pattern and practice of discrimination. We know that 70 percent of the Haitians -- 70 percent of the aliens who were detained are Haitian. We have no reason to believe, and in fact believe quite strongly that the Service is engaging in the same pattern and practice of discrimination.

QUESTION: Suppose the District Court gives you just what you are asking for here, even if that stretches the mandate, the remand.

MR. KURZBAN: Well, what we are asking for, Your Honor -- maybe it hasn't been made clear. What we are asking for is declaratory injunctive relief, stating that the Immigration Service cannot use the impermissible criteria of race and national origin in making determinations about parole.

QUESTION: Even though the regulations forbid it?

MR. KURZBAN: Well, just as the statute --

QUESTION: You think the lower-level people just continue to violate the law?

MR. KURZBAN: Absolutely, Your Honor. Just as the statute, just as the 1952 statute, 1182(d)(5), did not give them the authority to discriminate based on race or national origin.

QUESTION: Well, if they are going to do that, an injunction won't do you much good.

MR. KURZBAN: I think if this Court issued an injunction and issued a declaration --

QUESTION: We wouldn't issue the injunction.

MR. KURZBAN: Well, I think if this Court issued a declaration and remanded it back to the en banc court to issue an injunction --

QUESTION: You would just have another reason -- you would just have another weapon to use against lawless conduct, but there is already a weapon to use against it. There are laws and regulations that forbid this kind of application of the law.

MR. KURZBAN: That's correct, Your Honor, but what we have here is a continuing pattern and practice of discrimination, despite neutral statutes. That is

the problem. This is not just an isolated case. In 1980, for example, the District Court in another case called Haitian Refugee Center versus Civiletti found that the Immigration Service violated the statutes that allow people to claim political asylum in the United States, and violated it with respect to 4,000 Haitians seeking political asylum in our country. That was in 1980, and in 1981, we had the very same conduct we have here.

The effect of the Eleventh Circuit's en banc court decision is to say that the United States Constitution is irrlevant to protect against invidious race and nationality discrimination. They have in effect --

QUESTION: May I just ask one other -- what if you've got an injunction that said, obey the regulations as they now exist? Would that give your people adequate protection?

MR. KURZBAN: I think if it is done under the Constitution --

QUESTION: No, I just said -- the injunction doesn't mention the Constitution, but says, you know, under pain of contempt and all the rest, you are hereby enjoined to obey the regulations that are now in effect.

MR. KURZBAN: I think that coupled with declaratory relief making it clear that the government cannot use the impermissible criteria of race or national origin --

QUESTION: Well, then, say you can't use the impermissible criteria of race because the regulations forbid you from using it. Would that give you all the protection you need?

MR. KURZBAN: Yes and no. In a way, yes, but in a way, no. And the no is that here we have the Eleventh Circuit en banc who are making a statement --

QUESTION: But does it give you the moral statement you want? I guess that is the --

MR. KURZBAN: Well, in part, yes, but also because the Eleventh Circuit here has made a statement saying the constitution does not apply, and what we are asking is that that decision be --

QUESTION: What if we added to that a statement saying the Eleventh Circuit reached a constitutional question it never should have reached, took the view of the concurrence and dissent, but entered an injunction saying obey the regulation? Would that not give you everything you want?

MR. KURZBAN: Under what standard?

QUESTION: Under the standard set forth in the

regulation.

QUESTION: Just obey the regulation.

MR. KURZBAN: Well, the problem here is that the Eleventh Circuit also remanded it back on a facially legitimate and bona fide standard. If that is going to be the standard of review, I would submit to the Court that that is not adequate to protect against race or nationality discrimination.

That is the problem here. We don't just have the Eleventh Circuit remanding it back on a general standard. They remanded it back on a very, very narrow standard which --

QUESTION: My question didn't -- say we vacate everything they did, and we say, this is the injunction to enter. Obey these regulations. Tell the District Court to enter an injunction to obey these regulations. Wouldn't that give you all the relief you want? And we vacate everything -- I am not suggesting we do this, but I am trying to get the question out. Would not that protect you if we did that?

MR. KURZBAN: Would it be covered with declaratory relief I think is the question.

QUESTION: It would say nothing about the answer to the constitutional question, on the theory that we don't answer constitutional questions unless we

have to.

MR. KURZBAN: I think given the history of discrimination here, given that continuing pattern and practice of discrimination, that it is necessary for this Court to issue a declaration making it clear that under the Constitution no race and nationality discrimination isbpermissible.

The record in this case indicates an overwhelming pattern of race and nationality discimination. That race and nationality discrimination has been wholly unregarded by the government on the record of this case except for mere protestations of innocence.

The statistical evidence demonstrated a stark pattern of race and national origin discrimination wholly unrebutted by the government, but statistics alone were not at issue here. Petitioners presented documentary evidence, testimonial evidence, all of it going to the question of both race and national origin, and all of it unrebutted by the government.

The government's arguments in this case are largely arguments that are not in response to the issues presented on the facts of this record. The government suggests that finding the Constitution applicable will affect the sovereign power to control our borders.

We are not seeking from this Court any determination about any substantive review of any individual parole decision. What we are seeking merely is the equal enforcement of the statutes as Congress and the President have promulgated.

If tomorrow the Congress were to pass a statute that said no one shall be paroled, that is not the case before this Court. However, here, beginning in 1954, Congress passed a statute that said you made parole.

That statute, from 1954 to 1981, was enforced in a way that allowed people to be paroled if they were not likely to abscond or were not a security risk. In 1981, when the policy changed after 27 years, that policy was applied in a discriminatory manner to Haitians and Haitians alone.

The government contends here that both the Congress and the President have broad powers under the Immigration and Nationality Act. We are not contesting that here today. This is a situation where Congress, the President, and indeed even the Attorney General made it clear that the statute, 1182(d)(5), should be enforced in a facially neutral way.

The government has argued that due process does not augment the statutory rights to admission.

This is not an admissions case. This is a case, as Congress has made it perfectly clear in 1182(d)(5) that separates out something we call parole from admissions. Parole is a temporary release until a final determination is made about admissions.

The government contends that nationality discrimination can be drawn in the formulation of policy. This is not a question about policy. This is a question about enforcement, and even the language that the government quotes from Galvan versus Press when Justice Frankfurter said, "We are not writing on a clean slate but 100 years of history," even there Justice Frankfurter made it perfectly clear that when it comes to the enforcement of the immigration statutes, due process applies.

The United States Congress in 1965 made it perfectly clear that they would abolish all nationality distinctions in the Immigration and Nationality Act. In 1980, they reaffirmed that principle with respect to refugees, and in 1967 we agreed and became signatories to the United Nations Convention and Protocol with respect to the status of refugees which in Article 3 has a non-discrimination provision.

The government contends here that judicial review under the Constitution will somehow affect its

powers, but this Court, Justice Powell in Fiallo versus Bell made it very clear in Footnote 5 that even in the question of Congress's power to act on matters of admission, even on those questions, it will be subjected to a constitutional standard.

Finally, the government contends that Shaughnessy versus Mezei controls this case. In Shaughnessy versus Mezei, the question of admission was really the question at issue in that case. To release Mezei was the equivalent of granting him the admission that the Attorney General had already determined that he could not get.

In Mezei the Attorney General had made a decision. He had decided in that case that the alien was excludable on national security grounds and on the facts of that case to allow him them to assert a procedural due process right to be released would have the effect of reversing the determination that he was an excludable alien.

Shaughnessy versus Mezei was also determined before this Court made its determination in Bolling versus Sharpe. It was determined before the Fifth Amendment was found to be a source of equal protection. Equal protetion was never raised in any case.

Finally, I note, as Justice O'Connor

implicitly, I think, noted in Landon versus Plasencia, that the scope of Mezei is in some doubt, and I think it is in some doubt because in reality on the facts of Mezei, Mezei was really a returning resident to the United States.

He had lived in the United States for many years, and he was returning. This Court in Landon versus Plasencia said that even though an alien will be treated as an excludable alien who is a returning resident, he is still entitled to due process protections.

We submit to the Court that the issue at stake here is the same issue of equal protection and equal justice under law that this Court has recognized in a variety of contexts, and particularly in Truax v. Corrigan, where this Court said that the whole system of our law is based on the fundamental and general principle of the equal applicability of the law. That is what this case is about.

Your Honor, I would like to reserve the remainder of my time.

CHIEF JUSTICE BURGER: Mr. Solicitor General.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. LEE: Mr. Chief Justice, and may it please

the Court, I assume that it goes without saying that there is no warrant to vacate the judgment of the Court of Appeals for the Eleventh Circuit in this case.

It is very clear from the record in this case that simply governmental discrimination was urged both before the panel and also before the en banc court, and it was only the shift that was made really before this Court and that came out during the oral argument before the Eleventh Circuit that Mr. Kurzban is now emphasizing the difference between the statutory remedy and the constitutional remedy.

In any event, the Court of Appeals for the Eleventh Circuit has clearly stated the law with respect to the authority of the Attorney General and the Congress to parole pending the determination whether toadmit or to exclude, and the petitioners should not by their own change of position be permitted to achieve a vacation of that correct determination of the law.

Let me say that we strongly disagree with the assertions that the government has not contested the allegations of national origin and racial discrimination. It did. There was a six-week trial on that issue, and the District Court made a finding that there was no discrimination, but the real point for present purposes is that those allegations of national

origin distinctions are irrelevant.

The reason is, and the whole case comes down to the fact that the same rules that this Court has pronounced over a period of more than a century applicable to the decision whether to admit or to exclude are also both from considerations of the practical necessities of the parole decision and also by the square holding of this Court in Mezei, which has not been overruled, required to be judged by the same standards.

What I propose to do is to develop first those rules that pertain to the entry decision, whether the alien is to be admitted or excluded, and then to develop our argument that the same rules apply to parole.

QUESTION: Well, Mr. Lee, the District Court made its fact findings of no discrimination. The panel of the appellate court set that aside, and disagreed with those findings. Now, shouldn't the Court of Appeals en banc have determined the fact issue or at least remanded it if it thought additional facts should have been found rather than reaching the constitutional issue?

MR. LEE: No. What the en banc Court of Appeals did was exactly right for two reasons. One is that it simply held that those allegations were

irrelevant, and for reasons that I am about to develop, that holding was absolutely right.

Second, even as a fallback position under the rules -- I believe it is Rule 26 of the Court of Appeals for the Eleventh Circuit -- it is cited in our brief -- the granting of a suggestion of rehearing en banc automatically vacates the Court of Appeals opinion, that is, the panel opinion, so that the panel's --

QUESTION: Well, I guess I just don't understand why the constitutional issue should be resolved if it can be resolved on the basis of the statute and the implementing regulations.

MR. LEE: Well, I am not sure that I have any serious disagreement with you. All I am saying is that in the process, since it was our friends who asked the Court to resolve that issue that that panel -- excuse me, the en banc opinion not be vacated, because clearly it should not be vacated.

QUESTION: General Lee, you say as I understand it the reasoning of the en banc court was that these allegations of national origin discrimination were irrelevant because the government has the power to engage in national --

MR. LEE: Precisely.

QUESTION: But if the court below had made

finding that there was no national origin discrimination, it seems to me that Justice O'Connor's question is very apt. Why don't you first address the findings and see whether you have to come to make a constitutional adjudication that they are irrelevant.

MR. LEE: Yes. That, of course, gets us back also to what I will refer to as the Ashwander point, whether it should be resolved on some non-constitutional -- whether the whole case should be resolved on some non-constitutional ground as opposed to the constitutional ground.

and normally that is the approach that ought to be taken, and certainly we would have no objection to the Court taking that approach in this case. I would simply point out in fairness that this case may different, because not only have the petitioners switched positions in midstream, but also, as I read it, the Ashwander approach is a discretionary approach that says that we are not going to reach constitutional issues unless we have to reach them, but it is not -- it may be in this particular instance that the Court might conclude, given the review of that District Court opinion, that the likelihood that that court is going to change its view is so remote that this Court should simply proceed immediately to affirm the holding of the

Court of Appeals for the Eleventh Circuit.

QUESTION: General Lee, before you get into the main part of your argument, I am still puzzled by part of the en banc court's disposition, which, as I read Page 330 of this appendix, it contemplates a remand to the District Court in order to determine whether the people in detention are properly detained, and as a part of that determination to decide whether there is any discrimination going on.

Why did they do that?

MR. LEE: I am not sure. It may have been on an assumption, Justice Stevens, that these 400 people to whom Mr. Kurzban referred, who have got to be post-Judge Spellman's entry arrivals, are part of the class.

Now, Judge Spellman has indicated in a footnote that that may not be the case, but it may be that the Court of Appeals assumed that they were part of the class, and therefore evidence could be introduced as to them.

QUESTION: Doesn't that imply an unwillingness to accept at face value the finding of no discrimination?

MR. LEE: Well, not necessarily, if you do assume that the class applies to these post-judgment arrivals, because there could be some additional facts --

QUESTION: Are the post-judgment arrivals the 400 people --

MR. LEE: They are, yes.

QUESTION: -- who are now in detention?

MR. LEE: Yes, because as to the pre-judgment arrivals, they were all released, because of the APA ruling.

QUESTION: Would you agree as to those 400 people that on remand it is appropriate to determine whether they are the victims of any improper discrimination?

MR. LEE: No, for a couple of reasons. One is --

QUESTION: So you don't sustain the judgment of the Court of Appeals?

MR. LEE: Well, I am just not sure what the Court of Appeals had in mind as to that particular aspect.

QUESTION: We shouldn't affirm something we don't understand.

(General laughter.)

MR. LEE: Well, it is just that particular -- it is just that particular -- there is --

QUESTION: Well, but the whole case, whether there is discrimination going on as to these 400

people. That is not a tag end.

MR. LEE: Well, except that the Court of Appeals did not decide the issue as to whether these 400 are or are not part of the class. They may have -- I say they may have assumed that they are part of a class. On the other hand, it may be that there is some other evidence other than the statistical evidence which had already been presented that the Court of Appeals anticipated might be introduced.

In any event, the Court of Appeals' approach is an analytically sound one. The question as to what additional evidence might come in is something that can be determined once the case gets back to District Court.

QUESTION: General Lee, I hate to back up on this, but is it true that we don't know whether the 400 are in here or not in?

MR. LEE: Well, the 400 are here. I would assume -- I don't know to whom Mr. Kurzban was referring, but I would assume they would have to be post-judgment arrivals, because the original members of the class were all released on parole because of the other aspect, because of the APA aspect of the ruling.

QUESTION: The 400 are here?

MR. LEE: Excuse me?

QUESTION: The 400 are here?

MR. LEE: Oh, you mean in this Court?

QUESTION: Yes.

MR. LEE: No, it is not clear that they are. They arrived after the lawsuit -- after the judgment was entered.

Starting with the Chinese exclusion case just about a century ago, this Court has consistently reasserted the distinction between the authority of the political branches over, on the one hand, aliens who have actually entered the country, even though the entry might have been illegal, and persons like petitioners who at least in a legal sense have not yet penetrated our borders.

The constitutional power of Congress and the Attorney General over aliens who have entered is very large. Over those who have not, it is a power that simply knows no counterpart in any other corner of our constitutional jurisprudence.

As the Court said a couple of terms ago in Landon versus Plasencia, an alien seeking admission to our shores has no constitutional rights regarding his application.

That does not mean that he is not a person under the consitution. Nor does it mean that he has no

constitutional protections. It simply means that the limited package of rights which he enjoys does not include rights with respect to the substantive decision whether it will be admitted or excluded.

It is a principle that is bottomed not only on Congress's constitutional power over immigration and naturalization, but also on the responsibility of the political branches over foreign affairs and national security.

The power to control entry is an inherent attribute of sovereignty for this or any other country. This nation has always been one of the most generous in admitting foreigners into our midst. Would that we could do more.

QUESTION: General Lee, I hate to interrupt again.

MR. LEE: Yes.

QUESTION: This keeps running through my mind.

MR. LEE: Yes.

QUESTION: You are arguing that constitutionally you would not be inhibited from discriminating against these people on whatever ground seems appropriate. But as I understand your regulations, you are also maintaining that the

regulations do not constitute any kind of discrimination against these people, and you are already -- your agents in the field are inhibited by your own regulations from doing what you say the Constitution would permit you to do.

MR. LEE: That's correct.

QUESTION: Why isn't that the complete answer to the government's position? I mean, why do we have to go -- if you already are saying we are forbidden by law, not constitutionally, from discriminating, why do we have to go ahead and decide whether the constitution imposes a problem?

MR. LEE: You don't have to. The case, however, is not moot.

QUESTION: I understand that.

MR. LEE: What your question really goes to, Justice Stevens, is whether certiorari ought to have been granted in this case in the first place. We opposed it.

However, there has, in fairness to the Court, there has been nothing that has happened prior to the time that you disagreed with me on the circuit and as a consequence, since the case is here, since there hasn't been anything that has happened since the grant of certiorari, and since this very issue is one that

divided a panel and the en banc circuit, and since it is a question of very large importance to the administration of the immigration and nationalization laws, we would like to have the answer.

QUESTION: Thank you.

MR. LEE: Now, the real question, the real question then is whether this established right to exclude or to admit also applies to the parole stage. The answer to that question is yes for two reasons. The first one is that the rationale underlying the admission rule also requires that parole, whichin practical effect really is admission, be treated the same as exclusion.

And second, this Court has squarely held that they are to be treated the same. Prior to 1950 --

QUESTION: Mr. Lee.

MR. LEE: Excuse me.

QUESTION: In your view, would the Constitution provide any protections to people being detained pending parole as to the conditions of their detention?

MR. LEE: As I read this Court's decisions, Justice O'Connor, the answer to that question is yes. What Landon versus Plasencia said, and what I think the cases hold, is that the exclusion of their constitutional rights relates to the decision whether to

admit or not to admit, and of course the question here is, does that also extend to parole.

Prior to 1954, parole was rarely granted. Ellis Island functioned principally as a holding point pending admission or exclusion. But in 1954, we tried a new approach. The facility Ellis Island was closed. Parole was freely granted. And for more than two decades no serious problems resulted.

By the late 1970's, howver, aliens had begun to arrive in South Florida in such unprecedented and unmanageable numbers, including some 125,000 Cubans who arrived in the port of Mariel in the spring of 1980, that it was appparent to our national leaders that something had to be done.

In February of 1981, President Carter's specially appointed Select Commission on Immigration, consisting of Congressional representatives as well as --

QUESTION: Shortly after he left office?

MR. LEE: Well, the report was, but the appointment of the Commission, the appointment of the Commission occurred in 1980, and the report was issued in 1981.

That report concluded two things. One was that there was an immigration crisis that existed in the country, and the second was that there were two reasons

for it. One, the arrival of increasing numbers of aliens lacking required entry visas, and the post-1954 policy of routine paroles prior to admissions hearings.

The succeeding Administration continued the attempts to deal with this crisis, and a key element of the policy that it adopted, a policy which was recommended by the President's cabinet level task force, approved by the President and announced by the Attorney General, called for more restrictive use of parole, and increased use of detention.

In every meaningful respect, parole and entry are parts of the same whole, namely, the power of this nation to decide who will be permitted entry. There are good reasons for mainly this or any other nation to exclude some people, national security reasons, health and safety reasons, disease control, citizen employment, and others.

Those same reasons also apply to parole, because what is at issue in both contexts is exactly the same, whether aliens will be admitted into our national community without first making the necessary showing that they are entitled to enter.

The differences between parole and admission are differences of degree. Parole may be for a short time and it may be for a long time, but during the

interim, the same risks are at work that lead government to exclude until eligibility is established.

So long as the inflow is modest, those risks may be bearable, but when that reaches the crisis point, and when two successive administrations conclude that one of the reasons for the crisis is too loose standards being applied at the parole stage, then surely the Constitution does not prohibit the Congress and the Attorney General from preventing entry to those who have not proven their entitlement to enter.

This is not to say that the government's constitutional power over parole depends on the existence of a crisis. It is simply that our experience of recent years shows the wisdom of this Court's holding in Mezei that parole is a part of the admission exclusion holding.

The reason that Shaughnessy versus United States ex. rel. Mezei controls this case, and the reason that all of the petitioners' attempts to distinguish it are irrelevent are tied to the holding of that case that the decision whether to parole or not to parole is a part of the exclusion-admission total package, and therefore governed by the same judicial standard.

I submit that Mezei also shows the firmness and the universality of that rule, because if there were

ever to be an exception, a case whose peculiar facts would have justified treating the parole decision as something separate from the admission decision, would surely have been Mr. Mezei's case, because unlike the petitioners here, there was literally no other place in the world where he could go.

The petitioners stress the similarities between the parolee and the excludable alien, and the differences between the parole and the alien subject to deportation. They also rely on the holding in Leng May Ma v. Barber that a paroled alien did not lose her excludable status, and we agree. Parole is like exclusion. Our point is that it ought to be treated like exclusion, as it is under Mezei.

The petitioners' point, of course, is that since the parole is still excludable once paroled, the government does not give up a lot by extending parole, but that argument is multiply flawed.

First, the judgments concerning just how much the government gives up are judgments to be made by Congress and by the Attorney General. Second, this Court in Mezei squarely resolved the issue against the petitioners, and that holding is dispositive.

And finally, the petitioners are simply wrong as a matter of fact. There are good reasons not to

parole pending admission, and the petitioners' position is at odds with the findings and conclusions of two Presidential commissions in this respect.

The petitioners' efforts to distinguish Mezei are discussed in our brief. It was not called into question at all by Plasencia. In Plasencia, there was no issue of either exclusion or parole. Rather, the holding was simply that it was an exclusion hearing to which Ms. Plasencia was entitled.

I would like to discuss just one of the petitioners' bases for alleged distinction of the Mezei case, and that is that in Mr. Kurzban's words, this is a case about illegal discrimination, that this case is different because there is an allegation of national origin discrimination which in other contexts bring into play heightened judicial scrutiny.

The problem with that argument is that it comes about 13 years and three rounds too late, because that same argument that reliance by the excluded alien on constitutional positions which in other contexts entitle their beneficiaries to heightened scrutiny was attempted 13 years ago in Mandel, five years later in Fiallo, and rejected both times.

In Mandel it was First Amendment interests which were at stake, and in Fiallo classifications based

on legitimacy, both of which are entitled to heightened scrutiny.

Indeed, if anything, those were stronger cases against the government, because in both of those the argument in favor of the excluded alien also rested in substantial part, as Justice Marshall pointed out in his separate opinion in Fiallo, on the rights of citizens.

In Mandel, it was the acknowledged right of American citizens to receive, to hear Professor Mandel's thoughts and words. And in Fiallo, it was the rights of American citizens who were the kinfolk of the excluded aliens.

Nevertheless, the argument was rejected both times, and in Fiallo the Court was quite explicit as to the reason. The Court reasoned as follows, quoting from Justice Frankfurter's separate opinion in Harisiades: "The conditions of entry for every alien, the particular classes of aliens that shall be denied entry altogether," and then several others, "have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control."

Those judgments described by Fiallo, the conditions of entry for every alien, and the particular classes of aliens that shall be denied enty altogether

are the precise issues, the precise judgments at issue in Mandel, again in Fiallo, and again in this case.

QUESTION: General Lee, can I ask a question prompted by Justice O'Connor's question earlier? I think you have agreed that there is constitutional protection to the conditions of detention in the Eighth Amendment, for example.

MR. LEE: Yes, sir.

QUESTION: Does that mean that there will be constitutional protection to different -- choice among different alternatives? We talked about parole versus detention. I suppose there are different degrees of detention, different kinds of parole, and so forth. Are all of the decisions that are made regarding the person's fate so long as they don't violate the Eighth Amendment completely immune from constitutional --

MR. LEE: Well, I think so. The distinction that I would draw has to do with the distinction between judgments that pertain to whether or not the person does penetrate our shores temporarily or permanently.

QUESTION: Whether or not he can be totally excluded.

MR. LEE: Right.

QUESTION: But the decision to parole or to detain doesn't really affect the decision whether ot let

him in or not.

MR. LEE: Well, it is our position that they are identical, because the decision whether to parole or not to parole is really a decision whether to admit or not to admit. The only difference is a time difference.

QUESTION: But you wouldn't say that about the difference between solitary confinement and general population of the prison?

MR. LEE: Of course not, because those do not pertain to the judgment whether to admit or not admit. And that is the dividing line in my view, and I think --

QUESTION: Well, are they really identical, Mr. Lee, because presumably someone paroled could have parole revoked and then be excluded, could they not?

MR. LEE: Of course, and an alien once admitted can also have that admission revoked, and can be deported, but the point is, and I am merely faithfully reporting the decisions of this Court as I read them, the point is that the crucial distinction as announced by this Court in Landon versus Plasencia is rights pertaining to his admission, because the question is, is he to be held, so to speak, on the boat, and not permitted to enter until such time as we make a judgment whether he really fits the category of persons who are

entitled to enter, and that is what makes the difference between the exclusion cases and the deportation cases.

And with regard to those matters, exclusion and parole are part of the same package, both legally and also as a matter of practical operational fact.

Finally, the issue in this case really comes down to Congress's constitutional authority. What Congress has done is to establish a constitutional rule that -- or, excuse me, is to establish a statutory command that aliens are to be excluded, period, and then it gives to the Attorney General the discretion to determine in his discretion whether in certain instances parole or temporary admission should be granted.

Accordingly, the issue is not whether the petitioners are right or we are right concerning the likely risk of admitting aliens prior to the time that their entry decision is made. Rather, the question is whether Congress has the constitutional authority to make exclusion the general rule and then give the Attorney General the discretion to make some exceptions.

Given this Court's precedents, I submit that is simply not a closed question. As Justice Frankfurter sad in Galvan v. Press, and this Court has repeated frequently, we are dealing here not with merely a page

of history, but a whole volume, and that volume of history clearly puts parole into the same package with admission exclusion. That is exactly what this Court held in Mezei.

If there were ever to be an exception, it would have been in Mezei, and the judgment of the Court of Appeals should be affirmed.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Kurzban?

MR. KURZBAN: Thank you.

CHIEF JUSTICE BURGER: You have eight minutes remaining.

ORAL ARGUMENT OF IRA JAY KURZBAN, ESQ.,
ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. KURZBAN: Thank you.

Mr. Lee has said that in his view parole and exclusion are legally the same thing. I would remind him that his brief says just the opposite. His brief says that parole is not a legal admission into the United States. Indeed, that is exactly what Congress has said under 1182(d)(5). They are separate, and they are separate for very good reasons.

A temporary release of somebody from parole as it was established between 1954 and 1981 was for a series of reasons mostly beneficial to the government in

terms of cost, but also, as this Court said in Leng May Ma, showing the enlightenment of our society in temporarily paroling people pending a determination of their admission.

Parole does not grant an admission, and indeed it is really under the government's control, sole control as to how fast they bring an alien to a hearing after he has been paroled. It is up to the government to decide whether or not, after paroling somebody for two days, whether or not they wish to give them an exclusion hearing, or two months, or two years, but they are not the same.

Mr. Lee cites Mandel and Fiallo. I would remind him that even where Congress has stated and even where Congress has made a determination as to admission, it was reviewed under a constitutional standards. Mandel implicated clearly the question of admission and a narrow window of discretion by the Attorney General after Congress had spoken clearly on an exclusion. Fiallo involved an Act of Congress, and even there it was reviewed by the Constitution.

The government would attemp here to extend Mezei to cover the issue of discrimination. Just last week, this Court in United States versus Waite, in an analogous situation, said, even though questions of

parole -- I am sorry. Even though questions of whether or not to prosecute are reviewable only under the most narrow standard, and may in fact be wholly committed to agency discretion, even those questions when confronted by a claim of discrimination such as race discrimination, that the standard is different.

That is what we have here. This is not a case where you would apply a very narrow standard because it implicates admission. Here the standard, because it is a question of race discrimination, as this Court found just last week in United States versus Waite, it would be a different standard, and in Waite Justice Powell said that equal protection under the Fifth Amendment, that our approach, the approach of this Court, of equal protection under the Fifth Amendment is precisely the same as equal protection under the Fourteenth Amendment.

I would like to go back a minute on the question of remand, because I think there is some confusion here. The class in this case consists of 1,700 petitioners who have been released and 400 petitioners who are presently in detention.

The standard on remand by the en banc court gives no relief whatsoever to the 1,700 petitioners who have been released. To the 400 petitioners who are

presently in detention, it provides an impermissibly narrow standard in the context of race and nationality discrimination.

It applies a standard of facially legitimate and bona fide. While appropriate in the context of Fiallo versus Bell or in the context of Kleidienst where the Attorney General was acting just as in Waite, it is inappropriate in the context of race and nationality discrimination.

We seek injunctive relief, and we seek declaratory relief because this case arises not in a vacuum, Your Honor, but under a situation of a continuing pattern and practice of discrimination. This is not an isolated case. The record in this case demonstrated through the testimony of two former general counsels of the Immigration and Naturalization Service, through the testimony of immigration lawyers, through the government's own documents, that this pattern and practice of discrimination has continued for a period of ten years.

QUESTION: Mr. Kurzban, the District Court found otherwise, and the en banc court remanded for findings on whether there was discrimination. How do you interpret the en banc court's finding -- remand?

MR. KURZBAN: I interpret the en banc court as

merely paying lip service, Your Honor, because they --

QUESTION: Lip service to what?

MR. KURZBAN: Lip service to the question of race and nationality discrimination, because while making a broad holding on the constitutional grounds, then gave a very narrow standard of review, the facially legitimate and bona fide standard, and under that standard mere protestation of innocence, for example, may be enough.

This Court has said when it comes to the facially legitimate and bona fide standard that we will not look behind the exercise of discretion. Just from a practical point of how we would prove a discrimination case on remand, from a very practical point, we cannot look behind that exercise of discretion.

If immigration officials on remand were to say, well, we did this because we did not discriminate, or we did this because we believed that there was some deterrent, under the standard enuncicated in Kleindienst versus Mandel, which are appropriate when the Attorney General may act or appropriate when Congress may pass a law, would prevent us here from actually going back and proving in a record through discovery that discrimination still exists.

QUESTION: May I ask if you view this as

related just to the 400 subsequent arrivals?

MR. KURZBAN: No, Your Honor, not at all, because the en banc court also vacated the injunction that prevented the government from redetaining the 1,700 Haitians who have been released. The government is free now, and if the Court --

QUESTION: Do you think the hearing on remand will encompass everybody?

MR. KURZBAN: No, the hearing on remand is constituted by the Eleventh Circuit, made it very clear that it only pertains, only pertains to the 400 people who are in detention.

QUESTION: And are they all subsequent arrivals?

MR. KURZBAN: Some -- most are, but some aren't. Some are redetained.

QUESTION: I see. And they are all members of the class?

MR. KURZBAN: Those 400 and the 1,700 are all members of the class.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:55 o'clock p.m., the case in the above-entitled matter was submitted.)

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:

#84-5240 - MARIE LUCIE JEAN, ET AL., Petitioners V. ALAN NELSON, COMMISSION, IMMIGRATION AND NATURALIZATION SERVICE, FT AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)