

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

ORIGINAL

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 85-2067

**TITLE** UNITED STATES, Petitioner V. JOSE MENDOZA-LOPEZ AND ANGEL  
LANDEROS-QUINONES

**PLACE** Washington, D. C.

**DATE** March 3, 1987

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, :

4 Petitioner, :

5 V. : No. 85-2067

6 JOSE MENDOZA-LOPEZ AND ANGEL :

7 LANDEROS-QUINONES :

8 Washington, D.C.

9 Tuesday, March 3, 1987

10 The above-entitled matter came on for oral  
11 argument before the Supreme Court of the United States  
12 at 1:53 o'clock p.m.

13 APPEARANCES:

14 CHRISTOPHER J. WRIGHT, ESQ., Assistant to the Solicitor  
15 General, Department of Justice, Washington, D.C.; on  
16 behalf of the Petitioner.

17 KATHY GOUDY, ESQ., Lincoln, Nebraska; on behalf of  
18 the Respondent, appointed by this Court.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument next in No. 85-2067, United States versus Jose Mendoza-Lopez and Angel Landeros-Quinones. . .

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

ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT, ESQ.,  
ON BEHALF OF THE PETITIONER

MR. WRIGHT: Mr. Chief Justice, and may it please the Court, the question presented is whether defendants prosecuted under 8 USC 1326 for reentering the United States following a deportation may collaterally attack the deportation proceeding in the criminal prosecution.

The two respondents were arrested by agents of the Immigration and Naturalization Service in October, 1984, in Nebraska. At an immigration hearing in Denver with eleven other aliens they were given a list of free legal services and advised that the proceeding could be delayed if they wished to contact counsel. They waived their right to counsel.

The immigration judge questioned each alien at the hearing. Respondents both admitted that they were citizens of Mexico, that they had entered the United States unlawfully, and that they were subject to

1 deportation. The immigration judge advised both  
2 respondents that they were eligible to apply for  
3 suspension of deportation because they had been in this  
4 country more than seven years. The judge explained that  
5 to qualify for suspension of deportation an applicant  
6 must show that he is of good moral character and that  
7 severe harm would be suffered by a member of the  
8 applicant's immediate family if he were deported.

9 The judge also stated that the respondents  
10 could have five days to apply for suspension of  
11 deportation. Both respondents decided not to apply for  
12 suspension of deportation.

13 QUESTION: Mr. Wright how effective is that  
14 information? Does the attorney general grant relief in  
15 many cases?

16 MR. WRIGHT: No, suspension of deportation is  
17 discretionary matter .

18 QUESTION: Does he ever grant relief?

19 MR. WRIGHT: Yes, he does, most commonly if  
20 indeed a spouse of the alien is an American citizen.

21 The immigration judge ordered that both  
22 respondents be deported. He asked whether they wanted  
23 to appeal his order, whether they wanted to accept his  
24 order, or whether they wanted to reserve decision.  
25 Respondents both accepted the order and waved their

1 right to appeal. They were deported to Mexico two days  
2 later.

3 QUESTION: Mr. Wright, what would have  
4 happened if one of them had said, yes, I think I would  
5 like to appeal? Would they be deported nonetheless? Or  
6 would they remain here pending the appeal? Or what  
7 happens?

8 MR. WRIGHT: They would remain here pending  
9 appeal. One of the respondents asked whether or not  
10 they would be released on bond pending the appeal, and  
11 was told that there would have to be a proceeding to  
12 determine what the amount of the bond should be.

13 QUESTION: So the person might have to remain  
14 in custody pending the appeal?

15 MR. WRIGHT: That's right.

16 QUESTION: Both respondents were given forms  
17 at the border stating that they would be subject to  
18 felony prosecution if they returned without obtaining  
19 the attorney general's permission. Respondents --

20 QUESTION: Both of these respondents, then,  
21 Mr. Wright, did in fact leave the United States?

22 MR. WRIGHT: Both did. Six weeks later,  
23 however, both were arrested in Lincoln, Nebraska. They  
24 were charged under Section 1326.

25 QUESTION: From whence had they been

1 deported?

2 MR. WRIGHT: From El Paso, Texas, into  
3 Mexico.

4 QUESTION: From El Paso.

5 MR. WRIGHT: Respondents sought to dismiss the  
6 indictments, contending that their deportation  
7 proceeding had been conducted unlawfully. The District  
8 Court first considered whether respondents could  
9 collaterally attack their deportation proceeding, noting  
10 that the circuits are split on the issue and that this  
11 Court has not decided the question. It decided that  
12 collateral attack is permitted at least to the extent  
13 that the court could review the deportation proceeding  
14 prior to trial.

15 The District Court then concluded that while  
16 the immigration judge had complied with the regulation  
17 requiring that he inform respondents that they were  
18 eligible to apply for suspension of deportation, that  
19 respondents were not in a position to evaluate  
20 intelligently that option.

21 The court also found that respondent's  
22 decisions not to appeal were not considered judgments.  
23 On that basis, it concluded that the hearing was  
24 fundamentally unfair and dismissed the indictments. A  
25 divided Court of Appeals affirmed.

1 QUESTION: That was Judge Irbaum?

2 MR. WRIGHT: Yes, it was.

3 QUESTION: And you have conceded that.

4 MR. WRIGHT: We have.

5 QUESTION: That it was fundamentally unfair?

6 MR. WRIGHT: We have not raised -- I am sorry,  
7 we haven't conceded, we have not raised the issue before  
8 this Court whether the hearing was conducted properly.

9 QUESTION: You want us in our decision to  
10 assume it was fundamentally unfair.

11 MR. WRIGHT: That's correct. The Court of  
12 Appeals sided with those circuits that hold "that a  
13 material element of the offense prohibited by Section  
14 1326 is a lawful deportation." The court found that  
15 this Court's decision in Lewis, where the Court held  
16 that a defendant prosecuted for being a felon in  
17 possession of a firearm may not collaterally attack  
18 their felony convictions is not analogous. The Court of  
19 Appeals --

20 QUESTION: What does it mean to assume that it  
21 is fundamentally unfair? That is what troubles me. Are  
22 you asking us to say that so long as somebody is  
23 deported no matter what the unfairness in the hearing  
24 was? I mean, suppose two FBI agents just show up and  
25 say we are federal agents, we are going to deport you,

1 and they have no authority whatever, and they will say,  
2 we will give you a hearing right now, and they give them  
3 a quick hearing, and they decide they are going to  
4 deport them. They take them to the border and deport  
5 them.

6 Is that fundamental unfairness embraced in the  
7 kind of fundamental unfairness you want us to assume?

8 MR. WRIGHT: No, in that case the elements of  
9 the crime prohibited by Section 1326 are reentry after a  
10 deportation. Your facts do not amount to a  
11 deportation.

12 QUESTION: What amounts to a deportation?

13 MR. WRIGHT: You have to go before an  
14 immigration judge, who signs an order of deportation  
15 ordering you to be deported. You can always say in a  
16 prosecution under Section 1326 that I wasn't deported.  
17 An element of the crime is that you are deported.

18 We are conceding that the deportation hearing  
19 was conducted improperly, the specific impropriety found  
20 here was that suspension of deportation was not  
21 adequately explained to the two respondents.

22 QUESTION: Well, what if there was bias on the  
23 part of the administrative judge, the immigration  
24 judge? I mean, he was a brother of the worst enemy of  
25 one of them, and it was clearly just a rump proceeding?

1 You would want us to assume that, too? Any kind of  
2 procedural irregularity whatever in the deportation  
3 proceeding?

4 MR. WRIGHT: It is our position that the  
5 alien's options are to appeal to the Board of  
6 Immigration Appeals and then to the Court of Appeals or  
7 failing that, that they can apply to the attorney  
8 general for permission to reenter the United States  
9 following a deportation.

10 QUESTION: But you wouldn't think that even a  
11 so-called gross miscarriage of justice in the course of  
12 a 1326 proceeding could be raised?

13 MR. WRIGHT: That's correct. It is our  
14 position that it can't be raised there, that the correct  
15 approach is to raise it on appeal or to apply for  
16 permission to reenter.

17 QUESTION: How about if the right to appeal  
18 was not known by the person deported and therefore the  
19 waiver of the appeal was invalid? That can't be  
20 raised?

21 MR. WRIGHT: Of course that could be appealed,  
22 raised on appeal to the Board of Immigration Appeals.  
23 Now, your particular example, of course, the alien  
24 wouldn't raise it because the hypothetical is that they  
25 weren't told of that. It is our position that the alien

1 may still not take the self-help remedy of re-entry,  
2 that the proper course is to apply for permission to  
3 reenter, and if the alien has an argument that would  
4 justify suspension of deportation, for example, he would  
5 have an argument that would justify permission to  
6 reenter, and that is the proper course. Self-help --

7 QUESTION: Do you take the position that there  
8 are absolutely no due process limitations to the  
9 enforcement of Section 1326?

10 MR. WRIGHT: That's correct.

11 QUESTION: Mr. Wright, there is certainly some  
12 authority that at least when you are talking about a  
13 District Court Judge, which I take it is every bit as  
14 sacrosanct as an immigration officer judgment, that if  
15 you would find actual bias on the part of the judge,  
16 that could be set aside after the judgment has become  
17 final. Would you include these within the rubric of  
18 what you are talking about?

19 MR. WRIGHT: We don't think these should be  
20 raised in 1326. These sorts of terrible hypotheticals  
21 we would think would be good reason for a Court of  
22 Appeals to reopen the deportation proceeding and order  
23 that a new proceeding be held.

24 QUESTION: Or the Immigration Board of  
25 Appeals.

1 MR. WRIGHT: Certainly the Board of  
2 Immigration Appeals one would hope would do it before a  
3 Court of Appeals did it on the direct appeal.

4 QUESTION: What direct appeal? He has been --  
5 If you assume he has been done out of his right of  
6 appeal by this biased judge who never even informs him  
7 of his right of appeal, and then he is out of the  
8 country, there is really no way he can get the matter  
9 before the court any more unless the attorney general  
10 lets him back in in his grace, right?

11 MR. WRIGHT: Well, it is more difficult to  
12 appeal from a foreign country. It is not impossible.

13 QUESTION: You can do that?

14 MR. WRIGHT: The case of Mendez cited in our  
15 brief is an example where an alien did that and we would  
16 think that in these sort of terrible hypothetical  
17 situations that the proceeding ought to be reopened, but  
18 that is what we think the course ought to be, that the  
19 deportation proceeding ought to be reopened on appeal,  
20 or that permission to reenter should be sought from the  
21 attorney general, but that it shouldn't be raised  
22 following reentry in a criminal prosecution for unlawful  
23 reentry.

24 QUESTION: As I understand the Court of  
25 Appeals opinion it was not based really on the finding

1 that there were due process violations in the hearing.  
2 They simply said you can collaterally attack this, and  
3 then went on to say, we think the collateral attack  
4 should be sustained here. They didn't base it on any  
5 extreme denial of due process in the hearing. They just  
6 say you can collaterally attack it for any number of  
7 reasons. Isn't that correct?

8 QUESTION: That's correct, and while the  
9 District Court said fundamentally unfair here, the  
10 irregularity that he identified was failure to explain  
11 adequately the requirements of suspension of  
12 deportation.

13 QUESTION: Yes, and really that is all we have  
14 to decide here is whether on these facts that can be  
15 collaterally attacked.

16 MR. WRIGHT: Well, that is correct. The logic  
17 of our position, as I think the questions have brought  
18 out, is that collateral attack simply isn't authorized  
19 in prosecutions under Section 1326, however.

20 QUESTION: Mr. Wright, if the deportation had  
21 been at gunpoint you would still be making the same  
22 argument, wouldn't you?

23 MR. WRIGHT: Well, I am not sure whether you  
24 would have a deportation at gunpoint. That would be the  
25 same sort of — if somebody just throws you across the

1 border, that is not a deportation. That can be raised.

2 QUESTION: You require a hearing before an  
3 immigration judge of some sort?

4 MR. WRIGHT: Again, who signs an order of  
5 deportation.

6 QUESTION: Who signs an order.

7 MR. WRIGHT: That is a deportation.

8 QUESTION: Is it if it is so -- I mean, maybe  
9 we are playing on words. Say it is so terribly unfair,  
10 say the Judge is biased and he doesn't let any witnesses  
11 come in, and when he enters the order he pulls out a gun  
12 and takes the man across the border himself, so could it  
13 be so bad that it would be void, and therefore not a  
14 deportation? When is it a deportation and when it is  
15 not? I guess that is the issue.

16 MR. WRIGHT: Well, I would -- well, I don't  
17 really think -- that is certainly not the issue here.  
18 If the Court wanted to preserve a gross miscarriage of  
19 justice exception as courts did before 1952, that  
20 certainly could be done.

21 QUESTION: If you preserve that, then you have  
22 to ask the question whether this was a gross miscarriage  
23 of justice, and I think you don't want us to even be  
24 asking that.

25 QUESTION: Well, I am happy if you wanted to

1 consider that, because clearly this was not a gross  
2 miscarriage of justice.

3 QUESTION: But you know, you just change the  
4 facts a little, you didn't tell them about appeal, they  
5 didn't have a translator there. I mean, you can  
6 gradually move along the line, and do you get to a point  
7 where you might say that, well, this one is so bad we  
8 would admit it is "void" or it is not a "deportation"  
9 because it was so bad. I am not quite sure what your --

10 MR. WRIGHT: Well, I wouldn't get to that  
11 point, and I think the virtues of a clean rule that you  
12 can't reenter and you can't raise the issue on reentry  
13 have those obvious virtues.

14 QUESTION: But the really clean rule even  
15 covers the FBI agents case.

16 MR. WRIGHT: Well, no, because that is not a  
17 deportation.

18 QUESTION: Well, an official of the government  
19 said I am hereby deporting you, and I am signing a piece  
20 of paper that says you are deported, and then he takes  
21 him across. Why isn't that a deportation?

22 MR. WRIGHT: I think a deportation order has  
23 to have some meaning and must be signed by an  
24 immigration --

25 QUESTION: The procedure must be regular on

1 its face or something like that? The procedure must be  
2 regular on its face?

3 MR. WRIGHT: I think there has to be a  
4 deportation order signed by an immigration judge.

5 QUESTION: Well, after a proceeding?

6 MR. WRIGHT: I will settle for -- well, there  
7 certainly ought to be a proceeding.

8 QUESTION: But anyway the statute says how you  
9 deport somebody, doesn't it?

10 MR. WRIGHT: There are certainly regulations  
11 that cover that in some detail.

12 QUESTION: And they have the force of law, I  
13 suppose, or what? So you have to have an immigration  
14 judge and he has to sign a piece of paper. Does he have  
15 to act in accordance with the outlined procedure?

16 MR. WRIGHT: Well, of course he does, and of  
17 course if he doesn't --

18 QUESTION: What if he doesn't?

19 MR. WRIGHT: If he doesn't, then you should  
20 appeal and the Board of Immigration Appeals should  
21 correct the error, and if the Board of Immigration  
22 Appeals doesn't correct the error, the Court of Appeals  
23 should.

24 QUESTION: Well, I know, but if you haven't  
25 followed the procedures that the statute or the

1 regulations say lead to a valid deportation, it isn't a  
2 deportation.

3 MR. WRIGHT: Well, that brings us to the  
4 question of whether Section 1326 has anything to do with  
5 valid deportation. And it is our position that the  
6 language of the statute on its face says nothing about  
7 the lawfulness or the validity of the deportation. It  
8 simply says a deportation. We think that the absence of  
9 any requirement on the face of Section 1326 supports our  
10 argument, that is, the fact of the deportation and not  
11 its reliability that Congress intends to be at issue in  
12 a prosecution under Section 1326.

13 QUESTION: What if an immigration officer  
14 simply picks up several illegal aliens in one of these  
15 sweeps or raids that they conduct occasionally and  
16 simply takes that person with that person's consent to  
17 Tijuana or wherever else on the border. Is that a  
18 deportation?

19 MR. WRIGHT: No, that is not a deportation.  
20 Indeed, an alien who is granted voluntary departure  
21 after being brought before an immigration judge has not  
22 been deported and is not --

23 QUESTION: So the deportation connotes a  
24 formal order directing you to leave the country. Is  
25 that it?

1 MR. WRIGHT: Followed by the government  
2 actually removing you from the country.

3 QUESTION: Mr. Wright, Isn't there still the  
4 question as to -- at the original time as to whether  
5 they were adequately explained the special appeal that  
6 they could have made to the attorney general? Isn't  
7 there still a question on that?

8 MR. WRIGHT: That hasn't been raised here.

9 QUESTION: Well, I thought the trial judge in  
10 this case said so.

11 MR. WRIGHT: No, the trial judge here only  
12 found that the suspension of deportation rules were not  
13 adequately explained.

14 QUESTION: That is what I am talking about.  
15 That is what I said.

16 MR. WRIGHT: Yes, that is the issue, whether --

17 QUESTION: That is still here as to whether he  
18 did adequately explain it?

19 MR. WRIGHT: Right, although we did not raise  
20 that issue in our petition.

21 QUESTION: But it is still here, isn't it?

22 MR. WRIGHT: It is still there.

23 QUESTION: Mr. Wright, is it customary for the  
24 service to allow a voluntary departure if the illegal  
25 immigrant just says, you know, you got me, it is no use

1 going through the hearing? What do they usually --  
2 because otherwise you may be giving away the store  
3 here. It would seem to me to pay every immigration who  
4 is caught to say don't try me, just let me go and I will  
5 depart quietly, and then he comes back in and you can't  
6 apply the --

7 MR. WRIGHT: Yes. Well, the alien has to  
8 prove that he has either money or a ticket to leave the  
9 country.

10 QUESTION: All right.

11 MR. WRIGHT: An immigration judge won't allow  
12 voluntary departure unless that requirement is met. And  
13 the immigration judge won't allow it if the alien has  
14 done that before. In this case, for instance, there  
15 were 13 aliens. Two of them asked for voluntary  
16 departure. One was granted. One was denied because he  
17 had been granted voluntary departure before, and while  
18 he had ultimately left, he had only done it after he had  
19 been sent about five letters saying your time has run  
20 out.

21 QUESTION: I see, so you can get three bites,  
22 really. That is, the first time you just don't contest  
23 the deportation, say I will leave quietly, right? The  
24 second time you are caught you do contest it because  
25 they won't let you leave quietly and they deport you.

1 And then it is only the third time that the criminal  
2 statute would apply right?

3 MR. WRIGHT: Under those facts that is right I  
4 is not absolutely clear that an immigration judge would  
5 grant you voluntary departure the second time.

6 QUESTION: Let me just be sure I understand  
7 one thing. If he does grant voluntary departure, and  
8 the alien returns without permission, he has not  
9 violated 1326?

10 MR. WRIGHT: That's right. He hasn't been  
11 deported.

12 QUESTION: He hasn't been deported.

13 MR. WRIGHT: We think that Section 1326 is  
14 analogous to the federal statute at issue in Lewis and  
15 the federal statute that prohibits escape from federal  
16 custody. In both of those cases it is the fact of the  
17 prior proceeding and not its reliability that is at  
18 issue in the prosecution either for possession of a  
19 firearm or for escape from federal custody, and the  
20 courts all agree that collateral attacks are not allowed  
21 in those circumstances.

22 QUESTION: There is no penalty for illegally  
23 entering the United States unless you have been  
24 previously deported?

25 MR. WRIGHT: No.

1 QUESTION: The first time you pick up an  
2 illegal alien all you can do is deport?

3 MR. WRIGHT: No, that is what almost always  
4 happens. Eight USC 1325 makes it a misdemeanor to enter  
5 the United States unlawfully.

6 QUESTION: I see. I see.

7 MR. WRIGHT: And we think there is no question  
8 but that Congress can prohibit unlawful entry as it  
9 has. Accordingly it seems to make it even more clear  
10 that Congress can make criminal entry into the United  
11 States under certain circumstances, and that is all that  
12 Congress has done here. It has made criminal -- it has  
13 made unlawful entry following a deportation a felony  
14 subject to two years imprisonment. It seems plain to  
15 that Congress could make it unlawful to enter the United  
16 States and subject to a felony prosecution if you had  
17 polio. That is really all we think that Congress has  
18 done here.

19 The legislative history of Section 1326 makes  
20 it even more clear that it is the fact of the  
21 deportation and not its reliability that is at issue.  
22 The predecessor statute contained the phrase "in  
23 pursuance of the law." When Congress enacted Section  
24 1326 in 1952, it deleted that phrase from the statute.

25 QUESTION: That would lead me to think that

1 the FBI agent hypothetical would be covered. I just  
2 don't know how -- you are willing to read something into  
3 the statute but --

4 MR. WRIGHT: Well, I am sorry, I am --

5 QUESTION: Once you are willing to read  
6 something into it, why aren't you willing to read as  
7 much as the respondent would?

8 MR. WRIGHT: I am willing to read content into  
9 deportation, reentry into the United States following a  
10 deportation. Certainly if I grabbed someone and threw  
11 him out of the country, that is not a deportation, and  
12 it seems to me pretty simple to agree that an  
13 immigration judge ordering someone to be deported  
14 following by an actual deportation is a deportation, and  
15 that there is really not much to argue about on that.

16 QUESTION: There is a lot to argue about.  
17 Whether some other federal official acting under color  
18 of law purporting to be acting officially puts somebody  
19 on a boat, whether that is a deportation, I would think  
20 it could be called a deportation. So you acknowledge  
21 that you are willing to read something into the  
22 statute. You say no, it is not anything, it has to be  
23 pursuant to the legal formalities before an immigration  
24 law judge, so you are not really as virtuous in this  
25 thing not reading anything into the statute as you brief

1 makes out. It is just --- the quarrel is really over  
2 just how much you are going to read into it. That is  
3 all.

4 MR. WRIGHT: Well, I guess we give some  
5 content to the term deportation. We don't think that it  
6 has to be a lawful deportation beyond those very simple  
7 requirements that I have stressed. I wish I had said  
8 that in the brief.

9 I mentioned the fact that Congress deleted the  
10 phrase "in pursuance of law" in 1952. The ACLU filed an  
11 amicus brief contending that although Congress deleted  
12 that phrase it wanted to carry forward case law  
13 authorizing collateral attack. We showed in our reply  
14 brief that there was no such body of case law, but even  
15 if there were, deleting the language on which collateral  
16 attack would be based seems a most peculiar way to  
17 signal any intention to carry forward such a rule. The  
18 contrary conclusion, that Congress wanted to make clear  
19 that collateral attacks were not allowed, seems to me to  
20 be a much more reasonable reading of Congress's action.

21 The dissenting judge in the Court of Appeals  
22 and the Second Circuit in its opinion in Potrella noted  
23 that Section 1105(a) makes it especially clear that  
24 collateral attack is not authorized. None of the Courts  
25 of Appeals that have allowed collateral attack have

1 considered this provision. It was not clear under the  
2 1952 Act whether deportations order could be appealed.  
3 This Court held in 1955 that review was provided in the  
4 Courts of Appeals under the Administrative Procedure  
5 Act.

6 The lower courts approved other avenues for  
7 judicial review as well. Congress responded in 1961 by  
8 enacting Section 1105(a), which provides that appeal  
9 from the Board of Immigration Appeals to the Courts of  
10 Appeals is the "sole and exclusive procedure" for  
11 obtaining judicial review. That is an extraordinarily  
12 clear statement of Congress's intent. And it ought to  
13 be given force here.

14 Furthermore, Congress provided two exceptions  
15 to its rule that appeal from the board to the Courts of  
16 Appeals is the sole and exclusive procedure, and one of  
17 those exceptions, Section 1105(a)(A)(6), which provides  
18 for pretrial review and criminal prosecutions for  
19 failure to depart from the United States following an  
20 order of deportation makes it clear that Congress was  
21 thinking about collateral attack in criminal  
22 prosecutions when it enacted Section 1105(a) and that it  
23 recognized that absent an exception Section 1105(a )  
24 would bar collateral attack on deportation proceedings  
25 in criminal prosecutions.

1           But Congress made no exception for  
2 prosecutions under Section 1326. Therefore we think  
3 there is no such exception.

4           I would like to note briefly that we don't  
5 think that there is any reason to construe Section 1326  
6 contrary to its plain language and the language of  
7 Section 1105(a) to avoid a serious constitutional  
8 question. We think that those concerns were put to rest  
9 in Lewis, where the Court said that Congress could  
10 constitutionally focus on the fact of a prior proceeding  
11 and not its validity in denying a right to collateral  
12 attack.

13           This case is not meaningfully different from  
14 Lewis because the prior proceeding was administrative.  
15 Collateral attack is only useful when the prior  
16 proceeding is flawed in some way, and a flawed judicial  
17 proceeding is no better than a flawed administrative  
18 proceeding, we don't think.

19           In short, the respondents were deported and  
20 pulled when they were -- first they were given the right  
21 to appeal and they waived that right. They were then  
22 given a form at the border telling them that they  
23 couldn't reenter the United States without obtaining the  
24 attorney general's permission, and that they would be  
25 subject to a felony prosecution if they did return.

1           We don't think that there is anything unfair  
2 about denying them the -- about saying that they waived  
3 the right to appeal by waiving.

4           I would like to reserve the remainder of my  
5 time.

6           QUESTION: Thank you, Mr. Wright.

7           We will hear now from you, Ms. Goudy.

8           ORAL ARGUMENT OF KATHY GOUDY, ESQ.,

9           ON BEHALF OF THE RESPONDENTS

10          MS. GOUDY: Mr. Chief Justice and may it  
11 please the Court, I am here to argue that a deportation  
12 order which has not been previously reviewed in a  
13 judicial forum in any way can be looked at by a court  
14 before it becomes the predicate for a criminal  
15 conviction.

16          Such a review is permitted by the legislative  
17 history of Section 1326, the reentry after deportation  
18 statute, and it is also commensurate with the overall  
19 purpose of the Immigration and Nationalization Act. It  
20 is important to allow some procedure or format for such  
21 a review to determine whether the prior adjudication was  
22 after a full and adequate hearing. It is important to  
23 ensure that no gross miscarriage of justice occurred in  
24 that administrative hearing.

25          And the only way to ensure that is to allow

1 some examination of whether the applicable  
2 constitutional, statutory, and regulatory procedures  
3 were followed by the administrative judge.

4 QUESTION: Of course, the government says that  
5 clients like yours have an adequate opportunity to make  
6 that sort of a challenge if they just appeal from the  
7 order of the board or the immigration officer.

8 MS. GOUDY: In this particular case their  
9 rights of appeal ended within 48 hours after the  
10 hearing. The District --

11 QUESTION: Wasn't there a waiver, though?

12 QUESTION: What has that got to do with it?

13 MS. GOUDY: There was a waiver during the  
14 hearing. In this case the facts are pretty much  
15 intermeshed with the loss of their due process rights.  
16 The transcript which was provided the judge was  
17 unofficial. However, the tapes have been stipulated in  
18 of that hearing. When you listen to them you will hear  
19 that it is not like they are having the same  
20 conversation at all. The judge is saying one thing, the  
21 people are asking about bond. They are not following up  
22 on their questions when they try to enforce their  
23 rights. They don't --

24 QUESTION: Is that denial of due process to  
25 misunderstand the conversation between a judge and a

1 litigant?

2 MS. GOUDY: In this case it was found to be.

3 QUESTION: Well, do you say it is in this  
4 Court?

5 MS. GOUDY: When it goes to the extreme it did  
6 in this case, yes.

7 QUESTION: So even though they are given a  
8 right to appeal, you say they have still got to have  
9 this right to collaterally attack.

10 MS. GOUDY: They have a right to collaterally  
11 attack to determine if it was a serious violation of due  
12 process.

13 QUESTION: Even though they had the -- they  
14 could have done that by appeal.

15 MS. GOUDY: Yes.

16 QUESTION: I thought we took this case on the  
17 assumption that the defect below was in the failure to  
18 adequately explain the possibility of suspension by the  
19 attorney general of the deportation.

20 MS. GOUDY: That was one of the findings of  
21 the court in the main findings of a due process  
22 violation because of the serious harm that fell from  
23 that. They should not have been placed over the border  
24 if --

25 QUESTION: It was my understanding that their

1 right to appeal had been explained, and that no appeal  
2 was taken by those deported, by the respondents here.

3 MS. GOUDY: There is some language in the  
4 opinion that the right to appeal kind of got meshed in  
5 with the rest of the conversation that was going on.  
6 They did waive their right to appeal.

7 QUESTION: Yes.

8 MS. GOUDY: And when they were placed across  
9 the border, any future right to appeal ended at that  
10 point under Section 1105(a).

11 QUESTION: Do you think that the failure to  
12 explain the right of -- the possibility of suspension  
13 rises to the level of a gross miscarriage of justice as  
14 that term has been applied by this Court in earlier  
15 cases?

16 MS. GOUDY: In the facts of this case, because  
17 of the harm that was suffered by their failure to follow  
18 up on that suspension, yes, because they were -- there  
19 is no further right to appeal that deportation. To  
20 reenter the country they would have to get a visa. They  
21 lost their meaningful time, what was it, seven years, to  
22 get the suspension of deportation. Under the new Act  
23 they lost their chance for amnesty for the five years.

24 Because of the severity of the harm that  
25 occurred, yes, I do feel a gross miscarriage of justice

1 occurred in their deportation hearing.

2 What was filed in the District Court was a  
3 request for a procedural review of some sort of the  
4 actual deportation hearing. It was called  
5 alternatively a request for collateral attack,  
6 permission to bring up a collateral attack at the jury  
7 trial, and also a motion to suppress, in pursuant to  
8 Federal Rules of Criminal Procedure 12B. The thrust  
9 behind it was that it is impossible to learn if there is  
10 a gross miscarriage of justice unless there is some  
11 forum established to look at the facts, and that the  
12 criminal conviction must rest upon a lawful and adequate  
13 deportation order.

14 The deportation in this order was found by the  
15 Court to be unreliable. The Immigration Judge had  
16 acknowledged their eligibility for suspension of  
17 deportation and failed to act on their request.

18 Statute —

19 QUESTION: I don't understand. That doesn't  
20 mean that they weren't properly found to be illegal  
21 aliens. It just means that they weren't advised of the  
22 possibility of their appealing for a discretionary  
23 waiver of their deportation, right? It is entirely  
24 within the grace of the attorney general whether he  
25 would grant that, isn't it?

1 MS. GOUDY: Yes, the attorney general acting,  
2 too, as agent of the Immigration Service, yes.

3 QUESTION: I mean, it isn't as though they  
4 were entitled to be kept in the country. They only  
5 thing that they weren't told about was the possibility  
6 of their asking the attorney general to let them stay  
7 in. And that is what rendered it fundamentally unfair.

8 MS. GOUDY: Not necessarily entitled.  
9 However, Congress has put in the suspension of  
10 deportation statute. It is a law that allows you if you  
11 have been here seven years, even though you entered  
12 illegally, to remain here if you show you have been of  
13 good moral character and that it would cause severe harm  
14 to --

15 QUESTION: No, it doesn't allow you to stay.  
16 It allows the attorney general to allow you to stay if  
17 he wants to, doesn't it?

18 MS. GOUDY: If the application were processed,  
19 that is correct.

20 QUESTION: Yes. So, I mean, that is what I am  
21 having trouble with. Maybe there are some things that  
22 are fundamentally -- that render a proceeding  
23 fundamentally unfair. If something happened which  
24 caused the judge to find them deportable when they  
25 really weren't deportable, that might be something else,

1 but here really your only claim is, he should have told  
2 them that there was another avenue of discretionary  
3 relief that they might have pursued. Maybe he should  
4 have told them that, but I find it hard to say that that  
5 renders the deportation fundamentally unfair, and that  
6 is what you are arguing here. You are arguing a due  
7 process violation.

8 MS. GOUDY: I am arguing that the District  
9 Court should be allowed to review the facts of the  
10 deportation to see if there is a fundamental fairness.  
11 I am arguing whether they should be allowed to go back  
12 and look at the deportation at all.

13 QUESTION: Well, you are arguing that and the  
14 fact that there was fundamental unfairness. We wouldn't  
15 even have to reach the other question if we didn't see  
16 this to be fundamental unfairness.

17 MS. GOUDY: Right, the fundamental unfairness  
18 was found to be severe in that they wouldn't have gone  
19 across the border if they had been allowed to apply for  
20 the discretionary relief. If they wouldn't have gone  
21 across the border an appeal could have been filed under  
22 1105(a) under any of the formats available there. If  
23 they wouldn't have gone across the border, they might  
24 have their green cards today and be legal residents of  
25 the United States. And that was the substantial harm

1 that was found that made that fundamentally unfair.

2 They were told they had a right when they  
3 tried to ask questions in this mass hearing where there  
4 were 12 other defendants. Their questions weren't  
5 answered.

6 QUESTION: I find that a queer use of language  
7 to say that the ability to ask for a favor is a right.  
8 I mean, you can call it you have a right to ask for a  
9 favor. Now, if you want to call that a right you can  
10 call it a right, I guess, but it doesn't sound like a  
11 right to me.

12 MS. GOUDY: Suspension of deportation is -- it  
13 is a discretionary relief available if you can bring  
14 your evidence in sufficiently, but it is not a favor.  
15 If there is enough substantial harm to an American  
16 citizen that is a relative to you, and if you have met  
17 jumped through all the hoops necessary, it is something  
18 that they should discretionarily give you. It is  
19 something you have earned by seven years of good moral  
20 character in the United States, regardless --

21 QUESTION: Reversing the attorney general for  
22 his denial of relief under that provision?

23 MS. GOUDY: It is considered discretionary.  
24 They are very hard -- they would be very hard to win  
25 it. I don't know the answer to that question. The

1 government's position appears to be that Section 1326  
2 should be read as not reading in the word "lawful" into  
3 the word "deportation." The language of 1326 when it  
4 uses the word "deportation" is ambiguous on its face.

5           Deportation as defined in 1252 means a lot of  
6 different things. Deportation is the order to show case  
7 you are served with. Deportation is the hearing you  
8 have in front of the judge in which suspension of  
9 deportation is a secondary part. Deportation is the  
10 warrant that is signed after the hearing, and  
11 deportation is when you are finally placed across the  
12 border. It is entirely conceivable and happens in many  
13 cases that a person is deported and still here in the  
14 United States for many years on appeal of that  
15 deportation order.

16           The legislative history of Section 1326 offers  
17 little credence to the government's position that  
18 Congress intended to allow any deportation, even an  
19 unlawful deportation, to be reviewed for its factual  
20 basis.

21           QUESTION: What is your response, Ms. Goudy,  
22 to the government's argument that Congress took out the  
23 word "in pursuance of law" from Section 1326, modifying  
24 the word "deportation?"

25           MS. GOUDY: It is not a complete explanation.

1 QUESTION: Yours isn't or theirs isn't?

2 MS. GOUDY: The government's isn't. The  
3 complete explanation would be that there were about four  
4 statutes all involving some form of criminal penalty for  
5 reentry after deportation. There was one for reentry of  
6 radicals, one for reentry of prostitutes, one for  
7 reentry of procurers, and one for kind of a general  
8 reentry statute. And they all got merged. There was a  
9 1950 Senate report which was about the only discussion  
10 on this statute that is available in the legislative  
11 history, and in that --

12 QUESTION: Why do you need legislative history  
13 to tell you what it means when the statute at one time  
14 reads "deportation in pursuance of law" and then when  
15 Congress gets through amending it it no longer reads "in  
16 pursuance of law?" I would think that meaning is pretty  
17 clear without any legislative history.

18 MS. GOUDY: For one thing, the statute that  
19 had "in pursuance of law" did not in any way, shape, or  
20 form mirror 1326. It is not as if three words were  
21 extracted and the statutes match otherwise.

22 QUESTION: Well, it was considered by the  
23 House committee, as I recall, to be the predecessor of  
24 it because in explaining to the full -- I think it was  
25 the House, the full House what the changes being made

1 were. They published that statute next to the new  
2 provision, so that committee at least thought that this  
3 was the one that the new provision was replacing.

4 MS. GOUDY: And the other statutes just sort  
5 of disappeared. There is an earlier report where they  
6 agreed to merge it in the Senate, the four statutes,  
7 just to make it a more cohesive and enforceable Act of  
8 law. Also, the "in pursuance of law"; all of them use  
9 different languages. Furthermore, the "in pursuance of  
10 law" was not deleted. It got moved to Section 1101(g),  
11 which also has some explanatory explanation about  
12 whether or not you are deported if you pay to go across  
13 the border or if the government pays your way across.

14 MR. WRIGHT: It certainly was deleted from  
15 what was formerly 1326.

16 MS. GOUDY: It wasn't formerly 1326. The  
17 reading of the statute doesn't match at all. The  
18 language is inapplicable -- it is not inapplicable. The  
19 sense is the same in the section, but the language is so  
20 completely different. There were a lot of words that  
21 were deleted from there. There also is absolutely no  
22 legislative history of any kind to make it -- to show  
23 that Congress explicitly meant to block any form of  
24 collateral attack, and because this is a criminal  
25 statute, an explicit intent to take away an individual's

1 right has to be found in the legislative history before  
2 it can be interpreted.

3 QUESTION: What case of ours do you rely on  
4 for that?

5 MS. GOUDY: I am referring in general to the  
6 rule of lenity. I could obtain a case and submit it  
7 later if you wish.

8 QUESTION: You say this is a part of the rule  
9 of lenity that if Congress is going to make a criminal  
10 statute more severe than it previously had, it has to  
11 explicitly find that it is taking away something from a  
12 defendant or explicitly say so?

13 MS. GOUDY: No, that is not what I meant.  
14 What I meant was, is that if you are going to read  
15 negative connotations into a statute, there has to be  
16 some intent of Congress to show that those individual  
17 rights that are going to be taken away, the right to  
18 have some form of judicial review before being placed in  
19 jail, has to exist. If there is question in how you can  
20 interpret a statute and it can't be resolved by looking  
21 at the legislative history, it should be resolved in  
22 favor of the defendants.

23 I would also -- in conclusion what I want to  
24 state then is that what we asked for and was granted was  
25 some forum, some access to bring this hearing to the

1 attention of a Job, because how are you going to know if  
2 there was a gross miscarriage of Justice unless you give  
3 a person some access in to have it reviewed? A right  
4 with no enforcement provision into it is illusory.

5 Thank you.

6 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Goudy.

7 Mr. Wright, you have three minutes remaining.

8 ORAL ARGUMENT OF CHRISTOPHER J. WRIGHT, ESQ.,

9 ON BEHALF OF THE PETITIONER - REBUTTAL

10 MR. WRIGHT: Thank you. I would like to make  
11 two points. One is that the Immigration Judge here  
12 clearly explained to respondents that they had the right  
13 to appeal or to accept his ruling or to reserve  
14 judgment. The District Court said that he thought to  
15 choose not to appeal was not a considered judgment, but  
16 the tape of the proceeding clearly shows that this was  
17 more than adequately explained.

18 I would also like to make the point that under  
19 the statute at issue in Lewis, a person would not be  
20 convicted of a crime if four FBI agents hauled him into  
21 a barn and held a trial, and everyone would agree that  
22 that is not a conviction. The analogous sort of  
23 deportation --

24 QUESTION: I imagine there are some people if  
25 you asked them whether an FBI agent points a gun at you

1 and hauls you across the border, have you been deported,  
2 I think some people might say yes.

3 MR. WRIGHT: We wouldn't. Thank you.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
5 wright. The case is submitted.

6 (Whereupon, at 2:36 o'clock p.m., the case in  
7 the above-entitled matter was submitted.)  
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CERTIFICATION

Person 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:

5-2067 - UNITED STATES, Petitioner V. JOSE MENDOZA-LOPEZ AND

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ANGEL LANDEROS-QUINONES

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

BY Paul A. Richardson

(REPORTER)