

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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UNITED STATES, :

V. : No. 85-2067

JOSE MENDOZA-LOPEZ AND ANGEL :

Washington, D.C.

Tuesday, March 3, 1987

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

APPEARANCES:

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

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

C O N T E N T S

ORAL ARGUMENT OF

PAGE

CHRISTOPHER J. WRIGHT, ESQ.,

on behalf of the Petitioner

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KATHY GOUDY, ESQ.,

on behalf of the Respondent,

appointed by this Court

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CHRISTOPHER J. WRIGHT, ESQ.,

on behalf of the Petitioner - rebuttal

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1 PROCEEDINGS

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

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

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

8 ON BEHALF OF THE PETITIONER

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

15 The two respondents were arrested by agents of
16 the Immigration and Naturalization Service in October,
17 1984, in Nebraska. At an immigration hearing in Denver
18 with eleven other aliens they were given a list of free
19 legal services and advised that the proceeding could be
20 delayed if they wished to contact counsel. They waived
21 their right to counsel.

22 The immigration judge questioned each alien at
23 the hearing. Respondents both admitted that they were
24 citizens of Mexico, that they had entered the United
25 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 it 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

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

ANGEL LANDEROS-QUINONES

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

BY Paul A. Richardson

(REPORTER)