OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: GENE McNARY, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL., Petitioners v. HAITIAN REFUGEE CENTER, INC., ET AL.

CASE NO: 89-1332

PLACE: WASHINGTON, D.C.

DATE: October 29, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

- X

GENE McNARY, COMMISSIONER OF :
IMMIGRATION AND NATURALIZATION, :
ET AL., :
Petitioners :
v. : No. 89-1332
HAITIAN REFUGEE CENTER, INC., :
ET AL. :

- X

Washington, D.C.

Monday, October 29, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

IRA J. KURZBAN, ESQ., Miami, Florida; on behalf of the Respondents.

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PROCEEDINGS

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument in No. 89-1332, Gene McNary, Commissioner of Immigration and Naturalization v. the Haitian Refugee Center, Inc.

Mr. Dreeben.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE PETITIONERS

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

This case concerns the legalization or amnesty provisions of the Immigration Reform and Control Act of 1986. The question presented is whether the judicial review provisions of that act preclude district courts from entertaining broad pattern or practice claims directed at INS activities in processing particular legalization applications. The Eleventh Circuit upheld district court jurisdiction on such a theory. We submit that the court of appeals' holding is incorrect.

The statute is carefully structured to channel all review of determinations respecting legalization applications to a single time and place, namely a statutory review proceeding after the entry of a deportation or exclusion order. The Eleventh Circuit's departure from this framework, based on a nonstatutory pattern and practice

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exception, frustrates Congress' purposes in limiting review, imposes burdens on the courts, and intrudes into the INS' difficult and critical role in administering the legalization program.

The statute's requirement of case-by-case review responds to the sheer magnitudes and demands of the legalization program. The statute represented a unique undertaking by Congress to offer millions of undocumented aliens the opportunity to adjust their status to that of permanent resident and ultimately to citizen. Nearly 3.1 million applications were received by the INS which had to be processed in less than 2 years at the initial stage. Congress conceived this as a one-time program. And in recognition of the burdens that would be imposed on INS in attempting to administer it, Congress carefully structured and limited judicial review and administrative review to prevent various burdens from preventing the INS from accomplishing its function.

The centerpiece of the statute is a careful structure that is designed to channel all judicial review into the one opportunity that an alien has to challenge either a deportation or an exclusion order that threatens to remove him from the country. This system serves many of the purposes that underlie any system that eliminates piecemeal review of legal issues apart from the final

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results on benefits applications. It requires that remedies be exhausted, thereby giving the agency the opportunity to formulate policy and to ensure that there are -- whatever grounds are available to determine whether the alien qualifies or does not qualify are fleshed out at the administrative level.

It creates a concrete record so that when a court ultimately reviews the legalization determination it will not set aside agency action for non-prejudicial errors or abstract legal questions.

QUESTION: Mr. Dreeben, I thought one of the problems was that there was no record made of some of these proceedings, so there was no way ultimately to review it?

MR. DREEBEN: Well, Justice O'Connor, I think that --

QUESTION: Is that correct? Was that one of the concerns of the district court?

MR. DREEBEN: I don't think the district court addressed that concern at all. The concern has been raised by respondents that it would be impossible for a court of appeals to adequately review some of the constitutional claims that have been made here.

QUESTION: Right.

MR. DREEBEN: We disagree with that completely. The claims that are raised in this case regarding the burden

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of proof, regarding the availability of translators, regarding the adequacy with which a record is made, can be raised before a court of appeals. And if a court of appeals determines that there is some constitutional error that requires setting aside a particular denial it can remand to the agency and the agency can readjudicate.

QUESTION: Well, it is also suggested that perhaps there is no review possible unless there is a deportation order entered.

MR. DREEBEN: That is correct, Justice O'Connor. That is exactly --

QUESTION: Do we face potentially a situation where in fact there is no deportation order, and so an individual claimant wouldn't be able to raise it?

MR. DREEBEN: Well, in theory the INS has prosecutorial discretion not to institute deportation proceedings. And so an alien who is denied his legalization application and wants judicial review and comes to the INS and says please put me in deportation proceedings so I can eventually get access to the courts, in theory could be frustrated. There is absolutely no showing in this record that that has ever happened, and there is no indication that it ever will happen. The INS is an agency whose mission it is to remove illegal aliens from the United States. And if an alien comes to the INS and requests this procedure,

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there's no indication that it won't happen.

QUESTION: Well, but the scheme also envisions, as I understand it, that information produced at these hearings should not be used by the INS to thereafter oust them, simply because the alien has come in and has requested this status. Is that right?

MR. DREEBEN: That is correct. Congress gave confidentiality treatment to aliens, but only at one stage of the process. Only at the stage of applying for legalization and having that legalization application determined through the process of administrative review. Congress never extended that confidentiality protection to judicial review. Congress always contemplated that judicial review would take place only in the context of deportation proceedings. And it had some --

QUESTION: Well, if we were faced with the situation in one of these cases where no review could as a practical matter be obtained without giving up the confidentiality or something of that sort, do we have a Webster v. Doe problem here?

MR. DREEBEN: No, I don't think so, Justice O'Connor. I think that in the unique context of immigration, in which Congress has plenary power to distribute benefits and to effect the removal of illegal aliens, Congress has great latitude to craft a system that

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would serve important government interests in allowing judicial review but preventing burden to the courts. Here Congress contemplated that aliens should have an opportunity to have one bite at the apple in court to determine whether their legalization application was improperly denied.

And it determined to consolidate that judicial review with the judicial review of a deportation order, which would mean that the courts look at that particular alien's case on one occasion, not on one channel to review the legalization denial and then a separate channel to review the deportation order. Congress was well aware when it crafted this system that aliens who were illegally in the country have ample incentives and have demonstrated a proclivity for taking advantage of the legal process. And so it wanted a system that would provide this fair opportunity for review, but not until the alien who was illegally in the country was actually confronted with an order directing him to leave.

And I think that in the context of an immigration program such as this, where Congress is essentially legalizing millions of people who entered the country illegally, who have no status as citizens in the United States, and who are being given an opportunity essentially to leap ahead of the -- the waiting list of people who would like to become citizens, and become permanent residents and

then citizens, it should be allowed to craft a judicial system which is both fair and at the same time streamlined enough to avoid various burdens.

QUESTION: I take it, Mr. Dreeben, your entire case rests upon the prohibitory language in the statute that there shall be no administrative or judicial review except as provided in the subsection. If it were not for the prohibitory language, this action would accord with standard administrative review principles and the action could proceed?

MR. DREEBEN: I think our case would not be as strong if Congress had not introduced this framework for judicial review with the preclusion provision. But it is standard administrative law practice to review the validity of rules governing benefits programs when an individual is confronted with a determination on his particular claim. So I think there would be a very strong argument that even if the preclusion provision had not been put in, the fact that Congress contemplated judicial review only at the point in which a deportation order was entered would require the courts to direct judicial review to that point, in which an alien can raise the very claims that were raised in this case. An alien can argue that his due process rights were denied.

QUESTION: Is there a case that stands for that

proposition that I could look at?

MR. DREEBEN: Well, I think the Heckler v. Ringer case presents a very analogous situation. There people wanted to challenge a regulation governing eligibility for benefits in the Medicare program. They attempted to bring a lawsuit before they had completed the administrative process. Three of the people involved in that case had submitted claims and were afraid that their claims would be denied. One of the people in that case had not even submitted a claim. And this Court held that the provisions governing judicial review in the Medicare Act required that the claim about the validity of the rule be raised in the context of challenging a particular denial of benefits. And that is a standard administrative law way of deciding the validity of rules.

QUESTION: Well, Mr. Dreeben, what about Bowen v. the Michigan Academy case? That seems to point in the other direction, doesn't it?

MR. DREEBEN: I think Michigan Academy represents a distinctive situation, precisely because it did raise the question you alluded to about the possible preclusion of all judicial review of a constitutional claim. There a different aspect of the Medicare Act was involved in which Congress had precluded judicial review of particular benefits denials. And this Court in United States v. Erika

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had upheld that preclusion.

The next case down the line was Michigan Academy, which challenged a rule that was used to decide the validity of many benefits claims. The Court was deeply troubled by the idea that there would be no judicial review of a constitutional claim or claim that the regulation departed from the statute, and it therefore read the language of that statute to leave open the possibility of judicial review of rules alone.

The language of that statute had some similarities to this statute, but it has many differences. I think the most notable difference is that this statute is clearly structured to channel all judicial review up to one occasion, the opportunity for judicial review when a deportation order is entered. This statute has no indication that it contemplates any other form of judicial review of determinations respecting legalization applications.

Second, the language that was construed in the Michigan Academy case is somewhat different from the language that is at issue here. The language that is at issue here covers determinations respecting applications. The language that was at issue in Michigan Academy spoke of determinations of the amount of benefits. And I think in that context, given the very strong concerns that would be

raised if all judicial review was precluded, the Court read that language to leave open a challenge to rules. But there is no such necessity here, and indeed to recognize that kind of collateral action would disserve the important purposes that Congress had in limiting judicial review.

As I said, Congress wanted to make sure that remedies were exhausted through the administrative process so that the INS would have the opportunity to formulate its policy to act on particular cases and determine whether an alien would be disqualified from the benefits he sought on other grounds, wholly apart from his constitutional challenge. That makes some cases drop out of the process before they ever get to the courts.

Here the district court was operating more or less in a vacuum, and it ordered the reopening of 20,000 applications that had been denied by the INS, and ordered that they be readjudicated if the INS determined that one of these allegedly unlawful patterns or policies had been applied to those particular --

QUESTION: Mr. Dreeben, what is the status of the 17 plaintiffs in this case? Have they been through the process a second time and being accorded all of the procedures that they are complaining were denied the first time?

MR. DREEBEN: I am not sure of the exact status

of the 17 plaintiffs, Justice Scalia. My understanding is that, pursuant to the order of the district court, INS has identified all of the people who need to have second interviews and has offered them the opportunity to have second interviews. It has also granted --

QUESTION: With the procedures that they are demanding in this suit?

MR. DREEBEN: Those procedures will be applied. I don't think the interviews have occurred yet. There also are --

QUESTION: You don't think that they have occurred?

MR. DREEBEN: I do not think --

QUESTION: So they have not gotten what they are asking for in this suit yet.

MR. DREEBEN: No. Some of the 17 plaintiffs may have had their SAW status, their Special Agricultural Worker status granted to them, because the INS reviewed certain applications and it determined that it was not able to carry its burden of proof, to show fraud, or whatever, and it granted the applications.

QUESTION: Will the INS not give them their rehearing with the new procedures if this case comes out against the plaintiffs?

MR. DREEBEN: Well, --

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QUESTION: I'm trying to think if we're arguing about anything real here as far as these particular plaintiffs are concerned, if they in effect have been given what they want.

MR. DREEBEN: I am just not sure of whether all of the 17 plaintiffs have been through the process and completed it at this stage. I can find out that information. The plaintiffs did represent a class, and it is fairly common in class actions of this kind to allow substitution of plaintiffs in order to ensure that the case stays alive. We believe that there is an important interest that the Government has in establishing that we are not under the obligation to hire translators to provide translation at any interviews that we conduct.

The due process claims here, which we did not challenge in this case, relate to particular kinds of procedures that occur in particular benefits determinations. The plaintiffs were asking for interpreters. They were asking for the opportunity to present live witnesses. They were asking that a comprehensive record be made of what happens at the interview. These are claims that arose directly out of things that the individual plaintiffs say they experienced. One or more of the plaintiffs experienced each one of these things.

In our view those kinds of claims cannot be

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construed as anything other than an attack on the determinations respecting their applications, the very activity that is covered by the preclusion provision in section 1160(e) which is at issue in this case. The plaintiffs did not wait for the opportunity to get judicial review as Congress provided. They simply --

QUESTION: May I ask another kind of a practical aspect. You indicated that under the district court's order there have to be 20,000 hearings with -- reopening applications. Suppose instead of following this route they followed the route that you think was proper, namely an individual go to the court of appeals. Say the court of appeals had concluded on the merits exactly what the district court did here. Would you then have also had to have another 20,000 hearings?

MR. DREEBEN: Well, I don't think --

QUESTION: How would the 20,000 people be taken care of under the procedure that you think was proper?

MR. DREEBEN: I think that it would depend. The way that the INS has handled these kinds of issues to date, and there hasn't been a lot of experience with it, is to consider what legal issue is determined by the court of appeals, whether further review will be sought of that issue. And if no further review will be sought of it, the INS has undertaken in at least one instance to reopen

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applications and consider whether hearings need to be given. Now it did that with respect to a legal issue that was decided in the Fifth Circuit. Whether it would have decided to do that in this particular case, I don't know. INS may have concluded that these kinds of challenges --

QUESTION: But are you saying that if they agreed, they decided as a matter of litigating strategy or whatever it might be, that the court of appeals making the same decision was right on the merits, then they would have gone ahead and had the 20,000 cases reopened, wouldn't they?

MR. DREEBEN: Well, they might --

QUESTION: It would be only to the extent they wanted to continue their challenge to the merits of the determination.

MR. DREEBEN: They may have conducted a more abbreviated review to determine precisely on what grounds the aliens had been denied. One of the problems with this case is that many of the aliens, and the class itself, were not required to exhaust the administrative process. So we don't have here decisions by the legalization appeals unit saying this alien doesn't qualify because he failed to submit a medical exam, or his fingerprints analysis didn't check, or he was found to be convicted of a crime which rendered him excludable. These would all be grounds that would, totally apart from the alleged constitutional

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violations in this case, would disqualify the alien from the benefit that he sought. And if you have that kind of a record in a proceeding it substantially narrows the category of people who might be eligible for the benefit that the district court ordered across the board in this case. These --

QUESTION: It didn't order the granting of the benefit across the board.

MR. DREEBEN: That's true.

QUESTION: Just required the hearing with these minimum procedures to be met.

MR. DREEBEN: That is true, Justice.

QUESTION: And you are suggesting that in a lot of the cases it might be harmless error because there were other grounds for denying the application.

MR. DREEBEN: Exactly. And that is what you learn if you go through the administrative process as Congress contemplated.

I think another one of the major problems that we have encountered in these kinds of legalization cases is that district courts do not simply review an isolated question of law in the abstract, such as should the INS be paying for translators for these people. The district courts become inevitably enmeshed in administering the details of the program, really at the expense of INS'

ability to administer the program.

We have had district courts that have enjoined the INS from enforcing regulations, and have then entertained contempt motions when the legalization appeals unit applies that regulation in a way that the court thought was covered by its prior order. So what we have is direct collateral review going straight out from the administrative process to district courts in contempt proceedings about the INS' performance of its obligations. That is clearly not what Congress intended when it wanted to impress finality requirements on the legalization program, and it wanted to make sure that the aliens were not simply running off to the court every time they complained about some particular procedure.

The pattern of practice theory that was used in this case really is broad enough to allow any alien who doesn't like a legal ruling, or a ruling that he can characterize as a legal ruling, to go to court and say a pattern or a policy was applied to me and my application was denied. This is a collateral issue. The court doesn't have to wait about the finality require -- wait for the finality requirements in the statute, it can order the INS to reopen my application today. Now, that theory is not limited to class actions. It would equally apply to any individual who claimed that he had a legal claim.

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QUESTION: Why would an individual want to assume the burden of proving a pattern in practice if he could win his individual case by just showing it wasn't applied properly to him?

MR. DREEBEN: Well, the --

QUESTION: I don't understand the motivation for doing that if it were not a widespread problem.

MR. DREEBEN: Well, the motivation would be that the individual alien would like to have his denial reversed or his application readjudicated without having to go through the system that Congress intended, which does impose some more time elapsing before the alien can get it. And it is not just a pattern or policy. There is nothing inherent in the Eleventh Circuit's test that makes clear when you have a pattern or policy that is susceptible to challenge. If the INS had a rule that said no translators will be paid for, that would seem to qualify under the Eleventh Circuit's test for a discrete legal issue that could be snipped off from the rest of the case and challenged in a piecemeal fashion in district court.

QUESTION: Mr. Dreeben, what was the reasoning of the court of appeals for the Eleventh Circuit in saying that a pattern or practice suit could be entertained but apparently individual suits could not?

MR. DREEBEN: Chief Justice Rehnquist, I think

that the reasoning is the somewhat arbitrary sense that if a problem is affecting a large category of people the district court ought to hear about it, and if it is only a procedural error affecting one individual then we ought to leave it for the statutory review process. I don't think there is an intelligible line that can be drawn.

There are two Eleventh Circuit decisions -- one Eleventh Circuit, one Fifth Circuit decision -- that preceded this case that were relied on by the court of appeals in this case. The reasoning in those cases seems to be simply that there is a widespread problem going on here. A Federal district court needs to get involved because it would be more efficient and wise to hear it that way. None of those cases analyzed the language of the statute or explained why claims that could be raised in the sole forum for review of those claims, namely the court of appeals, should also be entertained on the district court simply because they affect a lot of different people.

I think it's just a judicial judgment that it would be more efficient to do it this way, but that was not Congress' judgment. Congress' judgment was to keep a case by case system in place in order to provide various benefits and in order to keep the district courts out of running the INS in effect.

Now there is another set of respondents here

besides the individual respondents, who I think all were clearly challenging some determination respecting their application. The other set of respondents are organizational plaintiffs. One of them was a qualified designated entity which was designated under the statute to accept applications and to serve as something of an intermediary between the INS and the aliens. The second organization didn't have that status, it was simply a membership organization that gives legal advice to Haitian aliens.

Those two organizations contend that they can come into court free from any exhaustion requirements and free from any restrictions of the statute because they could never have a deportation or exclusion order against them, and they therefore have to have a forum to address the harms that they claim have befallen them in this program. We think that that argument would completely undermine the careful scheme for judicial review that Congress prescribed for individual aliens.

QUESTION: How did the court of appeals rule on that point?

MR. DREEBEN: The court of appeals upheld standing for the organizational plaintiffs. The court of appeals essentially reasoned that they had suffered an injury within the meaning of this Court's decision in Havens Realty,

therefore they had article III standing, and the court never stopped to analyze whether allowing the organizations to bring suit would have any effect of disrupting the rest of the statutory scheme. We think for several reasons that the organizations cannot be permitted to circumvent the scheme for review that Congress provided.

First, the language that precludes judicial review of determinations respecting an application applies to any claim. It doesn't apply only to claims that were made by individual aliens. These claims that are made here by the organizations are identical in legal substance to the claims that are made by the individuals, and they are subject to the same bar. Second, it would be most anomalous to read the statute to allow the people who are more remotely injured, these organizations, to have a superior vehicle to present their claims, that did not require exhaustion, and that did not allow the agency to complete its formulation of policy.

All of the legal claims that are asserted by the organizations hinge on due process rights of individual aliens. They really are asserting a third-party standing theory in order to bring these kinds of claims.

QUESTION: Mr. Dreeben, do you -- I take it from what you say that all of the claims that these plaintiffs have could have been presented at the administrative level?

MR. DREEBEN: They could have been preserved at the administrative level.

QUESTION: They couldn't -- they could not then have been dealt with at the administrative level?

MR. DREEBEN: I think on a -- the constitutional claims would have been difficult for the INS to resolve. In this particular case each one of the constitutional claims had a parallel statutory claim. The plaintiffs contended that they could have gotten relief right under the statute. That the INS legalization appeals unit could have addressed. The constitutional claim, I think, would have had to be preserved by the individuals and then presented to a court of appeals, and a court of appeals could have adjudicated it. If it felt that it needed amplification of the record, the statute gives it the power, the tools to accomplish that goal.

QUESTION: Mr. Dreeben, do you acknowledge that the deprivation of SAW status is a deprivation of life, liberty, or property?

MR. DREEBEN: We haven't challenged that issue in the court of appeals or here.

QUESTION: Well, not challenging it -- because, you see, they are claiming that they are being deprived of two things. One is SAW status and the other is the ability to stay in the country. And what you are saying is you --

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the deprivation of the first can happen without any remedy, if you acknowledge that it's a deprivation of something they are entitled to.

MR. DREEBEN: No, it -- well, I think for purposes --

QUESTION: Well, it can. Until the second happens -- until the second deprivation happens, they have no remedy.

MR. DREEBEN: That is right, but it's not a case where Congress had precluded review. It is simply a unique context in which --

QUESTION: I understand. I understand. Well, all I want to know now is do you think that the deprivation of SAW status is a deprivation of life, liberty, or property within the meaning of -- I mean, prior to this statute they had no right at all, right? They were deportable.

MR. DREEBEN: It appears to give them something of an entitlement interest. This Court has never actually ruled that applicants for a benefit can claim a property or liberty interest in it, and we haven't presented that question here.

I'd like to reserve the balance of my time.

QUESTION: May I ask you one question before you sit down? (Inaudible) review, and that is perfectly true, but how much time might elapse between the denial of SAW

status and a deportation proceeding? How many years?

MR. DREEBEN: Well, Justice Souter, it could happen in two ways. First, an alien could simply try to vanish back into the underworld and then he would have to wait until he was apprehended. That could take quite a while. I mean, there are many cases in which aliens are not apprehended. If an alien wants judicial review and comes to the INS and says I'd like to be put in proceedings for the purpose of testing this denial, I think that could be accomplished within a year to a year and a half in the ordinary process.

QUESTION: Well, what if he takes sort of a third ground, and that is he doesn't really want to precipitate review. On the other hand, he believes that he is entitled to SAW status right now and he continues to act on that assumption, so that no one precipitates anything. The deportation proceeding might take place 10 years from now or 20 years from now.

MR. DREEBEN: That's right. And that is --

QUESTION: As a practical matter, if that is the case, he will never have any actual review of what he may now claim to be a pattern or practice violation.

MR. DREEBEN: Well, the injury -- the only injury that he can really complain of is the actual denial of his application, and Congress determined, not just for pattern

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or practice plaintiffs but for all participants in this legalization program, to limit the opportunity for judicial review. And to hold to the contrary that Congress cannot do this would effectively mean that Congress was obligated to not only allow 3.1 million illegal aliens to obtain legalized status, but to allow anybody who was disappointed with the result immediately to go to court.

Thank you.

QUESTION: Very well, Mr. Dreeben.

Mr. Kurzban, we'll hear now from you.

ORAL ARGUMENT OF IRA J. KURZBAN

ON BEHALF OF THE RESPONDENTS

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

I would first like to address Justice Scalia's question with respect to the individual plaintiffs and the class here. Under the appropriate procedures consistent with due process, all individual plaintiffs were granted SAW worker status. In addition, 12,000 of the class members, once the appropriate due process procedures were applied, were all granted source -- SAW status. There are other applications that have been held pending resolution in this case.

QUESTION: Some of the named plaintiffs have not yet gotten SAW status?

MR. KURZBAN: No, all of them --

QUESTION: They all have?

MR. KURZBAN: That is correct.

QUESTION: Will they be deprived of that status if the Government prevails here?

MR. KURZBAN: I don't believe they would, Justice O'Connor, but the other class members, and remember this was brought as a class action -- there are at least 8,000 or more applications that are still pending, in effect, resolution of this case, and they would be denied, we believe, the benefits if we did not prevail in this case.

The Government talks about the facts in this case in some sense as being abstract. There is nothing abstract about the facts in this case. In 1986 Congress granted an entitlement to individual SAW applicants to apply for this benefit and to have a benefit granted for them if they qualified. The undisturbed record below indicates that the Immigration and Naturalization Service in effect snatched that right away from these individuals by systematically violating their due process rights. The -- the methods that the Government used here on these applications resulted, as the district court said and as the court of appeals affirmed, deprive these applicants of a meaningful opportunity to be heard on their claims.

QUESTION: Well, Mr. Kurzban, doesn't your

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statement that the INS deprived them of due process rights, isn't it predicated in part on the assumption that Justice Scalia quizzed Mr. Dreeben about, that the statute confers some sort of a life or -- life or property interest in these people?

MR. KURZBAN: That is correct, Mr. Chief Justice. I think there is no question that Congress intended to do that here. They intended to give them both a property interest and a liberty interest. They intended under this statute, if they qualified, the Government shall grant the status. There was no question about it. If they met the appropriate days, if they met the other criteria under the statute, they were entitled to the benefit. So I think this --

QUESTION: Would that apply to an immigration bill that permits immigration from foreign countries and says that a certain number of people shall be admitted? Would someone who is not admitted, wrongfully not admitted although he is first on the list and meets all the qualifications, would he have a constitutional claim for deprivation of what, property or liberty, without due process?

MR. KURZBAN: Well, I think that is a different issue. It would depend --

QUESTION: I know it is, but how would it come

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out?

MR. KURZBAN: I think one might invoke other doctrines concerning the exclusion of aliens, particularly where if Congress passed a law --

QUESTION: But these people were aliens in this case, weren't they?

MR. KURZBAN: But they are not excludable aliens, and I think the Court's hypothetical really goes to --

QUESTION: Why are they not excludable aliens, if the assumption that they had no right to be here is entertained?

MR. KURZBAN: But once Congress granted that right, as they did here, they said if you qualify you are eligible for that right --

QUESTION: It's the same thing with someone who's in Poland. If you -- you know, we will let in so many people from Poland who are the first 300 on the list. And I am number one and I meet all the qualifications, I am denied admission. Would that be a deprivation of --

MR. KURZBAN: Well, I would say if you were denied admission because the Government has exercised inappropriate due process procedures --

QUESTION: That's his claim, that the embassy in Warsaw wrongfully didn't use the proper procedures to get him to qualify. Do you think there would be --

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MR. KURZBAN: Well, the only thing I would say about that hypothetical is that this Court has traditionally made a distinction between excludable aliens, that is people who are at the border seeking admission into the United States, and deportable aliens. The SAW workers for the most part were here in the United States and they were seeking this entitlement here. The Government -- the Congress recognized that they were in the country, and that as a deportable alien in the United States they would have a greater entitlement interest.

The -- on the facts of this record --

QUESTION: Indeed are there any of these SAW applicants who are not already in the country and applying?

MR. KURZBAN: Yes, Your Honor.

QUESTION: There are.

MR. KURZBAN: There were applicants, and there was a procedure set forth, a specific procedure in this case, set forth for aliens who were outside of the United States. But the class of people in this lawsuit on these facts were all farm workers who were in the United States already.

QUESTION: So the class of respondents before us today consists entirely of people who were in fact in this country?

MR. KURZBAN: That is correct, Your Honor.

QUESTION: And were deportable, absent being given

the SAW status.

MR. KURZBAN: That is correct.

The -- I would like to take on the Government's major notion here, which is that somehow we could have gotten review somewhere else. The kinds of due process violations that occurred in this case were ones that could have not been remedied in the administrative process, and could not have been remedied --

QUESTION: Unless they could have been remedied as a matter of statutory construction.

MR. KURZBAN: Well, I don't think so, Your Honor, in this case, and I would like to give an example.

QUESTION: Well, suppose they could have been.

MR. KURZBAN: Well, in a hypothetical situation if they could have been, not on the facts of this case, we would say still that the procedure that was set out in this statute was designed to look at the merits determinations. That is, when Congress talked about an application, a determination respecting an application and they talked about a narrow scope of review provision, they were talking about a merits determination in this case. They weren't talking about in effect the machinery that was used to create that determination.

On the facts of this case, however, and I would like to give one example of two of the named plaintiffs.

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There were two named plaintiffs in this case who submitted an application at the legalization office. I think it is important for the Court to understand that the legalization officer who first hears this is not an administrative law judge. He is not a person who has the authority to take discovery or to do detailed fact finding. He is only there solely for the purpose of doing fact finding on the question of whether or not the individual is eligible for the claim, that is whether or not the farm worker had enough days and whether or not the farm worker was otherwise admissible. He is not there and cannot do a kind of due process analysis required.

And the example here is that after he went through the legal -- these two plaintiffs went through this legalization officer's hearing, and the application was approved at that level, it was thereafter denied at the level of the regional processing facility. It was denied on a form letter denial saying that the person didn't meet the eligibility requirements because they were not credible. It then went to the legalization appeals unit. At the level of the legalization appeals unit, again, there was a form letter denial that said you did not provide sufficient information.

In fact, as a result of the district court action, we learned that the reason for this application's denial was

because the Government maintained a secret list. They maintained a secret list of contractors that the applicants had absolutely no way of knowing was the factor and the sole basis for denying the individual claim. And as the district court said, this did not happen in two cases. It did not happen in hundreds of cases. It happened, in the court's view, in thousands of cases where the Government was relying on a secret list.

Now let --

QUESTION: Mr. Kurzban, that could all have been reviewed before the deportation would occur. So if the only thing we are worried about is depriving the individual of deportation, we are timely enough. Isn't that right? That could all have reached a court of appeals.

MR. KURZBAN: I respectfully disagree, Justice Scalia, and the reason is that if we went to the circuit court of appeals under 1160(e)(B)(3), which is the section defining the scope of review, the court of appeals is limited solely to the administrative record as it existed at the time. Period.

QUESTION: It cannot remand to have a new, additional administrative record made?

MR. KURZBAN: The Government's claim here is that it could be remanded under the Hobbs Act. We would suggest that first of all the Hobbs Act is not applicable. The

statute 1160(e), nowhere in the statute or the legislative history incorporates the Hobbs Act. Secondly, the Hobbs Act itself under the terms of the Hobbs Act doesn't incorporate. And third, who would they remand it back to? They could only remand it back to the administrative agency here, to a legalization officer who cannot take discovery on due process claims, who is not an administrative law judge, who is not a person who can make determinations as to -- and as this Court has noted in --

QUESTION: They would remand it to the administrator of the INS, let him figure out how to get it taken. I don't know why you have to remand it back to the individual officer. Back to the head of the agency.

MR. KURZBAN: Because then I think we're thwarting what Congress intended here. Congress said that there is to be a narrow scope of review, we believe, on the merits determinations of these claims, but it was to be a narrow scope of review on these claims.

QUESTION: Can I come back? I agree with you that with respect to SAW status there seems to me to be no remedy, so that that is a problem, if that is an independent liberty interest or property interest that these people have. But I don't know that we have -- that any of our cases say anything about aliens, non-citizens, people who have no right to be here, except that they have a liberty

interest in not being deported. But that is not what we're talking about here. We're talking about whether they have a liberty interest in obtaining SAW status.

MR. KURZBAN: But I think Congress -- I am sorry, this Court has always recognized, since the 19th century, that with respect to deportable aliens, that those deportable aliens have constitutional rights under the Fifth Amendment.

QUESTION: Of due process with respect to the liberty and property interests that they have -- that have been conferred upon them. But that is the whole issue, whether they have been given any liberty or property interest in SAW status.

MR. KURZBAN: But here the Congress has said if you work 90 days, if you maintained -- if you were otherwise admissible, you are entitled to this. They said it, and they also said you are entitled to work authorization, which is an independent property interest in --

QUESTION: But it may say that with respect to people abroad, and we would not hold, I am confident, that those people abroad had been given any right to enter the United States which requires due process protections.

MR. KURZBAN: And that is an issue, Justice Scalia, respectfully, that is left for another day, because that is not an issue that is on the facts of this case.

This is a case involving deportable aliens.

QUESTION: What if Congress, Mr. Kurzban, after a period of months had repealed this statute so that there was no longer an authorization for the things that it provided for. Would you say that people who had not yet been processed had an interest in -- sufficient interest to claim that they couldn't be turned down because of their liberty interest?

MR. KURZBAN: I think that would be a different question, Your Honor.

QUESTION: Why?

MR. KURZBAN: Because the statute being repealed, I think the entitlement is created by virtue of the fact that Congress has given them that entitlement.

QUESTION: And Congress can repeal it when it wants to?

MR. KURZBAN: That is right. Congress can repeal that.

QUESTION: And can it condition it as it wants to?

MR. KURZBAN: It can condition it, I believe, as well. But here it didn't condition it in the ways that are meaningful for purposes of review.

I would like to, if I may, go back to the question of the circuit court's review. The Government is suggesting here that somehow you could get review in the circuit court

on these issues, and what I would like to focus on are the actual facts in this case, not some abstract proposition. The question of the secret evidence would have never even arisen in the circuit court of appeals because no one knew about it, number one, and number two, because the circuit court of appeals is limited to, solely, as it says, to the administrative record. That is a sufficient limitation that -- the Hobbs Act clearly doesn't apply here, and we couldn't get around that limitation, and that on the language of the Hobbs Act itself it doesn't apply.

And I would like to address the issue raised by Justice Souter with respect to these other conditions. In order to get into that circuit court of appeals review, assuming that it would be meaningful, and we believe it would not here, one would have to do a number of things. One would have to be arrested. One would have to subject themselves to a deportation proceeding. And then one would still be left, as the Government has conceded, to the discretion of a district director, the very person that we have sued in this case, up to his discretion as to whether or not he would put that individual in a deportation proceeding.

We would submit that these types of conditions are impermissible when you are dealing with procedural due process claims. And this Court has recognized in Rusk v.

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Cort, Justice Harlan's concurring opinion in Oestereich, that conditioning these types of claims, constitutional claims, is impermissible. So that these other conditions, aside from the practical aspects -- because what is the Government really saying here? The Government is saying that Congress intended to allow 100,000 or 20,000 cases to go to an administrative decision, to go up to the court of appeals, for what purpose? Simply to be remanded back to the district court to have a merits determination. That is not what Congress intended here.

A fair reading of 1160(e) is that these provisions for review limit review once there is a merits determination. There is no point served in the purpose of this legislation or its legislative history requiring people to go through hearings, useless hearings, only to go back again on the merits. And remember, Congress allowed this program only for 18 months. They wanted to have everyone have their cases decided within that 18-month period. It is silly to assume that Congress intended here to go through all these meaningless -- hearings that may take several years, may take 10 years or more, simply to go back to the district court on a merits determination where at that point, 3, 4, 5 years later, even if they could be put through that proceeding, that they would be able at that point to prove their claims.

QUESTION: That's standard administrative law, Mr. Kurzban, isn't it? You speak of pattern and practice review as though it's part of the judicial function to review administrative action in the abstract and make -- shape up the agencies, make sure that their rules are good, and so forth. But that in fact is not the way we function. Abbott Labs says that a rule can be as wrong as you like, I mean wrong on its face, and we would say unless that rule now, here and now immediately affects you, you cannot get it reviewed. You have to wait until the rule is applied against you, and then have it reviewed in the course of adjudication. That's standard administrative law.

MR. KURZBAN: That is right, Your Honor, and I think you're right in certain respects. So the question really turns here, not on general principles of administrative law, but what Congress intended under this statute. And we would submit that --

QUESTION: Well, one would assume that they intend the normal application of administrative law, unless they say something to the contrary.

MR. KURZBAN: But the plaintiffs, particularly when it involves a due process claim, have a presumption in favor of judicial review unless the Government can show by clear and convincing evidence that Congress intended otherwise. And here the language doesn't support the

Government's claim. At worst for the respondents in this case, the language is ambiguous.

The legislative history certainly rejects the Government's claim. The legislative history here, and this Court relied on contemporaneous and judicial interpretation in Lindahl when deciding whether or not there was judicial review in the district court. In this case the contemporaneous judicial construction of 1105(a), when Congress passed this statute, as the Government concedes based on Jean v. Nelson, based on Haitian Refugee Center v. Smith, were cases that said you could have judicial review of pattern and practice cases.

Secondly, the legislative history here, the Senate version of the bill, Senate 1200, was a provision that would have prevented the kind of class action that was brought in this case. That provision was rejected. And it was rejected not as the Government suggests, as a tradeoff for the House bill. There was the House bill and there was the Senate bill, and the Senate bill was simply rejected. Period. There was no compromise between the House and the Senate bill.

Third, and I think unfortunately, and I think this is just simply an error, the Government miscites the legislative history. They cite the provision -- in their reply brief they cite a provision that says Congress

intended this to only be the review, and they underline only. But the legislative history there that they are citing to is not the farm worker legislative history, it is not the legislative history of 1160(e). It's the legislative history of 1255, the other amnesty program. So the Government has no legislative history.

QUESTION: Well, Mr. Kurzban, the language of section 1160 says there shall be no judicial review of a determination respecting an application for SAW status, except in accord with the subsection. I don't find that ambiguous. How is that ambiguous?

MR. KURZBAN: Well, I think what it means, Justice O'Connor, is within this context when you look at 1160(e)(2)(A), (e)(2)(B), and (e)(3), when they are talking about a determination, a determination is on the merits of the case. We are not suggesting that if someone here was denied status because they didn't qualify that they could somehow go into district court. What we are saying is that the Congress here didn't use broad language like any claims arising under, as they did in the Medicare context, or they didn't use the language which this Court didn't even find persuasive under the Veterans Administration case, where the Congress said any issue of law in fact under any law by the administrator --

QUESTION: That brings you back to Abbott Labs

again, Mr. Kurzban. There are only two ways you get into court. Either the adjudication is hurting me, or the rule or the practice is independently, right now hurting me, because I have to put labels on my bottles and I don't know how to act, or something of that sort.

MR. KURZBAN: That is correct, and --

QUESTION: But you're saying you are being hurt not because of the mere existence of the practice or the rule, but because of the harm that that practice or rule produces in the adjudications. And the way to get that reviewed under standard administrative law process is to go through the adjudication and then go to the court where the administrative procedure act or the statute says that adjudication is appealed to. In this case it's the court of appeals, and your case has to be brought in district court. If we allowed this kind of an end run around adjudications for every rule or practice, we would disrupt the specification of which courts these appeals go to.

MR. KURZBAN: But that's where on the record you could get a review. These practices were practices of such a nature that they were extrinsic to the record. They were practices, due process violations, that were not in the record, that an individual couldn't get review. And Abbott Labs and the other cases go to an assertion that under normal circumstances on a merits determination. And for

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that reason I would like to go back to the language. Congress --

QUESTION: Before you do that, I don't know if this is necessary to your case, but is this final agency action?

MR. KURZBAN: Yes, I think it is final agency action.

QUESTION: Is that necessary to your case?

MR. KURZBAN: I think this is a case involving subject matter jurisdiction, so that whether or not ultimately there was a final agency action in any individual case is not necessary. The Government doesn't -- in fact, the Government really doesn't contest, Justice Kennedy, the question of whether or not these individuals were harmed, and the record is undisturbed below that in the individuals' cases they were directly harmed. They were denied their right to work, they were denied this entitlement benefit.

The -- I would like to go back to the language, because the language of the statute says respecting a determination of an application. When that is looked at in terms of (e)(2) and (e)(3), the narrow scope of review, that is Congress intended a sort of consistently narrowing of the review, first at the administrative level and then at the court of appeals.

The only sensible reading of that when looked at

as a whole is that the intention was on the merits on a final determination in a case that the administrative appeals would be limited to the record and that the circuit court of appeals would be even further limited to the record. And that they were not talking about here, where there were wholesale constitutional violations that were extrinsic to the record itself.

This Court --

QUESTION: May I ask on that point, are you saying that the word denial in subparagraph 3 of (e) is the equivalent of the word determination in the earlier parts?

MR. KURZBAN: Yes, I think it is. In other words --

QUESTION: It says such a denial, and it doesn't use the word denial earlier in the section.

MR. KURZBAN: That's correct. That's right, Justice Stevens. I think that that is what it refers to, and it means the denial on the merits.

The one final argument that I would like to call to the Court's attention, that this Court has recognized, as Justice O'Connor has pointed out, in the Bowen case and has made a distinction in a statute that is far broader than this statute here. Under the Medicare Act it says there is no judicial review of any claims arising under the statute. Far broader than the language here respecting a

determination, and yet this Court properly crafted an exception saying that when it goes to the methods, when it goes in effect to the underlying machinery for determining the claim. In this case the Government sabotaged in effect that machinery, not allowing an individual in the normal administrative course, to have their claim heard. And we would submit that this case in many respects is like Bowen for that reason.

Thank you.

QUESTION: Thank you, Mr. Kurzban.

Mr. Dreeben, do you have rebuttal?

REBUTTAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE PETITIONERS

MR. DREEBEN: Yes. May it please the Court:

The respondents are speculating about the adequacy of the court of appeals as a forum to entertain the due process claims in this case. That speculation should be rejected. The respondents have an opportunity to take advantage of the procedures that are provided under the Hobbs Act and under other procedures, and those claims can be adjudicated within the forum that Congress provided.

I'd like to answer Justice Scalia's concern about whether there is a due process interest in SAW status separate from the deportation itself. I think that in this case the due process interest is best conceptualized as

having the SAW program provide a defense to deportation. Congress intended that SAW applicants could apply for SAW status and legalize themselves, but the full machinery of the process was not brought into play --

QUESTION: Well, Mr. Dreeben, isn't more at stake than just deportation? If you get SAW status, doesn't that entitle the alien to get a work permit and to work and to come out from underground, so to speak? So we are talking about something more than deportation, it seems to me.

MR. DREEBEN: Yes, those benefits do come with being granted SAW status, but an alien who wishes to challenge the denial of SAW status, which Congress was intend -- could presume was an administratively correct denial, could seek work authorization as a matter of discretion from the INS and could get judicial review if INS abused its discretion in denying that work authorization to the alien. There is a remedy.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Dreeben.

The case is submitted.

(Whereupon, at 10:59 a.m., the case in the above-entitled matter was submitted.)

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