

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: MOSHE GOZLON-PERETZ, Petitioner

v. UNITED STATES

CASE NO: 89-7370

PLACE: Washington, D.C.

DATE: October 30, 1990

PAGES: 1 thru 42

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

**LIBRARY**  
SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

1                   IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - - X

3   MOSHE GOZLON-PERETZ,                   :

4                   Petitioner                   :

5                   v.                   :   No. 89-7370

6   UNITED STATES                   :

7   - - - - - X

8                                   Washington, D.C.

9                                   Tuesday, October 30, 1990

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   11:02 a.m.

13   APPEARANCES:

14   PETER GOLDBERGER, ESQ., Philadelphia, Pennsylvania;  
15       appointed by this Court on behalf of the Petitioner.

16   AMY L. WAX, ESQ., Assistant to the Solicitor General,  
17       Department of Justice, Washington, D.C.; pro hac vice  
18       on behalf of the Respondent.

19  
20  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
PETER GOLDBERGER, ESQ.	
On behalf of the Petitioner	3
AMY L. WAX, ESQ.	
On behalf of the Respondent	23
<u>REBUTTAL ARGUMENT OF</u>	
PETER GOLDBERGER, ESQ.	
On behalf of the Petitioner	38





1 controlled substances cases called special parole, which  
2 was -- in 1984, the Sentencing Reform Act instead created  
3 a new kind of post-incarceration supervision, to be called  
4 supervised release, which was carefully defined and  
5 circumscribed in detailed provisions of that 1984 statute.

6 Congress realized at that time that to prepare  
7 the Federal criminal justice system to make the change to  
8 this entirely new sentencing system would take time, and  
9 that 1984 statute thus initially set a start-up period of  
10 2 years, in fact over 2 years, for the new system before  
11 it would become effective. Congress soon realized that it  
12 would -- that 2 years would not be long enough and  
13 extended that period for another year, with the resulting  
14 effective date for supervised release and all other new  
15 aspects of the sentencing system of November 1, 1987.

16 Meanwhile, on October 27th, 1986, the President  
17 signed into law the Anti-Drug Abuse Act of 1986, which  
18 made a number of changes in Federal drug sentencing,  
19 especially in the higher-volume offenses. This 1986  
20 statute used the term, supervised release, without giving  
21 any definition for that term. In some of its provisions,  
22 including section 1002 of that statute which is the  
23 statute involved in this case under which my client was  
24 sentenced. Petitioner here was convicted for some of  
25 these higher-volume heroin offenses involving conduct with

1 occurred in February 1987, which was of course after  
2 enactment of that '86 drug act on October 27th of '86 but  
3 before the effective date of the Sentencing Reform Act on  
4 November 1, '87.

5 Under the law -- one more piece of background  
6 that's needed -- under the law as existed from 1984 until  
7 the effective date of supervised release under the '86  
8 Anti-Drug Act, persons convicted of the same offenses as  
9 the petitioner here would have been subject to ordinary  
10 parole but no other supplemental post-confinement  
11 supervision or monitoring. For example, in this case, the  
12 petitioner has an aggregate sentence of 20 years, of which  
13 he is likely to serve about 10 in prison and then to serve  
14 the remaining 10 years on parole, ordinary pre-sentencing  
15 reform act parole. If supervised release applies, this  
16 would be in addition to the petitioner's ordinary parole.

17 QUESTION: And, of course, since he serves 10  
18 years minimum, at the time that he is released all of the  
19 supervised-release provisions that Congress enacted in '84  
20 and in '86 will be in effect.

21 MR. GOLDBERGER: In one sense --

22 QUESTION: At the time that it is necessary to  
23 implement this scene, the statute will be fully effective  
24 by its own terms.

25 MR. GOLDBERGER: In one sense, Justice Kennedy,

1 that's true, but in another it's not. And that's because  
2 Congress provided in the effective date provisions of the  
3 '84 act which govern and control and include the  
4 supervised-release implementation and definitional  
5 provisions that not only would it have an effective date  
6 of November 1, 1987, but also that it should not apply to  
7 any offense committed before that date. I think the  
8 language of the statute is shall only apply to offenses  
9 committed after the taking effect of the statute, so that  
10 section 35.83, which is the supervised release provision  
11 of the Sentencing Reform Act by its -- by the terms of its  
12 own effective date provision, can never apply to my  
13 client's case or to the other people who committed  
14 offenses between October '86 and November 1, '87. That  
15 was Congress' specific declaration on that subject.

16 So the suggestion that the case is not  
17 significant because, after all, by the time he finishes  
18 serving the 10 year imprisonment portion of his sentence  
19 we'll have a system in place. It's true there will be a -  
20 - system in place, but it won't be a system that applies  
21 to him by law.

22 QUESTION: Well, it, it goes to the point of  
23 what Congress probably intended, and if you're saying that  
24 we can't know what supervised release means because it's  
25 an empty term without implementing provisions, there are

1 couple answers. One is that the implementing provisions  
2 are on the books. They're not enforced yet. The other is  
3 that the implementing provisions won't be needed so far as  
4 effecting the supervised release until they are fully  
5 effective.

6 MR. GOLDBERGER: Well, not only are they not  
7 applicable, and of course when we look for congressional  
8 intent, the first thing to look at is the language that  
9 specifically addresses the question. The language which  
10 addresses that question is language which says that those  
11 implementing provisions do not apply to an offense  
12 committed at the time my client committed his offenses.

13 But there's another --

14 QUESTION: Wasn't this just a mistake, as  
15 indicated by a later amendment that sought to plug the  
16 hole?

17 MR. GOLDBERGER: Well, there have been  
18 contentions in this case that several aspects of what are  
19 involved here have been mistakes. I -- but --

20 QUESTION: And it --

21 MR. GOLDBERGER: -- it imposes intriguing  
22 problems of how --

23 QUESTION: You think it was all deliberate? You  
24 don't think that there was some --

25 MR. GOLDBERGER: Oh, in the subjective sense, do



1 I think that Congress intended to put me in this position?

2 QUESTION: Right.

3 MR. GOLDBERGER: I -- no.

4 QUESTION: And us, too.

5 MR. GOLDBERGER: And especially you. No, I  
6 don't think it was deliberate in that sense, but there are  
7 rules. I don't think there was a member of Congress that  
8 knew at the moment that the vote was taken on the  
9 conference committee report that contained the language  
10 "supervised release" -- I'd be surprised if there was a  
11 member of Congress that had fully thought through all of  
12 this. But that's not where we look to -- for the meaning  
13 of a statute. We have rules to apply for this sort of  
14 situation, and the rule is we look to the language and if  
15 the language doesn't answer it, then to any number of  
16 other provisions.

17 QUESTION: Well, I thought one rule was that  
18 statutes normally take effect on the date of their  
19 enactment, and section 1002 doesn't contain the language  
20 you point to. Why didn't that become effective  
21 immediately?

22 MR. GOLDBERGER: If that -- the require -- the  
23 -- excuse me, the axiom of construction that a statute is  
24 deemed to become effective immediately if it doesn't  
25 provide otherwise is not a rule. Justice O'Connor, it's

1 an axiom of construction like any other. If it were a  
2 rule, then none of the other matters discussed in the  
3 briefs --

4 QUESTION: Well, why don't we apply the axiom of  
5 construction then and say 1002 became effective  
6 immediately on enactment?

7 MR. GOLDBERGER: Because there is such a wealth  
8 of other reasons not to. And it takes something to  
9 overcome that axiom, but I would suggest that we prevent -  
10 - presented those kinds of points, and they fall into  
11 basically into three categories.

12 First, that to put 1002 and especially its  
13 supervised-release provisions into effect immediately, is  
14 to create a set of some half-dozen inconsistencies,  
15 contradictions, and complete nullifications of related  
16 provisions of the statute that are not there if you --  
17 treat the statute as effective on November 1, '87.

18 The second areas of analysis that overcomes the,  
19 the presumptive axiom is the in pari materia approach,  
20 which says that we have to view the supervised-release  
21 phrase, otherwise undefined in 1002, in relation to all  
22 the other provisions dealing with supervised release, and  
23 all of them go into effect November 1, 1987.

24 And, third, finally, the rule of lenity. If  
25 this is a question worth talking about, if it's a question

1 intelligent people could answer in two ways and we can't  
2 come up with a clear, settled right answer, it's a  
3 criminal case. So that whatever power that axiom has in  
4 civil cases perhaps to act as a trump doesn't exist in  
5 criminal cases if (inaudible) the rule of lenity.

6 QUESTION: Mr. Goldberger, are you suggesting in  
7 response to Justice O'Connor's question that there are  
8 some things we call rules of statutory construction, other  
9 things we call axioms of statutory construction -- that  
10 the two are different?

11 MR. GOLDBERGER: No, I don't think so. Well,  
12 perhaps the -- to read the language and attempt to apply  
13 it as written, that's a rule. But there's -- I don't  
14 think it's fair -- other than that and things of that  
15 category, I think it's fair to say that the rest of these  
16 doctrines, in pari materia and what to do with silence,  
17 what to --

18 QUESTION: Rules -- the rule of --

19 MR. GOLDBERGER: -- rules that tell us what to  
20 do with silence and ambiguity.

21 QUESTION: And the rule of lenity.

22 MR. GOLDBERGER: And the rule of lenity are  
23 axioms, yes. And we call them rules only using that word  
24 loosely. That's right.

25 The ambiguities and contradictions which would

1 exist here, some of them are irreconcilable and I think  
2 the Government concedes this, that if we do not adopt the  
3 November 1, 1987 effective date, which may have been  
4 gotten to originally inadvertently but which we now -- is  
5 the resolution of the problem that works. The resolution  
6 that works eliminates the problem of having several other  
7 statutory provisions, drug sentencing provisions, make  
8 cross references that don't exist. It eliminate the  
9 problem of having -- of Congress in November of '86  
10 enacting a statute clarifying and correcting language in  
11 the drug-sentencing law which under the theory of the  
12 court below and advocated by the Government here would  
13 have been revealed some weeks earlier so that we would  
14 then have a nullity in the November '86 technical  
15 amendments act.

16 There are some half-dozen of those and they're  
17 all treated in the briefs and as -- I don't think there,  
18 they fit well in an oral presentation but I think --

19 QUESTION: Mr. Goldberger --

20 MR. GOLDBERGER: Yes?

21 QUESTION: Judge Becker's opinion for the court  
22 of appeals mentioned problems that that court saw with  
23 going your way in the future, and Judge Becker has devoted  
24 a great deal of time of course to probation and parole.  
25 Do you have any response to his criticisms of your



1 approach as to the future? What would -- inconsistencies  
2 that would happen further down the line?

3 MR. GOLDBERGER: No. Perhaps I'm remembering a  
4 different part of the opinion but I think what he was  
5 saying there, Mr. Chief Justice, is that the failure to  
6 have a uniform answer to this problem in all the circuits  
7 would create inconsistencies and problems down the line.  
8 But I don't think he suggested that having one clear  
9 answer either way would create problems and  
10 inconsistencies.

11 And I would suggest that more problems and  
12 inconsistencies down the line are created by perpetuating  
13 parole and special parole for an additional year. And  
14 indeed in the case of -- as the Government seems to argue  
15 in its brief at one point and as some of the circuits have  
16 -- have held to reintroduce it where it had not existed  
17 for 2 years earlier, would create far more problems down  
18 the line by having a parole system which there was no  
19 agency to administer.

20 I understand that just this weekend as Congress  
21 was wrapping up its business in the Judicial Improvements  
22 Act it may have extended the life of the parole commission  
23 by another 5 years. Even to have extended it, if, if what  
24 I hear is right that if, if it has been extended from 1992  
25 to 1997, that still doesn't cover many of these cases that

1 have 10-year mandatory minimums or longer and then under  
2 the Government's view wind up with people -- could wind up  
3 with people on parole rather than simply waiting a year  
4 until the system can be implemented in a coherent way  
5 where supervised release applies, that we have a system to  
6 understand it and a system to administer it.

7 In fact, there was a -- an additional part of  
8 the answer I wanted to give to Justice Kennedy's question,  
9 if I could, and that was -- that is that the Sentencing  
10 Reform Act provides, in that section which describes  
11 supervised release, that important judgments about  
12 supervised release are to be made by the sentencing judge  
13 at the time of sentencing. In fact, these are one of the  
14 most -- this is one of the critical ways in which  
15 supervised release is fundamentally different from parole  
16 is that it's to be decided on its length, its conditions,  
17 by the sentencing judge at the time of sentencing. And  
18 that's not something that's going to occur 10 years in the  
19 future. That's something that had to occur -- might have  
20 had to occur as early as the early winter of 1986 and --

21 QUESTION: Mr. Goldberger --

22 QUESTION: Conditions were imposed at the time  
23 of sentence?

24 MR. GOLDBERGER: Yes, sir, under 3583,  
25 subsection d.

1 QUESTION: I thought that the period of  
2 supervised release for the category of offenders we're  
3 dealing with in this case was fixed by the statute.

4 MR. GOLDBERGER: No, Justice Stevens, that's not  
5 correct. There is a minimum period fixed by the statute  
6 --

7 QUESTION: Oh, I see.

8 MR. GOLDBERGER: -- but the length above the  
9 minimum or -- and the decision whether it's to be above  
10 the minimum is in the discretion of the judge and must be  
11 decided at the time of sentencing.

12 QUESTION: I see.

13 MR. GOLDBERGER: I don't mean to mislead. There  
14 are provisions both in terms of your question, Justice  
15 Kennedy, and yours, Justice Stevens, to amend and modify  
16 both the conditions and the length later. But the initial  
17 decision is clearly imposed on the judge and by the judge  
18 at the time of sentencing.

19 QUESTION: And there is a variety of conditions  
20 that can be imposed in supervising?

21 MR. GOLDBERGER: Yes, there are a few that are  
22 mandatory and the rest are in the judge's discretion.

23 In addition to these anomalies and mismatches  
24 that the theory of the lower court and of the Government  
25 just can't explain away, and in fact the Government's

1 position is we'll worry about them in some other case.  
2 And I hope that's not the answer. I think that we have an  
3 opportunity here to answer the question in a way that  
4 doesn't require five more cases to resolve.

5 The pari materia argument tells us that when a  
6 term is used in a statute that -- where no definition is  
7 given and that definition clearly refers to another  
8 statute where that term was invented, the Sentencing  
9 Reform Act invented the concept of supervised release.  
10 It's not a term that criminal lawyers had a knowledge of  
11 before -- that you have to look to that other statute and  
12 bring it in. And then when that other statute --

13 QUESTION: Indeed, you couldn't look to the  
14 other statute until the other statute is effective.

15 MR. GOLDBERGER: That's correct.

16 QUESTION: Probably improper to look to it 'til  
17 it's effective.

18 MR. GOLDBERGER: That -- I think that's right,  
19 Justice Scalia. And not only that, you couldn't look to  
20 it in a case in which Congress had explicitly declared  
21 that it shall not apply.

22 The pari materia principle I think also goes to  
23 the internal interpretation of the '86 act, so that not  
24 only do we have to cross reference the -- the special --  
25 the supervised release provisions of the Sentencing Reform



1 Act but also the '86, November '86 technical act, but the  
2 other provisions internally of the '86 Anti-Drug Abuse  
3 Act, and that's where the pari materia argument runs into  
4 the contradiction argument. You wind up just with so many  
5 provisions that don't work or wind up being utterly  
6 meaningless that it -- you just can't have that way and  
7 have a statute that make sense. And if the intent of  
8 Congress -- if we have a presumption that the intent of  
9 Congress is to make sense and not to be absurd, you have  
10 to lead in that direction.

11 The legislative history doesn't help us on the  
12 intent of Congress in the sense of discussing the purpose  
13 of the change in language that occurred at that last  
14 moment of the amendment process from special parole to  
15 supervised release. But it -- and what it does tell us is  
16 Congress was in its usual end-of-October situation. It  
17 wanted to pass a drug bill this year and get it finished,  
18 and that there's no indication that there was a considered  
19 decision to change the concept of special parole, which  
20 had been provided in the bill before that, to supervised  
21 release, but also no indication that it was doing so for  
22 this reason as opposed to that reason. So we're in a pure  
23 analysis of the statutory language and structure which  
24 sends us to the solution that I'm suggesting.

25 QUESTION: Is the definition of supervised

1 release, plus all of the conditions upon it -- is that in  
2 a section of the statute that does not take effect until  
3 after this?

4 MR. GOLDBERGER: That's exactly right, Justice  
5 Scalia. That's section 3583 --

6 QUESTION: So you wouldn't even know -- you  
7 wouldn't even know how to handle supervised release  
8 without consulting a portion of the statute that's not yet  
9 in effect?

10 MR. GOLDBERGER: That's right. The Government's  
11 position is that courts could and no doubt did look to the  
12 statute, which as I mentioned at the outset had been  
13 enacted in 1984 and was there waiting to go into effect.  
14 But my response to that is that the statute not only by  
15 its terms wasn't effective but was inapplicable.

16 QUESTION: Are there any cases where in the  
17 interpretation of statute we use the doctrine of  
18 incorporation of reference that we do in wills, say?

19 MR. GOLDBERGER: I think --

20 QUESTION: Is this -- there was a body of extant  
21 statutory provisions that you could look to. They weren't  
22 in effect yet.

23 MR. GOLDBERGER: I --

24 QUESTION: You say these were just incorporated  
25 by reference?

1           MR. GOLDBERGER: I suppose that's pari materia  
2 of a sort. I'm not familiar with any other -- any other  
3 concept different from that, that when Congress uses a  
4 term that has a meaning, has a definition and a meaning,  
5 it's -- it's -- must be understood to be incorporating  
6 that definition and meaning.

7           But in this case -- and I don't mean that we  
8 have to blind ourselves to the existence on the books of  
9 this as yet ineffective statute. What I mean is we do  
10 look to 3583 and we look to it and we find that Congress  
11 has told us not to use it. And therefore, what we find is  
12 that we can't have the law, the '86 supervised-release  
13 provisions, at least going into effect before that other  
14 statute is available for the purpose of making reference  
15 to it.

16           As a final aid to statutory construction in the  
17 case, I do rely on the rule of lenity and I -- this is not  
18 where we start. It's not something that we use to avoid  
19 the rest of the problems and the issues, but it's a place  
20 that a defendant in a criminal case discussing a  
21 sentencing provision that is ambiguous -- it's ambiguous  
22 by virtue of silence and by virtue of contradiction -- is  
23 entitled to look. The Court should not rely in making its  
24 decision in any way on an assumption that Congress  
25 intended to add new punishment, and that's what it would

1 be in my client's case, new punishment of extended  
2 supervision, without a clear indication that intended to  
3 do so when there's another plausible interpretation.

4 QUESTION: Mr. Goldberger --

5 QUESTION: Do our cases extend the rule of  
6 lenity to the extent of punishment as well as to the  
7 denomination of the substantive offense?

8 MR. GOLDBERGER: Oh, yes, quite clearly so,  
9 Bifulco being the most important case and in many ways the  
10 most similar to this one. There's a case in which the  
11 court was dealing with the antecedent of supervised  
12 release, that is special parole. An ambiguity by virtue  
13 of silence was found, and the court, after careful  
14 analysis of the statutory language, cross references, and  
15 purpose, finally turned also to the rule of lenity and --

16 QUESTION: But didn't the statutes presume to  
17 set a date and say that this shall take effect on October  
18 the 27th?

19 MR. GOLDBERGER: No, there is no provision of  
20 that kind in the '86 act. There is only -- there are  
21 other -- perhaps what you're thinking of is that there are  
22 other effective dates stated later than October '86 for  
23 certain specified provisions of the '86 act and silence  
24 with respect to this provision and that then -- many but a  
25 minority of the lower courts upheld invokes that, that



1 rule of presumption that Justice O'Connor referred to  
2 early on in the argument.

3 QUESTION: Well, that does more than invoke that  
4 rule of presumption. It calls -- it calls into play  
5 another one of the, the maxims or rules, that is, inclusio  
6 unius est exclusio alterius.

7 MR. GOLDBERGER: Yes, that's right.

8 QUESTION: By specifically specifying a date in  
9 some instances, you assume that where they don't specify  
10 it, the ordinary rule of today applies. That -- that's  
11 probably the hardest indication against your position,  
12 isn't it?

13 MR. GOLDBERGER: Well, I -- it's -- it's an  
14 important argument that the other side has and it would be  
15 surprising to me though if there were a difficult problem  
16 of statutory construction like this one in which you  
17 couldn't invoke some maxim in Latin on each side. My  
18 favorite one in this case is in pari materia. Theirs is  
19 --

20 (Laughter.)

21 MR. GOLDBERGER: -- expressio unius.

22 QUESTION: Mr. Goldberger --

23 MR. GOLDBERGER: But there's more to say about  
24 it than that, which is that if the bill which provided for  
25 special parole had remained in that form and had been

1 enacted saying special parole rather than supervised  
2 release, I think expressio unius would have won the day if  
3 someone had tried to make, in that situation, the argument  
4 that I'm making.

5 It was by virtue of the substitution of  
6 terminology to supervised release to a term which -- which  
7 necessarily makes reference to another statute and which  
8 is meaningless without that other statute, which would in  
9 effect be telling a judge, you may impose a sentence --  
10 you shall impose a sentence of something called supervised  
11 release but -- of which we will not tell you the meaning.  
12 You can impose a sentence of your own design in this case.  
13 I think that's very problematic.

14 QUESTION: Let me just -- may I ask you one  
15 question to make sure I've got this sorted out?

16 MR. GOLDBERGER: Of course.

17 QUESTION: I mean I don't begin to have it  
18 sorted out, but the thrust in your argument is always  
19 focusing on supervised release. But if you are correct,  
20 are you also arguing that section 1002 and section 1003  
21 simply did not go into effect at all until November 1st?

22 MR. GOLDBERGER: There are arguments to be made  
23 and which we have made in our brief, and I'm not  
24 retreating from them but they're not the arguments that  
25 I've make so far this morning.

1 QUESTION: I understand, but it seems to me  
2 that, that if you carry the day on the supervised release  
3 you must be saying that section 1002 is not -- was not  
4 effective until November 1, 1987?

5 MR. GOLDBERGER: No, not necessarily. There are  
6 -- not all of the arguments I make are applicable to the  
7 rest of the section. There is not that pari -- the pari  
8 materia argument of incorporating the Sentencing Reform  
9 Act does not come into play for the argument against the  
10 mandatory minimums and against the non-parolability. They  
11 are similar to and do evoke the new Sentencing Reform Act,  
12 but they are not utterly dependent on the Sentencing  
13 Reform Act in (inaudible).

14 QUESTION: I understand, but earlier you made a  
15 -- one of your arguments was that if we decide in your  
16 favor in this case, we'll avoid a whole bunch of other  
17 cases. It seems to me if we accept your view under -- on  
18 supervised release, we're next have -- going to have to  
19 decide what the rest of 1002 means and what 1003 means,  
20 whether that went into effect in November 1st or not. I  
21 don't know what the answer to that --

22 MR. GOLDBERGER: Well, if you accept my argument  
23 you won't have to decide that, because you will decide, as  
24 argued in point a(2) of our brief that, that the whole of  
25 1002 didn't go into effect November 1, '87. But if you go

1       --

2               QUESTION: That would also apply to 1003 I  
3 suppose, wouldn't it, insofar as to rely on 1004 as  
4 setting forth the date and the whole scheme fits together  
5 and so forth?

6               MR. GOLDBERGER: And 1032 and 1866, there are a  
7 number of sections of the statute that follow the same  
8 pattern, but that's -- it's not --

9               QUESTION: We save those for another case.

10              MR. GOLDBERGER: There's no split in the  
11 circuits on that -- on that point. I, of course, stand by  
12 the arguments we've made in the brief on that. But they -  
13 - the whole argument does not stand or fall on that  
14 provision.

15              I would like to reserve the rest of my time if I  
16 may.

17              QUESTION: Thank you, Mr. Goldberger.

18              Ms. Wax.

19                      ORAL ARGUMENT OF AMY L. WAX

20                      ON BEHALF OF THE RESPONDENT

21              MS. WAX: Mr. Chief Justice, and may it please  
22 the Court:

23              Let me try to summarize this case in four basic  
24 points. It is virtually an unimpeachable principle of  
25 legislation and one on which Congress relies every time it



1 enacts a statute that a statute goes into effect upon  
2 enactment unless it states otherwise.

3 QUESTION: (Inaudible) axiom as suggested by  
4 your opposition?

5 MS. WAX: Well, I don't want to get into a  
6 semantical battle, but what we mean by this perhaps is  
7 best explicated by what Chief Justice Rehnquist said in  
8 *Albernez v. United States* about the Blockberger Rule.  
9 Silence on the Blockberger question and on the question of  
10 an effective date does not give rise to the kind of  
11 ambiguity that would license a broad-ranging foray into  
12 the statute looking for hints and clues that something  
13 else was intended, and it doesn't give rise to an occasion  
14 for application of the rule of lenity.

15 QUESTION: Have we applied the rule of lenity to  
16 an effective date issue?

17 MS. WAX: Never, Your Honor. There has never  
18 been a case in this Court in which the Court has held  
19 that, with silence on an effective date, a delayed  
20 effective date was intended and in our -- to our knowledge  
21 there's never been a court -- a case in the court of  
22 appeals, and that should tell us something.

23 Congress relies on this rule. When it enacts a  
24 statute it knows that putting in an express provision that  
25 the effective date is immediate is superfluous and

1       therefore it doesn't have to do that. And to question  
2       this axiom would invite statutory chaos because it would  
3       mean that every time Congress didn't stipulate an  
4       effective date we'd be free to go into a statute and look  
5       for little anomalies, little problems from which we might  
6       infer a contrary intent.

7                QUESTION: This isn't a little anomaly. It's  
8       the fact that you don't know what this term of art means.  
9       It's a brand-new word that is utterly meaningless to  
10      anybody unless you consult another statute that isn't in  
11      effect yet.

12             MS. WAX: That is correct. The statute that  
13      describes what supervised release is, it gives it content,  
14      that gives content to the word is not in effect during the  
15      pertinent period because under the '84 sentencing act it  
16      was given in effective date. But it's our view that this  
17      is not an obstacle to applying the plain terms of the  
18      revised penalty provisions, section 841, which clearly  
19      state that supervised release is the appropriate penalty.  
20      Because the fact is that 3583 which describes what  
21      supervised release means does exist. It's out there.  
22      It's on the books, albeit it doesn't have the force of law  
23      and perhaps a judge couldn't be held to the letter of it.  
24      But it does give content to the notion of supervised  
25      release. And these supervised release penalties for this

1 period from '86 to '87 are being applied daily in the  
2 Ninth Circuit, the Third Circuit, now the Sixth Circuit in  
3 the wake of a case that came down a couple of months ago,  
4 in the D.C. circuit in the wake of the United States v.  
5 Brundage. Judges are not going off on, on crazy tangents  
6 when they, when they pass sentence on individuals who get  
7 supervised release. They're pretty much being guided by  
8 3583, and the system is working.

9 QUESTION: Ms. Wax, if we go along with the  
10 Government's suggestion here, it does result in some  
11 anomalies and some problems in relation to other statutes,  
12 does it not?

13 MS. WAX: It does. There are some  
14 inconsistencies in the statute as a result of the  
15 provision for supervised release beginning in October of  
16 1986.

17 QUESTION: And would those problems be avoided  
18 by the construction by the later effective date suggested  
19 by the petitioner?

20 MS. WAX: Your Honor, that -- it would avoid  
21 some of them, but it would create other problems and  
22 inconsistencies in its wake. For every problem -- it  
23 would avoid some of the little statutory inconsistencies  
24 but it would pervert what Congress did when they passed  
25 this statute.

1 First of all, the thesis that the whole of  
2 section 1002 was delayed for a year is a non-starter,  
3 because in the penalty provisions in 1986 Congress  
4 stipulated that there would be no parole under these  
5 penalty provisions. They were mandatory prison terms, and  
6 there simply would be no reason for Congress to state that  
7 there's no parole if the effective was November 1st, 1987,  
8 because as of November 1st, 1987, parole was abolished.  
9 So that in itself definitively refutes the thesis that  
10 there was a delayed effective date for the whole of 1002.

11 QUESTION: Well, that's --

12 MS. WAX: And if there is --

13 QUESTION: -- that's just saying one statute was  
14 totally superfluous. That's not inconsistency. Am I  
15 right? And as they abolish -- they abolished parole  
16 effective November 1, '87 in two different ways but  
17 totally consistent with one another.

18 MS. WAX: Right.

19 QUESTION: Isn't that right?

20 MS. WAX: It would be -- because they abolish  
21 parole in '84 and the abolition of parole was going kick  
22 in in November of --

23 QUESTION: Right. They didn't need to do it  
24 again.

25 MS. WAX: They did need to do it again.



1 QUESTION: But they didn't do anything  
2 inconsistent.

3 MS. WAX: Well, we're only saying that it would  
4 be a surplusage.

5 QUESTION: Right.

6 MS. WAX: And we think that's an anomaly as much  
7 as the anomalies to which --

8 QUESTION: Yeah, but it doesn't create any  
9 administrative anomalies or anything like that. It just  
10 says they unnecessarily did something -- they  
11 unnecessarily abolished parole in two different statutes  
12 at the precisely the same consequence.

13 MS. WAX: Well, as a sign --

14 QUESTION: Which might be wise legislation in  
15 some circumstances to make a hundred percent sure their  
16 meaning is clear.

17 MS. WAX: But if we're -- if we're looking at  
18 these anomalies as a sign of what Congress intended to do,  
19 okay -- I mean, basically petitioner's argument is that by  
20 leaving these anomalies -- by creating these anomalies, by  
21 allowing supervised release to kick in, Congress was  
22 sending us a message that it wanted to delay supervised  
23 release. And we're saying, well, there's contrary  
24 evidence that Congress was sending the message that it  
25 wanted the whole of 1002 to go into effect immediately.

1 We're really making an argument about what Congress wanted  
2 -- what Congress meant to have happen when it passed this  
3 statute.

4 QUESTION: Well, they're not saying they wanted  
5 to delay it. They're saying that they had previously  
6 delayed supervisory release in the earlier statute and all  
7 they've done is said that this statute shall take effect  
8 at the same time as other supervised-release provisions  
9 take -- I don't see the inconsistency in it. Surely they  
10 could have drafted it better, but --

11 MS. WAX: Well, the other reason why we think  
12 that the way to solve whatever anomalies there are is not  
13 to delay supervised release is that Congress clearly  
14 passed a provision that had mandatory monitoring in it,  
15 and we have to go a little bit into the history of this  
16 enactment in order to understand why that's important.

17 Every -- the petitioner and we both agree that  
18 up until the penultimate moment when the 1986 act was  
19 passed, the statute provided for mandatory monitoring in  
20 the form of special parole for all of the drug categories  
21 that apply to petitioner's offense. So it was crystal  
22 clear that Congress wanted these individuals to get a  
23 mandatory term of monitoring.

24 The statute also provided that on November 1st,  
25 1987 there was going to be a word substitution. Every

1 place that special parole appeared in the statute,  
2 supervised released would now appear and so people  
3 committing offenses after November 1st, 1987, would get  
4 supervised release. But it -- but in no way did that  
5 draft statute, the penultimate statute, create a gap  
6 whereby there would be a period that individuals  
7 committing these drug offenses would get nothing.

8 On the eve of enactment for reasons that we will  
9 never know, a substitution was made, a single-word  
10 substitution. Every place that the term special parole  
11 appeared in the act, the word supervised released -- it  
12 was cross out and the word supervised release replaced it.  
13 The effect of that word substitution was simply to roll  
14 back 1 year the seamless transition from one kind of  
15 monitoring to another. The effect -- it is -- it's simply  
16 perverse to say that what Congress was doing when it  
17 substituted those words was opening up a year gap and  
18 sending the message that it wanted to delay the effective  
19 date of this statute either in whole or in part.

20 This is especially true as Justice Scalia  
21 pointed out because Congress knew how to delay the  
22 effective date of parts of this statute. It did it in  
23 section 1004, 1006, 1007, and 1009 and for Congress to  
24 choose this coy, roundabout, ambiguous method to  
25 accomplish the same thing, it's just not a plausible

1 account of what happened when Congress passed this  
2 statute.

3 What happened is this. Someone decided that  
4 there was no reason to perpetuate what was soon to be an  
5 outmoded form of monitoring. They might as well initiate  
6 supervised release a year early. But Congress forgot to  
7 make the little -- the collateral changes that would have  
8 created a completely harmonious statute. But the fact  
9 that Congress forgot to do a few little things over here  
10 doesn't mean that what they did in the core penalty  
11 provisions, what they did at the center, wasn't  
12 intentional. And --

13 QUESTION: It still -- it still isn't a badly  
14 drafted statute, isn't it? Not the first one we had.

15 MS. WAX: Well, there are a few oversights which  
16 result in some inconsistencies. That -- we concede that.  
17 But we don't think it follows from that either that  
18 Congress intended to delay the effective date or that this  
19 Court should square the circle by delaying the effective  
20 date of the statute.

21 Now, we point out in our brief that if the  
22 penultimate change had never been made and the statute was  
23 passed saying special parole instead of supervised release  
24 in all the places where the replacement was made, this  
25 would be a completely internally consistent and coherent



1 statute. So the question arises, you know, why not just  
2 rewrite the statute and put special parole back where  
3 supervised release is, which by the way is very different  
4 from saying that the effective date of the whole or part  
5 of the statute is delayed, which has very different  
6 consequences in particular that petitioner won't get any  
7 monitoring. That would be the consequence of delaying it.

8 But why not just substitute terms? Well, we  
9 think that the reason not to do that is that the statute  
10 says supervised release and not special parole. And --

11 QUESTION: Why couldn't I say that term has no  
12 meaning until the other statute takes effect, and since it  
13 doesn't have any meaning I'll assume it seems -- it means  
14 the same thing as parole, special parole?

15 MS. WAX: Well, Your Honor, once again while  
16 it's true that the definitional provision that gives  
17 meaning to supervised release or tells us what Congress  
18 meant by supervised released isn't in force, it still does  
19 exist. I mean, it is there for guidance. And it's --  
20 it's a little bit like the situation that would obtain if  
21 Congress had never enacted 3583 of the definitional  
22 provision but simply had explained in a House report or  
23 something what it meant by that. I mean, it's -- there is  
24 information out there. It's not as if we have nothing and  
25 judges have not acted as if we have nothing. That's the

1 other point.

2 QUESTION: It seems to me you -- you're  
3 presenting the case, as you ought to I suppose, you know,  
4 on the assumption it's our function to figure out what  
5 Congress intended. I don't think there were more than 20  
6 people who adverted to this refinement, this scrivener's  
7 change from special parole to the new terminology. It  
8 seems to me our job is to make sense out of -- as best we  
9 can out of a statute that it's -- it's a, you know,  
10 Chinese puzzle. We're trying to fit it together.

11 And a very sensible way to fit it all together  
12 that doesn't produce any inconsistencies anyway is to, as  
13 we've sometimes done, not deem the effective to be  
14 immediate. It's a sensible solution of -- for someone  
15 whose job is to try to make sense out of the law. It does  
16 make sense out of it, doesn't it?

17 MS. WAX: Your Honor, we think not, because of  
18 what Congress did when it passed the statute. It passed a  
19 statute that in all its incarnations, in all its versions  
20 provided for a mandatory term of post-confinement  
21 monitoring of some form. There was never a version of  
22 this statute that didn't provide for mandatory monitoring.  
23 The statute was designed to up the penalties that had  
24 existed, to plug gaps that were perceived in the previous  
25 law, to compensate for the inadequacies of previous law.

1 And it just -- it just doesn't make sense to say that  
2 having gone to all of this trouble they really meant to  
3 let whole -- all or part of this statute lie fallow for a  
4 year. It's simply perverse to solve the problem by  
5 delaying the effective date, especially since, as you  
6 suggest, another way to solve the problem which is equally  
7 good and avoids the problems I've just talked about is  
8 just to scratch out the change and put another word in its  
9 place. But, you know, both are equally intrusive. Both  
10 are equally activist.

11 And it's our view that the least -- the solution  
12 that does the least violence to what Congress wrote and  
13 what it did is simply to allow judges to turn to the  
14 appropriate page in the United States code and read off  
15 the penalty and pass sentence using that penalty. There  
16 really is no practical or legal obstacle to doing that.  
17 This is not a case where a judge sits down and is  
18 completely stymied by what he sees in front of him. And  
19 once again, judges have been doing it. They are doing it.

20 QUESTION: Ms. Wax, will you -- I should know  
21 this, but what sentence did this man get?

22 MS. WAX: Um --

23 QUESTION: Assume you win, what -- how long will  
24 he be in prison?

25 MS. WAX: He's going to be in prison for 15

1 years I believe.

2 QUESTION: 15 years plus a 10 -- 4 or 5 years.

3 MS. WAX: Well, petitioner's correct that the  
4 mandatory good-time provisions under section 4163 and 4164  
5 will apply to him, so he'll have some time deducted from  
6 his mandatory term of imprisonment.

7 QUESTION: If it's good time.

8 QUESTION: If it's good.

9 MS. WAX: If it's -- right, if it's good time.

10 QUESTION: Yes.

11 MS. WAX: But he'll be in prison for at least 10  
12 years is my understanding.

13 QUESTION: I see.

14 MS. WAX: Yeah. So it will be at least 10 years  
15 before he'll actually be out and be supervised.

16 My final -- the point -- one more point I want  
17 to make about this question of delaying the supervised  
18 release penalty, which of course would mean that  
19 petitioner would get nothing. It's important to note that  
20 the conflict in the courts below has not really been about  
21 whether individuals who are -- to commit their offenses  
22 during this period get nothing or get supervised release.  
23 Almost virtually every court that's wrestled with this  
24 problem has ruled that -- or the result of every decision  
25 has been that these offenders get something, either



1 supervised release or special parole. But petitioner is  
2 asking to be let -- to get nothing. And although the  
3 courts below have come out in different ways and they've  
4 said different things and some have concluded that the '86  
5 act is delayed and some have concluded that they're not,  
6 there's virtually unanimous agreement that it simply would  
7 not comport with what Congress did when it passed this act  
8 and what Congress intended to open up, to create this  
9 opening for individuals committing these offenses.

10 The second point about delaying supervised  
11 release is that it really can't be squared with the text  
12 and structure of the 841 penalty revisions. If you  
13 actually look at section 1002 and the changes that it made  
14 to section 841 to the penalties, you'll see that the terms  
15 of imprisonment, the fines, and the post-confinement  
16 monitoring supervised-release requirements are all put  
17 together in one paragraph. They're part of the same --  
18 they're part of an organic whole. They're meant to  
19 function together.

20 What petitioner is saying is that we're going to  
21 apply these statutes piecemeal. We're going to use the  
22 mandatory prison sentence from the 1986 act. We're going  
23 to go back I suppose to the 1984 act and use whatever  
24 post-confinement monitoring requirement there is in the  
25 1984 act. We're going to slap together this patchwork

1     which creates its own set of anomalies and contradictions,  
2     especially for cocaine offenses.  And in fact if you sit  
3     down and look at how it works to use part of the '84 act  
4     and part of '86 act you come up with blatant  
5     contradictions.  And that's apparent if you look at the  
6     cocaine offenses which -- the result of slapping together  
7     these two acts would be that more serious cocaine offenses  
8     would get a less harsh sentence than less serious cocaine  
9     offenses, and I won't bore the Court with the details of  
10    explaining that.  But that is the result of this patchwork  
11    solution.

12                 QUESTION:  We haven't found this boring.  It's  
13    been exciting stuff.

14                 (Laughter.)

15                 MS. WAX:  Well, it's important to us, Justice  
16    Scalia.

17                 In sum, we believe that the plain language of  
18    this statute should be applied, that this Court should  
19    respect the unimpeachable and vital legislative principle  
20    that statutes go into effect immediately unless Congress  
21    says otherwise and uphold the judgment of the court of  
22    appeals in this case.

23                 QUESTION:  I can't help but enjoy the difference  
24    between an axiom, a rule, and a vital legislative  
25    principle.

1 (Laughter.)

2 QUESTION: Thank you, Ms. Wax.

3 Mr. Goldberger, do you have rebuttal?

4 REBUTTAL ARGUMENT OF PETER GOLDBERGER

5 ON BEHALF OF THE PETITIONER

6 MR. GOLDBERGER: Thank you, Mr. Chief Justice.

7 We're not asking in this case for a delay in the  
8 implementation of supervised release. The Government is  
9 asking for an acceleration of the effective date of  
10 supervised release by more than an entire year ahead of  
11 the date that Congress decided it would take for the  
12 system to gear up and be ready to implement this entirely  
13 new form of sentencing.

14 QUESTION: There is an anomaly created by your  
15 proposal which is that your client would get nothing,  
16 neither, neither special parole nor supervised release.

17 MR. GOLDBERGER: He hardly gets a nothing. He  
18 gets nothing in addition to --

19 QUESTION: To his sentence. Right.

20 MR. GOLDBERGER: -- 10 years in prison and 10  
21 years of post-incarceration supervision, because and  
22 precisely because he's a pre-November 1, '87, offender.  
23 He receives both mandatory release supervision by virtue  
24 of the good-time laws which go out of effect for post-  
25 November 1, '87, cases and he receives parole on his

1 conspiracy sentence for 10 years which wouldn't exist had  
2 it been a post-November '87 sentence. So the anomaly that  
3 the Government offers really doesn't exist. In fact it  
4 cuts in our favor by showing the rationality of -- or --  
5 let's -- the lack of irrationality I think is more fair,  
6 yes, of saying that Congress was willing to tolerate a  
7 year's delay in the reinstitution of extra supervision for  
8 this small category of offenders to avoid upsetting a very  
9 complicated transition to a whole new sentencing system.

10 It's true that there's never been a case in this  
11 Court resolving a controversy about an effective date by  
12 finding that it was delayed. That's because in 200 and  
13 more years there's never been a case in this Court  
14 resulting in controversy about an effective date, so that  
15 doesn't tell us anything. And it's certainly not true  
16 that the courts of appeals have never found a delayed  
17 effective date. The majority of the courts of appeals in  
18 the cases underlying the conflict that you're here to  
19 resolve now have ruled in our favor by finding that there  
20 was a delay.

21 This is because -- the reason the majority of  
22 the circuits have gone this way is because that it is not  
23 fair to say that there are just a few little problems  
24 created by an immediate effective date. There are massive  
25 and irreconcilable problems in interpreting this and other



1 drug sentencing statutes. The problems are irreconcilable  
2 --

3 QUESTION: Well, does the -- does the  
4 legislative history show any -- give any reason for the  
5 substitution of special release for --

6 MR. GOLDBERGER: There is -- there's absolutely  
7 no legislative history explaining this precise change. It  
8 occurred after a bill can -- saying special parole had  
9 passed both houses. The change occurred only in the  
10 reconciliation process.

11 QUESTION: Well, what if the --

12 MR. GOLDBERGER: We don't know by whom or why.

13 QUESTION: What if the -- what if the statute  
14 hadn't been -- or the bill hadn't been amended in that way  
15 and it retained the special parole provision?

16 MR. GOLDBERGER: I don't think there would have  
17 been sufficient argument against the presumption axiom --

18 QUESTION: Of immediate -- of immediate  
19 effectiveness?

20 MR. GOLDBERGER: That's right. That's right.

21 QUESTION: It's just the -- it's just -- it's  
22 just this -- this new term being included in the statute  
23 which seems to be tied to the statute that becomes  
24 effective in '87 that gives you this argument?

25 MR. GOLDBERGER: This and all of those other

1 contradictions where certain other provisions in the 845  
2 series of drug statutes incorporate by reference and refer  
3 to sections of 841(b), the basic drug-sentencing law, and  
4 say, and this person shall receive twice the term of  
5 special parole as someone sentenced under 841(b) and here  
6 Congress said there is no special parole under 841(b).  
7 It's something else. So it's both the contradictions and  
8 the pari materia use of a term defined else where.

9 QUESTION: Would all of those be eliminated?

10 Suppose we just interpreted this to be a scrivener's error  
11 and to be special parole instead, would that eliminate all  
12 --

13 MR. GOLDBERGER: It absolutely would eliminate  
14 it, but we agree with the Government that that is the  
15 first impermissible answer to the problem.

16 QUESTION: Yes, right.

17 MR. GOLDBERGER: And that's because it's the  
18 only one that's directly contrary to the language  
19 deliberately chosen by Congress.

20 QUESTION: Deliberately chosen by Congress.

21 MR. GOLDBERGER: Well, we know that Congress  
22 changed the words "special parole term" to the words "term  
23 of supervised release." And we know that that didn't  
24 happen by computer error. We know that it happened by  
25 human act. Now it may have happened by human error, but

1 it happened by human action and it was then voted on in  
2 those terms by both houses. And when Congress has voted  
3 for certain words which it knows or ought to know are  
4 different from other words, then that is -- it would be a  
5 deviation from the judicial function to solve the problem  
6 by rewriting the statute.

7 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
8 Goldberger.

9 The case is submitted.

10 (Whereupon, at 11:52 a.m., the case in the  
11 above-entitled matter was submitted.)  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATION

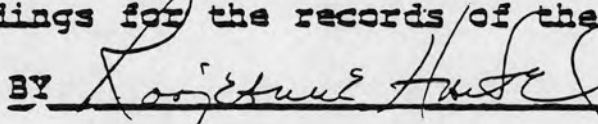
Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#89-7370 - MOSHE GOZLON-PEREZ, Petitioner V. UNITED STATES

---

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

BY



(REPORTER)



RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

90 NOV -6 P 2:49