

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: IMMIGRATION AND NATURALIZATION SERVICE,  
ET AL., Petitioners, v. NATIONAL CENTER FOR  
IMMIGRANTS' RIGHTS, INC., ET AL

CASE NO: 90-1090

PLACE: Washington, D.C.

DATE: Wednesday, November 13, 1991

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WASHINGTON, D.C. 20540

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 IMMIGRATION AND :  
4 NATURALIZATION SERVICE, :  
5 ET AL., :  
6 Petitioners :

7 v. : No. 90-1090

8 NATIONAL CENTER FOR :  
9 IMMIGRANTS' RIGHTS, INC., :  
10 ET AL. :

11 - - - - -X

12 Washington, D.C.  
13 Wednesday, November 13, 1991

14 The above-entitled matter came on for oral  
15 argument before the Supreme Court of the United States at  
16 1:57 p.m.

17 APPEARANCES:

18 STEPHEN J. MARZEN, ESQ., Assistant Solicitor General,  
19 Department of Justice, Washington, D.C.; on behalf of  
20 the Petitioner.

21 PETER A. SCHEY, ESQ., Los Angeles, California; on behalf  
22 of the Respondent.

23  
24  
25

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1 P R O C E E D I N G S

2 (1:57 p.m.)

3 CHIEF JUSTICE REHNQUIST: We will now hear  
4 argument in number 90-1090, INS v. National Center for  
5 Immigrants' Rights.

6 Mr. Marzen, please proceed.

7 ORAL ARGUMENT OF STEPHEN J. MARZEN

8 ON BEHALF OF THE PETITIONER

9 MR. MARZEN: Mr. Chief Justice, and may it  
10 please the Court:

11 The question presented in this case is whether  
12 the Attorney General has statutory authority to require an  
13 arrested alien, as a condition of his release on bond, to  
14 refrain from unauthorized employment pending a final  
15 determination of his deportability.

16 In 1983 the Attorney General promulgated the  
17 regulation challenged in this case. The operative two  
18 sentences read as follows; condition against unauthorized  
19 employment, a condition barring employment shall be  
20 included in an appearance and delivery bond in connection  
21 with the deportation proceeding or bond posted for the  
22 release of an alien in exclusion proceedings unless the  
23 district director determines that employment is  
24 appropriate.

25 The Ninth Circuit below held that the regulation



1 exceeds the Attorney General's statutory authority under  
2 section 1252(a) of 8 USC. That section provides that the  
3 Attorney General may impose such, quote, such conditions  
4 as the Attorney General may prescribe, close quote, on  
5 release bonds.

6 The court of appeals principally reasoned that  
7 the Attorney General could not detain an alien for  
8 engaging in unauthorized employment and that a bond  
9 condition must therefore relate to insuring appearance for  
10 hearings.

11 We ask this Court to hold that the Attorney  
12 General's regulation is within his statutory authority for  
13 three reasons. First, bond conditions may be used to  
14 further any of the purposes of the immigration laws.  
15 Second, protecting American workers from displacement by  
16 alien workers is a core purpose of those immigration laws.  
17 And third, a bond condition against unauthorized  
18 employment helps protect American workers from  
19 displacement by aliens.

20 The text of section 1252(a) authorizes release  
21 of an alien on bond containing, quote, such conditions as  
22 the Attorney General may prescribe. Those conditions are  
23 not limited by the text of that section to any particular  
24 subset of the concerns of the immigration laws. As the  
25 Attorney General explained almost 20 years ago in his

1 decision in Toscano Rivis, it would be unreasonable to  
2 construe the quoted language to mean that the Attorney  
3 General may impose bond conditions which are totally  
4 unrelated to the various purposes of the immigration laws.

5 But the reports clearly demonstrate a  
6 congressional intent to grant wide discretion otherwise.  
7 In particular, section 1252(a) --

8 QUESTION: Mr. Marzen, can I interrupt you with  
9 one question? If the -- and I know you disagree with this  
10 reading, but if the Ninth Circuit were correct that the  
11 regulation required that the bond condition be imposed  
12 even if the alien intended to do authorized work, would  
13 that regulation be valid, be authorized by the statute?

14 MR. MARZEN: It would be perfectly consistent to  
15 apply it even for authorized work as to aliens who are  
16 authorized to work only by regulation.

17 In other words, the Attorney General could  
18 decide that aliens in deportation proceeding who only are  
19 authorized by his regulation to work may lose that  
20 authorization if they are in deportation proceedings.

21 QUESTION: What about the aliens in this recent  
22 amnesty program where there was, where they applied for  
23 amnesty and during a period of time large groups were  
24 eligible for work that they might not otherwise have been  
25 eligible for, say, about that group?

1 MR. MARZEN: Yes. He could apply the  
2 regulation --

3 QUESTION: To them.

4 MR. MARZEN: -- against them to forbid their  
5 work.

6 Now I would note, though, in that context that  
7 he has not applied the regulation in that fashion. And in  
8 fact, part 208 of 8 CFR specifically provides that any  
9 alien who files a nonfrivolous assignment petition shall  
10 be given work authorization pending the determination of  
11 that asylum application. The same thing applies to  
12 aliens --

13 QUESTION: How does that work out in the  
14 administration of this bond condition? At the time the  
15 bond is requested or imposed, is there any prior  
16 determination of the alien's authority to work?

17 MR. MARZEN: Before the bond is stamped no work  
18 authorized, there is a determination by the district  
19 director or his designate that --

20 QUESTION: But, in what kind of -- is this an ex  
21 parte determination or does the alien have any part in the  
22 decision?

23 MR. MARZEN: The alien has an important part to  
24 play because he has to, he will be asked to furnish  
25 evidence of his work authorization.

1           The determination whether an alien is authorized  
2 to work comes down to, is based on two facts. First,  
3 whether the person arrested by the INS is, in fact, an  
4 alien. And we will usually know that from statements  
5 given to the arresting officer or travel documents found  
6 on the alien. They will say his country of birth and it  
7 won't be the United States.

8           The second fact you need is whether that  
9 immigration, whether the immigration status held by the  
10 alien, if any, authorizes him to work. That determination  
11 is made with, by reference to 8 CFR 274(a)(12). It lists  
12 the 27 or 26 statuses that authorize an alien to work. So  
13 the alien will even, either show his green card, will show  
14 some other document issued by the INS which the INS  
15 requires the alien to hold on his person, or will give the  
16 INS his A or application number, which again is  
17 cross-referenced to his immigration status. And you can  
18 just read from the regulation whether that status entitles  
19 the alien to work.

20           So it is an informal hearing.

21           QUESTION: So if the alien doesn't happen to  
22 have the card with him at the time he's apprehended, what  
23 does he do?

24           MR. MARZEN: He, he can still say what his A  
25 number is. And that will list whether he is, for example,



1 a lawful, permanent resident and is, therefore, entitled  
2 to work by virtue of status.

3 QUESTION: And then the officer just decides  
4 whether or not to ask for this condition right there on  
5 the spot.

6 MR. MARZEN: No. The condition -- once the  
7 officer -- the officer makes the determination whether the  
8 alien is authorized to work. But once the officer decides  
9 that the alien is not authorized to work, the condition  
10 must be imposed.

11 QUESTION: I understand. But he just makes  
12 that -- I'm a little puzzled. Is there any procedural  
13 safeguards to be sure that decision is made accurately?  
14 That's, I guess, what I'm asking.

15 MR. MARZEN: There's no specific -- the initial  
16 determination by the district director or his designate is  
17 informal. It's not, there are no specific procedures  
18 provided by the regulation.

19 QUESTION: But what happens in doubtful cases  
20 where you can't really tell right away and you got, the  
21 bond request is made right away?

22 MR. MARZEN: We take the position, and it hasn't  
23 been applied yet, but we would take the position that the  
24 burden of proof is on the alien. In implementation of the  
25 employee/employer sanctions in IRCA, the alien is required

1 to show the employer, actually anyone is required to show  
2 the employer, documents evidencing a right to work, either  
3 a green card or some combination of a couple of other  
4 forms of documentation, like a social security card and a  
5 driver's license.

6 The district director is essentially asking the  
7 alien to furnish the same sort of documentation. And  
8 given that the alien is the one who would have that  
9 documentation or who would know his A number, it's  
10 reasonable to require him to provide that information.

11 I would note, though, that immediately after the  
12 arresting officer or the district director or his  
13 designate makes the determination, there is prompt  
14 administrative and judicial review as we outlined. The  
15 form that the alien, that contains the bond, has a  
16 check-mark box so, which the alien, and the alien is  
17 required to sign the form. And he has to check a box  
18 saying whether he wants a bond redetermination proceeding  
19 by an immigration judge. Those bond redetermination  
20 proceedings are held very promptly in large cities with  
21 large alien populations. In California and in Texas,  
22 they're held every weekday.

23 QUESTION: If he, in that determination, in that  
24 hearing, if he demonstrates that he is authorized to work,  
25 then the condition would be removed from the bond.

1 MR. MARZEN: That's correct.

2 And there's a further level of review with the  
3 Board of Immigration Appeals. And the statute also  
4 authorizes, gives the alien the right to file a petition  
5 for a writ of habeas corpus.

6 It is, and it's not the case that the alien will  
7 even have to wait in custody while the writ, while the  
8 litigation is going on. He can post the bond with the  
9 condition that he not work. And as long as he asks for a  
10 bond redetermination within 7 days after posting bond, he  
11 can challenge the imposition of that condition while he is  
12 free on bail and through all the avenues of administration  
13 and judicial relief.

14 QUESTION: Mr. Marzen, is an alien who is found  
15 to be doing work which is not authorized subject to  
16 deportation on that ground?

17 MR. MARZEN: It depends on the alien's status.  
18 Frankly, 96 percent of aliens who are arrested and charged  
19 with deportability, according to INS statistics as of  
20 fiscal year 1989, entered without inspection. If that  
21 status determination is right, they're not, they're  
22 clearly not supposed to be here for any reason, let alone  
23 to work. It's not a further ground for their deportation  
24 that they, in fact --

25 QUESTION: The working without authorization is

1 not an additional ground for deportation.

2 MR. MARZEN: For the vast majority of aliens in  
3 deportation proceedings. For some people who, for  
4 example, a tourist who has overstayed his or her visa, for  
5 example, they would be deportable for overstaying the visa  
6 and if they engaged in work, that would be a violation of  
7 that status even if it were still in effect. So it  
8 depends on the status the alien has.

9 But the general answer to your question, Justice  
10 O'Connor, is that it's not an additional ground. I do  
11 note, though, that the statute, once we do have a ground  
12 for arresting an alien, the attorney, the statute,  
13 1252(a), gives the Attorney General the authority in his  
14 discretion to retake an alien back into custody so that  
15 if, for example, an alien entering without inspection were  
16 found to have been engaged in unauthorized employment, the  
17 Attorney General would be entitled in that case, even  
18 without the regulation, to take the alien back.

19 What the regulation and the bond condition give  
20 us the authority to do is to hold the risk of forfeiture  
21 over the alien to encourage voluntary compliance with  
22 essentially a preexisting duty not to engage in work.

23 QUESTION: I'm just curious about something.  
24 You take the position that the INS regulation, we, should  
25 be interpreted as not requiring a bond in circumstances in



1     which there is an authorized work permit for the alien.  
2     Why has the INS not amended the regulation to make that  
3     clear?

4             MR. MARZEN: Well, we want to enforce this  
5     regulation. And regrettably, the Ninth Circuit's decision  
6     would prevent this or any revised -- the presidential  
7     effect, would throw a cloud over any revised regulation,  
8     because the Ninth Circuit where about 40 percent of our  
9     immigration work takes place, has held that we, that it  
10    simply is not a basis for either detaining or using  
11    detention as a lever against unauthorized employment. And  
12    that we have to hold individualized hearings, so  
13    individualized that we have to treat each of these cases  
14    as a matter of first impression, if you will.

15            And it's for that reason that we have kept on  
16    the books, it's still codified at 8 CFR 103.6, this  
17    particular regulation and seek to enforce it to make sure,  
18    to make absolutely clear that the Attorney General does  
19    have the statutory authority.

20            Section 1252 --

21            QUESTION: Mr. Marzen, I just, to be sure I  
22    understand your answer to an earlier question by Justice  
23    O'Connor.

24            In fact, the condition is -- violation of the  
25    condition is never a separate basis, an independent basis

1 for deportability, is it? Because --

2 MR. MARZEN: That's correct.

3 QUESTION: Because he will always have committed  
4 a violation by accepting unauthorized work.

5 MR. MARZEN: Correct.

6 QUESTION: It makes it a double violation, is  
7 all that happens.

8 MR. MARZEN: I was -- and maybe I misunderstood  
9 the question. I thought I was answering the question of  
10 whether engaging in unauthorized employment was a separate  
11 ground for deportability. And for some aliens, it is.  
12 But a mere violation of the condition itself, you're  
13 exactly right, would not be a ground for deportability.

14 Section 1252(a) simply cannot be read as the  
15 court of appeals did the first 2 times around and as the  
16 respondents read it now. To be concerned solely with  
17 appearance, this Court in Carlson v. Landon rejected the  
18 contention that the predecessor to section 1252(a) was  
19 concerned only with appearance.

20 The Sixth Circuit, which wrote one of the  
21 opinions under review in that case, held that the alien  
22 Communist there had to be released because the Attorney  
23 General's authority was limited to insuring appearance for  
24 deportation proceedings. This Court rejected that  
25 limiting construction. It held that, and dismissed as of

1 not great significance the factor of probable availability  
2 for trial.

3           Once you are beyond the appearance limitation  
4 and, as this Court has held, can detain people for, who  
5 are security risks or can exercise the authority under  
6 1252(a) to further the public interest, prevention of  
7 unauthorized employment and protection of the American  
8 labor force against displacement by aliens is clearly one  
9 of those purposes.

10           If respondent's contention were correct, it  
11 would mean that the Attorney General could not revoke bail  
12 or impose a condition on an alien who repeatedly engages  
13 in unauthorized employment. In fact, we could not even  
14 impose the standard mandatory condition that is imposed on  
15 pretrial, on people who are arrested for crimes and are  
16 released pending trial that they not violate a Federal,  
17 State, or local law.

18           If the authority in subsection (a) is construed  
19 narrowly, the Attorney General would have even less  
20 authority over arrested aliens who are charged with  
21 deportability than we, than the Attorney General has over  
22 people arrested for violations of Federal crimes, criminal  
23 law.

24           QUESTION: I was going to ask you, is that  
25 condition that you just mentioned, that you shall obey all

1 laws of every State in the United States, is that included  
2 regularly in the bonds that we're talking about?

3 MR. MARZEN: No. In fact, it's --

4 QUESTION: Could it be?

5 MR. MARZEN: Yes, without question. That is  
6 an -- it is important, though, that to note that although  
7 the Attorney General has had the authority given by  
8 section 1252(a) for 40 years and has gone on record as  
9 saying he has the authority for more than 20, he has  
10 exercised it in a very conservative and measured fashion.  
11 And has, in fact, the only condition that I am aware of  
12 that he has imposed beyond ensuring appearance is to  
13 prevent unauthorized employment, although he could  
14 certainly impose this standard condition, the standard  
15 mandatory condition that I just referenced with relation  
16 to people released before trial.

17 The history of successive legislation is yet  
18 another reason why, that makes clear that Congress  
19 authorized bond conditions beyond those related to  
20 appearance. The Immigration Act of 1917 permitted release  
21 on bond, quote, conditioned that such alien shall be  
22 produced when required for a hearing or hearings in regard  
23 to the charge upon which he has been taken into custody,  
24 close quote. Congress expanded the permissible bond  
25 conditions in the legislative history, they said they



1 wanted to change that law in 1950 in the Internal Security  
2 Act.

3 The revised act, after repealing the 1917 law,  
4 specified that the appearance condition shall only be  
5 among the conditions. And the legislative history which  
6 referenced H.R. 10 specified that the Attorney General  
7 shall have full discretion and untrammelled authority to  
8 impose conditions for bond. Section 1252(a) of the  
9 Immigration and Nationality Act, which is the Attorney  
10 General's current authority, followed the procedure  
11 established by the 1950 Internal Security Act.

12 Once it is agreed that bond conditions and the  
13 Attorney General's authority in section 1252(a) can extend  
14 to any of the purposes of the immigration laws, it must  
15 extend to protecting American workers from displacement by  
16 aliens. Congress clearly intended to protect American  
17 workers from displacement by aliens not intended to work.  
18 They did so in two ways.

19 The first way was described this Court in  
20 *Sure-Tan* as the principle of selectivity. Nonimmigrants  
21 can lawfully enter the United States only in, generally  
22 speaking, only in a status that does not authorize them to  
23 work. And immigrants and the remainder of nonimmigrants  
24 can enter the United States in a status that authorizes  
25 them to work only if the Secretary of Labor has first

1 certified that they will not take away jobs from American  
2 workers who are willing and able to work.

3 If there was any doubt on Congress' purpose in  
4 this regard it was resolved by the employers' sanctions  
5 enacted by the Immigration Reform and Control Act of 1976.  
6 It prevents employers, the other half of this employment  
7 contract, from hiring the alien. Indeed, 8 USC 1324  
8 defines unauthorized alien to mean an alien not a  
9 permanent, lawful resident or, quote, authorized to be so  
10 employed by this chapter or by the Attorney General.

11 Thus, Congress has made it absolutely clear that  
12 unauthorized by work, unauthorized work by aliens is an  
13 evil that it wanted to prevent.

14 QUESTION: I'm just curious why, I mean, I  
15 understand you don't want to bite off any more than you  
16 have to, but why does the condition have to relate to a  
17 purpose of the immigration laws? For example, the  
18 condition you mentioned earlier that the person released  
19 not violate any State or Federal law, I'm not sure that  
20 that's a particular purpose of the immigration laws, to  
21 prevent violations of State or Federal law. Why couldn't  
22 the Attorney General impose any condition that's in the  
23 public interest?

24 MR. MARZEN: Well, Justice Scalia, I'm not  
25 giving up much, because the immigration laws vest vast,

1 vast discretion to the Attorney General.

2 With respect to your particular question, it is  
3 in fact a ground of deportability, not only violating a  
4 Federal law, but violating a State or local one as well.  
5 So that is within the various purposes of immigration  
6 laws. I'm simply actually defending, as I quoted at the  
7 outset of my argument, the position of the Attorney  
8 General that it must relate to the various purposes of the  
9 immigration laws.

10 That doesn't give up an awful lot, although,  
11 again, with respect to how that authority has been used,  
12 it bears mention that for the two decades that the  
13 Attorney General has been on record, he has only used that  
14 authority to prevent unauthorized employment.

15 QUESTION: I may be wrong, Mr. Marzen, but  
16 didn't the majority opinion in the Carlson case suggest  
17 that anyway it had to relate to some purpose of the  
18 statute, the condition?

19 MR. MARZEN: The Carlson majority said it, said  
20 it had to relate to the legislative scheme.

21 Again, the legislative -- now that section 23 of  
22 the Internal Security Act of 1950 has been codified and  
23 adopted for purposes of the Immigration and Nationality  
24 Act, the purposes are very, very --

25 QUESTION: I understand that. But at least that

1 would suggest that it would be improper for it to relate  
2 to some public interest purpose totally unrelated to the  
3 statutory scheme.

4 MR. MARZEN: That's true. It's just I'm -- for  
5 purposes of Justice Scalia's question --

6 QUESTION: You don't think --

7 MR. MARZEN: That's exactly right. It, there  
8 are not many public interests that are not part of the, a  
9 purpose of the immigration law, although, again, this case  
10 does not require the Court to plumb the depths of exactly  
11 how far that authority goes. We're dealing here with  
12 authority that is at the very absolute core of the  
13 purposes of the immigration laws and was, before the  
14 Immigration Nationality Act and the contract labor  
15 legislation was, in the 1952 act, and was reaffirmed by  
16 Congress in the 1986 Immigration Reform and Control Act.

17 A bond condition against unauthorized  
18 employment -- actually, before I get to that, I should  
19 perhaps address the Ninth Circuit's rationale in  
20 particular.

21 They concluded that the Attorney General's  
22 authority did not extend to detaining aliens for  
23 unauthorized employment, and by analogy that the bond  
24 condition could not be used for prevention of unauthorized  
25 employment almost entirely on the basis of IRCA's



1 rejection of employee sanctions. They had two basic  
2 rationales; that Carlson did not deal with unauthorized  
3 employment, which is true, but it still dealt with a  
4 nonappearance related restriction; and that IRCA rejected  
5 employee sanctions.

6 In that regard there are a number of points  
7 should be made. In IRCA, Congress can be said to reject  
8 at most a criminal sentence for unauthorized employment.  
9 It did not reject prehearing detention. In addition,  
10 there was, in fact, no legislative rejection of employee  
11 sanctions.

12 The reference that respondents make occurs in  
13 hearings on the Immigration Reform and Control Act. And  
14 it was simply a Senator in colloquy with a testifying  
15 witness dismissing a witness' suggestion that that would  
16 be a good legislative proposal. There is no congressional  
17 act as a body rejecting the proposed amendment to the  
18 proposed IRCA legislation or amending IRCA to take out an  
19 employee sanction, nothing that would indicate that  
20 Congress felt it actually would be bad to use bond  
21 conditions or detention in the way the Attorney General  
22 might.

23 In addition, a surprising concession in the  
24 brief by respondents is that the Ninth -- whatever  
25 authority IRCA provides or doesn't provide cannot affect

1 the Attorney General's preexisting authority in prior  
2 legislation. That takes out the guts of the Ninth  
3 Circuit's decision, because whatever Congress did in 1986,  
4 it clearly did not impliedly repeal the Attorney General's  
5 authority under section 1252(a) to impose bond conditions  
6 to further the various purposes of the immigration laws.

7 With that, it's knowing that the Attorney  
8 General has the authority to further these immigration law  
9 purposes and that unauthorized employment, prevention of  
10 it, is at the core of those purposes. It's important to  
11 note that the bond condition helps protect American  
12 workers from displacement by aliens. What it does, in  
13 fact, is provide an additional lever over aliens to  
14 encourage voluntary compliance. Aliens and their families  
15 often put up the money to post bond. The risk of  
16 forfeiture is a very, very effective way of getting the  
17 aliens to comply with the bond condition and prevent the  
18 evil Congress identified of them working.

19 This additional enforcement measure is  
20 important, especially as the legislative history we cite  
21 in our brief, to those American workers with few job  
22 skills who live on the margin of our society. 5 years  
23 after passage of IRCA, the INS is still arresting and  
24 charging with deportability almost 1 million aliens a  
25 year. Although most of those aliens take a voluntary

1 departure, more than 100,000 of them contested deportation  
2 hearings.

3 If the Attorney General does not have the  
4 authority that he seeks to exercise in this case, he would  
5 not be able to tell those 100,000 aliens that they cannot  
6 engage in unauthorized employment. And in that case the  
7 aliens would hold jobs that American workers should have  
8 instead.

9 I would like to reserve the remainder of time  
10 for rebuttal.

11 QUESTION: Thank you, Mr. Marzen.

12 Mr. Schey, we will now hear from you.

13 ORAL ARGUMENT OF PETER A. SCHEY

14 ON BEHALF OF THE RESPONDENT

15 MR. SCHEY: Mr. Chief Justice, and may it please  
16 the Court:

17 As the Chief Justice stated in U.S. v. Salerno,  
18 in our society liberty is the norm and detention without  
19 trial is the carefully limited exception.

20 The challenged regulation in this case results  
21 in two things. First, it tells persons arrested by the  
22 INS and simply charged with being deportable -- not yet  
23 found deportable, they've not yet had a hearing before the  
24 corps of immigration judges that the Attorney General  
25 hires precisely to determine whether they are deportable

1 or not, it tells them that in order to exercise their  
2 right to a deportation hearing, they must go cold, hungry,  
3 and homeless.

4 QUESTION: Which they are, in law, obliged to do  
5 anyway. As I understand it, it's not imposing a new  
6 disability from work upon them, it is simply requiring  
7 their commitment not to violate the law by taking a job.

8 MR. SCHEY: Well, Justice Scalia, what the law  
9 says is that when you are arrested, you are arrested upon  
10 probable cause, just as in a criminal case, you would be  
11 arrested upon probable cause.

12 Under our immigration laws, whether you have a  
13 right to work or not depends on your status. The Attorney  
14 General has hired 81 immigration judges and sent them  
15 throughout the country to hold hearings to determine your  
16 status, to determine your deportability. Until that  
17 determination has been made, it seems highly unfair to  
18 make the presumption that everyone arrested is definitely  
19 a deportable alien and unauthorized to work. That's the  
20 very point of that hearing.

21 The Attorney General slips back and forth  
22 between two descriptions of the class members in this  
23 case. He frequently in his brief, when he's trying to  
24 drive home a point, refers to them as illegal aliens, much  
25 in the same thrust of your question. They're just illegal



1 aliens, they're not authorized to work anyway. But once  
2 in a while if you look at the Attorney General's brief he  
3 describes them for what they really are; they're simply  
4 people charged in deportation hearings.

5 This Court recognized in Lopez-Mendoza that the  
6 majority of INS enforcement activity takes place in what  
7 are called area control operations. These are mass  
8 operations. This Court described those operations as  
9 chaotic in nature. It is simply not fair to assume that  
10 INS is right 100 percent of the time.

11 QUESTION: Mr. Schey, what's fair depends upon  
12 what Congress thinks is fair. And Congress thinks that  
13 the chances of the Attorney General being guilty of  
14 deception versus the chances of the arrestees being guilty  
15 of deception are such that the Attorney General may, if he  
16 wishes, not grant any bond at all and just keep the person  
17 in absolute detention and say never mind, I don't have to  
18 worry about your not working, I'm going to keep you in  
19 detention until this matter is cleared up. He could do  
20 that, couldn't he?

21 MR. SCHEY: Absolutely not.

22 QUESTION: He could not do that.

23 MR. SCHEY: Absolutely not.

24 Congress, Justice Scalia, spent 10 years  
25 debating legislation introduced by Congressman Hobbs, who

1 also introduced all the anti-Communist legislation that  
2 was on the books in the late 1940's and 1950's.

3           Congressman Hobbs introduced his first H.R. 10  
4 in 1939 and every year for the next 10 years he introduced  
5 legislation not just to detain every alien as you're  
6 suggesting, but just to limit the detention of four  
7 categories of aliens pending their deportation; criminals,  
8 subversives, dope peddlers, and slave traders.  
9 Just -- that's all that Congressman Hobbs wanted.

10           And anyone who reads the congressional debates,  
11 it will become absolutely plain that despite year after  
12 year of effort just to convince Congress to give the  
13 Attorney General the power to detain those four groups of  
14 aliens, just those four groups, that's what he was  
15 concerned about, every single Congress rejected his bill  
16 until finally in 1950 he backed down. And he said, okay,  
17 Congress, H.R. 10 as introduced in 1950 for the first time  
18 said, I want the Attorney General to have the power to  
19 detain just those four groups of aliens, but now I'm  
20 willing to say he should detain them once they've been  
21 found deportable, not pending the hearing, just once  
22 they've been found deportable.

23           And Congress rejected that proposal. In fact,  
24 one of the, one of the chief supporters of the Hobbs bill,  
25 H.R. 10, stated at the end of that process that the Senate

1 wouldn't even dignify the bill with a vote.

2 QUESTION: Well, Mr. -- Mr. Schey, how then, if  
3 that's your answer to Justice Scalia, how do you read  
4 8 USC 1252(a) where it says pending a determination of  
5 deportability, an alien may, upon warrant of the Attorney  
6 General be arrested and taken into consideration, and one  
7 of the alternatives is that he may be continued in  
8 custody?

9 MR. SCHEY: Well, Your Honor, I think that as  
10 this Court stated in Carlson v. Landon, it said that the  
11 Attorney General is left without standards to determine  
12 when to admit to bail and when to detain.

13 It is familiar law that in such an examination  
14 the entire act is to be looked at and the meaning of the  
15 words determined by their surrounding connections. That  
16 is precisely the holding. In Carlson, this Court --

17 QUESTION: How does that, go ahead, how does  
18 that bear on --

19 MR. SCHEY: Well, Carlson was dealing with the  
20 same language that we're dealing with today. And in  
21 Carlson and then in Witkovich --

22 QUESTION: It held, it held the aliens could be  
23 detained.

24 MR. SCHEY: It held that the aliens could be  
25 detained based on two things. Firstly, the Court said the

1 Attorney General is not left with untrammelled authority as  
2 to bail. The Attorney General must justify his refusal of  
3 bail by reference to the legislative scheme to eradicate  
4 the evils of Communist activities. This is a permissible  
5 delegation of legislative power because the executive  
6 judgment is limited by adequate standards.

7 When dealing with the alien Communists, as in  
8 these cases, the legislative standard for deportation is  
9 definite. And in fact, the detention language that we are  
10 discussing here today appears for the first time in the  
11 National Security Act of 1950 which specifically not only  
12 defined Communist activity, it held that that activity  
13 specifically subjected the person to deportation from the  
14 United States.

15 QUESTION: But that was -- that's not the only  
16 thing that subjects one to deportability.

17 MR. SCHEY: That is correct. There are several  
18 things. And if the Attorney General were correct, and he  
19 doesn't even state it in this limited fashion, the  
20 Attorney General states, gee, we can detain as long as it  
21 relates to any of the broad purposes of the Immigration  
22 Act. Well, firstly, having read the legislative history  
23 extremely carefully, I can tell you without any doubt  
24 Congress today would still be debating the 1952 act --

25 QUESTION: Well, then why did it enact this



1 thing which appears on its face to grant the, grant the  
2 authority to the Attorney General? The -- reading all the  
3 legislative history in the world that says Congress  
4 wouldn't have enacted it, doesn't get around the fact that  
5 Congress did enact this particular provision.

6 MR. SCHEY: Well, Congress enacted this  
7 particular provision within the framework of discussions  
8 and debate and conference reports that make it absolutely  
9 clear that Congress did not intend -- the only detention,  
10 in fact, ultimately in 1952 when this law was enacted, if  
11 you go to part (b) or (c) of the statute, for people who  
12 have been found deportable, there Congress specifically  
13 said that the person could be released on detention on  
14 bond in amount and specifying such conditions  
15 for -- excuse me, let me just read you the exact language.

16 Congress said in part (b) that, and part (c),  
17 that the person could be, and then it repeats the language  
18 from part (a). Part (a) is for persons who are awaiting  
19 deportation. Under part (c), which deals with people  
20 already found deportable, Congress repeats the language  
21 from part (a) that the Attorney General can release on  
22 bond in an amount and containing such conditions as the  
23 Attorney General may prescribe, and then adds the  
24 following sentence, or on such other conditions as the  
25 Attorney General may prescribe.

1           What does that language mean? Right away,  
2 Congress, once it was dealing with people who had been  
3 found deportable, Congress added the language that their  
4 release could be restricted to other conditions. If you  
5 look at the part (a) that you're referring to, it talks  
6 about conditions in the security. It's discussing  
7 conditions in the security.

8           QUESTION: But you know -- quite apart from what  
9 it may authorize as the Attorney General to impose  
10 conditions, it says they may be continued in custody. The  
11 Attorney General need not grant bail.

12           MR. SCHEY: Right. Your Honor, all that I can  
13 say, Mr. Chief Justice, all that I can say is that ever  
14 since the first, ever since the first laws were enacted,  
15 no. When you read the legislative history, it is  
16 impossible that Congress intended that section to mean  
17 that the Attorney General could detain any person without  
18 releasing them on bond, as long as it related to the broad  
19 purposes of the Immigration Act. Under that reading --

20           QUESTION: Excuse me. Not any person, any  
21 alien.

22           MR. SCHEY: Any alien. Under that reading, the  
23 Attorney General could detain anyone who's illiterate  
24 because the laws call for deportation of illiterates. The  
25 Attorney General could detain any alien --

1 QUESTION: Only if he's an alien.

2 MR. SCHEY: -- any alien who received public  
3 assistance within 5 years after entry into the United  
4 States, any alien -- there are approximately 100 separate  
5 grounds of deportation.

6 And under this broad reading of the statute, any  
7 one of those persons -- and it is simply clear. In fact,  
8 in 1952 when the debates came to a head in Congress and  
9 they were ultimately rejecting Congressman Hobbs' effort  
10 to allow -- all Congressman Hobbs wanted was to detain  
11 criminals, dope peddlers, slave traders, and subversives.  
12 When they ultimately rejected that, in subsection (c) they  
13 specifically put in you have to have a criminal  
14 conviction.

15 Under subpart (d) they specifically say once an  
16 alien has been ordered deported, the Attorney General can  
17 place restrictions on his activities upon release. No  
18 such language appears in (a), the Attorney General can  
19 place restrictions on his release.

20 In order to revoke, if an alien who is released  
21 subsequent to being ordered deported, if an alien is  
22 released and the Attorney General says, don't work, and  
23 that alien works, you look at the final part (d) of the  
24 statute, the only way that bond can be revoked is upon a  
25 criminal conviction. Why would Congress have given less

1 rights to someone awaiting deportation? These people are  
2 just awaiting deportation. They've simply been arrested.

3 And as to a person who's been found deportable,  
4 Congress says the Attorney General can place restrictions  
5 on that person, including their activities. And it uses  
6 very particular language and says if the person violates  
7 that condition, upon conviction he or she shall be further  
8 detained. It would simply make no sense for Congress to  
9 grant minimal rights to someone who's just charged with  
10 being deportable and then grant all these extraordinary  
11 protections to somebody who has been found deportable.

12 If I can add one other thing to, one other  
13 aspect in response to your question, Mr. Chief Justice.  
14 And that is that one has to look at the whole law. I  
15 don't think one can just look at one phrase. This is a  
16 comprehensive statute. In this statute, as this Court  
17 held, has held twice now, in *De Canas v. Bica*, and -- this  
18 Court has made clear that in 1952 the employment of aliens  
19 was at best a peripheral concern of Congress. Congress  
20 itself stated that.

21 Congress itself did not make the employment of  
22 undocumented workers illegal until 1986. And then this  
23 wasn't just some Congressman, any Congressman, who  
24 rejected the notion of detaining aliens for working  
25 improperly, this was Senator Simpson. Senator Simpson is



1 the author of the 1986 law. And when a witness testified  
2 in front of Senator Simpson and said, well, instead of  
3 penalizing employers we can far better serve the country  
4 by detaining aliens who work without authorization,  
5 Senator Simpson squared that approach and said this is a  
6 harsh, he called it harsh, he called it unrealistic, and  
7 he called it a proposal made out of a sense of  
8 frustration.

9 The 1952 law, this Court has made very clear in  
10 the Sure-Tan case and in De Canas, these are recent  
11 decisions of this Court, this Court has made clear  
12 Congress -- I don't necessarily agree with this and this  
13 Court probably doesn't agree with it, but in 1952 Congress  
14 at best had a peripheral concern with the employment of  
15 aliens. And in fact, as a predicate to the 1952 act  
16 Congress ordered up a study. Congress conducted a study.  
17 The Senate conducted a study pursuant to Senate  
18 Resolution 137. Nothing in that detailed study suggests a  
19 concern with unauthorized employment.

20 That report states, it's Senate Report 1515,  
21 80th Congress, that reports states that foreign labor does  
22 not present a serious immigration problem today. Adequate  
23 safeguards are included -- and they mean in the 1952  
24 proposed law -- adequate safeguards are included to insure  
25 that such aliens will not be admitted if unemployed

1 persons in the U.S. are capable of performing such  
2 services.

3 And the adequate safeguard that Congress came up  
4 with was section 212(a)(14) of the act which says you're  
5 excludable from the United States if you come to  
6 the United States intending to work and you do not have a  
7 work permit.

8 I would like to read you the one sentence, the  
9 key sentence from the conference report about  
10 section 1182(a)(14). It says it is the opinion of the  
11 committee, and this is the conference committee, that this  
12 provision will adequately provide for the protection of  
13 American labor against an influx of aliens.

14 Now again, if the Attorney General -- I can only  
15 tell you that when you read the legislative history  
16 leading up to the 1952 act and there is poor old  
17 Congressman Hobbs struggling to convince Congress just to  
18 allow the Attorney General to detain four groups of aliens  
19 and then backing off and saying, okay, I'll go along with  
20 it if you, how about we just detain them once they're  
21 found deportable. And Congress says to that, no way. The  
22 only way that we will authorize --

23 QUESTION: Maybe they read the statute wrong.

24 MR. SCHEY: Well, they wrote the statute. And  
25 again, it's not my place to say that they read the statute

1 wrong.

2 I think this Court has said in Pungalin Nun,  
3 this Court said that in this vital area of public  
4 interest, no matter how the chips may fall, it's this  
5 Court's responsibility to rigidly enforce the  
6 congressional intent. That's what this Court said. And  
7 in Pungalin Nun the chips fell down heavily against the  
8 aliens, very heavily. Nevertheless, this Court said it is  
9 our task to rigidly, rigidly enforce the intent of  
10 Congress.

11 QUESTION: Mr. Schey, can I --

12 MR. SCHEY: If the Congress --

13 QUESTION: Can I interrupt you? Because I want  
14 to be sure that before you're through, you do it at your  
15 own time, but would you comment on Mr. Marzen's suggestion  
16 that really 90-some percent of these people voluntarily  
17 depart and as to the others all they've got to do is  
18 produce their green card and they will automatically avoid  
19 this bond condition under the regulation? And why isn't  
20 that an adequate protection for those who are, in fact,  
21 authorized to work?

22 MR. SCHEY: Well, Your Honor, firstly, I think  
23 that that's -- I just, I really hear that argument by the  
24 Attorney General with, with great pain.

25 The notion that a person can easily establish

1 what their status is is simply absurd. If that were true  
2 we wouldn't need this entire corps, the immigration  
3 judges, this entire executive office of immigration  
4 review. We are not talking about the simple cases. As  
5 this Court noted in Lopez-Mendoza, 97 percent of the  
6 people arrested by the INS signed voluntary departures.  
7 And they're out of the country within 24 hours.

8 This regulation has nothing to do with them.  
9 This regulation has to do with the folk who are contesting  
10 their deportation. They are saying, I am a derivative  
11 citizen.

12 I just finished a case in the Ninth Circuit,  
13 Mondocka v. INS. INS said for 5 years Mr. Mondocka, you  
14 are a deportable alien. You don't have any rights in this  
15 country. I got involved in the Ninth Circuit after they  
16 had already issued a mandate and told the guy to leave the  
17 country. And at that point I determined he was a  
18 derivative citizen. The case went -- the Ninth Circuit  
19 remanded the case to the district court. I did one  
20 deposition. And at the end of the deposition the Attorney  
21 General's representative, the Assistant U.S. Attorney,  
22 said you are right, this person is a derivative citizen.

23 It is in the contested cases that the person  
24 will erroneously be denied their right to work pending the  
25 outcome of their deportation hearing. It is in the



1 difficult cases. These are not easy cases. Some of them  
2 are easy. My colleague from the Department of Justice  
3 mentioned the student who says, yes, I'm a student. Well,  
4 once he says I am a student, everybody agrees he has no  
5 right to work. I have no real problems with that case.

6 I have the problem with the thousands of  
7 contested cases where the person is saying, I'm a citizen,  
8 and the INS is saying, you're not a citizen. Or the  
9 person is saying, I'm a derivative citizen. There are  
10 about seven classes of derivative citizens. They're  
11 extremely complex. You have the -- you're born outside  
12 the United States, your mother was a U.S. citizen, she  
13 lived in the United States for 7 years after the age  
14 of 14.

15 QUESTION: In other words, the category -- I  
16 want to be sure I understand you. You're not concerned  
17 with so much with cases where the person is an admitted  
18 alien and can therefore establish whatever his status as  
19 an alien is, you're really concerned only with the cases  
20 where the status is between alienage and -- citizenship is  
21 at issue.

22 MR. SCHEY: Well, let me expand upon that  
23 because I think Justice Scalia also raises, or raised a  
24 good point.

25 There are some cases in which the plaintiffs

1 would have no argument with the Government, that a person  
2 walks up and says, I'm illegal, give me political asylum.  
3 Does that person have any inherent right to work?  
4 Probably not.

5 But there are a multitude of cases in which the  
6 person is saying, I am a lawful resident alien, and the  
7 INS is saying, no, you're not a lawful resident alien, we  
8 think you're a deportable alien. Or the person is saying,  
9 I am a -- INS is saying -- the person is saying, I'm a  
10 national. A national is people born in Guam, the Virgin  
11 Islands. There's a whole set of complicated laws about  
12 who is a national and who is not a national. The person  
13 saying, I was really born in Guam in 1945 and INS is  
14 saying, well, that's ridiculous, we think you were born in  
15 Tijuana in 1956. It's those contested cases.

16 This regulation makes no exception. This  
17 regulation presumes what INS has the burden of proving at  
18 the deportation hearing. In 1952 Congress did not say  
19 when we arrest you, you come forward and you prove to us  
20 that you are legally in the country. In the same section  
21 that we're discussing today, in section 242 of the  
22 Immigration Act, Congress stated the Immigration Service  
23 has the burden of proof.

24 QUESTION: But it also stated any such alien  
25 taken into custody may in the discretion of the Attorney

1 General and pending such final determination, may be  
2 continued in custody.

3 MR. SCHEY: It certainly says that.

4 QUESTION: That's what it said.

5 MR. SCHEY: And there are hundreds, there are  
6 hundreds --

7 QUESTION: Our statement in Carlson v. Landon,  
8 which you referred to where it said that the Attorney  
9 General is not left with untrammelled discretion as to  
10 bail. That doesn't have anything to do with what we're  
11 talking about today. That had to do with the argument  
12 that since what was permitted there was simply the arrest  
13 of an alien on the basis that he was a Communist.

14 MR. SCHEY: Oh --

15 QUESTION: Could you keep somebody under, could  
16 you keep somebody in detention for deportation just  
17 because he subscribed to the goals of the Communist Party?

18 MR. SCHEY: Absolutely --

19 QUESTION: And the Court said no, you couldn't  
20 do that, you had to show that keeping him, that letting  
21 him out he would subvert the Government. That's what it  
22 was talking about.

23 MR. SCHEY: Exactly. And that's my point.

24 QUESTION: I don't think it was speaking to  
25 whether this provision with, in 1252 means what it says at

1 all.

2 MR. SCHEY: Well, I think, Your Honor, you just  
3 made my point for me. The Supreme Court said in  
4 Carlson -- and I might add that it reiterated that  
5 position just a few years later in Witkovich. And I might  
6 also add that this is not an area where there are only one  
7 or two court decisions out there. This is an area where  
8 there are hundreds of district court, Board of Immigration  
9 Appeals, district court, court of appeals, and at least  
10 two Supreme Court decisions. So if this Court today votes  
11 with the Government --

12 QUESTION: What's the other Supreme Court  
13 decision?

14 MR. SCHEY: Witkovich.

15 QUESTION: And what did that involve?

16 MR. SCHEY: That involved the same statute.

17 QUESTION: The same --

18 MR. SCHEY: 242(d).

19 QUESTION: What, what was the basis of  
20 deportability?

21 MR. SCHEY: In Witkovich, the person was  
22 arrested for Communist activities.

23 QUESTION: Communist activities again, another  
24 Communist activities case.

25 MR. SCHEY: And, and the INS said a condition of



1 release is that you cannot work at a Communist newspaper.  
2 And this Court struck it down.

3 QUESTION: Of course. Because that would mean  
4 he's deportable just for his political beliefs or  
5 maintainable in custody just for his political beliefs.

6 MR. SCHEY: He was, he was arrested on a  
7 completely separate charge --

8 QUESTION: The Communist cases are a separate  
9 category of case where in order to uphold the detention at  
10 all, you have to establish something more than the mere  
11 membership in the Communist party.

12 MR. SCHEY: That's exactly right.

13 QUESTION: Which is the way, unfortunately, the  
14 statute read.

15 MR. SCHEY: That's right. Well, it's not a  
16 statute. It's the same statute. I mean, these Communists  
17 were not held under a different statute. These Communists  
18 were held under the same statute we're discussing here  
19 today, and precisely the language that you read out of  
20 Carlson indicated you could not have a blanket rule. You  
21 could not have a blanket rule. You would have to show  
22 that that individual person presents a threat to society  
23 before you could condition his release from detention on  
24 (a), (b), (c), or (d).

25 Let me raise one --

1 QUESTION: (a), just on the fact that he was a  
2 Communist.

3 MR. SCHEY: Could not detain him just based on  
4 the fact that he was a Communist. You would have to show  
5 that that individual's activities would present a threat  
6 to the United States.

7 There's another point that I would like to  
8 raise. Congress obviously does not think that the  
9 Attorney General has the power that the Attorney General  
10 thinks he has. And that becomes very plain in the  
11 following.

12 In 1988 and again in 1990, just a few months  
13 ago, just about 10 months ago, Congress enacted the very  
14 section we're discussing here. And how did it amend the  
15 section? It amended the section to make clear that the  
16 Attorney General could detain without bond persons who are  
17 convicted of felonies.

18 Now, if under part (a) -- and Congress took a  
19 lot of time to debate that because there were a lot of  
20 people in Congress saying, well, a person served his time  
21 on the felony, we cannot just continue to detain him  
22 without bond. If, if Congress intended to give the power  
23 to the Attorney General --

24 QUESTION: Yes, but maybe they misunderstood the  
25 statute. I mean, I think you misunderstand it and you're

1 a lawyer. Not all of them are.

2 MR. SCHEY: Well, again, I don't think it's my  
3 place to say whether they misunderstand it. All I can say  
4 is if Congress felt that the Attorney General already had  
5 the power that you suggest, it would not have wasted its  
6 time in 1988 and 1990 to put in subparts to this statute  
7 to make clear that there are very limited circumstances  
8 under which the Attorney General can detain without bond.

9 This is a case about detaining without bond.  
10 This is a case about detaining people without a hearing  
11 with -- the Attorney General says, oh, you get quick  
12 review. There's no evidence in this record that you get  
13 quick review. The only evidence in this record is it  
14 takes about 4 months to get review. The Attorney General  
15 fails to --

16 QUESTION: Well, Mr. Schey, is -- did this come  
17 up as a sort of facial challenge to the regulation?

18 MR. SCHEY: No, it did not, Your Honor.

19 QUESTION: I thought it did, that it came up  
20 before it was ever even implemented.

21 MR. SCHEY: That's not true. I know that the  
22 Attorney General says that.

23 QUESTION: They take that position.

24 MR. SCHEY: I know that they do.

25 QUESTION: Because I would assume that in an

1 individual case, the points you raise could surely be  
2 litigated, whether due process or something else requires  
3 some kind of hearing or special procedure. But if this is  
4 just a, some kind of facial challenge, I wonder if we get  
5 to those questions here.

6 MR. SCHEY: I'm not sure that it is, but I just  
7 wanted to point out that the record in this case does not  
8 indicate, and there's nothing in the regulations. In  
9 fact, if one looks at the regulations once, firstly,  
10 they're automatic. The Attorney General suggests that  
11 prior to -- that the Attorney General will consider  
12 whether to impose that. That's not what they say.

13 They say, in, at 48 Federal Register 8820, the  
14 rule would allow automatic imposition of this condition.  
15 It's an automatic imposition. Secondly, once it's  
16 imposed, the person against whom it is imposed has to show  
17 a compelling reason, not just a reasonable basis. I can  
18 come forward and convince the district director that I'm a  
19 U.S. citizen and I still have to show a compelling reason  
20 to work in order to get rid of the, this restriction.

21 If I am found deportable by the agency, its  
22 current regulations -- just 4 weeks ago, the agency came  
23 out with a whole new set of employment authorization  
24 regulations. If I am found deportable by the agency under  
25 these regulations that were promulgated in August -- and I



1 don't understand how the Attorney General thinks he's  
2 going to apply both sets of regulations together -- once  
3 I'm found deportable and I'm appealing my case in the  
4 Ninth Circuit or the Fifth Circuit, I cannot get work  
5 authorization.

6 QUESTION: Mr. Schey, your first example is, I  
7 think, mistaken. You said even if you convinced him that  
8 you were a U.S. citizen. Well, once he's convinced of  
9 that, he would be guilty of a violation because 1252 only  
10 applies to an alien taken into custody.

11 If you persuade him, you know, that you're a  
12 citizen, you're in a different category.

13 MR. SCHEY: Well, if I actually, and I think  
14 you're correct, if I actually persuaded him that I was a  
15 citizen, I hopefully wouldn't be there in a deportation  
16 hearing in the first place.

17 But my point was if I came forward and I was  
18 able to convince the local officials that I have to  
19 convince that I might win my deportation hearing it would  
20 not matter because under the regulation the condition will  
21 only be rescinded if I can show a compelling reason, and  
22 even then it is purely within the discretion of the  
23 Attorney General under the regulations whether they will  
24 or will not rescind the no work right.

25 I thank you, Your Honor.

1 QUESTION: Thank you, Mr. Schey.

2 Mr. Marzen, you have 4 minutes remaining.

3 REBUTTAL ARGUMENT OF STEPHEN J. MARZEN

4 ON BEHALF OF THE PETITIONER

5 MR. MARZEN: Three points. First, Mr. Schey  
6 asserts that there are thousands of cases in which there  
7 are derivative citizenship claims. With the addition of  
8 the new case that he has litigated in the Ninth Circuit,  
9 we know now of a total of two such cases, one cited in our  
10 brief in 1961 and the one he just mentioned.

11 QUESTION: What do you do about those two cases?

12 MR. MARZEN: The second part of my point is at  
13 page 25 of our opening brief, footnote 16. There is an  
14 INS operating instruction which provides as follows;  
15 quote, individuals maintaining a colorable claim to U.S.  
16 citizenship will not normally be subject to the condition.  
17 There is an out for us if we think it's abusive or  
18 frivolous. But if you have a colorable claim, the  
19 regulation will not be applied to you.

20 QUESTION: It says will not normally be, but the  
21 language of the regulation would seem to apply.

22 MR. MARZEN: We do make an exception in the  
23 operating instruction for just this sort of case.

24 Secondly, the 1990 Immigration Act which Mr.  
25 Schey brings up as Congress legislating new authority to

1 detain aliens which it didn't otherwise have is not quite  
2 what the 1990 act says. The 1990 act restricts the  
3 Attorney General's discretion to release people. Congress  
4 was dissatisfied with the Attorney General releasing  
5 aggravated felons pending a final determination of their  
6 deportability. So Congress reduced the Attorney General's  
7 preexisting authority to let these people out on bail.

8 QUESTION: What about the most recent amendment,  
9 does -- if the statute means what you say it means, why  
10 was that needed, do you suppose?

11 MR. MARZEN: I'm referring to the most recent.  
12 And the reason it was needed is that Congress did not want  
13 to allow the release of aggravated felons. He took away  
14 the Attorney General's discretion to release them either  
15 on their own recognizance or on bond.

16 The Attorney General, under this law, cannot  
17 release aggravated felons under any bond condition unless  
18 he determines that they pose no risk of flight and no  
19 danger to the community.

20 My final point is with respect to the  
21 legislation --

22 QUESTION: Before you leave that one point, Mr.  
23 Marzen, the regulation to which you refer in the  
24 footnote 16 that you cited, when was that adopted?

25 MR. MARZEN: Um --

1           QUESTION: Was that after this case began or was  
2 it in effect before the regulation was --

3           MR. MARZEN: I'm not sure. The date, the only  
4 date that it's attached to was an addendum on September 7,  
5 1984. So it's several years ago, but I don't know whether  
6 it was announced contemporaneously with the regulation.

7           The legislative history of H.R. 10 -- I just  
8 will direct the Court, if I might, to the appendix to the  
9 petition in our reply brief which points out that  
10 subsection (c) which contains the legislative history to  
11 which he refers does limit detention. But that, that  
12 provision had lifetime detention for those four classes of  
13 aliens after a finding of deportability.

14           That same legislation, and that's on page 6A,  
15 the same act, H.R. 10 on pages 3A and 4A contains almost  
16 in haec verba the authority that the Attorney General has  
17 in current section 1252(a), pending a final determination  
18 of deportability, the alien, the Attorney General may in  
19 his discretion continue the alien custody or release him  
20 on conditions. The legislative history to which he cites  
21 refers to a very controversial provision which wasn't  
22 adopted. There was no controversy in any of the committee  
23 reports or any of the floor debate over the Attorney  
24 General's authority that is at issue in this case.

25           QUESTION: What do you say to Carlson and the



1 other Supreme Court case that he cites?

2 MR. MARZEN: Carlson affirms that you can impose  
3 conditions that are unrelated to release. And we cite  
4 that as the strongest authority in our favor.

5 If there are no further questions.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Marzen,  
7 the case is submitted.

8 (Whereupon, at 2:57 p.m., the case in the  
9 above-entitled matter was submitted.)

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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:*

90-1090 IMMIGRATION AND NATURALIZATION SERVICE  
ET AL., Petitioners v. NATIONAL CENTER FOR IMMIGRANTS'  
RIGHTS, INC., ET AL

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

BY Michelle Sander  
(REPORTER)

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