

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

CAPTION: IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner V. JOSEPH PATRICK DOHERTY

CASE NO: 90-925

PLACE: Washington, D.C.

DATE: October 16, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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IMMIGRATION AND NATURALIZATION :  
SERVICE, :  
Petitioner :  
v. : No. 90-925  
JOSEPH PATRICK DOHERTY :

- - - - -X  
Washington, D.C.  
Wednesday, October 16, 1991

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
1:49 p.m.

APPEARANCES:

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Department of Justice, Washington, D.C.; on behalf of  
the Petitioner.

MARY BORESZ PIKE, ESQ., New York, New York; on behalf of  
the Respondent.

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

2 (1:49 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Case No. 90-925, The Immigration and  
5 Nationalization Service v. Joseph Patrick Doherty.

6 You may proceed, Ms. Mahoney.

7 ORAL ARGUMENT OF MAUREEN E. MAHONEY

8 ON BEHALF OF PETITIONER

9 MS. MAHONEY: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 In this case, the Court of Appeals for the  
12 Second Circuit found that the Attorney General of the  
13 United States abused his discretion in denying Mr.  
14 Doherty's motion to reopen his deportation hearing. The  
15 court of appeals accordingly remanded the case for an  
16 evidentiary hearing on Mr. Doherty's claim that he should  
17 be granted asylum in the United States and that he should  
18 be deported to some country other than the United Kingdom.

19 We request this Court to reverse the decision of  
20 the Second Circuit on two independent grounds that I would  
21 like outline briefly in order to clarify what the issues  
22 are for this Court to decide today.

23 First, we ask this Court to hold that the  
24 Attorney General had discretion to deny reopening because  
25 Mr. Doherty did not establish that he had good cause for

1 failing to raise his claims for asylum and withholding of  
2 deportation at his deportation hearing in September of  
3 1986. The Attorney General determined that he had a full  
4 and fair opportunity to raise those claims at that hearing  
5 and that he deliberately abandoned the claims as part of a  
6 tactical strategy that ultimately failed.

7 If this Court finds that the Attorney General  
8 properly denied reopening on this ground, and that this  
9 was not an arbitrary or unseasoned abuse of discretion,  
10 then it need not reach any of the other issues in this  
11 case, because that ground would in and of itself would be  
12 dispositive under this Court's decision in INS v. Abudu.

13 As a second and independent ground of reversal,  
14 we ask this Court to find that the Attorney General  
15 properly exercised his discretion in determining that Mr.  
16 Doherty's claims for withholding of deportation and asylum  
17 were just simply not sufficiently meritorious to warrant  
18 the extraordinary remedy of reopening.

19 I'd like to turn first to the issue of whether  
20 or not Mr. Doherty established good cause for failure to  
21 file his claims or pursue his claims in September 1986 at  
22 his deportation hearing, since we submit that this Court's  
23 decision in INS v. Abudu is in fact controlling on this  
24 ground.

25 On three prior occasions in the last 10 years,

1 this Court has looked at the question of what the Attorney  
2 General or the Board of Immigration Appeals' discretion is  
3 to deny reopening for failure to show good cause to raise  
4 the claim at the initial deportation hearing. In all  
5 three occasions in this Court's decision in Rios-Pineda,  
6 in the Wang decision, and most recently in Abudu, this  
7 Court found that the denial of reopening on these grounds  
8 must be sustained unless the decision is arbitrary and  
9 unseasoned. We submit that there is simply no way that  
10 the Attorney General's determination on this issue in this  
11 case was arbitrary or unseasoned.

12 This Court's decision in Abudu illustrates that  
13 there are essentially two interrelated requirements for  
14 establishing good cause to file an application for  
15 withholding of deportation or asylum after the deportation  
16 hearing has been closed.

17 And these requirements are, first, under the  
18 regulations, Mr. Doherty is required to reasonably  
19 explain, to provide a legally sufficient explanation of  
20 why he did not raise the claims or pursue the claims at  
21 the initial deportation hearing. And second, he also show  
22 that his claims for withholding of deportation and asylum  
23 are based upon evidence or circumstance that arose  
24 subsequent to the hearing.

25 I'd like to turn first to the issue of whether

1 or not Mr. Doherty has ever provided a reasonable  
2 explanation of why he didn't pursue these claims in  
3 September of 1986. The Attorney General found that the  
4 reason that he didn't pursue the claims in September of  
5 1986 was that he had an opportunity to do so, but he  
6 was -- it was part of an effort on his part to designate  
7 Ireland as the country of deportation, to withdraw his  
8 claims for asylum and withholding of deportation, and to  
9 try to expedite his deportation so that he could reach  
10 Ireland before the supplemental extradition treaty took  
11 effect.

12 QUESTION: Was it customary that people faced  
13 with deportation could indicate the country they'd like to  
14 go to, and if the country were willing to accept them that  
15 normally that's where the person would be sent? Was that  
16 the standard practice?

17 MS. MAHONEY: Your Honor, under the statute,  
18 under 243(a), an alien has the opportunity to designate  
19 the country that he wants to be deported to. But the  
20 statute specifically provides that the Attorney General  
21 may reject that designation if, in his view, it would be  
22 prejudicial to the interests of the United States. And  
23 the standard practice before the immigration judges that's  
24 been in effect for many years, in fact probably 50 years,  
25 is that when a national of a country designates a country

1 other than his country of nationality, the immigration  
2 judge gives him an opportunity to submit a claim for  
3 withholding of deportation or asylum to the country of  
4 nationality.

5 The whole idea here is that it is critical to  
6 the process that all of the defenses to deportation be  
7 asserted at the time of the deportation hearing in order  
8 to avoid piecemeal appeals.

9 QUESTION: Was it at all a surprise that the  
10 Attorney General designated the United Kingdom instead of  
11 Ireland as had been designated?

12 MS. MAHONEY: Your Honor, I do not believe it  
13 was a surprise. The INS took the position at the hearing  
14 in September of '86 that it was the position of the United  
15 States that Mr. Doherty should not be deported to Ireland,  
16 that it would be prejudicial to the United States'  
17 interests, that this was an issue of serious concern at  
18 the highest levels, and when that argument was rejected by  
19 the immigration judge, the INS indicated that it would  
20 appeal that decision because it was sufficiently concerned  
21 that deportation to Ireland would be prejudicial.

22 So there really can be no question that Mr.  
23 Doherty understood in September of 1986 that he was at  
24 risk.

25 And similarly, Your Honor, there was no reason



1 why he couldn't plead in the alternative. In this Court's  
2 decision in Abudu, Dr. Abudu was in precisely the same  
3 kind of circumstance. He designated England as the  
4 country that he wanted to be deported to, but he was a  
5 national of Ghana. So the immigration judge in that case,  
6 just like the immigration judge in this case, gave him the  
7 opportunity to apply for withholding of deportation to  
8 Ghana and for asylum, an opportunity that Dr. Abudu did  
9 not avail himself of. And thereafter when he sought to  
10 reopen the proceedings in order to do that, this Court  
11 found that he was barred, because you are permitted to  
12 plead in the alternative.

13 There's simply no reason -- the issue in  
14 September of 1986 that was presented --

15 QUESTION: Of course in that case he didn't have  
16 the reason that's advanced here.

17 MS. MAHONEY: Your Honor, he did have the reason  
18 that's advanced here.

19 QUESTION: No, his reason was some dentist had  
20 called on him or something like that, and that was the  
21 only new development.

22 MS. MAHONEY: Oh, in Abudu?

23 QUESTION: In Abudu, yeah.

24 MS. MAHONEY: Oh, in that it was an official in  
25 the foreign government who had come to his house --

1 QUESTION: Oh, and said they needed a doctor in  
2 Ghana.

3 MS. MAHONEY: They said they needed a doctor.  
4 And this Court --

5 QUESTION: And we said that wasn't enough to  
6 justify it.

7 MS. MAHONEY: Well, this Court found that it may  
8 well have been new in material evidence, but that he  
9 actually had a sufficient basis to assert his claim at the  
10 time of the hearing, and therefore, it couldn't constitute  
11 a reasonable explanation for having failed to raise the  
12 claim at the time of the initial hearing.

13 Similarly in this case, Mr. Doherty has never  
14 contended that he did not have adequate grounds to claim  
15 that he fear persecution in the United Kingdom.  
16 Essentially --

17 QUESTION: But even if he had adequate grounds  
18 in the first place, if there was a new development that  
19 was sufficiently significant, Abudu wouldn't have said he  
20 couldn't have raised a new ground.

21 MS. MAHONEY: The board decision in Abudu did  
22 say that, Your Honor. The --

23 QUESTION: But we didn't say that.

24 MS. MAHONEY: Well, this Court in Abudu  
25 didn't --

1 QUESTION: Because I remember the case.

2 MS. MAHONEY: This Court in Abudu didn't clarify  
3 the precise bounds of the discretion that the board would  
4 have or that the Attorney General would have, but this  
5 Court did assume in Abudu that the new evidence was  
6 material, but that --

7 QUESTION: But not sufficiently important.  
8 That's the last part of the opinion, as I remember. A  
9 separate question was whether the new evidence had  
10 sufficient significance to justify withholding, even  
11 though he'd had sufficient basis originally.

12 MS. MAHONEY: That's correct, Your Honor.

13 QUESTION: So in this case, though, there's a  
14 difference in what the new development is. And is  
15 arguably more significant than the visit from the man  
16 saying they needed another doctor in Ghana.

17 MS. MAHONEY: Your Honor, I believe that it's  
18 less significant. And the reason I say that is  
19 essentially what happened here, the change was that Mr.  
20 Doherty lost on appeal. The issue in September --

21 QUESTION: Well, and the law changed and he's  
22 going to go to England in any event now, which he wouldn't  
23 have -- which would not have been the fact at the time  
24 that you say he had to make his election.

25 MS. MAHONEY: Well, Your Honor, at the time that

1 he had to make his election -- you're referring to the  
2 change in Irish law?

3 QUESTION: Yes.

4 MS. MAHONEY: Well, first of all, I think that  
5 it's difficult for Mr. Doherty to claim that Irish law  
6 changed in a way that was in fact prejudicial to him since  
7 he in fact represented to the board in December of 1986  
8 that decisions of the Irish Supreme Court had, quote,  
9 "vitiating the political offense exception, thereby  
10 removing any obstacle," end quote, to his extradition from  
11 Ireland to the United Kingdom. So I think that the issue  
12 of the change in Irish law is really one that is difficult  
13 to understand how he could be making.

14 Moreover --

15 QUESTION: Are you saying if he'd, even at the  
16 time of the election, if he'd been deported to Ireland at  
17 that time, he still would have gone right to England in  
18 any event? Is that what you're basically saying?

19 MS. MAHONEY: Saying that the law of extradition  
20 in Ireland at that time is not fundamentally different to  
21 what it is now.

22 QUESTION: Well, does that mean that the net  
23 result of it is that if he'd gone to Ireland he still  
24 would have gone right away to England?

25 MS. MAHONEY: No, Your Honor, that isn't what we

1 would say.

2 QUESTION: Well, then that's different, isn't  
3 it?

4 MS. MAHONEY: No, because both before the change  
5 in Irish law and after the adoption of the European  
6 Convention on Terrorism, there was the possibility that  
7 the Irish Government would not extradite him. In fact,  
8 the Attorney General noted in his opinion that there was  
9 recently a member of the PIRA who was not extradited to  
10 the U.K. under the new extradition act --

11 QUESTION: Let me ask you -- it's very difficult  
12 to sort out all these things. But cutting through  
13 everything, is it not more probable now that if he goes to  
14 Ireland he will immediately go to England than it was at  
15 the time he made his election?

16 MS. MAHONEY: I don't believe so, Your Honor.

17 QUESTION: You don't think so.

18 MS. MAHONEY: Because even the new law has  
19 exceptions in it that allows the alien, or excuse me, the  
20 person subject to extradition in Ireland to try to  
21 establish that he's being -- the reason for the  
22 extradition is for persecution reasons.

23 QUESTION: Well, of course the court of appeals  
24 didn't agree with you.

25 MS. MAHONEY: No, but the court of appeals

1 really --

2 QUESTION: On this issue either.

3 MS. MAHONEY: Well, the court of appeals rested  
4 more on the question of whether or not the rejection of  
5 the designation by the Attorney General provided a  
6 reasonable explanation for Mr. Doherty's failure to pursue  
7 his claims for withholding of deportation and asylum at  
8 the time of the hearing in 1986.

9 Maybe the best way to try to put this in  
10 perspective is --

11 QUESTION: Before you do that, if it is as you  
12 say, why would he have had this change of heart? Is there  
13 a change in the attitudes of the Irish Government recently  
14 or in the makeup of the Irish Government?

15 MS. MAHONEY: Why would he no longer wish to go  
16 to Ireland? Is that the question?

17 QUESTION: Yes.

18 MS. MAHONEY: Your Honor, that question is not  
19 answered by the Attorney General or by the courts in this  
20 case, but I would note that he filed his motion to reopen  
21 the proceedings based upon the change in Irish law less  
22 than 1 month after the Attorney General Meese sent him a  
23 letter stating that he had accepted the INS appeal from  
24 the board's rejection of the designation letter. And  
25 therefore, he may well have surmised that it was likely

1 that the Attorney General would overturn the board's  
2 decision allowing him to go to Ireland.

3 QUESTION: I thought that -- didn't Attorney  
4 General Meese order him to be sent to England?

5 MS. MAHONEY: Yes, he did, Your Honor, but the  
6 motion to reopen based upon the change in Irish law was  
7 filed less than a month after the Attorney General,  
8 Attorney General Meese notified Mr. Doherty that he had  
9 accepted the appeal of the INS from the board's decision.  
10 Therefore, one inference that we could make is that --

11 QUESTION: You think he was rolling the dice,  
12 that what he'd like most of all was to stay in this  
13 country, not be deported at all. And he went whole hog  
14 for that initially. Then when it seemed he wasn't going  
15 to get that, he'd say I better have a -- I'd better have a  
16 fall-back position, and that's when he said send me to  
17 Ireland, even though it was no more attractive later than  
18 it was originally.

19 MS. MAHONEY: One intermediate step, Your Honor.  
20 I think initially he wanted to stay in the United States.  
21 In the summer of 1986 when the United States Senate  
22 adopted the supplemental extradition treaty, he very much  
23 wanted to leave the United States as quickly as possible  
24 because he was concerned that he would be extradited under  
25 that treaty. So then he designated Ireland. Then when

1 it -- and that designation was accepted, but then when  
2 the plan failed and he was not deported to Ireland as  
3 quickly as he wanted to be, and it became at least  
4 possible that the Attorney General was going to reject  
5 that designation, I think he then changed strategy again,  
6 and filed the motion to reopen.

7 QUESTION: May I ask another question? I don't  
8 have the dates as well in mind as I should, but I was  
9 under the impression that the Attorney General objected  
10 vigorously to his being deported to Ireland because he  
11 thought it was a matter of important American national  
12 policy that he go to England, which assumed -- made me  
13 think the Attorney General thought there was some  
14 difference. And as I understand your argument now,  
15 everybody should have known he'd end up in Ireland -- in  
16 England right a way, no matter which place he went.

17 MS. MAHONEY: No, Your Honor, the Attorney  
18 General did not find that he would certainly end up in  
19 England no matter what. He simply found that the --

20 QUESTION: But that's my point. But you're  
21 saying he would have. That's what I think you're telling  
22 me today.

23 MS. MAHONEY: I'm sorry, Your Honor, I'm not  
24 being clear. I'm saying that there wasn't a material  
25 difference in the extradition law of Ireland either before



1 or after the adoption of the new extradition act. In  
2 other words, that there was a chance that he would not be  
3 extradited to the United Kingdom under the old law and  
4 also under the new law. The Attorney General in fact  
5 noted that a member of the PIRA was not extradited under  
6 the new law, just as sometimes they had not been under the  
7 old law.

8 I think the key thing here is that Irish law  
9 really isn't germane to the question that was before the  
10 immigration judge in September of 1986. The issue in that  
11 proceeding was should Mr. Doherty be deported to the  
12 United Kingdom. And Mr. Doherty had several defenses to  
13 that available to him, and consistent with standard  
14 pleading and INS practice, he was required to assert all  
15 of them in the alternative. He could claim withholding of  
16 deportation, he could claim a right to designate Ireland,  
17 he could claim asylum. And that was the procedure that  
18 was followed in Abudu, and it is the standard procedure  
19 that has always been followed.

20 This Court recognized in 1963 in United States  
21 v. Foti, that Congress very much wanted to encourage the  
22 consolidation of all defenses to deportation in one  
23 hearing on the merits. So we are back to the question,  
24 why didn't Mr. Doherty simply plead in the alternative?

25 QUESTION: Do you have a better reason than just

1 failure to plead for sustaining the Attorney General's  
2 discretion?

3 MS. MAHONEY: Well, your Honor, it wasn't just  
4 that he failed to plead. He failed to plead for a  
5 tactical reason, a deliberate reason. He was trying to  
6 expedite his deportation.

7 QUESTION: Well, that may be so. But I just  
8 wondered if there was another reason.

9 MS. MAHONEY: Yes, Your Honor, there are  
10 additional reasons.

11 QUESTION: Well, your time is certainly running.

12 MS. MAHONEY: The -- if we look to issue of the  
13 merits, we can look first at the issue of asylum. Now  
14 this Court has indicated on a number of occasions that it  
15 is appropriate in considering motions to reopen to  
16 determine whether or not the alien has a sufficient claim  
17 on the merits that the extraordinary remedy of reopening  
18 is warranted.

19 With respect to the asylum claim, the Attorney  
20 General determined that reopening would in effect be  
21 futile because he -- there were three grounds on which he  
22 could exercise his discretion to deny asylum. And the  
23 first of those was that the nature and number of criminal  
24 acts that Mr. Doherty had committed were such that he  
25 would not be entitled to this humanitarian relief under

1 the asylum laws.

2 I'd like to emphasize here that the language of  
3 Section 208 specifically provides that the Attorney  
4 General may, in his discretion, grant asylum. There are  
5 no conditions in the statute, whatsoever, limiting the  
6 exercise of discretion. The court of appeals,  
7 nevertheless, found that the discretion was substantially  
8 circumscribed, and that the Attorney General was not  
9 allowed to exercise his discretion in this case to deny  
10 reopening without granting an evidentiary hearing.

11 With respect to the question of whether or  
12 not --

13 QUESTION: May I ask -- again, I should be  
14 better advised as to facts than I am, but is one of the  
15 grounds by the Attorney General exercised his discretion  
16 was because the Attorney General's believe that he was  
17 ineligible for asylum?

18 MS. MAHONEY: No, Your Honor, he did not find  
19 that he was ineligible for asylum. He simply found -- he  
20 assumed that he would be eligible, that he would meet the  
21 definition of refugee. He didn't make a factual finding,  
22 but was willing to assume it for the purposes of resolving  
23 the issue. But he did find that it would be -- that in  
24 the exercise of his discretion that he would deny asylum  
25 for reasons relating to Mr. Doherty's prior criminal

1 activity, which was established by his own admissions in  
2 the transcript of the extradition hearing, which was a  
3 part of the record in this case.

4 And second, he also found that it was  
5 appropriate to deny asylum in his discretion because of  
6 his political determination that it would be contrary to  
7 the foreign policy interests of the United States to give  
8 sanctuary to Mr. Doherty. The United Kingdom and the  
9 United States had been engaged in a collaborative effort  
10 to try to stem the tide of terrorism throughout the world,  
11 and believed that it would simply be incompatible with the  
12 United States' position in that effort to give sanctuary  
13 to Mr. Doherty.

14 QUESTION: And it's your submission that this  
15 ground was an independent ground?

16 MS. MAHONEY: Yes, Your Honor.

17 QUESTION: And that if we said -- sustained the  
18 exercise of the discretion of what you said before this,  
19 we don't need to get to the foreign policy issue?

20 MS. MAHONEY: That's correct, Your Honor. You  
21 could sustain it simply on the basis that there was no  
22 cause.

23 QUESTION: On either one of them.

24 MS. MAHONEY: Or on asylum, you could sustain it  
25 on the basis that the fact that Mr. Doherty was -- had

1 admitted that he had been convicted for a number of  
2 offenses was sufficient to allow the exercise of  
3 discretion to deny asylum.

4 QUESTION: Or on grounds of waiver. I thought  
5 you had argued that.

6 MS. MAHONEY: Well, waiver really -- I referred  
7 to, in this argument, as failure to establish good cause  
8 or reasonable explanation for asserting his claims for  
9 withholding an asylum at the time of the September 1986  
10 hearing. It's really the same argument.

11 QUESTION: Well, is it quite the same? Did he  
12 not make an initial affirmative waiver of any desire to  
13 have asylum or deportation?

14 MS. MAHONEY: Yes, he did. He deliberately and  
15 tactically abandoned those claims at his September hearing  
16 in order to expedite the proceedings.

17 QUESTION: If you lose on that, I take it you  
18 still have to address the withholding.

19 MS. MAHONEY: Yes, Your Honor. In terms of  
20 withholding, the issue is whether or not the Attorney  
21 General could also find that there wasn't a sufficient  
22 showing on the merits of this claim either. And the  
23 reason why we certainly believed that it was appropriate  
24 for the Attorney General to reach this conclusion is that  
25 withholding of deportation requires two showings, two

1 mandatory showings.

2 One is that you in fact are -- there is a  
3 probability that you would be persecuted if returned to  
4 the -- or sent to the country of deportation. And the  
5 second is that the Attorney General does not have serious  
6 reasons for believing that the alien has committed serious  
7 nonpolitical offenses. That's the language of Section  
8 243(h)(c). And if there are reasons to believe -- serious  
9 reasons to believe that he committed serious nonpolitical  
10 offenses, he simply is not entitled to --

11 QUESTION: And is it your position that the  
12 Attorney General can make that determination without any  
13 kind of a hearing at all?

14 MS. MAHONEY: Yes, Your Honor, in this case he  
15 can. And the reason he can is first of all, this comes on  
16 a case for reopening. And the question is whether or  
17 not --

18 QUESTION: Yes, as I understand your position,  
19 he could have denied it outright, even without any hearing  
20 at all because even though -- you're not now relying on  
21 the breadth of discretion. You're relying on the argument  
22 he comes within subparagraph (c) because he's statutorily  
23 ineligible for withholding.

24 MS. MAHONEY: Statutorily ineligible because of  
25 the undisputed facts from -- established in the

1 extradition transcript showed that he simply would not be  
2 able to satisfy showing --

3 QUESTION: Even though the hearing officer in  
4 that transcript, the judge, came to the conclusion that  
5 the nonpolitical language did not apply. It's not the  
6 same language, of course, but it's the same concept.

7 MS. MAHONEY: Well, although the judge in that  
8 case, Your Honor, acknowledged -- said right out that the  
9 facts were not really in dispute. The issue was simply  
10 whether or not as a matter of law under the political  
11 offense exception for the extradition treaty, he  
12 had -- whether or not those facts established that it was  
13 a political offense. And that issue, we submit, is  
14 different that the legal characterization that the  
15 Attorney General was required to make under Section  
16 243(h), where he determined that acts which are directed  
17 at the civilian population, even if done for political  
18 purposes or as part of an uprising in Ireland, in Northern  
19 Ireland, are nevertheless serious nonpolitical offenses.

20 QUESTION: Counsel, is there, in your view, any  
21 limit to the Attorney General's discretion to deny asylum?

22 MS. MAHONEY: Your Honor, that limit would be  
23 the limits of irrationality, wholly arbitrary --

24 QUESTION: Did he deny it on the basis of a  
25 race, pure and simple?

1 MS. MAHONEY: Your Honor, I believe that the  
2 Attorney General would find that it would not be  
3 appropriate to deny asylum on the basis of race. In the  
4 case of Jean v. Nelson, the Attorney General did take the  
5 position under a different section of the immigration law  
6 that it would be inappropriate to exercise discretion  
7 based upon race.

8 QUESTION: So you are saying there are some  
9 limits somewhere out there.

10 MS. MAHONEY: Well, Your Honor, I think that it  
11 is fair to say that when the Attorney General exercise his  
12 discretion under the asylum provision for reasons such as  
13 foreign policy or other political reasons, that the  
14 decision is essentially unreviewable, much for the same  
15 reasons that the Second Circuit in this case found that  
16 Attorney General Meese's decision that it would be  
17 prejudicial to the interests of the United States to send  
18 Mr. Doherty to Ireland would --

19 QUESTION: Would you take that position even if  
20 the Attorney General determined that the refugee would be  
21 subject to persecution on his return and that that would  
22 be wrong, but nevertheless that persecution furthered U.S.  
23 interests. Do you think that's within the scope of his  
24 discretion?

25 MS. MAHONEY: Your Honor, I think that the



1 Attorney General could properly find that Mr. Doherty's  
2 interests in sanctuary in the United States were not  
3 paramount, even if he was potentially going to be  
4 subjected to persecution in the United Kingdom. And that  
5 the national interest in foreign policy and leadership in  
6 combatting terrorism did in fact require the -- or at  
7 least that he found it appropriate to exercise his  
8 discretion in that regard.

9 I would note that in this Court's decision in  
10 Abudu, this Court was willing to assume that Dr. Abudu had  
11 made a prima facie case of persecution in Ghana, but  
12 nevertheless found that because he hadn't raised the  
13 claim, that it was sufficient to go ahead and send him  
14 back to Ghana despite that prima facie showing.

15 I'd like to reserve the rest of my time --

16 QUESTION: If I could, counsel. In your  
17 colloquy with Justice Stevens, you were talking about the  
18 Attorney General's authority, under your position, of  
19 withholding deportation as an initial matter because  
20 there's no substance to the case. I take it you don't  
21 have to go that far here because this was just a denial of  
22 a motion to reopen, and that would be a much simpler  
23 position for you to defend, I take it.

24 MS. MAHONEY: Your Honor, I do think there is a  
25 difference, yes. I think that the burden that the alien

1 has on reopening -- of showing a meritorious claim is  
2 higher than it would be if this were at the initial  
3 deportation hearing.

4 QUESTION: What's your best case for that?

5 MS. MAHONEY: Excuse me?

6 QUESTION: What's your principal authority for  
7 that?

8 MS. MAHONEY: I believe that in Wang this  
9 Court --

10 QUESTION: In Wang.

11 MS. MAHONEY: In Wang this Court indicated that  
12 it was important to give the Attorney General discretion  
13 to come up with --

14 QUESTION: Was that a withholding of deportation  
15 case?

16 MS. MAHONEY: No, it was not, Your Honor. Abudu  
17 was the only withholding of deportation.

18 QUESTION: Justice Blackmun I think had a  
19 question.

20 QUESTION: Let me be positive that I understood  
21 you. Did you say that even though there's a convincing  
22 showing of persecution, the Attorney General nevertheless  
23 may deny asylum in the interests of foreign -- U.S.  
24 foreign policy.

25 MS. MAHONEY: Absolutely, Your Honor.

1 QUESTION: And I had this one question, too.  
2 Going back to withholding for a minute, in so far as you  
3 rely on subsection (c) in the nonpolitical nature of the  
4 crime, do you -- what is the standard of review on that?  
5 Do you think that's an abuse of discretion or is that a  
6 question of law as to whether these facts show that kind  
7 of --

8 MS. MAHONEY: On a motion to reopen, we submit  
9 it should be an abuse of discretion because it is a mixed  
10 question of whether or not -- of fact and law. And we  
11 also believe that this Court should give deference to the  
12 Attorney General's -- characterization of conduct as a  
13 nonpolitical offense.

14 QUESTION: So it's deference, abuse of  
15 discretion, and a mixed question of law.

16 MS. MAHONEY: Thank you.

17 QUESTION: Thank you, Ms. Mahoney.

18 Ms. Pike, we'll hear now from you.

19 ORAL ARGUMENT OF MARY BORESZ PIKE

20 ON BEHALF OF THE RESPONDENT

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

23 This case raises a fundamental question about  
24 the circumstances under which the Attorney General can  
25 deny the relief of withholding of deportation, a form of

1 protection that is mandatory under the Refugee Act, to an  
2 individual who has been found to have established prima  
3 facie entitlement to it.

4 For now almost a decade, the executive branch of  
5 the United States Government has labored to hand over to  
6 the British Government the individual that we have  
7 represented, Joseph Doherty. Its efforts have been  
8 consistently rebuffed, both judicially and  
9 administratively. The litigation has been fueled by  
10 executive branch displeasure with a 1984 decision by a  
11 United States District Court judge denying the request of  
12 the British Government for Mr. Doherty's extradition.

13 That decision categorically denied the request.  
14 The district court judge, in rejecting the request, stated  
15 that the acts for which Mr. Doherty was sought were not  
16 common crimes, nor were they capable of being categorized  
17 as acts of terrorism, but rather they were political  
18 offenses and verbatim in their most classic form.

19 The issues that are now before this Court --

20 QUESTION: What did those -- what did those acts  
21 consist of that he so found?

22 MS. PIKE: There were two sets of acts, Justice  
23 Scalia. One set were acts of which Mr. Doherty had been  
24 convicted in absentia. The other set were acts with which  
25 he was charged. The first set of which he had been

1 convicted involved the shooting death of a member of the  
2 Secret Air Service, a member of the British Army, in an  
3 encounter between the IRA and the British Army in North  
4 Belfast. Mr. Doherty was one of the members of the IRA  
5 that was engaged in that operation. And the district  
6 judge found that it had been an ambush set up to engage  
7 and attack a British military convoy.

8 The second set of offenses had to do --

9 QUESTION: May I interrupt? What was Doherty  
10 convicted of in that in absentia trial? What offense?

11 MS. PIKE: In that trial, Your Honor, he was  
12 convicted of murder, attempted murder, possession of  
13 weapons, and for being a member of a proscribed  
14 organization.

15 The second set of offenses, to return to your  
16 question, Justice Scalia, had to do with Mr. Doherty's  
17 escape under orders of the IRA with seven other members of  
18 the IRA from a British prison in Belfast. The district  
19 court judge determined that both sets of offenses were  
20 political and his extradition could not be had for any of  
21 the offenses for which his extradition was sought.

22 The issues, however, before this Court now are  
23 the outgrowth of executive branch displeasure with that  
24 decision, and its long campaign to escape the force and  
25 effect of the decision denying Mr. Doherty's extradition

1 to the United Kingdom. These issues, therefore, cannot  
2 properly be understood apart from the tortuous history of  
3 those case, now almost a decade long. For with each  
4 decision adverse to it, the executive branch has resorted  
5 to legal positions more singular and more extreme.

6 Thus it is that the Attorney General now claims  
7 the power to withhold from an individual the relief of  
8 withholding of deportation, even though that individual  
9 has established prima facie entitlement to it, and even  
10 though that form of protection is mandatory under the  
11 Refugee Act. And the Attorney General is utterly without  
12 discretion. Once the standard is met --

13 QUESTION: Well, we are dealing though here, Ms.  
14 Pike, I think with a motion to reopen. And there is  
15 discretion there, is there not, on the motion to reopen?

16 MS. PIKE: Your Honor, motions to reopen, of  
17 course, are committed to the discretion of the  
18 decisionmaker. But the fact of the matter is that in  
19 order to be interpreted consistently with the convention  
20 and protocol that literally gave birth to the concept in  
21 American domestic law of withholding of deportation, that  
22 discretion is not in this case absolute or without limits.  
23 And the reason for that is this very, very significant  
24 holding of the Board of Immigration Appeals in conjunction  
25 with a motion to reopen.

1                   And that is, Your Honor, the Board of  
2 Immigration Appeals established that Mr. Doherty had met  
3 the initial threshold. He had established a prima facie  
4 case of entitlement to that relief.

5                   QUESTION: That's under (h) (1) that he  
6 determined the alien's life or freedom would be  
7 threatened?

8                   MS. PIKE: The Board of Immigration's order  
9 clearly directs that the case be reopened to allow him to  
10 apply for both.

11                  QUESTION: But I take the Attorney General says  
12 that he has an insubstantial case to resist the Attorney  
13 General's determination that the exceptions apply, the (a)  
14 and the (c) exception. Is that the -- is that the  
15 Government's position?

16                  MS. PIKE: Yes, that is, Your Honor. I mean,  
17 they in effect, though, do not dispute that he met the  
18 threshold he had to show, and that he established prima  
19 facie entitlement.

20                  Now what they want to do is to ignore the fact  
21 that he did establish that he fit within this narrow  
22 category. It is a very high standard. And in effect, to  
23 deny him that relief without even granting him a hearing.

24                  QUESTION: But you agree, Ms. Pike, that the  
25 Board of Immigration Appeals is pretty much a creature of

1 the Attorney General, isn't it?

2 MS. PIKE: Your Honor, I --

3 QUESTION: Perhaps in more ways than one, you  
4 may feel at times.

5 (Laughter.)

6 MS. PIKE: I could not, Chief Justice, stand  
7 before you and with a straight face deny the proposition  
8 that the Board of Immigration Appeals is not a creature of  
9 the Attorney General.

10 QUESTION: But he isn't bound by its rulings, is  
11 he?

12 MS. PIKE: The Attorney General is not bound by  
13 the rulings of the Board of Immigration Appeals. But  
14 against the history of this case, Chief Justice, he cannot  
15 simply disregard them.

16 QUESTION: Well, why not?

17 MS. PIKE: Because, Your Honor, the concept of  
18 abuse of discretion means just that, discretion can be  
19 abused. And here it was.

20 QUESTION: Why would it be an abuse of  
21 discretion if he were to disregard a finding of a  
22 subordinate body?

23 MS. PIKE: Because when he disregarded it, Your  
24 Honor, given the state of the record in the case, he did  
25 it in a manner that was fundamentally unfair. Despite the



1 fact that we had met the threshold that we had to meet,  
2 the threshold that entitled us to a hearing, he went ahead  
3 and made a determination as to the ultimate merit of our  
4 claim without ever giving us an opportunity to in any way  
5 respond to the negative features that he found in Mr.  
6 Doherty's background.

7 QUESTION: Well, do you think on a motion to  
8 reopen you're entitled somehow under the statute to an  
9 opportunity to respond in that way?

10 MS. PIKE: Your Honor, absolutely, I do, when  
11 the relief that is at stake is withholding of deportation.  
12 I do not think that in fairness I could state that as  
13 certainly if there was another form of protection that was  
14 here implicated. But we must focus on the fact that it is  
15 withholding of deportation, that we did meet that  
16 threshold, and that that form of protection is mandatory.

17 And for that reason, I think that we are in a  
18 position where having been deprived any opportunity to put  
19 forward our side of the case, that is an abuse of  
20 discretion by the Attorney General.

21 QUESTION: Did the Attorney General justify his  
22 decision not to reopen under the withholding section just  
23 on the ground that the threshold hadn't been met? Or that  
24 even if it had, he would make the determination under (a)  
25 and (c) that the relief was not available? I don't know

1 why you're so emphasizing the threshold, because it seems  
2 to me the Attorney General prevails if he has discretion  
3 to find that you have an insubstantial case under (a) or  
4 (c).

5 MS. PIKE: Your Honor, I have to disagree on  
6 that, because the fact of the matter is, is that once we  
7 do meet the threshold, it really does become at the very  
8 least an abuse of discretion to leap ahead and make the  
9 ultimate determination as to relief that is mandatory  
10 without affording us a hearing on this record. Because  
11 the very things that the Attorney General asserted as the  
12 basis on which he premised his denial were the very acts  
13 that were found by another factfinder in the basis of an  
14 adversarial context where we did have an opportunity to  
15 put forward evidence and contest them.

16 QUESTION: That was in the extradition?

17 MS. PIKE: That's right. But of course, the  
18 fact of the matter is, is that it is accepted that the  
19 political offense exception is really the mirror image of  
20 the nonpolitical crimes aspect of asylum law. Both  
21 exist to provide protection that is viewed under the law  
22 as being legitimate to people who commit political  
23 offenses, or who in the asylum context may even commit  
24 crimes, but still under withholding of deportation, be  
25 entitled to protection.

1           So we think that on the basis of this record,  
2 Justice Kennedy, that's what makes this wrong. This is a  
3 case that comes before this Court with a history of now  
4 almost 9 years. And that history cannot be ignored  
5 because time and time again the integrity of Mr. Doherty's  
6 positions have in fact been sustained.

7           Now, it may have been a different case, were  
8 there not this background. But it is there.

9           QUESTION: That might be true, Ms. Pike, but I  
10 don't see how that goes to whether it was arbitrary for  
11 him to deny reopening. Now I think what you've  
12 established is a district judge had come to a different  
13 conclusion about whether (a) or (c) applied. But the  
14 basis for which he came to that conclusion was surely a  
15 basis of law, not a basis of fact. The facts were out.  
16 And additional hearing wouldn't have established  
17 any -- you're not asserting they would establish any new  
18 facts.

19           The question is whether that offense met the  
20 meaning of (a) or (c). Now what you've established is  
21 that the Attorney General's interpretation differs from a  
22 United States district judge's. That may well be good  
23 cause for a lawsuit, but I don't see why it's an abuse of  
24 discretion for the Attorney General to say, look, it's no  
25 use reopening, we're just wasting time to reopen because I

1 know, I may be wrong, but I know that I'm going to find  
2 this comes within (a) or (c).

3 Now if you think it absolutely doesn't, maybe  
4 you have some appellate recourse. But why should he waste  
5 his time reopening when he knows that he's going to find  
6 that (a) or (c) applies? I find it hard to call that an  
7 abuse of discretion.

8 MS. PIKE: There are several reasons, Your  
9 Honor. To start with, first of all, there may well be new  
10 facts here. In the context, not only mind you, of  
11 withholding of deportation, but also of asylum, under the  
12 regulations, even when there is a mandatory ground for  
13 denial put forward by the Attorney General or by an  
14 immigration judge, the regulations see that as serious  
15 enough to require that the alien be afforded a hearing at  
16 which he can prove that the mandatory ground for denial  
17 does not apply.

18 QUESTION: As an original matter, but surely not  
19 when those facts aren't brought forward during the course  
20 of a long proceeding, and the issue is whether to reopen  
21 the proceeding, which is what we have here. You're not  
22 entitled to a full factual inquiry before he decides  
23 whether to reopen or not.

24 MS. PIKE: We think in this case were are, Your  
25 Honor, because the facts are extraordinary, and the case

1 is extraordinary.

2 QUESTION: Well that just means that the  
3 proceeding, the matter is reopened if you're going to just  
4 have the whole thing out on the table. In effect, it's  
5 just reopening it.

6 MS. PIKE: Once reopening is granted, yes, it  
7 would be reopened for the purposes the board had deemed.

8 QUESTION: What would happen if it were reopened  
9 that would be different if you had the hearing you wanted?

10 MS. PIKE: We think, Your Honor, based on past  
11 history in the case, we would certainly be able to  
12 establish that Mr. Doherty had not engaged in any serious  
13 nonpolitical crimes, and that he had not engaged in any  
14 acts of persecution.

15 QUESTION: But your whole point is that you're  
16 relying on the extradition record. It seems to me that  
17 almost cuts against you.

18 MS. PIKE: I don't see that it does, Justice  
19 Kennedy, because of the close fit between those various  
20 concepts. I think that at the very least, that  
21 extradition record has to rest very firmly against the  
22 Attorney General's diametrically opposed conclusion.

23 QUESTION: Well, but it seems to me that's a  
24 question of law. Did you allege at any point in the  
25 proceedings what new evidence you would have to adduce to

1 show nonapplicability of the (a) and (c) exceptions for  
2 subsection (h)?

3 MS. PIKE: We never had the opportunity. That's  
4 exactly what we're saying. We never had that opportunity.  
5 And that is what would have been dealt with in the context  
6 of the reopened hearing.

7 QUESTION: Well, don't you have that opportunity  
8 in connection with your submission for the motion to  
9 reopen, to just make an offer of proof?

10 MS. PIKE: Your Honor, what we established for  
11 the motion to reopen was that which we were required to  
12 establish. Our prima facie eligibility or entitlement,  
13 more correctly, in the area of withholding of deportation,  
14 to the relief that we sought. And in addition, we  
15 established the changed circumstances and the new facts  
16 that once excepted provided us the avenue for going  
17 forward with the rest of our case.

18 Yet, because of the determination that the  
19 Attorney General made, that hearing process was in effect  
20 pretermitted. We never got to that. And I think that  
21 again, in the context of withholding of deportation,  
22 that's a very serious matter because, as for example, the  
23 opinion of this Court in INS v. Abudu had indicated, that  
24 you cannot leap ahead in the context of relief that is  
25 nondiscretionary, that an ultimate determination on the

1 merits can be rendered in the case of asylum, for example,  
2 or suspension of deportation or adjustment of status. But  
3 not, not in the case of withholding of deportation.  
4 Because it is mandatory, it is so significant. And yet  
5 that's exactly what happened here.

6 QUESTION: Ms. Pike, can I just ask this  
7 question? In so far as the Attorney General relies on  
8 subsection (c), that they're a serious nonpolitical crime,  
9 is the Attorney General assuming that the facts stated and  
10 developed in the extradition proceeding are all  
11 correctly -- are all correct as in that proceeding, or is  
12 he relying on some other record?

13 MS. PIKE: Well, Your Honor, the answer to that  
14 is -- the first part of your question is yes, he does  
15 assume that those facts are correctly established in the  
16 record.

17 QUESTION: And you take the position those facts  
18 are sufficient to establish the nonpolitical character of  
19 the crime.

20 MS. PIKE: We take that position, but our  
21 alternative position, if you will, is that at the very  
22 least, they entitle us to a hearing.

23 QUESTION: But why isn't that record sufficient  
24 to let a reviewing court decide as a matter of law whether  
25 that subsection (c) is applicable or not?

1 MS. PIKE: We think, Your Honor, that under the  
2 circumstances as a matter of law, the decision cannot be  
3 made because absent the additional facts that could be  
4 adduced at the hearing, the proper balancing that is  
5 required in terms of the determination of the entitlement  
6 to that relief and possible exclusion from the protection  
7 of that relief can't be made.

8 And it is clear from the handbook that construes  
9 the convention and the protocol that the withholding of  
10 deportation section is fashioned on, that that process is  
11 absolutely central to the whole determination of claims  
12 for withholding of deportation.

13 So absent our part of the equation, we are in  
14 effect having a decision being made against us that does  
15 not involve our part of the case.

16 QUESTION: I understand.

17 MS. PIKE: If I might continue, though, to  
18 respond to what really was the second part of your  
19 question as well. There is a very curious aspect of the  
20 Attorney General's decision here which your question  
21 alluded to. And that is that although the Attorney  
22 General accepts that the facts that he chose to rely on  
23 from the extradition proceeding were correct, he admits in  
24 his opinion that in effect, he does not have to find that  
25 Joseph Doherty himself committed serious nonpolitical



1 crimes, that it's adequate if he can find that the Irish  
2 Republican Army committed serious nonpolitical crimes.

3 In effect, it is a tacit admission that there is  
4 not in this record any evidence that Joseph Doherty  
5 committed serious nonpolitical crimes. And the thing that  
6 is most compelling about this, and indeed most chilling,  
7 is that the Attorney General ultimately bases his decision  
8 on what he refers to as material that is exhaustively  
9 documented -- that's his phrase, exhaustively documented,  
10 in the record of another case, another immigration case  
11 altogether to which we were not a party, and which did not  
12 involve issues that were even remotely identical to the  
13 issues in this case.

14 Consequently, we think to have relied on that  
15 and to have made the determination, number one, without  
16 letting us have a hearing, and then on the basis of facts  
17 that are in another record altogether, really did deprive  
18 us of any opportunity to establish entitlement.

19 QUESTION: Well, Ms. Pike, if, however, the  
20 Attorney General did not abuse his discretion in relying  
21 on the waiver and denying the motion to reopen, I just  
22 don't see how you get to those other reasons at all. You  
23 may have something valid to argue about there, to the  
24 extent that we get into it, but I'm not sure we do.

25 MS. PIKE: Justice O'Connor --

1 QUESTION: I thought these were alternative  
2 grounds asserted by the Attorney General.

3 MS. PIKE: They are, but again, I must return to  
4 the basic point. This is mandatory relief and we stepped  
5 into the circle that entitles us to go further. If it  
6 were not mandatory relief, there might be a different  
7 result.

8 QUESTION: But certainly your client waived the  
9 right to deportation. He waived it. So the question is  
10 whether that can be excused on this record and the  
11 Attorney General says no, that the decision was  
12 calculated, was an attempt, perhaps, to manipulate the  
13 system, and so forth.

14 MS. PIKE: I would appreciate the opportunity to  
15 respond to that. This notion that Mr. Doherty had  
16 manipulated the system in a cynical or self-serving way I  
17 think is absolutely incorrect, and I do not think the  
18 record can be construed in that way.

19 The fact of the matter is that all that Mr.  
20 Doherty was doing was making an effort to avoid being  
21 deported to a country where he had a well-founded fear of  
22 persecution. That I do not think constitutes manipulation  
23 of the process. And in an effort to do that, Justice  
24 O'Connor, he availed himself of an option that is  
25 available under the statute to designate a country of

1 deportation, in effect to accomplish his own removal from  
2 this country at the expense of at that time going forward  
3 on an asylum claim because he knew that he would not be  
4 rejected by Ireland.

5 And it is that fact that is central here, and  
6 what distinguishes this case from other cases, because  
7 under other cases -- if I might just step back one moment.  
8 First of all, you had queried earlier was this standard  
9 procedure. Absolutely not. Absolutely not. The BIA said  
10 in its own decision it had found no other case where this  
11 had ever happened. And given that fact, Mr. Doherty's  
12 expectation of deportation to Ireland was under the  
13 circumstances reasonable.

14 QUESTION: Well, do you say that the Attorney  
15 General's order for deportation to the United Kingdom was  
16 itself a material change in circumstances, or that the  
17 order made enactment of the Extradition Act somehow  
18 material?

19 MS. PIKE: We did not say that at the time, Your  
20 Honor, because our motion to reopen had been filed in  
21 advance. And Mr. Meese's decision came down afterward.

22 QUESTION: Well, what are you saying now?

23 MS. PIKE: Absolutely. No question about it.

24 QUESTION: Which? Which is it?

25 MS. PIKE: Let me think. Absolutely, it was a

1 change in circumstance.

2 QUESTION: What? Was it the Attorney General's  
3 order itself or that the order made the Extradition Act  
4 amendment somehow material?

5 MS. PIKE: Both are material for separate  
6 reasons, but ultimately they dovetail. Mr. Meese's order  
7 was material because what it did was to transform the  
8 possibility that Mr. Doherty would not be -- let me start  
9 again.

10 The significance of the Meese decision was that  
11 it in effect ensured that Mr. Doherty was going to be  
12 returned directly to a country where he feared  
13 persecution. That was the significance of it. We had  
14 filed the motion to reopen within 48 hours of the  
15 implementation of the Extradition Act of 1987 because  
16 under that act, Justice O'Connor, what we feared was  
17 indirect return, but certain return to a country of  
18 persecution.

19 So both of those were absolutely material under  
20 the reopening standards that the regulations set forth.  
21 And we do not think in any way that the Meese decision  
22 vitiates what had been the original integrity of the claim  
23 under the Extradition Act.

24 QUESTION: Well, did the court of appeals affirm  
25 Attorney General Meese's order?

1 MS. PIKE: Not as to the need for a hearing on  
2 the motion to reopen for withholding of deportation and  
3 asylum.

4 QUESTION: I know, but did it say that he  
5 properly ordered -- he properly refused deportation to  
6 Ireland?

7 MS. PIKE: Absolutely, Your Honor.

8 QUESTION: And properly ordered Doherty deported  
9 to England?

10 MS. PIKE: That is correct. But --

11 QUESTION: You don't challenge that here?

12 MS. PIKE: We do not, Your Honor. But he made  
13 that order, and the Second Circuit appreciated that order  
14 as being made in the context of a motion to reopen that  
15 also involved claims for relief from deportation. So the  
16 fact of the matter is that even though that order directed  
17 his deportation to the United Kingdom, that order is not  
18 subject to being acted on until Mr. Doherty's claims for  
19 relief under the Refugee Act are properly adjudicated.

20 And if I might, in a desperate attempt to try to  
21 finish the notion of why the waiver did not here obtain,  
22 under the normal situation, which everybody agrees did not  
23 happen here, if indeed there had been any perceived risk  
24 of deportation to the United Kingdom, the country where  
25 Mr. Doherty feared persecution, the immigration judge

1 would have been obligated to go forward, to afford him the  
2 opportunity then and there to proceed on his asylum claim.

3 The record reveals that that never happened.  
4 And it never happened because unlike other cases, in this  
5 case, it was already known at that point in time, there  
6 was no uncertainty, the Irish Government had indicated it  
7 would accept him into the national territory. That was  
8 where he was going. That was the country he had  
9 designated. And therefore, the immigration judge saw no  
10 purpose to go forward on a claim for asylum to prevent  
11 deportation to a country where he wasn't going to be  
12 deported. It was that simple. And the asylum claim, the  
13 asylum hearing did not go forward at that point in time  
14 for that reason.

15 I would like finally to respond in this point to  
16 one other point that had been made by our adversary  
17 relative to the Extradition Act and the fact that there  
18 was no material change in the law as to that. The fact of  
19 the matter is that there was indeed a very material change  
20 that was worked by the Extradition Act, and that has to be  
21 appreciated in the context of providing the adequate basis  
22 for Mr. Doherty's motion to reopen. The Extradition Act,  
23 1987, as a matter of black-letter law, wrote out of  
24 existence the political offense exception to extradition.

25 Whatever the Irish courts may have done prior to

1 that really does not in any way obtain in terms of the  
2 finality that was accomplished once the Extradition Act  
3 was implemented. Once it was, there was no question.  
4 That defense was not available. That was the defense that  
5 Mr. Doherty had successfully defended against extradition  
6 with here, and we had every reason to believe that he  
7 could have successfully defended against extradition  
8 there. Certainly he had a strong case.

9 But with the passage of the Extradition Act --

10 QUESTION: You argued -- I thought you had  
11 argued that he couldn't. I thought you had argued that.

12 MS. PIKE: Your Honor, we had acknowledged that  
13 the Irish courts had made decisions that had made savage  
14 inroads into the political offense exception. There is no  
15 question about that. We did. But the defense still  
16 existed. It was capable of being raised. And we felt  
17 that given the facts of Mr. Doherty's case, that certainly  
18 he would still be able to go forward with that, and  
19 conceivably at least have the opportunity of defending  
20 against extradition on that ground. Once the Extradition  
21 Act was passed, that was absolutely removed. There simply  
22 was no possibility of doing that.

23 I see that I am out of time. Thank you.

24 QUESTION: Ms. Pike.

25 You have 2 minutes, if you have rebuttal.

1 REBUTTAL ARGUMENT BY MAUREEN E. MAHONEY

2 ON BEHALF OF THE PETITIONER

3 MS. MAHONEY: Thank you, Your Honor. Just a few  
4 points. First, with respect to withholding, I'd like to  
5 emphasize that there simply is no question of fact to be  
6 resolved at an evidentiary hearing. Mr. Doherty's counsel  
7 had an opportunity before the Attorney General to put in  
8 whatever evidence they thought might be appropriate to  
9 show that there was an issue of fact, but there simply  
10 isn't one.

11 The admissions that Mr. Doherty makes in his  
12 extradition transcript establish that there simply are  
13 serious reasons for the Attorney General to believe that  
14 serious nonpolitical offenses were committed. Therefore,  
15 a hearing would serve no purpose, and that should not  
16 require the Attorney General to reopen the proceeding.

17 In addition, I'd like to emphasize that the  
18 Attorney General did rely on a broader range of conduct in  
19 determining that serious nonpolitical offenses had been  
20 committed than those relied upon by Judge Sprizzo. Judge  
21 Sprizzo focused very particularly on the basically the  
22 murder of the British captain, and simply mentioned in  
23 passing that no civilians were injured on May 2nd of 1980,  
24 whereas the Attorney General focused specifically on the  
25 fact that Mr. Doherty sought to pursue his own political



1 motives not only through the killing of the British  
2 captain, but also through deliberate acts of violence  
3 directed at citizens of Northern Ireland on that day.

4 QUESTION: It was the factual basis for that  
5 conclusion, the record in the other case?

6 MS. MAHONEY: No, Your Honor, that was in the  
7 extradition hearing itself. The facts surrounding the May  
8 '80 events that Mr. Doherty admitted were that his group  
9 hijacked a van, held the driver captive, forcibly seized a  
10 private residence in a residential neighborhood, held the  
11 family captive, and waged a gun battle with automatic  
12 weapons from the family's living room. The Attorney  
13 General found that that conduct was precisely the type of  
14 conduct that endangered innocent civilians and could  
15 not -- and had to be regarded as serious nonpolitical  
16 offenses.

17 I see my time is up. Thank you.

18 CHIEF JUSTICE REHNQUIST: The case is submitted.

19 (Whereupon, at 2:49 p.m., the case in the  
20 above-entitled matter was submitted.)  
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:*

NO. 90-925 - IMMIGRATION AND NATURALIZATION SERVICE, Petitioner

V. JOSEPH PATRICK DOHERTY

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

BY Michelle Samuels

(REPORTER)

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