

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MARVIN STONE, Petitioner v. IMMIGRATION &
NATURALIZATION SERVICE

CASE NO: No. 93-1199

PLACE: Washington, D.C.

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1 PROCEEDINGS

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 93-1199, Marvin Stone v. The Immigration &
5 Naturalization Service. Mr. Morrison.

6 ORAL ARGUMENT OF ALAN B. MORRISON

7 ON BEHALF OF THE PETITIONER

8 MR. MORRISON: Mr. Chief Justice and may it
9 please the Court:

10 In March 1987, the respondent here issued an
11 order to show cause to petitioner as to why he should not
12 be deported from the United States. Approximately 10
13 months later, after a hearing, the immigration judge
14 ordered petitioner deported, and petitioner then filed an
15 appeal with the Board of Immigration Appeals, proceeding
16 pro se with a brief of approximately 13 pages.

17 Three-and-a-half years later, the Board of
18 Immigration Appeals affirmed the order of deportation on
19 July 26, 1991, in a brief opinion dealing with the issues
20 presented.

21 Less than a month later, acting pursuant to the
22 rules of the Immigration Service, petitioner filed a
23 motion for reconsideration or reopening. He later filed a
24 very short brief, and the Immigration Service attorney
25 filed a reply in the middle of October.

1 There the matter remained until the 3rd day of
2 February, 1993, at which time the Board of Immigration
3 Appeals denied the motion for reconsideration and
4 reopening in an order that ran a page and a little bit
5 onto the second page, most of which was boiler plate
6 response to the motion.

7 Petitioner then filed a petition for review in
8 the United States Court of Appeals for the Sixth Circuit
9 on the 16th February, less than 2 weeks after the order
10 came down. He filed his brief shortly thereafter, and the
11 Government filed its brief in the end of April 1993, a
12 lengthy brief of some 33 pages, 14 of which dealt with the
13 merits of the challenge.

14 In that brief, the Government said for the first
15 time to petitioner, you are too late. You should have
16 filed your petition for review shortly within the 90 days
17 after July 1991. Oral argument was held shortly
18 thereafter, and in early January the Court of Appeals for
19 the Sixth Circuit issued its ruling.

20 It concluded that the petition for review was
21 timely with respect to the denial of the motion for
22 reopening or reconsideration, but it was not timely with
23 respect to the original decision, even though the motions
24 were then pending before the Immigration Service.

25 It agreed with the Government that the failure

1 to file within the 90 days provided by the statute made
2 the filing too late when it came in February 1993, and the
3 question presented before this Court, on which the courts
4 of appeals are badly divided, is, is that decision
5 correct?

6 The Government recognizes that under the usual
7 rule in administrative law and judicial review, that a
8 timely filed motion for reconsideration or reopening
9 renders the decision of the agency not final, such that
10 not only need not a petitioner seek judicial review at
11 that time, but the petitioner may not seek judicial review
12 at that time.

13 And the reason for that rule is a sound one of
14 judicial economy. The courts should not become involved
15 in deciding cases if the agency which has the matter
16 before it has the ability and the power and under its
17 rules the authority to reconsider the decision at that
18 time.

19 QUESTION: I take it --

20 QUESTION: I have two questions, Mr. Morrison.
21 Number 1, what happens if the petition for judicial review
22 is filed first, and then the petitioner decides, I'll ask
23 for a rehearing. What happens then?

24 MR. MORRISON: It is my understanding that the
25 usual rule is that the filing of a petition for judicial

1 review takes the matter into court, and that it does not
2 divest the agency of the authority to reconsider, although
3 it does not stop the court from considering the matter,
4 and in that circumstance it is up to the court to decide
5 whether it will choose to proceed with the case or allow
6 it not to proceed.

7 QUESTION: Which the statute here -- an option
8 that the statute here eliminates.

9 MR. MORRISON: No, Your Honor, I don't --

10 QUESTION: It says that they shall be
11 consolidated in such a situation --

12 MR. MORRISON: No. It only says they shall be
13 consolidated, as I read it, if there are two or more
14 petitions for review.

15 That is to say, it does not direct the court of
16 appeals of the first case to hold it, and my reading of
17 the cases is that some courts more or less automatically
18 hold them if they are told. In some cases some courts
19 automatically don't hold them, and in other cases they do
20 what seems to me the sensible thing to do, which is to
21 look at the motion for reconsideration to see whether it
22 really raises some new issues.

23 For instance, in the immigration area, where
24 often the change in circumstances of the country to which
25 the alien would be deported would be a very important

1 element. If somebody was, for instance, to be sent back
2 to Bosnia, you would want to have the latest information
3 on what the state of the world was in Bosnia before you
4 sent the particular individual back.

5 On the other hand, if it was simply, you got it
6 wrong and you misread your opinion or the opinion of the
7 court of appeals there would be no particular reason for
8 the court to stay that.

9 QUESTION: My second question is whether the
10 filing of the motion for reconsideration or for reopening
11 simply tolls the period for review, or does it
12 retroactively render the decision nonfinal so that you
13 have the full period at the end of -- once the petition
14 for reconsideration is disposed of?

15 MR. MORRISON: I have not seen a case that deals
16 with that question, Your Honor, that comes up explicitly.
17 It wouldn't matter here in this particular case. My own
18 opinion --

19 QUESTION: Mr. Morrison, would you clarify what
20 you said before? I thought you said that in most -- the
21 normal situation is, not only can you file the petition
22 for reconsideration first, but if you do -- if you do, you
23 have no final order and you can't file a notice of appeal.
24 Maybe I misunderstood you.

25 MR. MORRISON: Yes, that is correct, Your Honor,

1 and the question I believe Justice Scalia was asking me,
2 is that because it makes it a tolling that you stop at
3 that point -- suppose they filed it, as in this case, on
4 day 26. They filed the motion for reconsideration on day
5 26.

6 The question that Justice Scalia I believe asked
7 me, does he -- does the petitioner here have 90 days from
8 the time of the denial of the motion for reconsideration,
9 or 90 minus 26, which I think is 64, and I don't know of
10 any case that answers that.

11 It is my opinion that the filing of the motion
12 for reconsideration renders it not final. This would be
13 analogous, for instance, to what happens under the Federal
14 Rules of Civil Procedure, where a filing of a timely
15 motion for reconsideration under Rule 52a or 59 renders
16 the decision nonfinal and you get your full 30 days at the
17 end of that time.

18 QUESTION: What happens if the Attorney General
19 then says, on the plane or on the ship, out you go?

20 One of the regulations says that the filing of
21 an application for reconsideration does not stop the
22 immediate deportation of the person. Suppose you have
23 filed for reconsideration. You say, then you have no
24 final judgment, you can't come to the court of appeals.

25 The Attorney General says, I'm shipping this

1 person out. Do you have any way to stop that --

2 MR. MORRISON: Yes, Your Honor.

3 QUESTION: -- since you can't get to a court of
4 appeals?

5 MR. MORRISON: You may not go to the court of
6 appeals under that circumstance. Under 1105a(a)(10) the
7 jurisdiction under habeas corpus in the district court is
8 specifically preserved for that situation, and there are a
9 number of cases where that arises where the alien would
10 then go to the district court where he would have to
11 obtain a stay of deportation, assuming that the agency
12 didn't give it to him.

13 I might point out, of course, two things. The
14 first is, we do not concede in this case the validity of
15 that regulation, because we believe that that regulation
16 depends upon the authority under 8 U.S.C. 1252c, which is
17 the authority to deport, and it says there must be a final
18 order of deportation. You then may have 6 months to
19 deport the alien.

20 This case doesn't present that question, so we
21 don't accept the validity of that regulation, and since
22 the phrases are the same in both statutes, we think they
23 should be interpreted together.

24 But even assuming the validity of the
25 regulation, we would first point out that in many cases,

1 as in this one here, Mr. Stone filed his motion for
2 reconsideration in August of 1991. At no time did the
3 Service ever try to deport him.

4 Indeed, it has not to this day tried to deport
5 him, even after it prevailed in the court of appeals, and
6 so it is in some respects true that the regulation
7 provides that, but it is not a process which automatically
8 goes forward. The statute, indeed, gives the agency
9 6 months to do it.

10 QUESTION: If you go to the district court on
11 habeas corpus, Mr. Morrison, what sort of considerations
12 does the district court look at in deciding whether to
13 give a stay or not?

14 MR. MORRISON: I would think it would look at
15 two things, Your Honor. First, it would look at, as in
16 any kind of an application for a stay, the equities, and
17 it might well look at the standard questions on a stay
18 such as the probability of success.

19 QUESTION: Predicting probability of success in
20 the court of appeals?

21 MR. MORRISON: Well, it's a little bit awkward.
22 I would suppose it would probably have to predict it
23 solely on the motion for reopening part of it. It doesn't
24 happen very much for this very sensible reason, that the
25 Immigration Service simply doesn't want to start to go

1 deporting people when it has it fully within its power to
2 simply decide these matters.

3 This case is not an unusual one in which a
4 motion for consideration languished for 17 months before
5 the Immigration Service, and the Immigration Service looks
6 a little awkward trying to throw people out of the country
7 before a) they decide the case and b) they have given them
8 their statutory right to go to the court of appeals.

9 QUESTION: Well, but the right to rehearing is
10 totally a creature of agency regulations.

11 MR. MORRISON: That is correct, Your Honor. I
12 would agree that --

13 QUESTION: They could cut that out tomorrow.

14 MR. MORRISON: I agree with that, and if they
15 cut it out we wouldn't have a situation like this.

16 The agency -- I think they could certainly on
17 reconsideration. On the reopening, Your Honor, it may be
18 a little different, because there are statutory
19 requirements with regard to the country to which the
20 person could be sent and other kind of asylum and other
21 kind of issues, and it might have a lot more difficulty
22 cutting out reopening in terms of presenting new evidence.

23 But obviously neither of those cases is before
24 us today, and the agency, even today when Congress told
25 them in 1990 to issue new regulations, they finally got

1 around to proposing them 4 years later, and those
2 regulations continue, albeit under somewhat different
3 circumstances, the right to file for reconsideration and
4 for reopening.

5 QUESTION: The part that I might be a little
6 confused about, that I need clarification about, is this.
7 Imagine that you are the immigrant, and now on day 1, down
8 comes an order. It says, go. Now, on the Government's
9 interpretation --

10 MR. MORRISON: Your Honor, do you mean --

11 QUESTION: -- it's a final --

12 MR. MORRISON: -- a final --

13 QUESTION: -- it's no reconsideration, final
14 order, go, and on the Government's interpretation, I know
15 what I'm supposed to do. I go and appeal immediately.
16 That stays the whole business.

17 I file a petition for reconsideration. When
18 that's finally decided I can appeal that, too, and the
19 thing will be consolidated. All right. I can understand
20 how that works.

21 Now take your interpretation. Your
22 interpretation, I sit there, I get the order, it says, go.
23 I'm not sure I know what I want to do. If, after all, I
24 file a petition for reconsideration, I no longer can
25 appeal the order saying go.

1 MR. MORRISON: At that time.

2 QUESTION: No, right.

3 MR. MORRISON: That is correct.

4 QUESTION: And if things drag on, the time will
5 expire. Maybe they'll deport me, so I might have to give
6 up -- I have to make a choice. Either I -- I'm -- I can't
7 really stay in the country during the appeal. If I
8 file -- at least I can't be certain I can.

9 If I file that motion for reconsideration, that
10 doesn't seem like a very good thing. It seems like I'll
11 either have to give up my right to file a motion for
12 reconsideration, or I'll have to give up my certainty that
13 I can stay here until I get an appellate court to look at
14 this thing. Now, am I right about that, and if I'm right,
15 why would Congress want to do that?

16 MR. MORRISON: Well, I would say that Your Honor
17 is correct that that is the way the Government interprets
18 the statutory scheme. I would say that Your Honor's
19 analysis gives further force to my view that the
20 Government's view that it has the right to deport somebody
21 while it is itself reconsidering the matter is not
22 correct.

23 I want to emphasize that issue is not before the
24 Court today, but it's particularly unreasonable for the
25 Government to take this position, because the regulations

1 on reconsideration, while they do warn you that you can't
2 stay in the country, don't also warn you that you better
3 go file your notice -- petition for review right away, so
4 the alien first learns that -- about this potential trap,
5 the same kind of trap that this Court remarked about
6 2 years ago in the Darby case. We have exactly that trap
7 here.

8 And we're also dealing with people who, by
9 definition, many of them are proceeding pro se, they get
10 no notice, many of them don't speak any English, if they
11 have lawyers, the lawyers may not be fully familiar with
12 these difficult matters of administrative law that we're
13 dealing with here. They're basically experts in the
14 immigration field.

15 And I think also it's fair to say that many
16 people know that the Immigration Service is not deporting
17 people promptly, even though their regulations say they
18 can do it. It leads to the possibility of selective
19 enforcement, which is a whole other set of problems.

20 QUESTION: Well, why isn't the most rational
21 thing to do to say, file your notice of appeal
22 immediately, then you can file for reconsideration, and
23 everything is going forward, leave it to the judgment of
24 the court of appeals whether it wants to stay the appeal
25 pending the reconsideration at the agency level?

1 MR. MORRISON: Well, Your Honor, I would say two
2 things to that. The first question, of course, is not
3 whether, if we were designing a system sitting here, we
4 would design the system that way.

5 The usual rule is to the contrary. That is to
6 say, as I outlined it before, and as the ICC case makes it
7 clear, the usual rule is to the contrary, that you don't
8 burden the courts with even having to deal with the
9 administra --

10 QUESTION: But that was the ICC's position in
11 that case. Here, the Attorney General's position, stated
12 in the regulation, is the other way.

13 MR. MORRISON: Well, it was the ICC's position
14 because that was the way they could get the case thrown
15 out of court.

16 I would say that the Immigration Service over
17 the years in cases like Foti and Cheng Fan Kwok took
18 different positions on which court you could go to
19 depending on who was the winner or who was the loser in a
20 particular situation.

21 QUESTION: But now there is no doubt about the
22 Attorney General's position. It's stated clearly --

23 MR. MORRISON: Yes.

24 QUESTION: -- and if you just read the
25 regulations you'd know what you have to do, and you're

1 saying that the Attorney General can't have such a
2 regulation.

3 MR. MORRISON: That is correct, and I say that
4 first because -- I want to answer Your Honor's question
5 about why the system wouldn't make sense.

6 It would make sense for everybody except the
7 courts of appeals. That is, the courts of appeals, the
8 judges would have to get these motions and sit down and
9 decide them regularly.

10 In many cases, the briefs would have to be
11 filed, and the court would have to decide whether to hold
12 argument or hold in abeyance, they would have to decide
13 whether to issue an opinion, which might end up being an
14 advisory opinion, and all of those reasons are the same
15 whether it's the immigration case or the ICC or the NLRB,
16 and I suggest to you that in the absence of some
17 indication that Congress intended the result to be
18 different in this case from others, it should not be
19 different.

20 QUESTION: Or even -- or for that matter, even
21 that the Attorney General intended the result to be
22 different. The language of the Attorney General's
23 regulation is not much different from the language of the
24 Hobbs Act that we interpreted in the ICC case. Isn't that
25 so?

1 MR. MORRISON: Well, there is nothing in the
2 regulation itself that tells you when you go to court. it
3 tells you when the alien can be deported, but there's
4 nothing in the regulation, which is of course another
5 problem that I have with it.

6 The Government makes a great deal of the fact
7 that this is an immigration area and that Congress was
8 very worried in 1961 when it passed the judicial review
9 provision at issue here to get these cases over with
10 quickly.

11 Well, the one particular problem that Congress
12 addressed was the multiple appeals. That is, the alien
13 going to the district court, the district court deciding
14 it on the record and going to the court of appeals.
15 Congress said, no, we don't want two levels of appeals.
16 Exclusive -- and that's the word in the statute, exclusive
17 jurisdiction is in the court of appeals. That took care
18 of one problem.

19 But interestingly, Congress did not say anything
20 at all about the kind of speed or the necessity for moving
21 the case ahead the way the Government suggests here.
22 There is nothing in the statute that distinguishes this
23 case from the Hobbs Act.

24 In fact, the Hobbs Act is the model, but
25 ironically -- the Government says Congress was concerned

1 about speed. They gave them 180 days for an alien to get
2 to court. They cut it back to 90 days. The Hobbs Act,
3 which deals with the ICC and many others, is only 60 days,
4 rather odd if you were really concerned about getting to
5 court.

6 QUESTION: What about the 1990 amendment,
7 Mr. Morrison? Isn't that a significant difference between
8 the statutory scheme here and the one involved in the
9 Hobbs Act case?

10 MR. MORRISON: I must confess, Your Honor, when
11 I looked at the 1990 amendment, I wasn't quite sure what
12 it was actually going to do in the real world.

13 My experience in the court of appeals is that if
14 you've got two cases arising out of the same matter, as
15 this surely would be, the court would inevitably
16 consolidate them. There is no legislative history that
17 helps on this. The Government's --

18 QUESTION: Isn't it fair to say that it displays
19 the expectation of Congress that at least with enough
20 frequency to be worth addressing in the U.S. Code there
21 would be two separate appeals, one from the original order
22 and one from the denial of the petition for
23 reconsideration?

24 MR. MORRISON: I think that that is, as an
25 inference -- the Government's position first is that under

1 our view of the statute there would never be a case in
2 which this would happen. That seems to me to be
3 demonstrably false, and let me explain why.

4 Suppose that the -- Mr. Stone here had not
5 filed, and then -- but had sought review in the court of
6 appeals within the 90 days. Six months later -- his
7 country of origin is Canada, so it's not likely to happen,
8 but let's assume that something happened in Canada that
9 made it very changed circumstances for him to go back
10 there.

11 He wouldn't file a motion for reconsideration,
12 he would file a motion to reopen, setting forth in
13 affidavits a new circumstance. For instance, his family
14 situation might have changed here, he might have a sick
15 child in the United States, and he would be asking for
16 some form of discretionary relief. Many aliens do that.
17 They ask for some form of discretionary relief on
18 reopening.

19 If that were denied, he would then seek judicial
20 review on the reopening under a rather different standard
21 from under the original case, just like in the ICC case.
22 That is, it would be an abuse of discretion, and there are
23 rules of the INS saying when they have to reopen and so
24 forth and so on, what you have to put forth.

25 In that situation, the 1990 statute would come

1 into play, just as it almost certainly would have come
2 into play before 1990, so --

3 QUESTION: Is that situation common enough,
4 however, to be a reasonable explanation for the statutory
5 provision?

6 MR. MORRISON: I can't answer --

7 QUESTION: I mean, you know --

8 MR. MORRISON: I can't answer that question,
9 Your Honor.

10 QUESTION: -- you can come up with a
11 circumstance that --

12 MR. MORRISON: Well, I think it's quite common
13 that aliens do submit new information. That is a fairly
14 common circumstance. There is nothing in the legislative
15 history to support it. There was directed to be a study
16 by the Attorney General afterwards, and I think there were
17 some -- less than 1,000 cases in which motions for
18 reopening were filed.

19 I'm sorry I can't read the Congress' mind on
20 that. It certainly is not an absurd notion that they
21 should do it, and it was a notion that they should do
22 something to speed up the process.

23 But interestingly, that amendment is adding a
24 new section (a)(6). It does not change either the meaning
25 of the final order of deportation, or the 90 days, or

1 anything else in the language which we're relying on here.

2 QUESTION: Mr. Morrison, may I go back to
3 Justice Breyer's question to you? I'm not sure I'm
4 thoroughly satisfied with your answer to him.

5 You in effect say the issue of whether a
6 petition for reopening stays the deportation is not before
7 us. Does that mean we must assume for present purpose --
8 for purposes of deciding this case that the Government is
9 correct?

10 In which event it seems to me the problem he
11 poses you haven't answered, namely that a person is
12 ordered to be deported, and files a petition for
13 reopening, and loses the right to appeal because it's
14 rendered the order nonfinal, and may therefore be deported
15 at the whim of the Government.

16 MR. MORRISON: Subject to the right of going to
17 the district court on a habeas corpus petition --

18 QUESTION: Yes, but the habeas corpus is not a
19 guarantee --

20 MR. MORRISON: -- and I would argue very
21 vehemently that --

22 QUESTION: Let's put aside for a moment the
23 habeas corpus, because that's not a guarantee by any
24 means, whereas the appeal is a guarantee.

25 MR. MORRISON: Yes, Your Honor, but one would be

1 hard-pressed to know what the Immigration Service would
2 say in response to my motion, which would say, first, we
3 have a timely motion for reconsideration which they
4 haven't acted on, despite the many months it's been before
5 them, they want to deport him, as soon as they act on it
6 he's going to file and go to court on -- he's going to go
7 to court and get an automatic stay of deportation. Where
8 do the equities lie in that kind of situation?

9 And I think, under those circumstances, most
10 district judges would be pretty hard pressed to say, send
11 him out of the country, he loses all of his rights at that
12 point regardless of what the merits of the decision are,
13 because the Immigration Service has it fully within its
14 power to correct the matter as soon as it wants to if it
15 will only get around to deciding these motions for
16 reopening.

17 QUESTION: I'm just concerned that your position
18 may not be the most protective of the immigrant. That's
19 what I'm suggesting.

20 MR. MORRISON: Well, Your Honor, I am
21 representing my client here today, and his case is not --

22 QUESTION: On this particular -- the state of,
23 you know, this particular record -- I'm thinking of the
24 hypothetical case in which a person 60 days after the
25 order of deportation is entered, is about to be deported,

1 and takes an appeal. He has an insurance policy right
2 now. He cannot be deported.

3 MR. MORRISON: That is --

4 QUESTION: Under your view, he could be.

5 MR. MORRISON: He could be deported if the
6 Service a) -- I don't believe under the law -- as I read
7 the statute --

8 QUESTION: Well, I understand, but you're
9 relying on an issue you say we don't have to decide.

10 MR. MORRISON: Have to decide, that is correct.
11 I'd be more than happy to have Your Honors decide it in my
12 favor on that issue.

13 QUESTION: But I'm just wondering if in order to
14 protect the people in this position we do not need to
15 decide that, and you say we don't. So you're willing to
16 rest on the proposition, as I understand it, that he would
17 be subject to deportation whenever he makes the -- when he
18 does something that makes the deporta -- if he -- let's
19 see. I don't want to get myself mixed up here. If he
20 fails to appeal, he would be subject to deportation.

21 MR. MORRISON: That is, I believe, the only
22 intellectually defensible way that you can reach the
23 result which I'm urging this Court to reach today, that my
24 client's petition for reconsideration stop, whether it's
25 tolled or made nonfinal. It's the only way he's going to

1 get his day in court, and that is my obligation to do it.

2 And I believe that aliens will be adequately
3 protected. I do not believe the Service will engage in
4 wholesale orders of deportation, and the district courts
5 would not stand for it if they did, when it's perfectly
6 within their power to see that people both --

7 QUESTION: If we affirm the Sixth Circuit here,
8 your client is on his way, right?

9 MR. MORRISON: That is correct, Your Honor.
10 That is correct, unless there is some other discretionary
11 form of relief, which he may seek with the Immigration
12 Service. As far as the court system is concerned --

13 QUESTION: Would that stay his deportation
14 further?

15 MR. MORRISON: No, it would not. It would not,
16 Your Honor, not unless --

17 QUESTION: When was the original order to deport
18 him entered?

19 MR. MORRISON: The -- well, the order to show
20 cause was in March 1987.

21 QUESTION: That was, what, 7 years ago?

22 MR. MORRISON: Yes. Almost 8 now.

23 QUESTION: Eight.

24 MR. MORRISON: The immigration judge was in
25 January '88, the Board of Immigration Appeals was 3-1/2

1 years later, in July of 1991, and they have made no effort
2 to deport him in those, whatever number of years you're
3 measuring it from, despite their regulations and despite
4 what they say the statute is, and I am very concerned
5 about this, Your Honor.

6 I don't know what the right answer is. It seems
7 to me the best answer is for the service to get off the
8 dime and to start to proceed with these matters so that
9 they can be taken care of. I think that's what Congress
10 wants, and instead of playing judicial yo-yo --

11 QUESTION: Mr. Morrison, I want to come back to
12 the 1990 amendment, the consolidation provision. You have
13 given me an explanation of how that provision has meaning
14 with regard to reopening. How does it have meaning with
15 regard to reconsideration, because it does say, any review
16 sought with respect to a motion to reopen or reconsider
17 such an order shall be consolidated --

18 MR. MORRISON: As Your Honor may know, the
19 Service has no time limits whatsoever on motions for
20 either reconsideration or reopening, and I suppose I
21 could, if I were an attorney in good faith, say to the
22 INS, there's a new case which you've decided which is
23 inconsistent even after my time for review has -- I've
24 already filed my petition for review.

25 You treated somebody differently. That's

1 reconsideration as opposed to reopening. Reopening is new
2 evidence. Reconsideration is that you're now inconsistent
3 with another line of cases that you're decided.

4 I'd like to reserve what little time I have
5 left. Thank you.

6 QUESTION: Very well, Mr. Morrison.

7 Ms. Brinkmann, we'll hear from you.

8 ORAL ARGUMENT OF BETH S. BRINKMANN

9 ON BEHALF OF THE RESPONDENT

10 MS. BRINKMANN: Mr. Chief Justice and may it
11 please the Court:

12 The Attorney General acted well within the
13 authority delegated by Congress in establishing the
14 administrative framework governing deportation
15 proceedings. It's a reasonable interpretation and
16 implementation of the act, and it warrants great
17 deference.

18 The Attorney General struck a balance between
19 several competing interests. On the one hand, she
20 promulgated regulations providing that an order -- a
21 deportation order becomes final upon dismissal of an
22 appeal by the Board of Immigration. That rule serves the
23 interest of finality and expedition. On the other hand,
24 she authorized a narrow avenue of relief through motions
25 to reopen or reconsider. Those serve the interests in

1 fair adjudication and permitting consideration of
2 information that arises later.

3 The Attorney General did not provide that such
4 motions affect the finality of deportation orders.
5 There's nothing in the Immigration and Nationality Act or
6 the implementing regulations that requires the Attorney
7 General to surrender the finality of deportation orders as
8 a condition permitting such motions.

9 QUESTION: I assume, just at this point you
10 might answer -- I think Justice Scalia brought up the fact
11 that her regulation doesn't say anything about whether or
12 not reconsideration tolls or makes it nonfinal, and the
13 regulation is written in the same words as the Hobbs Act,
14 as the Administrative Procedures Act, as interpreted by
15 this Court to mean that you file a motion for
16 reconsideration, it isn't final any longer, so what is it
17 that leads you to say that's what her decision is?

18 That isn't what her decision says. That isn't
19 what the regulation says. Rather, it uses the language
20 that this Court has interpreted as meaning what Mr.
21 Morrison said.

22 MS. BRINKMANN: Your Honor, we believe that the
23 Locomotive Engineers addressed a different question. The
24 issue in that case was whether or not the Hobbs Act and
25 Administrative Procedures Act required that a motion to

1 reconsider not affect the finality of an agency order, and
2 in that case the Court agreed with the Interstate Commerce
3 Commission that those statutes did not require that, and
4 they did not prevent an agency from taking another
5 approach, which the Interstate Commerce Commission took,
6 in that motions to reconsider could affect the finality
7 and suspend that finality to stay the time for seeking
8 judicial review.

9 QUESTION: But I think Justice Breyer's point is
10 that just as the Hobbs Act did not require it, so also the
11 text of the Attorney General's regulations do not require
12 it.

13 MS. BRINKMANN: Your Honor, we believe the --

14 QUESTION: The language is virtually the same.

15 MS. BRINKMANN: We believe that the Attorney
16 General's interpretation of that regulation is reasonable.
17 There's nothing in the statute or the regulations that
18 suggest that the filing of a motion undermines that
19 finality. To the contrary, the structure of the
20 regulations bolsters and corroborates the Attorney
21 General's interpretation. Not only does the --

22 QUESTION: You say 1) you infer that from the
23 regulation that says you can deport the person
24 immediately, that you don't have -- that its final -- one
25 thing that is in the regulations is that it's final for

1 purposes of putting the person on the boat or the plane.

2 MS. BRINKMANN: Yes, Your Honor, and not only
3 does that support the Attorney General's interpretation,
4 there's another aspect of the regulations where the
5 Attorney General provides that an alien does get an
6 automatic stay during an administrative appeal from the
7 immigration judge to the Board of Immigration Appeals,
8 therefore evidencing that the Attorney General not
9 providing such a stay means that -- after dismissal of an
10 appeal by the board means that that order is final.

11 We would also submit, Your Honor, that the
12 regulation concerning motions to reopen and reconsider
13 supports the Attorney General's interpretation in that it
14 requires section 3.8 of 8 C.F.R., that when an alien files
15 a motion to reopen or reconsider, the alien must specify
16 whether that deportation order is -- has been or is then
17 pending judicial review, clearly anticipating that
18 judicial review may -- should have gone forward if the
19 alien was intending to seek that.

20 QUESTION: Ms. Brinkmann, exactly what
21 interpretation of what section are we talking about when
22 you say that the Attorney General's interpretation is
23 entitled to great deference?

24 MS. BRINKMANN: Your Honor, we believe that the
25 language is 8 C.F.R. 243.1, establishing that a

1 deportation order becomes final upon dismissal.

2 QUESTION: Where is that in your brief?

3 MS. BRINKMANN: That is on the very last page of
4 the appendix to the Government's brief, Your Honor, page
5 10a.

6 QUESTION: 243.1 on page 10a?

7 MS. BRINKMANN: Yes, Your Honor. That
8 establishes that an order of deportation -- and it's down
9 to about the sixth line -- shall become final upon
10 dismissal of an appeal by the board of Immigration
11 Appeals. Also, if the alien waives the time for seeking
12 that administrative appeal, or that time expires, it
13 becomes final, and the plain language of the statute,
14 1105a(a)(1) is that no later than 90 days after that date
15 the alien must seek judicial review.

16 QUESTION: Ms. Brinkmann, I'm not -- I guess I
17 don't have everything in front of me, but it is not my
18 impression that in other agencies the mere fact that an
19 order is not final in the sense that a petition for
20 reconsideration may still be filed prevents that order
21 from being enforced. Is that the case in all other
22 agencies?

23 I mean, you're appealing to the Justice
24 Department's provision that says it can be enforced at
25 once as demonstrating that this is different from the

1 normal Hobbs Act or the normal APA situation. Is it the
2 case that in other agencies the orders are not enforceable
3 as long as a petition for reconsideration or a petition
4 for reopening can be filed?

5 MS. BRINKMANN: No, Your Honor, I believe there
6 are agency actions which can be enforced --

7 QUESTION: At once.

8 MS. BRINKMANN: But there's a difference in that
9 the deportation context, and I think this is what's so
10 important in the recognition of the deference and the
11 delegation of the authority Congress has given to the
12 Attorney General, and the statute directly recognizes
13 this.

14 There's a unique finality about deportation
15 orders, because once they are enforced, in virtually -- in
16 every case the issue is then moot. In recognition of that
17 finality, Congress provided for an automatic stay pending
18 judicial review except in the case of aggravated felons,
19 in fact, but in the situation which is before the Court.

20 At the same time, however, Your Honor, Congress
21 also recognized that there were important interests of
22 recognition, and in the statute 1105a(a), which sets forth
23 the exceptions to the Hobbs Act for judicial review in
24 this context, that provides that the Attorney General can
25 enforce a deportation order notwithstanding the

1 availability of judicial review unless and until the alien
2 in fact files for judicial review. That's paragraph 8 of
3 1105a(a).

4 And also there are two other aspects of 1105a(a)
5 that demonstrate Congress' interest in expedition of
6 finality. In subsection (c), Congress explained that
7 after the enforcement of a deportation order and an alien
8 departs, there is no further judicial review, so an alien
9 can in fact be deported before he seeks judicial review
10 and there's no further judicial review after that, again
11 demonstrating that Congress' intent was that the alien
12 should file a petition for judicial review to obtain an
13 automatic stay.

14 QUESTION: I wasn't talking about Congress'
15 intent. I was talking about the Attorney General's
16 intent. I thought you made the argument earlier that the
17 meaning of the Attorney General's regulation is made clear
18 by the fact that the Attorney General allows -- that the
19 regulations make it clear that the order can be enforced
20 at once, even though there may later be a motion for
21 reconsideration, and I'm saying I'm not sure that's
22 different from what most other agencies do, that even
23 though a motion for reconsideration is available, or a
24 motion to reopen, the order is enforceable at once.

25 MS. BRINKMANN: I think that the way which we --

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QUESTION: I'm not talking about Congress' intent, now. I'm talking about the Attorney General's regulations.

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MS. BRINKMANN: I understand, Your Honor. I think what we rely on that is to show the reasonableness of the Attorney General's interpretation and that those regulations should be read to view the lack of an automatic stay as bolstering her finality regulation and definition, because in the instance when it's not final, when there's an administrative appeal from the immigration judge to the board, she does give an automatic stay, so in that sense I believe it bolsters the reasonableness of the finality definition.

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QUESTION: We're not interested -- at the moment I'm not interested in the reasonableness of that interpretation, but is that the interpretation?

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Look, you have language in the Hobbs Act which says an order when it's served is final, okay, it's final on the date when it's served, no matter whether there's a petition for reconsideration, and the court says, that language says it's final when it's served, but it isn't final if you file a petition for reconsideration.

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That's what this Court said, irrespective, and this Court said it because the APA says exactly the same

1 thing. The APA says it's final, no matter whether there's
2 a motion for reconsideration or not, and this Court says
3 it's long been held that you file a motion for
4 reconsideration, not final any more.

5 Now we have for the third time a regulation this
6 time which says an order shall become final. It says
7 nothing about petitions for reconsideration, so why
8 wouldn't this regulation mean exactly what similar
9 language means everywhere else in the law, namely that it
10 is final, but if you file a motion for reconsideration, it
11 doesn't become final. That I think is what's worrying me,
12 and maybe some others.

13 MS. BRINKMANN: Well, Your Honor, we urge that
14 Locomotive Engineers held that the language of the Hobbs
15 Act and the APA does not require that motions to
16 reconsider not affect finality, but it permits an agency
17 to take another approach. The cases cited by the Court in
18 Locomotive Engineers themselves recognize that.

19 The first case cited, American Farm Lines,
20 recognized the fact that you could also have an
21 administrative ruling while judicial review is pending.
22 The very page cited by the Court in Locomotive Engineers
23 explains that the concept of an indivisible jurisdiction
24 where all of the proceedings must be in one tribunal or
25 all in the other may fit some statutory schemes but it

1 doesn't fit this one.

2 That's what the Court in American Farm Lines
3 said, and that was one of the cases on which the Court in
4 Locomotive Engineers relied, and that's what we submit
5 here. This is a different context.

6 Under Weinberger v. Salfi the Court has held
7 that where Congress does not define finality of an agency
8 order and delegates authority to the agency, that
9 executive official has it well within her power to define
10 that finality, and we submit that's what the Attorney
11 General has done here, and that that deserves deference.

12 QUESTION: With language that is the same as the
13 language in the Hobbs Act. I mean, it seems to me that
14 since we had interpreted this language not to do what she
15 wants to do, she might have used some different language.

16 MS. BRINKMANN: Your Honor, the Attorney
17 General's language long predated the opinion in Locomotive
18 Engineers, and the as the Court itself --

19 QUESTION: Maybe it should have been changed
20 after Locomotive Engineers.

21 MS. BRINKMANN: Well, Your Honor, the Attorney
22 General's whole regulatory framework and the other aspects
23 of the regulations we pointed to bolster that
24 interpretation of that plain language.

25 The Court itself acknowledged in Locomotive

1 Engineers that the plain language of those provisions
2 supports the position that we're advocating today. It
3 simply held that it did not prevent an agency from taking
4 another approach.

5 QUESTION: This is something that it seems to me
6 the law should be pretty clear about before somebody gets
7 put out of the country without the opportunity for
8 judicial -- don't you think it should be clear, and no
9 doubt about it --

10 MS. BRINKMANN: Yes, Your Honor, we do.

11 QUESTION: -- and not regulation language which
12 reads just like the statutory language which we said does
13 not prohibit later seeking of judicial review?

14 I would feel very much snookered if I were an
15 immigrant who read this regulation, read what the Supreme
16 court said a similar statute held, and then I'm told I
17 can't go to court. That doesn't seem to me the way a --
18 you know, an honorable country should operate.

19 MS. BRINKMANN: Your Honor, we believe that the
20 reading of Locomotive Engineers puts a person on notice
21 that the Federal agency that's administering the act, if
22 that agency has the authority to define finality and the
23 impact that motions to reconsider or reopen may or may not
24 have, that's where the person should look.

25 QUESTION: Yes, but the only specific language,

1 I take it, in your argument that the Attorney General's
2 regulation actually addresses to this issue is the
3 regulation that provides that when an appeal is taken
4 there should be a specification as to whether a motion for
5 reconsideration or reopening is pending, is that correct?

6 MS. BRINKMANN: We believe that that's one
7 regulation that bolsters the reading of 243.1.

8 QUESTION: But it doesn't require it, does it?

9 MS. BRINKMANN: Well, Your Honor, we think that
10 the plain language of the statute indicates that a --

11 QUESTION: But if we assume that the plain
12 language of the statute does not in and of itself answer
13 the question, and you then turn to the regulation that
14 says when you appeal you should say whether there's a
15 motion to reopen, et cetera, pending, you would -- I take
16 it you would agree that that may be some evidence, but
17 that is not an unequivocal statement for your position.
18 Do you agree with that?

19 MS. BRINKMANN: It doesn't specify in so much
20 words what the impact -- that a motion has no impact on
21 finality.

22 QUESTION: Right. It would be -- technically it
23 would be consistent, it could be consistent with Mr.
24 Morrison's position.

25 MS. BRINKMANN: We don't believe so, Your Honor.

1 In Mr. Morrison's position, there would not be --

2 QUESTION: I might file the motion for reopening
3 and say, I think I'll take an appeal anyway, and I'm going
4 to do it because I'm afraid the time may run against me.

5 MS. BRINKMANN: But under Mr. Morrison's
6 interpretation the Court is without jurisdiction to
7 exercise review over that petition for judicial review,
8 and that, Your Honor, is where we submit that the alien
9 actually is caught in a trap, the trap that --

10 QUESTION: Well, the trap that Justice Breyer
11 described.

12 MS. BRINKMANN: It's the trap that --

13 QUESTION: He loses his guarantee and his only
14 hope is habeas, in that case.

15 MS. BRINKMANN: Well, Your Honor, also the trap
16 of forever losing a right to judicial review if the --

17 QUESTION: If he's wrong.

18 MS. BRINKMANN: If he doesn't later submit yet
19 another petition. That was the trap that a litigant fell
20 into before the recent amendment of the Federal Rule of
21 Appellate Procedure 4, having -- if an alien were to file
22 a petition for judicial review based on the plain language
23 of the statute and believe it timely, then file a motion
24 to reopen on another matter, if that divests the court of
25 jurisdiction over the petition and the alien doesn't later

1 file yet another petition, he'll be forever barred of
2 judicial review.

3 QUESTION: I don't think Mr. Morrison took the
4 position that it divests the court. I didn't understand
5 that to be his position.

6 QUESTION: No, he does not.

7 MS. BRINKMANN: I believe it's his position if
8 the motion is filed first. If the motion is filed first,
9 there is no jurisdiction.

10 The courts have, in fact, continued to exercise
11 jurisdiction over a petition for review notwithstanding
12 the filing of a later motion as Mr. Morrison pointed out,
13 but they've done that without any analysis. The Ninth
14 Circuit in Berroteran-Melendez explained that that was the
15 practice without any analytic distinction between whether
16 the motion was filed before or after the petition for
17 judicial review, but that was the approach that the court
18 of appeals took.

19 QUESTION: Ms. Brinkmann, I guess we wouldn't
20 have this case here if the BIA had acted more promptly on
21 the motion to reconsider or reopen. Why does it take 18
22 months to decide something like that?

23 MS. BRINKMANN: Your Honor, I think like any
24 administration of an adjudicatory system some cases take
25 longer, some cases are quicker. There's nothing in the

1 record to indicate a particular obstacle in this case. I
2 think it --

3 QUESTION: That makes it all the worse, in a
4 way. If you were to say this was a particularly difficult
5 case, or that a lot of new and very debatable points had
6 been raised in the petition for rehearing or
7 reconsideration, we might think of it as an exception, but
8 if it's just routine that these things take 18 months, not
9 the original decision but the petition for rehearing, I
10 mean, I think it's amazing, frankly. I don't know of any
11 court in the country that takes anywhere near that long to
12 pass on petitions for rehearing after they've once decided
13 something.

14 MS. BRINKMANN: Well, Your Honor, I believe that
15 the priorities perhaps that the Board of Immigration
16 Appeals follows, whether it's to address new cases that
17 come up as opposed to frivolous motions to reopen or
18 reconsider, that may very well be a priority that is
19 taken, especially in the sense that the motions do not
20 affect the finality of the deportation order and that
21 judicial review of that can then be proceeding.

22 QUESTION: What is it that the court of appeals
23 should do under your view? If the alien seeks judicial
24 review of the BIA order within 90 days, and then files a
25 motion to reopen or reconsider, what does the court of

1 appeals do?

2 MS. BRINKMANN: Your Honor, we believe that it
3 is in the discretion of the court of appeals as to how to
4 exercise their jurisdiction.

5 A good example would be what happened in the
6 litigation of the voodoo case which came before this
7 Court. In that case, the court of appeals had
8 jurisdiction over the petition for judicial review within
9 the time for seeking judicial review, yet after the
10 petition.

11 There was also a motion to reopen filed. The
12 administrative process went ahead and resolved that.
13 Another petition for judicial review was filed and the
14 court of appeals consolidated those two, as Congress now
15 instructs all courts to do.

16 QUESTION: It would seem to me that in order to
17 honor the purpose of the statute the court of appeals,
18 since they can't really take a look at every case to
19 decide whether they're going to act on it, would enact --
20 would be quite within its powers to say that we're not
21 going to hear any of these petitions until the agency has
22 acted, in which case you're right in the same position
23 that Mr. Morrison's argument would take us in any event.

24 MS. BRINKMANN: Your Honor, we believe that
25 would, if that was a judicial imposition of a requirement

1 on the agency, that would run counter to the Court's
2 reasoning in cases like Darby v. Cisneros, where the Court
3 recognized where the Congress and the agency have not
4 imposed an exhaustion requirement it's not for the Federal
5 courts to impose that, either.

6 QUESTION: But the Congress has a statute which
7 says that the court of appeals shall consolidate, and if I
8 were a judge on the court of appeals, I'd say we have so
9 many hundreds of these cases in the Ninth Circuit, we
10 don't have the resources to look at every one case by
11 case, we'll simply wait in order to comply with the
12 command of the Congress that we consolidate the review, in
13 which case you're right where Mr. Morrison's position
14 would put you anyway.

15 MS. BRINKMANN: We don't believe so, Your Honor.
16 The court certainly can exercise their jurisdiction on a
17 case-by-case basis to decide whether or not there would be
18 a reason to stay in a particular case.

19 QUESTION: So now, under your view, the Ninth
20 Circuit should do this before it orders briefing? A panel
21 of the court should look at the case to decide whether
22 briefing should continue?

23 MS. BRINKMANN: No, Your Honor. I would imagine
24 in the real world a party would bring to the attention of
25 the court of appeals some basis for staying the

1 proceeding. A motion for reopening or reconsideration may
2 have nothing to do with the issue that's before the court
3 of appeals.

4 For example, Your Honor, in Chadha, in Cardoza-
5 Fonseca, all of those cases involved situations where
6 there were changes in law that might give the alien
7 another avenue for relief in the meantime during the
8 pendency of the litigation, and the alien could go back
9 and file a motion to reopen or reconsider on those
10 grounds.

11 The Court expressly recognized that did not moot
12 the judicial proceeding at that time for a couple of
13 reasons. 1) the threshold issue of deportability would
14 have to be resolved in any event, because those motions
15 were based on requests for other types of discretionary
16 relief. Also, the initial relief that may have been
17 requested -- for example, asylum -- the Court should go
18 ahead and adjudicate that, because that may be a method, a
19 relief that is more advantageous.

20 QUESTION: When does the court of appeals know
21 this, at oral argument on the appeal from the primary
22 decision?

23 MS. BRINKMANN: Well, Your Honor --

24 QUESTION: It decides then whether or not it
25 should stay its consideration?

1 MS. BRINKMANN: For example, in the case where
2 an alien is proceeding through the court of appeals on an
3 asylum request, and perhaps a legislative change comes up
4 that could entitle the alien to a lesser form of relief,
5 adjustment of status that might be to a temporary
6 situation as in Cardoza-Fonseca, there's no reason for
7 the -- the court of appeals ruling will in no way be
8 mooted or affected by that latter --

9 QUESTION: But my point is, the court of appeals
10 won't know this until it hears oral argument, so it
11 proceeds to the oral argument stage, which seems to me to
12 be no saving of resources, which is what Congress wanted
13 to do under the statute.

14 MS. BRINKMANN: Your Honor, we believe that
15 Congress' intent in finality and expedition,
16 particularly --

17 QUESTION: Ms. Brinkmann, wouldn't it be just
18 the court of appeals would get an application to stay the
19 appeal that's been filed pending the resolution? That's
20 the way these things come up in courts of appeals, don't
21 they?

22 If there's a later application affecting an
23 earlier case, we rely on the parties to apply for a stay,
24 and then you would get the problem that Mr. Morrison
25 brought out of the court of appeals that has enough

1 business already having to deal with all these extra stay
2 applications.

3 MS. BRINKMANN: Your Honor, we believe that that
4 same argument could be made, for example, for imposing
5 exhaustion requirements on agencies which the Court in
6 *Darby v. Cisneros* held was not the role of the courts to
7 impose that when the statute and the agency have not
8 imposed that.

9 We believe, again, in the unique situation of
10 deportation, where newly occurring events may become
11 relevant, the parties agree that newly occurring events in
12 a country to which an alien may be deported may become
13 relevant, so there is always a potential for a motion to
14 reopen or reconsider to be brought in the administrative
15 process at any time during the period of judicial review.

16 QUESTION: I wanted to ask your position on one
17 thing that I think Mr. Morrison conceded, and I'm not sure
18 he did. That is, the notion that the Attorney General
19 gave reopenings and reconsiderations and could do away
20 with them.

21 But now that we have this 1105a whatever, isn't
22 Congress assuming that there will be such applications, so
23 whatever you might have done before, Congress is
24 recognizing their existence. How can you now take away
25 the prospect of reopening or reconsideration?

1 MS. BRINKMANN: Your Honor, we agree that there
2 is this recognition now in a statutory framework of the
3 motions to reopen and reconsider which the Attorney
4 General has long permitted.

5 We maintain, however, that under the Court's
6 rationale in cases like Foti and Cheng Fan Kwok, the Court
7 has recognized that it is within the Attorney General's
8 authority to define the scope of deportation proceedings
9 and, we would submit, the scope of motions to reopen and
10 reconsider, and the Court has acknowledged that that may
11 indeed impact the nature of judicial review, but under
12 this scheme, that is in the nature of things in the
13 authority that has been delegated to the Attorney General
14 to structure that framework.

15 So while we believe that the statute does
16 recognize the existence of motions to reopen and
17 reconsider, we again believe that it's within the -- well
18 within the Attorney General's authority to structure the
19 administrative framework to define finality and to
20 interpret that as motions not affecting that finality.

21 QUESTION: So you're staying with the position
22 that, despite Congress' recognition that there are such
23 things as reopening applications, that the Attorney
24 General can say, we're going to forget the whole business,
25 making the statute addressing nothing, because there's

1 nothing for it to address.

2 MS. BRINKMANN: Your Honor, our argument
3 certainly doesn't rest on the authority to completely
4 abolish those motions, although there is no express
5 requirement of that in the statute.

6 But we do believe, as in the situation where --
7 in Foti where the Attorney General had altered the
8 administrative scheme to require that applications for
9 suspension of deportation now be brought into deportation
10 proceedings, that meant that the judicial review
11 provisions for deportation proceedings now were the sole
12 remedy, the sole avenue of judicial review for suspension.

13 In that same way, we believe that it's well
14 within the attorney general's discretion to set the limits
15 on motions to reopen and reconsider.

16 Thank you, Your Honor.

17 QUESTION: Thank you, Ms. Brinkmann.

18 Mr. Morrison, you have 4 minutes remaining.

19 REBUTTAL ARGUMENT OF ALAN B. MORRISON

20 ON BEHALF OF THE PETITIONER

21 MR. MORRISON: Mr. Chief Justice, you began by
22 asking Ms. Brinkmann what is it that we are being asked to
23 construe, and what is it she's asking deference to.
24 Obviously, the regulations the Attorney General has issued
25 can be construed and she can -- the Attorney General may

1 be entitled to some deference as to what her regulations
2 mean.

3 I would agree with several members of the Court
4 that these regulations don't say what the Government now
5 says, but even if those regulations were explicit, in the
6 end we are construing 1105 (a)(1), which is the provision
7 for judicial review. Ms. Brinkmann never mentioned the
8 magic word Chevron here today, but I know of no case in
9 which Chevron deference has been given to an
10 administrative agency to construe away a right to judicial
11 review.

12 The only case the Government cites is Weinberger
13 v. Salfi, and that case involved the question of not
14 whether, but when. That is, the question was whether the
15 Government could require you to take it later rather than
16 earlier, a totally different situation than what we have
17 here, and indeed this Court in Cheng Fan Kwok, in Darby,
18 in Lampf, and in other cases has specifically rejected the
19 view of the Government as to when judicial review is
20 available, because the whole theory of Chevron is that you
21 give review deference to the agency in order for it to
22 construe the statute under which it is operating.

23 The "it" here is the court of appeals that's
24 operating. The court of appeals doesn't get controlled by
25 the Government. After all, we have judicial review for

1 the very purpose of checking Government action, and it
2 would be odd, indeed, for the Congress to have said, we
3 will give the Government deference in construing the
4 jurisdiction of the court of appeals in a way that will
5 adversely affect those who want to challenge Government
6 action.

7 QUESTION: Oh, I thought we've done that in
8 past. I thought we have given deference to agencies in
9 their determination of when their action is final.

10 MR. MORRISON: The only case in which that
11 arises is Weinberger v. Salfi. It was raised by the court
12 sua sponte.

13 The Government did not object to jurisdiction,
14 did not object and said that they did not oppose the case
15 coming into court. No party, and this is a pre-Chevron
16 case, argued that the Government's interpretation of
17 finality, which was what's at stake there, should not be
18 given deference because the issue was raised by the court.

19 QUESTION: Mr. Morrison, are you saying that the
20 Hobbs Act couldn't be interpreted either way? I mean,
21 that was a case where the agency said, when we reconsider,
22 it makes it nonfinal for purposes of review. The ICC
23 could not have said under that act, under our regime
24 reconsideration does not stop the finality for purposes of
25 review?

1 Ms. Brinkmann kept insist -- was insistent that
2 that act was permissive, not mandatory.

3 MR. MORRISON: I was interested to hear her
4 statement that anyone could go read that decision and
5 understand that it was permissive. I read it the other
6 way around, that it was an interpretation of the Hobbs Act
7 as to when judicial review was available or not available.

8 In my view, it would be an incorrect
9 interpretation of the Hobbs Act and of the statute at
10 issue here to conclude the opposite of what I've urged,
11 but even if one could conclude the contrary, it would not
12 be because of the Attorney General's deference, to which
13 the Attorney General is due.

14 QUESTION: But if she's right about what the
15 statute means, that under the statute an agency can decide
16 for itself whether its application for reconsider will
17 stay the finality of its order for purposes of review, if
18 she's right about that, then we do, we should defer to the
19 agency's implementation of the Hobbs Act, if it can be
20 implemented either way.

21 MR. MORRISON: I do not believe that that
22 statute can mean that. It must mean it in light of the
23 Administrative Procedure Act which establishes the general
24 rule that if there is reconsideration or rehearing, then
25 the agency's action is not final, and that the agency

1 cannot decide to the contrary.

2 QUESTION: I think you've answered the question,
3 Mr. Morrison.

4 MR. MORRISON: Thank you, Your Honor.

5 CHIEF JUSTICE REHNQUIST: The case is submitted.

6 (Whereupon, at 12:01 p.m., the case in the
7 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:

MARVIN STONE, Petitioner v. IMMIGRATION & NATURALIZATION SERVICE

CASE NO.:93-1199

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

BY Ann Marie Federico

(REPORTER)

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