

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: UNITED STATES DEPARTMENT OF STATE, BUREAU  
OF CONSULAR AFFAIRS, ET. AL V LEGAL  
ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS,  
INC.

CASE NO: No. 95-1521

PLACE: Washington, D.C.

DATE: TUESDAY, OCTOBER 15, 1996

PAGES: 1-53

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES DEPARTMENT OF :  
4 STATE, BUREAU OF CONSULAR :  
5 AFFAIRS, ET AL., :  
6 Petitioners :  
7 v. : No. 95-1521  
8 LEGAL ASSISTANCE FOR VIETNAMESE :  
9 ASYLUM SEEKERS, INC., ET AL. :

10 - - - - - X

11 Washington, D.C.  
12 Tuesday, October 15, 1996

13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States at  
15 10:02 a.m.

16 APPEARANCES:  
17 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,  
18 Department of Justice, Washington, D.C.; on behalf of  
19 the Petitioners.  
20 DANIEL WOLF, ESQ., Washington, D.C.; on behalf of the  
21 Respondents.

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 first this morning in Number 95-1521, United States  
5 Department of State, Bureau of Consular Affairs v. Legal  
6 Assistance for Vietnamese Asylum Seekers, Inc.

7 Mr. Kneedler.

8 ORAL ARGUMENT OF EDWIN S. KNEEDLER

9 ON BEHALF OF THE PETITIONERS

10 MR. KNEEDLER: Mr. Chief Justice and may it  
11 please the Court:

12 This case involves a challenge to undertakings  
13 by the United States in connection with a comprehensive  
14 plan of action, an international agreement entered into by  
15 50 countries in 1989 to address the migrant crisis in  
16 Southeast Asia in the 1980's.

17 By 1989, 750,000 migrants from Vietnam alone had  
18 fled to other countries. Some countries began to turn  
19 back the migrants at sea, which resulted in a loss of  
20 life, and Hong Kong revoked its prior policy of treating  
21 the arrived migrants as presumptive refugees, and began to  
22 treat them instead as illegal aliens.

23 The comprehensive plan of action, or CPA, was  
24 designed to diffuse this crisis, to protect those migrants  
25 who genuinely feared persecution, to save the loss of

1 life, or to prevent the loss of life, and also to control  
2 further illegal immigration.

3 Under the CPA, Vietnamese and Laotians were  
4 permitted to land in Hong Kong and other countries, and to  
5 seek refugee status there. Those who were screened in or  
6 found to be refugees under international standards and  
7 under the auspices of the UNHCR were permitted to remain  
8 temporarily and seek resettlement in third countries, but  
9 a central tenet of the CPA was those that were screened  
10 and found not to be refugees would be repatriated to their  
11 countries of origin. That would be either voluntarily, it  
12 was hoped, or if need be, eventually involuntarily.

13 QUESTION: Mr. Kneedler, may I ask you to  
14 clarify at the outset what the Government's position is  
15 with respect to the statement by the respondents that the  
16 respondents requested the State Department to seek from  
17 the Hong Kong Government an extension of the undertaking  
18 to process these people to cover the proceedings on  
19 remand, and that the Department refused, so that a remand  
20 would force the Hong Kong Government's undertaking to  
21 lapse and would likely subject respondents to immediate  
22 forcible repatriation.

23 MR. KNEEDLER: Justice Ginsburg, I'm afraid  
24 there must have been some confusion. I'm informed by the  
25 State Department that the State Department did not refuse

1 that. And I'm informed that last week there were  
2 discussions approaching the Government of Hong Kong about  
3 this.

4 Those discussions again were taken up over the  
5 weekend, and just this morning we received from Hong Kong  
6 a letter in which Hong Kong -- and I just received it.  
7 I've given it to opposing counsel, but we did not have  
8 time to transmit it to the Court this morning.

9 In that letter, Hong Kong confirms a request  
10 made by the United States that the 24 Vietnamese migrants  
11 who are listed in an attached memorandum who are the  
12 plaintiffs in this case, and those of Lisa Le, basically  
13 the migrants for whom we previously had requested and  
14 obtained assurances, would not be repatriated before  
15 January 1997, January 31, 1997 or the completion of this  
16 case, whichever comes first.

17 QUESTION: I took that to be what you  
18 represented to this Court in your motion to join -- in  
19 your response to the motion to join additional parties,  
20 because there you said that the Government obtained  
21 insurances from the Hong Kong Government that both the  
22 Lisa Le plaintiffs and the plaintiffs in this case would  
23 not be forcibly repatriated during appellate and Supreme  
24 Court proceedings.

25 MR. KNEEDLER: Right.

1 QUESTION: So am I correct in saying the  
2 appellate proceedings would encompass whatever happens in  
3 the Lisa Le case in the D.C. Circuit?

4 MR. KNEEDLER: On remand through January 31.  
5 The --

6 QUESTION: And this case on remand.

7 MR. KNEEDLER: And this case on remand. The  
8 Government of Hong Kong is understandably getting somewhat  
9 impatient and also, with the reversion of Hong Kong to  
10 China on June 30, the Government of Hong Kong is eager to  
11 have the return of the migrants completed and especially,  
12 given the recent enactment of section 633 of the Illegal  
13 Immigration Reform Act, which removes the statutory basis  
14 for the claim, the circumstances of this case have  
15 substantially changed, but yes --

16 QUESTION: But your view is -- your  
17 representation is that it's January 30 or the termination  
18 of proceedings here and in the D.C. Circuit, whichever is  
19 earlier?

20 MR. KNEEDLER: That's correct.

21 QUESTION: The January 30 date or the  
22 termination of proceedings?

23 MR. KNEEDLER: That's correct.

24 QUESTION: That has been asked for, or that has  
25 been received?



1 MR. KNEEDLER: It was requested --

2 QUESTION: It was requested.

3 MR. KNEEDLER: -- and received this morning. We  
4 just received back a fax this morning from Hong Kong.

5 QUESTION: Well, if we --

6 QUESTION: Saying that the Hong Kong Government  
7 has agreed to that?

8 MR. KNEEDLER: Yes. Yes.

9 QUESTION: And if we were to vacate and remand,  
10 would you have objection to the D.C. Court entering a stay  
11 based on those terms?

12 MR. KNEEDLER: A stay in this case, a stay is  
13 not necessary because no injunction was ever entered in  
14 this case. The district court granted summary judgment  
15 for the Government and the court of appeals remanded for  
16 further proceedings consistent with its decision. In  
17 the --

18 QUESTION: But if we were to vacate and remand,  
19 what would the situation be?

20 MR. KNEEDLER: The situation would be, pursuant  
21 to these representations, Hong Kong would not  
22 involuntarily repatriate anyone in this case or the Lisa  
23 Le case before January 31 unless the case was earlier  
24 terminated.

25 QUESTION: The D.C. Circuit had not earlier

1 entered a stay, is that correct?

2 MR. KNEEDLER: In the Lisa Le case it did,  
3 because the district court in the Lisa Le case had entered  
4 injunctions based on the panel's ruling in this case. The  
5 district court in that case entered a series of  
6 injunctions which -- the D.C. Circuit for a month declined  
7 a stay. We filed a stay application here, and then when  
8 that stay application was ripe for consideration the D.C.  
9 Circuit entered a stay and the -- I think the  
10 representations we previously had obtained from Hong Kong  
11 were perhaps instrumental in that stay.

12 QUESTION: A stay of what? It certainly wasn't  
13 a stay of Hong Kong's deportation --

14 MR. KNEEDLER: No, a stay --

15 QUESTION: I think our writ doesn't run that far  
16 yet, does it?

17 MR. KNEEDLER: Right. No. It was a stay of the  
18 injunctions requiring -- preventing the State Department  
19 from declining to process the visa applications of Hong  
20 Kong, and basically the stay plus Hong Kong's assurances  
21 maintains the status quo.

22 Of course, the -- that representation does not  
23 prevent anyone from voluntarily repatriating. We're only  
24 talking about involuntary repatriations.

25 QUESTION: Mr. Kneedler, as long as we've gotten

1 into facts, may I ask you about the Government's position  
2 on one other factual issue which I'm not sure of?

3 The respondents, as I recall, made the  
4 representation -- this goes to the merits of their  
5 claim -- that with respect to refugees who had been  
6 screened out who were in Hong Kong from other countries  
7 than Vietnam, the United States continues to, or has, I  
8 guess, never refused to process immigrant visa  
9 applications, and that it is only those from Vietnam who  
10 have been the subject of this policy pursuant to this  
11 agreement.

12 And I -- that interests me because it seems to  
13 be a response to the Government's position that in fact  
14 the reason for the Government's action is not the  
15 nationality of the plaintiffs but the illegality of their  
16 status, and the respondents are saying there are plenty of  
17 others with equally illegal status, but if they are from a  
18 different country they are being treated differently. Is  
19 that -- is the respondent's claim factually correct, as  
20 you understand it?

21 MR. KNEEDLER: Well, the -- let me explain it  
22 this way. The basis for the Government's policy is that  
23 persons who are screened out under the CPA must return to  
24 their country of origin rather than applying in the  
25 country of first asylum.

1 QUESTION: Does the CPA cover anything other  
2 than Vietnamese refugees?

3 MR. KNEEDLER: It also covers Laotians.

4 QUESTION: Laotians.

5 MR. KNEEDLER: But in Hong Kong it's true the  
6 vast majority, in fact virtually all of the migrants  
7 subject to the CPA in Hong Kong are from Vietnam, but  
8 the -- this was -- this is a situation in which, in fact,  
9 there are no other aliens similarly situated to those  
10 covered by the CPA.

11 The CPA was a unique but perhaps precedent-  
12 setting international agreement to address migrant crisis  
13 of a sort of that the world is unfortunately very familiar  
14 with over the last 3 or 4 years.

15 QUESTION: You're saying the class, save for  
16 Vietnamese and Laotians, is an empty class.

17 MR. KNEEDLER: Well, yes, because the CPA was  
18 entered into to address a migrant crisis that was itself  
19 country-specific, and it --

20 QUESTION: Right, but I think if I understand  
21 your answer, it is there are no refugees from other  
22 countries than Vietnam and Laos in Hong Kong who have been  
23 screened out and who are applying for immigrant visa  
24 status. There are no such individuals, is that correct?

25 MR. KNEEDLER: Under the CPA, that's correct.

1 QUESTION: Well, not under the CPA.

2 MR. KNEEDLER: I --

3 QUESTION: Regardless of the CPA. They're  
4 either there or they're not there. Are there any such  
5 making applications?

6 MR. KNEEDLER: I frankly cannot represent  
7 whether there are people from other -- from other  
8 countries besides Vietnam and Laos. This agreement was --

9 QUESTION: This class includes only those  
10 people.

11 MR. KNEEDLER: Yes.

12 QUESTION: The CPA doesn't apply, and you  
13 wouldn't be following that with respect to --

14 MR. KNEEDLER: Right.

15 QUESTION: -- nationals from any countries --

16 MR. KNEEDLER: That's correct. The predicate  
17 for the application of this policy is the CPA in which the  
18 United States and other countries undertook as a way of --  
19 let me be clear about this. The CPA is a comprehensive  
20 agreement that has a number of parts to it, and the  
21 central part was, in order to get the countries of first  
22 asylum to allow people to land in the first place, they  
23 had to have some assurance of a screening opportunity and  
24 those found to be refugees would be resettled.

25 But an important corollary is, those found not

1 to be refugees would be returned, and that -- but the  
2 people found not to be refugees includes those who happen  
3 to have current visa petitions filed on behalf of them in  
4 the United States and others, and the United States, in  
5 consultation with UNHCR and other countries of first  
6 asylum, concluded that it was essential to carrying out  
7 the CPA to maintain that with respect to those migrants  
8 who were covered by the CPA.

9 Again, this was a problem migrant crisis-  
10 specific agreement, country-specific agreement, and in the  
11 conduct of foreign relations and addressing migrant  
12 crises.

13 QUESTION: So the CPA arose as a result out of  
14 massive migration of Vietnamese and Laotians --

15 MR. KNEEDLER: That's correct.

16 QUESTION: -- and not anybody else?

17 MR. KNEEDLER: That's correct, and it was that  
18 problem the CPA addressed, and we think it would be odd  
19 indeed if the United States in its conduct of foreign  
20 relations, where it can treat different nations  
21 differently for legitimate foreign policy concerns, could  
22 not also treat the nationals of those different nations  
23 differently depending on the circumstances that have  
24 arisen in the bilateral or unilateral -- I mean,  
25 multilateral arrangements, and also just in the real world

1 taking account of what has caused the outflow of migrants.  
2 Most migrant crises are country-specific, resulting from  
3 the internal conditions of a particular country.

4 QUESTION: Mr. Kneedler, in the proceedings  
5 below, as I understand the record, the Government argued  
6 that there was discrimination against Vietnamese nationals  
7 but it could be justified on a rational basis, and as I  
8 understand the argument made by the Government now is,  
9 there was no discrimination at all.

10 And on a secondary point, I think the record  
11 discloses that in the courts below the Government did not  
12 argue that the language of the statute referring to  
13 issuance of a visa did not include accepting a visa  
14 application.

15 Were either of these arguments raised by the  
16 Government below?

17 MR. KNEEDLER: Well, in -- going to the second  
18 one first for the moment, the -- we did argue that -- I  
19 think the argument that respondents make is that we did  
20 not argue that the question of consular venue is  
21 separately addressed and exclusively addressed by 8 U.S.C.  
22 1202(a), which says that a person shall apply for a visa  
23 in such locations as the Secretary shall prescribe by  
24 regulation.

25 But we certainly did argue that this was -- that

1 1152(a)(1), which bars preference or priority or  
2 discrimination in the issuance of visas, did not apply to  
3 consular venue, and the argument that consular venue is  
4 separately addressed by 1202(a) is just a further argument  
5 in support of our basic claim that the -- that 1152(a)(1)  
6 did not apply to this at all.

7 And in fact what we did argue in the court of  
8 appeals is that the regulation that the Secretary issued,  
9 which changed on appeal and the court of appeals applied  
10 the amended regulation on appeal, that that was issued  
11 pursuant, as we point out in our brief, to the very  
12 specific authority in 1202(a), which is the consular venue  
13 statutory provision.

14 So we think all these arguments were presented.

15 QUESTION: How about the discrimination point?

16 MR. KNEEDLER: In the lower court we argued that  
17 this was -- that this was not discrimination, at least  
18 that's my understanding, and also that -- but beyond that  
19 the position here that this -- that -- I don't know if one  
20 calls it justification, or it's not discrimination, that  
21 you can look at it either way, that discrimination is a  
22 conclusion that encompasses whatever justifications may be  
23 offered for the policy, or that it's not discrimination in  
24 the first place.

25 If the question just focused on whether there



1 were distinctions, then the statute would use  
2 distinctions, but it uses the word discrimination, which I  
3 think we would view as being a conclusion, and read into  
4 that should be, particularly on something like consular  
5 venue, the ability of the United States to take into  
6 account nationality considerations.

7 As we point out in our brief, when Congress  
8 enacted this provision in 1965, it had long been the  
9 policy of the United States before then and since then,  
10 for example, to adopt special procedures for security  
11 purposes for aliens from particular nations, from  
12 communist bloc countries for a while, and as the --  
13 there's a declaration cited at page 17 of our -- of the  
14 petition that describes that history and describes what  
15 was before Congress in 1965.

16 I think that goes to both -- to actually two  
17 points, that 1152(a)(1), the nondiscrimination provision,  
18 didn't apply to the applications for visas in the first  
19 place, but even if it did, Congress couldn't have not --  
20 could not have meant to absolutely prohibit the --  
21 irrespective of the justification the taking into account  
22 of nationality in the processing, in the procedures for  
23 the filing, the venue, and the review of visa  
24 applications, that the nondiscrimination provision was  
25 really intended from the outset to apply only to the

1 allocation of visas.

2 QUESTION: Let me ask you one more question.

3 The Government now urges us to vacate and remand because  
4 of the very recent amendment to section 1152(a)(1). Does  
5 that recent amendment cover all of the respondent's  
6 claims? Didn't they make constitution --

7 MR. KNEEDLER: They did.

8 QUESTION: Constitutional arguments and other  
9 things that haven't been addressed by the Court and that  
10 might not be covered by --

11 MR. KNEEDLER: Right. They made two further  
12 arguments. First of all, in the statutory argument, as we  
13 said in our brief, the recent amendment we think is  
14 dispositive, and one more piece of information on that I'd  
15 like to call the Court's attention to.

16 At page 21 of respondent's brief in footnote 13  
17 they cite a letter that was sent to the -- by 45 Members  
18 of Congress to the President in early August urging the  
19 President to drop his support for the provision of the  
20 bill that was ultimately enacted in 6 -- as 633 that was  
21 then in conference, 45 Members of Congress, and they said  
22 apparently those provisions were included in the House and  
23 Senate bills at the behest of the State Department in  
24 order to overturn the adverse result of the LAVAS  
25 decision, so it's entirely clear that the Members of

1 Congress when considering this provision, when it finally  
2 emerged from conference, knew that it was proposed for the  
3 purpose of and would have the effect of overturning the  
4 decision.

5 QUESTION: Mr. Kneedler, the respondents here  
6 have sought only injunctive and declarative relief,  
7 haven't they?

8 MR. KNEEDLER: That's correct.

9 QUESTION: They did -- they've not sought  
10 damages.

11 MR. KNEEDLER: No, that's correct, and we think  
12 it's clear, quite aside from this legislative history  
13 making clear that this was intended to apply to this very  
14 situation, the usual principles governing prospective  
15 relief would make clear that it's effective prospectively.

16 QUESTION: Well, the respondents have come back  
17 and said, oh, but we also want reparative injunctive  
18 relief looking to the past. Do you know what that's all  
19 about?

20 MR. KNEEDLER: Well, not entirely, because it  
21 would seem to us that any injunctive relief in this case  
22 would direct the Secretary of State to provide for the  
23 issuance of visas in Hong Kong in the future, and that's  
24 the very reason why prospective relief cannot be granted  
25 if it would be in conflict with a new statute, and the

1 conference and House reports on this legislation say that  
2 it was just intended to clarify the fact that the  
3 Secretary of State has unreviewable authority to establish  
4 visa venue rules, so it's clear that Congress was  
5 ratifying the Secretary's interpretation of the statute  
6 and intended to maintain the status quo.

7 In fact, the text of 633 says that nothing in  
8 this paragraph -- meaning 1152(a)(1) -- shall be construed  
9 to prohibit the Secretary from establishing procedures for  
10 the filing of applications. Respondents are asking this  
11 Court to construe 1152(a)(1) in a way that would apply to  
12 bar the Secretary from doing exactly that, so it seems to  
13 me the statute speaks directly to what this Court is being  
14 asked to do.

15 I'd like --

16 QUESTION: Mr. Kneedler, with respect to the two  
17 issues that were not decided by the D.C. Circuit, they  
18 haven't been considered, and you concede that they are --

19 MR. KNEEDLER: Right.

20 QUESTION: -- in the case and would be ripe for  
21 consideration, but the case -- this case and Lisa Le both  
22 raising the same questions but going on different tracks  
23 are somewhat confusing, disorderly. What's the  
24 Government's plan for proceeding should we grant your  
25 request to vacate and remand to the D.C. Circuit for

1 reconsideration in light of the very recent legislative  
2 change?

3 MR. KNEEDLER: Excuse me. I -- we would seek an  
4 expeditious response in the lower court. Whether that  
5 would involve presenting the whole matter to the full  
6 court or waiting for the panel to rule would be a  
7 different -- a question we would have to discuss.

8 QUESTION: Currently you have a panel in this  
9 case and an en banc court in Lisa Le.

10 MR. KNEEDLER: Right, that is correct. Now,  
11 there is -- we recognize the confusion, and there is  
12 something to be said, we acknowledge, for this Court going  
13 ahead and deciding the case now that it's been briefed and  
14 argued and presented to it. Our suggestion of a remand in  
15 this case all along, however, was based on this Court's  
16 usual course when there's been an intervening change in  
17 the law and also when other issues are in the case that  
18 haven't been addressed.

19 I would like briefly to address those two other  
20 issues, getting back to Justice O'Connor's question on  
21 them.

22 The first of the other two claims is one that  
23 the policy is arbitrary and capricious, in violation of  
24 the Administrative Procedure Act. There are two problems  
25 with that. The first is that judicial review of that

1 claim is precluded, as was judicial review of the  
2 statutory claim, and that is itself true for two reasons.

3 One, the comprehensive judicial review  
4 provisions of the INA establish that review is precluded  
5 under the INA, or, excuse me, under the APA, and also visa  
6 matters, including consular venue matters, are of the sort  
7 traditionally committed to agency discretion, and  
8 therefore barred -- judicial review is barred for that  
9 reason as well.

10 With respect to the preclusion of review, I  
11 would just like to point out that the INA contains  
12 provisions for judicial review of deportation orders of  
13 people who've entered the United States, and also for  
14 judicial review of people who are seeking to enter the  
15 United States, but in the latter category, only when  
16 somebody has arrived at our shores and is in exclusion  
17 proceedings and can seek review in habeas corpus, but not  
18 because exclusion matters are generally appropriate for  
19 judicial review, but because the person is in custody, and  
20 therefore has access to habeas corpus.

21 In this Court's decision in *Brownell v. Tom We*  
22 *Shung* in 1956, the Court held that an alien in the United  
23 States could have access to the APA to seek judicial  
24 review in an exclusion matter, but the Court pointed out  
25 it was not suggesting, of course, that an alien who had

1 never reached our shores would be able to do that, and it  
2 also cited legislative history of the '52 act in which an  
3 exclusive review provision was deleted in which the -- in  
4 which Congress made clear that it was not providing for  
5 review of consular officer decisions, or changing review  
6 under the INA.

7 Then in 1961, Congress came along and  
8 specifically overturned the Brownell decision, and  
9 provided for judicial review in exclusion only -- in  
10 exclusion matters only in habeas corpus, and not  
11 otherwise, intending to remove the APA, the very basis on  
12 which respondents seek to bring a challenge in this case.

13 And in fact the Court -- we spell this out at  
14 pages 25 to 28 of our brief, and in fact the House report  
15 on that legislation says that permitting an APA suit would  
16 "give recognition to a fallacious doctrine that an alien  
17 has a right to enter this country which he may litigate in  
18 the courts of the United States against the U.S.  
19 Government as a defendant."

20 Well, if that was true with respect to aliens  
21 who had reached our shores, then a fortiori would be true  
22 with respect to aliens who are in Hong Kong who have no  
23 rights under the United States Constitution with respect  
24 to their admission and no statutory rights that they can  
25 invoke in court.

1           But even if this Court were somehow to get  
2 around the preclusion of judicial review, we think the  
3 respondent's APA claim would fail on the merits. This is  
4 certainly not an arbitrary and capricious policy. The  
5 explanation is spelled out at pages 217 to 219 of the  
6 Joint Appendix in this case, in which the cable that went  
7 to the field in October of 1994 explains that this policy  
8 was reinstated after a careful review, after concerns were  
9 received from UNHCR and other first -- and first asylum  
10 countries that screening or processing immigrant visas in  
11 Hong Kong and other first asylum countries was  
12 discouraging people from returning voluntarily and  
13 therefore was seriously undermining the comprehensive plan  
14 of action.

15           The State Department also pointed out that since  
16 1990, when it had adopted the opposite view, it believed  
17 that conditions in Vietnam had improved, and therefore it  
18 was appropriate to insist that people return there before  
19 filing for visas to come to the U.S.

20           QUESTION: Mr. Kneedler, are you aware of any  
21 case that -- where questions such as these were raised  
22 below, not touched there, and where this Court responded  
23 to them as -- not as a court of review but the only court  
24 to pass on them?

25           MR. KNEEDLER: Not specifically. The Court



1 surely has the power to do it, and we don't deny that, and  
2 frankly we believe the other two claims can be very  
3 readily disposed of, and so we -- that's one of the  
4 reasons why on remand we would expect the court of appeals  
5 to readily dispose of the claims.

6 The court of appeals itself, for example,  
7 applied the change in the regulation on appeal, even  
8 though the respondents were invoking claims under the  
9 prior regulation, on the theory that no one has a vested  
10 right in receiving a visa, and if there's a change in the  
11 law, that should be applied.

12 We would expect the court to do that. In fact,  
13 we would expect Congress understood, knowing the LAVAS  
14 decision, that that would be the rule and it's change in  
15 the law would be applied. That's another piece of  
16 information.

17 But specifically, no, but we understand that the  
18 Court has the power.

19 If there are no further questions --

20 QUESTION: May I just ask one question,  
21 Mr. Kneedler, is it still the Government's primary  
22 submission, though, that we should simply GBR at this  
23 time, rather than addressing these issues?

24 MR. KNEEDLER: Yes, that would be our --

25 QUESTION: It is.

1 MR. KNEEDLER: That's our primary submission.

2 QUESTION: Thank you, Mr. Kneedler.

3 Mr. Wolf, we'll hear from you.

4 ORAL ARGUMENT OF DANIEL WOLF

5 ON BEHALF OF THE RESPONDENTS

6 MR. WOLF: Mr. Chief Justice, and may it please  
7 the Court:

8 There are two issues that must be resolved in  
9 favor of affirmance in order to -- in favor of respondents  
10 in order to affirm this case.

11 The first issue is whether the statute, section  
12 1152(a)(1), was violated by the Department's policy when  
13 that policy was in existence and before the new statute  
14 came along.

15 The second issue is whether the change  
16 instituted on September 30, 1996 deprives respondents of  
17 the right to relief.

18 QUESTION: What is the relief -- if you were to  
19 win on the first issue as you have described it, what  
20 would your relief be?

21 MR. WOLF: Well, the relief that we would  
22 suggest, Justice Souter, is relief -- reparative relief,  
23 relief that could, insofar as is possible, restore  
24 plaintiffs to the position that they would have been in  
25 were it not for the Department's illegal conduct.

1                   So for instance, in the case of somebody who had  
2    been --

3                   QUESTION: Well, do you concede that if the  
4    statute in fact was intended to be retroactive, that  
5    relief would be impossible?

6                   MR. WOLF: If the statute was intended to be  
7    retroactive, that relief would be impossible, but there's  
8    nothing in the language of the statute indicating any  
9    retroactive intent, and under this Court's decision in  
10   Landgraf, a new law cannot be applied retroactively to  
11   conduct predating its enactment if that conduct was  
12   illegal, so the new law cannot reach back and render  
13   lawful conduct that was unlawful at the time that conduct  
14   was -- took place, and certainly we are -- respondents are  
15   entitled to relief that would remedy the effects of the  
16   illegal conduct.

17                  QUESTION: But what you're asking -- you still  
18   haven't gotten the final judgment in this case, and what  
19   you're asking for is some sort of a declaration or  
20   injunction that the Secretary may not require repatriation  
21   from Hong Kong in order to process visas.

22                  Now, the traditional view is that we apply the  
23   law in effect when the -- when our Court decides a case,  
24   or the court of appeals applies the law when it -- in  
25   effect when it decides it. If the law in effect now is

1 that your clients are not entitled to any statutory  
2 relief, I don't see where your idea of reparative relief  
3 goes anywhere in the light of the new statute.

4 MR. WOLF: Mr. Chief Justice, first just to  
5 clarify the type of relief that we're seeking, we're  
6 seeking an order mandating the processing and the  
7 expeditious processing in Hong Kong of our clients' visa  
8 applications, not an order that would have anything to do  
9 with enforceable repatriation, per se.

10 QUESTION: But if under presently enforced law  
11 you're not entitled to that, the fact that you might have  
12 been entitled to it a year ago is something that a court  
13 ordinarily won't recognize.

14 MR. WOLF: Well, certainly, were the statute to  
15 be one that prohibited this Court from issuing an  
16 injunction or from granting the -- granting respondents  
17 the relief they're seeking, then that would be correct,  
18 but the situation here is that respondents had a  
19 substantive right to be -- to not be discriminated  
20 against --

21 QUESTION: Well, what do you mean by a  
22 substantive right?

23 MR. WOLF: Well, we had -- at the time we had an  
24 expectation, a reasonable expectation that we would not be  
25 discriminated against in the issuance of a visa. Under

1 Landsgraf, the new statute cannot reach back and make  
2 determinations --

3 QUESTION: Well, that's true if you're seeking  
4 damages, but just -- your whole effort here was  
5 prospective.

6 MR. WOLF: The principle of nonretroact -- of  
7 the principle concerning retroactivity applies, as I  
8 understand it, regardless of the type of relief that's  
9 being sought. The point is, is that this Court has the  
10 power to remedy the past effects of the illegal conduct,  
11 so there's nothing to prevent this Court from restoring  
12 respondents to the situation they would have been in were  
13 it not for the illegal conduct.

14 QUESTION: But I think you have conceded that we  
15 don't have that power if, number 1, you are not seeking  
16 damages, and you're not, and number 2, the statute is in  
17 fact to be applied retroactively. On those two  
18 assumptions, there's nothing we or any court could do,  
19 even on your own premise, but apply the new statute, and  
20 that would be the end of the case.

21 MR. WOLF: Justice Souter, that's correct if the  
22 statute were to be applied retroactively.

23 QUESTION: So everything turns on the  
24 retroactivity of the statute.

25 MR. WOLF: But Mr. --

1 QUESTION: And why should that be decided in the  
2 court of appeals where normally the first cut at an issue  
3 like that is, of course, not taken in this Court?

4 MR. WOLF: Well, I would say that there are two  
5 reasons in this particular case. The first reason is a  
6 concern regarding forcible repatriation. The Department  
7 has received certain representations from the Hong Kong  
8 Government that lapsed on January 31, 1997.

9 Given the proceedings in this case and the pace  
10 that it has gone at, we can't be confident that on remand  
11 we would be able to get relief after the appellate process  
12 and so on before the lapse of that time. The processing  
13 itself takes several weeks.

14 QUESTION: Mr. Wolf, the D.C. Circuit was  
15 prepared to hear the Lisa Le case en banc on September 19  
16 and deferred that only because the proceeding was pending  
17 here. Why would you not think that they would proceed  
18 expeditiously were we to vacate and remand?

19 MR. WOLF: Well, it's uncertain how the D.C.  
20 Circuit would handle this case. They may send it first  
21 back to the district court, in which case we would have to  
22 have proceedings before the district court, come back  
23 up --

24 QUESTION: Under what possible scenario would  
25 they send it back to the district court when it is the

1 decision of the three-judge panel that is the problem, not  
2 the initial -- the district court was just following the  
3 orders that the three-judge panel gave.

4 MR. WOLF: Well, Justice Ginsburg, that gets me  
5 to the next point about why a remand would be  
6 inappropriate in this case, and that is is that nothing  
7 about the change in statute alters the fact that the  
8 Department's conduct was illegal at the time that conduct  
9 took place. Respondents should not have to go back to the  
10 D.C. Circuit and relitigate that issue on remand. A much  
11 more appropriate disposition in this case --

12 QUESTION: D.C. Circuit was poised to litigate  
13 it en banc.

14 MR. WOLF: The D.C. Circuit was poised to  
15 litigate it --

16 QUESTION: And the fact that the cert petition  
17 was granted and heard doesn't make what the D.C. Circuit  
18 was intending to do any less appropriate than when the  
19 D.C. Circuit ordered it.

20 MR. WOLF: Well, for the same reasons, Justice  
21 Ginsburg, that it may be improvident for this Court to  
22 retain the certiorari petition as we indicated in our  
23 supplemental brief, it may also be improvident for the  
24 court of appeals for the D.C. Circuit en banc to retain --  
25 to consider this case yet again on all of the issues --

1           QUESTION: Why yet again? The very fact that  
2 the D.C. Circuit agreed to hear the case en banc is a  
3 signal, is it not, that the Court was quite divided and  
4 was not content to let it rest with the panel decision?

5           MR. WOLF: It was a signal that the Court viewed  
6 it as a serious question, as this Court's granting of  
7 certiorari is such a signal, but for the same reason that  
8 this Court might want to relinquish this case, the D.C.  
9 Circuit en banc could do well the same. At any --

10          QUESTION: Mr. Wolf, I have an unrelated  
11 question. It has to do with the latest submission. You  
12 represented in the supplemental brief that a remand of the  
13 case would cause the Hong Kong Government's undertaking to  
14 lapse and would likely subject respondents to immediate  
15 forcible repatriation.

16          That's a rather startling representation, and  
17 when I looked back at the pleading that wasn't even  
18 printed for this Court, it was the Government's response  
19 to your motion to joint parties, and I saw when I read to  
20 Mr. Kneedler that the Government represented that they  
21 would obtain -- had obtained assurances from the Hong Kong  
22 Government that no one would be forcibly repatriated  
23 during the appellate and Supreme Court proceedings in this  
24 case and in the Lisa Le case, what was the basis for the  
25 rather attention-grabbing representation you made in view



1 of the Government's representation that conflicted with  
2 it?

3 MR. WOLF: Well, Justice Ginsburg, we were not  
4 clear, based on that statement about whether or not the  
5 representation would include representations made on --  
6 would include the situation on remand. We spoke with  
7 Government counsel to ask whether they would make  
8 further -- get further representations from the Hong Kong  
9 Government. We were left certainly with the clear  
10 impression that that was not going to happen, and --

11 QUESTION: Before alleging to this Court that it  
12 would cause immediate repatriation, do you not think it  
13 would have been appropriate to let us know that the  
14 Government had something quite -- said something quite the  
15 contrary, had represented to this Court that no one was  
16 going to be repatriated pending the proceedings here and  
17 in Lisa Le?

18 MR. WOLF: Well, as I indicated, Justice  
19 Ginsburg, we believed there to be some ambiguity,  
20 significant ambiguity in that statement.

21 We checked with the Government. Apparently they  
22 believed there to be enough ambiguity to go back to the  
23 Hong Kong Government, which they never told us they were  
24 going to do, and that ended up being the situation as it  
25 exists today.

1 QUESTION: It was described in rather definite  
2 terms that the Department refused, and that the -- that  
3 would cause -- I mean, you didn't put anything -- you  
4 didn't indicate to us that anything was at all ambiguous.

5 MR. WOLF: I did not understand it at the time  
6 to be ambiguous. If it indicate -- if it was ambiguous, I  
7 regret that I -- that we put it in those terms, but at the  
8 time I did not see there to be any ambiguity.

9 As I understood the representation --

10 QUESTION: This is not ambiguous, but you just  
11 said to me that, well, you thought that that might be the  
12 problem, and you were well aware that the Government had  
13 already represented to this Court that no one would be  
14 repatriated until this Court and the D.C. Circuit were  
15 completed, proceedings were completed.

16 MR. WOLF: As I said, as I understood the  
17 representations at the time, they only applied to the  
18 Supreme Court proceedings and the appellates court in Lisa  
19 Le, and if it may have been my misunderstanding, I would  
20 apologize for that.

21 The Department's -- this Court certainly has the  
22 power to remedy the past illegal conduct, and there's  
23 nothing in section 1152(a)(1) which deprives respondents  
24 of a remedy in this case, and therefore, if a violation  
25 occurred prior to the enactment of the new law, then this

1 Court certainly could offer respondents, or the lower  
2 courts could certainly give respondents the relief that  
3 they are seeking, and the rule is no different in the case  
4 of an interpretive statute, or statute --

5 QUESTION: Well, Mr. Wolf, supposing somebody  
6 comes into court and says, up until 1994 I was entitled to  
7 receive a certain amount of money as a pension, but I  
8 realize -- this is 1996 -- now Congress has said that that  
9 no longer obtains, but I just want a declaratory judgment  
10 that I might have received it had I applied in 1994, now,  
11 would a court grant that sort of a thing?

12 MR. WOLF: Perhaps not, but in this particular  
13 case, taking your hypothetical, if the person had applied  
14 for pension benefits in '94, been denied on illegal  
15 grounds in '94, and then in '96 the law changed, the  
16 individual would still be entitled to receive the pension  
17 benefits for '94, or injunctive order granting the  
18 benefits.

19 QUESTION: What would be the possible  
20 conceivable meaning of the Congress' provision that the  
21 new statute applies to all cases filed after a certain  
22 date? Isn't that the way the provision in the new law is  
23 worded?

24 MR. WOLF: No, Justice Scalia.

25 QUESTION: How do we know what cases the new law

1 applies to?

2 MR. WOLF: The new law states what it states.  
3 It's a one sentence provision saying nothing in section  
4 1152 -- it's nothing in the former paragraph, meaning  
5 1152(a)(1), shall be interpreted as limiting the  
6 authority --

7 QUESTION: But there's an effective date  
8 provision for the legislation too, isn't there?

9 MR. WOLF: There is an effective date provision,  
10 that's correct.

11 QUESTION: And what does that say?

12 MR. WOLF: There are various different effective  
13 date provisions. There are 12 provisions that are  
14 specifically retroactive. This is not one of them.

15 QUESTION: How does this one read?

16 MR. WOLF: I'm not sure, Justice Scalia, whether  
17 there's a -- we checked, and I didn't recall seeing a  
18 default retroactive provision, but I believe the statute  
19 becomes effective on the date that it is enacted for -- as  
20 the default provision, and to that degree it is certainly  
21 the case that should the Department today institute a  
22 policy refusing to process visa applications on -- and  
23 discriminating in that process on grounds of race,  
24 nationality, or sex, then a person would not be able to  
25 obtain relief and would have no right to obtain relief.

1 QUESTION: I had thought that it had said all  
2 cases filed after a certain date, in which case your  
3 argument wouldn't make any sense, because that obviously  
4 means, regardless of what the situation might have been on  
5 the facts, if your case is filed after a certain date, the  
6 new law applies. Otherwise, it wouldn't make any sense.

7 MR. WOLF: This partic -- in our particular  
8 case, what -- the important retroactive event is the  
9 Secretary's determination, refusing to process immigrant  
10 visa applications at a time when he was required to do so.  
11 There is nothing in the statute indicating that the --  
12 indicating that the statute was intended to retroactively  
13 legalize conduct which was unlawful at the time.

14 QUESTION: Yes, but I have a little trouble with  
15 the language because your basic position is, as I  
16 understood the briefs correctly, is that 1152(a)(1) should  
17 be construed as a limitation on the authority of the  
18 Secretary.

19 MR. WOLF: Section 11 -- yes, that's correct.

20 QUESTION: But then as amended it says, nothing  
21 in this paragraph shall be construed to limit the  
22 authority of the Secretary, so forth and so on.

23 So if we were to decide the case, your basic  
24 submission, we would either have to say that something in  
25 1152(a)(1) limits the authority of the Secretary, or it

1 doesn't.

2 MR. WOLF: Well, I would say that the answer to  
3 that question, Justice Stevens, is provided for in Roadway  
4 Express, where the -- this Court stated that the fact that  
5 a statute may -- the Congress often enacts statutes that  
6 purports to interpret what a provision means and tells a  
7 court how to interpret what a provision means, but that  
8 does not make the statute any the more retroactive than  
9 any other type of congressional enactment.

10 QUESTION: No, but you're still asking us to  
11 construe a statute in a way directly contrary to the way  
12 Congress has told us we should construe it.

13 MR. WOLF: Well, with respect to what happened  
14 before --

15 QUESTION: It doesn't say -- there's no time  
16 limit. It just talks about people who are going to  
17 construe this statute, and you're asking us to construe  
18 this statute.

19 MR. WOLF: Well, I'm asking -- what I'm saying  
20 is that in Roadway Express the Court specifically adopted  
21 a very similar type of statute that informed the Court as  
22 to how the statute should be construed.

23 The Court stated that that did not apply to  
24 conduct that had predated the statute. In other words,  
25 the statute cannot make lawful what was unlawful --

1                   QUESTION: Mr. Wolf, are you saying there is no  
2 such thing as a clarifying amendment? Here we had a sharp  
3 division in the D.C. Circuit, excellent opinions on both  
4 sides saying what the judges thought this statute meant,  
5 and Congress then came in and said we think that the  
6 dissent had it right about what the statute meant. That's  
7 a clarifying amendment.

8                   So whether that controls us, and I agree with  
9 you it doesn't, it is the Congress saying we think that  
10 the statute did and should mean what the dissenting judge  
11 thought it meant.

12                   MR. WOLF: Which, Justice Ginsburg, is exactly  
13 what happened in Roadway Express. I mean, certainly the  
14 Congress could inform this Court --

15                   QUESTION: Did you cite Roadway Express in your  
16 papers?

17                   MR. WOLF: Yes. It's cited in the supplemental  
18 brief.

19                   QUESTION: In the supplemental brief.

20                   QUESTION: Mr. Wolf, two things occur to me.  
21 One is the point you've just been discussing with Justice  
22 Ginsburg, which is that conceivably the amendment by  
23 Congress should assist the courts in determining the  
24 meaning of the statute as it was originally enacted. That  
25 is possible.

1           Secondly, what the respondents are seeking  
2 ultimately is issuance of visas. Now, that hasn't  
3 occurred as yet, and if the Court were to order the  
4 Department of State to issue visas, that relief is  
5 prospective, and as I understand it, we have held that an  
6 amendment like this would apply to the issuance of that  
7 prospective relief.

8           I don't think there's any way to avoid that by  
9 trying to look backwards and say, well, the statute meant  
10 something else at the time. The relief, nonetheless, is  
11 prospective, and would appear to be governed by the new  
12 provisions of the statute.

13           MR. WOLF: Taking the first of your -- taking  
14 the first part of your question first, as this Court  
15 indicated in *Rusello*, the interpretations of a future --  
16 of a new Congress are hazardous grounds upon which to base  
17 interpretations of a previous Congress.

18           With respect to the second part of your  
19 question, certainly injunctive relief like all relief,  
20 compensatory damages, operates in the future, but there's  
21 nothing that prevent -- that in this statute deprives the  
22 Court of the power to remedy a past violation of the  
23 wrong.

24           In all of the cases that -- in which -- to which  
25 I believe you're referring, Justice O'Connor, the statute



1 specifically eliminated a remedy, but in our case there's  
2 nothing in section 633 that eliminates a remedy. It  
3 simply informs the Court of how Congress would like the  
4 Court to construe the statute, but if Congress wanted the  
5 Court -- wanted to apply that retroactively, the uniform  
6 decisions of this Court are that it must say so expressly,  
7 and there is nothing in section 633 that does that.

8 QUESTION: My point was not that, but rather  
9 that the statute applies prospectively and would govern  
10 the issuance of prospective relief.

11 MR. WOLF: The -- well, this Court has also held  
12 in numerous occasions, Justice O'Connor, that if Congress  
13 wants to take away a remedy, that it also must do so  
14 expressly, and again, there's nothing about section 633  
15 that takes away a remedy. It simply informs this Court of  
16 how the statute should be construed, and that is why I  
17 think River Express is dispositive on this point.

18 With respect to the issue of whether or not --

19 QUESTION: Well, but if you take the surrounding  
20 legislative history it's perfectly clear that Congress  
21 intended to disapprove the decision of the court of  
22 appeals in this case, is it not?

23 MR. WOLF: Well, even in Roadway Express the  
24 Court mentioned -- stated that even if Congress  
25 disapproves of a previous opinion, that doesn't mean that

1 it's retroactive, and the only expressions of legislative  
2 intent that we've seen really are two statements of  
3 Congressmen who are opposed to the bill, which also this  
4 Court has --

5 QUESTION: Which you cite in your brief.

6 MR. WOLF: Which the Department cites in its  
7 brief.

8 QUESTION: Well, I thought you cited it in your  
9 brief, too, didn't you at footnote 13?

10 MR. WOLF: Oh, that was a letter previous to the  
11 enactment of the bill. Those comments --

12 QUESTION: Where you say, having recently become  
13 aware of the obscure provision 45 Congressmen, including  
14 13 Members of the House -- sent a letter to the President  
15 August 1 expressing the view that the court of appeals'  
16 interpretation of 1152(a)(1) was correct.

17 MR. WOLF: Mm-hmm. Well, that's correct.  
18 That's correct, and the fact that, as I indicated, the  
19 fact that Congress may have a view as to whether a  
20 particular decision is correct or incorrect doesn't answer  
21 the question as to whether or not the statute is  
22 retroactive.

23 With respect to the issue of whether or not the  
24 Department's policy is discriminatory and violated section  
25 1152(a)(1) at the time, section 1152(a)(1) prohibits --

1 provides that no person shall be discriminated against in  
2 the issuance of an immigrant visa on the basis of race,  
3 sex, and nationality.

4 Section 1152(a)(1) therefore places nationality  
5 on the same footing as race and gender and prohibits  
6 discrimination with respect to all in the issuance of an  
7 immigrant visa. This policy is facially discriminatory.

8 If a French person or a Chinese person is in  
9 Hong Kong and has been screened out, they can go to the  
10 U.S. Consulate, or could, prior to the change in the law,  
11 go to the U.S. Consulate and have their visa processed,  
12 but if that person was a Vietnamese national, and they  
13 were screened out or illegally in Hong Kong, they could  
14 not. They'd have to go back to Vietnam to have their  
15 visas issued and processed.

16 Now, the Department argues that the fact that  
17 this policy took place in the context of the CPA, and the  
18 unique circumstances facing the Vietnamese refugee crisis  
19 at the time justified its illegal policy. And then the  
20 Department makes this sort of funny argument that  
21 justification and discrimination are the same thing. But  
22 this Court has never considered just -- discrimination and  
23 justification as one question. They're two separate  
24 questions.

25 The first question is, does the policy -- is the

1 policy facially discriminatory? Does it draw an explicit  
2 distinction between Vietnamese nationals and Laotian  
3 nationals, if Laotian nationals are in fact covered, and  
4 the nationals of other countries, and the answer to that  
5 must be yes.

6 The second question then is, does the policy --  
7 is the policy justified? Is there a compelling interest  
8 for the policy? What is the rationalization for the  
9 policy? But the statute prohibits discrimination in the  
10 issuance of a visa, and does not allow exceptions for the  
11 rational basis that the Department prefers, and the  
12 Department's argument at any rate with respect to the  
13 comprehensive plan of action --

14 QUESTION: In order to tell whether there's been  
15 discrimination, don't you have to first determine whether  
16 the two people are similarly situated? Doesn't that  
17 determination go into -- necessarily go into the question  
18 of discrimination or not?

19 MR. WOLF: Well, it seems to me that the statute  
20 places race, sex, and nationality as a category, and  
21 therefore that -- therefore you cannot dis -- you cannot  
22 differentiate between races, between genders. The statute  
23 describes that.

24 Let me give an example. Think about the -- of  
25 course, the Court's classic decisions in Hirabayashi and

1 Korematsu. The Court specifically in Hirabayashi said,  
2 well, Japanese Americans are not similarly situated to  
3 other Americans. Well, that didn't mean it wasn't  
4 discriminatory. The Department --

5 QUESTION: But do you think when Congress passed  
6 this statute, did it have in mind refusing to allow the  
7 State Department to carry on the ordinary country-by-  
8 country distinctions that it makes in conducting foreign  
9 policy? I mean, it might have done.

10 MR. WOLF: Well, Justice Breyer --

11 QUESTION: But I mean, is there any evidence  
12 that it did?

13 MR. WOLF: Justice Breyer, there's no specific  
14 legislative history of this provision. I would say that  
15 the statute says what it says, no person shall be  
16 discriminated against --

17 QUESTION: Well, all right, it says what it  
18 says. Isn't all foreign policy discriminatory by nations?  
19 We treat some nations one way, we treat other nations  
20 another way. All foreign policy runs that way. Now,  
21 maybe this was to be an exception from ordinary foreign  
22 policy, but should we assume that that was so?

23 MR. WOLF: Well, I -- the language says what it  
24 says, and the courts should construe the language as it  
25 says it. Now, the Department --

1 QUESTION: Well, if it says what it says,  
2 wouldn't we normally assume that what it had in mind was  
3 the kind of discrimination forbidding that kind of  
4 discrimination that did exist in Korematsu --

5 MR. WOLF: Well, in --

6 QUESTION: -- but not the kind of discrimination  
7 that is consistent with ordinary foreign policy, treating  
8 one nation differently from another?

9 MR. WOLF: It seems doubtful to me, Justice  
10 Breyer, because the statute prohibits discrimination, and  
11 discrimination is a different concept than the  
12 rationalization for the particular conduct at issue.

13 Even the Department does not maintain under the  
14 statute the mere rational basis for its conduct would  
15 justify these particular types of distinctions.

16 QUESTION: May I ask you just a factual  
17 question? Perhaps I should know this, but supposing there  
18 were a Vietnamese who had been a long-time resident of  
19 Hong Kong, that he was not one of the boat people, could  
20 he be -- could he apply for a visa in Hong Kong?

21 MR. WOLF: If a Vietnamese was not a boat  
22 person?

23 QUESTION: Yes.

24 MR. WOLF: Well, there are a number of  
25 Vietnamese who came by bus, and --

1 QUESTION: No, say he's lived there for the last  
2 20 years.

3 MR. WOLF: Oh, certainly. Certainly. A  
4 Vietnamese boat person who was lawfully resident --

5 QUESTION: No, not a boat -- I say, a  
6 Vietnamese. If that's true, then it doesn't seem to me  
7 the discrimination is on the basis of nationality.

8 MR. WOLF: Well, Justice Stevens, if you take  
9 two people, two nationals in the same circumstances, one a  
10 Vietnamese who has been denied refugee status, one French  
11 who have been denied refugee status, the French person can  
12 walk into the consulate, get their visa, the Vietnamese  
13 person cannot. That seems to me to be facially  
14 discriminatory.

15 QUESTION: But are you assuming the French  
16 person is also -- came as a -- was one of these migrants  
17 on the -- in this -- one of the boat people?

18 MR. WOLF: Well, Justice Stevens, I can't see  
19 how the fact that somebody came by boat or by plane  
20 would --

21 QUESTION: Well, it's whether he comes within  
22 the terms of the CPA or not.

23 MR. WOLF: Well, with respect to the CPA again,  
24 that issue seems to me to go to the rational basis, to the  
25 justification for the conduct, not to the classification

1 of the conduct.

2 QUESTION: Well, but the classifica -- the class  
3 does not include all Vietnamese. It includes a  
4 subcategory of Vietnamese who fit into the CPA category.

5 MR. WOLF: Yes, but with respect to the same  
6 subcategories of other countries, such as the same  
7 subcategory of French, the Vietnamese would be treated  
8 differently.

9 Now, it is true that Vietnamese are under the  
10 rubric of the comprehensive plan of action, but the  
11 plan -- comprehensive plan of action is addressed only to  
12 Vietnamese.

13 QUESTION: But Mr. Wolf, doesn't -- haven't you  
14 already shown why this is worlds different from Korematsu?  
15 Because Korematsu applied to people who were citizens of  
16 the United States just as much as it applied to someone  
17 who had just reached the shore. So it was a blanket  
18 policy, and you, by giving the answer that a resident of  
19 Hong Kong from Vietnam who had been there for awhile, was  
20 not involved in this urgent departure, would be treated  
21 like the Frenchman.

22 MR. WOLF: Well, Justice Ginsburg, actually, as  
23 I recall in Korematsu and Hirabayashi, at at least one  
24 particular time the classification only applied to  
25 Japanese on the West Coast who were rounded up and placed



1 into relocation centers, so the fact that it didn't also  
2 apply -- might not have also applied to Japanese on the  
3 East Coast would not have rendered the classification  
4 there any the less discriminatory, so in terms of the  
5 issue of whether this is discriminatory, there really  
6 should be no question.

7 With respect to the CPA argument anyway, it  
8 appears to be purely pretextual. At pages 116 and 117 of  
9 the Joint Appendix, the Department was inquiring --  
10 received an inquiry from its consulate as to whether or  
11 not the processing of a screened-out boat person would  
12 violate the CPA.

13 The Department said that to require such a boat  
14 person to return to Vietnam to have their visas processed  
15 was procedural overkill and not at all necessary to the  
16 integrity of the CPA and, in fact, during 4 years of the  
17 CPA's existence, from 1989 to 1993, the Department  
18 processed visa applications in Hong Kong, and the  
19 Department processes visa applications in Hong Kong of  
20 nationals from other countries such as Great Britain,  
21 England -- from Great Britain, from Hong Kong itself, from  
22 Australia -- so all of these visas are being processed in  
23 Hong Kong. It's hard to understand why this violates the  
24 CPA.

25 It seems to me that the Department's argument

1 with respect to the CPA --

2 QUESTION: Well, it would certainly encourage  
3 more people to come out if they know once they get in Hong  
4 Kong, where they have safe refuge, they can apply for a  
5 visa to the United States from there. I thought that's  
6 the purpose of the State Department's policy --

7 MR. WOLF: Well, Justice Scalia --

8 QUESTION: -- to discourage people from coming  
9 out.

10 MR. WOLF: Justice Scalia, that gets directly to  
11 my point, that the Department seems to be confusing the  
12 justification for its policy with the issue of whether or  
13 not the policy is a discriminatory one, and --

14 QUESTION: Isn't there something to what Mr.  
15 Kneedler said, that you know, discrimination in one  
16 sense -- you say someone has a discriminating taste. It  
17 can be a compliment. It simply means you can distinguish  
18 between different things. Invidious discrimination is  
19 something else.

20 But to say that you have to draw -- you can draw  
21 a bright line between the concept of discrimination and  
22 the term justification, I don't think is necessarily true.

23 MR. WOLF: Well, it seems to me that it's a  
24 line, Chief Justice Rehnquist, that this Court has drawn  
25 in numerous cases in the equal protection context, in the

1 context of numerous statutes that prohibit discrimination,  
2 and in view of -- Congress certainly was aware of how this  
3 Court interprets the meaning of discrimination when it  
4 passed the statute in 1965, and there's no reason to  
5 interpret this statute --

6 QUESTION: Thank you, Mr. Wolf.

7 Mr. Kneedler, you have 4 minutes remaining.

8 REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

9 ON BEHALF OF THE PETITIONERS

10 MR. KNEEDLER: Several points, Mr. Chief  
11 Justice. First of all, in Landgraf this Court said when  
12 the intervening statute authorizes or affects the  
13 propriety of prospective relief, application of the new  
14 provision is not retroactive, so analytically the question  
15 here is not one of retroactivity, since prospective relief  
16 is being asked for, and that's what the Court is being  
17 asked to do.

18 This statute specifically speaks to what a court  
19 should do, whether a court can construe 1152(a)(1) to  
20 prohibit the Secretary from establishing locations for the  
21 processing of visas, as Justice Stevens mentioned.

22 QUESTION: But Mr. Kneedler, to the extent that  
23 this is like a venue provision where you can have this  
24 processed, if Congress changes a venue rule while a case  
25 is in a tribunal, I assume the case would not have to be

1 dismissed at midstream, that unless Congress said  
2 otherwise, the venue that was proper when the case was  
3 initiated would stay.

4 MR. KNEEDLER: But that would be -- that would I  
5 think be not upset -- I mean, again, that would be a  
6 question of statutory construction, it would not be a  
7 question of an injunctive action. It would be a question  
8 of a rule of procedure to be applied in an ongoing case  
9 much like Landgraf, speaking to what a court has to do,  
10 has to decide at the time it's deciding a particular issue  
11 in a case. At the time the court decides venue, it  
12 decides venue, and the statute shouldn't reach back and  
13 change that.

14 This statute is not retroactive in the sense  
15 that people who got visas in 1993 during the interim  
16 period when the State Department had a contrary view, will  
17 have those visas taken away and be sent back to Hong Kong.  
18 This is entirely prospective, and if there was any doubt  
19 about Congress' intent that this governed this case, the  
20 letter from the 45 Members of Congress said that the  
21 amendment would overturn the adverse result in LAVAS.

22 The State Department's letter said it's  
23 amendment was intended to reverse the decision in LAVAS.  
24 Representative Smith said it was an attempt to overrule  
25 LAVAS, and Representative Conyers said it would have the

1 immediate effect of requiring two dozen Vietnamese,  
2 precisely these two dozen Vietnamese in Hong Kong, to  
3 return to Vietnam. There was no doubt that Congress  
4 intended and expected this to apply to this case.

5 With respect to the question of discrimination,  
6 this only covers people who were screened out under the  
7 CPA. Screened out is a term of art under international  
8 refugee matters, applying it here to this international  
9 agreement. It doesn't apply to other people who may be in  
10 Hong Kong like a Vietnamese national who may have gotten  
11 there in other ways.

12 Also, as the Chief Justice pointed out, this is  
13 not invidious discrimination by any means. The United --  
14 Vietnamese have been the beneficiaries of United States  
15 immigration policy over the last 15 years to an extent  
16 that few other countries have matched: 1.2 million  
17 Vietnamese have entered the United States, including  
18 400,000 who have departed from Vietnam during the orderly  
19 departure process. There is no way that this policy can  
20 be regarded as invidious discrimination against  
21 Vietnamese. It is designed to implement valid foreign  
22 policy.

23 My last point is that the discussion in this  
24 case is -- we think underscores why this sort of case  
25 doesn't belong in court to begin with. This is a case

1 challenging foreign policy and migration policy halfway  
2 around the world in a suit brought by aliens in a foreign  
3 country objecting to the way in which their visas are  
4 being processed in a foreign country, a classic matter for  
5 which judicial review is precluded, and has traditionally  
6 been committed to agency discretion by law.

7 And that rule cannot be circumvented by having a  
8 U.S. citizen who happens to have applied for a visa  
9 petition to file his or her own suit in U.S. courts. The  
10 Immigration Act makes clear that the visa petitioner's  
11 interest in a matter such as this is simply filing the  
12 visa petition and having the Attorney General determine  
13 whether the beneficiary of the visa petition would be  
14 entitled to a visa preference.

15 Once that happens, the U.S. person's interest in  
16 the matter lapses. There is no further interest. The  
17 alien abroad is accorded a preference and stands entirely  
18 on his own or her own with respect to whether there will  
19 be any admission to the United States.

20 In fact, the nondiscrimination provision invoked  
21 here speaks in terms of discrimination or preferences with  
22 respect to the alien abroad. It confers no rights on a  
23 U.S. citizen in the United States.

24 So with respect to both respondent's APA claim  
25 and the statutory claim, review is precluded.

1 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
2 Kneedler.

3 MR. KNEEDLER: Thank you.

4 CHIEF JUSTICE REHNQUIST: The case is submitted.

5 (Whereupon, at 11:02 a.m., the case in the  
6 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:*

UNITED STATES DEPARTMENT OF STATE, BUREAU OF CONSULAR AFFAIRS,  
ET. AL. V LEGAL ASSISTANCE FOR VIETNAMESE ASYLUM SEEKERS, INC  
CASE NO. 95-1521

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

BY Ann Marie Federico

(REPORTER)