

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

CAPTION: IMMIGRATION AND NATURALIZATION SERVICE V  
YEUH-SHAIO YANG  
CASE NO: No. 95-938  
PLACE: Washington, D.C.  
DATE: TUESDAY, OCTOBER 15, 1996  
PAGES: 1-52

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IN THE SUPREME COURT OF THE UNITED STATES

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IMMIGRATION AND NATURALIZATION :  
SERVICE, :  
Petitioner :  
v. : No. 95-938  
YUEH-SHAIO YANG :  
- - - - -X

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

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:04 a.m.

APPEARANCES:

BETH S. BRINKMANN, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the Petitioner.  
HOWARD HOM, ESQ., Los Angeles, California; on behalf of  
the Respondent.

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

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 95-938, Immigration & Naturalization  
5 Service v. Yueh-Shaio Yang.

6 Ms. Brinkmann, you may proceed.

7 ORAL ARGUMENT OF BETH S. BRINKMANN

8 ON BEHALF OF THE PETITIONER

9 MS. BRINKMANN: Thank you, Your Honor.

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

11 This case involves respondent's request for a  
12 waiver of deportation under section 241(a)(1)(H) of the  
13 Immigration and Nationality Act. The act commits that  
14 decision to the discretion of the Attorney General.

15 Exercising her discretion in this case, the  
16 Attorney General properly considered numerous frauds  
17 committed by respondent, including his fraudulent  
18 application for naturalization, fraudulent marriages,  
19 fraudulent divorce, and his participation in the  
20 fraudulent obtaining of documents for his wife's  
21 fraudulent entry into the country.

22 The Attorney General did not, again as a matter  
23 of discretion, consider the fraud respondent committed at  
24 entry.

25 QUESTION: I take it under the statute, the

1 Attorney General would have been perfectly free to  
2 consider that fraud.

3 MS. BRINKMANN: That's correct, Your Honor, and  
4 in fact the Seventh Circuit has expressly recognized that.

5 In Rodriguez-Barajas, Judge Easterbrook  
6 explained that the Attorney General's under no compulsion  
7 to disregard that initial fraud, and that any limitation  
8 on that has arisen out of the Attorney General's exercise  
9 of her discretion.

10 QUESTION: Well, you think, then, that the  
11 statute places no outer limits whatever on the discretion  
12 of the Attorney General?

13 If the Attorney General took the position that  
14 the fact of a fraudulent entry by the alien is a factor  
15 weighing against waiver, then nobody would be entitled to  
16 a waiver any time.

17 MS. BRINKMANN: Well, Your Honor --

18 QUESTION: I mean, that condition exists in  
19 every one of these cases.

20 MS. BRINKMANN: That's correct, Your Honor. The  
21 aliens that are in the pool of eligible aliens for this  
22 type of waiver share several common characteristics. They  
23 all have three factors weighing in their favor. They have  
24 to be the relative -- the parent, son or daughter or  
25 spouse of a citizen or a permanent resident alien. They

1 also must have presented themselves for entry. They have  
2 to have a validly, facially valid document, and they have  
3 to be otherwise admissible.

4 They also share the fact --

5 QUESTION: But for the fraud.

6 MS. BRINKMANN: Yes. They also share the fact  
7 that they all committed entry fraud.

8 Now, looking at that pool of applicants, the  
9 Attorney General has to decide who amongst that she should  
10 exercise her discretion to give a waiver to, and our  
11 submission is that it's certainly proper for the Attorney  
12 General to favor a person who has been law-abiding since  
13 their initial entry over someone who's perpetrated a  
14 series of frauds.

15 We would also submit, Your Honor, although it  
16 has not come up in the typical kinds of cases that have  
17 come before the board, if, for example, the entry fraud  
18 was intertwined with violence, for example, we certainly  
19 think the Attorney General in her discretion could take  
20 that into account.

21 QUESTION: Well, could take into account the  
22 circumstances of the particular fraudulent entry.

23 MS. BRINKMANN: Yes, Your Honor.

24 QUESTION: But not the mere fact that there had  
25 been a fraudulent entry, I take it?

1 MS. BRINKMANN: I'd look to the -- for example,  
2 the Court in the Rios-Pineda case, when the Court was  
3 looking at the Attorney General's authority whether or not  
4 to grant suspension of deportation there, I think  
5 characterizes looking to the nature and severity of the  
6 factor, so I would think that that would clearly be  
7 appropriate for the Attorney General to take into account.

8 QUESTION: Well, just because Congress has given  
9 the Attorney General the power to waive fraud, certainly  
10 you don't concede that the Attorney General couldn't say,  
11 I have the power but I decline to waive any kind of fraud.

12 MS. BRINKMANN: That's correct, Your Honor. In  
13 fact, particularly in the immigration context there may be  
14 other matters of foreign affairs or international  
15 relations that at a particular point in time the Attorney  
16 General would choose not to exercise her discretion in  
17 favor of waivers under this provision.

18 QUESTION: The statute does circumscribe  
19 discretion in one respect, does it not, or perhaps not,  
20 because the sentence is difficult. The last sentence of  
21 sub (H), a waiver of deportation for fraud granted under  
22 this subparagraph shall also operate to waive deportation  
23 based on the grounds of inadmissibility at entry.

24 What's the function of that sentence, other than  
25 to circumscribe or control the discretion of the AG?



1 Maybe you'll tell me --

2 MS. BRINKMANN: If I under --

3 QUESTION: -- it's an interpretation of the  
4 discretion once exercised.

5 MS. BRINKMANN: I think, if I understand your  
6 question correctly, Your Honor, it's clarifying some  
7 confusion that had existed under their previous provision,  
8 and it makes clear that if the Attorney General grants a  
9 waiver of deportation under this provision, that waiver of  
10 deportation waived the grounds of inadmissibility for the  
11 fraud and also for inadmissibility grounds that directly  
12 result from that, that being a fraudulent visa or  
13 fraudulent labor certification.

14 QUESTION: Would that be relevant in a later  
15 application for citizenship, or something like that? Is  
16 that why it's important?

17 MS. BRINKMANN: Well, in fact --

18 QUESTION: Because it seems to me to just  
19 restate that a waiver's a waiver.

20 MS. BRINKMANN: Well, Your Honor, I think I can  
21 give an example to explain it. There is some fraud at  
22 entry that doesn't involve fraudulent documents or labor  
23 certificates. Misrepresenting your marital status,  
24 perhaps, in an interview.

25 Some people obtain their visas based on false

1 information at a consulate beforehand, and then when they  
2 arrive at the port of entry, they continue to stand by  
3 what's in that visa, but perhaps they've been unmarried --  
4 they've been divorced or married in the meantime, so they  
5 would be committing a fraud at entry, but that would not  
6 necessarily relate to any fraudulent document.

7 If they had an independently based fraudulent  
8 document, that could be a ground of inadmissibility, and  
9 it would not be waived because it would not directly  
10 result from their fraud, and I think what the statute was  
11 trying to get at was that any of the grounds of  
12 inadmissibility at the time of entry that directly result  
13 from the entry fraud are also waived.

14 QUESTION: May I --

15 QUESTION: But then that is a narrowing of the  
16 Attorney General's discretion.

17 MS. BRINKMANN: No. We would simply say that  
18 describes what the effect of the grant of the waiver is.  
19 The Attorney General grants a waiver, and it specifies  
20 that it waives deportation based on those grounds. That's  
21 what the effect of a 241(a)(1)(H) waiver --

22 QUESTION: Well, it circumscribes the Attorney  
23 General to some extent in that it does control the extent  
24 of the waiver.

25 MS. BRINKMANN: The effect of it, yes, Your

1 Honor.

2 On the other hand, we would submit that as in my  
3 previous discussion of how the Attorney General could take  
4 into account the nature and severity of the initial fraud,  
5 the Attorney General certainly also as matter of  
6 discretion could take into account the nature and severity  
7 of the other grounds of inadmissibility on the fraudulent  
8 labor certificate or visa, the means by which that was  
9 procured.

10 QUESTION: I have to confess I'm still a little  
11 puzzled about your answer to Justice O'Connor. I  
12 understood you to say that the Attorney General could not  
13 take into account the mere existence of some fraud, could  
14 take into account the nature of the fraud, but are you  
15 saying that if -- say there's the mildest kind of form in  
16 the -- fraud in the world, that the mere fact there was a  
17 fraud could not be taken into consideration?

18 MS. BRINKMANN: No, I'm sorry, I misspoke if  
19 I --

20 QUESTION: No matter how mild it is, the  
21 Attorney General has discretion.

22 MS. BRINKMANN: That's --

23 QUESTION: Otherwise, it seems to me a person  
24 could commit a fraud and then claim a right to remain.

25 MS. BRINKMANN: That's right, and in fact, Your

1 Honor, one of the ironies of the Ninth Circuit's ruling in  
2 this case is, it really gives the type of open-ended  
3 immunity to aliens who enter by fraud. By requiring that  
4 later frauds be considered as a part of or an extension of  
5 the entry fraud, those aliens are put at an advantage over  
6 an alien who enters lawfully and then commits later fraud  
7 which is not forgiven.

8 QUESTION: But are you saying that the Attorney  
9 General would be within her discretion to say, I will  
10 never exercise my discretion to waive entry fraud?

11 MS. BRINKMANN: We believe that if that were  
12 based on a reasonable exercise of her discretion --

13 QUESTION: No, but that begs the question. The  
14 only fact you know is that she says, I'm adopting a  
15 policy. I will never exercise discretion, no matter what  
16 the circumstances, to waive entry fraud. Would that be  
17 lawful or not?

18 MS. BRINKMANN: Yes, Your Honor, we believe it  
19 would be. I guess in my initial answer I was trying to  
20 think of an example in which that might be the case, and I  
21 come back to the example of perhaps there are other  
22 immigration interests and other quotas that are so -- so  
23 important, and as a matter of policy --

24 QUESTION: No, but my question suggested that  
25 that was her across-the-board policy for all cases in

1 which the statute might be applied.

2 I'm not asking a question about subclasses. I'm  
3 talking about the entire class of possible waivers, and  
4 construed that broadly, would it be within her discretion  
5 to say, I will never exercise my discretion in favor of  
6 waiver?

7 MS. BRINKMANN: You mean waivers under  
8 241(a)(1)(H)?

9 QUESTION: Yes.

10 MS. BRINKMANN: Yes, Your Honor, we believe it  
11 would be.

12 QUESTION: But in any event, the BIA has adopted  
13 a different standard, right?

14 MS. BRINKMANN: That's correct, Your Honor.

15 QUESTION: And unless that standard is changed,  
16 I assume the Government would abide by the standard --

17 MS. BRINKMANN: That's --

18 QUESTION: -- that's been adopted.

19 MS. BRINKMANN: That's correct, Your Honor.

20 QUESTION: Is that right?

21 MS. BRINKMANN: That's correct, and it's a  
22 reasonable approach. I think the board has found that the  
23 cases that have come before it, that entry fraud does seem  
24 to be of a common ilk, and has decided to treat like cases  
25 alike in that regard, and need not look at that initial

1 factor.

2 As I mentioned earlier, if a case arose in which  
3 a different type of entry fraud was involved involving  
4 violence, for example, we believe that would be certainly  
5 something which the board may very well --

6 QUESTION: But do you say you're free to depart  
7 from that rule and that practice at any time you want?

8 MS. BRINKMANN: Yes, Your Honor, I think to the  
9 extent that --

10 QUESTION: For no reason at all?

11 MS. BRINKMANN: I think to the extent that there  
12 is judicial review for abuse of discretion the board would  
13 be well advised to provide a reason.

14 I have to hasten -- have to -- have to be quick  
15 to add at this point, Your Honor, at this point it's  
16 somewhat of a limited query, because the new statute that  
17 was passed a week and a half ago eliminates judicial  
18 review of the Attorney General's exercise of discretion  
19 under this provision.

20 QUESTION: But currently, do I understand it  
21 correct -- I must say, I was quite surprised to discover  
22 this, but the situation is, if you commit entry fraud and  
23 are successful, so long as you don't commit any other  
24 fraud, you're okay. Is that the current position?

25 MS. BRINKMANN: You're eligible for a waiver.

1 That doesn't mean you get it, Your Honor. At that point  
2 you can apply to the Attorney General. You have to be a  
3 relative --

4 QUESTION: Well, you may not get it, but you  
5 won't be denied it simply because you got in fraudulently.

6 MS. BRINKMANN: It will -- when the Attorney  
7 General, the Board of Immigration Appeals, the immigration  
8 judge exercise their discretion, the practice at this  
9 point is not to take into account the initial entry fraud.

10 QUESTION: I find that extraordinary, myself.

11 QUESTION: No matter how severe --

12 QUESTION: I --

13 QUESTION: I'm sorry.

14 QUESTION: Why is that?

15 MS. BRINKMANN: The fact of the matter is, Your  
16 Honors, when I've looked through all the cases, the  
17 typical case that has come forward involves very similar  
18 types of fraud, mainly people misrepresenting the fact  
19 they've been married, or been divorced, family relations.  
20 There have not been cases which involve incidences of  
21 violence, for example, and --

22 QUESTION: Well, why is it that in those kinds  
23 of cases -- why does the BIA disregard that fraud?

24 MS. BRINKMANN: Well, to an extent, Your Honor,  
25 I think that it's taken as a matter of treating like cases

1       alike, and that that's --

2                   QUESTION: Well, you could treat like cases  
3 alike and say we'll -- we will not disregard it in any of  
4 them.

5                   MS. BRINKMANN: Right, and that's what the  
6 alien's coming forward to, as asking for forgiveness for,  
7 as the board has characterized it.

8                   QUESTION: Ms. Brinkmann, there was one time  
9 when this kind of waiver for initial entry fraud was  
10 mandatory.

11                   MS. BRINKMANN: Yes.

12                   QUESTION: And then it was urged that Congress  
13 drop it altogether. Instead, Congress came up with  
14 something in between. They said the entry by fraud may,  
15 in the discretion of the Attorney General, be waived, but  
16 if you can respond to the question that's been raised by  
17 several of the justices, why in the first place did  
18 Congress provide for initially a mandatory waiver and now  
19 a discretionary waiver for one who has gained entry by  
20 fraud?

21                   MS. BRINKMANN: Your Honor, initially, this was  
22 enacted as section 7 of the Immigration Act in 1957, and  
23 it was responding to entry by -- immigrants were fleeing  
24 repression in totalitarian regimes, and had made  
25 misrepresentations in order to avoid repression, and



1 that's when the provision was first enacted, added to the  
2 statute.

3 Then it was somewhat modified in 1961. In  
4 between 1961 and 1981, that's when all the trouble and  
5 confusion started occurring, and that's what prompted  
6 Congress in 1981, or the proposals pending in Congress, to  
7 eliminate it altogether because it had caused such  
8 confusion.

9 For example, persons who entered by an innocent  
10 misrepresentation some courts had held were not eligible  
11 for the waiver, whereas aliens who had entered through  
12 fraudulent misrepresentations were. That's something that  
13 the 1981 statute -- amendment corrected. It also, of  
14 course, made it discretionary.

15 It also made it clear, for example, that it was  
16 not going to waive deportation for aliens who entered  
17 without inspection. Now --

18 QUESTION: -- policy by discretion of the  
19 executive is that anyone who commits fraud successfully  
20 upon entry is okay.

21 MS. BRINKMANN: I wouldn't say it's okay, Your  
22 Honor, but it's enough like all of the other cases that  
23 have come before the board that it's a wash, and that the  
24 board look, and the immigration judges look at the other  
25 factors that underlie the interest in the stat -- this

1 provision --

2 QUESTION: You get in under the provision of the  
3 law that says a spouse can get in, and you lie. You say  
4 I'm married to somebody. You are in fact not married to  
5 somebody. So long as you persuade the officer of the  
6 truth of that lie, it's okay. Once you're in, it's all  
7 right. That's the policy we now have in place.

8 MS. BRINKMANN: Right. Well, it dates back to  
9 1978, Your Honor. There's a similar provision for waiver  
10 of exclusion grounds, and that's when the Commissioner of  
11 INS first articulated this.

12 QUESTION: Well, I thought we were going to get  
13 serious about -- about enforcing our borders, and I was  
14 really quite surprised to find that that's the policy.

15 MS. BRINKMANN: Well, Your Honor, I have to say  
16 I think that in light of the statute that was recently  
17 passed, that Your Honor -- certainly it's a situation I  
18 think now where Congress has eliminated this provision  
19 from judicial review, and the --

20 QUESTION: Well, that doesn't save anything.  
21 The Attorney General can continue to let everybody in  
22 who's lied successfully, and there's no judicial review.  
23 It may make it worse.

24 MS. BRINKMANN: I would hasten to add, Your  
25 Honor, I mean, this waiver of deportation does apply to a

1 limited pool of people. It applies to people who are  
2 immediate relatives of U.S. citizens, or permanent  
3 resident aliens, and the main thrust behind this provision  
4 was for family unification, as I initially pointed out to  
5 Justice Ginsburg, in '57, it had to do with the nature of  
6 countries that aliens were fleeing, but the real  
7 interest --

8 QUESTION: Do they have to now be an immediate  
9 relative?

10 MS. BRINKMANN: Yes.

11 QUESTION: I mean, suppose they lied when they  
12 came in and they said they were an immediate relative.

13 MS. BRINKMANN: They have to be one. That's a  
14 statutory eligibility --

15 QUESTION: They have to be one now.

16 MS. BRINKMANN: At the time of the application  
17 for the waiver and the grant of the waiver, yes, Your  
18 Honor, and that was really the interest underlying, so  
19 although I think at first blush it may sound frivolous to  
20 permit people who have lied or misrepresented, I think  
21 that Congress really envisioned an overriding interest in  
22 the unification of families.

23 QUESTION: Your position here, I take it,  
24 Ms. Brinkmann, is that although the Attorney General has  
25 exercised her discretion in this manner to forgive entry

1 fraud, that she has control of just what that means, and  
2 it shouldn't be expanded by the courts.

3 MS. BRINKMANN: That's right, Your Honor.

4 QUESTION: Well, but on the other hand, I take  
5 it that you're saying that what the Attorney General's  
6 position has been, which is to overlook the initial fraud,  
7 is suggested if not compelled by the statutory history.  
8 Isn't that what you're saying?

9 MS. BRINKMANN: We don't believe that it is  
10 compelled by that, Your Honor, no. We think that to the  
11 extent the Ninth Circuit authority can be read that way,  
12 they're clearly wrong. We agree with Judge Easterbrook's  
13 opinion in the Seventh Circuit, which states that their  
14 statute imposes no compulsion on the Attorney General to  
15 disregard that initial fraud. That simply is one of the  
16 eligibility requirements. That's one of the factors I  
17 described earlier that all the aliens in the applicant  
18 pool have in common.

19 QUESTION: Well, that would make a lot of sense  
20 to me but for the way the Attorney General has  
21 administered the statute to date. I can't understand  
22 where it gets -- where that policy derives from, and I  
23 thought your earlier remarks indicated it derived from the  
24 statutory history.

25 MS. BRINKMANN: No, I think it actually derives

1 from the history before the agency itself, Your Honor. As  
2 I explained, it actually piggybacks on an interpretation  
3 of waiver for exclusion under section 212(i) in 1978. The  
4 Commissioner of the INS set forth this policy and that's  
5 what eventually was incorporated into the Attorney  
6 General's interpretation of the deportation waiver.

7 When that first statement was made about the  
8 exclusion waiver, the deportation waiver was not yet  
9 discretionary. It was mandatory. The exclusion waiver  
10 has always been discretionary, so once the deportation  
11 waiver became discretionary in 1981, and the Attorney  
12 General came to start interpreting that, she looked back  
13 to the interpretation that had been given to the exclusion  
14 waiver that was always discretionary.

15 QUESTION: Am I right, I thought -- I might not  
16 be, but I -- my reading of this was initially there were a  
17 group of people who did lie when they wanted to come in,  
18 particularly people who came from Iron Curtain countries,  
19 and they lied about what country they were coming from  
20 because they were afraid that they'd be sent back and  
21 killed possibly, and Congress initially passed this  
22 statute because it wanted to say that people like that who  
23 had families here should be permitted to stay here.

24 MS. BRINKMANN: Yes, Your Honor.

25 QUESTION: And if that's so, then wouldn't it

1 raise a legal question if the Attorney General said people  
2 just like that, or who tell equivalent lies to that, would  
3 all have to go back? That's why I wonder if there isn't  
4 some limitation arising out of the circumstances in this,  
5 where the history of this, that there were certain lies  
6 that would be told and the need to reunite families was  
7 such that that would be a limitation on the AG's  
8 discretion.

9 MS. BRINKMANN: We don't believe so, Your Honor.  
10 I think looking at the text of this statute following the  
11 1981 amendment, Congress was clear to write that the  
12 deportation may be waived in the discretion of the  
13 Attorney General.

14 QUESTION: Regardless of the history, what the  
15 statute does is give the Attorney General discretion.  
16 That's what it says.

17 MS. BRINKMANN: That's right, Your Honor. I  
18 think particularly against the backdrop of the history in  
19 1981, where there had been proposals to eliminate it  
20 altogether.

21 Also, I would add, Congress did set out the  
22 statutory eligibility requirements we've already  
23 discussed, and did not include any other even factors to  
24 consider in many provisions of the Immigration Nationality  
25 Act. For example, Congress has told the Attorney General

1 specifically to consider hardship to family members and  
2 all that.

3 This waiver provision contains none of that, and  
4 we think that bolsters our interpretation that it's left  
5 to the sole discretion of the Attorney General.

6 QUESTION: Ms. Brinkmann, may I go to the other  
7 end of the spectrum and make sure I understand you on one  
8 point, and that is, I understand you to have said that the  
9 policy of waiving any initial fraud applies to any initial  
10 fraud regardless of what it's circumstances may be.

11 In other words, there's no minor fraud versus  
12 major fraud. All frauds are equal if they are initial  
13 fraud, initial entry frauds, is that right?

14 MS. BRINKMANN: It's difficult to answer that  
15 question, Your Honor, because the cases all have very  
16 comparable types of fraud. There just haven't been --

17 QUESTION: All right, what if you had a fraud  
18 case in which you -- it was shown that the documents were  
19 procured by the entrant by holding a gun to the head of  
20 officials in foreign countries to force them to produce  
21 the fraudulent documents, would that be like all other  
22 kinds of frauds? Would that be within the policy of  
23 waiving all initial entry frauds?

24 MS. BRINKMANN: I think that would be within --  
25 it would be within the discretion of the Attorney General,

1 her delegates, to decide.

2 QUESTION: No, but I want to know what her  
3 policy -- I just want to understand what her policy is  
4 now, and would that fall within her policy of waiving  
5 initial entry fraud as you understand it?

6 MS. BRINKMANN: That case simply has not come  
7 up, Your Honor, and I would not want to say that it would  
8 come within that, because I think that --

9 QUESTION: So maybe not all frauds are equal  
10 for -- initial entry frauds are equal.

11 MS. BRINKMANN: They may not be, Your Honor.

12 QUESTION: Okay.

13 MS. BRINKMANN: I think that's true, and I think  
14 the Attorney General would be free to change her policy  
15 and explain that in the future any entry frauds that have  
16 to do with violence certainly are going to be weighed much  
17 more severely, in fact --

18 QUESTION: But that limitation doesn't exist  
19 right now. As far as we know now, and this is what I got  
20 from the brief, all entry fraud is not taken into account.  
21 Isn't that the rule as it now exists?

22 MS. BRINKMANN: Frankly, Your Honor, we also  
23 don't know the other way, because the case just has not  
24 arisen, and the Attorney General has not been presented  
25 with that situation.



1                   QUESTION: You don't know of a single case of  
2 entry fraud that has been taken into account.

3                   MS. BRINKMANN: No, Your Honor, certainly not in  
4 the reported cases I've seen. It might be, Your Honor,  
5 because in situations like that, the alien is more than  
6 likely going to be not otherwise admissible, will be  
7 inadmissible on other grounds.

8                   QUESTION: And there's also a question of what  
9 is the entry fraud. If I understand the way this policy  
10 operates, in this case there was a sham divorce in Taiwan  
11 before the petitioner entered, and you count that as  
12 preentry fraud, so if I understand what the policy is  
13 correctly, all of the other -- the later frauds postentry  
14 were just kind of surplus. It was enough to be outside  
15 this policy that there was a preentry fraud.

16                   MS. BRINKMANN: Your Honor, these are certainly  
17 I think a totality of circumstances when the Attorney  
18 General exercises her discretion, and any type of  
19 misdeed --

20                   QUESTION: Well, I wasn't asking you that. I  
21 may understand her policy incorrectly, but I thought your  
22 explanation of the policy was, we will waive entry fraud  
23 but nothing before and nothing after, and here there was a  
24 before, and now you're saying no, I don't have it right,  
25 it's somehow a totality of the circumstances test and not,

1 we'll zero in on the entry itself, I get there and say I'm  
2 from -- I'm from Austria rather than from Poland.

3 MS. BRINKMANN: I'm sorry, Your Honor, I  
4 misunderstood. I wanted to say that the -- some misdeed  
5 beforehand can certainly be considered. I just did not  
6 want to say that that was dispositive and meant that a  
7 waiver could not be granted.

8 QUESTION: I must say, I don't understand this  
9 concept of preentry fraud. Who is the fraud being  
10 committed on? I mean --

11 MS. BRINKMANN: On the United --

12 QUESTION: Well --

13 MS. BRINKMANN: -- States, Your Honor.

14 QUESTION: But it's only being committed on the  
15 United States at the time you present yourself for entry.

16 MS. BRINKMANN: No, Your Honor --

17 QUESTION: I mean, surely I can enter into a  
18 sham divorce if I want, and until such time as I applied  
19 for entry to the United States, it doesn't make any  
20 difference to the United States.

21 MS. BRINKMANN: Your Honor, respondent  
22 collaborated in obtaining fraudulent birth certificates  
23 and passports for his wife, and the reason that the  
24 divorce and remarriage under an assumed name that he also  
25 participated in was to commit a fraud in the United States

1 of America as his wife coming in under the fraud of being  
2 a U.S. citizen. If he had never come to this country --

3 QUESTION: It was her wife's entry that was the  
4 fraud. It wasn't the --

5 QUESTION: His wife's.

6 QUESTION: I mean, it was the wife's entry that  
7 he assisted that was fraud.

8 MS. BRINKMANN: That's true, and he --

9 QUESTION: Okay.

10 MS. BRINKMANN: Yes. I also wanted to point out  
11 that respondent in the court of appeals agreed with this  
12 view and admitted that the naturalization fraud, for  
13 example, its fraudulent application could be weighed,  
14 and --

15 QUESTION: There was a fraudulent application  
16 for citizenship here too, wasn't there?

17 MS. BRINKMANN: I'm sorry, that's what I meant,  
18 Your Honor. I misspoke. Yes, in 1982.

19 QUESTION: And the Ninth Circuit said that was  
20 improperly considered by the Attorney General?

21 MS. BRINKMANN: Yes, Your Honor.

22 QUESTION: You advised Justice Scalia that this  
23 was a very small class. I would have thought that  
24 numerically it's quite significant. Do you have any  
25 specific numbers as to how small this class is?

1 MS. BRINKMANN: I actually do have some  
2 statistics from the -- from fiscal year '95, Your Honor.  
3 I've been informed by -- this is from the Executive Office  
4 of Immigration Review. These were decisions on -- they  
5 classified them as 241(f) waivers, but it's now at  
6 241(a)(1)(H), and last year there were a total of 30 --  
7 this was for immigration judge rulings, 37 waivers with a  
8 grant rate of approximately 84 percent.

9 QUESTION: Thank you.

10 MS. BRINKMANN: Thank you.

11 QUESTION: Thank you, Ms. Brinkmann. I take it  
12 you want to reserve --

13 MS. BRINKMANN: I'd like to reserve the rest of  
14 my time. Thank you.

15 QUESTION: Mr. Hom. Am I pronouncing your name  
16 correctly?

17 MR. HOM: That's correct, Your Honor.

18 ORAL ARGUMENT OF HOWARD HOM

19 ON BEHALF OF THE RESPONDENT

20 MR. HOM: Mr. Chief Justice, and may it please  
21 the Court:

22 There are two basic points that we need to  
23 address. Number 1, this case, the facts of this case  
24 boils down to just one simple fact. Mr. Yang's assumed  
25 identity as the husband of a United States citizen, just

1 one basic fact.

2 Secondly, this is not a case of abuse of  
3 discretion. This is a case of statutory construction.

4 This is a case of statutory construction because  
5 the plain language of the statute, the INS's own  
6 interpretation, prior case precedents, legislative  
7 history, and the policy and the purpose behind this waiver  
8 all indicate that the original fraud must never be weighed  
9 in the decision to grant or deny a waiver.

10 QUESTION: As a matter of -- you say part of  
11 your argument to that effect is based on statutory  
12 construction. Where in the statute do you find that?

13 MR. HOM: Yes, it's subparagraph (ii) of  
14 241(a)(1)(H), and the petitioner's brief at page 5a and 6a  
15 is the section of law, and in subparagraph (ii) on page 6a  
16 it states that the alien was in possession of an immigrant  
17 visa or equivalent document and was otherwise admissible,  
18 and that's the key phrase, otherwise admissible.

19 QUESTION: Well --

20 QUESTION: Why isn't the key phrase, "fraud may,  
21 in the discretion of the Attorney General, be waived"?

22 QUESTION: Yes.

23 MR. HOM: Because the purpose of the waiver was  
24 to --

25 QUESTION: We're talking about statutory

1 construction now.

2 MR. HOM: Oh, yes, sir.

3 QUESTION: Yes.

4 MR. HOM: Right.

5 The waiver serves to take away that fraud.  
6 That's why that phrase, "otherwise admissible," that's  
7 what that refers to. Otherwise, other than the fraud.  
8 Otherwise admissible means other than the fraud that  
9 charges or that renders the alien to become excludable.

10 QUESTION: Well, that sets a condition upon  
11 the --

12 QUESTION: Yes.

13 QUESTION: -- exercise of discretion -- but it  
14 does not, it seems to me, to address the substance of what  
15 that discretion may consider.

16 MR. HOM: If I could answer the question this  
17 way, Your Honor, there are three steps in the processing  
18 of an application for a waiver before the immigration  
19 judge. The first step is, is there a requisite family  
20 relationship, the second step, subparagraph (ii), is the  
21 alien otherwise admissible?

22 In other words, is he a criminal? Has he  
23 committed other heinous acts but he cannot be neither  
24 waived because of the fraud, which is 212(a)(6)(C), and  
25 that's what otherwise admissible refers to --

1 QUESTION: Well, why do you -- that isn't at all  
2 clear to me. I mean, why isn't the otherwise -- just a  
3 threshold requirement, and once you meet that threshold,  
4 then you can invoke the Attorney General's discretion, but  
5 the statute doesn't say how it should be exercised.

6 MR. HOM: Yes, Your Honor. Once we reach that  
7 threshold that the fraud is taken off the table and not to  
8 be considered in order for the alien to apply for the  
9 waiver, then for the Immigration Service to turn around  
10 and look at that very same act would really nullify  
11 subparagraph (ii).

12 It wouldn't even have to be there at all if the  
13 Attorney General had absolute unfettered discretion. The  
14 language of the waiver would merely say, if the alien has  
15 a family relationship, then in the discretion of the  
16 Attorney General the waiver may be granted, so there must  
17 be some meaning --

18 QUESTION: So you say the fact that Congress has  
19 imposed additional conditions over and above the family  
20 relationships actually limits the Attorney General's  
21 discretion. That seems rather strange.

22 MR. HOM: And that's why I say, it's not a  
23 matter of discretion, Your Honor, it's really a matter of  
24 statutory construction. Subparagraph (ii) takes --

25 QUESTION: But construing the statute, mustn't

1 we take into account first the words that say "may, in  
2 the discretion of the Attorney General . . ." then the  
3 history that at one time the waiver was mandatory, and  
4 Congress changed it to make it discretionary.

5 You seem to be -- your statutory interpretation  
6 argument appears to be based on the pre-1981 statute, when  
7 the waiver was mandatory. Are you saying that Congress --  
8 that these words are meaningless?

9 MR. HOM: Your Honor, the change to add the word  
10 discretion in 1981 did not change the intent and purpose  
11 of the waiver. Even prior to the 1981 waiver change there  
12 was a separate exclusion ground with a parallel waiver,  
13 section 212(i), which permitted the Immigration Service to  
14 grant a waiver in its discretion for similar types of  
15 frauds.

16 The Immigration Service adopted the position in  
17 the parallel deportation waiver in now 241(a)(1)(H) that  
18 otherwise admissible means you put aside the initial fraud  
19 that renders him excludable in deciding whether or not to  
20 grant the waiver, and then the immigration judge, or the  
21 Immigration Service, may look at other adverse factors.

22 For example, if the immigrant had killed  
23 somebody to obtain that person's passport, or visa  
24 documentation, that would render the immigrant excludable  
25 under other acts, sections of the act, so that's the



1 purpose of otherwise admissible, to account for the  
2 concern that Your Honors have expressed previously that  
3 there may be certain factors in the commission of the  
4 fraud that are so heinous that we as human beings would  
5 not accept.

6 QUESTION: Well, so then you're saying otherwise  
7 admissible is not important to your interpretation of the  
8 act because you've given it this other meaning.

9 MR. HOM: I'm not sure if that's --

10 QUESTION: That's what your whole -- I thought  
11 your whole case turned on the otherwise admissible  
12 language, and you've just given what to me is a very  
13 plausible interpretation of it that the man can't be a  
14 heinous criminal, et cetera.

15 MR. HOM: Correct, so --

16 QUESTION: I don't see how that helps your case.

17 MR. HOM: Well, we're saying that if the alien  
18 is -- in the determination of the waiver we look at other  
19 factors other than the fraud factor, which is  
20 212(a)(6)(C), which is not listed there, but you could see  
21 the parallel exceptions for (5)(A) and (7)(A) of the  
22 statute, so if an alien is encompassed within the grounds  
23 of 212(a)(6)(C), 212(a)(5)(A) and (7)(A), those  
24 disqualifying factors cannot be held against the immigrant  
25 in the determination of the waiver, so the immigration

1 judge is permitted only to look at other factors, other  
2 than those three factors.

3 QUESTION: If that's so, I can understand --  
4 just -- how you could say may means must in respect to the  
5 initial kinds of fraud that led Congress to grant the  
6 discretion in the first place, which is what you're  
7 arguing now, I think, but assuming for the sake of  
8 argument that that's so, how then do you get from the  
9 language which talks about a waiver being related -- being  
10 a direct result of that fraud -- it says, that fraud, and  
11 that fraud means the fraud that enabled the alien to  
12 procure a visa, which this alien procured in 1978. How do  
13 you get from that to saying that the Attorney General  
14 cannot take into account her view of a different fraud,  
15 i.e., one that happened in 1982 that led to the  
16 procurement of naturalization papers?

17 Even if you're going to say they're all part and  
18 parcel of the same thing, I don't see how you escape the  
19 language.

20 MR. HOM: If we look at the initial language of  
21 241(a)(1)(H) on page 5a, the provisions of this paragraph  
22 relating to the deportation of aliens within the United  
23 States on the ground that they were excludable at the time  
24 of entry as aliens, described in section 1182(6)(C).

25 So if you look at the classification described

1 in 212(a)(6)(C), which is on the petitioner's brief at  
2 page 2a, the language there states -- misrepresentation is  
3 the caption -- any alien who by fraud or wilfully  
4 misrepresenting a material fact seeks to procure or has  
5 sought to procure or has procured a visa or other  
6 documentation or entry into the United States, those words  
7 there clearly show that acts could have occurred not just  
8 at the time of entry, but in the past in seeking the visa,  
9 or actually having obtained the visa, so it's very clear  
10 that the statute that grants the waiver is not limited to  
11 acts occurring at the time of entry, Your Honor.

12 QUESTION: It's not the statute that grants the  
13 waiver, it's the statute that makes the immigrant eligible  
14 to request a waiver.

15 MR. HOM: That's correct, Your Honor.

16 QUESTION: Yes.

17 QUESTION: Right.

18 MR. HOM: And the historical development of the  
19 act -- of the waiver --

20 QUESTION: It's still referring to the fraud  
21 that led him to have procured the visa.

22 MR. HOM: Well, that's not inconsistent with  
23 212(a)(6)(C). The statutory language talks and uses words  
24 in terms of present tense and past tense, so that those  
25 acts which are related to the visa procurement, yes.

1           If there are other acts not related to the visa  
2 procurement, then he would be otherwise inadmissible and  
3 the waiver could be denied, so I don't see that as  
4 inconsistent with our position, and I think that that  
5 should lay to rest a lot of concerns that the waiver is  
6 carte blanche to let immigrants come in, commit heinous  
7 crimes, and get away with murder.

8           QUESTION: Mr. Hom, if we looked at it from this  
9 point of view, let's say that there's something ambiguous  
10 about this, and a judge is trying to determine what the  
11 statute means and says, well -- let's assume that one  
12 person who got into the United States without making any  
13 false representations, no fraud, and once in the United  
14 States engaged in the very same acts as occurred here,  
15 such a person would be deportable, but if in addition to  
16 engaging in those acts there had been a fraud at entry,  
17 that person is eligible for a waiver.

18           MR. HOM: No --

19           QUESTION: Is that a reasonable way to --

20           MR. HOM: No, Your Honor.

21           QUESTION: -- to construe what Congress did?

22           MR. HOM: No, Your Honor. The waiver that is  
23 being -- the fraud that is being waived is the fraud to  
24 come to the United States. Frauds that are unrelated that  
25 occur afterwards -- tax fraud, welfare fraud -- all those

1 are separate, independent acts which render the immigrant  
2 deportable under different sections of 241(a).

3 QUESTION: What about the 1982 fraud here, the  
4 citizenship?

5 MR. HOM: Citizenship, on the application  
6 Mr. Yang repeated the same statements, that his wife is  
7 Mary Wong --

8 QUESTION: But he repeated them 4 years later,  
9 didn't he?

10 MR. HOM: That's correct, Your Honor. This is a  
11 case of an assumed identity, where the immigrant comes to  
12 the United States with a new identity as the husband of  
13 Mary Wong, and everything that he does after that is as  
14 the husband of Mary Wong.

15 QUESTION: Well, he's just continuing to make  
16 fraudulent representations, then.

17 MR. HOM: He repeats the same statement, Your  
18 Honor, that he is the husband --

19 QUESTION: Well, but, you know, I can repeat the  
20 same statements to defraud people time after time. That  
21 doesn't mean that all are subsumed under the first one.  
22 Each repetition is a new fraudulent representation.

23 MR. HOM: Well, Your Honor, the -- the INS has  
24 always interpreted the waiver to waive the conditions of  
25 the fraud, and until this case there has never been a

1 slicing up of the fraud into subcomponents.

2 QUESTION: Well, but the INS didn't interpret it  
3 this way in this case.

4 MR. HOM: That's --

5 QUESTION: So I mean, this was not the Attorney  
6 General's view. This was the view, the Ninth Circuit said  
7 the Attorney General has to do this.

8 MR. HOM: The Ninth Circuit looks at Mr. Yang's  
9 assumed identity as one fraud rather than individual acts.

10 QUESTION: And why -- where did they get the  
11 authority to do that, when the discretion resides in the  
12 Attorney General, not the Ninth Circuit?

13 MR. HOM: Correct, but the statutory language  
14 and the intent of Congress in passing the waiver was to  
15 not only help displaced refugees, but there's a subsection  
16 that granted the waiver to people with family relations  
17 who may not have --

18 QUESTION: It didn't grant the waiver. I  
19 think --

20 MR. HOM: Excuse me.

21 QUESTION: It -- they could have the threshold,  
22 and then the Attorney General may grant the waiver.

23 MR. HOM: That's correct, and if -- after the  
24 threshold is made, the Attorney General looks at other  
25 factors other than the fraud, because that is the act for

1 which he is being forgiven for.

2 QUESTION: But surely the Attorney General can  
3 look at a fraud that was committed 4 years after entry.

4 MR. HOM: But the --

5 QUESTION: Can the Attorney General look at a  
6 fraud that was committed 4 years after entry?

7 MR. HOM: Only if it is not related to the  
8 initial entry.

9 QUESTION: Well, where do you get that from?

10 MR. HOM: The concept of the fraud that exists  
11 at the time of entry. This is the same fraud that exists  
12 at the time of entry.

13 QUESTION: Well, it's the same fraudulent  
14 statement, but it's repeated 4 years later.

15 MR. HOM: And for the same purpose of his  
16 immigration status. It's not to --

17 QUESTION: It wasn't to obtain entry, it was to  
18 obtain citizenship, so it isn't the same purpose.

19 MR. HOM: Every immigrant, Your Honor, comes to  
20 America for the purpose of settling here permanently, and  
21 citizenship is the ultimate, is the final step in his  
22 process in coming to the United States.

23 QUESTION: Even on your theory of relationship,  
24 how do you relate the misrepresentation about the  
25 financial status?

1 MR. HOM: Well, that was a matter that the court  
2 of appeals remanded back to the immigration judge for  
3 redetermination. Cases have held that false statements to  
4 the immigration judge are properly considered in the  
5 exercise of discretion.

6 QUESTION: And you agree with that?

7 MR. HOM: The general rule that false statements  
8 to the judge --

9 QUESTION: You agree with that? You do not  
10 contest that general rule?

11 MR. HOM: Statements to the judge, correct.

12 QUESTION: Mr. Hom, could you help me with the  
13 statute here? I have trouble reading it. It's on page 5a  
14 and 6a of the Government's brief, and the crucial  
15 provision, the subsection (ii), Roman (ii), reads, was in  
16 possession of an immigrant visa or equivalent document and  
17 was otherwise admissible to the United States at the time  
18 of such entry except for those grounds of inadmissibility  
19 specified under paragraphs (5) (A) and (7) (A), and 1182(a)  
20 of this title, which were a direct result of that fraud or  
21 misrepresentation -- what is that?

22 MR. HOM: Yes.

23 QUESTION: That requires an antecedent, and I  
24 scanned this statute for any prior reference to fraud or  
25 misrepresentation, and I can't find any.



1 MR. HOM: Yes, what that refers to, Your Honor,  
2 is that if the immigrant had applied -- you have two  
3 situations. The immigrant applies for his immigrant visa  
4 based upon a labor certification, for example, and he --  
5 if he properly processed that labor certification, but  
6 submitted fraudulent documents, then that is the kind of  
7 fraud that directs -- directly results from that act.

8 QUESTION: So you say it should read, except for  
9 those grounds of inadmissibility specified under  
10 paragraphs (5) (A) and (7) (A) which required labor  
11 certification.

12 MR. HOM: Correct.

13 QUESTION: And section 1182, which is  
14 requirement of a visa.

15 MR. HOM: Correct.

16 QUESTION: Except for those grounds -- let's  
17 see, which involved fraud or misrepresentation and were a  
18 direct result thereof, is how it should have read.

19 MR. HOM: I'd like to -- I think I hear what  
20 Your Honor's saying --

21 QUESTION: My problem is the word that, a direct  
22 result of that. What fraud or misrepresentation? There's  
23 no fraud or misrepresentation mentioned.

24 MR. HOM: Well --

25 QUESTION: Isn't it right that that's in (6) (C)?

1 MR. HOM: Correct. That's --

2 QUESTION: And the reason that it's in (6)(C) --  
3 the reason that it's in (6)(C), as I read it, is in the  
4 preceding codification the words fraud and representation  
5 were at the top of (f), and they were broken out by  
6 Congress and moved to (6)(C), and so the antecedent for  
7 that is now (6)(C), is that right?

8 MR. HOM: Thank you, Your Honor, but there's  
9 also one other aspect of that. If an immigrant had bought  
10 the visa outside of the consular context instead of in the  
11 process of applying for an immigration visa --

12 QUESTION: But is what I said right? I don't  
13 want you to agree if it's not right.

14 MR. HOM: Oh, that's correct, but there's  
15 another aspect to it. There are two explanations. I  
16 was -- that's one, and the second one is, where the  
17 fraudulent documentation, say the fake passport was a  
18 counterfeit that he'd purchased down the street, so it was  
19 not part of a fraud to the United States Government.

20 As Your Honor had pointed out earlier, if he had  
21 divorced his wife and had not made that representation or  
22 showed that divorce document to the consular officer at  
23 his visa interview, then that would not be the kind of  
24 fraud that's encompassed and would not be the kind of  
25 fraud that would be forgiven by this waiver, so this is

1 not a charter of amnesty.

2 There are cases of frauds and bad acts that may  
3 be punished, and properly so. There are criminal  
4 sanctions that would be available, and once criminal  
5 convictions are obtained, then the alien becomes  
6 inadmissible under various sections of 212(a), so that the  
7 integrity of the immigration system is preserved. There  
8 are not a whole lot of waivers granted under this  
9 particular section.

10 QUESTION: Mr. Hom, there's one problem that I  
11 have with your notion that the consistent repetition of  
12 the same misrepresentation is a wash. As long as you say  
13 the same thing every time, then it all must be forgiven.

14 The statements about Mary Wong who was a dead  
15 soul, that were repeatedly made on documents signed by  
16 these people, were they not indictable crimes as false  
17 statements made to the United States?

18 MR. HOM: Possibly, but that's the very waiver  
19 that is -- the reason why the waiver is there.

20 QUESTION: So what you're saying is that you  
21 could have these people engage in repeated criminal  
22 conduct and nonetheless the Attorney General must ignore  
23 that in determining their eligibility for a waiver.

24 MR. HOM: Yes, if the fraudulent conduct relates  
25 back to the initial one. The appropriate solution --

1 QUESTION: So if there is any ambiguity you say  
2 yes, we should interpret Congress to mean that people who  
3 have committed in the United States repeated criminal acts  
4 nonetheless must be eligible for this waiver.

5 MR. HOM: Incorrect. The key phrase was  
6 eligible for the waiver. Subparagraph (ii) specifically  
7 states that if --

8 QUESTION: That's what I said, eligible for the  
9 waiver.

10 MR. HOM: Right, but he would not be eligible  
11 for the waiver because he would have been convicted of  
12 crimes involving moral turpitude, which are other grounds  
13 enumerated in subparagraph (ii) which are not listed  
14 there, but that's what the reference --

15 QUESTION: So what you say is, although this  
16 conduct, signing a false statement, could be indicted, if  
17 it's not indicted, it must be treated as if it didn't  
18 happen.

19 MR. HOM: Not necessarily indicted. If there  
20 are -- if there's an admission that he had committed the  
21 elements of the act that involves --

22 QUESTION: Is there -- is -- are you denying  
23 that Mr. Yang signed papers and presented them to  
24 immigration officials saying that he was the husband of  
25 Mary Wong, a citizen of the United States?

1 MR. HOM: He did sign those documents, and  
2 that's the purpose of the waiver.

3 QUESTION: And was it not true that at the time  
4 he signed those documents Mary Wong was a very dead soul?

5 MR. HOM: That's correct. His wife, Mr. Yang's  
6 wife had assumed the identity of Mary Wong. He did not  
7 represent that he was married to a deceased person. He  
8 was saying that his wife, his current wife, who used a new  
9 name, and that's why I've been trying to explain that this  
10 is a matter of an assumed identity as opposed to a --  
11 another type of elaborate fraud, as Your Honors have  
12 eluded to.

13 QUESTION: Well, it seems to me extraordinary  
14 that Congress would mandate that the Attorney General not  
15 consider what is concededly repeated crimes of false  
16 statements to the United States Government.

17 MR. HOM: Well, Your Honor, in this case there  
18 was one immigration examiner who was indicted and  
19 convicted for having received bribes, or soliciting bribes  
20 in this respect, and that's in the brief. If there was  
21 criminal acts that could be charged against Mr. Yang, I'm  
22 pretty sure that the FBI would have ferreted out those  
23 facts --

24 QUESTION: Well, I've just asked you, did he  
25 sign a document in which he said he was the husband of

1 Mary Wong?

2 MR. HOM: Yes, he did, but --

3 QUESTION: And he could not have been the  
4 husband of Mary Wong, as Mary Wong was dead.

5 MR. HOM: That's correct, Your Honor. If there  
6 was evidence to lead to a criminal conviction, one should  
7 have been brought, and then he should have been convicted  
8 and, if convicted, deported on that basis, and not  
9 deported based upon some exception or some misconstruction  
10 of a statute that has very salutary purposes behind it  
11 just because of potential prosecution.

12 If there was a prosecution, then he renders  
13 himself not to be otherwise admissible within the language  
14 of subparagraph (ii) and the person could be deported, so  
15 it's not a matter of denying the waiver.

16 QUESTION: But something he does 4 years  
17 afterwards, that wouldn't bear on his admissibility, would  
18 it?

19 MR. HOM: The waiver focuses on two points.  
20 Number 1, at the time of entry, is he within this  
21 classification of having committed this fraud, so he  
22 commits this one particular fraud, and he's warranted with  
23 it and it becomes an individual part of his new  
24 identity -- there's just no way he could shake that.

25 So when the person applies for his social

1 security card he puts down on the form he's married. When  
2 he applies for -- when he submits his income tax returns  
3 he says he's married, and I'm sure he put down he was  
4 married to Mary Wong.

5 All these are incidental aspects of his having  
6 assumed this new identity in coming to America, and not  
7 some separate independent fraud that has no relationship.  
8 If he committed other frauds, of tax fraud, for example,  
9 then he would be deportable on those independently, and so  
10 we're not talking about a denial of a waiver in those  
11 cases, but the fact that he's deportable on some other  
12 ground.

13 QUESTION: Well, you're saying, as you've said  
14 before during your argument, that he can repeat the same  
15 fraud unendingly and there are no consequences to it.

16 MR. HOM: And that's the purpose --

17 QUESTION: And the Attorney General must grant a  
18 waiver.

19 MR. HOM: Unless there are other adverse  
20 factors, other than that statement, Your Honor.

21 QUESTION: Just repeating the fraud is not  
22 sufficient.

23 MR. HOM: That's our position, Your Honor, the  
24 same fact.

25 The purpose of the waiver is not to relieve

1 Mr. Yang of any obligations. He could still be prosecuted  
2 criminally. His citizenship was denied.

3 QUESTION: Would you comment on -- go back to  
4 sort of a basic point of the -- the statute in -- before  
5 its most recent amendment said that the provisions of 241  
6 and so forth and so on shall not apply to an alien  
7 otherwise admissible. Now it says with respect to those,  
8 the Attorney General may, in her discretion, waive.

9 How do you get around the fact that one was a  
10 mandatory waiver and the other is a discretionary waiver?

11 MR. HOM: At the time there was a mandatory  
12 waiver of deportation. There is also a discretionary  
13 waiver for exclusion, and the Immigration Service's  
14 interpretation or application of the discretionary waiver  
15 was also to disregard the fraud that renders him  
16 inadmissible in deciding discretion, so that's the stage  
17 that was set when Congress in 1981 passed the new  
18 legislation to add on the word discretion for the  
19 deportation waiver. It conforms --

20 QUESTION: And to take out the words, "shall not  
21 apply."

22 MR. HOM: Correct, to make it discretionary, but  
23 nevertheless, that did not change Congress' understanding  
24 as to the interpretation, the proper application of the  
25 statute, because the Immigration Service had consistently



1 in the Alonzo case in 1979, cited in our brief, where the  
2 Immigration Service said, yes, frauds --

3 QUESTION: So the change meant absolutely  
4 nothing, in your view.

5 MR. HOM: Relative to the initial fraud,  
6 correct. It would permit the Attorney General to look at  
7 other factors, and we see from the discussion this morning  
8 that there are other factors that should render an alien  
9 inadmissible -- excuse me, that should result in the  
10 waiver being denied, even though it does not render the  
11 alien deportable and inadmissible. So there are acts  
12 which don't amount to a deportable act, but which  
13 nevertheless I think we are agreed are reprehensible acts  
14 and should be punished with the waiver being denied.

15 But in this particular case, we have to focus on  
16 the family. The waiver was for the purpose, was designed  
17 for the purpose of preserving families.

18 QUESTION: What you're saying is that under the  
19 old statute reprehensible acts that were not sufficiently  
20 serious to be an independent ground of deportation could  
21 not be taken into consideration.

22 MR. HOM: Yes, Your Honor.

23 QUESTION: That they may now be taken into  
24 consideration. That, you say, is the --

25 MR. HOM: Correct.

1 QUESTION: -- is the change.

2 MR. HOM: And there are some acts that are so  
3 reprehensible that even before the 1981 amendment to make  
4 it discretionary --

5 QUESTION: Yes.

6 MR. HOM: -- we see that persons who assisted in  
7 Nazi persecution or engaged in genocide were not permitted  
8 to apply for the waiver, and that was before it was made  
9 discretionary, so there were people who covered up their  
10 past involvement and came to the United States after World  
11 War II, and these people certainly should be thrown out of  
12 the country, but because the fraud was being forgiven, the  
13 INS had no way to deport those people. They had the  
14 relatives, and the waiver had to be granted.

15 So Congress in 1978 added on paragraph (4) (D)  
16 relating to genocide and said those people, they do such  
17 terrible things, they don't even get a chance to talk  
18 about a waiver.

19 Other people on the other hand, U.S. citizens'  
20 parents, children, spouses, they have a chance to ask that  
21 their loved ones be forgiven so that they may stay in this  
22 country, and that's the focus.

23 It's not to reward bad acts, but to preserve  
24 family ties, to consider the feelings of U.S. citizens,  
25 and not the alien who committed the fraud.

1 QUESTION: But I think your opponent agrees that  
2 there was -- there would have been discretion to decide  
3 the case the other way, take into -- give a greater weight  
4 to the family ties and all the rest. Am I wrong about  
5 that?

6 MR. HOM: Well, in the determination of  
7 discretion the depth of the family ties certainly would be  
8 a factor.

9 QUESTION: In other words, the Attorney -- the  
10 Immigration Service could have said, well, I think there  
11 were two separate frauds. The 4-year-later business  
12 relating to citizenship, I'll treat that as separate.  
13 Nevertheless, I think these family ties are so strong, and  
14 he's such a successful businessman and all these other  
15 things, I'm going to grant the waiver. They could have  
16 granted the waiver even if there are two separate frauds.

17 MR. HOM: That's correct.

18 QUESTION: Okay.

19 MR. HOM: That's correct.

20 Thank you.

21 QUESTION: Thank you, Mr. Hom.

22 Ms. Brinkmann, you have 3 minutes remaining.

23 REBUTTAL ARGUMENT OF BETH S. BRINKMANN

24 ON BEHALF OF THE PETITIONER

25 MS. BRINKMANN: Thank you, Your Honor. There

1 are two points I'd like to make. One goes to the  
2 separation of these frauds. It's clear these are separate  
3 frauds because they're false statements made for -- to  
4 obtain different types of benefits, certainly for  
5 naturalization.

6 QUESTION: Let me just interrupt if I may.  
7 Isn't it also true you'd take the same position even if  
8 they were the same fraud?

9 MS. BRINKMANN: That's right, Your Honor. I  
10 just wanted to respond to Justice Ginsburg's concern about  
11 the possible criminal prosecution. It's clear that --  
12 well, depending on the actual facts that haven't been  
13 fully investigated, that they would have to be for a  
14 criminal prosecution.

15 There are at least three provisions in title 18  
16 that could give rise to criminal prosecution. 1001 for  
17 false statements to a U.S. agency, also 1015 having to do  
18 with fraud concerning naturalization, and then 1028 has to  
19 do with fraud related to identification documents, and  
20 depending on the scope of respondent's participation in  
21 the purchase of the fraudulent passport and birth  
22 certificate, that could also apply.

23 And in sentencing, Your Honor --

24 QUESTION: Some of those would also apply to the  
25 original fraud in obtaining entry in the first place,

1 right?

2 MS. BRINKMANN: That's Your -- correct, Your  
3 Honor.

4 QUESTION: So it doesn't prove anything. You  
5 acknowledge that that's waivable. The later one may be,  
6 too.

7 MS. BRINKMANN: But there's certainly factors  
8 that can be taken into account by the Attorney General.  
9 It's not that the Attorney General has to prosecute and  
10 imprison people rather than deporting them. Certainly if  
11 they can be taken into account, for example, in sentencing  
12 simply uncharged counts can also be taken into account  
13 under this waiver provision.

14 QUESTION: When the Attorney General forgets  
15 about this initial fraud as the policy is, he doesn't then  
16 prosecute it criminally, I assume. He both allows the  
17 application under this provision and chooses not to  
18 prosecute, I take it.

19 MS. BRINKMANN: I can't speak to that, Your  
20 Honor. I'm not aware of all instances.

21 The other point I wanted to make had to do with  
22 the textual question about otherwise admissible. The --  
23 that term goes to other categories of people that are set  
24 forth in section 212 in 1182 as it's codified, of grounds  
25 of inadmissibility, excludability.

1           That has to do with categories that are related  
2 to health, to criminal history, stow-aways, smugglers,  
3 national security reasons, those are all reasons that  
4 statutorily an alien could be inadmissible, and that is  
5 what gives meaning to those words, otherwise admissible,  
6 in the statute.

7           Thank you, Your Honor.

8           CHIEF JUSTICE REHNQUIST: Thank you, Ms.  
9 Brinkmann. The case is submitted.

10           (Whereupon, at 12:02 p.m., the case in the  
11 above-entitled matter was submitted.)