OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

# THE SUPREME COURT

# OF THE

# UNITED STATES

CAPTION: JANET RENO, ATTORNEY GENERAL, ET AL., Petitioners v. AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ET AL.

CASE NO: 97-1252 C.2

PLACE: Washington, D.C.

DATE: Wednesday, November 4, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

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JANET RENO, ATTORNEY GENERAL, :
ET AL., :
Petitioners :
v. : No. 97-1252
AMERICAN-ARAB ANTI- :
DISCRIMINATION COMMITTEE, :
ET AL. :

- - - - - - - - - - - - - - - - - - -X

Washington, D.C.

Wednesday, November 4, 1998

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

MALCOLM L. STEWART, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

DAVID D. COLE, ESQ., Washington, D.C.; on behalf of the Respondents.



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C O N T E N T S





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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 97-1252, Janet Reno v. American-Arab Anti-Discrimination Committee.

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE PETITIONERS

MR. STEWART: Mr. Chief Justice, and may it please the Court:

Congress has legislated repeatedly to streamline the process by which decisions concerning the admission and removal of aliens are reviewed in the courts. Consolidation of judicial review and avoidance of piecemeal litigation have been integral features of past legislative measures. The 1996 immigration reform statute is Congress' most recent effort to achieve those goals.

Our position in the present case, however, does not depend on the existence of any special rule for immigration matters. Rather, as applied here the effect of the 1996 act is simply to reaffirm the generally applicable rule that the filing of administrative charges is not a final agency action subject to immediate judicial review.

Indeed, if respondents have identified no case,

either in the immigration context or otherwise, in which a court has entertained a constitutional challenge to an agency's decision to commence administrative proceedings. Dismissal of --

QUESTION: Mr. Stewart, may I ask you, what if the statutory scheme precluded review of a constitutional claim such as these respondents make?

MR. STEWART: If the statutory scheme altogether precluded judicial review, that is not only at the present time but after the entry of a final order of deportation --

QUESTION: Right.

MR. STEWART: -- the Court has held that preclusion of all judicial review would raise a serious constitutional question. That's not the same thing as --

QUESTION: We don't know at this juncture if your interpretation of the statute is correct. What other mechanisms exist for review of their constitutional claim?

MR. STEWART: Well, we certainly know that there has always -- both before and after the 1996 act there has been a provision authorizing a petition for review in the court of appeals after the entry of a final order of deportation, and I think there's general agreement that a petition for review --

QUESTION: But it requires a factual development

in their case.

MR. STEWART: And if the -- if there were ultimately final orders of deportation entered, and the respondents raised a constitutional challenge based on selective enforcement, and if the court of appeals then concluded that fact-finding was necessary in order to resolve the constitutional issue, it would then be required to determine whether a mechanism existed under the applicable statute.

Now, we believe 28 U.S.C. 2347(b)(3) would provide that mechanism, but --

QUESTION: It might provide the mechanism if the issue is properly raised, but can the issue be properly raised when it would not be based on anything in the record of the proceedings at the administrative level?

MR. STEWART: I think it would be properly raised in the sense that the respondents would claim that execution of -- if the respondents claimed that execution of the deportation order would violate their constitutional rights because the charges were initiated on the basis of unconstitutional considerations, I think that is a claim that would properly be before the court of appeals.

QUESTION: So is that the Government's position, that we may rely on that representation that you have just



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made about the legal position that the Government would take in those circumstances?

MR. STEWART: That is correct. That is not to say that we would concede either in the present case or in any other case that fact-finding actually is required in order to determine the merits of the claim.

QUESTION: But you would concede that the issue may properly be raised.

MR. STEWART: That's correct.

QUESTION: Well, Mr. Stewart, these cases were pending at the time of the enactment of IIRIRA, were they not?

MR. STEWART: That's correct.

QUESTION: So isn't the habeas corpus relief provided for in 1105(b) available?

MR. STEWART: Well, habeas corpus under the former statutory scheme was only in cases of orders of exclusion. It wouldn't have applied to orders of deportation. If --

QUESTION: But as I -- perhaps I don't have it written correctly here. It says, any alien held in custody pursuant to an order of deportation.

MR. STEWART: Well, if and when the aliens were held in custody that would be --

QUESTION: Well, surely they must be held in

custody before they're -- you can't deport them without having them in custody.

MR. STEWART: Well, the only -- the basis for -- if you look at page 1a of the appendix to the Government's brief, former section 1105a(a) was -- it's entitled generally Judicial Review of Orders of Deportation and Exclusion, and it says, Exclusiveness of Procedure, and then it says, the procedure prescribed by and all the provisions of chapter 158 of title 28, which is the Hobbs Act, says, shall apply to and shall be the sole and exclusive procedure for the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States.

And as the legislative history of the 1961 amendments to the Immigration and Nationality Act make clear, that provision was enacted in 1961 to replace a former system under which multiple avenues of review had been available for challenge by orders of deportation.

QUESTION: What's the purpose of 1105a(a)(9), which talks about habeas corpus for people held in custody pursuant to an order of deportation?

MR. STEWART: I would assume that would address the situation in which the alien challenged the detention itself, perhaps because it was prolonged, rather than challenging the validity of the final order of

deportation, because as I say the legislative history of the 1961 amendments to the INA indicate that the provision for Hobbs Act review in the court of appeals was specifically intended to replace prior duplicative avenues of review.

QUESTION: It's very bad English if that's what it means, because it says any alien held in custody pursuant to an order of deportation may obtain judicial review thereof. Now, that thereof refers to an earlier noun, and the only earlier noun available is order of deportation.

MR. STEWART: I think that is correct looking at that provision in isolation, but I think that provision is viewed in conjunction with (a)(1), which says specifically that judicial review in the court of appeals under the Hobbs Act is the only means of challenging the final order of deportation itself.

And again, one of the things I'd emphasize is that uncertainty as to what precisely would be the proper avenue for reviewing the final order of deportation really shouldn't distract the Court from the question of whether the instant suit was properly commenced.

That is, even though there might be some disagreement between the parties as to precisely how a judicial review of the final order would be carried out, I

think there is a common agreement that final orders of deportation are judicially reviewable.

QUESTION: Well, to the extent that we have to give meaning to a statute that is certainly ambiguous in part as to how it works in the interim, period, if no review is available of these constitutional claims, that might influence our interpretation of the statute. That's my concern.

MR. STEWART: It might influence -- I think to take a worst case scenario from the Government's standpoint, if the Court believed that Congress had unambiguously foreclosed all judicial review of respondents' -- of selective enforcement claims either before or after the entry of a final order, and if the Court held that respondents were constitutionally entitled to judicial review so that the deprivation of all review would be a constitutional violation, the Court would then have to determine what the proper remedy was, and we would submit that it is much more consistent with the overall scheme of the immigration statute and with general principles of administrative law that review be provided at the end of the proces.

Again, we're not asking for a special rule for immigration cases, but just --

QUESTION: May I ask in that regard, you rely in



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part on 2347(b)(3), and I understand you to say you think that would be available even though there would have been a hearing before the agency.

MR. STEWART: Yes, because there would not be a hearing with respect to the issues.

QUESTION: On a particular issue, on a particular constitutional issue, so you say they -- now, what is the legal effect of your advice to us on that interpretation of 2347(b)(3)? Would that preclude the Department of Justice when the case actually reaches that stage from making a contrary argument, do you think?

MR. STEWART: I don't know that it would be appropriate for a current Department of Justice employee ever to purport absolutely to bind future Department of Justice employees.

Certainly, if the Court wrote an opinion saying that the instant suit was barred based on its reading of the statute to allow a judicial review at the end of the day, the Court's opinion would give the respondents the necessary assurance that review would ultimately be available, whatever the binding effect of my representation might be.

And again, the other point I want to make is, if it -- if the Court at the end of the day concluded that section 2347(b)(3) simply was unambiguously unavailable to

the aliens, and that there was -- and if the Court further concluded that the aliens were constitutionally entitled to judicial review of their selective enforcement claims such that a denial of fact-finding would be a constitutional violation, the obvious remedy would be for the Court to fashion an appropriate mechanism similar to the section 2347(b)(3) transfer.

That seems to us a remedy for a hypothetical violation that is far more in keeping, again, both with the overall structure of the immigration laws --

QUESTION: Do you think the Court could do that if the Court concluded that it was constitutionally compelled?

What if the Court merely concluded, as you sort of admit as of now, that it's a very serious constitutional doubt on the issue?

MR. STEWART: I think if the Court concluded that there is a serious constitutional doubt, then it would presumably make every effort to read the statute in order to allow for such review, and I think whether or not our reading of the statute is the one that the Court would consider to be the better one, our reading is certainly reasonable enough that a court could in good conscience adopt it in order even to assuage a serious constitutional doubt.



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QUESTION: And your reading basically is, when the agency has not held a hearing on the particular issue, then (b)(3) triggers.

MR. STEWART: And here it's not simply -- I think that's right, but here it's not simply the particular issue, it is the particular action, namely the filing of charges. At the end of the day, the selective enforcement claim would be a challenge to the decision to bring charges in the first instance.

QUESTION: Well, can we proceed on the assumption that Mr. Cole and his clients cannot make in the administrative proceeding the record and the showing that's necessary for them to sustain -- support their legal claim?

MR. STEWART: I think we can make that assumption. That is, the immigration judge and the Board of Immigration Appeals are not authorized to adjudicate claims of selective enforcement.

Now, it is possible that in the course of trying the deportation charges evidence would emerge that would be relevant to the final resolution of the selective enforcement claims, but I think it's correct we can't count on that happening.

QUESTION: And to the extent that there is a temporal urgency to First Amendment claims, then we have



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to proceed on the further assumption that a First Amendment claim is likely to be delayed pending the administrative hearings, the adjudication of the First Amendment claims.

MR. STEWART: Well, I mean, I think in a sense your question depends upon the empirical premise that if somebody files a lawsuit alleging selective enforcement, that lawsuit is likely to be finally resolved before the deportation proceeding would be resolved if the matter went forward in that manner, so I don't know that it's necessarily the case that allowing an immediate selective enforcement challenge would speed up ultimate resolution of the First Amendment issue.

But the second point we would make is that there is no constitutional right to immediate adjudication of First Amendment claims simply to eliminate subjective uncertainty as to what a person's rights are.

That is, here, the respondents do envision a potential concrete harm, namely the ultimate entry of a final order of deportation against them, which they say would be in violation of their First Amendment rights.

But to the extent that they're worried about that harm, they clearly have an adequate remedy, because they can file a petition for review of the final order of deportation itself.



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The only harm that they're suffering in the interim is subjective uncertainty as to what the state of the law is, exactly what they can do, which they characterize as chill, and --

QUESTION: Mr. Stewart, I take it from everything you've said here and in your brief that you are accepting that there is such a claim as selective enforcement, so that you are not urging in any way what, for example, this Court held in the Whren case, that you don't look behind what the officer does for his motive.

MR. STEWART: I think we are accepting there is such a thing as a selective enforcement claim. I don't think we would accept the principle that whenever a selective enforcement claim is made out the automatic remedy would be vacatur of the final order of deportation.

QUESTION: Well, there's also a question of just what is selective enforcement in an immigration context, since the immigration statute itself is laced through with distinctions as to nationality.

MR. STEWART: That's correct. I mean, in the present case, at the time the initial deportation charges were filed the McCarran-Walter Act made membership in various forms of hostile organizations a separate and independent ground for deportation, so the very basis of selectivity that the respondents claim was

constitutionally impermissible was itself-recognized by Congress as a valid basis upon which deportation decisions could be made.

So while we could imagine extreme situations such as the agency deciding solely on the basis of race to file charges against one person and not another, it doesn't follow that what might be an impermissible basis of selection in other contexts would be an impermissible basis for selection in the --

QUESTION: Mr. Stewart, is there anything other than imagination? Is there any experience? Have there been any past cases where it was charged that the Immigration and Nationality Act was being enforced in an impermissibly selective way against people of a particular race, religion, political belief?

MR. STEWART: I don't remember any right now. I know that there was a challenge brought by a Mr. Rafidi in the D.C. Circuit that was a challenge to the processing of his deportation charges or exclusion charges. I don't remember whether that included a claim of selective enforcement.

There has certainly not been a history of frequent claims of selective enforcement. I think part of the reason for that is that people understand that immigration officials have very wide discretion, that



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matters regarding the admission and the ultimate removal of aliens are largely entrusted to the political branches, and therefore people understand that bases for selection that might appear unwarranted in other contexts would not be valid grounds for constitutional claims in the deportation context.

QUESTION: Mr. Stewart, these particular respondents, the deportation proceedings have been going on for some time, have they not? How many years now?

MR. STEWART: Approximately, a little over 11-1/2 years.

QUESTION: And do we still have all of the respondents before us, or has the situation changed in 11 years?

MR. STEWART: The situation has changed. We have referred to the eight respondents as the six and the two. The two are Hamide and Shehadeh, and they are permanent resident aliens as to whom the deportation charges are actually based upon the terrorist activity, the support of the PFLP.

With respect to the six, actual charges were based on routine status violations, overstaying a visit, failure to maintain student status, and the allegation was that we would not have pursued those charges but for there are ties to the PFLP.

With respect to two of the six, two of the six have obtained legalization, and consequently they would not -- they would no longer be subject to the routine status violations, so in a sense their claim of selective enforcement is moot.

Now, as the respondents' counsel has pointed out, there does remain at least a theoretical possibility that we could seek to deport them based upon the actual affiliation with the PFLP, and in that sense it's not altogether out of the question that the issues raised by this case could affect them, but --

QUESTION: Mr. Stewart --

QUESTION: None of these people are in custody.

MR. STEWART: That's correct.

QUESTION: Thank you.

QUESTION: Would you walk us through the Government's position in this case, by statutory provision?

I guess the first one we have to look to, because this came up in the transitional period, the first provision we have to look to is subsection (g) --

MR. STEWART: That's correct.

QUESTION: -- of the new law.

MR. STEWART: That's correct, which starts at the bottom of page --



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QUESTION: 17 --

MR. STEWART: 17a. That's correct.

QUESTION: Okay, so that's where we start.

MR. STEWART: That's correct.

QUESTION: Now, why -- and you say that this somehow refers us to the old 1105.

MR. STEWART: Well --

QUESTION: Why is that? I mean, it says except as provided in this section --

MR. STEWART: That --

QUESTION: -- not in the old 1105.

MR. STEWART: That's correct. Now, with respect to cases in which deportation proceedings are commenced after the effective date of the act, the phrase, except as provided in this section, can be given its literal meaning. That is, the only judicial review that will be available is judicial review under new 8 U.S.C. 1252, which is entitled, Judicial Review of Orders of Removal.

QUESTION: Yes.

MR. STEWART: It requires final order of deportation.

QUESTION: But it can't be given that meaning --

MR. STEWART: It can't be given that meaning with respect to the transition cases.

QUESTION: Why?



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MR. STEWART: Because if you look at the transition provisions, which are on page -- the bottom of page 18a and the top of page 19a of the Government's brief, it says, general rule that new rules do not apply.

Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title 3(a) effective date, the amendments made by this subtitle shall not apply, and the proceedings, including judicial review thereof, shall continue to be conducted with regard to such amendments.

QUESTION: Without regard.

MR. STEWART: Without -- I'm sorry, without regard to such amendments, which means that if and when a final order of deportation is entered against these respondents, pursuant to the transition rule provisions, judicial review of the final order of deportation would be conducted pursuant to former 8 U.S.C. 1105a.

QUESTION: Well, but that assumes -- it seems to me you're reading (g) more broadly than it is written, as though it applies to all proceedings, and I don't read (g) that way.

MR. STEWART: Well, (g) by itself would not necessarily be given that meaning, but if you look at the middle of page 18 --

QUESTION: What do you think (g) applies to? It doesn't apply to all deportation orders. It only applies to the decision of the Attorney General to commence a proceeding, or the decision to adjudicate a case, not the result of the adjudication, the decision to adjudicate, and the decision to execute a removal order, not to make the removal order, but to execute it. Isn't that as narrow as it is?

MR. STEWART: I mean, I think that 1252(g) is not intended to provide a mechanism for judicial review. It's simply to make clear that particular types of claims can't be brought other than through the mechanism provided in the INA itself.

QUESTION: But you agree it's just certain narrow claims. It's not the whole order of deportation. It is just -- one of which types of claims happens to be the one here, where they're saying the very commencement of the proceeding was discriminatory. This relates only to those narrow decisions. Do you agree with that, or not?

MR. STEWART: No. I think whether or not the language was artful, I think that the intent was to run the gamut and to say anything having to do with --

QUESTION: Geez.

MR. STEWART: -- the conduct of outcome of --

QUESTION: Well --

QUESTION: It's a strange way to say it.

QUESTION: Yes.

QUESTION: To commence proceedings, adjudicate cases, or execute removal orders.

MR. STEWART: Well, I --

QUESTION: Those are --

QUESTION: Adjudicated --

QUESTION: -- very specific --

MR. STEWART: But I think what was happening is that former 8 U.S.C. 1105a, the old judicial review provision, said, this is the exclusive review provision for final orders of deportation, and that left us open to the claim that if what you were challenging was not the final order of deportation itself, but some preliminary stage along the way, that was not literally covered by the language of 1105a.

QUESTION: One could read the section we're talking about to kind of run the gamut, as you say, to commence proceedings, adjudicate cases, or execute removal orders, kind of from beginning to end.

MR. STEWART: That's exactly the way that we would read it, and we --

QUESTION: Well, what if we don't? What if we disagree with you and think it has a narrower meaning in

this subsection (g), and that it just applies to the Attorney General's decision to commence, adjudicate, or execute removal?

MR. STEWART: I think even if you read the provision more narrowly than we would, it certainly applies to this case, because it applies to --

QUESTION: Yes, it would apply here, but what about other situations?

QUESTION: Well, would you have to leap back to 1105? Couldn't you simply say it refers back to the new section?

MR. STEWART: No, I think that's correct. I think --

QUESTION: Yes, but even if you do that you've got to decide what the new section is. Is it section 306 of the revised statute, or is it 1242 of the code, and if you make it 1242, then you don't pick up 309, as you do.

You're quoting the transition rule that comes out of section 309 of the revised statutes. That's not part of 1242.

QUESTION: That's right.

MR. STEWART: No, that's correct.

QUESTION: And why doesn't the word, this section, refer to 1242 as amended?

MR. STEWART: Well, because the --

QUESTION: You just ignore 309(c), it seems to me.

MR. STEWART: I mean, we would certainly have no objection with saying -- and one of the things I would emphasize is that the ambiguity here is not in our view about whether the instant suit should be removed. It's about precisely how the review proceedings will be --

QUESTION: Well, the first question is, what do the words this section mean? It seems to me you've got two choices, either 306 of the revised statutes or 1242 of the code. You don't have 309, I don't think.

MR. STEWART: I don't think we have 309, but I think we have former 8 U.S.C. 11 --

QUESTION: Well, but then if you don't have 309, that doesn't apply. That doesn't affect your reading of (g).

MR. STEWART: Well, 309 I think does affect our reading of (g), because it says the amendments made by this subtitle, which include the new 8 U.S.C. 1252, shall not apply to judicial review of final orders of deportation entered in cases that were pending on the act's effective date.

QUESTION: But if you think 12 -- but if you think (g) does not apply to final orders anyway, then nine has no application to (g). If you're reading (g) more



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narrowly so that it doesn't apply to final orders, it applies only to the Attorneys General decision to commence, to adjudicate a case, or to execute a removal order. It doesn't apply to the final product, which is the decision regarding deportation.

MR. STEWART: I mean, we would be perfectly happy with that reading --

QUESTION: Then you wouldn't have to go -- then 309 wouldn't govern it, right?

MR. STEWART: That's correct, and -- well, 309 would still govern, because 309 would say, review will ultimately be conducted without regard to the 1996 a -- act, namely, under former 8 U.S.C. 1105a.

I mean, in a sense, the view you're postulating gets us to the same place, in that the ultimate result is, if and when there's a final order, review will be under 1105a, and your reading is a way of eliminating the textual ambiguity in the phrase, except in this section.

QUESTION: Yes.

QUESTION: Now, the Ninth Circuit read (g) as requiring it to go through all of 252 to see if the action could be maintained.

MR. STEWART: Right.

QUESTION: And it relied on (f)(2) -- (f)(1).

MR. STEWART: That's correct.

QUESTION: And what's the matter with that?

MR. STEWART: I think the problem with it is that (f)(1) is not itself an authorization of judicial review. It is phrased as a limit on injunctive relief. It doesn't identify any character -- any category of cases as being subject to review in the district courts.

Whether it's message is, even if a case is properly under review, the relief shall not extend beyond the alien who's actually been in proceedings, so the essence is, no class-wide relief, even if a court of appeals in an individual case concludes that a statutory provision, for instance, is unconstitutional, the only relief would be to set aside the order of deportation in that case rather than to enter an injunction against applying that provision to other aliens.

If I --

QUESTION: Is there any -- to go back -- can I go back to Justice Kennedy's first question -- do you remember the First Amendment question? And I'd like to ask, assuming for argument's sake -- I know you don't agree with the assumption -- that they had a valid claim of immediate irreparable First Amendment injury by going ahead with a deportation, could you not -- I want to know if you agree with this.

Could you not use principles such as have been



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found in Mathews v. Eldridge, Bowen v. City of New York, where this Court and other courts have said that an agency must waive its right to compel exhaustion where an issue is collateral, where there's serious harm, where the agency decision makes no difference?

MR. STEWART: I think the Court has said that exhaustion requirements will often be construed not to apply in such a way as to create the potential for irreparable harm. I don't think the Court has said that there is a constitutional right to come into court immediately, whenever you can show --

QUESTION: They haven't said constitutional right, but they have said, really which is a weaker case, that where there is irreparable harm, it's a collateral issue, and there's really -- it's separable from the case -- they said that in Mathews v. Eldridge, we won't require -- that is -- we're not just requiring it. The fiction is, the court forces the agency to waive its right to exhaustion.

That's at least one way it's been put, and I just wonder if in a real First Amendment case -- and theirs may be. They say it is -- that wouldn't be available to them. And maybe you don't have an answer to that, and that's understandable.

MR. STEWART: I mean, I think -- I think because

1252(g) unambiguously bars a suit, an immediate suit challenging the commencement of proceedings, the Court could order the agency to waive that protection only if the Court held that the respondents were constitutionally entitled to an immediate review of their claims, and even upon your hypothesis that there would be irreparable injury, we wouldn't agree that there is a constitutional entitlement to an immediate judicial forum.

If I may, I'd like to reserve the remainder of my time.

QUESTION: Very well, Mr. Stewart.

Mr. Cole, we'll hear from you.

ORAL ARGUMENT OF DAVID D. COLE

ON BEHALF OF THE RESPONDENTS

MR. COLE: Thank you, Mr. Chief Justice, and may it please the Court:

The Government in this case admittedly targeted plaintiffs for core political activity such as distributing magazines, belonging to a group, and donating funds to that group's lawful activities. It did so avowedly for the purpose of disrupting those political activities.

It now contends that plaintiffs cannot obtain a judicial ruling on whether they have a First Amendment right to engage in these activities for the entire period

of time that it takes the deportation process to run its course, even though the deportation process cannot address their First Amendment claims, nor develop the necessary facts.

QUESTION: It is not clear to me why the deportation process can't address their First Amendment claims. The Government seems to say that. You seem to say it. It's not clear to me why.

The whole basis for the deportation proceeding is that they have engaged in this activity. That presents it right fairly in the record. Why can't the court of appeals, on review of the order, say, well, this is a First Amendment problem?

MR. COLE: Well, in fact, Justice Kennedy, the basis for the deportation of six of the eight has nothing to do with, the ostensible basis has nothing to do with these political activities. The ostensible basis is that one student took too few credits when he was in school, another worked without authorization when he was in school.

The Government, when they brought the charges, when they brought these technical charges said -- had a press conference to say, we don't care what the technical charges are. We want to deport them because they're associated with the PFLP. We view this as a football

game. We don't care how we score.

So our clients have been told, you've been put into deportation proceedings because of your political associations. You're not going to be able to litigate that in the proceeding itself.

In fact, we attempted to litigate it in the proceeding itself, the Government objected, succeeded, the BIA ruled that we couldn't adjudicate it, and the Government --

QUESTION: They're being deported because of their political associations. That's not the contention.

I mean, one must assume for purposes of your argument that they are deportable. You call them technical violations, but the fact is, they are not in compliance with what -- I mean, we must assume for purposes of this case they are not in compliance with what is necessary to remain in this country as aliens.

MR. COLE: Well, in fact --

QUESTION: And your assertion is that the only reason they have been picked on is because of their political reasons.

MR. COLE: Right.

QUESTION: Okay.

MR. COLE: Which is the same as any other select prosecution claim.



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QUESTION: That's not to say they've been deported because of that. They've been deported because they were in violation of the immigration laws.

MR. COLE: No, but when you make a selective enforcement claim, you show that similarly situated others, that is, other students who didn't take enough credits, have not been deported, and that they singled your client out for an impermissible basis, namely his political associations, which are protected by the First Amendment, and that is a traditional basis of a selective enforcement --

QUESTION: Mr. Cole, supposing you had a selective enforcement claim in a prosecution in the district court, and the district court ruled against you, you wouldn't have a right of immediate appeal to the court of appeals on that, would you?

MR. COLE: You probably wouldn't have a right of immediate appeal, but you would have had a right to raise that claim in a Federal court, to get it adjudicated and to get discovery on it if appropriate.

In this case, the Government's position is, for the many years it takes the deportation process to conclude, which can be 5, 6, 7, 10 years, you can't even get discovery.

This Court in Clinton v. Jones recognized that

delay in discovery is significantly prejudicial to plaintiffs. Here, they're saying we can't even raise our claim until we exhaust a proceeding that cannot address our claim in any way, that does not provide us any form of --

QUESTION: Mr. Cole, haven't you had discovery?

MR. COLE: I'm sorry.

QUESTION: Have you not had discovery in this case?

MR. COLE: We've been able to start discovery. The Government has successfully stayed discovery as a result of this jurisdictional question, so we have been blocked. We've been blocked --

QUESTION: How long has the case been pending?

MR. COLE: The case has been pending since the Government brought it 11 years ago.

QUESTION: And during those 11 years you have not been able to conclude discovery?

MR. COLE: Well, we were not permitted to engage in discovery at all, Justice Stevens, under this Court's selective prosecution doctrine until we demonstrated a colorable showing on both prongs.

QUESTION: When did you make that showing? I'm just --

MR. COLE: In 1994 the Court found that with

respect to six of the eight we had made that showing. In 1996 it extended that to the other two.

QUESTION: And how long a period between 1994 and 1996 were you permitted to engage in discovery?

MR. COLE: We were permitted to engage in discovery for much of that period of time, although there were issues -- the Government objected to virtually every discovery claim we brought --

QUESTION: Well, granting they object all along the line, but you -- I had the feeling you did have plenty of time to persuade the district court that there was merit to your claim, and that you must have gotten a pretty good share of the facts you need for the whole case.

MR. COLE: We did, Your Honor, but the position that the Government is taking in this case would mean that we would never have had that opportunity. We would never --

QUESTION: Well, I know, but you in fact have had, is what I'm trying to say.

MR. COLE: Right, but in terms of the legal question about how it's -- how the statute is appropriately read, should it be read to allow the Government --

QUESTION: Well, but of course, this is kind of

a very unusual case in a lot of ways. It's a transition situation, and it seems to me we should take into account the actual facts of this transition case, which is one, as I understand it, you pretty well have the facts that you're going to litigate about later.

Maybe I'm wrong. Maybe there's a lot of other stuff you need, but I don't know what it would be.

MR. COLE: Well, there's still significant discovery outstanding, including depositions of a number of the individuals who were involved, and ultimately what we have to show is the Government's motive.

QUESTION: Why is this case different from an ordinary administrative law case? I would have thought the ordinary route is, you go first to the agency, they decide a thing on the basis of the issues in front of them, and they create a record. Then you go to the court of appeals, and they look at the record.

In an unusual case, where they didn't develop enough of a record, of course the court of appeals can send it to a district court or anywhere else to get record facts developed where necessary. That's the traditional way. The statutes are consistent with that.

And where you have an unusual claim that requires immediate decision, it's collateral from the main case and threatens irreparable injury, a court of appeals

can hear that first.

They did it in Mathews and Eldridge, they've done it in Bowen, they did it in the cases involving the Haitian refugees, they've done it in dozens of cases, so I mean, that would be the normal route.

Go first to the agency.

MR. COLE: In fact --

QUESTION: Then you go to the court of appeals, then you go to a district court if you need to, and if you have something -- irreparable, serious harm, you get to jump the queue, all right.

Now, aren't the statutes consistent with that as much as they are in any case, and why can't you follow that rule?

MR. COLE: The statutes are not consistent with that, Your Honor.

The first reason is that section 1105a unambiguously -- there's not much that's unambiguous about these statutes, but one thing is unambiguous about 1105a and the 1996 act, and that is that the petition for review, which is authorized by statute, must be determined solely upon the administrative record, with one exception.

The one exception is for nationality claims. Those claims can be transferred to a district court.

But what -- so what Congress said was, appellate

jurisdiction here has to be remedied through the administrative --

QUESTION: They always say that in administrative law cases.

MR. COLE: No, in fact there is no -- Justice --

QUESTION: Yes.

MR. COLE: Justice Breyer, we've found and the Government has cited to no other statute governing administrative appeals that provides that the petition for review must be based solely on the administrative record creating one exception, and in 19 -- and every --

QUESTION: All right, so just pause right there. Your remedy for that, saying solely on the record, rather than read it solely on the record in a case that you can read it solely on the record -- you know, solely on the record in the ordinary case -- your remedy is, rather than read it that way, we should create some whole new set of court remedies that -- that's like burning down the house because -- I mean, you see --

MR. COLE: No.

QUESTION: -- you're advocating departing even further from what Congress wanted.

MR. COLE: No, I don't think so --

QUESTION: No.

QUESTION: -- Justice Breyer, and for this

reason. The traditional way that these types of claims were raised was to go to district court. Every court which addressed a claim in an 1105a appeal that required fact-finding beyond the record said, we don't have jurisdiction. They said that at the INS' urging.

The INS took the exact opposite position in every prior 1105a appeal raising claims requiring fact-finding beyond the administrative record. They said, there's no jurisdiction here because of the administrative record language. You can't transfer to a district court because of the administrative record language. Transfer to district court would obviously be beyond the administrative record.

Therefore, under Cheng Fan Kwok and McNary you go to district court, and that's the traditional way this was done.

Now, in 1996, in the 1996 act that the Government relies upon, Congress took up this matter and they actually went to the point of adopting in the Senate bill a provision that would have changed that rule, would have said that constitutional claims requiring fact-finding beyond the administrative record can be transferred to district court, but they rejected that in the final bill and instead they readopted the language which had been uniformly interpreted to bar appellate



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jurisdiction at all of claims --

QUESTION: Which language is that, Mr. Cole, the --

MR. COLE: The language which was rejected is in --

QUESTION: The one they adopt -- they adopted, readopted.

MR. COLE: The language they readopted is -- was originally in 1105a(a)(4), which says that the appeal shall be decided -- let me get you the page. It's on page 2a of the Government's brief.

It's determination upon administrative record at the bottom of the page, except as provided in clause (B), which refers to the nationality claims, this -- the petition shall be determined solely upon the administrative record upon which the deportation order is based.

Now, that was the -- that provision the Government had argued consistently before this case barred the court of appeals from hearing the kind of claim that we are now making. They said you have to go to district court. This Court in McNary said that that exact type of language meant that the exclusive appellate review scheme did not cover claims requiring fact-finding beyond the administrative record.

Now, if you turn to page 10a -- this is the '96 act. Congress first considers, as I said, considers a bill that says, constitutional claims requiring fact-finding can be transferred to the district court. They reject that and instead they adopt the language on page 10a. The court of appeals, except as provided in paragraph (5)(b), and that's again --

QUESTION: You're reading from -- whereabouts on 10a are you reading?

MR. COLE: The top of 10a.

QUESTION: Okay.

MR. COLE: Under scope and standard for review. It says, except as provided in paragraph (5)(B), and then that's -- again that's a reference to the nationality claim, the only claim that Congress has said can be -- facts can be developed beyond the administrative record. Except as provided in (5)(B), the court of appeals shall decide the petition only on the administrative record on which the order of removal is based.

So Congress considered the precise option which the Government is now saying is available on the court of appeals, and it decided to reject that option and instead to leave these claims where they had traditionally been litigated in district court, and I think for good reason.

Why? Because these are claims that require

fact-finding, intensive fact-finding. That's the kind of thing that district courts are well-suited to, not courts of appeals.

QUESTION: But it would apply your argument to all constitutional claims, I guess, and some are suitable are fact-finding, and others --

MR. COLE: No --

QUESTION: -- are not, and --

MR. COLE: This claim -- I'm sorry, Justice Breyer, but this claim -- our argument with respect to this provision --

QUESTION: Yes.

MR. COLE: -- does not apply to all constitutional claims. Chadha, for example, was a constitutional claim that could be decided without any fact-finding beyond the administrative record, and therefore was appropriately heard on the --

QUESTION: Mr. Cole, you left one thing out of your story. They did, indeed, adopt that language from 1105 which we had held would allow you to go to district court.

But they also added to the new statute subsection (9), which is on page 13a of the Government brief, which says -- which reads, consolidation of questions for judicial review: Judicial review of all

questions of law and fact, including interpretation application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien, shall be available only in judicial review of a final order under this section.

MR. COLE: That's right.

QUESTION: Now, that wasn't in the old 1105.

MR. COLE: That's true.

QUESTION: It is in this, and it makes it very clear that Congress did not intend the previous disposition of being able to go to district court with one of these claims to continue.

MR. COLE: Well, I beg to differ, Justice Scalia. The -- first of all, (b)(9) does not apply to this case, as the Government concedes, because of the transition rules, so (b)(9) is actually not applicable, and you have to then ask, why did Congress not choose to apply --

QUESTION: That depends. That depends. The Government conceded it but also said that you could interpret (g), when it says except as provided to this section, to include, to refer back to the new section.

MR. COLE: Well --

QUESTION: And that's the way I do indeed read it.



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MR. COLE: Well, I --

QUESTION: So I think this section does apply.

MR. COLE: No, but -- no, but Your Honor, what the Government has said -- I mean, what -- it's -- I agree with you that (g), when it says except as provided in this section no court shall have jurisdiction, refers back to 1252.

QUESTION: Right.

MR. COLE: But Congress has made clear that 1252 does not apply. The only provision that even arguably applies here from the new act is 1252(g). They have made it absolutely clear that the rest of 1252 is not applicable, and we argue --

QUESTION: Mr. Cole, what about the possibility that was vaguely mentioned of the Attorney General electing to have these transitional cases handled only under 1252?

MR. COLE: Right. Well, that's how we think subsection (g) can be made -- can be rendered coherent. That is to say, subsection (g) applies to those cases -- what Congress said was pipeline cases, cases which were pending at the time the law went into effect, should be covered by the old statutory scheme, not the new statutory scheme.

The Government agrees with that, with one

exception, subsection (g). We think subsection (g) is better read as making clear that in transitional cases, that is, cases that are pending, where the Attorney General elects to invoke the new procedures, which she is permitted to do by statute, in those cases, subsection (g) makes clear that 1252 is the exclusive review scheme, but only in those cases.

The problem with --

QUESTION: Is she prevented from doing that here by anything having to do with this lawsuit, or just, she has chosen not to exercise discretion that she has?

MR. COLE: Well, she's been enjoined from taking any action with respect to the deportation proceedings in these cases.

QUESTION: So if she wanted to make that election she couldn't because she's been enjoined.

MR. COLE: That's right. That's our -- that is our reading. That would obviously be open to the district court on remand, but I --

QUESTION: Your interpretation of (g), I mean, is very nice. It would be wonderful if that's what it said, but I see nothing in there that limits it to those cases where the Attorney General has exercised the option --

MR. COLE: Well, the problem --

QUESTION: -- to have the new statute apply. What language do you rely upon to limit it to that?

MR. COLE: Well, the -- there's an admitted tension, Justice Scalia, between section 309(c), which says that for pending proceedings the new rules do not apply, they should be governed by the old section 1105a scheme, and subject only to the exceptions set forth in succeeding provisions, which do not include (g) -- there's a tension between that, which seems to say 1105a applies, and 306(c), which the Government relies on, which suggests that subsection (g) shall apply to all claims arising from -- I'm trying to find the specific language.

QUESTION: All past, pending or --

MR. COLE: With -- yes.

QUESTION: -- future exclusion --

MR. COLE: Right. Right. It's on page 18a, shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such act.

So the Government says that means Congress intended one and only one provision of 1252 to apply to pending proceedings.

We think that reading is untenable for a number of reasons. First, it's inconsistent with 309(c), which says that pending proceedings are covered by the old law

subject only to the exceptions in the succeeding provisions, of which (g) is not one.

Second, when you apply (g) without the rest of 1252 it becomes not an exclusion, an exclusive jurisdiction provision, as it is denominated in the statute, but a nullification of all jurisdictional statutes, because it says, except as provided in this section, which the Government concedes doesn't apply, and notwithstanding any other provision of law, no court shall have jurisdiction to hear any of these claims, so it becomes a nullification provision --

QUESTION: That's why you can -- can't you read it -- I mean, one way to read it is to say, very well, in this odd transitional period Congress wanted no court to have the authority to decide fact-based constitutional questions. That's very unlikely.

The other possibility is to say, well, what you do with these transitional cases with fact-based constitutional questions is, you apply the old statute.

Now, when you apply the old statute, you're reading the statute in a way that again will reach the result, no constitutional review, which might well make it unconstitutional.

But the other alternative for us is to read the old statute and to say, we can read that in a way,



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granted, stretching the language under constitutional compulsion, that will give you the judicial review that you want, indeed, at the time you want, if you can make out a case for an emergency, irreparable harm, et cetera.

Now, what's wrong with that?

MR. COLE: Well, first of all, it requires reading 1252(g), which says that judicial review may not be based on any other provision of law -- you have to ignore that language and say judicial review may be based on 1105a.

Then you have to take 1105a, which says, judicial review under 1105a in the court of appeals must be determined solely upon the administrative record, and you --

QUESTION: That means in cases appropriate. Right, it does --

MR. COLE: And you have to read that -- so the Government -- the Government requires you to read the -- two statutes exactly against their meaning, and to adopt an interpretation that Congress --

QUESTION: The alternative, though, being to say that those -- the whole thing is unconstitutional, and then make up a set of procedures that would virtually parallel that but make it up on our own.

MR. COLE: Well, I think -- no, but I think a



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better option, Justice Breyer -- I think a better option is the option this Court took in McNary, which is to say, when Congress says that an exclusive review scheme is limited to the administrative record, it does not intend claims that require fact-findings beyond the administrative record to be encompassed within that exclusive --

QUESTION: Well, if it didn't intend that, it didn't do very much good in this amendment of the immigration law.

It's clear that what the amendments were intended to do is to prevent exactly what is going on here, stringing out the deportation endlessly while suits are brought in district court that interfere with the smooth progression and ultimate disposition of the deportation proceeding.

It's clear that that's what Congress had in mind, and what you're saying is, Congress didn't have that in mind.

Now, maybe you want to say Congress can't have that in mind, and strike down the whole thing as unconstitutional, but to read it to do something which is just implausible in light of what Congress was about in this --

MR. COLE: Justice Scalia, there is no



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indication that Congress was concerned about our case or cases of our --

QUESTION: Congress was certainly concerned about, as Justice Scalia -- stringing out deportation proceedings --

MR. COLE: I --

QUESTION: -- which is just what your case is doing.

MR. COLE: Well, and the irony here is that we're the ones who are seeking expeditious resolution, Chief Justice Rehnquist. It's the Government that is seeking delay.

If you rule for the Government in this case, we're talking about 5, 6, 7, 8 more years of litigation before we ever get to the question that our clients went to court for initially, which is, can we distribute magazines without fear of the Government targeting us.

QUESTION: Why are we talking about 6 or 7 more years of litigation when we've had 11 already?

MR. COLE: Because the Government took 9 years --

QUESTION: Well --

MR. COLE: Without any injunction in this case, the Government took 9 years to complete one quarter of the lead deportation hearing in this case, so it's not -- and

we have been seeking -- at every stage, Your Honor, we have been seeking to get a expeditious resolution of this case. The Government has been delaying. The Government --

QUESTION: You've been seeking to get expeditious resolution of your claim that the case is improperly brought.

MR. COLE: That's right.

QUESTION: The Government wants an expeditious ruling on the merits of the claim about the case, should your people be deported.

MR. COLE: What the Government wants to do is to delay the First Amendment question in the case, and I think if any other administrative agency targeted a U.S. citizen, held a press conference -- for any kind of initiational proceedings, and said -- held a press conference and said, we don't care what the technical charges are that we brought, we don't -- the IRS says, we're auditing these people, but we don't care about the technical charges. The reason we're auditing this newspaper is because it published pro-Republican editorials.

Now, is there -- do we have any doubt that that newspaper could not go into court and seek an injunction against that action even in a situation --



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QUESTION: Well, newspapers can't be deported.

(Laughter.)

MR. COLE: That's right, but newspapers can have their First Amendment rights chilled, and so can immigrants, the --

QUESTION: Newspapers don't gain anything by stalling. De --

MR. COLE: And --

QUESTION: Potential deportees do. Two of these people already are no longer deportable. I don't know why, because they've gotten married, because for some other reason. Their status has changed in the interim.

Everybody knows that this is the name of the game. String it out, and the longer it's strung out the less likely the deportation will be. Newspapers don't worry about these things. I mean, there is not the risk of, what should I say, gaming the system, which goes on in immigration cases.

MR. COLE: That's true, Your Honor, but what we're talking about is a principle that says that First Amendment claims require prompt review, that the uncertainty about whether or not you have the right to engage in a particular type of speech or association means that you will not engage in that association or speech.

That is what has happened to our clients. For

that reason, we didn't wait until the end of the deportation proceeding. We went right into court, we sought a resolution. It's the Government that has strung this out.

They brought two separate appeals, raising claims, all the claims on the second appeal that they could have raised on the first appeal. They have objected to discovery. They have taken us up on mandamuses to the court of appeals on virtually every issue.

We've been seeking -- we've been seeking expeditious resolution, and the reason, Your Honor, is that although it is true that in many cases delay is in the interests of the alien, in a case where the Government has said that we're bringing these proceedings because we want to chill your political activities, it's in the interests of these aliens and, indeed, of all aliens to know whether they have --

QUESTION: Is that what the Government said, or the Government said we just want to deport you?

MR. COLE: What the Government said is, the FBI report which urged the INS to bring this case said, deport these people because it would disrupt the activities of this group, activities which include distributing magazines, et cetera, et cetera.

They said with respect to Khader Hamide, one of

the individuals, they said, we think you should seek his deportation not because he's engaged in any illegal conduct, but because he is intelligent and shows great leadership ability, and therefore going after him will hamper the activities of the organization.

QUESTION: Can't you bring that up in the agency proceeding? The --

MR. COLE: We cannot bring -- we tried, Your Honor. The Government said, you can't, you have to go to district court, the BIA agreed, and that was consistent --

QUESTION: On what ground, irrelevant, or --

MR. COLE: On the ground that the statutory and regulatory authority of the immigration judge is limited to determining whether the charges of deportability are well-founded, and he is not allowed to look behind the charges at the motives of the district director who brought the proceedings.

QUESTION: Is that good law?

MR. COLE: That is the -- has been the accepted law, the agency's interpretation for years and years. No one has challenged it.

We sought to challenge it because what we wanted was a quick resolution of this. They said you have to go to district court.

When we won in district court, now they're



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saying you have to wait and go to the court of appeals, so it's the Government --

QUESTION: Mr. Cole, it may well be that your clients were targeted for ideological reasons, but the point is -- and this is what Congress was concerned about -- anybody can claim that they're being deported for ideological reasons --

MR. COLE: Well --

QUESTION: -- and file a claim in district court, and wait for 2 years to get that claim adjudicated by the district court.

MR. COLE: Justice Scalia, in the --

QUESTION: Anybody. You can just file --

MR. COLE: There have been three such claims over the history of the Immigration Act, so I don't think you're going to see a flood of litigation.

Secondly, this Court -- as this Court is well aware --

QUESTION: What were the two others, Mr. Cole?

MR. COLE: John Lennon, the former Beatle, charged that he was being selectively deported for -- on a drug offense.

The Second Circuit recognized that that would be a legitimate claim but ended up resolving his -- his claim was -- ended up getting resolved in another way.



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And then a man named Adamay Hernandez in the Ninth Circuit made a selective enforcement claim, but he had -- he put forward no evidence and it was just dismissed outright.

But this Court has made it very clear that selective enforcement claims are extremely difficult to get past first base on, and they are dismissed all the time. There has not been a successful selective prosecution claim in the Federal courts for years.

There's not -- this is the only successful selective prosecution claim that there's ever been in an immigration case, so you're not talking about some loophole that's going to make it possible for every immigrant to go in.

What you're talking about is when the Government has admitted that it targeted people for their political activities, that it doesn't care what the charges are, it wants to get rid of them because of their political activities, and it wants to disrupt those political activities, which the Government has also conceded are not criminal or illegal in any way, in that kind of a case, it's an extraordinary case, certainly the Federal courts should be open to allow an immigrant to get a --

QUESTION: Well, if it should -- if it should, wouldn't the expeditious thing be to have all this heard



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in one proceeding? I mean, whatever the shoulds are, wouldn't that be a better way to do it?

MR. COLE: Well, the problem is that the one proceeding that the INS has put us in cannot consider these claims. The court of appeals, according to the INS' longstanding interpretation and every interpretation of the act prior to the '96 act can't consider that claim, and Congress specifically thought about whether the court of appeals should be given the right to consider that claim in passing the provision with respect to constitutional claims involving fact-finding, and they rejected it and instead adopted language that says you can't go to the court of appeals for this kind of claim.

And as this court has said, it is a cardinal principle of statutory construction that the court can't adopt something that Congress has rejected in the process of enacting another statute.

In addition, the -- it is quite clear that the background against which Congress was acting -- Congress is presumed to know the law just as citizens are -- was that these kinds of claims were brought in district court. They could not be brought in the court of appeals. They had to be brought in district court.

So against that background --

QUESTION: But you -- it was very sparse. You

just said there were only two prior cases.

MR. COLE: Well, there's only two prior -- Justice Ginsburg, there are only two prior selective prosecution cases. There has been other types of claims, challenges to immigration practices that require fact-finding beyond the administrative record. McNary was one. There are a number of other sort of pattern and practice class actions.

But again, it's a handful of cases out of hundreds of thousands of deportation proceedings. This is not some huge problem, and I think it's because it's not some huge problem that Congress, while considering changing the law, decided to maintain the law, and that result, I think, is required not only by this Court's general principles of statutory construction, but by the principle of administrative law that Justice Breyer articulated on the Government's argument.

That is that, where collateral claims are at issue that the agency has no expertise to address and irreparable injury is at stake, even where the statute says you have to wait till the end of the process, this Court has consistently said you can go to district court.

And secondly, this Court has repeatedly said in the First Amendment area that because uncertainty about one's rights chills those rights, prompt judicial



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determination is necessary, under the finality rules of 1257 --

QUESTION: Of course, in this case that argument doesn't seem to fit, because it would -- if your people continue to engage in this speech activity that you're concerned about, that won't hurt their case at all. I mean, either they're deportable or not.

They've already been selected on the basis of prior speech activity --

MR. COLE: Justice Stevens --

QUESTION: -- so how can future speech activity --

MR. COLE: Justice Stevens, I think it's fair to say that the chill here is real. The INS holds substantial discretion over an alien who's in deportation proceedings.

It can decide to continue the proceedings, or drop the proceedings. It can decide to detain the person in their discretion. It can decide to add new charges in their discretion, as it has done with respect to all the aliens here. It can decide to deny discretionary relief in its discretion.

So the -- a rational alien who knows that he's been targeted for his political activities, that similarly situated aliens have not even been put into proceedings,

will assume that if he continues to engage in the activity that the Government has said it does not like, that discretion will be used in his disfavor, just as if the IRS announced that they were auditing a newspaper because of its Republican editorials, and they were auditing them for 1 year, you'd say, well, how's that going to affect the newspaper, because the audit is only with respect to that past year.

Well, the IRS has a lot of discretion about what it does with an audit, it could bring future audits, and so the newspaper will be chilled until the court says that it has the right to speak.

QUESTION: Thank you, Mr. Cole.

MR. COLE: Thank you.

Mr. Stewart, you have 2 minutes remaining.

REBUTTAL ARGUMENT OF MALCOLM L. STEWART

ON BEHALF OF THE PETITIONERS

MR. STEWART: I guess the first legal point I would want to make is that we certainly disagree with the contention that prior to the enactment of the 1996 statute there was a consistent practice of allowing claims like this to go forward.

The respondents have not identified any case in which a court has entertained a selective enforcement challenge to the filing of deportation charges. That

would have been inconsistent with well-established principles of administrative law that the filing of charges is not final agency action.

Cases like Cheng Fan Kwok are cases in which the Court has reviewed actions that took place outside the deportation process itself and has held that those were not subject to the exclusive review provision of former section 1105a, but to say that simply by challenging a nonfinal action an individual can have his claim heard immediately really is not consistent with administrative law principles.

The second point is that what is revealed pervasively in the FBI reports is a concern that the respondents were assisting in the raising of funds for a foreign terrorist organization. Certainly, in the course of surveilling the respondents the FBI came upon other PFLP-related activity other than the pure raising of funds, but the court concern was with fundraising, so this is very far afield from core First Amendment activity.

And the last point I'd like to make is that for respondents to claim that they have attempted at every turn to seek expeditious resolution of this process is simply untenable. The respondents have sought repeatedly to get district court injunctions against the ongoing deportation proceedings, they have sought successfully to

have stays entered in the immigration court itself to have the proceedings put on hold until the conclusion of the litigation.

There's nothing wrong with their doing it, but I think the respondents have acted throughout the proceedings on the assumption that their clients' interests are served by protraction of the proceedings rather than by speedy resolution.

QUESTION: Don't fault them for that.

MR. STEWART: I don't fault them for that.

QUESTION: That's standard in depor -- and you would do it yourself --

MR. STEWART: I --

QUESTION: -- if you were representing somebody.

MR. STEWART: That's correct. I don't fault them for that. My point is simply that having acted on the assumption that their interests are served by having the deportation proceedings take as long as possible -- thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Stewart.

The case is submitted.

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)



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JANET RENO, ATTORNEY GENERAL, ET AL., Petitioners v. AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, ET AL.
CASE NO: 97-1252

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