IN THE SUPREME COURT OF THE UNITED STATES

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

IMMIGRATION AND :

NATURALIZATION SERVICE, :

Petitioner :

v. : No.00-767

ENRICO ST. CYR :

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

Washington, D.C.

Tuesday, April 24, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:18 a.m.

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

LUCAS GUTTENTAG, ESQ., New York, New York; on behalf of the Respondent.

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P R O C E E D I N G S

(11:18 a.m.)

CHIEF JUSTICE REHNQUIST: We will hear argument next in number 00767, the Immigration and Naturalization Service versus Enrico St. Cyr.

Mr. Kneedler, we'll hear from you again.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONER

MR. KNEEDLER: Thank you, Mr. Chief Justice.

In this case, there are questions both of jurisdiction and of the merits of whether the Attorney General reasonably construed the act to conclude that petitioner in this case, oh, excuse me, respondent in this case is ineligible for discretionary relief under the repeal of 1182(c).

I do want to make sure that I'm able to address the merits question, but I did have a few things that I wanted to address with respect to habeas corpus and the constitutional question here.

One recent decision of this Court which I think is instructive on the question of when, what sorts of claims Congress must make a judicial forum available to, is the Court's decision two terms ago in American-Arab Anti-Discrimination Committee v. Reno in which the Court concluded that a constitutional claim of selective

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enforcement was not a judicially cognizable defense to a final order of removal, and in our view, if Congress could provide under the immigration laws that that sort of claim does not give right to a personal right to have a final order of removal set aside, then it follows a fortiori that Congress is not required to provide a judicial forum for a failure by the Attorney General to grant discretionary relief from removal that is purely statutory in form and particularly here where the objection is a non-constitutional objection to the failure to grant discretionary relief.

QUESTION: -- forum, the law doesn't apply to me because it doesn't take effect until the year 2004.

MR. KNEEDLER: If it is an application for discretionary --.

QUESTION: No, no, no. Just say that this whole statute doesn't apply to me because the whole statute doesn't take effect until 2004. It's fanciful in this circumstance but you can see where I am going.

MR. KNEEDLER: If the claim is that I am not subject to deportation or removal because the statute doesn't apply, that is subject to judicial review under this statute and we think that the suspension of habeas corpus clause probably does require that a court be available to entertain a claim that the person who is

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subject to removal is not an alien and is not subject to removal because in those cases, we will assume, this certainly for purposes of this case, the executive would be acting beyond any authority granted to the Attorney General.

QUESTION: Would you need habeas corpus to review those things? I thought they'd be reviewable under the legislation?

MR. KNEEDLER: Oh yes, no, yes, no, I'm sorry. I was going to the constitutional claims that the statutory judicial review procedures are inadequate because they don't cover more things. No, you certainly - -

QUESTION: Things are covered anyway.?

MR. KNEEDLER: Right. That's absolutely right. We think that the statute provides for judicial review of the two fundamental points at issue in a removal proceeding. Is the person an alien and is the person subject to removal? The statute provides for that. The Zipper clause that this Court referred to in the AADC v. Reno provides that all questions of law and fact, including statutory interpretation and constitutional interpretation can be heard only on judicial review of a final order of removal in the Court of Appeals.

QUESTION: Well, you go ahead.

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QUESTION: With respect to habeas corpus, it is not at all the case that Congress overlooked even in Section 1252 the possibility of habeas corpus relief. Subsection (A)(1) of Section 1252 establishes the general rule of Court of Appeals review but it specifically carves out an exception for situations in which an alien is in expedited removal proceedings and as to that, Subsection (e) of 1252 specifically provides for judicial review by habeas corpus.

So Congress knew when to provide and preserve habeas corpus by name in this statute. It did it for that limited category and did it in no other and 1252(b)(9), the Zipper clause says that unless that it's specifically provided for in 1252, the review is not available. And if there could be any doubt as I mentioned even before IIRIRA, Congress in AEDPA had repealed the provision of the prior judicial review provision in Section 1105a(a)(10) that said that, provided for custody review of aliens of their deportation orders, that that was specifically eliminated. So Congress knew very well what it was doing in eliminating habeas corpus as such but providing a fully adequate substitute, constitutionally adequate substitute in the court of appeals, something that this Court said in Swain Congress can do.

QUESTION: I have a question that perhaps the

statute answers. I just don't have it clearly in mind. If there had not been the provision, the specific provision for habeas in the accelerated review cases, would habeas review have been necessarily postponed in those cases until after the court of appeals had finished? In other words, I guess my question is was the provision for habeas review in the accelerated cases in effect the provision of kind of an alternative forum that otherwise wouldn't have been available until the conclusion of the --

MR. KNEEDLER: Do you mean, in the current law or the prior law?

QUESTION: The current law.

MR. KNEEDLER: The current law. No, it's a substitute for, an expedited, a substitute for a court of appeals review. People in that category, their orders of removal are reviewed only in the district courts, not in the courts of appeal.

QUESTION: Okay, what the prior law?

MR. KNEEDLER: In the prior law, it was frankly unclear to what extent habeas overlapped with court of appeals review, and this was I think part of the problem. Some courts have held that in habeas the alien could not get review of the merits of the deportation order but could just challenge the detention. Some courts have

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allowed some review of the deportation order, which, of course, would have provided for duplicative review in the courts of appeals and the district courts.

QUESTION: Might that have been the reason for the specific provision under the new law?

MR. KNEEDLER: No, I think the reason under the new law was one of expedition , to not have two stops in the court but only one petition for review in the courts of appeals.

QUESTION: Mr. Kneedler, the competing habeas provision in this period of uncertainty, whether you could go to both places, that was in the Immigration and Nationality Act itself. It wasn't 1143, was it?

MR. KNEEDLER: It wasn't? I'm sorry.

QUESTION: It wasn't the general habeas statute.

MR. KNEEDLER: Well, as we explain in our brief, the provision in the INA was necessary to preserve that habeas corpus because the prior act was worded, the judicial review is in the courts of appeals under the Hobbs Act except, and as this Court said in Stone there were a series of exceptions that follow that, one of which was the specific exception for district court habeas. Now, whether one views that exception as itself a grant of habeas or a preservation of habeas under 2241, we think is essentially irrelevant. In either event, the expressed

exception to seek, to preserve that was necessary and to our knowledge no court held --

QUESTION: That wasn't my question. My question was you referred to, wwas it 11? The one that was repealed?

MR. KNEEDLER: 1105(a)(10).

QUESTION: Yes, yes. And so, in the period of when you could go one place or the other, wasn't it the 1105 that was used to get into the district court?

MR. KNEEDLER: Some courts said it was 2241. Some said it was 1105(a). Some courts didn't explain it and there was really no reason to. In our view, probably the best way to look at it is that 1105(a) preserved general habeas jurisdiction but you could look at 1105(a) as a specific grant, but in either event, it was an expressexception to what otherwise would have been an exclusive court of appeals jurisdiction which the legislative history we set out in our brief of the 61 Act shows that Congress was aware that habeas corpus would have been precluded if the statute had been permitted toward - to be worded that way.

I also want to just briefly just touch on the notion that there is an unconstitutional suspension of habeas corpus if the Act operates in the way that we describe. And we think that that is clearly not correct.

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As this Court said in Felker, first of all, habeas corpus is available only insofar as it's provided by law. The courts are not free at large to address that question and the Court also reiterated in Felker that Congress, that it's essentially up to Congress, at least in the first instance, to exercise the judgment as to what the scope of the writ should be. Beyond that, in this context we think that's especially so because Congress has plenary power over immigration and has to be able to balance the need for access to the courts against, in this situation, what Congress saw to be a critical need for expeditious removal of criminal aliens who have already had a chance to test their criminal convictions.

And finally, this Court has also said that Congress, deference is owed to Congress with respect to what due process procedures are appropriate for people generally, and again, that's something where deference we think is especially appropriate in the immigration context.

For all of these reasons, we think Congress's judgment as to what sorts of things should be subject to review and what should not is due extraordinary deference by this, by this Court. And, in particular, we do not believe that Congress is required to provide for judicial review of a power that it has granted in the discretion of

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the Attorney General. This is not worded as a personal right of the alien, much less a personal right that is so fundamental that an alien should have access to courts, must have access to courts, to litigate it.

Congress should not be put to the choice or put in the all or nothing position of granting discretionary powers to the Attorney General only at the cost of buying into a system of judicial review. As this Court said in AADC v. Reno, there are a number of discretionary determinations the Attorney General makes all the time with respect to whether to institute proceedings in the first place, whether to drop them along the way, whether to perhaps not execute the order of removal at the end of the day. Those are all discretionary and surely Congress is not required to provide for judicial review of that. Congress could conclude that this should be regarded in the same way.

QUESTION: Could you just advise me, is it the Attorney General's position, the Justice Department's position, that anybody who is removable under this statute will be removed?

MR. KNEEDLER: Well, the Attorney General has the authority not to execute an order of removal if there was - -

QUESTION: And does he have regulations as to

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how that, what is the present position is, I guess my question.

MR. KNEEDLER: Well, there's certainly a general rule that final orders of removal will be carried out because that's what Congress had in mind, but Congress--

QUESTION: Does the Attorney General bring removal, removal proceedings under anybody that's within the purview of this statute?

MR. KNEEDLER: I, I can't represent that every, that every case has been brought but one of the things to bear in mind is that when Congress passed IIRIRA and expanded the definition of aggravated felony, it made that definition applicable to offenses that occurred before 1996 and in INS's view, that meant that Congress wanted INS to do something about people who had previously committed offenses and may not have been aggravated felons before.

So, the general thrust of the INS's enforcement efforts has been that but I certainly can't represent that it would never decline to remove someone. And the fact that in Accardi again an unexplained decision, this power may well once have been exercised should not prevent Congress from revisiting the question, revisiting the question of how discretionary relief should be thought of in saying for these purposes, it is constitutionally

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equivalent to the sort of discretion to institute proceedings in the first place that was unreviewable in AADC v. Reno even for constitutional grounds and has been held unreviewable in other situations as well.

Now, to the merits of the question.

QUESTION: Mr. Kneedler, Would you clarify one thing? You said that there is no more discretion under the new statute, but you just answered a question that says well there is discretion, but it goes on outside the statute. The Attorney General, is not required, even with knowledge that there is a person who is qualified to be removed, is not required to remove anyone. The discretion is there but it's kind of a lawless discretion. Is that what you're telling us?

MR. KNEEDLER: Well, it's, the fact that it's not judicially reviewable doesn't make it lawless. There are, there are either formal standards as --

QUESTION: That's what you were asked. You said there aren't any.. You said that --

MR. KNEEDLER: I don't, I don't, I don't believe there are and this Court pointed out in AADC v. Reno that there were internal guidelines for the exercise of that discretion in the past and the INS --

QUESTION: But you're not aware ofany?

MR. KNEEDLER: I am not aware of, but Congress

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could reasonably conclude that the statutory provisions for cancellation of removal sets up a similar, or allows the Attorney General to set up a similar regime but doesn't in the process require judicial review of that in the courts.

If I could turn to the merits question of whether the Attorney General reasonably determined that the repeal of 1182(c) does not provide a basis for relief in this case. First of all, Congress specifically addressed the temporal applicability of all of Title III-A of IIRIRA of which this repeal is a part in Section 309 of the act. In 309(a) Congress specified what it called a Title III-A effective date, which was six months after IIRIRA was enacted, the delay obviously being put in place to allow the Attorney General to set up the new procedures.

And then Congress, in 309(c) specified what is the operative event for applying that effective date.

MR. KNEEDLER: What it said was that for people in exclusion or deportation proceedings, note not removal proceedings, an exclusion or a deportation proceedings as of the Title III effective date, the amendments made by Title III shall not apply but instead, the prior law, the INA as in effect prior to Title III-A shall apply. It follows for people like the petitioner here, excuse me,

the respondent here, who was put in removal proceedings after the Title III-A effective date that Congress intended that the Title III-A provisions would be applied and Congress enacted them as a package. As I mentioned, it eliminated deportation and exclusion and replaced it with removal. It repealed specifically 1182(c) and replaced it with cancellation of removal and it provided a new system of judicial review.

QUESTION: Just in case. Imagine I've read this and it reminds me of these brain teasers in the newspapers, it's very complex. And suppose after I got through reading all these complex arguments technically on both sides, I got to the situation where I thought I want to assume Congress would have wanted to do what was basically fair in terms of retroactivity. All right. Then I thought there'd be, what's gone is the Attorney General's discretion to deal with a sympathetic case. I've thought of one. A man, 40, 45 years old, had several children, the bread-earner of the family when, in his youth, once stole a pair of tennis shoes in Massachusetts - an aggravated felony under this statute, I think.

Another time, on another occasion he stole some fruit from a passing train. All right? Now, what would seem to be the fair thing is at least you give him a shot so that we he was 20 years old and was going to steal the

fruit from the train, he would know that that might mean deportation. And so, if we're going to assume Congress would have wanted to do the fair thing, why wouldn't we assume that at least it would give these people a shot so that the second time they know the likely consequence. Hence, we would apply this so that it applies to people whose second felony, aggravated felony like stealing a pair of tennis shows, I say slightly sarcastically but it's within that, I think. So that they'd at least know when they did that what's going to happen.

Well, that's what I call the basic

MR. KNEEDLER: Well, with respect to the notice point, Congress specifically made the definition of aggravated felony applicable to offenses that occurred before that enactment and that includes situations in which someone might be rendered removable.

QUESTION: Certainly the first one but let's say the second one, so that now he knows what's going to happen and, you see, that's what I call --. Now, maybe you can't even get to that because you go through all the technical arguments.

We're at that point. Is there any answer? Is there any answer to that which suggests that the application of the way you're doing it, and indeed, I mean, you know, you go pick up people who are 60 years

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old. They have families. In their youth, they committed a few indiscretions and without any hope of mercy through any kind of discretion, they're gone.

MR. KNEEDLER: Well, several things. First of all, we don't think it's technical. We think the statutory specification of an effective date and what events that effective date attaches to couldn't be clearer from looking at Section 309 of the Act. Congress identified the commencement of proceedings as the operative event and that makes sense because what cancellation of removal as it's now called is something that is a forgiveness of a ground of removal. It's something that only arises after the removal proceedings have been brought. So, we think the statutory answer is clear.

With respect to fairness, it depends. Congress is looking at fairness from a broader perspective. It was looking at fairness from the perspective of a large number of criminal aliens in this country who had not obeyed our laws and it wanted to do something about it and Congress also, and importantly, concluded, made the judgment that the Executive Branch was granting far too many applications for discretionary relief under 1182(c).

What Congress did here spoke to the Attorney General. It did not speak to any supposed rights of

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individual aliens. It was responding to what it regarded as excessive, and even referred to as abuse of the power that was granted by the Attorney General and they wanted to take that away, and they wanted to take that away now. The only effective way they could do that was to stop now. It wouldn't have made any sense to grandfather in people who may have committed crimes 10 or 20 years ago if what they wanted to do was to stop the Executive Branch from granting too many applications.

At the close of our reply brief, we had citations to a colloquy between Senator Abraham and Senator Hatch and if you read that colloquy, it responds directly to your point, Justice Breyer. We don't set it out at length. But, importantly, in IIRIRA Congress actually drew back a little bit on the disqualification for discretionary relief. Under AEDPA the disqualification under 1182(c) for criminal aliens was broader. In IIRIRA for a permanent resident alien, Congress confined it to aggravated felony.

QUESTION: I didn't see anything. I read the colloquy and I didn't see anything in that that suggests that the Senators who were for this provision that became law wouldn't want to give the alien at least the knowledge of what was going to happen.

MR. KNEEDLER: But what Senator Hatch said as in

explaining one of the reasons for having done this was that in the category that Congress allowed to get relief under cancellation of removal, which was a category that was barred under AEDPA, those might have included people who committed their crimes a long time ago and those were the minor crimes that Congress identified as saying those people should be eligible not for 1182 --

QUESTION: Did he say first or both?

MR. KNEEDLER: Pardon me?

QUESTION: Did he say first or both? Of course they could have included somebody whose first crime was a long time ago. Did he say first or both?

MR. KNEEDLER: He was referring to any crime that might have been a long time ago. Well, that's the important thing. But even then, what Congress, what he explained is that Congress made them eligible for cancellation of removal. He didn't say that Congress had somehow carried forward 1182(c) relief, which, as we point out, was expressly repealed in Section 304(b) of IIRIRA, and it was repealed because it had been replaced with the provision for the cancellation of removal which Congress intended to be applied as part of a package dealing with the institution of removal proceedings and then the cancellation of removal proceedings.

Congress did not intend a hybrid sort of thing

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where discretionary relief from inadmissibility could somehow be applied in the proceeding where that didn't even make sense. But beyond the statutory answer to the question that we think Congress supplied in Section 309, this change in the law is not retroactive within the meaning of this Court's retroactivity jurisprudence and there are a variety of ways in which that could be understood but they all point in the same direction.

And I would like to identify them because they're different ways of coming at them. First of all, this Court has said in Lopez-Mendoza and most recently again in the AADC case that the enforcement of the immigration laws is inherently prospective. It looks to the question of whether aliens will be permitted to remain in the United States in the future, whereas the Court said in AADC, deportation is necessary in order to bring to an end an ongoing violation of the law. And the reason why this is so is that part of the justification for Congress's plenary power over immigration is as this Court said in the Harisiades case, that Congress has to take into account the contemporaneous policies with respect to aliens. It has to decide at any particular moment in time who that is an alien in this country should be permitted to remain and who should not.

Removal is not punishment or regulation of past

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conduct. It is a determination of who should be permitted to stay in the United States in the future. Another point that can be made about 1182(c) and Congress's repeal of it is that it operates much like the repeal of the authority to grant injunctive relief. When the Attorney General grants, under the prior law, granted 1182(c) relief, it was essentially an injunction against carrying out an order of deportation.

Well, this Court has made clear than when Congress most recently in Miller v. French that when Congress changes the authority for granting prospective relief, that that change in the authority for granting prospective relief has to be applied by the Courts at the time that it is applied, that it arises.

Another point is that this statute speaks to the power of the Attorney General not to any rights of the alien. This provision has never been worded as a right of the alien. It is again an act of grace or like a pardon as this Court has said. And this Court has made clear in its retroactivity jurisprudence and in Kansas v. Hendricks, for example, even in considering the ex post facto clause, that a statute is not retroactive simply because it arises in a case that is based on antecedent conduct. You have to look to see whether it is punishment or a penalty for the past conduct or whether what's going

on is simply regulating someone's current ability and in Kansas v. Hendricks it was a current ability to be at large. The statute, though, was triggered on the basis of prior conviction.

QUESTION: I believe the Court also said in Landgraf that if Congress hasn't clearly answered the question, then the Court, taking into account familiar considerations of fair notice, reasonable reliance, settled expectations asks whether the law attaches new legal consequences to events completed before its enactment. Now, that particular phase would certainly seem satisfied here.

MR. KNEEDLER: I don't think so. I don't believe it would. It does not attach new legal consequences in the sense relevant to retroactivity analysis.

QUESTION: With a new legal consequence to the second theft of the tennis shoes, or whatever, is without knowing it, the consequence is goodbye. Deportation.

MR. KNEEDLER: Well, for example, if there is an enhanced penalty provision for a second offense based on having committed a prior offense, that's not considered to be retroactive under ex post facto.

QUESTION: There's a legal consequence in this sense in that there are many plea bargains and plea

bargains I'm sure have been influenced by the fact that the alien who pleads guilty, and knows, or thought he could, apply for discretionary relief. That's a legal consequence that's been changed.

MR. KNEEDLER: It is, well, it's not a legal consequence of a guilty plea. This statute does not regulate past criminal conduct and it much less regulates guilty pleas. It provides deciding whether somebody will currently remain in the country on the basis of their past conduct. A guilty plea is not primary conduct of the sort that sometimes gives rise to retroactivity analysis in other settings.

QUESTION: Well, but it's not a clear case either way, I suppose. Wasn't that the point of Judge Easterbrook's opinion. I forget the case. It was cited, I guess, in the government's brief in which he suggested what has been suggested here that your, number one, the consequence does not depend, need not depend, on anything that happened since the guilty plea. And the guilty plea may very well have been entered on the ground that whatever the immigration consequence may be, it was a consequence that it was at least subject to mitigation by the exercise of discretion and the alien may very well have said, my best shot is with discretion and therefore I'm going to enter the plea on that basis. Now, since

there's no intervening event upon which the immigration is going to be predicated, it certainly is adding a consequence that was not there when the immigrant entered the guilty plea.

MR. KNEEDLER: It has not added the consequence to a guilty plea. It may have undermined the alien's expectation but this Court made clear in Landgraf that a law that affects someone's pre-existing expectations does not itself give rise to retroactivity analysis. There's not the slightest suggestion in this act that Congress intended the application of the various provisions to turn on whether someone pleaded guilty to the offense or did not. If I could reserve the balance - -

QUESTION: Even apart from the guilty plea cases, it does attach additional legal consequences to the conviction whether by guilty plea or not.

MR. KNEEDLER: Every court of appeals that has looked at that question has concluded that this statute does not raise retroactivity concerns on that basis because it goes to the prospective --

QUESTION: Even though the courts of appeals have said that, is it not correct that it did add significant legal consequences to the past crime?

MR. KNEEDLER: Not in the sense used in this Court's retroactivity analysis because again this is a

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situation that looks to current status --

QUESTION: Which of our cases are you relying on for that proposition?

MR. KNEEDLER: I rely on the discussion in Landgraf and --

QUESTION: Landgraf, which uses the terms additional legal consequences, something like that.

MR. KNEEDLER: In direct. This is not regulating criminal conduct. This is regulating status in the United States.

QUESTION: No, it's attaching new consequences to the criminal conduct. That much seems to be perfectly clear.

MR. KNEEDLER: It has undermined expectations but we do not believe it is attaching new legal consequences in the relevant sense.

QUESTION: But the Second Circuit said it's absurd to measure it in terms of what the criminal wrongdoer expected to happen in that sense. But nevertheless it does attach a very serious additional consequence. But you just said in Landgraf we didn't mean to --

MR. KNEEDLER: Not in that sense. In AADC v. Reno, again, the Court said that immigration law is prospective and retroactivity analysis we think just

doesn't apply for that reason.

QUESTION: Thank you, Mr. Kneedler. Mr. Guttentag, we'll hear from you.

ORAL ARGUMENT OF LUCAS GUTTENTAG

ON BEHALF OF THE RESPONDENT

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

I want to address first a few remaining issues on the jurisdictional question before I turn to retroactivity. Again, an analogy to the exercise of the pardon power is simply not applicable here because that deals with the exercise of discretion, not with the question of legal eligibility. We raise no claim regarding the exercise of discretion. Our claim is regarding the Attorney General's decision to exclude from eligibility an entire class of individuals based on the Attorney General's decision to apply the new statute retroactively.

That question of whether the new statute applies retroactively is a pure question of law and is one that's governed by the Landgraf principles and they're for courts to decide. By the very nature of the inquiry, it's an inquiry that must be decided by a court because it turns to what Congress intended pursuant to the default rules that this Court enunciated.

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Secondly, the American Arab case, we think, doesn't speak to the question here because the American Arab case dealt with whether claims could be raised in the District Court or in the Court of Appeals or whether an issue had to await resolution until there was a final order of deportation. There is a final order. This is not about the fragmentation of procedures. This is a question about whether any court at any time will be able to review this claim. And as we've indicated in our briefs, we believe it's appropriate to construe the statute to allow review in the Court of Appeals of this pure question of law. That does not lead to delay of proceedings or delay of removal; it's a pure question of law that needs to be interpreted as to what the statute means.

QUESTION: Now I take it your point is it only has to be interpreted once. This is not an issue once it's settled that's going to come up in case after case after case?

MR. GUTTENTAG: That's exactly right, Your Honor. And this is not a question of repetitive review of exercises of discretion, or anything like that.

QUESTION: Well, how is it that we can confine the decision? You think this would be a very rare instance in which there would be an application for review

under your theory of the case?

MR. GUTTENTAG: Yes, I think --

QUESTION: It involves a class of eligibility, then there might be people who say they in fact are citizens or they were never convicted and that would be about it?

MR. GUTTENTAG: Yes, I think it's an extremely narrow group of cases, Your Honor, and that's really what this Court's decisions during the finality era when the only review that was in habeas corpus established that during that period of time there was a very limited class of claims that were reviewable and they went to either constitutional claims or claims that the Attorney General had misconstrued the statute. When there's an error of law going to the construction of the statute, that's reviewable.

QUESTION: Can you narrow that further, which you may not want to do? But this particular claim I was thinking of is like a claim of no jurisdiction because it's saying there's a provision of the statute, a whole big section, that just doesn't apply because the time hasn't come yet for it to apply.

MR. GUTTENTAG: Right.

QUESTION: And now is that like jurisdiction or is it - -, I mean, it's not literally jurisdiction in a

12(b)(2) sense or something but what is --

MR. GUTTENTAG: It certainly is analogous in the sense that the Attorney General has decided what issue he has jurisdiction over and he's decided that he has no power to even consider these claims for relief. So, in that sense, it certainly goes to the Attorney General's determination of what the statute means and what class of cases he has jurisdiction to consider discretion and in that respect it's certainly similar.

I just want to note that the final order continues to be contingent on the adjudication of discretionary relief. It has been like that since 1917. It continues to be like that. The new cancellation provision is still the same. The regulation that I referred to earlier is at 212.3, I believe it is, and there is also a regulation at 1229 under the regulations implementing 1229(b) of the statute. One goes to the 1182(c) form of relief that we're asserting here. The other one goes to the existing cancellation of relief that's available for people whose convictions occur after the effective date but it continues to be the case that these applications for relief have to be adjudicated before a final order of deportation can be entered.

And I want to go back to the Accardi case for another moment because it is the case that Accardi was

decided by this Court in the term immediately following the Heikkila decision and in Heikkila the court went back and reviewed the entire sweep of decisions that this court had decided in relation to review of deportation orders during the time when the review was extremely limited and was limited to that that was available in habeas corpus and Heikkila reviewed all of that and it did it in detail and at the conclusion of that review, it said that the only scrutiny that was available was that which was required by the Constitution and the very next year this Court looked at the Accardi claim and in that context held that the claim raised there, a claim regarding discretionary relief, was reviewable and the dissent went back and cited the very same case that the court in Heikkila had said restricted review to the minimum, the Ecku case, and said that's the scope of review that we think is appropriate and habeas should not cover that claim and the Court rejected that and exercised jurisdiction over the claim. So, Heikkila and Accardi together, I think, establish that this claim is reviewable if it falls within that and it clearly does. The fact that Congress could --

QUESTION: The cases that Heikkila actually cited after it said that we conclude that review is available only as required by the Constitution, and there

are three or four of them, did any of those involve a situation like Accardi.

MR. GUTTENTAG: Those cases did not so far as I know, Your Honor. The Accardi case came the following term. There are numerous --

QUESTION: And there's no discussion of the basis of review in Accardi, is there?

MR. GUTTENTAG: But there is in terms of the distinction between the majority and the dissent.

QUESTION: Well, in the majority opinion, do they say exactly what the basis for review is?

MR. GUTTENTAG: It's a habeas corpus proceeding, Your Honor. It says that we review the failure to exercise discretion and it distinguishes that between the exercise of discretion.

QUESTION: I would think that if they're relying, we're relying on the Constitutional line that, as you say Heikkila set forth so clearly, they would have cited Heikkila. I mean, the failure to cite it, it seems to me, is so significant that I find it hard to believe that, - - regard that case as a holding that this is a Constitutional defect.

MR. GUTTENTAG: Well, in any event, at a minimum, Your Honor, it certainly established the very serious constitutional question --

QUESTION: Well, Accardi's also a five to four decision.

MR. GUTTENTAG: Yes, it was, Your Honor. It was a decision of this Court and specifically rejecting the dissent's view of the scope of habeas corpus. It was a five to four decision. But in any event, it certainly demonstrates the profound constitutional question that would arise if this statute were construed to bar review of the claims that have historically been reviewed and there is a long series of courts of appeals decisions reviewing precisely the same kinds of legal eligibility claims. We cite those in our brief in footnote 10, I believe it is, so that it was not there was a unique circumstance where legal eligibility claims in relation to discretionary relief reached the courts. It's just that they didn't reach this Court until the Accardi case. Now, I do want to recognize Congress could --

QUESTION: There are cases of this Court denying habeas relief in such circumstances, aren't there? I mean, they're old cases but they're cases.

MR. GUTTENTAG: Not that I'm aware of, Your Honor. I'm not aware of any where the court said that it lacked jurisdiction to hear the kind of claim that's presented here. Now, it is true that Congress could change the eligibility criteria and Congress could

eliminate discretionary relief. We don't dispute that. It's our contention Congress hasn't done that and the availability of discretionary relief has to be based on what the statute says. And the statute has to be interpreted in light of this Court's decisions in Landgraf and other decisions as to whether the new statute eliminates relief retroactively or not. But that question is a legal question that the Court must decide.

If Congress were to change the statute, that would be a different situation and in terms of the general principle of Chenery and administrative law, the Attorney General has not said I would adopt a general rule denying eligibility to everyone. He hasn't done that and there's no reason to believe that he would. Historically, fifty percent of the applicants received the relief if they were eligible.

QUESTION: But, isn't that one thing Congress was trying to correct here? They thought that the Attorney General has granted far too much discretionary relief.

MR. GUTTENTAG: That may be so, Your Honor, and that's what Congress did prospectively. We don't believe it did it retroactively and there's no reason to believe that the Attorney General, if he understood that he had the authority, would apply the new statute retroactively

to bar relief to the most compelling cases.

The very fact of applying this retroactively means that the kinds of individuals who are the most qualified for the relief are those who are rendered ineligible. A person, and this is, there are numerous examples set forth in one of the green briefs from the Florida Immigrant Advocacy Center, numerous individuals who committed offenses 20, 15, 10 years ago, minor offenses - theft of a car radio, a single drug offense for which a person received only probation, a theft offense.

QUESTION: These are all aggravated felonies under the statute?

MR. GUTTENTAG: They are now because Congress explicitly rendered them aggravated felonies by specific legislation specifically saying that this applies retroactively to old convictions. What Congress did not do, and we think it's a very different inquiry, it did not say that the eligibility for relief that that is eliminated retroactively. And in our view that's a significant distinction because Congress may and clearly did want to sweep a wide range of convictions into the new procedures. But it did not say that it wanted to eliminate relief particularly for those individuals whose offenses occurred so long ago.

QUESTION: What about the colloquy, the

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colloquy that they're talking about in the history?

MR. GUTTENTAG: Well, I would note that that occurred after the legislation was passed. So, to the extent that it says anything about it, and I don't know that it's relevant given that that colloquy occurred after the statute passed, but what's important is to look at what the statute indicates. And we believe you can work your way through the incredibly detailed and nuanced provisions in great detail and never find anything that says the eligibility for relief is repealed as to convictions that preceded this date. There is nothing there. The only thing that's there is an effective date that says that the new statute goes into effect on a certain date, including the repeal of section 1182(c). We recognize that and there's a provision that governs transitional rule cases and that says that those cases that are already in the pipeline shall continue to be governed by the old rules. But what this Court said repeatedly in both the Martin v. Hadix and in Lindh v. Murphy, and I'm reading from page 22 of our brief and quoting from the case, the only thing that's sufficient is an unambiguous directive or expressed command that the statute is to be applied retroactively. Language is so clear that it can sustain only one interpretation. There is no language in IIRIRA that can sustain only one

interpretation to apply this retroactively. What the statute does is say that new cases will be governed by new rules. We understand that but it doesn't say that the eligibility for --

QUESTION: Mr. Guttentag, what do you say about Mr. Kneedler's reliance on section 309?

MR. GUTTENTAG: 309 says only that, excuse me, that cases that were already in the pipeline shall continue to be governed by the rules in place at that time. And we agree with that. And presumably it means the cases initiated after that time will be governed by new rules. But what Lindh said is that even when a new statute goes into effect, in even language, it says a new statute shall apply to new cases. And that's at best an inference to be drawn from the 309 language, because it doesn't say it directly. But even if that inference could be drawn, what this Court said in Lindh is that inference is not in, or cautioned that that inference in and of itself is not sufficient to infer a retroactive effect. It's not sufficiently --

QUESTION: Of course, what you're talking about is something in Lindh where there is a different situation than here. Do you think that Congress has to make the same sort of showing that you say when we're basically with aliens over which Congress has plenary power and who

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do not have vested rights?

MR. GUTTENTAG: Yes, I do, Your Honor.

QUESTION: Why. What's the authority for that?

MR. GUTTENTAG: I think the Chew Heong case most significantly, the original case in which this Court held that retroactive analysis does apply and held that the provision did not apply and the government sought to distinguish that case on the ground that it involved treaty rights and so on. But that Court applied retroactivity analysis - this Court, excuse me - applied retroactivity analysis. It cited the same cases, U.S. v. Heth, and others, saying that retroactivity analysis applies in the immigration context. It's done it consistently since --

QUESTION: But what about the government's distinction that we're talking about treaty rights there?

MR. GUTTENTAG: I don't think, I think that's a false distinction, Your Honor. What we have here is legal permanent residents who are asserting rights under the statute. The treaty in Chew Heong had the effect of a statute and that's what the Court said. It had an entirely distinct part of that opinion talked about retroactive legislation in the immigration area. Here we have legal permanent residents who are asserting a statutory right and based on the fact that Congress didn't

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legislate with sufficient specificity.

QUESTION: Suppose Congress just changes its immigration laws and says that a whole large category of people who previously had been admissible as permanent resident aliens are no longer admissible. They have to pack up and go home. Can Congress do that?

MR. GUTTENTAG: Congress can do it if it does it explicitly, Your Honor, but it can't --

QUESTION: Okay.

MR. GUTTENTAG: Do it inferentially.

QUESTION: That's fine. But if Congress does it, is that retroactive? It's eliminating a qualification that used to be valid and they're saying for future residents in the United States, it's no longer valid.

MR. GUTTENTAG: Right. It depends on what it's based on, Your Honor. What this Court said is that retroactivity analysis is a practical look at the legal consequences of a past event. If Congress says every immigrant who did something in the past shall now be deported, that's a retroactive effect because we look at practical consequences and irrevocable --

QUESTION: What's the closest case youhavefor that kind of thing, that kind of a definition of retroactivity?

MR. GUTTENTAG: Well, I think that's exactly

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what the Court said in Lindh v. Murphy and that's what it said in Martin v. Hadix and I'd be happy to, but when it imposes. What the Court said in Martin v. Hadix is a common sense functional judgment about whether a new provision attaches new legal consequences to events completed before the enactment. And as I believe Justice Stevens said whether it increases a party's liability for past conduct, attaches a new disability or sweeps away settled expectations and that's all language from Landgraf and from Martin v. Hadix and that's what occurred here. Individuals pled guilty based on the law as it existed at that time and now as a result of that are ineligible for --

QUESTION: Well, you would draw distinction, using Justice Scalia's example to a new statute that said all aliens who are citizens of the United Kingdom shall now be deported. That wouldn't attach any legal consequences to past conduct. That they could do, I suppose.

MR. GUTTENTAG: I suppose they could, Your Honor.

QUESTION: Well, what if they were naturalized citizens of Great Britain. Certainly that would attach it to past conduct.

MR. GUTTENTAG: It may, Your Honor, but I think

the critical inquiry is whether it's an irrevocable act that was based and it sweeps away settled expectations and attaches new legal consequences. And if Congress chooses to do that, and I think this is the important distinction, if Congress chooses to do that, it has enormous power. But it has to do it explicitly. And it can't do it by inference. And that's why Landgraf laid down the rule. Congress is obligated to look at the consequences of what retroactive legislation --

QUESTION: What was the consequence involved in Landgraf? What was the consequence of Landgraf of applying it in prior conduct?

MR. GUTTENTAG: To the employer? I'm sorry. That an employer would have been subject to punitive damages based on a discriminatory act that occurred before the law change.

QUESTION: So, you're talking about the imposition of criminal penalties or penalties for a past act. Here you are talking about who can stay in the United States. It seems to me it's a totally different category, I think. It doesn't make sense to me to talk about making the statute retroactive.

MR. GUTTENTAG: Well that would suggest, Your Honor, that if the employer in the Landgraf case were an immigrant, that imposing punitive damages on that

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individual for their discriminatory conduct would be retroactive but passing a law now that says an immigrant will be deported based on that past discriminatory act is not retroactive.

QUESTION: That's exactly what I think it would suggest.

MR. GUTTENTAG: This Court has applied the same principles that Congress must legislate explicitly in the immigration context, not the Chew Heong case. It did it in Kessler v. Strecker. It did it in Mahler v. Eby. Again and again, it's precisely because the consequences are so severe and I think that the consequences for an immigrant to be deported on any real life practical consequence are far greater than the imposition of damages on an employer and there's a protected, as well as this Court having recognized again and again that a permanent resident has a protected liberty interest in being here.

It doesn't mean that Congress doesn't have the power but it must do it explicitly. And, again, as I say, I don't think that there's anything in this statute, the various provisions, there is not a specific provision that says that even though the new definition of aggravated felony sweeps very broadly, we acknowledge that and we recognize that. Congress has cast the net very wide but it's precisely because of that that the elimination of

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discretionary relief is so devastating and that if Congress intended not only to sweep everyone in, but then also to eliminate any eligibility for discretionary relief that existed at the time.

QUESTION: The Court below seemed to have applied its rule only to guilty pleas and not to an actual conviction on trial, didn't it?

MR. GUTTENTAG: Yes.

QUESTION: Do you defend that distinction?

MR. GUTTENTAG: Well, we believe the guilty plea represents the most compelling example of where the greatest reliance occurs, but we think anything - new consequences --

QUESTION: Do you defend the distinction?

MR. GUTTENTAG: No, we believe that the distinction should apply equally to a conviction but the court need not decide that here because this individual pled guilty.

QUESTION: What was in your complaint. What was the category in your complaint?

MR. GUTTENTAG: Mr. St. Cyr pled guilty and so that was the challenge that was brought in his case so far as I recall.

QUESTION: That's what I thought - that your case was in fact centered on the guilty plea.

MR. GUTTENTAG: Yes, it was, Your Honor.

QUESTION: So that whatever would apply in another case involving a trial and conviction is not before us now.

MR. GUTTENTAG: That's right, Your Honor. That's not directly presented by this case and I might note that when this Court decided the Hughes Aircraft case, it didn't pick the particular retroactive past event. There was the, it was the final determination. Since all the relevant events occurred prior to the change in law, this has a retroactive effect and we will leave for another day.

QUESTION: I must confess I find it hard to, just as a matter of interpreting statutes, to say it's retroactive to some people convicted of a crime or not as to others. Just as a matter of pure logic, I think it's pretty hard to swallow for me.

MR. GUTTENTAG: It would ultimately go back to the commission of the offense because that's the point at which the irrevocable act occurs and new consequence --

QUESTION: That is an event to which additional legal consequences are attached.

MR. GUTTENTAG: That's right, Your Honor, we --

QUESTION: And that would mean there's no

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distinction as to, you know, whether he got caught or whether he was sentenced heavily or pleaded guilty. Those aren't relevant, really.

MR. GUTTENTAG: That would be - - and that's consistent with what the Court does of course in the ex post facto context.

QUESTION: Suppose you have a statute that eliminates or narrows the circumstances in which a governor or the President, for that matter, can grant a pardon. That statute is passed and is framed in a way that it covers all crimes - all people currently in prison. Would you say that under our retroactivity law, you would have to interpret that statute to apply only to crimes committed after its passed and that people who committed crimes before that in reliance upon the fact that if I stole these sneakers, the Attorney General might let me stay in the country anyway? I mean, you know, this is not a very substantial reliance.

MR. GUTTENTAG: But reliance --

QUESTION: And if I stole the sneakers, the Attorney General just might let me stay in the country. This is the kind of reliance we're protecting. If you do the same thing in the pardon context, do you think that we would interpret to be prospective only a statute that narrowed the ability of a governor or of the President to

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grant mitigation of a criminal penalty?

MR. GUTTENTAG: Your Honor, first the critical inquiry is not reliance and this Court has not said that reliance is the test for retroactivity. It's new legal consequences. Whether that would apply to a pardon or not, I'm not sure, but it is the case that this Court has said that in the context of game time credits in the, I believe it was the Weaver case, although I may be wrong, it said that the eligibility for relief from sentencing that is discretionary - there was an act of grace with the board of parole that has a retroactive effect and hence violates --

QUESTION: Wait, it was discretionary whether they had to grant it, but they had granted it and there was an entitlement to it as it was described. Whereas, here you have nothing but this off-the-wall hope that the Attorney General might let you stay in the country.

MR. GUTTENTAG: No, I disagree with that, Your Honor, because what's here is the legal entitlement to apply. That's --

QUESTION: Let me just interrupt. We're not arguing whether it's an ex post facto law and therefore unconstitutional. You're only point is that they have to be clear about it.

MR. GUTTENTAG: That's absolutely right, Your

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Honor.

QUESTION: So your answer to his question should be depends how clear the statute is.

MR. GUTTENTAG: That's right. That is right and I --

QUESTION: I told you what the statute said. All it said is that this eliminated - this discretion is eliminated and it applies to all crimes, which is what the statute here says. And I don't think there's a chance in the world. I'm not talking about ex post facto. I don't think there's a chance in the world that we would, that any sensible court would interpret a statute like that to apply only to crimes committed in the future because all the people who committed those crimes in the past may have hoped that the governor would grand them a pardon.

MR. GUTTENTAG: The obligation --.

QUESTION: And that's just not the kind. Yes, we haven't made reliance the test for our retroactivity but basically what retroactivity law seeks to protect is reliance. And I find the reliance that we're arguing about here - such an insubstantial thing.

MR. GUTTENTAG: But, Your Honor, in that respect, that's where the ex post facto cases are relevant because the ex post facto cases, which this Court has cited in the civil retroactivity context is what

constitutes a retroactive effect. Look not to what the individual relied on in any sort of sense that we're talking about right now but rather whether it attaches new legal consequences. If it does that in the criminal context, it violates the ex post facto. If it does in the civil context, Congress has to be clear to achieve that effect and here because of the circumstances in which this applies it is particularly evident what the new legal consequences are.

QUESTION: I'm suggesting that eliminating an act of grace is not a substantial legal consequence of the sort that would invoke that rule neither in the pardon situation nor here.

MR. GUTTENTAG: The cases, I think, support the view that the fact that it is discretion, in fact in Hughes Aircraft itself --

QUESTION: I suppose Congress thought that by passing this very harsh law they would discourage people from committing new crimes, didn't they?

MR. GUTTENTAG: It certainly is one of the purposes.

QUESTION: That's one of the purposes, I guess, they must have thought it would have had an effect had it been in effect earlier on the old crime scene.

MR. GUTTENTAG: Right, that's certainly one of

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the elements. And it's not analogous to an injunction because this is not an ongoing prohibition against deportation. And that's, this is a one time negating the immigration consequences of a prior criminal conviction. That's what the waiver does. It is not on ongoing injunction against deportation and that also distinguishes this circumstance from the other cases that the government was speaking about that were discussed in AADC - prosecutorial discretion, an after the fact decision by the Attorney General not to actually implement the deportation or something like that. Those are discretionary acts and we recognize that. And those are not in the same category as this particular form of relief from deportation which has been in the statute since 1917 and upon which the final order of deportation is contingent. So, deferred action, and prosecutorial discretion, those other kinds of things are very different and that might be a unilateral hope but eligibility for a waiver of deportation is not.

I believe that the question this Court faces is whether a pure question of law decided by the Attorney General that will determine whether deportation becomes mandatory for persons who committed offenses many, many years ago at a time when the eligibility for relief was in the law and their likelihood of receiving it was at least

fifty-fifty, whether that pure question is reviewable in any court.

The Attorney General has decided that he lacks all authority, not because he doesn't want to grant relief, not because he thinks it might not be appropriate in many, many cases but because the Attorney General determined that he lacks the statutory authority because Congress took it away from it. We believe that legal ruling is wrong and that there is nothing in the statute that manifests the clear and unambiguous intent that this Court has repeatedly held in the retroactivity context is mandatory to impose those kinds of drastic new legal consequences on long time legal permanent residents who have made their lives, who have established their families, and who have done nothing wrong but that one offense, one time in the past and ever since complied with the law and are now swept up in this change and subject to mandatory deportation.

QUESTION: Thank you, Mr. Guttentag.

Mr. Kneedler, you have one minute remaining.

REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONER

MR. KNEEDLER Yes, with respect to the cases that I would rely on for nonretroactivity, Justice Stevens, I would mention Kansas v. Hendricks where the

Court said there was no ex post facto violation because the act wasn't retroactive even though it operated. One of the triggers was a prior conviction, but it looked to current and future of status. Also, the Cox case mentioned in Landgraf itself gives a description of some such cases.

With respect to attaching new legal consequences, that has to be proximate legal consequences in the sense of the statute like Title VII itself imposing penalties on prior conduct. The immigration laws do not regulate and penalize prior conduct. They look to someone's current status and decide whether he shall remain in the United States. There's no pre-existing right to remain in the United States so a new ground of removal does not interfere with any pre-existing rights. In particular, there was no right to expect to be granted relief from deportation. So, even if a new ground, substantive ground, for removal would be retroactive, and this Court's opinions would refute that, certainly taking away a discretionary power in the Attorney General to grant relief in the future is in no way retroactive. We think this case comes down to a question of deference to the Attorney General under this Court's decision in Aguirre and Aguirre and Chevron and the Attorney General has reasonably construed the act not to allow

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discretionary relief. With respect to jurisdiction, Congress was not required to recognize this form of relief as the sort of fundamental personal right that habeas has to be available for.

QUESTION: Thank you, Mr. Kneedler. The case is submitted.

(Whereupon, at 12:16 p.m., the case in the above-entitled matter was submitted.)

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