1   IN THE SUPREME COURT OF THE UNITED STATES

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3 SAMSON TAIWO DADA,   :

4   Petitioner   :

5   v.   : No. 06-1181

6 MICHAEL B. MUKASEY,   :

7 ATTORNEY GENERAL.   :

8 - - - - - - - - - - - - - - - - - x

9   Washington, D.C.

10   Monday, January 7, 2008

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12   The above-entitled matter came on for oral

13 argument before the Supreme Court of the United States

14 at 11:06 a.m.

15 APPEARANCES:

16 CHRISTOPHER J. MEADE, ESQ., New York, N.Y.; on

17   Behalf of the Petitioner.

18 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,

19   Department of Justice, Washington, D.C.; on behalf

20   the Respondent.

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C O N T E N T S

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

2   (11:06 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear argument

4   next in case 06-1181, Dada v. Mukasey.

5   Mr. Meade.

6   ORAL ARGUMENT OF CHRISTOPHER J. MEADE

7   ON BEHALF OF THE PETITIONER

8   MR. MEADE: Mr. Chief Justice, and may it

9   please the Court:

10   Congress has provided that certain aliens,

11   including those with good moral character, are eligible

12   for voluntary departure. Congress has also provided

13   that all aliens may file one motion to reopen raising

14   new facts within 90 days.

15   The question is how to reconcile these two

16   provisions. The parties agree on two key points:

17   First, the Government agrees that the statute can be

18   read to preserve motions to reopen for voluntary

19   departure recipients. Second, the Government agrees

20   that such aliens can file a motion to reopen; and if the

21   immigration official happens to act quickly enough, the

22   alien will receive a ruling. But, under the

23   Government's view, if the official does not act quickly

24   enough, the alien is denied an adjudication.

25   JUSTICE GINSBURG: Can we consider that in

1 your case, given that the application to reopen was made

2 when there were only two days left to run for the

3 termination of the voluntary departure time? In other

4 words, it was your delay, not the Government's, that

5 made it impossible to decide this in the requisite time.

6   MR. MEADE: Yes, Justice Ginsburg, and I

7 have two responses, one relating to this particular case

8 as well as to cases in general.

9   But, as to this particular case, Mr. Dada

10 found new counsel, which took a week; and in the

11 remaining time he prepared a motion to reopen with 80

12 pages of exhibits including affidavits, five letters,

13 medical documents, financial records including tax

14 returns. And that's why it took an additional

15 two-and-a-half weeks to do the motion to reopen.

16   But, as a general matter, aliens file at

17 different periods during the period. For example, in

18 the Eleventh Circuit case of Ugokwe, the alien filed with

19 30 days left in the period, and the Government -- the

20 agency -- didn't act in time.

21   But what happens in the agency is that

22 motions to reopen are, in fact, decided relatively

23 quickly -- just not quickly enough.

24   CHIEF JUSTICE ROBERTS: How many of those

25 are -- are granted?

1   MR. MEADE: How many --

2   CHIEF JUSTICE ROBERTS: What percentage of

3   motions to reopen are granted in favor of the alien?

4   MR. MEADE: We've looked for that statistic,

5   and we have not been able to find the statistic.

6   However, there are numerous cases presenting very

7   sympathetic facts which show grants of motions to

8   reopen.

9   CHIEF JUSTICE ROBERTS: So how many -- do

10 you know how many are filed on an annual basis?

11   MR. MEADE: Yes, I do. As a general matter,

12 there are 10,000 motions to reopen filed, but that's for

13 all aliens, for all removal proceedings. Since

14 voluntary departure is roughly 10 percent of all

15 removals, we estimate that there's roughly a thousand motions

16 to reopen filed by voluntary departure recipients.

17   CHIEF JUSTICE ROBERTS: So there would be no

18 reason not to file one of these if you were subject to

19 voluntary -- if you elected voluntary departure, and it

20 extended your time to stay, right? Presumably, everybody

21 would file one of these if we rule in your favor.

22   MR. MEADE: Not necessarily. There are --

23 the statute governs when a motion to reopen is proper,

24 and the Attorney General determined, even under the

25 previous statutory scheme --

1   CHIEF JUSTICE ROBERTS: We're dealing with

2   people who have already broken the law. So you're

3   saying they are likely to follow the statute that says

4   only file a motion to reopen under these circumstances?

5   MR. MEADE: Well, two responses: First,

6   there are sanctions for frivolous filings under the

7   immigration proceedings.

8   Second, the Attorney General, under the old

9   regime that wasn't tightened -- the Attorney General

10   concluded that there was no pattern of abuse of motions

11   to reopen.

12   And, third, going forward, this is not a

13   risk because --

14   JUSTICE ALITO: If an alien has not been

15   diligently pursuing his or her rights, you would argue

16   the person is still entitled to equitable tolling if

17   the alien files a motion to reopen?

18   MR. MEADE: When you say that they're not

19   diligently pursuing their rights, I am not clear --

20   JUSTICE ALITO: Isn't that generally a

21   requirement for equitable tolling: A person has to have

22   been diligently pursuing his rights?

23   MR. MEADE: Generally, yes, all though --

24   JUSTICE ALITO: But you don't advocate the

25   adoption of that here. You say if you file a petition

1 -- a motion to reopen, you get automatic equitable

2 tolling.

3   MR. MEADE: Yes. Not necessarily equitable

4 tolling, but, yes, automatic tolling under the statute.

5 But to show quickly --

6   JUSTICE GINSBURG: Why isn't -- why isn't it

7 fair to say: You have the short timeframe by statute

8 to leave the country if you've elected voluntary

9 departure. Yet, the Government has provided reopening

10 for all aliens. Okay.

11   Why isn't it reasonable to say that, by

12 asking for reopening when you've gotten permission to

13 voluntarily depart within "x" days, you are

14 relinquishing your voluntary departure status?

15   MR. MEADE: That --

16   JUSTICE GINSBURG: Isn't that a perfect

17 reconciliation of the two?

18   MR. MEADE: Yes, Justice Ginsburg. That's

19 the option that the Government is proposing

20 prospectively. It is also something that my client

21 requested at every stage of the proceedings before the

22 Board, before the Fifth Circuit, and the cert petition,

23 and in our opening brief. That is one way to reconcile

24 the two statutory provisions which the Government is

25 proposing on an ongoing basis that will not apply to our

1   client.

2   JUSTICE GINSBURG: But you raised the

3   question, as I remember, when you put it in the cert

4   petition. The Government advised against granting on

5   that question and limiting it to the question of having

6   it -- having it both ways, keeping your voluntary

7   departure and moving to reopen.

8   MR. MEADE: Yes, that's correct, Justice

9   Ginsburg.

10   CHIEF JUSTICE ROBERTS: Counsel, another way

11   to reconcile the two that I think would be beneficial to

12   your client, but I'm not sure it's open to us, is to

13   address the Government's view that, when you voluntarily

14   depart, your motion to reopen is automatically

15   withdrawn. That is, as I gather, set forth only in a

16   regulation and not the statute.

17   Now, it seems to me that if I were -- if I

18   thought it important to reconcile the two, I would be

19   much more concerned about that interpretation -- that

20   the motion to reopen is automatically withdrawn -- than

21   I would suggest we start incorporating equitable tolling

22   rules and all of that.

23   But, I take it, the vulnerability of that

24   regulation is probably beyond -- beyond debate.

25   MR. MEADE: Well, that regulation is subject

1   to litigation. That would be another way to solve the

2   problem as you suggest. It would be --

3   JUSTICE SOUTER: But it wasn't directly

4   challenged here, was it?

5   MR. MEADE: Excuse me?

6   JUSTICE SOUTER: That regulation was not

7   directly challenged in this case?

8   MR. MEADE: It was not directly challenged

9   because the Fifth Circuit is one of the circuits that

10 says that the motion -- that regulation is valid.

11   CHIEF JUSTICE ROBERTS: So if we don't

12 address it here, there's going to be another case in a

13 year or 18 months where that's going to be raised?

14   MR. MEADE: Your Honor, as to voluntary

15 departure recipients, this Court can construe the

16 statute to avoid the conflict here. And, moving

17 forward, the Government has a proposed solution which,

18 if adopted, will resolve the question on an ongoing

19 basis.

20   Some of the examples of the facts that arise

21 in motions to reopen are seen in various cases. For

22 example, a child newly diagnosed with mental

23 disabilities as in the Azarte case of the Ninth Circuit,

24 a parent newly diagnosed with health problems as in the

25 BIA case of Diaz-Ruacho --

1   CHIEF JUSTICE ROBERTS: Well, in all these

2   cases, if you think you have a good case on the motion

3   to reopen, all you have to do is give up the benefits

4   that you have availed yourself under voluntary

5   departure, and then the motion to reopen is not

6   automatically withdrawn.

7   MR. MEADE: With respect, that's not an

8   option to our client. Our client tried to do that, but

9   was not permitted.

10   CHIEF JUSTICE ROBERTS: No, I mean he -- you

11   should not elect voluntary departure in the first place.

12   MR. MEADE: Well, the problem is because of

13   the very nature of a motion to reopen. A motion to

14   reopen, by its very nature, is based on changed

15   circumstances, circumstances that were not available at

16   the original time of the hearing.

17   So a person could enter and accept voluntary

18   departure at the time of the hearing and, because of

19   circumstances that change, that, by definition, he or

20   she could not have known about, is then in a bind when

21   he wants to --

22   CHIEF JUSTICE ROBERTS: What were those

23   circumstances here?

24   MR. MEADE: The circumstances here is that

25   previous counsel had failed to submit an application and

10

1   supporting evidence. And under the BIA case law, that's

2   a proper vehicle for a motion to reopen.

3   JUSTICE GINSBURG: But it existed? You're

4   not saying something that came up later? What was the

5   ground that the, in this case, that wasn't brought up by

6   the first counsel?

7   MR. MEADE: It was a file for adjustment of

8   status, an application for adjustment of status and

9   supporting documents, as well as the supporting evidence

10   showing that this was a bona fide marriage. And the BIA

11   has numerous cases which says that a motion to reopen of

12   this type is a valid motion to reopen.

13   Now, of course, the agency didn't rule on

14   whether the facts did or not -- did or did not need a

15   motion to reopen. So that question isn't before the

16   Court, But the other cases... of facts that come up

17   tracks that come up to establish a motion to reopen and

18   why it's an important part of the immigration process.

19   JUSTICE SOUTER: Mr. Meade, why was your

20   client not allowed to withdraw the voluntary departure

21   option, withdraw from it?

22   MR. MEADE: Justice Souter, that's unclear.

23   The agency didn't ask -- didn't answer that in the first

24   instance. There has never been a reason given

25   throughout the entire litigation, and now there is some

1 irony --

2   JUSTICE SOUTER: So all we have on the

3 record is just an IJ's determination that he would not

4 accept it?

5   MR. MEADE: Well, it wasn't the IJ. It was

6 before the Board. It was presented to the Board, and

7 the Board's order only said he is ineligible for this

8 relief because he has overstayed the voluntary departure

9 period. But there is some irony --

10   JUSTICE SOUTER: But at the time he filed,

11 he had not overstayed, because he filed on Friday

12 afternoon, right?

13   MR. MEADE: Yes.

14   JUSTICE SOUTER: So -- so maybe the point is

15 we didn't have time to rule on it simply because he

16 filed it on Friday afternoon and he had to leave on

17 Sunday, and therefore, we should not take that as a

18 determination that had he filed it in time for timely

19 action by the court, he would have been denied it.

20   MR. MEADE: The agency has never given a

21 reason for why they did not accept the withdrawal,

22 although there is some irony in the fact that the

23 proposed solution going forward would give aliens

24 exactly what my client asked for if the agency --

25   JUSTICE ALITO: If the voluntary withdrawal

1 had been withdrawn successfully, he would then have been

2 subject to the alternate order of removal?

3   MR. MEADE: That's correct, Your Honor.

4   JUSTICE ALITO: And he could have been

5 removed immediately?

6   MR. MEADE: That's correct.

7   JUSTICE ALITO: And that would have mooted

8 the motion to reopen, wouldn't it?

9   MR. MEADE: It wouldn't have mooted the

10 motion to reopen. Motions to reopen are available to

11 all aliens subject to a final order, including criminal

12 aliens, including some accused of terrorism.

13   JUSTICE ALITO: Would it remain pending once

14 he had left the United States?

15   MR. MEADE: Not once he had left the United

16 States. But all my client wants -- all my client wanted

17 at that time was to be placed in the same circumstance

18 as all other aliens subject to a final ruling.

19   JUSTICE SCALIA: No, but he's not in the

20 same circumstance. I mean, he's made his choice. He

21 was offered voluntary departure, which had advantages.

22 He could arrange his affairs and go when he wanted

23 within 60 days. What he gave up was the ability to

24 appeal the determination.

25   That doesn't seem to me as, as outrageous.

1   I mean, it happens all the time. When a criminal

2   defendant pleads to a lesser charge, he gives up the

3   ability to appeal. And that's what's going on here. He

4   has gotten the advantage of a voluntary departure and

5   given up the ability to appeal. I don't bleed for him.

6   It seems to me it's an option presented

7   before him and he took it.

8   MR. MEADE: I have three responses, Justice

9   Scalia.

10   First, I'll agree that the alien can file

11   the motion to reopen. The only question is whether it's

12   going to be adjudicated in time.

13   Second, as for the question of the bargain,

14   whether giving up appeals is part of the bargain, all

15   parties agree that an alien who accepts voluntary

16   departure can continue to appeal to the Board, to the

17   courts of appeals. The only -- the only adjudicatory

18   process that the Government says that my client is not

19   entitled to now is one motion to reopen.

20   JUSTICE SCALIA: Still and all, it's part of

21   the deal. Even better. Even better. He hasn't even

22   given up all his appeals.

23   MR. MEADE: One final --

24   JUSTICE SCALIA: It's just part of the deal

25   he gave up this little ability to reopen, and that's --

1   that's the choice he made when he accepted voluntary

2   departure.

3   MR. MEADE: One final response is that in

4   the government's proposed regulation, an alien is

5   permitted to file a motion to reopen notwithstanding

6   having been granted voluntary departure, which indicates

7   that the government itself does not think that the

8   bargain includes -- or that Congress did not intend the

9   bargain to include a waiver of the one motion to reopen

10   which all aliens are entitled to file.

11   JUSTICE GINSBURG: Going back to the

12   question that Justice Alito put to you, that he would

13   then be, and you agree this is what you asked for first,

14   like any other removable alien. And Justice Alito asked

15   you: Well, then he could be removed immediately, is

16   that not so? My understanding was, yes, that's so, but

17   you can move for a stay of removal when you have a

18   reopening pending. Is that true?

19   MR. MEADE: Yes. If you have a final order

20   of removal, yes, you can file for a stay once you have a

21   final order. So my client is in a worse position.

22   Because he's under the voluntary departure grant, he

23   cannot get the same ability for a stay that those who

24   are subject to a final removal. So the irony is --

25   JUSTICE KENNEDY: If you say that tolling is

1   automatic, which I assume is your position, would it be

2   possible under the statutes to say that tolling is not

3   automatic but can be permitted in the discretion of the

4   hearing officer? Or are we then just

5   inventing something that's not in the statute at all?

6   MR. MEADE: Well, the problem, Justice

7   Kennedy, is that the agency would need to act within the

8   short time period. And --

9   JUSTICE KENNEDY: No. All it needs to do is

10 to say, we'll grant you an extension while we look at

11 this.

12   MR. MEADE: That's true, Justice Kennedy.

13 But that's essentially the same action that would be

14 needed to decide the motion to reopen in the first

15 place. Motions to reopen are discretionary. They go to

16 the same Board member that had decided the original

17 appeal. So it does not take much time or effort for the

18 agency to be able to decide these, as is reflected by

19 the general time periods for adjudication.

20   For example, in the Dekcladenu case from the

21 Fourth Circuit, the motion was decided in 23 days. In

22 the Sidikhouya case out of the Eighth Circuit --

23   CHIEF JUSTICE ROBERTS: Well, presumably it

24 doesn't take them much time because when someone elects

25 voluntary departure they don't have to address it. I

1   mean, this would obviously increase the volume of

2   motions to reopen. As I said, I don't see know why

3   anybody -- why everybody wouldn't file one, because it

4   extends their stay.

5   MR. MEADE: It's a discretionary

6   determination to the single Board member. And the Board

7   member could deny the motion to reopen, even when

8   there's a prima facie case. All they need to do is look

9   to see if it's in the subset of cases that the agency,

10   exercising its own discretion, where they agree that a

11   motion to reopen is proper. And all we're asking for in

12   this case, not special procedures, not anything added to

13   the motion-to-reopen process, but only the right to have

14   -- adjudication.

15   JUSTICE BREYER: Is there appeal? I mean,

16   what happens? They file a motion to reopen, denied.

17   Now, can they appeal that?

18   MR. MEADE: Yes.

19   JUSTICE BREYER: Okay. And -- now how much

20   time does that take?

21   MR. MEADE: Well, the denial of a motion to

22   reopen, at that point there would be a final order in

23   effect.

24   JUSTICE BREYER: Right. But how -- do they

25   then appeal the motion to -- they appeal the motion --

1   the denial of the motion to reopen or how long -- where

2   do they go? Do they have -- this is the Board, so they

3   go right to the court of appeals?

4   MR. MEADE: That's correct.

5   JUSTICE BREYER: And how long do those take

6   on average?

7   MR. MEADE: One difference, though, between

8   petitions for review and motions to reopen is that

9   petitions for review can be decided from outside the

10   country under the 1996 amendments. And motions to

11   reopen under the agency's regulations, cannot. So the

12   problem is that there is no ability for an alien --

13   JUSTICE BREYER: I'm not interested in the

14   problem. I'm interested in how much added time it

15   actually means. So let's go -- if you win, how much

16   additional time in a typical case will the alien have

17   before he has to leave?

18   MR. MEADE: Petitions for review take

19   longer. According to the agency's current regulations,

20   they take approximately, I believe, 13 months or so is

21   what the --

22   JUSTICE BREYER: And then, and then do you

23   in addition ask for cert or is it not in addition? Are

24   you including that within the 13 months?

25   MR. MEADE: Your Honor, I don't have those

1   exact statistics.

2   JUSTICE BREYER: Or would you just guess on

3   the basis of your experience? I'm not holding you to

4   it.

5   MR. MEADE: There might be cases where aliens

6   seek cert as well. But for the most part --

7   JUSTICE BREYER: All right. What I'm

8   wondering here, and this is because I see two contrary

9   things, if for to you win it means that you are adding

10   an average of, say, 400 days to a stay where Congress

11   said we want you to stay no more than 60 days or 120,

12   that's pretty hard for me to reconcile, to tell you the

13   truth.

14   MR. MEADE: Well, one of the answers on that

15   question on the petition-for-review front is exactly

16   what the government has proposed in its rule going

17   forward, which is that an alien who has voluntary

18   departure can file a petition for review, but by doing

19   so the voluntary departure grant terminates and they're

20   in the same position as other aliens, on the same level

21   playing field as other aliens. That's the solution being

22   proposed by the government going forward, and as to the

23   petition for review hypothetical, that would also apply.

24   That would just put my client in the same position as

25   all other aliens, including criminal aliens.

1   JUSTICE STEVENS: May I ask this so I'm sure

2   -- I'm not sure I understand. Are you asking for automatic

3   tolling just until the motion to reopen is decided or

4   until the motion is decided and also the appeal process

5   has run?

6   MR. MEADE: Just for the motion -- just for

7   the time that the motion to reopen is decided.

8   JUSTICE SCALIA: That's what I had thought.

9   JUSTICE BREYER: Well then, that's the

10 answer to my question.

11   JUSTICE SCALIA: But in your discussion with

12 Justice Breyer you seemed to be saying that he can hang

13 around right through the appeal.

14   MR. MEADE: Thank you for the correction,

15 Justice Scalia.

16   CHIEF JUSTICE ROBERTS: Well, is your

17 position that the right to appeal is taken away, just as

18 under the current regime the motion to reopen is taken

19 away?

20   MR. MEADE: No, Chief Justice Roberts. The

21 difference is that petitions for review can be

22 adjudicated from outside the country, so whether the

23 alien is here or abroad he can get an adjudication of

24 his motion -- of his petition for review, and that was a

25 change under the 1996 Acts.

1   The problem for motions to reopen is that an

2   alien cannot receive an adjudication at all. He can't

3   stay. He can't go. There's no way for those new facts.

4   JUSTICE SCALIA: That's by regulation,

5   though, that he can't, he cannot pursue that from out of

6   the country.

7   MR. MEADE: Yes, that's true. That is

8   not -- that is by regulation, although that regulation

9   applies to all motions to reopen, not just for the

10   subset of motions to reopen of voluntary departure

11   recipients.

12   JUSTICE KENNEDY: If your client or some

13   other client, assuming the government wins in this case,

14   leaves within the 60-day period and the petition for

15   rehearing is forfeited, can he take all these affidavits

16   and apply for an adjustment of status, or is that much

17   longer?

18   MR. MEADE: No. The problem is that for an

19   alien, for many aliens covered by voluntary departure,

20   once they leave the country they are subject to various

21   unlawful presence bars. So by leaving the country these

22   bars are triggered and they cannot get the same relief

23   from outside the country.

24   JUSTICE KENNEDY: Even with voluntary

25   departure?

1   MR. MEADE: Even with voluntary departure.

2   Leaving the country triggers these bars. Once you're

3   outside the country you cannot reapply for admission for

4   in some cases up to 10 years, and that precludes the

5   ability to leave the country and seek the relief, even

6   if you have a marriage to a United States citizen, even

7   if there are extreme circumstances in a particular case

8   that need to be addressed and that would be addressed

9   under a motion to reopen.

10   CHIEF JUSTICE ROBERTS: Do you have to argue

11   that the -- my understanding is that once the -- let's

12   say it's the government's proposed regulation and the

13   motion for -- or the voluntary departure is withdrawn to

14   enable you to consider the motion to reopen. They can

15   proceed with deportation at that time, correct?

16   MR. MEADE: Absolutely.

17   CHIEF JUSTICE ROBERTS: So you -- you almost

18   have to be arguing that the motion to reopen tolls the

19   time for deportation as well, right?

20   MR. MEADE: No. We just want -- under the,

21   under the question -- under the government's proposed

22   rule or under the --

23   CHIEF JUSTICE ROBERTS: Well, under your

24   position, I guess, is what your position is on that.

25   MR. MEADE: Right. Well, the tolling

1   solution, the tolling construction, would permit tolling

2   during the voluntary departure period and during the

3   voluntary departure period there is no final order in

4   effect. So yes, it would toll the time for leaving the

5   country.

6   CHIEF JUSTICE ROBERTS: In other words, the

7   government cannot enter a deportation order during the

8   voluntary departure period?

9   MR. MEADE: Yes. That's governed by the

10   agency's own regulations that say that there's no -- the

11   ultimate order of deportation does not go into effect

12   until an overstay of a voluntary departure period.

13   One thing that is --

14   JUSTICE SCALIA: So I'm not following this.

15   I thought the assumption was we're going to be using the

16   government's new proposed system, in which the

17   acceptance of voluntary departure is eliminated when you

18   file a reopening petition, right. So can the government

19   then proceed to deport you involuntarily or is that also

20   going to be stayed until -- until completion of the

21   reopening petition?

22   MR. MEADE: I'm sorry, Justice Scalia.

23   You're absolutely right. I was addressing the tolling

24   construction with Mr. Chief Justice. But as to the

25   government's proposed rule, under the proposed rule and

1   what my client asks for, the time -- the alien would be

2   automatically subject to a final order and could be

3   deported involuntarily so long as the alien did not get

4   and obtain a stay of deportation from the agency or the

5   court, so yes.

6   JUSTICE SCALIA: And that, that involuntary

7   deportation would effectively cancel the -- the petition

8   for reopening, right?

9   MR. MEADE: If the agency acted quickly

10   enough and involuntarily deported someone within that

11   time --

12   JUSTICE SCALIA: Why are you willing to

13   leave the involuntary deportees in that position,

14   whereas you're not willing to leave the voluntary

15   deportees in that position, that their reopening

16   petition just vanishes? Why is it any fairer for the

17   involuntary deportees than for the voluntary? In fact

18   it's probably fairer for the voluntary because they made

19   their choice.

20   MR. MEADE: Your Honor, I agree with you

21   that that regulation is problematic, although this Court

22   does not need to address it in this case.

23   With the Court's permission, I would like to

24   reserve the balance of my time.

25   CHIEF JUSTICE ROBERTS: Thank you,

1 Mr. Meade.

2   Mr. Kneedler.

3   ORAL ARGUMENT OF EDWIN S. KNEEDLER

4   ON BEHALF OF THE RESPONDENT

5   MR. KNEEDLER: Mr. Chief Justice, and may it

6 please the Court:

7   The filing of a motion to reopen does not

8 automatically suspend the obligation of an alien to

9 leave the United States within the time that was

10 specified in the Board's order granting permission to

11 depart voluntarily. A grant of voluntary departure

12 reflects an exchange of benefits between the government

13 and the alien and Petitioner's automatic tolling rule

14 would greatly subvert that reciprocal arrangement by

15 giving the alien the unilateral and automatic ability to

16 extend the substantive terms of the immigration relief.

17 The --

18   JUSTICE SCALIA: Mr. Kneedler, I think, I

19 think that your, your opposing counsel gave a good

20 answer to that. I also thought it was a quid pro quo,

21 but it's a very strange quid pro quo. I could

22 understand the government saying, look, if you accept

23 voluntary departure your reopening petition is dead; you

24 have to choose between asking for reopening or voluntary

25 departure. But that's not the quid pro quo you're

1   saying that the government is adopting. The quid pro

2   quo is if you accept voluntary departure you roll the

3   dice as to whether your reopening petition will be

4   decided in time. It isn't dead. It's still there, but

5   you just have to hope that it will be decided before you

6   get deported.

7   MR. KNEEDLER: Well, let me make one --

8   JUSTICE SCALIA: That's a very

9   strange statutory quid pro quo, it seems to me.

10   MR. KNEEDLER: Let me make one point clear

11   at the outset. Petitioner's motion to reopen was not

12   dismissed because he was not able to file one. It was

13   denied because he was not eligible for the underlying

14   substantive relief that he requested in this motion.

15   Overstaying a voluntary departure period does not, for

16   example, bar an alien from obtaining asylum or

17   withholding of removal on a motion to reopen. It's only

18   the particular substantive form of relief that he

19   requested in his motion to reopen that is at issue, and

20   that was denied.

21   JUSTICE SOUTER: Well, that may be. But

22   Congress passed a statute that grants a statutory right

23   to file a motion to reopen no matter what the relief is.

24   And the thing that seems strange to me, I guess to carry

25   Justice Scalia's question one step further, is what

1   seems strange to me is that Congress would have granted

2   that right in effect across the board, regardless of

3   what the reason for the reopening might be and yet would

4   have done so knowing that the -- the time for

5   adjudication before the IJ is likely to take longer than

6   the period of the -- prior to the moment of required

7   departure. It sounds as though Congress on your view

8   would be -- would have been giving a right to reopen

9   that in practical terms in most cases will avail the

10   alien absolutely nothing because he'll have to get out

11   before there can be an adjudication.

12   MR. KNEEDLER: With all respect, that's not

13   correct.

14   JUSTICE SOUTER: Why?

15   MR. KNEEDLER: Again, both prior to 1996 and

16   after 1996 Congress specified that an alien who

17   overstays the voluntary departure period is ineligible

18   for three forms of discretionary relief. Now it's

19   voluntary departure, cancellation of removal, or

20   adjustment of status. That was true both beforehand and

21   afterhand. Before 1996, there was no statutory

22   limitation on the time for either a motion to reopen or

23   voluntary departure. Congress was concerned about

24   abuses on both of those fronts, and what it did in 1996

25   was to compress the voluntary departure time for 60 days

1   because it was concerned about how long the agency was

2   allowing agents -- aliens to remain in the country under

3   orders of voluntary departure. And what it did with

4   respect to motions to reopen was very modest. It just

5   put in statutory form a limitation that the agency had

6   put in place pursuant to a statutory directive to place

7   time and number limitations on motions to reopen because

8   of Congress's concern about abuse.

9   JUSTICE SOUTER: Okay, but isn't the

10 question in this case whether what Congress did was as

11 modest as you say? Because if it is as modest as you

12 say, then in at least a substantial category of cases in

13 which a motion to reopen will be filed, there will in

14 fact be no time in the real world to act on that motion

15 before the voluntary departure date. And the question

16 is did Congress really intend a right to reopen that is

17 as modest as that.

18   MR. KNEEDLER: Well --

19   JUSTICE SOUTER: And it seems strange that

20 it would have.

21   MR. KNEEDLER: Two responses to that. With

22 respect to the voluntary departure, Congress anticipated

23 that the alien was going to leave under the order of

24 voluntary departure, not remain here. And prior to

25 1996, just to --

1   JUSTICE SOUTER: Well, it was -- was the

2   regulation -- was the current regulation in place at the

3   time of the '96 Act, that the -- that the departure of

4   the alien, whatever the term is, waives the motion to --

5   MR. KNEEDLER: That regulation has been a

6   fundamental part of motions to reopen going back at

7   least until the 1960s.

8   JUSTICE SOUTER: So, we have to assume that

9   Congress knew that.

10   MR. KNEEDLER: Yes. Yes, we do have. And

11   that's part of the arrangement. The only thing -- and

12   that regulation was repromulgated as part of General

13   Motion to Reopen Regulation in 1995.

14   JUSTICE SOUTER: Okay, then Congress knew at

15   the time of the '96 Act that, if in fact the motion to

16   reopen was filed in the normal course, it probably

17   couldn't be heard prior to the date at which (a) the

18   alien either will overstay and be in trouble for that or

19   (b) will have departed and, under the existing

20   regulatory regime, have forfeited his right to reopen.

21   And it's the strangeness that Congress would want --

22   would have wanted to extend the right to reopen to a

23   statutory level under these circumstances unless it

24   contemplated some kind of a tolling scheme that would

25   avoid this sort of Kafka-esque result.

1   MR. KNEEDLER: No. Again, if I may, the --

2   what Congress had in mind with the deal of being granted

3   voluntary departure was it greatly constricted the time

4   to leave. You have to leave in 60 days, and if you

5   don't leave in 60 days, you're not going to get

6   voluntary departure adjustment of status or cancellation

7   or removal. It didn't affect the eligibility for other

8   substantive relief that an alien might file for in a

9   motion to reopen, such as asylum, such as if he has new

10   evidence going to the ground of removal. But Congress

11   was particularly concerned not to allow these three

12   forms of discretionary relief to remain available. And

13   so I think Congress necessarily would have been

14   unconcerned about whether, if an alien did file a motion

15   to reopen within that greatly constricted 60-day period

16   -- in fact, in this case the Board gave 30 days --

17   Congress wasn't concerned about preserving the

18   underlying substantive eligibility for those forms of

19   discretionary relief, because it made that part of the

20   deal, that the alien was giving up if he left -- if he

21   didn't leave the country, he was giving up that. Those

22   were lesser order forms of relief that Congress was

23   making available, but it did not take away, for

24   example, the right to apply for asylum or withholding.

25   JUSTICE GINSBURG: Mr. Kneedler, why did the

1   Government advise this Court not to grant cert on

2   question number 1, which was: I want to apply to reopen

3   and simultaneously, I want to withdraw my voluntary

4   departure and be just like any other removable alien,

5   take my chances just like anyone else? The Government

6   said don't present that -- Court, don't consider that

7   question. Why?

8   MR. KNEEDLER: Because that had not been --

9   led to widespread litigation in the courts. This

10   automatic tolling rule is -- was what we were

11   fundamentally concerned about. In fact, we told the

12   Court not to take the case at all because the new

13   regulations were under consideration. But that

14   particular provision -- issue has not generated that

15   much litigation. This automatic tolling rule has, and

16   more than --

17   JUSTICE GINSBURG: but it seems that this

18   litigant said, number one, I don't want to take

19   advantage of the status of I have to get out, but I can

20   do so voluntarily. The first thing I want to do is to

21   move to reopen, withdraw my voluntary departure. And

22   then the second thing was, if I can't do that, please

23   extend my voluntary departure time while I move to

24   reopen. It seems that this litigant is being put in a

25   bind by not allowing this Court to consider what was the

1   alien's first preference, that is, to withdraw the

2   voluntary departure.

3   MR. KNEEDLER: But the Court rewrote the

4   question presented so as not to -- not to address that,

5   so I think it's not before the Court right here. But --

6   but beyond that, the deal, the arrangement -- the

7   Attorney General has a lot of discretion how to

8   implement the voluntary departure provision. In fact,

9   he has the authority to eliminate voluntary departure

10   for additional categories of people who are not eligible

11   under the statute itself. So whether to --

12   JUSTICE ALITO: What is the basis for the

13   rule that an alien can't withdraw, can't seek to

14   withdraw a request for voluntary departure?

15   MR. KNEEDLER: The regulations do not

16   provide for it, and it's inconsistent with the --

17   JUSTICE ALITO: There is no regulation that

18   prohibits it. Is that right?

19   MR. KNEEDLER: As far as I'm aware there is

20   no regulation that prohibits it, but the order is a

21   grant of voluntary departure, and the Board of

22   Immigration Appeals order says you're granted permission

23   to depart voluntarily within 30 days; if you do not, the

24   following consequences flow from that. Nothing in the

25   Board's order would allow the alien to avoid those

1   consequences by saying on the 28th day, after all I

2   don't want to do that. And this matter of implementing

3   the voluntary departure agreement is part of a general

4   scheme of a quid pro quo between the alien and the

5   United States. The voluntary departure is granted under

6   circumstances where the alien doesn't have that option.

7   So unilaterally -- allowing the alien unilaterally to do

8   that now is not provided for. Now, that doesn't -- that

9   doesn't take away from the Attorney General's

10   discretionary authority in implementing the Act to

11   provide for that, which is what he has proposed in the

12   new rule. But this case has to be decided under the --

13   under the rules that are now in effect.

14   JUSTICE BREYER: I'm having a lot of trouble

15   understanding the case, because it's so complicated. If

16   you -- could you track it through for a minute? I mean,

17   as I understand this, this probably doesn't concern

18   people who want to voluntarily depart before their case

19   is finished, right? Where they don't reopen because

20   there is nothing to reopen?

21   MR. KNEEDLER: Right, but the people --

22   JUSTICE BREYER: Okay. So we're at a person

23   who is before the Board or before the hearing examiner

24   and he wants to -- he is now got a final order against

25   him.

1   MR. KNEEDLER: Yes.

2   JUSTICE BREYER: Okay. So now you say to

3   him I'll tell you what we'll do to you: You leave, go,

4   good-bye, and we'll let you pursue your appeals anyway,

5   but from out of the country. That's true? Just tell me

6   if I'm getting it right.

7   MR. KNEEDLER: Well --

8   JUSTICE BREYER: I'm not talking about

9   reopening. I'm talking about appeals.

10   MR. KNEEDLER: Well, if he -- if he leaves

11   the country, I believe he can still appeal to the BIA.

12   JUSTICE BREYER: And can you go to court,

13   too?

14   MR. KNEEDLER: Yes. Justice Breyer, under

15   the statutory review provisions, you can -- you can

16   petition for review and leave the country and still have

17   --

18   JUSTICE BREYER: Okay. So no problem. You

19   say go, good-bye, and we'll give you some good deals

20   here if you'll really go, but you pursue your appeals.

21   JUSTICE STEVENS: Does not he lose his right

22   to have the motion to reopen ruled upon?

23   JUSTICE BREYER: That's what I'm asking, I'm

24   getting at.

25   MR. KNEEDLER: If I could just correct. I'm

1   incorrect that you can have your appeal adjudicated if

2   you leave the country. I --

3   JUSTICE BREYER: I'm not talking about

4   motions to reopen at all.

5   MR. KNEEDLER: No, I understand that. The

6   appeal from the immigration judge to the Board of

7   Immigration Appeals.

8   JUSTICE BREYER: Okay. But you can go to

9   there? You go to the BIA?

10   MR. KNEEDLER: That's where you go after --

11   JUSTICE BREYER: Okay. Now, why wouldn't

12   you treat --

13   JUSTICE SCALIA: I don't understand your

14   answer. You said you can or you can't from out of the

15   country?

16   MR. KNEEDLER: I've been informed that you

17   -- that if you leave the country, you cannot pursue.

18   JUSTICE BREYER: Cannot. Okay. But you can

19   go to the BIA? Leaving the country?

20   MR. KNEEDLER: No, you can't -- you can't go

21   to the BIA.

22   JUSTICE BREYER: You can't go anywhere.

23   MR. KNEEDLER: You can't -- you cannot go to

24   the BIA.

25   JUSTICE BREYER: So you lose all your

1   appeals, not just your motion-to-reopen appeals if you

2   leave the country?

3   MR. KNEEDLER: Your administrative appeals.

4   You do not -- the statute has been amended to allow you

5   to petition for review in a court if you leave the

6   country.

7   JUSTICE BREYER: Oh. Okay. So you say --

8   MR. KNEEDLER: Yes. Which was a change from

9   what was before this Court in Stone. In 1996, Congress

10   amended the Act to allow an alien to continue to

11   challenge the final removal order after he leaves the

12   country in court.

13   JUSTICE SOUTER: Yes, but you can't get to

14   court if you haven't been to the BIA, right?

15   MR. KNEEDLER: I believe -- I believe that's

16   true unless --

17   JUSTICE SOUTER: so, again, if we are talking

18   about a short period of time, like 30 days. In

19   practical terms there's no way he is going to get

20   through the BIA in 30 days. And, therefore, when he

21   leaves the country, he cannot then try to get or

22   complete his BIA review, and he therefore will have no

23   chance to get into court, right?

24   MR. KNEEDLER: I think that -- I think that

25   would be correct unless -- I don't think this has ever

1   come up that I'm aware of, about whether you could go to

2   court from an immigration judge's decision where you've

3   left the country and therefore can't appeal to the BIA.

4   JUSTICE SOUTER: There's no reason to assume

5   that you could.

6   MR. KNEEDLER: I just don't know the answer

7   -- I just don't know the answer to that, because I'm not

8   sure that scenario has come up, because usually, if

9   somebody wants to contest, they're not going to leave

10 the country before they have to, and if you appeal from

11 the immigration judge to the Board of Immigration

12 Appeals, that suspends the finality of the order of

13 removal or the order of voluntary departure that the

14 immigration judge has entered. So if you appeal -- if

15 you want to stay in the country, all you have to do is

16 file an automatic appeal with the Board of Immigration

17 Appeals and that suspends the finality of the departure

18 time.

19   JUSTICE SOUTER: Then by doing that you do

20 preserve your right to appeal; and you will preserve

21 your -- will you also preserve your right to go to court

22 if you lose in front of the BIA?

23   MR. KNEEDLER: Yes. Yes. You do.

24   JUSTICE SOUTER: Okay. We got that

25 straight.

1   MR. KNEEDLER: Yes. I'm sorry. I'm not --

2   JUSTICE SCALIA: So why, if you want to have

3   a petition for reopening, why don't you just first file an

4   appeal and then file a petition for reopening and the

5   appeal will enable you to stay in the country until your

6   -- your petition for reopening is --

7   MR. KNEEDLER: If you appeal to the Board of

8   Immigration Appeals, a motion to reopen arises only

9   after the Board has issued a final order on your appeal.

10   So if you appeal to the Board of Immigration Appeals, if

11   the Board rejects your claim on the merits, and

12   reinstates the voluntary departure period to allow you

13   to enter again --

14   JUSTICE SCALIA: You're appealing the

15   immigration judge's decision.

16   MR. KNEEDLER: Right.

17   JUSTICE SCALIA: The immigration judge's

18   decision, you're appealing that to the BIA.

19   MR. KNEEDLER: Right.

20   JUSTICE SCALIA: And that -- that enables

21   you to stay in the country --

22   MR. KNEEDLER: Yes. Until the --

23   JUSTICE SCALIA: And at the same time you

24   file a petition to reopen the -- the administrative law

25   judge's --

1   MR. KNEEDLER: With the immigration judge.

2   JUSTICE SCALIA: Yes.

3   MR. KNEEDLER: I -- I suppose you could do

4   that, but the -- but the appeal -- it would be like a

5   motion to reopen in a district court while you've got

6   an appeal to the -- to the BIA. I -- I think once the

7   appeal goes to the Board -- this case involves motions

8   to reopen filed with the Board of Immigration Appeals,

9   not with the immigration judge, and so -- the alien here

10   conceded his deportability, sought a continuance, and

11   that was denied. He had no other substantive grounds of

12   relief. He asked for voluntary departure. That was

13   granted. He took an appeal to the BIA arguing he should

14   have been granted a continuance; the Board affirmed;

15   reinstated a 30-day voluntary departure period; and then

16   he wanted to seek reopening.

17   And one question that Justice Breyer asked

18   about, what if reopening is denied, would the automatic

19   tolling rule continue? I suppose the alien could file a

20   motion to reconsider the denial of the motion to reopen,

21   and if you had an automatic tolling rule, it would -- it

22   would last as long as it took the Board to act on the

23   motion to reopen, which is -- which 60, 90, 120 days.

24   In this past fiscal year, the Board on motions to reopen

25   resolved I think only about 55 percent of those within

1   90 days. The Board has a huge backlog, and we're

2   talking -- and so we are talking about the very kind of

3   abuse of the immigration system that this Court was

4   concerned about --

5   JUSTICE KENNEDY: May I ask one question?

6   And I'm not sure we went all through the progression

7   Justice Breyer was going to begin. I take it that the

8   motion to reopen has -- shows new evidence, new factors,

9   new circumstances; and that would be unavailable on the

10   appeal, because the record hasn't been supplemented. Or

11   am I wrong about that?

12   MR. KNEEDLER: That -- that's true. It has

13   to be new evidence --

14   JUSTICE KENNEDY: While you have an appeal

15   -- while you have an appeal from what was in the record.

16   MR. KNEEDLER: Right, although --

17   JUSTICE KENNEDY: If you don't have the

18   motion to reopen then the -- then the new material is

19   not subject to the appeal, or am I wrong?

20   MR. KNEEDLER: No. It's not subject to the

21   appeal as such but the Board procedures take account of

22   developments that happen while the case is on appeal,

23   which is that you can file with the Board while your

24   appeal is pending and ask for a motion to remand on the

25   ground that new evidence has come up. For example, in

1   the case of adjustment of status, where -- the alien's

2   wife has filed a petition for immediate relative status

3   to let the alien get a visa, if while the case is

4   pending on appeal that petition has been granted, then

5   -- then it would -- then all the alien has to do is file

6   a motion with the Board and say there is new

7   information; please remand it back to the immigration

8   judge. So a lot of times what has happened is -- maybe

9   intervening things have happened but the alien doesn't

10   do anything about it during the year that the appeal is

11   pending with the Board of Immigration Appeals; then

12   there is a final order and the alien rushes in with the

13   -- with the new information at that point, where if he

14   had only brought it to the attention of the Board while

15   the appeal was pending, it could have been remanded.

16   JUSTICE BREYER: So your basic is -- don't

17   tell me if I'm right if I'm wrong, please. The --

18   the -- what I'm thinking your basic problem or position

19   is and why you've got into this, is because you think

20   any really meritorious case where there should be

21   reopening will be pointed out to the Board before there

22   is a final order in effect and before voluntary

23   departure becomes an issue?

24   MR. KNEEDLER: That -- that --

25   JUSTICE BREYER: And if we decide against

1 you, then you're thinking, well, what will happen in

2 every case is after there is a final order, the alien

3 will move for a motion to reopen because he will get a

4 few extra days.

5   MR. KNEEDLER: It's more than a few extra

6 days.

7   JUSTICE BREYER: He gets a -- several --

8   MR. KNEEDLER: It's an automatic tolling

9 period.

10   JUSTICE BREYER: Have I got it right, what

11 your point is?

12   MR. KNEEDLER: Yes. That is correct and I

13 -- and I think it's fair to say if you're talking about

14 changed circumstances or new evidence that arises after

15 the IJ has rendered his decision, that's a period that

16 might be a year; it might be a year and a half. New

17 developments or changed circumstances are far more

18 likely to have happened during that period of time than

19 they would during a 30-day period of voluntary departure

20 that -- that the Board reinstates at the conclusion of

21 the appeal.

22   So an alien in this position who has been

23 granted voluntary departure and knows that a motion to

24 reopen may not be a realistic option, if he wants to

25 seek adjustment of status or cancellation of removal,

1   the solution to that is to be alert and attentive and

2   file something with the Board, if there are in fact --

3   JUSTICE GINSBURG: Why isn't the solution to

4   withdraw, relinquish the voluntary departure?

5   MR. KNEEDLER: That would be -- that would

6   be one -- as the Attorney General said in his proposed

7   regulations, that would be one way to administer the

8   program, but the Act does not compel that. The Act does

9   not compel --

10   CHIEF JUSTICE ROBERTS: If you do that, the

11   alien is still subject to deportation, right?

12   MR. KNEEDLER: Yes. The alien is still

13   subject to deportation.

14   JUSTICE GINSBURG: With the provision that

15   he can get a stay.

16   MR. KNEEDLER: Yes, he could get -- he could

17   get a stay of removal, and the same -- same thing is

18   true here, if the -- if the alien remains in the

19   country, his voluntary departure period expires, he

20   could file for a stay of removal with the Board or he

21   could file for a stay of removal with the court of

22   appeals if he wants to file a petition.

23   JUSTICE GINSBURG: But then because he would

24   then be back -- if he stays here after the period is

25   run, then he has relinquished the voluntary departure.

1   He is like any removable --

2   MR. KNEEDLER: Right. Right. But -- but

3   like any person, he could file a motion for a stay with

4   the court of appeals to prevent his deportation.

5   JUSTICE GINSBURG: But not to stay -- but he

6   would not be hanging on to his voluntary departure.

7   That's gone.

8   MR. KNEEDLER: No, that -- that is correct.

9   JUSTICE SOUTER: Is there any reason he

10   could not unilaterally relinquish the voluntary

11   departure status as distinct from having to get the approval

12   of the Board or some bureaucrat?

13   MR. KNEEDLER: Well, as I say, the way that

14   -- the Board's order grants him permission to voluntary

15   depart and says the following consequences will attach

16   if you do not. Nothing in the Board's order allows him

17   to withdraw. It grants him that permission.

18   JUSTICE SOUTER: Well, I know it doesn't --

19   it doesn't address the issue, and my question is --

20   MR. KNEEDLER: Well, I think it probably

21   forecloses it.

22   JUSTICE SOUTER: Why?

23   MR. KNEEDLER: Because it's the -- it's the

24   content of the Board's order that -- that says you have

25   60 days to depart and if you do not, the following

1   consequences attach.

2   JUSTICE SOUTER: No, but the Board is

3   saying, look, I'm granting your request -- we are

4   granting your request for a voluntary departure status

5   and there are certain consequences that that status

6   carries. He is saying, on my hypothesis, I relinquish

7   that status. Why are conditions that attach when he has

8   the status an indication that he cannot voluntarily

9   relinquish that status without further action by the

10 Board?

11   MR. KNEEDLER: I -- I -- the statute and

12 regulations just don't provide for it.

13   JUSTICE BREYER: Well, if they don't provide

14 for it, and they don't say you can't do it, why isn't it

15 arbitrary not to let him do it? I mean -- what -- if

16 it's -- if it's arbitrary --

17   MR. KNEEDLER: He -- he requested it at the

18 outset. The case has proceeded on the sense that that

19 is -- that that is the arrangement, that -- that the

20 reciprocal benefits and burdens that the Government and

21 the alien have undertaken --

22   JUSTICE BREYER: It sounds almost arbitrary

23 to say to a person, look, if you think you have some new

24 evidence and want to reopen, do it. But Congress wanted

25 you to get out of here in respect to this 60 days, so

1   you have to give up that. You're not getting those

2   benefits. Now, it's a tough bargain, but it seems

3   reasonable.

4   MR. KNEEDLER: Yes, I --

5   JUSTICE BREYER: What I don't see is to say

6   once you ask for this you can never get status

7   adjustment.

8   MR. KNEEDLER: Yes. I'm not standing here

9   defending the contrary position as an overarching policy

10   matter, because after all the Attorney General's

11   proposed regulations provide for that. My --

12   JUSTICE BREYER: So why not apply them to

13   this person?

14   MR. KNEEDLER: As they are now drafted they

15   would apply prospectively. But my only point is that

16   voluntary departure and motions to reopen are

17   administered under the statute and the regulations and

18   the BIA orders that are entered under the current

19   regulatory framework, which has a different sort of deal

20   between the alien and the government in mind, and that

21   --

22   JUSTICE GINSBURG: Which you say -- you say

23   that under the current regime, the voluntary departure

24   application, granted, is irrevocable. That's --

25   MR. KNEEDLER: I think essentially -- I

1   think essentially yes. I --

2   JUSTICE GINSBURG: The regulations don't say

3   that. The regulations are just blank. It doesn't say

4   and if you do this it's irrevocable.

5   MR. KNEEDLER: Yes. And I want to qualify

6   my answer in a further respect -- that regulations with

7   respect to voluntary departure being granted by the

8   Board don't say anything like that. But I am informed

9   by the executive office of immigration review that if

10   the immigration judge grants voluntary departure and the

11   alien appeals to the Board, the ordinary course would be

12   for the Board to reinstate voluntary departure if it

13   rejects the alien's appeal. But if on appeal the alien

14   requests that voluntary departure not be reinstated once

15   the Board's order is entered, then the Board will omit

16   that from its final order of removal.

17   But Petitioner here did not request on his

18   appeal to the Board that the Board not reinstate a --

19   order a voluntary departure if it affirmed on the

20   merits. And so the Board went forward on the assumption

21   that the alien had requested voluntary departure,

22   entered an order on that assumption, and once it's

23   entered, it's a final order that would require some

24   amendment of the order, in order to -- in order to be

25   changed under the current regime.

1   JUSTICE GINSBERG: But the order didn't say

2   he couldn't withdraw?

3   MR. KNEEDLER: No, it didn't.

4   JUSTICE BREYER: So what about this? I'm

5   just trying this out. You don't have to respond if you

6   don't want to. But you say, look, the AG in his rules

7   here, really tried to reconcile the two interests that

8   we talked about in our prior conversation. Now

9   hypothetically, I suppose you say that was a reasonable

10   way of going about this, and we remand for consideration

11   about whether this prior situation that you couldn't do

12   that was arbitrary, capricious, abuse of discretion, or

13   your failure to apply it retroactively to a certain

14   class of people was arbitrary, capricious, abuse of

15   discretion?

16   MR. KNEEDLER: I think -- I think if the

17   Court wants to get into the question of whether he could

18   withdraw it, the proper thing for the Court to do would

19   be to reject the Petitioner's argument that there is an

20   automatic tolling rule, because we think that's

21   fundamentally inconsistent with Congress's deliberate

22   intention to impose a short deadline and not let the

23   agency extend that, but to remand to the Board of

24   Immigration Appeals for an explanation as to whether he

25   could withdraw his request for voluntary departure.

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1   I don't think the Court should decide that

2   question on its own. I think that should be remanded to

3   the Board. If in the meantime the Attorney General

4   issues regulations that provide for withdrawal of the

5   request, maybe because his case would be back before the

6   Board, those new regulations could be applied. But

7   whether that -- the alien should be allowed to do that

8   is fundamentally a question for the Attorney General in

9   the first instance.

10   JUSTICE KENNEDY: In one of your -- in one

11   of your arguments earlier you said the whole idea of

12   voluntary departure is to expedite the proceedings and

13   so forth. I assume that voluntary departure is never

14   elected as an option before the Board rules.

15   MR. KNEEDLER: It is --

16   JUSTICE KENNEDY: In other words, it -- or

17   am I wrong?

18   MR. KNEEDLER: No. It was elected before

19   the immigration judge. That's where you request it. If

20   the immigration judge rejects your arguments against

21   removability, grants you voluntary departure --

22   JUSTICE KENNEDY: Yes, but the removal -- at

23   the outset, you don't elect voluntary departure at the

24   outset of the hearing?

25   MR. KNEEDLER: You can. And you can get 120

1   days of time to depart. You can do that. People who

2   don't want to contest the removability at all --

3   JUSTICE KENNEDY: No, no, no. I mean in a

4   contested case.

5   MR. KNEEDLER: Right. In the contested

6   cases, you would ask for that at the conclusion of the

7   hearing before the immigration judge. That gets

8   suspended if you appeal to the BIA because the order is

9   not final. It doesn't become final until the Board of

10 Immigration Appeals affirms.

11   CHIEF JUSTICE ROBERTS: Mr. Kneedler, do you

12 know what percentage of these motions to reopen are

13 granted?

14   MR. KNEEDLER: I do not. I asked that

15 question, and I do not know the answer to that.

16   I would like to come back to the fundamental

17 automatic tolling rule that -- the fundamental

18 inconsistency of that automatic tolling rule with what

19 Congress did in 1996, because it shortened to 60 days

20 the time limit in which an alien can depart.

21   It also eliminated a prior exception that

22 had been the law that allowed an exception to the

23 consequences for somebody who overstayed even the much

24 longer voluntary departure period for exceptional

25 circumstances. Congress repealed that exception.

1   Prior to 1996, the Board in a case we cite

2   in our briefs called Matter of Shaar, held that if an

3   alien is granted voluntary departure and files a motion

4   to reopen, it rejected two arguments. One is that the

5   filing of a motion to reopen was itself exceptional

6   circumstances that eliminated the deadline. It rejected

7   that. It also in an en banc decision rejected the

8   automatic tolling rule that Petitioner is arguing for

9   here under a situation in which Congress had granted a

10   long time for aliens to voluntarily depart.

11   We think it defies common sense to suggest

12   that when Congress compressed the time to 60 days, it

13   meant to at the same time reverse what the Board had

14   done in Matter of Shaar and granted an automatic tolling

15   rule, not even one under the control of the immigration

16   authorities, but an automatic tolling rule as a matter

17   of law simply by the unilateral act of filing a motion

18   to reopen.

19   And the Board in Matter of Shaar addressed

20   all of those things. The Board of Immigration Appeals

21   has filed, followed Matter of Shaar, in the intervening

22   years since 1997 -- and importantly, I would like to

23   point this out, too, when Petitioner sought a motion for

24   reopening, he relied on a Board decision called

25   Velarde, which recognized that in some circumstances an

1   alien may file a motion to reopen to try to get

2   adjustment of status if there has been an intervening

3   development with respect to an immediate relative

4   petition filed by a spouse.

5   The Board adopted that rule in this en banc

6   published decision Villarde, but said one of the

7   qualifications for being eligible for that relief is

8   that you not be barred under Matter of Shaar, which

9   means you not be barred by having overstayed your

10   voluntary departure period.

11   So, in the very procedure that Petitioner

12   invoked in this case, there is a published Board

13   decision post-1997 that relies on that -- that relies on

14   that rationale, and the Board has followed that

15   consistently. It is at the very least a reasonable

16   interpretation of the act for the Attorney General not

17   to allow the undermining of this tightened voluntary

18   departure system by providing for reopening.

19   I should also point out that this is not

20   tolling in the normal sense. Tolling usually arises

21   where a person has a claim and there is a statute of

22   limitations for filing a claim before a forum.

23   Petitioner here was already granted

24   voluntary departure. The 60-day time limit is not a

25   procedural statute of limitations. It is a limitation

1   on substantive immigration relief. And we think it's

2   particularly odd that the filing of a procedural motion

3   to reopen would have the effect of changing the

4   statutorily limited time in which an alien could

5   voluntarily depart the United States.

6   CHIEF JUSTICE ROBERTS: Thank you,

7   Mr. Kneedler.

8   Mr. Meade, you have five minutes remaining.

9   REBUTTAL ARGUMENT OF CHRISTOPHER J. MEADE

10   ON BEHALF OF THE PETITIONER

11   MR. MEADE: The government's arguments on

12   the statutory interpretation in this case are undermined

13   by its own proposed rule for at least five reasons.

14   First, their proposed rule makes clear that

15   the government agrees that the statute can be read to

16   have multiple meanings.

17   Second, the proposed rule makes clear that

18   Congress did not intend voluntary departure recipients

19   to waive the motion to reopen when accepting voluntary

20   departure.

21   Third, the rule stresses the importance of

22   motions to reopen and their importance in bringing

23   changed facts to the agency's attention.

24   Fourth, the proposed rule turns on

25   unilateral action of the alien and permits that

1   unilateral action to terminate the voluntary departure

2   grant.

3   JUSTICE SCALIA: Do you agree with counsel

4   for the government as to how long it typically takes for

5   these motions to reopen to be disposed of? He said

6   something like 55 percent take, what, more than --

7   MR. MEADE: My understanding is that the

8   time, that the time is actually relatively short, that

9   they are generally decided within 90 days. They're

10 procedures passed by the -- by regulation which indicate

11 that they go to the same Board member. There has been

12 streamlining procedures by the agency in the early 2000,

13 2001, 2002 period which helped expedite these. And

14 actually, the time --

15   CHIEF JUSTICE ROBERTS: Do you have any

16 estimate about how many more motions to reopen will have

17 to be considered if your client prevails in this case?

18   MR. MEADE: I do not think that there will

19 be many additional motions to reopen, if that happens.

20 Certainly, if the government has a -- if the proposed

21 rule is adopted, the number of motions to reopen will

22 not be affected, because prospectively, the solution --

23 the problem will have been solved, and this case will

24 only be dealing with people in the pipeline, people who

25 have already made decisions about whether to file a

1   motion to reopen or not.

2   So assuming that the government's proposed

3   rule is enacted in anything like its proposed form, then

4   there will be no such problem going forward.

5   CHIEF JUSTICE ROBERTS: No, I don't

6   understand that, because my -- as I understand it, it

7   would in every case grant an effective extension of the

8   time that you have to depart if you hava filed a

9   motion to reopen.

10   MR. MEADE: No, that's not correct, with

11   respect. Under the government's proposed rule, the

12   alien would be placed in the same position as other

13   aliens and would be -- and there would be no additional

14   incentive to file a motion to reopen.

15   Under the government's proposed rule, the

16   period would not toll, the voluntary departure grant

17   would expire, and the alien would be placed in the same

18   position as otherwise --

19   JUSTICE ALITO: Isn't it your position that

20   the statute requires tolling?

21   MR. MEADE: Our interpretation is the

22   statute is subject to multiple interpretations. But the

23   one thing that the statute does not permit is the

24   solution, the construction that's being proposed by the

25   government in this case. The government -- the statute

1   would permit tolling. The statute permits reconciling

2   the provisions as the government proposes going forward.

3   But the one thing that the statute does not permit is

4   the government's position in this particular litigation.

5   CHIEF JUSTICE ROBERTS: You answered my

6   question with respect to the government's proposed

7   regulation. But under your position that would allow

8   the voluntary departure option to remain open, then

9   anyone who exercised that option would want to file a

10   motion to reopen because it would extend their time?

11   MR. MEADE: The motions to reopen are

12   subject to statutory and regulatory limits. Moreover,

13   the time period --

14   CHIEF JUSTICE ROBERTS: The answer is yes?

15   MR. MEADE: I'm saying that there -- aliens

16   could choose to do so, but I disagree that there would

17   be a -- many additional motions to reopen.

18   JUSTICE SCALIA: Your answer is yes, but the

19   Attorney General's rule would prevent that -- proposed

20   rule would --

21   MR. MEADE: Yes. That's part of the answer,

22   yes, Justice Scalia.

23   But in addition, the length of time of

24   adjudication is entirely within the agency's control.

25   It can take two days, two weeks, two months, or if it

1   takes longer --

2   CHIEF JUSTICE ROBERTS: Not if it has 10,000

3   of these a year, as you told me in your opening

4   argument. I mean, it takes some time to address them.

5   You can't say all they have to do is decide them all

6   within two days.

7   MR. MEADE: No. But the answer is that

8   there -- it is within their control, so the length of

9   tolling under any tolling rule is not within the control

10   of the alien. It's within the control of the agency.

11   This Court -- as to your question, Justice

12   Alito, on the -- with the regulations with respect to

13   withdraw in this case, the agency is silent on that.

14   It's unclear to me why the agency -- may I finish --

15   it's unclear why the agency did not give my client the

16   request he requested, and we ask that this Court either

17   grant tolling or interpret the statute consistent with

18   the government's proposed rule.

19   CHIEF JUSTICE ROBERTS: Thank you, counsel.

20   The case is submitted.

21   (Whereupon, at 12:07 p.m., the case in the

22   above-entitled matter was submitted.)

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24

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