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P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in case 06-1181, Dada v. Mukasey.

Mr. Meade.

ORAL ARGUMENT OF CHRISTOPHER J. MEADE

ON BEHALF OF THE PETITIONER

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

Congress has provided that certain aliens, including those with good moral character, are eligible for voluntary departure. Congress has also provided that all aliens may file one motion to reopen raising new facts within 90 days.

The question is how to reconcile these two provisions. The parties agree on two key points: First, the Government agrees that the statute can be read to preserve motions to reopen for voluntary departure recipients. Second, the Government agrees that such aliens can file a motion to reopen; and if the immigration official happens to act quickly enough, the alien will receive a ruling. But, under the Government's view, if the official does not act quickly enough, the alien is denied an adjudication.

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 the 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'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? Seemingly, 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 filing 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 was 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.

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 time frame by statute
8 to leave the country if you've left in 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 in the Ninth Circuit,
24 a parent newly diagnosed with health problems as in the
25 BIA case of Diaz Mucho --

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 the 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

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 show the various kinds of
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 in time for timely
19 action by the court he would have been denied.

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?

5 MR. MEADE: I --

6 JUSTICE KENNEDY: Or are we then just
7 inventing something that's not in the statute at all?

8 MR. MEADE: Well, the problem, Justice
9 Kennedy, is that the agency would need to act within the
10 short time period. And --

11 JUSTICE KENNEDY: No. All it needs to do is
12 to say, we'll grant you an extension while we look at
13 this.

14 MR. MEADE: That's true, Justice Kennedy.
15 But that's essentially the same action that would be
16 needed to decide the motion to reopen in the first
17 place. Motions to reopen are discretionary. They go to
18 the same Board member that had decided the original
19 appeal. So it does not take much time or effort for the
20 agency to be able to decide these, as is reflected by
21 the general time periods for adjudication.

22 For example, in the Dekoladeno case on the
23 Fourth Circuit, the motion was decided in 23 days. In
24 the Sidikhouya case out of the Eighth Circuit --

25 CHIEF JUSTICE ROBERTS: Well, presumably it

1 doesn't take them much time because when someone elects
2 voluntary departure they don't have to address it. I
3 mean, this would obviously increase the volume of
4 motions to reopen. As I said, I don't see know why
5 anybody -- why everybody wouldn't file one, because it
6 extends their stay.

7 MR. MEADE: It's a discretionary
8 determination to the single Board member. And the Board
9 member could deny the motion to reopen, even when
10 there's a prima facie case. All they have to do is look
11 to see if it -- in the subset of cases that the agency,
12 exercising its own discretion, where they agree that a
13 motion to reopen is proper. And all we're asking for in
14 this case, not special procedures, not anything added to
15 the motion to reopen process, but only the right to have
16 --

17 JUSTICE BREYER: Is there appeal? I mean,
18 what happens? They file a motion to reopen, denied.
19 Now, can they appeal that?

20 MR. MEADE: Yes.

21 JUSTICE BREYER: Okay. And how much time
22 does that take?

23 MR. MEADE: Well, the denial of a motion to
24 reopen, at that point there would be a final order in
25 effect.

1 JUSTICE BREYER: Right. But how -- do they
2 then appeal the motion to -- they appeal the motion --
3 the denial of the motion to reopen or how long -- where
4 do they go? Do they have -- this is the Board, so they
5 go right to the court of appeals?

6 MR. MEADE: That's correct.

7 JUSTICE BREYER: And how long do those take
8 on average?

9 MR. MEADE: One difference, though, between
10 petitions for review and motions to reopen is that
11 petitions for review can be decided from outside the
12 country under the 1996 amendments. And motions to
13 reopen under the agency's regulations, cannot. So the
14 problem is that there is no ability for an alien --

15 JUSTICE BREYER: I'm not interested in the
16 problem. I'm interested in how much added time it
17 actually means. So let's go -- if you win, how much
18 additional time in a typical case would the alien have
19 before he has to leave?

20 MR. MEADE: Petitions for review take
21 longer. According to the agency's current regulations,
22 they take approximately, I believe, 13 months or so is
23 what the --

24 JUSTICE BREYER: And then, and then do you
25 in addition ask for cert or is it not in addition? Are

1 you including that within the 13 months?

2 MR. MEADE: Your Honor, I don't have those
3 exact statistics.

4 JUSTICE BREYER: Or would you just guess on
5 the basis of your experience? I'm not holding you to
6 it.

7 MR. MEADE: There might be cases where alien
8 seek cert as well. But for the most part --

9 JUSTICE BREYER: All right. What I'm
10 wondering here, and this is because I see two contrary
11 things, if for to you win it means that you are adding
12 an average of, say, 400 days to a stay where Congress
13 said we want you to stay no more than 60 days or 120?
14 That's pretty hard for me to reconcile, to tell you the
15 truth.

16 MR. MEADE: Well, one of the answers on that
17 question on the petition for review front is exactly
18 what the government has proposed in its rule going
19 forward, which is that an alien who has voluntary
20 departure can file a petition for review, but by doing
21 so the voluntary departure grant terminates and they're
22 in the same position as other aliens, on the same level
23 playing as other aliens. That's the solution being
24 proposed by the government going forward, and as to the
25 petition for review hypothetical that would also apply.

1 That would just put my client in the same position as
2 all other aliens, including criminal aliens.

3 JUSTICE STEVENS: I'm not sure I understand
4 it. Are you asking for automatic tolling just until the
5 motion to reopen is decided or until the motion is
6 decided and also the appeal process has run?

7 MR. MEADE: Just for the motion, just for
8 the time that the motion to reopen is decided.

9 JUSTICE SCALIA: That's what I thought.

10 JUSTICE BREYER: Well then, that's the
11 answer to my question.

12 JUSTICE SCALIA: But in your discussion with
13 Justice Breyer you seemed to be saying that he can hang
14 around right through the appeal.

15 MR. MEADE: Thank you for the correction,
16 Justice Scalia.

17 CHIEF JUSTICE ROBERTS: Well, is your
18 position that the right to appeal is taken away, just as
19 under the current regime the motion to reopen is taken
20 away?

21 MR. MEADE: No, Chief Justice Roberts. The
22 difference is that petitions for review can be
23 adjudicated from outside the country, so whether the
24 alien is here or abroad he can get an adjudication of
25 his motion -- of his petition for review, and that was a

1 change under the 1996 act.

2 The problem for motions to reopen is that an
3 alien cannot receive an adjudication at all. He can't
4 stay. He can't go. There's no way for those new facts.

5 JUSTICE SCALIA: That's by regulation,
6 though, that he can't, he cannot pursue that from out of
7 the country.

8 MR. MEADE: Yes, that's true. That is
9 not -- that is by regulation, although that regulation
10 applies to all motions to reopen, not just for the
11 subset of motions to reopen or voluntary departure
12 recipients.

13 JUSTICE KENNEDY: If your client or some
14 other client, assuming the government wins in this case,
15 leaves within the 60-day period and the petition for
16 rehearing is forwarded, can he take all these affidavits
17 and apply for an adjustment of status, or is that much
18 longer?

19 MR. MEADE: No. The problem is that for an
20 alien, for many aliens covered by voluntary departure,
21 once they leave the country they are subject to various
22 unlawful presence bars. So by leaving the country these
23 bars are triggered and they cannot get the same relief
24 from outside the country.

25 JUSTICE KENNEDY: Even with voluntary

1 departure?

2 MR. MEADE: Even with voluntary departure.
3 Leaving the country triggers these bars. Once you're
4 outside the country you cannot reapply for admission for
5 in some cases up to 10 years, and that precludes the
6 ability to leave the country and seek the relief, even
7 if you have a marriage to a United States citizen, even
8 if there are extreme circumstances in a particular case
9 that need to be addressed and that would be addressed
10 under a motion to reopen.

11 CHIEF JUSTICE ROBERTS: Do you have to argue
12 that the -- my understanding is that once the -- let's
13 say it's the government's proposed regulation and the
14 motion for -- or the voluntary departure is withdrawn to
15 enable you to consider the motion to reopen. They can
16 proceed with deportation at that time, correct?

17 MR. MEADE: Absolutely.

18 CHIEF JUSTICE ROBERTS: So you -- you almost
19 have to be arguing that the motion to reopen tolls the
20 time for deportation as well, right?

21 MR. MEADE: No. We just want -- under the,
22 under the question -- under the government's proposed
23 rule or under the --

24 CHIEF JUSTICE ROBERTS: Well, under your
25 position, I guess, is what your position is on that.

1 MR. MEADE: Right. Well, the tolling
2 solution, the tolling construction, would permit tolling
3 during the voluntary departure period and during the
4 voluntary departure period there is no final order in
5 effect. So yes, it would toll the time for leaving the
6 country.

7 CHIEF JUSTICE ROBERTS: In other words, the
8 government cannot enter a deportation order during a
9 voluntary departure period.

10 MR. MEADE: Yes. That's governed by the
11 agency's own regulations that say that there's no -- the
12 ultimate order of deportation does not go into effect
13 until an overstay of a voluntary departure period.

14 One thing that is --

15 JUSTICE SCALIA: So I'm not following this.
16 I thought the assumption was we're going to be using the
17 government's new proposed system, in which the
18 acceptance of voluntary departure is eliminated when you
19 file a reopening petition, right. So can the government
20 then proceed to deport you involuntarily or is that also
21 going to be stayed until, until completion of the
22 reopening petition?

23 MR. MEADE: I'm sorry, Justice Scalia.
24 You're absolutely right. I was addressing the tolling
25 construction with Mr. Chief Justice. But as to the

1 government's proposed rule under the proposed rule and
2 what my client asks for, the time -- the alien would be
3 automatically subject to a final order and could be
4 deported involuntarily so long as the alien did not get
5 and obtain a stay of deportation from the agency or the
6 court, so yes.

7 JUSTICE SCALIA: And that, that involuntary
8 deportation would effectively cancel the, the petition
9 for reopening, right?

10 MR. MEADE: If the agency acted quickly
11 enough and involuntarily deported someone within that
12 time --

13 JUSTICE SCALIA: Why are you willing to
14 leave the involuntary deportees in that position,
15 whereas you're not willing to leave the voluntary
16 deportees in that position, that their reopening
17 petition just vanishes? Why is it any fairer for the
18 involuntary deportees than for the voluntary? In fact
19 it's probably fairer for the voluntary because they made
20 their choice.

21 MR. MEADE: Your Honor, I agree with you
22 that that regulation is problematic, although the Court
23 does not need to address it in this case.

24 With the court's permission, I would like to
25 reserve the balance of my time.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 Mr. Meade.

3 Mr. Kneedler.

4 ORAL ARGUMENT OF EDWIN S. KNEEDLER
5 ON BEHALF OF THE RESPONDENT

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

8 The filing of a motion to reopen does not
9 automatically suspend the obligation of an alien to
10 leave the United States within the time that was
11 specified in the Board's order granting permission to
12 depart voluntarily. The grant of voluntary departure
13 reflects an exchange of benefits between the government
14 and the alien and Petitioner's automatic tolling rule
15 would greatly subvert that reciprocal arrangement by
16 giving the alien the unilateral and automatic ability to
17 extend the substantive terms of the immigration relief
18 the --

19 JUSTICE SCALIA: Mr. Kneedler, I think, I
20 think that your, your opposing counsel gave a good
21 answer to that. I also thought it was a quid pro quo,
22 but it's a very strange quid pro quo. I could
23 understand the government saying, look, if you accept
24 voluntary departure your reopening is dead; you have to
25 choose between asking for reopening or voluntary

1 departure. But that's not the quid pro quo you're
2 saying that the government is adopting. The quid pro
3 quo is if you accept voluntary departure you roll the
4 dice as to whether your reopening petition will be
5 decided in time. It isn't dead. It's still there, but
6 you just have to hope that it will be decided before you
7 get deported.

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

9 CHIEF JUSTICE ROBERTS: That's a very
10 strange statutory quid pro quo, it seems to me.

11 MR. KNEEDLER: Let me make one point clear
12 at the outset. Petitioner's motion to reopen was not
13 dismissed because he was not able to file one. It was
14 denied because he was not eligible for the underlying
15 substantive relief that he requested in this motion.
16 Overstaying a voluntary departure period does not, for
17 example, bar an alien from obtaining asylum or
18 withholding of removal on a motion to reopen. It's only
19 the particular substantive form of relief that he
20 requested in his motion to reopen that is at issue, and
21 that was denied.

22 JUSTICE SOUTER: Well, that may be. But
23 Congress passed a statute that grants a statutory right
24 to file a motion to reopen no matter what the relief is.
25 And the thing that seems strange to me, I guess to carry

1 Justice Scalia's question one step further, is what
2 seems strange to me is that Congress would have granted
3 that right in effect across the board, regardless of
4 what the reason for the reopening might be and yet would
5 have done so knowing that the, that the time for
6 adjudication before the IJ is likely to take longer than
7 the period of the, prior to the moment of required
8 departure. It sounds as though Congress on your view
9 would be -- would have been giving a right to reopen
10 that in practical terms in most cases will avail the
11 alien absolutely nothing because he'll have to get out
12 before there can be an adjudication.

13 MR. KNEEDLER: With all respect, that's not
14 correct.

15 JUSTICE SOUTER: Why?

16 MR. KNEEDLER: Again, both prior to 1996 and
17 after 1996 Congress specified that an alien who
18 overstays the voluntary departure period is ineligible
19 for three forms of discretionary relief. Now it's
20 voluntary departure, cancellation or removal, or
21 adjustment of status. That was true both beforehand and
22 afterward. Before 1996, there was no statutory
23 limitation on the time for either a motion to reopen or
24 voluntary departure. Congress was concerned about
25 abuses on both of those fronts, and what it did in 1996

1 was to compress the voluntary departure time for 60 days
2 because it was concerned about how long the agency was
3 allowing agents -- aliens to remain in the country under
4 orders of voluntary departure. And what it did with
5 respect to motions to reopen was very modest. It just
6 put in statutory form a limitation that the agency had
7 put in place pursuant to a statutory directive to place
8 time and number limitations on motions to reopen because
9 of Congress's concern about abuse.

10 JUSTICE SOUTER: Okay, but isn't the
11 question in this case whether what Congress did was as
12 modest as you say? Because if it is as modest as you
13 say, then in at least a substantial category of cases in
14 which a motion to reopen will be filed, it will in fact
15 be no time in the real world to act on that motion
16 before the voluntary departure date. And the question
17 is did Congress really intend a right to reopen that is
18 as modest as that.

19 MR. KNEEDLER: Well --

20 JUSTICE SOUTER: And it seems strange that
21 it would have.

22 MR. KNEEDLER: Two responses to that. With
23 respect to the voluntary departure, Congress anticipated
24 that the alien was going to leave under the order of
25 voluntary departure, not remain here. And prior to

1 1996, just to --

2 JUSTICE SOUTER: Well, it was -- was the
3 regulation -- was the current regulation in place at the
4 time of the '96 Act, that the -- that the departure of
5 the alien, whatever the term is, waives the motion to --

6 MR. KNEEDLER: That regulation has been a
7 fundamental part of motions to reopen going back at
8 least until the 1960s.

9 JUSTICE SOUTER: So, we assume that Congress
10 knew that.

11 MR. KNEEDLER: Yes. Yes, we do have. And
12 that's part of the arrangement. The only thing -- and
13 that regulation was repromulgated as part of General
14 Motion to Reopen Regulation in 1995.

15 JUSTICE SOUTER: Okay, then Congress knew at
16 the time of the '96 Act that, if in fact the motion to
17 reopen was filed in the normal course, it probably
18 couldn't be heard prior to the date at which (a) the
19 alien either will overstay and be in trouble for that or
20 (b) will have departed and, under the existing
21 regulatory regime, have forfeited his right to reopen.
22 And it's the strangeness that Congress would want --
23 would have wanted to extend the right to reopen to a
24 statutory level under these circumstances unless it
25 contemplated some kind of a tolling scheme that would

1 avoid this sort of Kafka-esque result.

2 MR. KNEEDLER: No. Again, if I may, the --
3 what Congress had in mind with the deal of granting
4 voluntary departure was it greatly constricted the time
5 to leave. You have to leave in 60 days, and if you
6 don't leave in 60 days, you're not going to get
7 voluntary departure adjustment of status or cancellation
8 or removal. It didn't affect the eligibility for other
9 substantive relief that an alien might file for in a
10 motion to reopen, such as asylum, such as if he has new
11 evidence going to the ground of removal. But Congress
12 was particularly concerned not to allow these three
13 forms of discretionary relief to remain available. And
14 so I think Congress necessarily would have been
15 unconcerned about whether, if an alien did file a motion
16 to reopen within that greatly constricted 60-day period
17 -- in fact, in this case the Board gave 30 days --
18 Congress wasn't concerned about preserving the
19 underlying substantive eligibility for those forms of
20 discretionary relief, because it made that part of the
21 deal, that alien was giving up if he left -- if he
22 didn't leave the country, he was giving up that. Those
23 were lesser order forms of relief that Congress was
24 making available, but it did not take away, for
25 example, the right to apply for asylum or withholding.

1 JUSTICE GINSBURG: Mr. Kneedler, why did the
2 Government advise this Court not to grant cert on
3 question number 1, which was: I want to apply to reopen
4 and simultaneously, I want to withdraw my voluntary
5 departure and be just like any other removable alien,
6 take my chances just like anyone else? The Government
7 said don't present that -- Court, don't consider that
8 question. Why?

9 MR. KNEEDLER: Because that had not been --
10 led to widespread litigation in the courts. This
11 automatic tolling rule is -- was what we were
12 fundamentally concerned about. In fact, we told the
13 Court not to take the case at all because the new
14 regulations were under consideration. But that
15 particular provision -- issue has not generated that
16 much litigation. This automatic tolling rule has, and
17 more than --

18 JUSTICE GINSBURG: And it seems that this
19 litigant said, number one, I don't want to take
20 advantage of the status of I have to get out, but I can
21 do so voluntarily. The first thing I want to do is to
22 move to reopen, withdraw my voluntary departure. And
23 then the second thing was, if I can't do that, please
24 extend my voluntary departure time while I move to
25 reopen. It seems that this litigant is being put in a

1 bind by not allowing this Court to consider what was the
2 alien's first preference, that is, to withdraw the
3 voluntary departure.

4 MR. KNEEDLER: But the Court rewrote the
5 question presented so as not to -- not to address that,
6 so I think it's not before the Court right here. But --
7 but beyond that, the deal, the arrangement -- the
8 Attorney General has a lot of discretion how to
9 implement the voluntary departure provision. In fact,
10 he has the authority to eliminate voluntary departure
11 for additional categories of people who are not eligible
12 under the statute itself. So whether to --

13 JUSTICE ALITO: What is the basis for the
14 rule that an alien can't withdraw, can't seek to
15 withdraw a request for voluntary departure?

16 MR. KNEEDLER: The regulations do not
17 provide for it, and it's inconsistent with the --

18 JUSTICE ALITO: There is no regulation that
19 prohibits it. Is that right?

20 MR. KNEEDLER: As far as I'm aware there is
21 no regulation that prohibits it, but the order is a
22 grant of voluntary departure, and the Board of
23 Immigration Appeals order says you're granted permission
24 to depart voluntarily within 30 days; if you do not, the
25 following consequences flow from that. Nothing in the

1 Board's order would allow the alien to avoid those
2 consequences by saying on the 28th day, after all I
3 don't want to do that. And this matter of implementing
4 the voluntary departure agreement is part of a general
5 scheme of a quid pro quo between the alien and the
6 United States. The voluntary departure is granted under
7 circumstances where the alien doesn't have that option.
8 So unilaterally -- allowing the alien unilaterally to do
9 that now is not provided for. Now, that doesn't -- that
10 doesn't take away from the Attorney General's
11 discretionary authority in implementing the Act to
12 provide for that, which is what he has proposed in the
13 new rule. But this case has to be decided under the --
14 under the rules that are now in effect.

15 JUSTICE BREYER: I'm having a lot of trouble
16 understanding the case, because it's so complicated. If
17 you -- could you track it through for a minute? I mean,
18 as I understand this, this probably doesn't concern
19 people who want to voluntarily depart before their case
20 is finished, right? Where they don't reopen because
21 there is nothing to reopen?

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

23 JUSTICE BREYER: Okay. So we're at a person
24 who is before the Board or before the hearing examiner
25 and he wants to -- he is now got a final order against

1 him.

2 MR. KNEEDLER: Yes.

3 JUSTICE BREYER: Okay. So now you say to
4 him I'll tell you what we'll do to you: You leave, go,
5 good-bye, and we'll let you pursue your appeals anyway,
6 but from out of the country. That's true? Just tell me
7 if I'm getting it right.

8 MR. KNEEDLER: Well --

9 JUSTICE BREYER: I'm not talking about
10 reopening. I'm talking about appeals.

11 MR. KNEEDLER: Well, if he -- if he leaves
12 the country, I believe he can still appeal to the BIA.

13 JUSTICE BREYER: And can you go to court,
14 too?

15 MR. KNEEDLER: Yes. Justice Breyer, under
16 the statutory review provisions, you can -- you can
17 petition for review and leave the country and still have
18 --

19 JUSTICE BREYER: Okay. So no problem. You
20 say go, good-bye, and we'll give you some good deals
21 here if you'll really go, but you pursue your appeals.

22 JUSTICE STEVENS: Does not he lose his right
23 to have the motion to reopen ruled upon?

24 JUSTICE BREYER: That's what I'm asking, I'm
25 getting at.

1 MR. KNEEDLER: If I could just correct. I'm
2 incorrect that you can have your appeal adjudicated if
3 you leave the country. I --

4 JUSTICE BREYER: I'm not talking about
5 motions to reopen at all.

6 MR. KNEEDLER: No, I understand that. The
7 appeal from the immigration judge to the Board of
8 Immigration Appeals.

9 JUSTICE BREYER: Okay. But you can go to
10 there? You go to the BIA?

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

12 JUSTICE BREYER: Okay. Now, why wouldn't
13 you treat --

14 JUSTICE SCALIA: I don't understand your
15 answer. You said you can or you can't from out of the
16 country?

17 MR. KNEEDLER: I've been informed that you
18 -- that if you leave the country, you cannot pursue.

19 JUSTICE BREYER: Cannot. Okay. But you can
20 go to the BIA? Leaving the country?

21 MR. KNEEDLER: No, you can't -- you can't go
22 to the BIA.

23 JUSTICE BREYER: You can't go anywhere.

24 MR. KNEEDLER: You can't -- you cannot go to
25 the BIA.

1 JUSTICE BREYER: So you lose all your
2 appeals, not just your motion-to-reopen appeals if you
3 leave the country?

4 MR. KNEEDLER: Your administrative appeals.
5 You do not -- the statute has been amended to allow you
6 to petition for review in a court if you leave the
7 country.

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

9 MR. KNEEDLER: Yes. Which was a change from
10 what was before this Court in *Stone*. In 1996 Congress
11 amended the Act to allow an alien to continue to
12 challenge the final removal order after he leaves the
13 country in court.

14 JUSTICE SOUTER: Yes, but you can't get to
15 court if you haven't been to the BIA, right?

16 MR. KNEEDLER: I believe -- I believe that's
17 true unless --

18 JUSTICE SOUTER: And, again, we are talking
19 about a short period of time, like 30 days. In
20 practical terms there's no way he is going to get
21 through the BIA in 30 days. And, therefore, when he
22 leaves the country, he cannot then try to get or
23 complete his BIA review, and he therefore will have no
24 chance to get into court, right?

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

1 would be correct unless -- I don't think this has ever
2 come up that I'm aware of, about whether you could go to
3 court from an immigration judge's decision where you've
4 left the country and therefore can't appeal to the BIA.

5 JUSTICE SOUTER: There's no reason to assume
6 that you could.

7 MR. KNEEDLER: I just don't know the answer
8 -- I just don't know the answer to that, because I'm not
9 sure that scenario has come up, because usually, if
10 somebody wants to contest, they're not going to leave
11 the country before they have to, and if you appeal from
12 the immigration judge to the Board of Immigration
13 Appeals, that suspends the finality of the order of
14 removal or the order of voluntary departure that the
15 immigration judge has entered. So if you appeal -- if
16 you want to stay in the country, all you have to do is
17 file an automatic appeal with the Board of Immigration
18 Appeals and that suspends the finality of the departure
19 time.

20 JUSTICE SOUTER: And by doing that you do
21 preserve your right to appeal; and you will preserve
22 your -- will you also preserve your right to go to court
23 if you lose in front of the BIA.

24 MR. KNEEDLER: Yes. Yes. You do.

25 JUSTICE SOUTER: Okay. We got that

1 straight.

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

3 JUSTICE SCALIA: So why, if you want to have
4 a petition for reopening, why don't you just file an
5 appeal and then file a petition for reopening and the
6 appeal will enable you to stay in the country until your
7 -- your petition for reopening is --

8 MR. KNEEDLER: If you appeal to the Board of
9 Immigration Appeals, a motion to reopen arises only
10 after the Board has issued a final order on your appeal.
11 So if you appeal to the Board of Immigration Appeals, if
12 the Board rejects your claim on the merit, and
13 reinstates the voluntary departure period to allow you
14 to enter again --

15 JUSTICE SCALIA: You're appealing the
16 immigration judge's decision.

17 MR. KNEEDLER: Right.

18 JUSTICE SCALIA: The immigration judge's
19 decision, you're appealing that to the BIA.

20 MR. KNEEDLER: Right.

21 JUSTICE SCALIA: And that -- that enables
22 you to stay in the country --

23 MR. KNEEDLER: Yes. Until the --

24 JUSTICE SCALIA: And at the same time you
25 file a petition to reopen the -- the administrative law

1 judge's --

2 MR. KNEEDLER: With the immigration judge.

3 JUSTICE SCALIA: Yes.

4 MR. KNEEDLER: I -- I suppose you could do
5 that, but the -- but the appeal -- it would be like a
6 motion to reopen in the district court while you've got
7 an appeal to the -- to the BIA. I -- I think once the
8 appeal goes to the Board -- this case involves motions
9 to reopen filed with the Board of Immigration Appeals,
10 not with the immigration judge, and so -- the alien here
11 conceded his deportability, sought a continuance, and
12 that was denied. He had no other substantive grounds of
13 relief. He asked for voluntary departure. That was
14 granted. He took an appeal to the BIA arguing he should
15 have been granted a continuance; the Board affirmed;
16 reinstated a 30-day departure period; and then he wanted
17 to seek reopening.

18 And one question that Justice Breyer asked
19 about, what if reopening is denied would the automatic
20 tolling rule continue? I suppose the alien could file a
21 motion to reconsider the denial of the motion to reopen,
22 and if you had an automatic tolling rule, it would -- it
23 would last as long as it took the Board to act on the
24 motion to reopen, which is -- which 60, 90, 120 days.
25 In this past Fiscal Year the Board on motions to reopen

1 resolved I think only about 55 percent of those within
2 90 days. The Board has a huge backlog, and we're
3 talking -- and so we are talking about the very kind of
4 abuse of the immigration system that this Court was
5 concerned about --

6 JUSTICE KENNEDY: May I ask one question?
7 And I'm not sure the progression in which Justice Breyer
8 was going to begin. I take it that the motion to reopen
9 has -- shows new evidence, new factors, new
10 circumstances; and that would be unavailable on the
11 appeal, because the record hasn't been supplemented. Or
12 am I wrong about that?

13 MR. KNEEDLER: That -- that's true. It has
14 --

15 JUSTICE KENNEDY: While you have an appeal
16 -- while you have an appeal from what was in the record.

17 MR. KNEEDLER: Right, although --

18 JUSTICE KENNEDY: If you don't have the
19 motion to reopen then the -- then the new material is
20 not subject to the appeal, or am I wrong?

21 MR. KNEEDLER: No. It's not subject to the
22 appeal as such but the Board procedures take account of
23 developments that happen while the case is on appeal,
24 which is that you can file with the Board while your
25 appeal is pending and ask for a motion to remand on the

1 ground that new evidence has come up. For example, in
2 the case of adjustment of status, where -- the alien's
3 wife has filed a petition for immediate relative status
4 to let the alien get a visa, if while the case is
5 pending on appeal that petition has been granted, then
6 -- then it would -- then all the alien has to do is file
7 a motion with the Board and say there is new
8 information; please remand it back to the immigration
9 judge. So a lot of times what has happened is -- maybe
10 intervening things have happened but the alien doesn't
11 do anything about it during the year that the appeal is
12 pending with the Board of Immigration Appeals; then
13 there is a final order and the alien rushes in with the
14 -- with the new information at that point, where if you
15 had only brought it to the attention of the Board while
16 the appeal was pending, it could have been remanded.

17 JUSTICE BREYER: So your basic is -- don't
18 tell me if I'm right if I'm wrong, please. The --
19 the -- what I'm thinking your basic problem or position
20 is and why you've got into this, is because you think
21 any really meritorious case where there should be
22 reopening will be pointed out to the Board before there
23 is a final order in effect and before voluntary
24 departure becomes an issue?

25 MR. KNEEDLER: That -- that --

1 JUSTICE BREYER: And if we decide against
2 you, then you're thinking, well, what will happen in
3 every case is after there is a final order, the alien
4 will move for a motion to reopen because he will get a
5 few extra days.

6 MR. KNEEDLER: It's more than a few extra
7 days.

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

9 MR. KNEEDLER: It's an automatic tolling
10 period.

11 JUSTICE BREYER: Have I got it right, what
12 your point is?

13 MR. KNEEDLER: Yes. That is correct and I
14 -- and I think it's fair to say if you're talking about
15 changed circumstances or new evidence that arises after
16 the IJ has rendered his decision, that's a period that
17 might be a year; it might be a year and a half. New
18 developments or changed circumstances are far more
19 likely to have happened during that period of time than
20 they would during a 30-day period of voluntary departure
21 that -- that the Board reinstates at the conclusion of
22 the appeal.

23 So an alien in this position who has been
24 granted voluntary departure and knows that a motion to
25 reopen may not be a realistic option, if he wants to

1 seek adjustment of status or cancellation of removal,
2 the solution to that is to be alert and attentive and
3 file something with the Board, if there are in fact --

4 JUSTICE GINSBURG: Why isn't the solution to
5 withdraw, relinquish the voluntary departure?

6 MR. KNEEDLER: That would be -- that would
7 be one -- as the Attorney General said in his proposed
8 regulations, that would be one way to administer the
9 program, but the Act does not compel that. The Act does
10 not compel --

11 CHIEF JUSTICE ROBERTS: If you do that, the
12 alien is still subject to deportation, right?

13 MR. KNEEDLER: Yes. The alien is still
14 subject to deportation.

15 JUSTICE GINSBURG: With the provision that
16 he can get a stay.

17 MR. KNEEDLER: Yes, he could get -- he could
18 get a stay of removal, and the same -- same thing is
19 true here, if the -- if the alien remains in the
20 country, his voluntary departure period expires, he
21 could file for a stay of removal with the Board or he
22 could file for a stay of removal with the court of
23 appeals if he wants to file a petition.

24 JUSTICE GINSBURG: But then because he would
25 then be back -- if he stays here after the period is

1 run, then he has relinquished the voluntary departure.
2 He is like any removable --

3 MR. KNEEDLER: Right. Right. But -- but
4 like any person, he could file a motion for a stay with
5 the court of appeals to prevent his deportation.

6 JUSTICE GINSBURG: But not to stay -- but he
7 would not be hanging on to his voluntary departure.
8 That's gone.

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

10 JUSTICE SOUTER: Is there any reason he
11 could not unilaterally relinquish the voluntary
12 departure status as distinct from having to get approval
13 from the Board or bureaucrat?

14 MR. KNEEDLER: Well, as I say, the way that
15 -- the Board's order grants him permission to voluntary
16 depart and says the following consequences will attach
17 if you do not. Nothing in the Board's order allows him
18 to withdraw. It grants him that permission.

19 JUSTICE SOUTER: Well, I know it doesn't --
20 it doesn't address the issue, and my question is --

21 MR. KNEEDLER: Well, I think it probably
22 forecloses it.

23 JUSTICE SOUTER: Why?

24 MR. KNEEDLER: Because it's the -- it's the
25 content of the Board's order that -- that says you have

1 60 days to depart and if you do not, the following
2 consequences attach.

3 JUSTICE SOUTER: No, but the Board is
4 saying, look, I'm granting your request -- we are
5 granting your request for a voluntary departure status
6 and there are certain consequences that that status
7 carries. He is saying, on my hypothesis, I relinquish
8 that status. Why are conditions that attach when he has
9 the status an indication that he cannot voluntarily
10 relinquish that status without further action by the
11 Board?

12 MR. KNEEDLER: I -- I -- the statute and
13 regulations just don't provide for it.

14 JUSTICE BREYER: Well, if they don't provide
15 for it, and they don't say you can't do it, why isn't it
16 arbitrary not to let him do it? I mean -- what -- if
17 it's -- if it's arbitrary --

18 MR. KNEEDLER: He -- he requested it at the
19 outset. The case has proceeded on the sense that that
20 is -- that that is the arrangement, that -- that the
21 reciprocal benefits and burdens that the Government and
22 the alien have undertaken --

23 JUSTICE BREYER: It sounds almost arbitrary
24 to say to a person, look, if you think you have some new
25 evidence and want to reopen, do it. But Congress wanted

1 you to get out of here in respect to this 60 days, so
2 you have to give up that. You're not getting those
3 benefits. Now, it's a tough bargain, but it seems
4 reasonable.

5 MR. KNEEDLER: Yes, I --

6 JUSTICE BREYER: What I don't see is to say
7 once you ask for this you can never get status
8 adjustment.

9 MR. KNEEDLER: Yes. I'm not standing here
10 defending the contrary position as an overarching policy
11 matter, because after all the Attorney General's
12 proposed regulations provide for that. My --

13 JUSTICE BREYER: So why not apply them to
14 this person?

15 MR. KNEEDLER: As they are now drafted they
16 would apply prospectively. But my only point is that
17 voluntary departure and motions to reopen are
18 administered under the statute and the regulations and
19 the BIA orders that are entered under the current
20 regulatory framework, which has a different sort of deal
21 between the alien and the government in mind, and that
22 --

23 JUSTICE GINSBURG: Which you say -- you say
24 that under the current regime, the voluntary departure
25 application, granted, is irrevocable. That's --

1 MR. KNEEDLER: I think essentially -- I
2 think essentially yes. I --

3 JUSTICE GINSBURG: The regulations don't say
4 that. The regulations are just blank. It doesn't say
5 and if you do this it's irrevocable.

6 MR. KNEEDLER: Yes. And I want to qualify
7 my answer in a further respect -- that regulations with
8 respect to voluntary departure being granted by the
9 Board don't say anything like that. But I am informed
10 by the executive office of immigration review that if
11 the immigration judge grants voluntary departure and the
12 alien appeals to the Board, the ordinary course would be
13 for the Board to reinstate voluntary departure if it
14 rejects the alien's appeal. But if on appeal the alien
15 requests that voluntary departure not be reinstated once
16 the Board's order is entered, then the Board will omit
17 that from its final order of removal.

18 But Petitioner here did not request on his
19 appeal to the Board that the Board not reinstate a --
20 order a voluntary departure if it had affirmed on the
21 merits. And so the Board went forward on the assumption
22 that the alien had requested voluntary departure,
23 entered an order on that assumption, and once it's
24 entered, it's a final order that would require some
25 amendment of the order, in order to -- in order to be

1 changed under the current regime.

2 JUSTICE GINSBERG: But the order didn't say
3 he couldn't withdraw?

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

5 JUSTICE BREYER: So what about this? I'm
6 just trying this out. You don't have to respond if you
7 don't want to. But you say, look, the AG in his rules
8 here, really tried to reconcile the two interests that
9 we talked about in our prior conversation. Now
10 hypothetically, I suppose you say that was a reasonable
11 way of going about this, and we remand for consideration
12 about whether this prior situation that you couldn't do
13 that was arbitrary, capricious, abuse of discretion, or
14 your failure to apply it retroactively to a certain
15 class of people was arbitrary, capricious, abusive
16 discretion?

17 MR. KNEEDLER: I think -- I think if the
18 Court wants to get into the question of whether he could
19 withdraw it, the proper thing for the Court to do would
20 be to reject the Petitioner's argument that there is an
21 automatic tolling rule, because that's fundamentally
22 inconsistent with Congress' deliberate intention to
23 impose a short deadline and not let the agency extend
24 that, but to remand to the Board of Immigration Appeals
25 for an explanation as to whether he could withdraw his

1 request for voluntary departure.

2 I don't think the Court should decide that
3 question on its own. I think that should be remanded to
4 the Board. If in the meantime the Attorney General
5 issues regulations that provide for withdrawal of the
6 request, maybe because his case would be back before the
7 Board, those new regulations could be applied. But
8 whether that -- the alien should be allowed to do that
9 is fundamentally a question for the Attorney General in
10 the first instance.

11 JUSTICE KENNEDY: In one of your -- in one
12 of your arguments earlier you said the whole idea of
13 voluntary departure is to expedite the proceedings and
14 so forth. I assume that voluntary departure is never
15 elected as an option before the Board rules.

16 MR. KNEEDLER: It is --

17 JUSTICE KENNEDY: In other words, it -- or
18 am I wrong?

19 MR. KNEEDLER: No. It was elected before
20 the immigration judge. That's where you request it. If
21 the immigration judge rejects your arguments against
22 removability, grants you voluntary departure --

23 JUSTICE KENNEDY: Yes, but the removal -- at
24 the outset, you don't elect voluntary departure at the
25 outset of the hearing?

1 MR. KNEEDLER: You can. And you can get 120
2 days of time to depart. You can do that. People who
3 don't want to contest the removability at all --

4 JUSTICE KENNEDY: No, no, no. I mean in a
5 contested case.

6 MR. KNEEDLER: Right. In the contested
7 cases, you would ask for that at the conclusion of the
8 hearing before the immigration judge. That gets
9 suspended if you appeal to the BIA because the order is
10 not final. It doesn't become final until the Board of
11 Immigration Appeals affirms.

12 CHIEF JUSTICE ROBERTS: Mr. Kneedler, do you
13 know what percentage of these motions to reopen are
14 granted?

15 MR. KNEEDLER: I do not. I asked that
16 question, and I do not know the answer to that.

17 I would like to come back to the fundamental
18 automatic tolling rule that -- the fundamental
19 inconsistency of that automatic tolling rule with what
20 Congress did in 1996, because it shortened to 60 days
21 the time limit in which an alien can depart.

22 It also eliminated a prior exception that
23 had been the law that allowed an exception to the
24 consequences for somebody who overstayed even the much
25 longer voluntary departure period for exceptional

1 circumstances. Congress repealed that exception.

2 Prior to 1996, the Board in the case we cite
3 in our briefs called Matter of Shaar, held that if an
4 alien is granted voluntary departure and files a motion
5 to reopen, it rejected two arguments. One is that the
6 filing of a motion to reopen was itself exceptional
7 circumstances that eliminated the deadline. It rejected
8 that. It also in an en banc decision rejected the
9 automatic tolling rule that Petitioner is arguing for
10 here under a situation in which Congress had granted a
11 long time for aliens to voluntarily depart.

12 We think it defies common sense to suggest
13 that when Congress compressed the time to 60 days, it
14 meant to at the same time reverse what the Board had
15 done in Matter of Shaar and granted an automatic tolling
16 rule, not even one under the control of the immigration
17 authorities, but an automatic tolling rule as a matter
18 of law simply by the unilateral act of filing a motion
19 to reopen.

20 And the Board in Matter of Shaar addressed
21 all of those things. The Board of Immigration Appeals
22 has filed, followed Matter of Shaar, in the intervening
23 years since 1997 -- and importantly, I would like to
24 point this out, too, when Petitioner sought a motion for
25 reopening, he relied on a Board decision called

1 Villarde, which recognized that in some circumstances an
2 alien may file a motion to reopen to try to get
3 adjustment of status if there has been intervening
4 development with respect to an immediate relative
5 petition filed by a spouse.

6 The Board adopted that rule in this en banc
7 published decision Villarde, but said one of the
8 qualifications for being eligible for that relief is
9 that you not be barred under Matter of Shaar, which
10 means you not be barred by having overstayed your
11 voluntary departure period.

12 So, in the very procedure that Petitioner
13 invoked in this case, there is a published Board
14 decision post-1997 that relies on that -- that relies on
15 that rationale, and the Board has followed that
16 consistently. It is at the very least a reasonable
17 interpretation of the act for the Attorney General not
18 to allow the undermining of this tightened voluntary
19 departure system by providing for reopening.

20 I should also point out that this is not
21 tolling in the normal sense. Tolling usually arises
22 where a person has a claim and there is a statute of
23 limitations for filing a claim before a forum.

24 Petitioner here was already granted
25 voluntary departure. The 60-day time limit is not a

1 procedural statute of limitations. It is a limitation
2 on substantive immigration relief. And we think it's
3 particularly odd that the filing of a procedural motion
4 to reopen would have the effect of changing the
5 statutorily limited time in which an alien could
6 voluntarily depart the United States.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 Mr. Kneedler.

9 Mr. Meade, you have five minutes remaining.

10 REBUTTAL ARGUMENT OF CHRISTOPHER J. MEADE
11 ON BEHALF OF THE PETITIONER

12 MR. MEADE: The government's arguments on
13 the statutory interpretation in this case are undermined
14 by its own proposed rule for at least five reasons.

15 First, their proposed rule makes clear that
16 the government agrees that the statute can be read to
17 have multiple meanings.

18 Second, the proposed rule makes clear that
19 Congress did not intend voluntary departure recipients
20 to waive the motion to reopen in accepting voluntary
21 departure.

22 Third, the rule stresses the importance of
23 motions to reopen and their importance in bringing
24 changed facts to the agency's attention.

25 Fourth, the proposed rule turns on

1 unilateral action of the alien and permits that
2 unilateral action to terminate the voluntary departure
3 grant.

4 JUSTICE SCALIA: Do you agree with counsel
5 for the government as to how long it typically takes for
6 these motions to reopen to be disposed of? He said
7 something like 55 percent take, what, more than --

8 MR. MEADE: My understanding is that the
9 time, that the time is actually relatively short, that
10 they are generally decided within 90 days. They're
11 procedures passed by the -- by regulation which indicate
12 that they go to the same Board member. There has been
13 streamlining procedures by the agency in the early 2000,
14 2001, 2002 period which helped expedite these. And
15 actually, the time --

16 CHIEF JUSTICE ROBERTS: Do you have any
17 estimate about how many more motions to reopen will have
18 to be considered if your client prevails in this case?

19 MR. MEADE: I do not think that there will
20 be many additional motions to reopen, if that happens.
21 Certainly, if the government has a -- if the proposed
22 rule is adopted, the number of motions to reopen will
23 not be affected, because prospectively, the solution --
24 the problem will have been solved, and this case we'll
25 only be dealing with people in the pipeline, people who

1 have already made decisions about whether to file a
2 motion to reopen or not.

3 So assuming that the government's proposed
4 rule is enacted in anything like its proposed form, then
5 there will be no problem going forward.

6 CHIEF JUSTICE ROBERTS: No, I don't
7 understand that, because my -- as I understand it, it
8 would in every case grant an effective extension of the
9 time which you would have to depart if you had filed a
10 motion to reopen.

11 MR. MEADE: No, that's not correct, with
12 respect. Under the government's proposed rule, the
13 alien would be placed in the same position as other
14 aliens and would be -- and there would be no additional
15 incentive to file a motion to reopen.

16 Under the government's proposed rule, the
17 period would not toll, the voluntary departure grant
18 would expire, and the alien would be placed in the same
19 position as otherwise --

20 JUSTICE ALITO: Isn't it your position that
21 the statute requires tolling?

22 MR. MEADE: Our interpretation is the
23 statute is subject to multiple interpretations. But the
24 one thing that the statute does not permit is the
25 solution, the construction that's being proposed by the

1 government in this case. The government -- the statute
2 would permit tolling. The statute permits reconciling
3 the provisions as the government proposes going forward.
4 But the one thing that the statute does not permit is
5 the government's position in this particular litigation.

6 CHIEF JUSTICE ROBERTS: You answered my
7 question with respect to the government's proposed
8 regulation. But under your position that would allow
9 the voluntary departure option to remain open, then
10 anyone who exercised that option would want to file a
11 motion to reopen because it would extend their time?

12 MR. MEADE: The motions to reopen are
13 subject to statutory and regulatory limits. Moreover,
14 the time period --

15 CHIEF JUSTICE ROBERTS: The answer is yes?

16 MR. MEADE: I'm saying that there -- aliens
17 could choose to do so, but I disagree that there would
18 be a -- many additional motions to reopen.

19 JUSTICE SCALIA: Your answer is yes, but the
20 Attorney General's rule would prevent that -- proposed
21 rule would --

22 MR. MEADE: Yes. That's part of the answer,
23 yes, Justice Scalia.

24 But in addition, the length of time of
25 adjudication is entirely within the agency's control.

1 It can take two days, two weeks, two months, or if it
2 takes longer --

3 CHIEF JUSTICE ROBERTS: Not if it has 10,000
4 of these a year, as you told me in your opening
5 argument. I mean, it takes some time to address them.
6 You can't say all they have to do is decide them all
7 within two days.

8 MR. MEADE: No. But the answer is that
9 there -- it is within their control, so the length of
10 tolling under any tolling rule is not within the control
11 of the alien. It's within the control of the agency.

12 This Court -- as to your question, Justice
13 Alito, on the -- with the regulations with respect to
14 withdraw in this case, the agency is silent on that.
15 It's unclear to me why the agency -- may I finish --
16 it's unclear why the agency did not give my client the
17 request he requested, and we ask that this Court either
18 grant tolling or interpret the statute consistent with
19 the government's proposed rule.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 The case is submitted.

22 (Whereupon, at 12:07 p.m., the case in the
23 above-entitled matter was submitted.)

24
25

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