SUPREME COURT OF THE UNITED STATES

No. 97–1252

JANET RENO, ATTORNEY GENERAL, ET AL., PETITIONERS *v.* AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[February 24, 1999]

JUSTICE SOUTER, dissenting.

The unhappy history of the provisions at issue in this case reveals that Congress, apparently unintentionally, enacted legislation that simultaneously grants and denies the right of judicial review to certain aliens who were in deportation proceedings before April 1, 1997. Finding no trump in the two mutually exclusive statutory provisions, I would invoke the principle of constitutional doubt and apply the provision that avoids a potential constitutional difficulty. Because the Court today instead purports to resolve the contradiction with a reading that strains the meaning of the text beyond what I think it can bear, I respectfully dissent.

I

The first of the contradictory provisions is put in play by §306(c)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 110 Stat. 3009–612, as amended by §2 of the Act of Oct. 11, 1996, 110 Stat. 3657, which makes new 8 U. S. C. §1252(g) (1994 ed., Supp. III) immediately applicable as of the date of its enactment (*i.e.*, October 11, 1996) to "claims arising from all past, pending, or future" removal proceedings. Subsection (g), for its part, bars review in any court of "the deci-

sion or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien," except as provided in §1252. The exception, however, is cold comfort to applicants for review of proceedings pending when IIRIRA took effect, because the rest of §1252 is inapplicable to "an alien who is in exclusion or deportation proceedings" on the effective date of IIRIRA, April 1, 1997. Section 309(c)(1)(A) of IIRIRA, 110 Stat. 3009–625, as amended by §2 of the Act of Oct. 11, 1996, 110 Stat. 3657. Hence, by operation of §306(c)(1), it would appear that aliens who did not obtain judicial review as of the enactment date of October 11, 1996, and who were in proceedings as of IIRIRA's effective date of April 1, 1997, can never obtain judicial review of "the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien" in any forum. In short, §306(c)(1) appears to bar members of this class of aliens from any review of any aspect of their claims.

Yet §306(c)(1) is not the only statutory provision applicable to aliens in proceedings before April 1, 1997. Section 309(c)(1)(B) provides that, in the case of aliens in proceedings before the effective date, "the proceedings (including judicial review thereof) shall continue to be conducted without regard to [new §1252]." The parenthetical expression in this section specifically provides that the judicial review available to aliens before the April 1, 1997, effective date of §1252 continues to be available even after the effective date to aliens who were already in proceedings before the effective date. In other words, the terms of §309(c)(1)(B) preserve pre-existing judicial review for the self-same class of aliens to whom §306(c)(1) bars review.

We do not have to dwell on how this contradiction arose.[1] What matters for our purposes is that §306(c)(1)

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[1] Section 306(c)(1) was originally enacted on September 30, 1996. As it then read, it first provided that new 8 U. S. C. §1252 (1994 ed., Supp. III) would apply "to all final orders of deportation or removal and motions to reopen filed on or after the date of the enactment of this Act," 110 Stat. 3009–612, and then provided that subsection (g) would apply without limitation. Under this transitional arrangement, no review was available to an alien in proceedings after September 30, 1996, until such time as a final order was issued against the alien. When a final order issued, the alien would be entitled to any judicial review available under new §1252. The intent of this provision was thus presumably to preclude judicial review of nonfinal steps in the removal procedure in the interim before IIRIRA's effective date of April 1, 1997. This arrangement, however, conflicted with the different transitional provision set out in §309(c)(4). This section, entitled "Transitional Changes in Judicial Review," provides that where a final order was "entered more than 30 days after the date of enactment of this Act," subsection (b) of the old 8 U. S. C. §1105a does not apply. This subsection provides for habeas corpus proceedings for "any alien against whom a final order of exclusion has been made." In other words, §309(c)(4) expressly contemplates that old §1105a, less its habeas provision, applies to cases where a final order is issued more than 30 days after September 30, 1996, whereas the original §306(c)(1) as enacted contemplated that when a final order was issued on or after September 30, 1996, the new §1252 would apply.

It appears that Congress noticed this discrepancy. On October 4, 1996, Representative Lamar Smith of Texas explained on the floor of the House that he had "become aware of an apparent technical error in two provisions" of IIRIRA. 142 Cong. Rec. H12293. He explained that "[i]t was the clear intent of the conferees that, as a general matter, the full package of changes made by [new 8 U. S. C. §1252] effect *[sic]* those cases filed in court after the enactment of the new law, leaving cases already pending before the courts to continue under existing law." *Ibid*. By "before the courts," Representative Smith seems to have meant the immigration courts. He went on to explain §309(c)(4): "The conferees also intended, however, to accelerate the implementation of certain of the reforms [in new §1252]. This intent is clearly spelled out in section 309 of the act. Specifically, section 309(c)(4) calls for accelerated implementation of some of the reforms made in section 306 regarding judicial review, but does not call for immediate implementation of all of

and §309(c)(1) cannot be reconciled. Either aliens in proceedings on April 1, 1997, have no access to judicial review or else they have the access available under the law that applied before §1252 came into effect.[2]

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these reforms." *Ibid*. Representative Smith then proposed the first technical change, which does not concern us. He then added that "there is a need to clarify the scope of section 306(c) to ensure that it does not conflict with section 309(c)(4)," and introduced an amendment to §306(c)(1). *Ibid*. That amendment, enacted October 11, 1996, eliminated the part of the original §306(c)(1) that applied new §1252 to final orders filed on or after the date of enactment, but left untouched the immediate application of subsection (g). 110 Stat. 3657. The result of this amendment was that §306(c)(1) no longer qualified its preclusion of judicial review for aliens from the date of enactment with the application of the new judicial review provisions of §1252 to those aliens once final orders were issued against them. Instead, the amended language of §306(c)(1) now simply barred judicial review altogether. Thus the anomaly appears to have resulted from incomplete technical amendment.

[2]Although the parties have not so argued, it might at first blush be thought that because §1252(g) includes the language "notwithstanding any other provision of law," it carves an exception out of the general rule of §309(c)(1). The two problems with this notion are, first, that such an exception would swallow the rule, and, second, that §309(c)(1)(A) makes "the amendments made by this subtitle," including §1252(g) itself, inapplicable to aliens in proceedings as of April 1, 1997. If §1252(g) is not applicable to such aliens, then the words "notwithstanding any other provision of law" cannot have any special force regarding such aliens.

It might also be thought that, because §309(a) announces that IIRIRA shall take effect on April 1, 1997, except as provided in various sections, including §306(c), and §309(c)(1) is enacted "[s]ubject to the succeeding provisions of this subsection," somehow §309(c)(1) does not apply to §306(c). *Ante*, at 6, n. 5. This cannot be so, of course, because the "subsection" in question is §309(c), not §309(a). The exception in §309(a) means only to acknowledge that §306(c) is effective immediately upon enactment, not on April 1, 1997.

Finally, neither §306(c) nor §309(c) may be said to be enacted later than the other for purposes of implicit repeal. Both were enacted on September 30, 1996, and both were amended by the removal or alteration of some language on October 11, 1996. Because of this simultane-

The Court acknowledges the existence of an "interpretive anomaly," *ante*, at 7, and attempts to avoid the contradiction by a creative interpretation of §1252(g). It reads the §1252(g) bar to review of "the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien" to "appl[y] only to three discrete actions that the Attorney General may take," *ante*, at 11. The Court claims that a bar to review of commencement of proceedings, adjudication of cases, and execution of removal orders does not bar review of every sort of claim, because "many other decisions or actions that are part of the deportation process," *ibid*., remain unaffected by the limitation of §1252(g). On this reading, the Court says, review of some aspects of the Attorney General's possible actions regarding aliens in proceedings before April 1, 1997, is preserved, even though the rest of §1252 does not apply. The actions that still may be reviewed when challenged by aliens already in proceedings before the effective date of IIRIRA include, the Court tells us, "decisions to open an investigation, to surveil the suspected violator, to issue an order to show cause, to include various provisions in the final order that is the product of adjudication, and to refuse reconsideration of that order." *Ibid*.

The Court's interpretation, it seems to me, parses the language of subsection (g) too finely for the business at hand. The chronological march from commencing proceedings, through adjudicating cases, to executing removal orders, surely gives a reasonable first impression of speaking exhaustively. While it is grammatically possible to read the series without total inclusion, *ibid*., the implausibility of doing this appears the moment one asks

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ous enactment, to give primary influence to the "notwithstanding" clause would simply beg the question of legislative intent.

why Congress would have wanted to preserve interim review of the particular set of decisions by the Attorney General to which the Court adverts. It is hard to imagine that Congress meant to bar aliens already in proceedings before the effective date from challenging the commencement of proceedings against them, but to permit the same aliens to challenge, say, the decision of the Attorney General to open an investigation of them or to issue a show-cause order. Nor is there a plausible explanation of why the exclusivity provisions of subsection (g) should not apply after the effective date to review of decisions to open investigations or invite cause to be shown.

The Court offers two arguments in support of its ingenious reading, neither of which suffices to convince me of its plausibility. First, the Court suggests that Congress could not have intended the words "commence proceedings, adjudicate cases, and execute removal orders" to refer to all deportation-related claims, because this would require these parts of deportation proceedings to stand for the whole of the process, and such a use of language "is incompatible with the need for precision in legislative drafting." *Ibid.* But without delving into the wisdom of using rhetorical figures in statutory drafting, one can still conclude naturally that Congress employed three subject headings to bar review of all those stages in the deportation process to which challenges might conceivably be brought. Indeed, each one of the Court's examples of reviewable actions of the Attorney General falls comfortably into one or another of the three phases of the deportation process captured under the headings of commencement, adjudication, and removal. The decisions to open an investigation or subject an alien to surveillance belong to the commencement of proceedings (which presumably differs from adjudication, separately mentioned); issuing an order to show cause, composing the final order, and refusing reconsideration all easily belong to an adjudica-

tion. Far from employing synecdoche, Congress used familiar, general terms to refer to the familiar stages of the exclusion process, and the acceptability of interpreting the three items to exclude others requires considerable determination to indulge in such a reading.

Second, the Court explains that Congress had "good reason," *ante*, at 12, to focus on commencement, adjudication, and execution, because these are distinct stages of the deportation process at which the Executive was in the habit of exercising its discretion to defer action. To show the existence of this practice, the Court quotes a passage from a treatise on immigration law, which says descriptively that "'the INS may decline to institute proceedings, terminate proceedings, or decline to execute a final order of deportation,'" *ante*, at 13 (quoting 6 C. Gordon, S. Mailman, & S. Yale-Loehr, Immigration Law and Procedure §72.03[2][h] (1998)). The treatise also says that the courts have sometimes entertained efforts to challenge the refusal to exercise discretion, *ante*, at 14. The Court notes, perfectly plausibly, that the purpose of §1252(g) may well have been to bar such challenges. But this is hardly a smoking gun. The passage in question uses the notions of instituting and terminating proceedings, and declining to execute final removal orders, in the very same inclusive sense that §1252(g) does. The treatise says that "'[a] case may be selected for deferred action at any stage of the administrative process,'" *ante*, at 13, by which its authors evidently meant to say simply that from time to time the Executive exercises discretion at various points in the process, and that some courts have considered challenges to the failure to exercise discretion. This is no support for the Court's argument that Congress meant to bar review only of the "discrete" actions of commencement, adjudication, or execution.

Because I cannot subscribe to the Court's attempt to render the inclusive series incomplete, I have to confront

the irreconcilable contradiction between §306(c)(1) and §309(c)(1). Both context and principle point me to the conclusion that the latter provision must prevail over the former. First, it seems highly improbable that Congress actually intended to raise a permanent barrier to judicial review for aliens in proceedings ongoing on April 1, 1997. Judicial review was available under old 8 U. S. C. §1105a to those aliens whose proceedings concluded before the enactment of the amended §306(c)(1) on October 11, 1996, and judicial review of a different scope is also available under new 8 U. S. C. §1252 (1994 ed., Supp. III) to those whose proceedings commenced after the effective date of IIRIRA, April 1, 1997. There is no reason whatever to believe that Congress intentionally singled out for especially harsh treatment the hapless aliens who were in proceedings during the interim. This point is underscored by transitional §309(c)(4)(A), which expressly applies subsections (a) and (c) of old 8 U. S. C. §1105a (but not subsection (b) thereof) to judicial review of final orders of deportation or exclusion filed more than 30 days after the date of enactment. Section 309(c)(4)(A), in other words, contemplates judicial review of final orders of exclusion against aliens who were in proceedings as of the date of enactment.

Second, complete preclusion of judicial review of any kind for claims brought by aliens subject to proceedings for removal would raise the serious constitutional question whether Congress may block every remedy for enforcing a constitutional right. See *Bowen* v. *Michigan Academy of Family Physicians*, 476 U. S. 667, 681, n. 12 (1986). The principle of constitutional doubt counsels against adopting the interpretation that raises this question. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General*

v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909); see also *United States* v. *Jin Fuey Moy*, 241 U. S. 394, 401 (1916). Here, constitutional doubt lends considerable weight to the view that §309(c)(1) ought to prevail over §306(c)(1) and preserve judicial review under the law as it was before the enactment of IIRIRA for aliens in proceedings before April 1, 1997. While I do not lightly reach the conclusion that §306(c)(1) is essentially without force, my respect for Congress's intent in enacting §309(c)(1) is necessarily balanced by respect for Congress's intent in enacting §306(c)(1). No canon of statutory construction familiar to me specifically addresses the situation in which two simultaneously enacted provisions of the same statute flatly contradict one another.[3] We are, of course, bound to avoid such a dilemma if we can, by glimpsing some uncontradicted meaning for each provision. But the attempt to salvage an application for each must have some stopping place, and the Court's attempt here seems to me to go beyond that point. In this anomalous situation where the two statutory provisions are fundamentally at odds, constitutional doubt will have to serve as the best guide to breaking the tie.

Because I think that §309(c)(1) applies to aliens in proceedings before April 1, 1997, I think it applies to respondents in this case. The law governing their proceedings and subsequent judicial review should therefore be the law prevailing before IIRIRA. That law, in my

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[3] In such a situation, one court held some 70 years ago that "[i]t being conceded that the two acts are contradictory and irreconcilable, and being unable to determine that either became effective, in point of time, before the other, it results that both are invalid." *Maddux* v. *Nashville*, 158 Tenn. 307, 312, 13 S. W. 2d 319, 321 (1929). In our case, invalidating §306(c)(1) and §309(c)(1) would enable us to apply the law in place before the enactment of IIRIRA, as we ought to do on the other grounds here.

view, afforded respondents an opportunity to litigate their claims before the District Court. Former 8 U. S. C. §1105a(a) governed "judicial review of all final orders of deportation." For actions that fell outside the scope of this provision, an "alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court." *Cheng Fan Kwok* v. *INS*, 392 U. S. 206, 210 (1968). In *McNary* v. *Haitian Refugee Center, Inc.*, 498 U. S. 479 (1991), we applied this principle in finding a right of action before the district court in a constitutional challenge to procedures of the Immigration and Naturalization Service. Respondents' challenge to the constitutionality of their prosecution was filed prior to the entry of a final order of deportation, and so district court jurisdiction was appropriate here.[4]

II

The approach I would take in this case avoids a troubling problem that the Court chooses to address despite the fact that it was not briefed before the Court: whether selective prosecution claims have vitality in the immigration context. Of course, in principle, the Court's approach itself obviates the need to address that issue: if respondents' suit is barred by §1252(g), the Court need not address the merits of their claims. Yet the Court goes on, in what I take as dictum,[5] to argue that the alien's interest in

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[4]Respondents' challenge fell outside the scope of §1105a, and was not subject to the requirement of exhaustion contained therein in the former §1105a(c). As in *McNary*, the waiver of sovereign immunity is to be found in 5 U. S. C. §702, which waives the immunity of the United States in actions for relief other than money damages. This waiver of immunity is not restricted by the requirement of final agency action that applies to suits under the Administrative Procedure Act. See *The Presbyterian Church (U. S. A.)* v. *United States*, 870 F. 2d 518, 523–526 (CA9 1989).

[5]The Court says it "must address" respondents' various contentions, *ante*, at 16, and on that basis it takes up the selective prosecution issue.

avoiding selective treatment in the deportation context "is less compelling than in criminal prosecutions," *ante*, at 18, either because the alien is not being punished for an act he has committed, or because the presence of an alien in the United States is, unlike a past crime, "an ongoing violation of United States law," *ibid.* (emphasis deleted). While the distinctions are clear, the difference is not. The interest in avoiding selective enforcement of the criminal law, shared by the government and the accused, is that prosecutorial discretion not be exercised to violate constitutionally prescribed guaranties of equality or liberty. See *United States* v. *Armstrong*, 517 U. S. 456, 464–465 (1996); *Wayte* v. *United States*, 470 U. S. 598, 608 (1985). This interest applies to the like degree in immigration litigation, and is not attenuated because the deportation is not a penalty for a criminal act or because the violation is ongoing. If authorities prosecute only those tax evaders against whom they bear some prejudice or whose protected liberties they wish to curtail, the ongoing nature of the nonpayers' violation does not obviate the interest against selective prosecution.

No doubt more could be said with regard to the theory of selective prosecution in the immigration context, and I do not assume that the Government would lose the argument. That this is so underscores the danger of addressing an unbriefed issue that does not call for resolution

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Notwithstanding the usefulness of addressing the parties' arguments, a line of argument unnecessary to the decision of the case remains dictum. See *United States* v. *Dixon*, 509 U. S. 688, 706 (1993) (quoting with approval *United States Nat. Bank of Ore.* v. *Independent Ins. Agents of America, Inc.*, 508 U. S. 439, 463, n. 11 (1993), on "'the need to distinguish an opinion's holding from its dicta'"). Respondents' contention that their speech has been impermissibly chilled cannot require the Court to say that no action for selective prosecution may lie in this case; a claim of chilled speech cannot place the selective prosecution claim within the statutory jurisdiction that §1252(g) forecloses on the Court's view.

even on the Court's own logic. Because I am unconvinced by the Court's statutory interpretation, and because I do not think the Court should reach the selective prosecution issue, I respectfully dissent.