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INS v. Phinpathya

464 U.S. 183 (1984)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

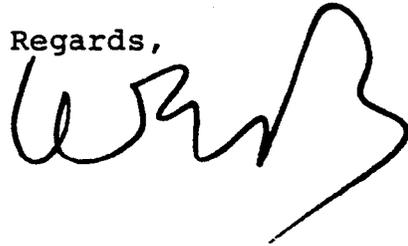
October 20, 1983

Re: No. 82-91 INS v. Phinpathya, Padungsri

Dear Sandra:

I join.

Regards,

A handwritten signature in black ink, appearing to be 'WJOC', written in a cursive style.

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

October 21, 1983

No. 82-91

INS v. Phinpathya

Dear Sandra,

I will be writing separately in the above, although I will concur in the judgment to reverse. Since I want to look into the background of Wadman, it may take me a little while.

Sincerely,

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

RECEIVED
SUPREME COURT U.S.
JUSTICE BRENNAN

October 28, 1983

'83 OCT 28 P1:03

No. 82-91

INS v. Phinpathya

Dear Sandra,

I was mistaken this morning. My completion of the separate opinion in the above waits on the briefs from the Ninth Circuit in Wadman. I am told it may be another week or ten days before I will receive them. I'll get on it just as soon as I can.

Sincerely,

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 6, 1983

No. 82-91

INS v. Phinpathya

Dear Sandra:

I have completed my research on this case and am now persuaded by the principal conclusions in your opinion. In particular, I agree with you that: 1) Ms. Phinpathya's trip to Thailand disqualifies her for discretionary relief under Section 244(a)(1); 2) Wadman was incorrect to the extent that the court of appeals held that our decision in Fleuti v. Rosenberg is relevant to the suspension-of-deportation context; and 3) the development of Section 244 law in the Ninth Circuit has been misguided because of the Wadman error.

Although these conclusions suffice, I think, to decide this case, your opinion goes on to reject the government's longstanding position that the "continuous physical presence" standard admits of some degree of flexibility. I should like to suggest that the legislative history supports the government. Unfortunately, that history was not developed by the parties but was unearthed by my clerk Mike Klausner's independent research.

As you know, neither party sought a literal interpretation of the statutory language, and I suppose that accounts for their failure to alert us to the legislative history that perhaps escaped your notice as it did mine. Your opinion understandably proceeds on the parties' assumption that the relevant legislative history of Section 244(a) (1) is found solely in congressional consideration of the Immigration and Nationality Act of 1952 itself. In fact, however, the provision at issue was adopted as part of the 1962 Amendments to the Act. It is the legislative history of those amendments, therefore, that is central to the question of whether Congress meant to have the continuous-physical-presence requirement applied literally. That legislative history, I submit, whether viewed as reflecting the initial understanding of the requirement in 1952, or as establishing a new understanding, reveals a congressional intent to have the term "continuous" interpreted more flexibly than the literal definition of the term would imply.

The 1962 Amendments originated as S. 3361. As introduced, the bill contained a provision that would have amended Section 249 of the Immigration and Nationality Act, the provision that allows the Attorney General to confer permanent-residence status on an alien who meets certain qualifications, such as "good moral character," and who establishes that he or she has "resided" in the United States since a statutorily provided date. At the time of the 1962 Amendments, that date was June 28, 1940, and S. 3361, as introduced, would have simply moved the date up to December 24, 1952. S. 3361, 87th Cong., 2d Sess., Sec. 4 (1962).

The House declined to amend Section 249 and sent to Conference, instead, a bill that differed from the Senate bill in that it left June 28, 1940 as the operative date of entry for relief under that section. 108 Cong. Rec. 22608 (1962). The Conference Committee compromised with an amendment to Section 244, instead of an amendment to Section 249, and that compromise became the current version of Section 244.

In explaining the intent of the conferees, the Conference Report stated that "[t]he now proposed language is designed to achieve the purpose envisaged by the Senate in a modified manner." H. Rept. No. 2552, 87th Cong., 2d Sess. p. 4. (1962). It then went on to explain that the new provision would 1) allow the Attorney General to grant relief from deportation only if deportation would result in personal hardship, and 2) require that all grants of relief be subject to congressional review. Neither of these requirements would have been imposed if the original version of S. 3361 had been adopted. When the Conference Committee's compromise was reported on the House floor, one Manager stated that "we largely restore title 3 of the Smith Act of 1940 ... as the guide for the purpose of making a determination of eligibility and obtaining the approval of the Congress for the ruling of the Attorney General," 108 Cong. Rec. 23421 (1962), and another simply restated the Conference Report's emphasis on the congressional-review and personal-hardship provisions of the bill. 108 Cong. Rec. 23423 (1962). Indeed, the reference to the Smith Act, formally titled the Alien Registration Act of 1940, is particularly significant, because

that Act, which contained the original suspension-of-deportation remedy, did not impose a continuous-physical-presence requirement. 54 Stat. 672 (1940). (Actually, it was Title 2, not Title 3, of that Act that authorized the suspension of deportation. Title 3 had nothing to do with it. I must assume, therefore, that the reference to "Title 3" was an error.)

Similarly, when the Conference Committee's version of the bill was reported on the Senate floor, the statements of the Senators belie the presence of any intent to impose a strict continuous-physical-presence requirement as a prerequisite to relief. Senator Keating, for instance, one of the Managers of the bill, stated that "[n]o person who would have been eligible for administrative relief under section 249 as the Senate proposed and amended it, would be excluded from consideration for relief under section 244 as the conference report now proposes to amend it." 108 Cong. Rec. 23448 (1962). Furthermore, the focus of the debate, like that of the House debate, was on the personal-hardship and congressional-review provisions of the Conference Committee bill.

In sum, the compromise was intended to achieve what an updating of Section 249 would have achieved, except that the Attorney General was to be constrained by a personal-hardship requirement and congressional review. This interpretation is supported not only by the Senators' and Congressmen's direct statements to that effect, but also by the complete absence of discussion on the meaning of the term "continuous." Doesn't it seem very unlikely that a provision that began with a "residence"

requirement could be changed to one requiring literally continuous physical presence without a word of comment by those who supported the bill in its original form? Of course, given the language that was enacted, we must conclude that something more than residence is required. How much more, however, is the question. I think this legislative history supports the conclusion that Congress meant that the INS should develop a flexible continuous-physical-presence requirement, and therefore I believe we should do no more in this regard than free the agency of the constraint of Wadman.

Although this is not a typical case in which we are presented with an agency's interpretation of a statute under which it operates, I believe that the INS's decisions under this provision lend support to this approach. Even before Wadman, the INS refrained from interpreting the statutory language literally. See, e.g., Matter of J.M.D., 7 I & N 105 (1956). Furthermore, in response to Wadman and Git Foo Wong v. INS, 358 F.2d 151 (9th Cir. 1966) (following Wadman in the context of an illegal initial entry), the INS stated that "after due and deliberate consideration, we came to the conclusion that there was no longer any necessity to limit the scope of the Wadman and Git Foo Wong decisions [to the Ninth Circuit]." Matter of Wong, 12 I & N 271 (1967). Indeed, the INS seems to have adopted a flexible interpretation of Section 244 wholeheartedly and made emphatic its opposition to a literal interpretation at oral argument. I would hold, therefore, that Wadman was incorrect in importing Flueti into this context, but that the INS has the power to apply

its own concept of flexibility that is consistent with the congressional design.

Do you see any merit in these comments? If so, should your opinion acknowledge the legislative history of Section 244 as supporting -- or, in any event, as precluding our disapproval of -- current INS practice?

Sincerely,



Justice O'Connor

Copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: 12-21-83

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SUPREME COURT U.S.
JUSTICE BRENNAN

'83 DEC 21 A11 :24

WLB
Please join me
concur

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-91

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER v. PADUNGSRI PHINPATHYA

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

[January —, 1984]

JUSTICE BRENNAN, concurring in the judgment.

The Court today holds that an unexplained three-month absence from the United States disqualifies an alien from eligibility for relief from deportation under § 244(a)(1) of the Immigration and Nationality Act (Act), 8 U. S. C. § 1254(a)(1), *ante*, at 11-12, and further, that our decision in *Rosenberg v. Fleuti*, 374 U. S. 449 (1963), is essentially irrelevant in the § 244 context, *ante*, at 8-10. I agree with both of these conclusions. In the process of reaching them, however, the Court seems to imply that Congress intended the term "continuous" in the phrase "physically present . . . for a continuous period" to be interpreted literally, *ante*, at 6, 11-12. If that is what the Court implies, the status of temporary absences far different from the one at issue in this case—for example, a short vacation in Mexico, see *Wadman v. INS*, 329 F. 2d 812 (CA9 1964), an inadvertent train ride through Canada while en route from Buffalo to Detroit, see *DiPascuale v. Karnuth*, 158 F. 2d 878 (CA2 1947), a trip to one's native country to tend to an ailing parent, or some other type of temporary absence that has no meaningful bearing on the attachment or commitment an alien has to this country—would presumably be treated no differently from the absence at issue today. Because such absences need not be addressed to decide this case, and, in any event, because I believe that Congress did not intend the continuous-physical-presence re-

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1, 8-9

To: The Chief Justice
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____

Recirculated: 12/28/93

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-91

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER v. PADUNGSRI PHINPATHYA

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

[January —, 1984]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE STEVENS join, concurring in the judgment.

The Court today holds that an unexplained three-month absence from the United States disqualifies an alien from eligibility for relief from deportation under § 244(a)(1) of the Immigration and Nationality Act (Act), 8 U. S. C. § 1254(a)(1), *ante*, at 11-12, and further, that our decision in *Rosenberg v. Fleuti*, 374 U. S. 449 (1963), is essentially irrelevant in the § 244 context, *ante*, at 8-10. I agree with both of these conclusions. In the process of reaching them, however, the Court seems to imply that Congress intended the term "continuous" in the phrase "physically present . . . for a continuous period" to be interpreted literally, *ante*, at 6, 11-12. If that is what the Court implies, the status of temporary absences far different from the one at issue in this case—for example, a short vacation in Mexico, see *Wadman v. INS*, 329 F. 2d 812 (CA9 1964), an inadvertent train ride through Canada while en route from Buffalo to Detroit, see *DiPascuale v. Karnuth*, 158 F. 2d 878 (CA2 1947), a trip to one's native country to tend to an ailing parent, or some other type of temporary absence that has no meaningful bearing on the attachment or commitment an alien has to this country—would presumably be treated no differently from the absence at issue today. Because such absences need not be addressed to decide this case, and, in any event, because I believe that

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

October 22, 1983

Re: 82-91 - Immigration and Naturalization
Service v. Phinpathya

Dear Sandra,

Please join me.

Sincerely,



Justice O'Connor

Copies to the Conference

cpm

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

October 24, 1983

Re: No. 82-91 - INS v. PHINPATHYA

Dear Sandra:

I await the dissent.

Sincerely,



T.M.

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 21, 1983

Re: No. 82-91-INS v. Phinpathya

Dear Bill:

Please join me in your concurring opinion.

Sincerely,

J.M.
T.M.

Justice Brennan

cc: The Conference

HAB

October 18, 1983

Re: No. 82-91 - INS v. Phinpathya

Dear Sandra:

I think the proposed opinion is a good one, and I could join it in the form you asked me to review preliminarily. Your copy is returned with minor suggestions on pages 3 and 4 and the notation of typos on pages 3 and 8.

My only suggestion, by way of substance, is that the opinion might be said to place undue emphasis on the fact that respondent was illegally in this country at the time of her departure. I suspect that the case would be decided the same way, and should be so decided, if she had been here lawfully at the time she departed to visit her mother. The discussion on pages 7-12 makes clear that Congress was focusing on the alien's physical presence, not on the alien's status during that presence.

I now agree that Fleuti is really irrelevant because the intention of Congress in enacting §244(a) was different from its intention in enacting §101(a)(13). Consideration of respondent's illegal status is pertinent to Fleuti's inapplicability, but I would prefer to see it included as just an additional consideration. A change to this effect could be easily made by simply moving the material I have circled on page 14 to the place indicated on page 16. The two small changes on pages 14 and 16 would then be made, and notes 11 and 12 would be reversed as to number.

This is only a suggestion. As I have said above, I would join the opinion in its present form.

Sincerely,

HAB

Justice O'Connor

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

October 19, 1983

Re: No. 82-91, Immigration and Naturalization Service
v. Phinpathya

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

cc: The Conference

October 17, 1983

62-91

87-92 INS v. Phinpathya

Dear Sandra:

Thank you for giving me the opportunity to take a look at your draft opinion. The bottom line is that I will be happy to join it.

I must have been inarticulate at Conference to have created doubt in your mind as to my views. I made the following note in my file on September 23, recording my tentative views, after reading the briefs and a bench memo:

"Reverse. CA9 plainly erred. I would prefer not to accept the SG's willingness to decide the case on its facts. We should take this opportunity to reiterate that §244(a)(1) should be strictly construed, and distinguish Flueti as basically inapplicable. If, however, Flueti were viewed as applicable, I would agree with the four dissenters in that case."

These views became firm after oral argument.

I make two comments on your opinion. I would not accord as much deference to Flueti. Some of the language on pp. 16-17 possibly may be viewed as suggesting that CA9's error was in departing from the Flueti factors. My own view is that Flueti is essentially irrelevant to this case. I appreciate, however, that you may need the votes of Justices who do not wish to go this far.

My second comment is that it would be helpful, I think, to refer specifically to the view expressed by the House Report, No. 1365, 82nd Congress, 2nd Sess. 63, that it was "grossly unfair to aliens who await abroad their turn on the quota waiting lists". Suspension of deportation of illegal aliens reduces the number of immigrants allowed into

the United States who have been willing to conform to our law. An interpretation such as CA9's is "grossly unfair" to the law abiding aliens.

These are very minor comments. Your opinion is excellent.

Sincerely,

Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

October 19, 1983

82-91 INS v. Phinpathya

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

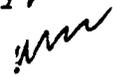
October 24, 1983

Re: No. 82-91 INS v. Phinpathya

Dear Sandra:

Please join me.

Sincerely,



Justice O'Connor

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

December 23, 1983

Re: 82-91 - Immigration & Naturalization
Service v. Phinpathya

Dear Bill:

Please join me in your separate concurrence.

Respectfully,



Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

October 17, 1983

82-91
Re: No. 81-92 INS v. Phinpathya

Dear Lewis,

I appreciate very much your time in looking at a draft opinion in this case. I am delighted you think you can go along with it, or with something which gives less deference to Fleuti. I will comply with both your suggestions and circulate something in due course.

Sincerely,

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

October 18, 1983

Re: No. 82-91 INS v. Phinpathya

Dear Harry,

I am grateful for your review of the draft in this case. Your suggestion about treating respondent's illegal status as merely an additional consideration in the discussion of Fleuti is excellent. I will make the change and the other minor suggestions which you recommended and will circulate it when it comes back from the printer.

Sincerely,



Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

October 19, 1983

No. 82-91 INS v. Phinpathya

MEMORANDUM TO THE CONFERENCE

This circulation takes a more restrictive view of § 244(a)(1)'s "continuous physical presence" requirement than our Conference discussion reflected.

In closely reviewing the legislative history, it becomes clear that this draft accurately reflects Congress' purpose as shown both by the plain language of the statute and its history.

If there are four others who agree, I think this approach is more sound.

Sincerely,

Sandra

pp. 2, 3, 4, 5, 7, 10

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-91

**IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER v. PADUNGSRI PHINPATHYA**

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

[October —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

In § 244(a)(1) of the Immigration and Nationality Act (Act), 66 Stat. 214, as amended, 8 U. S. C. § 1254(a)(1), Congress provided that the Attorney General in his discretion may suspend deportation and adjust the status of an otherwise deportable alien who (1) "has been physically present in the United States for a continuous period of not less than seven years;" (2) "is a person of good moral character;" and (3) is "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child," In this case we must decide the meaning of § 244(a)(1)'s "continuous physical presence" requirement.

I

Respondent, a native and citizen of Thailand, first entered the United States as a nonimmigrant student in October, 1969. Respondent's husband, also a native and citizen of Thailand, entered the country in August, 1968. Respondent and her husband were authorized to remain in the United States until July, 1971. However, when their visas expired, they chose to stay without securing permission from the immigration authorities.

777

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pp. 2, 3, 4, 5, 7, 10

To: The Chief Justice
Justice Brennan
Justice White
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Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-91

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER *v.* PADUNGSRI PHINPATHYA

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

[October —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

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I

Respondent, a native and citizen of Thailand, first entered the United States as a nonimmigrant student in October, 1969. Respondent's husband, also a native and citizen of Thailand, entered the country in August, 1968. Respondent and her husband were authorized to remain in the United States until July, 1971. However, when their visas expired, they chose to stay without securing permission from the immigration authorities.

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PP. 9, 11

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

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SPO
James
...

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-91

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER *v.* PADUNGSRI PHINPATHYA

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

[October —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

In § 244(a)(1) of the Immigration and Nationality Act (Act), 66 Stat. 214, as amended, 8 U. S. C. §1254(a)(1), Congress provided that the Attorney General in his discretion may suspend deportation and adjust the status of an otherwise deportable alien who (1) "has been physically present in the United States for a continuous period of not less than seven years;" (2) "is a person of good moral character;" and (3) is "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child," In this case we must decide the meaning of § 244(a)(1)'s "continuous physical presence" requirement.

I

Respondent, a native and citizen of Thailand, first entered the United States as a nonimmigrant student in October, 1969. Respondent's husband, also a native and citizen of Thailand, entered the country in August, 1968. Respondent and her husband were authorized to remain in the United States until July, 1971. However, when their visas expired, they chose to stay without securing permission from the immigration authorities.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

December 8, 1983

No. 82-91 INS v. Phinpathya

Dear Bill:

Thank you for your letter concerning this case. The reason my draft opinion does not dwell on the 1962 amendments to the Immigration and Nationality Act is because I disagree with the meaning you attribute to them. I assume the Solicitor General likewise views the history of the 1962 amendments as being essentially irrelevant for our purposes or he would have argued it.

Prior to 1962, an alien interested in a §244(a)(1) suspension of deportation had to prove that he was of "good moral character," that he had been "physically present in the United States for a continuous period of not less than seven years," and that deportation would subject him or his family to "exceptional and extremely unusual hardship." 66 Stat. 214. In 1962, to facilitate the entry of skilled specialist aliens and certain of their relatives, Congress amended §244(a)(1) in one, but only one, respect: An alien seeking suspension of deportation would be required to show only that deportation would result in "extreme," as opposed to "exceptional and extremely unusual," hardship. 76 Stat. 1248. Congress left unchanged the "good moral character" and seven-year "continuous physical presence" requirements. Thus, no matter what the 1962 Congress initially considered doing to §244, it gave no indication in the language it eventually chose that it wanted to enact some mysteriously hidden meaning in the "continuous physical presence" requirement.

Moreover, contrary to your suggestion, Congress left no ambiguity as to how flexibly the seven-year presence requirement should be administered. It expressly identified the exception to the literal application of the "continuous physical presence" requirement it was willing to tolerate. In §244(b), Congress provided that:

"The requirement of continuous physical presence in the United States specified in paragraphs (1) and (2) of subsection (a) of this section shall not be applicable to an alien who (A) has served for a minimum period of twenty-four months in an active-duty status in the Armed Forces of the United States and, if separated from such service, was separated under honorable

conditions, and (B) at the time of his enlistment or induction was in the United States." 76 Stat. 1248.

Thus, when expressly faced with the rigidity of its chosen language, Congress expressly amended the seven-year rule in only one respect.

If the face of the statute was not plain enough, a thorough reading of the legislative history of the 1962 amendments reveals that Congress knew precisely what it was enacting. As you note, the statute contained a provision that authorized the Attorney General to confer permanent status on an alien who could show, among other things, residence in the United States since a statutorily provided date. At the time of the 1962 amendments, that date was June 28, 1940, and thus a 22-year residency requirement was in effect. S. 3361 proposed moving the date up to December 24, 1952, thus reducing the length of the statutorily fixed residency requirement. However, as you also note, Congress abandoned the idea of creating a fixed date on which residency had to be established and enacted an entirely different scheme to accomplish its goal.

Congress decided that, if an alien was of good moral character, would suffer extreme hardship from deportation, and had been physically present in the United States for a continuous period of not less than seven years, the Attorney General should be able to suspend his deportation notwithstanding an absence of residence prior to a fixed statutorily specified date. The seven-year continuous physical presence requirement was a substitute for a longer and less flexible date of residency. Thus, Senator Keating, one of the Managers of the bill, explained:

"Section 244 as amended would permit aliens who have been physically present in the United States for 7 years, or, in more serious cases, for 10 years, to apply to the Attorney General for a suspension of deportation as under present section 244. The alien would have to show a specified degree of hardship to either himself or his spouse or children if he were to be deported as required by law. Should the Attorney General believe the application meritorious, he would recommend suspension of deportation to the Congress as under present law, and the Congress by resolution could approve the recommendation, suspend the alien's deportation, and adjust his status to that of permanent residence.

.

The conference amendment to section 244 does have have at least one advantage over the earlier Senate-passed amendment to section 249. Section 249, as the Senate proposed to amend it, would have applied only to

aliens who entered the United States prior to December 24, 1952. The conference version of section 244, on the other hand, has continuing future applicability to any alien who can satisfy either the 7- or the 10-year physical presence requirement in addition to the other criteria for suspension of deportation." 108 Cong. Rec. 23448-23449 (1962).

The disadvantage Senator Keating referred to is, of course, the requirement of case-by-case congressional review, which the rest of the Congress thought essential to control administrative abuses of the relaxed personal hardship requirements. Representative Walter did make a rather opaque comment that the House managers intended "largely" to restore the criteria embodied in the Alien Registration Act of 1940 "as the guide for the purpose of making a determination of eligibility and obtaining the approval of the Congress for the ruling of the Attorney General." 108 Cong. Rec. 23421 (1962). The 1940 Act authorized the Attorney General to suspend deportation of aliens of good moral character whose deportation "would result in serious economic detriment" to the aliens or their families. 54 Stat. 672. The 1940 Act did not even mention a "physical presence" requirement of any kind. Thus, even we assume that Representative Walter's isolated floor statement speaks authoritatively for the Congress as a whole, we can only interpret it in the context of what the 1962 amendments changed-- §244(a)(1)'s personal hardship requirement. In other words, in relaxing the "exceptional and extremely unusual personal hardship" showing to one of "extreme hardship," Congress may have been reverting to the 1940 Act's "serious economic detriment" test. But all of this speculation says nothing about the "continuous physical presence" requirement that Congress added after 1940 and retained--word-for-word--in the 1962 amendments.

In any event everyone, including Senator Keating, agreed that the Act retained a strict, threshold requirement that an alien show seven-years continuous physical presence before the Attorney General could consider his application for suspension of deportation. See id., at 23448 (remarks of Sen. Keating); id., at 23422 (statement of Managers on the part of the House); see also H. Rep. No. 2552, 87th Cong., 2d Sess., 4 (1962). The Solicitor General and INS admit that this was the case. They state that:

"Until the Ninth Circuit's decision in 1964 in Wadman v. INS, 329 F.2d 812, the lower courts and the Board of Immigration Appeals generally applied a strict, literal interpretation of the "continuous physical presence" language in Section 244(a)(1) and held ineligible for suspension of deportation any alien who was absent from the United States during the seven year period, without regard to the circumstances surrounding the absence. See, e. g., Arellano-Flores v. Hoy, 262 F.2d 667, 668 (9th Cir. 1958); United States ex rel. Bruno v. Sweet,

133 F. Supp. 3, 6-7 (W.D. Mo. 1955), aff'd, 235 F.2d 801 (8th Cir. 1956); In re Jacobson, 10 I. & N. Dec. 782 (B.I.A. 1964); In re Wong, 10 I. & N. Dec. 513 (B.I.A. 1964)." Brief for the United States 11-12.

A casual reading of the cases the Solicitor General cites refutes your suggestion that the INS refrained from literally interpreting the statutory language. While there may be an aberrational decision here and there,¹ INS's administrative practice certainly did not rise anywhere near the level of "consistent, contemporaneous administrative construction" that would require deference from this Court in the manner that you suggest. Indeed, INS's repeated literal application of the "continuous physical presence" leads to precisely the opposite conclusion.

In short, I am fully confident that the opinion accurately reflects the congressional intent--of both the 1952 and 1962 Congresses. Unless we are to ignore the language of §244(a)(1), the exception contained in §244(b), and the entire legislative history of the Act, the opinion must interpret the statute by its plain English meaning: to require a threshold showing of seven-years continuous physical presence. I hope you can see your way clear to join it.

Sincerely,



Justice Brennan

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¹See Matter of J.M.D., 7 I. & N. 105 (1956). Of course, even these aberrational decisions are not without statutory explanation. In In re Wong, 10 I. & N. 513, 515 (B.I.A. 1964), INS states that "[t]he statute makes it clear that to qualify for suspension, the [applicant] must have been in the United States without any absence, no matter how brief for the continuous period. The case of J-M-D-, 7 I. & N. Dec. 105, involved an alien whose absence from the United States during the statutory period was caused by his military service. The requirement of continuous physical presence is now dispensed with by section 244(b) of the Immigration and Nationality Act, as amended, in the case of an alien who now serves for 24 months in military service." The opinion cites several other INS decisions applying the statute literally. See id., at 515 and n. 3.

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-91

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER *v.* PADUNGSRI PHINPATHYA

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

[October —, 1983]

JUSTICE O'CONNOR delivered the opinion of the Court.

In § 244(a)(1) of the Immigration and Nationality Act (Act), 66 Stat. 214, as amended, 8 U. S. C. § 1254(a)(1), Congress provided that the Attorney General in his discretion may suspend deportation and adjust the status of an otherwise deportable alien who (1) "has been physically present in the United States for a continuous period of not less than seven years"; (2) "is a person of good moral character"; and (3) is "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child," In this case we must decide the meaning of § 244(a)(1)'s "continuous physical presence" requirement.

I

Respondent, a native and citizen of Thailand, first entered the United States as a nonimmigrant student in October, 1969. Respondent's husband, also a native and citizen of Thailand, entered the country in August, 1968. Respondent and her husband were authorized to remain in the United States until July, 1971. However, when their visas expired, they chose to stay without securing permission from the immigration authorities.

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5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-91

**IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER v. PADUNGSRI PHINPATHYA**

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

[January —, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

In § 244(a)(1) of the Immigration and Nationality Act (Act), 66 Stat. 214, as amended, 8 U. S. C. § 1254(a)(1), Congress provided that the Attorney General in his discretion may suspend deportation and adjust the status of an otherwise deportable alien who (1) "has been physically present in the United States for a continuous period of not less than seven years"; (2) "is a person of good moral character"; and (3) is "a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child," In this case we must decide the meaning of § 244(a)(1)'s "continuous physical presence" requirement.

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