SUPREME COURT OF THE UNITED STATES

No. 93–1199

MARVIN STONE, PETITIONER *v.* IMMIGRATION AND NATURALIZATION SERVICE

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

[April 19, 1995]

JUSTICE BREYER, with whom JUSTICE O'CONNOR and JUSTICE SOUTER join, dissenting.

The majority reads §106(a) of the Immigration and Nationality Act (INA), 8 U. S. C. §1105a(a) (1988 ed., Supp. V), as creating an exception to the ordinary legal rules that govern the interaction of (1) motions for agency reconsideration with (2) time limits for appeals. In my view, the statute does not create such an exception. And, reading it to do so risks unnecessary complexity in the technical, but important, matter of how one petitions a court for judicial review of an adverse agency decision. For these reasons, I dissent.

This Court, in *ICC* v. *Locomotive Engineers*, 482 U. S. 270 (1987), considered the interaction between reconsideration motions and appeal time limits when one wants to petition a court of appeals to review an adverse judgment of an administrative agency (which I shall call an "agency/court" appeal). The Court held that this interaction resembled that which takes place between (1) an appeal from a district court judgment to a court of appeals (which I shall call a "court/court" appeal) and (2) certain motions for district court reconsideration, namely those filed soon after entry of the district court judgment. See Fed. Rule App. Proc. 4(a)(4). The relevant statute (commonly called the Hobbs Act) said that a petition for review of a final agency order may be filed in the court of appeals "within 60 days after its entry." 28 U. S. C. §2344. The Court concluded, on the basis of

precedent, that the filing of a proper petition for reconsideration, “within the period allotted for judicial review of the original order . . . tolls the period for judicial review of the original order.” 482 U. S., at 279. That order can “be appealed to the courts . . . after the petition for reconsideration is denied.” *Ibid.* See also *id.*, at 284–285.

In my view, we should interpret the INA as calling for tolling, just as we interpreted the Hobbs Act in *Locomotive Engineers*. For one thing, the appeals time limit language in the INA is similar to that in the Hobbs Act. Like the Hobbs Act, the INA does not mention tolling explicitly; it simply says that "a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order." INA §106(a)(1), 8 U. S. C. §1105a(a)(1) (1988 ed., Supp. V). More importantly, the INA explicitly states that the "procedure prescribed by, and all provisions of [the Hobbs Act, 28 U. S. C. §2341 *et seq*.] shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation." INA §106(a), 8 U. S. C. §1105a(a). This statutory phrase is not conclusive because it is followed by several exceptions, one of which is the subsection setting the "[t]ime for filing [a] petition" for review. INA §106(a)(1), 8 U. S. C. §1105a(a)(1). But, the context suggests that the reason for calling the latter clause an exception lies in the *number of days* permitted for filing—90 in the INA, as opposed to 60 in the Hobbs Act. Nothing in the language of §106(a) (which was amended three years after *Locomotive Engineers*, see Immigration Act of 1990, §545(b), 104 Stat. 5065) suggests any further exception in respect to tolling.

Finally, interpreting the INA and the Hobbs Act consistently makes it easier for the bar to understand, and to follow, these highly technical rules. With consistent rules, a non-immigration-specialist lawyer (say, a lawyer used to working in the ordinary agency/court context) who seeks reconsideration of a Board of Immigration Appeals (BIA) decision is less likely to lose his client's right to appeal simply through inadvertence.

The majority reaches a different conclusion because it believes that one subsection of the INA, §106(a)(6), is inconsistent with the ordinary *Locomotive*

Engineers tolling rule. That subsection says that

> "whenever a petitioner seeks [(1)] review of [a final deportation] order . . . any [(2)] review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order." 8 U. S. C. §1105a(a)(6) (1988 ed., Supp. V).

This "consolidation" subsection, however, says nothing about tolling. Indeed, it does not address, even in a general way, the timing of petitions for judicial review; it just says what must happen when two reviews make it separately to the court of appeals and are on the court's docket at the same time (*i.e.*, they must be consolidated). And, the legislative history is likewise silent on the matter. See, *e.g.*, H. R. Conf. Rep. No. 101–955, pp. 132–133 (1990). Given that §106(a)(6) was enacted only three years after *Locomotive Engineers*, it seems unlikely that Congress consciously created a significantly different approach to the review-deadline/reconsideration-petition problem (with the consequent risk of confusing lawyers) in so indirect a manner.

Nevertheless, the majority believes this subsection is *inconsistent* with the ordinary *Locomotive Engineers* tolling rule because application of the ordinary tolling rule would normally lead an alien to appeal both (1) the original deportation order and (2) a denial of agency reconsideration, in a single petition, after the denial takes place. Thus, in the majority's view, one could never find (1) a petition to review an original deportation order and (2) a petition to review a denial of a motion to reconsider that order, properly together in the court of appeals at the same time. And, for that reason, there would be nothing to "consolidate" under the statute. An opposite rule (one which denies tolling) would, in the majority's view, sometimes produce (simultaneously)

both (1) an initial appeal from the original order and (2) an appeal from a denial of reconsideration (if the reconsideration motion were decided, and the second appeal taken, before the court could decide the initial appeal). The “no-tolling” rule would therefore sometimes produce two appeals, ready for consolidation. The majority concludes that it must infer this “no-tolling” rule in order to give the “consolidation” subsection some work to do and thereby make it legally meaningful.

I do not believe it necessary, however, to create a special exception from the ordinary *Locomotive Engineers* tolling rule in order to make the “consolidation” subsection meaningful, for even under that ordinary tolling rule, the “consolidation” subsection will have work to do. Consider the following case: The BIA enters a final deportation order on Day Zero. The alien files a timely petition for review in a court of appeals on Day 50. Circumstances suddenly change—say, in the alien's home country—and on Day 70 the alien then files a motion to reopen with the agency. (The majority says such a filing “must be” a “rare” happening, *ante*, at 18, but I do not see why. New circumstances justifying reopening or reconsideration might arise at any time. Indeed, this situation must arise with some frequency, since INS regulations expressly recognize that a motion to reopen or reconsider may be filed after judicial review has been sought. See, *e.g.*, 8 CFR §3.8(a) (1994) (requiring that motions to reopen or reconsider state whether the validity of the order to be reopened has been, or is, the subject of a judicial proceeding)). The agency denies the reconsideration motion on Day 100. The alien then appeals that denial on Day 110. In this case, the court of appeals would have before it two appeals: the appeal filed on Day 50 and the appeal filed on Day 110. The “consolidation” subsection tells the court of appeals to consolidate those two appeals and

decide them together. (In fact, the alien might well have informed the court of appeals, say on Day 70, about the reconsideration motion, in which case the court, unless it thought the motion a frivolous stalling device, might have postponed decision on the merits of the initial appeal, awaiting the results of the reconsideration decision, an appeal from which it could then consolidate with the initial appeal. See, *e.g.*, *Gebremichael* v. *INS*, 10 F. 3d 28, 33, n. 13 (CA1 1993) (decision on appeal stayed until the agency resolved alien's motion for reconsideration; initial appeal then consolidated with the appeal from the denial of rehearing)). In this example, the subsection would have meaning as an "exception" to the Hobbs Act, cf. *ante*, at 18, since nothing in the Hobbs Act requires the consolidation of court reviews.

The majority understands this counterexample, but rejects it, for fear of creating both a conceptual and a precedential problem. Neither of those perceived problems, however, is significant. The conceptual problem the majority fears arises out of the fact that, under the ordinary tolling rule, the filing of a petition for reconsideration is deemed to render an otherwise "final" initial (but not-yet-appealed) order "nonfinal" for purposes of court review. Hence, one may not appeal the merits of that initial order until the district court or agency finally decides the reconsideration petition. The majority believes that the reconsideration petition in the counterexample above (a petition filed *after* an appeal is taken from the initial order) also renders "nonfinal," and hence not properly appealable, the initial order, removing the initial appeal from the court of appeals, and thereby leaving nothing to consolidate.

The answer to this conceptual argument lies in the "general principle" that "jurisdiction, once vested, is not divested, although a state of things should arrive in which original jurisdiction could not be exercised." *United States* v. *The Little Charles*, 26 F. Cas. 979, 982

(No. 15,612) (CC Va. 1818) (Marshall, C.J., Circuit Justice), quoted in *Republic Nat. Bank of Miami* v. *United States*, 506 U. S. —- (1992) (slip op., at 5). The first appeal, as of Day 50, has reached the court of appeals. Thus, conceptually speaking, one should not consider a later-filed motion for reconsideration as having "divested" the court of jurisdiction. And, practically speaking, it makes sense to leave the appeal there, permitting the court of appeals to decide it, or to delay it, as circumstances dictate (say, depending upon the extent to which effort and resources already have been expended in prosecuting and deciding the appeal). After all, we have long recognized that courts have inherent power to stay proceedings and "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *North American Co.*, 299 U. S. 248, 254 (1936); cf. 28 U. S. C. §1367(c)(3) (1988 ed., Supp. V) (providing that district court may, but need not, decline to exercise supplemental jurisdiction over a claim when it has dismissed all claims over which it has original jurisdiction).

The precedential problem, in the majority's view, arises out of *Griggs* v. *Provident Consumer Discount Co.*, 459 U. S. 56 (1982) (*per curiam*), a court/court case in which this Court held that the filing of a reconsideration motion under Federal Rule of Civil Procedure 59 caused an earlier-filed notice of appeal to "`self-destruc[t],'" *id.*, at 61, despite the fact that the earlier-filed notice had "vested" the court of appeals with "jurisdiction." Were the same principle to apply in the agency/court context, then the reconsideration motion filed on Day 70 would cause the earlier-filed petition for review, filed on Day 50, to "self-destruct," leaving nothing for the court of appeals to consolidate with an eventual appeal from an agency denial of a reconsideration motion (on Day 100).

Griggs, however, does not apply in the agency/court context. This Court explicitly rested its decision in *Griggs* upon the fact that a specific Federal Rule of Appellate Procedure, Rule 4(a)(4), provides for the "self-destruction." That Rule says that upon the filing of, say, a Rule 59 motion to amend a district court judgment, a "notice of appeal filed before the disposition of [*e.g.*, that Rule 59 motion] . . . shall have no effect." By its terms, Rule 4(a)(4) applies only in the court/court context; and, to my knowledge, there is no comparable provision applicable in agency/court contexts such as this one. In the absence of such a provision, *Griggs* explicitly adds that the "district courts and courts of appeals *would both have had the power to modify the same judgment*," 459 U. S., at 60 (emphasis added)—as I believe the agency and the court of appeals have here.

I recognize that at least one court of appeals has adopted an agency/court rule analogous to the "self-destruct" rule set forth in Rule 4(a)(4). *Wade* v. *FCC*, 986 F. 2d 1433, 1434 (CADC 1993) (*per curiam*); see also *Losh* v. *Brown*, 6 Vet. App. 87, 89 (1993). But see *Berroteran-Melendez* v. *INS*, 955 F. 2d 1251, 1254 (CA9 1992) (court retains jurisdiction when motion to reopen is filed after the filing of a petition for judicial review); *Lozada* v. *INS*, 857 F. 2d 10, 12 (CA1 1988) (court retained jurisdiction over petition for review notwithstanding later-filed motion to reopen, but held case in abeyance pending agency's decision on the motion). That court's conclusion, however, was based upon a single observation: that "[t]he danger of wasted judicial effort that attends the simultaneous exercise of judicial and agency jurisdiction arises whether a party seeks agency reconsideration before, simultaneous with, or after filing an appeal." *Wade*, *supra*, at 1434 (citations omitted) (referring to the danger that the agency's ruling might change the order being appealed,

thereby mooting the appeal and wasting any appellate effort expended). While this observation is true enough, it does not justify the “self-destruct” rule, because it fails to take into account other important factors, namely (a) the principle that jurisdiction, once vested, is generally not divested, and (b) the fact that, in some cases (say, when briefing and argument already have been completed in the court of appeals) judicial economy may actually weigh *against* stripping the court of jurisdiction. On this last point, it is significant that under the Federal Rules, the motions to revise or reopen court judgments that cause an earlier-filed appeal to “self-destruct” must be filed within a few days after the entry of judgment. See, *e.g.*, Fed. Rule Civ. Proc. 4(a)(4) (10 days). The agency rules before us, in contrast, permit a motion for reconsideration (or reopening) well after the entry of the agency's final order. See 8 CFR §3.8(a) (1994) (no time limit on motion for reconsideration filed with BIA). See also, *e.g.*, 10 CFR §2.734(a)(1) (1995) (Nuclear Regulatory Commission may consider untimely motion to reopen where “grave issue” raised). This timing difference means that it is less likely in the court/court context than in the agency/court context that “self-destruction” of an earlier-filed notice of appeal would interrupt (and therefore waste) a court of appeals review already well underway. Consequently, this Court should not simply assume that the court/court rule applies in the agency/court context.

The majority ultimately says we ought not decide whether the “self-destruct” rule applies in the agency/court context. *Ante*, at 10, 18. But, the decision cannot be avoided. That is because the *majority's* basic argument—that a tolling rule would deprive the consolidation subsection of meaning—depends upon the assumption that the “self-destruct” rule does apply. And, for the reasons stated above, that assumption is not supported by any statutory or rule-

based authority.

Because this matter is so complicated, an analogy to the court/court context may help. In that context, in a normal civil case, a losing party has 30 days to file an appeal (60, if the Government is a party). Fed. Rule App. Proc. 4(a)(1). The Rules then distinguish between two kinds of reconsideration motions: those filed within 10 days (including motions for relief from judgment under Federal Rule of Civil Procedure 60(b)), which toll the time for appeal, and those filed after 10 days (in the main, other Rule 60(b) motions), which do not toll the time for appeal. See Fed. Rule App. Proc. 4(a)(4). When a party files a motion of the first sort (which I shall call an "immediate" reconsideration motion), a previously filed notice of appeal "self-destructs." *Ibid.* When a party files a motion of the second sort (which I shall call a "distant" reconsideration motion), a previously filed notice of appeal remains valid. A complex set of rules creates this system, and lawyers normally refer to those rules in order to understand what they are supposed to do. See Fed. Rule App. Proc. 4(a) (and Rules of Civil Procedure cited therein).

Agency reconsideration motions are sometimes like "immediate" court reconsideration motions, filed soon after entry of a final order, but sometimes they are like "distant" reconsideration motions, filed long after entry of a final order. (Petitioner in this case filed his motion 35 days after entry of an order that he had 90 days to appeal.) The problem before us is that we lack precise rules, comparable to the Federal Rules of Appellate and Civil Procedure, that distinguish (for appeal preserving purposes) between the "immediate" and the "distant" reconsideration motion. We therefore must read an immigration statute, silent on these matters, in one of three possible ways: (1) as creating rules that make Federal Rules-type distinctions; (2) in effect, as analogizing an agency reconsideration motion to the "distant" court

reconsideration motion (and denying tolling); or (3) in effect, as analogizing an agency reconsideration motion to the "immediate" court reconsideration motion (and permitting tolling).

The first possibility is a matter for the appropriate Rules Committees, not this Court. Those bodies can focus directly upon the interaction of reconsideration motions and appellate time limits; they can consider relevant similarities and differences between agency/court and court/court appeals; and they can consider the relevance of special, immigration-related circumstances, such as the fact that the filing of a petition for review from a "final" deportation order automatically stays deportation, INA §106(a)(3), 8 U. S. C. §1105a(a)(3) (1988 ed., Supp. V). The second possibility (that adopted by the majority) creates a serious risk of unfair loss of a right to appeal, because it is inconsistent with *Locomotive Engineers* (thereby multiplying complexity). And, it has no basis in the INA, which generally incorporates the procedures of the Hobbs Act and the text and history of which simply do not purport to make an exception denying tolling. The third possibility, in my view, is the best of the three, for it promotes uniformity in practice among the agencies; it is consistent with the Hobbs Act, whose procedures the INA generally adopts; and it thereby helps to avoid inadvertent or unfair loss of the right to appeal.

The upshot is that *Locomotive Engineers*, *Griggs*, the language of the immigration statute before us, the language of the Federal Rules, and various practical considerations together argue for an interpretation of INA §106(a) that both (1) permits the filing of a motion for reconsideration to toll the time for petitioning for judicial review (when no petition for review has yet been filed), and (2) permits court review that has already "vested" in the court of appeals to continue there (when the petition for review was filed prior to the filing of the motion for

reconsideration). This interpretation simply requires us to read the language of the INA as this Court read the Hobbs Act in *Locomotive Engineers*. It would avoid creating any “Hobson's choice” for the alien, cf. *ante*, at 11–12, for an alien could both appeal (thereby obtaining an automatic stay of deportation, INA §106(a)(3), 8 U. S. C. §1105a(a)(3)), and then also petition for reconsideration. And, it would avoid entrapping the unwary lawyer who did not immediately file a petition for court review, thinking that a reconsideration petition would toll the appeal time limit as it does in other agency/court contexts.

This approach does not undermine Congress' goal of expediting the deportation-order review process. Although the court of appeals might postpone decision of an appeal pending the agency's decision on a later-filed motion to reopen or reconsider, it need not do so. If the motion is frivolous, or made for purposes of delay, the INS can call that fact to the court's attention. And, of course, the agency can simply decide the motion quickly. The alien could prevent the court of appeals from acting by not filing an appeal from the original order, but, instead (as here) simply filing a reconsideration motion. That motion would toll the time for taking an appeal. But, the fact that the alien would lose the benefit of the automatic stay would act as a check on aliens filing frivolous reconsideration motions (without filing an appeal) solely for purposes of delay.

The majority, and the parties, compare and contrast the tolling and nontolling rules in various court-efficiency and delay-related aspects. But, on balance, these considerations do not argue strongly for one side or the other. When Congress amended the INA in 1990 (adding, among other things, the consolidation subsection) it did hope to diminish delays. But, the statute explicitly set forth several ways of directly achieving this objective. See, *e.g.*, Immigration Act of 1990, §545(a), 104 Stat. 5063

(creating INA §242B(d), 8 U. S. C. §1252b(d), directing the Attorney General to issue regulations providing for summary dismissal of, and attorney sanctions for, frivolous administrative appeals); §545(b)(1) (reducing time for petitioning for review from 6 months to 90 days); §545(d)(1) (directing the Attorney General to issue regulations limiting the number of motions to reopen and to reconsider an alien may file and setting a maximum time period for the filing of such motions); §545(d)(2) (directing the Attorney General to do the same with respect to the number and timing of administrative appeals). Significantly, the statute did not list an antitolling rule as one of those ways. At the same time, Congress enacted certain measures apparently designed to make the deportation-order review process more efficient. See, *e.g.*, §545(d)(2) (asking the Attorney General to issue regulations specifying that the administrative appeal of a deportation order must be consolidated with the appeal of all motions to reopen or reconsider that order; providing for the filing of appellate and reply briefs; and identifying the items to be included in the notice of administrative appeal). In light of these last-mentioned provisions, the consolidation subsection would seem consistent with Congress' purposes in 1990 even without an implicit no-tolling rule.

Indeed, the Attorney General has construed one of these last-mentioned 1990 amendments as authorizing, in a somewhat analogous situation, a tolling provision roughly similar to that in *Locomotive Engineers*. In §545(d)(2) of the 1990 Act, Congress asked the Attorney General to issue regulations with respect to “the *consolidation* of motions to reopen or to reconsider [an Immigration Judge's deportation order] with the appeal [to the BIA] of [that] order.” 104 Stat., at 5066 (emphasis added). In response, the Attorney General has proposed a regulation saying, among other things, that “[a] mo-tion to

reopen a decision rendered by an Immigration Judge . . . that is pending when an appeal [to the BIA] is filed . . . shall be deemed a motion to remand [the administrative appeal] for further proceedings before the Immigration Judge . . . . Such motion . . . shall be consolidated with, and considered by the Board [later] in connection with, the appeal to the Board . . . ." 59 Fed. Reg. 29386, 29388 (1994) (proposed new 8 CFR §3.2(c)(4)). See also 59 Fed. Reg., at 29387 (proposed new §3.2(b) (parallel provision for motions to reconsider)). This approach, which is comparable to the *Locomotive Engineers* tolling rule, would govern the interaction of administrative appeals and motions to reopen the decision of an Immigration Judge. It seems logical that Congress might want the same rule to govern the analogous situation concerning the interaction of petitions for judicial review and motions to reconsider or reopen a decision of the BIA.

One final point. The INS argues that the Court should defer to one of its regulations, 8 CFR §243.1 (1994), which, it says, interprets INA §106(a) as eliminating the tolling rule. See, *e.g.*, *Shalala* v. *Guernsey Memorial Hospital*, 514 U. S. — (1995) (slip op., at 6–7); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984). The regulation in question, however, says nothing about tolling. To the contrary, it simply defines "final order of deportation," using language very similar to the language this Court, in *Locomotive Engineers*, interpreted as embodying the tolling rule. Compare the regulation here at issue, 8 CFR §243.1 (1994) ("[A]n order of deportation . . . shall become final upon [the BIA's] dismissal of an appeal" from the order of a single immigration judge), with the language at issue in *Locomotive Engineers*, 49 U. S. C. §10327(i) ("[A]n action of the [Interstate Commerce] Commission . . . is final on the date on which it is served"). A lawyer reading the regulation

simply would not realize that the INS intended to create an unmentioned exception to a critically important technical procedure. Moreover, the INS itself has apparently interpreted the regulation somewhat differently at different times. Compare Brief for Respondent 13–17 (arguing that the regulation embodies a no-tolling rule), with *Chu* v. *INS*, 875 F. 2d 777, 779 (CA9 1989) (in which INS argued that a reconsideration motion makes the initial order nonfinal, and thereby implies tolling). See, *e.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U. S. —- (1994) (slip op., at 10–11) (inconsistent interpretation entitled to "considerably less deference" than consistently held agency view). For these reasons, I do not accept the INS's claim that its silent regulation creates a "no tolling" rule.

I would reverse the judgment of the Court of Appeals.