OFFICIAL TRANSCRIPT

ORIGINAL

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CHARLES B. MILLER, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY, ET AL. Petitioners v. RICHARD A. FRENCH, ET AL.; and UNITED STATES, Petitioner, v. RICHARD A. FRENCH, ET AL.

CASE NO: 99-224 & 99-582 c.1

PLACE: Washington, D.C.

DATE: Tuesday, April 18, 2000

PAGES: 1-55

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CHARLES B. MILLER, :

4 SUPERINTENDENT, PENDLETON :

5 CORRECTIONAL FACILITY, ET AL. :

6 Petitioners :

7 v. : No. 99-224

8 RICHARD A. FRENCH, ET AL.; :

9 and :

10 UNITED STATES, :

11 Petitioner, :

12 v. : No. 99-582

13 RICHARD A. FRENCH, ET AL. :

14 -X

15 Washington, D.C.

16 Tuesday, April 18, 2000

17 The above-entitled matter came on for oral

18 argument before the Supreme Court of the United States at

19 10:10 a.m.

20 APPEARANCES:

21 JON LARAMORE, ESQ., Deputy Attorney General, Indianapolis,

22 Indiana; on behalf of Petitioners Miller, et al.

23 BARBARA D. UNDERWOOD, ESQ., Deputy Solicitor General,

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

25 Petitioner United States.

1 KENNETH J. FALK, ESQ., Indianapolis, Indiana; on behalf
2 of the Respondents.
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1 P R O C E E D I N G S

2 (10:10 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 first this morning in No. 99-224, Charles Miller v.

5 Richard French, consolidated with 99-582, United States v.

6 Richard French.

7 Mr. Laramore.

8 ORAL ARGUMENT OF JON LARAMORE

9 ON BEHALF OF PETITIONERS MILLER, ET AL.

10 MR. LARAMORE: Mr. Chief Justice, and may it

11 please the Court:

12 The case addresses the automatic stay provision

13 of the Prison Litigation Reform Act. The full text of the

14 United States Code section may be found at page 1 of the

15 appendix to our certiorari petition.

16 The automatic stay is designed to effectuate

17 other provisions of the PLRA --

18 QUESTION: Mr. Laramore, let me ask you one

19 procedural question. The State's motion to terminate this

20 injunction was filed in 1997?

21 MR. LARAMORE: Yes, Your Honor.

22 QUESTION: And in your brief you say it's set

23 for hearing on the merits in June of 2000. Is there any

24 explanation for the 3-year delay in that?

25 MR. LARAMORE: The case -- there was no action

1 on the motion to vacate during the entire time the appeal
2 pended in the Seventh Circuit, and once the appeal was
3 concluded in the Seventh Circuit, the district court
4 judge --
5 QUESTION: But it would seem the appeal would
6 have nothing to do with going ahead with the motion
7 itself.
8 MR. LARAMORE: Well, we don't disagree with
9 that. The district court, though, did not set a hearing
10 on the motion --
11 QUESTION: For 3 years.
12 MR. LARAMORE: -- until after the appeal was --
13 was completed. That hearing date was then -- the initial
14 hearing was set -- the hearing was initially set for last
15 December, and it's now been extended until June of this
16 year.
17 QUESTION: Did you request --
18 QUESTION: Why didn't you ask for mandamus?
19 MR. LARAMORE: Our -- our appeal was pending at
20 that point in -- on the merits of the automatic stay
21 issue, and we chose not to go the mandamus route given how
22 procedurally complex that would have made the case at that
23 point.
24 QUESTION: Mr. Laramore, did you ask the
25 district court to proceed during the pendency of the

1 appeal to the Seventh Circuit?

2 MR. LARAMORE: We did not formally make that

3 request of the district court.

4 QUESTION: You didn't ask the district court.

5 You truly have no basis for going to mandamus a court to

6 do something that you didn't ask it to do.

7 MR. LARAMORE: Well, that's right, and we -- it

8 was our understanding that the district court -- without

9 it having made a formal request, that the district court

10 wanted to wait until the appeal was concluded.

11 QUESTION: Well, I suppose you had no interest

12 in having the case mooted, did you?

13 MR. LARAMORE: Well, we are interested in --

14 QUESTION: Which would have been the situation I

15 suppose if the district court had proceeded --

16 MR. LARAMORE: That would have perhaps mooted

17 this case --

18 QUESTION: -- and -- and had given you what you

19 wanted.

20 MR. LARAMORE: That would have perhaps mooted

21 this automatic stay issue, although perhaps not under the

22 doctrine of capability of repetition but evading review.

23 At any rate, the automatic stay is designed to

24 give district courts incentives to move quickly on motions

25 to terminate injunctions in prison cases. The Seventh

1 Circuit invalidated the automatic stay, found it violating
2 -- found it to violate separation of powers concepts. But
3 the automatic stay is constitutional for several reasons.
4 First, the automatic stay does not affect the
5 underlying judgment. It merely addresses in a temporary
6 way district courts' prospective equitable power, and it
7 only does so after the district court already has had 90
8 days to act on the motion to vacate or the motion to
9 terminate.
10 QUESTION: Mr. Laramore, I didn't -- I know
11 that's your argument, but I didn't follow it entirely
12 because it seems to me if you suspend the decree and it
13 doesn't become operative again until all the findings that
14 have been made -- all the findings required by the new act
15 had been made, how is that different from just starting
16 fresh and making those findings? It seems to me to say
17 suspended is kind of a euphemism for terminated because
18 you don't get it back again unless you establish what you
19 would have to establish to get a decree under the new law
20 in the first place.
21 MR. LARAMORE: It is correct that the injunction
22 only continues if the district court finds that it's
23 necessary to correct an ongoing constitutional violation.
24 So, you're correct in that sense.
25 And -- and the point I'm making is a -- a

1 formalistic point in a sense that it's -- that the
2 judgment is not -- that the automatic stay does not act
3 directly on the judgment, but acts only on the district
4 court's prospective equitable powers. It does mean that
5 the prisoners are not able to take advantage of the
6 injunctive portion of any existing order during the period
7 of the suspension.
8 QUESTION: What does the judgment say? The
9 judgment says that the State was in violation. Right?
10 And the rest is remediation.
11 MR. LARAMORE: Yes.
12 QUESTION: What it prescribes to remedy that
13 violation is -- is not -- is not part of the judgment.
14 It's part of the remedy I assume.
15 MR. LARAMORE: It is part of the remedy, yes.
16 QUESTION: But it's part of the judgment too.
17 That's what the judgment is. It includes the injunction,
18 doesn't it?
19 MR. LARAMORE: Well, it certainly --
20 QUESTION: I never heard of this suggested
21 distinction between remedy and judgment if the remedy is
22 part of the judgment.
23 MR. LARAMORE: And certainly this statute is
24 aimed at dealing with the remedial portions of -- of --
25 QUESTION: Yes, but -- but you say -- you say -

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2 MR. LARAMORE: -- however we describe it.

3 QUESTION: -- that the -- you say that the -- if

4 you agree with that, then -- then you must retract your

5 assertion that -- that Congress can, in fact, change the

6 remedies that are available for the future. In the case

7 of -- of an injunction that operates prospectively, your

8 position is that Congress has the power to change the

9 ability of the court to impose certain remedies in the

10 future, so long as Congress does not violate the

11 Constitution.

12 MR. LARAMORE: Yes.

13 QUESTION: Well, if that's the case, then it

14 can't be part of the judgment.

15 MR. LARAMORE: I'm not sure that I precisely

16 agree with what you said. Congress can direct the

17 judicial branch to reexamine the judgment itself and --

18 and impose upon it new standards such as the standards

19 that are in part (b) of this -- of this portion of the

20 Prison Litigation Reform Act.

21 What the automatic stay does doesn't direct the

22 judicial branch to do anything. It has -- it causes the

23 motion to vacate itself to act automatically as a stay of

24 the injunctive portions of the judgment prospectively.

25 QUESTION: I'm not -- I'm not sure the term

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1 judgment is quite accurate here. A judgment traditionally
2 -- it's -- you get a money judgment from -- from a common
3 law court. I think traditionally you get a decree from a
4 court of equity, which -- you know, that's more like the
5 Rufo case --
6 MR. LARAMORE: Yes.
7 QUESTION: -- which came up from the First
8 Circuit, rather than like the Plaut case which I think was
9 a -- a judgment.
10 MR. LARAMORE: Yes, I think that's exactly
11 right.
12 And -- and --
13 QUESTION: But just to explore this a little
14 further, let's suppose the lawsuit was brought by the
15 prisoners and it was determined by the court that the
16 prison was putting six people in a single cell room that
17 would properly hold only two and that it was a violation
18 of the Constitution, making it cruel and unusual
19 punishment, and further, that the prison was providing
20 only 1,000 calories of food a day, whereas to sustain
21 normal weight and life, 2,000 calories a day were
22 required. Now, let's just take that as an example.
23 Finding a constitutional violation and entering
24 a decree that that must be remedied by reducing it to two
25 people to a cell and increasing the food.

1 Now, you say that Congress can come in and
2 automatically end that order for relief based on the
3 motion by the State, that that's okay, that that does not
4 invoke the concerns that the Court expressed in Plaut with
5 interference with the judgment of a court in a decided
6 case.
7 MR. LARAMORE: Justice O'Connor, I -- I think I
8 would describe our position somewhat differently than
9 that. We say that it's appropriate for Congress to -- to
10 change the remedial law as it has done here and to require
11 the courts to apply the changed remedial law to existing
12 decrees.
13 And how that would apply in -- in the case that
14 you describe is that the State would make a motion and it
15 would say, we no longer need to have this injunction that
16 says we can only have two people in a cell and -- and
17 2,000 calories --
18 QUESTION: Well, you don't have to say anything.
19 You -- all you have to do is file a motion under this PLRA
20 and say, we file a motion to terminate the ongoing relief.
21 Right?
22 MR. LARAMORE: Right.
23 QUESTION: Okay.
24 MR. LARAMORE: And that shifts the burden.
25 That's where the substantive change has occurred in this

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1 case.

2 QUESTION: Well, in -- in your answer to Justice

3 O'Connor that -- that you just gave explaining the

4 authority of the Congress to, for want of a better term,

5 modify the terms of the decree, I kept waiting for you to

6 use the term prospective. And you seemed almost careful

7 not to do that. I -- I thought you were going to say that

8 this is --

9 MR. LARAMORE: No. I certainly didn't avoid

10 that on purpose.

11 QUESTION: -- this is a prospective --

12 MR. LARAMORE: Yes.

13 QUESTION: -- operation of -- of a statute. It

14 does not undo previously adjudicated rights in the sense

15 that a money judgment would be --

16 MR. LARAMORE: That's exactly right, Justice

17 Kennedy.

18 And -- and, of course, this is a prospective

19 statute in that it applies to any decrees entered in the

20 future as -- and -- and Congress has also set up the

21 mechanism to apply the same standards to decrees that are

22 already in existence --

23 QUESTION: But, Mr. Laramore, it seems to me

24 that in order for you to prevail, you have to establish

25 the initial proposition that constitutional issues aside,

1 which Congress lets the court resolve during that 90-day
2 period -- constitutional issues aside, Congress has the
3 power to eliminate a remedy that has been prospectively
4 imposed by a court. Let me pose a simple example that
5 doesn't contain a constitutional problem.
6 Suppose Congress passes a law that says that
7 Federal courts will not have authority to impose
8 injunctions against competition in any cases under Federal
9 statutes alleging violation of some -- some business --
10 business rights, that in the future, Federal courts will
11 not have the power to enjoin competition. All right?
12 MR. LARAMORE: Yes.
13 QUESTION: And the statute specifically says,
14 any injunctions already in effect, enjoining competition
15 for the future, will be dissolved. Is that law valid?
16 MR. LARAMORE: Plainly I think the prospective
17 portion of it applying to injunctions not yet issued is
18 valid.
19 QUESTION: Oh, sure.
20 MR. LARAMORE: And then the question I think
21 becomes --
22 QUESTION: Come on. Answer the hard question.
23 MR. LARAMORE: -- a formalistic one whether --
24 whether Congress may pass a law that says those
25 injunctions are no longer valid as -- as it did in the

1 Telecommunications Act as to some of the existing
2 injunctions, or whether it must do what it did in this
3 case, which is to say, courts must evaluate those
4 injunctions and apply the new standards to those
5 injunctions but --
6 QUESTION: Well, I don't think it has the power
7 to give the courts 90 days and say, if you don't do it in
8 90 days, they're no longer invalid unless it has the power
9 to invalidate them. Period. That's -- that's my --
10 that's my point.
11 MR. LARAMORE: Well --
12 QUESTION: And you're not willing to say that it
13 has the power to invalidate them.
14 MR. LARAMORE: It has the power to tell the --
15 and again, this is -- is perhaps too technical a way to
16 express it. But it has the power to tell the district
17 courts that they can no longer enforce those injunctions,
18 which may be the same as invalidating the injunctions.
19 QUESTION: You answered my question to say that
20 it was, once it's suspended, apart from the label. It's
21 like starting the case all over again.
22 But to -- to continue Justice Scalia's line of
23 questioning, does the 30 days, extendable to 90 days, mean
24 anything? On your theory of the case, couldn't Congress
25 have simply said, as of the day this new law goes into

1 effect, all bets are off, any prison litigation has to
2 start anew with a fresh complaint and meet the standards
3 that we set in this new law?
4 MR. LARAMORE: Yes, as a matter of separation of
5 powers.
6 QUESTION: So, is there anything on -- anything
7 that's constitutionally required by giving the district
8 court any time at all in your judgment?
9 MR. LARAMORE: Well, Judge Easterbrook says in
10 -- in his dissent that there may be a due process element
11 involved here, although I suggest that that is not such an
12 issue here as long as there are other methods that
13 prisoners can use outside of this injunctive --
14 QUESTION: Well, I --
15 MR. LARAMORE: -- to vindicate their rights.
16 QUESTION: -- prison litigation where the
17 finding has been made not just that there is a violation
18 of the Eighth Amendment, but that there is a violation of
19 the Eighth Amendment in this and that and the other
20 particular --
21 MR. LARAMORE: Yes.
22 QUESTION: -- as Justice O'Connor spelled out.
23 And a court has made that finding, that it
24 violates the Eighth Amendment in these particulars and
25 then Congress can say, never mind that. During the

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1 interim, the decree is out of -- out of force entirely.
2 That -- there has been a finding of a constitutional
3 violation --
4 MR. LARAMORE: Yes.
5 QUESTION: -- specific ways. I don't think that
6 anyone has questioned, at least in this litigation, the
7 (e)(1) of the statute that says, district courts, act
8 promptly and if you don't act promptly, you can be
9 mandamused by the court of appeals.
10 MR. LARAMORE: Yes.
11 QUESTION: But to say no matter how complex the
12 case is, you have 30 days or 90 days, I don't know of any
13 legislation like that, do you? Is there anything -- any
14 other statute like that that says --
15 MR. LARAMORE: There's no other statute that
16 we've found that acts in that way on an existing judgment.
17 QUESTION: Yes.
18 MR. LARAMORE: There are, of course, other
19 provisions with time limits that have consequences such as
20 the Speedy Trial Act and pre-trial detention --
21 QUESTION: Yes, but the result of the Speedy
22 Trial Act --
23 MR. LARAMORE: Yes.
24 QUESTION: -- is the defendant can't be tried.
25 And here it's the prisoners get their judgment taken away

1 from them.

2 MR. LARAMORE: But I do want to highlight two

3 portions of the statute that seem to be missing from the

4 example that -- that you've given and that Justice

5 O'Connor maybe began. Two things.

6 One is that this statute only applies at this

7 point to injunctions that are quite old. All of them must

8 be now at least 4 years old because that's how old the act

9 is. So, we're talking about situations where there has

10 already been a judgment in place for a lengthy period of

11 time. We would expect that either the prison has

12 conformed its conduct to the Constitution at this point or

13 the prisoners would be back in court seeking enforcement,

14 seeking contempt and that sort of thing.

15 QUESTION: Yes, but that doesn't really answer

16 Justice O'Connor's problem because if your reading is

17 correct, after 30 days, they could put six people in each

18 cell, even though they only had two during the 4-year

19 period.

20 MR. LARAMORE: Well, they could.

21 QUESTION: Isn't that right?

22 MR. LARAMORE: There would be no injunction

23 prohibiting it, but --

24 QUESTION: Well, that's my point. So, they

25 could do it.

1 MR. LARAMORE: They could do it. But, of
2 course, then the prisoners at that point can use the
3 provisions of 3626(b)(3) and get their permanent
4 injunction back at that point. They could also use the
5 temporary injunction provisions of the statute.
6 QUESTION: Yes, but until they get that
7 provision back, the State could legally say, we'll put the
8 six people back in the shell -- in the -- in the cell
9 until we get the litigation resolved.
10 MR. LARAMORE: Yes, but let me point out one
11 other --
12 QUESTION: They might not do it, but I'm just
13 trying to think of the --
14 MR. LARAMORE: But one -- one other thing about
15 that, Justice Stevens, is that the standard of conduct is
16 set in that judgment and that standard of conduct remains
17 because the automatic stay doesn't erase the judgment.
18 So, if -- if the State went ahead and put six people in
19 the cell, that -- there would -- there could be a damages
20 action by those prisoners against prison officials in
21 their individual capacities and qualified immunity would
22 certainly not apply because the State has already said
23 that six people in the cell is unconstitutional. So --
24 so, there's that incentive on the State as well.
25 QUESTION: But it hasn't -- Mr. Laramore, under

1 the new standard, they have -- they said it's
2 unconstitutional, but they haven't said it's the least --
3 that the -- the order is the least intrusive way to do -
4 - to take care of it.
5 MR. LARAMORE: That's --
6 QUESTION: Maybe it's unconstitutional but
7 attrition or something like that.
8 MR. LARAMORE: Well, I -- I understand the
9 question, Justice Ginsburg, but I don't think that that -
10 - that those requirements for narrowness and least
11 intrusiveness go to the substantive constitutional finding
12 that six people in a cell is unconstitutional.
13 QUESTION: No, but the point would be that six
14 people may -- say they put three in.
15 MR. LARAMORE: Yes.
16 QUESTION: And they would argue two was a
17 broader remedy than necessary. Three would have done it.
18 So, they go ahead and put three in, and then they -- they
19 -- but they surely do that.
20 MR. LARAMORE: Yes, they could do that.
21 QUESTION: And then fight about whether --
22 MR. LARAMORE: And that could be the subject of
23 later litigation, but -- but that's --
24 QUESTION: Well, they couldn't do that. I mean,
25 they couldn't do that. That would -- if that was

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1 unconstitutional.

2 MR. LARAMORE: Well, that's -- that's right.

3 QUESTION: If it was unconstitutional, it would

4 be unlawful, just as it would be unlawful if the

5 injunction remained in effect to disobey the injunction.

6 You're really just talking about whether you're going to

7 have two laws prohibiting this unlawful action or just one

8 law prohibiting this unlawful action.

9 MR. LARAMORE: Yes, and I answered Justice

10 Stevens' question the way I did with the understanding

11 that three in a cell had not been adjudicated --

12 QUESTION: Well, but there's an argument about

13 it. My point is the guards would have a -- a good faith

14 defense. They thought three was okay. Do you -- you

15 would have to litigate out whether or not it was

16 unconstitutional before you'd know the answer.

17 MR. LARAMORE: That's correct.

18 QUESTION: Yes.

19 QUESTION: May I go back to your -- your

20 proposition that started this discussion, that somehow

21 it's relevant that these decrees are at least 4 years old?

22 And for constitutional purposes, I don't know -- 4 years

23 old I guess. For constitutional purposes, I don't know

24 why that is relevant. Don't we make the -- don't we have

25 to operate on the presumption that an order in equity,

1 which is outstanding, is in fact an appropriate order
2 until a contrary adjudication has been determined? And
3 isn't that presumption just as good for a 4-year order as
4 a 4-month order?
5 MR. LARAMORE: In passing these portions of the
6 Prison Litigation Reform Act, Congress was addressing a
7 problem that it perceived which was --
8 QUESTION: Well, I -- I don't want to be picky
9 about your form. I recognize that. But what about the
10 answer to my question? Don't -- don't we have a
11 presumption of validity which is just as good for 4-year
12 as for 4-month or 4-day orders?
13 MR. LARAMORE: I think that the answer to that
14 is that that's a question of substantive law that Congress
15 could alter. Congress could, for example --
16 QUESTION: Congress could pass a statute, for
17 example, saying all decrees of -- of a court of otherwise
18 competent jurisdiction are presumed to be invalid?
19 MR. LARAMORE: Well --
20 QUESTION: Unnecessary? Could Congress do that?
21 MR. LARAMORE: Congress I think could go so far
22 as to say in a prospective manner that injunctions in
23 prison cases, for example, would expire after a particular
24 period of time --
25 QUESTION: Thank you, Mr. --

1 MR. LARAMORE: -- unless the contrary showing
2 was made.
3 QUESTION: Thank you, Mr. Laramore.
4 Ms. Underwood, we'll hear from you.
5 ORAL ARGUMENT OF BARBARA D. UNDERWOOD
6 ON BEHALF OF PETITIONER UNITED STATES
7 MS. UNDERWOOD: Thank you, Mr. Chief Justice,
8 and may it please the Court:
9 In light of the rule that it takes a clear
10 statement to deprive a court of its traditional equitable
11 powers, the PLRA's automatic stay, 3626(e)(2), does not
12 remove a court's traditional equitable power to prevent
13 irreparable harm while an action is pending. When prison
14 officials move under the PLRA to terminate prospective
15 relief, the (e)(2) stay comes into effect in the ordinary
16 case if the termination motion can't be resolved in 30 or,
17 on extension, 90 days. But nothing in the statute
18 purports to strip a court of its power to grant
19 extraordinary interim relief to either party if it finds
20 the party is likely to succeed on the merits and will
21 otherwise suffer irreparable harm, but it will take more
22 than 90 days to decide the motion.
23 And construing the statute to take away that
24 power, of course, would raise the serious constitutional
25 question about the power of Congress to suspend a final

1 judgment of an Article III court without giving the court
2 any role in the process. Several features of the statute
3 support this interpretation.
4 First, the words, automatic stay and the motion
5 shall operate as a stay, are commonly used to describe a
6 default rule for the normal case, the rule that governs
7 unless a court decides otherwise, not a rule that courts
8 can't change. There are other automatic stays in the law.
9 The bankruptcy stay was apparently the model for this.
10 Federal Rules of Civil Procedure establish an automatic
11 10-day stay of judgment in many cases, and as one Senator
12 noticed in discussing this provision, it's common under
13 State law for the State to get an automatic stay pending a
14 government appeal.
15 QUESTION: But none of -- none of these other
16 examples that you allude to were enacted for the very
17 purpose of inducing the court to which the stay applied to
18 act quickly. None of those examples had that purpose in
19 mind, did they?
20 MS. UNDERWOOD: That's --
21 QUESTION: I mean, the bankruptcy stay, for
22 example. The purpose of it isn't to hustle the -- the
23 courts that have litigation pending to -- to get the
24 litigation out of the way quickly.
25 MS. UNDERWOOD: No. I think that's right. I'm

1 simply pointing that the -- to the fact that the use of
2 the language, automatic stay, or the term, a motion shall
3 operate a stay, is conventional legislative usage.
4 QUESTION: Well, but I read the language in
5 3626(e)(2), any motion to modify or terminate prospective
6 relief shall operate as a stay, as unambiguous. And I
7 read this whole thing as a clear indication by Congress
8 that it wanted to do exactly what the State was arguing
9 ought to be done.
10 MS. UNDERWOOD: Well, to --
11 QUESTION: And that's automatic.
12 Now, let's say we read it that way. Is there a
13 constitutional violation?
14 MS. UNDERWOOD: Well, I think there is a -- a
15 serious constitutional question.
16 QUESTION: You said that, but is there a
17 violation if we read it as a clear intent by Congress to
18 have it operate just the way the State says?
19 MS. UNDERWOOD: Well, while we think it's
20 difficult, on balance, as we've said in our -- in our
21 brief, we think that it can be constitutionally defended
22 because it operates only on prospective relief and this
23 Court's precedents permit a change in law to affect
24 prospective relief even in what is otherwise a final
25 decree, an injunctive decree, and because it doesn't --

1 QUESTION: -- examples of -- a congressional
2 interference that would be upheld.
3 MS. UNDERWOOD: Well, Wheeling Bridge is an --
4 is the sort of the classic example of a case in which
5 there was a final decree prohibiting -- initially
6 requiring the taking down of the bridge, and then it would
7 have been -- would -- prohibited its -- its rebuilding.
8 QUESTION: Of course, there -- there it was
9 almost like a property right, a navigation servitude that
10 the United States had the -- could surrender at its will
11 anyway.
12 Do you have another one?
13 (Laughter.)
14 QUESTION: I -- I looked and I thought Wheeling
15 was the closest, but I think it's quite distinguishable.
16 QUESTION: It was a navigational servitude?
17 MS. UNDERWOOD: I'm not sure I would call it a
18 navigational servitude. There -- there had been a
19 determination that the bridge obstructed commerce,
20 interfered with interstate commerce, and Congress decided
21 in fact it advanced commerce rather than interfering with
22 it. I'm not sure that it was a right of the United
23 States. I mean, I don't think this is like the -- the
24 Sioux Nation situation, for instance, in which the
25 Government is actually giving up its own right. It

1 changed the regulatory regime about the relationship of
2 bridges to navigation and --
3 QUESTION: On behalf of private parties or
4 nongovernment --
5 MS. UNDERWOOD: The way it operated in -- in
6 that case on behalf of private parties. And it was then
7 appropriate for the injunction -- for the -- for the
8 prospective relief to take account of the change in the
9 law.
10 It's also the case, although this wouldn't be
11 legislative, that -- that the modification of the decree
12 in Rufo was -- meant to take -- was appropriate to take
13 account of -- of changes in law and -- and this Court's
14 decision in Agostini reflected the appropriateness of
15 modifying prospective relief to take account of changes in
16 law.
17 QUESTION: Ms. Underwood, those were all cases
18 where the court made the adjustment required by the new
19 law, and that's what (e)(1) of this statute does. It
20 says, court, act promptly and if you don't, the court of
21 appeals can look over your shoulder. I -- I asked Mr.
22 Laramore was there any statute that says, court, no matter
23 how complex the decision is, if you don't meet the 30
24 days, extendable to 90 days, then the winner becomes a
25 loser. I don't know any statute that operates that way,

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1 rather than saying to the court, act promptly but we're
2 not going to turn the winner into a loser if you don't.
3 MS. UNDERWOOD: Well, I don't know any statute
4 that operates that way either, and that's why we think
5 this is a difficult constitutional question. There is no
6 statute just like this.
7 QUESTION: Do you know -- do you know -- do you
8 know any -- any judicial injunctions just like this, that
9 permanently control the operation of an entire agency of
10 State government indefinitely?
11 MS. UNDERWOOD: Well, they don't --
12 QUESTION: I mean, extraordinary --
13 extraordinary problems may -- may require extraordinary
14 solutions. I'm unfamiliar with any other injunction by
15 courts that -- that manage an entire department of State
16 government.
17 MS. UNDERWOOD: Well, I don't know that this
18 manages an entire department of State government, and --
19 QUESTION: How many prisoners in the cell, how
20 many -- you know, what food they're to eat --
21 MS. UNDERWOOD: And --
22 QUESTION: -- what access to libraries and so
23 forth.
24 MS. UNDERWOOD: And even before the PLRA, there
25 was available a motion to modify under -- under the

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1 Federal Rules of Civil Procedure. This prescribes new
2 standards and a new procedure for dealing with it, but the
3 court -- but -- but it's not a new problem that
4 injunctions may require modification to deal with changing
5 circumstances.
6 QUESTION: I -- I would think Congress also
7 could find here that many State agencies really were quite
8 happy under -- under these injunctions. They could go to
9 the judge and get their appropriation, rather than go to
10 the legislature.
11 (Laughter.)
12 QUESTION: So that Congress could treat it as a
13 special case.
14 MS. UNDERWOOD: Congress did treat it as a
15 special case.
16 And the question is whether in doing so and
17 taking the court out of the process, not only modifying
18 the rules and modifying the -- the remedy, but doing so
19 without the intervention of a court, Congress has crossed
20 a constitutional line. There -- there is no precedent
21 that I know of for it, and that's -- and we urge that the
22 statute be construed not to do that not only because of
23 the constitutional principle but also because this Court's
24 precedents consistently say that courts should not be --
25 that Congress should not be read to have taken away a

1 court's equitable --

2 QUESTION: What are those precedents --

3 MS. UNDERWOOD: -- powers.

4 Well --

5 QUESTION: I mean, just a couple of them

6 perhaps.

7 MS. UNDERWOOD: In Scripps-Howard, the Court --

8 there was a statute that provided for stays pending

9 appeal of certain FCC orders and not for others, and this

10 Court held that the appellate court still had its

11 traditional power to grant stays in the second class of

12 cases, the class that the statute didn't authorize stays

13 for.

14 And in Honig, a statute provided that during the

15 dispute over the placement of a disabled child, the child

16 shall remain in the then current placement during the

17 proceedings. This Court called it an automatic

18 injunction, rather like the automatic stay in this

19 statute. And yet, the Court held that the district court

20 still had its traditional equitable power to lift that

21 automatic injunction and make its own determination about

22 the equitable needs for interim relief while the matter

23 was pending.

24 QUESTION: But those laws again, like the other

25 stays you mentioned earlier -- the purpose of them was --

1 was -- it was not directed against the anticipated
2 lassitude of the -- of the district judge, to whom you
3 want to give this power to -- to suspend the stay.
4 MS. UNDERWOOD: Well, the Court has -- the
5 Congress has provided another mechanism for expediting
6 review that was discussed earlier; that is to say, it
7 specifically directed the district court to decide
8 promptly and authorize mandamus for a failure to decide
9 promptly. I don't think that it follows from that that it
10 also intended during what might be a short time or it
11 might be a long time, but would be a time beyond the 90
12 days provided by the statute, that if it took longer than
13 that to resolve the matter, that constitutionally --
14 relief that had been ordered by a court for a
15 constitutional violation and whose termination might cause
16 irreparable injury -- and we're talking now -- if we're
17 talking about standard equitable powers, we're also taking
18 about a determination that at least the prisoners have a
19 probability of success on the merits.
20 The court might not be prepared to find that
21 there should be no termination, that the motion should
22 continue, but it would have to find, for injunctive
23 relief, that they had a probability of success on the
24 merits and that lifting the -- the existing decree would
25 threaten irreparable harm. It would make a judgment about

1 the balance of harms, that in that case Congress intended
2 essentially to cause irreparable injury.
3 QUESTION: Ms. -- Ms. Laramore, may I ask you
4 the question I -- I asked -- Ms. Underwood, may I ask you
5 the question that I asked Mr. Laramore? What if Congress
6 passes a law saying that a particular category of
7 injunctions, some of which are out there already, is no
8 longer permissible and all outstanding injunctions which
9 -- which violate that provision are dissolved? The
10 example I gave was no injunctions against competition.
11 MS. UNDERWOOD: Well, if you -- and if you take
12 out the question whether the Constitution --
13 QUESTION: Yes.
14 MS. UNDERWOOD: -- might independently require
15 that --
16 QUESTION: Yes.
17 MS. UNDERWOOD: -- that injunction, I think
18 Congress has the power to alter the law of remedies that
19 is applicable. Whether it has the power to simply declare
20 those injunctions void, as distinguished from sending the
21 matter back to a court for a court to determine whether
22 its standard is met, is another question. And --
23 QUESTION: Well, my question is it simply says,
24 those injunctions shall no longer be effective. It's not
25 a matter of any standard being met. This is no longer one

1 of the powers we give courts for the future in this kind
2 of case, and therefore, for the future in -- in these
3 cases, those injunctions are no longer effective. Period.
4 Is there anything wrong with that?
5 MS. UNDERWOOD: I think Congress could do that.
6 QUESTION: I think it could too.
7 QUESTION: Is -- to go back a minute to your
8 statutory argument.
9 MS. UNDERWOOD: Yes.
10 QUESTION: I -- I really wanted to hear the
11 other side on this, but I might -- I mean, the -- the --
12 you -- you point out, I think correctly, that the
13 operating language -- it's the words, shall operate as a
14 stay. Those are identical to the words in the bankruptcy
15 statute. It says, operates as a stay. And there's
16 nothing in the statute, as you point out, that suggests it
17 shouldn't operate like any other stay. And there's lots
18 that suggest it should. But there is the problem of
19 purpose, and in terms of purpose, I'd like to know the
20 following.
21 I'm familiar with one prison decree in Puerto
22 Rico. That was 20 judicial opinions, 20 years, 10
23 institutions, health, mental health, overcrowding four or
24 five times the -- the proper number in a cell, et cetera,
25 $70 million in fines, special masters, complicated beyond

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1 belief. I don't believe it's conceivable that you could
2 deal with something like that in 90 days.
3 Now, at the other extreme, there are ones you
4 probably could. You've looked into them. Is my
5 characterization of Puerto Rico correct, and if so, are
6 there others that just couldn't be done in 90 days? I
7 mean, is -- if that's a big problem, then I would think
8 probably Congress didn't want to clear them up in 90 days,
9 but just wanted to speed things up. If it's not a big
10 problem, it becomes more plausible that what they wanted
11 to do was end everything in 90 days. So, empirically what
12 are we dealing with? Are we dealing with a world where
13 it's very unlikely Congress, which is not -- which we
14 assume -- and it does normally do things that are
15 reasonable -- doesn't want to ask district judges to do
16 the impossible?
17 MS. UNDERWOOD: Well, I'd like to say two things
18 in answer to that question. One is that the -- there are
19 injunctions that are enormously complicated that could not
20 possibly be totally resolved in 90 days, although it might
21 be that parts of them could be. There's -- there's
22 nothing to prevent courts from addressing a termination
23 motion piecemeal or, indeed, from -- to prevent the State
24 from seeking to terminate a piece of the injunction, an
25 aspect of it, the medical care part of it, or some other

1 part of it. But, yes, there is a -- there are -- there
2 are numerous injunctions that have the kind of complexity
3 that would make a 90-day resolution difficult.
4 The other thing I want to say about this notion
5 that Congress -- the statute might be interpreted as
6 simply cutting everything off and requiring the prisoners
7 to start again is that that's what Congress rejected. An
8 earlier draft of this statute would have done exactly that
9 and -- and there have been bills since then to do that, to
10 say all injunctions will terminate in 2 years. In fact -
11 -
12 QUESTION: Ms. Underwood, is -- one -- one part
13 of your argument you say if for the interim you can meet
14 the preliminary injunction type standards, irreparable
15 harm, probability of success on the merits, then you can
16 keep the stay in effect. But one of the amici --
17 MS. UNDERWOOD: Keep the decree in --
18 QUESTION: Yes.
19 One of the amici in this case said that this new
20 legislation provides for a preliminary injunction. And as
21 I see that provision, the standards are identical to what
22 you're urging is necessary to keep the decree in force,
23 irreparable harm, probability of success on the merits.
24 And yet, in the new act that comes with a time limit. A
25 preliminary injunction can remain in force only 90 days.

1 So, tops you could have 180 days.

2 MS. UNDERWOOD: Well, we think it's implausible

3 that the (a)(2) preliminary injunction applies to

4 termination motions for just the reasons that I was

5 starting to say. That is, originally this -- this statute

6 was in the form of a bill that said all injunctions

7 terminate in 2 years. There was not only an automatic

8 stay, but there was an automatic termination, and everyone

9 did have to start all over again with an application for

10 new relief. And that -- there was serious criticism in

11 hearings and so forth of that bill, and Congress amended

12 it.

13 And the statute they enacted distinguished

14 sharply between termination motions -- between the

15 termination process and the initial relief process. And

16 the termination process is now no longer just termination.

17 It's a decision whether to terminate or continue the

18 injunction. And that's in (v) and so forth of the

19 statute. And the (a) provision, which contains the

20 preliminary injunction, applies to applications for new

21 relief. So --

22 QUESTION: Ms. Underwood, are we talking here

23 about serious -- serious problems? I mean, don't you

24 think that even when the injunction is dissolved after 90

25 days, the State would be very loathe to change anything

1 set forth in the earlier injunction that it was not
2 absolutely sure would comport with the new -- with the new
3 standard set forth in the new legislation? It would still
4 be unconstitutional and therefore unlawful to do anything
5 that would violate the constitutional rights of the
6 prisoners, wouldn't it?
7 MS. UNDERWOOD: Yes, but there are differences
8 of opinion about what is unconstitutional.
9 QUESTION: Exactly, but it will be -- the State
10 will be at risk with respect to that difference of opinion
11 when there -- when there is -- there had been an
12 injunction which is now dissolved.
13 MS. UNDERWOOD: Well, I'm not sure it would be
14 at risk with respect to liability.
15 But in any event, predicting what the State is
16 likely to do in the interim I suppose is a part of
17 ordinary equitable considerations. I suppose if the State
18 made some representations about what it was likely to do,
19 that might make interim --
20 QUESTION: And if the Commonwealth has paid $68
21 million rather than comply, you think they suddenly will
22 comply when there's no -- when there's no decree in
23 effect?
24 MS. UNDERWOOD: I'm not suggesting any
25 particular prediction about what various State officials

1 would or would not do and suggesting, rather, that courts' traditional equitable powers, precisely designed to deal with the likelihood of irreparable injury in a particular case to a particular set of prisoners under a particular decree in a case with a particular history --

6 QUESTION: Ms. Underwood, on your Bankruptcy Code analogy, there are provisions that Congress made for modification of the stay. And that seems to me is -- is conspicuously absent here. Automatic stay is used in both, but the Bankruptcy Act says the court can modify it, it can place conditions on it.

12 MS. UNDERWOOD: Every other automatic stay can be lifted by a court. This automatic stay contains, sometimes under expressed conditions, sometimes under just -- just general equitable authority -- this automatic stay does not contain a provision authorizing a court to lift it and it does not contain a provision prohibiting a Court from lifting it, and that's why we think --

19 QUESTION: Thank you, Ms. Underwood.

20 Mr. Falk, we'll hear from you.

21 ORAL ARGUMENT OF KENNETH J. FALK

22 ON BEHALF OF THE RESPONDENTS

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

25 In section 3626(e), as interpreted by the

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1 Seventh Circuit, Congress imposes an automatic stay on a
2 final judgment which cannot in any way be modified. This
3 is a legislative suspension of a final judgment. This
4 does --
5 QUESTION: But you will -- it's not a judgment
6 at law. It's an equity decree that is ongoing. And
7 surely, one characteristic of an equity decree of this
8 kind is it is modifiable.
9 MR. FALK: Of course, that is correct. And --
10 and Wheeling Bridge is, at least the initial case, that
11 talked about that. And in Wheeling Bridge, this Court's
12 holding was that if Congress produces new substantive law
13 which modifies the substantive law upon which the
14 prospective relief is modified -- is based, then the
15 prospective relief can be modified.
16 But in this case, there is no new substantive
17 law. It is merely Congress saying at a point certain we
18 are requiring that this stay be entered. And really --
19 QUESTION: May -- may I interrupt you here?
20 MR. FALK: Yes.
21 QUESTION: What if the -- the point that you
22 referred to were not, we'll say, 90 days? Let's assume it
23 was 2 years. Everything else is -- is the same in the
24 statute except there's a 2-year grace period following a
25 -- a request for termination. Would you find a

1 constitutional question here?

2 MR. FALK: I think there would still be a

3 question under Plaut because you would still be taking a

4 final judgment at some point and saying -- Congress

5 stepping in and saying, we are modifying it. However --

6 QUESTION: You would also be giving what I think

7 most of us would assume would be an adequate

8 opportunity --

9 MR. FALK: Exactly.

10 QUESTION: -- to review the continuing necessity

11 for even a very complicated decree.

12 MR. FALK: Exactly.

13 QUESTION: So, you could say in -- in the 2-

14 year example, that -- that it was in fact operating simply

15 as a rule for default of -- of a perfectly appropriate

16 judicial process.

17 MR. FALK: Yes, and if you -- and we view -- we

18 view the separation of powers as a functional test, is

19 Congress invading the central prerogative of the courts.

20 If Congress gives a court an unreasonably short deadline,

21 a deadline which in some cases cannot be met, then

22 obviously that is an invasion because after that --

23 QUESTION: No. I was going to say, so it boils

24 down to a question of time then.

25 MR. FALK: Well, yes, it does, but it also boils

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1 down --

2 QUESTION: It's a fact question. And -- and I

3 think we all -- I mean, Justice Breyer suggested I think a

4 moment ago and we would -- I imagine you would agree that

5 there are going to be some decrees covered by the statute

6 in which 90 days will be entirely adequate for the kind of

7 review, and probably they're going to be some in -- in

8 which it would not be. But it -- it comes -- it boils

9 down to a question of time in each case, doesn't it?

10 MR. FALK: Well, that's correct. However, what

11 the passage of time affects, what happens after the end of

12 that period is Congress stepping in, without having any

13 new law, without --

14 QUESTION: True. But in the 2-year example,

15 assuming the court just fools around, we would not find it

16 a -- a -- I take it you would not find it a separation of

17 powers violation --

18 MR. FALK: I think --

19 QUESTION: -- if the court is simply inactive.

20 MR. FALK: I think it will be much more

21 problematic. On the other hand, I also --

22 QUESTION: Why do you say more -- you're talking

23 about due process then, not separation of powers. If --

24 if the change in time is -- is the crux for you, all

25 you're talking about is whether -- whether Congress has

1 provided enough time for these people to have the court
2 make the proper decision.
3 MR. FALK: No, I don't think so. And I don't
4 think the change of time is relevant, as I said, under
5 Plaut. If Congress today --
6 QUESTION: Exactly, but that's not just what you
7 told Justice Souter. It seems to me you have to take the
8 position -- if you don't want us to treat this as a -- as
9 a due process, you have to take the position that even if
10 it was 10 years, Congress simply has no power to terminate
11 a judicial decree without a change, as you say, in the
12 substantive law.
13 MR. FALK: And I think -- I think obviously the
14 more time Congress gives, the less chance there is there
15 are going to be problems and the more we're going to want
16 to give Congress that limited ability to enter into --
17 QUESTION: You're going back again. The less
18 chance there will be due process problems, but the chance
19 that there will be a -- a separation of powers problem is
20 still 100 percent --
21 MR. FALK: There is --
22 QUESTION: -- assuming the situation arises.
23 MR. FALK: That's correct. There's a Plaut
24 problem with the statute no matter how much time is given,
25 but -- but from a general --

1 QUESTION: Well, if -- if Congress -- if -- take
2 the 2-year example again. I think we would probably read
3 the statute as -- as including the following mandate from
4 Congress to the judicial system. It is now the law of
5 remedies for a court sitting -- Federal court sitting in
6 equity, remedying constitutional violations, that there
7 must be some kind of a current review mechanism so that
8 decrees do not run on unnecessarily. Anything
9 unconstitutional about that per se?
10 MR. FALK: No.
11 QUESTION: Okay.
12 We're also assuming in the 2-year example that
13 -- that Congress, in -- in changing the law of remedies,
14 gives a court an adequate time to engage in the review.
15 We -- we assume 2 years would give them time to review any
16 decree.
17 MR. FALK: Yes.
18 QUESTION: So, I take it it would follow on --
19 on your own argument that there would not be a separation
20 of powers problem in that case.
21 MR. FALK: Well, it depends what happens after
22 the 2 years.
23 QUESTION: At -- at the end of the 2 years,
24 Congress, in effect, is saying, if you, court, do not
25 engage in a review for current necessity, which we're

1 giving you plenty of time, 2 years, to do, then there will
2 be a default rule. It will be suspended until you get
3 busy. And do you -- do you take the position that under
4 those circumstances, 2 years, adequate time, change in law
5 of remedies, the default rule would be a violation of
6 separation of powers?
7 MR. FALK: If it is applied retroactively to
8 existing judgments, yes. And I think we're back to Plaut.
9 The question there is can Congress reach in to a final
10 judgment in the prospective equity sense without providing
11 new law.
12 QUESTION: But to simply carry over from Plaut,
13 which was not an equitable decree, as I -- to equitable
14 decrees which have been traditionally revisable --
15 MR. FALK: Yes.
16 QUESTION: -- it seems to me is not an automatic
17 step.
18 MR. FALK: Well, they are revisable with new
19 law. And in fact, if -- if we look at the historical --
20 QUESTION: Well, I don't know that Wheeling
21 Bridge is as clear as you say about the Congress having
22 enacted a new law. I -- I think one can read it
23 differently.
24 MR. FALK: But -- but still, if we look at
25 Plaut, there was a concern of this Court's opinion in

1 Plaut of what was happening at the time, both before and
2 after the passage of the Constitution, with State
3 legislatures sitting as super courts either directly
4 reviewing judgments or passing legislation. Some of those
5 cases, at least as pointed out by the amicus in the -- the
6 Taylor amicus at page 5 of their brief, concerned cases in
7 equity. If there is an injunction --
8 QUESTION: Yes, but -- but they didn't make
9 distinctions between -- between new legislation -- new
10 legislative action that involve what you call substantive
11 law and new legislative action that alters the remedies
12 available for courts. Surely, those -- that prohibition
13 applied to both. If you're dealing non-prospectively,
14 certainly it's just as -- just as bad to -- to change the
15 law, the substantive law, as it is to change the remedial
16 law. You have to let what -- what's over the dam be over
17 the dam.
18 But once you're into the prospective area, why
19 should there be a distinction between a change in
20 substantive law and a change in the remedies that the
21 court is allowed to impose in the future? I don't see
22 the --
23 MR. FALK: Because if Congress says to a court,
24 you must suspend or even terminate this order, period, I
25 don't think Congress is functioning as Congress. Congress

1 is functioning from a separation of powers standpoint in a
2 judicial capacity.
3 QUESTION: But it can change the substantive law
4 and say, you -- you may not enforce this decree in the
5 future because we're changing -- we've decided we're going
6 to change the law on you, that -- that you -- that was the
7 basis for the decree?
8 MR. FALK: Of course, it can and that's the
9 function of Congress.
10 QUESTION: I don't see why you say of course for
11 the one and not of course for -- it's also the function of
12 Congress -- just as it is to enact substantive law, it is
13 a function of Congress to enact laws prescribing the
14 remedial powers of the courts within constitutional
15 limits. And that's -- that's not -- not the issue here,
16 whether this is within the constitutional limits.
17 MR. FALK: But --
18 QUESTION: Isn't that a fully legitimate
19 legislative power of Congress?
20 MR. FALK: But (e)(2) does not do anything. It
21 does not prescribe the remedial power of the court.
22 QUESTION: I thought it did. I thought it did.
23 I thought that the -- my understanding of this -- and I'd
24 like you to clarify --
25 MR. FALK: Sure.

1 QUESTION: -- is that Congress introduced a new
2 standard for all cases, and -- or they thought it was new.
3 The standard would be that you can't go -- you have to be
4 narrowly tailored --
5 MR. FALK: That's correct.
6 QUESTION: -- and you can't go beyond the -- and
7 it say that -- you can't go beyond the Federal right
8 that's infringed. And -- and it said, that applies to
9 every new case that's ever going to be brought.
10 MR. FALK: That's correct.
11 QUESTION: And it also applies to those in the
12 old cases, but only in the future.
13 And now what we do is we have a 2-year period or
14 a 10-month period or a 90-day period where, as we look at
15 the prospective relief and bring it into conformity with
16 the standard that's going to apply in the future for
17 everybody. Now, is that -- is that how it works?
18 MR. FALK: Well, that's how (b)(2) works, but
19 that's not how (e)(2) works. (e)(2) doesn't look to
20 future standards. (e)(2) says nothing about standards.
21 (e)(2) says no matter what you found, no matter what the
22 court did, no matter how egregious --
23 QUESTION: Oh, yes.
24 MR. FALK: -- the situation was --
25 QUESTION: So, but now -- that's -- that's the

1 automatic stay, of course, which is the substance here,
2 the issue. But I was speaking in generally and in terms
3 of the substance of the -- in terms of the substance of
4 the thing, how quickly you have to decide.
5 Is there any constitutional objection, do you
6 think, if you were to interpret those words, shall operate
7 as an automatic stay, like any other automatic stay and
8 say that's subject to termination for good cause and with
9 the burden shifted the other way, et cetera?
10 MR. FALK: I'm sorry. Is the question
11 whether --
12 QUESTION: In other words, if you adopt the SG's
13 interpretation of the words, shall operate as an automatic
14 stay, then in your opinion is there still a constitutional
15 problem?
16 MR. FALK: No, but we do not feel that the
17 statute is that pliable. We think the intent of Congress
18 is clear --
19 QUESTION: Why isn't it that pliable? What they
20 said -- they used the same words as any other statute.
21 They have a set of appeals provisions that -- that really
22 don't make much sense unless you interpret it their way,
23 and in addition, you have to assume an intent of Congress
24 that they were asking at least some district judges to
25 perform the impossible. So -- so, why -- why wouldn't

1 that be a perfectly reasonable interpretation of words
2 that don't demand a contrary interpretation?
3 MR. FALK: The purpose of the statute is to
4 circumscribe the district court's discretion as greatly as
5 possible.
6 QUESTION: Well, it's -- well, is there anything
7 in the legislative history that suggests that the SG's
8 interpretation, which is consistent with the language, is
9 not what Congress intended?
10 MR. FALK: Well, the 1995 conference report
11 discusses the fact that this was designed to make judges
12 rule more promptly. Now, that --
13 QUESTION: Well, more -- absolutely. This
14 shifts the burden. You have mandamus. You couldn't delay
15 3 years. You'd have to get this thing decided quickly,
16 but you wouldn't be asking them to do what is impossible.
17 MR. FALK: But the legislative history I believe
18 -- and there's not a -- there's not a lot of legislative
19 history, but the legislative history is replete with
20 examples brought by prison officials and by
21 representatives themselves of what they deem to be
22 improper interference by courts.
23 QUESTION: Exactly. And -- and where that would
24 be taking place, you would have an automatic stay. It
25 could be set aside only for cause. You would have

1 mandamus if the judge doesn't decide quickly, and you
2 would have an immediate appeal. All right. So, we would
3 cure that.
4 MR. FALK: But again, given that -- given that
5 legislative history and given that the purpose of the
6 statute in the larger sense is to circumscribe the
7 discretion of these courts, which Congress clearly from
8 the legislative history felt was running amuck in some
9 sense, it would --
10 QUESTION: Mr. Falk, do you know in -- in this
11 connection whether there is an automatic stay provision
12 like this one? Justice Breyer said it's like any other
13 provision for an automatic stay. I -- I brought out
14 before that the Bankruptcy Code is quite explicit that
15 Congress -- that the -- the court can modify on condition
16 that automatic stay. Is there another piece of
17 legislation, just as automatic stay, where the court can
18 say, yes, but we don't think so in this case?
19 MR. FALK: I'm not aware of that, Your Honor.
20 And -- and from a substantive standpoint, this is a unique
21 situation, which I believe you pointed out, which is that
22 the result of this automatic stay is to let the moving
23 party basically win their case. After -- after 30 or 90
24 days, the State will get everything it is ultimately going
25 to be asking for. It's going to be getting a suspension

1 which is, in effect, a termination of all that really --
2 and that -- that's the uniqueness.
3 QUESTION: What's wrong with that? I mean,
4 don't you think Congress could pass a statute -- let's
5 take an extreme one -- saying no injunction shall issue
6 for more than a year? After a year, if -- if the
7 situation is -- is not totally resolved, you go back to
8 square one and have to bring another lawsuit and establish
9 a violation all over again.
10 MR. FALK: I do not think Congress could pass
11 that law with regard to judgments that have already been
12 entered. I think that would be purely retroactive in the
13 Plaut sense. You'd be imposing a new ground of reopening
14 that did not exist when the judgment went into effect.
15 QUESTION: Yes. That -- that would be your
16 position. Well, I -- I don't agree with that.
17 MR. FALK: And in light of that, we think this
18 is a violation of the separation of powers under Plaut
19 because Congress has commanded the reopening of a judgment
20 in violation of the separation of powers.
21 Also from a separation of powers standpoint, as
22 I indicated, this statute does invade the central
23 prerogative of the court, the ability to rule and decide
24 upon cases subject only to review by superior courts.
25 QUESTION: Well, it really doesn't affect the

1 determination of the violation, does it? I mean, the
2 determination --
3 MR. FALK: No.
4 QUESTION: -- by a court that there's been a
5 constitutional violation is not affected.
6 MR. FALK: No, but the court --
7 QUESTION: What is affected if its upheld is the
8 remedial power of the court, not the substantive holding
9 of the violation. It would place substantive limits on
10 the remedies that can be employed. Isn't that correct?
11 MR. FALK: It would wipe out the remedy that had
12 been ordered. I mean, (e)(2) takes the judgment -- and I
13 believe the judgment includes the remedy -- and it wipes
14 out all -- everything according to the definition of
15 prospective relief. Everything with the exception of
16 damages is prospective relief. So, all declarations as to
17 past violations, all injunctions, any collateral matters
18 -- that is stayed.
19 QUESTION: Unless the court determines that the
20 relief meets the remedial standard adopted by Congress,
21 that it is narrowly tailored and no greater than
22 necessary, and so forth.
23 MR. FALK: That's correct. And then we're back
24 to the fact that 90 days is admittedly inadequate time in
25 some situations to do that. So --

1 QUESTION: Well, you're not suggesting, are you,
2 Mr. Falk, that Congress can't make rules regarding the
3 injunctive authority of -- of courts? Look at the Norris-
4 LaGuardia Act.
5 MR. FALK: No, we are not saying that at all,
6 but if you look at Norris-LaGuardia and if you look at
7 TROs, what you're dealing with there is Congress saying
8 we're giving you 5 days, 10 days, whatever, after which
9 you, court -- the temporary order, the ex parte order,
10 whatever goes away, but you, court, you can still function
11 as a court. You can enter a preliminary injunction. You
12 can do something.
13 Here not only is Congress saying to the courts,
14 after 90 days, you -- we -- we step in. We're going to
15 make the decision, but --
16 QUESTION: I -- I thought you had said a moment
17 earlier that Congress was just very, very limited in
18 dealing with what you referred to as the central authority
19 of -- of the courts. And I don't think that -- that's
20 correct. I think you have to qualify that statement a
21 good deal.
22 MR. FALK: Well, but even in the context of
23 Norris-LaGuardia or temporary restraining orders, Congress
24 still gives the court the power to act as a court. There
25 are deadlines. If they are --

1 QUESTION: Mr. Falk, I don't understand the
2 analogy between the TRO and Norris-LaGuardia, these short-
3 life orders. I thought that those time limits were
4 imposed by Congress not to squelch the courts, but to
5 respect the rights of a defendant who has been slapped
6 with an injunction and told to stop and in many cases on
7 an ex parte basis. So, I think it -- it would be arguably
8 a -- more than arguably -- a violation of due process if a
9 court were given the power to stop a defendant from acting
10 cold until the court gets around to adjudicating the
11 merits.
12 MR. FALK: Of course. And the -- the unique
13 thing about (e)(2), if you look at the 10-day limit, for
14 instance, a -- on a TRO, under (e)(2) the analogy would be
15 after 10 days the plaintiff would win and would not -- and
16 the court would not be able to stop that. That's exactly
17 what happens here. After 90 days --
18 QUESTION: Yes.
19 MR. FALK: I'm sorry.
20 QUESTION: Finish it. Finish it.
21 MR. FALK: I'm sorry. After 90 days, the State
22 wins and the court then cannot do anything to alter that
23 fact until they have their final hearing.
24 QUESTION: Mr. Falk, I come back to your -- your
25 objection. The telecommunications policy of the United

1 States was largely directed by the -- by the United States
2 District Court for the District of Columbia for about 25
3 or 30 years under a consent decree entered into by AT&T.
4 Do you really think that Congress did not have the power
5 to simply say, we do not want our national
6 telecommunications policy directed by judicial -- by
7 judicial injunction for the future, and henceforward, this
8 -- this decree shall have no force and effect?
9 MR. FALK: I think that would be a problem --
10 QUESTION: The only thing Congress could do in
11 that situation was to amend the substantive
12 telecommunications law?
13 MR. FALK: To the extent -- yes, to the extent
14 that they were acting retroactively.
15 QUESTION: I think that's extraordinary.
16 QUESTION: Is -- what do you say about the canon
17 of -- avoid a difficult constitutional question, interpret
18 the statute? Isn't it made for your argument? That is to
19 say, wouldn't you if you were a Congressman prefer an
20 interpretation that gave you 98 percent of what you wanted
21 rather than one that gave you 0 percent because it was
22 perfect? I mean, in other words, the 100 percent is
23 struck down and they get nothing. So, isn't that what
24 that canon is there for?
25 MR. FALK: I still think we have to operate

1 within the intent of Congress, and the question is whether
2 the language is explicit, which it's not, or whether
3 there's inescapable inference that Congress intended to
4 preclude this -- the court having this power. And I
5 believe there is, as did the Seventh Circuit.
6 QUESTION: The one thing I should read to make
7 sure there's that inescapable inference is the horror
8 stories about judges out of control? Is that the one that
9 I should --
10 MR. FALK: I believe if we put that in context,
11 yes. I think that would be --
12 QUESTION: Well, then we control them and that's
13 the mandamus and so forth.
14 MR. FALK: But again, Congress clearly felt that
15 the courts were not -- any of the courts, whether the
16 district courts or the courts of appeals, were not
17 controlling themselves, which is why we have such extreme
18 limitations in the PLRA.
19 And for these reasons, we think the Seventh
20 Circuit should be affirmed.
21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Falk.
22 The case is submitted.
23 (Whereupon, at 11:11 a.m., the case in the
24 above-entitled matter was submitted.)
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

CHARLES B. MILLER, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY, ET AL. Petitioners v. RICHARD A. FRENCH, ET AL.; and UNITED STATES, Petitioner, v. RICHARD A. FRENCH, ET AL.
CASE NO: 99-224 & 99-582

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY: Leona M. May
(REPORTER)