In the

Supreme Court of the United States

C. L. Swain, Superintendent,
Lorton Reformatory,

Petitioner,

v.

Jasper C. Pressley

No. 75-811

Washington, D. C.
January 19, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

C. L. SWAIN, SUPERINTENDENT, LORTON REFORMATORY, Petitioner,	:	
v.	:	No. 75-811
JASPER C. PRESSLEY	:	

Washington, D. C.

Wednesday, January 19, 1977

The above-entitled matter came on for argument at 2:05 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT H. BORK, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530
For Petitioner

MARK W. FOSTER, ESQ., Moore & Foster, 910 Seventeenth Street, N.W., Washington, D. C. 20006
For Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 75-811, C. L. Swain, Superintendent, Lorton Reformatory against Jasper Pressley.

Mr. Solicitor General, you may proceed whenever you are ready.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.

ON BEHALF OF PETITIONER

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

We are here on writ of certiorari to the Court of Appeals to the District of Columbia Circuit. That court, sitting en banc, held with one dissent that the United States District Court for the District of Columbia has jurisdiction to entertain Respondent Pressley's application for a writ of habeas corpus seeking post-conviction relief.

The conviction from which he seeks relief occurred in the Superior Court of the District of Columbia and we contend that the District Court had no jurisdiction to entertain such applications.

The issue is obviously uncertain, one, to the objectives Congress sought to attain in the 1970 reorganization of the court system in the District of Columbia; a major part of that reform and reorganization was intended to relieve the district court system of local criminal law enforcement.

The judgment of the Court of Appeals which we seek to have reversed brings the district court back in part into local criminal law matters.

The issue in this case is, first, the meaning and second, the constitutionality of Section 110(g) of Title III of the District of Columbia Code.

We think it is rather clear that Section 110(g) deprives the district court of jurisdiction over application for habeas corpus by those who have been convicted in the superior court.

The Court of Appeals held to the contrary that 110(g) is a mere exhaustion of remedies provision so that prisoners must seek relief initially in the superior court but may then, if that relief is denied, proceed into the district court with the same application.

Now, in construing the statute, the Court of Appeals stated, indeed, insisted that its interpretation was heavily influenced by its desire to avoid constitutional issues which it regarded as troublesome.

I wish to urge two propositions. The first is that Section 110(g) is so clear and so unambiguous in denying jurisdiction to the federal districts in a case such as this one that no amount of constitutional concern can justify interpreting the statute as a mere exhaustion of remedies provision. It is clear what Congress has done and there is no

legitimate way to avoid constitutional issues if constitutional issues there be.

My second point, therefore, is that 110(g) of the District Code passes the relevant constitutional test and does so relatively easily.

I would like to turn first to the statutory question. 110 as a general matter gives the superior court the power to entertain collateral attack upon its own sentences and that power is just as broad in scope and is the same nature as a collateral attack would be in a federal district court under 2255, for example.

Now, the relevant language to this case which is in 110(g) is this:

"An application for a writ of habeas corpus shall not be entertained by any federal court if it appears that the applicant has failed to make a motion for relief under this section or that the superior court has denied him relief."

I can think of no way that language could be made clearer. No federal court may entertain a superior court convict's habeas corpus petition if the convict has not made a motion in the superior court or if he has done so and has lost.

There are two clauses. The first one is an exhaustion of remedies provision. The second one is clearly a denial of jurisdiction provision and to read the second clause as a mere exhaustion of remedies provision is to read it out of the

statute which, I submit, is not interpretation. It is a repeal.

This is not a case like Gusik against Schilder where the Court thought it would have required a strain to read the finality language as other than an exhaustion of remedies provision and it refused to strain the language in order to reach a constitutional issue.

I think that this can be made clear if you ask yourself what would Congress do if it meant this to be a denial of jurisdiction? What would it do after the Court of Appeals decision on order to make that fact clear?

I can't think of anything that would make it clearer unless it italicized that language in the Code and then said, we really mean the italicized language.

It has done as much as it can to make this plain.

Now, there is much argument about the legislative history in this case. The truth is that there is very little legislative history in this case that is very enlightening but the Court of Appeals and, to some extent, Respondent, used an argument which -- use a wide variety of arguments none of which in the legislative history really go to overturn the language in the text but we do know two things. We do know that Congress intended to remove local matters from the federal district courts.

We know that the statute does that as we read it

and that supports it. But more importantly is the fact that Section 110(g) is modeled. Congress said it was using as a model 28 U.S.C. 2255 and, indeed, the language is almost identical.

We know that 2255, the post-conviction relief statute, is not an exhaustion of remedies statute. It is a jurisdictional statute. It says that you must go back to the sentencing court to get your post-conviction relief. You may go no place else and in that sense it removes jurisdiction from all other courts but the sentencing court.

110(g) copies that language and removes jurisdiction from any courts other than the sentencing court which, in this case, is the superior court.

I suppose if there is any difference between the two -- and there is -- it is that 110(g) is even clearer because whereas 2255 simply says that the motion shall not be entertained, language was added to 110(g) in the District Code and it says the motion shall not be entertained by the superior court or by any federal or state court, which nails it down.

Now, against all of this, the Court of Appeals really places reliance upon two points. The first one is that the local court system in the District of Columbia, the Article I court system was intended to be, in many respects, analagous to a state court system and that is quite true, but an analogy is by no means an identity.

This system differs in many respects and one of them is the respect which is plainly before us here.

The second point of reliance was that Congress could not have meant what it plainly said because that would have provoked heated constitutional debate and there was none. The answer to that is that there was no constitutional excitement because Congress had done the same thing 20 years before and there had been no constitutional excitement about that and it probably could plainly do the same thing again.

In 2255 -- under 2255, collateral atacks upon sentences imposed by territorial courts organized under Article IV of the Constitution -- a non-Article III court -- must be brought exclusively by motion in those courts, which parallels the situation here.

No court has suggested that it would be unconstitutional to send those -- that it is unconstitutional to require a person convicted in a territorial court to go back for his post-conviction relief under 2255 to that sentencing court so there was no occasion for Congress to think that there was anything unique or exciting or troublesome about what it was doing in this statute.

I think the statutory argument is clear so I'll turn to the constitutional argument.

Now, the constitutional objection really is that although Respondent may be constitutionally convicted and

sentenced in an Article I court created for the District of Columbia, he may not be required to seek his post-conviction relief in that same court. I think this court's decision in the United States against Palmore effectively disposes of that contention.

It is implausible that a person who can be tried initially, constitutionally in such a court may not have his post-conviction relief motion determined by such a court.

I think that is enough of the case but the argument is dressed up here by the statement that to require a convict to go back to the superior court is to suspend the privilege of the writ of habeas corpus which contravenes Article I, Section 9, clause 2 of the Constitution and also, the Court of Appeals suggested, contravenes the equal protection concept of the due process clause.

Neither of those claims, I think, is plausible after Palmore but I'll say a few words to them.

The suggestion that 110(g) violates the suspension clause is disposed of quite quickly, I think. It is our position, expressed in our brief, that history shows that the guarantee of the suspension clause was not intended to apply to any postconviction applications for habeas corpus.

At the time the Constitution was drafted and adopted, the commonlaw rule was that a post-conviction application for habeas corpus could be defeated by showing that there was a

judgment for conviction by a criminal court of general jurisdiction and that is our position, so that Congress would be free if it wished to suspend the writ entirely, but we don't rest upon that.

Our main point -- we may not reach that historical point because our main point is that it is clear that what was done here was in no sense a suspension of the privilege of the writ. Its exact -- the motion under 110(g) or under 110 is exactly commensurate with the writ of habeas corpus as it is exactly commensurate with 2255 so that is no suspension of the writ in this case.

The nature of the relief is the same. The grounds upon which it may be sought are the same. The procedure is the same and the only difference that is pointed to is that the court considered the motion as created under Article I rather than under Article III.

As I say, I think Palmore answers that contention because if an Article I court, given the special powers of Congress over the District of Columbia, is capable of providing a legitimate constitutional trial, I think it is capable of providing a legitimate constitutional post-conviction review.

Besides, it is clear that we are dealing -- that the purpose of the suspension clause was to prevent the effective denial of the writ altogether and was not to regulate or to prohibit Congress from regulating the details, the procedural

details.

Otherwise, if that is not true, we are going to get into questions about whether the new rules which allow the dismissal of a motion, whether delay in this filing prejudices the government, whether that is a suspension of the privilege of the writ or, as the rules were reasonably promulgated, I understand that they required that an application under 2255 be sworn to under oath.

I suppose we would have an argument about what was essential to the writ and I think it is quite clear that those procedural details are not put beyond Congress' power by the suspension clause and certainly here, when you have federal judges appointed by the President and confirmed by the Senate to 15-year terms and with a postconviction procedure which is specified by the Congress and it is as broad as the writ of habeas corpus, it seems to me that it is impossible to say that there is any suspension of the writ.

The Court of Appeals entertained some speculations about the Equal Protection concept which Respondent has not pressed here particularly but I think I should mention them in any event because they are in the opinion below.

The theory, apparently, is that equal protection may be in question because under 28 U.S. Code 2254, a person convicted in the state court may petition an Article III court for postconviction collateral attack while a superior court

convict in the District of Columbia must petition an Article I court.

It seems to me that this is nothing more than the suspension clause argument all over again and that once more and for that reason it is answered by the Palmore decision.

The argument, whether it is on the suspension clause or whether it is placed in this equal protection concept context, is always -- always contains the hidden assumption that the superior court is less legitimate in some ways than an Article III court is and if that assumption is rejected, as it was in Palmore, then I think there is no equal protection issue here, just as there is no suspension clause issue here.

And I think that is the end of the matter but I suppose there are a few other points that should be mentioned.

The equal protection concept obviously doesn't encompass the right to be tried in a particular tribunal.

If the remedies available are equal, then I think there is no problem.

QUESTION: Well, isn't there a little more to the equal protection argument than you suggest in that prisoners who are convicted in any of the states forums, which are presumably legitimate, nonetheless have the right to petition a federal district court for habeas and, in effect, someone convicted in the District of Columbia Court is the only person who does not have the right to petition a federal district

court for habeas?

MR. BORK: Well, I think, Mr. Justice Rehnquist, that that is the argument as I understand it but I think the argument necessarily rests upon the premise that even in the District of Columbia where the Congress has special powers under Section I, there is something less legitimate about an Article I court than there is -- less legitimate about an Article I court than an Article III court because if that assumption is not present, then there is really no denial of equal protection.

QUESTION: Well, there is no difference then between this defendant and a federal defendant.

MR. BORK: In the sense that federal defendant is remitted to the sentencing court?

QUESTION: Well, he goes 2255. He goes through an Article III court but he can't go two places.

MR. BORK: That is true in that sense.

QUESTION: And the state prisoner can go to state habeas and he can go to federal habeas.

MR. BORK: That is true and if the Court of Appeals decision were upheld in that sense, Mr. Justice White, prisoners here would be better off than prisoners under 2255 if one considers that being better off because they would get both a local system and a federal system. So I suppose we would have --

QUESTION: They would be better off if you would

treat them the same as if they were state prisoners.

If you -- I think the conclusion we are coming to, Mr. Justice Rehnquist is that, no matter which way one goes, if one adopts a rather artificial view of this matter, there will be the denial of equal protection because if the Court of Appeals -- well, 2254 prisoners go from a state system to a federal system and therefore it is said by the Court of Appeals, prisoners here should go from the Article I system to the federal Article III system but Mr. Justice White points out that that would -- if that is an advantage which one is entitled to examine under the equal protection concept, which I deny -- Mr. Justice White points out that that would then create a disparity which one would have to examine because persons who were entitled to go from an Article I court to an Article III court would be better off -- in some sense, they have two systems -- better off than those proceeding under 2255 who are always in the federal court and go right back to the sentencing court for their postconviction relief.

QUESTION: But if the prisoner feels he is getting the best in the first place, he isn't concerned about having been denied what he regards, at least, as less than the best, that is, less than an Article III judge.

MR. BORK: Well, that is true. I think Palmore says that an Article I court in the District of Columbia, given the powers that the Congress has in the District and given the way

it has established these courts, is not an inferior.

QUESTION: Well, it is one thing, is it not, Mr. Solicitor General, to say what kind of a judge you must have to try the case in the first instance and perhaps another thing to say what kind of a judge must be given jurisdiction for habeas corpus? That is, that would analogize it for the state situation versus the federal, would it not?

MR. BORK: Well, I suppose, Mr. Chief Justice. You see, here, I think, if one makes the state analogy there is, I think there is a clear difference between this and the states.

That is, Congress has created this court system with many safeguards that some state systems do not have and Congress has prescribed a careful set of post-conviction remedies that many states do not have.

QUESTION: Well, you emphasize the 15-year tenure. Suppose the tenure of judges in the District of Columbia were three years instead of 15 years?

MR. BORK: Well, I don't know off-hand that that would of itself make a difference but it should be noted, of course, that 110(g), like 2255, provides that if the federal court regards the procedures as inadequate and ineffective, then it may entertain the writ of habeas corpus so that should conditions change with respect to the District of Columbia courts, the statute by its terms allows access to the Article III courts.

I don't know if that is a sufficient answer to the question you put to me, but I am basically saying, if we are required to assume that there is a difference with constitutional significance or which rises to a level of constitutional notice between the Article III courts and the rest of the country and the Article I courts in the District of Columbia, then I think there is a very rational reason why Congress has treated them somewhat differently and that rational reason is that Congress has no control over the state court systems or their post-conviction remedies.

It does have that control over the Article I courts here and over the remedies and they have drafted a very careful and fair system with all of the rights of post-conviction review that any federal prisoner enjoys anywhere.

QUESTION: General Bork, do you think it would be constitutional for Congress to provide, with respect to state prisoners, that there shall be no habeas corpus petition entertained unless the federal court first determines that the state collateral attack procedure was ineffective?

MR. BORK: Well, I think -- I would like to answer that, but let me make clear that I don't think that that is involved, necessarily at all involved with the decision in this case.

QUESTION: Your answer one way would control this case as well.

MR. BORK: Well, I have speculated --

QUESTION: Because you relied on this ineffective exception in the statutory language here in one of your answers a minute ago. What I am saying is, if that is an adequate answer that, you know, the very last phrase in the statute that you just referred to, that would take care of the whole case,

MR. BORK: Well, let me go into that, Mr. Justice Stevens and see if I understand the problem. I had speculated, and this is speculation and I suppose one shouldn't engage in that, but I will because I don't think it is directly relevant here, that Congress might be able constitutionally to say that those states which adopt a post-conviction relief statute which is like 2255 with all of those procedures and mechanisms and meets certain other criteria in our judicial system, shall be freed of 2255 and post-conviction relief will be in those courts but otherwise you have access in it to the federal court under 2255.

QUESTION: Well, not 2255, really. Freedom under 2254 is what I should have said.

MR. BORK: I'm sorry. Quite right. Quite right.

QUESTION: Yes, that is what I meant.

MR. BORK: Quite right.

QUESTION: It would have to be adequate.

QUESTION: If it were adequate.

MR. BORK: It would have to be adequate and that would be an example of -- that is why I say I think Congress could constitutionally in that case turn over the post-conviction relief to a non-Article III court where to prescribe the adequate procedure and that is precisely what it has done here.

QUESTION: That would not be regarded as a suspension of the writ because the office of the writ would be performed by the state system whereas here it is performed by the District of Columbia system.

MR. BORK: Quite right, Mr. Justice Stevens. In fact, it could not be regarded as a suspension of the writ because Congress is free not to have any lower federal courts, no district courts or courts of appeals. We know that from the Constitution, from Article III itself and so, turning matters over to the state courts, as we did throughout much of our history, federal questions, would not be a suspension of the writ if the writ is adequate.

But that is our basic presentation. I think the statute cannot be gotten away from. I think that it says as clearly as words can ever say it, that the district court here has no jurisdiction.

I think the constitutional arguments are basically answered by Palmore with the additional observations I have made at the moment and for that reason we ask that the judgment of the Court of Appeals be reversed.

MR. CHIEF JUSTICE BURGER: Mr. Foster.

ORAL ARGUMENT OF MARK W. FOSTER, ESQ.

ON BEHALF OF RESPONDENT

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

My name is Mark Foster and I represent the Respondent Jasper C. Pressley.

Mr. Pressley contends here in this Court today, as he has from the day when he was arrested back in 1971, that he is innocent of the charges of which he was convicted in this case and that given the reasonably effective assistance of an attorney that he can establish that he is not guilty of these charges.

Now, the merits of his claim that he was denied the effective assistance of counsel are not before this Court; not before this Court because when Mr. Pressley went to the federal district courts, the Article III courts in the District of Columbia to present his federal constitutional questions, he found that the doors of the courthouse were closed against him.

That is to say, that his petition for writ of habeas corpus was dismissed for want of jurisdiction.

Now, let me ask the Court to consider this dismissal on jurisdictional grounds in the context in which it arises.

There is a general federal statute that says in its terms that the United States District Court for the District of

Columbia Circuit -- that is, the District Court here in the District, like all other United States' District Courts, has the jurisdiction to hear habeas corpus petitions on behalf of persons who are in confinement by color under the authority of the United States.

There is an affirmative statute which grants that jurisdiction.

Now, according to the government, tucked away in a remote corner of the new District of Columbia Code, is a statute which carves out a small exception to the general federal statute and that statute is the statute which is before this Court today, 23 D.C. Code Section 110(g).

Judge Tamm, joined by writing for eight judges of the United States Court of Appeals for the District of Columbia Circuit, found that the statute did not have the effect that the government urged upon this Court. Judge Tamm and the judges of the Court of Appeals found that the government's argument suffers from two principal vices.

The first is that they force upon this statute a result that Congress never intended and let me take exception with the respected Solicitor General. This Court has said that there can be no rule of law which requires that a statute be given an effect that Congress never intended, no matter how clear the words may appear on their surface.

And the second vice found by the Court of Appeals --

QUESTION: Sometimes it would be quite an undertaking to prove that the Congress did not intend what it said, wouldn't it?

MR. FOSTER: I think it is often a difficult task, your Honor, but this is an area particularly where this Court has felt that it is incumbent upon the Court to examine these statutes with great care as they work together in the context of the protection of federal rights and in many instances, this Court has said this language cannot be read literally, it must be read in context and I am only asking the Court to apply that same general -- I believe there is a tradition of interpretation of federal habeas corpus statutes that they will be examined closely to make sure that they are given the effect that Congress intended. Now --

QUESTION: Mr. Foster, are you conceding, then, that the literal language of the statute is against you?

MR. FOSTER: Your Honor, I do not feel that there is any grammatical reading of these words which yields the result that I desire.

However, I don't think that this Court sits to decide questions of grammar. It sits to decide questions of law and the question is, in the context of these statutes does this statute have the effect that the government urges?

I think one thing must be clear and that is, that when one looks to Congress' expressed intention in passing the

statute, there is no shred of evidence that Congress intended this statute to have the effect that the government urges upon this Court. That is --

QUESTION: In addition to the plain language.

MR. FOSTER: Outside the parameters of the statute to be sure, your Honor.

QUESTION: And when they used language like that, maybe Congress didn't think it needed to leave a lot of trails behind.

MR. FOSTER: That might be true, your Honor, except that Congress explained with some clarity what it did think the statute did and that --

QUESTION: Okay. So you will get to that, I am sure.

MR. FOSTER: That is, in fact, where I hope I am, your Honor.

The legislative history, I agree with the Solicitor General, is not lengthy in this case but its brevity gives it some clarity. Let me review the -- how this statute arose.

There had been hearings going on. There was considerable debate as to the possibility of reorganizing the courts in the District of Columbia.

The Justice Department came forward with a proposal for the reorganization of the courts in the District of Columbia. This statute was part of the Justice Department's proposal to Congress.

The Justice Department explained to Congress what the statute meant and Congress adopted the Justice Department's explanation of what the statute meant in so many words and the exact words which were picked up from the report that accompanied this statute when it was presented to Congress, carried on through the Senate, through the House, through the Conference Report are these:

"Section 110 is new. Rather than reyling upon the inherent power of the superior court to review judgments of convictions, the new section provides statutory procedures for post-conviction challenges.

"Section 110 is modeled upon 28 U.S.C. Section 2255 with only the necessary technical changes."

Now, to the trained eye, to someone who is familiar with post-conviction law in the District of Columbia, that legislative history speaks very clearly. It refers to two cases. The first is the case of the United States -- Burke versus the United States where the old Article I courts in the District of Columbia, talking about whether or not they had the power to review their own judgments of convictions, said, "The power of the Juvenile Court to vacate sentence may be regarded as inherent," the very words that appear in the legislative history and, again, in the Ingols case, the Court said, "The Municipal Court has inherent powers to vacate a sentence."

QUESTION: Did they cite either of those cases?

MR. FOSTER: Yes, your Honor -- well, I can't give you a citation in that form in this context. Those cases are discussed in the legislative history. There is no discussion of any aspect of any of these constitutional questions that we think are stirred at a later point.

I think, if you turn to the oral presentation that the Deputy Attorney General, Mr. Kleindienst gave when he presented this bill, the reference becomes even clearer.

He said that Title IV, of which this section is a part, is a sort of general grab bag of miscellaneous investigators for the United States Attorney severing out codefendants' consecutive sentences. He said this title,"Most of the sections are merely restatements of existing law and wherever appropriate, the language of federal statutes or federal rules has been used."

And then when he got to 110 in particular, he said, "Although the local court may have inherent power in the matter of post-conviction remedies, a special procedure was created to eliminate unnecessary litigation and to add certainty to the law."

Once again, that has an obvious reference to the Burke case. It was suggested by counsel in the Burke case that the Court, if it relied upon its inherent power to review judgments,would leave counsel and litigants with no guidance and that the Court should suggest some rules and some

procedures and the Court declined to do so in the Burke case, saying that --

QUESTION: Well, doesn't the reference to eliminating unnecessary litigation also cover the situation where you only have one collateral attack instead of two?

MR. FOSTER: Yes, your Honor, but --

QUESTION: -- which is precisely what the government at least contends this does.

MR. FOSTER: That would be true if the first part of his statement didn't exist, that the sections here are restatements of existing law.

Now, there is no way that, in the context of this being a restatement that--

QUESTION: Well, it can't do both, to restate existing law and also change law in the second part,"eliminating unnecessary procedures" necessarily implies a change, doesn't it?

MR. FOSTER: We argue that what they were doing was not changing a law but simply codifying what was an inherent or a commonlaw procedure. Therefore, there is no change. It is, in fact, a restatement of the law as it existed in the District of Columbia which was that the superior court, the Article I Court in the District of Columbia, have the power to review their own judgments on motion and that therefore, it was simply a making clear of a writing down in the form of

a statute of what was the law.

QUESTION: I am a little puzzled on how you deal with the reference to "eliminating unnecessary procedures."

MR. FOSTER: Well, I assume unnecessary litigation.

QUESTION: Pardon me? Unnecessary litigation?

MR. FOSTER: I assume that the reference is to unnecessary litigation over what the parameters of the remedy were, what the proper procedures were, whether one had to institute an independent civil suit and serve process and so on and so forth and they wanted to make it clear that the procedure here is the federal procedure of simply filing a motion within the context --

QUESTION: Mr. Foster, I gather your position is not that you go directly to the United States District Court with a petition for habeas corpus.

MR. FOSTER: Absolutely not, your Honor.

QUESTION: Must you go to a local court first?

MR. FOSTER: Well, I don't think the question is what procedure you must exercise. The question is, under Francisco and Gathright and the exhaustion --

QUESTION: I know, but under the statute. Right now, under the new statute that you are operating under, must you go if you want collateral attack, must you file your petition with the trial court, for instance?

MR. FOSTER: Well, let me say that in this case it

was done and so --

QUESTION: I know, but is that --

MR. FOSTER: -- my position would be that one does not. If the local courts have had one fair opportunity to decide these questions, citing Francisco and Gathright, then that is all that is required for exhaustion but in Mr. Pressley's case, he did file such a motion in the local courts and these issues were thoroughly aired.

QUESTION: I know, but would he be priviledged to file? Would he be privileged to file?

MR. FOSTER: Absolutely and clearly.

QUESTION: Well, then, neither clause of the statute means anything, in your view, of that part of 110, either the requirement that he make a motion for relief or that it not be denied.

MR. FOSTER: Well, I think what it means is that the issues must be presented to the local courts first before he has the right to go the federal court and that --

QUESTION: You say, if it is presented in the trial, that is enough?

MR. FOSTER: Clearly not at trial, but if they were thoroughly aired on appeal, your Honor, you would have to raise them on appeal.

QUESTION: On direct appeal.

MR. FOSTER: On direct appeal.

QUESTION: Well, let's assume that he does present an issue on direct appeal and they are fully aired and they are denied. Now, under this statute you say that he would have the right. Maybe he wouldn't have to for exhaustion but he would have the right to file his collateral position with the local courts.

MR. FOSTER: No question, your Honor.

QUESTION: And have them rule on it.

MR. FOSTER: No question, your Honor.

QUESTION: And then -- now, you know, that is more than state prisoners get in similar circumstances because most state collateral procedures are not available if the issues have been presented on direct review.

MR. FOSTER: Well, as I understand it, your Honor, every state -- well, the question of whether or not a state must constitutionally provide some form of post-conviction attack, I think has never been squarely decided by the Court.

It was before this Court in Case versus Nebraska and while the case was pending in this Court, Nebraska passed a statute providing --

QUESTION: I know, but if you say the Congress intended to give this fellow the right to go to two courts, even though he has presented the issues in direct appeal, you are arguing for much more than the state prisoners get in lots of states.

MR. FOSTER: Well, that may be, your Honor, but it seems to me that clearly, Congress can provide an additional procedure for people in the District of Columbia --

QUESTION: When they say they are trying to avoid unnecessary litigation?

MR. FOSTER: In the context of a restatement of the law as it stood in the District of Columbia, yes, your Honor, that is my position. Now --

QUESTION: Mr. Foster, could I ask you a question right there? Before this statute was passed, was it the practice in the Article III Court sitting in the District to require exhaustion in the District of Columbia Court?

MR. FOSTER: Your Honor, I know of no case that discusses the exhaustion issue but I certainly -- it is my impression that that was the procedure that one did it on.

QUESTION: In other words, whether or not required by statute, they treated it as though Section B of 2254 applied to the District?

MR. FOSTER: I don't think it would come up very often because normally people tried to get to the Article III courts by certiorari to the United States Court of Appeals, this old procedure which is gone here, so an exhaustion, I don't think would arise as a problem very often in that context. I know of no case that talks about it.

QUESTION: I was thinking, if that were the practice,

then the normal way to codify existing law would have been to draft a paragraph comparable to 2254(b) rather than one comparable to 2255.

MR. FOSTER: Well, I think that one can trace out the history, the intellectual history of this statute relatively easily. If you want to say that there is a motion in the local courts and it is a simple, modern post-conviction motion, where do you look? You look to the federal statute which sets up such a motion in the federal courts and if you apply that language without looking at it terribly carefully, the last paragraph may have an effect that you don't intend if your purpose, as Congress said it was, was simply to set up such a procedure in the local courts and I --

QUESTION: Wasn't the superior court setting up this whole set-up at the same time? There was nothing before that, was there?

MR. FOSTER: There were local Article I courts here in the District.

QUESTION: No, but they weren't superior courts.

MR. FOSTER: No, it was the Court of General Sessions, the Police Court --

QUESTION: They are entirely different.

MR. FOSTER: Yes, but there were non-Article III courts here in the District of Columbia that sat and people convicted in those local, non-Article III courts, once they

had, presumably, litigated their issues in the local courts, could then go to federal district court and file for a writ of habeas corpus and have their federal constitutional questions heard in an Article III court, so to the extent that this statute is a restatement of a law as it stood in the District of Columbia, it would be a statement of those principles.

Now, your Honor, the Solicitor General has argued that Congress was trying, when it passed the Court Reorganization Act, to get the federal courts out of the business of local law enforcement. We have no quarrel with that proposition. That clearly was the design so far as trials were concerned on local charges, under statutes that apply only in the District of Columbia.

However, the Solicitor General then seeks to bootstrap that argument into an argument that Congress also wished to remove post-conviction attack entirely from the federal district court here.

There is no statement -- and I would suggest to this Court, no implication in the legislative history that Congress went to that further step. It is very nice to argue that it may be in some philosophical way implied but I would argue to the contrary, it is not implied.

To move trials to a new court system is one thing, but to move the forum where one's federal constitutional rights are heard is quite another thing. There is nothing local about

the issue that Mr. Pressley seeks to raise. There is nothing local about one's right to have a competent, a reasonably competent attorney assist one at trial. That is a federal constitutional right and a right which applies nationwide.

QUESTION: How does that relate to what kind of a judge must hear him?

MR. FOSTER: Well, it --

QUESTION: Do you think that a superior court judge is less competent to evaluate the effect of assistance of counsel than a district judge?

MR. FOSTER: No, your Honor, I don't think we have argued or need to argue that there is anything less legitimate, as the Solicitor General characterizes it about the superior court. What we are saying is that it is different. It is not the same as a court where the judge of that court, his first allegiance is to the United States Constitution and his judgment is unimpaired, is protected by the fact that his salary and his tenure in office are protected by the Constitution.

There is a difference between that and a judge who is appointed for a 15-year term, who may be removed at the direction of a legislative body which sits under the very vaguest kind of guidelines, whose salary can be adjusted upwards or downwards by the Congress and who, at the end of the 15 years, is subject to reevaluation upon no standards at all.

This is the difference.

QUESTION: Well, now you are getting into equal protection, which -- do you accept the Solicitor General's characterization that you were deemphasizing your equal protection argument?

MR. FOSTER: Well, the Solicitor General said I had abandoned it and I don't accept that characterization.

QUESTION: He just said you deemphasized it, I think.

MR. FOSTER: Well, I think it is clearly deemphasized, your Honor. It is in a footnote at this time and I suppose that implies deemphasis but I think --

QUESTION: I thought so.

MR. FOSTER: Well, I think the reason that it is there -- in fact, I know the reason that it is there is because it arises in the context -- I am not arguing to this Court the merits of the equal protection question or the suspension clause question. All I am saying to this Court is, should this Court decide in the context of this statute federal constitutional questions which are wide open as far as this Court is concerned?

Now, is this the case which precipitates by force this Court into an area of constitutional law where there are very few guideposts of any kind whatsoever? And the equal protection argument is simply another example. There is a growing line of cases in the District of Columbia that talks

about this doctrine.

It has never been before this Court. This Court has denied certiorari several times and yet this Court will have to decide that question and that is why it is in the form that it is, not because I intend to abandon it, your Honor.

Now, the government --

QUESTION: As to the Solicitor General's point that this Court had decided that an Article I Court can convict you legally and constitutionally.

MR. FOSTER: Well, I take respectful issue with the Solicitor General because, in fact, I think Palmore is a case on our side. I think Palmore, to the extent that it decides this question, tends to support our point of view, as did the Court of Appeals.

What this Court said in Palmore was, that in the context of the Court Reorganization Act, which created two parallel court systems in the District of Columbia, it is constitutional to try people in the Article I Courts and there were many precedents for that, the courts-martial, the territorial courts, the Indian tribal courts and so forth and so on.

It is quite different to say that, for the purposes of post-conviction attack, you will be confined to one of those two courts.

In fact, the Palmore opinion is at pains to point out --

QUESTION: My point was that a conviction in an Article I Court is legal.

MR. FOSTER: No question.

QUESTION: That is what I asked you. Did you agree with that?

MR. FOSTER: Yes. Well, it is decided law, your Honor, that an Article I Court is constitutionally competent to try and convict someone of a felony created by the United States.

QUESTION: But it is not constitutionally sufficient to hear a habeas.

MR. FOSTER: I say it is not -- it is not the same thing for the purposes of the suspension clause as an Article III Court.

QUESTION: Why?

MR. FOSTER: Because the gist of an Article III Court -- what distinguishes and Article III Court from all other courts, that is, state courts, military courts, whatever, are the salary and tenure protections, two protections that throughout our history have been thought to be absolutely critical to the quality of the highest federal courts.

Now, the government wants to say to this Court --

QUESTION: All the federal courts are -- the lowest, if you take the district court as the third tier.

MR. FOSTER: I meant only that there are some federal

courts of limited jurisdiction like the military courts-martial to which it would not apply but the set piece under Article III of the Constitution, with federal --

QUESTION: Would you include the courts of Massachusetts in that?

MR. FOSTER: To me, the courts of Massachusetts are non-Article III courts and therefore, the analysis is the same.

QUESTION: Non-Article III but they have the very elements of tenure that you are talking about, comparable to the federal.

MR. FOSTER: Certainly, and I suppose that the people of Massachusetts, in their wisdom, might amend their Constitution and remove those provisions but so long as the presumption in our Federal Constitution is that these questions ought to be presented to federal Article III judges --

QUESTION: Well, you have lost me there. Couldn't the people of this country amend the Constitution and give all federal judges a ten-year term?

MR. FOSTER: No question, but they haven't done it. What I am saying is, in the context of this case as it arises in this Court, the linchpin of the organization and the way the Constitution was put together and still stands is the idea that federal judges are going to be these judges who had no local bias, no local allegiance.

They were protected from the passions of the moment

and political vogue by the salary and tenure protections. That makes them different, in my view, from any other judge who does not have those protections and this Court has said repeatedly that any substitute for federal habeas corpus must be exactly commensurate.

Now, I am not here to say what is more legitimate or less legitimate, better or worse, I am simply here to say that it is not exactly commensurate to say that the judge who will hear your claim is different in quality.

Those qualities have been thought to be very important. In fact, this Court, in Palmore, said, "We do not deemphasize the importance of the distinction between Article I and Article III, it is just that Article III is not required here."

In my argument, let me be perfectly clear on the federal constitutional point, my argument is not that Article III requires that these federal constitutional questions be heard in Article III court, it is that the suspension clause requires that these questions be heard in --

QUESTION: But don't you run into this problem, that if the difference is great enough to make the Article I trial an ineffective remedy, then you have statutory protection, by the last clause in the statute which reads that, unless it also appears that the remedy by motion is inadequate or ineffective, then you are not hurt, but if it is a lesser difference to that,

you then have to say it is a total suspension.

QUESTION: Well, I suppose that this Court could say that that is what the last clause means and that the Article I court is ineffective and therefore, you come out at the same point at the end of the argument.

I think that that argument suffers from the fact that those words have been interpreted many times by this Court in the 2255 context and it has been held not to mean that it is the particular form.

For instance, in the 2255 context, if you are in the circuit that does not hold your way, you can't say, oh, my remedy is ineffective because if I could go back to my home circuit, they would give me a different result and so, though I suppose it is open on grammar grounds to arrive at that result, I am not anxious to press the argument, your Honor.

QUESTION: Don't state court prisoners have the federal habeas corpus available since 1789?

MR. FOSTER: No, your Honor, absolutely not.

QUESTION: When did they --

MR. FOSTER: They acquired it after the Civil War in the acts passed in 1867 and in fact, the federal courts held that there was no right before then but I am not saying --

QUESTION: But your argument really doesn't prove that the Constitution was absolutely clear on this point.

MR. FOSTER: Well, I think -- let me back up a little

bit because I think I have not yet had an opportunity to say that as -- I do not say that, Mr. Pressley, the suspension clause requires an Article III judge for Mr. Pressley because he is like a state prisoner. That is not my argument. My argument is that 2241 gives jurisdiction to the federal district courts to grant writs of habeas corpus for people who are confined by the authority of the United States and that power has existed uninterrupted from the Federal Judiciary Act of 1789 -- in fact, those words have stood unaltered over 200 years of federal constitutional history and I think there is something I am very frank to say to this Court that the question presented by this case, the federal constitutional question presented by this case has never been decided by this Court.

That is to say, whether or not the suspension clause requires an Article III court.

QUESTION: Is another way of phrasing that to say, was the writ of haveas corpus suspended during the first 80 years of this country's history?

MR. FOSTER: I don't think so, your Honor, because I -- you mean, as the state prisoners?

QUESTION: Yes.

MR. FOSTER: But I am not arguing by analogy to state prisoners. I am saying that --

QUESTION: But was there any evidence in any decision of this Court prior to, say, after the civil war, that even a

federal prisoner could bring a collateral attack on a final judgment of a court of competent jurisdiction under the relief available in the first habeas act?

MR. FOSTER: On account of conviction?

QUESTION: Yes.

MR. FOSTER: Yes, your Honor, there were many, many cases. Any -- there are cases, books are replete with cases of people who between 1789 and the Civil War, being held by power of the United States, now.

QUESTION: I am not talking about being held by power of the United States. I am talking about a case in this Court which said federal habeas prior to the Civil War would reach a final judgment of a court of competent jurisdiction of the United States.

MR. FOSTER: Yes, your Honor, there are, I think, many such cases, especially as to Article I courts, the military courts, for instance, where frequently their judgments were reversed upon review by -- and they are, of course, analogous because they are Article I courts like the superior court in the District of Columbia. That right, I think, has existed from 1789 without any interruption and the government has not cited any case or suggestion. You see, that is --

QUESTION: I don't know how you get military courts under Article I. Military courts are temporary courts.

MR. FOSTER: Well, I --

QUESTION: They are not appointed for any time.

MR. FOSTER: That is correct, your Honor, but they are created under the same constitutional power that Congress exercised.

QUESTION: They don't begin to get close.

MR. FOSTER: Well, there are other examples, of course, special courts that have been set up through our history, Article I courts and in every case where an Article I court or any non-Article III authority of the United States has the power to lock people up, this Court and the other federal courts have always found, without exception, that the writ of federal habeas corpus would reach those people, every one of them, and that is, of course, one of the major differences between this case and Palmore because this Court in Palmore was faced with many examples of people who could be tried and convicted in non-Article III courts but in this case it is not faced with an example of anyone who could be confined by the power of the United States and could not ultimately go, after exhaustion, to a Federal Article III court, now, for resolution of his federal constitutional claims. There is no such case.

Now, many times in our history, in our legislative history, Congress has passed statutes which would appear to reach the result and I, once again, am forced to disagree with the Solicitor General. In the Guzik case, this Court was faced by a statute which says, "The judgments of courts-martial shall

be final, binding and conclusive on all courts of the United States." How much clearer could it be?

This Court said unanimously that language means that you must exhaust your remedies in the Article I courts before you present your question to the federal Article III courts.

It is the same question that is presented in this case? Does a statute -- is this a finality statute or an exhaustion statute is the other side of the same coin and I would claim that the same considerations which moved the Court to say, if we decide otherwise that this is not a finality statute in Guzik, it is going to launch this into an area of the Constitution that we have not yet adjudicated and it is not necessary under the statute, though it was reasonably clear.

There is no way to argue that final, binding and conclusive could be any more clear. Nevertheless, this Court felt compelled to avoid the issue where it was fairly possible to do so and that is my argument to the Court here today on this statute.

Now, the government draws much solace from the fact that the words are borrowed from 2255 and yet it must be clear that they have a different purpose.

2255 was, in effect, a traffic rule that said, "We are going to direct this litigation. We are going to spread it out over all the circuits because it is unfairly lumped up

QUESTION: At least they did not intend in the judiciary to make it state.

MR. FOSTER: Well, no matter what label is attached, there is only one sovereignty here in the District of Columbia and that is the United States of America. Whether the United States of America acts in its --

QUESTION: Well, then, it is not a state --

MR. FOSTER: No, that is why I was careful to say that I am not arguing that they created a 51st state. They said that for the purposes of how this will work out, it will work out like the states do, as if this were a state, not that it is the same and therefore, I would suggest that the place to look for Congress' purpose in picking up this language from 2255 is to the statute which regulates these relations between the states and the Federal Government and that statute is 2254 and what 2254 requires in this regard is exhaustion of non-Article III remedies, state remedies in that case, before you come into federal court for resolution of your federal constitutional questions.

QUESTION: Mr. Foster, is it any part of your argument that to construe the statute the way the government would have us construe it would lead to a constitutionally inadequate relief under 110(g) as compared with Article III, not only in terms of the District of Columbia judges being Article I judges with non-tenure and non-financial security, but in terms of the

possibly inadequate freedom of a District of Columbia judge to consider a constitutional claim compared to an Article III judge, and let me give you a case to illustrate what my question goes to.

Let's assume a conviction in the superior court, an appeal to the District of Columbia Court of Appeals on some constitutional claim by the defendant and the District of Columbia Court of Appeals rejects the claim and affirms the conviction.

The defendant then comes into the superior court under 110(g) making the same constitutional claim.

Would not the superior court feel absolutely bound to reject that claim by contrast with an Article III court which would not be bound by the decision of the -- nor the precedent of the District of Columbia Court of Appeals but would be free to consider the claim and accept it on the merits by contrast with the superior court under 110(g). Is that any part of your argument?

MR. FOSTER: Well, I certainly think, your Honor, I certainly agree with the implication --

QUESTION: I made a statement. That is a question.

MR. FOSTER: I understand that, your Honor. I certainly think -- I cannot -- because this is a new act, there is not enough experience for me to cite to this Court a case which would stand for that proposition, a case in which the

superior court on 110(g) has said, we are not free to consider this question because it has already been decided on direct appeal.

QUESTION: By our Court of Appeals.

MR. FOSTER: Yes.

QUESTION: On direct appeal.

MR. FOSTER: Exactly and our hands are, therefore, tied.

QUESTION: And an Article III court in the District of Columbia would -- its hands would not be similarly tied, I assume.

MR. FOSTER: Exactly not, and under --

QUESTION: Because its reviewing court had not yet spoken.

MR. FOSTER: And under Fay versus Noia, I would assume that the spirit of the review is to take a fresh look at it from the perspective of a judge whose primary allegiance is to the Federal Constitution with all of the protections that we have talked about and to make a new determination on that and that is what I think is protected by the ultimate right of people confined by the authority of the United States to go to a federal Article III court for ultimate resolution.

QUESTION: And so it is not only the claim that the Article I courts are staffed by judges who do not have tenure and who do not have salary protection, but also that it might

be a constitutionally less-adequate remedy for that reason.

MR. FOSTER: Because they are institutionally located differently than the federal Article III judges.

QUESTION: I didn't see that precise argument in your brief. That is what prompted my question.

MR. FOSTER: Well, I hope it is there. I hope it is there because I certainly intended it to be there. They are institutionally situated differently vis-a-vis the Constitution in the case before them than is the superior court, the trial court in the District of Columbia when we have automatic appeal of right and appointed counsel for all people so that there are direct appeals in most criminal cases here and their situation would be very different vis-a-vis a case that had already been decided by the District of Columbia Court of Appeals.

QUESTION: Well, is the claim that Mr. Justice Stewart has suggested that you urge as to the unconstitutionality because of the inability of the superior court to freely voice its view at the local Court of Appeals as already spoken, is that situation any different than the federal prisoner earlier convicted in federal court, say, in the Fourth Circuit in that he goes into the district court in Richmond and says "I want federal habeas. I was denied certain rights" and the district court in Richmond says, "Well, I may think you were but the Fourth Circuit considered these same claims on direct

appeal and turned them down. That Article III judge isn't free to rethink the thing.

MR. FOSTER: I think, your Honor, he is in a different situation under this Court's decisions dealing with post-conviction attack than the superior court judge would be and that is, this Court has emphasized that a federal judge, in reviewing a federal constitutional question on post-conviction attack, has a different job before him. The question is not guilt or innocence but the preservation of certain federal constitutional values that are paramount and the focus shifts slightly.

Now, I don't deny, Mr. Justice Rehnquist, that the opinion of the Fourth Circuit Court of Appeals in your example is of great weight but as I understand the situation of a judge faced with that question, he is bound to determine it again.

QUESTION: Well, all nisi prius judges are presumably bound by the appellate reviewing court, are they not?

MR. FOSTER: Yes, your Honor, no question about that. I am just saying that when the judge has before him a petition for habeas corpus, his focus is slightly different than it would be if he were trying the case.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Solicitor General, do you have anything further?

REBUTTAL ARGUMENT OF ROBERT H. BORK, ESQ.

MR. BORK: Just a minor thing, Mr. Chief Justice.

If it were true that a prisoner had a right to go into a different court system because his own system has already decided the issue and he has to go someplace the issue has not been decided, if that were a constitutional principle, then I think it would follow, Mr. Justice Rehnquist, that the federal prisoners here would have a right to go into the superior court system and the federal prisoners around the country would find 2255 unconstitutional and they would all have a right to go in the state court systems so that --

QUESTION: Or perhaps another circuit.

MR. BORK: Or another circuit, I think that might be. Unless the Supreme Court here had spoken, Mr. Chief Justice, in which case it would, again, be unconstitutional.

It has been rather clever, I think, argument about the statute. I think the constitutional issues must be addressed because what has happened is, there's a perfectly plain statute that says this in words as plainly as can be and we are told that the burden of proof is upon us to prove that Congress really meant what it said.

I think the burden goes the other way.

Now, it turns out that Mr. Kliendienst, a couple of pages before the language that was quoted, said that the

effort was to transfer the entire criminal jurisdiction to the superior court.

We could debate the ambiguities of Mr. Kleindienst's testimony but I think I would rather debate the clarity of the statute.

One other point. There was a suggestion that, although Congress explicitly said "We are using 2255 as a model" and then did it, the appropriate place to look is 2254, which I think is argument of the same tenor, as the constitutional interpretation here has been.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 3:07 o'clock p.m., the case was submitted.]