In the

Supreme Court of the United States

PENNHURST STATE SCHOOL AND HOSPITAL, ET AL., Petitioners, v. TERRI LEE HALDERMAN, ET AL.;	No. 79-1404
MAYOR OF CITY OF PHILADELPHIA, ET AL., Petitioners, v. TERRI LEE HALDERMAN, ET AL.;	No. 79-1408
PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, ET AL., Petitioners, v. PENNHURST STATE SCHOOL AND HOSPITAL, ET AL.;	No. 79-1414
COMMISSIONERS AND MENTAL HEALTH/MENTAL RETARDATION ADMINISTRATORS FOR BUCKS COUNTY, ET AL., Petitioners, v. TERRI LEE HALDERMAN, ET AL.; and	No. 79-1415
PENNHURST PARENTS-STAFF ASSOCIATION, Petitioner, v. TERRI LEE HALDERMAN, ET AL.	No. 79-1489

Washington, D.C.
December 8, 1980

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v.	:	No. 79-1404
TERRI LEE HALDERMAN, ET AL.;	:	
MAYOR OF CITY OF PHILADELPHIA, ET AL., Petitioners,	:	
v.	:	No. 79-1408
TERRI LEE HALDERMAN, ET AL.;	:	
PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, ET AL., Petitioners,	:	
v.	:	No. 79-1414
PENNHURST STATE SCHOOL AND HOSPITAL, ET AL.;	:	
COMMISSIONERS AND MENTAL HEALTH/MENTAL RETARDATION ADMINISTRATORS FOR BUCKS COUNTY, ET AL., Petitioners,	:	
v.	:	No. 79-1415
TERRI LEE HALDERMAN, ET AL.; and	:	
PENNHURST PARENTS-STAFF ASSOCIATION, Petitioner,	:	
v.	:	No. 79-1489
TERRI LEE HALDERMAN, ET AL.	:	

Washington, D.C.
Monday, December 8, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:01 a.m.

APPEARANCES:

ALLEN C. WARSHAW, ESQ., Deputy Attorney General, State of Pennsylvania, 16th Floor, Strawberry Square, Harrisburg, Pennsylvania 17120; on behalf of the Petitioners, Pennhurst State School and Hospital, et al.

THOMAS M. KITTREDGE, ESQ., Morgan, Lewis & Bockius, 2107 The Fidelity Building, Philadelphia, Pennsylvania 19109; on behalf of the Petitioners, Suburban Counties, et al.

APPEARANCES (continued):

JOEL I. KLEIN, ESQ., Rogovin, Stern & Huge, 1730 Rhode Island, N.W., Washington, D.C. 20036; on behalf of Petitioners Pennhurst Parents-Staff Association.

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DREW S. DAYS, III, ESQ., Assistant Attorney General, U. S. Department of Justice, Washington, D.C. 20530; on behalf of the United States as Respondent.

THOMAS K. GILHOOL, ESQ., Public Interest Law Center of Philadelphia, 1315 Walnut Street, Suite 1600, Philadelphia, Pennsylvania 19107; on behalf of the Pennsylvania Association for Retarded Citizens as Respondent.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear first this morning Pennhurst State School and Hospital v. Halderman and the consolidated cases.

Mr. Warshaw, you may proceed whenever you are ready.

ORAL ARGUMENT OF ALLEN C. WARSHAW, ESQ.,

ON BEHALF OF THE PETITIONERS PENNHURST STATE SCHOOL AND HOSPITAL ET AL.

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

This action was commenced in May of 1974 by a resident at Pennhurst State School and Hospital. By her original complaint that plaintiff sought damages and sought improved conditions at Pennhurst.

Pennhurst is one of ten state-owned and operated institutions for the retarded in Pennsylvania. It is located approximately 30 miles from Philadelphia in a rural setting and facilities range from modern modular buildings to old renovated hospital-type buildings.

At the time of trial it had a population of approximately 1,230 patients. That was down from 4,000 in the mid-'60s to 1,900 in the early '70s, to 1,200 in 1977. At the same time it's staff was approximately 1,500. Of its population, approximately 75 percent of that population was severely or profoundly retarded. That means an IQ of below 36, as compared

to the general population of the retarded where only five percent fit into that classification. That is a number which increased drastically as the population of Pennhurst decreased and deinstitutionalization occurred. While by the original complaint plaintiffs sought only damages and improved conditions at Pennhurst, subsequently there were two additional parties who joined by intervention. One of those parties, the Pennsylvania Association for Retarded Citizens, added statutory claims, added additional parties -- namely, the counties surrounding Pennhurst -- and in addition changed the request for relief to one requesting the closing of Pennhurst, and an order requiring the counties and the state to create and fund community placements for all residents at Pennhurst and all those awaiting placement at Pennhurst.

At approximately the same time the second intervenor was, of course, the United States, which mirrored the constitutional claims of the original plaintiff. At about the same time the district court certified a class which consisted of those at Pennhurst and those on the waiting list at Pennhurst, approximately 2,000 persons, and in addition anyone who might in the future be admitted to Pennhurst.

In December of 1977 after trial in the spring of 1977, the district court issued its opinion and finding, finding that Pennhurst did violate the constitutional and one statutory right of the plaintiffs. The statutory right was

Section 504 of the Rehabilitation Act.

QUESTION: Would that have been dispositive in itself or not?

MR. WARSHAW: Section 504? I believe, as decided by the district court it would have required the closing of Pennhurst. It mirrored its equal protection finding which was that Pennhurst as a large, isolated institution --

QUESTION: Would the result have been the same if the constitutional claim had not been reached?

MR. WARSHAW: I'm not sure that there would have been a right to treatment under 504. I think there was simply a right not to be excluded from community activities and federal programs --

QUESTION: So the right to treatment is constitutionally based, is that the holding?

MR. WARSHAW: By the district court.

QUESTION: But, you've indicated that the district court relied on the Equal Protection Clause of the Fourteenth Amendment.

MR. WARSHAW: Yes, sir.

QUESTION: What if any other provisions of the Constitution did the court rely on?

MR. WARSHA: The Due Process Clause and the Quid pro Quo Theory of right to treatment.

QUESTION: Due Process Clause of the Fourteenth

Amendment?

MR. WARSHAW: Yes, sir, and also the Eighth Amendment in terms of cruel and unusual punishment.

QUESTION: As incorporated in the Fourteenth.

MR. WARSHAW: Yes, sir.

QUESTION: Of course, we're not reviewing that judgment, are we?

MR. WARSHAW: Those holdings in our understanding are not before the Court today. Because the -- well, I should also describe the order of the district court. The order of the district court was that Pennhurst be closed, that the State and counties create community placements for all those at Pennhurst, and all those 2,000 on its waiting list; and that a master supervise and direct those activities as well as the interim operation of Pennhurst.

The Court of Appeals broke entirely new ground. It asked for a separate briefing on and decided the case under the Developmental Disabilities Act, the Developmentally Disabled Assistance and Bill of Rights Act.

QUESTION: Mr. Warshaw, with respect to the Court of Appeals' opinion, what power to legislate do you understand it thought that Congress was acting under when it passed this Developmental Act?

MR. WARSHAW: As I read the opinion, it found it unnecessary to reach the Fourteenth Amendment question and

found that the spending power had been exercised.

QUESTION: If it's simply the spending power, isn't the ordinary remedy for the violation of the spending power the cutting off of funds?

MR. WARSHAW: That is part of our position, certainly. The violation here is to use federal funds and violate the conditions of those federal funds. Therefore the remedy is to cut off the federal funds, if in fact a violation is found. That is our position on the remedy; yes, sir.

QUESTION: If the State of Pennsylvania simply threw up its hands and said, this whole problem is just insoluble; we can't cope with it. So, we'll close all the institutions and let things be cared for as they were 100 years ago or 150 years ago, would you think a constitutional question would arise?

MR. WARSHAW: No, sir, I think, both the courts -- as I understand it, certainly the district court recognized that there is no affirmative constitutional right to provide treatment. What it said was, in essence was, if you do, you must meet certain standards. I think the answer to that is, no, there would be no constitutional problem if Pennsylvania decided -- as it is not likely to do, of course -- that it would drop mental retardation services.

QUESTION: Did the district court rely at all upon the Developmentally Disabled Assistance and Bill of Rights Act?

MR. WARSHAW: Excuse me?

QUESTION: Did the district court rely at all upon that statute?

MR. WARSHAW: No, sir. It was in the final amended complaints of one of the intervenors and the original plaintiff. It was, so far as I know, not briefed post trial. It was not briefed post trial and it was not briefed --

QUESTION: And there was no basis in the district court?

MR. WARSHAW: It was considered by the district court.

QUESTION: Well, the new statutory basis was briefed in the Court of Appeals, though?

MR. WARSHAW: Yes, it was, on the request --

QUESTION: At the request of the Court of Appeals?

MR. WARSHAW: -- of the Court of Appeals. None of the parties asserted it in their original briefs.

QUESTION: Well, in any of the briefs, at that stage, was there any claim that the Developmental and Disabled Act rested on any power other than the spending power? Was there any claim that it was a congressional effort to enforce either the Eighth Amendment or the Equal Protection Clause or the Due Process Clause?

MR. WARSHAW: I don't think anybody -- there are references to Katzenbach, which of course would be the relevant

decision in the series of voting rights cases. I don't read the briefs to expressly assert the exercise of that power.

QUESTION: You read them that way here, though, don't you?

MR. WARSHAW: Excuse me?

QUESTION: You read the briefs here to make that claim, don't you?

MR. WARSHAW: Yes, sir, I do. I think at least one of the respondents certainly claimed that this was an exercise of the Fourteenth Amendment power. Once again, not directly, they cite the case and in that particular brief, which is the PARC brief, the Pennsylvania Association for Retarded Citizens brief; they refer to Katzenbach. And as I understand it, as they go along they then contend that this is a statute which sets conditions for all federal funding. I don't think --

QUESTION: Do you feel compelled to respond to that argument here, as stated?

MR. WARSHAW: To the constitutional argument?

QUESTION: To that very argument that you just are reciting.

MR. WARSHAW: The argument that it is a condition of all federal funding?

QUESTION: No, that it's a -- that this statute is an exercise of some power other than the spending power.

MR. WARSHAW: Your Honor, yes. First of all, on the

basis of statutory construction, and that is that the statute will not stand that construction. In finding -- and perhaps it's best to discuss the statute -- in finding a right to treatment in this statute, the Court of Appeals focused on a section entitled "Congressional Findings Respecting the Rights of the Developmentally Disabled."

I think the most important point to remember is that this Court has never found substantive rights in congressional findings. Congressional findings set a predicate for congressional action and for the courts they provide a means of interpreting the substantive provisions of congressional acts. They do not create rights in and of themselves. Certainly as this Court noted in Southeastern Community College v. Davis, when Congress intends to impose rights, it knows how to do so. And generally, as this Court also noted, in Harris v. McRae, when it does so it provides funding to assist in the implementation of those obligations. In this case it did neither, as to Section 6010.

In stark contrast, when it imposed obligations -- and once again, this is my point: the obligations in the Act do not, on its face, go beyond the funding.

QUESTION: Though those are really two discrete questions, aren't they?

MR. WARSHAW: Yes, sir. And I think you have to answer the first adversely to us, which is a point I can't

reach, I just don't think you can answer that first question adversely to us, namely that the Act goes beyond the funding under the statute before you even reach the constitutional issue. And that is the power, if Congress had wished to impose conditions beyond funding under the Act, could they have done so? And we contend, first, that they did not. And, secondly, that they could not.

QUESTION: General Warshaw, where is the text of 6010 upon which the --

MR. WARSHAW: It is cited throughout the briefs. I was referring in there to the Joint Appendix on the Writ of Certiorari, which was submitted as the appendix, as part of the appendix in this case.

QUESTION: Where, if you know, the page?

MR. WARSHAW: Excuse me. It's on page 198(a). It is also cited in more complete text at page 171(a) of the intervening petitioners' --

QUESTION: What was that first number?

MR. WARSHAW: In the blue appendix, it would be at page 171(a), and that is the more complete version.

Once again, in stark contrast to Section 6010, when Congress intended to impose conditions under this Act and impose obligations, it did so clearly, it did so by -- and it also provided funding for those obligations. It did provide funding for protection and advocacy systems, saying that the

developmentally disabled should have available counsel and advocacy services to protect their rights in social security matters, in constitutional matters, in the federal courts and the state courts, and administrative hearings, and they required the states to meet certain conditions in establishing that program. But they did provide funding for that as well. And, explicitly, the conditions of that funding are attached to the funding.

Secondly, they provided for certain kinds of special projects. Once again conditions of those special projects are conditioned on receiving funding and the conditions are explicit.

Finally, they provided funding for states which wish to participate in the planning, coordination, and provision of services advantages of the Act. And they say, if you want these funds, you must submit a state plan. And that state plan must comply to certain requirements. And if it doesn't comply, you don't get the state money.

And those conditions are very specific. And in addition in every one that is program-related, it is additionally limited. It is limited specifically to programs assisted by funds received under the Act. The creation of an individualized habilitation plan, which was described by trial and I believe in the legislative history as a crucial element of treatment for the retarded, is explicitly made a requirement

only for those who are in-program, receiving assistance under the Act. And the legislative history makes clear that we are talking about a specific habilitation program, not the generic mental retardation program. The conference report is explicit on that. We are talking about an individual person's program, and that program must meet that requirement, not the generic program.

The second requirement which has some relevance in this case is the requirement that the rights of persons in programs assisted under this Act be protected consistent with Section 6010. I submit to you those two provisions would be meaningless if 6010 had some broader application or had any application in terms of creating rights.

The Act does do important things. It helps the states to plan and coordinate their services, it helps them to work through demonstration models to improve their services for the retarded. The planning and coordination aspect is probably what Congress has focused on most, in terms of gap-filling, in terms of the failure of certain programs to meet the needs of the retarded. The Act serves an important purpose. It does not serve the broad purposes attributed to it by the Court of Appeals. It does not impose the kinds of obligations that that court found.

Finally, I think there are two additional points. First, when this Court interprets federal statutes, I think it

does defer to the view of the Federal Government, but when it does so the view of the Federal Government that it defers to is the view of those which are charged with implementing the statute. And if you look at those views as manifested by how they implemented this statute, there are several problems. Indeed none of their activities, none of their actions support the view of the Court of Appeals or the view of the respondents in this case.

First of all, Pennsylvania has received uninterrupted funding under the Developmentally Disabled Act. Certainly HHS does not believe we violated that Act. Secondly, the regulations provide no support for the proposition that 6010 is mandatory. It describes those, its references to deinstitutionalization are directory, and it has no references to standards for institutions. Thirdly, to the extent that anybody can argue in this case that Medicaid funds or other federal funds are conditioned on compliance with the terms of the Act, HHS again does not agree and neither do we, because they have supplied uninterrupted and substantial funding for Pennhurst.

Finally, at the time of trial, and perhaps even today, to the extent that the thrust -- and this provided a thrust, or is argued to provide a total thrust for federal funding, the Federal Government was making it extremely difficult -- and the record is clear on this -- if not impossible to receive

funding for community placements.

QUESTION: Is your argument that if the administrative agency charged with enforcing the Act that the Court of Appeals construed and applied, if the administrative agency charged with that enforcement had done, had ordered what the Court of Appeals ordered as a condition for federal funding, would you say that they would have exceeded their powers in this area?

MR. WARSHAW: Yes, sir, I would have. But I think the important --

QUESTION: Assume that they wouldn't, assume that if the administrative agency, if it had ordered that, that would have been within the Act. Then, I suppose someplace you've got to have -- a court somewhere has got to tell an agency or has got to tell a state what is -- to settle disputes as to what the Act --

MR. WARSHAW: Certainly. If they'd attempted to cut off our funds, there is an appellate process and I suspect we would have utilized it. They did not though, and the point I'm making --

QUESTION: You would have ended up in a court somewhere.

MR. WARSHAW: I believe that appellate process ended up in court.

QUESTION: But you say an agency couldn't have done.

MR. WARSHAW: They could not have done what the Court of Appeals did here. And they did not attempt to. Their regulations simply don't attempt to. And that's the point I'm making. If you look at their actions, interpreting the Act -- in 1977, I believe, their regulations were published -- they clearly didn't read the Act the way the Court of Appeals did. They did not view it as being mandatory.

QUESTION: I suppose your argument also is that even if the agency could have done it, the proper way of enforcing would be through the agency rather than a direct suit in court like this?

MR. WARSHAW: Yes, sir. That is our position. One final point, if I may, and that is, at trial it was clear -- and, in fact, in the Halderman respondents' brief it is conceded, Pennsylvania has been a leader in the creation of community programs. It has created them well, it has monitored them well, it has moved people reasonably well.

If this Act was intended to put our community placement programs under direct court supervision -- and let me point out that this was not a conditioned right, this was not a phased-in right. Under the Court of Appeals holding, this right went into effect immediately upon passage of the Act, this obligation. So, theoretically, immediately upon enactment we were subject to court supervision.

If we were subject to court supervision as a leader

in this field, what did that mean for 49 other states? And is that what Congress intended, to have the courts become case managers, in essence, for the mentally retarded? I don't believe it is and I don't believe this Court will find it is. Thank you. I would like to reserve my remaining time, if I may.

MR. CHIEF JUSTICE BURGER: Mr. Kittredge.

ORAL ARGUMENT OF THOMAS M. KITTREDGE, ESQ.,

ON BEHALF OF THE PETITIONERS

SUBURBAN COUNTIES, ET AL.

MR. KITTREDGE: Good morning, Mr. Chief Justice, and may it please the Court:

I'm here on behalf of the counties surrounding Pennhurst. I think in the first instance it's necessary to focus on the express language of Section 6010(1), which was relied upon by the court below in the 3rd Circuit. That language speaks of rights, it doesn't speak of duties or obligations in the states. Yet it is precisely those duties and obligations which the court below has in fact found, not only in the states but in their political subdivisions.

If you look at the legislative history, having first posited that in fact Section 6010(1) creates the obligation in a state and its political subdivisions to provide community living arrangements to all developmentally disabled persons, except for those rare cases that Judge Gibbons in the court

below mentioned.

And then look at the legislative history. There are very anomalous things that immediately appear. The legislative history is clear in the 1975 conference report. It speaks in terms of assisting the states in monitoring, in developing plans, in coordinating services. Nowhere does it say anything with respect to imposing on the states an obligation such as found by the 3rd Circuit.

QUESTION: It was under Professor Hohfeld's analysis, whenever there's a right, whenever anybody has a right, somebody else has a duty.

MR. KITTREDGE: I think this Court dealt directly with that question, with respect to --

QUESTION: Do you remember that? That's a little old-fashioned now. That was very much in style when I was in law school.

MR. KITTREDGE: I think this Court has found that, for example, that there's a constitutional right to abortions. I think in Harris v. McRae, however, the Court made it very clear that the --

QUESTION: No, there's a freedom, there's a freedom. That's precisely what the Court has not found, in my view, that there's a right. There is a difference. I think it's important, sometimes, to be a little bit accurate in momentous analysis.

MR. KITTREDGE: What would be the right, then, that was found by the 3rd Circuit? It would be the right to an entitlement, to have the states pay for something, to provide a service. I submit to the Court that that's a very different thing than saying, for example, that someone has the right to free speech, or freedom of the press.

QUESTION: It's freedom. If somebody has a right, somebody else has a duty. At least that's the way I was taught.

MR. KITTREDGE: If that is so, and if that was the intention of Congress, I submit, sir, that they would have plainly said so. And I don't think that they did intend that, and certainly they never plainly said so.

QUESTION: Mr. Kittredge, what do you think Section 6010 does mean?

MR. KITTREDGE: I think that 6010 is an expression of what the Congress regarded as a statement of the obvious, that the mentally retarded do have a right to receive humane, decent, appropriate treatment and services.

QUESTION: What kind of right is it? Is it a state law right, a federal statutory right, or a constitutional right?

MR. KITTREDGE: I don't think it's any of those, sir. I think it is their human right and it was not meant by the Congress to be anything more than expression of a right such

as that people have a right to clean air, for example. That doesn't necessarily mean --

QUESTION: Is it the expression of or the creation of?

MR. KITTREDGE: Pardon, sir?

QUESTION: According to the Court of Appeals, it was the creation of a right, a statutory creation, a congressional creation of a right --

MR. KITTREDGE: If in fact --

QUESTION: -- not manifested before.

MR. KITTREDGE: If, in fact, Congress meant to create a right -- "create," in an operative sense --

QUESTION: Correct.

MR. KITTREDGE: -- they wouldn't have said, as they did in the 1978 amendment, that they were describing. The 1978 amendment to Section 6010 says, that it's "the rights described in this chapter," not the rights created in this chapter. They didn't view those rights as operative things entitling people, all of the developmentally disabled in the United States, to receive appropriate services, treatment, and habilitation. They were expressing, I think, a hortatory view on all of those, the Federal Government and the states, who are responsible in our society to provide services to those who need them.

Granting the Developmentally Disabled Assistance and

Bill of Rights Act -- and if I can, I'd like to refer to that as the DD Act, simply because the other is so long -- discrete obligations were imposed on the states. In fact, the Congress did so very distinctly and explicitly. And Mr. Warshaw has already mentioned Section 6011, where the individualized habilitation plan requirement was imposed on the states for those persons receiving services from programs funded by the DD Act. And in 6012, with respect to the creation of a system to protect and advocate the rights of the disabled.

In 1978, when it was amended --

QUESTION: Before you leave the Section 6010, is it not correct that Section 6010(3) describes an obligation?

MR. KITTREDGE: It does indeed; yes, sir.

QUESTION: Do you just -- you construe that as creating a new obligation or merely a prefatory-like 6010(1) and (2)?

MR. KITTREDGE: That's exactly right; quite; I do, sir. I think you can at least logically make some kind of a distinction between 6010(3) which at least does speak in terms of obligations, and 6010(1) and (2). but I do not believe that that section 6010(3) creates an obligation in the states either, other than those obligations which are already in the states, with respect to Medicaid regulations, for example, and so on.

QUESTION: Well, is it correct then that under your reading of the statute -- and it may well be right --

that the statute has the same right-creating and duty-creating effect if 6010 were totally eliminated from the statute?

MR. KITTREDGE: That's correct. If you look at the legislative --

QUESTION: Of course, even if you're quite wrong and even if Congress purported to create rights and duties, there's a question of its power, isn't there?

MR. KITTREDGE: Oh, absolutely, sir. Absolutely. The Court of Appeals in its discussion of the constitutional predicate for this particular section as it was construing it mentioned both the spending power in Section 5 of the Fourteenth Amendment -- I must confess it is not clear, at least to me, which of those predicates the 3rd Circuit relied on. In any event, it makes no sense at all to rely on the spending power, because if in fact the spending power is the sole predicate for that enactment, there are two results. First of all, there's no showing for a finding by the district court that any of the counties are recipients of DD Act funds.

And secondly, even if you assume that everybody involved in this litigation was in fact a recipient of DD Act funds, the result of the finding, a reading of 6010 such as in the court below, would simply result in every state disdaining DD Act monies from now on. They would walk away from it. They would look at the enormous obligations created by what the 3rd Circuit has declared, they would look at the de minimis

funding provided under the DD Act, and I mean that in a relative sense, and they would simply say, no, thank you.

QUESTION: How many states have accepted these funds?

MR. KITTREDGE: I believe that all 50 have.

QUESTION: One recently, I think, withdrew, did it not?

MR. KITTREDGE: I believe, in Saturday's paper, it was reported that the State of Virginia has told the Federal Government that it can keep its DD Act money.

QUESTION: Isn't the second ground of the Court of Appeals, which purported to avoid the constitutional questions, really necessarily implicating constitutional questions through the back door?

MR. KITTREDGE: If you assume that the constitutional predicate of 6010 as found by the court below is the Fourteenth Amendment and the enforcement power in Section 5 of the Fourteenth Amendment, then you have to determine what it is, what is the Fourteenth Amendment right that is being enforced? Now, there have been some courts in this country who have found a right to treatment to arise from the liberty interest implications, placing a person in the custody of the state. But all of those have been focused on institutionalized persons. No court of which I'm aware, at least, has ever found a generalized right to treatment in all persons developmentally disabled or mentally retarded persons, in the United

States, whether they are in institutions or not. I would point out to you that in the 1978 Amendment it is expressly declared that there are more than two million developmentally disabled persons in the United States. Approximately 150,000 of those are in public institutions. If you speak in terms of a right to treatment under the Fourteenth Amendment, as I understand the rationale of that right to treatment, you have to focus on those who are in public institutions. The remainder, the vast majority of the two million, no court so far as I am aware has ever found to have a Fourteenth Amendment right to treatment. Thus --

QUESTION: And the 3rd Circuit has not, then, avoided a constitutional question by its second holding?

MR. KITTREDGE: I don't believe it has, sir. No; and I think it's important that the Court recognize that in fact the holding of the 3rd Circuit is not restricted to Pennhurst. The Solicitor General in his brief for Respondents here suggests without quite saying so that the focus of this case is the people at Pennhurst. I submit that that's not true, that if you look at the holding in the 3rd Circuit, that's not what the 3rd Circuit said. Moreover, the relief granted by the district court in this case directed the creation of community living arrangements, not merely for the 1,000 people at Pennhurst, but for the 2,300 people on the Pennhurst waiting list who have never been in Pennhurst, who

are not now in Pennhurst, who are not subject to state institutionalization, and whose Fourteenth Amendment rights certainly have never been implicated.

Not only that, the 3rd Circuit in the person of Judge Gibbons specifically said that its holding in that case applied to future applicants for services, not simply those currently receiving services. It is, I think, therefore quite clear that Judge Gibbons was finding a 6010 right to treatment for all developmentally disabled persons. If you read the section that is being relied upon, it says, "Persons with developmental disabilities have a right to appropriate treatment" etc. It does not say, institutionalized persons with developmental disabilities have a right.

The district court in South Dakota on September 26, 1980, found in the case of Henkin v. South Dakota that the State of South Dakota under the DD Act as construed by the 3rd Circuit in Halderman, had an obligation to fund the placement in a private facility of a 24-year-old retarded citizen of South Dakota.

QUESTION: This was a federal district court?

MR. KITTREDGE: Yes, sir, it was.

QUESTION: Do you know who the judge was?

MR. KITTREDGE: I don't offhand.

If in fact, in 1975 or 1978, the Congress had meant to impose this kind of a fiscal burden on the state, to provide

these services to all developmentally disabled persons, I submit there would have been some mention of it in the legislative history. Certainly Congress is fully aware of the fact that the fiscal resources available to the states and the counties are very limited in nature. There would have been some discussion, certainly, at least, as to how much all of this was going to cost. Yet there is no such discussion anywhere in the legislative history. I don't believe that the Congress could reasonably have blinded itself to the effect of what it was doing in a fiscal sense. And I think, if you read the statute as we have suggested it should be construed, you avoid that problem. Thank you.

QUESTION: Have you cited that South Dakota case in your brief?

MR. KITTREDGE: I believe it's cited in an amicus brief. I don't have a citation simply because I got it from Lexus.

QUESTION: If it isn't there, will you supply it to us?

MR. KITTREDGE: I shall be glad to do so, sir.

QUESTION: If you're not sure that it's in the amicus brief.

QUESTION: It might be helpful if you'd give us a copy of it if it isn't published formally in Fed. Sup.

MR. CHIEF JUSTICE BURGER: Mr. Klein.

ORAL ARGUMENT OF JOEL I. KLEIN, ESQ.,

ON BEHALF OF THE PETITIONER

PENNHURST PARENTS-STAFF ASSOCIATION

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

Mr. Justice Stewart, I agree that the issue is the rights and the concomitant duties, and I think the question here is legally enforceable rights as distinguished from the variety of vague ways in which the term is used.

I think it helps in understanding the analysis to take a precise look at what the Court of Appeals found as to the legally enforceable rights under this statute. First of all, it found that for each person at Pennhurst as well as on the waiting list, you have to have an individual determination by a court or master as to the appropriateness of an institution as compared to a community facility. This has to be court- or master-determined.

Secondly, in that determination there is a legal presumption in favor of community placement. Now, as a practical matter, the way this works in Pennsylvania is, the court has established a Master's Office. This is not a master. This is an office of more than ten people that is now operating the system in Pennsylvania. To date it has cost approximately $2 million to fund that office, and its budget is $60,000 per month in the future.

This office reviews all the actions at Pennhurst itself --

QUESTION: Where do those funds come from?

MR. KLEIN: From the State of Pennsylvania. The district court ordered the State to pay those monies and the State is currently paying them, sir.

This office has an office at Pennhurst and it reviews all the actions out there. In addition, it has devised a systemic community placement program. It also works with the parent, a member of the treatment team at Pennhurst, a friend-advocate also authorized by the court, as well as others, to devise community services for each individual. They actually get a place in position in the community. When that is done, if there is no objection, with the masters' approval a person is put in the community facility. If there is objection, there is yet a second master who has been appointed, called the hearing master. Then you go before the hearing master and you have to prove if you object to the community placement, that this community placement would be worse than Pennhurst.

At the hearing master's hearing you have a variety of due process rights, including the right to subpoena people. The hearing master has paid attorneys' fees to people appearing before him, also charged to the State of Pennsylvania. Some of these hearings have gone on for several days.

Now this is the duty that the Court of Appeals found

in the statute, and we suggest, every state has institutions with people housed in them now, so what the court was finding is a massive, nothing short of a massive federal takeover of the state systems. I would suggest that that was not only not contemplated by Congress but indeed would raise the gravest of constitutional issues, which I'll come to in a second.

Now, the court found this mandate, this broad mandate, in the two findings of right. And again, there is nothing unusual about this process. Congress often describes findings and then goes on to implement them. And here it makes broad statements of rights, clearly not legally enforceable rights, but it went on to implement them in the statute in a way different, perhaps, from that which the respondents would urge, and in a certain way more modest, but in our view much more sensible.

First, as to the issue of deinstitutionalization, that is, the Court of Appeals felt that Congress wanted these individual determinations and virtually everyone in the community.

Congress in 1975 had two very specific requirements. First, it asked the states as part of their plan to devise a plan to eliminate inappropriate institutionalization and also to improve conditions for those for whom institutionalization was necessary. At that point Congress said, the states have an obligation under this Act, a concrete legal

obligation to devote at least ten percent in 1976 of their monies for deinstitutionalization under the Act; that is, ten percent of the federal grant, and in later years they have to devote 30 percent of the federal grant.

And Congress realized that deinstitutionalization was costly and the legislative history says, in fact, we therefore appropriate additional funds so that the states will have the monies from their ten percent and in later years 30 percent.

Now that is an important and by no means insignificant step which, neverthelsss, is not the one the Court of Appeals found. However, the legislative history goes further, because in 1978 Congress amended the Act -- this was before the Court of Appeals decision in '79. It did two very significant things for present purposes. One, it eliminated the mandate for a plan for deinstitutionalization. They had had three years, the institutionalization had taken place; again, at a rate, perhaps, different than the Respondents would prefer. But it had taken place.

Second of all, they eliminated the earmark provision. Rather, they said, now --

QUESTION: Eliminated what?

MR. KLEIN: The earmarking funds for deinstitutionalization. They said, rather, you've got four priority areas under the DD Act, and you can put your money in any one of these, sixty-five percent of the federal grant. And the four

areas were case management services, child development services, community living services, or non-vocational social development services.

Without going into the details of what those are, it's clear that the states in '78 forward could continue to target DD monies for deinstitutionalization. It's also clear that they could move in entirely different areas, and indeed the Court of Appeals, of course, has moved them in exactly the opposite direction. Congress made it clear that all the monies under the DD Act could be used for institutional improvements, and the quote from the legislative history is "increasing the capacity of institutions and agencies to provide or coordinate services or to train personnel."

So it's very clear that Congress spoke on the issues that the Court of Appeals tried to extrapolate upon, only it spoke in a way that declares very different policy than others might have.

QUESTION: Could Congress have prescribed all of the conditions and limitations which the Court of Appeals has laid down?

MR. KLEIN: I think, Your Honor, Congress could describe conditions as a condition of funding, so long as those conditions in themselves were not unconstitutional. I have no question that so long -- that is, Congress, I assume, like the rest of us, could say, if you want federal

funds, you have to meet certain conditions. Now, the remedy there is the question Mr. Justice Rehnquist raised. From Rosado forward, this Court has made the clear the remedy is to give the choice to the states.

And I don't want to look at it as a fund cut-off, because that puts the moving hand on the federal government. Rather, the remedy is to the state. Either you comply with the conditions or you withdraw from our program. Now, Rosado -- Justice Harlan made this very clear -- in Rosado you're dealing with welfare payments, where the Federal Government is involved for a lot of money, unlike the DD Act. And, second of all, in Rosado it was a discrete dollar amount. Here you're talking about a massive takeover of the state symtem, the right to treat --

QUESTION: Well, Mr. Klein, you say this is just a conditional program, a grants-on-condition. But are the conditions directly enforceable in your view, in court, without action by the agency?

MR. KLEIN: Mr. Justice White, if the conditions are as I describe them, they're not directly enforceable in court. Of course, the welfare conditions in Rosado are enforceable, but the remedy is different. If the conditions are as the Court of Appeals for the 3rd Circuit said they were, then I think under Thiboutot you can enforce those. However, we don't think those conditions, we don't think this statute

confers entitlements, and I'm making an alternative argument that, if it did, contrary to our opinion, that nevertheless the relief should have been as designed in Rosado.

Now, going on in terms of what those conditions were, if you look at the conference report, the legislative history in '75, Congress made clear that the bill of rights and the sections that follow it -- you see there were three titles to the bill; Title II came out of the Senate bill, and it was a bill that had elaborate standards for all facilities. The House had no such provision. They compromised and the compromise came out with a three-section Title II: Section 6010, which was these findings; 6011 on the individual habilitation plans; and 6012 on creating a protection and advocacy service.

And Congress specifically said in the conference report, 6010 -- and this is the language -- "specifies rights, requires habilitation plans, and requires protection in advocacy." So I think it's quite clear that Congress understood the difference between a declaration or description and the imposing of a legal right or a legal duty.

Moreover, in the report, it talks about the discrete standards of 6010(3), as Your Honor, Justice Stevens, asked about, and it says, as to those: "In themselves we realize they will not insure quality treatment or habilitation. Therefore, we have no intention to displace or supplant other higher standards either required by the Medicaid statutes

or other state statutes."

So, again, throughout, Congress saw the limited purpose that was involved here.

Now, I think the final, if there were any doubt about the inappropriateness of what went on below, Congress right in the opening sections of the statutes specifically eschews any desire to take over the operation of a state plan. It makes that clear, that there should be no federal takeover. What we have here is a massive federal takeover.

One last point, Mr. Justice Rehnquist, I think you have raised the constitutional issue in a variety of contexts, and I think that's an issue that comes up in part because in order to make this a mandate that's enforceable other than for the option of fund cutoffs, it would have to be pursuant to Fourteen and five, it seems to me.

Now, it's clear that the Court of Appeals somehow thought it didn't have to reach that issue. Of course, this Court needn't reach that issue, or the constitutional issue, if it agrees with our reading of the statute. I would only say that the law, it seems to me is clear, and we would certainly welcome resolution of the constitutional issue rather than a remand. We could not bring it to this Court because the Court of Appeals rested its opinion on a narrow statutory ground; respondents chose not to seek the Constitution as an

alternative ground for affirmance. But I think it is clear that the United States Constitution does not require the states to devise an alternative system of care and to invoke any such requirement as the least restrictive alternative.

In 1970, in State v. Sanchez, this Court dismissed for want of a substantial federal question that issue. No federal district court -- and the Court is aware that federal district courts have been active in this area -- no federal district court has ever upheld a right to create alternative facilities for the mentally ill or the mentally retarded in a disputed case. It has never happened, and as I say, this Court has summarily rejected it.

So I think this Court, if it deems it appropriate, has to reach an issue, can go right ahead to each issue, and we welcome resolution of it. Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Ferleger.

ORAL ARGUMENT OF DAVID FERLEGER, ESQ.,

ON BEHALF OF THE RESPONDENTS HALDERMAN ET AL.

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

The monumental inhumanity of our nation's institutions for the retarded cannot be encompassed in any recital of the abuse and neglect which the lower courts found at Pennhurst. Because the enforced inactivity, the unbroken aloneness, pale beside the central fact that brings us to this

court, and that fact is the affirmative regression and harms caused to people at Pennhurst. Not the abuse, but the fact that people at Pennhurst there for retardation habilitation go backwards; people become more retarded. People lose skills that they had when they entered the institution. That tragedy in essence is a lack of life, a lack of the challenges and changes and questions that life presents to us that we need, and retarded people equally need, to develop. That denial for the retarded is what is called the denial of habilitation.

QUESTION: Mr. Ferleger, you say that it's this situation which brings you to this Court. Would you say you would be in this Court in the same posture had it not been for the congressional enactments of '77 and '78?

MR. FERLEGER: We would have been in this Court on constitutional grounds had Congress not enacted the Act after I filed the lawsuit in 1974.

QUESTION: Well, in other words, you're saying that the Constitution requires each state to provide some sort of care for the type of people you describe?

MR. FERLEGER: We're saying that the Constitution requires the states to provide protection from denial of particular constitutional rights, which include the right to habilitation.

QUESTION: Well, what provision of the Constitution do you get that from?

MR. FERLEGER: The sorts of rights I'm discussing are rights enunciated in this Court in Rodriguez, the right to more than zero education. The right --

QUESTION: Where are they enunciated in the Constitution? I think that was my brother Rehnquist's --

MR. FERLEGER: In the Fourteenth Amendment, the Due Process and Equal Protection Clause, and in the Eighth Amendment, Mr. Justice Rehnquist.

QUESTION: Then you don't agree with your friend that the State of Pennsylvania could, or any other state, could close all of its institutions and simply say, people will have to take care of their own, as they did 100 or 200 years ago?

MR. FERLEGER: Well, a denial of a right to care once someone is in a retardation program is, I think, different than a refusal of the state to create such a program. What we have here are people institutionalized, already harmed by the state, already subjected, in Jackson v. Indiana's words, "to institutionalization the purpose and the nature and duration of which have no relation to its purpose." But even --

QUESTION: What if, unlike Jackson v. Indiana, the state simply had never set about to create any sort of institutions for the mentally retarded? Would you say that the federal Constitution required them affirmatively to set up such?

MR. FERLEGER: No, I would not. I would not make

that argument.

QUESTION: But you won on your constitutional argument in the district court?

MR. FERLEGER: That's correct.

QUESTION: With respect to the people who hadn't been institutionalized?

MR. FERLEGER: That's correct. And it's our position --

QUESTION: And are you defending the judgment below on that ground?

MR. FERLEGER: Yes, we do. We join in defending the court below. But, of course, this Court need not reach that particular issue, because under the standards enunciated most recently in Fullilove and related cases, this Court has found that Congress may elaborate on Fourteenth Amendment protections through enforcing the Amendment under the Section 5. And that sort of enforcement, remedial enforcement, is exactly what the Congress intended to do in enacting the Developmental Disabilities Act.

Throughout the legislative history it's clear that the Congress intended to enforce and remedy violations of the Constitution, including the Fourteenth Amendment.

QUESTION: Mr. Ferleger, in view of your comments, do you disagree with General Warshaw's comment that Pennsylvania has been a leader in this field?

MR. FERLEGER: Pennsylvania has been a leader in this field. Pennsylvania has created as of 1976 community services that had served more than 3,000 individuals. So that, for Pennsylvania, the expansion and transfer of resources to the community has not been and will not be a difficult task. We're not talking, Mr. Justice Blackmun, about creating new services. We're talking about a retardation program that needs its resources shifted. There already is in Pennsylvania millions of dollars of funds available and unspent for community services, unspent since 1970. There is available in the country more than $3 billion today in federal money going to retardation services, all of which can be used to continue to provide the services but now provide habilitation, and not custodial care, not regression.

QUESTION: But we have to presumably write a principal opinion, if we sustain your position. And it can't be on the basis that the State of Pennsylvania has millions of dollars unspent that it could just as easily transfer to the kind of facilities you wish. It has to be something applicable to all fifty states.

MR. FERLEGER: I don't agree. I think that this Court can find, and in fact it appears from the argument so far to be conceded, that people at Pennhurst have been denied habilitation. Once that judicial determination of liability is made, the next question is remedy. And as to remedy,

I believe, as we explain in our brief, that the remedy for each state is going to be different. The nature of the creation, the way in which it proceeds, will be different in the various states.

Pennsylvania, it happens, has funds available, has a program in place, and the creation of an IHP, individual habilitation plan, and services, is something that Pennsylvania is doing; the federal court is not doing it, the special master is not doing it. Pennsylvania is doing it and has done it, and from all indications in the record intended to close Pennhurst by 1983. So that the remedy question in this case, I submit, is an easy one, and the liability question appears to be virtually conceded.

Congress was not content with prohibiting abuse or enhancing the institutions. Congress instead demanded that people not be dumped from inadequate institutions into more inadequate care in the community. Congress did not create a right to lose your abilities by leaving the institution. Congress required an affirmative right to habilitation. This is an anti-dumping case. This case seeks to assure services, not to deny services to people.

QUESTION: Mr. Ferleger, assuming the statute says precisely what you submit it says, your position is, I gather, that Congress had the power to enact this statute under Section 5 of the Fourteenth Amendment?

MR. FERLEGER: Yes, and Mr. --

QUESTION: You don't rely at all upon the spending power of Congress?

MR. FERLEGER: Both the spending power and the Fourteenth Amendment, as the Court -- Chief Justice Burger's opinion said in Fullilove, Congress used an amalgam of its powers. And I want to correct a statement earlier. At pages 117(a) to 118(a), the 3rd Circuit's opinion, they exclusively held that the rights of 6010 come from the Fourteenth Amendment.

QUESTION: Not from spending power?

MR. FERLEGER: They said that because they rested it on that they don't have to reach the more difficult questions --

QUESTION: The spending power generally is, it's well established, that Congress can grant, as to a state -- a state helps, say, in building a bridge, so long as the bridge meets certain specifications. And then if the state accepts the federal help, the bridge has to meet those specifications, same as they do with a highway or a welfare program or whatever.

MR. FERLEGER: That is correct. And that is true here, because the State has failed, and the facts are not contested.

QUESTION: I know, but the offer is not nearly so

explicit here, is it? You will at least concede that? That the offer of federal aid under this program is not nearly so explicit as the conditional donee accepting the conditions?

MR. FERLEGER: That's not correct and let me explain why. Congress was very clear in '75 and again in 1978 that its intention --

QUESTION: My only point is that before you answer, the money expended by the Federal Government under this program is very inadequate to meet the so-called conditions of the grant.

MR. FERLEGER: And that is why Congress said, we are creating the DD program to meld, in Congress's words, "into a cohesive client-centered thrust" all the other multi-habilitative programs.

QUESTION: So, including Medicaid and all the rest?

MR. FERLEGER: Medicaid, Medicare, vocational rehabilitation, right to education for the handicapped -- Congress noted all those in --

QUESTION: You think this is a post-Medicaid imposition of a condition on the receipt of Medicaid, for example?

MR. FERLEGER: This is a requirement that the funds under Medicaid, funds which go to Pennhurst, for example, be used to provide habilitation, not to make people regress.

QUESTION: So your position is that any state that accepts medicaid is bound by what you say, 6010 of

this statute requires?

MR. FERLEGER: Yes.

QUESTION: But even if that be true, what do you do with Justice Harlan's language of Rosado v. Wyman, where he says that if you don't like it, just don't take the funds?

MR. FERLEGER: He doesn't quite say that. He says in Rosado v. Wyman that the plaintiffs below are entitled to an injunction saying, no funds. Nowhere in that opinion does Justice Harlan say that that's the only remedy. And in fact the district court had in that case issued an order to the state regarding the benefits and the question of whether no funds is the only remedy was not before the Court in Rosado.

QUESTION: Wouldn't you say the strong implication of the Rosado opinion is just a cutoff of funds?

MR. FERLEGER: I don't think so, Your Honor, because in Lau v. Nichols the Court said -- and Chief Justice Burger's opinion in Fullilove in a separate section repeats the language -- that affirmative relief is possible and required even though there was a cutoff remedy available to provide education for the Chinese students.

QUESTION: But that was something that was based not just on the spending power?

MR. FERLEGER: Oh, that's -- I'm talking about a Section 5 case, not simply the spending power case. In this case I think we have both. And I agree that there are

constitutional difficulties with imposing affirmative obligations under the spending power. I think the Section 5 power is what gives --

QUESTION: So, Rosado is irrelevant if you're right on the Section 5?

MR. FERLEGER: Section 5? That's correct.

QUESTION: Well, there are all sorts of affirmative obligations if a state voluntarily accepts the conditions of of welfare, of a highway program, or of building a bridge. But the state has an option to accept the federal grant under those conditions or not to accept it at all.

MR. FERLEGER: That's correct.

QUESTION: That's established. But here the conditions were hardly made clear when Medicaid was enacted, for example.

MR. FERLEGER: For example. But under the DD Act Congress can create obligations.

QUESTION: After, after the original grant?

MR. FERLEGER: Well, Medicaid is one example, and it seems --

QUESTION: Can Congress in 1960 say, we grant you X million dollars on these conditions and the state accepts the money on those conditions and complies with the conditions, and then in 1970 can Congress come along and impose additional conditions upon the 1960 grant? That's the question here,

isn't it?

MR. FERLEGER: Not upon the 1960 funds, but upon all the funds that continue -- $3 billion this year -- to pour into these institutions, Congress can impose those conditions, and change the conditions, as Congress does frequently.

QUESTION: May I ask a question along those lines? May a state withdraw entirely, now, from any federal support for this sort of program?

MR. FERLEGER: That's a difficult question, Mr. Justice Powell, because --

QUESTION: What is your answer to it?

MR. FERLEGER: Although it's not raised by this case, my answer would be that a state could only withdraw if it assured that the people who had been and are being benefited by the funds are not harmed. The difficulty that that would --

QUESTION: How would it do that?

MR. FERLEGER: The difficulty of the question is that people currently receiving services, I think, would need to be assured of a lack of further harm for the state to withdraw.

QUESTION: I've understood you to argue that, you're talking about constitutional rights, if they are constitutional rights, even if a state withdrew, do you suggest a federal court would be obligated to construe and apply those rights?

MR. FERLEGER: I think a court would be obligated.

QUESTION: Even if the only funding came from a state?

MR. FERLEGER: Excuse me? Yes.

QUESTION: Even if the only funds for these institutions and for these patients came from the State of Pennsylvania, do I understand you to say that the rights you have described would still be enforceable by a federal court?

MR. FERLEGER: Yes, they would. In this case, because Congress was remedying violations of the Fourteenth Amendment, Congress can make determinations as to remedy of the Fourteenth Amendment without this Court having to find a specific constitutional right.

QUESTION: What if Congress cut off appropriations for the 6010-type programs?

MR. FERLEGER: If Congress cut off appropriations?

QUESTION: Just stopped appropriating money?

MR. FERLEGER: Then, Your Honor, we'd be back in the Court of Appeals on the constitutional issues.

QUESTION: And what would you ask Congress -- what would you make Congress do? Appropriate the money?

MR. FERLEGER: In that situation, in Pennsylvania, for my clients at Pennhurst --

QUESTION: I'm talking about the Chief Justice's hypothetical. Congress cut off the money. And you say you'd go into court. For what?

MR. FERLEGER: No, no. We would be in court on the constitutional issues, Mr. Justice Marshall.

QUESTION: Well, what would you go into court for if they cut off the money?

MR. FERLEGER: Not against the Congress, not against the Federal Government, but against the state --

QUESTION: Against the State of Pennsylvania.

MR. FERLEGER: -- for denying people's rights at the institution.

QUESTION: But you wouldn't go against Congress, would you?

MR. FERLEGER: No, of course not.

QUESTION: Now, the state then must assume all the burden on -- ?

MR. FERLEGER: It's not assuming the burden; states have the burden.

QUESTION: No, the dollar -- I'm talking about the dollar amount.

MR. FERLEGER: I'm talking about the dollar amount also, Mr. Chief Justice. The uncontested facts in this case show, and the national information in the amicus briefs is identical, and Congress found it to be true, that the institutional care would more than cover the community care. There's no new dollars being demanded from the states. The money is there, in Pennsylvania and across the country, the state money

that already is supporting the institutions.

QUESTION: Now, then, take it one more step. When the State of Pennsylvania stops appropriating money, just says, we can't afford this program, or we think it's wasteful, or whatever, the Legislature just doesn't give it any more money. What then?

MR. FERLEGER: The issue then would be whether -- whatever the state did in that case to the retarded individuals would continue to be a harm to them, in which case I think the Constitution would be violated.

QUESTION: And what would be the remedy?

MR. FERLEGER: And in that case I think the Court could affirmatively require a protection from harm, the sorts the compensatory relief that the Court found justified in Milliken v. Bradley. The counseling, the assistance, the same sorts of relief in Milliken.

QUESTION: Could I ask you, what is the usual pattern for any of these patients at Pennhurst having been put there in the first place? Are they civil proceedings that have institutionalized them?

MR. FERLEGER: Half the residents are committed by a court. About half, according to the record, are committed through application of parents or guardians. However, all --

QUESTION: But you don't -- aside from your claims about treatment and habilitation, you don't suggest that the

institutionalization of any of these patients has been unconstitutional?

MR. FERLEGER: The procedures?

QUESTION: Yes.

MR. FERLEGER: No, we do not challenge the procedures. All but two of the residents are over 18. All but two of the current 1,000 residents of Pennhurst are adults.

QUESTION: But you say about half of them have been sort of voluntary, so-called voluntary institutionalization occurs?

MR. FERLEGER: Were orginally committed that way. The difficulty is --

QUESTION: And the other half is that they were --

MR. FERLEGER: Committed by a court.

QUESTION: At the request of -- ?

MR. FERLEGER: Of various parties.

QUESTION: And based on findings that they are of danger to themselves or others?

MR. FERLEGER: The current law, because of Goldy v. Beal, a case striking down the commitment statute, the current law cited in my brief, Goldy v. Beal and implementing regulations, is that no one can be committed by a court to Pennhurst or any other retardation institution unless there's a finding that no community service can be made available. That is a state regulation and a consent decree issued by a federal court.

QUESTION: But we should judge this case on the assumption, I gather, that except for your claims about habilitation and treatment, these people have been properly institutionalized?

MR. FERLEGER: Committed in accordance with the statutes in effect at the time. However, the district court found that for those residents who say, I want to leave, Pennhurst goes to court to commit them. If you don't say anything, even if you're 50 or 80 years old, then Pennhurst assumes you still want to be there. So that the district court found, and the Court of Appeals upheld, that every resident is there involuntarily.

QUESTION: What court was it that decided Goldy v. Beal?

MR. FERLEGER: A three-judge federal court in Middle District of Pennsylvania.

QUESTION: So it was not a Pennsylvania court?

MR. FERLEGER: It was in Pennsylvania court..

QUESTION: I mean, it was not a state court?

MR. FERLEGER: It was not a state court; it was a federal court.

QUESTION: Mr. Ferleger, may I ask one question before you finish? You started by pointing out that in your view the central fact is that the residents of Pennhurst are in fact harmed by being residents of Pennhurst. Judge Seitz

in his dissent ends up by saying that it remains open to you to show that the particular mode of treatment is not rationally related to the state's purpose in confining people at Pennhurst. Have you, in your view of the record, already proved that as to every resident of Pennhurst?

MR. FERLEGER: Your Honor, we have proved that five times over. The state has --

QUESTION: Now, if that's true, Judge Seitz's view of the law requires the same result as the majority?

MR. FERLEGER: Yes, it does. Absolutely, Mr. Justice Stevens.

QUESTION: Just a different legal predicate for the same relief?

MR. FERLEGER: That's correct. We have shown and there's no contest that for every person at Pennhurst, community life is not only possible, but there is someone with the same disabilities now living in the community and getting proper community services.

QUESTION: But the difference, I suppose, is that it would remain open to your opponents to make sufficiently dramatic changes in Pennhurst so that the purpose of confinement would be fulfilled?

MR. FERLEGER: That's correct. And they have never suggested that they could do that or that they would want to do it.

QUESTION: The Court of Appeals doesn't require Pennhurst to be closed anyway.

MR. FERLEGER: The Court of Appeals requires an individual determination, as Congress expected, of what people need. And that is --

QUESTION: But it doesn't necessarily say, close down Pennhurst?

MR. FERLEGER: In fact, it specifically says they are not finding that Pennhurst must be closed. Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Days.

ORAL ARGUMENT OF DREW S. DAYS, III, ESQ.,

ON BEHALF OF THE UNITED STATES AS RESPONDENT

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

While many members of the Court have addressed questions to my colleagues about the extent to which the DD Act and the rights recognized under 6010 flow from the Constitution, particularly the Fourteenth Amendment and Section 5, it is the position of the United States that insofar as this particular case is concerned the spending power is the only issue before the Court, and there is no reason to address the extent to which Section 5 of the Fourteenth Amendment might justify the affording of the rights that are contained in 6010.

Congress passed the DD Act because it wanted to insure that federal funds were not used to maintain

developmentally disabled persons in custodial institutions under conditions that produced regression and brought affirmative harm to such persons. It decided upon the course that it took in 1975 based upon over a decade of efforts to encourage, if you will, the states and recipients of federal funds to move toward deinstitutionalization, to move toward community habilitation of people otherwise institutionalized.

The thrust of 6010 can be understood, we submit, only by looking at the legislative history, looking at what the two houses of Congress initially attempted to achieve and how the compromise that produced the DD Act came about.

The Senate in 1974 and '75 was concerned with the extent to which people in institutions like Pennhurst were having their rights, both constitutional and civil rights, violated. It made these determinations based upon court decisions such as Judge Johnson's decision in the Wyatt series of cases, decisions with respect to Willowbrook, and other institutions around the country. It also had legislative hearings and debates that focused on this question of the rights of people in institutions and how they could be protected.

The Senate bill ultimately contained the section called Title II, and it was entitled, the bill of rights. It contained detailed specifications with respect to standards for the provision of care, not only to the institutionalized, but to people in community-based services for the

developmentally disabled as well. This section, Title II, called "the bill of rights" in the Senate version, ran for over 400 pages.

The House version, in contrast, was very consistent with what Congress had done in the past, since 1963, in response to a message from President John Kennedy that there was a need to move away from institutionalization of mentally retarded people to community treatment in which, essentially, what the Government did was provide funds to the states that they were willing to accept certain conditions. It was clear that if those conditions were not met, then the funds would be cut off. So this focus was on how to provide additional funds and how to insure that those funds provided under the DD Act would be adequately utilized.

But I think the legislative history reflects the fact that both houses were concerned about conditions in institutions where individuals were subjected to inhumane conditions and nonhabilitative situations. In reviewing the legislative history of the DD Act, one need only substitute the name "Pennhurst" for the institutions that Congress made specific reference to, institutions such as Pennhurst where individuals do not receive services, treatment, or habilitation that allows them to develop, in fact where, whatever skills they came in with, they lose -- the ability to talk, the ability to walk, the ability to reason -- because this

record demonstrates that people in Pennhurst lose IQ points instead of gaining IQ points by being institutionalized, and where they are --

QUESTION: Is there anything, Mr. Days, is there anything in the evidence that demonstrates that it is the custody that has caused that, or is it possible that that was the natural course of the unfortunate condition?

MR. DAYS: This record, Mr. Chief Justice, speaks very strongly to the point that however Pennsylvania officials have tried to fix up Pennhurst, the conditions recur. There have been efforts since 1950 to paint up and fix up Pennhurst, but as the experts and other observers who testified in this case revealed, there is something about that isolated congregate facility that tends to produce the conditions that time and time again were found by people who visited Pennhurst. It was not something that --

QUESTION: The point I was inquiring about was, what is there in the record to demonstrate that a particular patient who has suffered regression, may not have suffered that same regression if they had stayed at home, or been somewhere else?

MR. DAYS: I think there is evidence in this record, Your Honor, that the fact that people in Pennhurst were not cared for, were not attended to, produced the type of regression that they experienced. There were children who went into

Pennhurst who were able to say a few words before they went there and when their parents came to visit them a couple of weeks or a couple of months later, they could not speak. There were children who could walk who were left in positions on the floor such that their limbs atrophied. That was caused by Pennhurst. Those people were able to function, they were able to do very rudimentary reasoning steps that no longer were available to them after they were in Pennhurst for awhile, and of course the physical harm that people suffered was clearly the result of the institution -- bitings, attacks by inmates, by persons in the institution upon other persons, by staff upon the residents, these were things that were produced by the institutionalization, not a natural consequence of the lack of development of those persons in Pennhurst. The record reflects that had they stayed at home they probably would have been in better position now than they have been after, as the record shows, an average of 21 years in an institution.

QUESTION: Do the experts really know whether this regression -- and take the child, the younger person -- comes from the environment or comes from a sense of abandonment by the parents? Do they really know which?

MR. DAYS: I think that the experts have testified uniformly that it does not come from the abandonment, it comes from conditions in the institution. And if I may emphasize, Mr. Chief Justice, we are not here urging this Court, or in

fact the lower courts, to make policy determinations, to make technical medical determinations. What we argue before the Court is that Congress made these determinations after over a decade of considering these problems. After some four years of hearings about conditions in these institutions, it had reached the judgment that something more than providing funds had to be done by the Congress, there had to be an affirmative effort to protect the rights of people who were found in institutions like Pennhurst.

QUESTION: General Days, in Section 6011 of what has been referred to as D&D, it starts out with the statement, "Conditions for receiving state allotment: The Secretary shall require as a condition to a state's receiving an allotment under subchapter 3 of this chapter that the state provide the Secretary with satisfactory assurances."

Was that complied with in each year subsequent to the adoption? Did the Secretary receive assurances and did she approve them, or did he approve them, whoever the Secretary was?

MR. DAYS: The habilitation plan submitted by the Commonwealth of Pennsylvania?

QUESTION: Yes.

MR. DAYS: It's my understanding that while there was paper compliance with some of these requirements, there was not the indication that in all respects habilitation plans had

been provided. And of course, in Pennsylvania, contrary to what Mr. Kittredge said, the record reflects that the counties received $600,000 in I believe '75 or '76 under the DD Act.

Many of the funds did not go to, or in fact, none of the funds went to institutions like Pennhurst. They went to services to people who were outside institutions.

QUESTION: Well, General, was there ever an indication by the Secretary that the state's compliance with the conditions of the statute was unsatisfactory?

MR. DAYS: Not that I'm aware, Your Honor. There was a reference to the fact that the agency that's responsible for administering this program has never raised any questions about what was going on there.

QUESTION: Well, that's true, isn't it?

MR. DAYS: It is true, but I think one has to view that in the context of the particular action of the United States in this case. After all, the United States came into this litigation to represent five --

QUESTION: Well, are you representing the agency that administers this program or not?

MR. DAYS: We are representing the United States and to the extent that we're representing the United States, we represent the agency that's involved in the transferring of funds.

QUESTION: Whether it wants you to or not?

Which is a perfectly --

MR. DAYS: Well, with all due respect --

QUESTION: Perfectly recurring situation.

MR. DAYS: That's right. The Attorney General --

QUESTION: You're just doing your duty, aren't you?

MR. DAYS: Well, we've always understood --

QUESTION: Whether you disagree with the agency or not? That's characteristic.

MR. DAYS: Mr. Justice White, we have always --

QUESTION: Well, I've been there.

MR. DAYS: Am I preaching to the choir in this regard, Mr. Justice White?

QUESTION: Just about; yes.

QUESTION: Then you're representing the Congress that enacted this legislation?

MR. DAYS: That's right, because we think that the Congress did what it was supposed to do. But the point I want to make about --

QUESTION: Whether or not the Congress knows you are, or not.

MR. DAYS: I have a distinct impression that the Congress does know that I'm here, but the point I wanted to make was to rebut something that was said by Mr. Warshaw. We did get into this case before the DD Act existed, and that was known to HEW, it was known to the Secretary. And secondly,

it is not true that the agency has continued to provide Medicaid funds to Pennhurst unmindful of the terrible conditions in that institution. As I think the briefs reflect, only 16 of the 40 units at Pennhurst have been certified under Medicaid, and what the Commonwealth of Pennsylvania wants to do is spend $4 million to try to fix up the institution so it can qualify for Medicaid funds. So it is not a situation where the only thing that's been happening insofar as the Government was concerned was this lawsuit that --

QUESTION: But the Commonwealth isn't challenging the Secretary's determination.

MR. DAYS: Excuse me?

QUESTION: The Commonwealth isn't challenging the Secretary's determination.

MR. DAYS: No. My remark was simply to indicate that contrary to Mr. Warshaw's suggestion, it is not just the Attorney General of the United States that has expressed a concern about the conditions in Pennhurst. The Secretary of HEW and now HHS has taken action to try to improve specific conditions in that institution.

QUESTION: But, General Days, is it not correct that in this litigation the United States did not raise any issue with respect to the violation of this statute until after the 3rd Circuit on its own motion brought the issue into the case?

MR. DAYS: That's correct, Mr. Justice Stevens.

We intervened in the case before the statutory issues were presented.

QUESTION: And in your intervention you did not allege a violation of the statute?

MR. DAYS: That's right, we did not. What we did was simply argue, as did the original plaintiffs, that there were violations of the Constitution reflected in the conditions in the institution. And after all, at that time, as counsel for the Commonwealth has pointed out, there was no request for deinstitutionalization. It was simply a request to include a condition. But we took the position before the district court and in fact argued before the Court of Appeals that there was enough in this record to establish a violation of constitutional principles.

But as I think all of us have recognized, the Court does not have to reach those issues in this case. The Court of Appeals has relied upon the statute, the statute reflects congressional policy with respect to people in institutions, and the decision ought to turn on that particular statutory construction.

QUESTION: Well, what if we disagree with you on the statute and with the Court of Appeals -- ?

MR. DAYS: As we suggested in our brief, Mr. Justice White, if the Court believes that the DD Act does not provide an adequate basis for the relief below, we think that a remand

is appropriate, so that the Court of Appeals can address the constitutional questions.

Getting back to the legislative history of this Act --

QUESTION: Mr. Days, before you proceed, perhaps you can help me on this question. Is the Government's only interest the result of federal funds being implicated? I'm talking now about a legal interest?

MR. DAYS: That's correct.

QUESTION: Is it your position that that's entirely on the statute and the acceptance by the government of federal monies?

MR. DAYS: That is correct.

QUESTION: In other words, you're not making any constitutional claim at all?

MR. DAYS: Let me explain our intervention, Mr. Justice Powell. We intervened expressing the various interests of the United States and the interest of the United States was in the fact that substantial amounts of federal funds were going to the Commonwealth of Pennsylvania under circumstances that appeared to produce harm for the people in the institution. So that was our reason for becoming involved; we did not go into the case merely because we were theoretically interested in constitutional questions.

QUESTION: But Mr. Days, couldn't you have prevented that somehow within the executive branch? If one arm of the

executive branch was doling out these funds and the Justice Department felt that it was in violation of constitutional rights, couldn't that have been corrected short of the federal courts?

MR. DAYS: Mr. Justice Rehnquist, we try to accomplish that on a daily basis. It's not always possible and in any event, as this Court well knows, Congress has acknowledged how difficult it is for an agency to cut off funds to people who are in need of assistance. In many instances the preferable approach would be to go to court to try to establish the rights and get specific performance, if you will, as opposed to going through a process that would cut off the funds.

In any event, under this particular legislative arrangement, even if the funds had been cut off under the DD Act, Medicaid funds and other funds would continue to flow. What we think the DD Act represents is a compromise between the Senate and House versions.

The Senate wanted to cut off all federal funds if there were not compliance with the 400 pages of detailed standards. The House did not want to do that. The compromise is, cut off funds that flow to the recipient under the DD Act. If there are other funds flowing, it does not indicate that the Secretary can cut off those funds, but it does provide the predicate for a person who believes that he or she is being

harmed by a particular situation to go into court and get relief. And that is the nature of the compromise.

QUESTION: Mr. Days, so that when you went in, you were also interested in enforcing the Act of Congress in that area?

MR. DAYS: I would take -- absolutely. It became clearer and clearer, Mr. Justice Marshall, particularly after the Court of Appeals asked for a specific briefing, that the DD Act was the issue before the Court.

QUESTION: General Day, just to clarify my thinking, are you saying that the federal Act would not have any applicability whatever, the DD Act, unless federal funds were being provided under it?

MR. DAYS: That's not exactly correct, Mr. Justice Powell. There are two parts of this. If funds go to the Commonwealth under the DD Act and the Commonwealth rejects the DD Act funds, then that takes out of the picture the administrative process, that is, the requirement of planning, the review of the plan by the Secretary, imposition of the plan, and then some review by the Secretary to determine whether there has been compliance. If there is noncompliance, the funds are cut off. And that's what happens if funds are flowing under the DD Act, or if they cease to flow. But that does not affect the right of a person under 6010 to get relief if non-DD federal funds are flowing to the recipient

state.

QUESTION: You're saying, if Medicaid funds are flowing, the obligations of 6010 would apply?

MR. DAYS: That's absolutely our position, Mr. Justice Powell. There has been a suggestion --

QUESTION: Well, then, if -- and then, you take that position, you also take that position that 6010 was enacted by Congress in the exercise of its spending power?

MR. DAYS: That's correct, Your Honor; we are not here --

QUESTION: Even if there's no spending under the statute?

MR. DAYS: Even if there were no spending under this statute, as long as there was spending under other federal programs.

QUESTION: Under some other auspices?

MR. DAYS: That's correct. The counsel for the Commonwealth and for the counties and for the Parents-Staff Association argue that these rights contained in 6010 are prefatory. Nothing could be further from the truth, if one looks at the record. The Senate was really trying to establish rights that would be recognized in the handling of federal funds. It has said so in many instances; it said so in the introductory provision, general findings; then it got to specific findings of the rights. At the end of 6010 there is a comparison between the rights that are created under 6010

and other constitutional and similar rights. There is the application of 6010 to the state plan provision. The Congress has time and time again in the statute indicated that it's talking more about wish fulfillment. In fact that is the history of Congress's original attempts in this regard, since 1963, trying to encourage, trying to prod. And what the legislative history reflected was that it was not working. In fact, Senator Javits referred to the fact, not only that states weren't doing a sufficient job, and that the Congressional will was not being satisfied in these programs, he pointed to insensitivity on the part of federal agencies with respect to this, that the agencies were not doing enough to recognize these rights. So, that this is far from a prefatory standard of Congress. We believe --

QUESTION: Mr. Days, could I ask, is there any evidence whatsoever that the agency administering this statute had a view about the reach of the statute as applied to the Pennhurst situation? Is there some construction of the statute by the agency one way or the other?

MR. DAYS: There is certainly nothing definitive. I think counsel for the other side is correct in indicating that the agency has spent its time encouraging through its regulations and dealing more with what the Court of Appeals referred to as presumptions against institutionalization, and the need to move people out of these institutions as quickly

as possible.

QUESTION: General Days, what is your response to the argument that if this is just an exercise of the spending power, the amount of money appropriated by the federal government is wholly inadequate to achieve the purposes that your construction of the statute would require?

MR. DAYS: My response, once again, goes back to the legislative history, that Congress on several occasions referred to the need to use DD funds to leverage the use of other federal and state monies to provide assistance to the developmentally disabled. So Congress was really thinking in terms of the entire pot of federal money going to assist developmentally disabled people. And I think there are references in the briefs of, the brief of PARC and of Halderman, to the fact that there are some $3 billion being spent by the Federal Government to assist states in meeting the needs of the developmentally disabled.

QUESTION: Don't you think that part of the established validity of the conditional spending power assumes that there shall be a knowing acceptance of the conditions on the part of the state, rather than a hidden, the acceptance that they only learn about afterwards.

MR. DAYS: Certainly it's preferable for Congress --

QUESTION: Well, don't you think that the whole validity of the concept depends upon that?

MR. DAYS: I don't think that the whole validity depends upon that. I think that the states were not --

QUESTION: The spending power is based upon the proposition that a state is free to accept or to reject the offer of federal funds, conditioned upon meeting certain requirements. And doesn't freedom of choice imply knowledge of what the conditions are?

MR. DAYS: I think what Congress has said in 6010 is not that the states are going to have their other federal funds terminated under the DD Act; that's perhaps another lawsuit. What Congress said was, insofar as those funds are flowing to the state, then individuals who are in those institutions may have a right to bring suit against you, recipient of those other federal funds.

So, in terms of the administrative process, I don't think there's any surprise associated with the DD Act.

QUESTION: Well, Pennsylvania seems to be quite surprised in this lawsuit.

MR. DAYS: Well, perhaps I should say, no reasonable surprise associated with that arrangement, particularly during this long relationship between the Congress and the states in terms of effort to assist the developmentally disabled. This is not a statute that came out of the Congress like a phoenix from the ashes. It's part of a continuum of relationship between states that have received billions of dollars

over the years from the federal government. So, for one, I don't think that the Congress has in any way abused or violated its spending power. It's done what it felt was appropriate, given the lack of movement in this regard over such a long period of time. Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Gilhool.

ORAL ARGUMENT OF THOMAS K. GILHOOL, ESQ.,
ON BEHALF OF THE RESPONDENT PENNSYLVANIA
ASSOCIATION FOR RETARDED CITIZENS

MR. GILHOOL: Mr. Chief Justice Burger, and may it please the Court:

This is a case of statutory construction at each point dispositive of the issues here. The Congress having studied over 12 years, from 1963, and then intensively over four legislative years, 1972 to 1975, came to certain conclusions about the situation of severely retarded people, about their human possibilities, about the necessary conditions for realizing those possibilities, and about the persistent destruction large isolated institutions impose upon retarded people.

6010 is both a deinstitutionalization statute and an anti-dumping statute. What is required in the statutory language are residential programs designed to maximize developmental potential and in the least restrictive setting.

The states must move severely retarded people out of large isolated institutions and, more, they must provide

structured habilitative residential programs in their stead.

The Congress did not leave the states naked in the face of this duty. The Congress, as my colleagues have adverted, was aware, and indeed legislated with particular awareness that there were massive amounts of federal funds being spent upon residential facilities and for retardation services, and they legislated to redirect those funds as well as the state funds being so spent to community care.

Mr. Justice Powell, Justice Stewart, the Congress used the phrase, "public funds," in 6010. And whenever the Congress has used that phrase, rather than "federal financial assistance," it has done so advisedly to reach both the full run of relevant federal funding strings, and state and local funds as well.

It comes, Justice White, perhaps more easily to my lips than to General Days', to point out that the Congress was moved in significant part to act in Section 6010 because of its impatience with the federal executive's actions with respect to these institutions.

QUESTION: But doesn't Congress have budgetary control over the federal executive institutions and oversight powers too?

MR. GILHOOL: Yes, indeed they do, Justice Rehnquist, and 6010 in the four years immediately before its development came significantly from what the Congress had learned in the

course of exercising that budgetary oversight. Senator Javits in introducing the bill, and his statement pervades the legislative history, said it was intended to end, to change and to end the insensitive federal financial support for facilities which provide inhumane treatment to retarded people.

QUESTION: I take it, when you speak about -- the way you spoke about public funds, you are relying on the Fourteenth Amendment enforcement power? Yes, you are. Is that right?

MR. GILHOOL: Yes, Your Honor.

QUESTION: You're just not speaking to the spending power, as General Days is?

MR. GILHOOL: Your Honor, the spending power is perfectly adequate to reach --

QUESTION: Not to reach state funds except as tied to federal?

MR. GILHOOL: Precisely, Your Honor.

QUESTION: All right.

MR. GILHOOL: And in Harris v. McRae, this Court pointed out that not only are state funds which match federal funds reached, but the Congress has on occasion, in Title XIX, for example, and here, I suggest, also reached to state funds which are not matching funds but which are invoked for similar purposes to those that the federal-state funds would be invoked for.

In January, 1975, at argument here, a Justice of the

Court raised the single question asked in O'Connor v. Donaldson about retardation, and made an observation that I think vividly showed what it was that Congress did nine months later in Section 6010.

The observation -- and I quote -- was, "States have said, 'We're going to institutionalize these people in order to give them the best custodial care we can, that is, decent and civilized care, but they're untreatable and we're just going to keep them in an institution indefinitely.'"

I continue with the observation: "Presumptively, these people in the then state of the art were not curable. Retardation was a permanent condition and one of indefinite duration, and the ideal was to provide decent custodial care to relieve the families of the economic, social, and psychological damage which might follow from the presence of the retarded person in that household."

I close the quotation with the observation: The state of the art has changed; the Congress has so found, and legislated in 6010, as well as in the Education of All Handicapped Children Act and in several other --

QUESTION: When was 6010 passed?

MR. GILHOOL: Pardon me, Justice --

QUESTION: When was 6010 -- ?

MR. GILHOOL: 1975, Justice Rehnquist. It was signed --

QUESTION: And when was this comment that you have referred to?

MR. GILHOOL: In January, 1975.

QUESTION: It was sometime during the year 1975 that the state of the art changed?

MR. GILHOOL: No, sir; oh, no, sir. For many long decades, as the Congress found, the technology had been such that retarded people, severely retarded people in particular, were known to have the capability to learn and grow and develop in the presence of the proper education and training technology. It was not a new fact; it was quite an old one. The Congress found that fact as a predicate for acting in 6010, as in the related statutes of the early 1970s.

The situation, therefore, as the congressional judgment again indicates, is that the choice is no longer warehousing on the one hand, of severely retarded people, or on the other, imposing damage upon families. There is a third choice, which affirms the humanity and citizenship of retarded people, and it is the choice which the Congress required the states to make in Section 6010, namely: to provide habilitating residential programs.

The Congress prohibited custodial care, and required developmental services. That is plainly the case on the face of 6010, and the Senate report accompanying the bill of rights said, expressly, custodial care, which is predicated on the

assumption that certain individuals are essentially incapable and "must be rejected."

Now, with this prohibition of custodial care, of warehousing, and the requirement of habilitation, large isolated institutions lost any reason they might have had for being, let alone the invidious reasons which prompted their original creation some seven decades ago. At their very best, large isolated state institutions for the retarded had been custodial.

QUESTION: May I interrupt long enough to ask you a question about how you think 6010(3) would actually operate under these circumstances? Let's assume it would take $100 million for the state to comply with the obligations, the conditions, the requirements of 6010(3). And let's assume further, the Federal Government was willing to put up $1 million, leaving $99 million to be put up by the state legislature. And let's assume the state legislature said, we don't have $99 million, we have -- say -- $79 million. May a federal court issue an injunction against the state legislature to borrow the money and put the additional funds up?

MR. GILHOOL: Your Honor, Mr. Justice Blackmun's concurring opinion in Usery may have spoken to the question. Of course, there is a point, both in terms of the magnitude of the federal funds made available under the spending power, and in terms of the relationship between the purpose the Congress

undertakes, and the purposes for which those funds were appropriated in the first place, which, if not present, would void the statute.

QUESTION: Where would you draw the --

MR. GILHOOL: Well, Your Honor, I think this case does not raise that question for two reasons, both reflected in the legislative history of this Act, and in the record of this case. First, Your Honor, as the court below found, the cost of providing, habilitating small-scale, family-scale residential programs in the community to the people at Pennhurst is less than the cost of the destructive care at Pennhurst.

QUESTION: But I'm asking what is a hypothetical question. I want to know under what circumstances may a federal court issue an injunction against the Legislature of Pennsylvania to provide such additional state funds as may be necessary to meet these standards?

MR. GILHOOL: Your Honor, under no circumstances, it would be my view, could a federal court to issue an injunction against the Legislature of Pennsylvania.

QUESTION: But what happens? Would all funds be cut off to these institutions in those circumstances?

MR. GILHOOL: One remedial alternative for the district court would be to enjoin the use of federal funds, which are well in excess of $150 million in Pennsylvania.

QUESTION: I understood you to say that 6010(3)

authorized the federal courts to cut off those federal and state funds. Did I misunderstand you?

MR. GILHOOL: No, Your Honor, on the contrary. And, forgive me, but the question you are raising, I take it, goes to whether, as petitioners assert, without really a very clear basis in Rosado itself, that the district court is limited from issuing affirmative relief to perform the purpose, to overcome the evil that the statute was intended to overcome, or is limited to an injunction to cut off funds. No, Your Honor, it is not our position that the district court would, could, or should issue an order cutting off federal or state funds. Rather, Your Honor, as the series of cases under the Social Security Act following Rosado that were often before this Court, Townsend and Swank and the rest, I think show, the federal district courts do properly enjoin the performance of the required behavior. Of course, it is open to the state at any point to come forward and say, we quit, not just the DD Act program, but Title 19 and Title 20, and then, that of course -- if there is any question at all, it is that very difficult constitutional question left open in the Prince Edward County case.

QUESTION: But then, wouldn't that be a violation of the statutory act, the bill of rights, if the states simply say they quit and are not providing these mental patients with any of the bill of rights that Congress has announced they have?

MR. GILHOOL: Yes, Justice Rehnquist, I think a strong argument can be made that such would violate the right declared in Section 1, in terms quite like the Civil Rights Act, 1982, where Title I of the Civil Rights Act --

QUESTION: Which horn of the dilemma do you choose?

MR. GILHOOL: Well, Your Honor, I think we are faced with neither horn of the dilemma in this case, and the Court is not required to reach that question.

QUESTION: Well, if 6010 was enacted exclusively under Congress's spending power, then I suppose the state could withdraw, and not accept any federal spending.

MR. GILHOOL: Yes, Your Honor, that is --

QUESTION: If on the other hand it were enacted under Section 5 of the Fourteenth Amendment, then perhaps a state couldn't withdraw.

MR. GILHOOL: Yes, Your Honor.

QUESTION: And that's your position?

MR. GILHOOL: Yes, it is.

QUESTION: They cannot quit.

QUESTION: Well, he doesn't need to take a position.

MR. GILHOOL: Exactly, Your Honor, and --

QUESTION: But he has taken a position. You are arguing, are you not, that there is an affirmative obligation to comply with the statute, regardless of the spending power? That's the way I understood your argument.

MR. GILHOOL: Yes, Your Honor, I take that position as a matter of reading the statute. That question, I think, is not raised by this case.

QUESTION: I thought you answered Justice Stewart's question a moment ago that no federal court could enjoin the Pennsylvania Legislature to appropriate funds to implement it?

MR. GILHOOL: Yes, I did. And I thought Justice Stewart and I were both pursuing it in the question he and you raised that the statute is based also in the Section 5 power as well as the spending power.

QUESTION: You did? Well, I'm not sure your answer to Justice Powell really confronts the problem, because admittedly you might not, a federal court might not enjoin the legislature. The question perhaps should be, could they enjoin these parties requiring that it do just what the district court did, in the face of a showing that the money isn't there? It seems to me your answer is, yes, they could.

MR. GILHOOL: However --

QUESTION: It's not a defense to a constitutional violation or to a violation of a federal statute that I don't have enough money to comply.

MR. GILHOOL: Exactly, Your Honor. And assuming that

this is a proper exercise of Congress's plenary powers, the answer must be, yes.

QUESTION: Let's take it one more step. How do they enforce it?

MR. GILHOOL: How does the court enforce it?

QUESTION: How do the courts enforce this? By contempt?

MR. GILHOOL: Well, Your Honor, ultimately; of course. The federal courts --

QUESTION: Now, let's assume the money, this state money just stops, and no more state money is available, and what's the remedy then?

MR. GILHOOL: Your Honor, in that eventuality I think a court would be hardpressed to find -- to invent -- to create benefit. The federal courts' remedial powers are broad, flexible, and most deep, and in the circumstances which this case, like most Civil Rights or Social Security Act cases present, the problem of no funds, the problem of a complete inability on the part of the state to discharge the statutory duty is not present, as it is not present here, and the Congress knew and expected it would not, for the Congress, dating back several decades, has been providing rich federal funding streams for retardation services. The states' own spending for retardation services dates back to the first decades of this century. The commitments, political and

otherwise, on the part of the political branches of the Government, make it unlikely that circumstance would arise. In any event, with respect to this case, the provision of habilitative residential services is well within the range of the very Pennhurst budget itself, were that budget, as we suggest 6010 requires, redirected to the provision of habilitative residential arrangements. Thank you.

MR. CHIEF JUSTICE BURGER: Do you have something?

MR. KLEIN: Mr. Chief Justice, if it's possible for the Court --

MR. WARSHAW: I'd like to yield my time to Mr. Klein to present rebuttal on behalf of the petitioners, if that would be acceptable to you.

QUESTION: Mr. Klein, I was about to ask your colleague before he ceded his time whether he agreed that the money was available?

MR. KLEIN: Maybe I'd better let him answer that.

ORAL ARGUMENT OF ALLEN C. WARSHAW, ESQ.,
ON BEHALF OF THE PETITIONERS PENNHURST STATE SCHOOL AND HOSPITAL ET AL. -- REBUTTAL

QUESTION: The claim is that one justification for the injunction is that the money is there and the state just refuses to spend it in accordance with the Act.

MR. WARSHAW: Your Honor, there are two branches to that argument. One finds --

QUESTION: Well, did the Court find the money was available?

MR. WARSHAW: It found that there was $18 million which had not yet been spent, but it had been committed to projects. It was committed to creating community service projects as opposed to community living arrangements.

QUESTION: Is there a short answer to my question? I guess there isn't, really?

MR. WARSHAW: There isn't. We would contest the proposition that every CLA is cheaper than residental placement, and we would say, we don't know whether the total cost of the entire community placement program would exceed that of residential placement. And we would contend that there is a substantial transition cost, because Pennhurst so long as one person is there is still going to have a substantial overhead. So to talk in terms of comparing costs and the facilities costs, there is no simple answer.

QUESTION: I guess there isn't a short answer. Thank you.

QUESTION: Would you agree -- well, let me pursue that. Would you agree that -- if the state money, the state has money available, which is subject to the conditions of the federal grant, that a federal court could direct and require it to be spent to implement and carry out the federal conditions?

MR. WARSHAW: I don't think on a federal grant

statute they can tell us how to spend our funds. I think they can condition the expenditure of federal funds and say in order to accomplish the purposes of this Act --

QUESTION: They can only stop the federal flow of funds, is that it?

MR. WARSHAW: Yes, sir. I don't think there can be an affirmative order against the state to spend its funds. The remedy is to cut off the federal funds.

QUESTION: Oh, no, no. But they can make you a grant of aid for a highway program or a welfare program or whatever, based upon the program's meeting certain specifications, and you have to spend your funds to meet those specifications if you get federal aid.

MR. WARSHAW: Yes, sir. The federal government in condition of a grant can say to you, we give you this much, you must supplement that with your own funds.

QUESTION: And if you accept this, your program has to meet these specifications.

MR. WARSHAW: Yes, sir. I understood the question, though, to go to the power of a federal court in enforcing that condition and order us to spend --

QUESTION: You're saying, when the government grant comes, it's your money, and then the only way to enforce it is to enjoin its use, except in compliance with the Act.

MR. WARSHAW: Yes, sir.

ORAL ARGUMENT OF JOEL I. KLEIN, ESQ.,

ON BEHALF OF THE PETITIONER PENNHURST

PARENTS-STAFF ASSOCIATION -- REBUTTAL

MR. KLEIN: That takes me back to what I think the starting point is, and I think it was not fully addressed. I am reminded of Professor Cox's statement when one talks about the right to appropriate treatment. I was thinking, as I listened to the argument today, that right, once loosed, is not easily cabined. And of course the respondents would fill it up in a way that suits their view of the state of the art, or the current knowledge. I think Congress was much more specific in how it did it.

Two critical points: nowhere in the legislative history or in the Act is there empower of federal court to make individualized determinations and nowhere does it require a legal presumption of deinstitutionalization. To the extent that Pennhurst is deficient -- and every institution, of course, will have deficiencies; I think we live in the real world -- Pennhurst should be improved.

But I think a very telling point has been omitted by my colleagues. They have a philosophy. I represent the parents, virtually all the parents and the guardians of people at the facilities who are strongly opposed to deinstitutionalization for the very severely and profoundly retarded people.

QUESTION: Mr. Klein, you say "virtually all."

Are there some that you do not represent?

MR. KLEIN: There are some parents who are not members of the organization, Your Honor; yes, that's correct. The organization has most of the parents. One small point: the named plaintiff in the case withdrew from this case precisely because she opposed the philosophy.

But the key point is that these parents, despite the shortcomings of Pennhurst -- and Lord knows, they'd like to see them improved -- they want to have their children remain there, their adult children even. And these people are being put through, under this statute, lengthy hearings to defend their philosophy. I suggest there is no way that Congress has the power to force them to do that. Thank you.

QUESTION: Mr. Klein, could I just ask you -- I should have asked General Days. What is the authority for the Federal Government to intervene in this case, do you know? Is it provided for in the Act?

MR. KLEIN: That issue -- no, that issue was raised. In fact, the court declined to grant certiorari on the issue. The United States Courts of Appeals were split at the time over the standing of the United States to participate -- United States v. Solomon, United States v. Mattson -- had rejected it.

The 3rd Circuit upheld it as a general enforcement provision. To some degree, on a going forward basis, Your Honor, the issue is moot because Congress has passed a statute

authorizing the United States in the future to participate. And the issue was raised by the State of Pennsylvania in its petition for certiorari in this Court's finding.

QUESTION: Is that a general statute?

MR. KLEIN: That is a general statute. It's called something like, "The All-Institutions Act," something like that, passed in 1980, Your Honor. Thank you very much.

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

(Whereupon, at 11:49 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Nos. 79-1404, 79-1408, 79-1414, 79-1415, & 79-1489

PENNHURST STATE SCHOOL AND HOSPITAL ET AL., MAYOR OF CITY OF PHILADELPHIA ET AL., PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS ET AL., COMMISSIONERS AND MENTAL HEALTH/MENTAL RETARDATION ADMINISTRATORS FOR BUCKS COUNTY ET AL., & PENNHURST PARENTS-STAFF ASSOCIATION.

V.

TERRI LEE HALDERMAN ET AL. & PENNHURST STATE SCHOOL...ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: William J. Wilson