

# ORIGINAL

1 IN THE SUPREME COURT OF THE UNITED STATES

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4 GEORGE A. RALSTON, WARDEN, :

5 Petitioner, : No. 80-2049

6 v. :

7 JOHN CARROLL ROBINSON :

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9 Washington, D.C.

10 Monday, October 5, 1981

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States at  
13 1:17 o'clock p.m.

14

15 APPEARANCES:

16

17 DAVID A. STRAUSS, ESQ., Office of the Solicitor General,  
18 U.S. Department of Justice, Washington, D.C.;  
19 on behalf of the Petitioner.

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21 JEROLD S. SOLOVY, Chicago, Illinois;  
22 on behalf of the Respondent.

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on behalf of the Petitioner	
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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Ralston against Robinson.

Mr. Strauss, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF DAVID A. STRAUSS, ESQ.,  
ON BEHALF OF THE PETITIONER

MR. STRAUSS: Mr. Chief Justice, and may it please the Court, the issue in this case is whether a Federal prisoner serving a sentence under the Youth Corrections Act, who commits a crime and is sentenced to a consecutive term of imprisonment as an adult, must continue to be treated as a Youth Corrections Act offender for the remainder of his Youth Corrections Act term.

In 1974, the Respondent in this case, Mr. Robinson, was convicted of second degree murder in the District of Columbia. The maximum punishment for that offense is life imprisonment. The Respondent was sentenced to ten years under the Federal Youth Corrections Act, or YCA. The YCA permits a Judge as an alternative to imposing an adult sentence to commit an offender under the age of 22 to the Bureau of Prisons for a program of treatment designed to correct his antisocial tendencies and restore him to a normal, productive, and law-abiding life.

QUESTION: Not to fit in with a group of hardened

1 criminals.

2 MR. STRAUSS: That's right. There is no  
3 suggestion that Congress intended it for that reason.

4 Congress intended also that the YCA be modeled on  
5 the English Borstal system, and provided as one aspect of  
6 YCA treatment that YCA offenders be segregated insofar as  
7 practical from other classes of offenders.

8 In 1975, while he was serving his YCA sentence,  
9 the Respondent was convicted of assaulting a Federal  
10 correctional officer with a deadly weapon. The Judge before  
11 whom he was convicted expressly declined to sentence him  
12 under the YCA, found that the Respondent would not benefit  
13 further from YCA treatment, and sentenced him as an adult to  
14 a five and a half year term of imprisonment. The Judge  
15 specified that this sentence was to run consecutively to the  
16 YCA term, and recommended that the Respondent be moved from  
17 the youth facility where he had been being confined to a  
18 more secure institution.

19 Two years later, in 1977, the Respondent was again  
20 convicted of assaulting a Federal prison guard, and although  
21 he was not yet 22, he was again sentenced to an adult term  
22 of imprisonment. This time the sentence was one year and a  
23 day. The Judge specified that this sentence was to run  
24 consecutively to his other two sentences.

25 When the Respondent received his adult sentences,



1 he acquired a dual status; although he was still serving a  
2 YCA term, he was also under an adult sentence. At this  
3 point, the Bureau of Prisons, following an established  
4 policy for dealing with dual status offenders, began  
5 treating the Respondent in prison as an adult offender. The  
6 effect of this was that the Respondent was given access to  
7 those treatment programs designed for adults as opposed to  
8 those programs designed for youthful offenders.

9           In doing this, the Bureau was exercising a power  
10 that is possessed by correctional authorities under the  
11 Borstal system, the English Borstal system, which as I said  
12 was the model for the YCA. In that system, the authorities  
13 could transfer an offender from a youth institution to an  
14 adult prison in a case like this.

15           QUESTION: Mr. Strauss, just on that analogy, in  
16 the Borstal system they could do that even without a second  
17 conviction, couldn't they?

18           MR. STRAUSS: That's right. They could do it.

19           QUESTION: Do you take the position that the  
20 Bureau of Prisons could do that under the YCA if this man  
21 had just been a very unruly inmate, and caused a lot of  
22 trouble, but never actually was convicted of a second  
23 felony?

24           MR. STRAUSS: That is not a necessary part of our  
25 argument here, because he has been convicted twice.

1 QUESTION: Well, what is your view on that  
2 question?

3 MR. STRAUSS: Our view is that the Bureau should  
4 have considerably more latitude in doing that than --

5 QUESTION: But what is your view on the question I  
6 asked you? Does the Bureau have the power to do that  
7 without a second conviction?

8 MR. STRAUSS: The Bureau does have the power to --  
9 Given the practicalities of the situation, the Bureau should  
10 have the power to place him in an adult institution.

11 QUESTION: You really don't need to rely on the  
12 second conviction then to sustain your position.

13 MR. STRAUSS: That is our position, but we do have  
14 the second conviction in this case.

15 In 1978, the Respondent brought this action to  
16 challenge the Bureau's policy by filing a pro se document in  
17 the United States District Court, in which he sought to be  
18 segregated from adult offenders, and to be treated according  
19 to the provisions of the YCA. The District Court ordered  
20 relief, ordering that Respondent be moved to an institution  
21 where he would be segregated and would receive YCA  
22 treatment.

23 At the time the District Court granted relief, the  
24 Respondent, because of his two adult convictions, and  
25 because he had compiled an extensive disciplinary record in

1 prison, including several violent incidents, was in the  
2 control unit of the United States Penetentiary at Marion,  
3 Illinois. That is the most secure facility in the Federal  
4 prison system.

5           QUESTION: And as of January, this all will be  
6 moot.

7           MR. STRAUSS: That's right, Justice Marshall. As  
8 of January, he begins his first adult sentence.

9           The Seventh Circuit affirmed the District court's  
10 order, and on our petition this Court granted certiorari.

11           The Respondent relies on the provisions of the  
12 YCA, which prescribe segregation and treatment for YCA  
13 offenders. The segregation requirement, as Respondent  
14 virtually concedes, and as, in any event, this Court has  
15 said and the legislative history demonstrates beyond any  
16 reasonable doubt, was intended to allow the Bureau to  
17 insulate YCA offenders from the corrupting influence of more  
18 hardened, experienced adult offenders. The Respondent is  
19 precisely the sort of offender from whom YCA offenders are  
20 supposed to be segregated. He is under two adult  
21 sentences. He has been in prison since he was 17, and his  
22 terms will not expire until he is 31. He has committed  
23 three violent felonies, and he has an extensive disciplinary  
24 record. This is just the sort of offender Congress had in  
25 mind when it decided that YCA offenders should, insofar as

1 practical --

2 QUESTION: But I gather, Mr. Strauss, that there  
3 is nothing in the legislative history to show that Congress  
4 ever contemplated this situation, is there?

5 MR. STRAUSS: That's right. In fact, it seems  
6 reasonably clear that Congress did not contemplate this  
7 situation.

8 QUESTION: On the face of the statute, it might  
9 appear that he is entitled to YCA treatment.

10 MR. STRAUSS: Well, the language --

11 QUESTION: On the face of the statute it seems  
12 that way, doesn't it?

13 MR. STRAUSS: It is essentially unenlightening.  
14 We do not suggest that it supports our position directly.

15 QUESTION: It is rather explicit, it seems to me.  
16 But in any event, in any event, I gather your argumenmt is  
17 that we can forget what the statute says, and just in  
18 contemplation of what Congress had in mind, this is not the  
19 kind of chap who is supposed to get YCA treatment.

20 MR. STRAUSS: Well, when the language of the  
21 statute is essentially not addressed to this problem, and  
22 leaves us where we started, then we have to --

23 QUESTION: Your argument seems to be that it would  
24 defeat the purposes of the statute as explicitly declared by  
25 Congress, if they were to put him with other young youth

1 offenders.

2 MR. STRAUSS: That is exactly right.

3 QUESTION: And there is no provision in the  
4 Federal institutions for hardened YCA people and unhardened  
5 ones. There is only one level.

6 MR. STRAUSS: Well, there are different levels of  
7 security for different types of YCA offenders and types of  
8 adult offenders.

9 QUESTION: There are?

10 MR. STRAUSS: That's right.

11 QUESTION: Why couldn't you put this guy in that  
12 one?

13 MR. STRAUSS: Well, there are several problems.  
14 One problem is that --

15 QUESTION: I thought you only had one.

16 QUESTION: Well, excuse me. There are different  
17 levels. Is this by regulation or is this by the statute?

18 MR. STRAUSS: This is not by the statute. This is  
19 by Bureau of Prisons policy.

20 QUESTION: By regulation.

21 MR. STRAUSS: That's right. The statute  
22 authorizes it, but the Bureau of Prisons has established  
23 it.

24 One problem, Justice Marshall, to answer your  
25 question, is that in several lower Court decisions



1 constraints have been put on the Bureau's power to place  
2 troublesome YCA offenders in maximum security institutions,  
3 and given those constraints, they have to place this sort of  
4 offender, for whom the Act is so clearly not designed, in a  
5 YCA institution --

6           QUESTION: Like a maximum security YCA  
7 institution.

8           MR. STRAUSS: There are no maximum security YCA  
9 institutions. There are YCA offenders in maximum security  
10 custody.

11          QUESTION: Where are they? In the regular  
12 institutions?

13          MR. STRAUSS: That's right.

14          QUESTION: So in the YCA institutions you don't  
15 have any separation.

16          MR. STRAUSS: There are YCA offenders in separate  
17 units. Actually, this is a difficult matter to talk about,  
18 because the policy is in flux.

19          QUESTION: I think you are not addressing my  
20 question. In the same YCA institution, do you or do you not  
21 have two levels of security, in the same YCA institution?

22          MR. STRAUSS: There are -- The YCA units consist  
23 only of offenders at a single level of security in any  
24 institution.

25          QUESTION: That is what I thought.

1           MR. STRAUSS: There are YCA units within  
2 institutions, and the institution is at a security level.

3           QUESTION: The man involved here, if put in a YCA  
4 institution by a Court, would be right beside the guy that  
5 was doing just fine.

6           QUESTION: He might very well. That's right.

7           QUESTION: We have something of a practical  
8 problem with this case, too, don't we, because if the case  
9 is argued now and the opinion doesn't come down before he  
10 begins serving his adult sentence, there will be an issue of  
11 mootness which we have traditionally dealt with by the  
12 Munsingwear case.

13          MR. STRAUSS: That's right. Yes. We regret the  
14 practical problem. We agree the proper disposition would be  
15 a Munsingwear order should the Court --

16          QUESTION: So whatever this Court does, it isn't  
17 going to have much effect on this particular Respondent.

18          MR. STRAUSS: Well, it will only affect a couple  
19 of months of his custody, but of course, that is enough to  
20 save it from mootness, and as we explained when we asked the  
21 Court to expedite consideration of this case, it is a  
22 pressing issue for several other reasons. There is a severe  
23 conflict in the Circuits.

24          QUESTION: I want to be sure, because I think -- I  
25 want to be sure about your colloquy with Justice Marshall.

1 There is no such thing as a YCA institution as such.

2 MR. STRAUSS: At this time, there is not. There  
3 is a plan in the works for establishing two and possibly  
4 three institutions consisting exclusively of YCA offenders.

5 QUESTION: Does that depend on the outcome of this  
6 case?

7 MR. STRAUSS: No, it does not. It depends on the  
8 outcome of separate litigation.

9 QUESTION: And the budget.

10 MR. STRAUSS: No doubt, the budget.

11 QUESTION: Mr. Strauss, may I ask you a question?  
12 Under the Youth Corrections Act, I suppose it is possible  
13 that the youth offender will serve a longer period of time  
14 in custody than if he were an adult, for example.

15 MR. STRAUSS: That is right.

16 QUESTION: That is possible, right?

17 MR. STRAUSS: That is right. Under a different  
18 provision of the Act from the one under which the Respondent  
19 here is sentenced.

20 QUESTION: Right, and if that is the case, and the  
21 theory of upholding that kind of a provision was that the  
22 youth offender would be getting special treatment, so there  
23 is a quid pro quo, in effect, is that not right?

24 MR. STRAUSS: That is the theory that some Courts  
25 have used. Yes.

1           QUESTION: Then, if the Bureau of Prisons can  
2 transfer someone in the middle of a youth offender sentence  
3 to an adult facility, then you lose that quid pro quo, don't  
4 you?

5           MR. STRAUSS: Well, that seems to be right,  
6 Justice O'Connor. The quick answer to that concern is that  
7 Mr. Robinson, the Respondent here, was not sentenced to a  
8 longer term than an adult would have received. An adult  
9 could have received life imprisonment. He was sentenced to  
10 ten years. So, whatever those concerns are, they are not  
11 present in this case.

12          QUESTION: But wouldn't our holding here cause  
13 major concerns in future cases if that happened to be the  
14 situation?

15          MR. STRAUSS: Well, that would, of course, depend  
16 on the contours of the holding. As for the other cases, I  
17 would point out that the argument is by no means decisive,  
18 because what offenders in YCA custody are entitled to is  
19 what Congress gave them, and if we can establish that  
20 Congress did not intend that this program would survive  
21 beyond the point where is served any purpose, then it can't  
22 be said that they are being denied or deprived of something  
23 that Congress intended them to have.

24          QUESTION: May I follow up with that? Is it your  
25 view that the second trial judge at the time of the second

1 offense could have imposed a concurrent sentence instead of  
2 a consecutive sentence, which would then have authorized the  
3 Bureau to treat him as an adult rather than a YCA offender?

4 MR. STRAUSS: Yes, if the second judge -- you mean  
5 the judge who sentenced him to his first adult sentence?

6 QUESTION: Yes.

7 MR. STRAUSS: If he had imposed a concurrent  
8 sentence, I would think there would be no question.

9 QUESTION: Couldn't the Department of Justice  
10 pretty much take care of the problem by asking for  
11 concurrent sentences whenever a YCA offender commits another  
12 felony?

13 MR. STRAUSS: Well, it could. Of course, that  
14 actually points out a paradox in the situation, that an  
15 offender whose crime was not sufficiently serious --

16 QUESTION: It can't get the benefit of the longer  
17 YCA sentence that Justice O'Connor adverted to it it did  
18 that, of course.

19 MR. STRAUSS: That's right. Also, he wouldn't get  
20 the benefit --

21 QUESTION: What he wants to do is get the benefit  
22 of the length of the YCA sentence but not the quid pro quo.

23 MR. STRAUSS: Well, he wants to impose a  
24 consecutive sentence essentially, the adult sentence to go  
25 on top of it. The paradox is that consecutive sentences



1 ordinarily denote a more serious offense, and the lower  
2 Court's decision --

3           QUESTION: So they want the additional time, and  
4 they also want to change the character of the first  
5 sentence.

6           MR. STRAUSS: Well, the Judge decided the  
7 additional time was necessary, and that makes it necessary  
8 also to change the character of the first sentence.

9           QUESTION: Well, it doesn't make it necessary.  
10 Under the Department's policy it is desirable to change the  
11 character of the first sentence.

12          MR. STRAUSS: Well, that's right. It is not  
13 necessary. It is not something we are required to do. In  
14 our view, it is necessary in order to maintain Congress'  
15 intention in enacting the statute.

16          The other point about the segregation requirement  
17 is that, as Justice Rehnquist pointed out, and as Justice  
18 Blackmun, in three months' time, the Respondent will begin  
19 his adult sentence, and at that time it is beyond dispute  
20 that he will be an adult offender, and no one would contend  
21 that at that time he can claim a right to be segregated from  
22 adults or placed as a YCA offender, but there is no basis  
23 for thinking that he is somehow less of a corrupting  
24 influence now than he will be three months from now, or that  
25 he is more fit to be placed with YCA offenders now than he

1 will be in three months.

2           QUESTION: Well, any decision the Court is going  
3 to make is going to apply to someone who might have nine  
4 years left, or a longer period.

5           MR. STRAUSS: That is right, but I think the same  
6 point still holds, that there is no basis for believing that  
7 at the earlier point, after he has committed a crime and  
8 sentenced as an adult, that somehow he will not become a  
9 corrupting influence until that sentence begins to run.

10           The other provision of the YCA on which the  
11 Respondent relies is the treatment provision, and again, the  
12 Courts below have applied this provision to the kind of  
13 offenders for whom Congress did not intend it. YCA  
14 treatment in Congress' view was designed, as Justice  
15 Rehnquist suggested in an earlier question, to return  
16 offenders to productive lives in the community, and to that  
17 end an integral part of the treatment Congress envisioned  
18 was a gradual phased, supervised reintegration of an  
19 offender into society.

20           At the end of his YCA term however, the  
21 Respondent, of course, will not be returned to a productive  
22 life in society. Instead, he will begin two adult prison  
23 terms, and for that same reason it will be impossible  
24 gradually to reintegrate him into society. So, an integral  
25 part of YCA treatment as Congress saw it will not be capable

1 of being afforded to this Respondent.

2           Nothing in the Act suggests that YCA treatment is  
3 preparation for a life in prison, and nothing in the Act  
4 suggests that the custodial phase of YCA treatment followed  
5 by an adult prison term will do anyone any good, society or  
6 the offender. It is at least plausible that a custodial  
7 treatment program designed to culminate in an offender's  
8 return to society when followed not by a return to society  
9 but by an adult prison sentence will do even the offender  
10 more harm than good.

11           So, if anything, it thwarts Congress' intention to  
12 attempt to provide Respondent with YCA treatment.  
13 Certainly, there is no basis in the YCA for requiring the  
14 Bureau of Prisons to provide treatment to an offender such  
15 as this.

16           QUESTION: I think you have answered this, but  
17 there would be no question if either one of these two Judges  
18 had said YCA, would there?

19           MR. STRAUSS: If the Judge had imposed YCA  
20 sentences, he would be a YCA offender. That is right.

21           QUESTION: And there would be no problem.

22           MR. STRAUSS: He would still be a YCA offender.  
23 There would be no basis for claiming he is an adult  
24 offender. I would point out that, as Justice Stevens  
25 suggested earlier, if his prison record were very bad, it

1 might be necessary to take some steps that would require  
2 confining him in conditions comparable to those of an adult  
3 offender, but the Bureau would still regard him as a YCA  
4 offender.

5           QUESTION: It is up to the Judge, not to the  
6 Department of Justice.

7           MR. STRAUSS: To decide whether someone is a YCA  
8 offender or an adult offender.

9           QUESTION: Right.

10          MR. STRAUSS: That is right, although the  
11 treatment conditions have to be in the control of the  
12 Bureau, and the confinement conditions more generally.

13          QUESTION: I still don't understand why it isn't  
14 sufficient to achieve the Department's end to just leave it  
15 to the Bureau if he is a youth offender to deal with him as  
16 an adult, or confine him as an adult, or confine him like  
17 they would an adult, if he gets out of hand.

18          MR. STRAUSS: Well, it may be sufficient if we  
19 could do that. One problem with that is that constraints  
20 have been put on the Bureau by the lower Courts. The other  
21 problem --

22          QUESTION: So you really think what this case is  
23 really about is the validity of the existing policy of the  
24 Bureau.

25          MR. STRAUSS: Well, the case is about the validity

1 of the existing policy.

2           QUESTION: I mean, whether they may confine a  
3 youth offender as an adult if he gets out of hand.

4           MR. STRAUSS: The obstacles that have been put in  
5 the way of implementation of that policy give this case its  
6 practical importance. Our view is that the proper  
7 interpretation of the statute remains, that Congress did not  
8 intend YCA treatment for someone who is going off to an  
9 adult --

10          QUESTION: Mr. Strauss, are you suggesting to my  
11 brother White that without a second conviction, just because  
12 of misbehavior, the policy of the Department would permit  
13 their treating him as an adult, even though he had been  
14 sentenced as a youth offender?

15          MR. STRAUSS: There may be some circumstances, in  
16 our view, under which a YCA offender is such a problem, the  
17 only practical way to deal with him is to place him in an  
18 adult penitentiary.

19          QUESTION: Well, that is the Bureau's presently  
20 published policy, isn't it?

21          MR. STRAUSS: That is the Bureau's present policy,  
22 and it is one that --

23          QUESTION: Well, its validity is not involved in  
24 this case.

25          MR. STRAUSS: That's right. Its validity is not



1 necessarily involved in this case, because he would --

2 QUESTION: Not necessarily. It is not involved.

3 QUESTION: You put in another word. You put in  
4 another word, not necessarily.

5 MR. STRAUSS: Well, if the Court were to hold that  
6 the Bureau has complete discretion to place an unruly  
7 offender in adult conditions whether or not he has a YCA --  
8 has an adult sentence, then a --

9 QUESTION: Well, if we were to do that, we would  
10 be answering a question that this case doesn't present.

11 MR. STRAUSS: That's right.

12 QUESTION: Ordinarily, isn't it the case that if  
13 you take a person 23 years old off the street and try him  
14 for a crime and the Judge sentences him to 20 years, he  
15 begins serving that sentence as soon as the Trial Judge  
16 directs, or as soon as his appeals are exhausted?

17 MR. STRAUSS: That is my understanding.

18 QUESTION: And here, of course, he begins serving  
19 the adult sentence after the YCA sentence expires.

20 MR. STRAUSS: That's right.

21 QUESTION: If there was a ten-year YCA sentence,  
22 as there was here in 1974, and say in the first trial, the  
23 first offense was in 1975, and the Trial Judge gave him one  
24 year, as he did the last time, it is your view that that  
25 one-year adult sentence would entitle the Bureau to give him

1 ten years of adult treatment, isn't it?

2 MR. STRAUSS: That one-year adult sentence, in our  
3 view, would make him an adult offender, yes.

4 QUESTION: And then the whole ten-year sentence  
5 could be treated as an adult sentence.

6 MR. STRAUSS: That's right.

7 QUESTION: Mr. Strauss, would the government  
8 regard an affirmance here as invalidating the policy?

9 QUESTION: The present policy.

10 MR. STRAUSS: The policy of treating YCA offenders  
11 with adult convictions as --

12 QUESTION: Yes.

13 MR. STRAUSS: I assume.

14 QUESTION: The present policy you told us, without  
15 regard to an adult conviction, that they can treat him as an  
16 adult if he gets too far out of hand. I thought you just  
17 told me that. That is the policy.

18 MR. STRAUSS: The policy of treating a straight  
19 YCA --

20 QUESTION: A YCA offender may be treated as an  
21 adult if he gets too far out of hand. That is the present  
22 Bureau policy, isn't it?

23 MR. STRAUSS: That's right, essentially.

24 QUESTION: And if we affirm here, are you  
25 suggesting that that would invalidate that policy?

1           MR. STRAUSS: Well, that would be a difficult  
2 question. It would depend on the nature of the affirmance.  
3 It would be difficult --

4           QUESTION: Well, I am just talking about an  
5 affirmance.

6           MR. STRAUSS: Well, this offender has two adult  
7 sentences for serious crimes in prison. It is hard to see  
8 how someone could be more unruly than that. So to that  
9 extent it would be a problem.

10          QUESTION: That is true, but you think an  
11 affirmance here would prevent the Bureau under its present  
12 policy from confining him as an adult?

13          MR. STRAUSS: Again --

14          QUESTION: If we affirmed.

15          MR. STRAUSS: Simply, if you simply entered an  
16 order of affirmance, I suppose it would be possible to carry  
17 out the other policy, but as I said, it is difficult to see  
18 how this offender can be -- can assert a right to continue  
19 the YCA treatment unless any unruly YCA offender could.

20          QUESTION: The argument is, that is what the Act  
21 says.

22          MR. STRAUSS: Well, in our view, that is not what  
23 the Act says or intends. I should also point out that the  
24 Bureau's policy that we have been talking about of placing  
25 unruly YCA offenders in adult conditions applies only to

1 segregation. The YCA forms of treatment, the characteristic  
2 forms of education and counseling made available to youths  
3 would still be available to them. Essentially the problem  
4 is that he would have to be put in some place like the  
5 control unit at Marion, where he is under very close  
6 supervision all the time, and as a practical matter in those  
7 conditions we cannot talk of segregation from adult  
8 offenders.

9           QUESTION: Mr. Strauss, if you know the policy, or  
10 if you know the background, has the Bureau of Prisons had  
11 any occasion to take an unruly youth offender who is in  
12 custody, who is thought to be subject to some emotional  
13 problems, and sent him off to a Federal psychiatric  
14 institution for analysis and treatment? Have they done  
15 that, do you know? If you know?

16           MR. STRAUSS: I would suspect they have. I don't  
17 know of any particular cases, but I would suspect it has  
18 been done.

19           QUESTION: That is common, or at least it is not  
20 uncommon with respect to other prisoners in other Federal  
21 institutions, isn't it?

22           MR. STRAUSS: No, it is common, and in fact my  
23 understanding is that at the Federal psychiatric prison  
24 institution at Butner, there are YCA offenders. That is a  
25 mixed institution specializing in psychiatric treatment.

1 The Respondent also happens to be there, but he is there as  
2 an adult.

3 QUESTION: Of course, Butner is a very special  
4 institution.

5 MR. STRAUSS: That is right. It specializes in  
6 psychiatric treatment. If there are no further questions, I  
7 will save the rest of my time.

8 CHIEF JUSTICE BURGER: Mr. Solovy?

9 ORAL ARGUMENT OF JEROLD S. SOLOVY, ESQ.,  
10 ON BEHALF OF THE RESPONDENT

11 MR. SOLOVY: Mr. Chief Justice, may it please the  
12 Court, I would like first to address Justice Blackmun's  
13 question of mootness, because Mr. Robinson and I sort of  
14 feel like the baseball player who came up from the minors to  
15 the big leagues, and then a baseball strike is called, and  
16 Mr. Robinson having struggled this long to get his  
17 YCA-mandated treatment as directed by Congress, I hate to  
18 see him lose it.

19 Number one, the mootness argument presumes that  
20 this Court will not act expeditiously. I will not indulge  
21 in that presumption. But if one were to indulge that  
22 presumption, I would like to point out that in January 1982,  
23 Mr. Robinson will only be conditionally released from this  
24 YCA sentence. At that point he will start serving his adult  
25 sentence, and should he be paroled within two years, he



1 would still be subject to the YCA sentence and could be  
2 called back into the YCA system.

3           Now, a lot of questions have been asked by the  
4 Court --

5           QUESTION: You mean in a sense for what would  
6 amount to violations of parole, the equivalent of parole.

7           MR. SOLOVY: That is correct, Mr. Chief Justice.

8           QUESTION: Well, what do you have to say about the  
9 proposition, laying aside the statute for just a moment,  
10 that this man is now demonstrably on this record precisely  
11 the kind of person that Congress said should not be mixed in  
12 with youth offenders?

13          MR. SOLOVY: Quite to the contrary, with all  
14 respect, Mr. Chief Justice.

15          QUESTION: What do these two convictions mean?

16          MR. SOLOVY: All right. Well, let's take -- the  
17 government says that Mr. Robinson is a hardened criminal,  
18 and he must be kept in the most maximum confinement  
19 possible, namely Marion, but yet when Mr. Robinson wound his  
20 way up to the Seventh Circuit, the Bureau of Prisons started  
21 thinking about its obligations, and they transferred him to  
22 the Memphis facility, which is a minimum -- a medium  
23 security, and then to Butner, which is an administrative  
24 facility.

25          Now, at Butner we lodged with the Court his

1 current report, where they say he requires a minimum of  
2 supervision, his attitude is positive, he interacts well, he  
3 does his job well, he has completed courses, and that is  
4 what Congress wanted to do when they passed the YCA. Under  
5 the YCA, a person could get a 20-year sentence. That means  
6 that the Trial Judge thinks that this person is a hard core  
7 case. He takes a long time to be rehabilitated. The whole  
8 purpose --

9           QUESTION: What would you say if a man was up for  
10 youth correction, YCA treatment, and the record showed he  
11 had three felony convictions for violent crimes. Do you  
12 think he would be a good subject?

13           MR. SOLOVY: That, Justice Marshall, of course, is  
14 what Congress gave to the Trial Court. Each time that that  
15 defendant came before the Trial Judge, the longest he --

16           QUESTION: I am not talking about this man.

17           MR. SOLOVY: Yes, I am talking about any person --

18           QUESTION: I am talking about a man who is brought  
19 before a Court, and this is his third conviction for a  
20 violent felony. Do you think the Court would be obliged to  
21 give him YCA treatment?

22           MR. SOLOVY: Oh, no, the Court is never under --

23           QUESTION: To the contrary. You would think he  
24 was not, wouldn't you? Now, wouldn't you?

25           MR. SOLOVY: Justice Marshall, this Court --

1 QUESTION: I say three violent felonies.

2 MR. SOLOVY: This Court has mandated the answer in  
3 Dorszynski. So long as the person is under the age of 22,  
4 the Trial Judge must make a specific no benefit finding.  
5 You take, for example --

6 QUESTION: I am saying he makes the finding.  
7 Which finding do you think he would make?

8 MR. SOLOVY: Well, if I were the Trial Judge, I  
9 would make the finding of no benefit.

10 QUESTION: And then I am going to ask you what is  
11 the significance of this case.

12 MR. SOLOVY: There is a world of difference,  
13 because Mr. Robinson was judged by the Trial Court in this  
14 case to require ten years of rehabilitative treatment to  
15 straighten himself out, and I have to back away from the  
16 question that when you read the government's brief, the  
17 Court and I, until I start reading the cases, are sitting in  
18 a never-never land. The Bureau of Prisons says, listen to  
19 our expertise, and it is impractical to mix these people  
20 together, but this system doesn't exist. There is no YCA  
21 treatment. There is no YCA system.

22 QUESTION: Well, in this case, you are not  
23 attacking the action of the Judges under later convictions.

24 MR. SOLOVY: Not at all, Your Honor.

25 QUESTION: They sentenced him as an adult. You

1 don't complain about that.

2 MR. SOLOVY: Not at all, Your Honor.

3 QUESTION: All you complain about -- and the Judge  
4 himself didn't attempt to terminate his prior youth  
5 condition.

6 MR. SOLOVY: I couldn't agree with that more.

7 QUESTION: And it is the Bureau of Prisons that  
8 said, because he has been convicted as an adult, we will  
9 terminate, treat him as an adult.

10 MR. SOLOVY: That is exactly the --

11 QUESTION: You are not suggesting that any later  
12 Judge is bound to sentence him for a later felony as a youth  
13 offender?

14 MR. SOLOVY: Not at all.

15 QUESTION: What is the longest sentence that you  
16 are aware of under the Youth Corrections Act?

17 MR. SOLOVY: Twenty-five years under the YCA.

18 QUESTION: How many sentences over ten years under  
19 the YCA are made, do you know?

20 MR. SOLOVY: The government sets it forth in its  
21 brief, and there are quite a number of them. I don't  
22 remember the exact figures, but there are quite a number of  
23 long --

24 QUESTION: But percentagewise, it is a small  
25 percentage of cases, is it not?

1           MR. SOLOVY: Percentagewise, I would say the long  
2 sentences are about 15 to 20 percent, and of course the  
3 answer that Congress gave to these difficult prisoners, and  
4 Congress envisioned this, is found right in the statute, at  
5 Section 5011. It says "Classes of committed youth offenders  
6 shall be segregated according to their needs of treatment."  
7 So Congress knew that when you gave a youth offender 20, 25  
8 years' worth correction sentence that there might be  
9 problems, and it said that you could house those youth  
10 offenders according to their needs for treatment.

11           QUESTION: Like sending them to Marion.

12           MR. STRAUSS: No, you can't send them to Marion --

13           QUESTION: Why not?

14           MR. SOLOVY: -- because Marion is a penitentiary,  
15 and Marion does not afford what Congress mandated should be  
16 afforded, which was rehabilitative treatment. Now, the  
17 Bureau of Prisons says that the Youth Corrections Act is  
18 passe, and therefore we won't enforce it. The Bureau of  
19 Prisons likes to mix the adult offenders with the youthful  
20 offenders, and they think that prevents violence, but that  
21 is exactly contrary to what Congress said.

22           QUESTION: Has the Bureau ever made any  
23 announcement of any such policy, or is that your inference?

24           MR. SOLOVY: That is the direct testimony of the  
25 Bureau of Prisons in Watts versus Hadden, Bell versus



1 Johnson, Brown versus Carlson, and as they say, that the  
2 Bureau of Prisons are much more direct in their testimony in  
3 the litigation than they are in the briefs filed with the  
4 Court. In Watts versus Hadden, the District Judge held as  
5 follows, and this is 469 Federal Supplement 234. I think  
6 this is a rather astounding statement.

7           There is an incredible irony in reading the  
8 Supreme Court's careful articulation of the policy,  
9 purposes, and procedures of the YCA in the directions given  
10 to sentencing Judges in Dorszynski with the knowledge that  
11 the entire system therein simply does not exist.

12           QUESTION: Well, that is not the only incredible  
13 irony in this case, is it? In a sense, you are urging that  
14 your client be continued to be confined under the sentence,  
15 whereas the government is urging that he be released from  
16 that sentence and start serving another sentence.

17           MR. SOLOVY: I agree, Justice Rehnquist, that that  
18 is a complete irony, and that when people come before the  
19 Courts, they do not want to be sentenced under the Youth  
20 Corrections Act, because the Youth Corrections Act is not a  
21 picnic. It gives them a longer sentence than they might  
22 normally get, and it gives them in many ways different types  
23 of treatment. This was not supposed to be a picnic. The  
24 Borstal system was hard work. Now, they want to take --  
25 What the government, though, has done, Justice Rehnquist, is

1 try to put Mr. Robinson in a penal never-never land. Bear  
2 in mind that one year after his ten-year YCA sentence he got  
3 a consecutive adult sentence.

4 QUESTION: For doing what?

5 MR. SOLOVY: For assaulting a prison guard.

6 QUESTION: Does that seem unreasonable to you?

7 MR. SOLOVY: No, the sentence doesn't seem  
8 unreasonable.

9 QUESTION: Suppose the government paroles him from  
10 the YCA Act today. Is this case moot?

11 MR. SOLOVY: Yes, except for the --

12 QUESTION: He will stay right where he is, won't  
13 he?

14 MR. SOLOVY: Except for the possibility --

15 QUESTION: And you couldn't say a mumbling word.  
16 Right?

17 MR. SOLOVY: Well, except -- No, that isn't  
18 correct, because there are cases like that, Mickless, for  
19 example, Mickless versus United States, because they could  
20 then parole him the next day from the adult sentence, and  
21 since he would still be subject to being called back for a  
22 parole violation, I think the Court would have the right to  
23 render a decision as to the conditions of confinement.

24 But meanwhile, Justice Marshall, they haven't  
25 paroled him, and he is still there, and he is still in the

1 wrong place, and they are still not giving him treatment.

2           QUESTION: Mr. Solovy, on your initial point, I  
3 want to be sure I understood you.

4           MR. SOLOVY: Yes.

5           QUESTION: You contend that because of the  
6 two-year parole at the end of his eight-year time in  
7 custody, this case will not be moot next January.

8           MR. SOLOVY: That is correct.

9           QUESTION: Technically, because there is a  
10 possibility of the other sentences being paroled --

11          MR. SOLOVY: That is correct.

12          QUESTION: -- within the two-year period.

13          MR. SOLOVY: That is correct, but I want to make  
14 sure that the Court understands my position. I am not  
15 quarreling with the legality of the second -- of the first  
16 consecutive sentence. The irony is that the second  
17 consecutive sentence is an illegal sentence, as this Court  
18 determined in Dorszynski, because there was no no benefit  
19 finding.

20          The government's position would result in strange  
21 anomalies. Take, for example, a misdemeanor who could only  
22 get a six-month sentence. He gets an indeterminate YCA  
23 sentence. That means he is there for a potential four to  
24 six years. He then gets in trouble, and he gets a one-year  
25 consecutive adult sentence. That means he is going to end

1 up serving five to seven years for an offense that if he  
2 were sentenced as an adult he could only be imprisoned six  
3 months, and that would be an anomalous result.

4           Under the Congressional scheme, it doesn't matter  
5 what pattern of sentences occur. If a youth at the age of  
6 18 commits a robbery and gets a one-year adult sentence,  
7 then gets in trouble again before the age of 22, he can get  
8 a YCA sentence. This Court has mandated that a Judge make a  
9 no benefit finding. But the question of what the Bureau of  
10 Prisons could do, whether they could yank a man in and out  
11 of his status as a YCA offender, Mr. Strauss referred to the  
12 Borstal system. Well, the Borstal system was plainly  
13 explained to Congress, including the power to take a person  
14 from a youth facility and put him in a penal institution.  
15 Congress did not adopt that suggestion. They explicitly  
16 left it out.

17           When the initial Act was proposed in 1943, the  
18 American Law Institute proposed that the Bureau of Prisons  
19 be given the authority to determine YCA status. All the  
20 Judges in America screamed about that. That was rejected.  
21 Then they proposed that the Judges and the Bureau of Prisons  
22 share these powers. That was rejected. And what you had  
23 was a system in which only the Trial Court could impose a  
24 YCA sentence.

25           Now, bear in mind, in Dorszynski, this Court held

1 that that determination of the Trial Judge is not reviewable  
2 by this Court. Now, what the Bureau of Prisons is saying is  
3 that either they can countermand the judgment of the initial  
4 Trial Judge or that the second Trial Judge could do that.  
5 Now, if this Court could not review a YCA sentence, then  
6 certainly the Bureau of Prisons could not do it, nor could  
7 the second Trial Judge, nor did the second Trial Judge in  
8 this case intend or pretend to countermand the Youth  
9 Corrections sentence.

10 QUESTION: I suppose your position would be the  
11 same if the sentence were concurrent.

12 MR. SOLOVY: No, Your Honor.

13 QUESTION: Why not?

14 MR. SOLOVY: That is a good question. I am not  
15 surprised you asked.

16 QUESTION: Well, I have been waiting for you to  
17 get to it.

18 MR. SOLOVY: Well, that is because it is probably  
19 one of the most difficult questions in the case, and we have  
20 agonized over what the correct answer is, and correct not in  
21 the manner of espousing our position but intellectually and  
22 legally correct.

23 QUESTION: The question is, the question in this  
24 case is whether the later conviction automatically  
25 terminates the youth sentence, wholly aside from any



1 discretion of the Bureau of Prisons. That is the question I  
2 want an answer to.

3 MR. SOLOVY: Exactly.

4 QUESTION: Does it automatically terminate it when  
5 there is a concurrent sentence? Or does it give some  
6 discretion to the Bureau to do it?

7 MR. SOLOVY: The Bureau can have no discretion,  
8 and bear in mind when I give this answer, and I may be  
9 sailing away the rights of some poor indigent someplace --

10 QUESTION: But not yours.

11 MR. SOLOVY: Not mine. I don't represent him. We  
12 believe that in this case the concurrent sentence would take  
13 precedence over the Youth Corrections sentence, because  
14 otherwise you would be having the discretion of two Trial  
15 Judges in conflict. When the Trial Judge gives a YCA and  
16 the second Judge gives a consecutive sentence, there is no  
17 tension whatsoever. The first Judge in effect is deferring  
18 to the discretion -- the second Judge defers to the  
19 discretion of the initial Judge. But when you have a  
20 concurrent --

21 QUESTION: Well, there is a conflict in the sense  
22 that in order to sentence him as an adult, he has to make a  
23 no benefit finding, which is contrary to what the first  
24 Judge found.

25 MR. SOLOVY: Under different circumstances for a

1 different time and a different --

2           QUESTION: I know, but he nevertheless says at  
3 this very moment he will not benefit from being treated as a  
4 youth, and yet your argument is that he must be treated as a  
5 youth.

6           MR. SOLOVY: Justice White, I don't think those  
7 sentences are in conflict, because his no benefit finding  
8 takes effect only upon the expiration of the youth offender  
9 sentence.

10          QUESTION: Well, that is your argument.

11          MR. SOLOVY: Well, that is the clear --

12          QUESTION: You go ahead on your concurrent  
13 sentence --

14          MR. SOLOVY: All right, but that is the clear  
15 answer under the Congressional Act. However, as to the  
16 concurrent sentence, now you have two Courts of equal  
17 jurisdiction, and the second Court says, for this offense, I  
18 wish to impose a concurrent adult sentence. Now, I might  
19 point out the Bureau --

20          QUESTION: And he says no benefit.

21          MR. SOLOVY: No benefit. The Bureau of Prisons,  
22 according to their statistics, they say they have in the  
23 youth corrections facilities 175 persons who have  
24 consecutive and concurrent sentences so although the Bureau  
25 of Prisons -- it doesn't make any difference to them because

1 they mix adult and youth offenders up all together, so it  
2 makes no difference, but they treat them as a youth  
3 offender. I think the answer is that that person can be  
4 immediately incarcerated as an adult offender, because the  
5 second Judge has exercised his discretion that this person  
6 should be immediately incarcerated as an adult, and I think  
7 the question is not without its difficulty, because the  
8 first Judge made a determination that the offender would  
9 benefit, but the second Judge says no. They are both Judges  
10 of concurrent jurisdiction. The first Judge cannot veto the  
11 power of the second Judge; as in this case, the second Judge  
12 could not countermand the sentence of the first Judge.

13 QUESTION: Well, he didn't even try to.

14 MR. SOLOVY: He didn't, Justice White. That is  
15 exactly correct. The government quotes in its brief the  
16 language that he would not benefit further, but they omit  
17 the rest of it in which he says, "and I decline to sentence  
18 him under the Act," which is exactly what he was required to  
19 do under Dorszynski.

20 QUESTION: Let me give you an easier one.

21 MR. SOLOVY: Yes, I wish you would, Justice  
22 Marshall. You have been giving me awful hard ones.

23 QUESTION: Suppose this man had been acquitted  
24 originally, and then knifed somebody. Where would he go?

25 MR. SOLOVY: Well, he would go back before the

1 sentencing Judge and that sentencing Judge under Dorszynski  
2 would exercise his discretion --

3 QUESTION: No, he was acquitted.

4 MR. SOLOVY: No, but I mean, under the second --

5 QUESTION: He was acquitted --

6 MR. SOLOVY: Yes.

7 QUESTION: -- and he knifed somebody.

8 MR. SOLOVY: Correct.

9 QUESTION: He would go to an adult jail, wouldn't  
10 he?

11 MR. SOLOVY: Depending -- if he were under 22, the  
12 Trial Judge is mandated by law and by this Court's decision  
13 --

14 QUESTION: Right.

15 MR. SOLOVY: -- to make a no benefit finding.

16 QUESTION: And if he found that he was entitled to  
17 adult treatment, where would he go?

18 MR. SOLOVY: He would go to an adult --

19 QUESTION: So the only difference here that is  
20 instead of being acquitted, he was convicted.

21 MR. SOLOVY: The difference is, Justice Marshall --

22 QUESTION: Is that right?

23 MR. SOLOVY: -- that the first Judge made a  
24 judicial determination that Mr. Robinson would benefit from  
25 treatment under the Youth Corrections Act for a ten-year

1 period. No other Court --

2 QUESTION: Regardless of how many crimes he  
3 committed?

4 MR. SOLOVY: Well, the theory of --

5 QUESTION: Suppose he shot 18 people in six days?

6 MR. SOLOVY: Well, then I assume they would  
7 electrocute him, you know, fairly, promptly, but the theory  
8 of the Youth Corrections Act, and Mr. --

9 QUESTION: Could they do that under your theory?  
10 Could they electrocute him under your theory?

11 MR. SOLOVY: Well, if he keeps shooting people,  
12 either -- it depends upon your theory of penology. I might  
13 veer more towards the Bureau of Prisons in that case, but --

14 (General laughter.)

15 QUESTION: I thought you would.

16 MR. SOLOVY: Well, even lawyers like some  
17 protection.

18 QUESTION: What would happen -- Suppose a Youth  
19 Corrections Act, as it was here, was pronounced, sentence  
20 was pronounced, and then the Judge said, however, I am going  
21 to put you on probation. That will be hanging over you.  
22 And then he goes out and commits a murder or something  
23 else. Do you think the Youth Corrections Act sentence must  
24 be served first before the second conviction, sentence must  
25 be served?



1 MR. SOLOVY: Well, I think that is a situation  
2 that could quite frequently happen, and I think that the  
3 Judges normally in those situations will determine whether  
4 under the second offense the Judge is going to sentence him  
5 as an adult, and whether --

6 QUESTION: I am assuming that the second sentence  
7 then for murder --

8 MR. SOLOVY: Is as an adult?

9 QUESTION: -- is as an adult. Is the Youth  
10 Corrections Act sentence going to be a barrier?

11 MR. SOLOVY: Normally, the Trial Court Judges  
12 exercise good sense, so if he has a second Judge who has  
13 given this gentleman, let's say, ten years, and as as an  
14 adult, he would not reinstitute the Youth Act sentence. If  
15 he did, then he would have to determine which really was in  
16 progress, and I guess the answer might be that he might have  
17 to serve his Youth Corrections Act sentence, but of course,  
18 in this case, Mr. Robinson --

19 QUESTION: Do you think that is what Congress had  
20 in mind in this Act?

21 MR. SOLOVY: What Congress had in mind, it is very  
22 clear that if someone had the time, as I had, to read the  
23 Act and the legislative history from beginning to end, what  
24 Congress had in mind was that there was going to be a big  
25 surge of youth coming back from the war, because this Act

1 started being considered in the early forties, and because  
2 it got tied up with an adult indeterminate sentence that the  
3 Trial Judges didn't like, it got kicked off to 1949, and  
4 they said that the percentage of crime committed by youth  
5 far exceeded their percentage of the total population, so  
6 that what Congress was trying to do was to stop hard core  
7 criminals, and we are penalizing Mr. Robinson in a way. We  
8 are saying he is a hardened criminal, and a failure of the  
9 system, when the system really didn't exist.

10           Now, when he finally gets to Butner a year ago,  
11 and they finally give him the treatment that Judge Moultry  
12 said in 1974 that he should get, which was intensive  
13 individual therapy, he has reacted wonderfully. He has  
14 completed courses in real estate, basic math. He is a  
15 member of the band. He does his job. He interacts  
16 positively. That is what Congress wanted to do. They  
17 wanted to take the youth of America and save them from being  
18 repeater criminals.

19           This wasn't, as they said, a molly-coddling feel  
20 sorry for the underprivileged.

21           QUESTION: But any time a Judge, when he finds a  
22 youth offender is convicted of another crime, any time a  
23 Judge goes to sentence, if he thinks the status of the youth  
24 offender should be terminated and he should start serving an  
25 adult sentence, he can affect that by just sentencing him

1 concurrently.

2 MR. SOLOVY: Exactly, Justice White.

3 QUESTION: And so that option is always available  
4 in such cases like this.

5 MR. SOLOVY: That is correct.

6 QUESTION: Do you know if the government asked the  
7 Judge to do that in this case?

8 MR. SOLOVY: We, unfortunately, of course, were  
9 not appointed until we got to the Seventh --

10 QUESTION: Of course, the government's position is  
11 that you should say that automatically the youth offender  
12 status ends with the second conviction --

13 MR. SOLOVY: That is correct.

14 QUESTION: -- and wouldn't want to leave it just  
15 to the Judge.

16 MR. SOLOVY: That is correct, but --

17 QUESTION: But the Judge could control it. You  
18 agree with that?

19 MR. SOLOVY: Yes, no question, Justice White, that  
20 if he wanted to terminate a Youth Corrections Act sentence,  
21 the second Judge would enter a concurrent sentence.

22 QUESTION: Is a YCA defendant entitled to the good  
23 time credits and the two-thirds maximum?

24 MR. SOLOVY: None whatsoever, Justice Rehnquist.

25 QUESTION: So those are strictly for adult

1 offenders?

2           MR. SOLOVY: Poor Mr. Robinson, as I say, at the  
3 end of the first year of his ten-year YCA sentence, he gets  
4 this adult sentence. The Bureau of Prisons says, it is all  
5 over, Mr. Robinson. No more Youth Corrections treatment,  
6 which you never got in the first place, but you are not  
7 going to get it. And you are going to -- they concede his  
8 YCA sentence is going, so therefore you will serve your full  
9 eight years before you get your conditional discharge, but  
10 as for your adult sentence, you get no credit whatsoever,  
11 and that is why the government and the Bureau of Prisons is  
12 so nervous about this case, because really you cannot say  
13 that it makes penological sense to keep Mr. Robinson  
14 incarcerated for eight years under the Youth Corrections Act  
15 and not give him the treatment that Congress mandated, and  
16 at the same time house him in Marion as an adult offender  
17 with the hardest of criminals in the nation, and say, you  
18 don't get your good time credits, you don't get your time  
19 off, nothing.

20           QUESTION: But as soon as he starts serving his  
21 adult sentence, he will receive those.

22           MR. SOLOVY: No, not retroactively.

23           QUESTION: Not retroactively, but --

24           MR. SOLOVY: He won't start receiving them until  
25 January of 1982.

1           QUESTION: Which will be the date he commences his  
2 adult sentence.

3           MR. SOLOVY: Correct.

4           QUESTION: Do you think the Judges across the  
5 country are aware of the fact that a concurrent sentence  
6 will terminate the youth offender sentence?

7           MR. SOLOVY: I think the Trial Judges are aware of  
8 that. What they are not aware of, Justice White, is that  
9 the Judge found in Watts versus Hadden that the Youth  
10 Corrections Act is a myth, and that this system does not  
11 exist, because if you ask the Trial Court Judges what is  
12 going to happen to their youth offenders when they are sent  
13 to the facility, they think they will be segregated from  
14 adult offenders, they think that they will receive  
15 rehabilitative treatment. They don't think they are going  
16 to be mixed with adult offenders who are going to enforce  
17 peace and quiet, because that isn't the intention of the  
18 Judges.

19           And I am surprised that the Bureau of Prisons,  
20 with the state of litigation that is going on, in Brown  
21 versus Carlson, Watts versus Hadden, Johnson versus Bell,  
22 where they are being told continuously to bring your  
23 performance within the Congressional mandate -- I mean, it  
24 is 32 years later -- that they would have the temerity to  
25 bring this case before the Court and say, defer to our



1 expertise, and it would be impractical to operate the Act as  
2 Congress has mandated, when they have never tried.

3 QUESTION: Well, the cases you have referred to  
4 are not from this Court, are they?

5 MR. SOLOVY: No, but Dorszynski --

6 QUESTION: Right.

7 MR. SOLOVY: -- mandates segregation,  
8 rehabilitation. It is all set out in this Court's opinion.

9 QUESTION: And it also makes the finding on  
10 review.

11 MR. SOLOVY: Correct.

12 QUESTION: You still keep talking about poor Mr.  
13 Robinson, and all he did was stab a prison guard.

14 MR. SOLOVY: But poor Mr. Robinson is someone --

15 QUESTION: Poor Mr. Robinson wants youth  
16 treatment. Isn't that rather adult action to stab a guard?

17 MR. SOLOVY: Justice Marshall, his first offense  
18 could not have been more adult. It was a murder committed  
19 in the course of a robbery. I don't think that any human  
20 being should be written off.

21 QUESTION: I just object to your using the word  
22 "poor."

23 MR. SOLOVY: All right. Well, let us say --

24 QUESTION: I mean, don't make me cry about it.

25 MR. SOLOVY: Let us say that it is my position

1 that Congress has mandated, whatever adjective we ascribe to  
2 Mr. Robinson, that he was to receive certain treatment, and  
3 that was rehabilitation and correction so that he would not  
4 be a threat to society.

5           QUESTION: And that comes under the Act of  
6 Congress.

7           MR. SOLOVY: Yes, it comes under the Act of  
8 Congress. We feel that if the government does not like the  
9 way this Act operates, if they want to run the Youth  
10 Corrections Act the way they want to run it as against the  
11 way Congress said it should be run, if they think that it is  
12 proper to mix adult offenders with youthful offenders, then  
13 we believe that that question should be put before Congress,  
14 and it should not be put before this Court, as this Court  
15 stated in Dorszynski.

16           If the Court should hold that this second sentence  
17 somehow revoked Mr. Robinson's youth offender status, then,  
18 as we set forth in our brief, you have serious  
19 constitutional issues of equal protection, double jeopardy,  
20 and due process. We do not believe that the Act has to be  
21 interpreted in a manner which raises those issues. We  
22 believe that the Seventh Circuit was clearly correct that  
23 the Third Circuit, which had issued these wonderful  
24 decisions in this area up to Thompson versus Carlson, was  
25 incorrect in its ultimate premise.

1           In Thompson versus Carlson, the Third Circuit  
2 clearly said to the Bureau of Prisons, you cannot  
3 unilaterally revoke this man's status. You do not have it  
4 within your power. As much as the Bureau of Prisons would  
5 like to have that power, they do not have it. The Courts  
6 have uniformly held that, other than the Fourth Circuit's  
7 decision in Outing. That is the only decision, and an early  
8 decision in Abernathy, which I do not think adequately  
9 addressed the issues, but all the other Courts have said,  
10 including Thompson versus Carlson, you do not have that  
11 power. Thompson versus Carlson said, though, that the  
12 second Judge in imposing the sentence terminated the first  
13 youth corrections sentence, and we believe the Seventh  
14 Circuit was clearly correct in holding that that was not the  
15 effect of the second sentence.

16           Indeed, the consecutive adult sentence may have  
17 been imposed in Mr. Robinson's case, as the Seventh Circuit  
18 pointed out, precisely because he was serving then a youth  
19 corrections sentence, and the Court might have imposed a  
20 youth corrections sentence otherwise. Thank you.

21           CHIEF JUSTICE BURGER: Do you have anything  
22 further, Mr. Strauss?

23           ORAL ARGUMENT BY DAVID A. STRAUSS, ESQ.,

24           ON BEHALF OF THE PETITIONER -- REBUTTAL

25           MR. STRAUSS: Mr. Chief Justice, one or two

1 points.

2           Justice White, the reason that the Judge's  
3 sentencing an offender to a concurrent adult sentence  
4 doesn't solve the problem is, of course, the Judge might  
5 think, as he evidently did in this case, that the offense  
6 was sufficiently serious that the additional punishment of a  
7 consecutive sentence was necessary.

8           QUESTION: I understand. You would rather have an  
9 automatic rule than have to convince the Judge. I can  
10 understand that.

11          MR. STRAUSS: Well, the Judge in this case didn't  
12 take any convincing. He thought a consecutive sentence --  
13 well, we don't know if he took convincing or not, but in any  
14 event he thought a consecutive sentence was necessary.

15          QUESTION: Well, I know, but if a concurrent  
16 sentence automatically terminates a youth offender, all a  
17 Judge has to say is, he could say, ten years as an adult,  
18 and the sentence to begin immediately, the youth offender  
19 status is terminated.

20          MR. STRAUSS: Well, the Judge could --

21          QUESTION: That is equivalent to a concurrent  
22 sentence.

23          MR. STRAUSS: That's right. Of course, that would  
24 prohibit the Judge from sentencing a consecutive sentence, a  
25 consecutive maximum sentence under the --

1           QUESTION: I agree with you.

2           QUESTION: But in this case, exactly what did the  
3 Judge say?

4           QUESTION: Your position is that you want an  
5 automatic rule to prevent the Judge from putting on a  
6 consecutive sentence.

7           MR. STRAUSS: We think if the Judge puts on a  
8 consecutive sentence, that it would be grossly --

9           QUESTION: That the sentence should start right  
10 now.

11          MR. STRAUSS: It should permit the Bureau not to  
12 have to treat him as a YCA offender anymore, now that YCA  
13 treatment is inappropriate for him.

14          QUESTION: Exactly what did the second Judge say  
15 with respect, if anything, to no benefit?

16          MR. STRAUSS: He said that the offender will not  
17 benefit any further under the provisions of the YCA, and  
18 sentenced him to an adult term, and also recommended that  
19 the offender be transferred from the Federal Youth Center  
20 where he had been confined to a more secure institution.

21          QUESTION: What page is that?

22          MR. STRAUSS: We paraphrased at Page 6 of our  
23 brief. It is also in the judgment and commitment order  
24 which we have lodged with the Court.

25          QUESTION: Well, that is just practically the same



1 as saying, I hereby terminate the --

2 MR. STRAUSS: Well, we don't rely on the Judge's  
3 statements. What we rely on is the fact that an adult  
4 sentence was imposed, and under the Act it now makes no  
5 sense to --

6 QUESTION: You want an automatic rule.

7 MR. STRAUSS: -- as a YCA offender.

8 QUESTION: May I ask why you don't rely on the  
9 Judge's statement?

10 MR. STRAUSS: Well, we think even if the Judge  
11 hadn't made the statements that it would make no sense to  
12 take an offender who is an adult offender in the  
13 contemplation of the YCA and continue to treat him as if he  
14 were a YCA offender.

15 QUESTION: So you want the authority to be put in  
16 the Bureau of Prisons --

17 MR. STRAUSS: We think --

18 QUESTION: -- to revoke the YCA status?

19 MR. STRAUSS: No, it is not -- to treat him as an  
20 adult offender.

21 QUESTION: Do you or don't you?

22 MR. STRAUSS: We do want the Bureau to be able to  
23 say in cases like this, we are going to treat this person as  
24 an adult.

25 QUESTION: Where do they get that authority to

1 overrule a Judge?

2 MR. STRAUSS: I think that is a misconception that  
3 the Respondent has been repeating. This isn't a matter of --

4 QUESTION: Well, isn't it true?

5 MR. STRAUSS: Well, it is not a matter of revoking  
6 or overruling or countermanding a sentence. The question  
7 is, what is the sentence.

8 QUESTION: Well, the Judge says Youth Corrections  
9 Act.

10 MR. STRAUSS: That's right.

11 QUESTION: And the Bureau of Prisons says no  
12 more.

13 MR. STRAUSS: After the second adult --

14 QUESTION: That isn't counteracted?

15 MR. STRAUSS: That is right, because the question  
16 is, what does the Youth Corrections Act --

17 QUESTION: Well, where do you get that authority?

18 MR. STRAUSS: The authority is already implicit in  
19 the Youth Corrections Act sentence. It is our view that  
20 Congress never intended a Youth Corrections Act sentence to  
21 be so inalienable that even --

22 QUESTION: Did the Judges know that?

23 MR. STRAUSS: The first sentencing Judge may very  
24 well have known that.

25 QUESTION: May. Do they?

1 MR. STRAUSS: We just don't know what the first  
2 sentencing Judge thought.

3 QUESTION: Well, where does the Bureau of Prisons  
4 get the right to overrule a Federal District Judge?

5 MR. STRAUSS: The Bureau of Prisons is not  
6 overruling a Federal District Judge.

7 QUESTION: It is just changing it.

8 MR. STRAUSS: It is not even changing it. The  
9 Federal District Judge gave him a YCA sentence. Our problem  
10 is, what does that entail? Specifically, does it entail  
11 continuing to treat him as a YCA offender when it makes no  
12 sense, and our view is, it does not entail that.

13 QUESTION: What you are saying, in effect, is that  
14 the second sentencing Judge is the one who has revoked or  
15 taken the action which terminates the YCA sentence.

16 MR. STRAUSS: We think the second sentencing  
17 Judge's decision was what made it no longer appropriate to  
18 treat him as a YCA offender.

19 QUESTION: I thought you abandoned that.

20 MR. STRAUSS: His decision to sentence him as an  
21 adult.

22 QUESTION: Well, did you abandon it or not?

23 MR. STRAUSS: Did I abandon what, Justice  
24 Marshall?

25 QUESTION: Relying on the Judge's action.

1           MR. STRAUSS: We are relying on the adult  
2 sentence, not on the Judge's statements that went with the  
3 sentence.

4           QUESTION: Do you rely on the Judge, the statement  
5 that the Youth Corrections Act is no longer in force? Do  
6 you rely on that or not?

7           MR. STRAUSS: The Judge sentenced him to an adult  
8 sentence, found that he would not benefit from YCA  
9 treatment. That is --

10          QUESTION: Do you rely on the Judge's statement?

11          MR. STRAUSS: The Judge made a statement that the  
12 offender would --

13          QUESTION: Do you rely on it or not?

14          MR. STRAUSS: We rely on his sentence, on the  
15 imposition of the adult sentence.

16          QUESTION: And what he said.

17          MR. STRAUSS: In order to impose that sentence, he  
18 had to make a certain finding.

19          QUESTION: And you rely on that.

20          MR. STRAUSS: Well, we rely on the sentence which  
21 includes the finding, but it is the sentence we rely on, not  
22 his extra statements.

23          QUESTION: I am a little puzzled. The language  
24 you quoted was in 1975 or 1977?

25          MR. STRAUSS: 1975.

1           QUESTION: 1975. So you say he did make the  
2 equivalent of a no benefit finding in 1975.

3           MR. STRAUSS: Yes, he made a no benefit finding  
4 explicitly.

5           QUESTION: Yes.

6           MR. STRAUSS: The 1977, there is no --

7           QUESTION: In 1977 he did not do it.

8           MR. STRAUSS: There is none in the judgment and  
9 commitment order, but the Respondent concedes he is no  
10 raising that here, so for purposes of this case that has to  
11 be regarded as a valid adult sentence.

12          QUESTION: Can you tell me in 1975 what was the  
13 maximum sentence which the Trial Judge could have imposed  
14 for the crime he was found guilty of?

15          MR. STRAUSS: Ten years.

16          QUESTION: So if he had given a concurrent  
17 sentence of ten years --

18          MR. STRAUSS: That's right.

19          QUESTION: -- that would have solved the problem.

20          MR. STRAUSS: Well, not quite, I suppose, because  
21 he had more than four and a half years left on his YCA  
22 sentence at that point.

23          QUESTION: Well, pretty close to solving it.

24          MR. STRAUSS: Pretty close to solving it. Of  
25 course, that would have required the Judge to jiggle around



CERTIFICATION

1 his sentences in order to take care of the problem.

2 QUESTION: Well, the Bureau immediately treated  
3 him as an adult.

4 MR. STRAUSS: That's right.

5 QUESTION: And apparently said, ten years is  
6 enough.

7 MR. STRAUSS: Ten years --

8 QUESTION: As an adult.

9 MR. STRAUSS: Yes, the Bureau thought that his YCA  
10 sentence plus the consecutive sentence --

11 QUESTION: So it did not solve the problem.

12 MR. STRAUSS: Thank you.

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

15 (Whereupon, at 2:17 o'clock p.m., the case in the  
16 above-entitled matter was submitted.)

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