OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JOHN J. McCARTHY, Petitioner V. GEORGE BRONSON, WARDEN, ET AL.

CASE NO: 90-5635

PLACE: Washington, D.C.

DATE: March 25, 1991

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN J. McCARTHY, :

Petitioner :

v. : No. 90-5635

GEORGE BRONSON, WARDEN, ET AL. :

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Washington, D.C.

Monday, March 25, 1991

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

APPEARANCES:

CHRISTOPHER D. CERF, ESQ., Washington, D.C.; on behalf of the Petitioner.

RICHARD BLUMENTHAL, ESQ., Attorney General of Connecticut, Hartford, Connecticut; on behalf of the Respondents.

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P R O C E E D I N G S

(10:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in No. 90-5635, John J. McCarthy, Petitioner, versus George Bronson.

Mr. Cerf.

ORAL ARGUMENT OF CHRISTOPHER D. CERF

ON BEHALF OF THE PETITIONER

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

While an inmate in a Connecticut prison, petitioner was sprayed with tear gas and forcibly removed from his cell. On the basis of that single episode, he filed a 1983 action against respondents, who are various officials and guards at the facility. The case was referred to a Federal magistrate, who conducted an evidentiary hearing and on that basis recommended that the case be resolved against petitioner.

QUESTION: What was he seeking, Mr. Cerf? Damages?

MR. CERF: He sought both damages and injunctive relief, Justice White.

The only question presented in this case is whether the reference was proper. In other words, whether a complaint based on a single episode of unconstitional --

unconstitutionally excessive force qualifies as a, quote, "prisoner petition challenging conditions of confinement" within the meaning of section 636(b) of the Federal Magistrate's Act, and is thereby subject to reference without the party's consent.

QUESTION: Mr. Cerf, do we take the case with the agreement of both parties that the defendant waived jury trial here?

MR. CERF: That issue is not before the case -- before the Court, Justice O'Connor.

QUESTION: So we decide it as though there was a waiver?

MR. CERF: That is correct. Now, I don't think, Justice O'Connor, that the fact that there was a waiver of the jury right here is relevant to the argument we make under the Seventh Amendment. And perhaps I should address that.

We think, as an initial matter, that by far the most natural reading of the statutory language is to construe the phrase "prisoner petitions challenging conditions of confinement" to refer to ongoing circumstances or practices, as distinct from a fully consummated, isolated event. We think that conforms with common usage, with this Court's use of the phrase, and with the use of the phrase by Congress in various other

statutes.

Whatever the outer limits of the definition may be, we think it strains the common meaning beyond the breaking point to suggest that a guard, by virtue of beating one prisoner on one occasion, thereby creates conditions of confinement.

But moving to your Seventh Amendment question, Justice O'Connor, in this case respondent has conceded that the magistrate is not empowered to conduct a jury trial at all in cases referred under the prisoner petitions clause, indeed in any case referred without the consent of the parties. At the same time, cases -- because of the rules governing the availability of injunctive relief, cases based on a simple, fully consummated episode, tend to be simple damages actions for which the party is entitled to a trial by jury under the Seventh Amendment.

Now, in light of respondent's concession, we think it is just highly unlikely that Congress would have intended to authorize the nonconsensual referral of an entire class of cases for which the jury trial rights so clearly attaches.

QUESTION: You can prevent that by demanding a jury trial, can't you?

MR. CERF: I -- that is correct. And

respondent's position on this, of course, is that Congress wrote a statute by which prisoners are told that entirely against their will they may have a case referred for trial before a magistrate, never bothered to mention that they could entirely avoid the reference simply by timely invocation of a jury trial right.

QUESTION: But in this particular case, if the respondent is right, it worked the way Congress wanted it to. Your client had his case referred to a magistrate. He could have prevented the referral by demanding a jury trial. He didn't.

MR. CERF: Chief Justice Rehnquist, I would question that that was how Congress wanted it to work. I think that Congress chose the phrase "conditions of confinement" for a reason. It didn't say, all prisoner petitions. It's -- it used what amounts to a term of art.

Now, what respondents are trying to sell here is the notion that all prisoner cases are governed under the case, and we -- are governed under the clause. And we think that's unlikely in light of the backgrounds and with amendment concerns.

Again, Mr. Chief Justice, we are not asserting an independent Seventh Amendment claim here. What we are suggesting is that, as an interpretive device, the Seventh Amendment is quite useful. And we think that the

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appropriate test here is that to the extent that a complaint, not at the time that a complaint is filed, but at the time that the case is actually set for trial, seeks and is appropriate for injunctive relief. In other words, it challenges an ongoing or recurrent circumstance or practice that in fact is a petition challenging conditions of confinement.

If, on the other hand, the only complaint at the time that the case gets to the point of trial is that an isolated event occurred, essentially a constitutional tort. I don't think that does qualify under the language.

QUESTION: If you can waive a trial and you can waive a jury, why can't you waive this?

MR. CERF: I suppose one can waive it, Justice Marshall, in the following sense. Under section 636(c), one can consent in any event the trial before a magistrate. There was no consent here, at least as the case comes to the court.

QUESTION: So what do you interpret from that, a waiver?

MR. CERF: That's the -- Congress deemed that consent rather than a waiver, but in effect it has the same -- it has same consequences.

QUESTION: What's so sacred about this that you can't waive it?

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MR. CERF: I'm not suggesting that the right can't be waived. What I am suggesting here is that Congress wrote a statute that says independent of the choice of litigants, it may be referred to magistrates entirely against their will. And again, we think that that is a rather unlikely thing for it to have done, given that magistrates, as all parties before the court now concede, take the position that magistrates are not empowered to conduct a jury trial.

QUESTION: There's a certain incongruity it seems to me in -- in your interpretation. Perhaps it's not an incongruity, but it seems strange at first blush. And that is that what you call a simple damages action based on a one-time thing would go to the district judge. And a major prison structure claim that things are all out of whack at the prison, could go to the magistrate.

MR. CERF: Respondents make the -- very much the same argument, as did the court below. And quite frankly, Mr. Chief Justice, I think it rests on some questionable premises. I -- I don't think it could be said that as a class, cases that qualify as conditions cases are more serious than cases based on a single, isolated episode. It's always difficult of course to rank constitutional violations. But to suggest that a claim in which a prisoner was beaten to death is somehow less serious than

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even a broad based class action seems to me not to be -- not surprising.

QUESTION: Well, it's not so much the seriousness of the event, but the amount of discretion that's called for. It seems to me that if you were going to allot these cases by the confidence in the judgment -- presumably you have more confidence in the judgment of a district judge than of a magistrate -- you would say that if you're trying to restructure a court -- a prison system, that kind of a case you'd trust to the discretion of a district judge, whereas you might not trust it to the discretion of a magistrate.

MR. CERF: I think in fact the incongruity implicit in the question is somewhat overstated. For example, we're not saying that only class actions qualify under our definition. Not at all. And in addition, Congress authorized the referral of all cases, including those based on specific episodes of misconduct under pretrial and the dispositive motions provisions of the act. And historically, 96 percent in 1990 of -- of prisoner civil rights cases are disposed of even before trial. I think that suggests, Chief Justice Rehnquist, a high level of confidence in magistrates' ability to handle all kinds of cases of all levels of complexity. In addition --

QUESTION: Mr. Cerf, can I interrupt a minute? The -- you're making a plain language kind of an argument. You say that the normal meaning of conditions of confinement suits your description of it. But if I understand your description, if I have a claim that, as a prisoner, for 1 week I was thrown into a dank cell with no toilet facilities, with rats -- abysmal conditions -- for a week, and I bring suit about that one incident. I don't claim that it's general in prison. I don't claim they've done it to me before or will do it to me afterwards. I'm just complaining about that 1 week. You say that is not a suit that relates to conditions of confinement?

MR. CERF: I would say quite frankly, Justice Scalia, that that is the most difficult category of cases to get -- to categorize, wherein you have what I suppose could be described as a past conditions case under any sort of conventional understanding of the phrase --

QUESTION: Well, why do you say it's a past conditions case? You say it's a conditions case only if it's on going and continuing.

MR. CERF: Well, I'm saying that as you posited the hypothetical, Justice Scalia, there was a condition of confinement in the conventional sense of the word in that for a period of time one was exposed to an unconditional circumstance. Under your hypothetical, however, that

circumstance has abated and everybody agrees to that.

I think frankly I found no such cases in the reported cases. I suspect that's in part because damages actions such as those may very often shake out in qualified immunity grounds. Given the rarity of the case, I think all that would be needed is a rule, and I would err on the side of administrability and say that the cleanest line here -- and again Congress required that some line be drawn -- the cleanest line here would be to say that complaints that at the time of trial seek to have tried an issue that there's an ongoing or at least recurrent circumstance, would qualify under conditions of confinement.

QUESTION: Gee, but if clean lines is the criterion, I think -- I think you lose, because that's the main argument that the other side has going for it -- that it's a lot of trouble to draw any of these lines between ongoing and non-ongoing and so forth.

MR. CERF: I don't --

QUESTION: You can say that any complaint about how you're treating -- treated in prison relates to a condition of your confinement. That's a nice clean line.

MR. CERF: It may be a clean line, Justice Scalia. I don't think it's the line that Congress drew. And indeed I think that goes to the -- to the very nub of

the case here. Congress simply didn't write a statute that said, all prisoner litigation may be referred to magistrates.

QUESTION: Well, but, Mr. Cerf, in the case of Preiser v. Rodriguez, this Court talked about the term "conditions of confinement" and gave some examples there that looked very much like this kind of case, and said that was a matter of a condition of confinement. And I suppose that Congress had in mind trying to alleviate the administrative -- or the burdens on the lower courts of handling prisoner petitions and letting as many of them go to a magistrate as possible. And it would appear that under Preiser we could give a broader interpretation of the term "conditions of confinement."

MR. CERF: Let me try to address both of those points, Justice O'Connor. As to Preiser, there's certainly no evidence in the legislative history that Congress was even aware of the Preiser case, much less that it patterned the statute after it. Much less, as I recall in the case, what was at issue there was whether a prisoner who was challenging the deprivation of good time credits could escape the exhaustion requirements of habeas by filing the suit under 1983. And Congress -- and the Court held that to the extent the challenge was to the fact or duration of confinement, exhaustion was required.

To the extent it went to conditions of confinement, habeas -- one could bring the claim under 1983.

But because the case so clearly fell in the first category, the court had no occasion to actually define what it meant by conditions of confinement. And indeed it the Court goes back and reviews the cases cited as examples in the Preiser decision of so-called conditions case, I think it will find that all of them, at least arguably, fall within the definition that we propose here. In one sense or another, they concerned an ongoing circumstance or practice.

The most difficult case for us is the Hainey case. I will concede that, but I think at least arguably falls in our -- in our category.

QUESTION: Suppose the prisoner alleges that if the officials will not -- are not enjoined, it is likely the conduct will be repeated. Does that turn it into a conditions of confinement case?

MR. CERF: I think it does, Justice Kennedy. In -- in that case, as in any --

QUESTION: But don't you almost always have to allege that if you're going to ask for an injunction?

MR. CERF: Well, that's correct, and I think that, again, the issue is not what is alleged in the complaint, because the decision is not made at that point.

But after the completion of pretrial proceedings that clarified and refined the issue that must actually be tried and the issue is actually set out, then, if at that point, the plaintiff has set out the essential predicates of injunctive relief, and as he suggests they are, that there is an ongoing circumstance or a reasonable likelihood they will recur, I believe that then in fact is a challenge to conditions of confinement.

QUESTION: I suppose this is a -- quite a routine and frequent allegation in order to support the claim for injunctive relief, is it not?

MR. CERF: It is a routine allegation. There are many, many cases. Whitley v. Albers is the classic paradigmatic example where only damages was sought. And again, that would not qualify as a conditions case under --

QUESTION: And I -- and I assume you have to make some such allegation if you're going to ask for injunctive relief.

MR. CERF: You would need to indeed. These are often pro se complaints, and I think that some benefit of the doubt may be given to the claimant in many of these cases, but again an injunction was -- an injunction was asked for here. And I don't think that that is controlling as to whether or not it's a conditions case,

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because at the time that this case went to trial as a result of the various pretrial proceedings, which again are conducted by the magistrate, it was absolutely clear that there was no injunctive claim left in the case. Indeed, the assistant attorney general had argued unequivocally on pretrial motions that, quote, "It does not appear how any injunctive relief would be appropriate to this case." There have been an effort to admit the various prison regulations. The petitioner had made that effort on the eve of trial, and the magistrate had kept them out on the view that this case was about a single incident back in 1983.

So, again, just to make sure our position is clear on this, Justice Kennedy, it's not the allegations in the complaint that are controlling. It is what is the issue that must actually be tried.

By the way, that is a judgment that would need to be made in any event. In any case on the eve of trial there must be some kind of pretrial decision as to what issues must actually be tried.

QUESTION: Well, isn't there one further wrinkle to it, and that is as long as the damage action was kept alive, there could never be a reference in what I would imagine was the run-of-the-mill case in which there's a request for damages as well as an injunction. There could

never be a reference except at the potential cost of two trials.

MR. CERF: Well --

QUESTION: So as a practical matter, it seems to me what you're saying is except in the unusual case in which there is not request for damages based on the past incidents of the practice in question, there never can be a reference.

MR. CERF: I -- that -- that's not our position, Justice Souter.

QUESTION: But why doesn't it follow from your position? Because it seems to me the only way out of it would be for the court to say, well, we'll take a chance that when the injunctive proceedings are over they'll drop the damage claim. And if the -- if the court doesn't want to take that chance, then the court is going to face two trials or the potentiality of two trials in every instance.

MR. CERF: I think that would not be the consequence, and if I -- if I might try to explain that. Because of background Seventh Amendment concerns, we do think that the prisoner petitions clause is a rough proxy for cases that seek and are appropriate for injunctive relief.

At the same time, it is not a perfect fit. For

reasons discussed previously, if someone includes an injunctive claim in what is otherwise -- what ought properly to be a damages suit -- we think the appropriate path is to have the injunctive claim dismissed prior to trial and to treat it as a specific episodes case.

And conversely, to get to your example, if somebody brings a case that is a classic conditions suit or is a conditions suit under our definition and includes an associated damages claim, I do think that nonetheless qualifies as a prisoner petition challenging conditions of confinement within the meaning of the act. I don't think, however, that any imperfections in the fit undermine the basic point.

And that basic point is it is simply implausible to believe that Congress would have even authorized the referral of an entire class of cases for -- to which the right so clearly attaches without mading -- making some provision for the magistrate to actually conduct a jury trial.

QUESTION: Excuse me, I -- it doesn't seem to me you've answered Justice Souter's concern. It isn't the fit he's concerned about. It's the fact that even when the defendant -- when the plaintiff is willing to waive the jury trial, no good comes of this provision whatever so long as there's a claim for damages. Because you must

try that claim for damages before a judge. So what's the good of trying -- being able to try the injunction portion before a magistrate?

MR. CERF: Well, the good of it --

QUESTION: So, in every case where there -- where there's a damage claim, you may as well not have the provision.

MR. CERF: I -- again, I -- let me be clear. If there is a damages claim and no jury trial right, and the damages claim is attached to or associated with a conditions claim, we think the magistrate can hear the case. That was the point I was trying to make a moment ago.

QUESTION: Oh, well, why is that?

MR. CERF: I think that in a sense you have a result that's driven by the statutory language. You have a statute that says conditions of confinement, and if you have a case challenging what everybody would agree to be conditions of confinement -- for example, petitioners generally are not being given enough food and a subclass of the class action alleges that as a result of the inadequate caloric intake they are -- have suffered some damages for which they want compensation -- I think that the language drives that result. And I think that would qualify as a prisoner petitions case.

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Again, if there is a time of jury trial demand, then either severance would be the -- mandated by the Constitution or the whole case would be tried -- tried by the judge. But that's the imperfection of the fit I was trying to address before. I --

QUESTION: I didn't understand that to be your position. Is that the position you took in your brief? I --

MR. CERF: That's the position we took in our reply brief, Justice Scalia.

I do want to make one point in response to an argument raised by respondents. They suggest that rather cataclysmic results will -- will flow from the issue before the Court today. And I want to suggest to the Court that in my estimation that is not -- not right. All cases of any stripes -- specific episode cases or conditions cases -- may still be referred to the magistrates, and the vast majority of such cases shake out before trial.

Indeed, in 1990, about 4 percent of cases actually needed to be tried. Of those, many of course may be tried pursuant to the consent of the parties. Still others will satisfy our definition. And still others must be tried by the district court in any event to the extent there is a timely jury trial demand. As a -- as a

practical matter, the number of cases actually affected by the decision today is relatively small.

But in any event, I just don't think it's correct to suggest that any interpretation that results in more cases being referred to Federal magistrates is necessarily in accordance with Congress' broad objectives. In expanding the power of Federal magistrates over the years, Congress has been quite aware of the constitutional concerns associated with such delegations and has been appropriately cautious. In our estimation, our view better accommodates both that historic caution and Congress' general objective of expanding the power of magistrates in some, but by not means all, classes of cases.

In the end, this is a relatively straightforward statutory case. We think that the plain language at the very least tips in our favor, and accordingly it is respondents' burden and not --

QUESTION: Mr. Cerf, can I -- can I ask you a couple more questions about your line?

MR. CERF: Sure.

QUESTION: I know this was raised in Justice Scalia's question so -- the specific cases referred to in Preiser, do you say each of them, except arguably Haines, was a case that would meet the conditions of confinement

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definition: the deprival of legal materials for the particular petition, the inability to -- with the one religious objection in the other case?

MR. CERF: Yes, I do. And I -- let me try to recall what those cases were. But the Cooper v. Pate case, for example, was a claim that a petitioner had been deprived of the Koran, and as I read the decisions in the lower courts, the claim was he was still being deprived of it, and therefore, there was sort of an ongoing claim for which an injunction seems to be quite an appropriate remedy.

As I recall the --

QUESTION: And your line is that if he'd complained of having been deprived of it 6 months ago, but then he eventually got it, it would not longer be a conditions of confinement claim?

MR. CERF: That is my claim, unless, of course -- and this is a judgment that would need to be made in any case -- unless of course he had satisfied the City of Los Angeles v. Lyons test of indicating some real and immediate threat that he would --

QUESTION: Yes.

MR. CERF: -- again be exposed to that unconstitutional conduct.

QUESTION: And conversely, in the case before

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us, if the prison had a rule that said when prisoners refuse to cell, it's appropriate to use tear gas to get them out of their cells. Which is it then?

MR. CERF: If there's a rule that's saying when a prisoner refuses to leave the cell, then it's appropriate? Again, a judgment would need to be made in that case as to whether there was some reasonable likelihood that that regulation would be applied to the person who -- who was bringing the case.

And I -- I do want to suggest --

QUESTION: Well, it had been applied, as it has here. I mean -- see the thing that's different about this case is there's no such rule. But would it be a different case if there were a rule and it had been applied in this case?

MR. CERF: It probably would in this sense, Justice Stevens. I think the City of Los Angeles test is going to be applied more generously in the prison context. When you're talking about the citizens in a city at large, it's somewhat difficult to actually demonstrate to the satisfaction of a court a real likelihood that one will again be exposed to even an ongoing regulation, policy, or practice.

If you have a regulation in a prison context, one can think of extreme examples. But in the typical

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case, a prisoner, not being able to leave of course, has some relatively high likelihood he or she will be exposed to that regulation and application.

QUESTION: Well, isn't -- isn't the -- isn't the prisoner the master of his own complaint? Even if there is a regulation, suppose he doesn't challenge it? He doesn't care about the regulation. He just cares about what he's been subjected to. Are you saying that even if he doesn't ask for elimination of the regulation, even if he -- all he asks for is money -- is money damages for the past violation, it would still be a condition --

MR. CERF: No.

QUESTION: -- of confinement case by virtue of the mere existence of the regulation?

MR. CERF: Not at all. No.

QUESTION: Okay.

MR. CERF: What I am suggesting is one needs to take in -- take into account what is being challenged and the nature of the relief and the nature of the claim. All of those are --

QUESTION: So it's up to him. He can make it a condition of confinement case by objecting to the regulation, or if he doesn't want to object to the regulation -- just wants to object to the application of the regulation to him, it becomes not a condition of

confinement case.

MR. CERF: Well, to a degree that true of any litigant I would think, Justice Scalia. One can -- in the City of Los Angeles, that happened not to be a class action. I believe that damages, at least as the case came to the court, were not at issue. One structures one's complaint to get the relief that one wants. But I don't think that that is --

QUESTION: Well, but Mr. -- let me go a step further. Supposing the complaint is I had inadequate dental care. I had a tooth ache on Friday and I couldn't get a dentist. And that's the sole charge, a single incident. And the defense is we have a regulation that the dentist is available on Monday, Tuesday, and Wednesday only -- something like -- so the real issue turns into the regulation. Is that the conditions of confinement or isolated incident?

MR. CERF: I suspect that would be -- if I understand the hypothetical -- that would be a conditions case. I mean, I think the judgment there would be is there a reasonable likelihood that that practice is going to be applied to this prisoner. And I would think it almost inescapable that it would be.

QUESTION: But he doesn't really care about he rule. All he cares about his own toothache.

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MR. CERF: Well, if he's -- if he's -- let me be absolutely clear. If he's only seeking damage --

QUESTION: Yes.

MR. CERF: -- he said for 4 days I had -- I had a toothache and I suffered terrible pain and I want compensation for that, and that's all he asking for, no, I don't think that is a conditions case.

QUESTION: Even though the defense is the reason he didn't get it is because we have this standard regulation that this is the way we treat all prisoners. They don't get the dentist except on certain days.

MR. CERF: That's -- that's correct, Justice Stevens. That's the line that I would --

QUESTION: Your rule then is simply a rule of pleading. If he -- if he is foolish enough to mention the regulation, we've got a conditions case. If he is laconic enough just to mention what happened to him on Friday, we don't. I mean, it's just a matter of pleading.

MR. CERF: Well, I don't suggest that it's only a matter of pleading, Justice Souter. I must however take the position that pleading is relevant to the analysis, as it is in the case of any litigant.

QUESTION: But if that's what --

QUESTION: It might turn in to be a conditions case in any event, because if the prison lost in Justice

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Stevens' hypothetical, I'm sure it would be collateral estoppel. And so it becomes a conditions case anyway.

MR. CERF: It may become that. I think that the key point in time here is at the time that the decision must be made, that is, when the case is about to go to trial. At that point, the magistrate has a clear sense of what the issues are to be tried. Now, if at that point he understands the defense is being raised and the complaint -- what's left of the complaint after pretrial motions practice if in fact the challenge is to an ongoing or recurrent circumstances, then I think that is a challenge to conditions of confinement.

If I might, Mr. Chief Justice, may I reserve the balance of my time?

QUESTION: Yes, you may, Mr. Cerf.

General Blumenthal, we'll hear now from you.

ORAL ARGUMENT OF RICHARD BLUMENTHAL

ON BEHALF OF THE RESPONDENTS

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

The most reasonable, logical, and workable interpretation of this statute is the one that was adopted by the Second Circuit which would include all grievances occurring during prison confinement. It is supported by the statutory text and legislative history. It doesn't

undercut the Seventh Amendment. It offers full protection to any prisoner's Seventh Amendment right. And it fulfills most importantly what was Congress' purpose in the 1976 amendments, which was to broaden the authority of the magistrates and ease of the burden of the Federal district court workload and, equally importantly, broaden the discretion of Federal judges to refer matters to magistrates.

QUESTION: You say the Seventh Amendment right would be protected I suppose just by the prisoner demanding a jury trial in a damages case?

MR. BLUMENTHAL: Like -- like every litigant --

QUESTION: Is that right?

MR. BLUMENTHAL: That is correct, Justice White. Like every litigant, a prisoner has the burden of demanding a jury trial within the limitations of rule 38.

QUESTION: And so there would be no reference?

MR. BLUMENTHAL: If there were a jury trial demand, timely made, there would be no reference.

QUESTION: And to that extent the language of the act would just be beside the point.

MR. BLUMENTHAL: It would not be beside the point, with all due respect, Justice White. It would enable a reference in the absence of a jury demand --

QUESTION: Well, in those -- in the damages case

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where there's a demand for jury trial, the aim of Congress just wouldn't be effective then?

MR. BLUMENTHAL: Well, I think we have to assume that Congress knew that -- and the cases are pretty clear on this -- that pursuant to (b)(1)(B), there cannot be a reference for a jury trial by the magistrate. And we don't differ at all with the petitioner on that point. But we also I think have to assume that Congress had in mind not the difference between a jury trial case and a nonjury trial case, but the dichotomy that, as was referred to earlier, exists under Preiser v. Rodriguez. In Preiser the Court decided -- this Court decided that there was a clear dichotomy between habeas cases on the one hand where there was a challenge to the fact or duration of confinement and those cases, on the other hand, where there was a challenge to conditions of confinement. And the Court did cite, not only Haines v. Kerner, which was a case involving solitary confinement and a claim for damages arising out of solitary confinement, but also the Wilberly case, which was a challenge to prison clothing.

So the Court clearly had in mind that broad distinction and so did Congress, because that was the kind of distinction that would serve its aim of broadening discretion, broadening the discretion of Congress to -- of

the court to refer to magistrates.

And I think we need to be very clear about what is involved in this particular case. To refer to this case a single episode case involving damages only is simply wrong. Throughout this case, indeed in the joint appendix incorporating the magistrate's findings at paragraph 56 and 57, there is a clear finding by the magistrate as to the existence of directives, pursuant to which and consistent with, which action here was taken against the petitioner. And it was one of the conditions of confinement, as the Second Circuit concluded, that the petitioner would be subject to --

QUESTION: But I guess the other side would say, General, that this plaintiff didn't care about those conditions. All he cared about was the single incident. Whether the case involves the conditions depends upon what the plaintiff is seeking relief from. If he's seeking relief -- monetary relief for a past event -- it doesn't involve conditions. It's a rational line I suppose.

MR. BLUMENTHAL: The petitioner in this case very much cared about the prison directives. Indeed, he directly challenged them in every complaint -- his initial complaint, his amended complaint, his second amended complaint. As Exhibits 2 and 3 before the magistrate, he offered the written directives which he sought against the

opposition of the State of Connecticut through an FOIA request. So he was very intensely interested in the conditions of confinement as embodied in those regulations, Justice Scalia.

And that is very much a matter of the record before this Court. Underlying the Second Circuit's opinion is the Preiser dichotomy, and we have to assume also underlying the distinction that Congress drew in the structure of this statute is that same dichotomy. Because Congress, when it wanted to limit the authority of magistrates who refer certain kinds of issues or matters, clearly did so. It did so in (b)(1)(A).

QUESTION: General Blumenthal, if -- taking the Preiser dichotomy for a moment -- if a plaintiff has a habeas claim, wanting to shorten his time in jail -- get out of jail, that is referable to a magistrate by a separate provision of the act?

MR. BLUMENTHAL: It is referable under that provision of the act that is provided for in (b)(1)(B). But it is referred to separately in the act, and clearly embodied in the structure in the act is that dichotomy which Congress saw this Court making.

QUESTION: So under -- under your interpretation both sides of the Preiser against Rodriguez types of complaints are referable to magistrates, albeit by two

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different provisions?

MR. BLUMENTHAL: Yes, that's correct, Mr. Chief Justice. And Congress did place limits in (b)(1)(A) on the kinds of matters that could be referred. It also, when it wanted to refer to a pattern or practice, did so for example in 42 U.S. Code 1997. It referred to a pattern or practice. In the Rico statute, it referred to a pattern of racketeering activity. When conditions or a pattern of action were what Congress sought to deal with, it did so very explicitly.

And there is nothing in this statute -- nothing at all -- nothing in the plain language of this statute or in the legislative history that mentions single episode or continuing, pervasive, ongoing conditions or that sets up that kind of dichotomy.

QUESTION: But on the other hand, is there anything in the legislative history that mentions Preiser?

MR. BLUMENTHAL: There is nothing, Justice Stevens, that --

QUESTION: Really the legislative history is kind of a draw I guess, isn't it?

MR. BLUMENTHAL: Well, in all honesty, the legislative history is pretty much silent on this --

QUESTION: Yes.

MR. BLUMENTHAL: -- subject. And what we have

to do -- what -- with all due respect -- what the Court must do in this instance is look to what the purpose of Congress was so clearly, which was to give -- to give courts maximum discretion in referring matters to magistrates.

QUESTION: Maximum but really not unlimited either. There are limits on it.

Let me ask you this about the jury trial. I don't understand your opponent to be arguing that there is a violation of the constitutional right. What he's saying is it's somewhat anomalous to say that in order to avoid a reference to a magistrate that the prisoner must make a jury trial. So that unlike a lot -- if the reference is impermissible without consent, he could normally get the trial before the judge.

But he doesn't have that -- there are three alternatives, the magistrate, the judge, or the jury. He can avoid the magistrate by insisting on the jury, but there's no way in which he can be sure that he can avoid a magistrate without making that demand.

MR. BLUMENTHAL: And that clearly --

QUESTION: Which is kind of anomalous.

MR. BLUMENTHAL: Well, I don't know that I would agree that it's anomalous, because I think that it was the intent of Congress that there be certain nonconsensual

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references.

QUESTION: Right.

MR. BLUMENTHAL: And that where there is no objection -- no timely demand for a jury, it's perfectly proper under (b)(1)(B) for there to be a reference to a magistrate by the district judge. The statute doesn't draw a distinction, doesn't constrain discretion as to those cases that, on the one hand, all of which have to be referred to one place or the other. It doesn't say all single episode cases have to be -- have go to the district judge. It doesn't say that all damage claims have to go to a district judge.

The Congress really was relying on the sound discretion of the courts to protect those rights, and it didn't distinguish either between important cases or unimportant cases, between big cases and small cases. That distinction would have been equally blurred and difficult to apply.

In protecting those Seventh Amendment rights, the petitioner and any other litigant would have the clear right to demand a jury and thereby avoid reference to a magistrate. But that would be for the purpose of conducting a jury trial, not to give the petitioner or anyone else the ability to choose between the -- between one judicial officer or another, and thereby in effect not

only frame his complaint but make the decision for the courts as to which of those judicial officers would be chosen.

This is a case I think that illustrates very dramatically the difficulty of drawing this distinction between a single episode on one hand and a continuing condition on the other, a claim for damages which was involved, and a claim for injunctive relief. But it also illustrates well the fact that there is a process difficulty with drawing that distinction, which is that anywhere along the line, sui sponte at the court of appeals level, as happened in Clark v. Poulton, this distinction could be raised.

And it would be according to this Court's rulings, and according to the -- most of the courts below, it would be jurisdictional. And as a consequence, if it were successfully raised by whatever party or by the court itself, the case would have to go back if there were a conclusion that the distinction was erroneously drawn. And it would begin all over again.

What would happen in this case is that 8 days' worth of hearing before the magistrate, 14 pages of docket entries, a massive case even though it seems like a single incidence case, a simple case involving damages. Not so at all. This case consumed a great of time on the part of

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the magistrate, on the part of the district court. And there are reasons of it relating to simply the excruciating administrative difficulty that would arise from adopting the distinction that is advanced here by the petitioner.

I think it's also illuminating to note how this case really came here and how the conflict in the circuits arose. The story of the conflict begins with Judge Swygert's concurring opinion in Hill v. Jenkins. Hill v. Jenkins didn't even turn on this issue. It involved a case in which a magistrate had failed to make any kind of findings or recommendations. There was no de novo review. Error was found for that reason.

Justice Swygert, in a concurring opinion, beginning with the word "presumably" and then saying what he thought this distinction was between single episode in continuing conditions cases, in the next four or five lines advanced the distinction without any citation either to other cases or legislative history, concluded that any other interpretation would be, to quote his concurring opinion, strained.

The distinction then acquired a kind of life of its own.

QUESTION: In what year was that do you remember, Mr. -- General Blumenthal? Roughly how long

ago?

QUESTION: 1979.

QUESTION: '79.

MR. BLUMENTHAL: 1979 in Seventh Circuit. Yes, Mr. Chief Justice.

The distinction then acquired, as I mentioned earlier, a life of its own. It was cited sometimes in decisions that really didn't involve the issue at all on both sides. At this point, the Ninth, Tenth, and Fourth Circuits have adopted it, the Fourth Circuit being somewhat ambiguous because it hasn't -- it started to adopt this distinction in a footnote in a case that Wimmer -- Wimmer case that didn't really involve the issue.

On the other hand, the Eighth and Sixth Circuits, along with the Second Circuit, have gone the other way. The only reasoned analysis of this distinction and of the merits on either side are contained in the Clark v. Poulton opinion for the majority, in which there is a very strong dissent and in which there is now being considered a petition for rehearing with a suggestion en banc. And of course, the opinion of Judge Neumann for the Second Circuit below.

We contend that our distinction, which is drawn clearly, naturally, logically -- the distinction adopted by the Second Circuit is one that serves the best -- the

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true goals of Congress in this statute. A goal that has been endorsed and articulated by this Court in United States v. Raddatz, which involved the question of whether a motion for suppression hearing could be referred to a magistrate.

The Court concluded that it could, that there did not have to be a new hearing before the district judge, and that is was the district judge who should have discretion under the statute, because that fit the structure of the statute, the purpose of Congress to broaden the authority of magistrates, to ease the workload of the district judges, consistent with Seventh Amendment rights, because the prisoners could continue to demand a jury trial and do often. But that discretion on the part of the district judge would exist whenever and wherever there were no timely jury demand.

I would just conclude by citing for this Court also the dissent that is contained in the Clark v. Poulton case when Judge Anderson, which I think strikingly illustrates the incongruity or anomaly -- to use two words that have been used today -- of the petitioner's approach. A single beating case would have to go to a district judge, but a case alleging daily beating of prisoners would go inexorably to a magistrate.

That cannot be in the interest of anyone, not

the judiciary, not the public, not even perhaps of prisoners, because let's remember that cases would have to be referred if they involved a single episode claim for damages, under petitioner's theory, even where the prisoner himself or herself might want to be heard by the magistrate at the prison.

It's very unlikely that the district judges would go out to the prison, but there would be great advantages, and were in this case, to having cases of this type heard at the prison where evidence would be accessible, documents would be there, and the difficulties of going to court and having that same accessibility would be avoided.

QUESTION: General Blumenthal --

QUESTION: I don't it has anything to do with this case, but the average prisoner would rather get out of prison than to have the case tried there.

MR. BLUMENTHAL: And indeed, Justice Marshall, the interestingly -- the (inaudble) initially offered by the petitioner here was $100,000 in damages, injunctive relief against the directives, and get me out of prison.

QUESTION: Judge Hastings used to refer to that as the holiday in court -- rightful holiday in court.

(Laughter.)

QUESTION: General, what you -- you know what

you say about the practicalities may be true. Congress surely could have picked better language to do what you -- what you say it's done. I mean the phrase "petitions challenging conditions of employment," one doesn't refer to -- you know if there's an automobile accident and somebody sues for damages, you don't say that -- that I am challenging the other person's driving of a car.

A petition challenging something really does call to mind a request for declaratory or injunctive relief. When you're suing for money, I don't know that you say you're challenging something. Very strange terminology for what you have in mind here.

MR. BLUMENTHAL: Well, the Second Circuit concluded, and of course we agree, that what Congress had in mind was the language of Preiser even though Preiser is not cited in the legislative history, and perhaps it had not yet become a term of art. But conditions of confinement, in the context of prison life, in the context of being confined, very arguably extends to anything that happens while that person is subject to the guard and care of the confining official.

QUESTION: I understand. I'm not focusing on conditions of confinement now. I'm focusing on the words "petitions challenging." And it seems to me that that does have a connotation of asking you to stop, asking for

an injunction or -- or a declaratory rather than asking for damages for something that's already happened. Can you think of any other context in which you'd refer to a damage action as an action in which somebody challenged something. I mean --

MR. BLUMENTHAL: We -- we --

QUESTION: -- you know, if you socked me in the nose, I don't bring a suit challenging your punching me in the nose. That would be a very strange way to put it.

MR. BLUMENTHAL: We have cited in our brief the definition contained in the dictionary, the -- some historical references and uses of the term "petition" to describe actions that may not involve equitable relief. But it would have been highly unlikely that Congress would have meant to circumscribe and cut out an entire class of action.

And indeed, petitioner concedes that the fit is not perfect without very clearly indicating its intent to do so. And the concessions that petitioner makes in footnotes 3 and footnote 9 very considerably eviscerate whatever argument could have been made on the basis of the distinction between equitable relief on the one hand and damages relief on the other hand.

The petitioner concedes in those footnotes that ancillary claims for damages, as he refers to them, can be

referred to the magistrate when they involve injunctive relief. And what is ancillary in one jurist's view from what it is in another jurist's view. And in footnote 9 mentions the instance of a single petitioner who was deprived -- allegedly deprived of constitutionally satisfactory meals as opposed to pervasive conditions. That distinction again seems to be breaking down.

So we would contend that as opposed to the -- the distinction offered by petitioner which is novel, imported, and really unworkable, that adopted by the Second Circuit is a natural, logical, reasonable one, consistent with the purpose of this statute and with the Seventh Amendment and other statutory provisions.

If there are no further questions, Mr. Chief Justice, that concludes my argument.

QUESTION: Thank you, General Blumenthal.

Mr. Cerf, do you have rebuttal? You have 3 minutes remaining.

MR. CERF: Mr. Chief Justice, we have no rebuttal. Thank you very kindly.

CHIEF JUSTICE REHNQUIST: Very well. The case is submitted.

(Whereupon, at 10:49 a.m., the case in the above-entitled matter was submitted.)

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