OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: MORGAN STANLEY & COMPANY, INCORPORATED, ET AL., Petitioners v. PACIFIC MUTUAL LIFE INSURANCE COMPANY, ET AL.

CASE NO: No. 93-609

PLACE: Washington, D.C.

DATE: Tuesday, April 26, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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MORGAN STANLEY & COMPANY, :

INCORPORATED, ET AL., :

Petitioners :

v. : No. 93-609

PACIFIC MUTUAL LIFE INSURANCE :

COMPANY, ET AL. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Tuesday, April 26, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:09 a.m.

APPEARANCES:

JAMES W.B. BENKARD, ESQ., New York, New York.; on behalf of the Petitioners.

RICHARD G. TARANTO, ESQ., Washington, D.C.; on behalf of the Private Respondent.

MICHAEL R. DREEBEN, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Federal Respondent.

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C O N T E N T S

PROCEEDINGS

(11:09 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 93-609, Morgan Stanley & Company v. Pacific Mutual Life Insurance Company.

Mr. Benkard.

Is that the correct pronunciation of your name?

MR. BENKARD: It is, Mr. Chief Justice.

CHIEF JUSTICE REHNQUIST: Please proceed.

ORAL ARGUMENT OF JAMES W.B. BENKARD

ON BEHALF OF THE PETITIONERS

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

Petitioners contend that section 27A of the Securities and Exchange Act violates the Constitution of the United States insofar as section 27A permits the reopening of final judgments granted to private parties in actions that are entirely closed.

The issues before this Court are whether the statute constitutes an impermissible infringement upon the principle of the separation of powers and upon the powers of the judiciary and upon the individual rights of those litigants who appears before the courts.

The Courts of Appeals for the Sixth and the Tenth Circuits, as well as seven District Courts who have

been faced with this issue, have recognized that this statute is in irreconcilable conflict with rules of law handed down by venerable and respected precedents of this Court. Consequently, they have held that the statute violates the Constitution.

The Fifth Circuit, from whose order we appeal, reached a contrary conclusion in large part on the basis of their holding that it was quite permissible for Congress to compel the courts to share parts of their judicial power with the Congress.

We submit that that holding is unprecedented. It is wrong. And it should be reversed.

Now, as I have said, our challenge is based upon two related grounds. The first is the separation of powers principle as set forth in Article III, and as early and authoritatively interpreted and implemented by this Court in Hayburn's Case.

There is no question but that section 27A constitutes such an intrusion or an interference. Secondly, there is the point of the rights of the individuals which we -- we contend that the judgment of the District Court, in essence, terminating Federal securities claims against the Petitioners constitutes a divestment of our due process rights.

There is no issue that section 27A was passed in

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direct reaction to this Court's decision in Beam and Lampf. Indeed, the Respondent set forth at some length the legislation reactions -- some might say it was overblown -- but, in any event, there was no discussion that we can find, and Respondents, I don't believe, have cited any, of the constitutional problems which bring us here today.

We do know that a statute was passed which overruled Beam, in essence -- or at least the part of the statute that we are here today on --

QUESTION: Why -- why did it overrule it? It simply provided a different statute of limitations, and what Congress does is enact statutes, including those involving limitations.

MR. BENKARD: But they can't reverse undue final judgments, Justice Souter.

QUESTION: Well, they -- they didn't -- you -- you agree, I take it, they didn't do what -- what would have been done by the Congress in Hayburn's Case.

MR. BENKARD: What they --

QUESTION: This -- this was not an instance -- what I'm getting at is this is not an instance in which there was an individualized action by Congress on a case-by-case basis --

MR. BENKARD: That's correct.

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QUESTION: To revise an otherwise ostensibly final decision of a court.

MR. BENKARD: That is correct, Your Honor.

QUESTION: So, Hayburn is no authority for you, is it?

MR. BENKARD: It -- it is, Your Honor, in that Hayburn's Case treats the broader principle of the powers of the judiciary being infringed by Congress, whether or not the statute preexists or comes after the judgment at issue. There are scores of -- there are a lot of cases which have interpreted Hayburn's Case in that way. That -- where they state that the Congress has no power, as we understand it, to revise final judgments of this Court. Whether or not --

QUESTION: But those are final judgments which, as judgments, are being revised. And in this case a general law is being changed.

MR. BENKARD: That is correct, Your Honor. A --

QUESTION: And you have -- I mean, do you -- you have no authority from this Court with respect to that latter proposition, do you?

MR. BENKARD: Your Honor, we have -- we have the authority in Gordon and in O'Grady, if you will, Your Honor, which we believe hold that when any law is passed by Congress, whether it be new or old, it cannot -- it

cannot infringe upon a final judgment which has been rendered by this Court.

QUESTION: Mr. Benkard, why do you concede that no -- no judgment has been revised by the statute? The statute washes out.

MR. BENKARD: Your Honor, forgive me. I did not mean to make --

QUESTION: I thought you did. I thought the question was that this -- this statute did not revise any judgment.

MR. BENKARD: Oh, no, no, no, no, no. Oh, no. No.

QUESTION: It certainly did.

MR. BENKARD: Oh, no, sir.

QUESTION: It wiped out judgments that were on the books, didn't it?

MR. BENKARD: The devil has my lips, Your Honor.

QUESTION: No, I think what --

(Laughter.)

QUESTION: No, I --

MR. BENKARD: I -- I --

QUESTION: Mr. Benkard, I think the -- I think the devil -- I don't think it's your lips the devil has got here.

(Laughter.)

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QUESTION: I -- I think your concession to me was that Congress had not, on a particularized case-by-case basis --

MR. BENKARD: That is correct.

QUESTION: Revised something.

MR. BENKARD: But they have revised these judgments, as Justice Scalia has pointed out.

QUESTION: But -- but in -- in Hayburn's Case, it was clear, at the time that the Court was asked to resolve the dispute, that the judgment would and could be revised by the Congress. There was almost a question of finality there.

Here the dispute was final as of the time the Court heard it -- for all that it thought, for all that it knew.

MR. BENKARD: Well, the dispute -- the dispute in -- in this case, Your Honor, or in Hayburn's?

QUESTION: In your -- in our case.

MR. BENKARD: The case was -- was, in essence, over before section 27A was enacted.

QUESTION: And so the Court could give its determination without fear of Congress revising it on the basis that the Court decided it?

MR. BENKARD: That is correct.

QUESTION: And that is the difference between

this case and Hayburn's, is it not?

MR. BENKARD: That -- there's no question, Your Honor. And this is an argument that Respondent, Pacific Mutual, makes: that somehow it makes a difference that a statute comes afterwards and strips a final judgment from a party, as opposed to coming before.

With all due respect, Your Honor, we say the interference is worse when it comes in the latter situation. At least in the -- in the previous one, the parties have some chance; they have some knowledge it's coming. When the statute comes afterwards, it -- it has divested the power of the judiciary even -- even more so.

QUESTION: Mr. Benkard, you're talking about the timing of the legislation. I would like you to consider the substance of the legislation that is in Hayburn's Case. Is it not true that, effectively, the legislature was setting itself up as an appellate tribunal, revising, modifying whatever initial decision the judiciary made?

So, the judiciary was being considered as sort of a first instance tribunal, and then came the legislature or the executive -- I forgot which -- but, anyway, the other branches, putting themselves over the judiciary on the question of the substantive rights of the claimant. And --

MR. BENKARD: Correct. There was the potential

for that, Your Honor. Here it's an actuality.

QUESTION: The -- but the actuality is what? This case involves a statute of limitations.

MR. BENKARD: Correct.

QUESTION: Is it not so that as between the judiciary and the legislature, statutes of limitations are in the legislature -- legislature's court? When the legislature doesn't act, then the Court has to make something up, and feels intensely uncomfortable doing so because statutes of limitations are, by their nature, arbitrary.

MR. BENKARD: Correct.

Your Honor, of course, you had to set the statute of limitations here. And then Congress didn't like the way you did it, and changed -- and changed the law. But the fact of the matter is, we're not saying that we have a vested right, if you will -- getting to another -- the later issue in the statute of limitations -- we're saying we have a vested right -- or whatever the right is that deserves the protection of the Constitution -- to the judgment which --

QUESTION: That's your due process argument. That's a -- that's a different issue.

MR. BENKARD: But -- it may be, Your Honor --

QUESTION: Let's stay on the separation of

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powers argument for the moment, if you would.

MR. BENKARD: I certainly will. I mean, you understand, I don't look on these two as Scylla and Charybdis. I look on them as fortifying doctrines. There's no question that the separation of powers appears first in our brief, if you will, because I can see getting into the whole vested rights briar patch. But I do not think that has to be done here.

The fact of the matter is it isn't so much the statute itself that we say is ours and ours forever, it is the judgment entered on the basis of that statute that deserves the respect of the Congress. And there's absolutely no question -- it's on its face --

QUESTION: Well, how -- how about Rule 60, which --

MR. BENKARD: Rule 60 being?

QUESTION: Which authorizes the setting aside of judgments within a certain time period. That is purely a congressional action.

MR. BENKARD: But it is for you to do, Your Honors. It's not for the Congress. The Congress has no power to come in, as they have -- Your Honor, I really want to get back to your question, Justice Ginsburg, it's not just the -- Congress can't say, well, we have decided, under 60(b), that a darn good showing has been made by the

-- by the appellants, and therefore we're going to reopen the judgment. 609(b) is within the province of the judiciary to decide on a variety of reasons: equity, discretion --

QUESTION: Well, but here -- here Congress has simply provided that the judiciary shall judge whether or not a new statute of limitations applies, and then decide the case on the merits.

MR. BENKARD: If I may segue then, they have in fact operated, as I believe you pointed out in your dissent in Sioux Nation, they have operated as an appellate court. They have told you -- they have told the courts of the United States, well, we're now going to decide that this case should be remanded, that it should be dealt with. That's with this Court does often.

QUESTION: The fact that you -- you recognize the distinction, and I think you were quite candid to do so, between deciding the merits of the a case -- does the claimant -- is the claimant entitled to a pension of benefit of some kind, and a question of time, where we agree that time is for the legislature -- statute of limitations have legislative decision written all over them. So, it's a question of this retroactivity.

And I'm wondering, is there any problem about separation of powers or due process, where the revival

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statute -- a statute that revives the claim that dies with a decedent, and then it's revived?

MR. BENKARD: I do not think it is the same kind of claim, Your Honor. Unless it is, in essence, blessed by a judgment, I can see a distinction.

QUESTION: Oh, that's it. But isn't that the distinction?

MR. BENKARD: Absolutely, Your Honor.

QUESTION: If Justice Ginsburg is talking about a claim that has expired without a lawsuit having been brought --

MR. BENKARD: Correct. It can be. We know that from Chase v. Donaldson.

QUESTION: Right.

MR. BENKARD: We know it from a variety of cases.

QUESTION: And you would distinguish that from a case where the statute, having expired, a suit is brought and dismissed on the basis of the statute; that's a different situation?

MR. BENKARD: Absolutely. Yes. And Chase v. Donaldson so made that distinction, as have many of the courts below.

QUESTION: So, it's just the holiness of the judgment that you're relying on, that --

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MR. BENKARD: That's --

QUESTION: A judgment can't --

MR. BENKARD: Absolutely. That's what the courts are all about. We are here in this building to serve you, to serve the principles of finality. If Congress can come here when they don't like a result and say, all we're doing is remanding it back to have another look at it, and if we have some kind of a sharing of judicial authority, you get two things: first, you get -- you get an erosion of the autonomy, it seems to me, of this Court and the courts -- the other courts as well. Not only that, you get institutional disharmony.

Here you have the courts of the United States doing the best they can to come down with decisions. People spend time, money, whatever to come and get those decisions. And you render final relief.

QUESTION: Well, we've told Congress the stat -- that, in effect, that its statute is broken. And so, Congress fixed it.

MR. BENKARD: Fine. They can fix it for pending cases. And that's the 27A --

QUESTION: But it seems to me they can do that without interfering with the courts. We have said that our considered judgment under this statute is that the statute of limitations is A, B, C, D.

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MR. BENKARD: You --

QUESTION: And no one quarrels with that. That is final.

MR. BENKARD: It is final --

QUESTION: The point is that Congress can alter that without demeaning or interfering with this Court.

MR. BENKARD: It --

QUESTION: And it should do so if it desires a different result. And that simply brings us to the next question, which is the due process question.

MR. BENKARD: Yes.

QUESTION: But so far as the separation of powers question, I see no interference.

MR. BENKARD: Well, I -- I, with the greatest respect, I see all the interference in the world. We see a bright line here between the situation where there is a judgment entered on whatever the old law is. The moving hand has writ under those circumstances. And if Congress can come back and tell you, no, you got the statute of limitations wrong, not only will it be different for future cases, but, for past cases as well. Why can't they do it for contributory negligence? Why can't they just change the burden of proof? Why can't they change the rules of evidence?

QUESTION: Mr. Benkard, I -- I assume that, for

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purposes of this case, you -- you would -- you can concede that it'd be a different matter if Congress simply passed a longer statute of limitations which would allow people who -- even people who had already sued and been denied because of the old statute of limitations to bring a new suit -- raising a res judicata issue, but that's a different issue?

Do you -- do you have to assert that it's --

MR. BENKARD: Wait -- no, wait a minute --

QUESTION: Must you assert that it's the same one for the purpose of this case?

MR. BENKARD: I'm not sure I have to. I think I have my lips back. But I do not think that that is a necessary concession for me to make. What I believe Your Honor is saying is, why couldn't Congress have just passed a new statute and give -- given the new remedy to the people whose judgments it already --

QUESTION: I think that's a harder question than -- than --

MR. BENKARD: Much. But I still think --

QUESTION: Congress setting aside a judgment of the court, which is -- which is what happened here. It set aside the judgment.

MR. BENKARD: Absolutely.

QUESTION: It said the case will be reopened.

MR. BENKARD: I say it can't do it.

QUESTION: Don't -- you don't think that's a harder question than --

MR. BENKARD: I do think it's a harder question. I don't think it's any -- we have also treated it at some length in our -- in our brief because it was raised by the other side. I -- there are a variety of responses to it, one of which comes out of Justice Kennedy's opinion in the Ninth Circuity, in Chada, where he said that one -- just because you can do the greater doesn't mean you can do the lesser. But there are a variety of other questions -- namely, the res judicata one.

And I also would argue at the end -- I'm glad I don't have to here -- but I -- I have a feeling that after the Denver decision on the aiding abetting point that in fact there may be a little deja vu here, which I think Justice Stevens noted in his dissent. But when that -- when that issue comes, I hope Congress is somewhat the wiser from what has happened here.

I wonder if I might spend a moment on Sioux Nation --

QUESTION: But there's one point on the due process side that I'd like you to address. Here you're talking about the right of the individual to the benefit of that judgment. If the case is still in the hopper

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because the litigants have strung it out or because the plaintiff, having been dismissed, takes an appeal that plaintiff knows plaintiff is going to lose, but has kept the case alive --

MR. BENKARD: Right.

QUESTION: Then those people have no due process rights, I take it?

MR. BENKARD: When you say, those people have no --

QUESTION: The people who deliberately prolonged protracted litigation, instead of accepting the dismissal. Isn't what happened here plaintiffs who came in with the expectation that the claim was timely, who then had their expectations disappointed by this Court's decision in Lampf?

MR. BENKARD: Mm-hm.

QUESTION: Congress responded to that disappointment and provided for two things: cases still in the pipeline --

MR. BENKARD: I understand. Your Honor, I've been doing this for 30 years, and I have filed a certain amount of appeals in my time that certain people have said to me, gosh, they're not really valid or whatever. Litigation is never over until a certain person sings. And --

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QUESTION: So, then we're dealing with the people who are unsophisticated, rather than the people who protract it --

MR. BENKARD: Well --

QUESTION: The people who are unsophisticated, those plaintiffs who didn't take that protective appeal or cautious appeal -- to characterize it in a non-pejorative way -- those people, the sophisticated, will -- those plaintiffs will succeed, whereas the ones who just accepted the dismissal lose?

MR. BENKARD: I don't want to fence with you, Your Honor, but a lot of sophisticated and unsophisticated people took appeals here during the pendency of the discussions in Congress concerning 27A. And they are in a different situation. But if you push me to it, and I'm happy to accept that, the fact of the matter is at some point you have to draw a bright line.

And, indeed, if one looks at two paragraphs in the McCullough opinion, which, to my knowledge, is still the law of this land, once that final judgment is reached, this Court can't look behind it and say, well, it wasn't a really good final judgment; it was based on a statute of limitations. You -- you should have filed an appeal, you shouldn't have filed -- have filed an appeal. Under those circumstances, it is done. And --

QUESTION: But the court -- courts can do that, as you conceded, all the time under 60(b)6.

MR. BENKARD: Courts can do it.

QUESTION: For any of the reasons of just and equitable, they can reopen a final, final judgment, right?

MR. BENKARD: Under those circumstances, it -- it would have been within Pacific Mutual's rights -- and I'm not saying we would agree to it -- for them to have gone the 60(b) route after the statute came in. They decided not to do that. They challenged the Constitution -- I'm sorry -- they -- they challenged our -- our action, and here we are.

But they were supposed to go to the courts under 60(b). The Congress does not have that authority.

Can you imagine if the Congress had the authority that is given to the courts under 60(b)? Think what the lobbyists would do with it. I mean --

QUESTION: And -- and you know what we would do with it, too.

(Laughter.)

QUESTION: Because there would be an individualized revision of judgments based on the particular application of law to the facts of that case.

MR. BENKARD: By the branch of the Government that rendered the judgment, Your Honor, not by another

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one. Not by the Congress.

QUESTION: But in the case that you were posing, Congress was doing what we were doing under 60(b).

MR. BENKARD: Oh, I don't believe so at all, Your Honor.

QUESTION: Then I misunderstood what you were saying.

MR. BENKARD: No, no, no. No. I'm saying that if you give 60(b) power to the Congress, you -- you have turmoil. They were -- this wasn't a 60(b) -- a 60(b) application isn't supposed to go to the Congress of the United States. It goes to the courts.

QUESTION: But the same argument could have been made before rule 60(b) was ever enacted, that you will have turmoil if you allow any setting aside of judgments.

MR. BENKARD: I -- I would suggest to you, Your Honor, both the separation of powers principles and due process. It is one thing to allow the branch of the Government that entered the judgment to exercise their discretion and to determine whether or not that relief should be granted. It is an entirely different thing to have the Congress come in and do it without -- you know, Mr. Justice Souter, you -- Justice Souter, you said that you did the same thing as the Congress -- you don't do it at all. You have different rules of law. You have

different standards than the Congress --

QUESTION: That's right, but in -- excuse me --

QUESTION: 60(b) wasn't brand new anyway. It -- it was an embodiment of what courts had been -- had been doing traditionally anyway, with some further specification of the grounds for it. But courts had traditionally asserted the power to -- to remove their own judgments for certain reasons, had they not?

MR. BENKARD: That's my understanding, Your Honor.

QUESTION: So, it came within the judicial power under traditional understanding?

MR. BENKARD: Right

QUESTION: And conversely, you don't claim that what's happening here is what would happen if Congress exercise a 60(b) power?

MR. BENKARD: I really don't know what happens if Congress exercised 60(b); I really hope it never does.

QUESTION: Well, when a court exercises a 60(b) power, it's looking to the individualized facts of the case.

MR. BENKARD: Correct.

QUESTION: And applying the rule of law, or -- or opening a judgment so that a -- a rule of law can at least potentially be applied differently.

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MR. BENKARD: But isn't that something that the courts should do, rather than the Congress?

QUESTION: I -- I quite --

MR. BENKARD: Isn't that what separation --

QUESTION: I quite agree, but that is not what the Congress is doing in this case --

MR. BENKARD: I agree. That's why it should be shot down. The --

QUESTION: Sioux Nation?

MR. BENKARD: Sioux Nation. Good. The -- the -- you are gracious, indeed, Your Honor.

The -- the point -- the point about Sioux Nation is this, that in the -- it is, I think it's fair to say, the linchpin of the -- of my opponent's argument, that, indeed, one can have sharing; that it's okay to have a little give and take, and it's the flexibility doctrine and all the rest of it.

And, indeed, the argument is made that in this Court -- excuse me, in the Sioux Nation case, this Court affirmatively rejected a separation of powers argument. Indeed, the Firth Circuit opinion -- I am reading now from -- well, it's A-32 of our petition for a writ, but it's from the second-to-the-last page of the opinion -- the Fifth Circuit stated in Sioux Nation, the Government appealed, asserting that the statute -- which took away

the res judicata defense -- the Government appealed, asserting that this statute violates the constitutional separation of legislative and judicial authority. Therefore, the Fifth Circuit says this question was explicitly raised and fought for by the Government in Sioux Nation.

Let's go to the record.

In the transcript of the oral argument of Sioux Nation, a member of this Court turned, at the very end of the Solicitor General's argument, and said, doesn't the separation of powers, doesn't that bother you at all? You don't make the argument. Is that conceivably a violation of the separation of powers doctrine?

Answer: I would have thought not, Mr. Justice Blackmun. I hesitated to answer the Chief Justice's question on another subject. I think Congress is entitled to say, you may have another opportunity to litigate your lawsuit. As a result, the majority opinion in this Court stated that because the Government had waived this very point, neither of the two separation of powers objections is presented by this legislation and, therefore, to this Court.

Nothing of the sort happened in Sioux Nation. It is not an authority for my adversaries. Indeed, in the majority opinion in Sioux Nation, specific reference --

and we believe approving reference -- is made to Hayburn's Case, as stating the general rule, and indeed, in the Chief Justice's dissent, I think he certainly reached the same conclusion --

QUESTION: Mr. Benkard, why doesn't the -- doesn't the judiciary violate the separation of powers when it denies Congress full control over the timeliness of a statutory claim, claimed as a creation of the legislature, the timeliness of the claim is a legislative judgment?

Hasn't the Court, in effect, taken -- encroached on the legislative turf by taking what should be an entirely legislative judgment -- what is the claim and how long do you have to bring it -- the judiciary has cut off the legislature's right to determine how long you have to maintain a statutory claim?

Why doesn't that violate the separation of powers? Why isn't that the judiciary?

MR. BENKARD: I know this isn't done.

QUESTION: Who is overstepping?

MR. BENKARD: May I ask you a question? I mean, on what grounds would the Court be fiddling with the -- the statutory language of the claim? I don't know what the grounds would be --

QUESTION: Well, the grounds would be those set

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forth in my dissent in Lampf.

(Laughter.)

QUESTION: Where I accused the Court of doing just that legislatively.

MR. BENKARD: Exactly.

QUESTION: And it -- it occurs to me that you're in precisely the position you would have been had my dissent prevailed in Lampf, aren't you?

MR. BENKARD: I think that's probably correct. I haven't -- I haven't really traced it through.

Anyway, Your Honor, could -- if I could reserve the rest of my time for rebuttal. Thank you very much.

QUESTION: Very well, Mr. Benkard.

Mr. Taranto, we'll hear from you.

ORAL ARGUMENT OF RICHARD G. TARANTO

ON BEHALF OF THE PRIVATE RESPONDENT

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

It's well established that Congress has broad legislative power to enact new laws to reach past events, specifically including a new statute of limitations to allow plaintiffs who are out of time under old law an opportunity to recover from defendants charged with wrongful conduct -- here, securities fraud.

The question in this case is whether those

defendants, who have obtained a final judgment under the old rule, have acquired a constitutional immunity from application of the new rule to them. Our position is that there is no separation of powers or due process problem with equal treatment of those defendants, along with those who happen to have cases still pending.

QUESTION: The question is even narrower than that, Mr. Taranto. They -- they may not have a constitut -- they -- it is possible that they do not have a constitutional right not to have the new rule apply to them, but they may have a constitutional right not to have it apply to them via the dissolution of judgments that they have received.

MR. TARANTO: That is possible, but I can't, frankly, think of a single case in which this Court has made a decision, in particular, on separation of powers turned on what is, in essence, a non-constitutional formality. And if I look -- if we look back at Robertson against Seattle Audubon Society, the Court specifically said, we look at the substance of what Congress did. And here, the substance is identical to a statute that says, the following class of plaintiff shall have a new 10b-5 prime cause of action.

QUESTION: Many things may be done in one way and not done in another. A State law that -- that simply

expropriates $2 million from every tobacco company is invalid. A State law that taxes every tobacco company in the amount of $2 million is valid. A -- a judicial decision that ignores a Federal statute on the ground that it's unconstitutional, and applies the rest of the law without that statute, is valid. A judicial decision that directs the marshall to go across the street and rip that statute off of the -- off of the books of -- of -- the statute books of the United States is invalid.

MR. TARANTO: I think, Justice --

QUESTION: There -- there's a right way and a wrong way to do things, isn't there?

MR. TARANTO: Well, in -- in Robertson, the -- the legislation was written, it seems to me, in a way that is much more troublesome under separation of powers doctrine than this. The legislation said, the following statutory requirements shall be deemed satisfied by meeting certain conditions.

The fundamental distinction between legislation and adjudication, I think as this Court said in Robertson, as your own concurrence, I think in Freitag, reflects, as the Court said in the procedural due process portion of Concrete Pipe, is the difference between making law and, on the other hand, interpreting and applying law to particular facts and finding facts.

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And the fundamental point I think about this statute is that it is legislative equally, whether Congress applied it to pending cases or to final cases. The reason that this -- that there is no challenge in this case to -- or in -- in any event, it is now conceded, as seven Circuits have held -- that section 27A is fully legislative, as applied to pending cases, is that the relevant constitutional line has to do with the difference between adjudication and legislation. And that line is no more crossed when Congress acts with respect to pending or final cases.

Indeed, our submission is that if Congress -- to take Justice Stewart -- Justice Souter's example -- undertook to consider the particular facts of a particular case, and to apply the law itself to that case, that would be equally unconstitutional in a pending case as it would in a final case.

QUESTION: Can Congress, which is dissatisfied with the -- with the outcome of a particular case or a particular class of cases, simply say that those cases shall be retried?

MR. TARANTO: I think that that is -- is -- it can in certain circumstances. That, I think --

QUESTION: Why in certain circumstances?

MR. TARANTO: Because I think when one follows

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the Sioux Nation analysis -- Sioux Nation necessarily rests on two propositions. The first is that a change of law to reopen judgments, by itself, is not the exercise of judicial power. The second proposition -- and this is what the entire waiver discussion in Sioux Nation concerns -- is to identify the source of Congress' particular power to change particular law.

In Sioux Nation, the particular law changed was exactly res judicata law. And this Court said, res judicata law may be changed by Congress when it is essentially waiving its own right not to pay money.

This case involves a change of law obviously within Congress' power under the Commerce Clause to set a limitation period for 10b -- 10b-5. But the finality principle -- namely, the idea that a change of law to reopen a judgment does not exercise judicial power -- I think stands entirely independently.

QUESTION: I read Sioux Nation much more narrowly than that. Its summation of its holding is, in sum, Congress' mere waiver of the res judicata effect of a prior judicial decision rejecting the validity of a legal claim against the United States does not violate the doctrine of separation of powers. That's its summation.

MR. TARANTO: Yes --

QUESTION: Here -- here Congress is legislating

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not for its -- not for the United States, but for private individuals.

MR. TARANTO: Yes, I -- I -- that's exactly right. But I -- I don't think that the separation of powers point, that the reopening of a judgment by a change of law is not the exercise of judicial, is dependent on the fact that the United States is a party there, any more than Pope against United States or Cherokee Nation, or the various cases in which this Court upheld against these kinds of challenges, legislation reopening Territorial Court judgments, where there were private defendants.

I think the private defendant has to do with two things -- one, the due process issue, and, two, the source of the particular legislative power to change res judicata law.

There may well be limits on Congress' power, with respect to private cases, simply to say, do it again. In -- when the United States -- when money claims against the United States are involved, I think that's not problematical. If, for example, there were a legislative determination that a whole raft of cases were decided under now clearly incorrect science and they should be -- and they, in essence, weren't fairly tried -- I think that might be within the power.

But here we don't have a question of the

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legislative power to change --

QUESTION: That logic may be correct, Mr. Taranto, but -- but, insofar as we are bound by stare decisis, all that Sioux Nation holds is that that can happen when the United States is waiving its own -- its own right to res judicata.

MR. TARANTO: Yes. I -- I utterly agree that there is no holding of this Court directly applicable to this case. I think the entire line, for example, of the Hayburn's Case princ -- cases have to do with advisory opinions and are irrelevant here. The closest I think this Court has come are the two lines of cases -- Sioux Nation and its predecessors, Pope and Cherokee, and the Territorial Court cases. And I agree that the holdings of those cases do not answer this question. But I do think that the principles of those cases do.

QUESTION: How about Klein?

MR. TARANTO: Well, I -- Klein, I think, has quite wisely not been argued in -- in this Court precisely because, as this Court made clear in Robertson against Seattle Audubon Society, this is a case in which Congress changed the law applicable to a class of cases and did not simply direct the courts to enter a -- a particular decision by making an adjudicatory decision.

Now, on --

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QUESTION: So, if that's the criterion, then I suppose you would say that the only thing they can't do is decide the case in -- in your view? Could they set a --

MR. TARANTO: No, I don't think so. I think -- I think that there -- that there are elements of adjudication -- principally, two, I think -- finding facts that are elements of a cause of action and interpreting or applying, rather than changing the law. I think that --

QUESTION: All right. What -- what about changing the law to a whole class of cases that have been already decided, in which plaintiffs have won, and saying we are now changing the law to provide for an affirmative defense of, let's say, an affirmative defense of -- of good faith or of qualified immunity, and all those plaintiffs can be called back -- the judgments will be dissolved, the cases will be retried with this new defense. Can Congress do that?

MR. TARANTO: I think, as a matter of substantive due process and as a matter of separation of powers, yes, I think Congress --

QUESTION: It's very strange that they haven't done that more often, if that's been so available. I know so many cases -- so many instances when they would have liked to have things come out differently, and they just never thought they could do that. It's nice to know.

MR. TARANTO: Well, I think --

QUESTION: No, please; and when you're done, I have a question.

MR. TARANTO: I -- it seems to me that -- that the longstanding presumption against retroactive legislation, including, I think, this kind, reflects deep-seated fairness concerns that is what, over the years, in fact, inhibits Congress or other legislatures from doing this sort of thing on any kind of -- in any -- in any way that would have generated this precise case in this Court before.

So, it's not in fact to be expected that Congress would do this on -- on any number of occasions.

QUESTION: You -- you just touched on -- on something which -- which I was thinking about. And I -- I wonder if you will elaborate on it. You -- you, in effect, I think, just said there is a point at which the separation argument and the due process argument come together.

And -- and if I understood what you were saying, you were saying the -- the reason that the judgment, as such, does not somehow affect the outcome of the argument -- the reason that the -- that the judgment is not sort of the touchstone of what is or is not the -- the appropriate separation of powers analysis is that, in effect, the

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judgment -- I think you're implying -- the judgment is -- is simply a property right at that point.

And because not every interference with a property right is a due process violation, the mere fact that the judgment giving rise to the property right is there should not, for separation purposes, be regarded as dispositive any more than the existence of a property right, as such, should be regarded as dispositive for due process.

Is -- is that, in a crude sort of way, what you're saying?

MR. TARANTO: Well, let me -- let me see if I can respond this way. I think, for separation of powers purposes, there is no charismatic significance to a judgment, because the underlying principles that separate Article I from Article III really don't make the magic moment of the judgment relevant to the question of whether somebody has been denied a politically independent adjud --

QUESTION: But -- but why is that so? Why is that so?

MR. TARANTO: Well, I --

QUESTION: Or why shouldn't it -- why shouldn't it be a magic moment?

MR. TARANTO: Well, I think, in part, because it

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produces what, to my mind, are arbitrary and indeed upside-down results --

QUESTION: Arbitrary because? Is -- is it --

MR. TARANTO: Because -- because they -- the distinction between Congress acting with respect to a pending case and Congress acting with respect to a case that has finally come to an end doesn't, as far as I can tell, either reflect anything in the text -- unlike the formal lines relined on in Chada and Bowsher and that line of cases, or the underlying constitutional principle. There are political judgments to be made in saying what the limitations period is.

There are in -- politically independent fact finding and law interpreting functions to be performed by the courts -- which is what Article III guarantees -- and I don't see that whether a particular matter is pending or has come to an end has any -- anything to do with those.

QUESTION: Well, one of your broadest answers is the line has got to be drawn somewhere.

MR. TARANTO: I think that the line has to be drawn by looking at whether what Congress has done is to make a adjudicatory decision, whether it acts too narrowly, whether it explicitly changes the law, whether it makes very case specific kind of fact findings. Here, I don't think we're even near that boundary. And that's

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why there's no dispute any longer about the validity of 27A as to pending cases.

Now, on the due process side, it seems to me important to keep in mind the two different roles judgments can play. A judgment can create a new right -- a right in a judgment -- like a judgment lien. But I don't understand that there's been any argument that that kind of property right should somehow be treated as more sacrosanct than the right of title to property or a contract right.

The other kind of right is what's talked about in all the cases concerning rights vested by a judgment. And the judgment there simply plays the role of confirming the legal entitlement.

And it seems to me, again, upside-down to say that if the legal entitlement was so clear and indisputable that it never gave rise to litigation in the first place, that is subject only to due process rationality; whereas if it was sufficiently disputable and ambiguous that litigation resulted, that somehow the result -- again, the underlying right is the property right -- is protected as sacrosanct when -- when a judgment has finally said, well, on balance, the right view of the existing legal entitlements is that you indeed have them.

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That seems to me to be exactly backwards, in terms of a role of a judgment. And here, the judgment itself is being -- is being raised to a level, by view -- by reference to all of the vested rights cases -- that indeed other vested rights, like contract rights and property rights are -- are -- have been held specifically by this Court to be subject to the rationality test.

And, of course, this case doesn't involve other specific constitutional provisions, like the takings clause or the contract clause, where vested rights of a specific sort may have additional legal protection.

If the Court has no further questions.

QUESTION: Thank you, Mr. Taranto.

Mr. Dreeben, we'll hear from you.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE FEDERAL RESPONDENT

MR. DREEBEN: Thank you, Mr. Chief Justice, and may it please the Court:

The separation of powers principles that apply to this case really are two. The first is of course that Congress cannot itself exercise judicial power that is given to the Article III Court. The second principle, which is the Hayburn's Case principle, is that Congress cannot require the Federal courts to engage in a form -- advisory opinion rendering by rendering non-binding

determinations that some other branch of Government -- either the executive branch or Congress -- then reviews.

QUESTION: Is there also some principle that the Congress cannot make it extraordinarily difficult for this branch to perform its functions? I can't phrase it with any more precision than that.

MR. DREEBEN: Yes, Justice Kennedy, I think there is a principle that -- that Congress cannot, by a variety of mechanisms, that -- that may not be easy to specify, weaken the judicial branch to the point where it -- it cannot perform its function at all.

QUESTION: Could Congress abolish -- assuming it could draw a statute that could do it -- abolish the doctrine of stare decisis?

MR. DREEBEN: I would have difficulty understanding a rational basis for Congress to abolish stare decisis entirely. And it might be difficult for such a doctrine to survive even due process review. As a matter of Article III jurisprudence, a total abolition of stare decisis might be one of those rare type of actions that would so weaken the judicial branch that you don't have a -- a functioning court system in the sense that the Constitution contemplates judicial power.

But the point that I -- I wanted to get to here is that the very specific action that -- that Congress

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took in section 27A, subsection (b), of requiring the reinstatement of a very limited class of securities fraud cases doesn't violate any of the principles that we've been discussing. It doesn't --

QUESTION: But -- but I take it one of the principles that you and I were just discussing, with reference to abolition of stare decisis, is that the courts cannot function effectively unless their judgments have a certain degree of (a) finality and (b) respect.

MR. DREEBEN: I agree with both of those propositions, but I think the key is --

QUESTION: And that's a separation of powers concept.

MR. DREEBEN: I think it is at the margins. But I think that the key is -- is a certain degree of finality. This statute does not rob judicial decisions en masse of finality. what it does is says that as to a particular class of cases, where Congress concededly has the power to change the law, Congress exercises the power to change the law.

And then, rather than requiring plaintiffs to refile wholly new cases based on new statutory causes of action, which it also clearly has the power to create, Congress adopted a much more precise procedural mechanism for getting the claim back into court.

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QUESTION: To wit, dissolved existing judgments. Why is not dissolving an existing judgment a judicial act? You -- you gave two things that would violate separation powers, and the first one was the performance of a judicial act. Except -- I don't know what could be more a judicial -- it's very hard to -- to define the judicial power, but if there's anything central to it, surely it is the entry or dissolution of a judgment.

MR. DREEBEN: Well, this statute, of course, does not, in terms -- to use -- to use the formal terms of the statute -- it does not dissolve a judgment. It is not a judicial decree that says the judgments in X case or X class of cases are dissolved. What it does is provide what is, in effect, Rule 60(b)(7), that says that a plaintiff who has the -- has had a final judgment entered against him, but has a change in statutory law that entitles the plaintiff's claim to succeed whereas before it failed, may go back to court. And the court, upon motion of the plaintiff, shall reinstate the judgment.

And formality does matter in this sense. I think that this statute is fully consistent with the general trend of Rule 60(b) law, which Congress would clearly have the power to enact. 60(b) may not right now be generally interpreted to permit the reinstatement of cases based on changes in statutory law. But I see no

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reason whatsoever why Congress could not enact, as a procedural housekeeping measure, a 60(b)(7) that I've described that would allow reinstatement of the case.

And that's if you characterize it as a procedural avenue -- namely, the procedural avenue of reinstatement.

If you characterize it, on the other hand, as a substantive act -- namely, Congress wanted the plaintiffs in this case to enjoy the substantive right to be able to litigate their securities fraud cases on the merits after they had been thrown out of court by what Congress viewed was a surprise, to them at least, in the way that the law evolved, then the substance of what Congress did is to create a new cause of action, a new right to proceed in court.

And the fact that it did so in a manner that required the reinstatement of a pending case, rather than the filing of a wholly new complaint should not be deemed to --

QUESTION: Why not? I just -- as I just went over with Mr. Taranto, there's a right way and a wrong way to do a lot of things. And -- and the mere fact that you can achieve the same result in another fashion doesn't show that doing it in this fashion is all right.

MR. DREEBEN: Well, what I --

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QUESTION: I suppose it follows from what -- and this relates to Justice Kennedy's question -- I suppose it follows from what you say -- that when Congress disagrees with a decision of this Court, it can -- you know, that the law is thus and so -- it can change the law and require this Court to retry the same case under the new law.

MR. DREEBEN: Well, I think when it changes the law and requires a -- a new trial of the case it's not really a new trial. I mean, it is a -- a new claim that's being pursued under the new law. And I don't see any impediment to that occurring whatsoever either, as a matter of Article III jurisprudence.

QUESTION: You -- you don't think that that tends to -- to demean the judiciary?

MR. DREEBEN: No, not at all. The judiciary's function, particularly when we're dealing here with an area of statutory law, rule 10b-5, which was created by the judiciary -- it did not have an express statute of limitations. This Court stepped in to supply what it viewed as -- as post hoc legislative intent of what Congress would have done.

Then Congress, which is clearly the proper body to provide a statute of limitations for a statutory cause of action, said what that limitations period will be. And

it determined that the -- the limitations period, retroactively, would be the limitations period that -- that the plaintiffs and the defendants had assumed to be the law before this Court's decision in Lampf.

That is an exercise of lawmaking power pure and simple. It -- it is clearly legislative. The courts are left with tasks that are entirely judicial. A motion is made to the court under an existing statute, section 27A, requesting reinstatement of the case.

If the party has satisfied the requirements of the law, the case is reinstated and the action then proceeds to trial on the merits. And ultimately, the courts will render judgments that -- that are reflective of the facts that are found in the cases and the application of law based on the securities laws. The courts are --

QUESTION: Mr. Dreeben, is one reason why this is a novel issue the relative newness of being -- I was trying to think whether there was a case involving the stat -- change in the Court's interpretation of what the legislature wanted in the way of a statute of limitations, where the Court itself said, applying the first Chevron case -- Chevron against Huson -- but we are not going to cut short the plaintiff's rights retroactively.

So, this rule will allow plaintiffs who maintain

their actions -- when everyone thought it was timely to stay in court -- and our new rules -- the limitation, should be three, not four, years -- will not operate retroactively. Was there any such decision before?

MR. DREEBEN: No, I'm not aware of any, Justice Ginsburg. And I -- I think that your speculation, that the interaction of Lampf and Beam were the direct source of section 27A, is probably correct. Until this Court had decided Beam, it probably would have not applied a new statutory holding as to a statute of limitations that shortened the period retroactively to other cases in the system.

QUESTION: I thought the basis for Beam was that that was the traditional mode of judicial -- you're not really saying that prospective decisionmaking has been the tradition?

MR. DREEBEN: No. On the contrary, what I am saying is that, under this Court's decision in Chevron v. Huson, the Court had refrained from applying a new statute of limitations backwards within the system to throw out cases that --

QUESTION: It's pretty novel to -- to say we're announcing this only for future cases. I mean, it seems that's the novelty, not -- not applying things retro --

MR. DREEBEN: It had -- it had been the -- the

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way that the Court had operated for many years. And I think that it explains why there have been, particularly since Chevron v. Huson has been decided, why there have been few, if any, opportunities for Congress really to consider the need to frame what is, in essence, a transition legislative rule between the old regime under which the -- the Lampf holding was that the I/III rule would prevail, to the new regime, which is that Lampf goes forward and displaces State law.

So, Congress, in effect, revived the State law statutes of limitations, which were the expectations of the parties in this case.

QUESTION: Mr. Dreeben, I'm wondering to what extent your argument is bottomed entirely in the fact that this is a statute of limitations case? Would your reasoning apply equally if Congress should tonight enact a statute reviving the aiding and abetting cause of action under 10b-5, and do it in a similar fashion?

MR. DREEBEN: Well, I think, Justice Stevens, as to separation of powers, the -- the cases are indistinguishable. Any time that Congress changes the law and determines that the law should be applied to cases that -- that are technically final within the system, that there be no different issue as to a plaintiff's side, defendant's side.

Whether there is a difference under any other doctrine in the Constitution, such as the due process clause or the takings clause, raises a more difficult question.

This Court has previously rejected a vested rights due process argument that a plaintiff made, in the Freeland v. Williams case, which was in the 19th century, where, in that case, the plaintiff had won a judgment. He had not executed it. Virginia or West Virginia, I believe, changed the law so as to preclude him from executing the judgment. And this Court upheld it, finding no due process violation when the legislature chooses to change a law, even in such a way that it wipes out a plaintiff's right.

And of course, the Fleming v. Rhodes case, more recently, which is the case that makes clear that whatever rights that are vested in a judgment are on a par with other economic rights, which Congress may retroactively regulate, provided that it has the rational basis for doing it. That case, I think, also establishes that plaintiffs, in general, are not protected by the due process clause.

There may be a harder case -- cases in the margins, that would raise takings claims. This case, I think, clearly raises no specter of a taking whatsoever.

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There is no tradition or any source of law that the Petitioners can point to that says that a judgment that rests on a statute of limitations is somehow a species of property. The right not to litigate a claim on the merits is -- is not regarded as the kind of property that -- that the Government would take.

In any event, it's not clear how the Government acquired this right, even if it is one. And it's certainly not a case where it would be unfair to require Petitioners to assume the burden of litigating on the merits their securities fraud case and paying a judgment if in fact they -- they committed securities fraud under what everybody acknowledges is preexisting liability.

This is not something that the public should bear, rather than Petitioners. So, I don't see this case as raising any takings problem either.

Congress does act circumspectly in changing the law with respect to cases that have gone final. Because there is, of course, a well settled distinction in the law between pending cases and final cases. But it is not of constitutional dimension for purposes of Article III.

There are other settings in which what is, in essence, the doctrine of res judicata; the doctrine of repose is overridden by a congressional determination that relitigation of a claim should go forward. Section 2255

in the criminal area is an example of that. The Sioux Nation case is an example of that, where Government debts are involved. And I think the same principle is equally applicable here.

QUESTION: Mr. Dreeben, does the Government have any case other than Sioux Nation in -- in which Congress has done this -- set aside an extant judgment?

MR. DREEBEN: Well, the other cases that -- that were the ones that Sioux Nation relied on, which are also cases in which the Government was --

QUESTION: The Government was a party?

MR. DREEBEN: So --

QUESTION: No case, in -- in which a private party was a party to the judgment, has Congress ever tried to set it aside?

MR. DREEBEN: I am not sure that there is no case. But we rely -- we don't rely --

QUESTION: But you don't know of any?

MR. DREEBEN: No. We don't rely on any precedent of this Court that says that.

I don't think, for separation of powers purposes, it should make a difference. In fact, if there should be any litigant whose ability to require the Federal courts to relitigate issues should be most suspect it would probably be the United States. Because the

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United States would have the -- the greatest capacity to, in some way, undermine the independence of the judiciary by treating its cases in some sort of a favored way.

QUESTION: But when it treats it as a disfavored way, as it did in Sioux Nation, there is certainly no problem.

MR. DREEBEN: Well, no problem except to the extent that the principle that is at issue is the independent of the courts to render final judgments on particular claims that shall never, under any circumstances, be relitigated again.

Thank you.

QUESTION: Thank you, Mr. Dreeben.

Mr. Benkard, you have four minutes remaining.

REBUTTAL ARGUMENT OF JAMES W.B. BENKARD

ON BEHALF OF THE PETITIONERS

MR. BENKARD: Your Honor, I will be very brief.

Number one, the concept that this statute is not an interference, and that the courts can do whatever they want when they get back is belied by the language of the statute itself, which states that upon such a motion -- excuse me -- upon such a showing, the case shall -- shall -- be reinstated on motion by the plaintiff.

There is no discretion left to the court. The Congress has told them what to do.

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QUESTION: Well, but the statute is not self-executing.

MR. BENKARD: That is correct, Your Honor. But anybody with a first year law student's education knows what to do with that statute, sir.

Number two, Hayburn's Case is supposedly irrelevant because there are no host judgment cases around -- supposedly -- no cases where the judgment's effect has been taken away, or no executive action.

I would ask the Court, in your leisure time, to look at page 10 of our reply brief, where we have cited three cases from this -- this Court, including the O'Grady decision, which was cited by Chief Justice Rehnquist, in -- in Sioux Nation, as well as two others -- Jefferson and Waters, as well as, I might add, Your Honors, many cases from the Circuit Courts of Appeal and the State Supreme Courts, on which my learned adversaries turn a Nelsonian eye.

There is not a word addressed to a single one of those decisions.

QUESTION: Mr. Benkard, I wanted to get your position clear on one question. Suppose Congress, instead of doing what it had done in this transition period, had said this particular claim, this 10b-5 claim, has a life of four years. All claims that were initially brought

before X date has -- have a life of four years. If Congress had done that, there would be no preclusion doctrine operating against the plaintiff, would there?

MR. BENKARD: In -- in essence, Your Honor, even though the claim was finally dismissed before the statute --

QUESTION: On the then-statute of limitations.

MR. BENKARD: That's correct. We would cleave to our position, Your Honor, that that would be a violation of the separation of powers. It would merely be an evasion of the doctrine by the Congress simply saying, we know you had a final judgment on a two-year or three-year statute, now it's four years. We --

QUESTION: So, you're saying that Congress simply cannot prolong a statute of limitations once a judgment has been rendered?

MR. BENKARD: That is our position, Your Honor.

Mr. -- Justice Kennedy, to -- to respond to your question as to what is the -- in the so-called flexibility cases, what -- how far can you go before interfering with the courts too much? From the Nixon decision at least, the phrase "potential disruption" is used. And if this isn't -- in other words, if there is a potential disruption when branch A takes something from branch B, then that does not pass muster.

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I -- I commend to Your Honors that nothing could be more disruptive than the ability of the other branch to take from you perhaps your most precious attribute -- and that is to terminate cases. And those cases are entitled to just as much due process protection.

The McCullough case lives. It is just as valid as it was when it was decided in 1898, and it's cited every day -- not every day -- it is cited constantly by courts.

Your Honors, we submit that indeed -- Justice Souter, the two doctrines do merge, although I think separation of powers is there. And it actually, in essence, it is the reason we have a due process right, as well.

And for that reason it is our submission that the holding of the Fifth Circuit poses the gravest possible threat to this judicial system and to the persons who rely upon it every day. Therefore, we respectfully urge that the decision of the Fifth Circuit be reversed.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Benkard. The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.)

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CASE NO.: 93-609

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

BY Ann Mari Federico

(REPORTER)