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OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

# THE SUPREME COURT

# OF THE

# UNITED STATES

CAPTION: ED PLAUT, ET UX., ET AL., Petitioners v.

SPENDTHRIFT FARM, INC., ET AL.

CASE NO: No. 93-1121

PLACE: Washington, D.C.

DATE: Wednesday, November 30, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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ED PLAUT, ET UX., ET AL., :

Petitioners :

v. : No. 93-1121

SPENDTHRIFT FARM, INC., ET AL. :

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Washington, D.C.

Wednesday, November 30, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

WILLIAM W. ALLEN, ESQ., Lexington, Kentucky; on behalf of the Petitioners.

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

THEODORE B. OLSON, ESQ., Washington, D.C.; on behalf of the Private Respondents.



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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 93-1121, Ed Plaut v. The Spendthrift Farm, Inc.

Mr. Allen, you may proceed.

ORAL ARGUMENT OF WILLIAM W. ALLEN

ON BEHALF OF THE PETITIONERS

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

The petitioners contend that section 27A(b) of the Securities Exchange Act, 1934, was a valid exercise of the legislative power, and that the decision of the Sixth Circuit Court of Appeals invalidating that statute primarily on separation of powers grounds was erroneous and should be reversed.

This Court has recognized since its decision in The United States v. The Schooner Peggy that final judgments may be subject to congressional influence even in the case of a final and appealable judgment as long as the case is pending. I think this --

QUESTION: You say -- you say a final judgment. You mean a final judgment in, say, a trial court, or do you mean a final judgment that has run through the appeal process and has become final against direct review?

MR. ALLEN: Your Honor, I am referring to a final judgment in a case that is still within the appellate process. I'm distinguishing between a final judgment in a pending case and a final judgment that has become -- has become final through the expiration of the parties' right to further appellate review, and I refer to that as a final case, and I think those distinctions are important to an understanding of the argument that the petitioners make.

QUESTION: Which are you calling which? The one where there's no further review possible you're going to call what?

MR. ALLEN: I'm saying that a case becomes final at that point.

QUESTION: Okay.

MR. ALLEN: Up until that point, the case is pending, although a final judgment may have been entered in that case, final in the sense that the court has issued its result in the particular dispute.

It has pronounced what the result of the adjudication is, but the case is still somewhere within the appellate process and is therefore still pending, and it's -- as I was saying, under The United States v. The Schooner Peggy, if a final judgment is entered in a case that still is pending within the process, the appellate

process, and Congress in the exercise of the legislative power changes the law at that point, under The Schooner Peggy and its progeny, I think it's clear that the court must apply the law as ordained by Congress rather than affirming its earlier final judgment that was rightfully rendered and conformed to the law which prevailed at the time that it was rendered.

QUESTION: If Congress intended the law to be retrospectively applied.

MR. ALLEN: Well, I think that that's correct, Your Honor. The issue that -- or the -- what this case calls for, l think, is to specifically identify the institutional interest of the court that requires separation of powers protection and requires the adoption of the absolute rule that was adopted by the Sixth Circuit, and that final judgments in final cases are absolutely sacrosanct and are forever beyond the reach of Congress, at least in private actions involving the adjudication of private statutory rights.

QUESTION: Has this Court ever upheld a legislative invalidation of final judgments of an Article III court?

MR. ALLEN: I think that it has. The closest statute, or the closest analogy here, Your Honor, I believe is the statute in The United States v. Sioux

Nation of Indians.

QUESTION: Well, but in Sioux Nation it involved the Government and the opinion of this Court at least said Congress did not interfere with the finality of the court of claims judgments and went on to justify it on the theory that a new action had been created, so how does that support your position?

MR. ALLEN: Well, actually, I think -- I agree that the holding in United States v. Sioux Nation does not directly address the question that's presented in this case.

In fact, I think for separation of powers purposes Sioux Nation was actually a more difficult case than is presented by section 27A(b), because 27A(b) clearly changed the law. It made a substantive change in the law and provided a mechanism by which this case and the defined group of cases could be reinstated for further adjudication by the courts of the new statutory rights.

QUESTION: In another sense, Sioux Nation was an easier case, since the party defendant was the Government, the party who had the benefit of the prior judgment, and I think the Court opinion suggested that the Government as a litigant could waive rights but it might not be able to impose the same sort of waivers on other parties who are not the Government.



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MR. ALLEN: Your Honor, I understand and agree that that language is in the opinion. However, I believe that that really addresses more squarely the due process argument in this case rather than the separation of powers issue, which I believe is really specifically why Congress should be prohibited from enacting a statute which authorizes the restoration of a case to pending status for further adjudication of rights that are created in that statute.

QUESTION: Well, that's certainly not what Sioux Nation said. I mean, the case's own description of its holding does refer to separation of powers. It says that Congress' -- this is a quote -- "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."

So we were using simply a waiver of res judicata by the Government as a vindication of the separation of powers validity of the case. Now, you may persuade us that's wrong, but that's at least what we said.

QUESTION: Well, Your Honor, I agree that that's what the Court said, but I do believe that this is a different case than Sioux Nation.

It is different because, again, the Court, or the Congress changed the law and created new rights, and I

think the difference, or the constitutionality of the statute is illustrated by postulating a statute that very well may violate and be unconstitutional under separation of powers principles as well as due process principles, and that would be a statute involving private statutory rights that calls for the following:

The judgment in favor of the plaintiffs in Civil Action Number 1234 is hereby set aside and remanded for further trial or for retrial on the same facts and on the same law, with the further congressional admonition that you will continue to retry this case on the same facts and the same law until you obtain the result that Congress wants, to wit, judgment for the defendants.

Now, that is a statute that -- involving private rights that I think would clearly be a judicial act, no change in the law, simply setting aside a judgment with an instruction to retry the case and attempt to come up with another result. I --

QUESTION: Suppose Congress changed the statute of limitations and then added a second clause which said, res judicata shall not apply in any 10b-5 case that has been commenced after a certain date, and sets that date 5 years back, so that all cases can be reopened if they've been filed within 5 years.

MR. ALLEN: That presents a little bit more

difficult problem than is presented by this case. I think, again, referring to the institutional interests of the Court that are protected by the separation of powers doctrine, the Court has an interest in preventing impairment of the judicial power and the exercise of the judicial power, and I think there may be limits under the separation of powers doctrine for legislation which just wholesale reopens masses of cases that might overwhelm the judicial system.

QUESTION: Is it just a question of straining our resources?

MR. ALLEN: Well, I'm saying that that might be an aspect of it, Your Honor. I -- that may not be the whole story.

QUESTION: Well, isn't the whole story that the judgments of this Court and of the Article III courts ought to be rendered without fear of their being corrected in a supervisorial way by the political branches?

MR. ALLEN: Well, Your Honor, that gets, again, back to the identification of the institutional interest that's being served by the rule that you're suggesting, which is that judgments are inviolate and that the rights that are fixed in those judgments are forever beyond the reach of Congress. I don't believe --

QUESTION: Let me suggest an institutional

interest. There are things that the President can do which neither Congress nor this Court can affect. It's his call. What he says goes. There are things that Congress can do that neither the President nor the courts can affect, and what Congress says goes.

I have always thought that the same applied to the third independent branch of Government. There are some things that the courts do that neither Congress nor the President can affect, but you're telling me no, that they --

MR. ALLEN: Well, I think there are some things that --

QUESTION: They can -- you can issue an opinion, but ultimately they can send it back and say, do it again.

MR. ALLEN: Well, Your Honor, I don't believe they can just send it back without more. We contend that they can change the law and the fact that the parties whose rights are affected, or the -- involved in a prior adjudication and a final judgment that became final, is not the bright line between the constitutionality of the legislative act, or does not define the constitutionality of the legislative act.

The Congress makes the law. It's the duty of the court to apply the laws, and to apply the laws as they are at the time the court acts.



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The court has an institutional interest in the integrity of the judicial process, and I don't think that Congress should be able to come along and run through and interfere with the process of finding facts, determining and applying the law, and coming to a result, but Congress can, in its discharge of its political and policymaking functions, change, enhance, withdraw, contract the private rights of parties, and I don't think that the --

QUESTION: It can create whole new rights, couldn't it?

MR. ALLEN: Indeed, Your Honor, yes.

QUESTION: So long as the Due Process Clause didn't prevent it, it could retroactively create a new right. Now, I think you would come up with some due process problems if you did that, but short of those due process -- it can do that, but it didn't do that here. It wants the Court to repronounce the prior right which it said no longer existed. The Court said, finally and ultimately, this right does not exist.

MR. ALLEN: Your Honor, I -- I think that that -- I understand the point that you're making. I don't agree, though, that the fact that the judgment has become final is the bright line here, and that it limits at that point forever more the power of Congress to affect those private rights.

Another example that might shed some light on this would be a statute which restores the aiding -- or, creates a cause of action for aiding and abetting a violation of section 10(b) and makes that retroactive and establishes a limitations period for 10 years.

Let's postulate that some individuals might have been sued for aiding and abetting a violation in the past, prior to the enactment of the statute, and the court held that no such cause of action existed, and that judgment became final. There's no question that that judgment would have been correct when rendered, but is that group of people forever immunized from the reach of Congress simply because they happened to be party to an adjudication that adjudged that no such cause of action existed.

QUESTION: No problem. I think you're absolutely right, but I think you'd come flat up against the wall of due process. I don't think you could create a --

MR. ALLEN: And I think that's an important point, that upholding the statute in this case is not going to open the floodgates. There still are limitations out there under the Due Process Clause and the Separation of Powers Clause that would not make every final judgment in a final case canon fodder for Congress.



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QUESTION: What would those limitations be as to the separation of powers? So long as the congressional action just deals with a few cases?

MR. ALLEN: No. I think that, again, I'm not sure where the outer limits of this would be, and I don't think it's necessary to define the outer limits of it under the Separation of Powers Clause. Actually, I think that the limits might come in the due process rationality test.

QUESTION: So you say, in effect, very likely the Separation of Powers Clause doesn't provide any limits.

MR. ALLEN: Well, I think it does.

QUESTION: Then what are they?

MR. ALLEN: Well, the limits are that the separation of powers doctrine prohibits the direct exercise of the judicial power. I think that the judicial power, the essence of it is the process of finding facts, of determining and applying the law, and reaching a result, and I think that if Congress unduly interferes with that, and again, the statute that I postulated as an example, it simply sets aside a judgment that that kind of legislation is the kind of legislation that the separation of powers doctrine was intended to prohibit.

QUESTION: No, but that can't be it. I mean,

the executive does that all the time. Administrative law judges apply to law to the facts and come out with a decision all the time. Congress used to do it before there was a claims court. It used to consider the facts of law and come up all the time -- applying facts to law and coming up with a decision is not the essence of the judicial function.

MR. ALLEN: Well --

QUESTION: The other two branches do that all the time.

MR. ALLEN: Well, I --

QUESTION: So you've got to come up with something else that makes us different. I had thought it was the fact that we could render final decisions, but you tell me that's not it.

MR. ALLEN: Well, you can render final -- you can render final decisions, and those decisions are final, but I don't think that they are forever immune from further congressional action.

QUESTION: Thank you, Mr. Allen.

Mr. Dreeben, we'll hear from you.

ORAL ARGUMENT OF MICHAEL R. DREEBEN

ON BEHALF OF THE FEDERAL RESPONDENT

SUPPORTING THE PETITIONERS

MR. DREEBEN: Thank you, Mr. Chief Justice, and

may it please the Court:

The court of appeals holding in this case rests on the view that there is an indispensable attribute of finality in judicial decisions that is completely immune from any congressional action, and accordingly, the court found this statute invalid under the separation of powers doctrine.

Our position is that there is a sense in which judicial decisions do have an attribute of finality, but it is not in the sense that the court of appeals found it in this case. The attribute of finality of a judicial decision is fairly accurately captured by the opinions that were rendered in Hayburn's Case, namely, a decision of an Article III tribunal is not subject to further review in another branch of Government, the executive branch, or Congress. The courts cannot be required to render a decision that depends for its finality on another branch's action.

On the other hand, the differentiation in the Constitution between legislative and judicial powers does not prevent Congress from prescribing new statutory rights that may be enforced between private parties despite the fact that there was a final judgment entered between those parties under former law.

The essence of this case is that Congress has

changed the statute of limitations --

QUESTION: It didn't change the substantive law, did it?

MR. DREEBEN: It did not change the substantive law of liability under Rule 10b-5, which is an important point that I think diffuses any possible due process concern in this case. The conduct at issue here was unlawful when it was undertaken, and there has been no change in that rule whatsoever. What has been changed retroactively is the period of time within which a suit under 10b-5 may be brought.

QUESTION: Mr. Dreeben, let's assume that Congress stopped right there, and let's assume that it made it perfectly clear that with respect to the, we'll call them the blind-sided plaintiffs who suffered in the aftermath of Lampf, that with respect to them there was -- the old statute of limitations was reinstated, and that, as it were, by definition this was intended to have retrospective effect.

Those plaintiffs could then -- if Congress had stopped right at that point, those plaintiffs could then have filed a motion under Rule 60(b), could they not, for vacation of the judgments against them and reinstatement of their causes of action under the new congressional statute?

MR. DREEBEN: They could have filed such a motion, Justice Souter, and some courts would have granted it on the basis of changed statutory law that would entitle them to reopen the judgment.

QUESTION: Well, would there have been any invalidity in that ruling?

MR. DREEBEN: No, I don't think that there would have been any invalidity in the ruling.

QUESTION: Would there have been a reason to rule otherwise?

In other words, the reasoning, I suppose, of the courts would have been that these people were blind-sided by what we have to accept was simply a lightening bolt of legal change, and that therefore they have a strong reason for equity on their side, assuming there is no due process problem, and I do so assume in the very fact of the retroactive effect of the statute.

Why wouldn't it have been virtually an abuse of discretion not to allow their reinstatement if they filed under Rule 60(b)?

MR. DREEBEN: I think that if Congress had manifested its intent to apply that new statute of limitations for the benefit of what you have called the blind-sided class, it would have been an abuse of discretion not to reopen the case and to provide for

further proceedings on the merits of the claim.

QUESTION: All right. Do we have the option, then, in this case, to say that just as we try to avoid the resolution generally of constitutional issues that we don't have to reach, that what should have occurred in the lower courts was the consideration of applying Rule 60(b) in combination with the new statute of limitations and not even reaching the issue of whether Congress itself can mandate the vacation of the judgment?

MR. DREEBEN: I am not sure whether in this particular case a Rule 60(b) motion was made. There were some cases raising this issue of a Rule 60(b) motion.

QUESTION: Well, I'm assuming for the sake of my question it probably wasn't made here, but shouldn't a court have said, shouldn't a trial court have said, in effect, I'm not going to reach the constitutional issue unless you somehow tell me that I've got to reach it because we can't get to the same point by applying the statute, by applying the statute of limitations under Rule 60(b), and shouldn't the Court have done that?

MR. DREEBEN: Well, the reason why some courts may not have done that is, there is a line of 60(b) law that changes in statutory law does not justify reopening of an otherwise final judgment, and it may be in the view that that was the requirement under 60(b) that those

courts wouldn't have chosen that avenue.

QUESTION: A rule --

QUESTION: Well, furthermore, I --

QUESTION: A rule suggested by the separation of powers.

MR. DREEBEN: No, I don't think that it is a rule suggested by the separation of powers, Justice Scalia, because what is going on in these cases is that Congress has acted legislatively to change a governing rule that was conceded by everyone when this Court -- when Lampf was before this Court, namely, what should the statute of limitations be for a statutory cause of action?

QUESTION: But under your answer to Justice Souter, you indicated that it would be in that hypothetical that you put, an abuse of discretion not to apply the new law, but that means that the law is, in itself, a mandate to reopen.

MR. DREEBEN: Well, it --

QUESTION: And I don't see how you've cured the problem.

MR. DREEBEN: I would agree, Justice Kennedy. I don't think that it would add up to a significant difference if a court fell that it was mandated by legislation to reopen a judgment under Rule 60(b) from reopening the judgment under section 27A, subsection (b),

if both actions were taken because of a belief that Congress required it. The --

QUESTION: If we assume that there's no due process problem in the enactment of the new statute of limitations, then basically, doesn't the question of abuse of discretion turn on a kind of traditional notion of equity?

In other words, should those who are blind-sided be given a second chance, and if that is in fact the criterion, is it fair to say that it's the mandate of Congress, rather than the application of a kind of garden variety criterion for reopening judgments, which is operative here?

MR. DREEBEN: I don't think it's quite as garden variety as all that, Justice Souter.

The cases that have addressed whether final judgments should be reopened because of changes in statutory law do not clearly indicate the courts must reopen final judgments that were otherwise not appealed, and I believe that it is for that reason that Congress prescribed a rule of law in section 27A, subsection (b), that in effect amends Rule 60(b) for this particular purpose and requires courts to reopen otherwise final cases for the application of new substantive law. There is nothing in that legislative action that is improper.

Congress could, if it wished, take over the entire function of promulgating Rule 60(b), could change the categories that are currently in it that permit reopening. Certainly if it does so in a way that is consistent with the general historical trend of Rule 60(b) law which has evolved over time, there would be no question whatsoever about the promulgation of such a rule of procedure.

QUESTION: Isn't this an effort by Congress to restore a doctrine that this Court abandoned, that is, the double whammy of Lampf and Beam? Congress is saying, for this class of plaintiffs we are ordering the Court to go back to Chevron Oil v. Huson?

MR. DREEBEN: I think that's essentially what Congress did in this case. In view of the fact that Lampf and Beam came down on the same day, you have a class of plaintiffs whose cases in effect retroactively became untimely, and the Court declared in Beam that it was not going to engage in what is essentially a legislative function of weighing the equities of various similarly situated plaintiffs and determine which ones get the benefit of a new rule and which ones do not.

Congress stepped in with what is a very legislative act, balancing equities that the Court itself does not have freedom to balance, and determining certain

plaintiffs, whose cases were timely filed under the law of their circuits when they were brought, should have an opportunity to go back to court and reach -- have the merits of their cases adjudicated.

QUESTION: Did we announce in Lampf that we were changing the law? Did we say that the law used to be differently but from today on, we, the Supreme Court, are changing it? Is that what we did?

MR. DREEBEN: Lampf is probably --

QUESTION: I thought we pronounced the law was this way and had always been this way.

MR. DREEBEN: That is generally the way that this Court operates when it interprets a statute. Lampf may qualify as a rare exception to that, because the Court very freely conceded that there was no underlying statutory right that Congress had ever created or that it was ever aware of, and that in fashioning a statute of limitations the Court was forced to act in a manner that it isn't comfortable acting and is uncharacteristic for it, namely, determining what the proper legislative solution would have been if Congress had addressed the question.

QUESTION: But Congress did not pass a statute of limitations for the future, did it?

MR. DREEBEN: That's correct.

QUESTION: All right. So I've a human question, rather than an institutional one.

I'd always thought that the human purpose underlying separation of powers was to prevent what I'd call a vendetta, where one group of people decide to pass a law, then apply it, then adjudicate it as well.

Now, why isn't this one of the strongest cases of vendetta one can imagine, an unpopular, small group of people who, in fact, are affected by a law that applies to no one else, that does not apply to the future and therefore doesn't affect general policy, and is retroactive, and reopens a closed judgment by a court? If there's a stronger example of a vendetta, I'd like to know it.

I mean, that's what I'm concerned about in terms of the policy underlying separation of powers, and I guess if they're taking away money from somebody, as I suppose they are, why isn't that also a violation of the Due Process Clause?

MR. DREEBEN: Well, Justice Breyer, they're not -- first of all, this law doesn't take away money --

QUESTION: If it has any effect at all, it takes away money, otherwise its null and void, isn't it? I mean, it has no effect -- nobody cares about the cases where the plaintiffs are going to lose.

MR. DREEBEN: Well, the -- if money is taken away it's because the defendants committed securities fraud under then existing law.

QUESTION: No. It's also because somebody reopened a statute of limitations in a closed case. I'm not -- I'm telling you -- I'm saying this to put forth as succinctly as possible what's bothering me about the case. Then I'm interested in what your response is.

MR. DREEBEN: Let me explain why Congress believed that it was fair, rather than constituting any kind of a vendetta. It was the essence of fairness to restore the right of these plaintiffs to litigate on the merits --

QUESTION: I don't mean abstractly fair. Maybe that's a loaded word, by -- I put that in quotes. I simply mean, by a group of people who are legislators assuming functions that normally would be carried out by other branches, the separation of powers being a guarantee that there will not be aiming at these particular persons in a way that normally involves functions of other branches.

MR. DREEBEN: Well, any retroactive legislation will apply, necessarily, to cases that can be identified, and the Court has upheld not only retroactive legislation under the Due Process Clause, but has upheld legislation

such as in Robertson v. Seattle Audubon Society that was enacted with the specific purpose in mind of affecting a particular pending case, so I don't think that by itself, retroactivity constitutes a separation of powers problem.

What Congress was doing here was something quite similar to what the Court itself had done under the rule of Chevron Oil v. Huson, namely, taking into account that people rely on what the statute of limitations is when they choose to bring a lawsuit.

Plaintiffs in these cases relied on the statute of limitations in their respective jurisdictions, and this case, for example, was filed before any Federal court had ever applied a Federal statute of limitations to a Rule 10b-5 case, borrowing it from another section of the securities laws.

When this Court decided Lampf, many people who justifiably relied on the existing state of the law were surprised, or Congress could have so found, and this Court, while it could have taken action to protect similarly situated plaintiffs under Chevron Oil v. Huson, and it had indeed taken such action in other statute of limitations cases where the statute was, in effect, retroactively made shorter, had declared in Beam that it would not take action to affect these particular cases.

And Congress really was stepping in to restore a

level playing field to the parties who had relied on existing law in bringing their lawsuit. It did not determine what the outcomes of this lawsuit would be. That would raise a wholly different and more difficult separation of powers problem under Klein, if Congress had in fact dictated what the ultimate merit outcome would be of a lawsuit between private parties.

It did nothing of the kind here. It restored parties to the places they would be under then-existing statute of limitations law. It did not even declare that the suits must be reinstated. The plaintiff must show that his suit would have been timely under the law that prevailed in this jurisdiction.

QUESTION: It does seem to me we have to assume, for your argument, that this is all quite fair and reasonable, that what the Court did in its prior opinion was a surprise, that it did not declare what the law had been but, rather, that it changed law, and then I'm rather stuck as to how you can say -- how this Court could say that, unless it said it in the opinion.

MR. DREEBEN: I don't believe, Justice Breyer, that the Court has to say that. All the Court has to recognize is that Congress could legitimately have viewed it as a change in law by virtue of the fact that this Court's holding was a novelty in this Court's

jurisprudence.

Thank you.

QUESTION: Thank you, Mr. Dreeben.

Mr. Olson, we'll hear from you.

ORAL ARGUMENT OF THEODORE B. OLSON

ON BEHALF OF THE PRIVATE RESPONDENTS

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

As the questions from the Court have already suggested, this case tests whether the ultimate repository of judicial power in the United States shall rest with the judiciary or with the Congress.

Section 27A is deceptively simple, but it is at once a great deal more and a great deal less than what its proponents claim. Simply put, what it is not is a new statute of limitations. What it is, is an instrument that directs Article III courts to redecide decided final cases and it instructs them in substantial part, with respect to an important legal issue in those cases, exactly how they must be decided.

QUESTION: Mr. Olson, you have no question that if one of these cases is still pending, if an appeal were lodged after Lampf and Beam, and it was just sitting there, that that case could go forward?

Take two plaintiffs identically situated, one



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gets the word from Lampf and Beam and says, I give up. The other one says, although it's hopeless, I'm going to file an appeal, and the court of appeals is backlogged, I'm going to let it languish. That person has a good claim that could still go forward.

MR. OLSON: There are two answers to that, or at least two that come to my mind, Justice Ginsburg. In the first place, we do not concede that there wouldn't be significant separation of powers questions with respect to the cases that are not final, but we are dealing with cases that are final.

This Court made the distinction between final cases, and has repeatedly made the distinction between final cases. To answer your question, even assuming that the statute would be constitutional with respect to the pending case, in Beam, in Federated Department Stores v. Moitrie, if I'm pronouncing that correctly, this Court has said that the final line and the importance of judicial power is that distinction between when a judgment becomes final and when it is not final.

QUESTION: Let me understand you better you what you said. You are not conceding that the legislature could not extend, while a case is still alive, could not extend the statute of limitations. Isn't the statute of limitations, the time in which a claim is alive, a

peculiarly legislative function?

MR. OLSON: I -- we submit, or we concede that the statute of limitations is a peculiarly legislative area.

QUESTION: And that's there are -- there are many cases where a statute of limitations is extended while the claim is still alive.

MR. OLSON: Under some circumstances, the Court has permitted that to occur. There are limitations, we submit. It may depend on whether or not there has been an actual decision in a case and where the case is, and when -- and the extent to which the rights of individuals are affected.

The important addition --

QUESTION: Suppose -- let's take this case, and Congress had reacted to Lampf and said, we don't think it should be the 90 limit, we think it should be a 5-year limit, so we're enacting a 5-year limit, and it applies to all cases to which it could lawfully apply.

MR. OLSON: If the cases were open, it would be, I concede, a considerably more difficult case. It's important to emphasize that Congress in this case did not enact a new statute of limitations at all. The statute of limitations for buyers and sellers of securities is as this Court decided in the Lampf decision. Buyers and

sellers of securities similarly situated, and the law today, is the statute of limitations as decided in Lampf.

QUESTION: I'm just trying to get an answer from you about Congress' power. We've been concentrating on the court's power. It was my understanding that Congress could extend the statute of limitations, that there wasn't any question about that, and that the problem in this case is that there was a final judgment and some people were placed out of court, some people were still in court. I don't understand the problem that you're suggesting that exists.

MR. OLSON: I submit that there is a spectrum, Justice Ginsburg, that when the Congress of the United States extends a statute of limitations, its power is greater where the cases have not been brought or the cases have not been litigated.

If the cases are already in the litigation process, and decisions have been made by Article III courts, and if the Congress is instructing the courts to set aside those decisions, those raised, for me, separation of powers questions and due process questions that are not completely resolved, and they are difficult to resolve. They are more difficult than if the litigation hasn't commenced that far.

But, as I stress, that is not this case.

Congress tried, or considered extending the statute of limitations and enacting a new statute of limitations. In fact, it did not have the votes to do so.

It specifically -- its sponsors specifically said, we tried to change the statute of limitations and we did not have the votes to do so, and of course the other distinction here, the distinction that's important to the court, and important to this Court and important under Article III, is that there was a final judgment. In short, what section 27A does, it has, even though statutes generally have prospective application, section 27A has only retrospective application.

QUESTION: And is that the key, because if the -- if -- I mean, is it -- does it violate separation of powers always, to open up a closed judgment? I mean, suppose that Congress wanted to change one of its tort statutes for the future. It said, 6 months is too short, we want 2 years, and the statute says it's 2 years for everybody, and then it says, apply this 2-year statute to closed cases insofar as due process allows.

MR. OLSON: I --

QUESTION: Now, that would focus it, because insofar as due process allows, you can't do it, but now, is there any objection to that --

MR. OLSON: I do believe, Justice Breyer, that

as I believe Justice Scalia was suggesting in his questions, that if there is a -- what the judicial power is is to -- and I go back to Marbury v. Madison, is to decide the rights of individuals, and that it is fundamental to that judicial power --

QUESTION: This is a --

MR. OLSON: -- to render final decisions.

QUESTION: The legislation is a class. You see, everybody's thrown into it. You have -- what I'm thinking.

MR. OLSON: Yes.

QUESTION: Everybody, and now you're saying that separation of powers stops that legislation applying to a person with a closed judgment even if it doesn't violate the due process clause.

MR. OLSON: I believe that it may, Justice Breyer. I would refer Your Honor to --

QUESTION: Because -- it does that because?

MR. OLSON: Well -- to the decision of Federated Department Stores v. Moitrie. I hope I'm pronouncing that right. It's the 1982 decision --

QUESTION: There's no R. It's Moitie.

MR. OLSON: Moitie, excuse me, thank you, Chief Justice -- in which the Court -- this Court considered that issue in the context of a judicial decision changing

a rule of law and efforts by parties then to reopen under Rule 60, and I think this may address the question that was raised by --

QUESTION: But you see what I'm trying to think of. Not -- I'm trying to get the due process out of it, and they're not focusing on an individual case, and they're not intending to do anything but as a class treat everybody alike, past, present, and future. So they're not examining the judgment, they're doing nothing but general legislation. What separation of powers principle bars that, if due process doesn't?

MR. OLSON: I believe that if -- the separation of powers issue that's important there is that decisions of Article III courts, when they become final, finally adjudicate the rights between the parties, and even that legislation of general application cannot set aside those judgments except in extraordinary circumstances. We are aware of no case --

QUESTION: All right, so what they do is, they say, don't open it, we're giving all those people a new cause of action.

MR. OLSON: Well, I think that that would -- that -- it would raise similar questions as the Court -- as this Court said in the Sioux Nation case describing the Klein decision of the last century. The limitation on

jurisdiction, appellate jurisdiction, was just a means to an end. The court would probably look at that in this similar context.

I will stress, though, that this case is vastly different than that case, because once we've looked at what section 27A does not do, it's also important to focus specifically on what section 27A does do. It applies only to cases, not to persons, not to litigants, only plaintiffs and defendants. It applies only to a finite and identifiable class of plaintiff -- cases, those that were pending on a certain day in history.

Number 3, it declares in imperative and unequivocal terms what courts must do with those cases. They must --

QUESTION: What if it didn't do that? What if that last feature were --

MR. OLSON: If it was discretion, if it was a matter of discretion?

QUESTION: It would --

QUESTION: It would simply be a 60(b) issue.

MR. OLSON: It would be a --

QUESTION: Assuming that the retroactive feature is not a violation of due process, assuming that, would there be any separation of powers problems if the courts simply acted under 60(b)?

MR. OLSON: I don't think -- I hadn't thought of it quite that way. I don't think that there would be a separation of powers problem except that I would again refer to the Federated Department Stores case and the fact that as far as I could tell in my research for this argument, I have never found a case in which sections of Rule 60(b) was used to set aside a final judgment and to reinstate the rights of the parties based upon a change in the statute. I've never seen section --

QUESTION: It seems to me you're on the horns of a dilemma. If you must reopen under 60(b) you violate the separation of powers because it's the same thing as a mandate. If you have the option to reopen or not reopen, I can't imagine it wouldn't violate due process. A court can either take account of the congressional change of law, or not take account of it as the court sees fit. If that's due process, I don't -- if that isn't a violation of due process, I don't know what is.

MR. OLSON: I agree with you, Justice Scalia.

QUESTION: Well, is it always a violation of due process if two different courts in effect view the equities differently?

MR. OLSON: No, because the -- as I understand this Court's due process jurisprudence, it is an important and essential difference to the procedural due process of

individuals when courts, acting according to established procedures, decide the rights of individuals and litigants.

It's another thing entirely under the Due Process Clause when a legislative body comes in and attempts to redecide, or to decide, what the rights are between individuals, and that is where the Due Process Clause joins the separation of powers --

QUESTION: But there, your due process objection is in effect to the retroactivity of a rule applied to a class which has already been adjudicated, so you're saying, yes, there is a due process problem in effect in the very notion of retroactivity, because there can only be retroactivity here to a class which has been subject to prior adjudication.

MR. OLSON: I agree with that, but I also feel that the fact that it's the legislator -- legislature coming along to redecide cases and redeciding the rights of individuals, if I understand your question correctly, Justice Souter, that would be an additional answer that we would submit. This statute --

QUESTION: Mr. Olson, is there any relevance at all to the fact that no rights about the conduct, whether there was a fraud, whether there wasn't, involved here, the only question resolved was whether the case was

brought on time, and so we're not dealing with what did the parties do and was it proper under the law, but simply, how much time was there to open the court's door?

That was the only question at issue, and that is a determination that I think you would concede, how much time do you have to sue, is for the legislature to decide.

MR. OLSON: Well, I would respond to that in this way. In the first place, the configurations of the 10b-5 remedy were for the legislature to decide, but as Justice Scalia pointed out in his concurring opinion in Lampf, a great deal has been imagined with respect to the 10(b) right. This Court was attempting to --

QUESTION: I'm asking you for the 10(b) right and, indeed, all other rights that Congress creates or that this Court says we should imply. Isn't it for the legislature and not for the court to say how much time someone has to knock on the court's door?

MR. OLSON: Yes, except to the extent that when this Court is construing a legislative enactment and giving flesh to that legislative enactment in terms of when and under what circumstances a private right of action under that enactment may be prosecuted, this Court has imagined and attempted to discern what the legislature would have done.

Mr. Dreeben in the Morgan Stanley argument last

term, and Mr. Allen today, has said that the same result would occur based upon their arguments if Congress decided to reverse this Court's decision last term in Central Bank of Denver.

The other point that I would --

QUESTION: Weren't we -- whatever limitation period we were constructing in Lampf, it was an endeavor to determine what Congress meant. We were not dealing with some judicial notion of laches.

MR. OLSON: That's correct.

QUESTION: The question was, we recognize that Congress has the power to set time limits. There isn't any question about --

MR. OLSON: No question about that, just in the same way that Congress had the power to decide whether aiders and abettors could recover, just as Congress had the power to decide whether buyers or sellers should have a right of action under section 10(b).

My point in answer to your question is that the statute of limitations is not some different species of law. This Court has repeatedly said that the statute of limitations is an important part of the judicial process. It's the part -- and this Court in Lampf decided that it was a part of the balancing process that Congress would have -- the 73rd Congress would have engaged in when it

decided how long people would have the right to bring an action.

My point is that neither the Government nor my opponent contends that there would be any difference in this case if it was the aiding and abetting defense, or the in pari delicto defense, or other aspects of the section 10(b) right.

The other point that I would make is that this was very much like a bill of attainder. The legislative history makes it clear that the Members of Congress that addressed section 27A were disturbed by and unhappy with this Court's decision in Lampf.

They named the plaintiffs that they felt -- by name, by individual name, that they felt were unfairly deprived of their rights, they named the defendants by name who they said should not benefit by their greed, and therefore the decision by this Court should be set aside and, furthermore, there was considerable discussion -- it's impossible to tell how dispositive it was -- that certain Members of Congress were concerned about the fact that it would make it better for the Government if more plaintiffs won more 10b-5 cases because it would cost the Government less in terms of the savings and loan bail-out.

So that very much like Klein, and very much

opposite to the Sioux Nation decision, Congress was requiring courts to set aside their judgments in order to benefit the Government, in part.

QUESTION: Mr. Olson, could Congress have created a new cause of action somehow and waived any res judicata effect of prior --

MR. OLSON: I find no decision from this Court that would suggest that Congress could do that with respect to the res judicata effect of prior decisions when individuals were involved. I recognize that, and to return to the Sioux Nation point, in that case, Congress and the executive branch, the Solicitor General, and this Court, determined that all that was involved in the Sioux Nation case was waiving the res judicata effect of a judgment against the United States and acknowledging a debt that it felt, the Congress felt at the time that statute was passed, it may have owed.

QUESTION: Well, would that be a separation of powers problem as applied to individuals, or a due process problem.

MR. OLSON: Well, as applied to individuals, I still think that it could be both, because I believe -- this case is somewhat difficult to differentiate intellectually from -- the due process aspects from the separation of powers aspects, because I believe it may

have been Justice Breyer's question that focused on the fact that the significant reason for the separation of powers discussed by the framers of the Constitution was that if you concentrated power -- or the power of the legislature, the power to make the law, with the power to enforce the law, with the power to decide how it would be applied, that would be the very definition of tyranny, so the separation of powers is intended to protect individual rights just as the Due Process Clause is.

I believe that the doctrine of res judicata, the finality of judgments, is a significant and fundamental component of the judicial power. It's also something that exists to protect individuals.

The summary -- in summary --

QUESTION: May I ask you a question, Mr. Olson, because I'm not quite sure of either your opponent's view or your view on this. Supposing, going back to the aiding and abetting business and the other case, supposing Congress today passed a statute authorizing a cause of action for aiding and abetting a 10b-5 violation and said, it shall be brought -- applied a case that's 10 years -- arose 10 years ago. Would that be constitutional?

MR. OLSON: Believe that both of our positions are clear. Mr. Allen I believe said in his argument that he believed that the Congress would have the power to do

that.

QUESTION: Would have, or would not have?

MR. OLSON: I believe that he said -- I hope I did not mishear.

QUESTION: I didn't really understand what he was saying.

MR. OLSON: Well, I thought that he said that.

QUESTION: But let's -- why don't I just ask what you think?

MR. OLSON: I was going to make that point affirmatively, that I do not believe that Congress would have the power to do that to the extent that the rights of individuals had been adjudicated --

QUESTION: Even though the prior case -- the holding of this Court in the 10b-5 case we had before was that there simply is no such cause of action.

MR. OLSON: Yes.

QUESTION: Now, why does such a holding prevent Congress from creating such a cause of action?

MR. OLSON: Well, with -- again, that would become complicated, and I think my answer is more of a due process answer than a separation of powers answer to the extent which the Court is deciding something that you may be forced to pay damages to someone for something that you did 10 years ago when you didn't have to --

QUESTION: Well, would that be equally true if there'd been no case in this Court in the meantime?

MR. OLSON: I think that I would go back --

QUESTION: I think what you're saying is Congress can't create a 10-year-old cause of action.

MR. OLSON: Well, that's part of my answer. The other part of my answer is the answer that I gave before.

I think this Court would see through it in a moment, that what it was -- that legislation would be no more than a means to an end, like the Sioux Nation characterized the Klein situation, that Congress was coming along, setting aside judgments in order to pick winners and losers after the fact, and I think that that would bother this Court a great deal from the standpoint of separation of powers, because it would be a subterfuge.

QUESTION: This statute -- it's interesting, because this statute embraces all of the weaknesses that one might identify with this character of legislative activity.

The interesting thing is that what Congress did here is strip -- what this Court customarily does, as articulated in Marbury v. Madison, is decide the rights of individuals, and decide cases, and decide how they should come out, and decide what the law was when the transactions occur or the conduct occurred.

Congress has now taken away all of that effect. The rights of individuals are now as decided by Congress, but Congress didn't change the prospective effect of the Lampf decision, it made the Lampf decision into something that didn't affect individuals, it didn't affect plaintiffs or defendants in the Lampf case if you uphold section 27A.

QUESTION: Are you saying, Mr. Olson, that Congress could do more but not less, unless -- I thought you said in answer to my question, suppose Congress said we don't like 3 years, we're going to make it 5, and everybody would cover -- be covered.

MR. OLSON: There's two answers to that. One, there's a right way and a wrong way for Congress to do similar things. Chadha is an example of that, although this is certainly not at all like Chadha, but the fact is that the Congress under some circumstances can do other things. What it can't do -- and that's about as well as I can do with that question, because unless the facts are specified it's more difficult to be more specific.

QUESTION: Congress, reacting to our Lampf decision, says, we think 5 years is a reasonable time. We also think there are many people who have a reliance interest in what they thought the law was, they proved to be wrong, so we want to cover those people, treat them in

the way we're treating the people that we are legislating for, as we have a right to do. We want everybody to have 5 years, and that includes people with cases pending, people who have been -- whose actions have been dismissed, and people who are filing their complaints today.

MR. OLSON: I still think, Justice Ginsburg, that that would create problems under the Due Process Clause and the Separation of Powers Clause, depending upon which cases and which individuals one was looking at and where they were in the spectrum, and the extent to which the legislation acted, in fact, prospectively if the decision had been --

QUESTION: But tell me what Congress could do if Congress is of a mind that it wants to enlarge the time that people can bring this 10(b) claim, and it wants to cover as many people as possible --

MR. OLSON: Well, this --

QUESTION: -- and says, we know -- one thing that we do know is our prerogative to set time limits for the bringing of Federal actions. You said there's a right way and a there's a wrong way. What is the right way for Congress to accomplish that objective of getting as many people in under what it thinks is the proper time limit?

MR. OLSON: I'm not certain where the line would be. It is a difficult question to answer. I do believe,

although it is not before this Court, that cases in which the issue is pending, under my -- Mr. Allen's definition, decided by a district court, for example, but on appeal, would still create constitutional questions.

Where Congress is simply enlarging the statute of limitations which has not been litigated, with respect to a claim that has not been litigated at all, I think Congress' power would be a great deal greater.

But this case is all the way at the far end of the spectrum.

QUESTION: I just wanted to know if you could tell me what was the right way. You have said that this way is the wrong way. I don't see --

MR. OLSON: Well, one of the --

QUESTION: -- in your answer so far that there is any right way.

MR. OLSON: Well --

QUESTION: You seem to be saying that Congress can deal with from this day forward but not for the past.

MR. OLSON: Well, the -- this Court has said --

QUESTION: Maybe there is no right way. Is there a possibility that there is no right way to overturn a judicial decision --

MR. OLSON: Not --

QUESTION: -- that adjudicated private --

MR. OLSON: Not --

QUESTION: Is that a possibility?

MR. OLSON: Well, of course, and that's what I am hoping that I've said.

QUESTION: Well then, say that. I mean --

MR. OLSON: Well, but I think that --

(Laughter.)

QUESTION: And you think there is no way in your argument, not that Congress -- there was a right way but Congress --

MR. OLSON: No way with respect to final judgments.

QUESTION: Would you go so far as to say a statute allowing setting aside of a judgment obtained by fraud or by bribery or something like that could not obtain final -- authorize the setting aside of final judgments?

MR. OLSON: No. Congress has done that, or this Court and Congress --

QUESTION: How does it get that power --

MR. OLSON: -- has done that with Rule 60(b).

QUESTION: Is that just the limit of its power? It only can do it where there's fraud?

MR. OLSON: Well --

QUESTION: What if the judge was hypnotized for

that class of cases.

(Laughter.)

QUESTION: Could they set aside all judgments in which judges over 90 years old were hypnotized and gave -- presumably gave a stupid judgment?

MR. OLSON: I -- in the first place, Rule 60(b) is a codification of what --

QUESTION: No, but forget 60(b). Could they pass such a statute for a limited class of judgments that they detected created -- they thought created a very --

MR. OLSON: I --

QUESTION: -- special doubt about --

MR. OLSON: I do not believe so, Justice Stevens.

QUESTION: Fraudulent judgments are invalid judgments.

MR. OLSON: Yes. Yes, but --

QUESTION: Stupid judgments are not invalid judgments, right?

(Laughter.)

MR. OLSON: That's exactly --

QUESTION: That's the distinction.

(Laughter.)

MR. OLSON: That's exactly what --

QUESTION: A clear distinction.

MR. OLSON: -- the Court said in Federated Department Stores. It doesn't matter whether the decision was wrong. Once the judgment is final, that fixes the rights of parties.

If I can make just one additional point with respect to section 27A, and I think I was about to finish making it, that this 27A is a very peculiar statute in that it completely and exclusively reversed the roles of the courts and the Congress. The court's decision is now purely prospective, such as like the one that -- like the Moitie decision that the justices of this Court rejected in the --

QUESTION: Some people think the Lampf case reversed the roles of Congress and the courts, too.

MR. OLSON: Well, but this Court didn't.

QUESTION: Some of us.

(Laughter.)

QUESTION: Unkind of you to point that out.

MR. OLSON: And, of course, this Court's decision, since it no longer affects the litigants either in that case or the cases that were pending, strips the -- allows the Court to be stripped of its power.

QUESTION: You said there's really no middle way, in for a calf, in for a cow. Lampf is and was the law, even if a lot of people thought it wasn't. You have

to go all the way down that line. There's no possible compromise.

MR. OLSON: Justice Ginsburg, section 27A(a) is not before this Court. The Court denied cert in that case, and a petition for cert that was filed in that case. We're only talking about the final judgment part of section 27, not only the judgment part of 27A(b), but the final judgment part of 27A(b), so we're only looking at one piece of it.

I would make some of those arguments with respect to 27A(a), but those aren't before this Court. What is before this Court is a classic exercise by the Congress of changing the results of this Court.

If it can change the results in Lampf, it can change the results in other decisions having to do with section 10(b).

If it can change the decisions of this Court and other courts with respect to the securities laws, it can change the results in this Court under ERISA, or RICO, or some other statute.

If it can change the result in Lampf and a group of cases, it can change the result in a single case. There is no principled stopping point. This is an egregious exercise of judicial power and an egregious weakening of the judicial power, and it is

unconstitutional.

Thank you.

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

(Whereupon, at 12:02 p.m., the case in the above-entitled matter was submitted.)



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BY Ann Marie Federico

(REPORTER)