

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: PENNSYLVANIA DEPARTMENT OF CORRECTIONS,
ET AL., Petitioners v. RONALD R. YESKEY

CASE NO: 97-634 *c.1*

PLACE: Washington, D.C.

DATE: Tuesday, April 28, 1998

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 PENNSYLVANIA DEPARTMENT OF :

4 CORRECTIONS, ET AL., :

5 Petitioners :

6 v. : No. 97-634

7 RONALD R. YESKEY :

8 - - - - -X

9 Washington, D.C.

10 Tuesday, April 28, 1998

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:03 a.m.

14 APPEARANCES:

15 PAUL A. TUFANO, ESQ., General Counsel of Pennsylvania,
16 Harrisburg, Pennsylvania; on behalf of the
17 Petitioners.

18 DONALD SPECTER, ESQ., San Quentin, California; on behalf
19 of the Respondent.

20 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor
21 General, Department of Justice, Washington, D.C.; on
22 behalf of the United States, as amicus curiae,
23 supporting the Respondent.

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1 P R O C E E D I N G S

2 (10:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 97-634, Pennsylvania Department of
5 Corrections v. Yeskey, Ronald Yeskey.

6 Mr. Tufano.

7 ORAL ARGUMENT OF PAUL A. TUFANO

8 ON BEHALF OF THE PETITIONERS

9 MR. TUFANO: Mr. Chief Justice, and may it
10 please the Court:

11 Applying the Americans With Disabilities Act to
12 State prisoners goes against the intent of Congress and
13 violates the Constitution. It also allows Congress to
14 alter the Federal-State balance of power without first
15 giving States notice and then opportunity to be heard, and
16 it ignores this Court's clear mandate that State prison
17 administrators who have difficult and dangerous jobs be
18 given great deference.

19 QUESTION: Well, Mr. --

20 QUESTION: Mr. Tufano, did you make your
21 constitutional argument in the courts below?

22 MR. TUFANO: Your Honor, we did make
23 constitutional arguments in that we have always argued in
24 this case as a matter of statutory construction,
25 federalism issues, and the issue of the clear statement

1 rule, and as a matter of statutory construction we believe
2 that the Court is to be guided by possible serious and
3 grave constitutional questions which could arise from an
4 interpretation of the Americans With Disabilities Act as
5 applying to prisoners.

6 QUESTION: Did you make that argument below,
7 that the statute should be construed a particular way
8 because to construe it another way would get into
9 constitutional difficulties?

10 MR. TUFANO: We did not, Your Honor. We argued
11 below, as we have always, the issues of federalism and the
12 same arguments that we've raised below regarding
13 federalism go to the arguments which we have made as a
14 matter of statutory construction regarding the Fourteenth
15 Amendment and the Commerce Clause as well.

16 QUESTION: Mr. Tufano, the language of the
17 statute says that public entity means any State or local
18 government, any department, agency, district or other
19 instrumentality of a State or States or local government.
20 That's very broad language, is it not?

21 MR. TUFANO: Yes, it is, Your Honor.

22 QUESTION: Now, what about the application of
23 the ADA -- disabilities act -- to employees of prisons?
24 Does it apply there?

25 MR. TUFANO: Yes, it does, Your Honor.

1 QUESTION: How about to visitors at prisons?

2 MR. TUFANO: We would take the position that it
3 does apply to visitors, Your Honor.

4 QUESTION: Well then, what, in the language that
5 I read, gets you off the hook for prisoners?

6 MR. TUFANO: We don't dispute the fact that the
7 Department of Corrections is a public entity within the
8 meaning of the ADA and in title II, but there is a
9 difference between the Department of Corrections being
10 considered a public entity and whether a prison is a
11 public entity or a program, activity, or service.

12 When the Department of Corrections wears its --

13 QUESTION: Well, a prison might not itself be a
14 program, but it might have within the prison context a
15 program or activity. In this very case it's alleged that
16 the particular program, the boot camp, is a sort of
17 program or activity of the prison.

18 MR. TUFANO: We believe, Your Honor, that
19 program, activity, and service have different meanings in
20 the context of a prison, that it is not the -- it was not
21 the intent of Congress to cover something like prisoners,
22 that prisoners are not part of the public, and that --

23 QUESTION: I can understand an argument that in
24 complying with the statute and the regulations, that the
25 prison only has to make reasonable modifications based on

1 the circumstances.

2 Now, surely the circumstance that it's a prison
3 and there are great security concerns would affect that
4 determination, would it not?

5 MR. TUFANO: It would affect it, Your Honor, but
6 again, you have to look at the fact that Congress'
7 findings in enacting the ADA talked about employment,
8 housing, voting, medical services, and it talked about
9 access to public services, and it talked about people
10 having -- being able to live independently, and they
11 talked about living in a free society, and the fact that
12 they based their findings in large part on the U.S.
13 Commission on Civil Rights Report of 1983, which they
14 lifted the conclusions almost verbatim, except for one, on
15 involuntary sterilization, and they chose a couple of more
16 which were not in the conclusions --

17 QUESTION: Mr. Tufano, which Civil Rights Act
18 did you say?

19 MR. TUFANO: The U.S. Commission on Civil Rights
20 Report of 1983, Your Honor.

21 QUESTION: And that is of the same genre, I
22 believe, as title VI, which, as you know, covers race
23 discrimination, and I think the language is almost
24 identical, so would you say, then, on your reasoning about
25 prisoners, that title VI would not apply either to

1 prisoners?

2 MR. TUFANO: That's correct, Your Honor. The
3 Congress specifically chose two or three findings, or list
4 of areas in the appendix to this report which did not
5 discuss them as areas where discriminatory practices
6 occur, and they specifically left behind the criminal
7 justice system, where --

8 QUESTION: Who is they? Was this report
9 approved by the whole Congress? Who is it a report of?

10 MR. TUFANO: It was a report of the U.S.
11 Commission on Civil Rights, and it was, I believe,
12 introduced into both committees of Congress, Your Honor.

13 QUESTION: And you want to attribute that to the
14 whole Congress?

15 MR. TUFANO: Well, Justice O'Connor's question
16 about public entity, and whether a prison is a program,
17 statutory construction, as this Court has held, is a
18 holistic endeavor, and you look not only at individual
19 sentences, but you also look at the whole purpose of the
20 law, and the purpose of the ADA was to provide for the
21 assimilation in free society of American citizens in
22 employment --

23 QUESTION: Well, what about the background of
24 the Rehabilitation Act, which has been on the books since
25 the seventies, and as I understand it, the ADA is modeled

1 precisely on that, and there is some 20 years of
2 Department of Justice regulations saying that prisons are
3 covered.

4 MR. TUFANO: In -- that's correct, Your Honor.
5 In -- the Rehab Act regulations which were promulgated by
6 the Justice Department referred to prisons, and in 1990,
7 when Congress enacted the ADA, and the States were to
8 supposed to have been given a clear statement that the
9 historic sovereign function of State prison management was
10 about to be entered into by the Congress, the -- what
11 Congress was aware of at best was Rehabilitation Act
12 regulations promulgated by the agency, nothing in the act,
13 and there were -- there was a Circuit Court decision and
14 two district court decisions, and in the ADA, it refers
15 back to parts of the Rehab Act regulations, part 39 and
16 part 41.

17 Part 41 doesn't say anything about prisons, and
18 the respondent and the Federal Government argue that the
19 States were to know that in part 42 there is mention about
20 prisons. Part 39 talks about the Justice Department and
21 Federal prisons very much into the fine print, and that's
22 what's wrong with the ADA.

23 The ADA -- the argument of the respondent in the
24 Federal Government as to what the clear statement was in
25 the ADA is to read the fine print. The problem is that

1 the fine print is in another set of regulations under a
2 different law, and it does not appear in the four corners
3 of the document, and it's our position that --

4 QUESTION: What does appear in the four corners
5 of the document that enables you to exclude prisons? What
6 language do you rely upon that excludes -- it doesn't
7 really exclude prisons entirely, just excludes those
8 programs in prisons that relate to prisoners?

9 MR. TUFANO: You start with the findings, Your
10 Honor, by Congress, in the findings section of the ADA,
11 where they talk about the different areas where they have
12 found problems with discrimination and the -- they don't
13 talk about the criminal --

14 QUESTION: So any area that is not mentioned in
15 the finding is not covered by the text of the act, even
16 though the words otherwise would cover it. Is that the
17 principle you want us to apply?

18 MR. TUFANO: Well, that's part of the principle
19 I'd want you to apply.

20 The other part would to be -- to look at the
21 meanings of the words in the statute regarding a qualified
22 individual who meets the essential eligibility
23 requirement.

24 QUESTION: May I go back to the findings for a
25 minute? What is it in the findings that excludes prisons?

1 It starts out, some 43 million Americans have one or more
2 physical or mental disability. Are you saying that's 43
3 million not counting prisoners?

4 MR. TUFANO: Yes, I am, Your Honor, because if
5 you look below that they talk about discrimination in such
6 areas as employment, housing, public accommodations,
7 education, transportation, communication, and recreation.

8 QUESTION: Such areas as.

9 QUESTION: Institutionalization is also in
10 there.

11 MR. TUFANO: Institutionalization is there, but
12 again --

13 QUESTION: And this is an institution.

14 MR. TUFANO: It's a correctional institution,
15 but --

16 QUESTION: Yes.

17 MR. TUFANO: -- we believe that the meaning of
18 institutionalization, which again these areas were lifted,
19 that that sentence in 12101(a)(3) is almost verbatim
20 language from the U.S. Commission Report, where
21 institutionalization is not discussed in the criminal
22 justice context.

23 QUESTION: Well, but just staying within the
24 four corners of the document is what we started to do. I
25 would have thought institutionalization includes being

1 institutionalized in a prison or a mental institution or
2 whatever kind of institution, just without knowing the
3 background of your argument.

4 MR. TUFANO: I understand, Your Honor, but
5 again, if you look at the language in the ADA which talks
6 about qualified individuals who meet essential eligibility
7 requirements -- and it's in the context of title II, which
8 is about public services, and I don't think that you can
9 reasonably conclude that meeting the eligibility
10 requirements to receive food stamps, or to get into a
11 library or a museum, is the same as meeting the
12 eligibility requirements to get into prison.

13 QUESTION: It isn't a matter of getting into
14 prison, but once you're in prison, the eligibility
15 requirements to use the prison exercise facilities, right?
16 I guess not everybody's allowed to use them. I suppose
17 the guards can't use them. Aren't there eligibility
18 requirements for various activities in the prison?

19 MR. TUFANO: There are eligibility requirements
20 within a prison, but the difference is that public
21 services are provided to the public for their benefit, and
22 not all of the programs and activities and services of a
23 prison are primarily for the benefit of the prisoner.

24 QUESTION: Okay, but you don't -- the word
25 public, I take it, you don't have a textual argument on

1 that. The word public is not defined anywhere so as to
2 say it means free people rather than incarcerated people,
3 so you -- am I correct?

4 MR. TUFANO: That's correct that that's our
5 position, Your Honor.

6 QUESTION: Well then, public apparently means, I
7 assume from the act, any person in relation to the
8 Government. Wouldn't that be the normal significance of
9 the term?

10 If Government is being bound, public is that
11 which is not Government, so public I presume would include
12 prisoners.

13 MR. TUFANO: Well, the public in the context of
14 the ADA, which talks about assimilation of people
15 immediately into free society, is very different from what
16 happens with prisoners, where we take them out of society.

17 QUESTION: It is very different, but is it
18 defined in the ADA anywhere?

19 MR. TUFANO: The word public is not defined
20 anywhere, Your Honor.

21 QUESTION: You said not all prison programs are
22 for the benefit of the prisoner, but the very one we have
23 before us surely is, this boot camp that allows a prisoner
24 to save many, many months of incarceration, isn't that
25 right? Wouldn't you call that for the benefit of the

1 prisoner?

2 MR. TUFANO: Certainly there's a incidental
3 benefit for the prisoner, but if you look at the Boot Camp
4 Act, the General Assembly in Pennsylvania was seeking to
5 deal with the problem of overcrowding in prison, and to
6 deal with the problems of riots in prison, and that was
7 the purpose of the statute. It was not to give inmates an
8 early way out of prison.

9 QUESTION: What about mental, State mental
10 institutions? Are they public institutions? Are the
11 residents of mental institutions members of the public?

12 MR. TUFANO: Yes, they are, Your Honor.

13 QUESTION: Why is that different from prisons?
14 I don't understand that. I mean, they're certainly
15 separated from the public just as well.

16 MR. TUFANO: But in mental institutions, Your
17 Honor, they're there because they need help, because they
18 can't make decisions for themselves, and in many cases the
19 court makes --

20 QUESTION: Well, that's all very true, but how
21 does that bear upon the word public?

22 MR. TUFANO: Because --

23 QUESTION: I don't see any element of voluntary,
24 or you know, having committed criminal acts in -- there's
25 just nothing in the word public that makes that

1 distinction.

2 MR. TUFANO: I think that a couple of
3 differences. One, that public does not imply someone who,
4 when they go through a prison gate, gives up or has
5 curtailed many of their rights, unlike somebody who is in
6 a mental institution who is there at times against their
7 will because they can't -- they don't have the capacity to
8 make a decision for themselves.

9 QUESTION: Well, but they've given -- they're
10 certainly deprived of rights.

11 MR. TUFANO: They are, Your Honor --

12 QUESTION: The basic right to walk out of the
13 institution.

14 MR. TUFANO: They are, but they're there for
15 their own help. They're there for their benefit, and a
16 prisoner is not in prison for his or her benefit.

17 QUESTION: That's all very true, but how do you
18 read that into the word public? I --

19 MR. TUFANO: I --

20 QUESTION: You have to give me a text to -- as
21 the doorway to what you want to achieve. I don't see a
22 single word in the act that has any of these notions.
23 They may make a lot of sense.

24 MR. TUFANO: Again, looking at what the goals of
25 Congress were in implementing the ADA and what they talked

1 about, the different areas that there, had problems with,
2 knowing that for 25 years and more this Court has
3 consistently talked about the problems unique to prison
4 management and have not applied the same constitutional
5 analysis to prisoners, so I believe that when you look at
6 the way prisoners are treated in the eyes of the
7 Constitution, if you look at the --

8 QUESTION: Well, let me ask you this. Do you
9 think that this Court would sanction a prison policy that
10 said black prisoners can't eat in the dining hall with
11 white prisoners because they don't have any constitutional
12 rights?

13 MR. TUFANO: I don't think this Court would
14 sanction it.

15 QUESTION: I don't think so, either, and if
16 Congress were enacting legislation based on its perception
17 that handicapped people suffer from discriminatory
18 attitudes and practices, then Congress might think that
19 that should be stopped, just like the thing I just asked
20 you about. I think that's possible.

21 MR. TUFANO: It's possible, Your Honor, but
22 again, what Congress has done in -- if they have tried to
23 apply the ADA to State prisons, what they've done is
24 applied a different standard now to how prison management
25 have to deal with the disabled, and in your example of

1 blacks in the cafeteria, this Court has held that the
2 normal strict scrutiny analysis doesn't apply in the
3 prison context when fundamental rights or a suspect class
4 are involved.

5 You look at whether it's reasonably related to a
6 legitimate penalogical interest, and with the disabled,
7 this Court has held that they're not a suspect class, and
8 that with prisoners, even in the most strictest of
9 scrutiny situations, you wouldn't normally apply that, so
10 now we have --

11 QUESTION: You wouldn't normally apply what?

12 QUESTION: We don't have an as-applied challenge
13 here in --

14 MR. TUFANO: I understand.

15 QUESTION: -- the context that you are concerned
16 about, I think, and as I suggested before it's quite
17 possible that concerns for prison security would be
18 relevant in deciding what specific action a prison has to
19 take with regard to a specific handicapped prisoner.

20 MR. TUFANO: Again, Your Honor, the problem is
21 that applying the ADA in title II to State prisoners will
22 shift the burden.

23 Currently, the actions or policies of a
24 Department of Corrections are presumed to be valid. Under
25 the ADA, the standard will be that prison administrators

1 with -- only with regard to the disabled will have to show
2 that there weren't any other means by which they could
3 have accommodated this person, that any other -- this was
4 the only way --

5 QUESTION: What sort of things practically,
6 Mr. Tufano, do you envision happening if the Third Circuit
7 opinion is upheld, or what sort of things are the prison
8 administrators going to be confronted with?

9 MR. TUFANO: Well, one of the things, and we
10 cite it in our brief, Your Honor, is in the Purcell case,
11 where an inmate was told that he had a doctor's
12 appointment, and he refused to go to the doctor's
13 appointment because he wanted to go into a cell and
14 release his tics because he had Tourette's Syndrome.

15 QUESTION: Release his what?

16 MR. TUFANO: His tics, his -- the emotional
17 outbursts which are --

18 QUESTION: Oh, t-i-c-s.

19 MR. TUFANO: Yes.

20 QUESTION: Okay.

21 (Laughter.)

22 MR. TUFANO: A different kind of tics.

23 He told the guard that --

24 QUESTION: I still don't understand the
25 expression, to release the tics, but --

1 (Laughter.)

2 QUESTION: -- if it satisfies the Chief
3 Justice --

4 (Laughter.)

5 QUESTION: Go ahead.

6 MR. TUFANO: But in that case -- in that case, a
7 simple situation where an inmate is telling a corrections
8 guard, I don't have to go to my medical appointment, and
9 he was given the opportunity to sign a release if he
10 didn't go to the appointment. He didn't want to do either
11 because, I have Tourette's Syndrome and I'm allowed to go
12 into my cell and release my tics at my leisure.

13 Now we're facing in that case the possibility of
14 punitive damages for the guards telling the inmate either
15 go to your doctor's appointment -- he wasn't sending him
16 to the rock pile. He was sending him to his medical
17 appointment -- or sign this release that you refuse to go
18 to your medical appointment, and he said no, I don't have
19 to do that, and we were not able to get the court in that
20 case to agree with us that that did not state a claim
21 under the Americans With Disabilities Act.

22 And the problem is, in a prison environment,
23 where you have murderers, rapists, the worst people in
24 society, if the disabled are going to be able to put a
25 guard on his defensive, that he's now got to think unlike

1 he has to think with regard to any other type of inmate,
2 but just with the disabled, that he has to start thinking
3 almost from a litigation avoidance perspective about
4 whether if he's going to be sued under the ADA, the
5 institution's going to get dragged into court, and --

6 QUESTION: Why is it different than under title
7 VI, with race discrimination?

8 MR. TUFANO: I'm sorry, Your Honor?

9 QUESTION: Why is it any different -- Congress
10 has said, here's a class, and thou shalt not discriminate,
11 but we recognize the need for reasonable regulations.

12 Congress says, thou shalt not discriminate in
13 prisons, you've conceded, even though they didn't use the
14 word prisons, on the basis of race, and apparently the
15 prison authorities are able to cope with that.

16 MR. TUFANO: The difference is, Your Honor, it's
17 one thing to say, thou shalt not discriminate on the basis
18 of race, it's another thing, in the Americans With
19 Disabilities Act, to say you shall not discriminate on the
20 basis of disability in a program activity or service and
21 you shall affirmatively make accommodations for this
22 person, and you shall only pick your course of action if
23 you can show that there wasn't anything else available
24 according to what the inmate wanted.

25 QUESTION: Well now, Mr. Tufano, the Federal

1 regulations dealing with the application of this act say
2 things such as the following:

3 A public entity shall make reasonable
4 modifications in policies, practices, or procedures where
5 necessary to avoid discrimination on the basis of
6 disability, and unless the entity can demonstrate that
7 making the modifications would fundamentally alter the
8 nature of the service, program or activity.

9 Now, that seems on its face to leave room for
10 prisons to say, it's not a reasonable modification that's
11 being sought, and it would alter the program or activity
12 that's necessary in the prison context.

13 MR. TUFANO: It might at first glance, Your
14 Honor, but a couple of points. One is that that is a
15 standard which prison officials do not have to apply with
16 regard to any other inmate, including inmates that would
17 be in a suspect class.

18 The other is that if you look at the regulations
19 it talks about the head of the agency or his or her
20 designee having to put in writing the fact that there were
21 no other ways of doing this without fundamentally altering
22 the program.

23 And recently some corrections officials asked
24 the Justice Department to exempt certain types of
25 programs, including boot camps, because clearly, to be in

1 a boot camp, given the physical regimen there would be --
2 they talked about boot camps, and I believe they talked
3 about firing ranges.

4 And the Justice Department's response was to
5 deny the request for exemption and said, only physical and
6 structural issues will be a reason for an exemption for
7 that --

8 QUESTION: Mr. Tufano, what responsibility does
9 the Justice Department have for the administration of this
10 law? Does it have any responsibility, other than issuing
11 regulations interpreting the law?

12 MR. TUFANO: I believe they --

13 QUESTION: Does it do anything else?

14 MR. TUFANO: I believe that they have
15 responsibility in the compliance section, Your Honor, with
16 regard to complaints under the ADA.

17 QUESTION: What is that? Complaints are made to
18 them?

19 MR. TUFANO: They could be made to them, if not
20 brought into court.

21 QUESTION: And what do they do when complaints
22 are made to them? They bring suit?

23 MR. TUFANO: They can, is my understanding, but
24 again --

25 QUESTION: I mean, that's the same with any

1 criminal law, isn't it?

2 MR. TUFANO: Well, it's not the same with any
3 criminal law, and that's part of our concern about the
4 ADA, Your Honor, is that --

5 QUESTION: We usually don't let the Justice
6 Department say what our criminal laws mean by issuing
7 regulations interpreting those criminal laws.

8 QUESTION: So why -- why is that? What's your
9 problem, and I'm not saying you don't have one, because I
10 hear this kind of problem quite a lot.

11 What Justice O'Connor said, I thought was the
12 case. The law requires reasonable accommodation, and so
13 you produce examples where it seems they're requiring
14 unreasonable accommodation, so why don't you say to the
15 court or whoever, reasonable is what it requires, what
16 we're doing is reasonable, and if you're right, you can do
17 it, and if you're wrong, you shouldn't do it?

18 I'm not saying it's that simple, but I want to
19 know what the problem is.

20 MR. TUFANO: The problem is, Your Honor, in
21 attempting to do that under either the section 5
22 enforcement powers of the Fourteenth Amendment or under
23 the Commerce Clause, there's no basis to do that to lift
24 the standard above which this Court has held.

25 QUESTION: But now you're getting --

1 QUESTION: I'm not -- that isn't my question.
2 My question is, is there any practical problem in applying
3 it to prisons that wouldn't exist in any other institution
4 in society?

5 Of course people can disagree about what's
6 reasonable, but ultimately, if you're reasonable you
7 should be permitted to do it and if you're not reasonable
8 you shouldn't be. Is there some kind of special problem?
9 What is it?

10 MR. TUFANO: Well, the special problem is the
11 unique situation of prisons. I mean --

12 QUESTION: They should be able to be
13 unreasonable but nobody else should?

14 MR. TUFANO: They should be able to, as they
15 have with issues of people's First Amendment Rights,
16 whether it's the free exercise of religion or freedom of
17 speech, they should be able to at least be able to treat
18 the disabled under -- at a minimum under the same standard
19 or the way they've had to treat other classes of inmates
20 who, like the disabled, are not in a suspect class, and
21 the fact that they're now going to have to treat prisoners
22 who are disabled different --

23 QUESTION: They'll have to treat them
24 reasonably, in light of their disability. Are you arguing
25 that they should be able to treat them unreasonably?

1 I mean, I'm getting to the same point over and
2 over, but I'm trying to find out what is your real problem
3 here.

4 MR. TUFANO: The real problem is having the
5 Federal Government involved in State prison management.
6 That's the basic problem, having to have -- for the first
7 time treating disabled inmates different from everyone
8 else, knowing, as this Court has held, that preferential
9 treatment for inmates poses security problems in a prison.

10 QUESTION: Why didn't anyone make this argument
11 to Congress?

12 MR. TUFANO: Well, because I believe that --
13 Congress I don't believe made a clear statement in the
14 ADA. In over 70 hearings and public forums in 50 States
15 we have not been able to find one instance where a State
16 correctional officer or official testified, or provided
17 any written testimony or comments.

18 QUESTION: But since the position has been taken
19 by some courts, by the Department of Justice, that first
20 under the Rehabilitation Act, now under the Disabilities
21 Act, prisons are covered, have any States, Pennsylvania or
22 any others, said to Congress please amend this statute?
23 Whatever you meant, please amend it so that we don't have
24 this litigation.

25 MR. TUFANO: I'm not aware, Your Honor, of

1 anyone after the fact doing that, but again, to rely on
2 the ADA regulations, and to allow this fine print in other
3 regulations under another law become the clear statement,
4 goes from where the States are supposed to have notice and
5 opportunity to be heard by Congress before the law is
6 enacted as opposed to --

7 QUESTION: Are you making the argument that even
8 though Congress says all and any, prisons are out, unless
9 Congress specifically mentions prisons, even though all or
10 any will cover any other kind of institution?

11 MR. TUFANO: I do believe that when it comes to
12 prison management, which is a fundamental aspect of our
13 sovereignty, that Congress could have spoken a lot more
14 clearly. They could have put the word prisons or
15 correctional facilities in their findings of areas where
16 discrimination persists. They might have --

17 QUESTION: But they didn't put in anything --
18 they used all, as Justice O'Connor said. They used any.
19 They used sweepingly encompassing, inclusive language, and
20 you're saying they have to single out prisons, I take
21 it --

22 MR. TUFANO: Yes, Your Honor.

23 QUESTION: -- as apart from all other
24 institutions.

25 MR. TUFANO: Yes, Your Honor.

1 I'd like to reserve the rest of my time, Your
2 Honor.

3 QUESTION: Very well, Mr. Tufano.

4 Mr. Specter, we'll hear from you.

5 ORAL ARGUMENT OF DONALD SPECTER

6 ON BEHALF OF THE RESPONDENT

7 MR. SPECTER: Mr. Chief Justice, and may it
8 please the Court:

9 Whether the ADA applies to State prisoners is
10 not a close question. The words of the ADA are clear.
11 The words are plain, and they cover State prisoners. The
12 ADA was enacted for one overriding purpose, and that
13 purpose was to eliminate discrimination in a clear and
14 comprehensive manner wherever it occurs in our society,
15 and that includes prisons.

16 QUESTION: May I ask you, Mr. Specter, one
17 question just to straighten me out. Does the statute
18 apply to Federal prisons?

19 MR. SPECTER: Yes. It applies under section 504
20 to the Federal prisons, Your Honor.

21 QUESTION: Under 504?

22 MR. SPECTER: Yes.

23 QUESTION: Does the Rehab Act apply to Federal
24 prisons?

25 MR. SPECTER: Yes, it does, Your Honor.

1 QUESTION: Yes, and it's basically the same
2 provision?

3 MR. SPECTER: Yes, Your Honor.

4 QUESTION: What is section 504?

5 MR. SPECTER: That's the Rehabilitation Act,
6 Your Honor.

7 QUESTION: Oh, the Rehabilitation Act.

8 MR. SPECTER: I'm sorry.

9 QUESTION: The Rehabilitation Act covers Federal
10 facilities and -- which came first, the Rehabilitation
11 Act?

12 MR. SPECTER: The Rehabilitation Act came in
13 1973, Your Honor.

14 QUESTION: Which covers only federally funded
15 programs in the Federal Government, and then the ADA
16 essentially extended the same thing more generally to all
17 State and public institutions.

18 MR. SPECTER: I couldn't have said it any more
19 clearly.

20 QUESTION: What's been the history of litigation
21 from prisoners in the Federal system under the Rehab Act?

22 MR. SPECTER: To my knowledge, Your Honor, there
23 haven't been very many reported cases of Federal prisoners
24 suing under the Rehabilitation Act. I know the Federal
25 Government and the Bureau of Prisons has policies which

1 prohibit discrimination based on disability.

2 QUESTION: Is the Federal Government liable for
3 punitive damages in the event of default?

4 MR. SPECTER: I don't think it is, Your Honor.

5 QUESTION: So that's the big difference.
6 There'll be a big damages component under the ADA.

7 MR. SPECTER: I don't know if big is the right
8 word, Your Honor, but there will --

9 QUESTION: Well, punitive --

10 QUESTION: Maybe huge.

11 (Laughter.)

12 MR. SPECTER: It depends on your perspective.

13 QUESTION: And attorney's fees recoverable?

14 MR. SPECTER: Yes, they are, Your Honor, just as
15 they're recoverable --

16 QUESTION: Under ADA.

17 MR. SPECTER: Yes, but I would like to mention,
18 Your Honor --

19 QUESTION: Now, is there a federal enforcement
20 arm under the Justice Department or not?

21 MR. SPECTER: The Justice Department has the
22 authority to enforce the ADA. They have authority to
23 investigate, to seek alternative dispute resolution of the
24 issues, and to bring lawsuits, Your Honor.

25 QUESTION: Is that by statute?

1 MR. SPECTER: That's by statute, yes.

2 QUESTION: By provisions of the ADA?

3 MR. SPECTER: Yes, Your Honor, and I would like
4 to mention in response to Justice O'Connor's question
5 about the potential for litigation under this act, the
6 provisions of the Prison Litigation Reform Act, many of
7 the provisions of the Prison Litigation Reform Act which
8 would drastically limit the abilities of prisoners to sue
9 State officials, applies to many of the provisions of the
10 act, Your Honor.

11 QUESTION: Well, how do you think that they
12 drastically limit it?

13 MR. SPECTER: They impose damages filing fees,
14 they have certain --

15 QUESTION: Well, but if some lawyer thought
16 there was the potential for attorney's fees and punitive
17 damages in a case, I assume the attorney would pay filing
18 fees.

19 MR. SPECTER: That is true, Your Honor, but I
20 can tell you from 20 years of experience in prison
21 litigation that there are very few lawyers out there who
22 are willing to take these cases, so -- but your
23 theoretical concern is a real one, but practically, there
24 aren't that many prison lawyers out in the real world.

25 QUESTION: Supposing, Mr. Specter, that a

1 criminal defendant in Pennsylvania has just been convicted
2 and he's going to be in prison for a long period of time,
3 and the judge sentences him to a regular prison, can he
4 make an argument that, you know, I've got a heart
5 condition and therefore I should go to a special -- to a
6 more lenient prison for that reason?

7 MR. SPECTER: I wouldn't call it more lenient,
8 Your Honor. He could go to a special prison. Even under
9 the Eighth Amendment he would have that argument, that, as
10 you say, if he's otherwise disabled, such as he's a person
11 who uses a wheelchair --

12 QUESTION: I'm not talking about somebody who
13 uses a wheelchair. Supposing he says, you know, I had a
14 heart attack 6 years ago, I just should get special
15 consideration, and the regime in the prison you're going
16 to send me to is just too rigorous.

17 MR. SPECTER: If his heart condition would
18 substantially limit his -- any major life activity, then
19 that would be an issue at the prison he was being sent to.
20 Then he could make that argument.

21 In the real world, with all due respect, Your
22 Honor, that type of scenario is not likely to occur very
23 often.

24 QUESTION: Why not?

25 MR. SPECTER: Because most prison systems have

1 medical facilities for people who have medical conditions.
2 They go to those situations, and in the real world -- in
3 prisons, there aren't -- if you have a heart condition and
4 you can't do strenuous exercise, for example, you're
5 usually classified for what's called light duty, in which
6 you'd be given a job sitting at a desk, or some such --

7 QUESTION: Without benefit of the ADA?

8 MR. SPECTER: Even without the benefit of the
9 ADA.

10 QUESTION: The ADA only requires reasonable
11 accommodation, isn't that right?

12 MR. SPECTER: Yes, Your Honor.

13 QUESTION: And what would constitute reasonable
14 accommodation in a prison is not necessarily the same
15 thing that would constitute reasonable accommodation in
16 some other public facility, isn't that so?

17 MR. SPECTER: I agree with that completely, Your
18 Honor.

19 QUESTION: And in this case we didn't get into
20 any of that. He made a claim, but there's nothing
21 exploring whether he has any right to be in this boot
22 camp, is that so?

23 MR. SPECTER: Yes, Justice Ginsburg, that's
24 exactly correct. That would be decided upon remand to the
25 district court if the court affirms the Third Circuit's

1 opinion.

2 Petitioners do not dispute in this case that --
3 at least in their brief that the Department of Correct --

4 QUESTION: Now, what if the medical condition is
5 such that the prison says, if you participate in the boot
6 camp program --

7 MR. SPECTER: Yes.

8 QUESTION: -- it will be a severe hazard to your
9 health?

10 MR. SPECTER: If the --

11 QUESTION: And it's a serious risk to you to
12 engage in this program in any meaningful way.

13 MR. SPECTER: If they can prove that, Your
14 Honor, and they can prove that the person's participation
15 in the program in that way is an essential requirement of
16 the program, then they have no liability.

17 QUESTION: And they're not a qualified
18 individual, I assume --

19 MR. SPECTER: Exactly.

20 QUESTION: -- under the statute. They just
21 don't qualify.

22 MR. SPECTER: That's exactly right.

23 QUESTION: And you share, I take it, my concern
24 that the requirements of the statute should be interpreted
25 in light of the prison need for security.

1 MR. SPECTER: I do, Your Honor. I -- we have
2 said in our brief and we endorse the lower court decisions
3 that have made that statement, that prison is different.

4 The ADA was developed to be a very flexible
5 statute. It was developed and enacted to cover a very
6 wide range of programs, and it has to be applied when
7 considering the particular factual circumstance of that
8 program, and we do not deny that prisons are different
9 than many other programs.

10 QUESTION: Suppose the prison official said,
11 this person can really participate in only about half of
12 our program. He can do a half a day of the strenuous
13 running, getting up early, marching, and calisthenics and
14 so forth. He can do this for half a day but not a full
15 day, and we think that the program really operates best
16 with a full day.

17 And it's just a matter of money, and they could
18 have a program so that -- say, if three or four prisoners
19 could do the half-day program, it might work, it might not
20 work. We're not sure how well boot camp programs work.
21 That's about the evidence.

22 What would the district judge do with a case
23 like that?

24 MR. SPECTER: Well, Your Honor, if you go to the
25 appendix of, the last page of the appendix of our brief,

1 you'll find the boot camp schedule, and you'll notice that
2 the physical activity covers about 40 minutes of --

3 QUESTION: Well, use my hypothetical.

4 MR. SPECTER: Okay.

5 QUESTION: Use my hypothetical.

6 MR. SPECTER: Yes, Your Honor. In that
7 circumstance the district judge may very well conclude
8 that the physical activity is an essential part of the
9 program and it would let the Department of Corrections off
10 the hook if there was no other way that they could
11 reasonably modify the program.

12 QUESTION: Well, suppose they could have a two-
13 track program, for some people do it half-a-day, some
14 people do it a full day, would they have to do that?

15 MR. SPECTER: They don't have to operate a
16 separate program, Your Honor, but they do have to make
17 reasonable accommodations. For example, for -- well, they
18 do have to make whatever accommodations that the district
19 court finds reasonable.

20 QUESTION: How does that work in the statute?
21 That is, one of the things that was worrying me is that in
22 section 12131(2) it uses -- you know, that's the one that
23 says -- defines qualified individual with a disability.

24 MR. SPECTER: Yes, Your Honor.

25 QUESTION: Well, it uses the word reasonable in

1 respect to modification to rules, policies, or practices,
2 and then when you get to the provision of auxiliary aids
3 and services the word reasonable doesn't easily fit there,
4 but it wouldn't make sense not to have it fit, so how --
5 and it similarly wouldn't make -- I mean, I don't think
6 the statute intends to make people do things that are not
7 reasonable.

8 MR. SPECTER: It doesn't.

9 QUESTION: So how is that worked out in the
10 interpretation?

11 MR. SPECTER: Well, auxiliary aids and services
12 is, the difference is because in auxiliary aids and
13 services you cannot participate in a program without them.
14 If you're deaf and you don't have an assisted --

15 QUESTION: Well, why isn't a -- is auxiliary
16 service like an extra boot camp? I mean, suppose somebody
17 said --

18 MR. SPECTER: No, no. An auxiliary aid, or
19 auxiliary service can mean an assisted listening device,
20 for example.

21 QUESTION: Yes, but suppose the person argues,
22 in my case what it requires is the following, because of
23 the boot camp something costs \$1 billion. I mean --

24 MR. SPECTER: Okay.

25 QUESTION: Which would be totally unreasonable.

1 I'm looking for something that's totally unreasonable and
2 then asking you how does that work.

3 MR. SPECTER: Oh, surely, Your Honor.

4 QUESTION: How does the word reasonable come
5 into it?

6 MR. SPECTER: Well, the regulations, which were
7 specifically incorporated into the statute within the text
8 of the act itself that were promulgated under section 504
9 and carried over to section (a) have an undue burden
10 defense, so when the prison can say, this would be an
11 undue financial or administrative burden, they have a
12 defense to liability.

13 QUESTION: And is that true also of
14 architectural barriers?

15 MR. SPECTER: Architectural barriers in existing
16 facilities, I believe it's true. In new facilities, they
17 have to build new facilities so that they're accessible.

18 QUESTION: Even if it costs \$10 billion to build
19 a one-room shack.

20 MR. SPECTER: Well, it doesn't.

21 QUESTION: But I mean, if it did.

22 (Laughter.)

23 QUESTION: My question is, is reasonableness
24 there coming into it?

25 MR. SPECTER: I would think so, Your Honor.

1 QUESTION: But you're not sure.

2 MR. SPECTER: But I can't point to any part of
3 the regulation, because this is not a structural
4 accessibility case.

5 QUESTION: Mr. Specter, the reasonable
6 accommodation standard crops up in various places in the
7 law, and one is in title VII in reasonable accommodation
8 to religious practices.

9 MR. SPECTER: Yes, Your Honor.

10 QUESTION: Are there other examples that one
11 would look to if we want to understand this concept of
12 reasonableness and how it relates to expense?

13 MR. SPECTER: Well, I think the clearest way to
14 look to read what Congress meant about reasonableness in
15 the ADA is to look at the great body of law that's
16 developed under section 504, which has applied the
17 reasonable -- basically the same regulations that are --
18 were incorporated into the ADA.

19 And I think that's one of the ways that Congress
20 was being flexible and sensitive to the needs of the State
21 agencies, including Department of Corrections, by using a
22 word with which district court judges and other courts are
23 familiar and know how to apply in a sensible fashion, and
24 I think that's an appropriate way to cover such a broad
25 range of activities.

1 QUESTION: Mr. Tufano told us what he's
2 concerned about is turning all these matters into Federal
3 cases.

4 MR. SPECTER: Yes, Your Honor. Well, I would
5 hope that that would not be necessary, because many of the
6 accommodations or reasonable modifications that would be
7 made would be made as a matter of course by prison
8 officials anyway. That's the first thing.

9 Secondly, I think many of them are very easy to
10 make. Putting up some grab bars, for example, is very
11 inexpensive. It's very -- a quick procedure, and it
12 allows a person who doesn't have the use of his legs an
13 easy access to the facilities, to toilet facilities or
14 shower facilities or the like. Many of these things are
15 not very difficult to accomplish.

16 The petitioners do not dispute that the
17 Department of Corrections is a public entity, but they
18 contend that it's ambiguous whether the boot camp is a
19 service, program, or activity, and our contention is that
20 the State -- I wanted to clear up one thing Mr. Tufano
21 said, is that -- or, Justice Ginsburg, you hinted at, is
22 the State boot camp statute which establishes the boot
23 camp, establishes it and defines it, describes this as a
24 program itself, so we believe that it's very clear that
25 program, service, or activity basically covers anything

1 that a State agency does.

2 The words program and activity were statutorily
3 defined by the Rehabilitation Act to cover all of the
4 operations of a prison, and those words were taken from
5 the Rehabilitation Act and put into the ADA so Congress
6 would ensure that they would have the same meaning.

7 We believe that the universal language of the
8 statute, its foundation in the Rehabilitation Act, and the
9 regulations which cover prisons, which were expressly
10 incorporated into the act, make it plain that there is no
11 statutory exception for prisoners, which is what the State
12 is arguing for.

13 We do not believe, and we don't think it would
14 be -- we think it would be an impossible burden for the --
15 for Congress to have to list every single entity which it
16 wanted to cover. I don't think it could even -- it would
17 be very difficult. I think it would be an impossible
18 burden for Congress to do that.

19 QUESTION: Mr. Specter --

20 MR. SPECTER: Yes.

21 QUESTION: -- do you agree with Mr. Tufano that
22 the State did not raise any constitutional argument in the
23 lower courts?

24 MR. SPECTER: Emphatically, Your Honor.

25 Since -- we believe that the case is clear, that

1 the language of the statute is clear, that this is a plain
2 meaning case, that the Court, because this case arises
3 from a motion to dismiss, that the Court must assume that
4 Mr. Yeskey has been discriminated against on the basis of
5 his disability, and he should not be denied relief because
6 the disability discrimination that occurred, or is alleged
7 to have occurred, occurred in a prison and while Mr.
8 Yeskey was a prisoner.

9 We believe, for all the reasons that I've stated
10 and those in our brief, that the judgment of the Third
11 Circuit should be affirmed.

12 Thank you.

13 QUESTION: Just one question. The cases of
14 ramps and some of the fixtures are fairly easy and
15 straightforward cases, but we both know that in the
16 employment context there's such a thing -- reasonable
17 accommodation includes reassignment. It also includes
18 redesigning of jobs.

19 Now, would you see -- seek in this case a
20 redesigning of the boot camp to accommodate a -- an
21 individual who is disabled in some way?

22 MR. SPECTER: Well, that might even not be
23 necessary in this case, Your Honor.

24 QUESTION: Well, if it was necessary.

25 MR. SPECTER: If it was necessary and they could

1 make reasonable modifications --

2 QUESTION: Sort of on the scale of light duty in
3 the post office or something like that.

4 MR. SPECTER: Yes, Your Honor, with one major
5 qualification, and that -- two major qualifications, and
6 that are -- they are that it didn't fundamentally alter
7 the essential requirements of the program and that it
8 didn't cause an undue financial or administrative burden.

9 QUESTION: Yes, and -- I understand that, but
10 that's -- we both know that that's tough. The -- you can
11 redesign jobs that fundamentally do the same thing, but
12 with half the efficiency, so we know there's a problem
13 there.

14 Let me ask you one other question. Even though
15 the accommodation may be different or reasonableness may
16 take on a different meaning in the remedial context, the
17 definition, very personalized definition of what is a
18 disability, let's say someone has a disability, of course,
19 of a psychological nature. That would have to be
20 accommodated in prison, right?

21 MR. SPECTER: If it substantially limited their
22 major life activities, yes.

23 QUESTION: Well, let's say it's in Pennsylvania
24 in the employment context some -- you can prove, this
25 individual can prove that claustrophobia is my disability,

1 and let's say this person has a history of claustrophobia
2 as a disability, and the -- as soon as he's sentenced by
3 the judge he says, I have claustrophobia. Now, how do you
4 accommodate that?

5 MR. SPECTER: You might not be able to. It
6 might not be a -- it might not be reasonable, and it would
7 certainly make a fundamental alteration in the nature of
8 cells.

9 (Laughter.)

10 QUESTION: But we both know it's a little bit
11 more -- reasonable accommodation is a bit more difficult
12 than our discussion's been so far.

13 MR. SPECTER: I don't think the task that
14 Congress gave to district courts is necessarily easy in
15 every case, but I think --

16 QUESTION: But we know under 504 it's pretty
17 difficult.

18 MR. SPECTER: Yes.

19 QUESTION: Okay.

20 MR. SPECTER: I think it's a task --

21 QUESTION: Well --

22 MR. SPECTER: -- that the district courts are up
23 to.

24 QUESTION: Did Congress give the task to
25 district courts or to prison administrators?

1 MR. SPECTER: Well, hopefully they -- district
2 courts will not have to deal with this. I believe that in
3 the first instance the prison administrators are the ones
4 charged with being responsible for making these decisions.

5 If there are no other questions I will --

6 QUESTION: Very well, Mr. Specter.

7 MR. SPECTER: -- yield the rest of my time to
8 Mr. Gornstein.

9 QUESTION: Mr. Gornstein.

10 ORAL ARGUMENT OF IRVING L. GORNSTEIN
11 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
12 SUPPORTING THE RESPONDENT

13 MR. GORNSTEIN: Mr. Chief Justice, and may it
14 please the Court:

15 The court of appeals correctly held that the ADA
16 prohibits State prisons from discriminating against
17 disabled inmates in their programs, services, and
18 activities that they provide to inmates for three reasons:

19 First, the text of the act unambiguously
20 prohibits such discrimination, second, the application of
21 the ADA to prisons was a logical -- State prisons was a
22 logical extension of section 504 of the Rehabilitation
23 Act's application to Federal prisons and to State prisons
24 that receive Federal funding, and third, the interpretive
25 principles that are relied on by petitioner do not support

1 the creation of a nontextually based exemption to the act.

2 Beginning with the text, the act applies to any
3 public entity that provides programs, services, or
4 activities and, since the act defines a public entity to
5 include any agency or department to a State, the State
6 Department of Corrections is clearly covered. Nor is
7 there any question that --

8 QUESTION: I think I'm very interested,
9 Mr. Gornstein, if it does apply, how you interpret the
10 accommodation that's required in the prison context.

11 MR. GORNSTEIN: Well, there would be two things
12 you would look to.

13 First of all, the backdrop of section 504, which
14 this Court interpreted in Southeastern Community College
15 v. Davis not to require accommodations that impose undue
16 burdens and not to require accommodations that would lead
17 to a fundamental alteration in the program, which in that
18 case included lowering standards and substantially
19 modifying a nursing program, and second of all you would
20 look to a general principle that this Court has applied in
21 section 504(2), to deferring to the reasonable medical
22 judgments of health professionals.

23 By a parity of reasoning, in the prison context
24 you would defer to the reasonable security judgments of
25 correctional officials in the context of an ADA case.

1 QUESTION: Mr. Gornstein, how much litigation
2 has there been on the section 504, because that's been
3 around for a couple of decades, involving prisons, either
4 Federal prisons or State prisons receiving Federal
5 assistance?

6 MR. GORNSTEIN: There has not been a lot
7 relating to prisons, very little.

8 QUESTION: Are damages available under the Rehab
9 Act?

10 MR. GORNSTEIN: Damages are available under the
11 Rehab Act with respect to State prisons, not federally
12 assisted prisons, but not with respect to Federal
13 correctional --

14 QUESTION: Right, so that might indicate why
15 there's less litigation, and no punitive damages.

16 MR. GORNSTEIN: It might, but the thing that I
17 wanted to add about that is that the Prison Litigation
18 Reform Act now does have a provision that -- a provision that
19 relates to damages, which can only be recovered when there
20 is physical injury. That is, psychological damages and
21 damages of that sort can only be recovered when there is
22 physical injury under the Prison Litigation Reform Act.

23 QUESTION: But under -- and that would cover the
24 ADA --

25 MR. GORNSTEIN: It would.

1 QUESTION: -- as well?

2 MR. GORNSTEIN: It would.

3 QUESTION: Tell us a little bit more about how
4 the boot camp might work. Let's suppose that a high
5 school had a physical conditioning program, very rigorous,
6 for its students 2 or 3 hours a day, and that a disabled
7 student wanted to participate, and it would cost \$5,000 a
8 year per disabled student increase to run a separate track
9 program for the disabled student.

10 The same with the boot camp. A disabled
11 prisoner wants to participate in boot camp. It would cost
12 \$5,000 a year for the second track for the disabled
13 prisoner.

14 Would the judge make the same determination in
15 each case, or would he say, prison budgets are such that
16 \$5,000 is more significant for a prison than it is for
17 schools?

18 MR. GORNSTEIN: I think that the real difference
19 would not come in in measuring undue burden but would come
20 in in the question of security, deferring to security
21 interests. I'm not sure the case would look that much
22 different when the question is just a financial one.

23 But I would add in response to your
24 hypothetical --

25 QUESTION: Well, let's say in each case you can

1 do it for \$5,000, second track, a second track for the
2 school \$5,000, second track for the prisoners.

3 MR. GORNSTEIN: There's a question --

4 QUESTION: Is the calculus just the same?

5 MR. GORNSTEIN: There would be a question that
6 would arise whether you have to do any sort of new and
7 separate program at all, whether that -- regardless of how
8 much it might cost. Whether you would have to run a
9 separate or new program, that would be a question.

10 QUESTION: Why wouldn't you in the boot camp
11 hypothetical, if it's feasible to do for \$5,000 a
12 prisoner, or \$5,000 a student?

13 MR. GORNSTEIN: I think that the question is
14 whether you're being denied access to services or a
15 program that is being provided by the institution.

16 Here, the program or service is the boot camp
17 program, and the question would be, would admission to
18 that require fundamentally altering that program.

19 QUESTION: \$5,000.

20 MR. GORNSTEIN: If rigorous physical exercise is
21 an essential part of that program, and there is no -- it
22 wouldn't matter how much money it would cost to construct
23 another one, it would be a different program.

24 QUESTION: Let's assume that we think it might
25 work if it's altered for this person. We're not sure, but

1 we're pretty sure it will work. It won't be as good, but
2 it will certainly have some benefits. The same with the
3 high school.

4 MR. GORNSTEIN: If it doesn't substantially
5 change the nature of the program, then if it's not costly,
6 then it may have to be provided under the ADA and section
7 504 as well.

8 On -- now, there is no question that States
9 provide programs, services, or activities. State prisons
10 do. They provide medical services to inmates. They
11 provide recreational activities, and they also provide
12 many programs like the boot camp program at issue in this
13 case, so there's no basis for an exemption in the terms,
14 programs, services, or activities.

15 I wanted to add that there's nothing unusual at
16 all about applying the ADA to State prisons. Prior to the
17 enactment of the ADA, the section 504 of the
18 Rehabilitation Act already applied through the Department
19 of Justice's regulations to State prisons receiving
20 Federal funding and to the Federal Bureau of Prisons.

21 QUESTION: Through the regulations, or through
22 the statute? That doesn't -- I thought the statute was
23 clear enough. I mean --

24 MR. GORNSTEIN: The statute --

25 QUESTION: It's as clear as this one, you say.

1 (Laughter.)

2 MR. GORNSTEIN: It's perfectly clear what the --

3 QUESTION: You wouldn't disagree with that.

4 MR. GORNSTEIN: I would not disagree with that.

5 I would only add that they didn't specifically mention
6 prisons, but the Department of Justice regulations did.

7 The final point I wanted to make was that
8 petitioners' reliance on Gregory v. Ashcroft and the
9 principles of constitutional doubt is misplaced in this
10 case. Each of those principles only comes into play when
11 there is genuine ambiguity in a statute to resolve and
12 here there is no genuine ambiguity. The text of the act
13 clearly and unambiguously prohibits State prisons from
14 discriminating against disabled inmates, so the court of
15 appeals' judgment should be affirmed.

16 If there aren't any further questions --

17 QUESTION: Thank you, Mr. Gornstein.

18 Mr. Tufano, you have 3 minutes remaining.

19 MR. TUFANO: Your Honor, I have no further
20 rebuttal.

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

23 (Whereupon, at 10:58 a.m., the case in the
24 above-entitled matter was submitted.)

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of:

PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL., Petitioners v.
RONALD R. YESKEY
CASE NO: 97-634

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

BY Don Mari Fedirko-----

(REPORTER)