1 IN THE SUPREME COURT OF THE UNITED STATES

2 -X

3 CORRECTION OFFICER PORTER, :

4 ET AL., :

5 Petitioners :

6 v. : No. 00-853

7 RONALD NUSSLE :

8 -X

9 Washington, D.C.

10 Monday, January 14, 2002

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States at

13 11:02 a.m.

14 APPEARANCES:

15 RICHARD BLUMENTHAL, ESQ., Attorney General, Hartford,

16 Connecticut; on behalf of the Petitioners.

17 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor

18 General, Department of Justice, Washington, D.C.; on

19 behalf of the United States, as amicus curiae,

20 supporting the Petitioners.

21 JOHN R. WILLIAMS, ESQ., New Haven, Connecticut; on behalf

22 of the Respondent.

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

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument

4 next in Number 00-853, Porter v. Nussle.

5 General Blumenthal.

6 ORAL ARGUMENT OF RICHARD BLUMENTHAL

7 ON BEHALF OF THE PETITIONERS

8 GENERAL BLUMENTHAL: Mr. Chief Justice, and may

9 it please the Court:

10 This case is about the meaning of the term,

11 prison conditions, and the reason it is here is because

12 the Second Circuit misinterpreted that term contrary to

13 the purposes of Congress and the meaning given that term

14 by this Court.

15 In fact, Congress adopted this Court's language

16 when it passed the Prison Litigation Reform Act of 1996

17 and adopted the meaning of that term given to it by this

18 Court in a line of cases, Preiser v. Rodriguez, the

19 Bronson case, McCarthy v. Bronson, and Wilson v. Seiter,

20 that very clearly include single episode and excessive

21 force cases, which the Second Circuit Court of Appeals

22 excluded in its decision. It interpreted the term, prison

23 conditions, to exclude those kinds of single episode and

24 excessive forces instances of misconduct by prison

25 officials.

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1 QUESTION: What's the universe of conditions and
2 nonconditions that you would suggest? There was
3 considerable discussion in the brief about the distinction
4 between 1983 suits and habeas corpus suits. You would not
5 draw the line there, would you, or would you?
6 GENERAL BLUMENTHAL: Preiser v. Rodriguez draws
7 the line between habeas corpus petitions on the one hand
8 challenging the fact or duration of confinement and the on
9 the other hand conditions of prison life, or conditions of
10 his prison life, as it refers to the petitions that we
11 think are the universe that would be included in 1983
12 actions. Virtually any conditions of prison life ought to
13 be regarded as conditions of confinement cases.
14 QUESTION: Well, can you give me an example,
15 under your theory, of a case that is not covered by habeas
16 corpus, but that also are not a condition of prison life
17 which is a 1983 suit? When could a 1983 suit lie under
18 your theory?
19 GENERAL BLUMENTHAL: Our position would be that
20 all of those 183 lawsuits ought to be subject, are subject
21 to the exhaustion requirement. There are no exclusions,
22 whether it's --
23 QUESTION: You can't think of any suit brought
24 by a prisoner that is not controlled by the term,
25 conditions, unless it's a habeas corpus suit?

1 GENERAL BLUMENTHAL: Well, if it were completely
2 unrelated to prison life -- an example might be, for
3 example, a lawsuit against a State tax commissioner, for
4 example, just to take one that seems relevant in light of
5 the earlier argument today, where the prisoner is claiming
6 that he's been denied a refund to which he's properly
7 entitled, and --
8 QUESTION: You're saying that all Eighth
9 Amendment claims under 1983, which is what most of the
10 prison cases are.
11 GENERAL BLUMENTHAL: All --
12 QUESTION: They claim that they've been deprived
13 of a constitutional right because they have been sentenced
14 to prison and the conditions of that prison, whether it's
15 an isolated beating by a guard or anything else, are
16 unduly -- are cruel and unusual?
17 GENERAL BLUMENTHAL: Yes, Justice Scalia. All
18 Eighth Amendment constitutional claims, indeed all
19 constitutional claims under 1983, this Court has never
20 established a hierarchy among such claims regarding
21 excessive force claims as deserving greater priority, so
22 that they ought to be spared the exhaustion requirement.
23 In fact, it is specifically said in Wilson v.
24 Garcia that, for example, on statute of limitations
25 questions there ought to be uniformity, and certainty, so

1 as to avoid the kind of litigation that also was the
2 purpose of Congress in passing the PLRA, and that is
3 really one of the key points here.
4 QUESTION: That's an easier line. What you're
5 saying is that the minute you begin defining a universe of
6 conditions which is smaller than the 1983 suits --
7 generally we have a whole jurisprudence that has to be
8 tested and create satellite litigation, et cetera, and I
9 understand that. I'm just wondering if your definition is
10 prevailing, Congress would have used those words,
11 conditions. It would have just said all 1983 suits
12 involving prisoners, period.
13 GENERAL BLUMENTHAL: Justice Kennedy, Congress
14 used that term because it was used by this Court to
15 describe a category of the universe as set forth in
16 Preiser and again in McCarthy v. Bronson, where the court
17 faced a similar issue under the Magistrates Act, the
18 nonconsensual referral of petitions to magistrates, and
19 said that all of these cases, 1983 cases are, indeed,
20 conditions of confinement cases, and Congress wanted to
21 use that language and that meaning given by this term so
22 as to avoid corollary or, as you put it quite well,
23 satellite litigation that, in fact -- in fact has been
24 spawned in the Second Circuit by the Nussle case, and we
25 see it, for example, in Royster v. United States, which is

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1 before this Court on cert, where excessive force is no
2 longer even involved.
3 It's a particularized instance, as the court of
4 appeals referred to it, of denial of the documents, legal
5 documents that the prisoner claims he is entitled to
6 receive, and courts then and now would have to decide what
7 kinds of cases are excessive force, if they are mixed with
8 other cases that may not be excessive force, if they seem
9 to involve in some respect ongoing conditions --
10 QUESTION: You can certainly find some Eighth
11 Amendment claims that have nothing to do with excessive
12 force, I think. A case comes to mind that we decided
13 earlier this term, a case called Molesco, which came from
14 the Second Circuit. It didn't come here under the Prison
15 Litigation Act, but what happened there was that the
16 prisoner had a heart condition, he ordinarily was allowed
17 to use the elevator to go up to the sixth floor cell, this
18 day the prison attendant said no, you can't use the
19 elevator, so he walked up the stairs and had a heart
20 attack.
21 Now, that case was brought under the Eighth
22 Amendment. I take it under your view that if it were a
23 prison litigation action he should have to exhaust
24 administrative remedies.
25 GENERAL BLUMENTHAL: Exactly, Mr. Chief Justice.

1 He ought to be required to exhaust because in that case,
2 for example, the prison administrator could and might well
3 make adjustments to the facilities, might do retraining,
4 different decisions on hiring, in fact, disciplining --
5 QUESTION: General Blumenthal, on the other side
6 of that is the argument that Nussle makes that he said
7 that the guards told me if I report what they did they
8 would kill me, so are there assurances -- you said the
9 value of -- no risk to the prisoners, this is going on, so
10 that they can cure it. He says, if I told they said they
11 were going to kill me. Are there assurances in the system
12 that there isn't going to be retaliation of someone who
13 makes an internal complaint?
14 GENERAL BLUMENTHAL: Certainly in Connecticut's
15 system, Justice Ginsburg, there are such assurances, and
16 in the joint appendix at 11 and at other places there are
17 requirements for confidentiality, for example. There is a
18 requirement for an informal contact or request.
19 In the Connecticut system, the commissioner
20 entertains, personally reads, is on the floor and, indeed,
21 there is the requirement that the lieutenant make two
22 rounds every day, that a captain make one round, that he
23 be or she be accessible in those circumstances, and that
24 protection be provided, and that is, as a matter of fact,
25 one of the advantages of exhausting, because it assures

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1 timely, prompt attention.

2 QUESTION: General Blumenthal, I don't really

3 understand this. Was the threat that the guards made, if

4 you tell somebody through an administrative internal

5 procedure we're going to kill you, but it's perfectly okay

6 to go to a court directly. We just really want you to

7 exhaust administrative remedies. We'll kill you if you

8 exhaust administrative remedies.

9 (Laughter.)

10 QUESTION: But if you go right to the court,

11 that's okay. Is that realistically what the threat was?

12 GENERAL BLUMENTHAL: Justice Scalia, the --

13 QUESTION: So this problem, you have it no

14 matter what, don't you?

15 (Laughter.)

16 QUESTION: You can't --

17 GENERAL BLUMENTHAL: The threat of retaliation

18 was more general.

19 QUESTION: I would think so.

20 GENERAL BLUMENTHAL: And it was never verified,

21 of course.

22 QUESTION: Prison guards don't --

23 GENERAL BLUMENTHAL: It was a claim.

24 QUESTION: -- administrative law generally, in

25 my experience.

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1 GENERAL BLUMENTHAL: Well, they're learning,
2 Justice Scalia, and part of the claim here was one of
3 retaliation, but it --
4 QUESTION: Was he still in prison when he
5 brought this case?
6 GENERAL BLUMENTHAL: He was in prison when he
7 brought this lawsuit. He waited for 3 years. He waited
8 until literally 3 to 5 days, depending on whether you look
9 at the complaint or whatever, until the statute of
10 limitations was about to expire, and then he went to
11 court.
12 It was not a timely, emergent, exigent plea for
13 help, and if there had been a real threat physically to
14 him, the prison administration would have afforded a far
15 more effective means of protection than going to Federal
16 court and seeking some remedy -- and by the way, he sought
17 money damages. He didn't seek any protection or
18 injunctive relief -- than going to Federal court and
19 seeking some remedy far in the future.
20 The excessive force claim -- and I want to be
21 very frank about it -- is intertwined with the single
22 episode contention on which the court of appeals also
23 relied, and in our view the excessive force claim, the
24 threat of physical harm, is a more difficult one because
25 it's raised in this Court's cases, in Hudson v. McMillian,

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1 and Farmer v. Brennan, which deal with the element of
2 proof, the elements of proof that have to be provided to
3 make out a claim, with the standard of intent that has to
4 be shown.
5 QUESTION: You acknowledge they do draw this
6 distinction between prison conditions and excessive force
7 cases?
8 GENERAL BLUMENTHAL: They do, Justice Kennedy,
9 but only for the purpose of the standard of proof or
10 intent, and this Court has made that distinction very
11 clear in Crawford-El v. Britton, which is cited in the
12 briefs at 523 U.S. 574, and particularly at 585 the Court
13 draws the distinction, because in Crawford-El it is saying
14 that a heightened standard of intent need not be shown,
15 should not be required in order to protect prison
16 officials from frivolous lawsuits or from discovery.
17 And the Court says we have a law that will do
18 that, we have the PLRA, and it says about the PLRA, most
19 significantly, and I'm quoting from 585, most
20 significantly the statute draws no distinction between
21 constitutional claims that require proof of an improper
22 motive and those that do not, so the Court there -- and it
23 goes on to say, if there is a compelling need to frame new
24 rules of law based on such a distinction, presumably
25 Congress either would have dealt with the problem in the

1 reform act, or will respond to it in future legislation.
2 What the Court is doing there is saying, and it
3 does so after a footnote that cites Farmer, and refers to
4 the Eighth Amendment, that is to say, footnote 7, we don't
5 mean that prison conditions should exclude the excessive
6 force claims simply because we have said in Farmer and
7 Hudson v. McMillian that under the questions presented
8 there they would do so, so the Court I think as answer --
9 this Court has answered that question, and --
10 QUESTION: Is this the citation to Crawford-El?
11 GENERAL BLUMENTHAL: Crawford-El is 523 United
12 States 574, and I have been quoting from 585.
13 QUESTION: Thank you.
14 GENERAL BLUMENTHAL: And 597. The quote was
15 from 597, but I want to make clear, in fairness, that
16 quotation is not central to the holding of the case, which
17 I mentioned earlier. It is a distinction that the Court
18 draws so as to in effect provide reassurance that the
19 Prisoner Litigation Reform Act will do the job of
20 eliminating frivolous litigation as, indeed, it did in
21 1997a(c), where it provided for dismissal of actions that
22 are frivolous, malicious, or seek monetary damage from an
23 official who is immune, and it uses the term, prison
24 conditions.
25 In fact, prison conditions is also a term used

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1 in 1997e(f), where there's a reference to the pretrial
2 proceedings that can occur by means of video, or
3 telephone, or other telephone communications technology.
4 There is no reason that the term, prison conditions, in
5 those sections of the statute, ought to exclude excessive
6 force cases or single episode instances of misconduct and,
7 indeed, it would do violence, it would be directly
8 contradictory to the purposes of Congress, which were to
9 reduce the volume of litigation, particularly frivolous
10 litigation, to give prison administrators a chance to
11 correct errors or mistakes and to reduce the interference
12 of Federal courts in prison administration, and to provide
13 a better record if there is going to be resort to the
14 Federal courts.
15 With the Court's permission, if there are no
16 further questions I'd like to reserve the remainder of my
17 time.
18 QUESTION: Very well, General Blumenthal.
19 Mr. Gornstein, we'll hear from you.
20 ORAL ARGUMENT OF IRVING L. GORNSTEIN
21 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
22 SUPPORTING THE PETITIONERS
23 MR. GORNSTEIN: Mr. Chief Justice, and may it
24 please the Court:
25 For four reasons, actions that challenge

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1 particular instances of unlawful conduct such as excessive
2 force are actions with respect to prison conditions that
3 must be exhausted under the PLRA.
4 First, in three cases, this Court has used the
5 terms, prison conditions, or conditions of confinement, to
6 refer to particular instances of unlawful conduct and, in
7 one of those cases, McCrary v. Bronson, it applied the
8 term to a single episode of excessive force. There's no
9 reason to think that Congress intended any narrower
10 meaning here.
11 Second, the purposes of the exhaustion provision
12 are to give prison officials an opportunity to resolve
13 problems within the prison by themselves, and to reduce
14 the enormous volume of prison litigation in Federal
15 courts. In terms of those two purposes, there's
16 absolutely no reason to distinguish between actions that
17 challenge particular instances of unlawful conduct such as
18 excessive force and any other sort of prisoner complaint.
19 Prison authorities in fact have a particularly strong
20 interest in resolving complaints about staff misconduct on
21 their own, and grievance procedures are fully effective to
22 do that without any need for significant Federal court
23 litigation.
24 Third, as this Court has recognized, it is
25 extremely difficult to administer a line between isolated

1 episodes or particular instances and more systematic
2 practices, or actions undertaken pursuant to a policy.
3 Any effort to do that would generate substantial
4 additional litigation on a threshold collateral issue when
5 Congress' goal was to reduce the amount of judicial
6 resources devoted to prisoner complaints.
7 And finally, creating an exception for
8 particular instances of unlawful conduct has the potential
9 to create an enormous loophole in the exhaustion
10 requirement. Already, that exception has been applied by
11 the Second Circuit to retaliation claims, to confiscation
12 of property claims, and it has the potential and
13 capability to be applied to a wide variety of prisoner
14 complaints that are directed at the actions of individual
15 officers.
16 It is very unlikely that the Congress amended
17 this exhaustion provision for the express purpose of
18 making sure that a dramatically increased number of cases
19 would have to go through the exhaustion process, would
20 have simultaneously cut out that large category of claims
21 that could benefit from the exhaustion process.
22 QUESTION: Could you tell me on your point 1,
23 you cited the case where excessive force applied to --
24 prison conditions applied to a single incident. What was
25 that case?

1 MR. GORNSTEIN: McCrary v. Bronson.
2 QUESTION: And was that pre or post enactment of
3 the litigation reform act?
4 MR. GORNSTEIN: That's preenactment.
5 QUESTION: Preenactment.
6 MR. GORNSTEIN: And in that case was a
7 construction of the Magistrates Act that had nonconsensual
8 referral in cases involving conditions of confinement, and
9 the Court interpreted the phrase, Conditions of
10 confinement, to embrace single incidents, including
11 excessive force, and rejected an alternative construction
12 that is similar to the one adopted by the Second Circuit
13 here that prison conditions refers to systematic
14 practices, and it did so for the same reasons, really,
15 that you should reach the same conclusion here.
16 The Court said that the purpose of that act was
17 to reduce the workload of Federal courts, and that would
18 further that purpose, and it said that trying to draw that
19 distinction between individual actions and systematic
20 practices would provoke -- generate a whole new round of
21 litigation, when what we're trying to deal with here is
22 something that's trying to save time.
23 QUESTION: What about Hudson and Farmer?
24 MR. GORNSTEIN: Hudson and Farmer show that the
25 term, prison conditions, can be used in a narrower sense,

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1 and that context matters, but here the context was in
2 defining the substantive elements for proving a particular
3 kind of Eighth Amendment violation, and the substantive
4 standards for proving a claim really have nothing to do
5 with whether a claim should be exhausted.
6 The context we have here is an exhaustion
7 provision, and the purposes of exhaustion, as I have said,
8 are to give prison officials a chance to act first to
9 solve a problem and to reduce the volume of litigation
10 and, in light of those purposes, it simply makes no sense
11 to adopt a narrower meaning. Instead, the Court should
12 adopt a broader meaning that comes from Preiser v.
13 Rodriguez, and McCrary v. Bronson, and Wilson v. Seiter.
14 QUESTION: Of course, still in all, even in
15 Hudson, I guess, drawing a distinction between continuing
16 prison conditions and single incident prison conditions,
17 or single incidents that aren't prison conditions, still
18 involves you in the same problem of satellite litigation
19 that you say would be one of the horrible effects of
20 adopting the same interpretation in the present case. I
21 mean, that didn't stop us from coming out that way in
22 Hudson. Maybe it should have, but it didn't.
23 MR. GORNSTEIN: Justice Scalia, two responses to
24 that. One is that the line that was actually drawn in
25 Hudson as I read it is not between single instances and

1 systematic practices, it's between excessive force claims
2 and everything else, which is -- does still have its
3 difficulties in administration, but maybe not quite as
4 challenging as single instances versus systematic
5 practices.
6 The other difference is, we're talking about
7 applying something at the liability stage to make a
8 determination on whether there has been liability enough,
9 as opposed to, what do we do right at the outset of
10 litigation when somebody comes in with a complaint, it's a
11 threshold question, and generating additional litigation
12 about that on a threshold question on a collateral issue
13 it seems to me is something that you would want to
14 generate less litigation about, generally speaking.
15 If the Court has no further questions --
16 QUESTION: Thank you, Mr. Gornstein.
17 Mr. Williams.
18 ORAL ARGUMENT OF JOHN R. WILLIAMS
19 ON BEHALF OF THE RESPONDENT
20 MR. WILLIAMS: Mr. Chief Justice, may it please
21 the Court:
22 When Congress enacted the Prison Litigation
23 Reform Act, it did so on the heels of at least three
24 decisions by this Court which clearly defined the term,
25 prison conditions, to exclude excessive force cases and

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1 those cases start, of course, with Wilson v. Seiter, which
2 expressly held, and I will quote, the very high state of
3 mind prescribed by Whitley does not apply to prison
4 conditions cases.
5 QUESTION: What was at issue in Wilson v.
6 Seiter?
7 MR. WILLIAMS: Well, of course, that was a
8 medical indifference case, deliberate indifference case
9 involving the distinction between a single incident and
10 multiple incidents, and to the extent that the Second
11 Circuit, post Nussle, has gone on to attempt to draw a
12 distinction of that kind, we do not defend it. The
13 distinction which I think is applicable here in defining
14 the term, prison conditions, is excessive force cases
15 versus all other types of cases, other than --
16 QUESTION: So on the other side of the line so
17 far as you're concerned would be a number of single
18 incident types of thing that did not involve excessive
19 force?
20 MR. WILLIAMS: Yes, indeed. I think the
21 distinction is one that this Court has made it absolutely
22 clear the distinction is between -- has to do with the
23 mens rea that's required. If the mens rea is a malicious,
24 sadistic, intending to cause pain, that's not a prison
25 condition. If it is, however, deliberate indifference,

1 that is a prison condition.

2 QUESTION: But why would Congress have made that

3 distinction and said that one -- the kind of cases you're

4 refer -- shouldn't exhaust administrative remedies whereas

5 the other one should. It doesn't -- I can see -- you can

6 certainly draw a definitional line, but why would Congress

7 have said case A exhaust, case B don't?

8 MR. WILLIAMS: Well, excessive force cases are

9 different. They've always been different under this

10 Court's jurisprudence. There are many protections that

11 are already built in to avoid frivolous litigation in the

12 excessive force context.

13 For example, the standard itself, cruel,

14 malicious, sadistic, is a very tough one to meet. Second,

15 Leatherman, of course, did not remove or excuse getting

16 away with just notice pleading. It required fact

17 pleading, so that when you combine the requirement of fact

18 pleading with the high standard that has to be met there's

19 a very -- it's a very rare case that will pass a 12(b)(6)

20 motion if it's an excessive force case in the first place.

21 QUESTION: Isn't the answer to your argument,

22 though, the answer that Mr. Gornstein gave a moment ago

23 when he referred to the significance of context? If the

24 issue before the Court involves a distinction among

25 different kinds of prison cases, then we can certainly

1 understand the distinction when we say conditions are
2 different from particular incidents, and if you refer only
3 conditions, you're meaning to exclude particular
4 incidents.
5 But if we're trying to draw a distinction
6 between prison cases and all kinds of -- all other kinds
7 of 1983 cases, which was the case when Congress passed
8 this statute, then I suppose it does make good sense to
9 use prison conditions in a much broader sense to cover
10 everything that might come out of prison litigation to
11 distinguish it from other kinds of 1983 cases, and isn't
12 that the answer to your argument based on our use of the
13 term in certain cases?
14 MR. WILLIAMS: I think that's more a policy
15 issue than a statutory construction issue, and I think
16 that this is just a simple case of statutory construction.
17 QUESTION: But the -- I mean, Mr. Gornstein's
18 argument is kind of a compared-to-what argument. He's
19 saying, when you use the phrase, conditions, what are you
20 comparing the conditions against? Are you comparing them
21 against other kinds of things that happen in a prison, or
22 are you comparing them against other kinds of cases that
23 might be brought under 1983, and the answer is possibly
24 going to be quite different, depending on which context
25 you're in.

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1 MR. WILLIAMS: Well, I think the context in
2 which this Court has used it, and therefore in which
3 Congress is presumed to have used it, is the latter.
4 QUESTION: The cases that, including the one you
5 cite, the Government cites for the opposite proposition.
6 MR. WILLIAMS: I think --
7 QUESTION: The cases say, and they have loads of
8 language there which seem to say it, that Wilson v. Seiter
9 and three other cases did focus on the issue of single
10 incident versus affecting several people. They all
11 decided that single incident is within the meaning of
12 prison conditions or the like.
13 Senator Biden on the floor says, if you pass
14 this law, you are going to sweep within it excessive force
15 cases, and nobody denies it, all of which from the most --
16 and the language, the language admits of Justice Souter's
17 suggestion, and he provides a purpose.
18 So taking all those things together, why isn't
19 the law in this case precisely along the lines he
20 suggested?
21 MR. WILLIAMS: There's no doubt that the cases
22 involved do not see a principal distinction between single
23 incident and multiple incident cases. That, I think, is
24 where the Second Circuit in the post Nussle cases has gone
25 wrong. I don't defend that. I think that the distinction

1 is the one that this Court has always drawn, which is
2 between the excessive force mens rea, which is cruel,
3 malicious, sadistic, intending to cause pain and nothing
4 else, on the one hand --
5 QUESTION: That's only excessive force?
6 QUESTION: That's only excessive force?
7 QUESTION: I see somebody in dire need of
8 medical attention and I sit there smiling cruelly --
9 please, get me a doctor.
10 MR. WILLIAMS: That is exactly --
11 QUESTION: You call that excessive force?
12 MR. WILLIAMS: That's -- no. That's deliberate
13 indifference. This Court has often said that. That's
14 exactly what we're talking about.
15 QUESTION: Well --
16 MR. WILLIAMS: There -- it's -- indeed --
17 QUESTION: It has nothing to do with the things
18 you were saying, then, cruelty, and savagery, whatever.
19 MR. WILLIAMS: Well, the term is --
20 QUESTION: You can be just as cruel and savage
21 without applying excessive force, if you do it right.
22 MR. WILLIAMS: The -- we can have words mean
23 whatever we want them to mean, but this Court has made it
24 clear what it means when it refers to excessive force, and
25 that is the mens rea that we were just talking about

1 which, after all, comes from Judge Friendly's seminal
2 opinion in Johnson v. Glick.
3 That, however, is not what we mean when we talk
4 about prison conditions, and this Court has made that
5 clear, and made it clear at the time Congress enacted the
6 PLRA, and I think that the important distinction between
7 the PLRA and the Magistrates Act is that when the
8 Magistrates Act was passed, all they had -- and that's
9 what this Court held in McCarthy v. Bronson, all they had
10 to guide them on the meaning of the term was Preiser, and
11 so following Preiser, of course, that's what it meant, and
12 that's why they used it that way in the Magistrates Act.
13 But after this Court decided McCarthy and
14 Brennan, this Court then went on to address the issue,
15 focus on the language, and explain this very distinction
16 that I'm arguing for here, and it was after this Court had
17 done so in three cases, one after the other, that Congress
18 then passed the PLRA.
19 QUESTION: That's what I don't understand. Now,
20 I didn't realize this. You're conceding, I take it, that
21 an individual incident is a prison condition, as long as
22 it isn't an excessive force incident, and at that point,
23 although maybe there are three cases that say this -- I'll
24 read them -- why would anybody want to say that a single
25 incident refusing to feed a prisoner, a single incident

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1 refusing to give him medical assistance, a single incident
2 refusing to let him take exercise in fact is a prison
3 condition, but a single incident of hitting him is not?
4 MR. WILLIAMS: I can't speak for Congress'
5 intention, but I can speak for the meaning of the words as
6 they've been defined by the Court, and there is an obvious
7 distinction under this Court's cases. That's what we're
8 talking about when we talk about statutory construction,
9 and that's why I say that this is not a grand policy case.
10 This is a traditional --
11 QUESTION: Well, but we're also talking about
12 reaching a sensible result.
13 MR. WILLIAMS: Well, the sensible result is the
14 result that this Court has often reached in the past,
15 which is to say to Congress, if this is what you want to
16 do, do it in the way that you're supposed to do it.
17 QUESTION: But it really isn't quite that clear
18 what Congress wanted to do as between these two views.
19 MR. WILLIAMS: Well, of course, if Congress is
20 ambiguous, then we go back to the default position, and
21 the default position is, we go back to dictionary meaning,
22 and this Court held in McCarthy v. Bronson that if you
23 just look to the dictionary definition of the term, prison
24 conditions, you're not talking about excessive force
25 cases, and in McCarthy this Court said, however, we don't

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1 use the dictionary definition because when the Magistrates
2 Act was passed Congress is presumed to have been looking
3 to Preiser, but once Congress gets mushy, as they really
4 are in the PLRA, because some sections use the term prison
5 conditions, some sections don't, and that's even true in
6 the title 42 amendment, so --
7 QUESTION: Mr. Williams, there's a case that has
8 come up in various forms where violence, random violence
9 is what characterizes the prison system. There was the
10 litigation in Alabama, where the State Attorney General
11 said, this, the atmosphere in this prison is jungle-like,
12 and this Court said it in Dosset v. Rawlinson. Where do
13 you put those cases? Those are excessive force cases, but
14 it's pervasive in the prison, not just one beating by a
15 guard. Would those cases come outside the prison
16 Litigation Reform Act, even though you're talking about
17 the kind of conduct that pervades the entire institution?
18 MR. WILLIAMS: I'm not sure that this Court has
19 ever told us exactly what the mens rea is that must be met
20 in such a case, and I think that will be the answer to the
21 question when that case arises. If this Court says that
22 in any given pervasive violence situation, then the
23 necessary mens rea remains the Johnson v. Glick one, then
24 that's an excessive force case and it's not a prison
25 conditions case.

1 On the other hand, if this Court says that the
2 necessary mens rea is simply deliberate indifference, then
3 it is a prison conditions case.
4 QUESTION: Well, it's hard to say it's
5 deliberate indifference when you're beating up on someone.
6 MR. WILLIAMS: If you're suing the individual
7 guard, of course, you're dealing with an instance of
8 brutality. What I was thinking of is the more interesting
9 question of where the warden issues a decree.
10 QUESTION: The warden knows that this is going
11 on. It's not deliberate indifference, because it's a
12 jungle-like atmosphere.
13 MR. WILLIAMS: If the warden is aware of it and
14 is tolerating it, then it becomes policy, and then this
15 Court is going to have to say, well, what's the standard
16 of liability for the warden? Is it deliberate
17 indifference or is it the Johnson v. Glick? I don't know.
18 I don't believe this Court has told us.
19 QUESTION: I would think that just the usage,
20 ordinary English, what the words mean, when a condition
21 pervades a prison, then it's a prison condition.
22 MR. WILLIAMS: Well, I think that that gets off
23 into the single incident versus multiple incident issue,
24 and I prefer to think of it in terms of the mens rea, and
25 I can conceive that an argument might well be made, and in

1 fact I would be happy to make it, that where it is so
2 pervasive that the warden is charged with actual knowledge
3 of -- there's the municipal liability cases under 1983 --
4 that he's charged with knowledge of it, then I would say
5 that the Johnson v. Glick standard applies, and it's not a
6 prison condition, but you could make the other argument
7 just as well.
8 In any event, it's an easy line to draw so that
9 we will know, the district courts will know in any given
10 case where it falls on the line of --
11 QUESTION: Why in the world would Congress --
12 you can give us no inkling of why Congress would sit down
13 and say, whether there has to be exhaustion of
14 administrative remedies ought to depend upon what state of
15 mind the actor is going to be held to? Why is there any
16 conceivable connection between those two issues, and
17 that's what you're saying they did, that they left it up
18 to the future law of this Court as to what mens rea will
19 be required, and if on the one hand the mens rea is going
20 to be, you know, just deliberate indifference, then you
21 have to exhaust, and if it's intentional cruelty you don't
22 have to exhaust.
23 MR. WILLIAMS: I would think that the reason for
24 that, if Congress had a reason, is that Congress knew that
25 because of the very high bar this Court has a record in

1 excessive force cases, combined with the fact pleading
2 requirement, that the concerns Congress had about
3 frivolous litigation and undue meddling of the district
4 courts in their business are already met by existing law,
5 and therefore the PLRA need not be concerned with it and
6 indeed, I think just about everybody agrees that the
7 concerns of Congress in enacting the PLRA was precisely
8 those two things, neither of which readily fits the
9 excessive force model.
10 QUESTION: But if you have a guard who is
11 sadistically beating people, certainly that seems to be
12 the sort of thing that might easily be corrected, at least
13 for the future, by exhaustion.
14 MR. WILLIAMS: But that, again, is a policy
15 question, Chief Justice.
16 QUESTION: Well, it is, but when we're trying to
17 figure out what Congress really intended here, I think one
18 shies away from a distinction which is perfectly
19 technically sound but doesn't seem to have anything to do
20 with what people thinking about the desirability of
21 exhaustion would have thought about.
22 MR. WILLIAMS: Well, when you look at the entire
23 PLRA, and I was a little dismayed in preparing for oral
24 argument to realize that the entire PLRA isn't in the
25 joint appendix to our briefs, but when you look at it in

1 its entirety, the presence or absence of that phrase,
2 prison conditions, is quite interesting.
3 For instance, in title 42, prison conditions do
4 not apply to the attorney fee cap. Rather, that relates
5 to prisoner suits, and similarly the distinction that
6 there can be no monetary award for emotional distress
7 unless it's accompanied by physical injury, those are
8 prisoner suits, not prison conditions cases.
9 When you look further, section 807, the lien
10 provisions under the act, again, there's no prison
11 conditions limitation, so clearly Congress had in mind
12 that there are some kinds of suits by prisoners where it
13 wants to impose more stringent limitations and others
14 where it wants to impose some limitations but not the
15 whole panoply of limitations.
16 QUESTION: But here the prisoner suits, it
17 happens to be the caption for the provision. They use in
18 the text prison conditions but the caption is prison
19 suits, isn't it?
20 MR. WILLIAMS: Yes, it is, and then in the
21 context of the section they go on and draw the
22 distinction. Sometimes it's all prisoner suits, sometimes
23 it's just prisoner suits about prison conditions, so I
24 think we really get no place in particular from the fact
25 of the caption.

1 QUESTION: What would we do with a case where
2 the prisoner said, these guards are beating up on me, and
3 the reason they are is that this prison doesn't give
4 guards any training, doesn't supervise them, so my 1983
5 suit is against the guards that beat me up, but they're
6 also against the officials in the prison who are
7 responsible for training and for monitoring? Those have
8 to go to --
9 MR. WILLIAMS: They go two different directions
10 and, of course, as we know, that is common place in
11 prisoner's suits, that they have multiple counts, multiple
12 claims, and some of them are dismissed early on, some of
13 them go a little bit farther, and so forth. That is the
14 nature of prison litigation in this particular case, the
15 suit against the guard for beating him up would not
16 require exhaustion and would go forward. Prison
17 conditions claims obviously would have to be exhausted,
18 had they not already been exhausted.
19 QUESTION: Suppose I believe that policy was
20 relevant, would I then be right to think that the isolated
21 beating case is perhaps the strongest case where you
22 should require exhaustion, for the reason that the prison
23 doesn't want such a person on its payroll, and if the
24 prisoner is right, they'll find out about it fast and get
25 rid of him

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1 MR. WILLIAMS: No, actually, the difficulties of
2 removing a civil servant who has --
3 QUESTION: Oh, but I'll take action.
4 MR. WILLIAMS: When you combine all of his
5 Laudermill rights with all of his rights under the
6 collective bargaining agreement, moving that guard or
7 taking meaningful disciplinary action against him is not
8 going to be necessarily that fast.
9 Of course, what you can do quickly is move the
10 prisoner to another unit, but then you deal with what we
11 know to be the reality of the prison guard grapevine, so
12 that there's not an easy solution.
13 QUESTION: You say that a prison guard who
14 maliciously beats up on people is just there to stay, so
15 to speak?
16 MR. WILLIAMS: Well, one would hope not.
17 QUESTION: One would.
18 MR. WILLIAMS: But the fact of the matter is
19 that, like all public employees, they enjoy a number of
20 due process protections and, like most public employees,
21 they also enjoy union protection.
22 QUESTION: Many of them are not public employees
23 any more.
24 MR. WILLIAMS: I'm sorry.
25 QUESTION: Many of them are not public employees

1 any more. That's one reason some States have moved to
2 having private companies manage prisons.
3 MR. WILLIAMS: I agree. I agree. That is true.
4 QUESTION: In those cases there wouldn't be a
5 problem in getting rid of a guard.
6 MR. WILLIAMS: Well, there's probably still a
7 pretty effective union contract. The guards' union is a
8 pretty powerful force and, indeed, in this case that was
9 present. There were the references to the fact that the
10 guards' union was involved in a big dispute with the
11 Governor of Connecticut, who happened to be a friend of
12 Mr. Nussle, so that that was present.
13 The attempt by the State to take the title 18
14 definition and move it over to title 42 I think is equally
15 unsuccessful. The fact that it's in a different part of
16 the code is one reason why Congress certainly wouldn't
17 have attempted to adopt it. Indeed, it's in a part of the
18 code, title 18, that deals with different issues from
19 those which Congress was dealing with in its title 42
20 amendments.
21 Most importantly, of course, it is explicitly
22 limited by its terms to section 802, that is, title 18,
23 and is not applicable elsewhere and, as this Court held in
24 the Vermont Agency of National Resources case, that at
25 least suggests that it is inapplicable to title 42.

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1 Also of great interest, and I think not
2 addressed in the briefs, is that section 803 has its own
3 definition section, just as section 802 does, but in the
4 section 803 definition the term, prison conditions, or
5 conditions of confinement, is not defined, but
6 interestingly, in section 802 and in section 803 there is
7 a definition of the word, prisoner. The words aren't
8 precisely the same, but the words appear to have the same
9 meaning.
10 Now, why would Congress find it necessary to
11 define prisoner in section 803 when they'd already done so
12 in 802, unless it was because they took seriously the
13 limitation in 802, that the definitions there were limited
14 to section 802?
15 So I think that the attempt by the petitioners
16 to borrow the section 802 language and incorporate that
17 into section 803 simply won't work, and what we are left
18 to fall back on is the statutory construction arguments
19 which I have previously made.
20 I hate to say it, but I think I'm out of time.
21 Thank you.
22 QUESTION: You're not out of time, but you're
23 welcome to sit down.
24 MR. WILLIAMS: Out of ideas.
25 QUESTION: Yes, okay.

1 (Laughter.)

2 QUESTION: Thank you, Mr. Williams.

3 Mr. Blumenthal, you have 4 minutes.

4 REBUTTAL ARGUMENT OF RICHARD BLUMENTHAL

5 ON BEHALF OF THE PETITIONERS

6 GENERAL BLUMENTHAL: Thank you, Mr. Chief

7 Justice, and may it please the Court:

8 I am not completely out of ideas. A few brief

9 ones: First, to expand, perhaps, on the point raised by

10 Justice Breyer, I can't speak for all the State prison

11 systems throughout the United States, but a prison guard

12 who did what Mr. Nussle claimed he or they did would be

13 transferred, disciplined, perhaps fired by this

14 commissioner. I am certain of that fact, because we have

15 assisted in that process.

16 Indeed, some of those guards have been

17 criminally investigated, not guards involving this

18 incident, but some who have committed the kinds of acts

19 that Mr. Nussle might complain of. There are speedy,

20 effective administrative remedies that can be applied to

21 protect prisoners, and it is in the interests, may I

22 respectfully suggest, of the State to do so to eliminate

23 or at least reduce prison unrest, to make sure that it

24 isn't held liable in more serious incidents, if they are

25 bad guards.

1 The administrators of modern prison systems have
2 a very powerful and compelling self-interest in using the
3 grievance system as a management tool. Now, that may not
4 have been on Congress' mind. Congress undoubtedly was
5 concerned, as the legislative history clearly shows, with
6 the fact that there were 40,000 of these lawsuits pending,
7 prisoner petitions, constituting one-quarter of the entire
8 Federal case load. Congress wanted to streamline the
9 system and force all of these prison petitions to go
10 through the exhaustion process, and there is no evidence,
11 absolutely no evidence in the legislative history or
12 elsewhere it intended to carve out or make an exception
13 for single incident excessive force cases and, indeed, the
14 evidence is all to the contrary.
15 McCarthy v. Bronson was a single incident,
16 single episode of excessive force, but this Court said
17 that it was included in the term, conditions of
18 confinement, for purposes of the Magistrate Referral Act.
19 That is the term that Congress understood it to be.
20 Crawford-El confirms at 597, where I quoted it. It's in
21 our view conclusive on this point, but we would submit
22 that the interests of the statute are best served,
23 Congress' purposes are best served. The distinction that
24 is suggested by the respondents is unsupported in
25 principle and unworkable in practice for many of the same

1 reasons that this Court said in Wilson v. Seiter that the
2 single incident versus continuing practice distinction was
3 simply illogical and impractical.
4 If the Court has no further questions, I have
5 nothing further.
6 CHIEF JUSTICE REHNQUIST: Thank you, General
7 Blumenthal. The case is submitted.
8 (Whereupon, at 11:48 a.m., the case in the
9 above-entitled matter was submitted.)
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