

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 JEFFREY A. BEARD, SECRETARY, :

4 PENNSYLVANIA DEPARTMENT OF :

5 CORRECTIONS, :

6 Petitioner :

7 v. : No. 04-1739

8 RONALD BANKS. :

9 - - - - -X

10 Washington, D.C.

11 Monday, March 27, 2006

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:05 a.m.

15 APPEARANCES:

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17 General; Harrisburg, Pennsylvania; on behalf of the
18 Petitioner.

19 JONATHAN L. MARCUS, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.;
21 on behalf of the United States, as amicus curiae,
22 supporting the Petitioner.

23 JERE KRAKOFF, ESQ., Pittsburgh, Pennsylvania; on behalf
24 of the Respondent.

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

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Beard v. Banks.

5 Mr. Rovelli.

6 ORAL ARGUMENT OF LOUIS J. ROVELLI

7 ON BEHALF OF THE PETITIONER

8 MR. ROVELLI: Mr. Chief Justice, and may it
9 please the Court:

10 The policy challenged in this case applies to
11 a small class of dangerous, disruptive inmates, all
12 confined at level 2 of the Long Term Segregation Unit,
13 which is the most restrictive custody in the
14 Pennsylvania prison system.

15 These central facts inform every aspect of
16 the Turner analysis which governs the outcome of this
17 case. The denial of periodicals and photographs, with
18 the opportunity to earn them back by improved behavior,
19 is logically connected both to rehabilitation and
20 security. Level 2 inmates have a -- have failed every
21 attempt at rehabilitation. Yet, nearly all of them
22 will be released from prison. The goal at level 2 is
23 to turn these inmates around, to improve their behavior
24 enough that they can be advanced safely to programs
25 with more opportunities for self-improvement. Until

1 that happens --

2 JUSTICE STEVENS: Mr. Rovelli, I -- I forget.
3 How big a class of -- of prisoners are we talking
4 about?

5 MR. ROVELLI: Less than 40.

6 JUSTICE STEVENS: Less than 40? And does the
7 record tell us how long they have been in level 2?

8 MR. ROVELLI: Well, the duration of -- of
9 confinement at level 2 varies widely from one inmate to
10 another because it is affected by their improvement.

11 JUSTICE STEVENS: But is there any average or
12 any -- is there -- does the record tell us how -- how
13 long most of them have been there?

14 MR. ROVELLI: The record does not tell us how
15 long most of them have been there. At the time of the
16 case in the trial court, which was 2002, 25 percent of
17 them had been promoted to level 1 or had been released
18 from the Long Term Segregation Unit altogether.

19 JUSTICE STEVENS: Does that mean that 75
20 percent had not?

21 MR. ROVELLI: At that time, yes.

22 JUSTICE STEVENS: And how long -- do we know
23 what the average period of incarceration in level 2 is?
24 Is it a matter of weeks, or is it a matter of years?

25 MR. ROVELLI: Well, realistically it's in

1 between. Again, the -- the unit had only been in
2 operation for 2 years at the time that the record was made.
3 So there's very little --

4 JUSTICE STEVENS: I'm trying to understand
5 whether typically they're there for a long period of
6 time on the one hand, or are they there sort of on
7 probation and are periodically reviewed and moved into
8 another system?

9 MR. ROVELLI: They're -- they're moved when
10 their behavior improves. The average over a long
11 period of time has been in the range of a year or so.

12 JUSTICE STEVENS: I see.

13 JUSTICE KENNEDY: Were there any prisoners,
14 since the inception to your program, that have been in
15 there for the whole 2 years?

16 MR. ROVELLI: Through today? I'm sorry. Oh,
17 from the time of its inception?

18 JUSTICE KENNEDY: Yes.

19 MR. ROVELLI: Until the 2-year point. Yes,
20 there were. I don't know exactly how many there were,
21 but there definitely were.

22 JUSTICE KENNEDY: Are -- do -- is -- is
23 Pennsylvania alone or nearly alone in imposing this
24 rule, or is this typical of the restraints imposed in
25 -- in this maximum restrictive confinement?

1 MR. ROVELLI: There's a wide variation of
2 privilege grants and withdrawals even at the highest
3 levels of security. The ACLU's amicus brief points to
4 three other States that -- that have the same program
5 as Pennsylvania, and frankly, I'm not even sure as to
6 those, that it's identical. But the Court has
7 recognized that -- that these sorts of variations,
8 particularly when we're talking about high security
9 prisoners, are precisely what Turner contemplates.

10 JUSTICE KENNEDY: Is this one of the most
11 severe restrictions in the Nation with respect to
12 reading material and photographs?

13 MR. ROVELLI: I'm sure that it is.

14 JUSTICE GINSBURG: What is the reason that --
15 that the State or the regulations allow paperbacks from
16 the library and not current events? I'm just -- that
17 -- the rationality of -- of that line escapes me.

18 MR. ROVELLI: Well, there's -- there is
19 certainly a security component to it. Paperback books,
20 small, compact, much more difficult to use as weapons,
21 and the experience of the prison staff that operate
22 this high security unit is that newspapers and
23 magazines are -- have been a -- a frequent source of
24 mischief.

25 JUSTICE SCALIA: Can we explain that? How

1 does one use a newspaper as a weapon? I mean, you
2 know, maybe disciplining a dog or something.

3 (Laughter.)

4 MR. ROVELLI: Actually inmates, particularly
5 the worst of the worst, are quite clever at using
6 newspapers. A newspaper rolled tightly with toothpaste
7 used as an adhesive can be compacted into very nearly
8 the equivalent of a nightstick.

9 JUSTICE GINSBURG: But you --

10 CHIEF JUSTICE ROBERTS: But a paperback
11 version of War and Peace is less dangerous? It seems a
12 --

13 MR. ROVELLI: The experience of prison
14 officials is that, yes, it is, and -- and actually it's
15 very common in prison systems to distinguish, for
16 example, between hardback books and paperbacks. Yes,
17 it's -- these are difficult lines to draw, and that's
18 where the professional expertise of the people who deal
19 with the problems every day comes into play.

20 JUSTICE GINSBURG: But if the concern is the
21 safety concern, then you would have an equal concern
22 with the Jewish Daily Forward, which is a newspaper
23 format, or -- and I don't know what the Watchtower
24 comes out in these days.

25 MR. ROVELLI: Yes. Well, Justice Ginsburg,

1 the -- the experience of prison administrators is that
2 prisoners are less likely to use religious and legal
3 materials for mischief, and as to paperbacks as well,
4 they do supply an alternative means of receiving
5 information from outside the prison. But again, if I
6 -- if I allude frequently to the experience of prison
7 administrators, it's -- it's because that's what these
8 -- this policy is guided by. Newspapers and magazines
9 have a high value to inmates.

10 CHIEF JUSTICE ROBERTS: Well, that's why I
11 thought your answer would have focused on that rather
12 than the security concerns, is that you take away what
13 it is they want the most because that's most likely to
14 result in them conforming their behavior so they can
15 get it back.

16 MR. ROVELLI: Yes, and that is -- is the
17 primary purpose of the policy overall, and --

18 JUSTICE BREYER: So why -- let's see. They
19 go to the prison library what? Once every couple of
20 weeks or what? Once a week?

21 MR. ROVELLI: Actually --

22 JUSTICE BREYER: One -- one visit per month.
23 And -- and how often do they go to the prison library?

24 MR. ROVELLI: Inmates at level 2 are not
25 permitted to go to the prison library.

1 JUSTICE BREYER: It's ordered.

2 MR. ROVELLI: They can order books from the
3 library. They are allowed to visit the -- the mini law
4 library that's proximate to the unit.

5 JUSTICE BREYER: Yes, what it says -- that's
6 what -- it says, to review legal materials, one at a
7 time may be let out of his cell and is escorted to a
8 mini law library in hand. All right.

9 Why couldn't you have a -- if he wants to see
10 the newspaper in that mini law library, why couldn't
11 there be a copy there, only the parts that are
12 consistent with the censorship policy, just like a news
13 of the day.

14 MR. ROVELLI: Having --

15 JUSTICE BREYER: Is there a security reason
16 or is --

17 MR. ROVELLI: There's definitely a security
18 reason.

19 JUSTICE BREYER: Is there a security reason
20 when he's there in leg irons looking at the books, the
21 law books, in the mini law library?

22 MR. ROVELLI: Allowing the -- the inmate to
23 request to go to the mini law library for an additional
24 purpose or for a separate purpose to read periodicals
25 puts increased demand on going there, and moving these

1 inmates is a -- a very demanding operation. It
2 requires two officers and physical restraints and going
3 through layers of security. So it puts increased
4 demands on prison resources.

5 JUSTICE GINSBURG: What does the -- what does
6 the inmate have to show in order to go to the law
7 library? That is, suppose the inmate's position is I
8 want to go there and I want to read Law Week and Legal
9 Times and other -- I want to see what's new, what's
10 breaking in the law so that maybe I'll have something I
11 can put in a petition, and that's why I want to go
12 every -- every chance I get to the law library. Could
13 such an inmate go to the library?

14 MR. ROVELLI: Yes. The inmate may go to the
15 law library subject to the limitation of one inmate at
16 a time, subject to the sign-up list. The inmate may
17 get --

18 JUSTICE GINSBURG: Well, that would mean that
19 the inmate could go and look at the legal newspapers,
20 but not -- not the Christian Science Monitor.

21 MR. ROVELLI: The Christian Science Monitor
22 is not available to him in the -- in the mini law
23 library, and -- and actually, if he wanted to
24 subscribe, he could receive a -- a legal periodical in
25 his cell.

1 JUSTICE GINSBURG: So he could get Law Week,
2 Legal Times, and --

3 MR. ROVELLI: Subject --

4 JUSTICE GINSBURG: -- the National Law
5 Journal. All of those he could get.

6 MR. ROVELLI: Subject to the content
7 restriction of religious and legal materials that would
8 fit in one property box, he may.

9 JUSTICE SOUTER: Now, on -- on your theory of
10 -- of behavior modification, would it, nonetheless, be
11 -- be open to the State to say, no, you may not receive
12 any more legal materials and you may not go to the
13 library to look at them? Because that's something you
14 very much want to do. And in order to do that, you've
15 got to shape up and -- and get moved down to a lesser
16 level of security. Would that -- I'm not saying that
17 the State is -- is about to do that, but on your
18 theory, could the State do that?

19 MR. ROVELLI: Yes. Yes, Justice Souter, the
20 State could, as long as the overall Turner analysis is
21 observed. And, in particular, I think that would
22 implicate the availability -- the availability of
23 alternative means of exercising the asserted right to
24 receive information from outside the prison.

25 JUSTICE SOUTER: Well, what would -- I mean,

1 you know, one of the arguments made on the other side
2 is that if you accept the behavior modification theory
3 as an adequate justification, the Turner categories
4 essentially become incoherent.

5 What, for example, would be the alternative
6 means in this case if the State said, we realize that
7 the people in -- in -- at level 2 want to see legal
8 materials very, very much because that is a source of
9 hope for them, and we want them to have that source of
10 hope only if they shape up and -- and get down to a
11 reduced level of security, so we're going to stop it,
12 period? What would be the alternatives within the --
13 the Turner analysis?

14 MR. ROVELLI: The inmate would still have
15 unlimited access to counsel visits and can still visit
16 the mini law library and do his own legal research,
17 even if he's not allowed to subscribe to or -- or keep
18 legal materials, legal periodicals in his own cell.

19 JUSTICE SOUTER: What if the -- what if the
20 inmate said, look, the -- the lawyers who come to see
21 us are -- are great guys, but they're -- they're
22 overworked. They don't have time to be thinking about
23 novel legal theories, which we would dream up perhaps
24 if we could get to Legal Times and these periodicals?
25 So it's -- it's not an alternative.

1 MR. ROVELLI: Ultimately any prisoner is --
2 is free to challenge the adequacy of his ability to
3 access the courts in a -- in an as-applied challenge to
4 his own conditions.

5 JUSTICE SOUTER: So you're -- you're saying
6 there -- there's a separate value here, and that is the
7 value of access to courts. And -- and that limits what
8 can be done for purposes of behavior modification.

9 MR. ROVELLI: Definitely.

10 JUSTICE SOUTER: All right. What about the
11 marriage example? The -- the Court has said, yes, you
12 couldn't -- the -- the State can't prevent the inmate
13 from -- from getting married. I don't see where the
14 separate source of -- of value is that would -- that --
15 that would affect that analysis. No right of access to
16 court. The associational rights can be abridged and so
17 on.

18 Why, on your analysis, wouldn't -- wouldn't
19 the proper disposition of the earlier case have been to
20 say, yes, the State can preclude marriage too because
21 that's something they very much want and -- and the
22 State can preclude that unless they shape up and -- and
23 get down to a -- a lesser level of security?

24 MR. ROVELLI: Well, the marriage ban, Justice
25 Souter, of course, is subject to Turner analysis as

1 well, and I think that where Turner might bring up
2 short a ban on marriage for these high security inmates
3 is in the -- the logical connection to the
4 rehabilitative purpose in that there being so few
5 inmates and marriage is going to be such an infrequent
6 occasion, it's hard to see the marriage ban as
7 influencing level 2 inmates generally to improve their
8 behavior.

9 JUSTICE SOUTER: So you're saying there just
10 is not a logical connection there within --

11 MR. ROVELLI: Yes.

12 JUSTICE SOUTER: -- the meaning of the -- of
13 the case?

14 MR. ROVELLI: That -- yes.

15 JUSTICE SOUTER: But there would be a logical
16 connection for those who want to get married.

17 MR. ROVELLI: That -- that implicates --

18 JUSTICE SOUTER: You're -- you're saying it
19 might not make sense as a systemic policy --

20 MR. ROVELLI: Yes.

21 JUSTICE SOUTER: -- because it isn't a big
22 enough problem. But for -- we're not talking about a
23 whole system here. We're talking about 40 people or
24 less, and if some of those 40 people want to get
25 married, why doesn't it make perfect sense to say no

1 marriage?

2 MR. ROVELLI: Well, you could say that about
3 all -- probably a range of things if you went so far as
4 to query each inmate as to what it is that they value
5 most or what it is they're most interested in doing --

6 JUSTICE SOUTER: You can, and on -- on your
7 analysis, why isn't that sufficient?

8 MR. ROVELLI: It would be an interesting
9 program and I would defend it that you could query
10 inmates on what is most valuable and then deprive them
11 of it subject to --

12 JUSTICE SOUTER: Okay, but how do we get
13 around the marriage case then?

14 MR. ROVELLI: Well, I -- I don't think we
15 need to get around the marriage case in the sense that,
16 particularly as to high security inmates, prison
17 officials have very wide discretion to fashion policies
18 that serve the goals. And -- and to do it --

19 JUSTICE SOUTER: So as to these, the -- the
20 marriage could be banned, in effect, you're saying.

21 MR. ROVELLI: It could be banned, but I do
22 think that it would be subject to a -- a pointed
23 challenge on the logical connection, but in theory,
24 it's -- it is one of the instruments -- a privilege
25 that could be withdrawn for behavior modification

1 purposes.

2 This case is -- is exceedingly similar to
3 Overton where the Court directly observed that
4 withdrawing visitation privileges is a proper and even
5 necessary technique to -- to improve the behavior
6 especially of high-security prisoners who have few
7 privileges left -- left to lose, which is precisely the
8 same situation that we're presented with in this case.

9 Turner too -- I'm sorry. Overton as well is
10 instructive on the subject of adequate alternatives.

11 JUSTICE GINSBURG: But I thought there, there
12 was a genuine security concern, which I think you
13 pretty much said doesn't exist here when you consider
14 what they can have in -- in the cell.

15 MR. ROVELLI: I think that -- that in both
16 Overton and this case, there were both behavior
17 modification and security concerns. And I'm not even
18 sure that their weight -- they're weighted as between
19 the two altogether different between the two cases.
20 Actually all of the discussion in Overton was in the
21 context of behavior modification, which is related both
22 to security and to rehabilitation. But the -- the
23 tenor of the discussion was actually, I would say, more
24 directed to rehabilitation.

25 The Court recognized in Overton, as adequate

1 alternative means of exercising the right, letters and
2 phone calls. The inmates in this case have the
3 opportunity of unlimited correspondence, family,
4 chaplain, and counsel visits, and as -- as we've talked
5 about, books from the prison library.

6 Quickly addressing the last two Turner
7 factors, accommodating the asserted right would
8 altogether defeat the goals of the policy. It would
9 have, as I alluded to when I did speak of security, a
10 significant impact on guards and prison resources, and
11 there are no ready alternatives.

12 If I could reserve the balance of my time.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr.
14 Rovelli.

15 Mr. Marcus.

16 ORAL ARGUMENT OF JONATHAN L. MARCUS

17 ON BEHALF OF THE UNITED STATES,

18 AS AMICUS CURIAE, SUPPORTING THE PETITIONER

19 MR. MARCUS: Thank you. Mr. Chief Justice,
20 and may it please the Court:

21 Pennsylvania's policy of prohibiting its most
22 dangerous and recalcitrant prisoners from possessing
23 newspapers, magazines, and photos as an incentive to
24 improve their behavior does not violate their First
25 Amendment rights.

1 CHIEF JUSTICE ROBERTS: Where do you draw the
2 line? I take it somewhere -- you couldn't deprive them
3 of food, if that would get them to -- to conform.
4 Justice Souter was asking about marriage. I mean, how
5 do we tell when -- when you can deprive someone of
6 something they -- to modify their behavior and when it
7 goes too far?

8 MR. MARCUS: Yes, Mr. Chief Justice. This --
9 I mean, this Court has already said that with respect
10 to Eighth Amendment rights, the Turner analysis does
11 not apply. So with respect to basic -- basic
12 necessities, health care, food, and water, the -- the
13 Turner analysis doesn't apply, and so you could not
14 sort of create an incentive program to take away Eighth
15 Amendment rights.

16 And under -- with respect to the rights that
17 can be -- that can be limited in order to serve
18 legitimate penological interests, we think that -- that
19 the Turner approach would give a lot of deference to
20 and a lot of flexibility to States to -- to use
21 incentive programs --

22 JUSTICE SOUTER: But don't we -- don't we
23 have the same problem if we're -- if we're dealing with
24 First Amendment interests that we do when we're dealing
25 with Eighth Amendment interests? In other words, if --

1 if we don't say, well, they get outside of Turner
2 analysis because they require -- by virtue of being
3 enumerated rights, they require an analysis specific to
4 them, is the abridgement of the right carried so far
5 that it is unreasonable? If we don't say that, then I
6 don't see, as your friends on the other side have
7 argued, I don't see where the logical stopping point is
8 if we accept the -- the behavior modification theory.

9 MR. MARCUS: Well, I -- I think -- I mean, I
10 think there is -- I don't think it's a boundless
11 theory. I think you have to keep in mind that this
12 program in Pennsylvania was -- it's implemented as a
13 last resort. I mean, the prisoners that this
14 regulation applies to are a narrow class of 40
15 prisoners who have been the most violent and most
16 disruptive --

17 JUSTICE SOUTER: Oh, oh, I -- I realize that.
18 I mean, they're -- they're making an in extremis kind
19 of argument. I understand that. But if -- if we
20 accept an in extremis kind of argument on the theory of
21 behavior modification, then I don't see why that
22 argument does not, for example, cover the marriage
23 case, and maybe -- maybe it should. I don't know why
24 that argument would not allow for a total deprivation
25 of all communication outside of, let's say, access to

1 counsel.

2 And -- and so it seems to me that whether we
3 admit it or not, what's going on here, whether we call
4 it Turner analysis or not, is we're making some kind of
5 a judgment as to whether they're carrying the
6 deprivation for behavior modification purposes in these
7 extreme cases too far.

8 MR. MARCUS: But --

9 JUSTICE SOUTER: And if that's what -- I'll
10 -- I'll be quiet in a second.

11 (Laughter.)

12 JUSTICE SOUTER: If that's -- if that's what
13 we're doing, aren't we just as much outside the Turner
14 analysis when we're talking about the First Amendment
15 or associational rights under the First Amendment as we
16 are when we're talking about the Eighth Amendment? And
17 shouldn't we say so?

18 MR. MARCUS: I -- I don't think so, Justice
19 Souter. I think there's still room under the Turner
20 analysis to apply the exaggerated response test, and
21 that's one of the things the Turner analysis does when
22 you go through the four factors, as -- as the
23 Government did and the State has done in its brief,
24 that there could be a situation where you would find
25 that there's been an exaggerated response and that

1 their withdrawal of the First Amendment right is
2 actually an exaggerated response.

3 For example, maybe if -- if there was just
4 one minor disciplinary violation for, let's say, using
5 obscene language, and then every -- all First Amendment
6 rights to communication were -- were pulled out at that
7 point for the remainder of the time --

8 JUSTICE SOUTER: So -- so but at some point,
9 there's sort of a reasonableness limit then you're
10 saying.

11 MR. MARCUS: There is a reasonableness limit,
12 and we've -- we've --

13 JUSTICE SCALIA: Do -- do you concede that
14 just because a right is enumerated, it means it cannot
15 be entirely taken away in prison?

16 MR. MARCUS: No. This Court --

17 JUSTICE SCALIA: I mean, like, you know, try
18 the right to bear arms.

19 (Laughter.)

20 MR. MARCUS: That's right. No. I mean --
21 no. This Court has drawn -- has drawn that
22 distinction. The distinction this Court has drawn is
23 that -- that most rights can be limited or even totally
24 prohibited within prison, consistent with -- with
25 legitimate penological objectives, deterrence or

1 rehabilitation. The exceptions this Court has
2 identified are for the Eighth Amendment and also for
3 access -- you know, access to the courts, that you
4 could -- that -- because that also implicates the
5 integrity of the criminal justice system.

6 JUSTICE GINSBURG: Apart from those two,
7 access to the courts and cruel and unusual punishment,
8 then anything goes for this set of incorrigible
9 prisoners? They can take away -- the First Amendment,
10 in other words, is out the window. They have no First
11 Amendment rights that the State needs to respect. Is
12 that --

13 MR. MARCUS: Well, I think it would be --
14 Justice Ginsburg, I think it would be a rare case where
15 an incentive program like this could be struck down as
16 a -- you know, as a facial matter, as -- as this
17 challenge is. I think it would be a rare case. But I
18 think you do -- you do still go through all the -- all
19 four factors, and you would look at the fourth factor
20 and see that, in fact, Pennsylvania does give prisoners
21 the opportunity to regain those privileges if they
22 behave well. As the State pointed out, at the time the
23 record was made in this case --

24 JUSTICE GINSBURG: But -- but for this -- for
25 this group, while they're in that situation,

1 essentially there's no First Amendment rights. I think
2 that's what your -- your argument. They can regain
3 them, but that's the purpose of the behavioral
4 modification program. But the -- the only thing that
5 these prisoners get is the Eighth Amendment.

6 MR. MARCUS: Well, we do think that -- that
7 the State can go -- can go quite far with respect to
8 restricting First Amendment rights, but this Court
9 still -- I mean, under prong two, this Court does look
10 to alternative means to exercise the right. And here,
11 99.9 percent of the prisoners in Pennsylvania, do get
12 to possess newspapers, magazines, and photos. The LTSU
13 prisoners who graduate get to, and on top of that,
14 while they're in the LTSU, the prisoners get to possess
15 two books. They --

16 JUSTICE STEVENS: Mr. Marcus, I was kind of
17 interested in your calling this an incentive program.
18 Is there any -- there are no intermediate stages. It's
19 an all-or-nothing incentive, isn't it?

20 MR. MARCUS: Oh, not at all. There are many
21 -- there are many intermediate stages. There are
22 restricted housing units and then there are SMUs and
23 -- and special management units, and -- and --

24 JUSTICE STEVENS: No, I mean, with respect to
25 the prisoners in this population.

1 MR. MARCUS: There are incentive programs
2 within each of those restricted units, and -- and the
3 prisoners that end up at the LTSU -- the vast majority
4 of them have already been through the SMU program and
5 haven't made it and have failed that program. So
6 they've tried numerous other incentives before getting
7 to this point.

8 JUSTICE STEVENS: Well, I didn't understand
9 that the -- the prisoners in this particular part of
10 the prison had any intermediate incentive. They either
11 get out after a year or 2 or they don't. Isn't that
12 right? I mean, they either get to a different
13 classification.

14 MR. MARCUS: Right, and that depends on their
15 behavior.

16 JUSTICE STEVENS: There's no scoring. You've
17 got 25 points now, so you're pretty close to your goal
18 or anything like -- it's not --

19 MR. MARCUS: Well --

20 JUSTICE STEVENS: -- not like most incentive
21 programs I've heard about.

22 MR. MARCUS: Justice Stevens, they get a
23 review after 90 days and then every 30 days thereafter.
24 There's nothing in the record to suggest those reviews
25 are an empty gesture.

1 JUSTICE STEVENS: And -- and does the review
2 correlate it in any way with these particular
3 deprivations? I mean, what is the review -- how does
4 the review correlate with their inability to get
5 reading materials?

6 MR. MARCUS: Well, the -- the review
7 correlates with their behavior, and to the extent they
8 show a positive adjustment in their behavior, their --
9 they graduate from level 2 to level 1 where they do
10 have access to newspapers and magazines and then they
11 can graduate all the way out. And my understanding is
12 a number of prisoners have done that within 1 year.
13 And with respect to someone who never gets out, that
14 person might have an as-applied challenge if that
15 person could show that his behavior --

16 JUSTICE STEVENS: Is there any evidence at
17 all that the amount of reading that they do has any
18 correlation to their opportunity for getting better
19 assignments?

20 MR. MARCUS: While they're in the LTSU?

21 JUSTICE STEVENS: Yes. That there's any
22 correlation whatsoever between how much these people --
23 these prisoners read and when they get into the next
24 level of the prison.

25 MR. MARCUS: No, I don't think any such study

1 is done. But again, the court of appeals was wrong to
2 require the State to offer evidence. I mean, this
3 Court has emphasized in Turner that the connection
4 between the regulation and the goals need merely be
5 logical.

6 JUSTICE STEVENS: So the legal issues would
7 be precisely the same if the State denied totally any
8 reading material to the prisoners. We'd have the same
9 issue.

10 MR. MARCUS: Well, it would be a more
11 difficult case to defend under the second --

12 JUSTICE STEVENS: Why would it be more
13 difficult?

14 MR. MARCUS: -- under the second prong of
15 Turner because under the second prong of Turner, you
16 look to alternative means. We might still come in here
17 and defend that program, but here they do provide
18 alternative means to read and to see loved ones through
19 visitation and through correspondence and to have two
20 -- they have two books in their cell so they can
21 continue reading. So there -- that -- that does factor
22 into the balance, and we think it -- it's very clear
23 that Pennsylvania's program is reasonable, and it would
24 just be a more difficult case if they totally
25 prohibited --

1 JUSTICE STEVENS: I understood your argument
2 to, in effect, contend that the behavior modification
3 rationale will justify the program no matter what the
4 balancing process is.

5 MR. MARCUS: No, that's -- that's not our
6 position. We think there is a balancing under Turner,
7 and you do -- you do look at all four factors of the
8 test. And we think that Pennsylvania's just clearly
9 satisfies that test. And if you applied this across
10 the board to the general population, it wouldn't. It
11 wouldn't pass the test. But -- but these are the --
12 these are the worst of the worst and they've gone
13 through many other -- Pennsylvania has gone through
14 countless other measures to try to improve these
15 inmates' behavior, and so I think it's wrong to
16 conclude, as the court of appeals did, that this was an
17 exaggerated response.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, Mr.
20 Marcus.

21 ORAL ARGUMENT OF JERE KRAKOFF

22 ON BEHALF OF THE RESPONDENT

23 MR. KRAKOFF: Mr. Chief Justice --

24 CHIEF JUSTICE ROBERTS: Mr. Krakoff.

25 MR. KRAKOFF: -- may it please the Court:

1 I'd like an opportunity to respond to several
2 of the points that were made by my colleague.

3 First, I find it interesting that and also of
4 some relevance in this case that the decision to deny
5 access to secular newspapers and magazines that this
6 policy of withdrawing access to these materials is not
7 a policy of the Federal Bureau of Prison with respect
8 to its most maximum security inmates, those who are
9 housed in the control units.

10 I also think it's important to note that
11 while there's a 90-day minimum period that these
12 inmates have to remain in the Long Term Segregation
13 Unit on level 2 status where this -- when this policy
14 applies, the policy also says that as long as an inmate
15 is serving a disciplinary sentence within the prison,
16 that he's not eligible for promotion to level 1. And
17 the testimony from the department's designated witness,
18 Deputy -- Superintendent Dickson, acknowledged that
19 most of the inmates in the unit are, indeed, serving
20 disciplinary time.

21 JUSTICE KENNEDY: Well -- well, it seems to
22 me that that's an as-applied challenge. If -- if a
23 particular inmate -- the terms of -- the conditions of
24 confinement are particularly harsh and he -- he or she
25 has an unrealistic opportunity to get to a less

1 restrictive confinement, then -- then he can bring a
2 suit.

3 MR. KRAKOFF: I was -- I was simply trying to
4 point out -- the -- the Court had asked how long are
5 inmates generally in the Long Term Segregation Unit,
6 and -- and the point that I made is that it's not
7 unusual for inmates to remain on level 2 for periods in
8 excess of 1 year.

9 CHIEF JUSTICE ROBERTS: Mr. Krakoff, what --
10 I take it you wouldn't have any objection to
11 terminating of television rights, for example. If
12 prisoners have the right to watch television, they
13 misbehave, the penalty is no television. Is that all
14 right?

15 MR. KRAKOFF: That is correct. Our position
16 is that the choice of what vehicle the institution
17 wants to permit through which inmates can gain access
18 to what is occurring outside of the prison walls in
19 political and other public matters, that's the
20 institution's choice. And the reason these inmates
21 sued for access to newspapers and magazines is because
22 the representative plaintiff, Mr. Banks, was allowed to
23 receive his Christian Science Monitor magazine because
24 it was religious in nature, but was denied the
25 opportunity to receive his Christian Science Monitor

1 newspaper under -- under this policy.

2 There's another very important --

3 CHIEF JUSTICE ROBERTS: What other
4 alternatives would you have the prison administrators
5 rely on? You have an incorrigible prisoner who's
6 misbehaving. He won't behave. They go through every
7 -- he gets up to level -- level 2. What -- what should
8 they have done instead?

9 MR. KRAKOFF: Okay. Bottom line under my
10 reading of Turner and Safley is that there has to be
11 first that logical connection under the first prong.
12 But that's not a -- an imperative --

13 CHIEF JUSTICE ROBERTS: I'm sorry. What
14 should they have done instead? Let's say he gets out
15 of the prison 1 hour every other day. Should they have
16 taken that hour out? I mean, not out of the prison.
17 Out of his cell. Should they have taken that hour
18 away, or what -- what other options do they have?

19 MR. KRAKOFF: Well, what their -- their
20 argument is essentially that this policy was basically
21 a decision by default, not a decision that was reasoned
22 by prison administrators. They -- they essentially
23 said virtually everything has been taken away from
24 these prisoners.

25 CHIEF JUSTICE ROBERTS: Right, and I want you

1 to tell me --

2 MR. KRAKOFF: And we have nothing left to
3 take away.

4 CHIEF JUSTICE ROBERTS: I would like you to
5 tell me what else they should have done. Why is that
6 wrong?

7 MR. KRAKOFF: It's wrong because there is no
8 logical connection to taking something away under the
9 facts of this case when taking away an entire litany of
10 -- or a very broad spectrum of things which -- in the
11 special management units, where these inmates came
12 from, they had had magazines taken away on their first
13 phase in the special management units. They had been
14 offered the incentive of earning access to magazines,
15 of earning access to weekly visits with family members,
16 of earning access to telephone calls, in fact, of
17 earning access for release from their cells the 23
18 hours a day to engage in -- in small group activities
19 with other inmates. And most spectacular was they had
20 the opportunity, while in the special management unit,
21 to earn a 3- to 6-month probationary period in a
22 general population cell block.

23 CHIEF JUSTICE ROBERTS: And none of that
24 worked. Right?

25 MR. KRAKOFF: Absolutely. And my point is if

1 -- if that didn't work, including magazines, which is
2 the equivalent of -- essentially of -- of newspapers,
3 they had no logical or --

4 CHIEF JUSTICE ROBERTS: So your answer to my
5 question is there's nothing else they could have done,
6 but they shouldn't have done this because this wasn't
7 going to work either.

8 MR. KRAKOFF: My answer is that you can't
9 deprive an inmate of his constitutional right of free
10 speech --

11 JUSTICE SOUTER: No, but consistent --

12 MR. KRAKOFF: -- unless there's reason to do
13 so.

14 JUSTICE SOUTER: Consistently with your
15 answer, it seems to me, you have to say they should
16 give the TV back, they should give the magazines back
17 because none of those worked either. And those are
18 First Amendment deprivations to some degree.

19 MR. KRAKOFF: What they've done here is
20 they've removed all of the vehicles to --

21 JUSTICE SOUTER: No. But I mean, what's --
22 what's your answer to my question? It seems to me that
23 your point to the Chief Justice was the courts have to
24 review the efficacy of these moves.

25 MR. KRAKOFF: That's right.

1 JUSTICE SOUTER: And if -- if there is no
2 efficacy and there is an infringement of what, at least
3 for people on the outside, would be a protected right,
4 then they have no justification for taking those rights
5 away. And if that's going to be the analysis, then on
6 -- on the argument you just gave, they've got to give
7 the TV rights back, they've got to give the magazine
8 rights back, and so on. Isn't that correct?

9 MR. KRAKOFF: May I answer it this way? I
10 know I'm supposed to say yes or no and then --

11 (Laughter.)

12 MR. KRAKOFF: -- to give an explanation.

13 JUSTICE SOUTER: I sure would like that, but
14 --

15 (Laughter.)

16 MR. KRAKOFF: I'll say no. My instinct is
17 no, and I would also say the --

18 JUSTICE SOUTER: But then why? Why?

19 MR. KRAKOFF: I've been reading *Turner v.*
20 *Safley* and then more recently *Overton* because this is
21 basic in my practice to represent prisoners. And my
22 reading of *Overton* is that you can't have a policy.
23 The prison officials cannot have a policy unless there
24 is reason to believe that the policy is going to
25 advance a legitimate penological interest.

1 JUSTICE SOUTER: Right. And in -- in your
2 argument, in your answer to the Chief Justice, you were
3 pointing out a situation in which taking away the TV
4 didn't work, taking away the magazines didn't work.

5 MR. KRAKOFF: I think --

6 JUSTICE SOUTER: Why then do they not, on
7 your theory, have to give TV and magazines back?

8 MR. KRAKOFF: I -- I think that an
9 institution can always make judgments about how
10 extensive they want to allow inmates to --

11 JUSTICE SOUTER: All right. Then where does
12 your efficacy criterion go? You're saying they may
13 make judgments, and apparently they may -- may make
14 judgments and maintain them even if those judgments do
15 not, in fact, advance their interests. Here, you're
16 saying they -- it's not going to advance their
17 interests, so they can't do it. In these cases, you're
18 saying they don't advance their interests, but they can
19 as a matter of judgment. And I don't know how to draw
20 that line.

21 MR. KRAKOFF: No. I'm -- I'm not saying they
22 can't as a matter of judgment. I -- I'm suggesting
23 that they can select among options -- we're
24 specifically speaking about access to information
25 outside the prison walls. And what I'm suggesting is

1 that they can't eliminate every suitable way by which
2 inmates can gain. And I think the word is of
3 sufficient utility -- was the -- was the language that
4 was used in Overton. And I'm saying the bottom line is
5 they can't eliminate all means by which inmates can
6 access information.

7 JUSTICE KENNEDY: But -- but -- the whole
8 rationale of your case -- if I were you writing your
9 brief, I would have this problem. This really matters
10 to the inmates, but that's exactly the State's point.
11 That's the reason it's taken away. It really means
12 something. And I -- I just -- I just don't know what
13 to do with that conundrum.

14 MR. KRAKOFF: I've had other --

15 JUSTICE KENNEDY: And -- and it seems to me
16 it's the heart of your case and that it surfaces here
17 in the answers you've attempted to give.

18 MR. KRAKOFF: Obviously, this -- this did
19 matter enough to the prisoners to commence a lawsuit.
20 I don't think that the standard by which a court --
21 this Court or any other Federal court should determine
22 whether or not there's a logical connection or a
23 reasonable connection is whether or not inmates choose
24 to file suit. That's establishing a litmus test --

25 JUSTICE KENNEDY: But the whole basis

1 for the suit is that it matters to the prisoner, and
2 that's exactly why it's been taken away because there's
3 nothing else left that we can do with these prisoners.

4 MR. KRAKOFF: But I see a distinction. There
5 are lots of things that matters to prisoners and lots
6 of things that matter to us in the free world that
7 aren't going to change our behavior. There -- there
8 are some things that are important to us --

9 JUSTICE SCALIA: What about changing other
10 people's behavior? Your -- your assertion that it does
11 no good is based upon the fact that it has not altered
12 the behavior of these people who are in the unit. But
13 what about other people who don't want to get thrown in
14 the unit? I mean, don't you have to look at the
15 deterrent effect? And -- and is it easy for you to say
16 that the -- that -- that the in terrorem effect of
17 being deprived of -- of literature, television, or
18 whatever has not induced other people to shape up?

19 MR. KRAKOFF: They made the argument that
20 this is part of an overarching deterrent program.

21 JUSTICE SCALIA: Well, I think it is.

22 MR. KRAKOFF: Well, but if you look --
23 Justice Scalia, if -- if one looks at the record
24 carefully, you see that this policy which, by the way,
25 applies to 40 inmates in one particular institution in

1 a -- in a prison system that has 23 adult institutions
2 for men, that this policy is essentially a classified
3 policy. The policy itself says this is not to be a
4 matter of public dissemination and is only to be given
5 to personnel on an as-needed basis. The inmates who
6 receive the inmate manual in the Long Term Segregation
7 Unit have to sign for it. They receive a number, and
8 every manual has to be returned.

9 Apart from the prison grapevine, which all of
10 us know there is a prison grapevine, I submit that it's
11 -- it's not great enough to tell inmates throughout the
12 system that, in fact, if you get into the Long Term
13 Segregation Unit, this very small unit, that you may
14 lose newspapers and magazines. I don't think it is
15 known, and I think in order to deter, a policy has to
16 be publicized, as it was in Overton. Michigan made it
17 very clear to the prisoners, that if they got involved
18 into drug violations, that their visits for 2 years
19 would be suspended.

20 And if I may --

21 JUSTICE GINSBURG: So let's say if -- if the
22 flaw is it doesn't deter other people because they
23 don't know about it, then if they -- if they broadcast
24 it all over so everyone knows about it, then it's okay?

25 MR. KRAKOFF: Well, I say that in order to

1 make a deterrence argument, at least an argument that
2 makes sense to me, that in order to deter somebody from
3 doing something, they have to know about that policy
4 and they have to know what the consequences are. If
5 there were a secret policy in the State of Indiana that
6 they, you know, will execute persons committing first
7 degree murder, any argument that that's going to --
8 that the death penalty is going to act as a deterrent I
9 think --

10 JUSTICE BREYER: But is there other -- are
11 there other bases? Because so far your argument is
12 they're so bad that you might as well give them
13 whatever they want because it won't matter.

14 (Laughter.)

15 JUSTICE BREYER: Now, I'm parodying it, but
16 you understand why I don't think it's your strongest
17 for the reasons said.

18 But are there others which might be a little
19 -- you had other arguments --

20 MR. KRAKOFF: Yes, and -- and I -- I do want
21 to say -- and I don't know how to say it more -- more
22 clearly -- I understand it, but I'm obviously not
23 framing this in a way that is getting my point across.

24 I'm not suggesting that because people -- these are
25 the most incorrigible, recalcitrant inmates in the

1 entire 38,000 inmate prison system, that that means
2 that they can get anything that they want.

3 I'm suggesting that when you take away a very
4 significant right -- and that is the ability to learn
5 what is happening beyond the prison walls -- there has
6 to be a reasonable basis for doing so.

7 Now, if I've been reading Turner and O'Lone
8 and Overton incorrectly, then I'm doing a disservice to
9 my clients.

10 JUSTICE BREYER: No, no. It has nothing to
11 do with the law. I understand your argument. Your
12 argument that you have made is, at the very least, you
13 can't say that this deterrent effect is that big a
14 deal. I mean, now, there were other reasons justifying
15 it. They said, for example, if one --

16 MR. KRAKOFF: Security.

17 JUSTICE BREYER: Yes, and they made a big
18 case in this. It's on 188 in the appendix.

19 MR. KRAKOFF: Exactly.

20 JUSTICE BREYER: And they made a major point.
21 They said that with the newspapers, they set fires,
22 they throw feces. They use them as a spear, and then
23 when asked, why couldn't you do the same with library
24 books, or couldn't you do the same with paperbacks,
25 they said, yes, it's possible, but it's less likely

1 because of the size of the document. And we don't have
2 to forbid everything. We just forbid the things that
3 we think are particularly likely. Now, what about
4 that one?

5 MR. KRAKOFF: Well, my -- my -- I suppose my
6 most straightforward answer would be that the Jewish
7 Forward can burn as quickly as the New York Times, that
8 the Christian Science Monitor --

9 CHIEF JUSTICE ROBERTS: Well, then now you're
10 giving -- now you're making their situation worse
11 because they tried to make your client's situation
12 better. I mean, yes, they could -- maybe they could
13 prohibit religious journals as well, but they -- for
14 various reasons, they decided not to do that. Maybe
15 they could have eliminated legal materials as well, but
16 again, they decided not to do it. They take a more
17 circumscribed approach. So I'm not sure it's a very
18 effective response to say, well, they let religious
19 materials in and that can be used as well.

20 MR. KRAKOFF: I think it's a realistic --
21 with all due respect, I think it's a realistic
22 response. I'm not faulting them. I applaud them for
23 doing what was a reasonable thing.

24 JUSTICE GINSBURG: I thought you were using
25 that to say that the security concern doesn't hold up

1 because of the papers that they're allowed to have in
2 their cells can be used similarly for fires, similarly
3 to do other bad things.

4 MR. KRAKOFF: Right.

5 JUSTICE GINSBURG: So I thought that's why
6 you were using that, just to say that the -- the
7 security concern is dubious because the materials that
8 they are allowed to have in their cells can -- could
9 achieve exactly the same end.

10 MR. KRAKOFF: Well, there are other things,
11 Justice Ginsburg, that are routinely permitted in -- in
12 the cells and, in fact, that probably have to be in the
13 cells that can be used. They're given -- they're
14 giving -- given writing paper, and the testimony of
15 Deputy Dickson was that they -- they fling feces with
16 writing paper and they fling feces -- and by the way --

17 JUSTICE SCALIA: Do you know what kind of a
18 fire you can make with the Sunday New York Times?

19 (Laughter.)

20 JUSTICE SCALIA: Are you going to -- are you
21 going to compare that to writing paper and -- and to --
22 to the Jewish Advocate or whatever it is? I mean --

23 MR. KRAKOFF: Well --

24 JUSTICE SCALIA: -- it seems to me a
25 perfectly reasonable line.

1 MR. KRAKOFF: The -- but it's not only --
2 it's not only writing paper. It's -- and they have to
3 have blankets. The blankets are flammable. Their
4 clothing is flammable. The bed sheets are flammable.

5 CHIEF JUSTICE ROBERTS: So if visitors -- if
6 there's a security issue with visitors to the prisoner,
7 you're saying you can't prohibit visitors because if
8 you allow the lawyers to come in, because they're
9 visitors too?

10 MR. KRAKOFF: No, I think that would be a
11 specious argument.

12 CHIEF JUSTICE ROBERTS: Well, but it wouldn't
13 undermine the security rationale just because you have
14 some exceptions where there are other countervailing
15 interests that might outweigh the security concern.

16 MR. KRAKOFF: But if, in fact, their
17 suggestion is that -- if their suggestion is that the
18 inmates are less likely to burn a Bible, for example,
19 and assuming they're -- they're Christians rather than
20 somebody else who has the Bible, they're less likely to
21 burn a -- the Bible or some book of scriptures, that
22 makes sense. But when you suggest that they're less
23 likely to burn a legal newspaper or a religious
24 newspaper, that doesn't make sense.

25 And I'm suggesting this isn't a question of

1 equities that if they're nice enough to permit these
2 prisoners to read religious-based or legal-based
3 newspapers and magazines, that forecloses the inmates
4 from saying -- does that make a lot of sense? I don't
5 -- I don't think so.

6 JUSTICE STEVENS: May I ask you --

7 JUSTICE BREYER: What is it that I should read
8 then in respect to what's actually bothering me? In
9 Turner v. Safley --

10 MR. KRAKOFF: Right.

11 JUSTICE BREYER: -- the Court says we
12 resolve, when a prison regulation impinges on an
13 inmate's constitutional rights, which it does here, the
14 regulation is valid if it is reasonably related to
15 legitimate penological interests. That standard is
16 necessary if prison administrators and not the courts
17 are to make the difficult judgments concerning
18 institutional operations. And that's where I think
19 it's difficult to balance this case. If we were to
20 decide for you, are we going too far in interfering on
21 what the prison administrators should be doing, or have
22 they gone too far?

23 Now, if I'm supposed to look at this record
24 and try and make up my mind, which I think is about
25 that question, what do you want me to look at?

1 MR. KRAKOFF: I want you to read the entire
2 brief --

3 JUSTICE BREYER: Well, I'll read the briefs.
4 I have no problem with the briefs --

5 MR. KRAKOFF: No. I -- I suggest that our --
6 my brief might be more coherent than I today.

7 (Laughter.)

8 MR. KRAKOFF: And I think we make out a
9 strong case -- that we make out a strong case for why
10 the policy in question is not reasonably related to a
11 legitimate penological interest.

12 I would suggest, looking at another aspect,
13 Justice Breyer, that there was some comment about the
14 adequacies of the -- the alternatives, the other
15 avenues, and that's an important consideration under
16 the second prong of -- of Turner. And I think it's --
17 it's strange to suggest that the prison chaplain who
18 visits level 2 inmates for religious purposes and that
19 attorneys, assuming that an inmate has an attorney,
20 generally are going to come discuss either a section
21 1983 action or a criminal case, and that relatives once
22 a month for an hour are going to discuss current
23 events, and that they're going to act as kind of a
24 quasi wire service by summarizing--

25 JUSTICE STEVENS: May I ask you this

1 question?

2 MR. KRAKOFF: Yes.

3 JUSTICE STEVENS: You said that the prison
4 grapevine really doesn't tell the prisoners about this
5 particular lack of access to public materials. Does
6 the prison grapevine let them know that they're going
7 to be in the cell for 23 hours a day and only be out 1
8 hour a day?

9 MR. KRAKOFF: They're actually, Your Honor --

10 JUSTICE STEVENS: If that is generally known,
11 it would seem to me that that itself would be
12 sufficient incentive to try and avoid this program,
13 whether or not you're going to be able to read the
14 Christian Science Monitor or the New York Times. It
15 seems to me that the -- the -- what we're fighting
16 about is trivial compared to the very obvious deterrent
17 value of 23 hours in the same cell 7 days a week, 30
18 days a month, 365 days a year. I don't think I'd care
19 about this other stuff.

20 MR. KRAKOFF: I agree with that point,
21 obviously. But every inmate in disciplinary
22 confinement stays in what is referred to as -- as the
23 restricted housing unit, and they all know --

24 JUSTICE SCALIA: Of course, I could say the
25 same thing about going to jail, I mean, at all.

1 MR. KRAKOFF: Well --

2 JUSTICE SCALIA: You know, I could say
3 whether I'm there 23 hours or all or not --

4 MR. KRAKOFF: Yes.

5 JUSTICE SCALIA: -- it's enough of an
6 incentive that I -- that I don't want to go to jail.
7 There's -- there's incentives and there's incentives.

8 MR. KRAKOFF: Yes, but I suggest that -- that
9 living in a cage and exercising in a cage in -- in
10 seclusion, that's -- that's a prison within a prison.
11 And those things deter normal people, people who --

12 CHIEF JUSTICE ROBERTS: And once you're in
13 that situation already, as these prisoners are, and
14 they're still not conforming their behavior to the
15 prison rules, you have a limited number of options for
16 trying to get them to do that, and your response to my
17 first line of questioning was that there's nothing else
18 you can think of that they could do.

19 MR. KRAKOFF: At some point, the options
20 expire. They have taken so much away from these
21 prisoners. Is that going to then justify? Say, well,
22 we've taken everything else and this is what we have
23 left. Is that the kind of situation where deference is
24 supposed to be high because they're making -- I don't
25 see that as a real choice. They're doing what they

1 have available.

2 CHIEF JUSTICE ROBERTS: So your response is
3 they should just grin and bear it. They --

4 MR. KRAKOFF: My -- my response is that they
5 have taken so much away from these inmates who are the
6 most incorrigible, recalcitrant inmates in the system.
7 And they say in their -- in their policy that these
8 inmates are either unwilling or incapable of changing
9 their -- changing their behavior. I submit that some
10 of these men probably are, and I think it's also
11 interesting that they --

12 JUSTICE SOUTER: I -- may I interrupt you --

13 MR. KRAKOFF: Yes.

14 JUSTICE SOUTER: -- with this question?

15 Aren't you really saying that when the deprivations get
16 beyond some point, some serious point, the issue is not
17 properly analyzed under Turner and Safley, can they do
18 one thing more? The issue really becomes one of cruel
19 and unusual punishment. Is the totality that they have
20 taken away so great that it is cruel to maintain these
21 people under these circumstances? Is that the argument
22 you're really making?

23 MR. KRAKOFF: It isn't. That's -- that's an
24 option if one reaches the point where it truly is cruel
25 and unusual. We didn't file an Eighth Amendment

1 challenge here based upon the facts that I knew.

2 JUSTICE SOUTER: Oh, I know that wasn't --
3 that wasn't the claim that you made, but isn't that the
4 argument that you're making?

5 MR. KRAKOFF: No. And -- and I think that --
6 I know in Overton there was a dissent by Justices
7 Thomas and Scalia that essentially said that that's
8 what you have. You -- you have an Eighth Amendment
9 argument if a policy rises to that level, but if a
10 policy doesn't constitute cruel and unusual punishment,
11 then you're out of luck. And that kind of swallows up
12 the First Amendment in my view and the other -- and
13 other amendments as well.

14 Now, what I'm suggesting is not that they've
15 reached the point of cruel and unusual punishment. I'm
16 suggesting that there comes a time when you take away
17 so many things from these prisoners, that you basically
18 -- yes, you may have to give up and you may have to
19 keep them in segregation. And they do keep men in
20 segregation -- other forms -- for 10, 15 -- I
21 represented a man who had been in segregation for 30
22 years. So it's not as though that's unusual. They do
23 give up on people in -- in the Pennsylvania prison
24 system all of the time. That would not be unusual.

25 I suggest that if we reach the point where

1 the law says that if you run out of options, you can do
2 anything that you want as long as it doesn't rise to
3 cruel and unusual punishment, that we may as well
4 forget about --

5 JUSTICE KENNEDY: But -- but the State's
6 position is that it wants to avoid that ultimate
7 deterrent. It -- it wants to take away privileges for
8 a while to see if he can conform. You're depriving the
9 State of the -- of the option to avoid the most extreme
10 circumstances of forgetting about him altogether
11 forever.

12 MR. KRAKOFF: Well, I -- I --

13 JUSTICE KENNEDY: And it seems to me that --
14 that your -- your argument is -- is at cross ends with
15 its own purpose.

16 MR. KRAKOFF: Well, it -- unless there are
17 other questions, I think I've reached --

18 JUSTICE STEVENS: Just let me just ask one --
19 one thing I am curious about. The argument -- it seems
20 to me that there's kind of a flow of these. Some of
21 them get out of this system and some stay a long time.
22 What does the record tell us about how often, if they
23 conform to the regular rules without any violation for
24 40 days or a year, do they -- do they get out of this
25 -- this situation?

1 MR. KRAKOFF: The -- the rules themselves say
2 kind of in a preamble that -- that confinement is for a
3 minimum of 90 days, but that often it's -- it's longer
4 than that --

5 JUSTICE STEVENS: I'm not posing what the
6 rules say. Does the record tell us whether -- you
7 know, whether this system is just something we're
8 talking about or whether it really has an effect on
9 people moving from this classification to another
10 classification.

11 MR. KRAKOFF: Well, there were -- there were
12 10 inmates in the first 2 and half years of the
13 operation, according to Deputy Dickson, who had moved
14 out of -- out of the unit.

15 The record is silent as to whether any of
16 these inmates ordered subscriptions for newspapers or
17 magazines. So we don't know whether that even arguably
18 was a factor.

19 I think that the -- that the State has
20 acknowledged that there might be many reasons why
21 inmates might leave the Long Term Segregation Unit that
22 could be unrelated to the -- the, quote, incentive of
23 newspapers and magazines. So we don't know whether any
24 of them have left because they've simply gotten tired
25 of being in segregation for 2 and a half additional

1 years, after flunking out of the special management
2 units, or whether there were other -- other factors.

3 Two -- what -- what is concerning is that two
4 inmates left straight from the unit to the streets
5 because their sentences expired. And so they were
6 essentially people who -- you know, they -- they could
7 read about the -- an ancient war in the Bible, but they
8 couldn't read about Iraq. So they were going to have
9 -- I don't know if that's a healthy situation. That's
10 not from a constitutional perspective, --

11 JUSTICE GINSBURG: What -- this --

12 MR. KRAKOFF: -- but from a practical
13 perspective.

14 JUSTICE GINSBURG: What other than the
15 periodical, newspaper access differentiates this
16 custody from the next higher --

17 MR. KRAKOFF: Special management unit?

18 JUSTICE GINSBURG: Yes.

19 MR. KRAKOFF: Well, all -- the various
20 incentives -- there's no possibility of earning access
21 to radios or televisions in the Long Term Segregation
22 Unit. The most there can be would be twice a -- twice
23 a month visits if they're promoted to level 1, as
24 opposed to four time a month visits if they succeed in
25 the special management unit. There's no opportunity

1 for out-of-cell group activities while in the Long Term
2 Segregation Unit. They lose that as an -- that's not an
3 incentive. That is an incentive in the special
4 management unit. There's no probationary period where
5 they can be released to a general population cell block
6 which, as the Court knows, a general population cell
7 block is -- offers many opportunities that segregated
8 cell blocks don't. And that's not available.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 MR. KRAKOFF: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Rovelli, you have
12 2 minutes remaining.

13 REBUTTAL ARGUMENT OF LOUIS J. ROVELLI

14 ON BEHALF OF THE PETITIONER

15 MR. ROVELLI: Very briefly, if -- if I might
16 turn myself to just the very first point that Mr.
17 Krakoff made about inmates being compelled to stay in
18 the Long Term Segregation Unit until they complete
19 their disciplinary custody. I would draw your
20 attention to pages 40 and 41 of the joint appendix,
21 which show that -- that the unit manager has the
22 authority to set aside disciplinary custody, and an
23 inmate who graduates the Long Term Segregation Unit
24 gets all of their disciplinary custody set aside
25 completely. So in a sense, the -- the disciplinary

1 custody aspect is another incentive.

2 JUSTICE SCALIA: Mr. Rovelli, do the other
3 prisoners know about this? I'd like you to respond to
4 the -- to the assertion that nobody knows about this
5 anyway, so it doesn't deter anybody.

6 MR. ROVELLI: The principal means by which
7 other prisoners would know about it is the very
8 effective prison grapevine, although it does appear in
9 the -- in a chart that's appended to the handbook for
10 the special management unit, and 75 percent of the
11 inmates who wind up at level 2 come from the special
12 management unit.

13 The other thing I would point out about the
14 effectiveness of this program, as opposed to the give-
15 up-on-them proposition, is that even at -- even in
16 2002, when the program was only 2 years old, 25 percent
17 of the inmates who had been sent there had graduated.
18 The statistics on that are at pages 7 and 8 of our
19 reply brief.

20 Finally, if -- if the Court were to affirm
21 the court of appeals, then this case has to be sent
22 back to trial and the burden is put on the prison
23 system to demonstrate empirically that this regulation
24 can achieve its goals. In a sense, I've just
25 demonstrated that it has achieved its goals, but much

1 more importantly, the effect of that would be to
2 totally undermine, if not void, Turner and Overton.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 12:05 p.m., the case in the
6 above-entitled matter was submitted.)

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