

1                               IN THE SUPREME COURT OF THE UNITED STATES

2   - - - - -X

3   SUSAN JINKS,                               :

4                               Petitioner                               :

5               v.                               :   No. 02-258

6   RICHLAND COUNTY, SOUTH                               :

7   CAROLINA.                               :

8   - - - - -X

9   Washington, D. C.

10    Wednesday, March 5, 2003

11                       The above-entitled matter came on for oral

12   argument before the Supreme Court of the United States at

13   11:27 a.m.

14   APPEARANCES:

15   ROBERT S. PECK, ESQ., Washington, D.C.; on behalf of the

16               Petitioner.

17   JEFFREY A. LAMKEN, ESQ., Assistant to the Solicitor

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

19               behalf of the United States, as Intervenor.

20   ANDREW F. LINDEMANN, ESQ., Columbia, South Carolina; on

21               behalf of the Respondent.

22

23

24

25

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	ROBERT S. PECK, ESQ.	
4	On behalf of the Petitioner	3
5	JEFFREY A. LAMKEN, ESQ.	
6	On behalf of the United States,	
7	as Intervenor	15
8	ANDREW F. LINDEMANN, ESQ.	
9	On behalf of the Respondent	18
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(11:27 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
next in No. 02-258, Susan Jinks v. Richland County.

Mr. Peck.

ORAL ARGUMENT OF ROBERT S. PECK  
ON BEHALF OF THE PETITIONER

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

In enacting section 1367, Congress took up this  
Court's invitation in Finley to manage the boundaries of  
supplemental jurisdiction. It had two goals in doing so.  
It sought to provide a Federal forum for plaintiffs that  
so chose to use it, and for -- for reasons of respect for  
the interests of comity and federalism, it provided a  
mechanism by which those cases may be returned to State  
court.

They knew that there was a dilemma, a dilemma  
caused by the operation of statutes of limitations, and so  
they sought to find and found a simple, practical,  
workable solution that traveled down a well-trod path.  
It's a path that was traveled down by the Soldier and  
Sailors' Relief Act, a act that also tolls State statutes  
of limitations even when exigent circumstances do not  
exist. And in the case in 1993 holding that, Conroy, this

1 Court found that it was applicable in that instance to a  
2 defendant who was a town.

3 It also traveled down that road in section 108  
4 of the Bankruptcy Act. This too provides that kind of 30-  
5 day window after dismissal of the automatic stay or  
6 lifting of the automatic stay for a plaintiff to file an  
7 action which is otherwise purely a State matter in State  
8 court.

9 This Court found in *Stewart v. Kahn* that there  
10 is no federalism bar to congressional authority as long as  
11 that authority exists someplace in the Constitution.  
12 Throughout its history, pursuant to Article I, which has a  
13 cognate provision duplicative of the authority it derives  
14 also from Article III, Congress has used its jurisdiction-  
15 setting authority as a traffic cop over the area of  
16 concurrent State and Federal jurisdiction. It has done so  
17 almost from the beginning in the Anti-Injunction Act, the  
18 removal statute, and has always found this to be a  
19 necessary incident of maintaining a dual-court system.

20 QUESTION: Well, the Anti-Injunction Act just  
21 applies to Federal courts, doesn't it?

22 MR. PECK: The -- it gives Federal courts the  
23 authority, though, to stay a State action when it  
24 interferes with the jurisdiction of the Federal court.

25 QUESTION: It's an -- that -- that's an

1 exception to the Anti-Injunction Act.

2 MR. PECK: That's an exception contained in the  
3 Anti-Injunction Act, and another exception is when an act  
4 of Congress so provides.

5 The choice of tolling did not attempt to give  
6 longer life in State court than it would have enjoyed in  
7 Federal court. It did not eliminate defenses that were  
8 available in Federal court, have the matter remain there.  
9 It did not change the State's policy on waiver of  
10 municipal liability or alter its statute of limitations.  
11 It simply said that the case, as it stood in Federal  
12 court, is now available to be heard in State court. The  
13 State is free to change both its waiver of immunity, its  
14 statute of limitations, and Congress accepts those changes  
15 regardless of the application of the supplemental  
16 jurisdiction statute.

17 Once that jurisdiction attaches, once the  
18 Federal court has authority to hear the State action, then  
19 even after the Federal -- Federal claim has fallen away,  
20 the court still has the jurisdiction to hear what  
21 otherwise would have been a purely State claim

22 This is unusual in a diversity case. When  
23 complete diversity is broken, the jurisdiction ends. But  
24 here no one, not the Supreme Court of South Carolina, not  
25 the respondents, not the amici, questioned Congress'

1 authority to say that this remains a Federal matter  
2 because a Federal interest has attached because the matter  
3 has now been heard.

4 QUESTION: I didn't understand it that way, I  
5 thought South Carolina said, Federal court, you want to  
6 take this and deal with this stale claim? That's all  
7 right with us. It's one of the ironies of the case that  
8 the State's position is the Federal court can have it if  
9 you keep it. The only thing they can't do is give it back  
10 to us when we don't want it because that would be  
11 commandeering the use of our courts. South Carolina's  
12 position is the Federal court can keep our State claim in  
13 Federal court. Indeed, it must if it wants the claim to  
14 remain alive.

15 MR. PECK: That -- that is correct, and even at  
16 this late date, rule 60(b) would enable a plaintiff like  
17 Susan Jinks to seek to reopen that Federal case, to -- to  
18 reconsider its judgment and allow this case to still live  
19 if -- if the tolling provision is ineffective.

20 So here what we're saying is that there's a  
21 continuing Federal interest in this matter. There's --  
22 there's been a Federal attachment to what otherwise would  
23 have been a purely State matter. In a removal situation,  
24 for example, South Carolina could not refuse a remand and  
25 we contend that that authority which is contained in the

1 removal statute is the same kind of authority that  
2 Congress is exercising here because what Congress has  
3 effectively done is define the legal effect of the  
4 appearance of this matter in Federal court and the Federal  
5 disposition of it. And the State courts of South Carolina  
6 or any other State is not equipped, it's not authorized to  
7 refuse that definition because Congress is the supreme  
8 sovereign of Federal law. So --

9 QUESTION: We -- we know what Congress has --  
10 has -- has defined. Why is it important? I mean, what is  
11 the -- how would you define the important interest to the  
12 Federal courts in -- in our seeing the constitutional  
13 issue your way?

14 MR. PECK: Well, first of all, Congress wanted  
15 to provide this Federal forum. They clearly had the  
16 authority to do that. But they also wanted to take in the  
17 interest of comity which this Court has always referred to  
18 as a vital consideration.

19 QUESTION: The State says, we don't want this  
20 kind of comity. Keep it.

21 MR. PECK: It's -- it's very nice for the State  
22 to have that interest, but the federalist design of our  
23 Constitution provides that impetus that Congress was  
24 acting on.

25 QUESTION: No, but I -- I want to get down to

1 specifically what's important to the Federal courts and to  
2 Congress.

3 MR. PECK: Well --

4 QUESTION: Why would it hurt the Federal courts  
5 if you lose this case? What's -- practically what's --  
6 what's at stake?

7 MR. PECK: I -- I think there are -- there are  
8 several things that might happen. Right now what we call  
9 supplemental jurisdiction is a doctrine of discretion. It  
10 would be turned into a doctrine of plaintiffs' rights,  
11 that if the State courts are refusing to receive these  
12 case -- cases, then the Federal courts will be obligated  
13 to hear these State matters even if they were novel and  
14 complex matters in which only the State courts have the  
15 appropriate expertise to hear it. And I think that would  
16 cause some problems.

17 QUESTION: What difference does complexity make  
18 if the State Federal court's position is we don't want to  
19 clutter up Federal courts with a lot of State tort --  
20 garden variety, simple State tort claims? We don't want  
21 to be a fender bender court.

22 MR. PECK: And I think it is perfectly  
23 legitimate in Congress' jurisdiction-setting authority for  
24 them to make that determination. These are matters that  
25 are --



1                   QUESTION: The -- the idea is that Federal  
2 courts should be occupied with Federal cases and not with  
3 State cases.

4                   MR. PECK: And I -- I think that is an  
5 appropriate -- appropriate reason for Congress to adopt  
6 this kind of a statute to assure that that happens.

7                   The other -- Justice Souter, the other possible  
8 consequence is that plaintiffs, fearful that a Federal  
9 court will not hear their matter, will not take it back if  
10 the -- the State courts will not accept the matter, may be  
11 left without a cause of action on their State claim, that  
12 they will suddenly be shut out the door. And in order  
13 to --

14                  QUESTION: And how is that going to hurt the  
15 Federal courts?

16                  MR. PECK: That does not necessarily hurt the  
17 Federal courts, but Congress certainly has a right to be  
18 concerned for those litigants and try to --

19                  QUESTION: Why -- why isn't the person to be  
20 concerned for those litigants the State courts under whose  
21 law the litigants want to sue?

22                  MR. PECK: Because -- because, Justice Souter,  
23 here the State courts have -- have -- Congress has  
24 basically done one thing. They've -- they've looked at  
25 the idea of comity that this Court had talked about in

1     Guaranty Trust, in Ragan, and -- and what they said is  
2     that comity is a reciprocal process. It's got to have a  
3     two-way street.

4             And so what we're doing is we're not giving  
5     longer life in Federal court to what's in State court. We  
6     have the authority to assign to the State courts a matter  
7     that is purely Federal in nature. Now we have a matter  
8     that has a Federal interest because of the intervention of  
9     its arrival in Federal court, and because of that, we have  
10    enough authority also to say that this is a matter that  
11    the State courts can't refuse. They can't suddenly say  
12    that we do not recognize the authority here --

13            QUESTION: But comity is traditionally a matter  
14    of consent rather than having one sovereign impress its --  
15    its law on the other. I mean, it's consensual.

16            MR. PECK: It is consensual, but then again, the  
17    -- the idea behind comity is tied up with our -- our  
18    federalism and our idea that we have a dual court system  
19    That dual court system recognizes that there will be  
20    conflicts. There will be some -- some difficulties  
21    between the Federal and State systems. Those difficulties  
22    is what Congress is trying to police.

23            It's a -- it's a function that they have  
24    performed repeatedly, and the removal statute is a very  
25    good example of that. And certainly Congress could insist

1 -- could insist that the State courts receive back even a  
2 matter that the Federal court erroneously dismissed rather  
3 than remand it.

4 And here they're not asking the South Carolina  
5 courts to do anything that they don't normally do. If a  
6 -- a matter is --

7 QUESTION: Well, they're asking the South  
8 Carolina courts to grant relief in a case that is outside  
9 the statute of limitations. I take it they don't -- the  
10 South Carolina courts don't normally do that.

11 MR. PECK: South Carolina courts, as -- as we  
12 cited in the -- the Hilton Head and Moriarty decisions,  
13 has said that they will sometimes waive the statute of  
14 limitations in the interest of justice.

15 Another instance in which they waive that issue  
16 is when venue has been misapplied. When -- when they  
17 demand that venue be placed in one particular place, you  
18 file in that wrong place, the statute of limitations  
19 expires before that court acts on it, they say it has  
20 jurisdiction to transfer it to the proper venue.

21 QUESTION: Well, would this case come out  
22 differently in the State? Supposing Georgia, a  
23 neighboring State, had no such waiver. Would this case  
24 come out differently there?

25 MR. PECK: I don't think so, and the reason I

1 don't think so is because when all that is left in the  
2 Federal court is a matter that is otherwise a State-based  
3 claim, that Federal court sits as just another court of  
4 that jurisdiction, another court within that State's  
5 system. And for that reason -- for that reason, it ought  
6 to be treated, when Congress so authorizes -- and  
7 Congress, exercising that Article III, that necessary and  
8 proper powers that it had, utilizing the Supremacy Clause,  
9 authorizes that this be treated essentially by tolling as  
10 meeting the statute of limitations.

11           They have the right to define the meaning of  
12 what the Federal law is here, and that is simply what  
13 they've done. They've done it by adopting a tolling  
14 provision that is not unlike other tolling provisions  
15 throughout the law. And here it's clear that they --  
16 they've done something that they have the authority to do.

17           Tolling comports completely with the federalist  
18 design of the Constitution, enables the court's  
19 consideration of what court is best positioned to  
20 adjudicate. That is decidedly a jurisdictional decision.  
21 Here -- and it's -- and it -- it is doing that by allowing  
22 the courts to control their own borders of what is  
23 appropriate to them and what is not.

24           QUESTION: I thought the South Carolina Supreme  
25 Court agreed that as far as the Federal courts are

1 concerned, this is all fine. So it was necessary to spare  
2 the Federal courts having to sit on a case that no longer  
3 has a Federal element. That's fine. It serves a  
4 legitimate Federal purpose.

5 But, says South Carolina, you can't -- it isn't  
6 proper to tell us then -- they can dump it. That's fine.  
7 They can't tell us that we have to pick it up.

8 MR. PECK: That is indeed what they've said.  
9 But Stewart v. Kahn says otherwise.

10 QUESTION: That was a -- that was a Civil War  
11 tolling of the statute of limitations.

12 MR. PECK: That is correct. It found that  
13 within the war power, Congress had the authority to toll  
14 the statute of limitations in a State action brought in  
15 State court. Obviously then there is no Tenth Amendment  
16 overlay that prevents the use of that war powers  
17 authority.

18 Here they have similar authority, both in  
19 Article I, section 8, to establish the inferior courts, as  
20 well as Article III where there's a cognate phrase, and  
21 that authority has to be equivalent. They've used that  
22 authority also with respect to bankruptcy, again deriving  
23 from section 8.

24 And so here again there's no question that these  
25 other tolling provisions have been properly used. No one

1 has questioned their constitutionality in recent times,  
2 and this simply adopts a longstanding congressional  
3 approach to this issue. It's one that this Court has  
4 previously approved.

5 If -- if the respondent has his way, enormous  
6 mischief will result. You leave the courts with a  
7 Hobbesian choice, a choice that they have been  
8 uncomfortable with in which you've seen courts granting  
9 motions for reconsideration, courts requiring waivers of a  
10 statute of limitations, so having much the same effect --  
11 and clearly when tolling does that, it is clearly  
12 appropriate to the judicial power -- and in other  
13 instances, simply holding onto a case they would otherwise  
14 allow the State courts to do, again in the interest of the  
15 federalist overlay in our Constitution.

16 QUESTION: Well -- well, isn't it -- if --  
17 suppose you should not prevail here. Well, then you just  
18 bring -- the plaintiff would bring two actions, bring --  
19 bring a protective action in the State court within the  
20 statute of limitations and then that would solve the  
21 problem, wouldn't it?

22 MR. PECK: But that -- that's an unworkable  
23 solution. Congress sought to avoid that. Congress wanted  
24 to give a Federal forum capable of hearing all matters  
25 that a plaintiff would expect a single court to hear. And

1 by filing a protective action of that sort, first of all,  
2 you could not stop the State court from continuing to  
3 proceed, possibly eclipsing in speed the Federal court and  
4 coming up with res judicata on their Federal claim, as  
5 well as the fact that you may be signaling the Federal  
6 court that on the State matter we have a preference to be  
7 in State court when that really isn't the case.

8 I -- I would -- if there are no further  
9 questions, I would like to reserve the rest of my time.

10 QUESTION: Very well, Mr. Peck.

11 Mr. Lamken, we'll hear from you.

12 ORAL ARGUMENT OF JEFFREY A. LAMKEN

13 ON BEHALF OF THE UNITED STATES, AS INTERVENOR

14 MR. LAMKEN: Mr. Chief Justice, and may it  
15 please the Court:

16 The tolling provision at issue here is within  
17 Congress' constitutional powers for two reasons.

18 First, it establishes the legal effect of a  
19 distinctly Federal set of events: the filing, pendency,  
20 and dismissal of an action in Federal court over a  
21 defendant over whom the court can exercise jurisdiction.

22 Second, it serves legitimate Federal interests,  
23 ensuring that if plaintiffs are held harmless for having  
24 selected a Federal forum in the first instance and  
25 ensuring that Federal courts are not required to exercise

1 jurisdiction and decide cases that involve potentially  
2 sensitive issues of State law that are more reliably and  
3 more appropriately decided in the State court.

4           Because municipalities are not States or arms of  
5 the States, sovereign immunity does not prevent them from  
6 being hailed into Federal court and it doesn't prevent the  
7 Federal courts from exercising jurisdiction over cases  
8 against them, including supplemental State law claims.

9           Congress can establish the rules for when  
10 Federal courts should hear such claims and the rules for  
11 when they should not. Congress has corresponding  
12 authority to establish reasonable rules about the legal  
13 consequences of the pendency of the Federal action, of the  
14 filing of the claim, its pendency, and the court's  
15 decision to dismiss it under specified rules that Congress  
16 itself has established.

17           The rule established here falls within the  
18 tradition of Federal control over the effect of Federal  
19 proceedings. It falls in the tradition of, for example,  
20 legal effect of the filing of a bankruptcy petition which  
21 stays all the actions that are against the debtor and  
22 tolls the State limitations periods during the pendency of  
23 the automatic stay.

24           Or the removal provision which takes cases out  
25 of State courts, stays the proceedings in State courts,



1 and thus prevents the State courts from proceeding in a  
2 way such as by deeming the case constructively dismissed  
3 that might have the effect of causing the statute of  
4 limitations to continue to run.

5 And the effect of a Federal -- a judgment of a  
6 Federal court case.

7 All these are matters that are controlled by  
8 Federal law, and that Federal law is no less binding on  
9 State courts adjudicating State causes of action,  
10 including against municipalities, than they are on Federal  
11 courts.

12 The rule in this case serves twin Federal  
13 interests.

14 First, it holds plaintiffs harmless for having  
15 selected a forum -- a State -- excuse me -- a Federal  
16 rather than a State forum in the first instance. Absent  
17 this sort of rule, plaintiffs would face the risk, if they  
18 chose a Federal forum, of having the statute of  
19 limitations run on their State law claims. If the Federal  
20 court then chose to dismiss, those State law claims would  
21 be barred. And plaintiffs would have an artificial  
22 incentive to avoid Federal court, including for the  
23 assertion of their Federal law claims.

24 It also serves the interests of Federal courts  
25 in ensuring that they don't have to decide State law

1 claims that are potentially sensitive, that under the  
2 standards this Court articulated in Gibbs that Congress  
3 has codified in section 1367(c) and it reflects sensible  
4 notions of division between State and Federal authority  
5 more appropriately belong in State court and can be more  
6 reliably adjudicated there.

7 This Court's decision in Stewart v. Kahn  
8 establishes that there is no constitutional impediment to  
9 congressional preemption of State tolling rules if it  
10 serves a legitimate Federal interest, the tolling  
11 provision here, like the social -- excuse me -- like the  
12 Soldiers' and Sailors' Relief Act, the bankruptcy  
13 automatic stay tolling rule, following that tradition.

14 Finally, the tolling rule here intrudes only  
15 modestly on State interests. The timely filing of the  
16 State claims in Federal court serves all of the statute of  
17 limitations purposes as the claim -- as the timely filing  
18 of those same claims in State court.

19 Accordingly, we ask that the judgment of the  
20 State supreme court be reversed.

21 If there are no further questions.

22 QUESTION: Thank you, Mr. Lamken.

23 Mr. Lindemann, we'll hear from you.

24 ORAL ARGUMENT OF ANDREW F. LINDEMANN

25 ON BEHALF OF THE RESPONDENT

1                   MR. LINDEMANN: Mr. Chief Justice, and may it  
2 please the Court:

3                   By enacting section 1367(d), Congress has  
4 intruded on principles of State sovereignty. This case  
5 involves more than just the tolling of a State law statute  
6 of limitations. It involves, in this particular instance  
7 where a political subdivision is involved and South  
8 Carolina law is involved, specifically the South Carolina  
9 Tort Claims Act -- this case involves a -- a waiver of  
10 State law sovereign immunity, State law governmental  
11 immunity.

12                  QUESTION: What about examples cited by the  
13 representative of the Solicitor General of the Soldiers'  
14 and Sailors' Civil Relief Act and other Federal laws that  
15 have a similar effect on South Carolina and other States?

16                  MR. LINDEMANN: Well, I would submit to the  
17 Court that, first of all, the issue has never come up,  
18 never been litigated in this Court, and as far as I'm  
19 aware, has never been litigated in any court whether or  
20 not the Soldiers' and Sailors' Act in any application is  
21 -- is constitutional.

22                  QUESTION: Okay. So you think, as far as you're  
23 concerned, it would be the same problem and the same  
24 result.

25                  MR. LINDEMANN: No, I do not necessarily believe

1 it will be the same result. I believe it would be a much  
2 more difficult question for this Court than what was  
3 facing the South Carolina Supreme Court and is presently  
4 before this Court.

5 QUESTION: Why?

6 MR. LINDEMANN: Because you have different  
7 Federal interests that are involved. And obviously, in  
8 determining whether or not the -- a statute is proper  
9 under the Necessary and Proper Clause and to do a Tenth  
10 Amendment analysis, you have to look at -- you have to  
11 weigh the various Federal and State interests that are  
12 involved.

13 In this particular case, which I'll elaborate  
14 more momentarily, you have very superficial, I would  
15 submit, Federal interests involved compared to a very  
16 substantial State interest of determining whether or not  
17 the State and its political subdivisions are subject to  
18 suit under State law.

19 QUESTION: But is it not -- is it not correct --  
20 is it not correct that the intrusion on State sovereignty  
21 -- forget the Federal side of the balance for a moment --  
22 the intrusion on State sovereignty is precisely the same  
23 under all these other statutes?

24 MR. LINDEMANN: I would disagree, Justice  
25 Stevens.

1                   QUESTION: Why is the intrusion in the Soldiers'  
2 and Sailors' Civil Relief Act any different than this one?

3                   MR. LINDEMANN: The Soldiers' and Sailors' Act  
4 -- it would be a very similar intrusion on the -- on the  
5 State sovereignty.

6                   QUESTION: And how about the bankruptcy statute?

7                   MR. LINDEMANN: The bankruptcy -- the actual --  
8 any -- any of these statutes that have been cited by the  
9 petitioners and by the Government that actually provide  
10 for a stay of a State court action I think are  
11 substantially different because I would submit to the  
12 Court that a stay of a State court action, whether it's  
13 pursuant to the Bankruptcy Code, pursuant to the removal  
14 statutes, any of -- Anti-Injunction Act, any of those does  
15 not have the same effect upon State sovereignty because  
16 it's not changing the actual liability of the defendant,  
17 in this particular case, Richland --

18                  QUESTION: Well, neither does this statute  
19 change the liability. It just preserves the cause of  
20 action.

21                  MR. LINDEMANN: I --

22                  QUESTION: Just like the Soldiers' and Sailors'  
23 statute.

24                  MR. LINDEMANN: I -- I would respectfully  
25 disagree, Justice Stevens, because what has occurred in

1 this particular case is Richland County was entitled to  
2 State law sovereign immunity once 2 years passed from the  
3 date of the loss. And at -- at the point that this  
4 lawsuit was filed in State court --

5 QUESTION: Wouldn't it be entitled to sovereign  
6 immunity if a sailor had -- had sued them too?

7 MR. LINDEMANN: Well, that's why I was trying to  
8 distinguish the stay cases from the Soldiers' and Sailors'  
9 Act. I think the Soldiers' and Sailors' Act issue is a  
10 much closer question and there what you're weighing is  
11 much more substantial Federal interests.

12 QUESTION: I'm -- I'm just looking at it from  
13 the State's point of view in the point of my questions.  
14 It did not seem to me that the State interest in it being  
15 immune was any different in any of those situations.

16 MR. LINDEMANN: Well, I would -- I would submit  
17 that there is no difference in the Soldiers' and Sailors'  
18 context, but there would be a major difference in any of  
19 the situations involving a stay.

20 QUESTION: Mr. Lindemann, I don't -- I don't see  
21 what difference it makes that the statute of limitations  
22 in this case was applied to -- to what you call State  
23 sovereign immunity. That is, you -- you acknowledge that  
24 this entity, Richmond -- Richland County, was -- was not  
25 entitled to sovereign immunity as we know it under Federal

1 law.

2 MR. LINDEMANN: That's correct, Your Honor.

3 QUESTION: But you're saying that the State  
4 wished to confer upon Richland County a shorter statute of  
5 limitations for suit against it than -- than this Federal  
6 statute permits.

7 Why is that any -- any different from applying  
8 the same statute against South Carolina's determination  
9 that a private individual should not be suable after 2  
10 years? What difference does it make whether -- whether  
11 the person being affected by it is a private individual or  
12 Richland County? So long as it's not the State of South  
13 Carolina, Federal sovereign immunity law is not -- is not  
14 at issue. What do we care?

15 MR. LINDEMANN: Well this, Your Honor, is not a  
16 case involving the Eleventh Amendment.

17 QUESTION: Exactly.

18 MR. LINDEMANN: This is not a case that is  
19 involving Federal constitutional immunity.

20 QUESTION: Exactly.

21 MR. LINDEMANN: This is a case that was brought  
22 -- a negligence case that was brought in State court  
23 against a State governmental -- or a local governmental  
24 entity in the State of South Carolina to which South  
25 Carolina law should apply. And the reason why we contend

1 that this violates the Tenth Amendment is it intrudes into  
2 the areas of State sovereignty to determine, number one,  
3 what South Carolina law provides; number two, how South  
4 Carolina law determines whether or not their own  
5 governmental entities are subject to suit.

6 QUESTION: But, Mr. Lindemann, one of the  
7 curiosities about this case is if the Federal court, once  
8 the Federal claim dropped out, decided that it would clean  
9 -- clean up the operation, it would keep it in Federal  
10 court, there would be a Federal court adjudicating South  
11 Carolina's State law case. The only regulating rules  
12 would be State rules. And South Carolina says, that's  
13 okay with us. They can take our law into the Federal  
14 court and apply it there and -- but we don't want it back.  
15 In other words, we want to force our cases to be litigated  
16 into -- in the Federal court. And that doesn't make a  
17 whole lot of sense.

18 MR. LINDEMANN: Well, it's not as much that  
19 they're trying to force the Federal court to litigate the  
20 case. Obviously, the plaintiff chose that forum to start  
21 with. And Congress has deemed -- has provided for  
22 supplemental jurisdiction. So obviously Congress has  
23 provided a forum in Federal court for the litigation of  
24 these State law claims. And so South Carolina has not  
25 said, you can't give it back to us, but what South



1 Carolina had said is that in the interim, if there's a  
2 dismissal without prejudice of the State law claims in  
3 another court, whether it be the Federal district court or  
4 whether it be in a court of another State, if there's a  
5 dismissal without prejudice under South Carolina law,  
6 that's considered as if the suit had never been brought in  
7 the first place.

8 QUESTION: In other words, you're saying it's  
9 all right with us if the Federal court adjudicates this  
10 purely State claim. The State isn't offended by that, but  
11 it is offended by getting it back even though everyone had  
12 notice in ample time within the -- the county had ample  
13 notice because they received a Federal summons and  
14 complaint. So there was no question of -- of repose  
15 involved.

16 But there's one -- another aspect of this, it  
17 seems to me, passing strange. Are you suggesting that the  
18 removal statute would be vulnerable to a similar attack?  
19 Because that's really -- if you're talking about State  
20 court, this is wrenching a case out of the State court,  
21 ousting the State court of jurisdiction, putting it into  
22 the Federal court. I would think if you're right about  
23 sending it back, then you'd certainly object to lifting it  
24 out.

25 MR. LINDEMANN: I don't believe the interest

1 here is that South Carolina has a problem with -- with the  
2 Federal court deciding issues of State law, and I don't  
3 think South Carolina has a problem with deciding those  
4 issues itself. The problem South Carolina has in this  
5 particular case is with Congress expanding upon State law  
6 that actually set the boundaries as to when and how a  
7 political subdivision can be sued.

8 QUESTION: What difference does it make whether  
9 it's a political subdivision or not? Suppose South  
10 Carolina law said, gas stations shall be immune from suit  
11 except that you can sue them within two years, and then  
12 the same situation occurs. Would -- would not the Federal  
13 court be intruding upon South Carolina's decision of  
14 immunity just as much?

15 MR. LINDEMANN: South -- yes, the Congress would  
16 be intruding upon --

17 QUESTION: So -- so --

18 MR. LINDEMANN: -- the ability of the State of  
19 South Carolina to set a statute of limitations for private  
20 defendants.

21 QUESTION: That's -- and that's all we're  
22 talking about, to set a statute of limitations whether  
23 it's for private defendants or whether it's for Richland  
24 County which, as far as Federal law is concerned, is a  
25 private defendant, or whether it's for gas stations.

1           I mean, I -- you -- you try to make something  
2 different of this case by saying what it involves in -- is  
3 Richland County, but what we, the Federal courts, say is  
4 Richland County is not the State of South Carolina. It is  
5 not a State entity, and as far as we're concerned, it's a  
6 gas station.

7           MR. LINDEMANN: But I would submit to the Court  
8 two points in response to that. It goes beyond because  
9 it's a governmental entity and you look at the application  
10 of State law because again, this is a State law case  
11 brought and adjudicated in a State court. And you look at  
12 the State law which actually provides a greater defense  
13 for a governmental entity than it does for a private  
14 citizen.

15           To give the Court an illustration --

16           QUESTION: You would have no --

17           QUESTION: You give greater defenses for gas  
18 stations. Would -- would that change the gas station case  
19 simply because you give greater defenses to gas stations?

20           MR. LINDEMANN: No, it would not change the  
21 case.

22           QUESTION: Of course not.

23           MR. LINDEMANN: My point is it -- it actually  
24 makes a stronger case to show the intrusion on State  
25 sovereignty where you have a political subdivision.

1                   And if I may illustrate. Prior to 1985, South  
2   Carolina recognized absolute sovereign immunity for its  
3   State entities as well as its political subdivisions. And  
4   if you looked at -- the question that comes to mind is  
5   whether Congress, prior to 1985, could have enacted a  
6   statute that subjects Richland County, a political  
7   subdivision in the State of South Carolina, to a claim for  
8   negligence in the operation of its local detention center  
9   where South Carolina law itself provides there is no such  
10   claim because of sovereign immunity.

11                  QUESTION: The answer is, of course, they could  
12   if they had a -- if there is a basis in the Constitution  
13   for the Federal Government to pass a law that changes  
14   State law. They do it every day of the week.

15                  And so usually what you ask is, is there a basis  
16   here? Of course, there is. They say Article III.

17                  Indeed, was there a problem Congress was trying  
18   to cure? Indeed, there is. It was the mess that existed  
19   before the statute.

20                  Is there an infringement of what the State would  
21   like to do? Of course, there is but the Constitution  
22   gives the power to the Federal Government to do that.

23                  Now -- now, what's -- that -- like, you know,  
24   purely I'd say hornbook. So what -- what is the -- what  
25   is the special thing about this infringement of the

1 State's power to do what it would like to do here?

2 MR. LINDEMANN: I respectfully disagree with  
3 you, Justice Breyer. If, prior to 1985, Congress wanted  
4 to create a situation where Richland County would be  
5 liable for the operation of its detention center, it would  
6 have to do so in the context of a Federal cause of action  
7 which obviously existed at that time under section 1983.  
8 What I'm saying is --

9 QUESTION: So Congress in your opinion doesn't  
10 have the power to -- to interfere with State law insofar  
11 as it creates State laws of action? Congress couldn't  
12 pass tort reform, for example.

13 MR. LINDEMANN: Well, I believe tort reform in  
14 certain instances would be permissible. I -- I believe  
15 that -- and certainly the -- the precedent set by this  
16 Court supports this -- that Congress has the authority  
17 through preemption and through its properly enacted  
18 statutes to limit the liability in State court actions --  
19 in State law actions, but cannot create liability where  
20 none existed previously. And I'd submit to the Court that  
21 I'm not aware of any single example where Congress has  
22 stepped in and created a statute that creates a -- a State  
23 law cause of action or expands upon a State law cause of  
24 action to create liability where none existed.

25 QUESTION: Except the Soldiers' and Sailors'

1 Relief Act, for example.

2 MR. LINDEMANN: Well, and the Soldiers' and  
3 Sailors' Relief Act, if it is indeed constitutional, is  
4 based upon a different weighing of the Federal interest  
5 versus the State interest. You obviously in that case  
6 have much greater Federal interest involved than the  
7 simple convenience to litigants to have to be able to be  
8 -- have the ability to file your Federal and State claims  
9 in the same Federal action without concern that your State  
10 action might ultimately be dismissed after the statute of  
11 limitations ran.

12 Obviously the Soldiers' and Sailors' Act  
13 involves First Amendment war powers. It involves issues  
14 of national defense and deployment of armed services  
15 around the country where they're not available to -- where  
16 they don't have the immediate availability of access to  
17 our court system. Those are much different rights, much  
18 different Federal interests, and would create a much  
19 different issue. And how this Court would ultimately  
20 resolve that issue I cannot say, but it would certainly  
21 make a much stronger case for allowing that than the  
22 simple case that is -- or the Federal interests that are  
23 at stake in this particular instance.

24 The --

25 QUESTION: If we went back to the old ways, is

1   there any unconstitutionality in one of the things that  
2   was done? And the Federal judge will say, yeah, this is  
3   really State business, but I'm not going to subject the  
4   plaintiff to a time bar. So, defendant, Richland County,  
5   any defendant, would you agree that you will waive the  
6   statute of limitations should I dismiss this case without  
7   prejudice. The -- the -- the State -- the county  
8   certainly could do that.

9               MR. LINDEMANN: That -- that happened frequently  
10   prior to 1990, and I'm actually aware of -- personally of  
11   instances even since 1990 where that's been the case --

12              QUESTION: And how about bringing --

13              MR. LINDEMANN: -- and that obviously is the  
14   solution.

15              QUESTION: A plaintiff brings a protective  
16   action and says, I really want this 1983 claim to be the  
17   front runner, but if I fail on that, I want to have these  
18   garden variety State -- whatever it is -- assault cases.  
19   So the plaintiff begins a State -- a case in State court  
20   and the State tort claims, the Federal case, including the  
21   1983 claim

22              MR. LINDEMANN: That's right.

23              QUESTION: Then that would be perfectly all  
24   right.

25              MR. LINDEMANN: That would be perfectly all

1 right, and in fact --

2 QUESTION: And all that accomplishes is having  
3 two cases instead of one, which is if -- if that can be  
4 avoided, it's -- for the efficiency of the system, it's a  
5 pretty good idea, isn't it?

6 MR. LINDEMANN: But realistically looking at the  
7 way 1367(d) operates anyway is you often do have two  
8 separate lawsuits such as what we have in this particular  
9 instance.

10 QUESTION: But that's what 1367(d) was meant to  
11 overcome I thought, having two lawsuits going on, just to  
12 have the -- the State court sitting there and nothing  
13 happening in the event that the Federal court should  
14 dismiss the Federal claim and there's a live lawsuit to  
15 pick up.

16 MR. LINDEMANN: There are many different  
17 alternatives that courts dealt with this issue prior to  
18 1990. And in fact, I'd submit that there's certainly no  
19 authority to support any finding or any conclusion that  
20 litigants' due process rights were violated before 1367(d)  
21 was enacted.

22 QUESTION: No. It wasn't necessary to  
23 litigants. It's just that your solution to the problem  
24 permits the two parties who want to try their case in  
25 Federal court to confer a jurisdiction on the Federal



1 court that the district judge believes it doesn't have and  
2 doesn't want.

3 MR. LINDEMANN: Well, and -- and that is true.

4 QUESTION: So from a point of view of protecting  
5 the State, I guess Congress dived into this mess. I -- I  
6 wrote an opinion. You might -- to recall it to mind, it  
7 happened to involve a plagiarism. Did you read -- I had a  
8 1st Circuit case. It involved plagiarism of an Icelandic  
9 poet called Franjen Gendulik.

10 (Laughter.)

11 MR. LINDEMANN: I'm not aware of that --

12 QUESTION: And in that -- you're not aware of  
13 that. Well, if you don't -- that doesn't call it to  
14 mind --

15 QUESTION: It was made into a movie, wasn't it?

16 (Laughter.)

17 QUESTION: But the poem was Suze Sine Razmut  
18 Nogot.

19 In any case, the -- the point was at the end of  
20 that it seemed like a terrible mess. There seemed like  
21 five solutions. Each of them had something to be said for  
22 it, and so Congress went in to legislate in order to deal  
23 with this procedural mess.

24 Now -- now, why isn't that a legitimate interest  
25 just as legitimate as the interest in protecting soldiers

1 and sailors, the interest that underlies lots of other  
2 Federal legislation?

3 MR. LINDEMANN: Well, I would submit to Your  
4 Honor that that is certainly not a very substantial  
5 Federal interest to the extent it is a Federal interest.

6 QUESTION: To deal with a problem of unfairness  
7 to States, unfairness to litigants, try to have a uniform  
8 rule?

9 MR. LINDEMANN: Well, I don't believe it -- it  
10 creates unfairness necessary to litigants, and there are  
11 obviously solutions around it -- and was dealt with by --  
12 many courts dealt with this particular issue prior to  
13 1990. And I would submit that when you balance that  
14 Federal interest with the State interests that are  
15 involved here and -- which is obviously what -- what's the  
16 analysis under the Tenth Amendment, that the result should  
17 be that the State interests involved to be able to control  
18 State law and State law claims, to be able to control when  
19 and how State -- States and their political subdivisions  
20 are subject to suit under State law, that those interests  
21 far outweigh the Federal interest. Obviously it is a  
22 balancing problem

23 QUESTION: Isn't -- isn't one of the questions  
24 who should do the balancing? Should we do it or should  
25 Congress do it?

1                   MR. LINDEMANN: Well --

2                   QUESTION: Doesn't Congress normally make this

3 kind of policy decision?

4                   MR. LINDEMANN: Well, I believe in this --

5                   QUESTION: And the branch of the Federal

6 Government that makes this kind of policy decision.

7                   MR. LINDEMANN: Well, there -- there's clearly

8 no -- no legislative history that suggests that Congress

9 made that particular balancing. In fact, there's nothing

10 in the legislative history --

11                  QUESTION: No, but I assume the State of South

12 Carolina was represented in Congress at the time they made

13 that decision and could be -- could raise all these

14 objections in that forum

15                  MR. LINDEMANN: Well, I would submit to the

16 Court that just as this Court ruled in the Raygor case

17 last term in the Tenth Amendment context, just like in the

18 Eleventh Amendment context --

19                  QUESTION: The Eleventh Amendment was really

20 implicated there.

21                  MR. LINDEMANN: -- you have to look at whether

22 or not there's a clear statement that Congress intended to

23 affect Federal-State relations such as it did.

24                  QUESTION: No, but I think the clear statement

25 rule is limited to States, and of course, counties are not

1 considered the same as States.

2 MR. LINDEMANN: Well, I would -- I would submit  
3 to the Court that if -- if Your Honor is suggesting that  
4 only comes into play in Eleventh Amendment cases, that --  
5 that -- I would disagree with that because Gregory versus  
6 Ashcroft was a Tenth Amendment case and this Court ruled  
7 based upon the clear statement rule.

8 Now, whether or not a party has standing to  
9 assert --

10 QUESTION: Was that -- was that a -- an  
11 immunity --

12 QUESTION: That was State officials.

13 QUESTION: -- official -- an officer immunity  
14 case?

15 MR. LINDEMANN: That was a case. It was a -- a  
16 ADEA case, Your Honor, looking at the qualifications of  
17 State judges in the State of Missouri.

18 QUESTION: But the difference is that the State  
19 is not amenable to suit in Federal court. The  
20 municipality is just like any other corporation. So --

21 MR. LINDEMANN: I don't disagree with that.  
22 That's why we are not pursuing this matter under the  
23 Eleventh Amendment. However, a municipality has standing  
24 to assert a challenge under the Tenth Amendment, and this  
25 Court in the Printz case, Printz v. United States, was

1 actually --

2 QUESTION: It's not a kind of jurisdictional  
3 challenge. I mean, the State -- if the State were sued in  
4 Federal court and there was a pending claim, the State  
5 would say you -- we don't fit under 1367(a), and the State  
6 not there at all. But here this claim is properly brought  
7 in Federal court against the city. Is that right?

8 MR. LINDEMANN: That -- that's correct, Your  
9 Honor.

10 QUESTION: So it seems to me there's a very  
11 large difference in that respect.

12 MR. LINDEMANN: We -- we are certainly not  
13 arguing that 1367(d) is unconstitutional as applied to --  
14 I mean, (a) is unconstitutional as applied to Richland  
15 County. What we're arguing is that the expansion of the  
16 State law statute of limitations and the limited waiver of  
17 sovereign immunity under State law is what, as applied in  
18 this particular case, violates the Tenth Amendment.

19 QUESTION: I can see in the abstract what your  
20 argument is, but in the concrete, let's take the removal  
21 case. So there's a case lodged in State court. It's  
22 lifted up, put into Federal court, and then more than 2  
23 years later, it gets remanded. Practically what's the  
24 difference in terms of South Carolina and its concern with  
25 stale claims between those two cases?

1                   MR. LINDEMANN: Well, Your Honor, obviously a  
2 removal situation is substantially different in that  
3 jurisdiction was first lodged in the State court, and as a  
4 result, any type of waiver issue or any type of statute of  
5 limitations issue would be resolved by the fact that there  
6 was a initial filing of the State court claim in State  
7 court.

8                   QUESTION: But functionally I don't see any  
9 significant difference if the concern is we don't want  
10 stale claims. We don't want to adjudicate claims that  
11 have been hanging around more than two years. In my case,  
12 yes, you touched base in Federal -- in State court. What  
13 you got was what you got in Federal court, that is, notice  
14 that the plaintiff is suing arising out of this particular  
15 episode. I don't see practically any difference if the  
16 State's -- the State is trying to protect its concern for  
17 adjudicating stale claims. The claim is still stale when  
18 it comes back from the Federal court.

19                  MR. LINDEMANN: It's not so -- as Your Honor  
20 pointed out earlier, it's not solely an issue of repose  
21 because here because the respondent, the defendant in the  
22 -- in the underlying case is a governmental entity, there  
23 is a aspect of State sovereign immunity that comes into  
24 play that doesn't come into play in -- in the other  
25 instances. And so you have the added interest of

1 preserving the right of the State in order to determine  
2 whether it's going to waive its sovereign immunity, which  
3 of course didn't happen until 1985, and when it does waive  
4 sovereign immunity, the extent to which it's going to  
5 waive it. And again, I'm referring to State law sovereign  
6 immunity, not Federal constitutional immunity under the  
7 Eleventh Amendment or otherwise. So what --

8 QUESTION: I understand that. I just don't  
9 understand why you think we should -- we should care.

10 MR. LINDEMANN: Well --

11 QUESTION: If you're not talking about Federal  
12 sovereign immunity of the State, why should we care if --  
13 if the State chooses to create some other kind of  
14 sovereign immunity that -- that isn't the kind that we're  
15 concerned about?

16 MR. LINDEMANN: Because it goes, Your Honor, to  
17 the heart of exactly what the -- the State sovereignty,  
18 the interests of State sovereignty that's involved in this  
19 case.

20 QUESTION: No, it doesn't. No, it doesn't. The  
21 -- the essence of State sovereignty is everything covered  
22 by Federal State sovereign immunity which is States and  
23 agencies of States. Everything else is not central to  
24 State sovereignty, whether -- whether they choose to make  
25 Richland County a -- you know, give them some State

1 sovereignty protection or -- or choose to make a gas  
2 station that way.

3 I don't -- I just don't understand why you  
4 expect this to impress us, that the State has gone beyond  
5 Federal State sovereign immunity and created some new  
6 element of State sovereign immunity. I mean, they're --  
7 they're free to do that, but I don't see how it invokes  
8 any new doctrine under either the Eleventh Amendment or  
9 the Tenth Amendment or any other provision of Federal law.

10 MR. LINDEMANN: Well, I'm not submitting that it  
11 creates any type of new doctrine, Your Honor. What I'm  
12 suggesting is that it's an aspect of State sovereignty for  
13 a State court -- I mean, for a State legislature to  
14 determine what the law is in that State that is applicable  
15 purely to State law claims litigated in a State court.

16 QUESTION: Okay. Why isn't the answer then  
17 necessarily the same whether we have a private litigant or  
18 whether we have a -- a political subdivision? They said  
19 for the private litigants, two year statute of  
20 limitations. Why isn't your answer exactly the same? The  
21 State was exercising the State's -- the same sovereign  
22 power in each case.

23 MR. LINDEMANN: Well, I believe it would also  
24 apply to a private litigant, and I didn't try to convey to  
25 the Court --



1                   QUESTION: Okay. I -- I hadn't understood that  
2 was your position.

3                   MR. LINDEMANN: What I'm trying to suggest to  
4 the Court is because you have this added element of State  
5 law sovereign immunity, which is created by a State  
6 constitution, it makes it even a more compelling Tenth  
7 Amendment --

8                   QUESTION: But you don't -- you don't need it.  
9 You don't need it. The private litigant doesn't have any  
10 sovereign immunity rights under State law, but the private  
11 litigant would be able to insist on the two-year statute  
12 just the way the county is insisting on it here.

13                  MR. LINDEMANN: I believe that would be the  
14 case. Now, that's not the issue, obviously, before this  
15 Court and that's not decided by the South Carolina Supreme  
16 Court. The South Carolina Supreme Court decided this case  
17 in a very limited fashion and found that 1367(d) as  
18 applied to political subdivisions in South Carolina, given  
19 the South Carolina Tort Claims Act and the history of  
20 sovereign immunity -- State law sovereign immunity in that  
21 State, that as a result, as applied to Richland County,  
22 it's unconstitutional.

23                  QUESTION: Suppose a judge should say -- the  
24 Federal judge -- knowing South Carolina's position on this  
25 question, I'll keep the case, which is now an entirely

1 State case, and I know that in diversity cases I'm  
2 supposed to apply the State statute of limitations. So if  
3 the Federal judge keeps this case in deference to South  
4 Carolina's position that it doesn't want it, it's too  
5 late, and the Federal court in a diversity case must apply  
6 the State statute of limitations, when -- when does that  
7 limitation begin, when South Carolina said it would if the  
8 case were reinstituted there?

9 MR. LINDEMANN: No, Your Honor. I would -- I  
10 would submit that the statute of limitations started to --  
11 or ran from obviously the date of loss through -- through  
12 for the two-year period, and if the case was filed in  
13 Federal court within that two-year period, the statute of  
14 limitations, as well as the -- the argument that sovereign  
15 immunity applies, would not be applicable to that case.

16 But what occurred in this case is there was a  
17 dismissal without prejudice of the State law claims.  
18 Under South Carolina law, a dismissal with prejudice is  
19 treated as if the suit was never brought in the first  
20 place. And as a result, when the case was refiled in the  
21 State court, it was refiled beyond the two years, at which  
22 point the statute of limitations had run and at which  
23 point Richland County was also entitled to absolute  
24 immunity under the South Carolina Tort Claims Act.

25 And I would again submit to the Court that the

1 reason why we believe that this is a significant issue  
2 under the Tenth Amendment for this case and why the  
3 Eleventh Amendment jurisprudence of this Court does not  
4 govern is -- is because of the importance of the State law  
5 interest. And the key to this whole argument is the point  
6 that this is not a Federal claim litigated in Federal  
7 court. In fact, the cases that have been cited by the  
8 petitioner in their briefs, the Burnett case, the Order of  
9 Railroad Engineers case, all of those cases are  
10 distinguishable because those are Federal causes of action  
11 that are litigated in Federal court.

12 This is a State law claim that's litigated in  
13 State court under purely State law, and we would submit  
14 that the South Carolina General Assembly should decide  
15 what is the applicable South Carolina law and that  
16 Congress does not have the power under Article III and the  
17 Necessary and Proper Clause to override that statement of  
18 State law and to create liability where no liability  
19 previously existed. And that is the key point.

20 Congress has the authority through a validly  
21 enacted statute and through use of the Supremacy Clause to  
22 limit liability in State actions by providing for  
23 preemption, ERISA being an example, but there is no  
24 example that I'm aware of where Congress has created  
25 liability where none previously existed.

1                   QUESTION: Thank you, Mr. Lindemann.  
2                   MR. LINDEMANN: Thank you, Your Honor.  
3                   QUESTION: Mr. Peck, you have 4 minutes  
4 remaining.  
5                   MR. PECK: If the Court has no further  
6 questions, I would ask that the Supreme Court of South  
7 Carolina be reversed and would waive rebuttal.  
8                   CHIEF JUSTICE REHNQUIST: Thank you, Mr. Peck.  
9                   The case is submitted.  
10                  (Whereupon, at 12:15 p.m., the case in the  
11 above-entitled matter was submitted.)  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25