Supreme Court of the United States

In the Matter of:

JOHN T. WILLINGHAM AND C. A. JARVIS

Petitioners,

vs.

DANIEL MORGAN

Respondent.

Docket No. 228

Place Washington, D. C.

Date April 22, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

John T. Willingham and C. A. Jarvis, Petitioners,	:	
v.	:	No. 228
Daniel Morgan, Respondent.	:	

Washington, D. C.
Tuesday, April 22, 1969

The above-entitled matter came on for argument at 10:20 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 228, John T. Willingham and C. A. Jarvis, Petitioners, versus Daniel Morgan.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Beytagh.

ORAL ARGUMENT OF FRANCIS X. BEYTAGH, JR., ESQ.

ON BEHALF OF PETITIONERS

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

In certain respects this case involves a rather narrow and somewhat technical issue of Federal procedures, but underlying it are some important questions that relate to notions of Federal supremacy involve issues of importance to prison officials and to Federal Governmental officials generally.

The issue in a nutshall is this: A Federal statute, Section 1442(a)(1) of Title 28 of the United States Code, provides that suits against Federal officers may be removed when brought in a State court to a Federal court where the acts that are alleged to have occurred upon the basis of the suit occur when the officer is acting under "color" of his office.

We have set the statute out at page 2 of our brief. It provides in pertinent part as follows: "A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the District

Court of the United States for the District and division embracing the place wherein it is pending.

"1. Any officer of the United States or any agency thereof or person acting under him for any act under color of such office."

The issue arises here on the following facts. Respondent Daniel Morgan was a prisoner at the Federal Penitentiary at Leavenworth, Kansas.

He had been transferred there in March 1966, and in July, 1966, some four months later, filed the damage action which is the subject of this suit in a Kansas State court. Petitioners Willingham and Jarvis are the warden and, were then, warden and chief medical officer of the Federal Penitentiary at Leavenworth.

They were the only named defendants in respondent Morgan's suit. There were 75 unnamed co-defendants. He sought a total recovery in excess of $90 million in damages. He alleged in some ten counts a variety of tortious acts that he said had been perpetrated upon him by petitioners Willingham and Jarvis and the other 75 people.

In substance his complaints can be boiled down to two issues. He asserted that he had been innoculated with some dangerous foreign substance which had caused him to fall and injure himself, and that in the course of this innoculation unauthorized people had been giving him medical assistance.

And in another count he asserted in conclusory fashion that he had been beaten and assaulted and tortured in various respects.

Petitioners Willingham and Jarvis filed a general denial in State Court denying all the allegations in the ten-count complaint that had been filed by respondent.

They also filed, pursuant to Section 1442(a)(1) a verified petition for removal of this action from the Kansas State Court to the Federal District Court for the District of Kansas. In this removal petition they asserted that at all relevant times they had been acting in their official capacities as warden and chief medical officer of Leavenworth Penitentiary, and they set out the various counts of the complaint and then at page 9 of the record they said that Morgan was at all times mentioned a duly committed prisoner inmate of the Federal Penitentiary at Leavenworth and further that any act or thing that these petitioners or either of them may have done or authorized to be done concerning Morgan complained of by him was done and made by them in the course of their duties as officers of the United States of American and as persons acting under officers of the United States of America, and under color of such office and by virtue thereof.

And they again refer to their offices as warden and chief medical officer.

Morgan then filed a motion in the Federal District Court

to remand the case back to the State Court. He asserted for a variety of respects that petitioners were not acting under color of office when they committed the acts he alleged they had committed.

He also filed a rather extensive set of interrogatories on petitioner Willingham directed in substantial part to obtaining the names of the unnamed, unidentified co-defendants.

With the District Court's approval an enlargement of time to answer these interrogatories was obtained.

The next step was petitioners filing a motion for summary judgment in the Federal District Court on the ground that Morgan's suit should be dismissed under the so-called official immunity doctrine which has been established by this Board as relating to executive officials as well as judicial and legislative officials in cases dating back to Spalding versus Vilas and going through Barr versus Matteo.

Petitioners at that point filed a fairly extensive affidavits which are set out at pages 44 through 48 of the printed appendix. Those affidavits detailed their duties as warden and chief medical officer at Leavenworth and stated that the only contact that they had had with Respondent Morgan was within the prison walls of Leavenworth and was in the course of their official duties as warden and chief medical officer.

Respondent Morgan opposed dismissal on a variety of grounds. The District Court in August of 1966 denied the

motion of respondent Morgan to remand the suit to the State Court, finding that removal was proper under Section 1442(a)(10 and writing a short opinion in that regard.

Subsequently in December of 1966, the District Court granted petitioner's motion for summary judgment and dismissed the suit. In substance the basis for the dismissal was the District Court's determination that the suit was covered by the official immunity doctrine and that not only had it been properly removed but that it was subject to dismissal.

Respondent Morgan then appealed to the Tenth Circuit from this judgment and both parties frankly thought that the issue before the Tenth Circuit related to whether the District Court had properly determined that the prerequisites for the official immunity doctrine had been met, and the case was briefed and submitted on the brief to the court on that basis.

However, in deciding the case the Tenth Circuit found it unnecessary to reach the question of whether the official immunity defnese was properly invoked here. Instead it, although it started out by saying and spent most of its opinion discussing the nature of the interrelationship between the official immunity standard and the so-called color of office test removal, it concluded that the District Court had erred in finding that the suit had been properly removed.

It said that the color of office test for removal was much narrower and that is a quote from the Court of Appeals

opinion than the standard of official immunity. And, therefore, it determined that the District Court did not have an adequate basis on which, on the record that existed, on which to determine that removal was proper and it reversed the District Court's decision, not reaching the official immunity question, and remanded for a factual determination in its words, of the question whether removal was proper.

Q What was the issue that was open on remand?

A As I understand it, the Court of Appeals said that the District Court needed a more adequate factual basis for making a determination as to removal and that is the issue that the District Court is directed to address itself to on remand.

The Court of Appeals did mention in passing that quite curiously that it thought that perhaps the standard for dismissal on the basis of official immunity might have been made out here, but nonetheless it didn't feel that the standard of color of office for removal had been satisfied.

We brought the case here on petition of certiorari, which the court granted, for several reasons.

The case has great potential for substantial mischief if left standing. There is, as respondent concedes, an obvious relationship between the official immunity doctrine and the color of office test for removal when suits are brought against Federal officers in State courts, as often they are, and

peculiarly, prison officials such as are involved in this case can be subjected to harassment by bringing, and having to defend against these kind of suits if the standard that the Court of Appeals has now erected is left standing.

So we agree with the Tenth Circuit in only one respect and that is that the question that must be considered is the interrelationship of the official immunity doctrine and the color of office test under the removal statute.

We think, however, that the Court of Appeals is manifestly wrong in concluding that the color of office test is narrower than the official immunity defense.

We think that simply stands the law on its head because the result of that is that any suit proper for removal would a utomatically be dismissable.

And Congress, therefore, would have done a rather empty act in providing a Federal forum to do nothing but dismiss suits. In effect, petition for removal would be an action to enjoin the suit.

Q Every suit that would be removable should be dismissed according to the Tenth Circuit?

A That is the way we understand it and plus ---

Q And plus some that would not be removable would also be dismissable. Is that right?

A As I understand the Tenth Circuit's opinion, yes, sir. Assuming that the State Courts would apply would be.

Q Yes.

Q But every suit that id dismissed is not removable, isn't that what the Tenth Circuit said?

A That is correct, yes.

Q And what do you think is wrong with that?

A I think a number of things ---

Q In terms of possible mischief.

A I think that the mischief is apparently the Tenth Circuit would require that extensive factual inquiry be made to determine the threshold issue of removal and if that is so, then many of the purposes which the official immunity doctrine is supposed to serve would be disserved by this notion, because you would put these officers to the kind of burden that Barr versus Matteo and the related doctrines are supposed to protect them against.

Q I suppose that assumes that the immunity doctrine also implies a right to have your immunity adjudicated in the Federal Court?

A Well, I think Congress has made the judgment that these suits in the main should be determined in Federal Courts.

Q Because of the removal?

A Because of the removal provision.

Q But if State Courts would apply the Federal standard of immunity, and the officers resorted to that in the State Court, they would not be disadvantaged, would they?

A I am not sure whether they would or not. I think Congress has made the judgment, as I said, that these suits should be -- the Federal officer have a right to have these suits determined in a Federal Court.

Now we are not taking the position that every suit that is removed should be dismissed. Indeed a number of suits that in other circuits where I think they have properly construed the removal statute, they found removal proper, but have determined that the suit is not dismissable under Barr versus Matteo and the case goes on for trial.

Q Well, the Tenth Circuit relied on certainly other authority for their rules, such as the cases wherein there is a negligent performance of an operation in a Government hospital?

A There was one District Court case in that respect. The other cases it relied on were all motor vehicle negligence cases.

Q That is right.

Well, how about those cases? How about the negligence cases?

A I think the negligence cases present a difficult problem. It is no longer a viable one because Congress has taken care of that by statute by providing that where motor vehicle negligence suits involve actions done within the scope of an employee's performance they become suits against

the United States under Section 2679, I believe as amended.

But our position is basically those suits are wrong.

Q Are removable?

A That is correct. But I should note the Tenth Circuit completely ignored a whole host of Court of Appeals authority, and cited a District Court decision, but there are at least three Courts of Appeals that have squarely faced this issue. The Second Circuit, the Fourth and Fifth Circuits have concluded exactly the opposite and any comparison of the reach of these two concepts, they have reached the opposite conclusion.

I should note that you asked about the mischief that may come from this. It is another problem and it involves the fact that this doctrine won't relate simply to prison officials but would relate to Federal officials generally.

Some Federal officials do some things in some places in this country that are not popular. Indeed the whole notion of removal stemmed from that.

The first statute was in 1815 and had to do with the opposition by some New England States in the War of 1812. It was limited to custom officials but it provided a way for Customs Officers of the United States to remove suits brought against them when they were inforcing the customs laws to a Federal Court, instead of being sued in the State Court.

It goes on through the nullification controversy of 1833 where it was extended to revenue officers. The statute has

been successively expanded to include officers of both Houses of Congress and officers of the courts and then was expanded in 1948 to include all Federal officers.

Q I beg your pardon. Suppose a prison guard beats a prisoner. And that suit is brought and it is so alleged. Do you think that is under the color of office, too, and removable?

A I think that there may be a difference between a prison guard and a senior prison official such as the individuals involved here.

Q Why?

A Because I think that the problem in making the factual determination that apparently the Tenth Circuit was required, was substantially more difficult as we have tried to delineate in a short reply brief for the file, for senior officials such as these people.

There are over 2,000 prisoners at Leavenworth. For them to recall what they were doing on a particular day and whether they had anything to do with this man at all.

Q Well, that goes to the question of burden. Maybe the burden -- that isa question of burden and a question of proof, but why should there be a different rule as to the removal as to the case of a prison guard and in the case of a person, of the warden or chief physician. I don't understand it.

A A prison guard, it seems to me, there may be

circumstances under which suits brought against him are not removable. He obviously has some authority to exercise discipline over prisoners but obviously he can go beyond that and abuse it.

Now this court has construed in cases like Classic and Monroe versus Pape and Screws versus the United States, analogous provision which relates to actions under color of law by State officers.

And the approach taken there has been that even misuse of power clothed with authority provides the statutory requisite of the color of law.

I think there may be circumstances in which prison guards go so beyond the scope of ---

Q I gave you a very simple case, and I thought your answer was going to be that it would be removable. Prison guard is charged with complaints filed against prison guards for beating up a prisoner to his injury. Then is that removable or is it not under the statute?

A I would have to know more about it. I would have to know whether the guard was able to file a verified, swear to a removable petition.

Q You are getting back to the Tenth Circuit position in supporting it. The complaint is filed, and the complaint merely alleges that the prison guard beat up this prisoner and injured him and he suffered damages which he is now claiming.

And petition for removal is filed, the prison guard says I didn't do it. You say that there has to be a trial of fact before then, that is exactly what the Tenth Circuit has said here on which you are complaining of before this court.

A No, your Honor. You added the point that he is able to verify that he didn't do it. If he can do that, I agree that it is ---

Q I am saying that he denied, he files a denial that he did it. Think that is enough?

A I think if whe can swear to an affidavit that he did not do these things alleged, then the suit is removable. If, however, in some cases that this court has considered, such as Soper and Simes involves situations where in your hypothetical, the Guard obviously had something to do with the individual.

There was some altercation, there was some action; he was there and something happened, and so that presents a more difficult case.

Q Are you making any distinction between the prison guard because he is a guard on the one hand and the warden because he is a warden on the other hand?

A I think in terms of the -- how elaborate a statement is required in order to justify removal. There may be some difference.

Q Well, in these cases you have got exactly the same

thing. The prisoner said he did it and the guard or the warden says I didn't do it.

If you want to go beyond that, it seems to me that you are agreeing with the Tenth Circuit.

A No, I don't agree with the Tenth Circuit. But I suggest is that there may be some difference if the individual is not able to respond by filing a verified removal petition that he ---

Q What I really started out to ask you is this, Mr. Beytagh: Suppose we should disagree with the Tenth Circuit. Do you think that we should then confront the issue of whether there is immunity in this case?

A We have not urged the Court to do that. The Tenth Circuit didn't reach it. Of course, the District Court did.

If the Court feels that on the basis of the record that is available to the Court, that it can uphold the District Court's determination in that regard, of course, the Government feels that that is fine. On the other hand we are not urging that ---

Q Do you think that maybe what we ought to do is to decide only the question of removal and then remand to the Court of Appeals?

A Well, quite properly, your Honor, that is the only question the Court of Appeals and it is a little bit difficult to urge the Courts go beyond that, but as I said, we would not

be upset by that approach, either.

I was going to mention in response to Justice White's question, that there is some real potential for mischief here in the Tenth Circuit's narrow reading of the removal statute. And two cases I think show why this is so.

One case is called Perez versus Rhiddlehoover. It was brought by Leander Perez down in Louisiana against Federal voting examiners, in a State Court, seeking to prevent them from carrying out the functions that Congress had charged them with carrying out.

Now, they sought to remove that case, the question there was whether they were acting under color of office.

Now if Federal officials seeking to enforce laws like this are required to come forward with a substantial showing that they were acting within the scope of their official duties, and the dely and the harassment and the addictiveness that comes from that is permissible, then I think that there is some real mischief.

Another case, the Court is familiar with, Norton versus McShane, which came out of the Meredith incident at the University of Mississippi, where suit was brought by individuals down in Mississippi against Marshall McShane and others.

Their removal was sought in the State court and it was granted. But if you read the statute narrowly and you can't

obtain removal without a thorough-going extensive factual inquiry, then there is a real potential for mischief and hazards.

We think the plain language of the statute itself supports our reading. It says color of office. It doesn't say within his official duties. It says under color of office. As I mentioned the courts construed other similar provisions in a broad fashion. Also it seems to us that while respondent here is more or less conceded that the Tenth Circuit's result is indefensible, his position is not satisfactory either.

In short he says while the Tenth Circuit may have erred in determining the comparative reach of the two statutes, it did not err in determining that the record was inadequate for the District Court to determine the question of removal.

We think on the facts presented and the reasons developed at some length in our brief and in our reply brief that this simply is not so and that if you say at least to officials like these they must do more than they have done here, deny the charges, assert that all the actions occurred within the prison walls, and assert that anything that was done occurred within the color of their office, that inevitably you are going to have the extensive kind of litigation on this threshold issue that is going to defeat most of the purposes of the official immunity doctrine and I think also subvert Congress' intent in enacting the statute.

Q When was this statute passed?

A This particular statute dates back to, well 1815 was the first time the removal statute was passed. That related to customs officers and it has been expanded since that time. In 1948 it was expanded to include all Federal officers.

Q What brought about the passage of the law?

A The passage of the first law as I understand had to do with the opposition of some New England States to the War of 1812 and they didn't want Federal officers collecting customs duties up there.

MR. CHIEF JUSTICE WARREN: Mr. Snee.

ORAL ARGUMENT OF JOSEPH M. SNEE, ESQ.

ON BEHALF OF RESPONDENT

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

This is a rather unique case, in that the Respondent here would submit to the Court that the result reached by the Court of Appeals was quite correct, but for the wrong reasons.

We made clear in our brief there is neither reason nor authority to support the views expressed by the Court of Appeals in the Tenth Circuit on the alleged interrelationship between the immunity standards and the color of office test.

However, we say that the Court was correct in reaching its result. We do not concede, as counsel just stated, that the result was incorrect. And we say that for the reason that the record in this case was clearly inadequate, both under

Section 1446(a), title 28 of the Code, and prior decisions of this court clearly inadequate to support Federal jurisdiction on removal.

If one fact stands out in this case, it is that the record is singularly devoid of facts. The only uncontroverted fact in the record as was pointed out by the Court of Appeals is that at all times the only contact which the Petitioner had with the Respondent were within the walls of Leavenworth Prsion.

In some of the cases, in the case which was cited by the Court involving automobile accidents, the majority saw there was no color of office on the part of the driver of the automobile and, therefore, no removability, a matter which is now corrected by the Federal Court of Claims Act in the removability under a different section.

In none of those cases, however, was immunity involved. Clearly there is no immunity under Barr versus Matteo on the part of an automobile driver was being charged with negligence. He is not exercising any sort of discretionary act.

One case, Braun versus McBurnett, involving 1442(a)(3), court officials, held there was a right of removability for two deputy marshals transporting a Federal prisoner to a penitentiary because they were in the performance of their duties under that section of the statute and clearly again there was no immunity.

Now the question of as, as the Respondent sees it, is one

of right of removability, is one which is deferred by statute and the requirements of the statute must be met.

Congress didnot see fit if indeed it could do so, did not see fit to allow removability of every case of prosecution against a Federal officer simply because he is a Federal officer. In the various sections of this statute, various tests are put down for the different categories of a person who are covered, and as a District Court case has said, Congress knew what it meant, knew how to say what it meant in these statutes, and it put down under color of office.

This Court, Section 1446(a) requires that the petition contain a plain and short statement of facts. We are not left, however, with that bare statutory requirement because this court in two cases, Maryland versus Soper and Colorado versus Symes, where there was a far more detailed statement of facts than is present in this record, in both cases held that the case should be remanded to the District Court, to the State Court.

Q Those were both cases that involved revenue agents?

A Prohibition agents that come under the revenue part of this statute, yes.

Q Right. That was a criminal case, and the episode ---

A They were both criminal cases, your Honor.

Q --- happened somewhere out in the countryside in the territory of a state. Is that right?

A Right.

Q It was a murder, I think, murder charge.

A Both cases.

Q And here as I understand it the claim is that the very allegation that the only association between the defendant and the plaintiff was within the prison walls of Leavenworth Penitentiary. It goes far toward carrying the burden of showing color of office.

A Well, your Honor, that allegation is made first in the affidavit supporting the motion for summary judgment. And was evidently cast in terms of Barr versus Matteo an immunity rather than removability.

And if it does not seem facetious, I would say that it is not misinterpreting the mind of this Court in Barr versus Matteo to say that the outer perimiter of duty is measured by the walls of Leavenworth Penitentiary.

But it is the only uncontroverted fact. Now in Maryland versus Soper, it was clear that the officers were present in the performance of their duty but that this Court held that is not sufficient because they had to show that they were doing nothing other than official duties at the time this homicide occurred.

And they had not by the candid, specific positive statement of facts given the Court a basis upon which to reach this determination.

Bot the petitioner and the respondent engaged in a battle

of conclusionary statements which would be inadmissible as evidence. Color of office is a conclusion of law which must be made by the Court on the basis of facts by the person who seeks removal, and the burden of proof is upon him, quite differently from the situation which existed in Norton versus McShane, where a conclusionary affidavit by the Attorney General they were acting in the performance of their duty was regarded as sufficient because there as in every case the burden of proof was on the plaintiff and he had made no attempt to controvert this statement.

The fundamental error respondent submits was even comparing these two concepts of immunity and of removability.

They are different in origin, they are different in purpose they are different in test, and they are different in effect. And to try to compare the two of them is like asking is a horse better than a cow. It is along two different orders, two different categories. Each should stand upon its own two feet.

For the reasons that have been suggested why the petitioner in their brief and after a very careful analysis of the opinion of the Court of Appeals as distinguished from its judgment, I think it is incorrect to say that the removal power, the removal test was far narrower than the immunities standard.

But for the same reasons it is also incorrect to suggest as petitioners do, that the removal power is far wider. They are different orders and different categories. And we have been

told that the decision of the court below puts the law on its head.

I would suggest to try to establish the jurisdiction of a court under the removal statute by determining that immunity was present is putting the cart before the horse, and we must have jurisdiction established before entering into the immunity question.

And the record in this case does not sustain that burden of proof which this court has recognized.

Q What do you say would have to be alleged in order to show that it was under color of office?

A Perhaps I can best answer that question, Mr. Justice Black, by saying what was not alleged, in this case.

In the affidavit which was submitted ---

Q You could say, couldn't you, what has to be alleged?

A Well, I shall, your Honor. They have to allege some fact which ties the alleged act into their official duties. In their affidavit there was a long list of their official duties, but I think it is highly significant that no where in that affidavit do they even mention any of the incidents which were raised in the respondent's complaint.

They do not make the slightest effort to tie those in, and they would only have to do it with regard to one act in order to prefer jurisdiction upon the Federal Court.

Q Do they show where it happened?

A No. There is no mention of these incidents.

Q Is there any complaint about where it happened?

A In their petitions, your Honor?

Q Yes.

A No.

Q The plaintiff's case, anything in the plaintiff's complaint?

A Yes, the plaintiff is very detailed complaint.

Q Why does he say it happened?

A He does not say so. He just says that he was subjected to these particular ---

Q Well, it was in the prison?

A It was in the prison, your Honor.

Q How do you know that?

A He says so, and this is not controverted by either party. He says that the warden and the chief medical officer were not acting within the color of their office.

Q You say that the fact that it happened in the prison isn't enough?

A That is not enough, your Honor, because other than official acts may be committed within prisons. And with regard to the question of Mr. Justice Fortas raised, I think that it might be fairly easy to establish removability in the case of the prison guard, but certainly not immunity.

Q Did they say what he is? What does he do?

A The complaint alleges, your Honor, that he was inoculated with various harmful substances.

Q I mean, does the complaint charge what the defendant does?

A Yes, your Honor.

Q What does it say he does?

A The defendant?

Q Yes, what is his occupation?

A As warden.

Q Warden of the prison?

A Yes. All the interrogatories which were submitted by respondent in several places raise some question as to whether he was actually acting as warden at the time some of these facts, the alleged facts, were committed.

Q Why would that be necessary in the statute intended a man is in a prison and a warden, and is there guarding a prisoner, isn't it enough to say that he is the warden in order to get removed. Why would you have to go any further?

A Because that merely establishes, your Honor, that he is a Federal officer.

Q It establishes that he is a Federal officer inside the prison and that this man was a prisoner.

A It does not establish that every act which he commits within the prison is under color of office. He made that conclusion.

Q What are his charges?

A The charges of the ---

Q That he charged the warden with having done?

A He charges the warden with having knocked him to the ground ---

Q In the prison?

A In the prison. Now there are circumstances where such an act might be under color of office and there are circumstances where it might not be.

Q Well, wouldn't that be -- carry with it an inference unanswered that what he did was to knock him down while he was attending to his duties as a guard?

A Well, that may be, your Honor, except We do not think it meets the test put down by this Court in those two cases.

Q I wonder if the matter of burden of going forward may be relevant here. Now, let us assume that it was alleged somewhere that these injuries, the alleged tort took place in the prison. I have a little difficulty in finding that, except in the interrogatories which were not answered.

But let us assume that it was alleged that the injury took place in the prison. Let us assume that it is alleged or stipulated that the defendants were and are officers of the prison, and then I wonder if it -- and a petition for removal is filed -- I wonder if that does not then shift the burden of going forward to the plaintiff, the prisoner, and if that is

so, what did the prisoner do to go forward with the verified allegations here tending to demonstrate that the action of the warden and the chief physician was outside of the scope of their office?

A Well, Mr. Justice, it is perfectly true that the burden of going forward in such a case, in the case of removal of power, is upon the other party, not upon the person seeking removal.

But the burden of proof does not shift.

Q What did he do with respect to the burden of going forward. Is there anything in this record?

A There is nothing in the record which would suggest the burden of going forward exists, because it does not exist until there is some factual basis put forth.

Q Well, let us assume for the moment that we should conclude that where it is alleged that injuries took place within the prison, that the -- where it is shown that the defendants are officials of the prison, just assume with me for the moment that we would conclude that that sets up a prima facie case for removal.

And let us assume further that the burden of going forward beyond that point you see is on the plaintiff prisoner to make some further allegations that tend to show, for example, that the warden and the physician acted outside of the scope of their office in doing the acts complained of here.

What I am asking is, is there anything in the record here setting forth allegations, verified allegations by the prisoner contending to show that the physician and the warden proceeded outside of the scope of their official duties?

A Well, your Honor, the conclusionary statements of the petitioners were met by an equally conclusionary statement of the respondent.

Q And did the Court act on that?

A The District Court evidently did, your Honor.

Q Did either one object to it?

A No, your Honor, this question was not really litigated in the District Court to any extent. It was a motion to remand prepared by a motion to deny.

Q And the parties chose to submit to the Court on the allegations of the pleadings up to that time?

A Yes, your Honor.

Q Then why do we need to go any further?

A Because this is a question of jurisdiction, your Honor. Under the Federal Statute.

Q Does that change it. Take litigants act with reference to jurisdiction of the court and appointed them on that with sworn evidence.

A They cannot waive a jurisdiction requirement, your Honor.

Q Well, they can't waive the jurisdictional requirement

but what evidence, what are they going to pass on if not on the allegation in the pleadings? That is usually the way you determine jurisdiction, allegations in the pleadings.

A Well, I think the allegations were defective, your Honor.

Q For failing to allege what?

A Facts to support the conclusions from which the Court could draw the conclusions that the warden in performing these acts if he did perform them, was acting under the color of his office.

Q That is really the sole issue?

A That is as I see it your Honor, yes.

And the question of jurisdiction was raised by the Court of Appeals.

Q And once you decide that the case is over?

A Yes, your Honor, I would submit to the Court that it can approve the judgment of the Court of Appeals without approving its reasoning, and it would be a rather simple thing.

Q But once you proved that the warden did this outside of the scope of his authority, you recover against the warden and everybody else. What is left in the case?

A No, as the Court has said, this Court said in the Symes case, this is not a question of guilt or innocence. It is merely establishing some causal relationship between the

incidents if it occurred, and his official duties.

Q You would first have to prove that the incident did occur?

A I would think under the holding in Colorado versus Symes that it would not be true, your Honor.

Q Well, how could you find out when he was acting under color of authority and when he was not? The only way I submit you could do it is when he was beating the man up he was outside the color of authority. Once you prove that you have proved your case.

A Can he not answer, your Honor, if I beat him up, this was in the exercise the ordinary discipline of the prison? He doesn't have to prove that he went too far. As a matter of fact in Maryland verus Soper, the warden held the removant does not have to be for precisely the acts with which he is charged, if he shows that these acts were in some way -- he doesn't have to admit the homicide -- in order to show that at the time ---

Q All he has to show is that he beat him up.

He doesn't have to show the homicide.

A All he has to do is show that in his relations with this prisoner he was always acting ---

Q Well, wouldn't there be some substance to the fact that Leavenworth is a maximum security prison and the respondent was in that prison, so whatever the warden is charged with doing was done in the prison, unless he escaped.

A No, it happened in the prison, whatever happened.

Q And then wouldn't the normal reaction be that it was under the color of his office?

A I should assume that would be a rather easy thing to do, to establish, but not the slightest effort was made.

Q Well, I can submit that the fact that he says that the only time I came in contact with this man was inside the prison when I was the warden. That does not give you any idea that it might be under the color of his office.

A It might be under color of his office, but it doesn't establish it.

Q Well, what else would he have to say other than under color of authority? What else could he say, the warden? I beat the man up?

A No, that does not have to be said.

Q Well, what could he say?

A He must be able as this Court said, to show they were not connected with unofficial activities.

Q Well, suppose he said just that. Would that be enough?

A No, there must be facts.

Q What are the facts?

A That is what I find hard to understand from the opinion of this Court in Maryland versus Soper, because the petition there was so detailed in its allegations of facts that I don't know quite what else they could have alleged.

Q Well, wouldn't that be true in this?

A I suppose a good deal depends upon the allegations in the original complaint as to what he would have to say. He does not have to admit that he did the act, but he does have to show that if they were committed, they were committed in some way, they had some causal connection with his official duties.

He was not off on a frolic of his own. Or that he was warden at the time. The interrogatories raised some question as to this.

Q Don't you think that is what he tried to do in paragraph 8 of the petition for removal on page 9 of the Appendix, where he says, before that, he has alleged that he was the warden; in paragraph 8 he says that anything that was done or may have been done was done under color of office and as an employee, et cetera?

And that the acts complained of was made solely under color of office and with the scope of their authority. But there is a general allegation and then the question is whether in fact the burden of going, it seems to me, maybe the question is whether the burden of going forward with particularized allegation, much more particularized than in the complaint uwhich as you said earlier is pretty general, too, whether that burden then shifted to the plaintiff.

Perhaps I am not saying that I am sure that is correct, but that is one possibility.

A My comment on that, your Honor, would be that paragraph 8 for the most part is conclusionary in nature and I would think the burden of going forward with the proof does not shift until there has been some proof.

Q What you are really saying is raising is a question as to whether paragraph 8 is sufficiently particular as to shift the burden of going forward and I suppose that the question would naturally arise as to whether you can expect more than that at this stage of the case and whether that is adequate as a matter of law?

A Yes, your Honor.

Q One of these defendants was a physician, was he not?

A Yes, your Honor.

Q And the record shows that he had been assigned there to do services as a physician, does it not?

A Yes, your Honor.

Q And the complaint is based on a charge that the physician forced him with the aid of the other man to take some kind of shot in his arm or leg or somewhere and it did him great harm.

Now why doesn't that show about as well as you can show it that the man was, they were both in the performance of their duties because as a physician he wanted him to have that medicine. Do they have to go on and prove beyond a shadow of a doubt?

A No, your Honor, I think it was ---

Q And everybody agrees to it that that was alleged.

A It would be very simple to submit an ordinary medical record showing that this was the ordinary medical treatment and this negates then any possibility.

Q Well, he doesn't allege it was an ordinary one; he just alleges that they did that, gave him this serum, and he thought it might kill him.

A He alleges they did this on a frolic of their own.

Q He doesn't say that?

A Yes, in the complaint, your Honor.

Q What?

A In his complaint.

Q What part?

A I may be wrong on that, your Honor. It may be in the motion forremand to the State Court.

Q As I gather, what he alleges is they were treating him with a serum, the doctor, and the other man was helping him to give it to him and he then fell to the floor.

A Well, I would propose a hypothetical question, your Honor. Suppose -- do the facts which are given by the petitioners in their removal petitions and their subsequent affidavits, do they negate or do they give any facts that negate the idea that the doctor may have been engaged in some kind of a strange research.

Q Well, that is a possibility, of course. But when you file pleadings, both sides going to submit it to the court on removal, on pleadings, I don't see where you have to go any further than the pleadings.

A Because this court so held in Maryland versus Soper, your Honor.

Q In what?

A Maryland versus Soper, that the allegations had to be sufficient to show that not only were they at the time performing their actual duties, but they weren't performing any other acts which were not related to their official dutues.

That was the holding of this court in Maryland versus Soper, that they were not doing other things besides official duties at the time.

Q But you look at the whole record. Does that say that you don't look at the whole record where the parties submitted on the pleadings and that is all they submitted on? Does that case stand for the principle that a judge is barred from taking the parties at their word and looking at the pleadings as to what has happened? And he has to somehow force them to come in and swear in addition to the pleadings?

A They should allege some fact.

Q That is right. But it does allege it. If it does allege it, why isn't that enough if it is not denied?

A The only answer I would have to that, your Honor, is

that we are dealing with a jurisdictional matter. That is all.

Q But why would the jurisdiction make such a difference. That is a strong word. It means many things at many places. But the mere fact that you are testing a jurisdiction, I thought you always tested it mainly by the pleadings, what it alleged, not what can be proven.

A Well, perhaps the distinction should be drawn between the case which is removed under 1441 where the pleadings themselves must establish that the District Court would have original jurisdiction and 1442(a), where the sole jurisdiction of the Federal Court is derivative, no cause of action is created by 1442. The cause of action must already exist.

I point out in this court in Wheeler, Wheeldin versus Wheeler, if the facts which are necessary for removal need not be contained in the petition, in one case, Logemann versus Stock, it was held in effect the petition removal was satisfied by the -- or cured by the fact that the necessary jurisdiction facts were contained in the attached complaint.

Q Do you know of any State in the Union that it is not sufficient to file a complaint without swearing to it and you judge whether or not the court has jurisdiction by what is alleged?

A That is true, your Honor.

I see my time has expired.

MR. CHIEF JUSTICE WARREN: Mr. Beytagh.

REBUTTAL ORAL ARGUMENT OF FRANCIS X. BEYTAGH, JR., ESQ.

ON BEHALF OF PETITIONERS

Mr. Beytagh. Mr. Chief Justice, and may it please the Court.

Just several points.

I think Mr. Justice Marshall put his finger on the real problem here. Let us assume that none of these acts occurred. This is the basic position of petitioners that they didn't do anything to harm this man. What else can they do?

They denied it, they said that any contact that they had with him was within the prison walls and they said they were acting within their official duties.

And they said that they were acting within their official duties and they said they were the warden and the chief medical officer.

Now respondent keeps saying we need more facts. I submit that if there are no more facts to refer to, I don't know short of what Mr. Justice Marshall suggested that they must admit that they did something wrong or all they can do.

Q Are you relying on the allegations of the papers as being the facts as far as this trial is concerned? Or do you think he is right in indicating, as I gather is an indication, that you had to have some sworn to?

A No, your Honor, I agree with you on that. I don't see how you can take any other position. It seems to me the District

Court had before it controverted allegations. It had factual circumstances and it had to seek to apply the statute against that and it seems to me in the circumstances there wasn't anything else that it could do.

The reliance on ---

Q Well, it isn't quite as easy as that, is it, Mr. Beytagh, because the complaint contains a lot of very specific allegations, and I suppose that they could have said that he was never inoculated or if he was inoculated the prison records show that such and such were the facts and that he was never given any unusually onerous task to perform and his prison records show so and so, so there could have been specificity of the question.

It seems to me it is maybe who has the burden of going forward for purposes of this removal ---

A I think that is correct. But it seems to me that any of that would have been subject to the same claim that it was conclusionary in nature and, therefore, inadequate, and it seems to us that the District Court had an adequate basis here and that Section 1446 on which respondent now relies is mentioned by the Court of Appeals only in one sense it said that all the requirements thereof were met.

So, in conclusion we submit that the Soper and Symes cases as Justice Stewart pointed out were criminal cases and there at least everybody agreed something had occurred. And, therefore,

we don't think they are controlling here. In our view the Court of Appeals was wrong and we submit its judgment be reversed.

Q Mr. Beytagh, I take it though, you say that the removal test is narrower than the course of employment?

A I think course of employment is a somewhat different notion. I think that there is ---

Q No, it is just narrower. The fact that the event occurred while he was working with an employer isn't enough to show removal?

A I think it may not be enough, but again you have the notion of color of office which has been given a broad reading and that is what the statute said.

Thank you.

A VOICE: May the Respondent have three minutes?

MR. CHIEF JUSTICE WARREN: Just one moment.

Mr. Snee is representing the petitioner in this case, and Professor, just a moment.

Professor Snee, on behalf of the Court, I want to express our appreciation to you for having accepted the assignment to represent this indigent defendant. We consider it a real public service when lawyers are willing to undertake the assignments of this kind and it is of a great help to the Court in the resolution of these cases.

So we do thank you for your very generous and very ardent

assistance to us.

We will go to the next case at this point.

(Whereupon, at 11:20 a.m. the oral argument in the above-entitled matter was concluded.)