In the

Supreme Court of the United States

ARTHUR KRAUSE, Administrator of the Estate of Allison Krause, Deceased,

Petitioner,

v.

JAMES RHODES, et al.,

Respondents.

No. 72-1318

Washington, D.C.
December 4, 1973

Pages 1 thru 34

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Tuesday, December 4, 1973

The above-entitled matter came on for argument at 1:35 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

STEVEN A. SINDELL, ESQ., Sindell, Sindell, Bourne, Stern & Spero, 1400 Leader Building, Cleveland, Ohio 44114, for the Petitioners.

R. BROOKE ALLOWAY, 17 South High Street, Columbus, Ohio 43215, for the Rspondents.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next No. 72-1318, Krause against Rhodes.

Mr. Sindell, you may proceed whenever you are ready.

ORAL ARGUMENT OF STEVEN A. SINDELL

ON BEHALF OF THE PETITIONERS

MR. SINDELL: Mr. Chief Justice, and may it please the Court, I don't believe that this case can be decided with respect to the questions of law that are presented without a reference, at least some reference point, to what the record contains with regard to the facts. And I think something has to be said in that regard.

The complaints filed in this action clearly state what would otherwise be a cause of action as at least I can best understand. We have alleged that four innocent students were shot on a college campus without any justification. We have alleged, Members of this Supreme Court, we have alleged that the Governor and the generals conspired intentionally to deprive these people with the specific intent, in bad faith, in effect, of their rights under the Federal Constitution and under 1983. We have alleged that these facts are true in that they can be proven.

We were confronted with a motion to dismiss, on which, as I understand it and notwithstanding any affidavit that was ever filed in this record contains, if anything, the liberal

invocation of the privilege against self-incrimination by some of these defendants. We have alleged in these cases that there was no justification for it, and nevertheless, and notwithstanding that, and based upon what we felt in effect were news media accounts of this incident, that the passions of the headlines were substituted for the rules of evidence in this case. And I quote specifically where the concurring opinion in the lower court said that the pleadings clearly contrived to hide rather than disclose the true background of the events and they predicated causes of the action without disclosing their true subject matter without any evidence before that court to so find. That is exactly what was said.

The majority opinion in the lower court is infected with statement after statement that there was a riot, that there was an insurrection, that there was a rebellion, and, Members of this Court, even the Governor of the State of Ohio the day after it occurred never used a word like that in his proclamation to justify it, not one word to that effect.

Nevertheless, the court has so found. I am not suggesting anything except that there is a colorable claim. What, as juxtaposed to these allegations, have the defendants said? They have invoked the privilege of self-incrimination at least nine times in response to material interrogatories. And more importantly, if we are going to take judicial notice, let us then take judicial notice of one responsible investigative

organ of this Nation, and that is the Federal Bureau of Investigation, where it was specifically stated, and I am quoting at pages 24 and 25 of our brief, things like these:

"We have some reason to believe that the claim by the National Guard that their lives were endangered by the students was fabricated subsequent to the event."

"[One Guardsman] admitted that his life was not in danger and that he fired indiscriminately into the crowd. He further stated that the Guardsmen had gotten together after the shooting and decided to fabricate the story that they were in danger of serious bodily harm or death from the students."

"The Guardsmen were not surrounded."

"No Guardsman claims he was hit with rocks immediately prior to the firing."

"There was no sniper."

"Some Guardsmen (unknown as yet) had to be physically restrained from continuing to fire their weapons."

Directly quoted. The people shot in this case were over a football field away. One man sits here in a wheelchair for the rest of his life. And I say that if we are going to substitute in a court of law, in a court of appeals, news media headlines or whatever predilections of the facts the court may have, for the presentation of evidence in its orderly course, then I say that we have really reached the stage where the rudimentary concepts of due process of law have been

violated. And I think that would be a shocking departure from procedure, at least as I have always understood it in the past.

We have here a situation where there was no claim of insurrection. There is no evidence in this case, not only the day after the shooting in the Governor's proclamation did he use "insurrection," "rebellion,""invasion," "riot," "tumult," or any such words.

But, your Honors, in addition to that, months later with the advice presumably of competent counsel, my brother here, then he did not say anything more than that there were threatened disorders and breaches of the peace, and in fact in answers to interrogatories that are part of the record in this Court.

The President's Commission on Campus Unrest said that this shooting was unwarranted, inexcusable, and unjustified. It is our view that the rules of evidence cannot be supplemented by the factual predilections of a judge reviewing a complaint, not a summary judgment motion, but a complaint.

Now, specifically dealing with the question of immunity, and I think it's important that we do that here in this regard, in Sterling v. Constantin, that Supreme Court was confronted with a situation where a Governor, Governor Constantin, had issued a proclamation which was stronger than the one issued by Governor Rhodes. It said that there was an insurrection. It said that there was a rebellion. It said

that there was a state of affairs that justified the calling of martial law. And nevertheless the District Court went on to find behind those allegations of the Governor in his proclamation that that wasn't true, and in fact no such thing existed except what they characterized as breaches of the peace. And when the Governor and the generals came to this Court and said, "We are immune under the 11th Amendment," this Court specifically held that a Federal court has ample jurisdiction to determine the veracity of those allegations with evidence properly presented before it.

And I think the case of Moyer v. Peabody is clearly distinguishable from this one. And I want to address myself to that point. Indeed, Moyer was a 1983 action. There is no question about that. But what is important to recognize about Moyer, and again I must return to the facts because I think they are critical, in that case the Governor and the complainant both agreed on two things: They agreed, number one, without dispute that an insurrection existed and they agreed that the Governor acted in good faith. These were stipulated facts before that court, and I quote the language when I say that the Supreme Court in its opinion said, "We are here assuming that there was an insurrection and that he exercised good faith, and the only question is that he was unreasonable in arresting Moyer under those circumstances."

Now, this is not such a case. There is no agreement

among counsel in this case that a state of insurrection existed. Instead we have alleged there was a peaceful gathering on a college campus with bullets intervening to break up what otherwise was a peaceful gathering on a college campus.

Now, if we can't prove that, then we should lose. But if we can prove it, it's not a Moyer case. We do not agree as counsel did in Moyer that there was good faith on the part of the Governor. To the contrary, it is our allegation in this case, and it is our intention to prove that the Governor was personally involved in this situation, that as commander-in-chief -- remember, this was a time several days before the Republican senatorial primary. Without editorializing on the validity of the law-and-order position that he was taking, the fact is that that was his position that he advanced in that particular situation. And here was threatened disorder and he just wasn't sitting behind his desk receiving information of an alarming situation and sending troops out. He went down there to that campus the day before this incident occurred. He made a speech in the presence of the commanding general --

QUESTION: How far are you going to go away from this record?

MR. SINDELL: I want to stop going away from this record for this reason.

QUESTION: You have been gone about 15 minutes. Are you coming back?

MR. SINDELL: Your Honor, I want to go to court and I want to prove these things. And the reason that I bring these things into the case is simply because three of the reviewing judges in this case, three of them, have gone outside the record and refused to believe that the allegations were true. That's why I go outside the record, not to convince you of what I say is proof as a matter of law, but to convince you that they are allegations which warrant the right to prepare evidence in a court.

QUESTION: I don't have to follow you outside the record if you keep out, do I?

MR. SINDELL: All you have to do is to agree with me that the complaint's allegation should be taken as true and it seems to me that we are entitled to prove them.

I would like specifically in regard to the 11th Amendment contention, and I would like to address myself to that for a moment. It seems to me that the distinction that has been made here between a statute, that an unconstitutional action under a statute that is allegedly unconstitutional is different than an action which is just plain unconstitutional because of the nature of the action, really was never intended as a distinction to be engrafted upon the Civil Rights Act at all. Congress intended to reach the unconstitutional effect, as I understand the decisions of this Court. It says every person who acts, not under a statute, not without a statute, within a

statute, every person who acts under power of law to violate the constitutional rights of another is liable for that action, every person. And it doesn't engraft any distinction at all. The only reason we are not seeking an injunction in this case -- and it says in that statute an action at law, equity or other proper redress. The breadth is broad. We can't seek an injunction in this case. All we have is the available remedy of damages. That's obvious from the circumstances. And therefore, we are well within the terms of the Civil Rights Act and to say that only where a statute exists that's unconstitutional can the Civil Rights Act apply, is to, I think, emasculate the very purpose that Congress had in mind which was to reach the State official himself for the effect of what he did. And this Court has never held, for example, in dealing with police officers in Monroe v. Pape or in Egan v. City of Aurora, or any of those cases, that because they were acting under color of a valid statute that therefore for some reason they were immune. That would be inconsistent, I think, with the entire purpose of the Civil Rights Act. They were conducting actions, not under a statute, but under oath which were unconstitutional which violated the rights of those individuals and therefore they were held inappropriately so by this Court to be within the purpose and intent of the Civil Rights Act.

It seems to me that cases like Ex parte Young, Sterling v. Constantin, Griffin v. Board of Prince Edward

County, all the way ranging from the passage of the Civil Rights Act right up to the present time have all held that where an injunction is the appropriate form of redress, that the Civil Rights Act makes no distinction between damages and injunction. That issue has been raised here, and I don't think there is any difference because Sterling specifically holds that an injunction is a more extraordinary remedy and damages are a less extraordinary remedy. And other cases have so held as well of this Court. And I don't see the difference. It depends on the remedy that's needed, it would seem, and on the damage that has been done and not upon the nature of the relief sought. Congress never intended, as I read the legislative history, as interpreted by this Court, to make a distinction between damages and injunctive relief as to whether or not there is immunity. I have never read that in any of the decisions and I don't think it's supportable by any of the rules of law that have been promulgated by this Court. And I am thinking of cases like Mitchum v. Foster and Monroe v. Pape, Zwickler v. Koota, and particularly of the various circuits like McLaughlin v. Tilindis, Jenkins v. Averette was a damage action, many cases under the Civil Rights Act involved damages where damages is the appropriate remedy.

What I think is critical here is that we did bring a case against the State of Ohio. We sued the State in its own courts. We brought that case and we contended that the doctrine

of sovereign immunity was unconstitutional, in violation not only of the Ohio Constitution, but of the Federal Constitution.

QUESTION: What standard do you think applies in a 1983 action? I know you allege in the complaint the intentional wrongs, certainly you think that would state a cause of action. How much farther would the section reach, would you say?

MR. SINDELL: It seems to me, Mr. Justice White, in this regard -- and I don't mean to not answer your question, but I do want to emphasize that we couldn't have alleged anything stronger. But taking it a step down, it seems to me that perhaps negligence in the tort sense may not be appropriate --

QUESTION: You would say if it were reasonable for a person to understand that a certain act did not violate the law, he hasn't been negligent?

MR. SINDELL: Well, that's the tort standard, as I understand it, reasonable conduct under the circumstances.

QUESTION: So it really doesn't depend on how it finally turns out whether it violated the law or not?

MR. SINDELL: Well, I think that it's critical to, as you point out, I think it's critical to an interpretation of the Civil Rights Act to ask what the state of mind of the person you are suing is in addition to what the result was. A mere accident can cause a terrible tragedy and yet not create liability. It is my suggestion to this Court that the appropriate standard that occurs to me for a police type

situation is in Jenkins v. Averette, a case of the Fourth Circuit, I believe, where it was held, and in that particular case an act of wanton misconduct, a very high degree of recklessness, was sufficient to establish a cause of action --

QUESTION: It would require at least that.

MR. SINDELL: At least a high degree of recklessness, yes. I would say that would be the appropriate standard. But I would not suggest to you that a lower standard is not possible. I am simply saying that as the state of this case is now, I don't see how we could have alleged anything stronger. And that's really what I am suggesting in this particular situation.

I would emphasize with respect to the 11th Amendment claim, your Honors, that this case is not a case against the State, the State is not a party to this action. No money is being sought from the State treasury at all. No judgment rendered in this case will require a State official to take any action or prohibit a State official from taking any action. This is not an action even against State officials. The present defendants in this case aren't even officials of the State of Ohio at all. And I would suggest that the entire body of 11th Amendment law as I read it suggests that in such a case where the individual act is allegedly unconstitutional, that that is not barred by the 11th Amendment. And I think Sterling specifically so holds.

What is being attempted, and I think this is the

critical distinction here, and if I understand the defendant's argument, is that we shouldn't just consider these things, but we should ask ourselves what will be the effect on the Governor in the future, how fearful will the Governor be, the chief executive be, or other executives below him, and I might add it goes all the way down to the trigger man in this particular case. The court held everyone to be immune, not just the Governor. But let's ask that question. What will be the effect,that the State government will not be able to operate, that people will be fearful, that they will have to come in and defend lawsuits, and so on and so forth, if I understand that argument correctly?

And I would have this to answer to it. I would say that that argument can be made in every single case under 1983. There is no case where it cannot be argued that the effect of suing an individual for damages for violating constitutional rights, be he the Governor or anyone else, would not have some effect on the future conduct, would not give them some pause for concern, would not inconvenience them in some way. But it is my suggestion that that was exactly what Congress had in mind, that was the very effect that was intended. Congress passed the Civil Rights Act in part to deter this very kind of thing. And if we are to give meaning to that enactment, I think we have to recognize that the purpose and intent of that particular enactment was to effectuate the deterrence

that any tort remedy has. And this is a congressionally sanctioned court. As I understand section 1983, it is for the compensatory tort action as well as having a deterrent effect, and the deterrent effect that is complained of here is the very purpose of the enactment in the first place. And so to say that because it has an effect, that should be the reason to bar suit, for that reason alone, it seems to me that that runs completely contrary to the whole intent. It seems to me that if this Court should hold that -- and we have sued the State of Ohio which has immunized itself in the State court -- if this Court holds that this, too, is an action against the State, then we are really left without a remedy, we have no place to go. Then this Court has permanently and forever foreclosed any right to appear in a court of law anywhere against anyone to test the allegations in these complaints and to establish any form of redress. This is it. This is our last opportunity to have redress. There will be none. We can't sue the State in its own courts and we can't sue -- if this Court holds that we can't sue here, we are without redress.

Finally, I would like to conclude with the question of immunity as it applies to legislators and judges and that has been raised, and I am cognizant of Pierson v. Ray and Tenney v. Brandhove. But I think this is very important. First of all, let me say that I have some empathy with the dissenting opinions of Mr. Justice Douglas in those cases that

a dishonest legislature, if it so allege, a dishonest judge should be subject to suit, but we have those decisions and they stand as they do now. And I suggest this: that after all, a legislative process a legislator is involved in a deliberative thing. The result of what he does is open to the public. He has the opportunity -- first, he must concur with other people. If his enactment is going to be harmful, a court can review it. All of this process can take place and there is full opportunity for the public and the democratic process to participate.

So perhaps we can say, as does our Constitution, that a legislator shall not be examined in any other place. And what the judge was saying is true. It is an open process, presumably a deliberative one. Before any finality takes place a court can review that action.

But such is not the case with an executive. In the case of an executive, you have a situation where the actions may be or may not be taken with deliberation, but not necessarily with public participation at that time. The Governor in theory can in his own chamber secretly without making it public open up and decide to wield the weapons of death without any such legislative or judicial process as a result of which the instant action of a bullet terminates a youngster or man or anyone's life.

Now, it seems to me that the executive immunity as

applied in that situation is clearly distinguishable from what occurs with a legislator and with a judge. And under those circumstances, I suggest to you that to say that they are all in the same kind is contrary to the purpose of the Civil Rights Act itself. To say that a Governor cannot even be -- or a general or a Guardsman -- cannot even be subject to inquiry, and we only ask that he act honestly in this case. We say he can make a mistake, that's O.K. It's that he act honestly, that is the only claim we make. And I suggest to you to say that we can't even inquire into his honesty, which has never been subject to any open democratic process is in effect to seriously endanger the citizenry and to yield a Governor or general an absolute unbridled license without any review or inquiry at all except who knows how long after in the electoral process. I don't think that's the intent of the Civil Rights Act at all.

I would like to reserve whatever remaining time I have, unless there are questions, for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Alloway.

ORAL ARGUMENT OF R. BROOKE ALLOWAY ON

BEHALF OF THE RESPONDENTS

MR. ALLOWAY: Mr. Chief Justice, and may it please the Court, I would like to make just a preliminary remark as to my posture in this case. While I am of counsel in both the prior case which has just been heard and the Krause and

Miller cases which are being heard together at this time, I represent Governor Rhodes in his individual capacity, and I am fully cooperative with all defense counsel in this case, and I endorse my brother Charles Brown's argument in all respects.

There are some things that I believe are applicable peculiarly to Governor Rhodes which ought to be brought to the attention of the Court. I am prepared to answer questions on any aspect of the case, but my argument in chief will be addressed to Governor Rhodes' position primarily.

There has been a great deal of talk about the case of Sterling v. Constantin as it may have limited or may not have limited Ex parte Moyer. I believe it did not limit it in any material respect. The requirement of Sterling v. Constantin is expressed at 287 U.S. 399. "By virtue of his duty to cause the laws to be faithfully executed, the executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive."

Now, the way Sterling v. Constantin arose, there were stipulations and there was evidence taken which made it appear to the court, to the district court, which had also had some prior jurisdiction on some of the same controversy, that this exercise of discretion on the part of the Governor of Texas was not in entire good faith, that is, it was not within the limits of his discretionary power since he was using it for

the purpose of controlling the production of oil even though the expression was made that there were tumultuous conditions. The proclamation, I might say, in the Sterling case is very similar to the proclamation in the instant case. That is,I am speaking of the proclamation of April 29, 1970. But in this case the Governor was exercising his executive discretion with respect to calling out the Guard and had proclaimed that there were riotous conditions, that there was tumult, there was danger to persons and property, and this the Court of Appeals and the District Court felt was a matter of judicial notice, that there was sufficient notoriety in the situation of the campuses in Ohio and indeed throughout the Nation in May of 1970 that the court could not affect to be ignorant of the situation.

My brother, Mr. Sindell, has made a very emotional argument with respect, and running pretty much along the lines of his brief, but he does not get into the actual allegations of the complaint. If one goes to the actual allegations of the complaint, one must find that there are only mere conclusions as to the part which Governor Rhodes took in the matter other than the fact that he did issue a proclamation and that he did call out the Guard.

In order to state a cause of action, -- I can understa that the question might be anticipated just what can a plaintiff do? Suppose a Governor maliciously and corruptly,wantonly, and

evilly, let us say, decides to call out the National Guard for the specific purpose of extinguishing a life. If he does that, surely there are facts which could be stated in the complaint other than the bare conclusion that the defendant conspired to deprive the plaintiff, or the decedent, of their civil rights in each of these cases. There must be other facts available which could be pleaded which would support that situation. Obviously there are not, and obviously there was a situation in which it could not be reasonable to conclude from the allegations of the complaint itself, in either of these cases, or in any of these cases, that the Governor conspired and evilly, corruptly, and we can use other adverbs, to deprive these decedents of their civil rights.

These conclusions are not reasonable under the facts well pleaded in the complaint, and therefore we submit that the judgment of the District Court below and that the judgment of the Court of Appeals, the majority of the two, was correct that the 12(b)(1) motion to dismiss was properly sustained.

We submit further that there are other reasons on which looking only at Governor Rhodes' particular situation, one must conclude reasonably from the allegations of the complaints that there were substantial intervening causes, if anything, in connection with Governor Rhodes' proclamation which caused the death of these unfortunate people. There were intelligent intervening substantial forces which intervened

between the proclamation which is all that is actually shown to have been promulgated by Governor Rhodes. Therefore, on other grounds, the motion to dismiss would properly have been sustained.

I submit also that the question of whether a State employee, if a National Guardsman be an employee, or a State officer, whether the doctrine of respondeat superior applies. And in this instance we submit that there is no authority for applying the doctrine of respondeat superior so as to bring Governor Rhodes within the ambit of a proper action against him in these cases.

And for all of those reasons, and for the reasons my brother Mr. Brown has set forth, I would say that Governor Rhodes is in an a fortiori situation with respect to all of the defendants. We must bear in mind that there are only seven defendants in this case. There are, as Mr. Sindell referred to them, the trigger men, there are no persons alleged to have been trigger men in these instances, and those must be taken as admissions in the brief and/judicial admissions that there are no persons who are so charged in this case.

So with respect to Governor Rhodes, any liability which applies to him must be on the doctrine of respondeat superior which we suggest is clearly not applicable.

I have nothing further to argue --

QUESTION: The point of the allegation was that he

ordered out the National Guard onto that campus at a time when he himself knew, or should have known, that arming them with live ammunition, sending them there in their state of training was an imminent danger to the lives of the students on that campus, and that's alleging personal culpability on his part, not on any doctrine of respondeat superior, isn't that correct under the circumstances?

MR. ALLOWAY: I would say, if the arming of the National Guard is in and of itself is a culpable act, yes, just as he is personally charged with having issued the proclamation which called out the Guard. Yes, if that is a culpable act, he is culpable. I submit that neither of those acts is one on which culpability can arise, because the training of the Guard is -- and this is a matter of judicial notice and is in the record -- that the training of the Guard is under the supervision of the United States Government and was at that time. The training of the Guard was the responsibility of the United States military officers, and the duty, the constitutional and statutory duty of Governor Rhodes was to call out the Guard, and the arming of the Guard and the actions of the Guard were the responsibility of the individuals and of any commanding officers who issued commands.

I would submit that the act of calling out an armed Guard is the risk that one takes any time a National Guard unit is called out. It is within the realm of possibility

that in the discretion of officers having discretion, there may be live ammunition used.

QUESTION: Of course, we are dealing, Mr. Alloway, are we not, with the allegations of the complaint?

MR. ALLOWAY: Yes.

QUESTION: For the purposes of this case in its present posture, under well-settled principles of law, we must assume they are all true, all those well-pleaded allegations are true in fact. That is correct, isn't it?

MR. ALLOWAY: I think I should place the emphasis on the words "well pleaded."

QUESTION: But what I have said is generally accepted.

MR. ALLOWAY: Yes, it is certainly an accepted proposition. Yes. And I would place strong emphasis on the matter of the words "well pleaded," because I would submit that this Court should not approve retrospectively or prospectively the irresponsible use of inflammatory language in pleadings and therefore then take the allegations as true.

QUESTION: Of course, the claim of your brother on the other side is that a very serious error was made by the Court of Appeals when they disregarded the allegations of the complain and instead called upon what they understood to be their personal knowledge or judicial knowledge of what the true facts were, and that the majority of the Court of Appeals therefore violated what you and I have just agreed is a fundamental,

very elementary principle of law that on a motion to dismiss the well-pleaded allegations of the complaint are assumed to be true.

MR. ALLOWAY: Plus, if your Honor, please, matters of which the court can properly take judicial notice. And the only fact which I am suggesting --

QUESTION: I can understand that if a complaint depended upon the plaintiff's allegation that he was Napoleon Bonaparte, for example, that a court could presume that that probably wasn't true, but beyond extreme cases like that, how many exceptions are there to this rule?

MR. ALLOWAY: I would say, your Honor, that one exception to the rule would certainly be the situation of the campuses in the State of Ohio and over the country generally in May of 1970, and that there were at those times riotous situations where unusual measures had to be taken.

QUESTION: That may well all be very true. As a matter of fact, we have here a lawsuit in which a complaint was filed making certain allegations which, as I read them, are not emotionally charged allegations. They are very serious allegations. And a motion to dismiss. What you say may all be very true, as a matter of fact it may all come out in a trial. But this is a motion to dismiss a complaint.

MR. ALLOWAY: That is correct.

QUESTION: Didn't the court err in saying, well,

whatever the complaint may say, we know the real facts are such and such, and therefore, the District Court was correct in dismissing the complaint.

MR. ALLOWAY: If the court did commit error in respect of its statements, nevertheless the judgment of the court taking the narrowest construction of any judicial notice which it has a right to take was sufficient on which to dismiss the complaint. I would say, your Honor, that, for instance, the proclamation of Governor Rhodes is a document of which judicial notice could and should properly have been taken, and that the facts well pleaded plus properly judicially noticed facts are sufficient.

Now, I would suggest, for instance, if the Court please, that if we are going to take facts well pleaded, and let's say that we have to allege in order to plead a cause of action that there were no roving bands of men bent upon destruction of property and endangering life, that allegation might have been made, but it was not made. That would not have been a conclusion, that would have been a statement of fact. I would submit that it's a conclusion that the plaintiff' attorney could not in good conscience have made, but it would be a statement of fact. That would be one.

If we would take, for instance, a statement that the ROTC building did not burn down the night before in the city of Kent, that would be an allegation of fact. It would not be

an allegation which the plaintiff could in good conscience make, but it would be an allegation of fact which would support the complaint beyond the support that it needs, beyond the support which it does not have.

QUESTION: Are you saying that the court could take judicial notice of the specific item you have just mentioned, namely, the burning of the ROTC building?

MR. ALLOWAY: I would say,if the Court please, that the court could take judicial notice of generally disorderly conditions in the area of Kent, Ohio, including the Kent University campus. Therefore, that we are in the situation where Sterling v. Constantin applies to make the action of the Governor of Ohio not reviewable. It not being reviewable, I would say further that the natural consequences of his act are also not reviewable under the doctrine of executive immunity, and that the court had sufficient before it to make those determinations of fact in a general way Whether or not the court could take judicial notice of the specific fact of the burning of the ROTC building. I would be of the opinion that it could. That was a widely known fact. That was perhaps almost as widely known a fact, certainly as widely known in the midwest area as the killing of Lee Harvey Oswald by Jack Ruby. The burning of the ROTC building was a notorious event viewed by millions of people.

QUESTION: Could the court take judicial notice that

there was "insurrection" on the campus at Kent?

MR. ALLOWAY: I would say that the court might do so, although I don't think it's necessary for the court to do that, because insurrection is not a sine qua non of the proper exercise of the discretionary power of the Governor to call out the Guard.

QUESTION: Well, my point is is it outside of the judicial notice? It can take judicial notice that Kent University is there or there are 18 buildings, but insurrection is a rather complicated legal term, which is the basis of the lawsuit.

MR. ALLOWAY: It is a very complicated term. I don't think it is a term which we necessarily must find in order to find the judgment of the Court of Appeals and of the District Court correct.

QUESTION: Well, of all of the other terms that were in the Governor's proclamation, can the court take judicial notice that they are correct?

MR. ALLOWAY: I am sorry, I don't believe I follow that.

QUESTION: Didn't the proclamation say there was insurrection and this and that, the Governor's proclamation?

MR. ALLOWAY: Yes.

QUESTION: Well, can the court take judicial notice that thoose statements are facts that are true?

MR. ALLOWAY: I will have to confess to you I have not thought about it, and I think that I would say probably not; that your Honor has just said that the term "insurrection" is a very complicated term which is widely embracing and has many legal consequences.

QUESTION: It is a legal conclusion, not a fact.

MR. ALLOWAY: It is a conclusion and not a fact, that's correct.

QUESTION: But in this case we have positive allegations on one side and on the other side all you have is the Governor's proclamation, right?

MR. ALLOWAY: Well, we have the Governor's proclamation, but we have some specific facts in the Governor's proclamation, that in the territory of northeastern Ohio there were roving bands of men who were committing acts of violence.

QUESTION: Can the court take that as true?

MR. ALLOWAY: I think the court can take that as true. It is a fact. That is it is a fact as distinguished from a conclusion.

QUESTION: So whatever the Governor says is a fact, but whatever the petitioners say is not? While to the contrary the rules say that you must get all well-pleaded facts in one paper. It doesn't say anything about that other paper.

MR. ALLOWAY: Again, I respectfully emphasize the words "well pleaded," and I submit that if the Court will

examine each complaint, it will find that the "facts" are conclusions.

QUESTION: But the court went off on the merits, it didn't go off on the fact it wasn't well pleaded.

MR. ALLOWAY: Yes, that's true.

I have nothing further.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Sindell, do you have anything further?

REBUTTAL ORAL ARGUMENT OF STEVEN A. SINDELL

ON BEHALF OF THE PETITIONERS

MR. SINDELL: Yes, Mr. Chief Justice, I do.

First of all, I would like to indicate to the Court, if the Court will examine the proclamations of the Governor, it will find that the one that is applicable to the Kent State incident which is the May 5th proclamation after it occurred does not mention anything about roving bodies of men. That referred to a truckers' strike. There may well have been roving bodies of men and that had nothing to do with Kent State. It didn't even include Portage County, although it included vast other areas of the State of Ohio. The fact is that the Governor's proclamation at no time even mentions the word "insurrection." It doesn't even, if we want to talk about well-pleaded facts, the Governor's proclamation has no facts which give rise to a conclusion that there was a state of insurrection or riot of any kind. It simply refers to disorders

Now, I want to be perfectly clear about our contention here. It is not our contention that the Governor is liable under the Federal Civil Rights Act because he called out troops. That is not our claim. We are claiming, and what hasn't been read by my brother in connection with Sterling v. Constantin, that hasn't been read, is this: While the calling out of the troops is unreviewable, according to that case, it goes further and it says that it does not follow from the fact that the executive has this range of discretion deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts otherwise available, is conclusively supported by mere executive fiat.

The contrary is well established. What are the allowable limits of military discretion and whether or not they have been overstepped in a particular case are judicial qu-stions, and that is what we are contending in this case.

And I would like to address myself to this matter of pleading and what is well pleaded and what isn't pleaded. I understand, at least as a trial practitioner who engages in some amount of litigation, I have always understood that the basic concept is notice pleading, that we are not required to plead filings of evidence or any evidence really. I have always heard it was improper to plead evidence as such

and that largely the Federal rules are designed to confine the pleadings to the general allegations.

Now, we have alleged a conspiracy to engage in a direct act which involved deaths of people, and included in that concept are orders and judgments and statements in their facts that we believe exist in good faith to back it up.

Now, what I am simply suggesting is this: If it wasn't well pleaded enough for my brother, Mr. Alloway, then he had the prerogative under rule 12(e) to tell me that and to make a motion to make definite and certain and to ask me to be more specific if I didn't plead it well enough. And he didn't do that. He didn't ask me for more facts. He didn't say it's so vague that it's not well pleaded. He didn't say we don't have notice, we don't know what you are talking about. Instead he filed a motion to dismiss, and thereafter invited the court to conclude that it was --

QUESTION: He isn't under obligation to ask you for more. He can stand on your complaint, and if he thinks it's infirm, and that's what defense counsel does, isn't that true?

MR. ASINDELL: Mr. Chief Justice Burger, he has every right to suggest that it's infirm, and I claim that ... has specifically alleged, and I quote from the complaint, all acts herein mentioned, including every one of them, the shootin and everything else, were done individually and in conspiracy by these defendants with the specific intent of depriving

plaintiff and plaintiff decedents of their rights to due proces and equal protection.

I contend that if that doesn't state a violation of constitutional rights, then nothing does. Now, if he wants it more specific than that, then I suggest that he ask me what he wants, that he tell me that it's too vague, and that's a question of pleading. But what I have said here in its allegation form and in its notice form is well pleaded in the concept of the Federal Rules of Civil Procedure to give notice. And let's be practical about it, I sit in an office that has four walls and I look at what I ..know at the time I plead, and I know that the Governor was down there, that he was involved in this event, that he was personally present, that he was giving orders, was doing a lot of things. I am not the FBI, I don't have those materials available. I only have what I know. And it seems to me that on the basis of all those orders that were apparently given, when he stood there and said publicly that we should eradicate people and that these people should be eradicated, and so on and so forth -- and I don't want to get too far off the record, except to say that when all those things were present before me, all I can say is I felt that there was some basis to make the allegation, and I think we have a right to ask him some very specific questions

QUESTION: You thought you had a basis for saying intentionally, willfully, wantonly --

MR. SINDELL: Absolutely.

QUESTION: -- and maliciously.

MR. SINDELL: Absolutely. He was running for political office at the time. He was running on a law and order platform. I would like to ask him some questions, what orders did you give to your --

QUESTION: That isn't responsive to my question. What basis did you have for concluding that he was malicious -- because he was running for office?

MR. SINDELL: No, not because he was running for office, because of his desire to be elected and to demonstrate. I am saying allegedly to demonstrate to the --

QUESTION: What basis did you have for saying he was malicious?

MR. SINDELL: As I understand -- I had the basis for saying that he was malicious in the concept of maoice, that to -

QUESTION: Willfully, wantonly, intentionally disregarding the lives and safety of students.

MR. SINDELL: Yes.

QUESTION: Maliciously.

MR. SINDELL: It seems to me, your Honor -- and again the concept of malice is involved here, vindictiveness -- it seems to me that when orders are given in order to further a political goal which involves the risk of injury to an individual and perhaps an intent to create a demonstration that

this particular -- we're going to show the people that I stand for law and order, notwithstanding the risk to the lives of the people involved, I think that comes within the concept of certainly wanton, willful, and, if you will, malice. I don't think --

QUESTION: I just wondered what you thought it was.

MR. SINDELL: That's what I would like to ask him about. That's what I would like to get into in this case.

QUESTION: You would like to find out whether your allegations are true.

MR. SINDELL: Well, I would like to ask him the questions that pertain to the allegations which I think have been reasonably filed, yes, and I think there is a basis for so doing.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:30 p.m., the oral argument in the above-entitled matter was concluded.)