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In the

Supreme Court of the United States

SARAH SCHEUER, Administratrix of The Estate of Sandra Lee Scheuer, Deceased,

Petitioner,

v.

JAMES RHODES, et al.,

Respondents.

No. 72-914

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Washington, D.C.
December 4, 1973

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Washington, D. C.

Tuesday, December 4, 1973

The above-entitled matter came on for argument at 11:35 a.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:

MICHAEL E. GELTNER, ESQ., American Civil Liberties Union of Ohio Foundation, 203 East Broad Street, Columbus, Ohio 43215, for the Petitioner.

CHARLES E. BROWN, ESQ., 42 East Gay Street, Columbus, Ohio 43215, for the Respondents.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-914, Scheuer against Rhodes.

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

ORAL ARGUMENT OF MICHAEL E. GELTNER

ON BEHALF OF THE PETITIONER

MR. GELTNER: Mr. Chief Justice, and may it please the Court, this case is here on a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

The plaintiff's decedent, Sandra Scheuer, was killed by a National Guardsman's bullet on the Kent State University campus in 1970. Therafter the the plaintiff filed action in Federal Court alleging the deprivation of civil rights under section 1983, section(1) of the Civil Rights Act of 1871, specifically detailing the alleged conduct and misconduct of the defendants charged.

The defendants moved to dismiss on the ground that while the action was in form against the defendants individually, in fact it affected the State of Ohio, therefore suit against the State of Ohio and barred by the 11th Amendment.

Appeal was taken to the United States Court of Appeals for the Sixth Circuit, and in a divided opinion a panel of the circuit affirmed, again on the 11th Amendment ground. Judge White in writing his majority opinion went beyond the 11th Amendment ground and concluded that he reached the same result

under the doctrine of executive immunity which he held covered the field in actions arising under the Civil Rights Act.

So we are here without a record. We are here with a complaint and motions, and here on a theory which has heretofore not been applied to actions charging individuals with misconduct under the Civil Rights Act or against any other jurisdictional basis which would otherwise lodge jurisdiction in the court.

As to the first issue, the 11th Amendment sovereign immunity issue, so-called, the nominative issue is mentioned in my brief. It has been our position throughout the litigation that this ground was repudiated long ago; it's inconsistent with our basic notions of federalism. That the 14th Amendment can be made to coexist with the 11th Amendment only insofar as the doctrine of ex parte Young is and remains viable, and the doctrine of ex parte Young applies a fortiori in a case in which the plaintiff seeks damages against an individual and charges the individual with misconduct.

QUESTION: The petitioner here is an Ohio resident?

MR. GELTNER: Yes, your Honor.

QUESTION: You make no point of the applicability of the 11th Amendment in the case.

MR. GELTNER: I understand your Honor's dissenting opinion in the Employees of the Department of Mental Health in the State of Missouri v. the Department of Missouri. I certainly

am willing to take advantage of that position. I don't think it's necessary to reach out to that proposition to decide this case on that issue. In point of fact, this Court has never suggested that an action against an individual, an individual, or here individuals, who are governmental officers which doesn't seek in any way to get at the State Treasury or at public property, is an action which falls under the 11th Amendment. Therefore, I didn't feel it was necessary to reach out for the proposition in your opinion, your Honor.

The Missouri case which is the most recent decision of the Court on point, it seems to me, pins down quite clearly that there has been no expression of sentiment in this Court for the proposition that the 11th Amendment could conceivably reach a case such as this one. The majority opinion of Justice Douglas makes it quite clear that if the Congress under section 5 of the 14th Amendment were to attempt to lodge jurisdiction even against the State if it were acting validly within a grant of legislative power, could do so. Justice Marshall's opinion for himself and Justice Stewart specifically exempts actions against individual officers from the thrust of his opinion which is that the 11th Amendment is a jurisdictional limitation, in effect, a gloss on Article III.

So it is quite clear to me that what the Court of Appeals and what the District Court did was simply express its hostility to the plaintiff's view of the case by going out

on a grounded decision which is totally unsupported by the precedents of this Court.

So we get to what I believe is the heart of the case, and that is the question of whether or not an executive immunity, so-called, or sometimes called a governmental or official immunity attaches in suits arising under section 1 of the Civil Rights Act of 1871, specifically whether or not a government official can say, "I am immune from suit, and therefore, although the plaintiff has charged me specifically with a deprivation of a constitutionally protected right, nevertheless, because of one's position, one may not be sued."

The precise issue has not been adjudicated before in this Court. We have Barr v. Matteo, which is a defamation case, arising under the law of the District of Columbia in which the Court framed what I view as a Federal common law defense to a state tort action. Barr v. Matteo, for reasons summarized in our brief, does not really cover the ground here. We don't have a libel action here. I expressed some doubt as to whether or not the same result would be reached in Barr v. Matteo on the basis of the law of defamation as it now stands after the Court's opinions leading up to Rosenbloom. And I think it's pretty clear that Barr v. Matteo does not cover this case.

The only expression of judicial opinion in this Court of significance on the immunity question here is Justice Harlan's concurring opinion in the Bivens case. If you may

remember, the Bivens case presented both the question of whether or not there was a cause of action arising under the 4th Amendment and likewise the question of whether or not the defendants were immune from suit assuming there was a cause of action. Justice Brennan's opinion for the majority did not reach that second question because the Court of Appeals had not reached it. Justice Harlan noted at the end of his long concurring opinion that it was not appropriate or necessary for him to decide the question, but he believed it was appropriate to venture the opinion that for the most flagrant examples of governmental abuse of power, there would certainly be a right to redress. That is essentially the basis of the claim asserted by the plaintiff in this case.

The issue has been spoken to by many courts of appeals. By and large the courts of appeals have distinguished actions arising under the Civil Rights Act from State tort actions, have noted, as did Justice Harlan, that a deprivation of a constitutional right is significantly more serious than a tort arising under State law. For that reason they concluded that irrespective of the State rule of immunity which might be applicable, it was clear to those courts that there was no such executive immunity under the Civil Rights Act.

This conclusion, it seems to me, is the appropriate one. It certainly fits the intention of the Congress. The Congress of 1871 perceived the problem before it as essentially

a problem of violence and saw the problem that was sought to be reached by both sections 1 and 2 of that Act as governmental and nongovernmental violence, the nongovernmental violence being essentially covered by section 2 of the Act which is presently section 1985, and the governmental violence being covered primarily by section 1 of the Act, that is, this is an appropriate case fitting within the precise legislative intention of the Congress. The Congress' intention was recently summarized for the Court in Justice Brennan's opinion in District of Columbia v. Carter. It certainly supports that conclusion that that is what Congress was concerned with.

QUESTION: Moyer v. Peabody, cited in your brief, I take it you think there is not much left of that.

MR. GELTNER: We discussed Moyer v. Peabody at some length in our brief.

QUESTION: It must be in your reply brief.

MR. GELTNER: It is discussed, I believe --

QUESTION: Well, don't trouble yourself. I didn't find it in your index.

MR. GELTNER: There are two briefs, two relatively long briefs. There is a main brief and a reply brief.

We see Moyer v. Peabody, first of all, as being substantially limited by the Court's opinion in Sterling v. Constantin. Secondly, to the extent that Moyer v. Peabody makes an expression that the Governor of a State can do

whatever the Governor of a State believes it is appropriate to do, is overruled by Sterling v. Constantin, and furthermore fundamentally inconsistent with the thrust of this Court's decisions preceding it as specifically inconsistent with Ex parte Milligan which was decided the year Congress passed the statute. The sole question that seems as to the legislative intention is what that Congress intended. It is inconceivable that that Congress with its viewpoint could have intended an immunity of this kind for a State Governor in view of the fact that State law enforcement was primarily what the Congress was attempting to reach with both sections 1 and 2.

So we get the prevailing history and it is pretty clear that unlike the legislative history, legislative immunity, which was recognized in 1871 both by the Federal Constitution and by parallel State constitutions, and unlike the longstanding doctrine of judicial immunity, there is no substantial support for the view of executive immunity at the time this Congress acted. Congress simply must have seen it as an appropriate purpose to reach governmental misuse of force, and there is no basis to believe from the debates that Congress intended to carve out any individuals as immune from the reach of its legislative power.

QUESTION: In one of those three cases, Strauder?, wasn't that a judge involved in that case, wasn't it, Ex parte Strauder.

MR. GELTNER: Ex parte Virginia?

QUESTION: Wasn't it one of them?

MR. GELTNER: Yes, your Honor, Ex parte Virginia.

QUESTION: The judge was involved.

MR. GELTNER: Well, we distinguish clearly judicial immunity here from executive immunity. As I mention in my brief, the legislative history, to my mind, does not even support judicial immunity. We've got Pierson in this Court and Bradley v. Fisher at that time to cope with. This is clearly a different issue.

Now, it is in fact true that many States now have a doctrine of executive immunity for State courts and similar actions. It's likewise true that this Court has recognized such an immunity in Barr v. Matteo with respect to a parallel issue, namely, State libel actions involving Federal officials. They don't cover this issue. And, secondly, to the extent that there is an implication in any of these opinions that it is appropriate to distinguish for punitive purposes between ministerial officials and so-called officials exercising discretionary functions, we believe that any such distinction is basically inconsistent with the purpose of the Civil Rights Act and inconsistent with logic.

There is, for example, in the remand opinion of the Second Circuit in the Bivens case a suggestion that while the particular parties before the court, their Federal narcotics

agents, were not immune, possibly the Director of the Federal Narcotics Bureau or somebody else who made basically discretionary decisions would be immune from suit.

Now, the distinction has never been applied in Civil Rights Act cases. In tort cases the distinction has always been the distinction based upon the immunability of lower level officials to mandamus where there is a positive declaration by law that they must do an act. So, for example, a court clerk might be subject to mandamus to compel the court clerk to give a copy of a document to somebody. Similarly, those courts have said refusing to engage in an act which could be compelled by mandamus could be a basis for liability. But those courts have also said a discretionary act, that is one not subject to mandamus, might be immune from suit.

Now, to hold that as to the Civil Rights Act seems anomalous. You might, for example, have a situation in which a semi-police official orders a policeman to engage in an unconstitutional act and a situation in which the person who commits the act who had no basic decision-making powers is left holding the bag while the officer who made the decision to engage in the constitutional deprivation is in fact immune. That seems senseless in view of the fact that it was clearly the purpose of the Congress to reach both.

In addition, there doesn't seem any sensible basis to close the doors of the court with respect to that sort of an act.

The distinction between ministerial and discretionary acts, when one clearly looks at it, breaks down. In fact, at all levels of government when we are dealing with the question of use of governmental force discretion is exercised. So that at both levels the concept of a ministerial discretionary distinction breaks down as being basically inconsistent with the policy sought to be served by the Congress.

So what we are left with then is the bare frame that if officials are subject to suit, it will be troublesome for them. They are too important to be called into court, they will have to spend time, they will have to spend money, they might be intimidated. That seems to me that here the Congress has declared a specific policy, the purpose of which is to prevent certain kinds of wrong, is precisely then that the intimidation should attach. And, in fact, the threat of liability is the way in which Congress attempted to achieve its results in 1871 of preventing the misuse of governmental force on individuals.

Your Honor, I have requested that I reserve 10 minutes, and I believe my 20 minutes are up. So if there are no more questions now, I would like to reserve rebuttal time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Geltner.

Mr. Brown.

ORAL ARGUMENT OF CHARLES E. BROWN ON

BEHALF OF THE RESPONDENTS

MR. BROWN: Mr. Chief Justice, and may it please the Court, the issues in this case are such as to go to the very heart of federalism. They go to the very delicate balance between our form of government. And the issue is: Can Federal courts control the administration of State law.

I respectfully disagree with Mr. Geltner as to the issue of jurisdiction. In our judgment that is a very important issue in this case.

QUESTION: That is the 11th Amendment issue?

MR. BROWN: Yes, your Honor.

The court below, that is the District Court, at the time we filed our motion to dismiss under the 11th Amendment, and as this Court well knows the 11th Amendment applies not only to suits by citizens of one State against another State, but by the citizens of a State against its own State, which is the case here at bar. At the time we filed our motion to dismiss, there was pending before the district judge an affidavit of General Del Corso that he was not at the scene, an affidavit of General Canterbury that he gave no order for anyone to fire, and there was the executive proclamation of Governor Rhodes that a riotous condition, insurrection, if you will, existed in the city of Kent and the Kent State University area.

Pursuant to that the National Guard was called out. Now, at this point under Ohio statute, the members of the Ohio National Guard had no choice. They, of course, had to go.

They were ordered to go.

It is important to note, and I would like to point out to the Court that before this Court today we do not have the issue of the Ohio National Guard. There are seven named defendants, and those are the only people before the Court today and not the entire Ohio National Buard.

Now, under the 11th Amendment, 12(b)(1) motion to dismiss which goes to the question of jurisdiction, and, of course, as this Court well knows, the 12(b)(6) motion goes to the question of whether a cause of action is stated, the Court has consistently held that to determine whether or not a suit is in fact against the State, you look behind the nominal parties defendant named and look at what is the essential nature and effect of the lawsuit.

Now, this test was set out by this Court in the Ford case. Dugan v. Rank, which is a 1963 decision from this Court, defines when a State is affected, and if in fact a State is affected, then you look behind anomalous parties defendant and determine that it is a suit against the sovereign. In Dugas v. Rank this Court stated that if the judgment sought would expend itself on the public treasury or domain or interfere with the public administration, or if the effect of the judgment would be to restrain the government from acting or to compel it to act, then the act is considered to be one against the State.

Now, we submit here that the seven named defendants

are nominal parties only and that this action is in fact one against the State of Ohio.

Now, the case of Barr --

QUESTION: Any more so than in the Sterling case against --

MR. BROWN: The Sterling case is distinguishable. That is an injunction action, your Honor, to enforce an unconstitutional statute. Now, we don't have that situation here.

QUESTION: I know, but the claim at the outset was that the court had no jurisdiction to entertain the suit, and this Court ruled that the Federal courts did have jurisdiction to entertain the suit, that there was no bar, the suit against the Governor was not a suit against the State.

MR. BROWN: Your Honor, I respectfully disagree with you. I don't believe the Court said that. I think what the Court said, because you have an unconstitutional statute you don't have the State acting, therefore, it isn't the State acting. The State cannot enforce an unconstitutional statute. As I read the decision I think that is what you said.

QUESTION: As long -- you think the Federal court in this case would have jurisdiction if there is an allegation that the defendants violated constitutional rights.

MR. BROWN: No. If we were acting under an unconstitutional statute, your Honor. There is a difference, if

I may say, between stating a cause of action and jurisdiction. I am not to the stating a cause of action.

QUESTION: That is the distinction you assert.

MR. BROWN: Yes, sir. There is a definite distinction in my opinion. And I am saying here that if the seven named defendants were acting under a constitutional warrant at the time, and there is no allegation or challenge to the contrary by the petitioners, and if they were acting within the delegation of that statutory warrant, then they are agents of the sovereign and the action may not be maintained. There is no jurisdiction. And as I pointed out a minute ago, your Honor, I will get to the cause of action discussion later as it relates to the doctrine of executive immunity.

But this Court in Barr in quoting from Gregoire adopted Judge Hand's reasoning and logic to the effect that if actions are permitted to be maintained against State officials, then you will have times when a State official will abuse his power, there will go unredressed some wrongs, but you must weigh the equities, which is more important. This is a pragmatic, a public policy argument, if you will. And, for example, to illustrate that point, as Mr. Chief Justice mentioned a moment ago, in Moyer v. Peabody we had the question of calling out the National Buard. Justice Holmes wrote the decision in that case. This Court held that the calling out of the National Guard was not reviewable, and Justice Holmes

stated, "As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the governor to deprive citizens of life under such circumstances was consistent with the 14th Amendment, we are of opinion that the same is true of a law authorizing by implication what was done in this case."

And in that particular case perhaps a man was unconstitutionally deprived of his liberty; he was put in jail for I think two and a half months. But this Court held that the discretion of the executive branch of a State government in calling out the National Guard is his discretion.

QUESTION: That wasn't an 11th Amendment case, was it?

MR. BROWN: No, it was not, your Honor.

QUESTION: I thought we were talking about the 11th Amendment, or have you moved on to the --

MR. BROWN: Now, the petitioners on the 11th Amendment argument rely on Sterling, Ex parte Young, those kind of cases, all of which are distinguishable in our opinion because we are talking about unconstitutional statutes. And in Sterling, before the governor called out the Guard, the Federal court had already enjoined the matter. So he was flying right in the face of an order of a Federal court at that time.

The Larson case applied the 11th Amendment immunity, the agents of the sovereign were immune even if their actions at the time were ultra vires.

MR. CHIEF JUSTICE BURGER: I think we will pick up at that point after lunch.

(Whereupon, at 12 noon, a luncheon recess was taken.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Brown, you may proceed whenever you are ready.

MR. BROWN: Mr. Chief Justice, and may it please the Court, in going further on my jurisdictional argument as to whether the court below under rule 12(b)(1) had jurisdiction, I would like to point out that contrary to what my eminent opponent stated, Sterling v. Constantin did not in fact overrule Moyer. It cited it with approval, it stated they were dealing with a different situation, the taking of property.

Moving on now to the effect test, that is, if the nature of a lawsuit, even though naming nominal parties defendant, in facts affects State government, then it is an action against the State. And this court in Dugan v. Rank which was a 1963 decision stated the test. The general rule is that a suit is against the sovereign if the judgment sought would extend itself on the public treasury, domain, or interfere with the administration of justice. If the effect of the judgment would be to restrain government from acting or compel it to act.

Now, that is exactly what we are talking about here. Granted, the Dugan case is a Federal Government case, but which is more important, constitutionally granted rights to the State, that is the 11th Amendment, or the common law interpretation of the immunity of the Federal Government?

Along that same line, as this Court well knows, in Barr v. Matteo they quoted with approval Judge Learned Hand in Gregoire v. Biddle, and I would like to quote a part of Judge Hand's opinion. "Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith....the answer must be found in a balance between the evils inevitable in either alternative."

"In this instance, it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retalliation."

I submit to the Court that is exactly the situation with which we are here confronted. What would be the effect on State officials in every State of the Union if Federal court were to be granted jurisdiction in this kind of a situation? Any vituperative, vindictive plaintiff wanting to vent his spleen on a State official could file a lawsuit. You could literally tie up State governments, just mimeograph thousands of lawsuits against all kinds of people and tie up State governments. That is exactly how it could be affected.

QUESTION: Judge Hand's comment in the Gregoire case was not in the context of 1983.

MR. BROWN: No, your Honor, it was not, but the same

reasoning would apply, it seems to me.

QUESTION: And that is also true of Barr v. Mateo.

MR. BROWN: Yes, that is true. Yes, sir.

Let's just take a specific example of a National Guardsman in any State in the Union called to active duty to quell riots, insurrection, what have you. If he knew that in the performance of his duties as he was commanded to do by the Governor of the State of Ohio and his commanding officers that he could be sued, would he diligently carry out his duties? This is a very pragmatic policy consideration. Should officials, all State officials, be free to carry out their duties unhindered and unhampered, or should they live in constant fear of being sued?

We feel, as did Judge Hand, that they must be free to carry out their duties. Now, query: Does that leave people without a remedy if you have a dishonest official or somebody acting vindictively? It does not because they are still subject to the electoral process and they can be recalled from office.

In conclusion, therefore, on the 12(b)(1) motion on jurisdiction, we clearly feel the courts below were correct in their interpretation of that matter and the 11th Amendment, and further that the only material before the court when considering the motions were affidavits which I previously mentioned which incidentally were in the Krause case and not the Scheuer case, but they are in effect companion cases. And the court also

took judicial notice of the facts as they exited at Kent State on this tragic day. And I am sure this Court is well aware of Judge Connell's concurring opinion in that regard in the Sixth Circuit.

Going on now to the question of sovereign immunity, first of all, 1983 says, as the Court well knows, all persons who violate someone's rights are subject to suit, et cetera. And yet this Court has held in Pierson v. Ray, a 1969 decision, that judges acting within their scope as judges are immune under 1983 for acts within their discretion. In the Tenney case which is a 1950 case, this very Court held legislators immune while doing things within their discretion.

Now, it seems to me in Congress that the people that pass the laws and the people that interpret the laws have immunity when the very person designated by the Constitution of the United States and the constitutions of the respective States would not have immunity to carry out the very laws that the legislature imposes and the judiciary interprets. I would respectfully submit the petitioners are in error when they state that executive immunity was unknown prior to 1871 enactment of 1983, and we cite in our brief two cases, both preceding 1983, Kendall v. Stokes and Wilkes v. Dinsman, an 1845 case and an 1849 case. So executive immunity did, in fact, exist.

And another point I think worthy of comment, our laws

as they were traditionally adopted in this country were a carryover, of course, from the common law of England, which has known immunity for some period of time.

Do we have executive immunity now? In our judgment the answer is clearly yes. Barr v. Matteo which once again quotes Gregiore v. Biddle. And as I previously stated Moyer v. Peabody, the court there held that certainly the discretionary act of the Governor in calling out the Guard was within his power and right.

Now, we go on to the diversity matters in applying the wrongful death, diversity --

QUESTION: Mr. Brown, could I inquire a moment? Let's assume that it is alleged that the State officials -- this is with respect to immunity. It is alleged that the State officials acted deliberately and knowingly to violate a constitutional right in the sense that they intended to deprive somebody of a constitutional right. And let's assume that it's proved and everybody can see that they knew they were and they did it deliberately. Would you still insist on immunity?

MR. BROWN: Probably not if they could prove all of the things which your Honor has in fact stated.

QUESTION: Well, would you say you would submit those kinds of allegations to proof or not?

MR. BROWN: Not the allegations, your Honor. A court

is bound to determine the facts in the first instance as they really exist, as they truly exist, and the court may do whatever it wants --

QUESTION: I understand that, but would you permit a court to see if a plaintiff could prove those kinds of allegations against a State official?

MR. BROWN: Not normally, your Honor, unless there were some evidence before the Court, concrete evidence, other than sheer allegations and sheer conclusions of law and unwarranted deductions of fact, not unless there was something.

QUESTION: I know, but here is a complaint, let's assume, that says that the official has deliberately and knowingly deprived a person, and intentionally has deprived a person of his constitutional rights. That is the allegation and they want an opportunity to prove it. Now, would your claim of immunity stop that suit in its tracks before it ever got started?

MR. BROWN: If in fact that were true, your Honor, no.

QUESTION: Well, I am saying all you have is the allegation in a complaint.

MR. BROWN: I would say that standing alone is insufficient, yes, sir.

QUESTION: Well, then you would say dismiss the case without any opportunity to prove it.

MR. BROWN: Depending on the facts as they really

existed, if I were the Federal court --

QUESTION: Well, how do you know the facts existed?

MR. BROWN: Because some well-pleaded facts I think the court should take note --

QUESTION: Well, let's assume that they are well-pleaded facts.

MR. BROWN: On that mere allegation I would dismiss the complaint with nothing further before me, yes.

QUESTION: So you would say that you would insist on immunity even though it is alleged and somebody stands ready to prove --

MR. BROWN: If it is more than the sheer allegation standing along, your Honor. This is the distinction I am attempting to make. The court may call a preliminary hearing and look into the facts. In the rare instance --

QUESTION: Your immunity claim would not stop.

MR. BROWN: No. Well, for example, let's take a gross situation where, let's say, two highway patrolmen stop a drunk driver, summarily try him and shoot him. Certainly I am not claiming in that situation that you would have immunity. I'm not.

QUESTION: Here you are in effect reading in the allegations of bad faith out of the complaint.

MR. BROWN: I am saying the court below properly looked into the facts as they existed. That is what I am saying,

your Honor, yes. And I would point out that the petitioners did not even ask for a preliminary hearing. The only evidence before the court were the facts that we had before it plus the judicial notice of the facts as they took --

QUESTION: I don't suppose you would suggest that the State officials would be immune from criminal prosecution under a Federal criminal law.

MR. BROWN: I would not, your Honor. I would not say that.

QUESTION: What about 242 that speaks of conspiracy to deprive people of their constitutional rights?

MR. BROWN: Are you talking about a criminal prosecution there?

QUESTION: Yes.

MR. BROWN: I would say they would not be immune to criminal prosecution.

QUESTION: And if the same allegations were made in a civil suit, that would have to be proved to prove a criminal violation?

MR. BROWN: Yes.

QUESTION: Would you say that the immunity would apply there in a civil suit?

MR. BROWN: In a criminal situation?

QUESTION: In a civil suit.

MR. BROWN: In a civil suit. Just because it was

a criminal act?

QUESTION: No, just because the very same allegations in the civil action are made the State would have to prove in the criminal case, that the government would have to prove in the criminal case,to succeed, you say there would be no immunity in the criminal suit but there would be in the civil.

MR. BROWN: That's right, your Honor. That is the position I take.

QUESTION: That would apply to the Federal statute?

MR. BROWN: Yes, sir, in my opinion.

QUESTION: They both were enacted at the same time, weren't they?

MR. BROWN: I believe they were, I am not positive on that, your Honor.

QUESTION: What justification do you have for taking the criminal and not the civil?

MR. BROWN: Pragmatic public policy considerations to have public officials carry out their duties unfettered for fear of a bunch of lawsuits.

QUESTION: Then you are telling me that Congress meant to apply this criminally but not civilly, is that what you are saying?

MR. BROWN: Well, there are two different statutes you are talking about, your Honor.

QUESTION: You are passing the same batch of statutes.

MR. BROWN: Well, your Honor, of course --

QUESTION: You are telling me the Congress said that you are criminally liable but not civilly liable.

MR. BROWN: Yes, sir, that is exactly what I am saying.

QUESTION: And what in the world do you have to back that up?

QUESTION: I suppose one difference would be that anyone can start any kind of a frivolous lawsuit but to get an indictment, you have got to go through a grand jury. One of the historic purposes of a grand jury was to be a buffer against frivolous, irresponsible charges, is that not so?

MR. BROWN: Yes, your Honor.

QUESTION: Is that in the debate? Of course, it's not.

MR. BROWN: No, sir. And neither is judicial immunity in the debate, your Honor, or legislative immunity. This is court interpretations.

QUESTION: Well, you would now interpret this statute, the 1871 statute.

MR. BROWN: I am asking -- this Court is going to interpret it as it has in the past, your Honor, absolutely. And they have applied it in certain situations.

QUESTION: You want us to say that this man can go to jail, but he can't be subject to an injunction.

MR. BROWN: We are talking about damages in this action,

your Honor, and I am saying --

QUESTION: Well, you say he can go to jail for five years, but he can't be sued for $2 damages.

MR. BROWN: Yes, sir, your Honor, I am saying that loud and clear, not based upon unwarranted conclusions of law and unwarranted deductions of fact. I am saying that.

Briefly, your Honors, as my time is running out, on the diversity issue, there we clearly apply the law of the form Erie v. Tompkins, and there are a long line of Ohio cases cited in our brief dealing with the question of executive immunity with officials of State governments in doing their discretionary acts.

Moving on briefly to the issue of justiciability, whether or not the training and weaponry of the Ohio National Guard is a justiciable matter which this Court should consider, this Court set forth the guidelines in Baker v. Carr, six elements. This case,we feel, clearly falls into those. This Court recently heard the case of Gilligan v. Morgan involving the very issue of whether or not this was a justiciable question or a political question. They decided that it was not, that the judiciary should not get involved in these matters, and we feel that was a proper decision. I see no distinction to be made between an injunction, which was the Gilligan case, and an ex post facto damage action which is what we have here.

Finally, your Honors, if the political question is

overruled, the Federal Government who sets up the standards for training the National Guard and Congress who is given the responsibility under the Constitution, the Federal Government certainly would be an indispensable party in that regard.

In conclusion, therefore, we feel that the court below considering Rule 12(b)(1) and Rule 12(b)(6), properly applying those rules to the issues of jurisdiction and executive immunity, properly dismissed petitioner's complaint.

If the Court has no further questions --

QUESTION: Mr. Brown, I suppose your position does undercut somewhat anyway section 1983, doesn't it, to the extent you are asking for --

MR. BROWN: Sir, in response to that I would say this Court has applied 1983 to two classic cases, the Birnbaum case and Ex parte Virginia, both involving civil rights violations, one involving a Jewish gentleman and the other involving a judge who refused to let black people sit on his jury. So those are classic situations for the application of 1983. But extending it to abolish executive immunity, it seems to me, is not proper.

QUESTION: Moyer v. Peabody was under the Civil Rights Act, was it not?

MR. BROWN: This was the Governor of Colorado calling out the National Guard. That was before the Civil Rights Act.

QUESTION: No.

MR. BROWN: No, that was after, that was 1908. That was the Governor of Colorado calling out the National Guard. This man was imprisoned for two and a half months and he sued for false imprisonment. And the Court said the court could not question the Governor calling out the National Guard, and that's where Holmes said no one would doubt the Guard would have the right to fire into a mob at time of insurrection.

QUESTION: You are not suggesting that Ex parte Young is wrong or should be overruled?

MR. BROWN: It should be distinguished, your Honor. That was an injunction action, clearly distinguishable.

QUESTION: Well, that's your grounded distinction, all right. It has to be, I guess.

MR. BROWN: Yes. And I also involved on the unconstitutional statute.

QUESTION: You say, then, that there is not immunity if it's an injunction, action for injunction?

MR. BROWN: No.

QUESTION: The immunity exists only when the action is for money damages?

MR. BROWN: No. If you are talking about an unconstitutional statute -- these cases hold immunity does not exist, you are either talking about an unconstitutional statute or the officer acting outside the statutory warrant. Now, those are the two instances, and all the cases attempted to be

distinguished by my eminent opposition here. We don't have that in this case and it is unchallenged that there was an authorized statute and we were acting within it.

QUESTION: Well, then, the distinction that my brother Blackmun asked you about was not the distinction you made, it's not as between an injunction and damages. Am I correct in that?

MR. BROWN: It depends on what .. seeks, your Honor. I could not make the complete bold statement that every injunction action would be defeated, no -- would not be defeated. It would depend obviously on what was attempted to be enjoined. But every case relied upon by the petitioner, we feel, is readily distinguishable.

QUESTION: Well, the Sterling case would be an example of that. That's your Texas case where the injunction suit was brought to prevent the enforcement of a statute that had previously been declared, as I recall it, unconstitutional. The Governor was applying it notwithstanding the court's --

MR. BROWN: He was ignoring the Federal court, pure and simple.

QUESTION: Barr v. Matteo would not bar an injunction.

MR. BROWN: In what regard, your Honor?

QUESTION: As here.

MR. BROWN: As here?

QUESTION: Yes.

MR. BROWN: Well, the holding in Barr, I am not really sure I follow your Honor. An injunction action as to prohibit what?

QUESTION: Action of an executive officer of a State.

MR. BROWN: It would enjoin him, in my opinion, if he were attempting to enforce an unconstitutional statute or acting in an area ultra vires, yes, outside the statutory warrant.

QUESTION: Well, then why wouldn't there be a flood of lawsuits? The same flood you are talking about.

MR. BROWN: Because we are talking about different things. You are talking about in one instance unconstitutional statutes and acting clearly outside the authority --

QUESTION: You said if there is a possibility of an action for damages,there would be a flood of lawsuits. You now say there is a possibility of an action for injunction. And my question is why wouldn't there be just as much of a flood of lawsuits?

MR. BROWN: We are talking about executive immunity, whether it exists as to damages or injunction, your Honor. And I am saying that if the elected public officials of this country cannot constitutionally carry out their duties under the proper statutory warrants, there will be a flood of lawsuits. Now, if they are acting outside of either of those two, and if they do something wrong, clearly they are subject to lawsuit or

injunction.

QUESTION: Some of these are not elected officials.

MR. BROWN: No, the vast majority are appointed, but they still fall within the executive branch of the government.

QUESTION: On an examination of Moyer v. Peabody, that was brought under 1983 in the Federal court by the gentleman who was imprisoned two or three months. So that it was the same kind of an action as we have here.

I guess there are no further questions. Thank you, Mr. Brown.

MR. BROWN: Thank you very much, your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Geltner.

REBUTTAL ORAL ARGUMENT OF MICHAEL E. GELTNER

ON BEHALF OF THE PETITIONER

MR. CHIEF JUSTICE BURGER: You agree that Moyer was old 1979, present 1983, wasn't it?

MR. GELTNER: Yes, Moyer was.

Your Honor, if I could mention -- the thing about Moyer is Moyer was a case in which the Governor of Colorado concluded that there was an insurrection. As a consequence of this conclusion that there was an insurrection, he imprisoned the plaintiff, and the plaintiff brought an action charging a deprivation of his constitutional right.

Now, the thing about Moyer, Moyer holds that the Governor's decision of insurrection is unreviewable. That part

of Moyer was clearly overruled by Sterling v. Constantin. The dictum in Justice Holmes' opinion in Moyer to the effect that the Governor could do more than imprison, it seems to me is completely out of consonance with our traditions. The concept is basically that in an insurrection, which we did not have here, in an insurrection the Governor can do whatever he pleases to put down the insurrection. In fact, in Ex parte Milligan the Court held that there was only one thing that an insurrection or rebellion changed and that was it permitted the writ of habeas corpus to be suspended during the continuation of the insurrection. We don't have either of those issues here. We don't have an insurrection; we don't have here the question of whether or not the writ was properly suspended.

QUESTION: It seems to me that would go to whether or not/a complaint would state a cause of action rather than immunity.

MR. GELTNER: Absolutely, your Honor.

QUESTION: And wasn't there immunity talk in Moyer?

MR. GELTNER: I view that talk as being basically connected with the court's decision on the cause of action. That is all that I see there. And I think that the opinion bears it out.

QUESTION: Do you think the expressions that the action of the Governor in Colorado calling out the Guard was an unreviewable action was a dictum by Justice Holmes?

MR. GELTNER: No, I think that was the holding of the

case. That aspect of the case was specifically overruled by Chief Justice Hughes' opinion in Sterling v. Constantin, the specific holding of the unreviewability of the determination of the existence of insurrection. So what we are left with as to Moyer is the dictum that Justice Holmes issued. I read that dictum as being related to the power of the Governor to do whatever the Governor feels --

QUESTION: If that's the way you read it, the case has nothing to do with immunity.

MR. GELTNER: Yes, your Honor, that's exactly the way I read it.

QUESTION: So that it doesn't make any difference what Constantin did to it.

MR. GELTNER: Yes, your Honor, I read it that way. I read both cases as having no bearing on immunity but having bearing on the cause of action.

QUESTION: Mr. Geltner, is it essential to your position that bad faith be proved?

MR. GELTNER: No, your Honor.

QUESTION: What would have to be proved?

MR. GELTNER: Our position is that we rely for our substantive theory -- again going to the cause of action rather than immunity issue -- we rely on Monroe v. Pape, and the few expressions in dictum in this Court's opinions in D. C. v. Carter and in Moor v. Alameda County, specific intention

to cause injury or to deprive one of a constitutional right is a prerequisite to establishing criminal liability under 18 U.S. Code, section 241, which is the criminal analog of section 1983. In Monroe the Court specifically dealt with the distinction and how that specific intention is not necessary; rather, section 1983 was to be interpreted in line with the intention of Congress to reach governmental misuse of force and with the pre-existing body of tort law which founded liability on fault. So that the only question that relates to the viability of the cause of action is whether or not we have alleged and proved fault on the part of the individual defendants, which fault led to the deprivation of a constitutional right.

QUESTION: You are using "fault" in the same sense as the word "negligence" is used?

MR. GELTNER: I am using "fault" in the sense of either wrongful intention, recklessness, wanton and willful misconduct, or negligence.

QUESTION: Mere negligence.

MR. GELTNER: Mere negligence. Now, as to mere negligence, this Court has not passed directly on that issue. The weight of authority in the circuit courts is that mere negligence when tied to a deprivation of a constitutional right, for example, negligence leading to a misuse of weapons by governmental troops, states a column (?) under section 1983. And in my brief I have cited the cases on which we rely for that

proposition. I believe Monroe supports us.

QUESTION: I was going to ask whether you read Judge Celebrezze's dissent that way.

MR. GELTNER: There again Judge Celebrezze's dissent didn't have to reach out for the question of the cause of action. We have alleged, and I believe we can prove, although we have no record before us, what we allege. We have alleged intentional conduct, we have alleged recklessness, we have alleged wanton and willful misconduct. We believe at this point it's not encumbent on us to prove it. We can't prove it before this Court.

QUESTION: Do you consider a showing of negligence meeting the standards you have just suggested if the evidence was that the Governor had signed the proclamation for calling out the Guard or signed the order on the basis of newspaper accounts as to what was happening down in some southern county in the State?

MR. GELTNER: Your Honor, we are not claiming the liability of the Governor flows from the fact that the Governor called out the Guard. That is not the basis for liability in this case. We have alleged with great specificity what we rely on. We rely on orders, we rely on the rules of engagement which existed at the time in the Ohio National Guard, which the Governor knew about, specifically the orders to carry loaded weapons, the orders to march head on with bayonets out into a

crowd. These are matters of record as a consequence of Gilligan v. Morgan, and we rely on that. We do not rely on the mere act of calling out the Guard.

QUESTION: I don't remember whether it was Justice Marshall or Justice Powell, it seems to me, who indicated that negligence in the traditional sense would be enough to support liability of the Governor, and I thought you had indicated negligence in calling out the Guard would be one of those --

MR. GELTNER: I didn't mean to say that. We are not claiming negligence in calling out the Guard. We are claiming negligence in the way in which the Guard is supervised and the way in which the Governor acts himself at the scene. Those are the things that we are relying upon. We don't have to reach out for the question of whether or not the Guard was negligently called out here.

QUESTION: Mr. Geltner, what constitutional right is it that you claim your client was deprived of?

MR. GELTNER: Well, we are claiming that the Constitution protects one from being killed or injured by the use of governmental force without due process of law, and by due process of law we simply mean a hearing. To the extent that the governments can injure one or can kill one, it can only do so insofar as it acts legitimately in defense of appropriate interests or it does so through the criminal process.

QUESTION: Do you rely on any of our cases for that?

MR. GELTNER: We rely primarily on the Screws case. I rely very heavily on the legislative history. This is precisely what the 1871 Congress was concerned with. The Civil Rights Act has reached out to cover many areas. The core of the Congress was concerned with killings and beatings. We rely on Screws which holds that specifically. I rely on the dictum in District of Columbia v. Carter, and we rely on a long line of Circuit Court opinions which reach the conclusion that the use of governmental force outside of the criminal process is a deprivation of due process. The latest opinion, which is cited in my reply brief, which explores the area most carefully is Chief Judge Friendly's opinion in Johnson v. Glick. We rely upon that case and the cases it cites.

Now, if I could, we have heard a lot in this case about the facts. It has been my feeling all along as expressed by the opinion of the courts below that somehow they read the newspapers and took judicial notice of the conclusion that everything the Guard did was proper and that there was insurrection or something close to it. The fact of the matter is there are no affidavits in this case, there are no such facts. The affidavits were filed in the Krause case. These cases have not been consolidated. What we have here is a complaint. And the newspapers and the opinions that the judges garnered from the newspapers below doesn't seem to me to have any bearing

on the way in which the precise legal issues ought to be decided here. To the extent that there is any document in existence which has any bearing on the facts of the case, it is the Scranton Commission report which is not in the record. It is the only document of which under the rules of evidence this Court can take judicial notice. I do not propose the Scranton Commission report as a finding of fact. But if the Court feels some necessity to go beyond the pleadings, it is the only finding of the governmental agency which has dealt with the subject matter.

Now, we have been hearing throughout the case the view that this immunity is necessary because in the absence of immunity, the courts are going to be flooded with complaints, these complaints are all going to be frivolous, and as a result of all of these frivolous complaints, the government is going to stop, people are just going to stop acting.

It is not an inscription of this case a member of the bar of a Federal district court should not be presumed to be filing frivolous paper. He signs -- rule XI requires the complaint to be signed. He is subject to disbarment if he files frivolous complaints. And, finally, the argument when you analyze it closely comes down to the old argument if you permit this kind of suit, the courts are going to be flooded. That is precisely the argument that was made in the Bivens case.

QUESTION: I didn't understand Mr. Brown to be worried about the courts. I understood him to be concerned about Governors or mayors or individuals, including judges, who would have to take time off, among other things, from their duties to defend the suit and in a state of apprehension as they approached the decisional process.

MR. GELTNER: I understand the distinction. But underlying it is the view that the courts will be flooded by complaints of this kind, which flooding will then result in loss of judicial time, loss of attorneys' time, loss of official time and intimidation. In substance it's the same argument made in the Bivens case. It's the same argument that was rejected. And further, it requires this Court to make basically a legislative finding of fact, and I think the Congress has made that finding of fact. The Congress considered these issues and the Congress acted. And at this point the Court, in order to reverse the congressional decision, would in effect be making a legislative act in the face of another legislative act without any empirical basis to support it.

So I think all those theories are just untenable as a basis for either the 11th Amendment ground or the executive immunity ground.

Thank you, your Honors.

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

(Whereupon, at 1:34 p.m., the oral argument in the above-entitled matter was concluded.)