IN THE SUPREME COURT OF THE UNITED STATES

JAMES INGRAHAM, by his mother and next friend, ELOISE INGRAHAM, et al., Petitioners, v. WILLIE J. WRIGHT, I, et al., Respondents.	No. 75-6527

Washington, D. C.,

Wednesday, November 3, 1976.

The above-entitled matter was resumed for argument at 10:03 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

[Same as heretofore noted.]

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume with the arguments in No. 75-6527.

Mr. Howard, you have 22 minutes remaining.

ORAL ARGUMENT OF FRANK A. HOWARD, JR., ESQ.,

ON BEHALF OF THE RESPONDENTS -- Resumed

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

When the Court recessed yesterday I was attempting to answer Mr. Justice Blackmun's question, which I understood to be whether civilly committed institutional inmates were within the reach of the Eighth Amendment.

I would like to try to arrive at the answer by explaining our theory of the reach of the Eighth Amendment, and why, under that theory, derived from this Court's decisions, my answer to the question would have to be no.

This Court's decisions have never, in my reading, departed from the historic intent or the literal text of the Amendment, which is internally consistent. It speaks of excessive fines, excessive bails, and cruel and unusual punishment.

The Amendment, as we read the Court's decisions, only speaks to punishments which are inflicted consequential to or collateral to the criminal process of law. Corporal punishment in the schools, in our view, is no part of the criminal process

by any view. It is civil and correctional, therapeutic in nature. It is not within the criminal concept at all.

The history of the Eighth Amendment has been explained too often for me to try to bore the Court with it. It originated from the imposition of inhumane sentences by the English courts. Its interpretation by this Court's decisions has uniformly been in the criminal context. In fact, the Court has rejected its application in civil cases, in such cases as deportation, the Fong Yue Ting case, and in a case involving incarceration for civil contempt, this Court has rejected the Eighth Amendment as applicable there to give relief.

The clearest illustration, we believe, is in the case which is heavily relied upon by the petitioners, and that is Trop vs. Dulles.

The distinction can be seen by comparing Trop with its companion case, which was decided by this Court on the same day in 1958, Perez vs. Brownell. The Nationality Act of 1940 in Perez stripped Mr. Perez of his citizenship because he voted in a foreign election. He was -- there was no criminal conviction, there was no criminal process. The Court sustained that denationalization.

In Trop, Mr. Trop had been found guilty by court martial of wartime desertion, and the statute there imposed denationalization as a consequence of that conviction. And Chief Justice Warren, in his opinion, as we read the opinion,

only came to the question of the Eighth Amendment after finding that there was a conviction, the Eighth Amendment was invoked by that criminal consequence. He then proceeded to the famous language about penal -- the distinction between penal and non-penal statutes, that the government can't label something non-penal when it really is penal.

In our view, that is a secondary test. The threshold test is always whether there is a criminal process, link or nexus. If there is found such a connection, then the question is whether the punishment is penal. And if it is found to be penal, then the question is, is it cruel and unusual?

And the Court has certainly expanded the definition of the term "cruel and unusual". But we submit that it has never expanded the basic definition of punishment.

So, unless there is punishment in the Eighth Amendment sense, the Amendment does not apply.

And that brings me to the cases in the lower courts, which have departed from this standard that I'm suggesting. The prison cases are the best example, and the most famous prison case is that decision written by Mr. Justice Blackmun while on the Court of Appeals, Jackson vs. Bishop, in which the flogging of prisoners in Arkansas Penitentiary was prohibited as violative of the Eighth Amendment.

Other cases have applied it to juvenile institutions. Nelson vs. Heyne in the Seventh Circuit dealt with a juvenile

institution where there were criminal and non-criminal youngsters in the institution. But it gave no analysis to what we see to be the threshold issue.

QUESTION: Mr. Howard, could I interrupt?

MR. HOWARD: Sure.

QUESTION: I can't remember whether yesterday you answered Mr. Justice Blackmun's question about two persons in the same institution, one there as a result of conviction for a crime and the other is a finding of mental illness, and the same punishment being meted out to both. Was it your answer that one would have an Eighth Amendment claim and the other would not?

MR. HOWARD: Yes, sir. I was really trying, in a long-winded way, to get to that answer now by explaining our theory. My answer would be yes, that under the rigorous analysis of this Court's decisions, the mental, civilly committed mental patient would not have the benefit of the Eighth Amendment.

QUESTION: But would your analysis be the same if both of them -- if the person inflicting the discipline said in words, "This is punishment" and was in effect punishing the man for a crime in both situations?

MR. HOWARD: I think it would be the same, Mr. Justice. Again, I see it as a question of the contours of the Eighth Amendment. And what I see to be a blurring of those contours by lower treatment so far, which has not examined this problem.

Most of the cases involving mixed institutional custody have not stated why the Eighth Amendment is invoked, they have assumed that it's been invoked.

QUESTION: I was wondering if one could reconcile the cases you described, about the loss of citizenship, by simply saying that in one case it was punishment and the other case it was not, rather than saying in one case there was a criminal process and in the other there was not. Wouldn't the opinions be consistent with that rather simple approach?

Is there any language in the opinions that would be inconsistent with that rather simple approach? Let me put it that way.

MR. HOWARD: Well, I find it difficult to see the analogy, Mr. Justice Stevens, because in the Perez and Trop cases, the end result was exactly the same. And the only distinction that I can see between taking away -- restoring Mr. Trop's citizenship when he was convicted of wartime desertion and taking it away from Mr. Perez when he voted in a foreign election was the Chief Justice's lead in the opinion by discussing punishment as a consequence of crime.

QUESTION: Well, why couldn't one just simply say punishment and forget the "as a consequence of crime"? Would not the same distinction apply? That's really my problem.

MR. HOWARD: No, sir, --

QUESTION: Because in the loss of citizenship

situation, it clearly was -- I mean, in the consequence of wartime desertion, it was clearly punishment. And it would seem to me if that had been done by Executive Order or by some other procedure other than as a result of crime, one could consistently with the opinion still call it punishment covered by the Eighth Amendment.

I'm not quite sure why one could not do that.

QUESTION: Well, it followed a court martial conviction for a criminal offense, didn't it?

MR. HOWARD: Yes, it clearly did.

QUESTION: And only that.

MR. HOWARD: And I believe that was Chief Justice Warren's basis for reaching the Eighth Amendment. He didn't articulate the reasoning that I'm urging to the Court here.

QUESTION: Well, that's my point. The opinion does not articulate the rationale when you find in the opinion?

MR. HOWARD: Not in so many words. But I think it must -- I think the rationale is there and has to be recognized.

QUESTION: Mr. Howard, on your two men in the mental institution, how do you get around the Screws case?

MR. HOWARD: Sir, I --

QUESTION: They were both -- both of them were incarcerated.

MR. HOWARD: No, sir, I would not accept that. I

would say that --

QUESTION: And you come to the Assembly Committee man and said: You did something wrong, you spit on the floor, and so I'm going to deny you your rights, and I'm going to beat the daylights out of you to punish you.

MR. HOWARD: Mr. Justice, I --

QUESTION: Isn't that Screws?

MR. HOWARD: No, I don't think they are the same. I think that the courts have found -- have had a solicitude for institutional cases, and it's perfectly understandable. When a man's or a child's liberty is taken away from him and he is put into an institution and he's isolated from the community and he cant go home to his parents at night, and he's subjected to inhumane conditions in that institution, then the courts have found that the conditions demand a remedy.

I would suggest that the Fourteenth Amendment would be more appropriate as remedy in those situations than the Eighth Amendment. And a few courts have drawn that distinction, between prisoners either in jail or in a reformatory as a result of a criminal act, and inmates there either because of mental incompetence or because they are pretrial detainees. It seems to me that for a detainee or a mental patient to suffer inhumane treatment or conditions is so irrational, is so unrelated to a State objective that he could challenge that treatment based on the Fourteenth Amendment.

QUESTION: You say it's only not clearly a violation of the Eighth Amendment, you're not saying it could be a violation of the Fourteenth?

MR. HOWARD: I'm not saying that there could not be a remedy; and of course if we take it to this case, that is the issue that is not before the Court today.

There was a third question presented in the petition for certiorari which would have brought a substantive due process issue here. The Court did not accept that, and of course neither of us have briefed it, and I would not want to make any concessions on it.

But that's a possibility.

QUESTION: But the point, as I understand it, is that the Screws case involved a deprivation of life without due process of law, and did not involve the Eighth Amendment as such; is that it?

MR. HOWARD: Yes, sir. It --

QUESTION: I defer to the expert who argued the Screws case, but -- .

[Laughter.]

MR. HOWARD: The Screws case, of course, was a criminal case, and it required specific intent, but I think this gets us back to the case that was argued yesterday about the right that has to be found, if there's to be a deprivation. And --

QUESTION: Mr. Howard, could I interrupt again?

It seems to me we may just be arguing what constitutional basis there would be for the kind of review the plaintiffs seek in this case, because, if I understand you correctly, you're saying that if the student is given a fair hearing, say they have a full trial on whatever the charge against him is, and a fair procedure to determine his guilt, and then, as a result of that, they impose a punishment, say, they decide this offense justifies locking him in the basement for four days, or something, in the basement of the school, without bread or water, anything. I think you're saying as a matter of substantive due process that would be intolerable, even though it might not violate the Eighth Amendment. And, if so, what difference does it really make?

Because isn't your test still going to be one of is it such an extremely severe penalty as related to the offense that it's not constitutionally tolerable?

MR. HOWARD: Mr. Justice, I think there are several questions there. I don't wish to concede that there is a Fourteenth Amendment substantive remedy here, because we really haven't examined or briefed it; and certainly I don't concede that procedural due process steps are required in every case.

QUESTION: No, but I'm assuming we give the procedural due process to get that aspect out of the question, that's all.

MR. HOWARD: And then a heavy punishment as a result

of --

QUESTION: Say you lock a five-year-old or seven-year-old boy in the basement for ten days. Could a school do that, provided it gave him an adequate hearing? Would the Constitution tolerate that?

I think your position is either yes, or it has to be under some provision under other than the Eighth Amendment.

MR. HOWARD: Certainly the schools can't do it, my first position would be that there are adequate enough State remedies, and no reason to suspect that those remedies aren't been enforced, that there is no clear call for federal --

QUESTION: Then how can you acknowledge the State right to do that, and yet question the hypothetical case about the inmate in a mental institution who is given an unusually severe discipline? What's the difference in constitutional terms?

MR. HOWARD: Well, I may be driven to the point of relying -- falling back on the Fourteenth Amendment. I find it difficult to say that a student who suffers truly excessive punishment can't have any remedy. But I --

QUESTION: Do you prefer to have us find it as a matter of substantive due process, rather than apply the Eighth Amendment? That seems to be --

MR. HOWARD: I would prefer, Mr. Justice, that it come to you in an appropriate case so that the question can be

examined very carefully. I wish only to --

QUESTION: Well, isn't that the very issue here, whether, no matter how severe the punishment, there is any constitutional remedy, based on the facts alleged here? Maybe he has proceeded under the wrong theory, but do you still deny him any relief?

MR. HOWARD: Well, the only issue that the Court faces here, with respect to severe punishment, is whether the Eighth Amendment reaches it. It was -- the Fourteenth Amendment was a part of the case below. The Fifth Circuit, for example, rejected an examination case-by-case of the punishments inflicted in this case, and I think, at least partly, on the theory that it gets the federal courts squarely into the business of second-guessing school administrators as to whether corporal punishment was necessary; and, if it was, then whether two licks or swats or five licks was appropriate in each case.

And I think the Fifth Circuit held that that was not an appropriate function of the federal courts, and I would refer to your language in Bishop vs. Wood, the case involving the dismissal of the city employee, in which you made the point that the federal courts are not the appropriate forums to pass on daily multitudinous decisions which are handed down every day in public agencies.

QUESTION: And which do not affect the litigant's constitutional rights. But here I'm troubled by the -- the

problem it seems -- the underlying problem here is whether the Constitution protects an individual from being imprisoned indefinitely by a school, if that's the course the school chooses to punish him.

QUESTION: But here there's no imprisonment, there was no deprivation of liberty, was there?

QUESTION: No, but in principle it's the same thing, --

MR. HOWARD: No, sir.

QUESTION: -- it seems to me.

QUESTION: But not on the Constitution, which, under the Fourteenth Amendment, talks about life, liberty or property. And here there was no deprivation of any of the three, was there?

MR. HOWARD: No, there was not. And I -- the ordinary case, of course, involves a temporary detention and no deprivation of liberty.

QUESTION: No, but the point would be the only constitutional protection against the deprivation of liberty is to have the procedural due process precede it. And I'm assuming that the deprivation of liberty that I described was made only after a fair and full trial ascertaining guilt.

The question is, is there then any limit on the punishment the State can impose on the student for his infraction of a school rule? And apparently your position is there's no limit. Unless it's substantive to some kind of

substantive due process.

MR. HOWARD: I find it very difficult to take the extreme position that you put me in, Mr. Justice, and I only say again that I would urge the Court --

QUESTION: Isn't that the problem with the Fifth Circuit opinion? We don't have to review every time a student gets slapped, in order to avoid the constitutional extreme that the Fifth Circuit has reached. That's the only suggestion I'm making.

MR. HOWARD: Well, it may have to do also with this dilemma of what right in the Constitution is secured.

Now, if the Eighth Amendment doesn't cover it, does the Fourteenth Amendment, by its own force and effect, provide that right --

QUESTION: Well, that question was presented in the petition, was it not, and cert was not granted on that issue?

MR. HOWARD: It was not granted, Your Honor, and that is why --

QUESTION: We limited the grant to questions one and two in the petition?

MR. HOWARD: Yes, sir.

I'm urging the Court not to rush to judgment on this, unless the case comes to you with full briefs and argument, because --

QUESTION: What would be along the line is if the

teacher struck this child out on the street; that would be assautl and battery, wouldn't it?

MR. HOWARD: Yes, sir. And --

QUESTION: But merely because it's in the school, that takes it out of assault and battery.

MR. HOWARD: Well, I don't think it does, I think that these are essentially, as the Fifth Circuit stated, tort claims. The Constitution doesn't provide a remedy for every wrong, and Section 1983, as Paul vs. Davis teaches us, --

QUESTION: Well, assault and battery is obviously a State, it's not a federal.

MR. HOWARD: Yes, sir.

QUESTION: That's what I'm talking about.

MR. HOWARD: One of the judges on the Court of Appeals asked counsel during the argument: Isn't this an attempt to use a constitutional canon to kill a Florida -- do away with a Florida flyspeck? And it seems to me that that was an apt question.

If I might turn to the due process issue, the -- I understood Mr. Rogow yesterday to concede the point that we make in our brief, and that is that the true issue here is whether procedural due process steps are required before the administration of any punishment, not just severe. And I was prepared to quarrel with his definition, but I don't believe I have to.

This theory has been rejected by all courts which have considered it, with the exception of Baker vs. Owen, in which this Court held that parental objection may not overrule the administrator's discretion. The Court did not review the question of procedural due process, so it was not a precedent there.

The Baker Court found a few steps to be necessary, and there is one unreported case from Georgia, which is cited in the briefs, which also required it.

Goss vs. Lopez is the starting point, we believe, here, and the Goss case, as we see it, was predicated upon the deprivation of the right to education, in that suspensions, at least, took the child out of school, away from the education which the State had guaranteed to give him.

Corporal punishment, in contrast, is correction while keeping the child in school. The purpose of corporal punishment as a disciplinary alternative is to correct the child quickly while putting him back to class.

The record here at least shows that there was no retardation of progress of any of the children. The numerous citations are collected and briefed to the record, these students progressed fairly normally on through school. They suffered no reputational harm, and there's no showing that future schooling or future employment was jeopardized.

So, in so far as the first inquiry, whether there is

a protected interest, the State of Florida guarantees children the right to an education, but it doesn't guarantee them the right to go to public school with immunity from corporal punishment in case of misconduct.

The petitioners have sought to find a secured right in the Fourth Amendment, for which there is no case support at all, and it was never argued below. The Fifth Circuit didn't even deal with this question.

Mr. Rogow suggests the penumbra theory, and I don't know how far that goes or what it covers.

Further, I think, in his most strongest reliance, is on some generalized liberty interest. We say first that there is no deprivation of liberty. The Constitution says that liberty shall not be deprived or taken away. And corporal punishment in the normal situation -- and that's what we're talking about -- is a temporary detention only for correctional purposes.

The student's liberty interest is just one ingredient in a balance of interests which has been reached by the States and by almost all of the States. State policy and history in this country favor local educators' discretion and control in these sorts of decisions, and provide remedies when that discretion is abused.

So we submit that there is no call for a federal mold which is going to be frightening to administrators, probably

self-defeating, in terms of the use of this remedy, because educators don't look upon rules of the Supreme Court, even if they are called informal, they don't look upon them as informal, they are mindful of Wood vs. Strickland, the personal liability problem.

My time is up, and I thank the Court.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Howard.

Mr. Rogow, do you have anything further?

REBUTTAL ARGUMENT OF BRUCE S. ROGOW, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. ROGOW: I do, Mr. Chief Justice.

Mr. Chief Justice, may it please the Court:

As I understand Mr. Howard's argument, it boils down to the fact that the Constitution can ban the flogging of prisoners, but it cannot ban the flogging of students.

We don't think that that --

QUESTION: Well, in his argument he was limiting his remarks to the Eighth Amendment, was he not?

MR. ROGOW: Yes, and so am I at this point, Mr. Justice White. And I want to reiterate to the Court that there are two separate and distinct issues in this case.

In the Eighth Amendment context, the argument is that this punishment is civil in nature, and not criminal, and therefore some distinction can be drawn on that basis. That is merely a label of convenience.

The factor to be looked at is whether or not it is punishment, irrespective of who is meting out that punishment.

And Trop vs. Dulles and Perez vs. Brownell, when one reads them, I think sees that the focus is upon punishment, not punishment for a crime, but whether or not there was punishment involved.

And the Court found in Perez that stripping a person of his nationality was not punishment. What it was was an exercise of the international affairs power of Congress, saying that if someone voted in a foreign election, then, because we had to show the foreign country that we were not interfering in their business, we would strip a person of his nationality. But it was not at all, looking at that, as punishment.

In Trop, it was punishment. And so the focus is upon punishment. We think that's an important --

QUESTION: Well, what you're saying is it was precisely the same thing in both Trop and in Perez, i.e., the deprivation of citizenship, and the reason it was punishment in the one case, in Trop, and not punishment in Perez is, what I had understood, or one could understand, was that in Trop it followed a conviction of a criminal offense. And isn't that what made it punishment?

MR. ROGOW: No, I don't say --

QUESTION: It was part of the sanction imposed upon one convicted of a criminal offense. And in the other

case it was -- there was no criminal proceeding whatsoever.

Now, isn't that what made the same consequence, punishment in the one case and not punishment in the other?

MR. ROGOW: No, Mr. Justice Stewart. Not the way I read it. And when one reads Perez carefully, one notes that the original law which stripped a person of his nationality, which was a civil -- a law passed during the Civil War, involved no desertion conviction at all. The historical basis for Trop and Perez was an old statute that said, if you served -- or if you deserted, whether or not you were convicted or not, you would be stripped of your nationality.

I think the focus is upon punishment, not --

QUESTION: Well, why was it punishment in the one case and not in the other?

MR. ROGOW: Because --

QUESTION: In the precise same thing.

MR. ROGOW: Because, in Perez, it was not punishment because Congress was exercising a specific power that it had, not to punish a person, but to protect the country. And I think when one reads Perez carefully, that that is a conclusion that one comes to.

That is the basis for the distinction. But I don't think it makes very much difference in our case, quite frankly, and I don't --

QUESTION: What if Congress says, "We exercise our

interstate commerce power here" --

QUESTION: Yes.

QUESTION: -- and that we're going to do this to you. Does that make it not punishment, --

MR. ROGOW: If it's to --

QUESTION: -- because Congress is exercising a specific power?

MR. ROGOW: If it's a legitimate exercise of that power, which it was in Perez, and there is a legitimate governmental interest that was being protected, and the Court found that in Perez, then --

QUESTION: But I thought the only cruel and unusual punishment clause was a barrier to what would otherwise be a quite sweeping exercise of congressional power; that you have the power to regulate interstate commerce almost any way you want to, except when you run up against a specific prohibition in the Bill of Rights.

Are you saying that that is not the case?

MR. ROGOW: No, I'm not saying that is not the case. But I'm saying that the first question that must be addressed is whether or not the intent of Congress, in inflicting some kind of sanction upon a person, is to punish.

QUESTION: Well, the source of congressional power is not really relevant here. Is it? So long as it's -- one might inquire upon whether or not it was an appropriate exercise of

power granted by the Constitution to the Federal Legislature; but once one found an affirmative answer to that, then the question is: Did Congress enact a criminal law or a civil law?

Congress has enacted many criminal laws under its commerce power. The Dyer Act, the Mann Act, and many, many others.

Now, I suppose -- andit has enacted, as we both know, many, many kinds of civil legislation under its commerce power.

But the question is not the source of Congressional power, but whether or not this is what has been created as a criminal offense, followable by a criminal sanction. If so, it's punishment; and if it's not, it's not.

MR. ROGOW: I -- where we --

QUESTION: Isn't it?

In other words, if under the --

MR. ROGOW: -- where we disagree, Mr. Justice Stewart, is that I don't think that the criminal aspect is important. The punishment aspect is important.

But, as I say, Trop and Perez are not essential to our case at all. Because we come down to --

QUESTION: Mr. Rogow, in Perez, was there any rule against voting in a foreign election?

MR. ROGOW: Any rule in what, in a foreign country or in this country?

QUESTION: No -- here.

MR. ROGOW: No, I don't think that -- I don't think there was.

QUESTION: So you are -- there was a consequence that was imposed, --

MR. ROGOW: Yes.

QUESTION: -- but it was -- but you violated no law.

MR. ROGOW: No.

QUESTION: By voting there.

MR. ROGOW: No.

QUESTION: But you did by deserting.

MR. ROGOW: Yes. Yes.

QUESTION: And intra the sanction of expatriation followed only upon conviction of a criminal offense. I'm not talking about its predecessor in the Civil War, I'm talking about the law involved in Trop; isn't that correct?

MR. ROGOW: Yes, it did.

QUESTION: Not upon the fact of desertion, --

MR. ROGOW: No.

QUESTION: -- but upon a conviction of a criminal offense.

MR. ROGOW: Yes, sir.

All I am saying is that the focus is punishment, and is it p unishment. If it's punishment, no matter who metes it

out, it can violate the Eighth Amendment.

QUESTION: But isn't that -- isn't it of some substance in arguing, making your punishment argument, that whatever happens to him follows upon the breach -- supposedly follows upon a breach of a rule,of an official rule?

MR. ROGOW: And that's exactly what happened in this situation.

QUESTION: Well, that's what I -- yes, I understand.

MR. ROGOW: There are breaches of official rules, and then punishment is imposed.

QUESTION: But if it is limited to punishment, what happens if the principal tells a teacher: "You've been late three days this week, give me a rule and I'll whack you one"?

Is that a violation of the Eighth Amendment?

MR. ROGOW: No, because -- and we have never said that one whack is a violation of the Eighth Amendment. The question is whether or not there is some opportunity for a hearing before authorized punishment can be used.

QUESTION: Well, there is no hearing, no nothing, I gave you all the facts. The principal said, "You've been late, and you've been late too many times, and you deserve punishment; I'm going to punish you, give me the ruler", and whack!

MR. ROGOW: I would say there would be an -- there should be an opportunity for a hearing under the Fourteenth Amendment, because --

QUESTION: I asked was that a violation of the Eighth Amendment.

MR. ROGOW: No, sir, it is not a violation of the Eighth Amendment.

QUESTION: And the difference between that and this case is?

MR. ROGOW: Is the excessive and severe and brutal nature of the punishment which is imposed. I have said that we are not seeking to outlaw under Eighth Amendment concepts corporal punishment.

QUESTION: But you said punishment was the key.

MR. ROGOW: Yes. First one looks at punishment. If the punishment is excessive or severe, the Eighth Amendment may come into play. That is our Eighth Amendment argument.

In the Fourteenth Amendment context, one looks at punishment again --

QUESTION: Well, is the Fourteenth Amendment here?

MR. ROGOW: The due process argument.

QUESTION: Is here?

MR. ROGOW: Certainly.

If there is punishment that is to be imposed, what we are saying is there must be an opportunity for a hearing prior to the imposition of that punishment. Because there is both a liberty interest which I talked about yesterday and a property interest, which I want to be very clear on, is also

involved here.

James Ingraham was driven from that school by the paddle for over a week. Had he been suspended for over a week, he would have been entitled to a hearing under Goss vs. Lopez. He was in effect suspended by the paddle, so we have a property interest that is involved, in addition to a liberty interest.

One of the arguments that has been raised by Mr. Howard --

QUESTION: But you don't have the property interest involved in every case in which you contend procedural due process is required.

MR. ROGOW: No.

QUESTION: Because most cases would not involve the school absence.

MR. ROGOW: No.

Another argument that has been raised here is that these are matters that should be left to the public schools. We give wide latitude to the public schools in our argument, but there come moments when arbitrary decisions by governmental officers bring the Constitution into play.

Here the due process hearings that we ask serve as a protection. It provides rule by law and not rule by fiat, protects the individual against arbitrary action by the government.

These did not occur. These kinds of protections did

not occur in this case. There was no consultation with the principal, and even if there were consultations with the principal under Florida law, there is no opportunity to be heard prior to the infliction of any corporal punishment. And we are saying there is severe deprivations that are involved, and therefore there must be an opportunity to be heard.

QUESTION: Well, judging by your answer to Justice Marshall's question, a severe deprivation wouldn't be necessary if he's entitled to a hearing before he has one whack with a ruler.

MR. ROGOW: I'm saying that in our -- in a Fourteenth Amendment context, that is a deprivation of liberty because it involves an intrusion, a bodily intrusion, a deprivation of privacy, the resultant, as the district court judge found, of psychological harm, stigma, ridicule, all of that. And the facts of this case support that.

QUESTION: What, one whack with a ruler is a deprivation of privacy?

MR. ROGOW: It certainly is an invasion upon one's privacy and freedom not to be -- to have one's bodily integrity invaded by the government.

QUESTION: Not to be whacked?

MR. ROGOW: Not to be whacked.

QUESTION: Mr. Rogow, I think you agreed yesterday that there would be a tort action under Florida law against the

principal and teacher involved. Is there any reason to think that that wouldn't afford equally adequate relief to the individuals in question here?

MR. ROGOW: It might afford equally adequate relief, but Monroe vs. Pape says that is not the test. If there is --

QUESTION: I understand that. I was asking whether or not the Florida courts, if recourse had been sought there, would not have afforded adequate relief?

MR. ROGOW: It would be available in the Florida courts.

Children do not lose their rights at the --

QUESTION: Is the State law equivalent of the Federal Tort Claims Act in Florida?

MR. ROGOW: Not a State equivalent, the School Board can be sued, the individual teachers could be sued.

QUESTION: There's no immunity under Florida law?

MR. ROGOW: No. No.

But this case cannot turn on that issue. If, for instance, a prisoner were beaten and everyone concedes that that prisoner has the right to a hearing if he's being punished by 100 whacks with a strap, 100 blows with a strap, he could sue in State court or federal court; if there is excessive and severe punishment that violates a constitutional right, both courts are equally open. Monroe vs. Pape.

Children do not lose their rights at the schoolhouse

door. That was the effect of the Court of Appeals decision. It went much too far.

We submit that when children are in school, they are in custody of school authorities, of people acting under color of State law, and those persons are bound by the Constitution.

And for those reasons, the decision below should be reversed.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:36 a.m., the case in the above-entitled matter was submitted.]

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