In the

Supreme Court of the United States

RAYMOND K. PROCUNIER, ET AL.,

PETITIONER,

V.

APOLINAR NAVARETTE, JR.

RESPONDENT.

No. 76-446

Washington, D. C.
October 11, 1977

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RAYMOND K. PROCUNIER, et al.,

Petitioner,

v. Case No. 76-446

APOLINAR NAVARETTE, JR.,

Respondent

Washington, D. C.

Tuesday, October 11, 1977

The above-entitled matter came on for argument at 10:45 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:

SANFORD SVETCOV, Deputy Attorney General, 600 State Building, San Francisco, California 94102 For Petitioner

MICHAEL E. ADAMS, ESQ., La Casa Legal De San Jose, 1600 East Santa Clara Street, San Jose, California 95116 For Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 76-446, Raymond K. Procunier v. Apolinar Navarette.

Mr. Svetcov, I think you may proceed when you are ready.

ORAL ARGUMENT OF SANFORD SVETCOV, ESQ.,

ON BEHALF OF PETITIONERS

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

May I, at the outset, reserve five minutes of my time for rebuttal?

The question presented by this case is whether a complaint alleging that state prison officials negligently lost 13 items of a prisoner's outgoing mail in 1971 and 1972 states a cause of action under 42 United States Code Section 1983 of the Civil Rights Act.

This question reached this Court in the following way:

On January 4th, 1974, Respondent Navarette, with his present counsel, filed a second amended complaint in the United States District Court for the Northern District of California, solely for damages. He alleged that while he was a California prisoner in 1971 and 1972 at Soledad Prison, 13 items of his outgoing mail were not received by his addressees.

In his first and second causes of action, he alleged that the Defendant deliberately refused to send these letters either, one, in knowing disregard or two, in bad faith disregard of the prisoner's First Amendment right of free expression.

These causes of action are not before the Court today.

In his third cause of action, it is alleged that the letters were not received because the Defendant negligently and inadvertently mishandled the mail. It is this cause of action and only this cause of action which is before this Court today.

Now, there is one matter, Your Honor, I would like to set to one side at this time. There is a suggestion in Respondent's brief in this Court that the claim of mail loss involved or resulted in a denial of access to the courts as well as the denial of free expression.

That is not the case. I must point out that in the lower courts, Respondent expressly stated the following, and I quote: "The claim against mail interference does not purport to allege denial of access to the courts," and we take Counsel and Respondent at his word. He told us --

QUESTION: Where do we find that in the Appendix?

MR. SVETCOV: You find that in the record at page 17. It is not in the Appendix. It was not printed for the

Appendix but it is in the record that was sent from the Ninth Circuit to this Court.

It also appears in the reply brief in the Ninth Circuit Court of Appeals at page 7 and page 9. Now --

QUESTION: May I ask a question about that particular point?

MR. SVETCOV: Yes.

QUESTION: Does it really matter? As I understand your submission, it is that an allegation of negligence is insufficient under 1983. Are you suggesting there are different standards depending on what the Constitutional violation is?

MR. SVETCOV: I am not --

QUESTION: In other words, if it were denial of access to the courts, perhaps negligence would be enough?

MR. SVETCOV: Mr. Justice Stevens, I am not suggesting that at all. I am just trying to clear up a matter that seems to have reappeared in the briefs in this Court that I thought had been cleared up earlier and was not before this Court and I want to make that clear, that a denial of access is not the question here.

QUESTION: But your basic position is that even if it were before us, your argument would be precisely the same?

MR. SVETCOV: Correct.

QUESTION: Well, Counsel, are we focusing here on

some sort of a gloss that is added to the burden of proof of a Plaintiff because the action is brought under 1983 or should we focus on the definition of the Constitutional right itself?

Supposing this case had been brought in the Superior Court of California where you do not have to rely on 1983 to be accorded general jurisdiction? Would your argument be the same?

MR. SVETCOV: No, California has a procedure for suing public officials who act negligently and so, in tort law and it would not be a Constitutional cause of action at all.

QUESTION: Well, but could you not assert a 14th Amendment claim in the Superior Court of whatever county Soledad is located in?

MR. SVETCOV: As a matter of fact, Your Honor, the California Supreme Court has held in the last two years that they have concurrent jurisdiction under Section 1983 and would entertain -- and the state courts may entertain 1983 causes of action in the state courts.

QUESTION: Yes, but does it take 1983 to enable a superior court to entertain a Constitutional cause of action?

MR. SVETCOV: Probably not. I think there would be independent state causes of action available.

QUESTION: What do you conceive to be the Constitutional right that the Respondents assert here?

MR. SVETCOV: The Respondents assert an inmate's right of free expression in the mail. I have to remind the Court again and again that it is the inmate who is bringing this suit. It is not the addressees and that kind of gets me to the second part of my argument now but the point we make in the second part of our argument in our briefs is that in Procunier versus Martinez in 1974, this Court did not find a right of free expression in the inmate, it found a right of free expression in free person correspondent.

Now, if the free person correspondents were bringing this suit, perhaps we would have a different case insofar as what the Constitutional right was that was involved. We may not have a different case insofar as whether negligence or intent is before us.

QUESTION: What if we were to decide in this case that the point reserved in Justice Powell's opinion in Procunier against Martinez should be resolved in favor of the Respondent, that is, that there is a right of inmates to communicate by letter. Do you think that Constitutional right would be violated if a prison truck carrying mail down to the local Post Office negligently went off the road?

MR. SVETCOV: Absolutely not, Your Honor.

QUESTION: Yet that does not turn on anything to do with 1983. That turns on a definition of the Constitutional rights, does it not?

MR. SVETCOV: Well, my understanding of 1983 is that you do not state a cause of action under 1983 unless you can first find the Constitutional deprivation.

QUESTION: What would happen if the truck went off the road every day accidentally?

MR. SVETCOV: Your Honor, I think that if the truck went off the road every day.

QUESTION: Accidentally.

MR. SVETCOV: Accidentally. That a cause of action could be stated under Your Honor's formulation in Estelle versus Gamble, that that might constitute sufficient evidence to support a claim of deliberate indifference and Respondent here has two claims of intentional tort of deliberate refusal, of deliberate indifference under which he may attempt to assert that what happened to him constitutes that.

QUESTION: How many times was his mail negligently not delivered?

MR. SVETCOV: The allegation in this complaint is that 13 items of mail, over a period of one and a half years, were not delivered. I should point out, Your Honor, that the record in this case showsthat over 150 pieces of special-purpose mail, that is, mail to attorneys, reporters, courts, public officials were mailed on behalf of the Respondent and this is in addition to routine correspondence to family and friends of which no record is kept in the California prison

system, so what we are looking at is 13 pieces of mail out of at least more than 150 that records were kept of; we do not know how many more of which no records were kept.

Your Honor, in a case I tried in the U.S. District Court two years ago concerning San Quentin Prison, a prison comparable, in fact, to Soledad, the record was undisputed that over 3,000 to 4,000 pieces of mail were handled per day.

If you translate that into a year and a half, you are talking in excess of one and a half million pieces of mail and all we have a complaint of in this case is that 13 pieces were lost in that period.

Thirteen out of one and a half million is a very small fraction. We have no other allegation in this complaint that any other prisoners were subjected to this.

QUESTION: But that is admitted. For the purpose of this case, it is admitted.

MR. SVETCOV: That 13 pieces were lost. Negligently. Yes.

Let me get back to my discourse.

QUESTION: Before you get back, would you say, would you approach this case on the assumption that 13 pieces were lost negligently?

MR. SVETCOV: That is the allegation in the complaint.

QUESTION: Would you say it was just through

negligent conduct in the sense that, such as Mr. Justice Rehnquist was suggesting, that they just negligently lost them in a truck somewhere or in a fire or -- is that what you are saying? Would you approach it that way?

MR. SVETCOV: Well, let me quote from Respondent's brief in this Court?

QUESTION: Or that he thought he was following a regulation and just misread it?

MR. SVETCOV: Well, in this Court, Respondent states the following, that the mail was "unaccountably lost or mislaid due to inadvertent mishandling."

QUESTION: So it is sort of -- it would be an unconscious act of which -- just a negligent act?

MR. SVETCOV: All right, there was one piece of mail on which he makes a specific allegation that it was refused mailing and that then a reason was given for the refusal but I find that not to bear on this negligence claim because there was a deliberate refusal and a reason was given. That does not fall within our negligence cause of action. That falls within the deliberate cause of action.

QUESTION: But if you read page 12 of the Appendix at paragraph two of the third cause of action it says, "Defendant negligently and inadvertently misapplied the prisoner mail regulations.

MR. SVETCOV: That is correct, Your Honor.

QUESTION: It seems to me you could, under the rules of pleading, show that they refused to mail that because they did not properly understand the regulations, rather than that this got left in a drawer when everybody else's mail went ahead.

MR. SVETCOV: Well, Justice Rehnquist, that might be true in the ordinary case where only one cause of action was alleged but the fact is in this case, three causes of action are alleged with respect to the mail and in the first two, the allegations are that there was a deliberate refusal to send the mail, deliberate refusal.

Now, in the third cause of action, the allegation is a negligent and inadvertent mishandling and misapplication of the regulations but I take that to mean pure carelessness, not that they misunderstood the rules. I took that to be what was happening with respect to the deliberate refusal.

QUESTION: Mr. Attorney General, you are reading the brief rather than the pleading. As Justice Rehnquist points out, the language is, "Practum is a result of interference with or confiscation of such correspondence by reason of negligent understanding of the rules" and so forth. The word "confiscation and interference" certainly is not just ordinary mishandling, is it? That is not a truck going off the bank of the river or whatever you want.

MR. SVETCOV: Well, Your Honor, as I understand

these three causes of action, as they have been pleaded through four complaints in the lower courts, they were dealt with below as two causes of action for deliberate refusal, the third cause of action for negligent loss of the mail.

That is the way they have been dealt with below. This is not a Haynes v. Koerner situation where Respondent does not have counsel. He has counsel. Counsel was the same counsel throughout, from the Second Amendment complaint on and I have to take counsel at his word that what he means by his complaint is that the mail was unaccountably lost or mislaid by inadvertent mishandling.

QUESTION: Do you think we should look at the brief rather than the pleading itself? Isn't the test still the test under any conceivable facts can be shown under the pleading that will entitle him to relief and so forth and so on?

MR. SVETCOV: If -- under any conceivable fact, if the allegation is confiscation, it seems to me that confiscation can be dealt with at trial under twin allegations that are not before this Court, namely, deliberate indifference.

QUESTION: Well, but it is negligence in the sense that he did not study the regulations and realized that this was not the kind of mail he was supposed to refuse to deliver?

MR. SVETCOV: Well, that --

QUESTION: It would be, the particular act was

intentional, but the negligence is in failing to study the regulations and then there is a second allegation about negligence in the supervisors not training their people and how they handled the mail. That is not the kind of negligence you are talking about with a truck going off the road, is it?

MR. SVETCOV: Well, that is the kind of negligence which the Court of Appeals held stated a cause of action and that is the kind of negligence we took in our petition to certiorari to this Court to ask this Court to say does not state a cause of action.

QUESTION: Well, Mr. Svetcov, let me interrupt you once more and then I will try to keep my mouth shut because I have taken more of your time than I should. Isn't it possible that the Court of Appeals could be wrong and yet this part of the complaint stay the claim for relief?

MR SVETCOV: Only if it was construed to state a claim for relief for deliberate indifference and that the confiscation was repeated, was so repeated as to constitute a deliberate indifference to the right of free expression.

But to say that an act of inadvertence and mistake is -- constitutes a constitutional deprivation as opposed to a tort, I have difficulty with construing it as a constitutional deprivation.

My point is that if it happens often enough as alleged, the answer is the causes of action and deliberate

indifference recognized by the Court.

It is not in a windfall cause of action in negligence. In other words, negligence is traditionally dealt with in tort law.

Let's put ourselves in the area of injunctive relief. I suppose that if Respondent was seeking an injunction, he could, by requesting a simple order, do away with an entire body of tort law. All public officials will be told, "Thou shalt not be negligent" and I am sure that a district court could enter such an order, but whether such an order would be efficacious is doubtful and the point I am making is that it seems to me that 1983 is a deterrent statute and not a compensation statute and the deterrence that it is aimed at is the deterrence of deprivations of constitutional rights.

QUESTION: That you should not destroy this man's mail, negligently or non-negligently. What is wrong with that? And I use the word "negligently" as you used it, which is not the way I use it.

MR. SVETCOV: Your Honor --

QUESTION: Well, tell me, what do you mean by, in this case, what was the negligence?

MR. SVETCOV: The negligence, as I understand it, is the unintended -- unintended conduct which resulted in a loss to the Plaintiff, unintended.

QUESTION: Well, what about those words? There is no "unintended" in those words. It is deliberately. Is that not what you add up to?

MR. SVETCOV: The allegation in causes of action one and two is deliberate. The allegation in cause number three has not been construed to be an allegation of deliberate refusal. It has been construed to be an allegation of neglicence.

QUESTION: Negligent in understanding the statute? Understanding the rules? Or negligently going to sleep? Or negligently driving off the road?

MR. SVETCOV: The complaint alleges negligent and inadvertent misapplication of the rules.

QUESTION: Do you put inadvertence in the same place as negligence?

MR. SVETCOV: I put it in the same place because that is the allegation in the complaint. The complaint says that the Defendant negligently and inadvertently misapplied the prisoner mail regulations and as I understand "inadvertent --"

QUESTION: Negligently -- look, well, let me understand this. The man says, Here is a letter written to his lawyer and the man "Negligently misunderstands the rules and burns that letter up." Is that negligence?

MR. SVETCOV: He burns it up?

QUESTION: Yes. Is that negligence?

MR. SVETCOV: No, that is not negligence.

QUESTION: Well, is that possibly what you are talking about here?

MR. SVETCOV: I do not think that is what they are talking about at all.

QUESTION: They could be though, could they not?

MR. SVETCOV: I have to take counsel at his word when he says --

QUESTION: Well, he said --

MR. SVETCOV: -- it was unaccountably lost or mislaid due to inadvertent mishandling. He is not talking about burning it up, Your Honor.

QUESTION: He said, "Negligently on the rules." What did he say about --

MR. SVETCOV: He said, "Negligently and inadvertently misapplied the rules."

QUESTION: That is not negligence, as I understand it.

MR. SVETCOV: Well, Your Honor, that may well be true but the point is, that is the understanding --

QUESTION: Do you understand that he violated the rules inadvertently?

MR. SVETCOV: And unintentionally, yes.

QUESTION: But he did violate the rules?

MR. SVETCOV: That appears to be the case, or at least he misapplied them. Whether violated and misapplied are the same thing, I do not know. He may have applied a different rule -- a rule to the wrong type of mail. That is one way of construing it.

QUESTION: At a trial we would have found all that out, would we not have?

MR. SVETCOV: At a trial we will still find it out because there can be a trial under the first and second causes of action, Your Honor.

QUESTION: Does the single question on which we granted certiorari -- there was a limited grant, was there not?

MR. SVETCOV: There was a limited grant.

QUESTION: Does that include the question of whether there, indeed, is a constitutional right with respect to the mail?

MR. SVETCOV: Let me --

QUESTION: Or do we adjudicate this case on the assumption that there was a constitutional right which the prison guards should have known?

MR. SVETCOV: Well, the certified question reads as follows, Mr. Justice White, "Whether negligent failure to mail certain of the prisoner's letters states a cause of action under Section 1983?" This was addressed to the

determination of the Ninth Circuit.

QUESTION: So you think, then, arguably, anyway, the case involves the question of -- even if there was a deliberate loss here, a deliberate refusal to mail, that whether or not the state is liable because no adjudicated right in the mail had ever -- would have been known by them?

MR. SVETCOV: Oh, yes, that is correct. That is our position.

QUESTION: And is that issue here, do you think?

MR. SVETCOV: That issue is here insofar as the negligence claim is concerned because even as to the negligence claim there must be an underlying constitutional deprivation and regrettably, Your Honors did not certify the first two questions because we would have welcomed -- we would be happy to be here arguing that there was no First Amendment deprivation in 1971 and 1972 even if there was deliberate refusal to send the mail.

QUESTION: Well, did you argue that in your brief?

MR. SVETCOV: Well, we argue it, but we do argue it as a backstop to the negligence point.

QUESTION: Well, that is subsumed in the question, is it not?

MR. SVETCOV: That is subsumed in the question certified.

QUESTION: If a deliberate interference with the

mail would not constitute a constitutional violation, then, of course, the a fortiorari one does not. That is your point, is it not?

MR. SVETCOV: That is absolutely correct.

QUESTION: And even if a deliberate loss of the mail would be a violation of a constitutional right, it may be that they might not be liable because the right had not been adjudicated.

MR. SVETCOV: That is absolutely correct and that is what Your Honor said in Procunier versus Martinez, that prior to that case, the state of the law as to prisoner mail was totally uncertain, that prison officials had no basis for knowing what to do with it and it seems to me that Procunier versus Martinez applies precisely to our defendants.

How are they expected to anticipate this Court's decision in 1974?

QUESTION: So if we agreed with you on that particular point, we would need to get any farther with how much 1983 deals with just mishandling

MR. SVETCOV: That is correct.

QUESTION: Then we would not get to the point of the question of whether there is, in fact, the underlying substantive constitutional right, because at least it had not been enunciated prior to this decision.

MR. SVETCOV: That is right. That is right. You

could resolve the case that way. Now, we had hoped that this case would be decided upon in the lead point, whether, under any circumstances, negligence, negligent action could invade a constitutional right and our position on that, as stated in our brief, is that it cannot and should not.

QUESTION: Of course, another way of putting that might be that some constitutional rights are rights against deliberate action, that the right itself is against deliberate action, not against negligence.

MR. SVETCOV: Well, you know, Your Honors have cited a number of cases about a number of constitutional rights and I can think of no case yet decided by this Court where you did not require some sort of intent and I am thinking of Washington versus Davis, where you say there has to be a purposeful denial of equal protection.

I am thinking of Estelle versus Gamble. There has to be a deliberate indifference before you can have cruel and unusual punishment.

I am thinking of the whole body of Fourth Amendment law. All illegal arrests and illegal searches and seizures are deliberate acts.

In Bishop versus Wood, Your Honor, in the Due Process case involving the employer and their employee, that Justice Stevens read, my recollection of your language is that the Due Process Clause was not to be used as a means for

federal courts to resolve all mistakes by public officials, that there has to be some sort of motive to deprive of a right.

QUESTION: Suppose -- if a mail truck negligently hit somebody on his way to church, he would hardly have a claim that the government had interfered with his free exercise of religion.

MR. SVETCOV: Well, that reminds me of some hypotheticals in Amicus' brief. The first hypothetical was that if a prisoner was walking across the exercise yard and negligently run down by a truckdriver, that, he would concede, did not state a cause of action but somehow if the prisoner was walking across the yard and was on his way to church, that would invade his First Amendment rights to worship and I simply cannot see that unless the truck driver knew that the fellow was going to church and ran him down, how the First Amendment right could be implicated.

QUESTION: Ran him down deliberately.

MR. SVETCOV: Right, ran him down deliberately.

QUESTION: Not negligently.

MR. SVETCOV: Not negligently. He couldn't -- if he knew of the right and he ran him down, I think an inference would be drawn.

QUESTION: Well, if he did it deliberately, you do not need to call on the First Amendment, do you?

MR. SVETCOV: We could try him in state court for

murder, Your Honor.

QUESTION: What if he just did not like the guy -- he was not trying to prevent him from going to church, he just wanted to kill him?

MR. SVETCOV: We would try him in the state court for murder.

QUESTION: Would there be a 1983 cause of action for violation of his religious freedom?

MR. SVETCOV: As I understand this Court's decision, there has to be a combination of an intent to do the act and a consciousness in some fashion that a constitutional right would be implicated.

QUESTION: Well, what about taking somebody's life in the course of your official duties on purpose?

MR. SVETCOV: You know, the debates on this Act considered that in connection with Section two of the Ku Klux Act. If you recall, the original version of that Act listed a certain number of crimes, murder, mayhem, assault with respect to the Ku Klux Klan and the opponents pointed out that the Due Process Clause has never been sought to protect life, liberty or property, that those kinds of action were --

QUESTION: Would you say that a prison guard who beats up a prisoner is not violating 1983?

MR. SVETCOV: Intentional -- if cruel and unusual punishment is indicated.

QUESTION: Now, the Screws case said the only way it could apply is for the guard to say as he was shooting him that "I am shooting you to deny you your constitutional rights." That is what this Court said in the Screws case.

Am I right?

MR. SVETCOV: It said that the word "willfully" in Section 242 of 18 U.S. Code required proof, either by direct or circumstantial evidence that the Defendant intended to deprive the victim of a constitutional right.

QUESTION: Which means he had to say as he was shooting him, "I am shooting you for the purpose of denying you your rights."

MR. SVETCOV: Well, he has to either say that or have told someone that on his way to the shooting.

QUESTION: Or written a letter.

QUESTION: Well, let us say that it is perfectly clear that he deliberately -- a state officer deliberately murders some person he just arrested. He just does not like him. Is that a deprivation of life without due process?

MR. SVETCOV: No, I do not think so. I do not think this Court has ever held that and I do not think that the debates about the --- surrounding --

QUESTION: But if he deliberately took his life to keep him from going to church, it would be a 1983 Act?

MR. SVETCOV: In addition to the murder cause of

action in the state courts.

QUESTION: I know. I am asking about the 1983 Act.

MR. SVETCOV: I understand that, Your Honor. I think it could --

Thank you, Your Honor.

QUESTION: May I ask you one question on your b brief?

MR. SVETCOV: Certainly, Justice Stevens.

QUESTION: Do you think there is a difference between a negligence case involving a truck going off the road, say, and losing the mail for the reason and a negligence allegation such as one may read this complaint as making in which the negligence alleged is that the officers did exactly what they thought they were supposed to do and the particular acts they did were deliberate in that sense, but there was negligence either in their failing to read their regulations or in their superiors in instructing them.

Is this case the same as, in your view, as the case involving just sloppy handling of the mail?

MR. SVETCOV: Well, you know, that truck driver thought he was doing the right thing just before he went off the road, too. He thought he was driving a beautiful automobile. He thought he was --

QUESTION: You think it is the same?

MR. SVETCOV: I think it is the same.

I have been thoroughly distracted from my argument, Your Honor, but I feel that all the points I wanted to cover have been covered.

QUESTION: That often happens here.

QUESTION: That is a great tribute to your questioners, you know.

MR. SVETCOV: Thank you very much, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Adams.

ORAL ARGUMENT OF MICHAEL E. ADAMS, ESQ.

ON BEHALF OF RESPONDENT

MR. ADAMS: Yes, sir.

May it please the Court:

I would like to say initially that we are premature in standing here before you for the reason that we have not yet had our trial. We have not yet developed a sufficient record to provide this Honorable Court with the detailed information, the factual predicate to reach a determination about whether and to what extent negligence can stand as a cause of action for First Amendment violations.

With the record --

QUESTION: But you are not premature in the sense that the Ninth Circuit held that there was a constitutional violation, under some circumstances, for failure to allow a prisoner to send mail out of the prison and that 1983

authorized the statement of a claim for the violation of that right negligently.

MR. ADAMS: Well, the Ninth Circuit, in reaching that determination, was applying existing law that many other circuits -- indeed, almost all of the other circuits had already reached similar decisions with respect to it and it was not purporting to -- well, did not carry the, if you will, the burden on its shoulders that I would believe that this Court does.

If this Court wishes to resolve an area that is, to some extent muddied and may call for some clarification, then it would simply seem to me appropriate that Your Honors have the benefit of a full and complete record indicating just what was going on in relation to the regulation of mail from Defendant Procunier on down to the mailing room clerk, how was responsibility distributed? Who was acting? Who was failing to act and with what degrees of intent?

We could have anything here from inadvertence to gross negligence to recklessness to deliberate conduct and on the other end of the extreme, of course, it could be found --

QUESTION: With regard to deliberate conduct, Counselor --

MR. ADAMS: I am sorry, Your Honor?

QUESTION: Insofar as the conduct may have been

deliberate --

MR. ADAMS: Yes?

QUESTION: -- that is covered by your first two causes of action.

MR. ADAMS: Exactly.

QUESTION: Which are not in issue here.

MR. ADAMS: That is correct, Your Honor. But if we -- I guess that is --

QUESTION: In the present posture of the case, there is no question. However, if this Court decides this case that you have got to remand for a trial on your first two causes of action, that is clear, is it not?

MR. ADAMS: Yes, Your Honor, that is clear and in a way, that stands as an argument, at least from the standpoint of judicial economy, for making the remand now and watching the case and considering the bringing of it back once the trial has been had and sufficient record developed so that a more decisive and clear -- a more effective standard that would be more meaningful and provide more guidance to the other circuits could then be devised.

QUESTION: Mr. Adams, don't you think we realized that when we voted to take this case?

Well, could you not assume that and proceed with your argument?

MR. ADAMS: Certainly, Your Honor. Let me just

pass down that initial point --

QUESTION: And save the judicial time.

MR. ADAMS: If it is the wish, then, of the Court to reach a determination, then, at this point with respect to negligence, let me say that there are two basic reasons that it seems to me that negligence should be allowed as a cause of action in respect to the First Amendment and they go to the purposes of that Amendment, the purposes that Congress had in mind, those purposes being, as I understand them, deterrence in compensation.

In dealing first with deterrence, this Court carefully explored the question of the extent to which compensation should be provided and the extent to which immunity should be allowed to state officials in relation to conduct involving the exercise of discretion and in the cases of Scheuer v. Rhodes and Wood v. Strickland, that I am sure Your Honors are extremely familiar with, that balance was struck with a certain degree of deference given to the importance of state officials engaging in decisive action and acknowledgement that the public interest called for that.

Now, what we may well have here on the part of those officials who were exercising discretion in relation to the regulation of prisoner mail is a failure to act, an abdication from the exercise of any discretion whatsoever, a failure to look at the options and if Petitioner's request is

honored by this Court and if the opportunity to obtain money liability against such state officials as those is the effective result of a determination by this Court, that, in effect, is granting absolute immunity for a complete abdication. It undercuts the very moving rationale of Scheuer v. Rhodes and Wood v. Strickland.

If we look for a moment for guidance to the common law, as this Court has in deciding immunity questions in relation to 1983, we will find that the common law, when it deals with conduct that is not the exercise of discretion but, rather, ministerial in character, liability and negligence is generally allowed. This is the prevailing rule. And, indeed --

QUESTION: Are you talking about the contours of the First Amendment rights or about some limitation that 1983 puts on the First Amendment right?

MR. ADAMS: I am talking about the limitations that 1983 would put on litigation under any constitutional guarantee, including the First Amendment. In other words --

QUESTION: You think, then, if you had brought an action in the Superior Court of California under the Constitution, assuming you could do that, where you were not limited by whatever limitations 1983 may impose, that there would be no question that you could recover, say, for a negligent failure to get the mail out of the prison as the

result of a truck accident?

MR. ADAMS: If we assume, in your hypothetical, Your Honor, that common law immunities and limitations to those common law immunities as established, for example, in California, governed, yes, I would have no problem with the immunity because we are dealing with negligence, at least in the form of failure to act -- inadvertent failure to act.

We are not talking about the exercise of discretion and California has made perfectly clear, in the case I have cited in my brief, Johnson v. State, that even where discretion ought to be exercised but in the actual fact of the instance that caused an injury, it was not, then the immunity that ordinarily would enclose that particular official or the governmental entity that he represents, is not available and that official stands fully exposed to negligence liability as though the act were ministerial from the outset.

QUESTION: Well, what if you have a situation where the city has a park with an amplifier system that it makes available to all sorts of political groups and you represent a group that has had the park made available to it and the amplifier system breaks down due to failure of proper maintenance on the part of the city. Is that a violation of your group's amendment rights?

MR. ADAMS: Okay, I would say not, Your Honor.

QUESTION: Why is that different from the mail truck running off the road?

MR. ADAMS: Well, let me answer that in two ways. First of all, let me say at the outset that I quite agree with certain of the questions of the Court's that were addressed to the Petitioner, that my third cause of action deals with misreading of the regulations and it does not purport to include factual inadvertence by subordinates -- you know, subordinate prison officials such as posed in that mail truck hypothetical.

In answer, however, to your hypothetical, and also to a situation of misreading of regulations such as directly raised in my third amendment, third cause of action, I think we need to look at the overall course of action, the overall pattern or implied policy that is being pursued by the subordinate officials to decide if there is liability or not.

In other words, there is a balancing test that needs to be undergone and we need to look at the severity and degree of the harm that is being risked to the people, you know, who are subject to the power of that particular governmental official and I would concede that an isolated instance of inadvertent conduct by an official who is otherwise prudent, you know, who is not an official who engages habitually in careless conduct, be that careless misreading

of regulations or be that being careless in driving the mail truck down the road, then there is no liability under 1983 for such an official.

QUESTION: Is there any carelessness under 1983, though?

MR. ADAMS: Well, indeed, I would believe that there is, Your Honor. I -- as I have sought to contend --

QUESTION: Well, certainly, 1983 was a Ku Klux Klan Act --

MR. ADAMS: Yes.

QUESTION: And they were not careless.

MR. ADAMS: Certainly not but the governmental officials who failed to track down and bring the Ku Klux Klanners to justice many times were and this is something that was squarely in the minds of the members of Congress who were debating that act.

QUESTION: It was?

MR. ADAMS: And I have quoted in my brief, Your Honor --

QUESTION: Yes, I read that.

MR. ADAMS: -- certain places where it is quite --

QUESTION: There is quite a lot on the other side, too.

MR. ADAMS: Well, I do not mean to take up the Court's time with quotes. I probably, as an upshot of the

legislative history --

QUESTION: Well, why would --

MR. ADAMS: It is rather ambiguous. Quotes can be raised from both sides and I think we need to look at the current position to decide --

QUESTION: What about the mail truck question? The mail truck deliberately runs up on the curb and hits somebody.

MR. ADAMS: Well, it depends on whether that person has a constitutional right --

QUESTION: He is a careless driver. That is the 14th time he did it.

MR. ADAMS: Okay.

QUESTION: Does that violate 1983?

MR. ADAMS: I think probably not, Your Honor. Now, the distinction I want to make in answer to your hypothetical is that if there is no constitutional right involved, it is a matter for the state courts.

QUESTION: Well, to get neared to that, if he drives the truck up on the curb 13 times in a period of two years and hits somebody.

MR. ADAMS: Well, if those 13 times were each time directed at picketers, let's say, who were exercising their First Amendment rights along the sidewalk, yes. There we have a course of conduct and even if --

QUESTION: By the mail truck driver?

MR. ADAMS: If he is using a governmental instrumentality to interfere with First Amendment rights, I think we would have a 1983 cause of action but if they were simply pedestrians or people that he did not like --

QUESTION: And all he did was, he ran through a red light.

MR. ADAMS: Well, I would adhere to the distinction of an isolated instance versus a course of conduct.

QUESTION: What my real problem is --

MR. ADAMS: Although that really seems as though it is intentionality in your hypothetical.

QUESTION: From what you say, you want to prove that these people deliberately denied him the right because they did not understand the regulations. Whatever you are trying to say, why did you not say it? We are stuck with your language.

MR. ADAMS: Why did I not say it in the complaint?

QUESTION: Or, why did you say that you were only talking about negligence?

MR. ADAMS: Because the -- from the two items of mail where there are any facts at all in regards to what happened, it would appear that what occurred was just a blatantly negligent misreading of the applications.

We have eight items of mail that were returned to

Mr. Navarette from the correctional counselors named in the complaint and why did they return that mail to him? Because the mail was not legal, not business and not personal they said, in their note to him.

Now, that had absolutely nothing to do with the regulations --

QUESTION: Is that in this record? I saw one. That is all I saw. Did I miss --?

MR. ADAMS: It is not in the record before Your Honor now. It is not here and I can give you --

QUESTION: I am not talking about that because I have not seen that.

MR. ADAMS: Okay, I believe this is physically in the clerk's office.

QUESTION: All right. I do not go and read them all until after the case is argued.

MR. ADAMS: Yes, Your Honor. It is not in the Appendix that has been printed by the Court.

QUESTION: But you did say that all you are talking about is negligence. And to me, negligence means going through a red light. To me, when you say negligence I do not get the idea that you mean that somebody deliberately misread rules or regulations.

MR. ADAMS: Certainly not deliberately misread rules and regulations and if that is what we have, then my

existing causes of action that are not before this Court would cover the matter but if, on the other hand, we have a sloppy misreading of the regulations or sloppy practices in terms of unwritten -- you know, the unwritten supplemental rules that may well exist at the Soledad Prison level that I do not know about yet because all I received in the summary judgment motion were the statewide regulations that Procunier himself drafted.

I don't know what existed at the state -- at the prison level but there may well have been negligent misinterpretation of things there.

Their refusal to send the packet of draft writs of habeas corpus in December of 1971 after the prison law project may well have been a negligent misunderstanding by the mail room clerk as to his duties in the matter.

QUESTION: Isn't part of your problem here an effort to plead a 1983 complaint out of a personal injury form book, really?

MR. ADAMS: I do not think so, Your Honor. Certainly, no personal injury form book was used by me in drafting this complaint. It was an attempt to match the law under 1983 with the facts of this case as I understood them.

QUESTION: Mr. Adams, as I have understood what you have said, you agree that an isolated act of negligence would not implicate Section 1983.

MR. ADAMS: That is correct, Your Honor.

QUESTION: In this case, as I understand the facts, 16 or 17 items of mail were not delivered whereas --

MR. ADAMS: Twenty-five items, Your Honor.

QUESTION: Twenty-five? I thought the other counsel said 17.

MR. ADAMS: He miscounts.

QUESTION: Well, how many were delivered? I will ask you to answer that.

MR. ADAMS: How many were not delivered?

QUESTION: No. Well, you told us 25 were not delivered.

MR. ADAMS: Yes.

QUESTION: How many items of this type mail were delivered?

MR. ADAMS: Opposing counsel is correct on that when he says something over 150. By my count, it would indicate 160 to 170. There is a rather illegible mail log that was supplied by Petitioner at the time of summary judgment that is part of this record and it is difficult to count from it but it is something over 150 so we are talking about one in six or one in seven of this man's -- a ratio of one to six or one to seven of this man's mail were interfered with.

QUESTION: Your position, then, is that 25 acts of negligence out of 160 -- 175 constitute a course of conduct?

MR. ADAMS: It may well, Your Honor. At this po int I do not know. I need to find out. This is simply another reason why we have an insufficient record to, in my view, for the Court to make a determination.

You know, we are not talking about a concept that can either be plugged into 1983 or taken out of 1983 whole cloth. We are talking about a concept of reasonableness in relation to risk of harm to others that is already interwoven with the decisions of this Court, particularly the qualified immunity decisions, that depends on the meaning of particular amendments and I would point out to Your Honors that a decision in favor of Respondent's position here does not open any Pandora's Box for a greater volume of cases because we are talking about a decision similar in relation to the First Amendment.

QUESTION: Well, I thought, Counsel, that the Court, in narrowing the question as it did, it was trying to pass on what the Ninth Circuit's opinion said his allegations, your client's allegations --that state officers negligently deprived him of those rights state a 1983 cause action and that that is the only issue in the case, not what kinds of acts or negligence or not, that is for the trial. But whether negligence -- the question here is whether negligence is ever covered under any circumstances by 1983, at least under the narrow, limited question under which the review was

granted.

MR. ADAMS: Yes. And my answer, in brief, to that, Your Honor, would be that there is no bar within the intrinsic meaning of the First Amendment to negligence such as there is in the Eighth Amendment. Intrinsically, that calls for a deliberate indifference standard.

The 14th Amendment, Equal Protection, for example, I would agree with Counsel that this Court has found a requirement of intent on the part of the acting state officials intrinsic in that particular constitutional guarantee.

However, when we look at the First Amendment --

QUESTION: It uses the word "shall," which is a sort of intent. The 14th Amendment uses the word "shall."

MR. ADAMS: Yes, and that language of the 14th Amendment, you know, is consistent with the decisions of this Court and supports a meaning of intent.

Not all constitutional guarantees are framed in terms of the state of mind of the acting state official and the First Amendment is one of those that does not. If Your Honors would consider cases like Edwards v. South Carolina and Finer v. New York, cases that involve, you know, police conduct with situations that are unruly, possibly involve disturbing of the peace. We have a speaker or some marchers exercising First Amendment rights.

The question about whether First Amendment rights

were involved there or not does not turn on the state of mind of the police official. It does not turn on whether he was exercising the utmost diligence in protecting their rights or whether he was a little bit reckless or negligent or whatever you might say in regard to those rights.

It does not turn on that, but rather, the independent examination by this Court of the record so we are not talking about an intent obstacle in the First Amendment.

QUESTION: Well, the First Amendment says "shall" also, does it not?

MR. ADAMS: Well, it says "There shall be no law."

QUESTION: It says, "Congress shall make no law."

MR. ADAMS: But when we go beyond the making of the law --

QUESTION: "Abridging the freedom of speech or of the press." It says "shall," the same as the Equal Protection Clause.

MR. ADAMS: In relation to the initial maker of the law, but then those laws are applied and --

QUESTION: Of course, if we wanted to be completely literal, this would not be a First Amendment case at all because it does not involve Congress at all, does it?

MR. ADAMS: Well, that is correct, Your Honor.

QUESTION: Mr. Adams, I wonder --

MR. ADAMS: Yes, Your Honor.

QUESTION: -- Mr. Justice Stewart focuses on the words "make no law." Is part of your submission that in the negligent application of a regulation you are talking about a law, a legal rule as applied to your client? It does not really make much difference whether the law is drafted to say, "This mail shall be destroyed" or if in a practice repeatedly, they destroy certain kinds of letters. That is is in the nature of a law abridging the freedom of expression as applied to your client whereas when a truck goes off the road, it is not even arguably law abridging anybody's freedome of expression.

Is that the distinction you were seeking to draw?

MR. ADAMS: Yes, Your Honor, I would be in agreement with that and I seek to provide a comprehensive opportunity for my client to prove import, that in one way or another, in the intentional -- whether through the deliberate drafting of the law or whether through a negligent follow-up in the preparation of those regulations, be that a follow-up on the part of the supervisory defendants in failing to train or supervise or get feed-back from the defendants on the line, so to speak, in terms of mail evaluation or negligence in terms of the defendants on the line in terms of trying, with some modicum of prudence and diligence, to be consistent, you know, to follow what would at least be a reasonable meaning of those regulations, then those rights have been violated.

There are a few other points that I would like to briefly advert to that arose in the questions of the petitioning attorney.

First of all, briefly, in relation to the right of access, I say at length in footnote two, page three of my brief, why I now press it even though I did, now, in retrospect, inadvisedly concede the right of access in written argument, both before the District Court and the Court of Appeals.

In terms of the coverage, the constitutional coverage of the conduct here involved, the sending and receiving of -- well, the sending of mail -- the First Amendment free expression, as I see it, is completely coterminus with the right of access.

The distinction, then, the materiality of the right of access has to do only with the history of the development of these rights; the right of access is an older right and has a longer history to it.

That distinction, in my view, became more material when Wood v. Strickland was decided because I talked about subtle constitutional rights and I think there is -- well, there is -- if this Court were to take Petitioner's view that only a decision by this Court itself were to establish a right to be settled within the meaning of Wood v. Strickland, then, obviously, I am out in the cold as far as free

expression goes because, although, as I have argued in my brief, there were some District Court decisions that, in my view, reasonably and very clearly let Defendant Procunier know, he being party in a couple of those suits and as well as some of the other defendants know that there was prisoner free expression already, reasonably in advance of 1971-1972, there is no decision by the Court until Martinez v. Procunier, where there was the beginning of acknowledgement of that right and in Pell v. Procunier very shortly thereafter where it was made express that, indeed, prisoners have a certain measure of First Amendment free expression.

In terms of right of access, Johnson v. Avery was decided much earlier and that could have been a foundation for at least that right so indeed, candidly, I made the concession before.

If the Court wants to deal with the question that, really, I think is not properly before this Court as a matter of the question on which cert was granted -- but if the Court should wish to deal with it, I would suggest that it might be in the interest of making a decision that gives good guidance to the Circuit Courts and the lower Federal Courts that will be reading this decision to look at all the rights that the facts fairly raise and I think that the facts do fairly raise right of access as well as free expression.

There is another question that may be in the minds

of this Court in relation to the allowing of negligence that I would like to address myself to briefly and that is whether the relief that might be available in state court is not really sufficient for the kind of harm that we are speaking of here and I would suggest to Your Honors that it is really not, that we need a federal forum, the forum of 1983 and a federal perspective in order to properly grant compensatory relief because we are talking about different interests, not just common law interests, you know, injury to person, injury to property.

We are talking about constitutional interests and as Justice Harlan said very eloquently in his concurring opinion in Monroe v. Pape, those interests are fundamentally different in character and often would call for a different measure of damages in order to provide compensation.

For example, in the Troy v. Dulles case 356 U.S. involving a decision by this Court that the Eighth Amendment was violated by the denationalization of an individual.

There was no physical mistreatment but yet the total destruction of an individual's status in organized society violated that constitutional right.

There would have been no damages at common law.

And what about the right of an individual to vote or to attend an integrated school? What are the common law money damages there? And what about Mr. Navarette right here?

Common law perspective, handful of mail -- what is it worth?

But when we look at it from a constitutional perspective, we are talking about this man's effort to communicate with the world outside him and that has a certain value in terms of the rehabilitation of this man. When a person --

QUESTION: Conceding all that, again, I thought the issue before the Court was whether negligence producing that consequence is covered by 1983.

MR. ADAMS: Yes, Your Honor and although this has not been squarely decided by this Court, I would submit that if the Court would -- it would be a logical and plausible extension from the immunity decisions that this Court has made that negligence should lie.

The Court has looked in the past in Wood v. Strickland and Scheuer v. Rhodes to the common law for a guidance and if we look here to the common law, we will find that state officials -- that public officials are subject to negligence liability where their acts are ministerial in character and not the act of exercise of discretion and all I am asking for here --

QUESTION: Liable in the state courts is what you mean, do you?

MR. ADAMS: What does that mean, now?

QUESTION: Do you mean liable in the state courts or liable under 1983?

MR. ADAMS: That would be a liability in the state courts. That is the way the common law resolves the problem. And while that is not something that should be followed as an automatic matter in dealing with 1983, there being a greater interest in attaching liability because the purpose, after all, of 1983 is to provide relief for the infliction of constitutional harm by state officials.

We should at least go as far as the common law goes and on that basis, I would urge the negligence to be allowed.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

You have about four minutes left, Mr. Svetcov.

REBUTTAL ARGUMENT OF SANFORD SVETCOV, ESQ.

MR. SVETCOV: Thank you, Your Honor.

The Ninth Circuit stated"The section"-- referring to Section 1983 -- "places no narrow limitation on the nature or quality of the conduct which makes actionable but concerns itself entirely with the consequences of that conduct."

QUESTION: Where are you reading from?

MR. SVETCOV: I am reading from the Appendix to the Petition for Certiorari at page 7.

And then on page 8 it goes on to say, "The allegations that state officers negligently deprived him of those rights --" referring to the First Amendment rights,

" -- states a 1983 cause of action."

We filed our writ from that ruling.

Now, the Ninth Circuit construed that the third cause of action was the state of cause of action in negligence. If this Court or a majority of this Court reads it as stating some other cause of action as habitual misreading of statutes and regulations reads to us, deliberate indifference, then he does not need a negligence cause of action and the Ninth Circuit, insofar as it held that negligence states the cause of action, was misreading what this compliant was all about.

But the Court, I think, should go further and unequivocally hold that if it does, indeed, allege negligence because he must mean negligence here. He said "deliberate indifference" in his first two causes of action -- then we decide that under no circumstances does negligence state a cause of action and I think that this Court'd decisions, particularly Estelle versus Gamble, Paul versus Davis, Rizzo versus Goode, support the proposition that negligence does not state a cause of action under 1983.

The pattern of error by subordinate officials has to be something more than negligence. It has got to be so egregious, widespread and continuing as to permit an inference of deliberate indifference and we read deliberate indifference to mean some sort of infirmative intentional

conduct or a refusal to act upon a clear duty.

Now, I want to clear up the point about whether there are 13 items or 25 items that Justice Powell raised.

The complaint lists 13 items of mail, Justice Powell. It is true that some of those apparently have multiple addressees and I think one of the items was reproduced eight times and put in eight different envelopes and sent and when it was turned it, there were a package of eight alleged but that is one item of eight.

So if you add up the multiples, it comes up to 25 letters in Respondent's parlance but we accept his listing of 13 items. There were 13 letters, as we see it. Some of them had multiple copies. That clears that up.

Now, I have a fairness question that I have difficulty in dealing with.

Counsel seems to say that Mr. Procunier, the director of the California Department of Corrections, should have known about the inmate's First Amendment right of free expression back in 1971 and 1972 because he was in court, in the lower court -- district court and circuit court -- litigating the question but Mr. Procunier was here in 1974 and this Court did not tell him anything about an inmate's right of free expression and I have a -- there is a basic unfairness in coming and telling him now, "You should have known it in 1972" when he was not told about it in 1974 and I submit it

on that.

Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, Gentlemen.

The case is submitted.

[Whereupon, at 11:46 o'clock a.m., the case was submitted.]