In the

Supreme Court of the United States

EARL L. BUTZ, et al.,

Petitioners,

vs

ARTHUR N. ECONOMOU, et al.,

Respondents.

No. 76-709

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Washington, D. C.
November 7, 1977

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v.	:	No. 76-709
ARTHUR N. ECONOMOU, et al, Respondents.	:	

Washington, D.C.
Monday, November 7, 1977

The above-entitled matter came on for argument at 1:55 o'clock p.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:

DANIEL M. FRIEDMAN, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530; for the Petitioners.

DAVID C. BUXBAUM, Esq., 11 Broadway, Suite 1612, New York, New York 10004; for the Respondents.

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 Butz against Economou, No. 709.

Mr. Friedman, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.

ON BEHALF OF THE PETITIONERS

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

This case, which is here on a writ of certiorary to the Court of Appeals for the Second Circuit, is a damage suit seeking $32 million against various officials of the Department of Agriculture, growing out of an administrative proceeding they conducted under the Commodity Exchange Act--

Q Mr. Friedman, excuse me for interrupting you so soon. But you say it is a damage suit growing out of an administrative proceeding. Did the government ever question the basis of the District Court's federal jurisdiction in this case?

MR. FRIEDMAN: No, Mr. Justice, because the posture of this case was the complaint was filed and there was a motion to dismiss on the ground of immunity. There has been no answer filed in this case yet. And all of those questions are open under the decision of the Court of Appeals. Our position is that this case was properly dismissed at the outset.

Q Does that not that put us in something of an awkward position in that we are asked to rule on a defense on the merits when in fact there might be no federal jurisdiction?

MR. FRIEDMAN: The core of the problem, Mr. Justice, is the District Court dismissed this suit. And the Court of Appeals reversed the dismissal saying that the immunity in this case was not what the District Court held. And, therefore, as the case now stands, it goes back to the District Court to consider these other issues. And we brought the case here because we think the threshold ruling on immunity was erroneous.

Q What if I ask you what the jurisdiction was?

MR. FRIEDMAN: The jurisdiction was asserted under a large number of different sections in the complaint.

Q Do you think any of them is sustainable?

MR. FRIEDMAN: I am not certain of that. Some of them, it seems to me, are clearly not sustainable. There are allegations of violations of constitutional rights, a claim of implied right of action for violation of the First and Fifth Amendments. There is a claim relating to the federal jurisdiction.

Q In terms of just jurisdiction, not whether they stated the cause of action, is any of them sustainable?

MR. FRIEDMAN: I suspect probably.

Q You suspect probably?

MR. FRIEDMAN: Yes. I mean, it is in a sense similar to many of these cases which are brought against government officials for damages based upon their actions taken in performance of their duties.

Q Sort of a Bivens type of suit?

MR. FRIEDMAN: We suggest this is not the Bivens type of suit because that in fact involved a constitutional claim. This has some constitutional allegations but basically we think this is comparable to a suit for malicious prosecution and defamation. I think it is similar to the case that this Court had before it in the companion to Barr, Howard v. Lyons, where a suit was brought against--

Q But that was diversity jurisdiction.

Q You said, Mr. Friedman, you suspect that one or more of these several that are cited may afford a basis for jurisdiction. Can you suggest one that you suspect?

MR. FRIEDMAN: The only one that I could see that they rely on conceivably might be with Section 1331, which is the federal question jurisdiction. I think you have to stretch that a bit to say that that is the kind of thing involved in this case. But that would seem to me to be the only one under which there might possibly be a basis here. Or if it was a Bivens type of suit, alleging violations of the First and Fifth Amendments.

Q That is a federal question type of suit too, is it not?

MR. FRIEDMAN: It is, yes. But I was thinking in terms of the claim of basically malicious prosecution and defamation and so on growing out of the federal thing and then the--

Q What is the federal question in a case like that?

MR. FRIEDMAN: I suppose the federal question would be whether these individuals had exceeded their authority in conducting the administrative proceeding, which may be enough to bring it in. As I said, we have not focused on this question, this issue, because this was not the case as we saw it that came up to this Court from the Court of Appeals decision. We would be happy if the Court wishes to submit a supplemental memorandum on this issue, if the Court deems it desirable, because we have not frankly focused on it or considered it.

Q You mean in the motion to dismiss no one ever moved to dismiss for want of jurisdiction?

MR. FRIEDMAN: The only motion that was filed for want of jurisdiction was with respect to the suit against the Department of Agriculture and the commodity credit authority, and that was on the ground it was brought by sovereign immunity. There was no motion made to dismiss for lack of

jurisdiction in the sense of the Court had not had its jurisdiction properly invoked.

Q I suspect, Mr. Friedman, that as the dialogue continues, that may well develop to be the case, and we will firm that up at the end of the argument.

MR. FRIEDMAN: If the Court wishes, we will of course submit a memorandum on this topic.

The issue in the case, as posed by the Court of Appeals decision, is whether these government officials who conducted this administrative proceeding have absolute immunity, as we contend, or a qualified immunity, as the Court of Appeals held. And the critical significance of that distinction of course is that under absolute immunity the issues are relatively narrow, whether the official is active within the scope of his authority and whether the action was discretionary. Whereas under qualified immunity you get into the whole problem of motive and intent, and this involves a far more sweeping examination and the kind of thing that normally cannot be disposed of summarily on either a motion to dismiss or summary judgment.

The Commodity Exchange Act provides a comprehensive regulatory system for the futures commission business. And under the act people who are so-called futures commission merchants are required to register with the Secretary of Agriculture. And the Secretary has promulgated a regulation

that requires these individuals to meet certain minimum capital balances and to file reports on their balances. The respondent, Mr. Economou and his corporation, were registered with the Department of Agriculture as futures commission merchants. And he submitted one of these reports on his minimum capital situation, and this raised some questions within the Department of Agriculture over the correctness of his report and whether in fact he was in compliance. As a result of this, an audit was directed of his books and records. The audit was made, and eventually the Assistant Secretary of Agriculture issued an administrative complaint, subsequently amended and broadened, charging that Mr. Economou and his corporation had wilfully violated the minimum capital regulations.

And, in accordance with the standard practice of the Department of Agriculture, this complaint was made available in the Department's press room with a cover sheet that stated exactly, summarized, what the complaint alleged and pointed out that the mere issuance of this complaint did not constitute any adjudication of violation.

A hearing was held before a hearing examiner of the Department, who found that Mr. Economou had committed these wilful violations. The hearing examiner proposed that Mr. Economou's registration be suspended for 90 days and that for that period he be barred from any trading in the commodities

market. Under the statute, the Secretary of Agriculture has delegated to the judicial officer of the Department the authority to hear appeals in such cases. This matter was appealed to the judicial officer who upheld the decision of the hearing examiner and imposed this punishment.

The Court of Appeals set aside this judicial order on the ground that the finding of wilfulness was erroneous.

Q That was in a separate proceeding from this one.

MR. FRIEDMAN: That was a separate proceeding. This proceeding--this lawsuit began during the time the case was pending on appeal from the hearing examiner to the judicial officer. And it was at that point that Mr. Economou began this case. It started as a suit to enjoin the Department from conducting any further proceedings. But coupled to that complaint at the very end was a claim for $32 million in damages. And then at a later stage in the proceeding the complaint was amended to expand on the claims and also to add another defendant, who was the judicial officer.

Q This complaint was filed then while review was either pending or open administrative review in the Second Circuit?

MR. FRIEDMAN: This was filed before that, Mr. Justice. Let me give the chronology. The hearing examiner had decided the administrative proceeding adversely to Mr. Economou,

He had appealed from that decision to the judicial officer, and then while that appeal to the judicial officer was pending, before the judicial officer had heard argument in the case, the present complaint was filed, seeking both to enjoin further administrative proceedings and seeking the damages of $32 million. After the injunction was denied by the District Court, then the case proceeded to decision before the judicial officer. Then the decision of the judicial officer was taken to the Second Circuit, and the Second Circuit reversed that decision. And in the interim, the complaint was amended, as I say, to expand somewhat on the causes of action and also to bring in as a defendant the judicial officer who had decided the case against Mr. Economou.

The complaint named 12 individual defendants, starting with the Secretary of Agriculture, the Assistant Secretary who had issued the complaint, the administrator of the Commodity Exchange Authority who directed the whole proceeding and ordered the audit, the regional director in New York under whose supervision the audit was conducted, three auditors who had gone in and audited his books, a man named Davis who was a lawyer in the general counsel's office of the Department of Agriculture, who had tried the case for the government, the hearing examiner examiner who had initially decided it, and the judicial officer who had affirmed the hearing officer's decision.

The amended complaint said that by maliciously and wrongfully instituting these proceedings against Mr. Economou the people in the Department of Agriculture had tried to injure his reputation and put him out of business, and the complaint suggests that they did these things because he had been very critical of the way these people were administering the act.

More specifically he makes three claims. He says, first, the institution of the proceedings were unauthorized because the Department had not given him a warning letter which they normally would do and thus afforded him the opportunity to bring the mistakes into line to correct any deficiencies.

Secondly, they said the Department had no authority to issue a sanction of any sort because prior to the time the sanction was issued, he had ceased operating as a futures commission merchant.

And, third, the defendants were charged with issuing a defamatory press release, which I assume has reference to the release of the complaint in the covering memorandum to the press office.

Q Where is that in the appendix, if you have it right at hand, Mr. Friedman?

MR. FRIEDMAN: The complaint, you mean?

Q No, the press release.

MR. FRIEDMAN: Oh, the press release itself is not

set forth in the appendix, but the cover sheet to the press release is set forth at page 150. All that there was was there was the cover sheet and the copy of the administrative complaint. The complaint was released to the press together with this cover sheet which is set forth at page 150.

Let me add one other thing. The complaint set forth ten different causes of action, four of which were asserted to violate the respondent's constitutional rights under the Due Process Clause and his rights to free speech. And, as I have indicated, he sought damages of $32 million, which are broken down into various segments, $6 million for this, $4 million for that, $800,000 for something else.

At the early stage of the proceedings, in opposing his application for a stay of the administrative proceedings, the defendants had filed an affidavit by the petition of Mr. Davis, the lawyer of the Agriculture Department, that set forth in detail the functions performed by each of the individual defendants with respect to this case. And, on the basis of that affidavit, the defendants then moved to dismiss this suit on the ground it was barred by the doctrine of official immunity.

The District Court so held and did dismiss it. The Court of Appeals reversed, holding that while this Court's decision in Barr, if it had been the last word on the subject, might well induce them, as it had the District Court, to hold

that these people were protected by official immunity. It believed that the more recent decisions of this Court involving the immunity of state officials sued under Section 1983 of Title 42, suggested there had been a changed in the law, and they thought that under the new cases a qualified immunity--the good faith and reasonable ground tests suggested in Scheuer v. Rhodes would be adequate to protect these individuals.

As we see the case, there are two basic issues in the case. The first is whether the absolute immunity that this Court recognized in Barr v. Matteo, is still a sound doctrine and, if so, whether the more recent cases under Section 1983 now indicate that only qualified immunity is appropriate.

The reasons for absolute immunity have been stated many times, and I cannot find any better statement than what Learned Hand said many years ago in Gregoire v. Biddle, which we have set forth at pages 17 and 18 of our brief and which this Court quoted from extensively in Barr. And because of the time I will not quote it. But what Learned Hand said in effect was, it goes without saying, he began, that if in fact a government official has misused his authority and has injured someone, it would be monstrous to deny that person recovery. But he said the problem is you cannot tell that until the case has been tried. And, therefore, if you permit

people to make these charges and force the respondent to defend on the merits, this is likely to inhibit all but the most fearless and all but the most vigorous from acting as they should act because, as he said, "Again and again the public interest calls for action, which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith." And he said, "So, it is often the case the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

Q Mr. Friedman, in Barr did the Court indicate that the absolute immunity it came up with there would apply to actions outside the scope of authority?

MR. FRIEDMAN: Oh, no. Oh, no. What they said was it had to be within the outer perimeter.

Q Then how do you interpret that?

MR. FRIEDMAN: The outer perimeter of his authority?

Q He has to be doing the kind of thing, does he, that he is authorized to do under the statute?

MR. FRIEDMAN: I would suppose it is the kind of thing, that it had to be some way connected--

Q What if it turns out later that the Court

decides he had no authority whatsoever to do it, he just made a mistake?

MR. FRIEDMAN: I think that is what it really was intended to protect, Mr. Justice.

Q Yes. So, it does not have to be within the scope of his authority?

MR. FRIEDMAN: That it was within the general scope of his authority.

Q You mean the kind of thing he was authorized?

MR. FRIEDMAN: That is right. In this case, for example, it was ultimately held by the Court of Appeals that the finding of wilfulness was erroneous.

Q What would you say if it had been decided in a case that an official had no authority to do a certain act under a statute and the next time he did it anyway, knowing that he had no such authority?

MR. FRIEDMAN: Then I would think he was clearly acting beyond his authority.

Q Then no absolute immunity and no immunity at all?

MR. FRIEDMAN: I would think not. I would think that because if he is acting beyond his authority, he does not have any immunity at all. Or if he is acting patently beyond his authority.

Q What if a complaint alleges that he injured

this person knowing that he had no authority under the statute to act as he did?

MR. FRIEDMAN: I think it is not the allegation that he said knowingly. I think the question is whether in fact what he was doing was within his assigned duty.

Q The allegation is that he did it maliciously in the sense he knew he was acting beyond the scope of his authority.

MR. FRIEDMAN: I do not think that is enough, Mr. Justice.

Q In that case then, where he alleges it was held last year that he had no such authority and yet he did it anyway knowing that he did not, you say say that he could stand in court on that?

MR. FRIEDMAN: No, I think that is a different case where it has been held that he does not have authority. But where the allegation is only that there was no authority--

Q The allegation is that he knew he did not have authority.

MR. FRIEDMAN: That is the allegation that is always made in these cases, Mr. Justice. It is always alleged that--

Q I was just trying to find out what the content was of Barr's rather careful indication that the officer must be acting within the scope of his authority, and it was a very close question in the Barr case.

MR. FRIEDMAN: And it was a close question whether this particular official had the authority to issue press releases.

Q If you apply Learned Hand's test though, do you not come out with a somewhat different answer to my Brother White's question because, as you say, it is alleged in all these cases that he knew he did not have the authority? And I would think that the teaching of Learned Hand in Gregoire v. Biddle is that that is something you ought not to have to try out every time.

MR. FRIEDMAN: I would say except for the one case that Justice White posed, where it had been previously held that he does not have the authority.

Q Previously held by whom?

MR. FRIEDMAN: I assume from Justice White's question that it was held by the courts.

Q This Court?

MR. FRIEDMAN: Presumably by a court whose ruling the official would feel obliged to observe.

I mean, we do know that there are instances in which officials of the government seek to obtain a conflict among the circuits so that they do not consider themselves bound by a particular court.

Let us, if I may, turn to the facts of this case to see what this charge involves, and I would like to show why

the importance of absolute immunity in this situation.

The affidavits show that everything that the defendants did in this case--all their actions were taken as part of their duties in enforcing this statute. Under the statute the Secretary is directed to investigate--when an investigation was appropriate--to see whether in fact there were violations of the minimum capital requirements. Once it appeared that there was a violation, they were justified in issuing a complaint. Once the complaint was issued, Mr. Davis had assigned to him the trial of this case as part of his duties. The hearing examiner's sole connection with this case is deciding the case on the record before him, as that was the function performed by the judicial officer.

According to Mr. Economou, in a lengthy affidavit that he filed in this case, all of this was a plot against him. I would just like to refer the Court to page 29 of the appendix where Mr. Economous says in this affidavit: "The action undertaken by the CEA"--Commodity Exchange Authority--"in their Docket No. 167 and the various acts of officials and employees in connection therewith are in actuality an organized conspiracy for the specific purpose of discrediting me in the financial community and with the investing public and through me to cause the downfall and destruction of the American Board of Trade Inc., a new exchange and marketplace." That was an entity that Mr. Economou was trying to organize.

Q Mr. Friedman, may I ask a question here. Do you suggest that we look at each of the defendants separately? Some of the defendants you did not quite get to were auditors rather than the higher ranking people. In some areas there is a distinction between the position of a prosecutor, say, and a police officer. One gets absolute immunity. The other gets qualified immunity. Do you think that distinction might apply to the difference between an auditor and a hearing examiner, for example, or a lawyer trying the case?

MR. FRIEDMAN: We think that the auditors in this case were really performing factors which involved considerable discussion because in conducting an audit you have to decide what you are going to look at, how intensively you are going t go into it, how much you are going to question these people. And once again it seems to us the threat of possible suit with these enormous damages being sought here, this is enough to deter the auditor from perhaps being as vigilant as he might be. Obviously, the farther down the line you go, the lesser the discretion involved. And at some point it ceases to be discretionary at all, of course. But we think there is enough here, in terms of the auditors, that they did have enough discretion to make this an appropriate--

Q Would you apply this same rule to, say, an FBI agent who is an accountant by training, who is investigating a business crime, or an auditor for Internal Revenue investigating

the financial background of a possible tax prosecution? Would those auditors be like FBI agents and police or like the auditor here?

MR. FRIEDMAN: I think it might vary from case to case. But I think that it would be more like the auditors in this case.

Let me just come to one other aspect of this. All of these people are basically conducting an investigatory proceeding, a disciplinary proceeding, to determine whether some sanctions should be imposed upon the respondent. And I suggest that, for instance, if there is a danger that at some later point these officials are going to have to try to justify to a jury what they did in the face of these charges of a conspiracy--and of course it is colored by the claim that they were after him because he had been critical of the way they were administering the act--if they had to justify this, it seems not unreasonable to conclude that in a close case they may shade their decision.

Q Mr. Friedman, does it make any difference in your argument that here there was an administrative review proceeding open to the respondent after these government officials had performed their tasks in which he could challenge their conclusions as opposed to Barr v. Matteo and Howard v. Lyons where, if they did not get the relief in the independent judicial suit, they apparently would not get it at all?

MR. FRIEDMAN: This is one of the factors, the point that you do not have to subject government officials to personal liability in order to correct errors, if any, that may have been committed. Here if everything he says about this proceeding it is true, it has been corrected because of the reversal of the decision against him.

Q His damages, his injuries, have not been repaired.

MR. FRIEDMAN: His injuries of course have not been recompensed. But again we come back, it seems to me, to the basic policy underlying the immunity, which this Court has recognized in Barr and which Learned Hand recognized, that it has been considered better that there may be occasional instances in which somebody who has a just claim will be denied it. But that is outweighed by the importance in the public interest of making sure that government officials are not deterred from acting vigorously and fearlessly because of the threat of possible private liability.

Q Mr. Friedman, now that I have interrupted you, may I ask you a couple of other questions? I think perhaps the answer to my first one is self-evident. And the question is, Who defends federal officials when they are sued in cases like this? And I suppose the answer is, by your presence here, that the Government of the United States does.

MR. FRIEDMAN: That is correct, with one or two

possible exceptions. There may be situations where we see something of a conflict of interest among all the defendants, in which case we will avoid this conflict by furnishing the funds for them to retain outside counsel or, secondly, where a charge in a suit like this suggests the possibility of some criminal violation. Of course if the Department might ultimately be prosecuting some of these people, we do not attempt to defend them in civil liability. In that situation once again we do provide them with outside counsel. We pay for the outside counsel.

Q So, this is done at government expense, by the government or at government expense. If there were no immunity and there were a judgment against the officials, based upon malicious action, who would pay the government?

MR. FRIEDMAN: Ordinarily the official would have to pay it out of his own pocket. Unless there is some statute specifically authorizing the payment of such a judgment, the government has no funds ordinarily to pay to those judgments. Conceivably in some situations Congress might enact a private bill to pay for it. But normally the official pays it out of his own pocket. It is coming out of their own pocket. A man may have his lifetime savings wiped out if a jury several years later should conclude that what had seemed to him at the time to be a reasonable action in fact was not taken in good faith. That is the thing, it seems to me, that is the

the most serious and bothersome and dangerous about this thing.

Q Then as a general rule there would be no indemnification--

MR. FRIEDMAN: Normally there would not.

Q --by the government employer.

MR. FRIEDMAN: I might add that the Attorney General has just recently proposed legislation under which these suits would be channeled away from the individual defendant to the United States, to amend the Tort Claims Act to permit this type of suit to be brought under the Tort Claims Act. That legislation has just recently been recommended because of concern that something should be done to rectify the situation where individuals have suffered damages as a result of government action. But it seems to us that that is a very different thing from subjecting the individuals personally to liability for what they have done in the course of their official duties.

Q I take it you think that would meet the problems that Judge Learned Hand was raising in the Biddle case.

MR. FRIEDMAN: I would think so. And we are hopeful that this legislation will be enacted, but when and how it is difficult to predict.

If I may, I want to come to just one other thing, which is the question of these cases that the Court has

decided in Scheuer v. Rhodes, Wood v. Strickland, under Section 1983. We think that those cases do not announce any modification of the salutory principle recognized in Barr v. Matteo. We think those cases turn on the fact that in Section 1983, Congress provided a remedy against state officials for persons whose constitutional rights had been denied them by those officials under color of law. And as this Court has recognized several times, it would really vitiate that section, would rob it of its effectiveness, if because of the existence of absolute immunity, those officials could not be held responsible for the conduct they had committed.

Indeed, this Court has recognized that one of the things that Congress intended to do under 1983 was provide a remedy for people against state officials who had under their state authorities done these things.

Q Mr. Friedman, let me ask you just one question here at the end--not very specific. Would you see some analogy between Judge Hand's expressions that were alluded to and that you mentioned philosophically and the approach in criminal law of the strict rules of evidence and strict enforcement of constitutional guarantees under that broad rubric that it is better to have a hundred guilty men go free than one innocent man be found guilty? Is there some relationship between those concepts?

MR. FRIEDMAN: I am not sure. The only relation I could suggest is perhaps the suggestion that it is better that occasionally a particular individual not recover than the large group of government officials be deterred. It is kind of the converse of it. In the one case it is better that a hundred guilty go free than one innocent go to jail. Here it is that it is better that an occasional one not be able to recover than that the hundred government officials be deterred from acting vigorously I think.

Q But, Mr. Friedman, how about the investigator for any one of the government agencies acting within the scope of his authority as you understand it to, for example, make arrests without warrants or in unusual circumstances making searches without warrants? He just happens to make a mistake.

MR. FRIEDMAN: It seems to me the investigator brings up a different problem which is--

Q He is a government official.

MR. FRIEDMAN: He is a government official but--

Q He has a great deal of discretion.

MR. FRIEDMAN: This Court has recognized in Pierson v. Ray that police officers--

Q 1983, is it not?

MR. FRIEDMAN: 1983.

Q Well, no, that has nothing to do with it, with

the federal investigators, I thought you indicated.

MR. FRIEDMAN: Yes, but also it is a common law--a common law traditionally--police officers have had in effect a qualified immunity. It has been tradition for--

Q Is there not some line somewhere in the federal hierarchy that there is no absolute immunity?

MR. FRIEDMAN: At some lower level. The discretion that a police officer exercises in deciding whether or not to arrest someone or whether to break down a door or--

Q Pretty broad discretion.

MR. FRIEDMAN: It involves discretion but possibly not the kind of policy discretion that the immunity principle is designed to further. That is, it has been said in some courts that a fair test of whether or not this is discretion--Is this the kind of action by the government official which the possibility of substantial personal liability is likely to deter him from taking? That is the kind of thing.

And police for centuries have been acting vigorously and they all know that if they exceed their authority, they are sued for false arrest.

Q And they may all have savings.

MR. FRIEDMAN: They may. They may. But this I think is a special case. The courts have not definitively decided yet the precise scope of the immunity of all federal officials. As we suggest in our brief, this Court does not have to

determine the outer perimeters of that immunity in this case because we think whatever may be those limits, certainly all of these individuals, with what they did in this case, are well within the--if I may say so--the inner perimeter of their duties.

Q Mr. Friedman, you have relied almost exclusively on Barr v. Matteo. There is one other class of government officials who, it has been established, have absolute immunity from civil liability, and that is prosecutors.

MR. FRIEDMAN: Yes.

Q Do you think there is a sufficient analogy between at least some of these defendants and prosecutors to bring them under the umbrella of that doctrine?

MR. FRIEDMAN: We have suggested that, Mr. Justice. Certainly with respect to Mr. Davis, the lawyer who tried the case at the administrative level, his function is basically that of a prosecutor. And the auditors, by the way, in addition to conducting the audit, also testified as witnesses--and witnesses traditionally have immunity--and also participated and aided the prosecutor in presenting the case. And then the assistant secretary who issued the complaint might be viewed as perhaps analogous to the prosecutor who gets the indictment before the grand jury. As we set out in our brief--

Q Witnesses may be absolutely immune for their

testimony.

MR. FRIEDMAN: Yes.

Q But the auditors might have been witnesses absolutely immune for that. But they also were investigators, were they not?

MR. FRIEDMAN: They were investigating. And, as I say, that we think--

Q In that role are they more like Federal Bureau of Investigation or the police or what?

MR. FRIEDMAN: I would say it is hard to say. They are somewhere in between, I think. They are somewhere in between. The auditor is somewhat different from what the FBI agent does, but it also has some similarities.

Q The Court of Appeals for the Second Circuit discussed briefly, casually but did not take it much further, this analogy between at least some of these defendants and prosecutors in footnote eight I think of Judge Mansfield's opinion for the Court.

MR. FRIEDMAN: The Court of Appeals suggested some distinctions which we do not think stand up. We think the basic purpose of the immunity is the same, whether they are prosecuting a criminal case or bringing this kind of enforcement.

Q Of course that immunity would not, even if stretched to its limits, would not cover every one of these

defendants, would it?

MR. FRIEDMAN: No. No. But we think they are covered--some of them are covered by that, and some of them are covered by various other facets.

Q By Barr v. Matteo generally.

MR. FRIEDMAN: GEnerally. And, for example, we think the judicial officer and the hearing examiner have an immunity comparable to that which judges--

Q Under Pierson, that is right.

MR. FRIEDMAN: --traditionally enjoy.

Q What would happen if the auditor made his audit, made his report, testified, and then held a press conference out on the steps of the building, saying that "This man is a dirty crook and ought to be shot, quartered, and et cetera"?

MR. FRIEDMAN: I would think that the auditor would be liable in that situation.

Q You would not have any problem with it.

MR. FRIEDMAN: Because that is not part of his job. That is not part of his job, to hold a press conference and call him names.

Q Mr. Friedman, in this case, deprivation of constitutional rights are alleged. This is not true in Barr. Do you think this makes a difference in the resolution of the case in any way?

MR. FRIEDMAN: We do not, Mr. Justice, and let me

explain why. It is very easy, when a complaint is being drawn, to charge that the actions of the government officials denied you your property without due process of law. I suppose in any case where an administrative proceeding were brought to revoke someone's registration or to suspend their license or something like that it is very easy to allege that this resulted in denial of due process of law.

Q Just as before you said they always--

MR. FRIEDMAN: Yes, this is more and more. This is happening more and more. Here, of the ten causes of action, four of them assert a violation of constitutional rights.

Q But it is a factual distinction between the two complaints.

MR. FRIEDMAN: It is a factual distinction but not one that we think warrants a different immunity in the case of the Constitution. In this case, for example, the different courses of action shift back and forth, and it seems to us it would be most strange to say, "Well, with respect to six of its causes of action, the government officials have absolute immunity but with respect to the other four, which are very similar but where he has alleged a violation of constitutional rights, they have only qualified immunity.

We think the fact that a charge is made that the action of the government official violated the constitutional rights of the plaintiff should not cause any different results.

And we have discussed that at some length in our brief.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Buxbaum.

ORAL ARGUMENT OF DAVID C. BUXBAUM, ESQ.

ON BEHALF OF THE RESPONDENTS

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

The factual circumstances surrounding this case are very important. I should point out that this case was decided on the district level on a motion to dismiss. There was no discovery in this case. There were no affidavits attached to the motion to dismiss. And we must therefore regard the allegations in the complaint as being true.

The factual circumstances are these. Mr. Economou had long been in the commodities business as a member of one of the more established exchanges in Chicago. He, through the years, had come to some conclusions about the way the commodities business in his particular area was being run, and he found, he felt, that there were substantial problems with the commodities industry and with the regulatory agencies that were regulating it. At that time the regulatory agency was the Commodity Exchange Authority, which was a portion of the Department of Agriculture.

He made known--very well known--his complaints about both the Commodity Exchange Authority and about the industry

itself. He het off on his own, leaving the Chicago mercantile position that he had, and established his own exchange, registering an offering with the Securities and Exchange Commission, registering some other trading organizations with the Securities and Exchange Commission, preparing to register his exchange, or the exchange known as the American Board of Trade, with the SEC, and do a number of other things. He formed an organization which he was installed as the president of called the American Association of Commodity Traders, I believe. And this was designed to change the concepts which existed in the commodities business at the time.

People--and this is all registered in the complaint and also in the affidavit which is the first part of the appendix--people in the industry and people who were regulating the industry too umbrage at this particular activity of Mr. Economou.

It so happens that Mr. Economou is not the only person--

Q How do you know they did?

MR. BUXBAUM: How do we know they did? One of the reasons we know they did is because of the action they took against him in this particular case.

Q You do not know their actions were taken for that reason.

MR. BUXBAUM: We certainly alleged it, and it must be

deemed as true for the purposes of this particular argument.

Q That is as far as you know, is that it is alleged?

MR. BUXBAUM: We believe we have more evidence than that.

Q And we must take that as true.

MR. BUXBAUM: Yes, I would think so.

Q That is your point.

MR. BUXBAUM: That is my point.

Q If there is jurisdiction.

MR. BUXBAUM: Always if there is jurisdiction.

In any event, as I say, these matters were published as a matter of record. And there were other people also pointing at the Commodity Exchange Authority and the way the commodities business was being regulated. Eventually Congress did away with the Commodity Exchange Authority and set up a Commodity Futures Trading Commission, Congress itself feeling--and I think properly so--that there was something wrong with the way the industry was being regulated at the time. An indepdent agency was set up in 1974, parallel to the Securities and Exchange Commission which now regulates the commodities business in a different way.

In addition--just to get a little bit technical for a second--Mr. Economou felt that there was too big a spread between the bid and ask price on the various exchanges, and

he looked to eliminate that big a spread. He felt that there should be a specialist on the floor of the exchanges as they are in the securities exchanges to make an orderly market. All of these things did not sit well, as we allege in the complaint, with the industry and with the regulators. He was withdrawing from the supervision of the Commodity Exchange Authority. He was closing out his business. He was no longer involved in this particular business. And he was in the process of closing out his accounts. And, in fact, he closed out all of accounts before the second amended complaint came down.

Initially a complaint was issued claiming that he was underfinanced on the basis of new regulations that had been issued just a short time before in the amount of several thousand dollars. He went to Washington and elsewhere to ask how he might alter this situation and attempted to resolve the situation by meetings with Washington. He received no help whatsoever. As I say, he was in the process of liquidating his accounts when, without notice, without an opportunity to be heard, without anything, his complaint came down, alleging that his business was deteriorating at a rate of $4,000 a month, number one. And, number two, providing this information to the Securities and Exchange Commission, where he had several registrations tha had already been approved and some that were pending.

In essence, what happened is that this particular announcement had appeared in the press. By the way, the press release has been lost by the petitioners in this case, and they cannot find it. But the press release, as reflected in the newspapers which we do have--

Q I thought the release was on page 150 of the appendix.

MR. BUXBAUM: We do not believe that to be the case, Your Honor. We believe that that particular document, first of all, is not part of any file in this case. It was made a part of the appendix over our objection. And I want to point out that there were two complaints issued. It was the second one that was devastating. And both the cover sheet and whatever was attached to the cover sheet has been alleged to be missing by the petitioners in this particular case. It does not exist. That is what we have been informed at the District Court level.

When this news came out, and when this news was brought to the attention of the Securities and Exchange Commission, that his business was being--its capital was being lost at the rate of $4,000 a month, that devastated his entire business. It was not just a simple matter.

He proceeded pro se up the ladder to appeal this decision. And he appeared himself before the Second Circuit of Appeals without the assistance of an attorney. And the

Court of Appeals said that at least, as a minimum, since there was admittedly no wilfulness involved in this particular case, they dismissed it. There may have been 25 other froudns for dismissal also. But they said since it did not meet the test of wilfulness, a threshold test, therefore the entire matter was dismissed.

In the hearings that were held, by the way, in the administrative hearings that were held below, the petitioners admitted that if they had informed Mr. Economou of the fact that they were going to come down with this particular allegation, that he would have in all likelihood corrected it, and therefore there would have been no need to proceed.

In addition, it was admitted in one of the administrative hearings that the statement that the business was losing capital at the rate of $4,000 a month was erroneous. It was an erroneous statement, a very substantial and harmful erroneous statement.

This particular action, as has been explained by Mr. Friedman, was commenced with the idea of attempting to stay these administrative proceedings. And, as generally happens, these attempts do not bear fruit because the courts are properly quite concerned about protecting the public in a case where it is alleged that the firm is undercapitalized, irrespective of the fact that this particular firm was actually just liquidating accounts. Still the courts are

concerned about that.

Q Ordinarily you could not go to court in a separate action, could you, and challenge an administrative determination where the statute authorizing the agency to make that determination provided for judicial review like was available in the Second Circuit here?

MR. BUXBAUM: Indeed, ordinarily you could not.

In any event, this attempt I suppose was made at a time in the hope that--since this was such a frivolous matter and since clearly this institution was withdrawing from the business and clearly it had no further jurisdiction over the particular respondent in this particular case, that perhaps a court would stay these entire proceedings. In fact, of course, the court did not stay the proceedings. And so a damage action was instituted.

As anyone in the securities or commodities business knows, when you receive an announcement in the press that indicates the capital of your firm is diminishing at the rate of $4,000 a month, the chances of your continuing in business among the members of the--especially a small firm--among the members of the industry are very, very slight.

To get to the question of jurisdiction, the allegations in the complaint are one of the reasons that the entire proceedings here were commenced was to chill the speech of this gentleman, who is a thorn in the side of the Commodity

Exchange Authority, which was being subject to other criticism at the time also, and to chill his freedom of speech, as I said, and to take his business, to destroy his business, and to deprive him of both First and Fifth Amendment rights. So, there are Bivens type tort claims clearly alleged in the complaint and explicated in the affidavit that is the first part of the appendix, which was prepared by Mr. Economou when he was appearing pro se. It is somewhat lengthy. But it does contain numerous essential facts in this particular case.

Q Would not a judgment of a couple of million dollars chill somebody else in what they were doing?

MR. BUXBAUM: Yes, a judgment of a couple of million dollars, if that was the judgment that was eventually--

Q Would a judgment of a smaller amount chill somebody in what they were doing in a job that they took an oath to do?

MR. BUXBAUM: Well, if we presume--

Q Could it not?

MR. BUXBAUM: Excuse me.

Q Could it not?

MR. BUXBAUM: It very well might. It might chill them from doing--it might prevent them in the future from doing the wrong thing.

Q It might also prevent them from doing the right

thing.

MR. BUXBAUM: I do not believe that--

Q If they had to go in court every time they made a move and subject themselves to be sued--if you sue me for eight million, I am flattered. But, I mean--[laughter]--some other people have problems.

MR. BUXBAUM: I would say this, that I think it is beyond peradventure that most federal officials would have the reasonable, good-faith immunity, the limited immunity of reasonable good faith, so that even if they were wrong, if they behave reasonably and in good faith, they would be immune from suit. No one is denying them that immunity.

Q But that is something you prove after a jury trial and if you had been deposed for a few days and that sort of thing.

MR. BUXBAUM: I do not know. I do not know. That is the common way of doing it. But certainly the Second Circuit points out this could be done by a motion for summary judgment. A motion for summary judgment would give us an opportunity. There has been no discovery in this case.

Q I would think under normal rules of summary judgment, if you simply alleged that you were in good faith and you are the party that has the burden of proof on that issue, you could not win a motion for summary judgment on that basis. Any sensible district court would say you go to trial

on that.

MR. BUXBAUM: When you say a motion for summary judgment could not be won, you are talking about by the petitioners, I take it.

Q Right.

MR. BUXBAUM: If the petitioners demanded to say, "You claim that this was a conspiracy to deprive your client of his constitutional right to free speech and to take his property without due process of law"--you cannot just rely upon assertions in a complaint. At that particular point, as a minimum, it would be our responsibility to come forth with some evidence. And, if not, the Court would certainly--and so if it was a frivolous claim--

Q That does not go to the defense at all. That goes to your ability to sustain against a motion for summary judgment, a motion to get you out of court on the merits.

MR. BUXBAUM: The only thing I am pointing to is that frivolous claims could not easily sustain a motion for summary judgment.

Q What if in this case right here the respondents would come in and say, "We did not conspire"? The Court would then say, "Good. Now we have got both sides. Let us have a trial." What else could the Court say but that? One says yes and one says no. Trial.

MR. BUXBAUM: If there is a legitimate dispute on the

evidence, yes, of course, the Court would say that.

Q That is exactly what Gregoire v. Biddle and all those say we do not want to get involved in.

MR. BUXBAUM: It seems to me that the way the immunity law now exists--first of all, I do not believe we should create what jurists call a new class. I do not believe that federal officials should be different from anyone else in society.

I think that there are important decisions of this Court recently that indicate that everyone in the United States is subject to the law of the United States. And I think these are matters that should be and must be accorded due respect.

Q And that includes prosecutors and judges?

MR. BUXBAUM: Prosecutors and judges--

Q Or must we say they are not people? [Laughter]

MR. BUXBAUM: Prosecutors and judges and legislators are--in part pursuant to the Constitution, in part pursuant to the rulings of this Court--in the areas in which they operate where they require discretion in order to evaluate either facts or law and come down with a decision, rightfully we believe are immune from suit.

There is a recent case where this Court has granted cert where a judge--I understand from my reading--permitted sterilization of someone when he had no statutory authority to

do so without notice on an ex parte basis, without informing the person that they were to be sterilized. The operation took place, and the person found out about it a number of years later. That sort of thing, it would seem to me, would--

Q That is a precedent?

MR. BUXBAUM: That is not a precedent. This Court has granted certiorari in this particular case.

Q No matter how that case is decided, there is a difference because that was a 1983 action against a state judge. Your burden, it seems to me, is to convince us that there has been a retreat from Barr v. Matteo. Do you concede that if Barr v. Matteo is still flourishing in full vigor that dismissal would have been correct in this case?

MR. BUXBAUM: No. Even if it was flourishing in full vigor, I would not concede that a dismissal would be appropriate in this case. First of all, there have been no hearings. There was no factual information on the exact scope of activity of any of the petitioners in this case. All we had is one affidavit that was filed long before the motion to dismiss, had no connection with the motion to dismiss, was not referred to in the motion to dismiss, and we had never had a chance to challenge.

So, I would say we do not know what the activities of the petitioners were in this case, number one. Number two, my reading of Barr v. Matteo is somewhat different from that of

the petitioners. I do not think Barr v. Matteo, as some people have alleged, grants all federal officials immunity from suit, providing they were operating in the outer sphere of their authority. I do not think that is the proper reading of Barr v. Matteo. I think what it does say is that full immunity, total immunity, is not only to be granted to highest ranking federal officials, not only members of cabinet rank, but it can also be granted to other officials in policy-making positions who need such immunity so that when they make policy, they can clearly in this discretionary area make policy free from belated quarterbacks second-guessing them as to the policy they made. I think that is what Barr v. Matteo says. I do not think that it says that everyone--

Q I did not involve constitutional rights either, I gather.

MR. BUXBAUM: Barr v. Matteo did not involve constitutional rights. Indeed, it did not.

Q On that point, counsel, do you think the reasoning of the Court's Bivens' decision would necessarily carry over to give you a claim under the Fifth Amendment, based simply on a claim of denial of procedural due process?

MR. BUXBAUM: That is not our claim under the Fifth Amendment. Our claim under the Fifth Amendment is that in addition to that, there had been a taking of property without due process of law.

Q Is it a condemnation type of claim?

MR. BUXBAUM: In essence--

Q Confiscation of the property without compensation.

MR. BUXBAUM: Confiscation, yes.

Q There is nothing that a hearing would have remedied?

MR. BUXBAUM: Nothing that a hearing--not a hearing that we allege was a staged hearing inwhich everything had been predetermined.

Q Then it is in effect a fair-hearing claim rather than an eminent domain claim that you make under the Fifth Amendment, is it not?

MR. BUXBAUM: It seems to me that it is a little of both because I think the press release, which may not have been within the authority, at any rate, of the officer who released it, alleging a false fact, which was later admitted to be false--namely, that the business was depreciating at the rate of $4,000 per month--was enough in those circumstances to destroy the business.

Q Do you think your strictly procedural, fair-hearing claim is completely analogous to the Bivens claim?

MR. BUXBAUM: Do I think it is completely analogous? I am sorry. I do not understand the question.

Q Bivens was Fourth Amendment.

MR. BUXBAUM: Right.

Q You have a First Amendment claim here, denial of free speech.

MR. BUXBAUM: Right.

Q In Bivens the Court held there was an implied basis for jurisdiction under 1331 where there was a Fourth Amendment violation.

MR. BUXBAUM: Right.

Q Do you think a procedural fair hearing deprivation under the Fifth Amendment stands on all fours with the Bivens case?

MR. BUXBAUM: No. But I do not think that is our only allegation.

Q I realize you made a number of other allegations. I was inquiring about that one.

MR. BUXBAUM: No, I do not think it stands on all fours. I would really have to think about that. I do not think it stands on all fours with Bivens. But I think there should be no distinction, we would argue, between deprivation of First Amendment rights and--I would point to the most recent case of Dellums v. Powell in the Court of Appeals of the District of Columbia wherein First Amendment rights were clearly violated and in which a Bivens type suit did proceed--and Fourth Amendment rights. I think all rights under the Constitution which are under the first ten mendments in which

an individual can be harmed could give rise theoretically to a Bivens type tort. And I do not think this Court should differentiate Fourth Amendment from First or Fifth Amendment rights.

Q If the allegation that he had made these speeches was not in the case, would you still have a case?

MR. BUXBAUM: If we could not prove that--

Q No, no. If you did not allege that this was aimed at stopping you from speaking, would you have any case?

MR. BUXBAUM: We still think we have a case under Barr v. Matteo. We think we have a Bivens case also under the taking of property, lack of due process hearing and Fifth Amendment taking of property through in essence this press release which in essence destroyed the business or helped to damage the business.

Q You do not see any difference between Bivens and Barr v. Matteo? Do you think they are different?

MR. BUXBAUM: I do think they are different, yes.

Q That is right. You had them together so fast. And Gregoire v. Biddle, what do you do with that?

MR. BUXBAUM: I beg your pardon?

Q Gregoire v. Biddle is still good law, is it not?

MR. BUXBAUM: Yes, I suppose it is.

Q After this Second Circuit opinion?

MR. BUXBAUM: Let me say this--

Q Do we have a choice between the two?

MR. BUXBAUM: I would say this. I think that Scheuer v. Rhodes did modify and can very well be read to modify Barr v. Matteo. I think it can and should be read--and I do not think that Scheuer should only be held to apply to 1983 cases. There should be a standard uniform policy with regard to both state and federal officials. And I think the petitioners make a good argument that 1983 was enacted by Congress for specific purposes. I think that when it was enacted it was understood and expected that federal officials would be restrained by the first ten amendments to the United States Constitution and that there would indeed be potential recovery against federal officials, should they breach the civil rights of citizens.

Q But when 1983 was enacted, neither then nor since has there been a federal counterpart to 1983. And when 1983 was enacted, there was not even any arising under jurisdiction. That was not enacted until 1875. So, when 1983 was enacted, clearly there would have been no claim against any federal official under the existing laws in the United States.

MR. BUXBAUM: When you say there would have been no claim, I think there were claims made against federal officials. I think that going back as far as U.S. v. Lee there were claims made against federal officials. Certainly the Bivens type situation had not been clearly enunciated by

this Court. But I think there were expectations when 1983 was enacted, and there has been no counterpart on the federal side because I do not think the Congress felt it would be necessary to enact one. I think it assumed that, number one, federal officials would not do these things and--

Q Bivens certainly depended upon the existence of a rising under jurisdiction under Section 1331.

MR. BUXBAUM: Yes.

Q Which did not exist at the time 1983 was enacted.

Q Mr. Buxbaum, just a trivial question. You were dismissed also as to the Department of Agriculture itself.

MR. BUXBAUM: Yes.

Q And the Commodity Exchange Authority.

MR. BUXBAUM: Yes, that is correct.

Q Do you ask that that be overturned?

MR. BUXBAUM: We have asked that it be overturned in our brief.

Q Did you cross-petition?

MR. BUXBAUM: No, we did not cross-petition. We did not. We have in our brief before the Court raised that issue. And I wish to point to a recent decision that is referred to by the petitioners in this particular case where--in Expeditions Unlimited v. Smithsonian--where in Judge Wilkey's concurring opinion he states that there is some serious question if they

had to review the issue ab initio as to whether or not the Smithsonian, which we regard as a federal institution, was amenable, that under those circumstances he would have to reconsider the whole matter in view of the legislative history. And it has been said that historically the concept of sovereign immunity which had been recognized by this Court and by others was something that should not have been made part of our heritage from our English brethren in the sense that, as some of the earlier cases have said, the people were presumably sovereign in the United States of America, there was no sovereign, and there was no sovereign to grant a petition of right and as such it was error from the inception to grant sovereign immunity to the federal government. That has been said. I realize that in the view of all that has gone since the initial time to today it is a difficult argument to sustain. But I think there is something to be said for considering that particular argument.

I think that it is interesting in the Expeditions Unlimited case it makes reference to the Economou case, and it finds the Second Circuit decision not in accord with its feeling. However, if the separate opinions are read, I think the separate opinions, the concurring opinions, indicate that there is very serious doubt in the minds of at least three of the justices in the District Court of Columbia as to whether or not Barr v. Matteo has the same vigor as it did in view of

the decision in Scheuer v. Rhodes. It is our feeling, at any rate, that Barr v. Matteo does not grant immunity to all federal officials irrespective of their positions and their activities but only to those having policy-making positions and acting within the scope of their authority. It seems to me that others are very well protected by a good-faith, reasonable defense to suit.

I want to point out that individuals in commerce--

Q Counsel, it has been suggested to you before that does not protect them from being sued.

MR. BUXBAUM: No, it does not.

Q Which is what Judge Hand was concerned about and what the Biddle case was concerned about, the being exposed to jeopardy in a civil sense.

MR. BUXBAUM: That is a serious problem, Your Honor. And yet people in private life, in private industry, are subject to suit, and it does not prevent them from acting vigorously in corporate activity. Outside directors of corporations have been subject to more vigorous suit. Questions of disclosure have been raised to a new level by the Securities and Exchange Commission among corporate officers, and corporate officers are subject to greater scrutiny. People in the commodities and securities business-- not only are they subject to suit individually under 10(b)(5) for their own wrongdoing but for failure to supervise under the

New York Stock Exchange laws and under the laws of NASD. Private individuals and private industry are subject to suit, and they seem to be able to vigorously carry out their activities. Why not federal officials? Why should they be any less subject to suit, provided that they are given a good-faith, reasonable immunity so that when they act in good faith and reasonably they will not be subject to harassing suits?

It seems to me that there should be a balance between the private world and the public world of government. I think in view of the broadening responsibilities of private individuals in business that government and federal officials will act wrongfully. And I might point out that there has been a tremendous growth of federal bureaucracy, if you want to use that word, and other government; and there is a feeling among--it is alleged there is a feeling among people that they have lost control over these bureaucratic institutions. They do not know how to relate to them. And if they feel they are wrong and that they have a right to suit, it seems to me it would help to bring the concept of legitimacy to government.

Q If a private individual is deterred from acting by the threat of a suit, he is only deterred in pursuit of his own private interests, whereas if a government official is deterred from enforcing some governmental policy, he is conceivably deterred from acting in a way that would benefit a

great number of people.

MR. BUXBAUM: That is true, except most of these allegations, where there are suits against federal officials, are allegations that the official is acting in a private and narrow way rather than in a public way. That is the allegation.

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

[Whereupon, at 3:04 o'clock p.m., the case was submitted.]

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