ORIGINAL

In the

Supreme Court of the United States

LAKE COUNTRY ESTATES, INC., ET AL., Petitioners,	)	
vs.	)	No. 77-1327
TAHOE REGIONAL PLANNING AGENCY, ETC., ET AL., Respondents.	)	

Washington, D. C.
December 4, 1978

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Respondents.	:	

Washington, D. C.
Monday, December 4, 1978

The above-entitled matter came on for argument at 10:04 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, 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:

JOHN J. BARTKO, ESQ., Burd, Bartko & Welsh, One Maritime Plaza, Suite 1440, San Francisco, California 94111, on behalf of the Petitioners.

KENNETH C. ROLLSTON, ESQ., Owen & Rollston, Post Office Box 1520, Zephyr Cove, Nevada 89448, on behalf of the Respondents.

E. CLEMENT SHUTE, JR., ESQ., Assistant Attorney General of California, 6000 State Building, San Francisco, California 94102, on behalf of 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 first this morning in 77-1327, Lake Country Estates against Tahoe Regional Planning Agency.

Mr. Bartko, you may proceed.

ORAL ARGUMENT OF JOHN J. BARTKO, ESQ.,

ON BEHALF OF THE PETITIONERS

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

My argument will focus on the questions of whether there should be a per se rule according all compact created agencies the status of states for the purpose of the Eleventh Amendment, without regard to their purpose, financing, function or the relationship of the agency to the states. As subsidiary issues thereunder, whether under appropriate agencies, under appropriate standards, the compact agency before the Court should be treated as a state, and further whether the provisions of this compact have waived any claim of immunity.

Also, my argument will focus on the question of whether or not the claims asserted under 42 U.S.C., Section 1983, are such that the Eleventh Amendment may be raised as a bar.

In addition to the Eleventh Amendment issues, the Petitioner raises the question of whether or not the members of the governing body of this agency should be accorded the

absolute immunity which is accorded to Members of Congress and members of state legislatures.

QUESTION: You are not going to argue, then, Counsel, the merits of your -- what I would call the merits of your claim against the Tahoe Regional Planning Agency?

MR. BARTKO: If Your Honor is referring to the Bivens issues?

QUESTION: No, I meant the claim that there was a taking or something of that sort.

MR. BARTKO: No, Your Honor, I do not intend to do so. This case is before you after a motion to dismiss on the pleadings.

The Court of Appeals concluded that the Petitioners were entitled to predicate a claim based upon violation of their Fifth Amendment rights that their property should be not taken from them without just compensation and due process of law. Respondents have attacked this conclusion in their briefs.

Inasmuch as no cross-petition was filed in this Court and such an attack would not sustain the position of the court below, we do not believe that that issue is properly before this Court. I am prepared to address it if the Court wishes me to do so, however.

Some background information is useful for purposes of placing these issues in perspective. The compact agency with which we deal is known as the Tahoe Regional Planning Agency.

It is the product of an agreement between the States of California and Nevada, whereby they created a regional agency with the power to regulate and control land-use development and certain environmental factors in the Lake Tahoe Basin. Congress gave its consent to the compact in December of 1969.

The agency is controlled by a governing board consisting of ten members, none of whom are elected. The TRPA was charged by the compact with adopting a regional land-use plan and ordinances, rules and policies to effectuate that plan. Its jurisdiction, as I have said, is limited to the Lake Tahoe Basin.

Petitioners are owners of land in the Tahoe Basin. A master plan had been approved by local governmental authorities for the development of their land. Subsequent thereto, the TRPA enacted its plan and classified virtually all of Petitioners' property into a category known as "General Forest." The permitted uses in that category were largely recreational, hiking, picnicing, stables, timber growing, livestock raising. A small portion of Petitioners' land was classified into a category known as "Conservation Reserve." The permitted uses in that classification were the same until such time as this holding zone were permitted for other uses.

The Petitioners' filed suit contending that their land was not suitable for any of the permitted uses. The

complaint alleged a taking without just compensation and a denial of due process under the Fifth and Fourteenth Amendments, as well as claims under similar provisions in the State Constitutions of both Nevada and California. It sought declaratory, injunctive and monetary relief against the agency itself, the Tahoe Regional Planning Agency, members of its governing body and its Executive Director. It also sought relief against several counties who are members of the compact.

This case is, as I noted before you in the pleadings -- the District Court having granted a motion to dismiss, it concluded that if Petitioners were successful in proving that the agency had taken their land without just compensation, such an act would have been beyond the scope of the agency's authority, since it had not been granted condemnation powers, and, as such would have been ultra vires, and therefore --

QUESTION: But if the powers exercised are equated to something like zoning authority, then it is another matter, isn't it?

MR. BARTKO: Well, in this Court's decision of last term considering the ordinances of the City of New York, I think, the Court has concluded that zoning, in and of itself, imposes regulatory uses which, if consistent with a due public purpose, can be appropriate, but there are outer limits to even zoning powers.

In this particular instance, there are both zoning

regulations and classification of the land into permitted uses. We believe that the complaint which is before the Court presents the clearest of questions.

QUESTION: Presents what?

MR. BARTKO: Presents the clearest of questions, Your Honor.

QUESTION: In what respect?

MR. BARTKO: The complaint alleges that in this particular instance the land is so ill-suited to the classification it was put into that all value has been taken from it. Rather than being --

QUESTION: So that it is a taking?

MR. BARTKO: Yes, Your Honor.

QUESTION: A Fifth Amendment taking.

MR. BARTKO: In addition, the District Court found that the individual members of the Tahoe governing body were protected in their discretionary acts with absolute immunity.

This case was consolidated with others in the Court of Appeals. The Court of Appeals ruled in its initial decision that the Petitioners had stated the claim, under the Fifth Amendment Due Process Clause, against the Tahoe Regional Planning Agency and against the individuals for injunctive and mandatory and declaratory relief.

QUESTION: Because it was a taking?

MR. BARTKO: Yes, that is the basis of their claim,

that it was a taking involving a violation of the Due Process portion of the Fifth Amendment. The Court reasoned that, because Congress had given its consent to the compact, the compact had been transformed from two separate state laws into Federal law, for purposes of interpretation, and ruled that the claim was based on the Fifth, rather than the Fourteenth Amendment, because it had become Federal law.

QUESTION: Well, just because Federal law might govern, wouldn't make it a Federal action. Was the claim that this agency was a Federal agency -- action by the Federal Government, a taking by the Federal Government?

MR. BARTKO: No, the claim was under both the Fifth and the Fourteenth Amendments.

Our position in the courts below and here has been that this --

QUESTION: Was the submission that if Federal law governed it would be a Fifth Amendment question?

MR. BARTKO: The submission was that the act here constituted a violation of the guaranteed rights under the Constitution, that is to say, violations of the Fifth Amendment rights.

QUESTION: By whom?

MR. BARTKO: By an agency which was not entitled to the protection of the Eleventh Amendment, an agency, for these purposes, which may be sui generis.

QUESTION: But the Fifth Amendment protects only against Federal action, does it not?

MR. BARTKO: Yes, but the Fourteenth would protect against an action by this agency --

QUESTION: But I was asking you what the claim was under the Fifth. Why was there a claim at all under the Fifth?

MR. BARTKO: Because the Petitioners were unsure as to whether the claim should be under the Fifth or the Fourteenth Amendment, because of uncertainty as to whether or not the Congressional consent would transform it.

QUESTION: While you are stopped here -- The State of California has power of eminent domain, I take it.

MR. BARTKO: It does.

QUESTION: And the State of Nevada has?

MR. BARTKO: It does.

QUESTION: Could California have taken the action taken here, with respect to the land lying within its borders, under the power of eminent domain?

MR. BARTKO: It could, but in this particular instance, both states created an agency which they did not empower to exercise eminent domain.

QUESTION: They didn't purport to take it under the power of eminent domain. The agency did not purport to take it under that power, did it?

MR. BARTKO: That's correct. It did not have that

power under either empowering statute.

QUESTION: Would each of those two member states of the compact have authority to exercise police power, by way of zoning and land use?

MR. BARTKO: They would have such authority, but it is not traditional in either California or Nevada for states to exercise such zoning and regulatory power; rather, it is more traditional for a local government bodies, such as cities and counties, to exercise those powers.

In this instance, the two constituent states created an agency with such powers, but without statutory power to effect a condemnation by eminent domain.

QUESTION: Mr. Bartko, if I could back up a minute. You said that when you filed this suit you didn't know whether this agency was federal or state. What is it? Have you made up your mind yet? It has to be decided, doesn't it?

MR. BARTKO: I don't believe that it does have to be decided. I believe that this agency is not entitled to Eleventh Amendment protection, and that although it may be, as a constituent portion of the state, a political subdivision. And, therefore, the question of whether or not it is federal or state need not be decided, although the teachings of this Court suggest that interpretation of the compact is, in fact, a federal question.

The only issue before the Court now is the issue of

Eleventh Amendment immunity of the agency. And since all constituent bodies of the state are not entitled to Eleventh Amendment, the question need not be reached.

If this agency is more like a county or a city than more like a state, than the Eleventh Amendment would not protect it.

QUESTION: But then it would have zoning powers, would it?

MR. BARTKO: Yes, it would, and in all fairness --

QUESTION: And land-use powers.

MR. BARTKO: Yes, and in all fairness the provisions of this compact do, in fact, charge the agency with land-use regulation --

QUESTION: That was one of the purposes of creating it, wasn't it?

MR. BARTKO: Yes, it was.

QUESTION: But it wouldn't have powers of condemnation?

MR. BARTKO: No, it would not.

QUESTION: Or of taking?

MR. BARTKO: It would not and should not have under these circumstances.

QUESTION: In your inverse condemnation suits in the federal law, isn't the general requirement that unless Congress has authorized condemnation your remedy is to enjoin the federal official who has gone on the property and the fact of the taking,

rather than try to get damages?

MR. BARTKO: We have, in fact, included such claims in this complaint.

QUESTION: For an injunction?

MR. BARTKO: We have included claims against the officers for an injunction and for declaratory relief, that their actions are beyond their powers. But the issue still remains what is to happen to the Petitioner in the interim period, while he is contesting the validity of the agency in taking the actions it has taken? If, in fact, the agency has taken acts which are beyond its powers, and all Petitioners' remedy will be is to tell them that they have stepped beyond their power, then the attention of the courts will only be in pruning back regulation beyond the authority of the agency, and they will have, in effect, a lease on Petitioners' land while these questions are adjudicated.

We believe that those claims for interim relief from monetary damages are appropriate under the Fifth Amendment's just compensation provision.

QUESTION: Would you think you would be entitled to damages if there is no immunity, simply from the fact that your use of it has been suspended for a period of time?

MR. BARTKO: I would believe that would be appropriate.

QUESTION: You haven't sought that kind of damage here, have you?

MR. BARTKO: We have a general claim for damages. It is not limited in nature to interim relief, as opposed to the ultimate value of the land. Our claims in this case are that if, in fact, there was a total taking, then the agency may be responsible for the full value of the land. If, in fact, they did not intend to take the land, they are only responsible for monetary relief for the interim period in which Petitioner has been denied the use of his land while he seeks a remedy in the courts to enjoin the agency from doing so further.

QUESTION: Would that period cease as of the date an injunction was issued in your favor?

MR. BARTKO: I believe it would.

The Court of Appeals granted a petition for rehearing and ruled, sui sponte, that although it had earlier decided that the TRPA was liable under Bivens' principle, it was entitled to Eleventh Amendment protection. The decision of the Court of Appeals was premised upon its reading of this Court's decision in Petty v. Tennessee-Missouri Bridge Commission, at 359 U.S. The Court of Appeals believed that that decision held that all compact agencies are the same as the states for Eleventh Amendment purposes.

We believe a careful reading of that opinion will show that the author, Mr. Justice Douglas, in fact, assumed arguendo for the purposes of that decision that the agency was, in fact, so protected by the Eleventh Amendment. In fact, the majority

decision phrases the question as being one of whether or not there was a waiver, assuming arguendo that the entity was entitled to the protection. And three of the concurring justices concurred on the express stipulation that the Court had not reached the constitutional question of whether or not the agency was, in fact, entitled to Eleventh Amendment protection.

QUESTION: How would a waiver berelevant if there was nothing to waive, in the Petty case?

MR. BARTKO: As a matter of analysis, it might not be relevant, Your Honor, but it was a way of sidestepping a more difficult question. And, since the waiver appeared so clear to the Court in that case, it is my view that the opinion did so in an appropriate fashion.

QUESTION: Well, on your interpretation, isn't that somewhat like assuming without deciding that a court has jurisdiction -- the court goes on to decide the case? Isn't a decision on that assumption -- that arguendo assumption -- about jurisdiction, a decision on the merits on the decision on jurisdiction?

MR. BARTKO: No. I believe the court always had jurisdiction to interpret the meaning of the compact, and the Petty case makes that clear. The issue was not one of jurisdiction, because the court had that jurisdiction to interpret its meaning. The issue was whether or not the court would also confront the question of whether all compact agencies, because

they are created with the consent of Congress, are states for the purposes of the Eleventh Amendment immunity.

Now, we know from the teachings of this Court, and particularly its decision in Mt. Healthy v. Doyle, at 429 U.S. reports that not all portions of a state, not all subdivisions of a state are entitled to Eleventh Amendment immunity. In that case, the Court decided that a school board was not an arm of the state, but was more like a separate political subdivision, and, as a consequence, was not entitled to Eleventh Amendment immunity.

We urge that the same view is appropriate when dealing with a compact created entity. The purpose of the compact clause and Congress' expressed consent to the entry of states into compacts, was to protect the national interest to allow Congress to allow which compacts should, in fact, be entered into, not to transform all agreements between states into the states themselves.

If, in fact, all compact created entities are states, for purposes of the Eleventh Amendment, it raises the question of whether or not a controversy between one of the creating states and the entity, as such, that it can only be brought in this Court under its original and exclusive jurisdiction.

No discernible reason has been advanced for singling out compact agencies from other political subdivisions of states for special protection. The arguments advanced by Respondents

that, in fact, states would be unlikely to enter into compacts if, by doing so, they consented to federal jurisdiction, misses the point that under the Petty decision this Court is always the final arbiter of the meaning of the compact. It also overlooks the fact that compacts can be created like this one which expressly limit the responsibility of the constituent states and the power of the compact-created agencies.

In addition, we would urge the Court to look to the intent of the parties in the creation of this compact. It is, after all, a contract between two states. Both the States of California and Nevada have argued in their briefs that the Tahoe Regional Planning Agency was not intended to have the Eleventh Amendment immunity of the states.

In the addition to the arguments urged before the Court in my briefs, the provisions of the compact itself indicate the intent of the creating states that this particular agency not be entitled to assert their Eleventh Amendment immunity.

Articles of the compact refer to the entity as a "political subdivision." We know from the Mt. Healthy decision that political subdivisions, if they are not compact-created entities, are not entitled to Eleventh Amendment protection.

A portion of the compact refers to jurisdiction in the federal courts. The jurisdiction of this particular agency is highly localized. Zoning and land-use regulation is

traditionally a local, not a state, function.

The authority to make rules is not limited by the veto power of the governors in the states.

QUESTION: Wait a minute now. You say "traditionally a state function." In neither of these states, California or Nevada, may they condemn land for state highways?

MR. BARTKO: In both states, I believe, the states have and do, in fact, exercise the power of condemnation of land for highways.

QUESTION: I thought you said they did not have the power?

MR. BARTKO: What I meant to say was that zoning and land-use regulation is, in fact, ordinarily a local function --

QUESTION: As distinguished from taking?

MR. BARTKO: Yes, Your Honor.

Both the states have urged before this Court that they have no control over the compact agency which they have created. They have no veto power. The majority of the members of this compact agency and its governing body are appointed by local agencies, not by the governor of the respective state. Six of the ten members are, in fact, appointed by local counties and cities. As a consequence, the states do not control the agency which they have created, and by stark contrast to the agencies considered by the Eighth Circuit in Petty and by the Second Circuit in Trotman, this lack of control by the constituent

states shows that the compact has not created an arm of the states entitled to Eleventh Amendment immunity, but --

QUESTION: What would you do about a home rule city that under a state constitution has powers that can't be reached by the legislature?

MR. BARTKO: A home rule city in my own State of California is, in fact, a separate political subdivision and would not be entitled to Eleventh Amendment immunity.

QUESTION: So, you would make the same argument with respect to them?

MR. BARTKO: I would.

QUESTION: You would say it is just like a state?

MR. BARTKO: No, I would say it is because --

Excuse me. I misapprehended the Court's question.

Control is an important factor in making a decision. In this particular instance, neither state has control. There may be instances --

QUESTION: Well, what about a home rule city then, does it have Eleventh Amendment protection, or doesn't it?

MR. BARTKO: I believe a home rule city, if the state does not have control over it, should not have Eleventh Amendment protection.

All of these provisions in the compact indicate the considered intent of contracting parties that the TRPA be a separate organ from state government. Lack of control is an

important factor in making such a judgment.

In addition, we believe the provisions of this compact, if there were in fact Eleventh Amendment immunity, have waived that immunity. We know that there can be such a waiver by this Court's decision in Petty. We know by the Court's decision in Edelman v. Jordan that such waivers should not be taken lightly.

However, this compact has two interesting provisions which we believe are analogous to those in Petty. It refers, in the compact language at Section 6(b) to jurisdiction in the federal courts. It states as follows: "Each such action shall be brought in a court of the state where the violation is committed or where the property affected by a civil action is situated, unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision of both the State of California and the State of Nevada." It refers expressly to federal court jurisdiction.

In addition, the congressional consent which was also relied upon by the Court in Petty is, in our view, equally as broad. It provides that nothing in the compact should in any way affect the powers, rights or obligations of the United States where the applicability of any law or regulation of the United States in, over or to the region.

The only distinguishing factor in the consent provision in the Petty case was specific reference to the courts

of the United States. We believe that this provision is even more encompassing, because it refers to all of the rights, powers and obligations of the United States.

QUESTION: May I interrupt just a minute. Your brief states that the states are not responsible for the debts of the agency. How is the agency financed?

MR. BARTKO: The agency has the power to call upon local counties for a fixed amount of funding in each fiscal year. As it presently stands, $150,000. If the agency is to receive additional funds, it must rely on the largess of the constituent states or perhaps grants and subventions from other agencies.

The compact also provides that the states shall not be responsible for obligations created by the agency and limits the power of the agency in that respect.

The other issue raised by the Petitioners is whether or not the members of the governing body of this agency should be entitled to absolute immunity. The Court of Appeals ruled that to the extent that members of the body might be acting, in part, in a legislative function, they would be so entitled to absolute immunity.

The teachings of this Court's decision indicate that absolute immunity has heretofore in the legislative sphere only been granted to Members of Congress and members of state legislatures, not to lower bodies.

In the absence of the traditional safeguards which were relied upon in this Court in the Butz decision last term, to extend immunity to those acting in a judicial function, it should not be done.

In this particular instance, there are none of the traditional safeguards which apply to an ordinary legislature. The members of the governing body are not elected and called upon to justify their acts periodically. There is no established practice or rules of discipline in this body that would, in fact, allow the body to police itself and its members.

QUESTION: Are the members appointed by the governors?

MR. BARTKO: A portion of the members are. Each governor has a right to appoint one member. There is also another member from each state who serves by reason of his classification as Director of Natural Resources in each state. So, four of the ten members are, in fact, either appointed or state officers. The remaining six officers are designated, by reason of their service on the local agencies, such as counties and cities.

QUESTION: By whom?

MR. BARTKO: By those local agencies.

QUESTION: Well, then, there is indirect public responsibility in each case, isn't there, with respect to some the governors and with respect to some, the local agencies?

MR. BARTKO: Yes, but I believe that it is too indirect,

Your Honor. In this instance, they would be serving in two functions and they would not be called upon at an election with respect to whether or not they served as a good city councilman, to also be responsible for their decisions as a member of this compact agency, since it is a broader function.

QUESTION: Mr. Bartko, are you arguing the immunity now?

MR. BARTKO: I am.

QUESTION: I take it the Court of Appeals ruled on whether there was a cause of action under the Fifth or the Fourteenth, or both? Either one.

MR. BARTKO: It ruled that there was a cause of action under both the Fifth and Fourteenth Amendments in the second decision.

QUESTION: I take it there has been no cross-petition here.

MR. BARTKO: There has not.

QUESTION: And yet the Respondents argue their first point that the Court of Appeals erred in holding there was a cause of action.

MR. BARTKO: That is correct.

QUESTION: Do you think that issue is properly here?

MR. BARTKO: I do not believe it is properly here. I believe that issue goes only to the question of remedy. And, in fact, what it would do --

QUESTION: Yes, but why shouldn't we be able to consider -- Let's assume -- If we ruled in their favor, the case would be over.

MR. BARTKO: No, it would not be over to the extent we have stated claims against the individuals with respect to our claims for injunctive and declaratory relief. And, as a consequence --

QUESTION: Well, it would be over against the agency.

MR. BARTKO: It would be over against the agency.

QUESTION: And we wouldn't have to consider some of the questions you have been arguing.

MR. BARTKO: Yes, that is true.

QUESTION: Apparently, the Court of Appeals felt that way, too, or it wouldn't have reached the cause of action issue, ahead of immunity and ahead of the Eleventh Amendment jurisdictional question.

MR. BARTKO: Yes, but I believe the question really that should be addressed is whether or not we have an appropriate record for this Court to determine such an important question. We come before you on a motion --

QUESTION: The Court of Appeals thought it did and it wouldn't expand the relief that the agency got before the Court of Appeals.

MR. BARTKO: The Court of Appeals did, in fact, reduce the relief it granted against the agency. It originally

had granted relief and then found that it could avoid that question by finding that Eleventh Amendment immunity applied. But what the Court would be doing by sidestepping the Eleventh Amendment immunity question would, on a very sparse record in my view, be confronting a far more difficult question, that is whether --

QUESTION: Yes, but -- Let's assume that we disagreed with you -- If we agree with you, then where do we go? If we agree with you and there is no Eleventh Amendment immunity, where do we go then?

MR. BARTKO: Then the case would be remanded to the District Court for development of the facts in the record. And, in fact, we would proceed forward on the claim based on the Fifth Amendment.

QUESTION: You would argue that Respondents, then, cannot have us review the cause of action relief?

MR. BARTKO: I would so argue, because it would not support the decision of the Court of Appeals.

QUESTION: Well, it would though, as far as the agency is concerned.

MR. BARTKO: It would as far as the agency, but that goes to the agency and the agency alone. It would not terminate the case because our claims against the individuals would survive for purposes of injunctive and mandatory relief.

QUESTION: Well, at least the agency is entitled to

have the Court of Appeals affirmed on a separate ground, is it not?

MR. BARTKO: The agency has made that claim and I concede --

QUESTION: Entitled. If we were to agree with all of its contentions, as a matter of procedure.

We are not saying that they are right. It is just a question of whether we are entitled or whether even prudentially we should reach the cause of action issue.

MR. BARTKO: I believe that in fact the Court can, under its prior decisions, extend itself to reach the cause of action, but it would be inappropriate on this record.

QUESTION: What would be the relief against the individuals in that circumstance?

MR. BARTKO; The relief against the individuals would be both injunctive and, in fact, monetary. Monetary to the extent that we seek interim relief with regard to what has happened to the property in the interim.

QUESTION: What cause of action are you asserting against -- Is it a different cause of action against them?

MR. BARTKO: No. It is the same cause of action against the individuals.

QUESTION: What if we ruled the Court of Appeals was wrong on its cause of action only?

MR. BARTKO: It would go only to remedies to the

individuals. If they were with regard to the Bivens issue, in fact, there would be no monetary relief available against the individuals as well.

QUESTION: Or injunctive?

MR. BARTKO: I believe that the constitutional claims --

QUESTION: You still have to have a cause of action to get an injunction, I suppose.

MR. BARTKO: Yes, we still have to have a cause of action, but the Bivens claim and, in our view, the constitutional claims for purposes of determining whether there has been a taking or not, are different.

There has, in fact, been, with regard to the immunity question, a traditional reluctance to expand absolute immunity because qualified immunity, in itself, is ordinarily sufficient. It protects appropriate government action.

MR. CHIEF JUSTICE BURGER: Mr. Rollston.

ORAL ARGUMENT OF KENNETH C. ROLLSTON, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I would like to primarily address, in my portion of the argument, the question of the appropriate remedy in this case.

Initially, I think, a brief iteration of our view of the facts is in order.

Zoning of this property is conservation reserve, which zoning permits development in accordance with a specific plan, a plan that is submitted -- a master plan -- detailing, particularly on large parcels, the development which is desired on that parcel.

The record of this case reveals that that specific plan was solicited by the governing body of TRPA at the time this property was zoned conservation reserve and that no such application has been received.

I believe it is also important to focus down to the fact that when we deal with appropriate remedies, as the issue is framed before this Court: Is monetary relief appropriate?

Principally we are talking about individuals. Are those individuals responsible,monetarily, for their legislative acts? The specific individuals before this Court are the governing body members of the Tahoe Regional Planning Agency. Those individuals are sued for their specifically authorized act, specifically authorized by the compact, of adopting a general plan and a land-use ordinance.

It is not just that it is specifically authorized, it is specifically required. The compact, in Article 5, tells the governing body members, "Thou shalt adopt a general plan." In Article 6, the compact tells the governing body members, "Thous shalt adopt a land-use ordinance."

So, we have not just authorized, we have required

legislative acts. Further, the compact, specifically, in great detail,specifies and constitutes the governing body. It is not left to mere choice.

QUESTION: In Nevada or California, are members of a zoning board, or any zoning body within the states, subject to liability or are they immune?

MR. ROLISTON: They are absolutely immune, under the law of both the State of California and the State of Nevada. The pertinent authority is cited in my brief.

QUESTION: Mr. Rollston, supposing that this compact had authorized the regional planning authority to promulgate a criminal code, and the individual members of the governing body promulgated a code that said anyone caught shoplifting should be taken out to the nearest tree and hung. Do you think the fact that the compact authorized the promulgation of a criminal code would completely immunize the members?

MR. ROLISTON: Insofar as their undertaking legislative acts, yes. I think it is important, in responding to your question, to note that we are dealing with a very, very significant difference when we talk about legislative acts, as compared to executive acts. This Court had before it earlier this term Butz v. Economou which Counsel for the Petitioners addressed. When you talk about executive acts, you are talking about a much more channelized area of responsibility.

QUESTION: You wouldn't call the fellow who threw

the rope over the tree limb a legislator, would you?

MR. ROLISTON: I certainly would not, Your Honor.

QUESTION: Apparently, there is conduct in this case other than legislative?

MR. ROLISTON: The only question before this Court, though, Your Honor, as framed by the Petitioner -- not the only question -- but the only question on this issue, specifically as framed by the Petitioner: Is there absolute immunity for legislative acts? Period. No one, neither Petitioners nor Respondents has dealt with non-legislative acts. The simple question before you is that. When you are dealing with executive acts, it seems to me, you are dealing with a much more channelized area. Certainly there is discretion, but you have discretion within the law. Principally, "Thou shalt enforce this area of the law," the preeminent function of the Executive.

There are no such parameters for legislators at all. You have an area in which you may act, a broad area. The wisdom, the collective wisdom of whether that law is reasonable or necessary is up for the legislature to decide.

Further, an Executive official, unlike a legislator, is much more subject and much more continuously subject to the control and supervision of the Judiciary, unlike what is typical of a legislator.

QUESTION: Mr. Rollston, you mentioned earlier about how carefully they spelled out all these requirements you put

on them of action they should take, and I think you said they spelled it out in very great detail. But they didn't touch immunity, did they?

MR. ROLLSTON: No, they did not, Your Honor.

QUESTION: Where do you get immunity from, the state immunity?

MR. ROLLSTON: Well, I think, this Court in its prior decisions, has recognized an absolute immunity for legislative acts. We can go to Tenney v. Brandhove, Doe v. McMillan or the Gravel case. In those cases, this Court manifestly was dealing with state and national legislators. What we are essentially asking is that --

QUESTION: Are you saying that this is on the same level as the Governor or the Legislature of Nevada? This Tahoe Regional Planning Agency, is that on the level of the Governor or the State Legislature?

MR. ROLLSTON: The State Legislature, Your Honor.

QUESTION: It is on the same level? How did it get there? It is not elected.

MR. ROLLSTON: No.

QUESTION: But it gets an immunity, to an officer who is not elected. He is appointed. I can't just pick up immunity like that.

MR. ROLLSTON: Well, it depends on whether you are examining immunity from the level of the act or of the task

performed.

In Butz v. Economou, this Court spoke of the level of the act, or the fact that some of these individual defendants in that case were performing a judicial role. They were not, by any means --

QUESTION: You are talking about another case now.

MR. ROLISTON: I am talking about another case, but I think it depends principally on the type of act --

QUESTION: What can they do in the name of the state, what can this Tahoe Regional Planning Agency do in the name of the state?

MR. ROLISTON: It is dealing with problems that neither state can solve singly in the area of land-use and environmental control.

QUESTION: In the name of the state?

MR. ROLISTON: Not in the name of the state, no.

QUESTION: Well, my question was: What can they do in the name of the state?

MR. ROLISTON: Not in the name of the state itself. It can do nothing.

QUESTION: Then your answer is nothing?

MR. ROLISTON: Not in the name of the state.

QUESTION: How do you get immunity? If you can't act in the name of the state, how can you get state immunity?

MR. ROLISTON: Because it is performing a legislative

task on an interstate basis.

QUESTION: Interstate? That's a brand new immunity.

MR. ROLLSTON: We are dealing with a unique entity, the compact entity.

QUESTION: Is that a new immunity? An interstate compact immunity? Is that new?

MR. ROLLSTON: Well, the number of compact cases that there have been you could literally put in a very small hat and it would sink. There is not a lot of authority in that area, in that specific area. That's why --

QUESTION: Well, then this is new?

MR. ROLLSTON: I don't believe it is new, Your Honor, because we are talking about --

QUESTION: Can I assume that if you can't name it it is new because you have researched it, haven't you?

MR. ROLLSTON: Well, I've also found a number of cases which indicate -- cases of this Court and elsewhere -- that have indicated that when you deal with a legislative act immunity is appropriate. I think --

QUESTION: Couldn't California, with respect to the land west of the lake, have done for itself just what the agency has done in terms of defining the land-use? Does it have the legal authority to do it?

MR. ROLLSTON: Most certainly, Your Honor.

QUESTION: How about Nevada?

MR. ROLISTON: Most certainly.

QUESTION: What if they had got together? Perhaps someone else could answer that. What if informally each of them had acted alone, but coordinated their objectives? Then it would be state action, I take it?

MR. ROLISTON: It would be state action. Also, under Tenney v. Brandhove, it would be absolutely immune from the monetary remedy, entirely.

I think the key point is that we are dealing with individual legislators. Should those individual legislators be required to pay for essentially getting into a position of -- an alleged public benefit has occurred here by them undertaking authorized acts. Should they be required to pay and give the property to the public?

The chilling effect of what we deal with here cannot be gainsayed. You are dealing with several legislators in an area of very difficult constitutional law. It is the collision between the Fifth Amendment and proper police power prerogatives. How are eleven lay members, how should they and are they to be held to a standard whereby if they err they are subject to a juror's speculation?

QUESTION: Would you agree that someone carrying out their mandate and going on the landowner's property with a bulldozer would be subject to some sort of individual liability, if in fact the act he was performing constituted a taking?

MR. ROLLSTON: Certainly.

QUESTION: So, it is just the fact that these people are legislators, rather than actually carrying out the legislation, that is important to you on that score?

MR. ROLLSTON: On that score, because you are talking about, at best, an executive act. You are not talking about someone deciding, as a matter of policy, what the law should be. You are talking about someone going out there and physically doing it. And what we deal with here is completely the opposite.

We do not believe that the remedy that is necessary or appropriate here is a monetary remedy. This Court has consistently focused on the adequacy of alternative relief in the context of governmental entities to ascertain whether it was appropriate to imply a monetary remedy. That is how it should be and that is how it has always been. If Petitioners' rule is adequate, you are literally dealing with a situation in which by a judicial determination that some authorized legislative act exceeds permissible bounds, that there is thereby -- if it is invalidated for any reason, the prospect of monetary relief against those legislators who went out there and adopted that particular legislative act.

QUESTION: Before you sit down, are you going to suggest why the cause of action issue is here?

MR. ROLLSTON: Well, Your Honor, the precise question -- Well, first, it was raised prior to certiorari being granted.

It is in the brief.

QUESTION: Who raised it?

MR. ROLISTON: Co-Respondent on behalf of --

QUESTION: He didn't cross-petition?

MR. ROLISTON: Did not.

QUESTION: I know you put it in your brief.

MR. ROLISTON: But it was also in the cross-petition further --

QUESTION: What cross-petition?

MR. ROLISTON: I am sorry, the petition in opposition -- the opposition brief to certiorari.

QUESTION: Do you think that entitles you to raise it?

MR. ROLLSTON: Well, that, particularly when we deal with a circumstance of: Should absolute immunity be appropriate for a legislative act? We are assuming that a monetary remedy comes in there. I think it is clearly within, and reasonably subsumed within the questions presented to this Court.

QUESTION: I take it that the Court of Appeals anticipated that there would be further proceedings in the lower court against some of the individuals.

MR. ROLISTON: Yes, Your Honor.

QUESTION: And yet if you won on the cause of action issue the case would be over.

MR. ROLLSTON: As to the individuals.

QUESTION: Well, as to everybody.

MR. ROLLSTON: Injunctive and declaratory relief would remain, Your Honor.

QUESTION: Why, if there is no cause of action? Don't you need a cause of action to get an injunction? I thought you did.

MR. ROLLSTON: Certainly, Your Honor, but there are other causes of action in the nature of injunctive and declaratory relief that are here. And I agree with Counsel on that score, that the precise question, cause of action, was not a subject in the petition or raised prior to certiorari being granted.

QUESTION: So are you abandoning that? I am sure that we don't like to deal with any more than we have to. So are you suggesting that we need not and should not deal with the cause of action issue?

MR. ROLLSTON: With whether the complaint states a cause of action, Your Honor?

QUESTION: Oh, yes, the Court of Appeals ruled that there was a cause of action stated under both the Fifth and Fourteenth Amendments. And, I take it, your brief -- I am reading here -- you say the number one question is: Is a cause of action properly implied for Fifth and Fourteenth Amendment due process claims?

MR. ROLLSTON: For damages, Your Honor. That's our

concern.

QUESTION: Must we reach those, or not?

MR. ROLLSTON: I believe you must reach that question, and that that question would determine what is, by all accounts, the Respondents' who I represent, most critical concern in this case. And that is whether damages are appropriate.

QUESTION: You are saying -- I gather -- that we may address that in the context of damages, but we may not address the cause of action question in the context of injunctive or declaratory relief. Is that what you are saying?

MR. ROLLSTON: That specific matter --

QUESTION: Is that what you are saying?

MR. ROLLSTON: Yes, Your Honor.

QUESTION: So there may be a cause of action for injunctive or declaratory relief, but a different cause of action is involved when you are seeking monetary damage, is that it?

MR. ROLLSTON: Yes, Your Honor. The key difference has to do with the other remedies being there, the fact that we are dealing with a Legislative act, rather than an Executive act. And I think it equally deals with separation of powers, because in a context where a court is essentially asked to decide what property should be in the public domain, I submit, that's a Legislative question. When a public entity has not

decided and has no power to acquire it.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Shute.

ORAL ARGUMENT OF E. CLEMENT SHUTE, JR., ESQ.,

ON BEHALF OF RESPONDENTS

MR. SHUTE: Mr. Chief Justice, and members of the Court:

I will argue two points, that Tahoe Regional Planning Agency is not a state agency of California or Nevada, and is not entitled to state sovereign immunity, and even if the agency were considered an instrumentality of the state, the states have not waived their Eleventh Amendment immunity, or sovereign immunity through the compact.

QUESTION: Do you agree with your friends and your colleague that California could have done independently and Nevada the same what the agency did in its own name?

MR. SHUTE: Certainly, Your Honor, both states would have had the authority to do this through state instrumentalities or local instrumentalities.

QUESTION: When you say "authority to do this," -- define the land-use zoning? We are not talking about a taking now.

MR. SHUTE: That's correct.

QUESTION: They would also have the power to take, would they not?

MR. SHUTE: That's correct. For example, California has a Coastal Commission with regulatory authority, which is a state agency. It is organized that way.

QUESTION: If each state could do it with immunity, what is there that prevents the two states from creating an entity, as they did here, to do exactly the same thing?

MR. SHUTE: There is nothing to prevent it, but in fact if you read this compact closely there is a great reluctance on the part of both states to give this agency great authority --

QUESTION: You mean they could have done this but they didn't?

MR. SHUTE: They did not do it, Your Honor. This agency has been characterized by the Ninth Circuit in People v. Tahoe Regional Planning Agency as not a super agency, and that both states only reluctantly gave authority because of political and policy reasons between California and Nevada.

QUESTION: But from the point of view of your litigating posture, all you have to show is that California is entitled to the result it obtained in the Ninth Circuit. You don't have to show affirmatively that the planning agency does not have any immunity, do you?

MR. SHUTE: That's correct, Your Honor. We, perhaps, should have a table in the middle of the room, because we join with Petitioners on the argument of the agency not being a state agency and we are co-respondents on other issues in this

litigation.

One of the Court's questions was whether a home rule city in California would be entitled to Eleventh Amendment immunity. And this Court has held in Moor v. County of Alameda that California counties are sufficiently independent from the state to not be entitled to Eleventh Amendment immunity.

I am sure the same result would obtain as to a home rule city. And, in theory, two states could agree to create a city, across state lines, giving all the power that would be given to cities in both states.

QUESTION: Well, they might have to have a compact.

MR. SHUTE: And they would have to have a compact. But that agency would have all the attributes of a local government and there is no inherent reason why because it was created under a compact, that it should be considered an instrumentality of the state.

QUESTION: Then you are telling us that if the compact had recited that each of the sovereign states hereby delegates to the agency its powers of eminent domain and its powers to regulate land use and to make zoning classifications, they could have done that.

MR. SHUTE: They could have done that.

QUESTION: Then there would be absolute immunity.

MR. SHUTE: And there presumably would also be direct state control. And that's one of the points that I want

to emphasize.

QUESTION: Would it make any difference in that circumstance, whether the Governor in each of the states appointed five of the members or whether they were elected by popular election?

MR. SHUTE: Well, I think it might not matter if they were elected by popular election and had otherwise exercised state authority, but I think that state control is the key to whether an instrumentality of the state has been created. And with this compact, the Governor of California appoints one member; a state officer from the Natural Resources Agency is another member. The state delegation is actually a minority of the five members allegedly representing the interests of California. The Governor has no veto power over actions of the agency. The highlight of this, I think, is the fact that California has been sufficiently displeased with the actions of the Tahoe Regional Planning Agency, on occasion to have sued it. And then it suffered the debacle and irony of losing the litigation. And that was in People v. Tahoe Regional Planning Agency in 516 Fed. 2d, where California did not approve of the means by which the Tahoe Regional Planning Agency had allowed two highrise casinos in Nevada to be approved for construction.

We litigated in the District Court and in the 9th Circuit the nature of the compact and the nature of the kind of approval it had been given, and the court found that this was a limited body, the TRPA, and that it had approved these casinos

by default and said California loses.

Well, if the Director of the Department of Motor Vehicles of a state announces that no longer will license plates be required in the state and the governor doesn't think that's the correct way to proceed, he will call the director in and say, "Knock it off, or we'll get a new director." You don't see State versus Department of Motor Vehicles litigating what the director's authority is.

I think that illustrates very aptly that California or Nevada do not control the actions of this agency.

QUESTION: That litigation is final on the zoning for these highrise gambling places?

MR. SHUTE: That litigation is final. And it was on a point having to do with what happens when two states disagree. There is other litigation concerning the same casinos. But the actions of the TRPA are still subject to litigation and some of that litigation is brought by California. So, we don't believe that we control that agency. We know from experience that we don't control it. And we think that one of the primary tests for the creation of a state instrumentality is state control.

Now the Court also asked: What is this agency? It is very difficult to know, because it is a unique creation by interstate compact. It has some attributes of a local agency. It has some attributes of a regional agency. It may even have

some attributes of state agencies. The Ninth Circuit said it was entirely a matter of Federal law, which preempted any state law. So we believe that it is a creation or creature of Federal law, subject to Federal court jurisdiction, because it is not cloaked with the state's immunity.

QUESTION: Couldn't the matter be controlled by Federal law but still be a state agency and still not be subject to the Eleventh Amendment?

MR. SHUTE: Yes, Your Honor. Certainly in the instance, for example, where there would have been a waiver due to the circumstances.

QUESTION: I suppose state officers and state agencies can violate Federal law and get sued for it without it turning them into Federal instrumentalities.

MR. SHUTE: That is correct, but that illustrates the uniqueness of an interstate compact. It has been considered to be a creation of Federal law, and that is what the Ninth Circuit held. The Ninth Circuit further held that it preempted any claims under state law. So we are dealing here with a creature of Federal law through the compact.

QUESTION: But Federal law can't be activated. Only the states can activate it, isn't that so?

MR. SHUTE: That is correct, Your Honor, and Congress ratifies it. But I think decisions of this Court in Petty and certainly the Ninth Circuit in this case have indicated that it

becomes a question of Federal law because of congressional ratification.

QUESTION: I take it, it would have been valid for California to have said, "We will not join this compact unless there is an agreement that no gambling establishment may be created within twenty miles from the center line of Lake Tahoe," if there is a center line.

MR. SHUTE: Your Honor has hit directly on one of the sore points between the two states. California would prefer that there not be an expansion of gaining and Nevada disagrees. And this is what makes this negotiation for compacts difficult.

QUESTION: You mean that wasn't even anticipated by California?

MR. SHUTE: It was anticipated, and there is language in the compact to grandfather certain casino location, and that was the compromise that was struck at that time. But it has been a continuing sore point. And it illustrates the complexity of negotiating between states in such a sensitive area.

QUESTION: How much sovereignty did California give up?

MR. SHUTE: We submit that California gave up no sovereignty.

QUESTION: That's what I thought. But they didn't give up sovereignty, they gave up immunity, I thought that was

your position.

MR. SHUTE: Well, we are saying that the Tahoe Regional Planning Agency is not an instrumentality of the state. It is not entitled to any immunity. We argue that we don't believe it is in question.

QUESTION: The land itself belongs to California.

MR. SHUTE: No, the land belongs -- the land is located within California and Nevada and much of it is in private ownership, and some is in Federal ownership.

QUESTION: Part of the land that originally was in California is still California land, taxed by California, controlled by California.

MR. SHUTE: Through the local zoning authority.

QUESTION: Mr. Shute, is the State of California a party to this suit?

MR. SHUTE: The State of California was a named defendant in the complaint, but --

QUESTION: Has never been served.

MR. SHUTE: -- has never been served.

QUESTION: So, why are you here?

MR. SHUTE: Because we were parties in two of the other consolidated actions before the Ninth Circuit.

QUESTION: Are those two actions before us?

MR. SHUTE: It is our understanding that the Ninth Circuit entered one judgment in the consolidated opinion with

the four cases and that technically the four cases are here.

QUESTION: Who is representing those cases?

MR. SHUTE: No one. No one has appeared to file the briefs.

QUESTION: And you think they are still here?

MR. SHUTE: I am not sure about that, Your Honor, but I do know the rules say that if it is one judgment the cases are before the Court.

QUESTION: Well, assuming for the moment, you are properly here, the only issue addressed in your brief, if I remember it correctly, is the Eleventh Amendment issue. Is that right?

MR. SHUTE: In the opposition to certiorari, we argued no Eleventh Amendment waiver. In our brief on the merits, we pointed out that we do not believe that the TRPA is an instrumentality of the state. That occupies about ten or twelve pages of our brief. So we have briefed the point that I am arguing.

QUESTION: I am a little bit puzzled. This goes back before your time to the Amendment to the Federal Rules of Civil Procedure, when you could bring in parties. Originally a defendant was allowed to bring in a party that was -- that he claimed was liable to the plaintiff instead of him. And the result was that all sorts of defendants used that rule to kind of point the finger at somebody else and say, "No, it's not me, it's the other guy." And they finally changed that rule because

of that fact.

It seems to me the state's position here is a little bit like that. You are not just trying to get yourself off the hook, you are trying to get the agency on the hook.

MR. SHUTE: No, Your Honor, we are -- First of all, we were parties in the other cases consolidated. And I would respectfully request that our role be considered amicus curiae, if the Court disagrees that we are properly parties in this action. But, beyond that, it is our position that a state instrumentality was not created. That was expressly ruled on by the Ninth Circuit. And that is why we take this position. We never did think the agency was entitled to Federal immunity. No one did until the Ninth Circuit came out with that ruling on its own motion.

QUESTION: But how could that hurt the State of California, if this Court were to hold that it was entitled to some sort of immunity?

MR. SHUTE: Well, because then it would be considered a state instrumentality, and in a state court proceeding, presumably, we could be responsible for its actions, when, as I had pointed out, we don't believe that we control them, and we don't, therefore, think we should be responsible.

Just a brief observation on waiver. The parties agree on the test to be applied, that there must be either an expressed waiver or a waiver by such overwhelming implication

as leaves room for no other reasonable construction.

Article 6(b), which has been alluded to, is basically an enforcement provision. It gives venue and jurisdiction over actions brought by or against the Tahoe Regional Planning Agency. We believe the reference to Federal court jurisdiction refers to otherwise existing Federal jurisdiction, as where the TRPA brings a lawsuit in Federal court, by general appearance, waiving whatever immunity it might have for that particular case.

And, further, that language could refer to general Federal jurisdiction that would exist if our position is correct, that a state instrumentality has not been created, in any event.

QUESTION: Mr. Attorney General, what if we agree with you on the immunity issue? Where do we go here then with respect to the agency? Put the individuals aside, what do we do then?

MR. SHUTE: The Tahoe Regional Planning Agency would be a proper party in the Federal court proceeding, because we do not assert the state's immunity.

QUESTION: Do we just decide the Eleventh Amendment issue and if we disagree with the Court of Appeals just reverse and stop there, is that what we do with respect to the agency?

MR. SHUTE: I think what you should do is decide that the agency is not an instrumentality of the state and is not

entitled to assert state's immunity, and then there would be no further Eleventh Amendment issue.

QUESTION: I know, but is that the only issue for us, with respect to the agency?

MR. SHUTE: I think, Your Honor, there can be other issues with respect to the kinds of causes of action --

QUESTION: Does the state have a position on the cause of action question, or not?

MR. SHUTE: No, Your Honor. The argument of whether Bivens can be raised before this Court, and so forth, we have not briefed.

Thank you.

MR. CHIEF JUSTICE BURGER: You have just one minute left, Mr. Bartko.

REBUTTAL ORAL ARGUMENT OF JOHN J. BARTKO, ESQ.

ON BEHALF OF THE PETITIONERS

MR. BARTKO: The Court has focused on the cause of action question, which has been neglected by the parties and treated as one of only remedy. In fact, we believe that that question is one which can be easily decided in Petitioners' favor.

If there is a hierarchy of constitutional rights, there is none that should be singled out for greater protection than the Fifth Amendment. This Court has already implied such a cause of action for violation of the Fourth Amendment. The

language of the Fifth Amendment, itself, specifically, proscribes the taking of property without just compensation. It is a long and easily recognized right in the history of this country. It was recognized before the Constitution, is expressed in the Constitution --

QUESTION: Your submission is, when you are talking about the Fifth: Is there any agency created by an interstate compact as part of the Federal Government? And if it had power of condemnation and took something, send them to the Court of Claims and get the money. Is that your submission?

MR. BARTKO: It is not our submission. It is that it is appropriate as a Fourteenth Amendment claim as well, and we pled it under Section 1983.

QUESTION: Why do you keep talking about the Fifth Amendment?

MR. BARTKO: Because the Ninth Circuit has, in fact, put us in that position. We believe our 1983 claims are equally appropriate.

QUESTION: Well, you need to talk about the Fifth Amendment, if you are going to say that it was incorporated in the Fourteenth, don't you?

MR. BARTKO: Yes, we do, Your Honor.

QUESTION: And then your analogy is basically to Moor v. County of Alameda, in saying that this instrumentality is like a subdivision of a state which doesn't get Eleventh

Amendment immunity?

MR. BARTKO: That is correct. It is a lower body not entitled to immunity.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 11:05 o'clock, a.m., the case was submitted.)