

ORIGINAL

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1064  
TITLE CITY OF LOS ANGELES, Petitioner  
v.  
ADOLPH LYONS  
PLACE Washington, D. C.  
DATE November 2, 1982  
PAGES 1 thru 51

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ALDERSON REPORTING

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1 the governmental standpoint the issues are also quite  
2 complex and difficult and often deal, when you're  
3 speaking of use of force, with the kinds of questions  
4 that are often faced, for example, in deciding upon  
5 military tactics. These are very difficult of  
6 resolution.

7           Now, there are really two decisions from the  
8 Ninth Circuit Court of Appeals that are at issue here,  
9 and the city of course submits that they were  
10 erroneously reasoned. But before going to the defects,  
11 the most important and significant defects in the  
12 reasoning of those two opinions, it may be helpful to  
13 have some background in this matter, in particular with  
14 reference to recent developments which may or may not  
15 affect the justiciability of the case. As you probably  
16 know, the city believes that the case is not moot and  
17 needs to be resolved.

18           But, beginning with the beginning, about five  
19 and a half years ago the Respondent Mr. Lyons filed an  
20 action in federal district court seeking both a  
21 declaration and an injunction against the Los Angeles  
22 police department to limit the use of the  
23 unconscious-rendering control holds to situations where  
24 an officer is faced with deadly force. We submit that  
25 that's the effective prohibition of such holds.

1           And his primary theory and the theory that  
2 developed was that the control holds shock the  
3 conscience. And the Respondent's position is that the  
4 control holds shock the conscience intrinsically, having  
5 little to do, if anything, with the training of the  
6 officers, but they're intrinsically of the kind that  
7 shock the conscience.

8           Now, the control holds of which we speak are  
9 neck restraints that are really of two different  
10 fundamental varieties. The first are techniques that  
11 officers apply with their arm on both sides of the neck,  
12 to put pressure on the carotid arteries which transmit  
13 oxygenated blood to the brain. The second family are  
14 techniques known as bar-arm restraints, which rely upon  
15 pressure of the forearm against the front of the neck  
16 and the trachial tube.

17           The purpose of both of those techniques is to  
18 assume control of the individual, and in the vast  
19 majority -- and the record demonstrates this -- people  
20 submit. They do have the potential, as the record  
21 reflects and the district court found, of rendering  
22 people unconscious if necessary, whereupon they can be  
23 turned onto their belly, which is the typical approach,  
24 and handcuffed such that that person is now in control.

25           Now, these are techniques that officers are

1 trained in, but they're relatively infrequently  
2 applied. We're speaking of thousands upon thousands of  
3 encounters between police officers and citizens, and in  
4 a large city such as Los Angeles we're speaking of a  
5 tremendous number of arrests.

6 QUESTION: You speak of training. Isn't  
7 training an issue in the case?

8 MR. MERKIN: The case need not be decided on  
9 training, this case need not. The district court  
10 certainly had that issue before it, but the fundamental  
11 error here is legal. More specifically, Mr. Justice  
12 Blackmun, it has to do with the legal standards that  
13 were demanded of the district court upon review in the  
14 Lyons II decision, as we call it, the review of the  
15 preliminary injunction.

16 We submit that the Court of Appeals failed to  
17 look for the application of the appropriate legal  
18 standards, and those legal standards of which I speak  
19 are really two and they are quite related. One is the  
20 standard that derives from principles of federalism and  
21 equity, which says that the federal courts should only  
22 assume control over the activities, let's say, of a  
23 police department in the most extraordinary  
24 circumstances.

25 Secondly, to have a constitutional violation

1 here the court had to find that the tactic involved  
2 shocked the conscience. That too requires in effect the  
3 most extraordinary type of conduct. Indeed, I believe  
4 in a concurring opinion you wrote, Mr. Justice Blackmun,  
5 outrageous conduct is what triggers the constitutional  
6 violation.

7 QUESTION: Well, you had a number of deaths  
8 here, didn't you?

9 MR. MERKIN: There are deaths in the record,  
10 yes.

11 QUESTION: A number of them, aren't there?

12 MR. MERKIN: There are indeed.

13 QUESTION: 16.

14 MR. MERKIN: There are at least, yes.

15 QUESTION: Let me ask another question.  
16 There's been a six-month moratorium?

17 MR. MERKIN: Yes.

18 QUESTION: It expires in ten days.

19 MR. MERKIN: That's right.

20 QUESTION: What's the city going to do then?

21 MR. MERKIN: I don't know, and I don't know  
22 that the city knows.

23 QUESTION: You're representing them. You  
24 don't know?

25 MR. MERKIN: I don't know, and part of the



1 reason for that is that the city submits that this is  
2 the kind of thing that is subject to reasonable debate,  
3 indeed there's a debate going on, not just within city  
4 government but to some extent nationwide; and that these  
5 decisions, especially in this particular situation, are  
6 such that there may be tentative decisions such as we  
7 have already now from the city of Los Angeles, that are  
8 subject to change and modification.

9           QUESTION: Mr. Merkin, can you tell us at  
10 least who will probably make that decision --

11           MR. MERKIN: Yes.

12           QUESTION: -- about which Mr. Justice Blackmun  
13 inquired?

14           MR. MERKIN: Yes, and I can tell you a little  
15 bit about how and on what basis that decision will be  
16 made, I believe. The controlling authority over the Los  
17 Angeles police department is a five-member board of  
18 police commissioners, who are civilians appointed by the  
19 mayor and confirmed by a 15-member city council. That  
20 board, if it has all five at the session that takes up  
21 the issue, will decide by majority vote what policy to  
22 follow.

23           QUESTION: Is the commission holding off until  
24 this Court rules, in effect?

25           MR. MERKIN: No. I have no indication that

1 that is their desire. My most recent information is as  
2 follows. I did recently file a memorandum indicating  
3 that they were going to take up the matter one week from  
4 today. My most recent information is it will probably  
5 be later this month, but I do not have a specific date.

6 QUESTION: But in any event, I gather there'll  
7 be no outstanding restraint which would prevent the  
8 restoration of the practice if the commission decides to  
9 restore it?

10 MR. MERKIN: That is correct, and the  
11 commission and the city government as a whole believes  
12 that these tactics are constitutional. They may or may  
13 not be good tactics. Reasonable people, reasonable  
14 chiefs of police, reasonable experts, can differ, and so  
15 long as that's the case we're not in the extreme  
16 situation where reasonable people, reasonable people who  
17 are informed and have reflected on the subject, are  
18 going to concur that these tactics are not civilized,  
19 they're barbaric, and they cannot be tolerated in this  
20 society.

21 QUESTION: What is the policy that you would  
22 have this Court hold the city is free to adopt if it  
23 wants to with regard to the use of these holds?

24 MR. MERKIN: I think the policy is derived  
25 from two different notions. The first is the standard

1 that is referred to, the shock the conscience standard

2 --

3 QUESTION: No, no. What is the policy that  
4 you want this Court to in effect say the city is free to  
5 adopt if it wants to? When could the city use the holds  
6 and under what circumstances, in your view?

7 MR. MERKIN: Returning to the description of  
8 the control holds themselves, the latitude that I think,  
9 Justice O'Connor, that we speak of is to use the holds  
10 in circumstances such as they were most recently used  
11 before. Now, that is one possibility, but the city  
12 government has yet to decide that, if it chooses to use  
13 the holds, whether it will want that extent of  
14 latitude.

15 It may, for example, compromise and may  
16 prescribe the holds are to be used in some circumstances  
17 but perhaps not in others. But I think they want -- the  
18 city government wants the full constitutional latitude.

19 QUESTION: Would it be all right if the rule  
20 said that they should only use it unless the application  
21 of such force is necessary to prevent serious bodily  
22 harm to the officer? Would that be all right?

23 MR. MERKIN: That is a reasonable approach,  
24 but it's not --

25 QUESTION: Well, isn't that what the court

1 said?

2 MR. MERKIN: That is what the court said, but  
3 the court --

4 QUESTION: That's what the court said, didn't  
5 it?

6 MR. MERKIN: The district court did make that  
7 determination, yes.

8 QUESTION: Well, what's wrong with it?

9 MR. MERKIN: There are two problems.

10 QUESTION: You just said it was all right.

11 MR. MERKIN: There are two problems wrong with  
12 that, Mr. Justice Marshall. The first is the notion of  
13 what is a threat of serious bodily harm is ambiguous.  
14 And the policy that was followed by city government up  
15 to that point was broader. There were circumstances --

16 QUESTION: Excuse me, Mr. Merkin. Isn't the  
17 answer that you should give Justice O'Connor that what  
18 you want is the same latitude that the city had before  
19 with respect to the use of these holds?

20 MR. MERKIN: Yes.

21 QUESTION: Everything that you used to be able  
22 to do, you want still to do.

23 MR. MERKIN: Constitutionally, yes.

24 QUESTION: And you want us to say that you're  
25 free to do it, isn't that right?

1           MR. MERKIN: Well, that the policy that was  
2 followed, yes.

3           QUESTION: You want us to say that  
4 constitutionally you're completely free to follow the  
5 practice you followed before you were enjoined?

6           MR. MERKIN: That is correct, yes.

7           QUESTION: Subject to being sued by people who  
8 are injured.

9           MR. MERKIN: Subject to being sued and  
10 defending those suits in, for example, a damages action  
11 brought under the Monell decision.

12          QUESTION: Well, what recourse does a man have  
13 whom you kill? What recourse does the man that you kill  
14 have?

15          MR. MERKIN: Well, the individual, the  
16 deceased him or herself does not have any personal  
17 recourse, of course. They are very unfortunate  
18 situations when people die.

19          But when it's a remote consequence -- if we  
20 were to -- if the Court were to formulate a rule that a  
21 person fearful of a remote consequence can get an  
22 injunction, then so many of us who fly airplanes, for  
23 example, do all kinds of things, walk just the streets  
24 --

25          QUESTION: Well, isn't the answer to the

1 question that the decedents' representatives would have  
2 the same right as though a police car had negligently  
3 run them down on the street and killed them in the  
4 pursuit of someone else?

5 QUESTION: Do you consider murder and  
6 negligence on the same level?

7 MR. MERKIN: No, we do not.

8 QUESTION: Thank you.

9 QUESTION: May I ask you a question about the  
10 posture of what we're asked to review. You pointed out  
11 that you're interested primarily in the standard of  
12 review. What's before us, as I understand it, is a  
13 preliminary injunction --

14 MR. MERKIN: Yes.

15 QUESTION: -- which has been affirmed by the  
16 Court of Appeals. And there were findings made by the  
17 district court which were also affirmed.

18 Do you question any of the findings?

19 MR. MERKIN: Yes.

20 QUESTION: You're asking us to say some of the  
21 findings are clearly erroneous? For example, the  
22 district judge found that the use of the bar arm and the  
23 carotid artery holds engender a high risk of irreparable  
24 injury or death as presently used. Do we accept that as  
25 true or do we have to look at the record and decide it's

1 not true?

2           You will have an opportunity to prove this at  
3 the full trial, as I understand.

4           MR. MERKIN: That's quite correct. Mr.  
5 Justice Stevens, I think you could make two  
6 determinations of clearly erroneous findings, but you  
7 need not do that. You need not, to support the reversal  
8 of the Ninth Circuit, make those determinations or even  
9 quibble with the facts.

10           What you can do is say that the Ninth Circuit  
11 Court of Appeals in reviewing the findings of fact and  
12 conclusions of law should have been looking for some  
13 particular things. For example, one thing it should  
14 have looked for was a finding that there was a clearly  
15 superior alternative; moreover, that this clearly  
16 superior alternative -- and there had to be some gross  
17 disparity between the alternative and the technique  
18 before the court -- was prevalent nationwide.

19           QUESTION: The thing that puzzles me is, you  
20 brought the case up by appeal, rather than taking  
21 advantage of the normal opportunity of a trial litigant  
22 to adduce additional evidence at the trial court level  
23 and straighten out all these factual matters. As we get  
24 the case, the standard of review for us, I understand,  
25 is whether it was an abuse of discretion for the trial

1 judge, having made these findings, to say we'll have a  
2 preliminary injunction subject to further review, and  
3 you develop evidence that shows that he went too far.

4 MR. MERKIN: Mr. Justice Stevens, to that I  
5 would say there are really two issues we brought to the  
6 Court. The standard is one, but the other is standing.  
7 This trial would be of gargantuan proportion, and the  
8 review by the Ninth Circuit and then ultimately perhaps  
9 by this Court might be years in the coming.

10 QUESTION: You're saying that no one would  
11 have standing to challenge this practice, is that  
12 right?

13 MR. MERKIN: By declaratory or injunctive  
14 relief, no. But there are other remedies, not only that  
15 the Respondent in this case has --

16 QUESTION: No one could challenge it. You  
17 just have to wait until people get hurt and then they  
18 can sue for damage, is that your view?

19 MR. MERKIN: Because it is remote. If it were  
20 not a remote consequence.

21 QUESTION: Well, there are 16 cases. How many  
22 would it have to be before you could have injunctive  
23 relief?

24 MR. MERKIN: I can't give you a mathematical  
25 formula, Mr. Justice Stevens. But I think we can



1 distinguish between -- when a person has reason to be  
2 anxious walking down the street in some town or city,  
3 there you're really fearful of your encounters with the  
4 police, and we must apply an external standard: Is a  
5 person being reasonable in such fear? There there's a  
6 . serious problem indeed in that community.

7           But when you're talking about a remote  
8 consequence -- now, there are 16 deaths that have been  
9 ascribed to the control holds out of literally thousands  
10 of applications of the control holds. Now, the city is  
11 --

12           QUESTION: Does that figure appear in the  
13 record, Mr. Merkin? The 16 deaths constitute what  
14 proportion of the total number of holds, do we know?

15           MR. MERKIN: We know by extrapolation. There  
16 is in the record the following calculation, that in one  
17 18-month period the control holds were applied 935 times  
18 and that the Respondent contends that 3 people died. We  
19 calculated that that's, I think, a percentage of 0.31  
20 percent of the individuals die maximum.

21           QUESTION: Mr. Merkin, if you're talking about  
22 standing, you don't have to get killed to have  
23 standing. If you have the hold applied to you and you  
24 find it objectionable and if it is an invalid police  
25 procedure, don't you have a right to sue about it?

1           Isn't the proper number to look at the 935 who  
2 were subjected to the hold? And all of them claim it  
3 was an improper procedure. At least they theoretically  
4 might so claim. And you say none of them would have  
5 standing unless they get killed?

6           QUESTION: I thought you said they could sue  
7 for damages.

8           QUESTION: But none of them's going to have a  
9 suit for equitable relief?

10          MR. MERKIN: You cannot sue for equitable  
11 relief in circumstances where the threat of injury is so  
12 remote.

13          QUESTION: But there's some injury to  
14 everybody who's subjected to it, isn't there? Maybe  
15 it's not enough to get all that excited about. But  
16 you're talking about standing. Is there any injury  
17 whatsoever?

18          MR. MERKIN: There is a possibility of injury  
19 indeed, okay. But --

20          QUESTION: But only 935 people have been hurt,  
21 so we don't think there's a sufficient probability to  
22 justify anybody having standing to litigate, to  
23 challenge the practice? Are you serious?

24          MR. MERKIN: We're talking about the  
25 Constitution.

1 QUESTION: Yes.

2 MR. MERKIN: And the Constitution talks about  
3 -- truly, it speaks relatively, I think, in this area,  
4 the compared to what.

5 QUESTION: The Constitution speaks of  
6 "individual rights," "individual."

7 MR. MERKIN: Yes, Mr. Justice Marshall.

8 QUESTION: So each one of those 900 would have  
9 a constitutional right, wouldn't they?

10 MR. MERKIN: But see, I think standing -- and  
11 the Court's decisions seem to suggest this, Mr. Justice  
12 Marshall and Mr. Justice Stevens, require that the  
13 threat to the individual be quite meaningful. And it's  
14 going to be -- the individual's going to be fearful  
15 rationally --

16 QUESTION: Well, when the police puts his arm  
17 around my neck, can I object then?

18 MR. MERKIN: You can object, certainly.

19 QUESTION: Mr. Merkin, there was a motion in  
20 this case to dismiss the writ as improvidently granted  
21 or dismiss on the grounds of mootness, and as I read the  
22 Respondent's brief they assert not that the case is  
23 actually moot in the technical sense, because of course  
24 I guess there's an action for damages pending, but that  
25 the need for the preliminary injunction has disappeared

1 in view of the department's change of policy, and  
2 therefore that we should simply vacate the preliminary  
3 injunction and presumably let the case proceed in the  
4 district court.

5 Your response in your reply brief is an  
6 argument that the case isn't moot in the technical  
7 sense. But I didn't understand the Respondent to  
8 contend that it was moot in the technical sense. I  
9 thought they were simply saying that the need for  
10 injunctive relief had disappeared.

11 Do you disagree? I take it you disagree with  
12 that, but could you say why?

13 MR. MERKIN: Yes, Mr. Justice Rehnquist. One  
14 of the points we did make in response was we're speaking  
15 of the question of whether or not there's a case or  
16 controversy. And while it's true that the recent city  
17 policy conforms to more or less what the Respondent is  
18 asking for, that may change and it may change quickly.  
19 It could change this month, it may not. It may change  
20 in three months, it may change before the matter comes  
21 to trial. It may not.

22 We're speaking of a very fluid situation at  
23 this moment. But in any event, one of the fundamental  
24 problems is that we're speaking of whether or not  
25 there's a case or controversy to begin with, and the

1 sooner that that kind of issue is resolved the better it  
2 is for the judicial system to dispose of cases that are  
3 advisory in nature.

4 QUESTION: Mr. Merkin, the policy of using  
5 these control holds is based -- is expressed in the  
6 regulations or the training manual, isn't it?

7 MR. MERKIN: Yes.

8 QUESTION: And they are authorized only in  
9 order to overcome resistance?

10 MR. MERKIN: Yes, generally.

11 QUESTION: Well, that's the policy. That's  
12 the policy.

13 MR. MERKIN: That's not the full panoply of  
14 the policy. It's a little more specific than that.

15 QUESTION: Well, is an officer free to --  
16 according to the policy, is an officer free to apply a  
17 control hold to a person he's arresting for a traffic  
18 offense who is entirely peaceful?

19 MR. MERKIN: Of course not.

20 QUESTION: Would that violate -- that would  
21 violate the regulations?

22 MR. MERKIN: It would be out of policy indeed,  
23 Mr. Justice White, and probably -- it could be  
24 unconstitutional.

25 QUESTION: Would a person to whom the control

1 hold is erroneously applied, erroneously in terms of  
2 what he's told to do, would a person who is subjected to  
3 that kind of control hold have a cause of action under  
4 California law?

5 MR. MERKIN: Yes. If the amount of force that  
6 was applied was not reasonable and necessary, then there  
7 is an action under California law. The penal code sets  
8 that standard for California peace officers.

9 QUESTION: Well now, do you think the  
10 injunction forbids the use of the control holds at all?  
11 Is that what it does?

12 MR. MERKIN: No, it does not.

13 QUESTION: What does it do? It says, just  
14 please obey the regulation?

15 MR. MERKIN: No.

16 QUESTION: What does it say?

17 MR. MERKIN: It rewrites the regulation. It  
18 says that you've allowed too great a latitude in when  
19 these holds can be applied and we want to limit it to  
20 really serious threats to an officer. The immediate  
21 response to that is, when an officer is faced generally  
22 with a serious threat -- and that's where the definition  
23 of serious bodily harm comes in -- then --

24 QUESTION: The training bulletin says:  
25 "Control holds should be used only when necessary to

1 stop a suspect's resistance." Now, the injunction  
2 thought that that was too lenient a standard?

3 MR. MERKIN: Apparently so. But there are  
4 circumstances where an officer has yet to be in a  
5 situation where he or she is faced with a very serious  
6 threat to his or her well-being, which might require the  
7 pulling of a baton if the officer has a baton or the  
8 pulling of the revolver where there's a threat to the  
9 officer's life, but it may escalate very quickly. And  
10 one thing that's very important is for an officer to  
11 take control of a situation to prevent the escalation.

12 We're speaking of a grappling physical  
13 encounter between two individuals, and the sooner that  
14 the officer has control of the other person's body and  
15 his or her weapon, for example the revolver, in a  
16 position of safety, the better.

17 QUESTION: Doesn't the gun sort of get  
18 control?

19 MR. MERKIN: Excuse me, Mr. Justice Marshall?

20 QUESTION: Doesn't a loaded gun usually get  
21 control?

22 MR. MERKIN: It usually does, when people are  
23 acting rationally.

24 QUESTION: Why do you have to choke him to  
25 death?

1 MR. MERKIN: Well, you don't have to choke  
2 people to death. And I think that we do, as I say, take  
3 issue with the general conclusion that all of these  
4 deaths have been caused by the control hold system.  
5 This is an incredibly complex medical phenomenon that  
6 does require further study and will be studied. The  
7 process of review in the city of Los Angeles is not an  
8 episodic thing.

9 QUESTION: If you're looking at the city  
10 policy or what the rules are, the governing rule about  
11 the control holds, a person is not going to have a  
12 control hold applied to him unless he resists.

13 MR. MERKIN: Almost always --

14 QUESTION: Isn't that what the training manual  
15 says?

16 MR. MERKIN: Yes, that's the policy.

17 QUESTION: And so you have to count -- as far  
18 as the city's liability is concerned or as far as the  
19 validity of the policy is concerned, the control hold is  
20 only applied, supposedly, if there's been resistance to  
21 the arrest.

22 MR. MERKIN: Yes, but there's one additional  
23 predicate I would add here, that it's only where the  
24 officer has tried lower force techniques and they  
25 failed, or at the time it just didn't seem reasonable to



1 try to twist the arm or bend the wrist to cause pain.  
2 What they do teach the officers is to escalate and  
3 de-escalate the level of force to no higher level than  
4 necessary to control somebody.

5 QUESTION: Well, again -- again, my question  
6 still stands. As far as the policy is concerned,  
7 control holds are authorized only when there's  
8 resistance, when it's necessary to use force.

9 MR. MERKIN: When it's necessary to use force,  
10 that is correct. That is the policy. And it's not to  
11 use them at the officer's complete discretion.

12 QUESTION: Well, if the person to be arrested  
13 or confronted is entirely peaceful, there would never be  
14 an occasion to use a control hold, as far as the policy  
15 is concerned.

16 MR. MERKIN: That is correct, and that is  
17 Respondent's -- Respondent's charge here is that when he  
18 had his encounter with the officer department the  
19 control hold was put on for no reason whatsoever, that  
20 he did nothing to prompt it.

21 QUESTION: That's a violation of the  
22 regulation, or it's a violation of his duty.

23 MR. MERKIN: Exactly. It's a violation of a  
24 number of things. And if the case ever does go to  
25 trial, of course we would have to determine if that

1 actually happened.

2 QUESTION: Well, in terms of standing, in  
3 terms of showing some future risk to himself, he would  
4 have to show that, not only that he is liable to be  
5 stopped for a traffic incident again, but another  
6 policeman is likely to disobey his orders.

7 MR. MERKIN: There are two cases he's  
8 bringing, in a sense. There's the primary case and then  
9 there's the hidden case. The primary case is, you have  
10 to be fearful that the hold would be applied according  
11 to policy, and that's his Monell theory.

12 QUESTION: Well, I know. But if it's applied  
13 according to policy, the predicate for that is that he  
14 resists.

15 MR. MERKIN: That's correct.

16 QUESTION: That he resists, and in short that  
17 he is committing an illegal act himself.

18 MR. MERKIN: Yes. And the other, the hidden  
19 case that he is in a sense is that the control hold is  
20 applied without provocation. And that is an entirely  
21 different case, and whatever the probabilities may be  
22 with regard to the policy, they've got to be, hopefully,  
23 incredibly remote with regard to out of policy  
24 application of the control holds.

25 So we're speaking of, once again, on both

1 issues, very remote possibilities of injury to the  
2 individual.

3 QUESTION: To the same person.

4 MR. MERKIN: To the same person.

5 QUESTION: There was no class certification  
6 here?

7 MR. MERKIN: There was no class  
8 certification.

9 I would like to reserve my time for rebuttal,  
10 please.

11 CHIEF JUSTICE BURGER: Mr. Mitchell.

12 ORAL ARGUMENT OF MICHAEL R. MITCHELL, ESQ.,

13 ON BEHALF OF RESPONDENT

14 MR. MITCHELL: Mr. Chief Justice and may it  
15 please the Court:

16 This case should be dismissed because my  
17 client no longer needs the injunction that was granted.  
18 The city has now complied with the terms of that  
19 injunction and my client --

20 QUESTION: But it would like to cease  
21 complying.

22 MR. MITCHELL: Pardon?

23 QUESTION: It would like to cease complying.  
24 I take it if it ceased -- it revoked or suspended the  
25 rule only under the force of the injunction.

1           MR. MITCHELL: No, that's not correct, Justice  
2 White. There was another death in April of 1982 and a  
3 firestorm of public criticism that, along with this  
4 lawsuit -- I believe this lawsuit did have some impact  
5 -- resulted in the moratorium.

6           QUESTION: Well, when did the moratorium  
7 occur, before or after the entry of the preliminary  
8 injunction?

9           MR. MITCHELL: After entry of the preliminary,  
10 by a year and a half. So for a year and a half --

11          QUESTION: It had been stayed, hadn't it? The  
12 injunction had been stayed?

13          MR. MITCHELL: The injunction has always been  
14 stayed. There has never been a --

15          QUESTION: So it was a voluntary decision,  
16 then?

17          MR. MITCHELL: Correct.

18          QUESTION: Mr. Mitchell, from my point of view  
19 the threshold question here is the standing to bring  
20 this case. Let me give you a hypothetical to see if it  
21 will shed any light on it. There is a good deal of  
22 debate in police circles and public circles about the  
23 hot pursuit by police cars, and sometimes that spills  
24 over into the speed of fire engines. But confining our  
25 hypothetical to the hot pursuit, where police will

1 pursue a bank robber or whatever, and frequently injure  
2 other people, citizens, or kill them, do you think a  
3 citizen who is fearful of that has standing to go into  
4 the courts and stop the practice of hot pursuit?

5 MR. MITCHELL: Well, Your Honor, it's a  
6 complex question. What you need to know, of course, is  
7 whether or not that citizen, I believe, has a  
8 justifiable fear of real immediate injury.

9 QUESTION: Let's assume, then, that on one  
10 occasion a police car in hot pursuit collided with his  
11 car and did very substantial damage and injured him.  
12 Now, with that addition, does he have standing?

13 MR. MITCHELL: Well, it's certainly not --

14 QUESTION: Other than for damages? Damages,  
15 clearly he has a claim. Does he have standing for  
16 equitable, injunctive relief to change the practice of  
17 the police or the fire department?

18 MR. MITCHELL: No, Your Honor, he would not,  
19 because that policy would not be that police cars  
20 collide broadside with citizens' cars. The policy is  
21 that you chase people that you need to chase.

22 In this instance we have a policy, a direct  
23 policy, that you choke people who do not threaten  
24 serious bodily harm. That's like saying you take your  
25 car and run it into a citizen's car.

1 QUESTION: But the rule is, as I understand  
2 it, the rule is that you are not supposed to apply these  
3 control holds, you're not supposed to choke them, unless  
4 it's necessary to overcome resistance.

5 MR. MITCHELL: Your Honor, if you'll look at  
6 the record, the city training officer says that, Mr.  
7 Speer -- his deposition is at page --

8 QUESTION: Well, is the policy written or  
9 isn't it?

10 MR. MITCHELL: It's written several different  
11 ways, Your Honor. Yes, it is.

12 QUESTION: Where is it in the record?

13 MR. MITCHELL: At number 74, page 21, 30, and  
14 91 in the official record, and the training bulletin --  
15 the training bulletin, at the city's petition for cert,  
16 41A in the appendix. It says "subdue any resistance."

17 QUESTION: You say that 41A, is that policy  
18 not the city policy or isn't it?

19 MR. MITCHELL: Well, it's not the city policy  
20 today.

21 QUESTION: Well, I know, but was it? That is  
22 the policy? That's an adequate description of the  
23 policy?

24 MR. MITCHELL: To subdue any resistance or if  
25 an officer felt a bodily attack was going to be made

1 upon him. That was the city policy as best I understand  
2 it.

3 QUESTION: So if a person -- if an officer  
4 simply applies the control hold for no reason  
5 whatsoever, he's disobeying his instructions.

6 MR. MITCHELL: Absolutely. But in the case of  
7 Adolph Lyons, of course, presumably the officer felt  
8 that something was about to happen. Presumably he felt  
9 that there was about to be a bodily attack. We don't  
10 really know, since we have nothing from the officers in  
11 the case.

12 But consider the position of Adolph Lyons. As  
13 a black male in the city of Los Angeles, if you take the  
14 statistics -- and let me point you in the record to the  
15 statistics. The only ones that we have are in the city  
16 cert petition at page 11. It shows application of a  
17 total of 113 -- 1,113 strangle holds, with a total of  
18 six deaths in the period. Which means that  
19 approximately one out of every 200 times that the  
20 strangle holds are applied, a death will result.

21 Now, I submit to you that that, plus the fact  
22 that they are quite obviously having a disparate impact  
23 on the black male population of Los Angeles -- you are  
24 12 times more likely to be strangled if you are black,  
25 to die of strangulation, if you are a black male than if

1 you are white. And 12 of the 16 deaths have been black  
2 males.

3           There are 200,000, approximately 200,000,  
4 black males in the city, and they're killing  
5 approximately 2 per year with strangle holds. We've got  
6 12 in 6-1/2 years. If you take those statistics, it's a  
7 simple calculation to show that your chances as a black  
8 male of being strangled are one in 500 versus one in  
9 6,000 for anybody else in the city.

10           So Adolph Lyons, who suffered almost death --  
11 he was almost death number 17 in this case. He  
12 defecated and urinated, he lost consciousness. He  
13 suffered --

14           QUESTION: It was a traffic violation, wasn't  
15 it?

16           MR. MITCHELL: Yes, it was, for a traffic  
17 violation.

18           He suffered this conduct and is terrified that  
19 he'll suffer it again. He has one chance in 500 of  
20 being stopped and choked by the LAPD, and if he is one  
21 chance in 200, because one out of every 200 times they  
22 choke, of dying. It is not reasonable to expect the  
23 black population, black male population of Los Angeles,  
24 to suffer that continuing threat.

25           QUESTION: Mr. Mitchell, was it the position



1 of the Respondent for purposes of getting the  
2 preliminary injunction that the Los Angeles city police  
3 routinely use these choke holds for routine traffic  
4 stops?

5 MR. MITCHELL: No, it was not, Your Honor, not  
6 that they did that routinely. And we haven't developed  
7 all the facts yet. There's a massive amount of work to  
8 be done before we get to the trial. Whether they do it  
9 routinely in traffic stops or not, we don't know.

10 QUESTION: And in any event, Mr. Lyons would  
11 continue to have his damages action, would he not?

12 MR. MITCHELL: If he lives, if he lives. And  
13 I submit that the risk that he might die far outweighs  
14 the possibility that he might be satisfied with any  
15 damage action.

16 What the LAPD is requiring Mr. Lyons to do  
17 every day is to play a game of roulette that's a very  
18 unusual one. It's one where the LAPD says, our policy  
19 is you've got to choose a number with this roulette  
20 wheel with 100,000 places as your chances of dying, and  
21 we're going to spin this wheel and if that ball should  
22 fall in your slot you die.

23 Now, that kind of policy is different from one  
24 where it says, you put down your money, we'll spin the  
25 wheel and if the ball falls in your slot you lose your

1 money, because the next day you can go back into court  
2 and say, that policy is a taking without due process and  
3 it's unconstitutional. It's not true when they take  
4 your life.

5           QUESTION: Was there any evidence in the  
6 record, Mr. Mitchell, about the conduct of these various  
7 people that had the fatal consequences? That is, were  
8 they intoxicated, under the influence of drugs, or how  
9 did they react to the police encounter? What does the  
10 record show about that?

11           MR. MITCHELL: Your Honor, the record shows  
12 that apparently several of them were under the influence  
13 of various drugs, and that may have well contributed to  
14 their deaths, because when you're under the influence of  
15 narcotic-type drugs, including alcohol, you're  
16 insensitive to pain, and so when a police officer puts a  
17 choke hold on you and seeks to obtain your compliance by  
18 causing you pain, like that bar arm control, you don't  
19 feel it. And if you don't feel it, he can continue to  
20 give pressure before you stop, and you die by virtue of  
21 that insensitivity to pain.

22           So those are especially people who you want to  
23 avoid choking. The district court made that finding, in  
24 fact, that those people are ones who are very, very  
25 delicate.

1           Now, the cases that the Court seems to rely on  
2 in terms of judging whether Mr. Lyons has standing do  
3 not involve the threat of death, and that's what  
4 distinguishes them. A threat, an immediate threat, is  
5 comprised of at least four elements: First of all,  
6 you've got to know you're threatened. There's got to be  
7 some real probability that you're going to be subject to  
8 -- the threat's going to be carried out. And there's a  
9 consequence to the threat as well as an immediacy of the  
10 threat.

11           Now, the consequence is what in many cases, it  
12 seems to me, is implicitly assumed but never expressed.  
13 The threat of death as a consequence is much different  
14 than the threat that bail will be too high, as in  
15 O'Shea, or that you'll be treated discriminatorily by a  
16 judge.

17           The fact that the Philadelphia police  
18 department doesn't have a disciplinary process that  
19 adequately disciplines police officers, as in Rizzo,  
20 doesn't involve a threat of death, a direct threat that  
21 we can calculate, as we can in this situation. I don't  
22 think anyone in this room would like to trade places  
23 with Adolph Lyons and have that chance that they're  
24 going to die.

25           You can avoid deciding the case, however, and

1 you have in the past on many occasions avoided  
2 addressing complex and very important constitutional  
3 questions, on the grounds that my client no longer needs  
4 the injunction, with the assurance that the city cannot  
5 return to its former policy.

6 QUESTION: How can you say that? Excuse me.  
7 How can you say that when they've said ten days from now  
8 they may return to their policy?

9 MR. MITCHELL: Because I have seen -- and it's  
10 not in the record -- the massive outrage and outcry of  
11 that community. I just simply believe it's politically  
12 impossible for the city to do that.

13 QUESTION: You would not object, then, to  
14 vacating the injunction? It's been stayed.

15 MR. MITCHELL: That's correct.

16 QUESTION: But I don't know when the stay  
17 expires. When we get through with this case, I  
18 suppose. But you would not object to our vacating the  
19 injunction?

20 MR. MITCHELL: Not in the least.

21 QUESTION: Well, how would we -- on what basis  
22 would we vacate the injunction, that the case is just  
23 not ripe? You can't say it's moot, can you?

24 MR. MITCHELL: I can say it's moot, Your  
25 Honor, because my client walks the streets of Los

1 Angeles these days with none of that fear that he had  
2 before. He doesn't have the standing to have the  
3 injunction any longer.

4 QUESTION: Well, I don't know how we can do  
5 that, how we have all that knowledge of what the reality  
6 is in Los Angeles.

7 MR. MITCHELL: He has no controversy any  
8 more. He wants to settle.

9 QUESTION: Well, I don't quite understand.  
10 Would we vacate the injunction and dismiss the  
11 proceeding, or direct the district court to dismiss the  
12 suit?

13 MR. MITCHELL: Well, there are several counts  
14 down there for damages that remain. The damage claims  
15 would remain.

16 QUESTION: Oh, then as far as you would go  
17 would be vacate the injunction, but otherwise let the  
18 lawsuit proceed, is that it?

19 MR. MITCHELL: Yes, Your Honor.

20 QUESTION: Does your client agree with you?

21 MR. MITCHELL: Your Honor?

22 QUESTION: Does your client agree with you?

23 MR. MITCHELL: That it should be dismissed at  
24 this point?

25 QUESTION: Yes.

1 MR. MITCHELL: Yes, Your Honor, he does.

2 QUESTION: When did he tell you that?

3 MR. MITCHELL: After the moratorium was  
4 imposed. I must in all candor --

5 QUESTION: What's his position right now? I  
6 mean, I'm just wondering about you standing up there  
7 giving away half of your case.

8 MR. MITCHELL: I haven't spoken to him this  
9 morning, Your Honor, but I don't think that his position  
10 has changed.

11 In all candor, should that moratorium be  
12 lifted on November the 12th, we'll be right back in the  
13 district court and we'll want that injunction that day.

14 QUESTION: Well, isn't that itself more or  
15 less a confession that the Kamenish doctrine really  
16 doesn't apply to you and that there is a real prospect  
17 that the moratorium could shift, and if it does you'll  
18 be back in district court right away?

19 MR. MITCHELL: Justice Rehnquist, there's  
20 chances that they could do hundreds and hundreds of  
21 different things. I can't speculate as to what the  
22 police commission is going to do. But I don't think  
23 this Court, not this Court, should concern itself with a  
24 case like this where it's involving --

25 QUESTION: Under your suggested disposition,

1 if we vacate it and you go back to trial, I gather all  
2 of the issues, constitutional and everything else, would  
3 have to be resolved in any event by the district court  
4 in the first instance, would they not? Wouldn't you in  
5 the damages aspect of the suit raise all these  
6 constitutional questions, the validity of the choke  
7 holds and the rest of it?

8 MR. MITCHELL: Your Honor, the way the  
9 complaint is drafted, those are not raised with respect  
10 to the primary count, count one. We would in fact have  
11 to prove, I suppose, that it was a taking of my client's  
12 right to liberty without due process.

13 QUESTION: In this specific instance.

14 MR. MITCHELL: In this specific instance.

15 QUESTION: Is this a 1983 suit? What is it?

16 MR. MITCHELL: Yes, it's a 1983 suit.

17 QUESTION: I guess it's your position that all  
18 that's gone on in the past in this case is just wasted  
19 effort?

20 MR. MITCHELL: No, Your Honor, I don't take  
21 that position at all.

22 QUESTION: I don't see what else you can say.  
23 You've gone through all of this for how many years? How  
24 many years has this case been pending?

25 MR. MITCHELL: Since 1977, Your Honor.

1 QUESTION: And all of that's just going to be  
2 washed down the drain?

3 MR. MITCHELL: Your Honor, I think this case

4 --

5 QUESTION: You say you'll start again after  
6 the moratorium's lifted?

7 MR. MITCHELL: Your Honor, if it's lifted we  
8 will.

9 QUESTION: Didn't you just say that?

10 MR. MITCHELL: Yes, we will.

11 QUESTION: So you wasted your time and you've  
12 wasted other people's time all along.

13 MR. MITCHELL: No, Your Honor. I think this  
14 case --

15 QUESTION: Well, I object to you wasting  
16 mine.

17 QUESTION: More than that, if I understand  
18 your speech about the fear that your client suffers as  
19 he wanders around Los Angeles, that you're going to let  
20 him suffer that fear during the period between the  
21 lifting of the moratorium and the time you can get back  
22 and get another injunction, which may well take a couple  
23 of months.

24 MR. MITCHELL: Well, Your Honor --

25 QUESTION: I don't suppose -- you don't know



1 for sure what the judge will do, if you have to prove  
2 your case all over again.

3 MR. MITCHELL: Your Honor, my understanding is  
4 that on the 9th of November the police commission must  
5 make a decision as to whether the moratorium is lifted  
6 or not.

7 QUESTION: Supposing they say, we're going to  
8 lift it. You say, well, we don't care. That's somewhat  
9 inconsistent with the argument you made a little while  
10 ago.

11 MR. MITCHELL: No, Your Honor. I misspoke if  
12 I said that. I'll be in court on November the 10th, the  
13 day after November the 9th, to get a preliminary  
14 injunction.

15 QUESTION: Yes, but you may not get it, and  
16 you're saying you don't care if we lift the one that's  
17 now protecting your client.

18 MR. MITCHELL: This one has never been in  
19 effect.

20 QUESTION: Well, because it's been stayed.  
21 But you say you don't even ask us to lift the stay. You  
22 just say, well, just dismiss the injunction, I'm  
23 confident I can get it again if I need it. It's a  
24 strange posture for representing a client.

25 QUESTION: Well, isn't it essential to your

1 posture, the statement that you really don't think the  
2 political authorities in Los Angeles will ever  
3 reinstitute this procedure?

4 MR. MITCHELL: Indeed.

5 QUESTION: So you'll be back in the district  
6 court if you have to be, but you think the chances are  
7 99 out of 100 that you won't have to be?

8 MR. MITCHELL: Precisely.

9 QUESTION: That also is very relevant to your  
10 standing, too, isn't it?

11 MR. MITCHELL: Standing to be here today?

12 QUESTION: To ask for an injunction. You say  
13 that you don't need any protection, that the threat to  
14 you is nonexistent in the future. So you don't need an  
15 injunction.

16 MR. MITCHELL: Because the city has changed  
17 its policy.

18 QUESTION: Yes.

19 MR. MITCHELL: And now it only chokes when it  
20 should.

21 QUESTION: It not only has changed its policy,  
22 but you say you have no fear with respect to its present  
23 policy.

24 MR. MITCHELL: Correct.

25 QUESTION: So you don't need an injunction.

1 MR. MITCHELL: Absolutely.

2 QUESTION: When will you get to trial on your  
3 case in the ordinary course of events down there?

4 MR. MITCHELL: With that calendar, probably  
5 not until next summer, late spring.

6 QUESTION: It's going to be a protracted  
7 trial, I gather?

8 MR. MITCHELL: I'm sorry?

9 QUESTION: It's going to be a long trial?

10 MR. MITCHELL: Yes, Your Honor, I expect it  
11 will be.

12 QUESTION: The city indicates it'll go on for  
13 a very long time.

14 QUESTION: Will the only issue that remains be  
15 the damages issue if we do as you suggest?

16 MR. MITCHELL: Yes, Your Honor, assuming the  
17 moratorium is not lifted, absolutely.

18 The question of federalism, it seems to me in  
19 this case, that has been raised by the city is not a  
20 real question any longer. The city claimed that this  
21 injunction, if issued, would completely -- cause them to  
22 completely revamp all their training procedures, spend a  
23 great deal of money. And now the city on its own in May  
24 of '82 has done precisely what the injunction required,  
25 did it with great ease.

1           But I don't think that the way they raised the  
2 question addresses the issue of federalism that concerns  
3 Adolph Lyons, which is that the Constitution is the  
4 principle of federalism that he was seeking to be  
5 protected by. He wanted to be protected from  
6 deprivation of his life without due process of law.  
7 That's the principle of federalism that he was concerned  
8 with, and there's no other principle of federalism, it  
9 seems to me, that in any way makes a local police  
10 department immune from this federal protection for the  
11 citizen.

12           The city would have this Court institute a  
13 policy that, no matter what policy the city had, the  
14 federal judiciary would be powerless to enjoin the  
15 policy. If Adolph Lyons does not have standing to  
16 challenge this policy, there's absolutely no one in the  
17 city of Los Angeles who did, and he's the man, he's one  
18 of the men, who was almost killed by it.

19           So if you do not dismiss as improvidently  
20 granted, vacating the injunction --

21           QUESTION: Mr. Mitchell, am I right, the only  
22 judgment before us is the judgment of the Court of  
23 Appeals affirming the preliminary injunction, isn't it?

24           MR. MITCHELL: Yes.

25           QUESTION: And there was another judgment, was

1 there not, that's not here at this time?

2 MR. MITCHELL: Justice Brennan, there was a  
3 Lyons I, if you like --

4 QUESTION: Yes.

5 MR. MITCHELL: -- where the court did  
6 reinstitute the lawsuit. It had been dismissed because  
7 of the standing problem. So there are two judgments.

8 QUESTION: But the only one before us now is  
9 the affirmance by the Ninth Circuit of the preliminary  
10 injunction, isn't it?

11 MR. MITCHELL: No, Your Honor, I think they're  
12 both before you now. Those were issues presented in the  
13 petition for cert.

14 QUESTION: Well, what do we do with the other  
15 one under your submission?

16 MR. MITCHELL: Well, if you dismiss as  
17 improvidently granted and vacate the injunction, you  
18 needn't do anything else.

19 QUESTION: Well, we're not dismissing as  
20 improvidently granted if we vacate the injunction.

21 MR. MITCHELL: I beg your pardon?

22 QUESTION: We're not dismissing as  
23 improvidently granted if we vacate the injunction, are  
24 we?

25 QUESTION: No, you're taking action on the

1 merits then.

2 MR. MITCHELL: Indeed. You could order it  
3 remanded for vacation of the injunction.

4 QUESTION: Mr. Mitchell, if every policeman on  
5 the beat had carried out the instructions in the manual  
6 that Justice White read earlier in the argument, would  
7 there be any problem, that is, that it's used only when  
8 it's necessary to subdue violence?

9 MR. MITCHELL: That wasn't the words I heard  
10 Justice White read.

11 QUESTION: Well, that's the essence of it,  
12 isn't it?

13 MR. MITCHELL: The essence is to subdue any  
14 resistance. That's what the bulletin says. And that  
15 means subdue all resistance, Your Honor.

16 QUESTION: Well, it says "necessary to subdue  
17 resistance," "necessary." Not just when it's applied  
18 for the purpose of.

19 MR. MITCHELL: Mr. Justice White, a police  
20 officer may subjectively feel that it's necessary for  
21 him to choke a black man on the streets of Los Angeles  
22 because --

23 QUESTION: That isn't what the bulletin says.  
24 It says "necessary" and it doesn't say if the officer  
25 feels it's necessary.

1 MR. MITCHELL: Well, combined with the --

2 QUESTION: It may be objectively. It may be  
3 an objective test.

4 MR. MITCHELL: I don't think it is, Your  
5 Honor. I think the other statements in the record --

6 QUESTION: You'll find out in your trial.  
7 You'll find out in your damage suit.

8 MR. MITCHELL: Well, I don't think you should  
9 leave people to a damage remedy in a situation like  
10 this, not with this overwhelming threat. So if you do  
11 not dismiss --

12 QUESTION: Well, this overwhelming threat that  
13 you say you don't need any protection against any more.

14 MR. MITCHELL: Well, it's gone, and hopefully  
15 it'll be gone forever.

16 Thank you.

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1 CHIEF JUSTICE BURGER: Do you have anything  
2 further, Mr. Merkin?

3 QUESTION: Excuse me, Mr. Merkin. Will you  
4 tell me what do you think is before us? You brought the  
5 case here. What judgment is here?

6 ORAL ARGUMENT BY FREDERICK N. MERKIN, ESQ.

7 ON BEHALF OF THE PETITIONER -- Rebuttal

8 MR. MERKIN: The one you stated, Mr. Justice  
9 Brennan. The judgment that comes from the court of  
10 appeals in affirming a preliminary injunction, but there  
11 are decisions of this Court --

12 QUESTION: No, no. What other judgment is  
13 before us?

14 MR. MERKIN: No other judgments.

15 QUESTION: That's the only one.

16 MR. MERKIN: Only judgment, yes.

17 QUESTION: And that is stayed by the courts.

18 MR. MERKIN: And that is stayed.

19 QUESTION: But there's a special standing  
20 issue even in that judgment.

21 MR. MERKIN: That's right. It's inherent in  
22 it, and this Court has ruled in the past that decisions,  
23 -- the term "early in the proceedings" upon which this  
24 Court has a rule, can be raised at a later point. It's  
25 inherent and indeed, the court could raise it on its



1 motion if it so desired because it's a case of  
2 controversey under Article III which is at issue  
3 There are just two points I would like to  
4 address on rebuttal. The first is to clarify a point  
5 relative to what the city wants. The city wants  
6 flexibility. It's not clear that the city ever will go  
7 back to the control holds -- wants the flexibility to do  
8 so should it make that determination.

9 The second issue goes to whether the  
10 respondent believes the case is moot. If the respondent  
11 believes that the need for a declaration or injunctive  
12 relief is moot, respondent would move to dismiss all  
13 aspects of the case other than damages. And counsel for  
14 the respondent said, apparently, that only the damages  
15 issue remains.

16 I think what the respondent is trying to do,  
17 however, is to have the spectre of federal judicial  
18 control there overseeing the police department's  
19 decisions on this matter. And if they're not  
20 satisfactory to the respondent, then the respondent will  
21 be in court perhaps --

22 QUESTION: Respondent could have said that  
23 when you filed your petition for certiorari. And we  
24 wouldn't be here. We wouldn't have all this problem.  
25 Right?

1 MR. MERKIN: Well, I --

2 QUESTION: Couldn't respondent have said we  
3 don't care about the injunction, and let it go.

4 MR. MERKIN: Respondent could have said that,  
5 yes.

6 QUESTION: You wouldn't be up here, would you?

7 MR. MERKIN: That's right.

8 QUESTION: I think in fairness to respondent,  
9 though, the moratorium hadn't taken place at the time  
10 you filed your petition, had it?

11 MR. MERKIN: I don't believe so. I believe,  
12 Mr. Justice Rehnquist, we filed our petition in December  
13 of 1981. The moratorium followed roughly six months  
14 thereafter. And debriefing was well underway at the  
15 time on May 12th, that the police commission instituted  
16 the moratorium. It was shortly thereafter that  
17 respondent moved to have the writ dismissed as having  
18 been improvidently granted.

19 QUESTION: And we didn't take action on that  
20 motion.

21 MR. MERKIN: That's right. And I believe  
22 correctly so.

23 QUESTION: Mr. Merkin, do you think we could  
24 safely assume, in view of what's been said in court  
25 today, that if we were to dismiss the write as

1 improperly granted, that your opponent means what he  
2 says and he would just go in and move to dismiss the  
3 injunction before the district court? You don't believe  
4 him, I take it.

5 MR. MERKIN: I don't think that's a fair  
6 assumption. For example, --

7 QUESTION: He's, in effect, represented to the  
8 Court that he's prepared to do that, as I understand  
9 what he said. And it seems sort of silly to be deciding  
10 the kind of a case in which obviously, there's some  
11 difference of opinion if no matter what we do he's going  
12 to say let's vacate the injunction and then you'd  
13 probably be happy, wouldn't you?

14 MR. MERKIN: Mr. Justice Stevens, I think he's  
15 sayin vacate -- he's not concerned about the preliminary  
16 injunction, but his primary causes for declaratory  
17 injunctive relief I think he still wishes to pursue.  
18 Because otherwise, he would dismiss all injunctive, all  
19 equitable aspect of the case.

20 QUESTION: It would seem to me that a couple  
21 of good lawyers would be able to settle this case and  
22 save the damage issue without requiring this Court to do  
23 very much about it.

24 MR. MERKIN: Well, there is a problem that the  
25 city faces with respect to the doctrines enunciated by

1 the Ninth Circuit. Whatever control hold policy the  
2 city chooses is immediately challengeable in district  
3 court, and not just the control hold policy; any use of  
4 force policy.

5 QUESTION: That narrows your complaint down to  
6 the standing issue, then, doesn't it?

7 MR. MERKIN: Well, that --

8 QUESTION: You'd like an advisory opinion on  
9 the standing issue is what I understand.

10 MR. MERKIN: I don't believe it's advisory.

11 QUESTION: Maybe you'll get a different panel  
12 in the Ninth Circuit next time.

13 (Laughter.)

14 MR. MERKIN: Perhaps. But that's basically  
15 all I have. Thank you.

16 CHIEF JUSTICE BURGER: Thank you, gentlemen,  
17 the case is submitted.

18 (Whereupon, at 11:55 a.m., the case was  
19 submitted.)

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CERTIFICATION

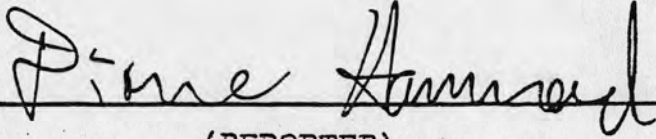
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CITY OF LOS ANGELES v. ADOLPH LYONS # 81-1064

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