ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

DKT/CASE NO. 81-1335

TITLE DISTRICT OF COLUMBIA COURT OF APPEALS ET AL.,
v. Petitioners
MARC FELDMAN AND EDWARD J. HICKEY, JR.

PLACE Washington, D. C.

DATE December 8, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

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DISTRICT OF COLUMBIA COURT OF APPEALS ET AT., :

Petitioners :

v. : No. 81-1335

MARC FELDMAN AND EDWARD J. HICKEY, JR. :

- -x

Washington, D. C.

Wednesday, December 8, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:38 o'clock p.m.

APPEARANCES:

DANIEL A. REZNECK, ESQ., Washington, D. C.; on behalf of the Petitioners.

ROBERT M. SUSSMAN, ESQ., Washington, D. C.; on behalf of Respondent Feldman.

MICHAEL F. HEALY, ESQ., Washington, D. C.; on behalf of Respondent Hickey.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in District of Columbia Court of Appeals and others against Feldman and Hickey.

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

ORAL ARGUMENT OF DANIEL A. REZNECK, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. REZNECK: Mr. Chief Justice, and may it please the Court, these two cases are here on a single issue, whether the federal courts in the District of Columbia have jurisdiction to review prior decisions of the D.C. Court of Appeals denying applications to the D.C. bar or the D.C. bar examination by particular applicants.

Rather than burdening the Court with a recital of the facts of these cases, which are fully set out in the brief, I thought it would be useful if I outlined at the outset the routes by which an applicant may obtain admission to the D.C. bar as they bear on these cases. There are three possible routes.

One is graduation from an ABA-approved law school and success on the D.C. bar examination, and there is no dispute here that neither of these applicants met that standard. That particular --

QUESTION: Neither of them? Did they ever get to the second one?

MR. REZNECK: Neither took the bar examination, and neither was a graduate of an ABA-approved law school.

QUESTION: So they were, as I understood, the problem is that they were barred from taking the examination. That is the issue, isn't it?

MR. REZNECK: On the circumstances presented to the D.C. Court of Appeals, each one was not permitted to take the D.C. bar examination. That is correct, Your Honor.

Now, that requirement of graduation from an ABA-approved law school prevails in most jurisdictions in the United States. Its validity has never been undermined by any court, to my knowledge, and when an effort was made to challenge it here several years ago, this Court held that the challenge did not present a substantial federal question.

The second route for admission to the D.C. bar is admission on motion of a person who is a member of a court of general jurisdiction of any other state or territory, and who has been engaged in the practice of law for five of the eight years preceding the application. This is Subsection (c) of the Court's Rule

46 that we have been dealing with.

I would point out to the Court that teaching at an ABA-approved law school qualifies under this rule as being engaged in the practice of law, and Mr. Feldman, as his brief indicates, has been doing that for some period of time at Rutgers Camden, which is an ABA-approved law school. In other words, Mr. Feldman can be admitted on motion to the D.C. bar after the specified time period. He is not forever barred from the D.C. bar by the fact that he did not graduate from an ABA-approved law school.

The third route is that a person who is a graduate of an unaccredited law school is eligible to take the D.C. bar examination upon completion of 24 credit hours in an ABA-approved school. This is the so-called 24-hour rule, which is involved in Mr. Hickey's case. There are six ABA-accredited law schools in the District of Columbia. There are two in Mr. Hickey's home state of Maryland. There are 172 in the United States as a whole, and 24 credit hours at any one of them is sufficient to satisfy the Court's 24-hour rule, and Mr. Hickey is still entirely eligible to do that.

Thus, there are several different routes into the D.C. bar. The one route which we submit is not

available is for a frustrated bar applicant to go to the United States District Court and obtain a coercive order against the D.C. Court of Appeals, nullifying a prior decision of that Court, and requiring it to abandon its own rules for admission, and that is what both the Respondents have attempted to do here.

I would like to identify for the Court several important interests which we regard as being at stake in this case. First, and I suppose most obvious, is the interest of the D.C. Court of Appeals in maintaining its independence and its authority in a matter which has been expressly confided to it by Congress, admission to its bar, and the governing statute here, I think, is about as explicit as it could be. This is Section 2501 of Title XI of the D.C. Code:

"The District of Columbia Court of Appeals shall make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar."

And I want to emphasize that we are not talking here about admission to the bar of the U.S. District Court for the District of Columbia or the U.S. Court of Appeals for the District of Columbia, which are entirely free to regulate their own bars as they see fit, and they do so.

QUESTION: Mr. Rezneck, do you think your case stands on any different footing than if you were representing the highest court of a state?

MR. REZNECK: Yes, I do, because of the Court Reorganization Act, Justice Rehnquist.

QUESTION: In what respect does it stand on a different footing?

MR. REZNECK: I think that considering the history of regulation of the bar in the District, which was originally confided to the U.S. District Court as a court of general jurisdiction, you had a considered judgment by Congress expressed in that statute transferring that jurisdiction to the District of Columbia Court of Appeals as the highest court of the District of Columbia.

I think it is a question of what implications can fairly be drawn from that transfer of jurisdiction. I would point out that there is precedent in this Court under the Court Reorganization Act, specifically the Swain versus Pressley decision by Justice Stevens on behalf of the Court several years ago, which construed a different provision of the Court Reorganization Act as conferring less jurisdiction on the federal district court here than would be true on federal district courts elsewhere in the country because of the provisions and

the intent of Congress in the Court Reorganization Act.

So, I do think that we stand on a different and on a stronger footing here in the District for an absence of jurisdiction in the federal courts.

QUESTION: Well, suppose before Alaska was admitted to the Union it had the same kind of a problem. Once it was admitted -- that is, the federal courts, territorial judges performing certain functions. Once it was admitted to the Union, it comes in on an equal footing with all other states, and also with equal burdens, does it not?

MR. REZNECK: Then it is a state. It would depend, of course, as to whether the Act of Congress had anything to say about control over admission to the bar. Normally that would not be the case when a state is admitted. Here we do have a statute which deals explicitly with the subject of control of admission to the bar, and of course there isn't any Congressional statute applicable anywhere else in the United States except in the District of Columbia.

So that we have that statute to interpret and apply here, particularly in the light of the prior history in the District of Columbia of regulation of the bar.

As I was indicating, the D.C. Court of Appeals

is not in any sense attempting to control the bars of other courts in the District of Columbia. Mr. Feldman, for example, is a member of the bar of the U.S. Court of Appeals for the D.C. Circuit. His name appears on briefs in cases in that court, and in the reports of decisions in cases in that court. While he was in Washington, he was eligible to practice in the Federal District Court here, because he was associated with a member of the bar of the Federal District Court.

In other words, we are concerned solely here with admission to the local bar, and that is the right to practice in the local court system and to hold oneself out as admitted to the general practice of law in the District of Columbia, and we submit that the decision below overturns or undermines one of the pillars of the Court Reorganization Act of 1970, which was the transfer of jurisdiction over the local bar from the federal court to the U.S. -- to the D.C. Court of Appeals.

And I would suggest that a few lines of the history here are instructive, because as I think this Court knows from its prior decisions under the Court Reorganization Act, and as I certainly well remember when I came to Washington to practice 20 years ago, we had this unique hybrid court system here, where you had

a federal court system that was a court of general jurisdiction, not limited jurisdiction, you had a local court system that was entirely subordinated to the federal court system, and you had a local bar which was under the control of the U.S. District Court.

QUESTION: Well, in those days, Mr. Rezneck, there was a Municipal Court which is somewhat like the Superior Court now. Is that correct? Somewhat.

MR. REZNECK: No, it was -- well --

QUESTION: Somewhat.

MR. REZNECK: The Superior Court is a court of general jurisdiction.

QUESTION: Yes.

MR. REZNECK: The Municipal Court was certainly not.

QUESTION: It performed functions somewhat like, but broader. Now, in those days, what was the situation on practicing before the Municipal Court?

MR. REZNECK: There was separate admission to the Municipal Court bar. If one was a member of the --

QUESTION: Did you have to take an examination?

MR. REZNECK: No. If one was a member of the bar of the U.S. District Court, one was admitted to the bar of the Municipal Court, and I believe also of the

D.C. Court of Appeals, as it then was, so that you had really a mirror image situation of what prevails now.

QUESTION: And then when the Municipal Court later became the Court of General Sessions, did the same practice prevail?

MR. REZNECK: The same situation prevailed, because that was prior to Court Reorganization.

QUESTION: And then it went from the Court of General Sessions to --

MR. REZNECK: The Superior Court, and it was then that the Superior Court became a court of general jurisdiction. The D.C. Court of Appeals became the highest court --

QUESTION: Like any other -- Like any other state court.

MR. REZNECK: Correct. The D.C. Court of Appeals became the highest court of the District of Columbia, and both federal courts in the District of Columbia were reduced to the status of courts of limited jurisdiction, like other lower federal courts in the United States.

QUESTION: Mr. Rezneck, are there any areas at all in which judgments of the D.C. Court of Appeals are reviewable other than in this Court?

MR. REZNECK: I think that there may be one

provision in the Court Reorganization Act that deals with certain types of criminal cases where you have a joinder of D.C. Code and U.S. Code offenses in the local court system. I think there is some provision which may still exist for review of such cases by the U.S. Court of Appeals, although that may be part of the phase-out. There was some transitional reviewing jurisdiction even after the Court Reorganization that existed for some years, but --

QUESTION: But after that phase-out, judgments of the D.C. Court of Appeals would be reviewable only by this Court?

MR. REZNECK: Only by this Court. That's correct. And that was a key provision of the Court Reorganization Act, that decisions of the D.C. Court of Appeals were made directly reviewable here instead of in the lower federal courts as they had been previously, and the independence and control over the D.C. bar which was confided by Congress to the D.C. Court of Appeals had been scrupulously respected by the federal courts in the District of Columbia prior to the decision in the present case. There has been an unbroken line of cases in the Federal District Court which had dismissed suits by frustrated bar applicants as not being the business of the Federal District Court in Washington.

QUESTION: Did those cases raise Constitutional questions?

MR. REZNECK: Some did.

QUESTION: But is -- Is your view that the case turns on the fact that there was an application for the right to take the bar exam, or would it be the same case if they had never applied, and just made an attack on the rule collaterally?

MR. REZNECK: If they had gone into the District Court originally, in the first instance?

QUESTION: Yes. Say it was a little clearer case of a Constitutional claim of substance. There was an old Illinois case, I know, that denied admission to women, and supposing you had that kind of a rule. Would a woman have to apply for admission before she could bring a collateral attack on the rule?

MR. REZNECK: Well, you don't, of course, have to reach that question here, because of the case --

QUESTION: But I am trying to understand your theory.

MR. REZNECK: Right.

QUESTION: I mean, is it your view that the jurisdiction is so exclusive that every attack on the rule must be made by seeking admission to the bar?

MR. REZNECK: If we were pressed to take a

position on that because the facts required it, I think our position would be that the will of Congress is that exclusive jurisdiction over bar admission should be --

QUESTION: Would you limit that --

MR. REZNECK: -- in the D.C. Court of Appeals.

QUESTION: Would you limit that contention to the D.C. Court of Appeals? You wouldn't apply it generally to state courts?

MR. REZNECK: No, because there is no Act of Congress that would govern in such situations.

QUESTION: And you probably don't think it would be valid as applied to state courts.

MR. REZNECK: Well, I haven't had to face that question, and of course it is not necessary to face the question that you put in these cases, because --

QUESTION: Well, the reason it may be is that at least as to one of the applicants, it is not at all clear that he applied for anything other than discretionary relief from the rule as opposed to a holding that the rule was invalid.

MR. REZNECK: I think --

QUESTION: And if he just asked for discretionary relief, it might be just like a case where he had done nothing.

MR. REZNECK: I think that there are three -- I have thought about this, and I think that there are three possible approaches that could be taken, and there are authorities, I think, that support each of them. They all lead to the same result here.

I think one could conclude that on the basis of the Court Reorganization Act, that exclusive jurisdiction from start to finish is confided to the D.C. Court of Appeals subject to review by this Court. There is an intermediate position, which is that where applicants have gone to the D.C. Court of Appeals or, for that matter, to a state court in the states, and have obtained an adverse decision from the state court or in this case the D.C. Court of Appeals, that they cannot then go into the Federal District Court to seek review or to relitigate any issues that were before the local court.

And I think there is a third position, which I know finds support in a decision by Judge Marrage and in the Fourth Circuit decision in the Woodard case that we have cited in our brief, which is that bar admissions matters are of such paramount importance to the states that whether it is the District of Columbia or the states, they belong in the state court system from start to finish, subject -- and I always emphasize subject --

to final review in this Court.

So, under any of those views, of course, these cases would be decided exactly the same way, in favor of dismissal here.

QUESTION: Under the third view, you wouldn't draw a distinction between a license for a doctor, say, and a license for a lawyer?

MR. REZNECK: Not under that third view. That is probably the broadest approach. It certainly isn't necessary to the decision of this case, but there is very respectable authority in the Fourth Circuit, and I think also in the Ninth Circuit, taking that -- taking that point of view.

QUESTION: And what do you say about the, again, on the waiver, that this is just a -- I know your rule, but please waive it? That is all that happened here, in one case, at least.

MR. REZNECK: Well, I don't think that is really an accurate summation of what happened here, because I know that the Respondents here have attempted to avoid the effect of the Summers case --

QUESTION: Yes.

MR. REZNECK: -- by asserting that all that they were doing was asking for a waiver, and that they were not in any sense making a so-called claim of right

which would create a justiciable controversy and lead to a judicial determination.

I would point out that if you read their petition carefully, that you will see that each Respondent was asserting in his petition to the D.C. Court of Appeals that he was qualified to practice law in the District of Columbia, that he was qualified for admission to the D.C. bar, or at least to take the D.C. bar examination, by reason of the unique circumstances of his particular case.

In fact, they necessarily had to assert, and they did in fact assert that they were qualified to practice in the District of Columbia because that was a predicate for them to be eligible for a waiver. In other words, there was a claim of right on which the court was capable of taking judicial action.

I would like in that connection just to refer to a couple of points in the record on that. Let's take, for example, Petitioner Mr. Hickey in the D.C. Court of Appeals. This is at Page 20 of the Joint Appendix. His first point: "Petitioner is substantively qualified to sit for the bar examination." In other words, he was asserting --

QUESTION: Excuse me, Mr. Rezneck. I don't --

MR. REZNECK: That is in the Joint Appendix.

QUESTION: Oh, in the Joint Appendix.

MR. REZNECK: Right, 20a. That is the Hickey petition. "Petitioner is substantively qualified to sit for the bar examination." That was a predicate to his request for a waiver, that he met the qualifications, other than in the one respect of not having graduated from an ABA law school.

His counsel, and I emphasize that both these litigants were represented by distinguished law firms, and it seems to me unrealistic to say that what has happened here was somehow a trap for the unwary, which is the phrase that they have used. At Page 24 of Mr. Hickey's petition, his counsel stated, after reviewing the unique circumstances of his case, "Far more than most, this man has earned the right to sit for the bar examination."

QUESTION: Yes, I know, but he starts his petition by saying he seeks a waiver.

MR. REZNECK: Yes --

QUESTION: -- and the last line is, for the foregoing compelling reasons, rule so and so should be waived. So it is a request for a waiver.

MR. REZNECK: He does, but I don't think that the terminology -- I don't think that the terminology of a request for a waiver can be determinative of the

question whether the D.C. Court of Appeals made a judicial determination in his case. In other words, I don't think this is simply a pleading matter. There have been numerous cases in the circuits in which people asked for exceptions, for exemptions.

QUESTION: Do you think there was appellate jurisdiction in this Court to review that determination? Say he had filed a notice of appeal after the denial. Could we have reviewed that?

MR. REZNECK: Are you speaking of the Hickey case specifically?

QUESTION: The one that -- Which one is Page 21? That is Hickey.

MR. REZNECK: That's the Hickey petition.

QUESTION: Yes.

MR. REZNECK: Right. I understand that there may be different -- somewhat different considerations as between the two with respect to the --

QUESTION: But on this petition, they entered an order denying it and saying we refuse to waive the rule.

MR. REZNECK: Right.

QUESTION: Is it your view that that was an appealable order in this Court?

MR. REZNECK: Well, I think that the question

of this Court's jurisdiction over that kind of decision is, I think, unsettled in the sense that there is no doubt that this Court would have Constitutional -- Article III jurisdiction to review it, because it is a matter which arises in the District of Columbia, where all law is federal, and I think that you will find in Justice Marshall's opinion in the Pernall case --

QUESTION: Well, I don't mean to interrupt, but you say he couldn't bring an independent proceeding in the District Court.

MR. REZNECK: Right.

QUESTION: And I am asking you, did he have any remedy at all? Could he have direct review here?

MR. REZNECK: I think that he could if there is a question as to whether he explicitly had not raised federal Constitutional questions, assuming that that --

QUESTION: Well, we've got the petition in front of us.

MR. REZNECK: Right.

QUESTION: As you read the petition, did we have jurisdiction to review the order denying?

MR. REZNECK: I think there is a question on the petition as written as to whether there would be statutory jurisdiction under 1257.

QUESTION: So your answer is no.

MR. REZNECK: Your Honor, I think that is an unsettled question. I really do not know the answer to that. There would clearly be Constitutional jurisdiction, because it is a federal matter, by virtue of arising in the District of Columbia.

I think, if I may try to be responsive to your point, because I understand what you are seeking here, that he could have raised, whether he did so explicitly or not, he could have raised in the D.C. Court of Appeals, either in that petition or on a petition for reconsideration following the denial of his waiver, any and all federal Constitutional questions which he later asserted in his suit in the District Court, and I would suggest that what you have here is a situation of a bypass of available remedies. That is one way to characterize it. Or a splitting of claims. That is another way to characterize it.

QUESTION: Well, in other words -- I think I understand your -- Your position is, his only remedy is by filing in the D.C. Court of Appeals and then direct review here, and at his first opportunity he must raise all the questions he wants to raise, and then we could review them, and he is --

MR. REZNECK: I don't think it would necessarily be his first opportunity, Your Honor.

QUESTION: You said he bypassed --

MR. REZNECK: He could have --

QUESTION: All he did was ask for a waiver, and he is done now.

MR. REZNECK: He could have gone -- He could have gone back and raised any and all federal Constitutional or statutory questions by way of petition for reconsideration after the action of the Court of Appeals in this case. I don't think that would be imposing an unreasonable burden on him if the alternative is to inject the federal court system and to review --

QUESTION: But there would be no -- was there a timeliness requirement on that?

MR. REZNECK: No.

QUESTION: This is an adjudication that really doesn't bar him from just starting all over again wherever he wanted.

MR. REZNECK: That is -- That is correct. In fact, we have taken the position in the District Court --

QUESTION: A rather strange case of adjudication.

MR. REZNECK: We took the position in the District Court, Your Honor, that if Mr. Hickey wants to renew this process and apply for a waiver and raise any

and all of those questions now, he is free to do that in the D.C. Court of Appeals now and the court will hear him.

QUESTION: Mr. Rezneck, it seems to me I have seen perhaps in some New York proceedings, if someone is dissatisfied with what might be classified as an administrative action of the New York Court of Appeals, they apparently have a right to bring an action in the Supreme Court of New York, which is obviously subsidiary to the Court of Appeals. Would there have been any possibility of initiating -- of either of these Respondents initiating action in the Superior Court of the District of Columbia?

MR. REZNECK: I think one -- I suppose one could presuppose or postulate that you could -- you could have formulated an action perhaps against the admissions committee in the Superior Court. I think under the statutory framework here, where jurisdiction over the bar is so clearly confided to the D.C. Court of Appeals, that from a procedural standpoint, these petitioners proceeded correctly, which was to file a petition in the D.C. Court of Appeals as an original matter.

QUESTION: And it is that statute that confides the jurisdiction or the responsibility for

admission to the bar to the District of Columbia Court of Appeals that you rely on to say that the -- that Court of Appeals is in a different position here than the highest court of the state?

MR. REZNECK: Well, I rely on it as making a Congressional allocation of jurisdiction between local and federal courts which has no counterpart in any federal statute applying elsewhere in the United States.

QUESTION: Well, if you were representing the state of New Jersey in the same set of facts, would you be making different arguments, except that you think you have an additional argument?

MR. REZNECK: I would -- That is correct. I would be arguing for the same result, because there is a long line of cases in the Circuit and District Courts holding that a bar applicant who goes to the state court system first cannot thereafter seek, in effect, collateral review of the state court decision by going to the federal courts. That is a line of authority which is summarized by the Tenth Circuit in a case called Doe versus Pringle. We would certainly make that argument if this case arose in New Jersey.

QUESTION: Is that the case in which there is some suggestion that there is the risk that the federal courts would become superboards of law examiners? One

of the cases has that.

MR. REZNECK: Well, there is a lot of language in these cases, and I may say, if I might speak to that point, that -- because I think it does give some additional strength here to the idea that it is entirely rational to construe the Congressional purpose here as conferring this jurisdiction exclusively on the court, on the D.C. Court of Appeals, that we are dealing here with judges who, although Article I judges, admittedly, are nevertheless nominated by the President, are confirmed by the Senate of the United States, are used to dealing with questions of federal Constitutional and statutory law as their daily staple.

This is a court which has shown itself over the years since it was made the highest court of the District to be fully receptive and congenial to claims of federal Constitutional law. This, almost above all courts, I suppose, in addition to the federal court system, is a court which can properly be entrusted with the determination of federal Constitutional or other questions, subject to ultimate review by this Court.

In other words --

QUESTION: Well, Mr. Rezneck, what if I went before the -- or what if my wife, assuming she were admitted to the bar, went before the Court of Appeals

for the Ninth Circuit and applied for admission to that court, saying that she was admitted to practice in the state of Arizona, the district of Arizona, and the Ninth Circuit says, no, we don't admit women to practice here? Is there any review that she could have of that ruling?

MR. REZNECK: If the -- If that was the decision of the Ninth Circuit?

QUESTION: Yes.

MR. REZNECK: Well, I would think she would have a petition for certiorari in this Court.

QUESTION: And that that would be a case in the Court of Appeals within our jurisdiction?

MR. REZNECK: Yes, that would, it seems to me, be a clear Constitutional violation by the Ninth Circuit.

QUESTION: Well, I assume it would be, and I assume that Respondents here are claiming that there was a clear Constitutional violation, and your answer isn't that there wasn't a violation, but that whatever the case with respect to that may be, there is no remedy.

MR. REZNECK: No, I think that -- the case that you put is really an -- is in the sense that you have the judicial determination by the Ninth Circuit acting in a judicial capacity which would be reviewable

in this Court on writ of certiorari, just as here it is our position that you had a judicial determination by the D.C. Court of Appeals acting in a judicial capacity which was reviewable by this Court, but not in a lower Federal District Court.

So, I don't see any conflict or divergence between the two cases.

QUESTION: Well, we wouldn't -- if the Constitutional issues weren't raised, we normally wouldn't review those issues.

MR. REZNECK: You are speaking on review of the D.C. Court of Appeals decision.

QUESTION: Yes.

MR. REZNECK: Well, again, I think that really goes to a question which has not ever been settled in the District of Columbia, because as Justice Marshall's opinion which I referred to in Pernall --

QUESTION: I know he could have raised them, and I know your position is that whether he raised them or not, the federal court has no role in this matter at all.

MR. REZNECK: That is correct.

QUESTION: But until he does raise those issues, at least some federal issue, some federal -- is the decision reviewable here, other than -- just other

than the refusal to waive?

MR. REZNECK: It may be reviewable as a decision on federal law, all of which decisions are ultimately reviewable here.

QUESTION: Well, I know, but it wouldn't include Constitutional issues.

MR. REZNECK: Yes, it --

QUESTION: If he didn't raise them. If he didn't raise them.

MR. REZNECK: If in fact he didn't raise them, that would pose a question, but he pleaded the facts which would support the very Constitutional claim that he articulated as a Constitutional claim when he got to the District Court.

QUESTION: We normally require something more than a record that -- on the basis of which a Constitutional issue could have been raised.

MR. REZNECK: I think my point would be that with respect to the question here, which is the allocation of jurisdiction between the D.C. Court of Appeals and the Federal District Court, that if he could have raised those questions --

QUESTION: Right.

MR. REZNECK: -- in the D.C. Court of Appeals, and obtained a full and fair hearing of them, and there

is no contention to the contrary --

QUESTION: Then he could never go to the federal court.

MR. REZNECK: -- that he cannot go to the Federal District Court under the scheme that is in effect in the District of Columbia. That is correct.

QUESTION: And he couldn't go there in the first instance without going to the --

MR. REZNECK: We don't have to reach that point, but if forced to it, that would also be our position.

QUESTION: Well, the same rule.

MR. REZNECK: But I emphasize that he is entirely free to seek to raise those questions now if he chooses to do so, assuming he did not do so before, and of course I am only referring to Mr. Hickey in this regard. There is no question, I think, on a fair reading of the record that Mr. Feldman raised those federal constitutional questions in the D.C. Court of Appeals.

QUESTION: What if he has to raise factual questions to make out his Constitutional claim? In other words, say he alleges he was denied because of his race or something, and the other side denies it. Can the factual determination be made by the party that

denies the allegations?

MR. REZNECK: Well, of course, we don't have anything like that here.

QUESTION: No, but I mean, I am just asking you. I am trying to get the structure of the whole setup. How would it work in that case?

MR. REZNECK: I think that -- I think that the state court system, at least in the first instance, subject to review by this Court, would provide the factfinding mechanism by which such a question would be adjudicated. Now, I think it is clear that if you could demonstrate that that mechanism was inadequate, just as in other contexts, and didn't provide a fair and adequate remedy in the state court system, that would provide a basis for going to the federal courts. I think that is true in habeas corpus, and it is true in a number of other contexts.

QUESTION: That is kind of an exhaustion requirement.

MR. REZNECK: We are not disputing that proposition at all, but again, that doesn't arise in this case.

I would like to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Sussman?

ORAL ARGUMENT OF ROBERT M. SUSSMAN, ESQ.,

ON BEHALF OF RESPONDENT FELDMAN

MR. SUSSMAN: Thank you. Mr. Chief Justice, may it please the Court, I would like to begin by going back to the initiation of proceedings in the District of Columbia court system, and to sketch for this Court some of the facts that Mr. Rezneck omitted to present.

I would like to begin, if I can, by mentioning Mr. Feldman's qualifications and legal training. Mr. Feldman elected to educate himself as a lawyer not by going to law school, but by reading law, that is, pursuing a program of legal study in a law office, which is a recognized method of training for the bar in the state of Virginia and in a number of other jurisdictions around the country.

Mr. Feldman completed --

QUESTION: Must all jurisdictions have the same patterns? If Virginia elects to allow private study as a predicate for taking the bar, does that mean other states must do it?

MR. SUSSMAN: No. I think that the states have reasonable latitude in that regard, subject to Constitutional principles, and there is no necessary requirement that --

QUESTION: Well, you need not spend your time establishing that there are other ways to learn the law. Roscoe Pound, I think, did not go to a law school in the conventional way, and neither did Justice Jackson fully, but that isn't the issue here, is it?

MR. SUSSMAN: Well, I think the issue here, Your Honor, is the jurisdiction of the District Court to hear a Constitutional challenge to the requirements for bar admission in the District of Columbia. We have not presented our position on the merits of the case. The issue that we have addressed both in the District Court and in the Court of Appeals is the jurisdictional issue, and I think that that is the issue which is now before the Court.

I do want to point out that Mr. Feldman was admitted in Virginia, and subsequently in Maryland, after passing the bar exams of both states, and he decided to become associated with a law office here in the District of Columbia, and as a result, and quite naturally, he sought admission to the District of Columbia bar.

Upon filing his admission papers with the committee on admissions, he was informed that the rule, Rule 46 of the Court of Appeals barred Mr. Feldman at the threshold from being considered for admission to the

bar, because the rule required graduation from an ABA-accredited law school, and Mr. Feldman had not attended such a school.

Mr. Feldman nevertheless felt that his qualifications were good, that he had had a thorough legal education. He had a commitment to the standards of the profession, and he hoped that he could find some way to persuade the bar admission authorities in the District of Columbia to consider his qualifications on their merits.

The committee on admissions advised Mr. Feldman that the only way he could be considered for admission to the bar was if there were a waiver of the requirement of graduation from an ABA-accredited law school. It further advised Mr. Feldman that there was one body and one body only in the District of Columbia that could grant such a waiver, and that was the D.C. Court of Appeals itself.

Mr. Feldman's next step was to submit a petition directly to the Court of Appeals asking the court to waive the requirement of ABA -- graduation from an ABA-accredited law school and consider his individual qualifications, and I would like to stress what issues were raised by that petition and what issues were not, because I think that these are the matters on which the

jurisdictional issue before this Court will turn.

Mr. Feldman in his petition asked solely for an exercise of discretion by the D.C. Court of Appeals. He said in essence, I acknowledge that I didn't attend an ABA-accredited law school. I acknowledge that the rule on its face bars my admission. But I think that I have pursued a course of legal education which is entitled to some consideration, and I appeal to the discretion of the court to waive the rule and take a look at my individual qualifications.

QUESTION: Well, now that you are here, are you in the position of saying that this Court sits to review the exercise of discretion by 51 or two or three, depending on how you count Puerto Rico --

MR. SUSSMAN: No, I -- Your Honor, I don't think that this Court sits to review the exercise of discretion by state court systems, but I do think that this Court and the lower federal courts sit to enforce Constitutional rights in cases where Constitutional issues have been properly raised, and --

QUESTION: Well, you don't think this case is properly here, I would think.

MR. SUSSMAN: Well, I think it is here on appeal from the decision of the D.C. --

QUESTION: You didn't come here, anyway.

MR. SUSSMAN: Well, that's right. I think we would be happier to be in the District Court litigating the merits of Mr. Feldman's Constitutional claims, and I don't think, to address a point that Mr. Rezneck raised, that we could have sought review in this Court from the denial of the waiver of petition, because the only issue that was raised by the waiver petition, and clearly the only issue which was addressed in the order of the Court of Appeals was whether the rule requiring graduation from an ABA-accredited school should be waived.

QUESTION: Would you think that the rule, whatever the rule is, should be the same for a jurisdiction which would not permit a person to sit for examinations to be -- to practice medicine unless they had graduated from a school, a medical school accredited by the American Medical Association or some other such body?

MR. SUSSMAN: Well, I think that on the merits, there are certain Constitutional principles which should be applied to all accreditation schemes, whether they are schemes involving the practice of medicine, the practice of law, or the practice of any other profession, and I think that it would be anomalous if the federal courts, lower federal courts were free to entertain Constitutional claims involving the legality

of a state's accreditation scheme for medicine but not to entertain exactly the same claims when they arise in connection with admission to the bar.

And I must say that I believe that that would be the consequence of the very broad rule which Mr. Rezneck is --

QUESTION: Counsel, are you arguing that there is a Constitutional right to a waiver?

MR. SUSSMAN: No. No, absolutely not.

QUESTION: Well, how else could you get here?

MR. SUSSMAN: You mean, how else could we get to the Court on an appeal from a decision of the --

QUESTION: Well, could you get to any court?

MR. SUSSMAN: I think the Constitutional claim that we asserted in the -- in the District Court and in our complaint is not that there is a Constitutional right to a waiver, but that Rule 46, both on its face and as administered over a period of time by the D.C. Court of Appeals was unconstitutional. I don't think that we would contend that every applicant --

QUESTION: Well, you did, didn't you, petition and ask them to waive?

MR. SUSSMAN: We did but we didn't request that as a matter of Constitutional right, and indeed that is the very point that we are making.

QUESTION: Well, what right did you have to ask them for a waiver?

MR. SUSSMAN: I think that is precisely the issue. I don't think that we sought a waiver as a matter of right. We believed that a fair-minded and reasonable decision-maker would grant a waiver as a matter of discretion. That is to say --

QUESTION: It is really a different claim that you presented to the United States District Court than was presented to the District of Columbia Court of Appeals.

MR. SUSSMAN: Oh, I think it is a very different claim, and --

QUESTION: Why shouldn't you at least have gone to the District of Columbia Court of Appeals with your Constitutional claim as a matter of exhaustion before you went to the District Court?

MR. SUSSMAN: Well, Justice Rehnquist, I think that the decisions of this Court have recognized that where a litigant is attempting to raise a Constitutional issue, the litigant has a choice of forum. That is to say, that if the litigant wishes to press the Constitutional claim in the federal court, the federal court should be available.

QUESTION: Are those 1983 cases?

MR. SUSSMAN: Well, Monroe v. Pape is one of those cases. The England case is another case. Those are cases arising under 1983, but I would not say that they are any different from the claim pressed here, which arises directly under the Constitution and 1331.

QUESTION: What authority do you have other than 1983 claims that there is no principle of exhaustion available here?

I think your colleague wants to call your attention to something.

MR. SUSSMAN: Well, the cases that we have cited in our -- in our brief are 1983 cases, but I would say beyond that that the exhaustion requirement as I have always understood it is a requirement in most cases to exhaust administrative remedies. That is to say, if there is a reasonable prospect of obtaining administrative relief from the relevant decision-makers one is obligated to attempt to obtain that type of relief before then going into court and claiming that the decision-maker has acted unlawfully.

But I don't think that there is any rule which says that one is obligated to raise before the decision-maker in an administrative context not only issues of discretion but issues of law as well, particularly issues of federal law, and I think that --

QUESTION: But even if the decision-maker is the highest court of the District of Columbia?

MR. SUSSMAN: Even if the decision-maker is the highest court of the District of Columbia, I would --

QUESTION: Hasn't the reason for saying on occasion that you don't have to raise Constitutional issues before an administrative tribunal is that typically such a tribunal may be made up of an engineer and a doctor and an architect, who probably don't have too much expertise in Constitutional questions, but I wouldn't think that would apply where the administrator is a court.

MR. SUSSMAN: Well, Your Honor, if I can respectfully disagree, I think that in the absence of strong countervailing policy considerations, a litigant is entitled to litigate Constitutional issues in the federal court. The choice of forum is with the litigant. Now, I think that the policy behind an exhaustion requirement, be it in the administrative context or in the judicial context, is to give a chance for the administrator to address those issues which are peculiarly within the competence of that administrator, perhaps in the hope that a controversy in the Constitutional sense will be avoided.

Now, here, we went to the D.C. Court of

Appeals to seek that type of relief which was uniquely within the province of the D.C. Court of Appeals to grant us. We wanted a waiver from the rule because, quite frankly, we felt that if there was any prospect of attaining admission to the bar administratively and informally, much better to do that than to proceed directly in federal court and --

QUESTION: No one likes to sue to be admitted to the bar.

MR. SUSSMAN: Well, that's right. That was not an appealing prospect, and we wanted to make very sure that we had exhausted all possibility of obtaining admission within the confines of the D.C. administrative process for bar admission before going to federal court and raising our Constitutional claim.

QUESTION: Well, there is some suggestion, at least, that Feldman raised his Constitutional issue with the D.C. Court of Appeals.

MR. SUSSMAN: Your Honor, I think that we advised the D.C. Court of Appeals that we were contemplating raising Constitutional issues. We identified what those issues were, but, and this is quite important, we did not submit them for decision. We told the D.C. Court of Appeals that these are issues that we are prepared to raise in federal court if and

when the waiver application is denied.

And I think that the order issued by the D.C. Court of Appeals disposing of the waiver application is perfectly consistent with the character of our petition. The order entered by the Court says that the petition for a waiver is denied. It does not say that Rule 46 has been examined under the Constitution and has been upheld.

So, it is true that we advised the Court of Appeals that there were Constitutional issues we wanted to pursue, but we --

QUESTION: Well, we now have a problem, I suppose, of splitting a cause of action, possibly, and neither of the federal courts ruled on that issue, did they?

MR. SUSSMAN: That's right, neither of the courts ruled on that issue, but I don't think that that is an issue which one has to decide if the Court concludes that the petition was merely administrative in character. If the petition --

QUESTION: Well, if the Court were to conclude that your filing was judicial in character initially, then presumably we would be faced with what to do with the splitting of the cause of action or the res judicata problem. Would we then have to remand on that, or

should we, or what?

MR. SUSSMAN: Well, I think you are right, if you conclude that the petition sought judicial action, the issues remaining are res judicata issues.

QUESTION: Right.

MR. SUSSMAN: And I don't think that classifying the petition --

QUESTION: And should that be remanded, in your view?

MR. SUSSMAN: No, I think that you can decide the res judicata issue without considering whether there was an impermissible splitting of the cause of action. We have contended in our brief that if there was a cause of action asserted by the waiver petition, it was a very different cause of action from that which was advanced in the complaint in the District Court. And of course it is a fundamental principle of res judicata that if the second case brings forward a different cause of action from the first case, then there is no res judicata bar. The issues presented in the second case can be heard.

QUESTION: I don't think that is true. Anything that was litigated or might have been litigated is barred.

MR. SUSSMAN: Well, though, I think, Your

Honor, with deference, that the threshold question is whether the causes of action are the same. If the causes of action are the same, the issue is not -- if the causes of action are different, excuse me, the issue is not one of res judicata, but collateral estoppel, and then the question is not what issues could have been raised, but rather what issues were in fact raised and decided.

Now, I would make one further point in that connection which is, let's assume that the causes of action are absolutely the same in the waiver petition and the District Court complaint. Let's also assume for the sake of argument that the denial of the waiver petition was action taken in an administrative capacity. We would still say that Mr. Feldman was entitled to do precisely what he did, which was to put the D.C. Court of Appeals on notice that he planned to raise Constitutional claims, reserved those Constitutional claims for litigation in federal court, and then thereafter asked for a federal court decision.

So, I think that if the Court does find it necessary to address the res judicata issues, which we don't think are before the Court for decision, there is not just one, but several grounds for concluding that there is not a res judicata bar to considering the

Constitutional issues raised by Mr. Feldman's complaint.

Thank you, Your Honor.

CHIEF JUSTICE BURGER: Mr. Healy.

ORAL ARGUMENT OF MICHAEL F. HEALY, ESQ.,

ON BEHALF OF RESPONDENT HICKEY

MR. HEALY: Mr. Chief Justice, and may it please the Court, we requested the opportunity to present a brief argument this afternoon on behalf of Mr. Hickey because of certain important distinctions between Mr. Hickey's case and that of Mr. Feldman.

Again, since Mr. Rezneck did not take the opportunity to highlight any of the facts, let me take a few moments to do that.

After a distinguished, a long and distinguished career in the United States Navy, Mr. Hickey decided to retire from the Navy, having attained the rank of Commander, and to enter into a new profession, the practice of law. In March of 1975, he enrolled the Potomac School of Law, a newly established law school here in the District of Columbia. In fact, Mr. Hickey was a member of its first class.

Potomac was not accredited by the American Bar Association. Indeed, because of its newness, it had not even been through the extensive ABA accreditation

process. However, the D.C. Court of Appeals had followed a practice for some time of granting waivers from its requirement that applicants for the bar examination be graduates of an accredited law school.

In the spring of 1978, Mr. Hickey applied for such a waiver. The petition submitted on Mr. Hickey's behalf emphasized certain aspects of his qualifications. It also emphasized his many years of service to the country. His Navy career spanned 20 years. He received numerous decorations for valor in connection with almost 200 combat missions as a Navy fighter pilot. It emphasized his age -- at the time he was 47 years old -- his family situation, and the resulting need to embark on his new career as soon as possible.

What it did not emphasize or address in any way was a claim of a present right to admission to the bar. It did not raise any legal arguments. The D.C. Circuit so found. Petitioners in this case do not really contest that fact. Instead, what they claim is that Mr. Hickey should not, and it is their words, "be better off" than Mr. Feldman because he did not present any claims to the District Court.

Now, whether Mr. Feldman presented them in such a way as to make his act judicial or not, I think

Mr. Sussman has addressed that, and I don't think that they were, but in Mr. Hickey's case, there was no presentation of any legal arguments.

Petitioner's contention that he is nonetheless barred from Federal District Court is very intriguing in that light, since the fundamental basis of their decision that the action of the D.C. Court of Appeals in Mr. Feldman's case was a judicial act is the presentation of this letter. No letter was submitted in Mr. Hickey's case.

Having said that, I think we have to look back at certain fundamental principles of federal court jurisdiction. It is beyond dispute that had no action been taken to the D.C. Court of Appeals, had Mr. Hickey gone in the first instance to Federal District Court, the Federal District Court would have had jurisdiction to entertain his claims.

QUESTION: Well, there is dispute about that.

MR. HEALY: Mr. Rezneck --

QUESTION: I understood Mr. Rezneck to say that the federal court has no role at all, that if you want to challenge these rules, you go to the D.C. Court of Appeals, period.

MR. HEALY: Mr. Rezneck, when pressed this afternoon, Justice White, did say that. In his brief he

says he doesn't have to address the question.

QUESTION: Well, I know, but don't say there isn't a dispute about it, because he has just made the dispute

MR. HEALY: Your Honor, let me say there should be no dispute.

(General laughter.)

MR. HEALY: The cases are very clear, and we have cited a number of them in Footnote 5 of our brief, the various circuit courts that have considered --

QUESTION: There is no other situation that has the statute that Mr. Rezneck claims makes a special case out of the District.

MR. HEALY: Your Honor, I think that contention is respectfully without merit. I think if one looks at the cases of Key v. Doyle or Swain v. Pressley, as cited by Mr. Rezneck, if one looks at the Senate report and the House of Representatives report in connection with the passage of that Act, that the intention of the statute was to make the D.C. Court of Appeals at best equivalent to the highest courts of the various states.

With respect to the comity claim that he also makes, I don't think there is really any difference, but in fact the D.C. Court of Appeals is still a creature of

the federal government. It is not a state court. So, if anything, it is less than a state court. So I think that issue drops out.

Having said, and I think the cases support us, that Mr. Hickey could have gone in the first instance to District Court, Mr. Rezneck still argues that the Summers case applies. Again, the fact that Mr. Hickey never raised his Constitutional claims takes us out of the Summers case entirely.

QUESTION: Supposing Mr. Hickey had gone in the first instance to the District Court without ever having gone to the District of Columbia Court of Appeals. What would his Constitutional claim be if he had never made application to be admitted to the District of Columbia bar? That he was entitled to a waiver, but he had a hunch that the District of Columbia Court of Appeals wouldn't give it to him?

Do you think the federal court would really pass judgment on that claim?

MR. HEALY: Your Honor, you might have a question of standing at that point, and in fact in the District Court counsel for petitioners argued that because we had not made a formal application after having been denied the waiver, that we didn't have standing. Judge Greene thought that there wasn't any

merit to that argument.

Clearly, we have the requisite Constitutional standing by having made the petition for a waiver.

QUESTION: Why did you have standing? Because for all practical purposes you had asked for admission to the District of Columbia bar or not?

MR. HEALY: We had -- as the D.C. Circuit found, Mr. Hickey in his petition acknowledged that the rule applied to him, and would on its face have barred him from sitting for the bar examination. He sought a waiver. When that waiver was denied, then the requisite standing -- he had been denied admission to the bar. That is correct. At that point in time.

QUESTION: But they didn't interpret it as having requested admission to the bar.

MR. HEALY: Not a claim of right to admission to the bar. There may be a point in time that one must do something in order to gain the requisite standing in order to have one's federal claim, but the question addressed in the Summers case was whether the applicant there, as he had, had raised his Fourteenth Amendment claims in an adjudication by the state court.

Therefore, having claimed a present right to the bar, and having litigated federal questions, therefore, this Court's power to review on certiorari

had attached. If there is no claim of right --

QUESTION: Wasn't the Court of Appeals, the District of Columbia Court of Appeals judgment or its order -- it says, you are not entitled to admission.

MR. HEALY: It says that a petition for waiver will not be granted.

QUESTION: Yes, and this rule keeps you out.

MR. HEALY: That's correct, Your Honor. We were denied admission to sit for the bar examination. However, that is not an adjudication --

QUESTION: Well, Ex Parte Garland says that it is a judicial action, doesn't it, the exclusion of attorneys from the bar is an exercise of judicial power.

MR. HEALY: Justice O'Connor, I would respectfully submit that there is a difference between judicial power and a judicial act. I would not dispute the fact that the general administration of the bar is something that has been given to the courts to administer in all of the states, but what the other courts that have considered it since that time and what the Supreme Court has said in Summers and as the Seventh Circuit said in Ktsanes, what you have to decide is whether the judicial power has been exercised in such a way as to give rise to a case or controversy which then

becomes something that can be reviewed in this Court if federal jurisdictional questions are raised.

QUESTION: The District of Columbia Court of Appeals certainly said this rule is sufficient to keep you out.

MR. HEALY: Yes, Your Honor, it did, and what we then did in Federal District Court was to contend that the rules were unconstitutional on their face and as applied.

QUESTION: And if that had been by a state court, you would have had a right to go into the Federal District Court. That is your theory.

MR. HEALY: Yes, Your Honor.

QUESTION: Now, where is that case? The citation of that case?

MR. HEALY: In the state court situation?

QUESTION: That the highest court of the state rules against you, and that gives you a right of action in the district court of that state.

MR. HEALY: The Ktsanes court, the Seventh Circuit decision -- it is K-t-s-a-n-e-s -- said that an application for a waiver from the court's rules does not become a judicial act within the meaning of Summers, and that one has the right subsequently to go to federal court.

QUESTION: I didn't say waiver or anything. My question was, if the highest court of the state rules against you on anything, where do you get the right to appeal that to a United States District Court? That is my question.

MR. HEALY: Yes, sir. If the highest court of a state rules, having been presented with claims against one, one must take a petition for certiorari to this Court.

QUESTION: How do you apply that to this case?

MR. HEALY: In this case, we did not submit any federal questions -- we did not submit any state law questions to the D.C. Court of Appeals.

QUESTION: Did I say state or federal questions in my hypothetical? I didn't say either.

MR. HEALY: If one submits purely a state law question, one could still go to federal court. If one simply asked for a waiver, we would submit that that is not a ruling by the state court and in judicial capacity.

QUESTION: What is it?

MR. HEALY: It is merely an administrative act denying a request for a waiver.

Finally --

CHIEF JUSTICE BURGER: You time has expired.

MR. HEALY: Thank you, sir.

CHIEF JUSTICE BURGER: Mr. Rezneck, you have three minutes remaining.

ORAL ARGUMENT OF DANIEL A. REZNECK, ESQ.,
ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. REZNECK: Let me just respond very briefly to a couple of points. Mr. Feldman's counsel has asserted that he did not raise federal Constitutional questions in the D.C. Court of Appeals. I think the record clearly is contrary to that. If one examines his letter to the D.C. Court of Appeals, which is at Pages 6 to 15 of the Joint Appendix, one will see --

QUESTION: Six? Pages 6 --

MR. REZNECK: Six to 15. One will see such questions, for example, this Court must give him some opportunity to show that his unique training and experience have provided him with adequate qualifications to practice law. A flat rejection of Mr. Feldman's application without according him that opportunity would represent the very kind of irrebuttable presumption that the Supreme Court and the United States Court of Appeals have expressly condemned.

The District Court found explicitly that he did more than seek a Rule 46 waiver. He in fact raised

Constitutional and statutory issues before the D.C. Court of Appeals.

QUESTION: As I understood Mr. Sussman, he said that he stated their Constitutional positions but he didn't really tender them.

MR. REZNECK: I don't know what that means, Your Honor. If you look at his own complaint, which I think may be the best evidence on this, his own complaint in the District Court, Page 41, and he is describing the proceedings in the D.C. Court of Appeals, and he says, "Finally, counsel argued that on its face and as applied, Rule 46 violated both the United States Constitution and the federal antitrust laws insofar as it conclusively denied admission to the bar to all persons except graduates of an ABA-accredited law school."

I think the record is clear here that he did raise those questions, that he certainly could have taken them to this Court on certiorari from the decision of the D.C. Court of Appeals. He did not do so. He sought a bypass or a short circuit by going to a Federal District Court. And I do not think that is permissible.

With respect to Mr. Hickey in that regard, while Mr. Hickey did not articulate his claims in the

same way, I think a fair reading of his petition will show that Mr. Hickey claimed before the D.C. Court of Appeals that he was qualified to take the D.C. bar exam. Judge Robb, who dissented in the U.S. Court of Appeals, said that he could see no difference in Constitutional principle between a claim of right of admission to the bar and a claim of right to take the bar exam, and that each tendered an issue before the D.C. Court of Appeals which was reviewable here, and was not brought here.

I just wanted to comment in conclusion on the point raised by Justice O'Connor. If this Court should find that the decision of the D.C. Court of Appeals in each of these cases was a judicial determination, which we submit it was, what the result should be. We submit that the result should be a reversal of the decision of the U.S. Court of Appeals and a reinstatement of the judgments of dismissal of the District Court.

That is so for two reasons. It would be an effort to relitigate in the District Court a judicial determination by the highest court of the state, and there is clearly no subject matter jurisdiction in the federal court to do that under a long line of cases, and alternatively, it would be res judicata either on the theory that the same facts and theories in essence were

pleaded in both courts, or alternatively, that all theories could have been pleaded in the D.C. Court of Appeals and were not and are still barred by the doctrine of res judicata.

So, either way you go on that question, once you conclude it is a judicial determination, I submit that the result here should be a dismissal of both cases, which is what both district court judges found should be done.

Thank you.

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

(Whereupon, at 2:47 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

DISTRICT OF COLUMBIA COURT OF APPEALS ET AL., Petitioners v. MARC FELDMAN AND EDWARD J. HICKEY, JR. NO. 81-1335

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Pirie Hammond

(REPORTER)