

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-167

TITLE GEORGE C. CHAPPELL, ET AL., Petitioners
v. VERNON WALLACE, ET AL.

PLACE Washington, D. C.

DATE April 26, 1983

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1 IN THE SUPREME COURT OF THE UNITED STATES
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3 GEORGE C. CHAPPELL, ET AL., :
4 Petitioners :
5 v. : No. 82-167
6 VERNON WALLACE, ET AL. :
7 - - - - - :

8 Washington, D.C.
9 Tuesday, April 26, 1983

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 2:05 p.m.

13 APPEARANCES

14 J. PAUL McGRATH, ESQ., Assistant Attorney General of
15 the United States, Department of Justice,
16 Washington, D. C.; on behalf of the Petitioners.
17 JOHN MURCKO, ESQ., Oakland, California (appointed by this
18 Court); on behalf of the Respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in the case of George C. Chappell and others
4 against Vernon Wallace and others.

5 Mr. McGrath, you may proceed whenever you're
6 ready.

7 ORAL ARGUMENT OF J. PAUL McGRATH, ESQ.

8 ON BEHALF OF PETITIONERS

9 MR. McGRATH: Thank you, Mr. Chief Justice,
10 and may it please the Court.

11 There is but one issue in this case and that
12 is whether military personnel may be permitted to
13 maintain a damage action against their superiors for
14 alleged constitutional torts. The Ninth Circuit held
15 that they may, at least under certain circumstances, and
16 we ask this Court to reverse that ruling.

17 The respondents were five black enlisted men
18 who were serving aboard the guided missile destroyer,
19 U.S.S. Decatur. They sued their superiors from the
20 chief petty officers immediately above them on up to the
21 commander of the ship and charged that actions taken by
22 those superior officers were racially motivated and
23 therefore that the Equal Protection rights of the
24 respondents were violated.

25 The actions in question were actions taken in

1 the ordinary course of military command. They involved
2 assignments to particular parts of the ship or to
3 particular duties. They involved performance
4 evaluations. They involved minor punishments for
5 actions taken aboard the ship. And they involved
6 scoldings, or in the words of the record below, being
7 chewed out by their superior officers.

8 The District Court dismissed, on the motion of
9 the defendants, but the Court of Appeals reversed. In
10 doing so, the court recognized that permitting an action
11 such as this to be maintained had serious drawbacks.

12 The court agreed that the mere maintenance of
13 such an action can be disruptive of military
14 discipline. And the court also expressly recognized
15 that permitting a civilian court at the beginning of
16 such a process to review the internal disciplinary
17 mechanisms of the service -- of the military services
18 could usurp military functions.

19 But nevertheless the court held that a
20 constitutional damage action could be maintained and
21 that the superior officers were not entitled to absolute
22 immunity, and then it remanded the case to the District
23 Court to consider whether this particular case could
24 continue in light of a four-part test which the court
25

1 promulgated.

2 The decision of the court below, if allowed to
3 stand, means at least two things. First it means that
4 every military commander is subject to damage suits by
5 his or her subordinate for any command decision taken
6 with respect to them. And secondly, the decision below
7 is flatly inconsistent with the whole approach this
8 Court has taken to intra-military suits. And it is
9 extremely troublesome in its impact.

10 QUESTION: And the same would go for the Fifth
11 Circuit case?

12 MR. McGRATH: No, Mr. Justice White, the Fifth
13 Circuit case was a judicial review of the intra-military
14 process and it is clear that in certain circumstances
15 the review process within the military --

16 QUESTION: This case you don't think lends any
17 support for this --

18 MR. McGRATH: It lends no support whatsoever.

19 We urge two bases for reversal here. First,
20 under the Bivens case and the cases following Bivens,
21 this Court has consistently held that no constitutional
22 damage action will be implied if special factors counsel
23 hesitation.

24 Well in this case, the special nature of the
25 military command structure, as framed by Congress, and

1 its operation, are the special factors which counsel
2 hesitation in implying a Bivens remedy.

3 And secondly, under the Butz decision, this
4 Court has held, and in cases following Butz, this Court
5 has held that there should be absolute immunity afforded
6 to governmental officials if those officials have
7 special functions.

8 QUESTION: You mean against damages or
9 injunctions?

10 MR. McGRATH: Against damages.

11 QUESTION: But not injunctions?

12 MR. McGRATH: Not against injunctions.
13 Injunctions could still rest.

14 QUESTION: Yes.

15 MR. McGRATH: If the special functions of the
16 individual could not be effectively carried out without
17 absolute immunity.

18 QUESTION: Well, Butz also distinguished,
19 didn't it, immunity, absolute immunity, from suit for
20 common law torts, as compared to constitutional
21 violations where it indicated qualified immunity.

22 MR. McGRATH: Yes. In the Butz case, they
23 were distinguishing Barr against Matteo which had held
24 at least if a federal officer was acting within the
25 scope of the office, they were generally absolutely

1 immune from nonconstitutional torts and held that in the
2 constitutional area the situation was different because
3 by definition, the federal official was acting outside
4 of any authority that the federal --

5 QUESTION: Well we're dealing with alleged
6 constitutional torts or violations here.

7 MR. McGRATH: Yes.

8 QUESTION: How do you distinguish the Wilkes
9 cases?

10 MR. McGRATH: The Wilkes case, which was the
11 1851 decision of this Court which recognized that, at
12 least at that time, a military superior could be sued by
13 essentially -- for essentially assault and battery, is
14 distinguished on several grounds.

15 First of all, that case did not deal with a
16 constitutional tort. The question whether there was a
17 Bivens type action, whether a governmental official
18 could be sued for a constitutional tort, was not decided
19 by this Court until 1971 in the Bivens case itself.

20 Secondly, the Wilkes case, to the extent it
21 can be read as permitting a nonconstitutional tort
22 action, is inconsistent with Barr against Matteo.

23 And third, that case really arises in a
24 different era. It arises in an era when the military
25 was much smaller, did not have the elaborate system of

1 review that has been promulgated by the Congress since
2 then. It is inconsistent with this Court's decisions in
3 Feres and Stencel Aero, which we discuss in our brief.

4 It is not, in our view, necessary for this
5 Court to overrule the Wilkes against Dinsman case in
6 reversing the Ninth Circuit, because it did not deal
7 with a constitutional tort. But we feel that for all
8 those reasons it is not controlling.

9 QUESTION: Do you think the plaintiffs here
10 could ask for injunctive or declaratory relief?

11 MR. McGRATH: Not at this point. For
12 instance, under the Mindes case and others, what the
13 courts have held, including this Court, is that the
14 intra-military actions are ultimately reviewable,
15 judicially reviewable.

16 Here there were a number of courses of action
17 that were open to the respondents. They could have
18 sought action from the Board of Corrections of Naval
19 Records. They could have sought Article 138 proceedings
20 against their superiors and they could have sought other
21 remedies to deal with the particular things they were
22 complaining about.

23 At the end of those processes, had they
24 availed themselves of them, and had the carrying out of
25 those processes not been done in accordance with the

1 statutes and the regulations in the Constitution, there
2 would have been ultimately judicial review under the
3 rules laid down by this and other courts.

4 But that is a wholly different situation from
5 the one we have here where before taking any of those
6 actions, this suit was filed and, as the record shows,
7 as the joint appendix showed, they took only in
8 desultory fashion, one or two half-hearted steps in
9 these directionse. But, in any event, the
10 administrative remedies were never exhausted. The --

11 QUESTION: But if you can't get an injunction
12 here, it wouldn't be because of immunity.

13 MR. McGRATH: If you could not get an
14 injunction here, it would not be because of immunity.
15 The injunctive part of the case, which actually was not
16 really focused on by the court --

17 QUESTION: That was a prayer for declaratory
18 and injunctive relief.

19 MR. McGRATH: The declaratory and injunctive
20 relief would be separate, that's correct. That the two
21 principle bases that we rely on for saying that the
22 prayer for declaratory and injunctive relief should not
23 be allowed are, first of all, that there is no cause of
24 action stated.

25 QUESTION: Your argument is that a Bivens

1 cause of action just shouldn't lie in this context at
2 all.

3 MR. McGRATH: It should not lie in this
4 context at all.

5 QUESTION: Whether for damages or for an
6 injunction.

7 MR. McGRATH: Whether for damages or for
8 injunctive relief, but we do not rely on absolute
9 immunity when we're discussing the equitable question.

10 QUESTION: If a claim was brought by someone
11 in the military, Marine Corps, for example, and said
12 that the training course was excessively harsh and
13 violent and they suffered injury, where would that kind
14 of claim stand under the Federal Tort Claims Act?

15 MR. McGRATH: Under the Federal Tort Claims
16 Act, that case would not lie. In the Feres decision of
17 this Court, it was held that a military -- military
18 personnel could not sue the government under the Federal
19 Tort Claims Act, at least for actions taken within the
20 military context. And that decision has been reaffirmed
21 a number of times since then, Mr. Chief Justice.

22 QUESTION: How does that bear here?

23 MR. McGRATH: I think that decision bears here
24 in this sense. In the Feres case, this Court recognized
25 that the Tort Claims Act was broad enough, on its face,

1 to permit suits by military personnel. Yet the Court
2 viewed the fact that suits by military personnel for
3 command decisions would have a particularly disruptive
4 effect on military discipline.

5 Having found that, the Court refused to imply
6 that military personnel could sue their superiors, could
7 sue the government under the Tort Claims Act for actions
8 by their superiors. And that, we think, shows that this
9 Court has paid a special deference to Congress in this
10 area of intra-military disputes. The Court has been
11 reluctant to add remedies onto those specifically
12 applied by Congress in this area because of the fact,
13 and the Court has stated it over and over again, the
14 threat of disruption of military discipline is so great.

15 The military, after all, is a unique
16 institution in our life. It is the only institution
17 that is designed to be prepared to send men into
18 combat. This Court has recognized over and over again
19 that that single fact makes the military command
20 function and military discipline an overriding concern
21 and one that the Court should be very hesitant to
22 disrupt.

23 The particular case before us, I think, is a
24 classic example of why the Court should refrain from
25 fashioning a new remedy here. The plaintiffs were

1 sailors on a ship. As the record shows, that ship was
2 about to embark on a five-month voyage to the Indian
3 Ocean right at the beginning of the Iranian crisis.
4 That meant, obviously, these men would be in very close
5 contact with their superiors during, perhaps, very
6 hazardous circumstances for a long period of time.

7 To import into that situation the added
8 artificial disruptive effect of an ongoing civilian
9 lawsuit between the subordinates and their superiors
10 could not possibly have anything other than a disruptive
11 effect. And it is for that reason, the very fact that
12 the existence of the lawsuit can disrupt the functioning
13 of the military discipline process that we especially
14 urge that the court's decision below was incorrect.

15 QUESTION: Mr. McGrath, I guess the plaintiffs
16 also filed under Section 1985(3).

17 MR. McGRATH: They did file under 1985(3),
18 yes, Justice O'Connor.

19 QUESTION: The briefs don't deal with that
20 very extensively. How do you address that problem?

21 QUESTION: The briefs do not deal with that
22 very extensively, nor did the Court of Appeals and I
23 believe that probably the reason for that is this. In a
24 number of this Court's decisions in deciding whether
25 damage actions should be implied under 1983 or 1985, on

1 the one hand, or under the Constitution, in the case of
2 federal officials, on the other, this Court has over and
3 over again stated that generally the same considerations
4 apply in either case.

5 QUESTION: Does section 1985(3) reach actions
6 by federal officials?

7 MR. McGRATH: Well, it would be our position
8 that it does not reach actions by federal officials in
9 any event. There has been no decision by this Court on
10 that subject. I think, however, that if you look at the
11 legislative history of that 1871 Civil Rights statute,
12 you will not find anything suggesting it was designed to
13 go against the federal government or federal officials.

14 The statute talks, on its face, about persons
15 in territories in the states which would tend to suggest
16 it wasn't meant to so imply, so apply, but there is
17 really no definitive holding on that question.

18 What we would say, in any event, is that the
19 Court really does not have to reach that question, that
20 under cases such as Butz and Carlson against Green, if
21 this Court were to hold that a Bivens case would not
22 properly lie because it should not be implied because
23 special factors do counsel hesitation, that that same
24 reasoning should apply to 1985(3). Both because of that
25 and also because under Feres and other cases, this Court

1 has been reluctant to imply new remedies in
2 intra-military suits.

3 QUESTION: Now would all of the personnel
4 actions involved here have been subject to review?

5 MR. McGRATH: Yes. All of the actions here
6 would have been subject to review. For example, to the
7 extent that there, a number of the complaints have to do
8 with performance evaluation records. Those are all
9 subject to review by the Board of Correction of Naval
10 Records.

11 A number of the actions are alleged, just bad
12 acts by commanding officers. Those are all subject to
13 review under Article 138 of the Uniform Code of Military
14 Justice. There were minor punishments involved. For
15 instance, one of the actions mentioned in the papers
16 prominently is a \$50 fine for one of the men's having
17 left his clothes out in the work space just before an
18 inspection. That was subject to the informal review
19 procedures within the military.

20 In short, every single action here was subject
21 to review under those provisions and also, I think,
22 perhaps even more important, under the Naval, Navy's
23 Equal Opportunity Program and its regulations, which
24 expressly bar discrimination in any form within the Navy.

25 I would like to just make one more point. The

1 number of times that this Court has dealt with
2 intra-military suits it, in each case, has pointed to
3 the fact that going too far in fashioning new remedies
4 would have an intrusive and disruptive effect on
5 military discipline. And in each case, it has pointed
6 to the fact that the military has its own internal
7 system of justice, which has been fashioned by Congress.

8 We believe those decisions make total sense.
9 They make complete sense in this case where, I think,
10 everyone agrees that the implication of a damage remedy
11 would have the greatest personal impact on the military
12 command process and therefore we urge that the decision
13 of the Ninth Circuit be affirmed -- be reversed.

14 CHIEF JUSTICE BURGER: Thank you.

15 Mr. Murcko.

16 ORAL ARGUMENT OF JOHN MURCKO, ESQ.

17 ON BEHALF OF RESPONDENTS

18 MR. MURCKO: Mr. Chief Justice, if it may
19 please the Court.

20 I represent five black sailors who are here
21 because they were intentionally discriminated against by
22 their commanding officer and other officers aboard the
23 U.S.S. Decatur in job assignments, in promotions, in
24 discharges, as well as in advancement in ratings, in
25 skilled ratings, in schooling for skilled ratings, and

1 also because of the fact that they were threatened with
2 violence and also subjected to various actions by people
3 who were sympathetic to the Klan aboard the ship, and no
4 action was taken by the command.

5 Before I get into my argument, I would like to
6 briefly relate some of the salient facts here, which we
7 think are particularly urgent and that show the
8 discriminatory, the serious discriminatory action by the
9 command.

10 QUESTION: How high up does this go?

11 Do they sue the Chief of Naval Operations, on
12 the theory that he is the last word, or perhaps the
13 Secretary of the Navy for not having the right kind of
14 officers on the ship?

15 MR. MURCKO: No, we think it only applies to
16 the officers that were involved in the intentional acts
17 of discrimination against the black people who were on
18 that ship and which deprived them of their
19 constitutional rights.

20 QUESTION: What if they had -- what if they
21 had taken their complaint to the Admiral of the Fleet
22 and the Admiral had brushed it off and said these are
23 military command matters. Is he subject to suit, too?

24 MR. MURCKO: No, I don't believe so. I think
25 it would only apply to those particular individuals that

1 were practicing the racial discrimination and wouldn't
2 go further than those particular individuals.

3 QUESTION: What if an allegation was that the
4 Admiral tolerated this conduct? Cause of action?

5 MR. MURCKO: Well, if he condoned it and in
6 some way participated in it, then I believe that he
7 would definitely be responsible.

8 QUESTION: I'm trying -- mine is just after
9 the event, the allegation is that these matters were
10 brought to his attention and he did nothing about them.

11 MR. MURCKO: Well, the thing is if he had the
12 authority and the responsibility to take action against
13 these individuals and he knew that the commander was
14 involved in intentional racial discrimination and he
15 failed to take any action, then I believe that he would
16 also be a participant and would be responsible for the
17 discriminatory acts if they were continuing and he knew
18 that they were continuing.

19 QUESTION: What if he responded by pointing to
20 the provisions of the Code of Military Justice that
21 permits the enlisted personnel to make complaints
22 against their officers and said, here are your remedies?

23 MR. MURCKO: I'm sorry, I don't understand
24 your question, Mr. Chief Justice. Would you please
25 repeat the question?

1 QUESTION: Well, there are other remedies for
2 military personnel within the structure of the military,
3 are there not?

4 MR. MURCKO: Yes, that is correct. There are
5 certain remedies. There are certain remedies that are
6 available. However, we think that those remedies
7 essentially are not adequate. They do not provide the
8 type of relief that Bivens states should be provided,
9 such as a damage remedy. In addition, under Article
10 138, an individual does have the right to report his
11 commanding officer.

12 However, we believe that this is a very
13 informal remedy and what occurs is that the commanding
14 officer calls in the individuals responsible, another
15 officer, another person, and they informally discuss it,
16 informally discuss it. There's no right to a hearing,
17 there's no right to subpoena witnesses, there's no right
18 to present evidence, it's just an informal remedy,
19 essentially, that is ineffective.

20 In fact, numerous federal courts have held
21 that these remedies, so-called military remedies, are
22 ineffective and are futile for servicemen to pursue
23 because essentially the military has not had a history
24 of supervising and essentially irradiating or
25 eliminating the problems under Article 138, a condition

1 in this case.

2 We have applied to the Board for the
3 Correction of Naval Records and in one case they denied
4 our relief. In other cases, they referred us to the
5 Chief of Naval Personnel and we still haven't gotten any
6 effective relief from the Chief of Personnel, even
7 though we sent all of the complaints that we have --

8 QUESTION: How about appeals from Captains
9 Masts? They're not automatic, are they?

10 MR. MURCKO: No, there was one appeal in this,
11 there was one Article --

12 QUESTION: I mean you had that right to appeal.

13 MR. MURCKO: Yes, you do have a right, it
14 isn't automatic, that is correct.

15 QUESTION: You have a right to appeal.

16 MR. MURCKO: Yes, that is correct.

17 QUESTION: And they could have.

18 MR. MURCKO: There was only one Article 50 in
19 this particular case --

20 QUESTION: Well, they said several Captains
21 Masts, I read in the appendix.

22 MR. MURCKO: No, there was only one Article 50
23 and that was regarding Lemons and the fact that he was
24 punished for one infraction of leaving his clothes when
25 another person was not -- a white person was not

1 punished.

2 QUESTION: But he could have appealed that,
3 couldn't he?

4 MR. MURCKO: Yes, that's correct. He could
5 have appealed it, but the thing is, it wasn't a question
6 of that particular violation there, it was more a
7 question of the actions that were taken by his command
8 against him because of the fact that he was denied any
9 right to take the examination for his position --

10 QUESTION: But he wasn't denied the right to
11 appeal. I'm just, it doesn't hurt the case to admit one
12 of them was a good one, does it?

13 MR. MURCKO: No, no, I said he didn't exercise
14 it, that's correct.

15 QUESTION: I mean, we don't have to go all the
16 way with you, do we?

17 MR. MURCKO: That's correct, sir.

18 So, we feel that Seaman Wallace here had been
19 intentionally discriminated against by Commander
20 Chappell, by Lieutenant Commander Viafore and by
21 Lieutenant Jordan where they intentionally kept him out
22 of OI Division after he had been approved to go into OI
23 Division by the Personnel Development Board, which is a
24 board of five chiefs who make a determination if a
25 person is qualified. The five chiefs said Wallace is

1 qualified. In addition, his division officer said yes,
2 he is qualified. He should be in the Operations
3 Intelligence Section.

4 Yet Commander Chappell, as well as Lieutenant
5 Jordan, intentionally kept blacks out of the
6 Intelligence Division, because they felt that they could
7 not trust black people there, because they did not want
8 blacks in positions of authority and responsibility.

9 And so, as a result of that, they transferred
10 him out, they transferred Wallace out into the area of
11 the Deck Division. And essentially, he was required
12 there to chip paint as well as to swab the decks, which
13 is the traditional role of black people in the Navy.
14 Historically they have been kept either as stewards or
15 as people who worked in decks and unskilled jobs.

16 In addition, he had been threatened, Wallace
17 had been threatened by his division officer on more than
18 one occasion to be transferred out because of the fact
19 that he was speaking up about the treatment of blacks on
20 that ship.

21 Also, Wallace had been subject to the actions
22 of Klan sympathizers on the ship. Some sympathizer hung
23 a noose in his work space. The noose has been the
24 symbol of lynching of blacks for a long time. This
25 caused great consternation for Seaman Wallace, put him

1 in great fear and caused him great humiliation.

2 This was done in the presence of Lieutenant
3 Jordan, as well as Chief Parks. They knew that it was
4 there, yet they didn't order it down. They did not
5 bring the responsible people to task. And Wallace
6 complained to them and they did nothing about it.

7 In addition, there was numerous graffiti in
8 the work spaces that the Klan put, including "Kill
9 Colored Kiis -- KKK." This was reported to Lieutenant
10 Jordan, to Commander Chappell. They took no action to
11 clean up, to clean it up or to get the responsible
12 people. And the respondents were involved in trying to
13 essentially clean up the ship in that sense.

14 Ensign Shannon also was discriminated
15 against. He had been threatened by Lieutenant Bianco,
16 to be killed by Lieutenant Bianco because he left a door
17 open. And also, he was given a low evaluation because
18 of the fact that he had been complaining about the
19 treatment of blacks on the ship.

20 After the suit was filed, there were more
21 threats by these officers. Hickey was threatened to be
22 sent to Deck Division because of the fact that he filed
23 the suit and the others were essentially required to be
24 in dangerous conditions, including Lemmons and
25 Richardson, because of the fact that they filed the suit.

1 Moving on to the argument, we think that
2 first, it appears that the government, in their reply
3 brief, concedes that in cases involving unconstitutional
4 conduct by officers are reviewable in federal court for
5 injunctive and declaratory relief. And that's on page
6 two and footnote two. So we think, in this case, that
7 essentially they accede the question of jurisdiction of
8 a federal court over these issues.

9 In addition, we feel that they accede the
10 question of justiceability. So the sole question here,
11 we feel at this time, is the question of damage remedies
12 and we feel essentially that, in this particular case,
13 that the plaintiffs, the black sailors should be treated
14 the same as any other litigants in federal courts and
15 they are entitled to damage remedy for violation of
16 their constitutional rights.

17 QUESTION: Would you limit this sort of relief
18 to peacetime, or would you carry it into wartime?

19 MR. MURCKO: No, we just limit it to
20 peacetime, Mr. Chief Justice. We think that that is
21 what the Ninth Circuit Court of Appeals did and we stand
22 behind the Ninth Circuit Court of Appeals 100 percent.

23 We think that the damage remedy is the
24 narrowest form of remedy in the courts and we feel that
25 the injunctive relief that the government said it

1 doesn't oppose is much more intrusive. It's much more
2 intrusive into the military because of the fact that it
3 orders the military --

4 QUESTION: I thought they said they oppose it
5 in this case, not because of immunity, but because of
6 other considerations.

7 MR. MURCKO: That is correct. They may oppose
8 it in this case, Your Honor, but as a general rule, they
9 said they're not opposing the fact that a service
10 personnel does have the right to go to court and seek an
11 injunction against his superiors who are violating his
12 constitutional right and that's in writing, Your Honor.

13 And so we feel essentially that it's much more
14 intrusive, this injunction is much more intrusive than
15 any damage remedy.

16 QUESTION: Let me ask you just a simple
17 question. You set this case for trial on July 8 and on
18 July 7 this ship gets orders to go to Timbuktu. What
19 would happen?

20 MR. MURCKO: Well, the ship would probably
21 have to go to Timbuktu. I think that that would take a
22 priority.

23 QUESTION: You don't doubt that, do you?

24 MR. MURCKO: Don't doubt it for one minute.

25 QUESTION: What happens to the case?

1 MR. MURCKO: They have to wait until they get
2 back, unless they transferred some of the people off the
3 ship, which happens in many cases when you --
4 QUESTION: Including the commander of the ship?
5 MR. MURCKO: Pardon?
6 QUESTION: Is the commander going to depart?
7 MR. MURCKO: No, the commander would go. The
8 commander would go. The commander would go with his
9 ship. That's his obligation, but the people would --
10 QUESTION: You couldn't stop him from going,
11 could you?
12 MR. MURCKO: No, that's correct. We could not
13 stop him, his duties and obligations are to national
14 security.
15 QUESTION: But can't you see a whole lot of
16 problems?
17 MR. MURCKO: Well, Your Honor, we can just
18 continue the case. Other cases are continued.
19 QUESTION: It might go back to what this Court
20 said in Bivens, that you ought to move very cautiously.
21 Didn't this Court say that in Bivens.
22 MR. MURCKO: Yes, that is correct, Justice
23 Marshall.
24 QUESTION: And don't you urge us to move very
25 cautiously here?

1 MR. MURCKO: Yes, I do urge you to move
2 cautiously here, Your Honor, that is correct.

3 And in addition, we feel that the government
4 also apparently concedes that there is still racial
5 discrimination in the Naval when it states that on page
6 nine, footnote 8 of their brief, that the U.S. military
7 is making headway against racism. They recognize that
8 racism is a problem in the military and we feel that
9 essentially there must be, these individuals must have
10 the right to vindicate their rights to be free of racial
11 discrimination in the Navy.

12 We think that an important point that the
13 government makes essentially is that whether Congress
14 has enacted a gold remedy for servicemen. Essentially,
15 what they're trying to do is state Bivens on its head.
16 Because Bivens states that there is a cause of action
17 under the Constitution for violation of Constitutional
18 rights, unless there are special factors counseling
19 hesitation in the absence of a remedy by Congress.

20 And we think that essentially the remedy
21 exists under Bivens for these black servicemen, but the
22 government essentially is trying to deprive these black
23 sailors of the right under Bivens by saying that
24 Congress never, Congress never provided a remedy. Well,
25 the remedy is there. Congress never provided an

1 alternative, specific remedy and the thing is, we don't
2 think that that's required.

3 But even more, we feel that Congress has
4 spoken in this area. In 1976, it issued a statute,
5 10 USC 1089, which essentially gave absolute immunity to
6 military medical personnel for any acts that they
7 perform in the military and only makes the government
8 reponsible for their acts. Well, at that time, Congress
9 recognized that officers of the military are subject to
10 liability, otherwise they would not have had to pass
11 this statute.

12 And we feel that by doing so, if it intended
13 to preclude liability, it would have included all
14 officers in there. It would have made all officers
15 absolutely liable. But it did not do so. It just said
16 medical personnel are not liable. And by doing so, we
17 think they recognized the authority of Dinsman v. Wilkes
18 and Wilkes v. Dinsman which holds that a superior
19 officer is responsible for the violation of the rights
20 of people under his command.

21 QUESTION: I take it, then, you wouldn't --
22 you would say Congress could say, in providing remedies
23 before the Corrections -- Board of Corrections, for
24 example, that this remedy shall be exclusive.

25 MR. MURCKO: Yes, that is correct.

1 QUESTION: If they actually said it and it
2 wouldn't make any -- if they said it, it wouldn't change
3 the situation much if it was a lot -- a pretty poor
4 remedy.

5 MR. MURCKO: Well, the thing is, Congress
6 could say that but then there'd be a different issue,
7 Justice White. Then we'd have to make a determination
8 whether a statutory exemption or immunity would take
9 precedence over a constitutional right. That is another
10 case. That is not this case, Justice White. We feel
11 that --

12 QUESTION: Well I think -- what if we happened
13 to disagree with you and thought that the provision of
14 these other remedies for some or all of these acts was
15 intended by Congress to be the exclusive remedy --

16 MR. MURCKO: Well, the thing is --

17 QUESTION: -- and at least it presents the
18 sort of a situation where you should not imply Bivens
19 remedy. What if we thought that and disagreed with you,
20 then do we have to reach some constitutional issue?

21 MR. MURCKO: Well, we think this Court in
22 *Carlson v. Green* stated that the remedy of the Federal
23 Tort Claims Act is not adequate for prisoners because it
24 does not provide the type of relief that the
25 Constitution requires and that these other relief that

1 have been passed by Congress was not adequate in
2 vindicating the constitutional rights.

3 QUESTION: But we didn't suggest that Congress
4 couldn't have provided -- that there wouldn't be a
5 Bivens remedy in the Carlson against Green situation,
6 did we?

7 MR. MURCKO: No, that's correct. No, the
8 thing is I'm not saying that Congress can't provide a
9 remedy, I'm talking about whether Congress provides an
10 immunity --

11 QUESTION: They can provide a remedy and they
12 can also make it exclusive.

13 MR. MURCKO: That is correct.

14 In addition, we think another important
15 question here is the question of immunity, whether
16 military officers are entitled to qualified or absolute
17 immunity. And we think that in this particular case,
18 the main argument of the government here is whether or
19 not there is going to be a breakdown in discipline
20 caused by these particular types of actions.

21 We think that when there's racial
22 discrimination involved, that the discipline has, the
23 special relationship between a sailor and his
24 commissioned officer as well as the discipline, has
25 already broken down. It has broken down by the

1 intentional discrimination and we feel that essentially
2 the disciplinary effect on a sailor is that the damage
3 action presupposes an obedience of the orders,
4 otherwise --

5 QUESTION: If the discipline breaks down, they
6 can use the brig, can't they?

7 MR. MURCKO: Excuse me.

8 QUESTION: If the discipline really breaks
9 down, they can use the brig or whatever the equivalent
10 is on board ship.

11 MR. MURCKO: Yes, that is correct. That is
12 correct. But discipline doesn't just mean punishment.
13 Discipline means also affecting the relationship as far
14 as people's attitude toward number one, the enlisted
15 person has toward his officer and number two, the
16 attitude that the officer has toward the enlisted.

17 And we feel essentially that the -- there must
18 -- that special relationship must be kept intact and we
19 say that it's affected by the intentional
20 discrimination, long before the suit is brought, the
21 intentional discrimination destroys that special
22 relationship which we think is so important to the
23 national security of our country.

24 And we think that by the time the suit is
25 brought, it does not affect the discipline because

1 essentially what this individual is trying to do is
2 vindicate his rights and try to put a stop to the
3 intentional discrimination action caused by his superior
4 which, in effect, is causing harm to the military.

5 QUESTION: Do you think it'll encourage suits
6 out of the Ninth Circuit?

7 MR. MURCKO: No, I don't think it would
8 encourage suits any more than it would now, because of
9 the fact that --

10 QUESTION: The Ninth Circuit, if we hadn't
11 taken the case, do you suggest this would have no impact
12 on suits by military personnel against their officers?

13 MR. MURCKO: Well, I wouldn't say it would
14 have no impact at all, but I'm saying that essentially
15 there's an economic question here. Number one, there's
16 a question here of whether servicemen can afford to
17 retain attorneys to bring suit on their behalf because
18 of the fact that they make such a low amount of pay.

19 Second, they don't qualify for legal services
20 under the indigency program because of the fact that
21 they make over \$300 a month. And in addition, the fact
22 is many attorneys will not take these type of case when
23 they know there is no great remuneration involved for it.

24 So we don't believe that there's going to be
25 any flooding of the gates for these type of suits. And

1 in addition, the government only points to approximately
2 10 suits in their brief when there are over two million
3 service personnel.

4 QUESTION: But if you win, what will happen?

5 MR. MURCKO: Well, if we win, Your Honor,
6 Justice White --

7 QUESTION: You did win in the Ninth Circuit.

8 MR. MURCKO: That's correct. If we win here
9 and then essentially we'd go back and all we're entitled
10 to is a hearing to determine whether or not *Mindes*
11 entitles us to a trial.

12 So we've been waiting five years for a trial,
13 Justice White, and we haven't gotten any step closer,
14 any closer to that.

15 We think essentially that the primary question
16 here is the question of immunity. And we think that the
17 qualified immunity is the norm under the *Harlow v.*
18 *Fitzgerald* case. And we think that that is the type of
19 immunity that military officers are entitled to.

20 We think that that gives naval officers
21 adequate protection against suits by their inferiors.
22 We think that essentially only recognized constitutional
23 claims can be brought.

24 In addition, we think that any frivolous suits
25 can be dismissed under a Motion for Summary Judgment. In

1 addition, we feel that there -- the arguments by the
2 government that there is essentially an absolute
3 immunity here has no basis in the common law. The
4 common law provides essentially, as the Dinsman case
5 holds, that military officers do not have absolute
6 immunity. This Court in Dinsman v. Wilkes and Wilkes v.
7 Dinsman held that military officers do not have absolute
8 immunity. They only have qualified immunity.

9 QUESTION: Are they state military officers or
10 federals in that case?

11 MR. MURCKO: I believe that was the U.S. Navy,
12 Your Honor.

13 QUESTION: Didn't you say Sherrier against
14 Rhodes?

15 MR. MURCKO: No, I said Dinsman v. Wilkes.
16 Dinsman v. Wilkes.

17 QUESTION: Sherrier against Rhodes was the
18 state militia, National Guard. Excuse me, I thought you
19 were relating those two things.

20 MR. MURCKO: Yes, that's right. That's
21 correct. That's correct. But Dinsman v. Wilkes says
22 that naval officers, United States Navy, are answerable
23 for common law torts when they are intentional and
24 malicious, so there is no common law basis for this
25 absolute immunity the government is asking.

1 In addition, the judicial immunity that this
2 Court has recognized as well as the prosecutorial
3 immunity is also a rule in the common law. But nowhere
4 the common law does it say that military officers are
5 entitled to absolute immunity.

6 So we move on to the constitutional area.
7 Does the constitution provide absolute immunity for the
8 military? No, it does not. The only area where it
9 provides constitutional immunity are legislative
10 functions and presidential functions.

11 QUESTION: I don't recall your brief, but did
12 you refer to any cases in the British Navy or the
13 British Army prior to 1776 where suits against officers
14 of the British were sustained?

15 MR. MURCKO: Yes, that's correct. We do cite
16 numerous cases from the common law of England which
17 allowed suits against the officers there for intentional
18 violation of their inferior's rights. And damage
19 actions were upheld. So there's a long tradition in the
20 common law which allows a military person to sue a
21 superior for intentional violation of his rights.

22 So we feel, in concluding, essentially that
23 the Court of Appeals decision should be affirmed and the
24 defendant's right to a Bivens action should be allowed
25 to proceed.

1 Thank you.

2 CHIEF JUSTICE BURGER: Thank you.

3 Do you have anything further, Mr. McGrath?

4 MR. McGRATH: I have nothing further, Mr.

5 Chief Justice.

6 CHIEF JUSTICE BURGER: Thank you, gentlemen.

7 The case is submitted.

8 (Whereupon, at 2:50 p.m., the case in the
9 above-entitled matter was submitted.)

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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:

George C. Chappell, et al., Petitioners

v. Vernon Wallace, et al. No. 82-167

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