

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-5872

TITLE ROY E. DANIELS, Petitioner V. ANDREW WILLIAMS

PLACE Washington, D. C.

DATE November 6, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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ROY E. DANIELS, :
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Petitioner :
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V. : No. 84-5872
:
ANDREW WILLIAMS :
:
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Washington, D.C.
Wednesday, November 6, 1985

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at
12:59 a.m.

APPEARANCES:

STEPHEN ALLAN SALTZBUG, ESQ., Charlottesville,
Virginia; on behalf of the Petitioner.

JAMES WALTER HOPPER, ESQ., Richmond, Virginia, on
behalf of the Respondent.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Daniels against Williams.

Mr. Saltzburg, you may proceed whenever you are ready.

ORAL ARGUMENT OF STEPHEN ALLAN SALTZBURG, ESQ.

ON BEHALF OF THE PETITIONER

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

I must begin by confessing that the facts of this case are much less exciting than the two cases previously heard by the Court. Indeed, the facts are quite simple.

A state prisoner in Virginia, a prisoner in the Richmond City Jail to be exact, filed a suit in Federal District Court alleging that he was injured while he was incarcerated in the Richmond City Jail. And, he alleged specifically that he slipped on a pillow which was on some newspapers on the stairs in the jail.

QUESTION: So, it is a negligence case, is it?

MR. SALTZBURG: Mr. Chief Justice, it sounds like a negligence case and both parties have treated it as such.

The facts hardly look like facts that would support a federal action or a case that this Court should spend its time on, but, in fact, this case and these facts really are a messenger of major issue and how the Court decides that

1 issue will be of great importance to everyone incarcerated
2 in any jail or prison in any state in this country.

3 And, that issue, simply put, is whether or not persons
4 who are incarcerated have a right to be cared for, have their
5 persons protected by those who have been entrusted with their
6 safety.

7 QUESTION: So, you think you are talking just about
8 prisons?

9 MR. SALTZBURG: Justice White, yes.

10 QUESTION: All right.

11 MR. SALTZBURG: Not only yes, but a very important
12 part of our argument will be that the reason why we urge that
13 there was a duty upon the state to provide some kind of compensation
14 for a prisoner who can prove that he was, in fact, injured
15 while in custody is that is part of the due process of law
16 the person is entitled to when he is incarcerated as a person
17 may be under the Thirteenth and Fourteenth Amendments.

18 The Court of Appeals sitting en banc decided three
19 questions, all adverse to the Petitioner. It decided by a
20 five to four vote that this Court's decision in Parratt v.
21 Taylor which had held that a prisoner could bring a suit seeking
22 compensation for a negligent deprivation of property, as long
23 as there was no meaningful state remedy, that Parratt did
24 not apply to liberty interest, did not apply to injuries to
25 the person, and that a prisoner had no right to sue in federal

1 court for injuries to his person even if no state remedy were
2 available.

3 An unanimous Court of Appeals, nine-zero, held
4 that Parratt -- another holding, that the Parratt case ought
5 to apply to liberty and property interests, meaning that even
6 if it were wrong concerning protection of the person, that
7 if a meaningful remedy were available in state court that
8 for this kind of injury a prisoner could not sue in federal
9 court under 1983.

10 Finally, a six to three split on the court held
11 that there was a meaningful remedy in state court.

12 This afternoon I would like to concede at the outset
13 one of the major points decided by the Court of Appeals. We
14 do not quarrel with the holding of the Court of Appeals, the
15 nine to nothing holding, which is Parratt applies in cases
16 in which a prisoner is claiming that he was injured as a result
17 of the tortious conduct of a safety officer while in custody
18 and whether that tort is negligence or an intentional tort,
19 not an independent violation of the Fourteenth Amendment.

20 But, we concede that the Parratt reasoning ought
21 to apply, if, indeed, a meaningful remedy were available in
22 state court for this Petitioner, this Petitioner ought not
23 to be able to proceed with the Section 1983 action.

24 QUESTION: Mr. Saltzburg, can you explain why you
25 think the drafters of the Fourteenth Amendment were concerned

1 with possible state law negligence actions by state officers?

2 MR. SALTZBURG: Yes, Justice O'Connor. Perhaps
3 I can explain or answer that best this way. The drafters
4 of the Fourteenth Amendment and of the 1866 and 1871 Civil
5 Rights statutes which enforced the Fourteenth Amendment plainly
6 had in mind, as this Court has noted several times in the
7 legislative history cited in Monroe v. Pape and Mitchum versus
8 Foster, that one of the evils that gave rise to the Fourteenth
9 Amendment and the Civil Rights statutes was the problem of
10 law enforcement officers, sheriffs as well as courts, failing
11 to do what was necessary to protect people in their --

12 QUESTION: Well, failing to act consciously by reference
13 to the word "deprive," don't we have to look at that word
14 in the clause and inquire whether the ordinary meaning of
15 the word "deprive" means an intentional rather than a unintentiona
16 kind of an act or discrimination?

17 MR. SALTZBURG: Justice O'Connor, there are two
18 answers that I would like to give you to that. One is the
19 Court has looked at the meaning of the word "deprive" in Parratt
20 v. Taylor and the majority of the Court, in Justice Rehnquist's
21 opinion, said that in the context of a \$23.50 hobby kit which
22 had been lost that the prisoner was deprived of liberty within
23 the meaning of the Fourteenth Amendment.

24 QUESTION: By a negligent act?

25 MR. SALTZBURG: By a negligent act.

1 QUESTION: But, property, not liberty?

2 MR. SALTZBURG: Yes, Justice Blackmun, that was
3 a property case. Ours is a liberty case.

4 In a moment I will argue liberty deserves as much
5 protection as property. But, Justice O'Connor, there is also
6 a second answer and I think that before the Court is an argument
7 implicit, I suppose, in this case, but almost explicit, that
8 maybe Parratt ought to be reconsidered. Maybe the Court should
9 take another look. And, we had anticipated that and briefed
10 it and I intend to argue that too, that even if the Court
11 looks again, that Parratt was indeed correct.

12 The first point that I would -- There are three
13 major points I would like to argue and that is, Justice Blackmun,
14 as you said, the first point is that liberty interests deserve
15 as much protection at least as property interests.

16 The second point is that negligent deprivations
17 should be deemed to be within Section 1983 when prisoners
18 are in custody and in control of state officers.

19 And, the third point is that there was no meaningful
20 remedy within the meaning of Parratt and the Chief Justice's
21 opinion for the Court in Hudson v. Palmer in Virginia state
22 courts at the time this suit was filed.

23 On the first point, whether liberty interests should
24 be given as much protection as property interests, this
25 argument -- the argument I make is the one that I believe

1 finds strong support in virtually everything this Court usually
2 looks at in rendering decisions on the law, on constitutional
3 law and the meaning of statutes.

4 The history of the Civil Rights Statute is a history
5 set forth at some length in Monroe versus Pape and Mitchum
6 v. Foster and it is a history of a Congress concerned with
7 the abuse of people.

8 It is true that property sometimes was damaged when
9 people were deprived of their rights, but it is a history
10 that speaks eloquently about people.

11 The language of the Civil Rights Act does not mention
12 the word "property." It speaks about interest protected,
13 the rights protected by the Constitution and laws of the United
14 States.

15 Even if the Court somehow were to want to draw a
16 line between liberty and property, as the four dissenting
17 judges said in the court below, surely the person would come
18 out on top in any rational system. And, indeed, drawing the
19 line between liberty and property is not only difficult, but
20 it may be unnecessary in most cases. It is the deprivation
21 of good time wrongfully, a deprivation of property or liberty.
22 It is the failure to process properly a claim of employment
23 discrimination which this Court has confronted. Is that a
24 liberty claim or a property claim? Our point is it should
25 not matter.

1 Indeed, there is a tragic irony in the argument
2 that was made by the majority of the Court of Appeals, an
3 argument that is repeated by the Respondent in this case.
4 Prior to the Civil War and prior to the Fourteenth Amendment,
5 this Court was called upon to decide whether certain people
6 and classes of people were people or property and the Court
7 said property. A war was fought, an amendment was adopted,
8 and statutes were enacted to correct that decision.

9 And, now, the Court of Appeals has held that certain
10 people don't even qualify even as property. They don't get
11 as much protection.

12 In our view, that decision flies in the face of
13 the language of the statute. It ignores the decisions of
14 this Court which has emphasized the history of that statute.
15 It flies in the face of logic and it is wrong as a matter
16 of law.

17 That is the easiest point in our view that we have
18 to make this afternoon.

19 The second point is the more difficult one. It
20 is made more difficult by the fact that in the case that follows
21 this, the Solicitor General of the United States will argue
22 to the Court that it should not only reconsider Parratt, but
23 it should reject the holding of Parratt v. Taylor.

24 Thus, Justice O'Connor, I would like to reach the
25 question you asked which is was the Court correct when a

majority of the justices in the Parratt case said that, indeed, a negligent deprivation could be a deprivation of property within the meaning of the Fourteenth Amendment, and, therefore, within the reach of Section 1983.

It is not our contention that every state tort gives rise to a civil rights action under Section 1983. Were we to have to argue that, we could not win.

Indeed, the end of the Parratt opinion contains a reference to an automobile accident involving a state officer and the same majority that had decided Parratt suggested that surely that alone could not warrant a suit under 1983.

The Solicitor General would be right if, in fact, we were asking this Court to say every time there was an injury at the hands of a state officer that there had to be a remedy, a damage remedy. You would have to overrule every notion of sovereign immunity that has been in effect both before and after the Civil Rights law.

We ask this and only this, that this Court recognize what it said in 1856 in South versus Maryland; that there has been a common-law duty on the part of officers into whose custody prisoners have been placed to protect. The officers have been held responsible in damages.

QUESTION: Well, that was in the days of Swift against Tyson, wasn't it? I mean South against Maryland really doesn't have any very direct application today.

1 MR. SALTZBURG: No, Justice Rehnquist, you are correct.
2 It was in the days -- In a careful look at the opinion, one
3 has difficulty knowing whether the Supreme Court was deciding
4 as a matter of state law or federal common law. In dictum
5 also, whether or not it is a statement about the liability
6 of a sheriff was state or federal law. And, it is a pre-
7 Fourteenth Amendment position.

8 Our position is, however, that the Congress that
9 was responsible for putting forth the Fourteenth Amendment
10 and the Civil Rights law, that that Congress understood that
11 for centuries sheriffs and law enforcement officers were
12 responsible for persons placed in their custody. A decision
13 had to be made --

14 QUESTION: Mr. Saltzburg, can I ask this question
15 that your argument prompts? Supposing -- Assuming there is
16 immunity for sovereign immunity of some kind for the officer
17 as a matter of Virginia law here. Supposing there was a guest
18 or a visitor in the prison who was with the prisoner and they
19 both slipped on the pillow and were injured as a result of
20 the guard's negligence. In your view, the prisoner would
21 have a right because he is in his custody. What about the
22 guest?

23 MR. SALTZBURG: Our position would be that the guest
24 would not. And, indeed, that may seem to be an unjust result.
25 Our position though is there is a difference between the guest

1 and the prisoner in terms of freedom to make a choice, to
2 enter or not enter. And, the prisoner has no such choice.

3 And, Justice Stevens, the argument we make is
4 premised on one inescapable fact which is after the Civil
5 War the Reconstruction Congress had some choices it had to
6 make. It had to make a decision on how much authority to
7 leave with state courts, how much authority to vest in federal
8 courts, what kinds of protections to give people.

9 Now, it is possible --

10 QUESTION: Are you suggesting, Mr. Saltzburg, that
11 the Fourteenth Amendment -- the Due Process of the
12 Fourteenth Amendment imposes more stringent restrictions upon
13 states than the Due Process Clause of the Fifth Amendment
14 does on the federal government?

15 MR. SALTZBURG: No, Justice Rehnquist, I am not.

16 QUESTION: Well, then, are you relying on anything
17 other than the Due Process Clause of the Fourteenth Amendment
18 here?

19 MR. SALTZBURG: Due Process Clause plus the Civil
20 Rights statutes which were enacted.

21 QUESTION: Now, let's break that down a minute.
22 I understood your claim was brought under 1983.

23 MR. SALTZBURG: Yes.

24 QUESTION: And, that the reason that you are suing
25 is because 1983 gives you a right to recover for a violation

1 of your constitutional rights. The violation of your constitutiona
2 right was a deprivation of liberty without due process of
3 law.

4 MR. SALTZBURG: Yes.

5 QUESTION: Well, why did the 1866 and 1871 statutes
6 have anything to do with it?

7 MR. SALTZBURG: Well, without those statutes and
8 without a decision like Bivens versus United States, it wouldn't
9 have been clear that a person could have sued in federal court
10 even if his rights had been violated.

11 What we ask the Court to look at is the entire body
12 of legislation enacted following the Civil War.

13 QUESTION: But, all that does is get you into court,
14 as I would say, to assert your constitutional claim. It
15 doesn't define the limits of your constitution claim.

16 MR. SALTZBURG: We don't quarrel with that, Justice
17 Rehnquist. We agree with that.

18 QUESTION: Well, all the talk about Congress knew
19 that keepers of prisoners had duties, how does that fit into
20 your argument?

21 MR. SALTZBURG: It does tie in, I hope, with the
22 citation of South versus Maryland, which this Court said
23 as a matter of -- may have been federal common law. The
24 assumption being that, in fact, sheriffs and jailers were
25 responsible and suable for damages when they failed to protect

1 persons in their custody. We ask this Court to reason from
2 that. And, when Congress used similar language to that which
3 was found in the Fifth Amendment and it used the board language,
4 no state shall deprive a person of liberty, property, or life,
5 that the Congress would not have intended to allow the states
6 to escape the responsibility that they previously had in the
7 state officers.

8 QUESTION: Well, would the same liability be here
9 on a Bevins claim against a federal prison warden in the same
10 situation here?

11 MR. SALTZBURG: Yes, in the same situation --

12 QUESTION: But, South against Maryland wasn't speaking
13 of federal officials, was it?

14 MR. SALTZBURG: No. But, I think it is undeniably
15 our contention that some remedy is required for prisoners
16 placed in federal custody and there is a failure to exercise
17 due care to protect them.

18 I would just note if I might in answering that question
19 that it is not at all clear that anything in the Federal Tort
20 Claims Act now would stand in the way of any remedy. The
21 kinds of acts we are talking about, as we understand it, are
22 remedial under the Federal Torts Claims Act and the arguments
23 made which I really can't address in this case, but will be
24 addressed in the next case concerning the implications for
25 the federal system, I think, are probably exaggerated in the

1 brief filed by the Solicitor General.

2 But, it is our argument that a failure to protect
3 those people who are incarcerated in the only lawful form
4 of involuntary servitude and incarceration permitted by the
5 Thirteenth Amendment, that part and parcel of the due process
6 that they are entitled to is the protection of their safety.

7 QUESTION: May I interrupt again? If I understood
8 you correctly, you said they should not be deprived of the
9 protection they previously had had. The assumption I was
10 making is that as a matter of Virginia law the sovereign
11 immunity defense protected both the prisoner and the guest
12 before the 1983 was enacted, therefore, the effect of the
13 statute as you construe it would be to give an extra protection
14 to the prisoner that nobody else in the Commonwealth had.

15 MR. SALTZBURG: Justice Stevens, it is probably
16 the case that the prisoner was protected in the early 1800's
17 under Virginia law and no one else was. There is a case cited
18 by the majority of the Court of Appeals, an 1820's case,
19 suggesting that the sheriff would be liable in a suit by the
20 prisoner.

21 The current state of Virginia law is probably that
22 no one could recover in state court against the sheriff or
23 the person who committed the tort.

24 And, our argument is that part and parcel of due
25 process when someone is incarcerated is that they be protected

1 and they are entitled to a remedy.

2 On the point of a remedy, I would like to be clear
3 about this, we believe the remedy ought to be a state remedy.
4 We do not argue to this Court -- and we use the word "court"
5 that there must be meaningful remedy in a state court. We
6 use court in the broadest sense of the term. The court could
7 be an administrative tribunal, it could be a workman's compensa-
8 tion court. The question we believe that Parratt properly
9 phrased was whether there is a meaningful remedy that protects
10 the prisoner's safety in the hands of state officials.

11 And, the argument we make concerning the duty of
12 the state, we believe, is supported by the language in the
13 Screws case which was a criminal case which did impose an
14 intent requirement and was properly distinguished, we believe,
15 in Parratt.

16 We would also cite --

17 QUESTION: Mr. Saltzburg, before you go on, when
18 you talk about a meaningful remedy, are you talking about
19 the right to recover or the right to have access to the state
20 court to present your case and take what defenses may be advanced
21 as they come along? I think you are satisfied that sovereign
22 immunity will be played in this case, but I would suppose
23 in many cases the state would elect not to do it.

24 MR. SALTZBURG: Justice Powell, our position is
25 as follows: That if -- The state may have many defenses which

1 do not -- are not inconsistent with the notion of a meaningful
2 remedy.

3 QUESTION: Such as contributory negligence.

4 MR. SALTZBURG: Which we concede, contributory
5 negligence being one, the statute of limitations being another.
6 If the prisoner is somehow at fault, fails to comply with
7 the ordinary rules of procedure, we do not say that the state
8 should not be able to close its doors whatever the tribunal.

9 When it comes to sovereign immunity, our claim is
10 merely this: If the state says you can sue but you cannot
11 recover against anyone, that is not a meaningful remedy.

12 There is a problem in this case and it is a problem
13 I must own up to and that is the prisoner in this case did
14 not file originally a state court action. He filed his suit
15 in federal court and his explanation was he feared the
16 sovereign immunity defense. Even in federal court the sovereign
17 immunity defense was raised. The Court of Appeals explicitly
18 asked both the Petitioner and Respondent, Petitioner would
19 you go to state court if that defense were waived? The answer
20 was yes. They asked Respondent, would you waive the defense?
21 Respondent's position was we believe -- even though we claim
22 this defense, we believe this defense is made in good faith
23 and can win in state court, there is still a meaningful remedy.

24 We didn't file the state court action only to have
25 them plead again to show that it would be pleaded. It was

1 already before the Court of Appeals.

2 QUESTION: Mr. Saltzburg, you have probably already
3 answered this adequately, but let me ask anyway whether, as
4 far as you are concerned, it is clear that in Virginia the
5 state law is such that a state officer sued in his individual
6 capacity has an absolute defense based on sovereign immunity.
7 You are satisfied that that is the case.

8 MR. SALTZBURG: Justice O'Connor, you put it slightly
9 more strongly than I would. If I can soften it to be as exact
10 as I can, I am satisfied that current state of law in Virginia
11 set forth in our brief, most particularly the Messina case,
12 is that the Virginia Supreme Court has justified sovereign
13 immunity on two grounds, one more recently than the other,
14 both on protecting the public fisc, but more recently on the
15 grounds that it is important to encourage people to be public
16 officers and that, in fact, sheriffs repeatedly assert sovereign
17 immunity defense and that there are not many reported decisions
18 because the circuit courts in Virginia --

19 QUESTION: When sued in their individual capacities?

20 MR. SALTZBURG: Yes. And, that in this case I believe
21 the record fairly shows, although there is no transcript
22 available for oral argument, that in fact the Respondent wanted
23 to adhere to that in any state court proceeding.

24 We believe this case ought to be disposed of by
25 the state. The most important thing I have to say this

1 afternoon is that I do not represent a Petitioner who is asking
2 the federal courts to throw open the doors to a host of suits.
3 The argument that I make on behalf of this Petitioner is that
4 there is protection of the person required under the Fourteenth
5 Amendment that is enforceable by federal civil rights law
6 and if, and only if the state fails to provide protection.

7 QUESTION: But, shouldn't the word "deprivation"
8 have the same meaning regardless of the context in which the
9 suit arises?

10 MR. SALTZBURG: Justice O'Connor, the only answer
11 I can make to that is if you accept, and you may not, but
12 if you -- If I can persuade you to accept the argument that
13 part of due process when someone is incarcerated -- Here is
14 where the state does act intentionally, when it willfully,
15 intentionally, and knowingly says we are going to take away
16 your freedom and your ability to protect yourself.

17 Part of the requirement of due process is that they
18 supply the protection and in this context when they fail to
19 do that for whatever reason believe that they, in fact, deprive
20 a person of a right.

21 QUESTION: Would you say that is an intentional
22 deprivation?

23 MR. SALTZBURG: Justice Rehnquist, I argue especially
24 in our reply brief -- I believe that the line between negligence
25 and intention is far more looser than Respondent in this case

1 and in the case to follow would have the Court believe.

2 If I might explain, plainly the state intends to
3 incarcerate, plainly the state intends to have a prisoner
4 do or not do certain things. I do not believe in this case
5 there is an allegation that the defendant -- Respondent intended
6 to harm the Petitioner.

7 QUESTION: If your client had been in a federal
8 prison what would be the situation with exactly the same facts?

9 MR. SALTZBURG: It is my understanding, Mr. Chief
10 Justice, he would sue under the Federal Tort Claims Act
11 where he would have a claim. If he did not have one there --

12 QUESTION: I didn't get what you said. You could
13 sue, of course.

14 MR. SALTZBURG: Under the Federal Tort Claims Act.

15 QUESTION: What about the governmental function
16 and discretionary --

17 MR. SALTZBURG: It is inconceivable that anyone
18 would argue, I think, under the Federal Tort Claims Act that
19 the person who leaves a pillow on the stairs is exercising
20 a discretionary, a judgmental function.

21 QUESTION: The function of a prison is a discretionary
22 function, isn't it, a governmental function?

23 MR. SALTZBURG: Certain aspects surely are. And,
24 if part of the question is could the warden be sued or could
25 the director or superintendent of the prison be sued, our

1 answer is no. We do not ask to have that part of sovereign
2 immunity declared to be invalid.

3 QUESTION: In short, would you or would you not
4 have a remedy if you were in federal prison?

5 MR. SALTZBURG: I believe that we would under the
6 Federal Tort Claims Act. If we did not --

7 QUESTION: That would be contrary to quite a few
8 holdings of this Court, wouldn't it, on discretionary function?

9 MR. SALTZBURG: I hope not. But, if we didn't,
10 if we didn't, and, if, in fact, the simple negligence of a
11 federal prison guard caused injury, perhaps death, to a federal
12 prisoner and if it were held that the Federal Tort Claims
13 Act didn't allow suit, we would then say that, in fact, under
14 Bivens that person could come in and ask the court to protect
15 his due process rights under the Fifth Amendment.

16 QUESTION: Mr. Saltzburg, a moment ago in answering
17 the Chief Justice's question you said you don't ask to have
18 the federal sovereign immunity declared invalid. I take it
19 you are not asking to have the state sovereign immunity declared
20 invalid either. If Virginia chooses to retain sovereign
21 immunity, then these people have their cases tried in the
22 federal district court.

23 MR. SALTZBURG: That is exactly right, Justice Rehnquist
24 And, it is not a happy result for us. We believe these cases
25 belong in state court. There is a state Tort Claims Act that

1 took effect on June 1, 1982. It does not apply in this case.
2 However, it was enacted after Parratt, perhaps in response
3 to Parratt. It remains on the books as long as Parratt remains
4 on the books. It does not apply in cases in which a prisoner
5 asks for more than \$25,000. The statute keeps all --

6 QUESTION: Does it have a repealer clause in case
7 Parratt is overruled?

8 MR. SALTZBURG: No, sir, it does not.

9 QUESTION: May I ask you if you would characterize
10 your due process claim in this case as a procedural due process
11 claim or a substantive due process claim?

12 MR. SALTZBURG: I think the proper characterization
13 of it, Justice Stevens -- and I hesitate before answering --
14 is more in the nature of substantive due process despite by
15 hesitancy in light of the attack made by the Solicitor General
16 in the next case. I hesitate but I do not back away from
17 that statement.

18 QUESTION: I think that is the thrust of your argument.

19 MR. SALTZBURG: It is our contention that the Solicitor
20 General must prevail, must, if the only way our Petitioner
21 could win the case is for the Court to hold that every state
22 tort is a 1983 tort.

23 QUESTION: Mr. Saltzburg, if the Court were to hold
24 that negligent infliction of harm to a prisoner by a state
25 official does state a claim, how would you propose to handle

1 defenses for qualified immunity? Is inadvertence always a
2 defense? Would it ever be a defense? How do you handle it?

3 MR. SALTZBURG: Justice O'Connor, we conceded that
4 a qualified immunity, such as this Court has already held
5 under 1983, is adequate. It would clearly, if applied by
6 state in its own tort system, if adequate for federal purposes,
7 it certainly would not be a denial of a meaningful remedy.
8 And, we think that takes care of a lot of the problems of
9 anticipating decisions, the failure to anticipate decisions
10 before they are announced.

11 QUESTION: So, it could always be a defense in state
12 law?

13 MR. SALTZBURG: Yes. And, in fact, if that were
14 the only defense, both a state tort claim and a 1983 suit
15 in state court could be brought together and the same defense
16 would apply to both.

17 May I reserve the remaining time for rebuttal?

18 QUESTION: Negligence would -- There wouldn't be
19 many occasions where the defense would apply in the negligence
20 section.

21 MR. SALTZBURG: Justice white, very few -- The cases
22 where it does apply are cases in which after the Court clearly
23 announces a decision such as you must do this to conform to
24 the due process clause, someone doesn't know about it but
25 should have known. That is probably the only case.

1 CHIEF JUSTICE BURGER: Mr. Hopper?

2 ORAL ARGUMENT OF JAMES WALTER HOPPER, ESQ.

3 ON BEHALF OF THE RESPONDENT

4 MR. HOPPER: Mr. Chief Justice, and may it please
5 the Court:

6 This is a garden variety slip and fall case, a common
7 law tort. It occurred in a jail and it caused bodily injury
8 to a prisoner. It was said to have occurred due to the simple
9 negligence of a deputy sheriff leaving a pillow and some news-
10 papers on the stairs used by the prisoner.

11 We wish today to address by way of argument two
12 points. Our first point is that an act of simple negligence
13 by a deputy sheriff causing unintended bodily injury should
14 not constitute a deprivation of liberty in the constitutional
15 sense.

16 Our second point is that even if an act of simple
17 negligence constitutes a deprivation in the constitutional
18 sense, a state law defense such as the defense of sovereign
19 immunity, does not violate due process when it operates to
20 preclude recovery.

21 We believe that the Petitioner here has assumed
22 that as a prisoner his interest in freedom from personal injury
23 is a liberty interest that is protected by the Due Process
24 Clause and we believe that this assumption of his is based
25 largely upon the fact of his incarceration. As a result of

1 his incarceration, he believes that a special duty is owed
2 to him to keep him absolutely free of tortious injury.

3 He argues that an act of simple negligence by a
4 deputy sheriff in this case constitutes a deprivation of this
5 liberty interest and he argues that there is, in fact, an
6 absolute state defense of sovereign immunity such that no
7 state recovery would be allowed, therefore, he has concluded
8 that this deprivation has occurred without due process of
9 law.

10 We submit that if the Petitioner's basic argument
11 is accepted, almost any negligent tort that is committed by
12 a guard or a deputy sheriff, depending on the availability
13 of a state tort remedy, could be considered a deprivation
14 of a liberty interest without due process of law.

15 For example, if a prison guard or a deputy sheriff
16 could have an automobile accident resulting from his simple
17 negligence when he is taking a prisoner to or from court for
18 a hearing, if an injury has occurred to that prisoner and
19 there is no adequate state remedy, then it can be said that
20 a deprivation of a liberty interest has occurred in that set
21 of facts.

22 QUESTION: May I ask whether there is an adequate
23 state remedy in your hypothetical?

24 MR. HOPPER: Justice Stevens, I am assuming in the
25 hypothetical I just proposed that there would not be a state

1 remedy.

2 QUESTION: You are just assuming it for the
3 hypothetical. You know what the law is in Virginia though?
4 I mean, in most of these cases, is there or is there not a
5 sovereign immunity defense is what I am trying to figure out.

6 MR. HOPPER: Justice Stevens, with respect, the
7 law in Virginia is not clear as to this particular, unique
8 government official, a deputy sheriff, and it is subject to
9 constant review by the courts of record in the Commonwealth.

10 QUESTION: What did the Court of Appeals say?

11 MR. HOPPER: Justice White, the Court of Appeals
12 said that they thought that sovereign immunity defense had
13 no part in this case.

14 QUESTION: And, it was not available in Virginia.

15 MR. HOPPER: And that it was not available.

16 QUESTION: Why shouldn't we take that as the law
17 of Virginia?

18 MR. HOPPER: With respect, Justice White, the case
19 relied on by the Fourth Circuit was an 1826 case.

20 QUESTION: Well, you suggest we should just say
21 the Court of Appeals didn't understand Virginia law.

22 MR. HOPPER: With respect, Justice White, yes.

23 QUESTION: Yes.

24 QUESTION: Aren't they more likely to understand
25 Virginia law than we are? Several of them are Virginia lawyers,

1 aren't they?

2 MR. HOPPER: With respect, Justice Rehnquist, they
3 ought to. I do not agree with their conclusion in this case,
4 however. If I may, the reason I do not agree is because,
5 again, they relied on an 1826 case. Sovereign immunity was
6 not recognized by the Virginia Supreme Court until 1839, it
7 was not then further developed until 1849. Therefore, the
8 case that the Fourth Circuit has relied upon, I would submit,
9 arose prior to sovereign immunity ever even being discussed
10 within the Commonwealth of Virginia.

11 QUESTION: So, sovereign immunity in Virginia now
12 exists only to the extent it has been declared and it has
13 never been declared with respect to a prison guard.

14 MR. HOPPER: Justice White, that is correct.

15 Petitioner urges --

16 QUESTION: I would suggest the inference is the
17 Court of Appeals was quite correct then.

18 MR. HOPPER: Respectfully, Justice White, I do not
19 agree with the Court of Appeals.

20 QUESTION: I know, but what -- They have said we
21 never had sovereign immunity until now and now we are going
22 to have it here, there, but they have never said about this
23 case.

24 MR. HOPPER: That is correct.

25 QUESTION: They have never touched on this case.

1 MR. HOPPER: That is correct, Justice White. The
2 highest court of the Commonwealth of Virginia has not spoken.

3 QUESTION: How about the lower courts?

4 MR. HOPPER: There are numerous circuit courts of
5 the Commonwealth of Virginia, Justice White, which deal with
6 this issue.

7 QUESTION: And say that there is sovereign immunity.

8 MR. HOPPER: Justice White, with respect, they are
9 divided and the reason they are divided is because the court
10 of record in the Commonwealth of Virginia engages in a
11 determination of whether the act being performed is discretionary
12 or ministerial.

13 The Petition in this case, however, urges that a
14 special duty is owed to prisoners because they are in the
15 complete control of the state and he argues here perhaps that
16 the prisoner had no choice but to go down the stairs upon
17 which he fell.

18 QUESTION: Mr. Hopper, let me interrupt you and
19 get back for a moment -- I fear I may be confused. I thought
20 that the Court of Appeals held that there was an adequate
21 remedy under Virginia law. Am I wrong in that?

22 MR. HOPPER: No, Justice Rehnquist, you are not
23 wrong. They did hold that there was an adequate remedy under
24 Virginia law.

25 QUESTION: And, you are here now saying there isn't

1 an adequate remedy under Virginia law?

2 MR. HOPPER: No, Justice Rehnquist, I am saying
3 that there is an adequate remedy under Virginia law.

4 QUESTION: Then how do you differ from the Court
5 of Appeals with respect to the adequacy of the Virginia remedy?

6 MR. HOPPER: I do not, Justice Rehnquist, differ
7 with the Court of Appeals on the adequacy of the Virginia
8 remedy. I differ only with the Court of Appeals on whether
9 sovereign immunity applies to this particular officer.

10 QUESTION: You would say that it was an adequate
11 remedy even though sovereign immunity is available.

12 MR. HOPPER: Justice White, yes, it would be my --

13 QUESTION: I know, but that certainly isn't the
14 thrust of the Court of Appeals.

15 MR. HOPPER: I understand that, Justice White.

16 Again, referring to the example that Justice Stevens
17 alluded to earlier, where is the difference if an individual
18 comes to the very same jail where this Petitioner was housed
19 and he had to go see the Petitioner on a cold and icy day
20 in January? The jail only has one entrance which has a number
21 of steps to it. Let's suppose in this hypothetical that the
22 deputy sheriff who is in charge of the outside of this jail
23 is charged with various duties including -- various duties
24 which would include keeping ice and snow from the steps and
25 this visitor, although not with the prisoner, is coming to

1 see the prisoner, slips on these steps and has bodily injury
2 as a result of the negligence of the deputy sheriff. This
3 visitor is then confronted with the identical sovereign immunity
4 defense that we have here.

5 The only apparent difference in the status of the
6 case is the status of the individuals. Yet, under Petitioner's
7 theory, one must conclude that the visitor would have no remedy,
8 either in the federal or the state courts because of the operation
9 of sovereign immunity.

10 QUESTION: As I understand the difference is that
11 he was a voluntary visitor.

12 MR. HOPPER: Justice Marshall, that is what the
13 Petitioner has just said, yes, sir.

14 QUESTION: The Petitioner was a voluntary visitor?

15 MR. HOPPER: No, sir. The visitor would be a voluntary
16 visitor.

17 QUESTION: Yes, but the prisoner wouldn't be. That
18 is the difference.

19 MR. HOPPER: Justice Marshall, that is correct.
20 That is what he says.

21 QUESTION: That is the difference.

22 MR. HOPPER: That is correct.

23 Petitioner argues that the Due Process Clause though
24 is not violated the moment that the tortious injury occurs.
25 He says that his now may be a substantive due process claim.

1 Yet he has said in his petition that the due process rights
2 are not violated until there is no state remedy available
3 to him.

4 Yet surely I think we would all have to agree that
5 this injury could not have been inflicted by the deputy sheriff
6 on the Petitioner even if a pre-deprivation hearing were held,
7 simply because no process would ever justify inflicting an
8 injury on anyone's person.

9 The fact of the hearing or the lack thereof does
10 not affect this injury.

11 Petitioner's basic position, we believe then, is
12 really that his loss should not go without compensation.
13 In essence, he argues for the best of all possible worlds.
14 Unfortunately, in Virginia, it is not the best of all possible
15 worlds. There are not only the sovereign immunity defense,
16 but other official immunity defenses such as prosecutorial,
17 judicial, witness, parole board, legislative immunities.
18 Therefore, citizens in the Commonwealth of Virginia may be
19 injured by the actions of governmental officials but do not
20 always have a tort remedy available to them against either
21 the official or the government which he represents in Virginia.

22 As I mentioned earlier, sovereign immunity was not
23 recognized in Virginia until 1839. The Virginia Tort Claims
24 Act, however, did not become effective until July 1, 1982.
25 The Tort Claims Act, however, does not do away with the immunity

1 of local government or local governments' employees. Conse-
2 quently, the Petitioner is not unique in Virginia in suffering
3 injury at the hands of government or local government and
4 being without a tort remedy.

5 In fact, individuals who have been injured by govern-
6 ment negligence have suffered injuries at least equal to and
7 sometimes greater than that of the Petitioner. Examples are
8 readily found on pages 32 and 33 of the Petitioner's brief.
9 Messina versus Burden interestingly enough was a slip and
10 fall case on some steps of a community college in Virginia.
11 Hinchey versus Ogden represents the other end of the extreme
12 where the plaintiff lost a leg and part of her buttocks.
13 In both of these cases, however, the plaintiff was without
14 any remedy in state law at all because of the operation of
15 the doctrine of sovereign immunity.

16 We don't think that predicaments like these or that
17 of the Petitioner's have breached anything found in the
18 Constitution. It has been held that when a state law creates
19 a cause of action and the state is free to define the defenses
20 for that claim, including the defense of immunity, unless
21 the state law is in conflict with the federal law.

22 QUESTION: Well, Mr. Hopper, supposing in this case
23 instead of the Petitioner slipping going down the stairs the
24 trustee or deputy had intentionally shoved him down the stairs
25 intending to injure him. Would you say that that was a federal

1 constitutional violation?

2 MR. HOPPER: Justice Rehnquist, would I also have
3 to assume -- respectfully have to assume in the hypothetical
4 that the deputy was in a position to prevent that injury?

5 QUESTION: Well, I suppose you can always prevent
6 yourself from intentionally shoving somebody else down the
7 stairs.

8 MR. HOPPER: I am sorry, Justice Rehnquist, I under-
9 stood you to say a trustee which meant to me another inmate.

10 QUESTION: Let's say a guard, a guard.

11 MR. HOPPER: All right, sir. If a guard were to
12 intentionally push the plaintiff down the stairs --

13 QUESTION: Yes.

14 MR. HOPPER: -- that is a closer question, Justice
15 Rehnquist, and may well create a constitutional deprivation
16 in a constitutional sense because of the intentional act of
17 the deputy sheriff or guard.

18 QUESTION: Can you just say that it would?

19 MR. HOPPER: There again, Justice White, if it is --

20 QUESTION: Aren't intentional torts distinguished
21 from negligence for a great many reasons?

22 MR. HOPPER: Yes, Chief Justice Burger, they are.
23 And, if this were an intentional tort, then --

24 QUESTION: That could be an assault and battery,
25 pushing someone down the stairs.

1 MR. HOPPER: That is correct, Chief Justice Burger.
2 In addition to --

3 QUESTION: It is quite different from ordinary
4 negligence, isn't it?

5 MR. HOPPER: That is correct, Chief Justice Burger.
6 And, in addition, there would be a remedy under Virginia law,
7 I think, both tort and criminal law, in that hypothetical.

8 QUESTION: Would you raise your voice a little bit,
9 Mr. Hopper?

10 MR. HOPPER: Yes, sir. I beg your pardon.

11 QUESTION: I am not sure our microphones are working
12 well.

13 QUESTION: How about gross negligence or reckless
14 conduct?

15 MR. HOPPER: Justice O'Connor, again the question
16 becomes closer as you get into gross negligence. In gross
17 negligence, there is a reckless disregard by the actor. We
18 are in a position of conceding that the degree of gross
19 negligence may well give rise to a constitutional deprivation.

20 QUESTION: Would you just explain to me why, if
21 we focus on the word "deprivation" just for a moment, why
22 the mental state of the person who does the depriving has
23 anything to do with whether a deprivation occurred? Say you
24 talk about deprivation of life and some guy gets wrongfully
25 executed. Would it make much difference whether it was done

1 deliberately or they just had a misidentification by mistake?
2 Wouldn't it equally be a deprivation of life?

3 MR. HOPPER: Justice Stevens, yes, it would be a
4 deprivation of life in that kind of --

5 QUESTION: Even if it was negligent?

6 MR. HOPPER: Justice Stevens, I would -- The only
7 guidance that I have in answering that question would be
8 Parratt versus Taylor and Parratt versus Taylor has contradictory
9 language but would seem to indicate that that negligent act
10 would constitute a deprivation at least so far as --

11 QUESTION: Well, if it is on life and property,
12 why is it different on liberty?

13 MR. HOPPER: Justice Stevens, intellectually it
14 should not be different.

15 However, as Justice O'Connor has pointed out, the
16 word "deprived" is found in both Section 1983 and the Due
17 Process Clause and we believe that in the due process sense,
18 the Due Process Clause, it should be limited to the deliberate
19 actions of state officials which are designed to take away
20 those constitutional interests, simply because historically
21 the guarantee of due process has been applied only to the delibera
22 decisions of government to consciously take away life, liberty,
23 or property.

24 Surely it is our position that the framers of the
25 Fourteenth Amendment left room in the Due Process Clause to

1 recognize that government must conduct its affairs for the
2 benefit of the general population through people. Those people
3 will occasionally commit error as human beings. Otherwise --

4 QUESTION: Let's pursue that business of intention
5 a bit. An act of negligence occurs in not keeping the floors
6 safe or the stairways safe as compared with the situation
7 of a guard assaulting the person. One is within the scope
8 of employment and hitting somebody over the head with a bat
9 or club is not within the scope of employment. Doesn't that
10 afford a basis for a difference in the two?

11 MR. HOPPER: Mr. Chief Justice, logically it may,
12 but Monroe versus Pape was dealing with that same type of
13 situation where, I believe, the argument was that those officers
14 were acting outside the scope of their authority. But, for
15 the purposes of state action, it was held that they were within
16 the scope of their authority.

17 The suggestion that you make in the due process
18 sense may well provide a bright line or a clear division to
19 view a "deprivation" in the constitutional sense.

20 If we may now turn to our second point, that is even
21 if an act of simple negligence by a deputy sheriff constitutes
22 a deprivation in the constitutional sense, then the sovereign
23 immunity defense does not violate due process when it precludes
24 recovery.

25 On this point, we have some difficulty speaking

1 on behalf of the Commonwealth as to her rationale for not
2 providing an opportunity to this plaintiff to receive money
3 damages simply because of the status of the deputy sheriff.
4 He is neither a state employee nor is he a government employee,
5 he is simply a deputy -- a constitutional officer under the
6 Virginia Constitution and the Virginia Code. His position
7 is funded by a formula of both state and local funds.

8 The Virginia Tort Claims Act does not apply to him,
9 nor is he afforded representation by the state Attorney General's
10 office.

11 Similarly, the municipality does not exercise any
12 control over him and he is not offered representation by the
13 city attorney's office.

14 On the other hand, if he were a local government
15 employee, he would be not covered by the Tort Claims Act,
16 however, he would be extended sovereign immunity for simple
17 acts of negligence while performing discretionary functions.

18 As I mentioned earlier, the deputy sheriff in Virginia
19 occupies an unique position as a public official in Virginia's
20 scheme of government.

21 Several of the courts of the Commonwealth, the courts
22 of record, have extended to him the defense of sovereign immunity
23 for acts of simple negligence while performing discretionary
24 functions.

25 On the other hand, he has also been denied such

1 a defense by several of the other courts of the Commonwealth
2 depending on what the court considers to be a discretionary
3 function.

4 Here, the Petitioner maintains that the sovereign
5 immunity defense is absolute and that it will bar any action
6 brought in the state court. He argues that the state has
7 created a system of civil compensation for tort victims.
8 In this case, however, the state does not provide him with
9 compensation for his particular injury.

10 He says without an opportunity to be heard on the
11 merits of his claim in state court, he has been deprived of
12 his liberty without due process of law.

13 In the best of all possible worlds, the Petitioner's
14 loss probably should not go without compensation. However,
15 should the Respondent prevail in the state court on the defense
16 of sovereign immunity, he will not receive compensation for
17 his injury.

18 QUESTION: Mr. Hopper, tell me once more what your
19 position here is about the availability of sovereign immunity
20 in the event the Petitioner were to bring his case in Virginia.
21 The Court of Appeals said that there would be no sovereign
22 immunity. Your position is what?

23 MR. HOPPER: My position, Justice Rehnquist, is
24 that there would be sovereign immunity because this individual
25 was performing discretionary acts and an act of alleged simple

1 negligence is alleged against him while performing those dis-
2 cretionary acts.

3 QUESTION: And, what precisely is the discretionary
4 act, not cleaning the stairwell?

5 MR. HOPPER: That is correct, Justice Blackmun,
6 not taking the pillow or the newspapers from the stairway.

7 QUESTION: I am going to remember that at home.

8 (Laughter)

9 MR. HOPPER: It has never been the law, we believe,
10 that a state violates due process whenever it makes available
11 substantive or procedural rules of tort law which on occasion
12 preclude individuals from obtaining relief for certain injuries
13 caused by state actors.

14 The states have been permitted to erect reasonable,
15 procedural requirements for triggering the right of adjudication
16 such as statutes of limitations and filing fees.

17 It is only --

18 QUESTION: May I give you one other hypothetical
19 that occurs to me as a result of Justice Rehnquist's question.
20 Supposing your sovereign immunity doctrine were much clearer
21 than it is. You had a black and white rule, the state has
22 waived sovereign immunity in all cases except when a prisoner
23 litigates. Would you think that would stand up, because we
24 don't like suits by prisoners, they are mostly harassing,
25 you know, they waste a lot of time.

1 MR. HOPPER: Justice Stevens, in answer to your
2 question, I think that we would have to determine whether
3 that decision was wholly arbitrary or irrational.

4 QUESTION: It surely wouldn't be wholly irrational.
5 It would save the Commonwealth a lot of money.

6 MR. HOPPER: We would have to weigh then a balancing,
7 if you will, of the private interest against the public interest
8 and the public interest of maintaining orderly administration
9 of its jails and prisons may very well outweigh the interest
10 of the prisoner to bring a suit in the courts of the
11 Commonwealth and receive compensation for that.

12 I cannot give you a blanket answer because I think
13 that it would depend --

14 QUESTION: It would clearly prevail on your -- If
15 your first argument is right, you would still definitely win
16 because it doesn't come in. I am just wondering how your
17 second argument would treat that kind of case.

18 MR. HOPPER: The second argument being a balancing
19 of the governmental interest, Justice Stevens in your hypothet-
20 ical?

21 QUESTION: Well, your argument, as I understand
22 it, is, first, there is no deprivation of liberty because
23 it is a negligence case. If you win on that, you win no matter
24 what the sovereign immunity situation is.

25 Your second argument is that in all events there

1 has been no deprivation of due process because he has the
2 same rights as other citizens and sovereign immunity is just
3 something all citizens have to confront. Then I am saying
4 what if all citizens don't have to confront it, just prisoners,
5 then I am just wondering whether you would still say there
6 was no denial of due process.

7 MR. HOPPER: Justice Stevens, I would come down
8 on the side that there would be no denial of due process
9 assuming that there was a wholly rational and not arbitrary
10 reason for that.

11 QUESTION: Reason for that.

12 MR. HOPPER: And, the legislature would make that
13 determination at some point in its deliberations.

14 In the recent case, however, of Messina versus Burden,
15 the Virginia Supreme Court has stated that sovereign immunity
16 serves a multitude of government interest in this case and
17 these include not only those that Petitioner alluded to earlier,
18 which was protecting the public purse, but a number of others,
19 among which were eliminating public inconvenience and danger
20 that might spring from officials being fearful to act, assuring
21 that citizens would be willing to take public jobs and also
22 preventing citizens from improperly influencing the conduct
23 of governmental affairs through threat or the use of vexatious
24 litigations.

25 The Virginia court has also noted that government

1 can only function through servants such as this deputy sheriff
2 and that certain of those servants much enjoy the same immunity
3 in the performance of those discretionary functions as the
4 government enjoys.

5 Given the continued validity of the sovereign immunity
6 doctrine in Virginia, the Virginia Supreme Court has acknowledged
7 that it must continue to engage in a very difficult task of
8 deciding which government employees are entitled to immunity
9 based on the nature of their acts, either discretionary or
10 ministerial, on a case-by-case basis. Such rationale, we
11 believe, reflects what Virginia considers to be some of the
12 important purposes of the immunity defense which benefits
13 society as a whole in Virginia.

14 The balance of state and private interests favors
15 the government's interest in this sense and it is rashly related
16 to a legitimate state interest, that of jail or prison adminis-
17 tration in this particular instance.

18 It has been held that immunity rules do not in and
19 of themselves deny due process. We believe that such rules
20 do not deny process simply by limiting the state remedy available
21 to this Petitioner.

22 We believe that to agree with Petitioner that his
23 procedural due process rights have been violated by the immunity
24 defense would result in common law torts becoming Section
25 1983 cases in the federal courts.

1 The constitutional question then is whether state
2 procedures, includign sovereign immunity defenses, provide
3 the Petitioner with the process required under the Due Process
4 Clause.

5 We urge this Court to conclude that Virginia's pro-
6 cedures in this case do, in fact, comply with the Due Process
7 Clause.

8 Thank you.

9 CHIEF JUSTICE BURGER: Do you have anything further,
10 Mr. Saltzburg?

11 MR. SALTZBURG: Mr. Chief Justice, yes.

12 ORAL ARGUMENT OF STEPHEN ALLAN SALTZBURG, ESQ.

13 ON BEHALF OF THE PETITIONER -- REBUTTAL

14 MR. SALTZBURG: I would like to answer a question
15 Justice White posed with respect to the opinion of the Court
16 of Appeals with respect to state sovereign immunity.

17 It is true, Justice White, that a majority of six
18 of the Court of Appeals expressed the view that there were
19 several Virginia Supreme Court cases which would suggest that
20 there wouldn't be sovereign immunity.

21 It is also true that Respondent's position was and
22 is that there is sovereign immunity in this case.

23 An assistant attorney general, arguing companion
24 cases which were argued together with this and questions were
25 put, indicated that he supported the view there was sovereign

1 immunity.

2 QUESTION: Well, I know, but as between the Court
3 of Appeals and the Attorney General of the Commonwealth, whose
4 words do we take?

5 MR. SALTZBURG: Well, Justice White, we believe --

6 QUESTION: It might have been a professor from the
7 Virginia Law School.

8 MR. SALTZBURG: Surely the Attorney General of Virginia
9 above me and the Court of Appeals, of course, but our position
10 is -- and I didn't want this to be missed -- that it is not
11 a meaningful remedy in a suit where in a state like Virginia
12 in order to litigate this this prisoner would have had to
13 go to state court, might never have gotten a final resolution.
14 This has gone to a jury, traditional jury trial in the circuit
15 court of Virginia. A general verdict might never have declared
16 whether there was or was not sovereign immunity. If the Virginia
17 Supreme Court did not review this case, and it reviews very
18 few as this Court probably knows, there would not be an answer.

19 QUESTION: Well, you have got a Virginia intermediate
20 Court of Appeals nows that presumably review more cases.

21 MR. SALTZBURG: That is correct, Justice Rehnquist,
22 but it did not exist at this time and there was no right of
23 review for this prisoner.

24 And, the question we put to this Court is whether
25 it is truly a meaningful remedy when the Petitioner judges

1 that the sovereign immunity defense is likely to succeed,
2 the Respondent believes it will succeed, his counsel believes
3 it will succeed, he so represents to the court --

4 QUESTION: And then it does, and then it does succeed
5 in the state court, so it hasn't been a meaningful remedy,
6 then you are around the mulberry bush again.

7 MR. SALTZBURG: Yes, Justice White, maybe. If,
8 in fact, this prisoner is allowed to file in federal court
9 and keep a federal suit alive. Under Tamoneo we might lose
10 under the statute of limitations. Our position is that is
11 a bad way to run a state court system and a federal system.
12 It delays recovery, it delays the protection for the prisoner
13 perhaps for a very long time. If that is meaningful, then
14 we will lose.

15 The last point, Mr. Chief Justice, is that the Martinez
16 case is cited a great length in the brief, although not here
17 in the argument. This Court carefully left open in Martinez
18 the question of what kind of immunity would be recognized
19 for 1983 purposes. It did not, as suggested in the brief,
20 say that state immunity would automatically be accepted if
21 they were rational. Left it open and said that is a question
22 we will address another day. That question is now here.

23 The last thing I would say is this case may boil
24 down to this and when the Court judges the first question
25 put by Respondent as to what the intent of the Congress was

1 when it enacted Section 1983. His position is that if a prisoner
2 in the custody of a sheriff were negligently stolen away and
3 lynched, there would have been no remedy in a federal court
4 even after the state courts' doors were closed. Our position
5 is that that is wrong.

6 QUESTION: May I just ask this question, Mr. Saltzburg?
7 Someone mentioned what would be the situation if a prisoner
8 were being transported and had an automobile accident as a
9 result of his negligence. Assume, for example, that this
10 deputy sheriff was transporting your client in this case down
11 to federal court to testify in a case and did have an automobile
12 accident and was charged with negligence. I suppose your
13 position would be the same, would it? Would you view that
14 as identical to being in jail?

15 MR. SALTZBURG: Yes, Justice Powell. My time is
16 up. Might I answer that with another sentence?

17 QUESTION: Yes.

18 MR. SALTZBURG: Our position is in that specific
19 fact situation, yes, he should be able to sue under 1983.
20 It would be possible, however, for the court to say that where
21 a prisoner avails himself of benefits that are not imposed
22 upon him, for example, educational benefits and certain medical
23 benefits, that he knowingly chooses to avail himself of that
24 are not imposed upon him against his will, that simple negligence
25 in that context ought to be no different from negligence for

1 any other person. It is not in this case.

2 QUESTION: If the prisoner were being taken to his
3 doctor's office.

4 MR. SALTZBURG: At his request for special medical
5 treatment?

6 QUESTION: Yes.

7 MR. SALTZBURG: It might very well make a difference.

8 QUESTION: It might make a difference.

9 MR. SALTZBURG: Thank you.

10 CHIEF JUSTICE BURGER: Thank you, gentlemen.

11 The case is submitted.

12 (Whereupon, at 1:54 p.m., the case in the above-
13 entitled matter was submitted.)
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#84-5872-ROY E. DANIELS, Petitioner V. ANDREW WILLIAMS

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