ORIGINAL

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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-732

TITLE THEODORE CLEAVINGER, MARVIN MARCADIS, AND TOM LOCKETT, Petitioners V. DAVID SAXNER AND ALFRED CAIN, JR.

PLACE Washington, D. C.

DATE October 16, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

THEODORE CLEAVINGER, MARVIN MARCADIS, AND TOM LOCKETT, Petitioners v. DAVID SAXNER AND ALFRED CAIN, JR. — No. 84-732

Washington, D.C.

Wednesday, October 16, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 o'clock, p.m.

APPEARANCES:

KENNETH STEVEN GELLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

G. FLINT TAYLOR, JR., ESQ., Chicago, Illinois; on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Cleavinger and others against Saxner.

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

ORAL ARGUMENT OF KENNETH S. GELLER, ESQ.

ON BEHALF OF THE PETITIONERS

MR. GELLER: Thank you, Mr. Chief Justice, and may it please the Court:

The issue in this case is whether members of an institutional Disciplinary Committee who are responsible for adjudicating charges that federal inmates have committed violations of prison rules may be sued for damages by inmates who were dissatisfied with the results of these disciplinary hearings.

Now, this is a somewhat narrow legal issue in some respects but it is of extreme practical importance to the Bureau of Prisons and the operation of the federal prison system. There are more than 30,000 of these IDC hearings held each year in the federal prison system, and this Court has noted on a number of occasions that the maintenance of good order within these institutions is central to the accomplishment of all other correctional goals.

Therefore, it is essential that the

disciplinary process work correctly and that these IDC hearings reached the right results in the cases that are brought before them. Any extraneous factor that threatens to skew the results of these hearings is therefore a very important and serious problem.

We believe, for reasons that we hope to explain, that the threat that disciplinary committee members might be sued for damages in their personal capacity on the basis of their service on these committees, to do just that would skew the results of these hearings and therefore would weaken prison discipline and security, and for that reason we have sought certiorari in this case.

The facts here can be briefly stated. In January 1975 there was a two-day strike by inmates at the Terre Haute prison. A few weeks later the respondents in this case, Saxner and Cain who were inmates at Terre Haute, were charged with encouraging prisoners to engage in another work stoppage.

These charges were heard before prison IDC on February 21, 1975. Members of the IDC that day, unfortunately for them, were the three petitioners in this case, Cleavinger, Marcadis and Lockett. After hearing testimony and looking at the documentary evidence, the IDC found respondents guilty of

encouraging this work stoppage.

In addition, based on the evidence that had been introduced at the hearing, the IDC found the respondents had also committed another violation of prison rules, possession of contraband, on the basis of certain materials advocating the formation of a prisoners' labor union that had been found in their cells.

The Discipline Committee ordered that respondents be placed in administrative segregation and that they forfeit some of their good time. Saxner and Cain appealed this decision to the prison warden, who gave them virtually all of the relief that they had requested. He ordered their release from administrative segregation, and he ordered that the forfeited good time be restored to them.

The warden refused to expunge respondents' records, and so they therefore took the next step in the administrative appeals process by appealing to the Regional Director of the Bureau of Prisons who in April 1975 gave them the rest of the relief that they had requested. He ordered that their records be expunged.

Respondents were still not satisfied, so they brought this Bivens action against the three members of their Discipline Committee, alleging that petitioners

and other prison employees had violated their rights under the First, Fourth, Fifth, Sixth and Eighth Amendments to the Constitution.

The only charge that is relevant here is the Fifth Amendment claim because the jury found after trial that petitioners had violated respondents' due process rights at the IDC hearing by finding them guilty of a charge, the possession of contraband charge, of which they had not received 24 hours' advance notice.

The jury awarded $5,000 for this due process violation.

QUESTION: Did the jury itself make the determination that due process had been denied because of finding their guilt on the charge that hadn't been made, or was that determination made by the judge?

MR. GELLER: The jury found -- there was a special verdict. The jury found that the respondents had been deprived of due process because they had not given advance notice of the charge on which they had been convicted, the possession of contraband charge.

QUESTION: So, it was a jury finding?

MR. GELLER: Under special verdict.

QUESTION: And it's all procedural default?

MR. GELLER: Procedural due process, yes.

Petitioners appealed this $9,000 verdict to

the Seventh Circuit, but a divided panel of the Court of Appeals held that they were not entitled to quasi-judicial immunity, and they sought re-hearing en banc but that was denied by a vote of five to four.

QUESTION: Was that the only ground on which they appealed, just the --

MR. GELLER: The petitioners also challenged the amount of damages. The Seventh Circuit thought that the amount was excessive but did not set it aside and did not seek review in this case.

QUESTION: So, we don't have anything to do, then, with the damages, whether under our cases the instructions on damages were --

MR. GELLER: That is not an issue here. The only question we sought certiorari on is the absolute immunity question.

I might also add, although it's also not here, that the jury was incorrectly instructed on qualified immunity under this Court's subsequent decision in Harlow.

Now, the framework for analyzing the absolute immunity issue in this case is --

QUESTION: Is there a provision for the government paying the damages?

MR. GELLER: There is not.

QUESTION: There is not?

MR. GELLER: The framework, we think, for analyzing the absolute immunity issue in this case is rather clear in light of this Court's prior decisions. In Butz against Economou the Court held that most Executive Branch officials charged with constitutional violations enjoy only a qualified immunity from damages liability.

The Court held that there are certain government officials whose special functions require a full exemption from damages liability in the public interest, and in a number of cases since Butz the Court has wrestled with the question, whether this particular function or that required a full exemption from damages, liability, prosecutors or witnesses in judicial proceedings, or the President of the United States.

But this case, we think, is quite different from all of these previous cases in a rather fundamental way, and that's because this Court has already held in cases stretching back more than a century that one function of government that does require a full exemption from damages liability in the public interest is the adjudicatory function, and the Court has also held in many cases that even Executive Branch officials who don't hold the rank or title or Judge, such as

Administrative Hearing Officers, are nonetheless entitled to quasi-judicial immunity if what they're engaged in are adjudicatory functions that are comparable to that of a judge.

The test that we think emerges from these cases, principally Butz against Economou, is the following: a government official is entitled to quasi-judicial immunity if, first, his role is functionally comparable to that of a judge; second, the controversies that he resolves are such as to lead to harassing or retaliatory litigation that would chill the proper performance of those adjudicatory duties; and finally, that the adjudicatory system contains other safeguards to avoid or correct constitutional violations if they should occur.

We think that if that test is applied to this case, the result that follows inevitably is that Executive officials whose job it is to adjudicate prison disciplinary charges at these hearings have to be afforded absolutely immunity from damages liability in suits brought by disgruntled inmates if this important governmental function is to be performed properly.

As to the first factor announced in Butz, the record, we think, shows beyond doubt that the Institution Discipline Committee members are engaged in

the classic judicial function. They are required to deermine, based on the evidence before them, whether a specific individual has committed specific alleged charges, and they do that precisely the way judges or administrative law judges would go about doing the precise, same thing.

QUESTION: In some prisons don't they have disciplinary boards composed of prisoners?

MR. GELLER: Not for imposing discipline, Justice Marshall. I think that would violate the due process clause.

QUESTION: Don't some jails have disciplinary boards composed solely of prisoners?

MR. GELLER: Not to my knowledge, certainly not the federal system.

QUESTION: Do they have any where they have it half and half?

MR. GELLER: No, not --

QUESTION: It's only guards?

MR. GELLER: It's not guards. I should make that point quite clear. Judge Cudahy in his concurring opinion has this offhand reference to the fact that --

QUESTION: Guards --

MR. GELLER: Guards do not sit on these committees.

QUESTION: Glorified guards?

MR. GELLER: They're not glorified guards. They have to be at the level of department head or higher. These are high level correctional officials at the prison. They're not guards. They're not people who have day to day contact with the prisoners, and this is done to assure to the extent possible, impartiality, and people of stature who won't be influenced.

QUESTION: Well, two of the them are in charge of the very facility you're talking about.

MR. GELLER: They are part of the correctional staff. It's not the warden himself. The warden keeps aloof from these proceedings because he has to hear appeals from them.

QUESTION: I just have a little difficulty in getting demoted to the level of a prison guard.

MR. GELLER: I am not suggesting you are, Justice Marshall.

QUESTION: Mr. Geller, if I understand you, the immunity would attach even if the warden decided to assign a guard to hear one of these cases, wouldn't it?

MR. GELLER: I think if what the guard was doing is what these IDC members do, that the immunity would attach just the same, but that would relate more to the final part of the Butz test, I think, which is

whether the system is procedurally fair, and when I get to that I will explain that one of the facts of this system that makes it procedurally fair is that the members of this discipline committee are high-level officials of the prison who do not have day to day contact with the inmates. Although I think it would be procedurally fair even to appoint the guard, I want to make the point that that's not what is done in the federal prisons.

QUESTION: Mr. Geller, I understand. This of course is a federal case and it's a Bivens-type action rather than 1983 action. Lots of our cases sort of don't draw a fine distinction between the federal and state procedures.

Do you think the decision of this case will also apply to state systems in 1983 litigation?

MR. GELLER: I don't think I can answer that categorically. We'd have to know what the features are of each of these state systems to see how these disciplinary committees are composed.

I would say in general, since all of these systems have to meet the requirements of Wolff against McDonald, and in all of these systems there is the same fear of retaliatory litigation, I would think the answer would be yes, but we are primarily concerned with what

the rules are in the federal system.

QUESTION: I think in your brief you rely on both 1983 cases and federal cases --

MR. GELLER: Well, the courts in the immunity cases have never distinguished between them, and the Court of Appeals decisions that have decided this particular issue have not really drawn distinctions. But we want to focus here on the federal system. That is our prime concern, and we think it would have a drastic effect on the operation of the federal disciplinary system because of the way it's structured to have the threat of damages liability hanging over the heads of these decision makers.

QUESTION: The reason I asked, of course, is as Justice Marshall suggests, supposing a state system as a routine matter used guards at the trial level but had an appellate review system, you would still say the immunity --

MR. GELLER: I would make the same -- I would make the same argument, but that's not the case in the federal system, and of course whatever system the State set up would have to satisfy the due process clause as construed in cases like Wolff.

QUESTION: Mr. Geller, does the record show what portion of their work time these particular

petitioners spend in sitting on the IDC?

MR. GELLER: I don't believe the record shows it, but I think I have information that would answer your question. It's not a very large percentage of their time.

I have statistics that were compiled by the Bureau of Prisons a year ago. I think they're accurate. At Terre Haute, for example, this committee sits 3.5 hours a day, three days a week, and there are 29 members of the staff of several hundred who are eligible to sit on this committee. I don't think they spend a large percentage of their --

QUESTION: To that extent they are somewhat different than administrative law judges who presumably spend just about all their time adjudicating?

MR. GELLER: Yes. Well, they're different in that sense, but I would suggest that in many ways that makes them more subject to the threat of harassing or intimidating litigation because this is not their full-time job and perhaps they don't have the same professional commitment to judging that an administrative law judge --

QUESTION: Would they be more like, Mr. Geller, the temporary and part-time judges in Virginia and other states who are appointed from members of the

bar and just sit for two weeks, or two months?

MR. GELLER: Yes. It's full-time when they're doing it, but it's obviously not full-time for them in terms of their occupation. But when they're out doing it --

QUESTION: Can you come up with one of these part-time judges in the state of Virginia that has absolute immunity?

MR. GELLER: I don't think there's any question that he would, and we think the same should apply here. Just what these judges do, what these Disciplinary Committee members do, is precisely the same as what a judge does. He listens to the evidence. He has to resolve credibility disputes. He has to make rulings on whether evidence should be admissible.

It might not be admissible because it's irrelevant or redundant or some other reason, and they have to justify their conclusions like the judge does by having written findings explaining on the basis of the evidence precisely why they have reached the decision that they have.

We believe this is the essence of the adjudictory function, and we really don't believe respondent's brief is taking serious issue with that proposition. What IDC members do, therefore, is

functionally comparable to that of a judge.

We think that it's equally obvious that the proper functioning of this adjudicatory system would be seriously impaired if the people who sat on these committees were fair game for litigants who were unhappy with their decisions.

In Bradley versus Fisher, and more recently in cases like Person versus Ray and Stump versus Sparkman, the Court has upheld the principle of absolute judicial immunity by emphasizing that judges would be intimidated and the whole judicial process would suffer if they could be sued personally on the basis of their rulings.

The Court in Butz against Economou made the same exact point in the context of administrative law judges, pointing out the fractious nature of much administrative litigation these days. Well, if these statements are true, and we believe they obviously are, it's hard to imagine a context in which there is more likelihood of harassing or intimidating litigation than this one.

We would think that the principle the Court announced in these cases is really at its zenith in a case like this, and we think that's true both by focusing on the identity of the putative plaintiffs in these Bivens cases, by focusing on the identity of the

putative defendants in these Bivens cases.

As to the plaintiffs, as this Court noted in Wolff against McDonald, prison disciplinary hearings take place against a background of resentment and hostility on the part of many inmates towards prison authorities.

QUESTION: Excuse me for the interruption, but are there any written, specified qualifications for service on these committees?

MR. GELLER: Yes, there are. In 1983 the Bureau came out with detailed regulations providing who can serve on these committees, not at the time, I believe, of -- actually, at the time of this hearing which was 1975, there were regulations that require that at least two of the three members of the committee be a department head or higher.

There was also a requirement, which is still in the regulations, that no one could serve on these committees who was involved in the charging decision or in the investigational decision.

QUESTION: Any requirement with respect to education?

MR. GELLER: Well, there is, as I was about to say, not in the last few years. The Department -- the Bureau of Prisons has instituted an extensive program of

certification and periodic testing, and no one can serve on these committees unless they satisfy those testing and certification requirements.

But at all times since 1975 and afterwards, no one can serve on these committees unless they had a certain stature within the Bureau of Prisons, unless they were impartial in the sense that they were not at all involved in the charging or the investigation of the particular case that was before the ITC.

QUESTION: What is the educational requirement for a guard?

MR. GELLER: Well, Justice Marshall, again a guard does not sit on these committees, but if a guard did wish to take the test there is an extensive program of testing, learning the rules of --

QUESTION: My question is very simple. How much education does he have to have?

MR. GELLER: To become a prison guard?

QUESTION: Yes, sir.

MR. GELLER: I am not aware of what the educational requirements for guard are, Justice Marshall. I am aware of what they are for people who would like to sit on these.

QUESTION: Well, what is the educational requirement before one can sit on one of these

committees?

MR. GELLER: If a prison employee wishes to sit on an IDC, he has to go through a periodic testing program and certification, has to pass a written test, has to learn the rules of this Court in cases like Wolff against McDonald, and he has to learn the regulations that the Bureau of Prisons have promulgated for the operation of these IDC's.

QUESTION: I still want to know the educational requirement, one year, two year or no year.

MR. GELLER: Justice Marshall, you are talking about how much formal education they have to have in terms of high school or college. I'm not certain what the answer to that is. As far as I know there isn't any, except for whatever educational requirements there are to become an employee of the Bureau of Prisons.

QUESTION: So, you don't know of any?

MR. GELLER: I don't know of any formal educational requirements. I do know that there are extensive educational requirements to sit on an IDC. There are, as far as I know, no educational requirements in terms of high school education to become an Article 3 Judge.

QUESTION: Or Supreme Court Justice.

MR. GELLER: Or a Supreme Court Justice.

QUESTION: Notice I left out, Solicitor General. I left that out.

MR. GELLER: Actually, by statute, the Solicitor General must be learned in the law, Justice.

QUESTION: But it doesn't say anything about his assistants?

MR. GELLER: It doesn't say anything about his assistants, that's true, or his deputies, although they all are.

QUESTION: Congress would take care of that.

MR. GELLER: Congress, I think so.

In any event, unlike in a normal adjudicatory process where I think a litigant really has no reason to expect that he lost before a judge because the judge was hostile to him personally, the unfortunate reality is that in the prison disciplinary proceedings many inmates do feel that they lost solely because the board was hostile to them, or was biased or committed some act of misconduct, and we think that the inmates who lose at these IDC hearings would therefore often like to strike back in some way.

Now, the Court said, in Wolff against McDonald, and I quote, it said, "Retaliation" -- they are talking about retaliation by prisoners resentful of disciplinary hearings. The Court said, "Retaliation is

much more than a theoretical possibility."

If that's so, and we believe it certainly is, there is every reason to expect that this retaliation would take the form of damage actions if they are available. I think the urge to strike back by filing Bivens-type actions would often prove irresistible and as this Court is well aware, prisoners as a group are somewhat prodigious and indiscriminate litigators.

QUESTION: Do you think your case would be stronger if the prison were to hire some full-time adjudicators to sit and serve in this function?

MR. GELLER: Like ALJ's, or --

QUESTION: Yes.

MR. GELLER: That is the solution that the respondents offer. I think that our case in many ways would be stronger in terms of absolute immunity. Our case, I think, would be much weaker in terms of what impact that would have on prison discipline and security because this Court in the cases like Wolff against McDonald has refused to require those sorts of procedures, simply because it would jeopardize prison discipline and security.

I hope to discuss that if I have time when I talk about the third Butz test which is the procedural protections that are available in a particular

adjudicatory system under attack.

So, we think that the factors that deter the filing of insubstantial lawsuits really don't have the same effect on prisoners as they do on other potential litigants, and there's a real fear, I think --

QUESTION: Mr. Geller, you mentioned that there are some 30,000 of these hearings --

MR. GELLER: Yes.

QUESTION: -- in the federal system every year. Are there any statistics on how often the members of the Disciplinary Commission have actually been sued?

MR. GELLER: Well, I asked -- there's nothing in the record, obviously, but I asked the Bureau of Prisons recently and they told me there are approximately 75 pending Bivens suits by prisoners.

I should add, and that may seem like an insubstantial number, it doesn't seem that way to me, but there is every reason to expect that if this Court were to affirm -- I mean, right now there is some uncertainty about whether these sorts of suits can proceed. The Fourth Circuit en banc has held that Disciplinary Committee members have absolute immunity. A number of District Courts have held that.

I think if this Court were tc affirm, we would see a drastic rise in that. But let me also say,

Justice Stevens, that our principal concern here is not necessarily that the courts will be flooded by Bivens suits. We are more concerned by the fact that if this Court affirms, and the potential is there for Bivens suits for personal damages liability, that the people who sit on these committees will take that into account when they're making their decisions on whether somebody has committed a particular offense.

That's what we're concerned about. It's the extraneous influence on the adjudicatory process, and not necessarily the fact that there will be several hundred Bivens suits filed, although I think we can expect there will be.

Now, finally, let me get to the third factor mentioned in Butz. We believe that the procedures at these IDC hearings provide sufficient safeguards for the protection of constitutional rights by the inmates without the need for Bivens actions.

Needless to say, the disciplinary hearings in the federal system fully meet and in many respects go beyond the requirements of the due process clause as construed in cases like Wolff and Ponte versus Real. People who sit on these committees, as I said earlier, have to be impartial. An inmate is entitled to notice of the charges against him, he is entitled to call

witnesses, to give documentary evidence.

The inmate is entitled to give his side of the story, generally entitled to be present throughout the proceedings except during the deliberations of the committee, and most importantly, the IDC has to keep a complete record of its proceedings and has to justify both the liability decision it makes, whether the prisoner is guilty or innocent, on the basis of the evidence. It also has to justify what sanction it has decided to impose if it finds that the prisoner committed the violation, and also three levels of administrative review within the prison system, plus the opportunity of judicial review.

There is an appeal first to the warden, then to the Regional Director of the Bureau of Prisons, and finally General Counsel of the Bureau of Prisons who personally reviews each of these matters in order to try to achieve some consistency. And this very case, I think, shows that this is a meaningful remedy because the respondents in this case appealed to the warden and then appealed to the Regional Director, and within six weeks had gotten all of the relief that they had ever asked for.

I should add as a footnote to all of this that another perverse effect of the Seventh Circuit's

decision --

QUESTION: Mr. Geller, how can you say they got all the relief they asked for? Didn't they spend some time in solitary?

MR. GELLER: No, there's nothing, obviously, that -- even the judge who sends someone to jail pending charges --

QUESTION: I understand, but isn't that the risk that this remedy is supposed to take care of? Let's say you had an arbitrary board that stuck somebody away for three weeks, knowing it would be reversed later, they would just be -- well, that's too bad, you got out after three weeks.

MR. GELLER: I agree, but I think the same thing could be said for many judicial-type decisions. The actual sanctions that were imposed were set aside as quickly as they could have been set aside when they were brought to the next level of review.

QUESTION: Well, suppose the appellate tribunal felt the same way, let's just keep them there another couple of weeks and then -- what if they just delayed?

I'm not suggesting it happened, but --

MR. GELLER: No, I understand, Justice. And there can't be delay in this system because the

regulations provide there must be a decision within, I believe --

QUESTION: But you're saying, even if the regulation is violated there should be no remedy?

MR. GELLER: Well, there should be no Bivens remedy. There is appeal to the next higher level, and there is appeal to the courts.

QUESTION: In the meantime he sits in solitary.

MR. GELLER: Well, he wasn't in solitary.

QUESTION: But, that's the possibility, and you can't come in -- I really don't know --

MR.GELLER: I think that's a possibility,but it's a possibility with judicial proceedings as well. All I'm saying is that in terms of the actual sanctions imposed, it's not as if there is no way short of a Bivens remedy of getting people to be appreciative of constitutional rights, because there is an administrative remedy which I am told leads to reversals in 20 percent of the cases, and there is full opportunity for judicial review of constitutional violations.

QUESTION: So, then, 20 percent of the cases, somebody has suffered some temporary harm for which there will be no recourse?

MR. GELLER: Well, but the harm may have been

very, very minor. It may not have involved --

QUESTION: It may be minor tc us but --

MR. GELLER: No, Justice, in this case for example, if there had been no segregation order but simply the forfeiture of good time, it seems to me that if six weeks later the good time had been restored, there would have been absolutely no damage.

QUESTION: But isn't segregation a typical remedy in discipline cases --

MR. GELLER: In the more serious ones, but many of these IDC hearings don't involve such serious charges.

Now, let me just say, the respondents object to the adequacy of these procedures. In fact, as I read their brief, they don't take much issue with our analysis of the first and second Butz criteria. They make no real effort to suggest that what the petitioners were doing here was not comparable to a judge, and they certainly make no effort to rebut our suggestion that there would be grave potential for retaliatory litigation here.

They put all of their eggs, it seems to me, in the third basket of Butz by claiming that the procedures were not adequate, and what they suggest is that if the Bureau of Prisons wants absolute immunity fcr its

hearing officers, what they should do is incorporate into the disciplinary system precisely those trial-type features that exist in court, or that exist in administrative proceedings.

But I think this shows the fatal flaw in respondent's argument, because this Court, in Wolff against McDonald, said that the due process clause does not require those sorts of proceedings, and the Court didn't say that in an offhand or cavalier manner.

What the Court did was carefully balance the private rights involved versus the public interest in maintaining prison security and discipline.

QUESTION: The respondents' contention isn't that due process requires it, but that if you're going to give absolute immunity --

MR. GELLER: I understand that. I understand, but the point I'm making is that if in order to gain absolute immunity for these decision makers the Bureau of Prisons would have to incorporate all these trial-type procedures at the very same time that the prison discipline and security that we are concerned about in asking for absolute immunity would occur, because if this Court refused to require those procedures in Wolff against McDonald, basically they would jeopardize prison security.

The Court said that to require cross examination, or lawyers present, or the right of confrontation, would undermine correctional goals, would jeopardize prison security, would heighten tensions in the institution. These are the very sorts of things that the respondents claim the Bureau of Prisons has to risk in order to get absolute immunity for its decision makers.

So, it's sort of a Catch-22, on order to --

QUESTION: I guess there is a middle ground, decision makers that are a little more independent from the working processes of the prisons, with maybe all the other trappings.

MR. GELLER: Perhaps, Justice O'Connor, although I think there is a degree of impartiality and the due process clause obviously doesn't require any more, this Court held in Wolff against McDonald.

But beyond that, I mean, there are 30,000 or 35,000 or these hearings every year. You would need a corps larger than the corps that handles disability cases, I would think. And you know, it is common knowledge, I think among correctional officials, that for discipline to have any effect it has to -- there has to be a quick hearing and a prompt determination.

If you -- if we need a corps of roving

administrative law judges, it may be a long period of time before these hearings could be held.

QUESTION: Do you think that the qualified immunity standards in the Harlow versus Fitzgerald summary judgment procedures are just wholly inadequate to --

MR. GELLER: They're not wholly, and obviously what the Court has done in the area of qualified immunity is useful, but it's not at all a complete answer because all qualified immunity really does is prevent an adverse judgment from being entered against the defendant, perhaps.

It doesn't prevent the defendant from being sued. It doesn't prevent the defendant from perhaps having to go through many months of litigation, the burden and expense of having to defend against litigation.

QUESTION: Furthermore, he may be stuck from time to time because under qualified immunity standards he deserves to be stuck.

MR. GELLER: Or because an error was made. I mean, I see many of these cases, Justice White, and I think the Court would be surprised at how often, despite Harlow, district judges refuse to dismiss these cases quickly, either by finding that there are disputed

issues of material fact or whatever.

QUESTION: Does the government pay the cost of defense? Who defends the cases?

MR. GELLER: Well, a case by case determination is made by the Justice Department.

QUESTION: In this case, who --

MR. GELLER: The Justice Department was representing these people, but they had no right to representation and of course the Justice Department or the government does not pay any final judgment.

QUESTION: Oh, I understand that.

MR. GELLER: Thank you.

QUESTION: But they do represent it?

MR. GELLER: In these cases the Justice Department generally represents the defendant.

CHIEF JUSTICE BURGER: Mr. Taylor.

ORAL ARGUMENT OF G. FLINT TAYLOR, JR., ESQ.

ON BEHALF OF THE RESPONDENTS

MR. TAYLOR: Thank you, Mr. Chief Justice, and may it please the Court:

What the Government comes to this Court today to ask is a radical extension of the doctrine set forth in the case of Butz versus Economou, and further asks this Court to ignore its decision in Wood versus Strickland and to afford them an exceptional form of

absolute immunity which has heretofore been reserved by this Court only to judges and to administrative law judges.

QUESTION: What do you say about the standard that was set down in Imbler against Pachtman, that the standard is the functional comparability of the two activities, that is, how does it compare in function with that of a judge?

MR. TAYLOR: We don't have any disagrement with that. In Imbler --

QUESTION: What I'm asking you is, how do you think that standard should be applied?

MR. TAYLOR: Well, I think it's applied very clearly through the Butz test. You have to look at the function. That's the beginning of it. You look at the function in light of the independence of the decision maker, in light of the procedural safeguards.

QUESTION: An administrative law judge can't enter a judgment or make a final determination?

MR. TAYLOR: That's right, he --

QUESTION: He makes recommendations.

MR. TAYLOR: That's true, but he -- if you compare him to these supposed senior administrators that made the decisions in this case, the 1975, you find the differences are paramount. You find that he's a

lawyer. You find that he has seven years of experience. He's required to have seven years of litigation experience in hearing decisions.

He can't perform any other functions. The only function that he can perform is being a hearing officer.

QUESTION: What would you say about a justice of the peace or a lay judge in some of the states? Do they have absolute immunity, or not?

MR. TAYLOR: Well, you mean like a magistrate, that kind of thing? I'd have to look at it on a case by case basis. I think that they by and large are independent. They're a third force, an adjudicatory force. They're not drawn from one side or another like it is in a prison.

In a prison, the prisoners are being judged in these hearings by their adversaries, that is, the prison guards or the prison administrators themselves. And this case is a perfect example of it. If you read in the appendix the supposed record of the hearing, you see page after page of these administrators, one of whom was an operational lieutenant who after Mr. Saxner was placed in segregation was in charge of his day to day custody, asking him question after question designed to elicit unfavorable information.

It was like an inquisitorial process, not an adversary proceeding. He had no counsel. He had no right to compel witnesses. He had no right to cross examine. In fact, he was convicted on double hearsay that was unattributed. That was it. That was the sum total of it.

It says a one-line thing, what is the evidence they relied on? It was double hearsay not attributed to a name, but someone said he was about the institution talking with people and encouraging the work stoppage.

That was the sum total of the evidence that he was convicted on.

QUESTION: I would think your argument, then, should be there shouldn't be any immunity at all?

MR. TAYLOR: Well, we are bound by the dictates in Butz versus Economou and Wood versus Strickland. I'm not here on a clean slate. I'm here arguing the principles of judicial immunity.

QUESTION: What about prosecutors?

MR. TAYLOR: Prosecutors get their immunity from another branch of the quasi-judicial doctrine, and that is because they are integrally involved in the judicial process. A prosecutor has all the safeguards of that open judicial process.

QUESTION: But aren't they adversaries?

MR. TAYLOR: They're adversaries, that's true, but they got their immunity not because of their adversarial position but their position in a judicial process that's supervised by a judge.

We don't have that here.

QUESTION: Isn't there a charging party? Doesn't somebody actually make the charge in the prison disciplinary hearings, and they give notice of the charge?

MR. TAYLOR: That's right.

QUESTION: Who gives them -- who charges them?

MR. TAYLOR: A guard -- it depends on the factual situation, but a guard will bring an incident report, which will then be served on the prisoner, who will then come to the hearing after getting notice, although that was one of the major problems in this case.

QUESTION: And was the guard sued in this case?

MR. TAYLOR: The guard was sued, yes, the charging guard was also sued.

QUESTION: And is he at issue here?

MR. TAYLOR: No, he's not.

QUESTION: What happened to him?

MR. TAYLOR: He was acquitted by the jury.

QUESTION: I see, and what was -- was there an argument about his immunity?

MR. TAYLOR: No, in terms of absolute immunity, no, no. And I think that --

QUESTION: But qualified immunity?

MR. TAYLOR: Qualified immunity?

QUESTION: Yes, was it?

MR. TAYLOR: There was -- that wasn't the finding of the jury. I don't think they made a specific finding that he had qualified immunity. I think they found on the facts that he wasn't involved in the due process violation or the retaliatory action which spawned the basis of the placement in segregation.

QUESTION: How about the warden?

MR. TAYLOR: The warden was sued also, and he was also acquitted by the jury.

QUESTION: So, the immunity issue -- was it on that basis, or do you know?

MR. TAYLOR: I'm sorry.

QUESTION: Was there immunity for him, or not?

MR. TAYLOR: No, no. It wasn't a question of immunity. It was a factual determination, as I understand it.

QUESTION: Was there an argument for his absolute immunity?

MR. TAYLOR: No, there was none made. The only argument for absolute immunity that was made by

defendants was pre-trial for these IDC members. And another aspect of the proceeding, Your Honor, is that you asked about the prosecutor and you asked about, isn't there a charging guard.

Well, the IDC does the questioning in the proceeding, so it acts as a prosecutor and then it adjudicates, and it adjudicates on bases other than just the evidence. It adjudicates on behavior, background; it adjudicates on what it knows about the individual.

And I have to take strong exception to the Government's position that because these are senior -- or some of them are now senior officials in the institution, that that means they are more impartial. They worked their way up through the system. These were all guards that have been promoted, and in fact as I pointed out, Mr. Marcadis, one of the three members, was still an operational lieutenant who had day to day custodial responsibilities for Mr. Saxner.

So, I think that's somewhat of a distinction, without a difference, in a prison context. The adversarial -- as you get closer to the warden, that that whole kind of influence and pressure which Butz talks about that is so absent from an ALJ, there's no agency pressure, whereas here the pressure of the warden, the pressure of the situation of the fellow

guards and the fellow administrators all of whom are in an adversarial, keeper-kept relationship with the prison guards is paramount, and that goes to that important question about independence.

I am flabbergasted that the Government would think that we don't take issue with the fact that these people are independent. We certainly say, and we argue, on of the strongest points in our brief is the lack of independence.

If you look at Bradley versus Fisher, if you look at Stump versus Sparkman and Pierson versus Ray, you see in all those cases, again and again they are talking about the independence of the judiciary, the importance of preserving the importance of the juridicary. There's no independence here to preserve. That is the first part of the Butz test.

Another part of the Butz test to determine whether you get absolute immunity, and which they use to determine ALJ's, administrative law judges did, is the reliability of the information before the body. In an ALJ hearing, in an administrative law hearing, you can't convict somebody entirely on hearsay. It's subject to cross examination. There are lawyers there. You have the right to compel.

QUESTION: An administrative law judge can't

convict anyone of anything. He can't even enter a judgment.

MR. TAYLOR: Well, that's true, but he makes a recommendation based on a plenary hearing and that recommendation then goes to the agency and then that is either affirmed or denied or whatever.

QUESTION: Or reviewed de novo by the judge, by the body.

MR. TAYLOR: That's true, and there's an absolute right to judicial review, which of course there isn't here either. Here you have to make a constitutional claim and it's a discretionary proceeding whether you get into court or not. So, that's another important Butz factor which is absent here, appellate review, the importance of review, and finally, the procedural safeguards.

Counsel seems to be trying to say that because you get minimum due process in these hearings, that that equates with the procedural safeguards, making you functionally comparable to a judge.

I think this Court has again and again and again dealt with due process cases, starting with -- well, before this but germane to my argument, starting with Goldberg versus Kelly, Morrissey versus Brewer, Gagnon versus Scarpelli, and then Wolff and various --

Baxter and other various prison disciplinary cases.

And again and again, I can quote you language from each of those cases where you looked at disciplinary -- not hearings,due process hearings which had by and large more safeguards. The welfare deprivation hearing in Goldberg had the cross examination confrontation, the same with parole revocation hearings and probation revocation hearings.

In each of those cases the Court looked at those hearings and characterized them as informal proceedings, as non-adversarial proceedings, and just recently in the Walpole case out of Massachusetts, this Court looked at a disciplinary hearing, and Justice O'Connor, speaking for the Court, characterized that disciplinary hearing in a prison context was a "non-judicial proceeding."

So, I think that it's clear that if we talk we can use the word "functionally comparable," but when we're talking about "functionally comparable" it means what it says. We have to look at what a judge does and see if what a judge does and what the protections that a judge operates under, and the independence that a judge or an ALJ brings to a situation exists or --

QUESTION: What immunity do parole and probation officers have?

MR. TAYLOR: I don't think that's been decided by either this Court. Probation officers, I would assume, would get qualified immunity, but I don't think that has been decided.

QUESTION: What about parole?

MR. TAYLOR: Parole officers, there are some circuit cases, I think the Ninth Circuit and one other circuit, who have decided -- have afforded them absolute immunity, the other circuit being the Seventh Circuit, I believe. But the distinctions between parole officers, parole boards and hearing officers, prison guards and prison officials in a prison context are quite paramount, and that is that a parole board doesn't come from the prison. It's judging prisoners, but it is not chosen from the prison. In Illinois the Governor chooses them.

He has to have specific background in education. He's approved by the Senate of the State of Illinois. Prison guards and prison officials in a prison context are quite paramount, and that is that a parole board doesn't come from the prison. It's judging prisoners, but it's not chosen from the prison.

In Illinois the Governor chooses them. He has to have specific background in education. He's approved by the Senate of the State of Illinois.

QUESTION: Do you know where the senior prison people who serve on these boards come from, or have they been guards before or been promoted, or do they have special qualifications, an elite corps that are brought in from outside?

MR. TAYLOR: I can't speak in general as the Government has. I can only point you to our record, and I think that in my experience, having litigated in various federal prisons over the last ten or 15 years, it seems that in all the cases -- and also in state prisons as well, that this is -- they come right from the prison.

These men that judged my clients here were long-time prison guards. You can tell subjectivity right in the record. When I put Mr. Cleavinger on the stand and tried to get into his thought processes in putting my client in segregation and finding him guilty of a nonexistent charge, he said my client is talking against the institution and that is wrong.

That was what he conceived of. That was his subjectivity. The kinds of evidence in the record here is astonishing, if you're looking at them as judges. If you're looking at them as adversarial prison guards, then that's a different matter. But if you're looking at them as judges or administrative law judges, we have

to deal with the reality of where they're coming from, what their attitudes are, what kind of relationships they're in with these prisoners.

As Justice Stevens pointed out, the remedy is so important. It's barely cavalier to say, well, in this case -- this case happens to be the exception, I think, that proves the rule. Mr. Saxner, I think who was a jailhouse lawyer, who was in contact with the ACLU, with judges, with Congressmen, and who in fact -- the reason that he was put in segregation when all is known is because there had been a death in the prison hospital and he was going out and interviewing prisoners about the abhorrent conditions in that prison hospital.

Unfortunately, three other prisoners died in that hospital after this case, and the fourth death came to this Court in the Green versus Carlson case. He was put into segregation for that activity, and those are the kinds of cases that it's so important to have a remedy, that there is no remedy in that circumstance but damages. As was said in Bivens, it's damages or nothing in that kind of situation.

He can be let out of segregation, 30 days, 60 days, 90 days later, but he has no remedy and there is no deterrent then. There is no satisfactory deterrent on that kind of conduct, and it seems to me that the

Government has brought some statistics that are the evidence of record, but it seems to support our position in the sense that 75 Bivens cases, he says, are pending and I didn't understand whether that was 75 Bivens cases against federal prison guards in general or just in the disciplinary due process area against hearing officers, but I am assuming the latter.

You look at that in light of the 40,000 adjudicatory cases or whatever that he says that they deal with per year, and I think that -- and I know in the Seventh Circuit, the Sixth Circuit, the First Circuit and the Second Circuit, you have been able to sue IDC members for at least ten or 15 years.

I know Justice Stevens sat on the Chapman case in the Seventh Circuit in the early '70s which allowed that kind of suit. I can cite the names of cases in other circuits as well, so it isn't like there's a new thing that's going to happen now.

QUESTION: One gets the impression from Judge Woods' opinion that perhaps even the Seventh Citcuit may be lined up to reconsider the whole point.

MR. TAYLOR: Well, he has what Judge Cudahy characterized as an ambiguous footnote, that at some time we ought to reconsider this, perhaps. And I have no more guidance than the footnote, as you have, as to

what that indeed means.

The Seventh Circuit hasn't reconsidered it. It voted down a rehearing on that issue.

QUESTION: From five to four?

MR. TAYLOR: Right, right, and I think that there's no justification for the radical extension and unwarranted extension of Butz that we would be dealing with here. If we look at Wood versus Strickland, this Court at that time as it was developing the qualified unity defense, was looking at a very similar situation.

It was dealing with school board members who as one of their functions adjudicated, in the words of the Court, disciplinary cases against students, and there were due process that was similar to the kind of due process that we have in a prison situation. That is, counsel could appear. There was some kind of notice. There was some kind of information given as to what the charges and the evidence was.

But, it was informal in the way that a prison disciplinary hearing is informal.

QUESTION: Is it rather -- you have tried a lot of these cases, apparently. How much difference would it make to you in the bottom line as to whether there is qualified or absolute immunity?

MR. TAYLOR: To me, in terms of money or --

QUESTION: In terms of result.

MR. TAYLOR: I think there would be --

QUESTION: You are going to have to prove some -- you are going to have to prove that these people acted unreasonably, if judged on an objective basis.

MR. TAYLOR: That's true, and --

QUESTION: And how often can you do that?

MR. TAYLOR: Well, I only do it -- I only bring those cases to trial when I think I can do it, and I've had 100 percent success on the cases I've done. I don't hold 100 cases in my pocket, but in the very severe cases, which is the ones that I bring to court where a jailhouse lawyer, for instance, the only woman jailhouse lawyer in the Seventh Circuit was put into segregation for two years for possession of a camera, and they used an elastic contraband regulation to do that.

Well, the jury in Peoria, Illinois brought her back a large judgment over a qualified immunity defense.

QUESTION: Did I understand you to say the parole officer is entitled to absolute immunity?

MR. TAYLOR: No, I didn't say that. I said that this Court hasn't decided it. If I were to personally be asked whether I thought the Court should extend absolute immunity to parole officers, I would

probably say no, but I think that that -- we don't have to reach that issue here because the parole board is an independent body that is selected from the populace at large and has checks and balances on it. It is approved by the Senate.

QUESTION: Are they required to be law trained?

MR. TAYLOR: They are required to either be law trained, medically trained, they take psychologically trained. They're taken from -- they have some kind of college background, and taken from various areas because as you have noted in the Greenholtz case, the parole decision is predictive in a lot of ways and you need a lot of different kinds of information and experience to be brought to make that kind of predictive decision.

I think also in the parole hearing context, you do have the right to a lawyer, so the safeguards are -- I think that the important safeguards, probably the two most important safeguards here, other than of course the independence of the decision maker him or herself, is the right to cross examine and confront.

QUESTION: Is there any statutory requirement for federal parole officers in terms of education, or can any person who is appointed serve?

MR. TAYLOR: That I don't know. I only know

in the two circuits where the immunity was afforded, that being the Sellars case in the Ninth Circuit and the Powell case in the Seventh Circuit. In those circumstances they were the kinds of background that I have explained, were part of the decision in deciding that in fact Butz be extended or applied to a parole body.

But, I would point out, in Morrissey versus Brewer, that this Court looked at a parole board and characterized it as a neutral and detached hearing body, and I don't think that this Court --

QUESTION: Of course you can be neutral and detached if you've only been to --

MR. TAYLOR: Well, that's true. That's not the only requirement, but that's --

QUESTION: There are two separate things. If there's an educational requirement as you suggest, that's one thing, but neutral and detached, to suggest that the more educated you are the more neutral you get, certainly doesn't make any sense.

MR. TAYLOR: No, I'm not trying to make that suggestion. I'm trying to say that in the decision maker there has to be independence, there has to be neutrality, and also if you want to look at it as functionally comparable to a judge, then you have to

look at the kind of factors that make him "into a judge" and an ALJ.

It's apparent you can look at the kinds of things that is required for an ALJ, and that's what I am -- there should be a distinction, as you have pointed out. It's not all the same thing, but both of those things are important and determinative, whether in fact you've got the independence and the neutrality that's so important under Butz.

QUESTION: Prosecutors, you say, have sort of a derivative immunity; they're part of the judicial process?

MR. TAYLOR: That's the major --

QUESTION: And you don't ask them how detached the prosecutor is, do you?

MR. TAYLOR: No, you don't.

QUESTION: And you don't ask -- in Butz was there also a charging party involved there?

MR. TAYLOR: Yes, there was.

QUESTION: Absolute immunity?

MR. TAYLOR: Yes, there was.

QUESTION: Employed by the agency?

MR. TAYLOR: Yes, because it was linked --

QUESTION: Not very independent, or not?

MR. TAYLOR: He wasn't a judge. His immunity

was derivative in the same way the prosecutor's was.

QUESTION: So, there are other things, other than immunity; other things other than independence?

MR. TAYLOR: Yes, the procedural safeguards, the availability of review -- oh, another important one is the use of precedent in the decision. If you look at an ALJ, they write their own opinions, although as the Chief Justice has pointed out they don't themselves enter the judgments.

They do write findings of fact, conclusions of law. They have a burden of proof which is preponderance of the evidence under substantial relevant evidence.

QUESTION: Does the historical immunity and practice enter into the calculation, if at common law the prosecutor was absolutely immune? Is that a factor for us in extending absolute immunity?

MR. TAYLOR: It's definitely an important factor. Judges come from common law, common law and statute with regard to legislature, it comes out of statute and out of the, I think the speech and debate clause.

QUESTION: Have you found any historical immunity in the context of this case in the prison --

MR. TAYLOR: None. None whatsoever, and I think the Court looked at that in Procunier in declining

to give prison guards who were making other decisions -- that those decisions had to do with mail and the enforcement of mail regulations and decided that a prison guard in that context should have only qualified immunity.

QUESTION: Would you say that guards who testify at one of these hearings are -- just have qualified immunity?

MR. TAYLOR: Yes, I --

QUESTION: And they wouldn't enjoy witnesses' immunity?

MR. TAYLOR: No. I think that we start to -- again, I think that the witness immunity in Briscow, and I'm sorry, I was headed towards that when you asked me the question before, the prosecutor's immunity in Imbler, the grand jury's immunity which comes from common law as well, are all, because they are critical parts of the judicial process of a judge supervised trial.

I don't think that a witness that comes before a school board or a witness that comes before -- because those aren't judicial proceedings to begin with, so I don't think that the immunity would lie there. In fact, I think we would take the same position of a witness in front of a prison disciplinary board that we would take

with regard to the IDC members themselves.

I think that with regard to the harassing litigation standard that the Government talks about, I'd first point out that we don't reach that if the Butz -- other two or three standards that I've talked about in Butz are not met, and we think that clearly they're not met here.

But going to that question, we think that judges have more than enough in their arsenal to deal with the potential of harassing litigation that these allegedly prodigious litigators, that is the prisoners, as the Government would have it, are going to bring to the courts.

It starts out with the dismissal as frivolous under, I think, 28 U.S.C. 1915, and the district judge can use that technique to get rid of cases right from the beginning that it feels are not -- do not warrant further attention. You have the --

QUESTION: I understood the Government's point to be not so much the flood of litigation, but the impact on the decision making process in the prison, that the close calls would go for the inmate because of fear of suit.

MR. TAYLOR: Yes, I think that's an untenable position, Your Honor, in the sense that if you're

starting out with someone who's independent, who's in the middle, if you've got three forces, you've got a prosecutor, you've got a defendant, you've got a judge and you can see that in all the kinds of situations that get the immunity.

That's one thing, but here we have an adversarial situation to begin with. We need a deterrent to bring that body into some kind of line with the clear mandates of the Constitution, so it's not like -- I think my experience, and I think common sense would say that in this adversarial situation we need the deterrent. It's not so much --

QUESTION: Your answer is, yes, that would be the result and it's the result that should take place, namely that more cases would be decided for the prisoner?

MR. TAYLOR: Well, I --

QUESTION: That's the result and that's exactly what you intend?

MR. TAYLOR: The result that I intend is that it be deterrence from unconstitutional conduct.

QUESTION: That just puts it another way.

MR. TAYLOR: Yes, and I think that what I'm saying is that in this circumstance, yes, when you look at the other side, the flip side of the coin of deterrence, I suppose is the Government's argument of

harassment. But legitimate lawsuits that may get past a Harlow determination either on the clearly established right or as Jutice Brennan has pointed out, also on whether it's a constitutional violation at all.

I think this Court has clearly defined what due process rights a prisoner has, and they aren't very many, and it seems to me that a prison guard can give those rights without fear of any kind of harassing litigation because it will go right out.

If the guard comes in and says, I gave them notice and I gave them the other guarantees of Wolff, then that should do it. Under Harlow, those are the clearly established rights. The prisoner has no other rights that he can bring on the due process context. So, only the meritorious cases will get past --

QUESTION: What was the grounds in the administrative appeal for setting aside this --

MR. TAYLOR: Well, that was a debate in the --

QUESTION: Or did they write something? Did they tell you --

MR. TAYLOR: Well, at the trial Warden Benson testified.

QUESTION: The administrative --

MR. TAYLOR: The administrative paper itself.

QUESTION: Yes. Did they give some reasons?

MR. TAYLOR: The reason, I think, that they gave was that due process was violated.

QUESTION: In what respect, did they say?

MR. TAYLOR: I can't swear to whether they said because they brought those new charges in the middle of the hearing.

QUESTION: How did he testify at the --

MR. TAYLOR: At trial, what I was trying to establish through the regulations was that he -- that they expunged because he was innocent, because the regulations said that's the only way you can do it. He was taking the position, no, it wasn't because he was innocent, it's because his family brought pressure on him.

That's what I meant about the exception that proves the rule in the administrative procedure, that he tried to say it was because of due process violations and because his father kept calling.

QUESTION: So, what did you claim in that trial, what the due process violation was?

MR. TAYLOR: The due process violations that we claimed were the fact that during the hearing itself they brought two new charges which did not conform to the evidence, did not give him any notice of them, and proceeded to try him on it and convict him of it right

there on the spot.

QUESTION: And is that what the jury found?

MR. TAYLOR: Yes. Well, exactly, the jury found the due process violation. It received an instruction which delineated what due process was under Wolff. So, there was no specific finding "X," it was because of notice or "Y," because --

QUESTION: They just said due process?

MR. TAYLOR: They said due process, period, but they were instructed on the Wolff standards that were clearly established as of the time of this trial.

In conclusion, I want to point out to this Court that we are not dealing with 1983 or 1985. We are dealing with the record of 1975. We are dealing with what happened in that context, with those regulations.

QUESTION: But there has never been a determination that what he was charged with he didn't do?

MR. TAYLOR: No, that would be the Carey versus Piphus question. I think the jury more or less found that because they wouldn't have given him $9,000 otherwise.

QUESTION: I wouldn't think they would have, yes.

MR. TAYLOR: And it was -- the evidence was so clear, Your Honor, that in fact what he was doing, and

if you read the record of the proceeding, that's all they're concerned about is his First Amendment rights.

QUESTION: Do you claim -- do you think that the jury should have been authorized to give this amount of damages without a finding that the defendant or the prisoner didn't do what he was charged with?

MR. TAYLOR: Well, that's a good question, because the Government raised that on an NOV.

QUESTION: Then what happened?

MR. TAYLOR: The judge looked at the evidence and said that the evidence of damage was such that it supported the verdict whichever way you looked at it.

QUESTION: And the Government didn't appeal it?

MR. TAYLOR: No, it didn't take it to the circuit or, of course, to this Court.

Thank you very much.

CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:30 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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#84-732 - THEODORE CLEAVINGER, MARVIN MARCADIS, AND TOM LOCKETT, Petitioners V. DAVID SAXNER AND ALFRED CAIN, JR.

: that these attached pages constitutes the original
nscript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)