OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-588

TITLE UNIVERSITY OF TENNESSEE, ET AL., Petitioners v. ROBERT B. ELLIOTT

PLACE Washington, D. C.

DATE April 21, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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UNIVERSITY OF TENNESSEE, ET. AL. :

Petitioners :

v. : No. 85-588

ROBERT B. ELLIOTT :

- -x

Washington, D.C.

Monday, April 21, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 o'clock a.m.

APPEARANCES:

BEAUCHAMP E. BROGAN, ESQ., Knoxville, Tenn.; on behalf of Petitioners.

RONALD L. ELLIS, ESQ., New York, N.Y.; on behalf of Respondent.

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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: We'll hear arguments first this morning in Tennessee against Ellictt. Mr. Brogan, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF

BEAUCHAMP E. BROGAN, ESQ.

ON BEHALF OF PETITIONERS

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

This case arises under the full faith and credit clause of the Constitution and its implementing statute, 28 U.S. Code Section 1738. The issue before the Court is whether traditional principles of full faith and credit apply in actions under the Reconstruction statutes and Title VII to issues fairly and fully litigated before a state agency acting in a judicial capacity.

Petitioners seek issue preclusion in this action on the basis of a prior state adjudication under the Tennessee Uniform Administrative Procedure Act, which Respondent voluntarily invoked for the purpose of protecting his due process rights under the Fourteenth Amendment of the Constitution.

This prior adjudication was not rendered by a Title VII federal agency within the EEOC Title VII

enforcement scheme, but was rendered completely outside the Title VII enforcement scheme. Petitioners contend that under the decisions of this Court traditional principles of full faith and credit apply to state agency adjudications as well as state court adjudications, unless exempted by Congress.

Petitioners further contend that neither the Reconstruction statutes nor Title VII repeals the full faith and credit doctrine as applied to state agency adjudications.

QUESTION: Mr. Brogan, the Respondent here stated claims under both Title VII and under the Constitution, did he not?

MR. BROGAN: Under 1983 and Title VII, yes.

QUESTION: Under --

MR. BROGAN: The Reconstruction statutes.

QUESTION: And you claim that there should be issue preclusion with respect to both of these claims?

MR. BROGAN: Yes, sir, issue preclusion only, not claim preclusion, with respect to both 1983 -- and when I refer to 1983, I'll include all of the Reconstruction statutes which Respondent sued under, 1981 and so forth.

But we contend that issue preclusion, not claim preclusion, applies to both 1983 and Title VII on

the basis of this prior adjudication, which was a judicial proceeding under the state law of the state of Tennessee.

It was under the Tennessee Uniform Administrative Procedure Act that was voluntarily invoked by the Respondent. It was not a part of the Title VII enforcement scheme.

QUESTION: Well, what if we disagree with you on the Title VII? Is the case over or not?

MR. BROGAN: No, sir, I don't think so. I think that you could plausibly reach a different conclusion as to 1983. But I think the same rule applies. I don't think --

QUESTION: What difference would it make if we said that no preclusion under Title VII? What would be left?

MR. BROGAN: Well, there would be a lot left. 1983, as this Court has held, the procedures --

QUESTION: You mean the plaintiff would still have further relief even if he could get all the relief he wanted under Title VII -- I mean, even if he got all the relief that Title VII would afford him, would there be still further relief under his other cause of action?

MR. BROGAN: Well, yes, because under 1983, as

this Court has held, the relief and the remedies and the procedure for effecting that relief are entirely different. You don't have to do anything to file a lawsuit under 1983 as a precondition to filing. All you have to do is just go down to federal court and sue to invoke the jurisdiction of the court.

But under Title VII you have to file a claim with the EEOC and then --

QUESTION: What about the remedy?

MR. BROGAN: The remedies are entirely different. Under Title VII the back pay is limited, the damages are limited, whereas under 1983 you're not limited as to back pay, compensatory, punitive damages, and so forth.

The period of time of the statute of limitations is different as to both statutory schemes. So we think that there is a difference.

But we think that under our theory of the case that there's really no different reasons why you should apply one rule as to one scheme and one as to another. We think that under the holdings of this Court that there is no express or implied repeal of the full faith and credit doctrine clearly to 1983, and neither do we think there is as to Title VII.

Now, this action arose when the University

simply proposed to terminate plaintiff's employment for inadequate work performance and improper job behavior. And under the Tennessee Administrative Procedure Act, which is the model uniform act adopted by 31 jurisdictions, the University was required to afford the Respondent an opportunity for a hearing, and he elected to take a hearing under the Uniform Administrative Procedure Act.

Now, that Act has procedural safeguards fully equivalent to the Rules of Civil Procedure, and you have the same type of trial, the same type of hearing, that you would have in the federal court.

QUESTION: Mr. Brogan, as I understand it the Respondent claims that at the administrative hearing the state successfully objected to his efforts to introduce evidence of discrimination against him, at the administrative proceeding, and he was precluded from offering his evidence.

MR. BROGAN: Yes, that's true, Your Honor. He does claim that he was unsuccessful in introducing certain evidence. But those go to his Title VII claims.

Now, the Petitioners do not take issue with the fact that he still would have a right to try his claims to the extent that they are now swallowed up by

his issues that were adjudicated. Now, it is true --

QUESTION: But if efforts to offer evidence on a particular issue were successful on the part of the state, keeping that evidence out, how should he be precluded then later from litigating it at the federal level?

MR. BROGAN: Well, I don't think he would be, Justice O'Connor. If he was not allowed to litigate an issue, then under our doctrine he would not be precluded. He would only be precluded from relitigating the issues that were actually litigated and decided by the administrative law judge.

QUESTION: Well, what he claims is that the administrative hearing officer decided the issue all right, but wouldn't let him offer his evidence because the state objected to it, on the question of discrimination.

Is that what happened?

MR. BROGAN: No, Your Honor, that is not what happened. It is true that certain evidence was not admitted, but the evidence is abundantly clear, and both lower courts found, that he was clearly permitted to introduce evidence of racial discrimination as an affirmative defense to the proposed charges. And he insisted on making that election as how he would

defend.

He chose to defend, and he introduced voluminous testimony, and according to the district court and also the Court of Appeals, virtually every allegation of individual discrimination that he alleged in his federal complaint was litigated in the administrative agency hearing, the individual instances.

Now, it's true that his claims, his class action claims, were not litigated and evidence of that was not admitted. But under the ruling by the Sixth Circuit Court of Appeals, it would be wholly immaterial as to what he was allowed to litigate, because the Sixth Circuit Court of Appeals did not examine the record below.

The Sixth Circuit Court of Appeals clearly said that he was permitted to assert as an affirmative defense the issue of racial discrimination. But the Sixth Circuit ruled that, without regard to any evidence that he may or may not have presented, absent state court review, no agency's onstitution is ever, and I mean ever, entitled to preclusive effect in a subsequent civil rights action.

So that under our theory of the case, Your Honor, if he had been permitted to litigate everything

that he wanted to put into evidence and then the ruling had been against him, the Sixth Circuit would have said: You have a right to start all over again; you're not bound by the finding of that law judge.

QUESTION: Well, Mr. Brogan, are you claiming that the state administrative decision is a judicial proceeding of a court within the meaning of Section 1738?

MR. BROGAN: Yes, we are, Your Honor. It is plainly a judicial proceeding, because under the nation's statutory scheme a state can enable and enact legislation to permit the executive branch as well as the administrative branch of state government to exercise judicial powers.

Now, the state of Tennessee and 31 other jurisdictions have done this in the form of adopting this Uniform Administrative Procedure Act. And under that Act, there isn't any question but what this is a judicial proceeding within the meaning of both the full faith and credit clause and Section 1738. It is a judicial proceeding.

The decisions of this Court we don't think have ever made any distinction between state agency adjudications and state court adjudications where the state agency --

QUESTION: Under the state law, if you seek judicial review of the administrative decision where do you seek it?

MR. BROGAN: It has to be in state court.

QUESTION: Well, does it -- is it de novo?

MR. BROGAN: No, sir.

QUESTION: Or is it on the record?

MR. BROGAN: It's on the record, but -- but --

QUESTION: And it's not a new hearing. It's just a question of substantial evidence or some violation of the law, is that it?

MR. BROGAN: That's correct. According to the law, the state law says that the only method of judicial review of this federal decision is to file a petition in a state chancery court within 60 days from the date of the final order.

And the state statute sets forth the scope of judicial review, which is very similar to the federal Administrative Procedure Act. It can be set aside if it's contrary to law, if it's contrary to the facts, or if it's not supported by substantial evidence.

Now, that's what he contended when he went back to the district court. If you look at what he did, the 60 days came and went. He had 60 days after this final agency order was entered to file a petition for

judicial review. He did not do that. The Petitioner did not do that.

QUESTION: And under state law that was final?

MR. BROGAN: Yes, Your Honor. It could not be collaterally attacked in Tennessee. It had the same effect as a state court judgment. It was final and binding on the parties, both parties.

Now, after the decision is made, the judge found that the evidence was not sufficient to warrant Petitioner's -- I mean, the Respondent's termination. He said, considering everything in its proper context, I'm going to find that you're guilt for the eight charges, but I don't think it's sufficient to warrant your termination. But I think you ought to be transferred to another county under new supervisors.

All right, he was transferred to another county. 60 days, Your Honor, after he was transferred, and 84 days after this agency decision was final, he returned to federal court.

Now, when he returned to federal court, he did not go to federal court and say: Your Honor, I have a right to sue letter under EEOC, here it is; I want a trial de novo.

What he did was he filed a motion which in

effect sought to have the district court review according to the standards of the Administrative Procedure Act the judgment of the agency. And that's set forth on page 24 of the joint appendix. This is what he said.

He says, the decision of the judge and the agency constituted an abuse of discretion, is contrary to law, and is not supported by reliable, probative, and substantial evidence.

Then over in paragraph number 8, he said: The administrative law judge's and agency's decision and remedy -- the remedy, that's ordering his transfer -- was equally unconstitutional and unlawful in wrongfully rejecting said claims of racial discrimination despite clear evidence thereof.

Now, if it please the Court, he made no argument before the district court that the evidence -- that he didn't have a full and fair opportunity to litigate. He said the evidence in overwhelming that the decision is wrong.

Now, the district court said: Well, I, number one, don't have authority to review it under the Administrative Procedure Act, because that places the statutory authority to review it in the state court, subject to appeal to the Court of Appeals and on up to

the Tennessee Supreme Court if necessary.

Now, then he said -- and he applied the full faith and credit doctrine, although he did not use those words. Judge MacRay said: Since you did not appeal that agency decision within the time permitted by law, it is now final; those findings are binding on you, they're binding on the University of Tennessee; you cannot go behind that agency decision; and I cannot undo what is done, I cannot order you back to the place from where you was transferred. It's already been accomplished, anyway.

So Judge MacRay said that under principles of res judicata and collateral estoppel that action could not be attacked in this court or any other court, and we think he's entirely right, Your Honor.

QUESTION: But the Court of Appeals reversed Judge MacRay.

MR. BROGAN: Yes, sir. Yes, Your Honor, the Court of Appeals reversed, relying principally on the Kremer case.

QUESTION: Well, Mr. Brogan, Section 1738, as you know, uses the term "such acts, records, and judicial proceedings." And don't you think it stretches the language a bit to say that a proceeding presided over by an administrative law judge is a judicial

proceeding in the sense that the people who drafted 1738 used it?

MR. BROGAN: Well, we think it is, Your Honor, for this reason. This Court in Thomas versus Washington Gas & Light Company, every member of this court in Thomas, felt that issue preclusion should apply to an agency adjudication, and the plurality said that state agency adjudications were just as entitled to full faith and credit as a state court judgment.

And every member of this Court agreed. The only disagreement was with whether claim preclusion should apply in that case. But not one member of this Court dissented with the proposition that issue preclusion should apply to an agency adjudication.

Now, in some of the recent cases that have been decided under these statutes, the Migra case, the Parsons case, which is the most recent case, this Court stated this, and I just wanted to quote it because I think it's important. It says:

"The Full Faith and Credit Act, 28 U.S. Code Section 1738, requires federal courts as well as state courts to give state judicial proceedings the same full faith and credit."

And the same thing with the Marese case.

QUESTION: But that's no revelation, because

that's exactly what the statute says, that you have to give full faith and credit to judicial proceedings. The question is what is a judicial proceeding.

MR. BROGAN: Well, I think you'd have to look at the state law, Your Honor, to determine what is a judicial proceeding. And if a judicial proceeding under the Uniform Administrative Procedure Act, which is specifically enacted by the state legislature for the purpose of enabling people to protect their constitutional and statutory rights, where they have the same plenary type right to a hearing as you would have in a federal court -- I don't know what a judicial proceeding is.

It's similar, it's very similar to the federal Administrative Procedure Act, and this Court has always ruled, since at least Utah, that decisions under the federal Administrative Procedure Act, even though they're unappealed, are entitled to full faith and credit, even though that's not under this statute.

QUESTION: But is that because the Court held that they were judicial proceedings within the meaning of 1738 or just that as a matter of common law preclusion that doctrine ought to apply?

MR. BROGAN: Well, it would have to be on the doctrine of common law and traditional principles,

because the full faith and credit statute, of course, does not apply to the federal government. But the principle is the same, and we can't find any difference between applying one standard to state agency adjudications and another one to federal adjudications.

And we think that in this case the reason is even more pronounced than in a federal adjudication because if the full faith and credit doctrine applies then it's mandatory that the principle be applied, whereas under the federal agency adjudications it's not mandated and this Court has some leeway and discretion, I suppose, as to whether to apply traditional rules of preclusion.

So our position is that if you look at the meaning of the full faith and credit clause and it's implementing statute -- and after all, all the statute does is just implement the clause, and the clause very specifically says that it's a judicial proceeding -- I mean, if it's a judicial proceeding.

Now, of course, if it's not a judicial proceeding within the meaning of that statute and the clause, then I would have to confess, Your Honor, that it's not entitled to full faith and credit. But if it is --

QUESTION: Well, Mr. Brogan, it says "judicial

proceeding of any court."

MR. BROGAN: That's what the statute says, but the clause does not say that, and we don't think that this Court has ever given such a cramped interpretation.

QUESTION: But the clause doesn't bind the federal government, does it?

MR. BROGAN: I understand that, Your Honor, the statute would. But it implements the clause, and we think that under the national statutory scheme that the clause and the statute have to be read together. And we think this Court has always read them together.

As a matter of fact, in reading these cases under the full faith and credit doctrine, the Court hardly ever refers to the second part of the statute, that says how you prove the judicial records of a state court, and that's all that section does. It just says how you prove these judicial records.

But they look to the second part of the statute, which says -- which is the important part, and that is the part, if it please the Court, that says you must give them the same full faith and credit that they enjoy in the state of rendition.

Now, we think that if you did not give this judicial proceeding under the Administrative Procedure

Act full faith and credit, it would in effect nullify and render futile the Administrative Procedure Act in all these various states. And these Administrative Procedure Acts do more than just define the rights of the employer and employees.

They deal with ratemaking, the suspension and revocation of licenses. Just sort of like the federal government's statutory scheme under the APA, where you have the Federal Power Commission, the ICC, the state agency has all sorts of regulatory boards and agencies that come under this Administrative Procedure Act.

And the state of Tennessee has administrative law judges, just like the federal government does, that adjudicate these rights. So that if you forget for a moment that this is a civil rights case and say in an ordinary situation would this adjudication be entitled to full faith and credit if it's not appealed and it becomes final and binding on the parties, we say it would.

So then the only question is whether the Reconstruction statutes or Title VII expressly or impliedly repealed the full faith and credit doctrine, and we say it doesn't because of the holding of this Court in Allen and Migra with respect to the 1983.

And with respect to Kremer, the Sixth Circuit

Court of Appeals just swallowed footnote 7 hook, line, and sinker, and said that, based on footnote 7 of Kremer, we will never ever give preclusive effect to a state adjudication without state court review.

I want to point out to the Court that the Sixth Circuit Court of Appeals did not recognize the critical distinction between an EEO, the federal agency, and an agency under the Administrative Procedure Act, like we have in this case. Under the agency that was involved in Kremer, the Court's entire opinion deals with an anti-discrimination agency where a litigant or a claimant is required, is mandated by the federal law, that he go to the federal agency route. And the EEOC does not have any investigative of adjudicative powers, and they only have to give substantial weight to the decision of EEOC.

Well, the EEOC has nothing whatsoever to do with the Administrative Procedure Act proceeding. It's entirely outside the scope of Title VII. So that we think that is the critical distinction.

Nothing required the Respondent to litigate his claims of racial discrimination before the Administrative Procedures Act -- the administrative law judge. Nothing even demanded that he go there in the first place.

He could go directly to the federal court under the Reconstruction statutes immediately, and he could have prosecuted his right to sue letter, his EEOC complaint, gotten a right to sue letter, and then gone to federal court.

But he did not do that in this case, and we think that that is the critical distinction between the Kremer footnote 7, if footnote 7 is construed to be an implied repeal of the full faith and credit doctrine as to Title VII cases, which is apparently what the Sixth Circuit felt.

But this Court did not say that as I read footnote 7. It just said that state agency adjudications that are unreviewed should not. It didn't say that they shall not. It just said they should not.

But as the opinion points out in the Kremer case, nothing required the claimant in that case to appeal his state administration or prescribed the weight that the court would give to it. And that is the same with respect to this case.

And I'd like to same the next five minutes for rebuttal, if it please the Court.

Thank you.

CHIEF JUSTICE BURGER: Mr. Ellis.

ORAL ARGUMENT OF

RONALD L. ELLIS, ESQ.,

ON BEHALF OF RESPONDENT

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

Mr. Brogan and the University of Tennessee constantly refer to the traditional principles of preclusion and the full faith and credit that is due judgments of administrative agencies. In so doing, they fail to make the critical distinctions that are necessary in determining how the Court should handle the agency decision in this case.

The particular decision is not covered by the full faith and credit clause, because it is not a -- that only applies to decisions from state to state. Similarly, Section 1738 of U.S.C. 28 does not apply because, as Justice Rehnquist pointed out, this is not the decision of a court.

Since we are not faced with the tension that 1738 necessarily invokes when we are dealing with the civil rights statutes, again Justice Rehnquist is right that what we are left with is the common law preclusion. And the issue in this case is whether the Court should fashion the common law of preclusion for the agency decision in this case.

QUESTION: Mr. Ellis, how do you deal with our

decision in the Washington Gas Light case?

MR. ELLIS: Well, Your Honor, I think that there are a number of ways that that decision can be looked at. First of all, considering the fact that that involved a decision of a state court and a decision involving the District of Columbia, it is possible to look at the District of Columbia as a state for the purposes of the full faith and credit clause.

QUESTION: But if you do that, weren't you just dealing with an administrative proceeding in the District of Columbia there?

MR. ELLIS: That in fact was an administrative proceeding. I don't think that that case announced a broad principle, first of all, as to how administrative agency decisions should be handled by this Court, and certainly not in the context of someone bringing a civil rights action.

QUESTION: Well, Mr. Ellis, it did characterize in the plurality opinion in Thomas versus Washington Gas, the Court characterized the Chicago Railroad case as holding that the fact findings of state administrative tribunals are entitled to the same res judicata effect in the second state as findings by a court.

MR. ELLIS: That's right, Justice O'Connor.

And I think that the distinction we would make is that an agency decision when you're going from state to state may be entitled to preclusion if that agency satisfies certain other prerequisites that traditional principles of preclusion require; that in the case where you are not going from state to state, that is from state to federal, federal to state, or federal to federal, that what you must look at is either the federal statute in the case of state to federal or a federal common law if it's not covered by the statute or the clause.

And that in the case of federal common law, it's up to the court to determine whether it is appropriate to fashion a rule of preclusion or to apply a federal rule of preclusion for the particular type of decision which is sought to be precluded.

We would submit that, contrary to what Mr. Brogan says, that we should not forget that this is a civil rights action, and that in determining whether we should fashion a rule of preclusion we should look to Congress' intent in fashioning the Civil Rights Act in terms of how they expected a federal court to deal with an agency decision.

And in this case, certainly with respect to Title VII, Congress has spoken not once, not twice, but three times concerning the preclusive effects of agency

decisions: First of all, in 1964 with the adoption of Title VII; then in 1972, when the amendments of Title VII were made; and then in a slightly different context, in the adoption of the Civil Rights Reform Act in 1978.

In each of those instances, what Congress did was indicate what its view was concerning the preclusive effect of state agency decisions or, more precisely, the right of claimants bringing civil rights actions to a de novo trial in federal court.

As this Court recognized in Alexander versus Gardner-Denver and Chandler versus Roudebush, the Congress enunciated certain principles concerning the rights of employees to bring cases in federal court. First of all, the court -- the Congress indicated that all employees, whether federal, state, or private, would be entitled to that trial de novo, regardless of what prior agency decision was utilized by that employee.

Secondly, the Court has found and Congress has reiterated that individuals bringing civil rights actions under Title VII would be entitled to pursue independently rights under Title VII regardless of their rights under other applicable state and federal statutes.

The Court has gone on to say that, for the purposes of Title VII, the federal courts have the

primary responsibility for the enforcement of those rights. That's the language that the Court recognized in Kremer, and the Court recognized that the dividing line between preclusion and non-preclusion in the context of a civil rights action was whether a claimant crossed the line between agency action and state court action.

QUESTION: Well, what about the Section 1983 claims?

MR. ELLIS: Well, Your Honor, I think that if we're in the area of federal preclusion, then what we do is we do not have the tension of 1738 and 1983 that was important in Allen versus McCurry, that if we do not have that tension then what we rely on is the expressed intent of Congress in the formulation of 1983 and the other Reconstruction civil rights statutes; that if 1738 is not in the picture, then the clear intent of Congress was that those rights under 1983 were to be enforced in federal court; and that in fact the Congress that enacted 1983 had certain suspicions about state courts and state agencies, and it was the reason why they decided that those rights would be --

QUESTION: Well, do you take the position that Section 1983 is not enforceable in state court?

MR. ELLIS: No, no, Your Honor. I don't take

that position. I'm just trying to enunciate how Congress' intent was enunciated in terms of what they felt was important in terms of 1983. And their intent was that, to the extent possible, the rights that were guaranteed under 1983 should be protected by federal courts.

QUESTION: I don't know how that bears directly on this case, though, because in this case the Respondent himself initiated the administrative proceeding in the Tennessee agency, didn't he? There was nothing under Tennessee law that would require him to do that.

MR. ELLIS: Well, Your Honor, I think that one thing that we have to remember is that, the sequence of events in terms of this agency and what happened. While it is true that the University of Tennessee is empowered to act as an agency, in fact what happened was the University proposed Mr. Elliott termination, and if he did not respond within five days seeking to have the University rule on whether there was just cause to terminate him his termination would have been final.

So that the agency decision in this case is really not an external agency. What it is is the University of Tennessee taking the last step in saying that Mr. Elliott is going to be disciplined.

QUESTION: Well, are you saying that if he had not gone to this agency proceeding he couldn't have come into federal court after having been notified of his termination under 1983?

MR. ELLIS: No, Justice Rehnquist. What happened really was that he went into federal court. While Mr. Brogan makes a point of the fact that he should have gone into federal court, in fact that's what Mr. Elliott did. Mr. Elliott --

QUESTION: Yes, but he did voluntarily initiate this agency proceeding. I mean, there's no way of getting around that, is there?

MR. ELLIS: Given the five days in which he had to make the decision, Mr. Elliott, knowing that his employment was about to be terminated, elected to contest that termination, but immediately went into federal court.

QUESTION: There's nothing under federal law that would have required him to go to that agency at all, is there?

MR. ELLIS: There's nothing that would have required him to go there. As a practical matter he had to go there. Mr. Elliott was put in the untenable position at that point of suffering the loss of his employment of electing to contest his termination.

And as soon as he had filed, as soon as he had indicated to the University of Tennessee that he was going to contest, he went immediately to federal court. And not only did he go immediately to federal court, but what he attempted to do was to stop the state, the University of Tennessee, from proceeding with its determination.

It's not that Mr. Elliott had such an abiding faith in that decision. It's just that the practicalities of the situation were that if he did not do that he might find himself without a job.

QUESTION: But he could get it back if he won his federal suit.

MR. ELLIS: Well, as a practical matter, the possibility of recovering his job some time down the road is not something which someone in that position would consider to be a viable alternative. And given the congestion in the federal courts -- and in fact, what happened in this case, there were a number of delays in the federal court before the agency decision.

Mr. Elliott would have been out of a job and, while he had he right to reinstatement and back pay, the practical application of it is that he would have been unemployed and lost some of the benefits of being on the job.

QUESTION: Well, is there a fair employment practices act in Tennessee?

MR. ELLIS: Yes, there is.

QUESTION: And an agency for that purpose?

MR. ELLIS: There is an agency.

QUESTION: Did he file with that agency?

MR. ELLIS: He filed -- he did not file with that agency. He filed --

QUESTION: Do you think he satisfied the preconditions for a Title VII suit, then?

MR. ELLIS: He has filed --

QUESTION: Put it the other way --

MR. ELLIS: After he filed with the University of Tennessee --

QUESTION: Put it the other way --

MR. ELLIS: -- he did file with --

QUESTION: Put it the other way. Exhausting the internal University procedures would not satisfy Title VII, is that it?

MR. ELLIS: That's correct.

QUESTION: So he would still have to -- if he went on Title VII, he would have to exhaust the fair employment practices commission procedures?

MR. ELLIS: Subsequent to his filing with the University, he did file appropriately for Title VII

purposes and receive a right to sue letter.

QUESTION: Oh, I see.

MR. ELLIS: So he has now received that right to sue letter, and he has gone through the appropriate procedures in Tennessee and the EEOC.

QUESTION: I see. Thank you.

MR. ELLIS: As I indicated, Congress did not stop with the Civil Rights Act in terms of indicating what should be the result when someone files a subsequent civil rights action when there is a prior agency decision.

In enacting the Civil Service Reform Act in 1978, although that's a different statutory scheme, the conference report and the Senate and House reports indicate quite clearly that the intent of Congress was to protect the rights of trial de novo which employees had under Title VII.

That statute provides for at least nine different times at which an employee may bring suit in federal court. Included in that right to bring suit in federal court is a right to bring suit even after an employee has sought review in the EEOC and before the Merit Systems Protection Board.

Congress indicated that an employee would still have the right to bring his individual employment

discrimination case. In fact, the statute specifically distinguishes between individuals who claim only an adverse action and individuals who claim an adverse action pursuant to one of the anti-discrimination statutes.

And while individuals who only claim an adverse action are entitled to a review in the Court of Appeals or the Court of Claims pursuant to an administrative procedure type proceeding, individuals who claim their adverse action also violates the anti-discrimination statutes are entitled to go into federal district court for a trial de novo.

I think the concerns of Congress in making the federal courts available to claimants in civil rights cases is borne out by the facts of this case. What has happened is that the University of Tennessee as part of its employment decision has determined that Mr. Ellictt should be disciplined and has gone into federal court and told the federal court that: we have determined what should happen to Mr. Elliott, and the federal court should not intervene.

The decision of the administrative law judge is no more than the decision of an employee of the University of Tennessee, a recommendation to his own supervisor as to how the University should deal with Mr.

Elliott.

As such, it is not, as the University claims, somewhere down the line in terms of the agency action, the state action, but it is merely the beginning of the process. That is, only after the agency has affirmed the initial order is Mr. Elliott's employment in jeopardy.

That point was raised by the University in seeking to have Mr. Elliott's case originally transferred from the federal court. When Mr. Elliott went into federal court and sought a temporary restraining order, the University of Tennessee went into federal court and said that: We have a decision that we can make in terms of a hearing. Mr. Elliott is not fired. We haven't had our final decision on Mr. Elliott, and whatever action we take on Mr. Elliott will not be final until we have given him this administrative hearing.

So that the University in getting the case out of federal court urged the federal court that they had not finished with Mr. Elliott, and therefore the federal court should abstain from taking action until the University had made a final decision on Mr. Elliott's employment.

Because the hearing examiner in this case was

an employee of the University, the particular decision also should not be entitled to preclusive effect because Mr. Elliott should have been entitled to an impartial hearing by an external body.

QUESTION: May I interrupt you with a question that's been running through my mind. Supposing, instead of going into federal court, you decided that after the administrative proceeding was over, but without seeking -- first of all, do you agree that the review in the state court would have been on the record of the administrative proceeding and not de novo review?

MR. ELLIS: That is not entirely correct. It is possible for someone who is appealing under the Administrative Procedure Act in Tennessee to raise procedural irregularities in the hearing and to introduce evidence de novo in chancery court.

QUESTION: But if there were no procedural irregularities, would it then be based on the record?

MR. ELLIS: It would then be based on the record.

QUESTION: Well, the question I wanted to ask is, supposing after the termination of the administrative proceeding and without seeking review at all in the state court, you decided you had an independent common law or state statutory cause of

action that you wanted to bring in a state court of Tennessee.

If you filed that kind of a lawsuit, would the administrative proceeding preclude the relitigation of issues in state court in Tennessee?

MR. ELLIS: According to the Tennessee Administrative Procedure Act, the only way to review in state court the decision of an agency is through the chancery court. It is possible that that agency decision would be preclusive in the Tennessee state courts if it covered the same area that the agency decision covered.

QUESTION: And there was a fair hearing.

MR. ELLIS: And there was a fair hearing.

I think it's important to recognize that, despite the University's protestations to the contrary, that Mr. Ellictt did not have an opportunity to raise his racial discrimination claims fully and fairly. He did attempt on many occasions throughout the hearing to present evidence which would have been relevant to claims of discrimination, not only to his own personal claim but to the claims that he had raised on behalf of the class and claims which he had raised against other defendants in federal court.

The hearing examiner took the position, first

of all, that he had no jurisdiction to handle racial discrimination claims; and, even if he did, that he could not adjudicate questions that did not concern Mr. Elliott and the University.

Any other person, any other defendant, was not germane to the determination of the administrative law judge, and therefore he excluded evidence which Mr. Elliott tried to present concerning how other individuals were treated, other areas of discrimination by the University of Tennessee, and the ability of Mr. Elliott to function in the University of Tennessee as an extension agent.

As we indicate in our brief, there are a number of deficiencies in this particular agency decision, not the least of which is that this agency is not the kind of agency that we usually think of as an external body ruling on questions between two parties. Mr. Elliott did not receive an impartial hearing.

We believe that, regardless of what kind of rules might apply to agency decisions, such rules should not apply to the type of agency decisions in this particular case; that despite the procedures that the Administrative Procedure Act provides in terms of the external trappings, that in fact the due process requirements are not satisfied because Mr. Elliott had

not had an opportunity to have at least one impartial hearing on his claim of discrimination.

We believe that the failure to provide such an impartial hearing robs this particular agency decision of the ability to preclude private from proceeding in federal court.

Mr. Elliott's counsel asked for, early in the proceedings, that the University provide an administrative law judge who was entirely unconnected with the University or the Extension Service. The University was empowered to seek, through the secretary of state, to have someone from that office act in the capacity of administrative law judge. The University failed to do that.

Instead, one of the defendants in this case, Mr. Armistead, appointed one of his employees to act as a fact finding and to recommend a decision to Mr. Armistead.

The facts in this case are not that much different from the situation in Arnett versus Kennedy in terms of the question of due process. As Justice White mentioned in that case, and we agree: "No man should be a judge in his own cause."

And if the University of Tennessee, even if it had provided -- even if the particular decision in this

case would not on general principles, not be entitled to preclusion, on the specific facts of this case and on the specific content of this hearing, the rules of preclusion should not apply and Mr. Elliott should have been allowed to bring his particular employment discrimination case in federal court.

We think that the Sixth Circuit was right, that this Court's decision in Kremer indicates the proper dividing line, that the Sixth Circuit's rule should be affirmed and that agency decisions, regardless of their extent, regardless of how the state wants to characterize them or how the agency wants to characterize them, should not be entitled to preclusive effect, and that that result is the result that Congress wished when someone brought a civil rights action.

Thank you.

CHIEF JUSTICE BURGER: Mr. Brogan, do you have anything further?

REBUTTAL ARGUMENT OF

BEAUCHAMP E. BROGAN, ESQ.,

ON BEHALF OF PETITIONERS

MR. BROGAN: Just one point, Your Honor. May it please the Court:

With respect to whether Respondent received a full and fair hearing and an impartial hearing, I would

like to point out that the Administrative Procedure Act prescribes the procedure whereby the claimant or the employee has rights to this full, plenary type due process hearing, which is similar to the Federal Rules of Civil Procedure.

Now, at no time, and I mean no time, did he ever object to the appointment of the hearing officer. He could have done so, but he never did. Instead, he deliberately, voluntarily litigated this issue of racial discrimination over a period of 28 days before this administrative law judge.

Now, if he thought he did not have a full and fair hearing, he could have taken that up immediately, either in the state chancery court or with some other court.

If a federal court is reviewing this question as to whether or not to apply the doctrine of preclusion in the first case, there is no question but what under the decisions of this Court the federal court can look to see whether the party received a full and fair opportunity to litigate.

And I'm pointing out that the record is devoid of any claim by Respondent. When he went back to the district court and when he went to the Court of Appeals, he never raised the issue that he did not have a full

and fair opportunity to litigate or that he did not receive a full and fair hearing.

He did not seek a stay of the administrative agency judgment, which he had an absolute right to do under state law. He never did that.

QUESTION: In broad terms, Mr. Brogan, is it not helpful to the whole system if administrative dispositions are encouraged? The problems may go away if they are free to take an administrative route first, without foreclosing judicial proceedings later.

MR. BROGAN: Well, we would like to think that, Your Honor. But apparently that's not always the case, if you read all the decisions that have worked its way up to this Court: the Kremer case, the Allen case, the Migra case.

And this case here is a splendid example. This man had a 28 day trial in the state court and he still wants another trial on those identical issues in federal court. And we think that to have a law of non-preclusion, where a litigant can invoke a hearing to protect his liberty and property interests under the due process rights, which this Court says you have to afford him before you can take adverse personnel action against him, would work just the opposite.

We're different from a private employer. A

private employer could have just gone ahead and terminated him, and then if he had proceeded through the EEOC scheme, it's true he could have been put back to work.

But under this Court's decisions, the state is the victim. The state has no choice but to give him the hearing if he requests it.

So that we think that a rule of non-preclusion would encourage, rather than discourage, litigants from going into federal court.

Thank you, Your Honor. I thank the Court.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:59 a.m., the oral argument in the above-entitled case was submitted.)

CERTIFICATION

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

#85-588 - UNIVERSITY OF TENNESSEE, ET AL., Petitioners V.

ROBERT B. ELLIOTT

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

BY Paul A. Richardson

(REPORTER)