

# TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

RODNEY P. WESTFALL, ET AL., )

Petitioners, )

v. )

No. 86-714 )

WILLIAM T. ERWIN, SR. AND )

EMELY ERWIN )

LIBRARY  
SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

PAGES: 1 through 42

PLACE: Washington, D.C.

DATE: November 2, 1987

## Heritage Reporting Corporation

*Official Reporters*  
1220 L Street, N.W.  
Washington, D.C. 20005  
(202) 628-4888

IN THE SUPREME COURT OF THE UNITED STATES

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

-----X

RODNEY P. WESTFALL, ET AL., :

Petitioners, :

v. : No. 86-714

WILLIAM T. ERWIN, SR. AND :

EMELY ERWIN :

-----X

Washington, D.C.

Monday, November 2, 1987

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

APPEARANCES:

DONALD B. AYER, ESQ., Deputy Solicitor General, Department  
of Justice, Washington, D.C.;

on behalf of the Petitioners.

M. CLAY ALSPAUGH, ESQ., Birmingham, Alabama;

on behalf of the Respondent.

C O N T E N T S

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ORAL ARGUMENT OF

PAGE

DONALD B. AYER, ESQ.

on behalf of Petitioners

3

M. CLAY ALSPAUGH, ESQ.

on behalf of Respondent

24

DONALD B. AYER, ESQ.

on behalf of Petitioners - Rebuttal

38

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

(1:00 p.m.)

1  
2  
3 CHIEF JUSTICE REHNQUIST: We'll hear argument now in  
4 No. 86-714, Rodney P. Westfall versus William T. Erwin.

5 Mr. Ayer, you may proceed whenever you're ready.

6 ORAL ARGUMENT OF DONALD B. AYER, ESQ.

7 ON BEHALF OF PETITIONERS

8 MR. AYER: Mr. Chief Justice, and may it please the  
9 Court.

10 The issue in this case is whether the Court of  
11 Appeals erred in denying immunity to three supervisors at a  
12 military supply depot in a negligence action against them for  
13 employment-related injuries suffered to an employee at the  
14 depot.

15 There is substantial agreement, as indicated in the  
16 briefs, among the parties concerning a number of points. First  
17 the parties agree that there is a thing called absolute  
18 immunity that exists under the Federal common law and does  
19 protect a significant category of Federal activities, that is,  
20 the activities of Federal employees against personal liability  
21 of those employees from State tort law actions.

22 QUESTION: This is the Barr against Matteo and Howard  
23 against Lyons line of cases?

24 MR. AYER: That's correct, Your Honor.

25 QUESTION: Mr. Ayer, what's the source of that

1 immunity do you suppose?

2 MR. AYER: Apart from this Court's cases, you mean,  
3 going back?

4 QUESTION: Yes. Do you detect any source for finding  
5 that immunity?

6 MR. AYER: Well, the source, I think, is the priority  
7 of protecting the ability of the Federal government to function  
8 and perform the duties and tasks that it has ultimately under  
9 the Constitution. I think one could ask the question, is it a  
10 matter of supremacy and are we invoking the supremacy clause.  
11 And I would say I guess my answer to that would be, sort of.

12 And I'll explain that by saying that technically in  
13 this case we are talking about an application of State law that  
14 has been made applicable in the context of exclusive  
15 jurisdiction Federal enclaves as a matter of Congressional  
16 action, a blanket enactment of State law.

17 But the concern remains very real. So that the "sort  
18 of" is explained by the fact that there is not a technical  
19 conflict that does not involve an act of Congress triggering  
20 the application of State law. There is nonetheless the tension  
21 between the application of evolving State tort law concepts and  
22 the priority of the Federal government being able to perform  
23 its functions through its employees.

24 QUESTION: This is not a constitutional principle,  
25 though, right. I mean, Congress could I presume pass a statute

1 saying there is no immunity whatever for Federal?

2 MR. AYER: That is certainly true, yes.

3 QUESTION: So it's sort of like a negative commerce  
4 clause kind of?

5 MR. AYER: Well, I think what we're talking about is  
6 maybe a sort of an assumption or a presumption that it is  
7 intended that the Federal government be able, intended in the  
8 Constitution, absent some action by Congress indicating  
9 otherwise, that it be able to go forward with its activities as  
10 authorized by Congress, and the disruption that would result by  
11 the regular interaction of State law principles interfering  
12 with the performance of those functions I think is what it's  
13 designed to protect. Congress could of course say we do not  
14 intend to have these Federal authorizations override State law.

15 QUESTION: So you are proposing a sort of dormant  
16 commerce clause analysis in effect?

17 MR. AYER: I think that's correct, Justice O'Connor.

18 QUESTION: Our cases have never discussed the theory,  
19 have they? In fact, the Barr case arose out of what was it, a  
20 liable?

21 MR. AYER: That's right.

22 QUESTION: Action and was discussed in terms of  
23 privilege, not immunity at all.

24 MR. AYER: Well, it was clearly discussed by  
25 reference to the decision in Gregoire v. Biddle and the need to

1 protect the Federal functioning. It was discussed in language,  
2 I think, that went well beyond the implications of the  
3 defamation character of the action that was involved there.

4 QUESTION: Federal instrumentalities from State  
5 taxes, what's the basis of that immunity?

6 MR. AYER: It may well be somewhat analogous to this  
7 situation. It's analogous in the sense, as Justice Scalia has  
8 pointed out, that Congress could override it if it chose to.  
9 If it chose to define Federal priorities in a way that allowed  
10 the State law to override, it certainly could do so.

11 But we're dealing with a situation here where there  
12 has been no such overriding, and we're trying to focus on what  
13 the proper rule ought to be in the situation where Congress  
14 presumably intends to have its activities carried out in a way  
15 that has evolved both under statutes and regulations.

16 QUESTION: Well, isn't there some analogy here to  
17 Clearfield Trust? It seems to me there's as much analogy to  
18 that kind of Federal common law as there is to the negative  
19 commerce clause. Where in effect you know the Government deals  
20 in checks, we need to know when these things or what rule  
21 they're going to be governed by, they're in all fifty States,  
22 so we don't follow the State rule in every single case. Not as  
23 a matter of necessarily some at least explicit Constitutional  
24 doctrine, but just as I suppose you say, if Congress had  
25 thought about it, or the Court will think about it for

1 Congress, that's the sort of rule there ought to be.

2 MR. AYER: I will agree with that as well, Your  
3 Honor. I mean, I would prefer to characterize it in the terms  
4 that the Court has put it in, and that is, in terms of the need  
5 to protect the functioning of the Federal government and to  
6 analyze it that way.

7 And we think that when analyzed that way, there are a  
8 number of policy considerations upon which the doctrine has  
9 rested.

10 Before I get to that, I'd like to indicate precisely  
11 what it is we are seeking to argue here today, and what we've  
12 argued in our briefs. Although we believe that Federal  
13 employees are properly immune from State tort law actions for  
14 all acts that they take within the scope of their employment,  
15 our principal submission both in our briefs, and today is that  
16 they are immune for that conduct within the outer perimeter at  
17 least when they are in the exercise of some activity that does  
18 involve a component of discretion.

19 That is, in the words of this Court's decision in  
20 Davis v. Scherer, they exercise discretion whenever the law  
21 "fails to specify the precise action that the official must  
22 take in each instance."

23 QUESTION: Well, Mr. Ayer, if what we are trying to  
24 do is to determine what Congress would do if it had thought  
25 about it, should we analogize then to the Federal Tort Claims



1 Act for our guidance in determining discretionary acts for  
2 which there might be immunity?

3 MR. AYER: I think not, Justice O'Connor. And  
4 there's a couple of reasons for that. One is that, maybe the  
5 most practical, although I think not the most significant one,  
6 is that the Federal Tort Claims Act and the Discretionary  
7 Function exception of that Statute really doesn't provide us  
8 with much of a practical solution when one goes to it and tries  
9 to identify the precise level of discretion. This Court's  
10 decisions in Variq do indeed suggest that a fairly low level of  
11 discretion should be the cut off under the Tort Claims Act at  
12 least where you're dealing with regulatory sorts of activities.

13 But much beyond that there is, I think we have to  
14 say, some significant amount of confusion as to exactly where  
15 the line is drawn in various situations. But --

16 QUESTION: Well, nonetheless, that's a line Congress  
17 has drawn, and wouldn't most Tort claimants be suing both the  
18 employee and the Federal Government if they had a State tort  
19 action, so you would be determining that question anyway,  
20 wouldn't we?

21 MR. AYER: Well, that's possible that they would be.  
22 But I'd like to give the second reason, which is really the  
23 primary reason why it's not an appropriate thing to do. And  
24 that is that the Tort Claims Act and personal immunity are  
25 really dealing with very different things, and have very

1 different consequences. The principle that the government will  
2 be liable for its conduct and essentially that the burdens of  
3 harm resulting from its conduct in certain defined situations  
4 defined in the Statute, primarily defined to include sort of  
5 run of the mill negligence in the performance of duties is a  
6 principle that amounts to a reallocation of that burden. It is  
7 not an action that will necessarily at all have the impact of  
8 shaping the conduct of the Federal government. The Federal  
9 government has to engage in many activities that will  
10 unavoidably have some harmful affects, and the conclusion is  
11 drawn as to at least some of those that the government should  
12 nonetheless should pay for those things while going on doing  
13 them in many instances.

14 With regard to personal liability, you're dealing  
15 with a very different animal which will have very different  
16 consequences. Imposing the liability on the individual will  
17 clearly have a direct effect in shaping his or her conduct.

18 QUESTION: Mr. Ayer, is there anything in the Federal  
19 Tort Claims Act that substitutes the liability of the United  
20 States for the liability of the individual actor as a  
21 defendant?

22 MR. AYER: Yes, there is. There are a couple of  
23 answers to that, Chief Justice Rehnquist. One is that when  
24 there is an award under the Federal Tort Claims Act, you may  
25 not proceed further or proceed at all against an individual.

1 And our understanding of that and our sense of what that meant  
2 was that Congress wanted to be very careful to create a clear  
3 line substituting liability once an action had been brought.  
4 We do not read that at all as indicating its understanding that  
5 individual employees would otherwise be liable.

6 The law at the time the Tort Claims Act was enacted  
7 we are frank to say was less than completely clear. We think  
8 that when one reads Spaulding v. Vilas, one comes up with a  
9 principle of absolute immunity without regard to malice  
10 applicable at least at the level of a sub-cabinet officer.

11 Barr v. Matteo was taken by this Court and was  
12 decided on a vote of 4-1-4 with the one vote obviously going in  
13 favor of the immunity but for reasons that didn't join in the  
14 majority opinion because the law at that time was not a hundred  
15 percent clear. In that state of unclarity of the law, it made  
16 perfect sense for Congress to enact the provision that it did,  
17 setting a bright line rule and a defense for an individual  
18 should the government actually be held liable.

19 Now, there's two other examples, two other sets of  
20 statutes that are also I think responsive to Your Honor's  
21 question. One of those is known as the Drivers' Act, and the  
22 other I think is known as the Rodriguez Act. In any event, the  
23 second one deals with the liability of doctors.

24 Taking the second one first, in the early 1970s,  
25 there developed some case law including the District of

1 Columbia Circuit's decision in Henderson v. Bluemink finding  
2 Federal doctors liable for their actions simply acting as  
3 doctors. And in response to that, in a rather direct response  
4 applicable to various categories of Federal doctors, Congress  
5 enacted legislation saying those doctors aren't liable,  
6 substituting in essence the United States as a party.

7 They did not at that time take action with regard to  
8 other categories of Federal employees. We believe that they  
9 didn't do that because they were acting directly in response to  
10 a particular problem that had arisen. The problem had not  
11 arisen as to the other categories of employees at that time.

12 QUESTION: Well, why doesn't the plaintiff in a case  
13 like that just sue the United States under the Federal Tort  
14 Claims Act?

15 MR. AYER: In this case, they cannot sue the United  
16 States because they have a remedy under the Federal Employees  
17 Compensation Act.

18 QUESTION: So it's like when you're covered by  
19 Workmen's Compensation, a private employee, you try to find  
20 some other person to sue so that you can get a tort recovery  
21 rather than a Workmen's Compensation?

22 MR. AYER: Well, I would think many plaintiffs do do  
23 that. And I also think it is noteworthy that under the laws of  
24 many States, and I think it's actually a substantial majority  
25 of States, it is not allowed to sue a co-employee, once you

1 have recovered a Worker's Compensation recovery.

2 The second statute, in answer to your question, is  
3 the Drivers Act, which in 1961 --

4 QUESTION: May I, before you leave the other? Is it  
5 therefore true that the Federal Employee Compensation Act omits  
6 a provision that's found in many other compensation statutes,  
7 and maybe that should be the remedy?

8 MR. AYER: The Federal Employees Compensation Act  
9 does not state whether or not an employee who recovers may sue  
10 a co-employee. And we think that that silence is just that,  
11 silence.

12 QUESTION: And most other compensation schemes do  
13 have such an express provision, or has it been read into some  
14 of those statutes?

15 What I'm really probing for, is it possible that one  
16 could give you the relief you seek by saying that's how that  
17 statute should have been interpreted if that's really what the  
18 problem is?

19 MR. AYER: Well, I think it is clearly not, and this  
20 is something that we certainly looked into in preparing our  
21 briefs in this case. I think it is certainly not that we can  
22 say, that's the way that statute should have been interpreted.  
23 And the reason it's not is at the time the FECA statute was  
24 enacted, the state of affairs in the States was not as I've  
25 just described it. I think it is now 47 States that have a

1 provision in some form or other that more or less denies a co-  
2 employee recovery once you have a Workers' Comp recovery.

3 QUESTION: Why isn't it reasonable to assume that if  
4 Congress promptly reacted to the medical malpractice situation  
5 the way they did and also reacted to the drivers' liability the  
6 way they did, seeing a problem there, that they would do  
7 precisely the same thing here, if there's such a simple  
8 solution?

9 Who should do the lawmaking here at the bottom of  
10 this case that we're all troubled by?

11 MR. AYER: Well, I think there is a very good  
12 argument to be made for the Court's continuing to do the  
13 lawmaking which rests initially on the fact that the this Court  
14 has been doing the lawmaking in this area for a very long time.

15 QUESTION: And apparently, when they did the  
16 lawmaking, they found a basis for liability against doctors and  
17 a basis for liability who would -- I mean, Congress would have  
18 thought there would have been liability against drivers, why  
19 not against people who store whatever this product was in a  
20 negligent manner?

21 MR. AYER: Well, as to the doctors, I think there is  
22 serious doubt as to whether anybody thought that that was an  
23 appropriate thing to have happen.

24 With regard to the drivers, I think indeed you can  
25 make a reasonable argument that driving, that the rules of the

1 road that everybody has to obey including Federal mail delivery  
2 people and other Federal employees. Somebody's got to have a  
3 set of rules or we're all going to be running into each other.  
4 And the idea that a court would have concluded that Federal  
5 employees must play by the same rules including the liability  
6 rules is not surprising as to drivers.

7 I think it would be quite surprising with regard to  
8 virtually every other category of Federal employee and Federal  
9 activity that you can imagine.

10 QUESTION: Well, supposing a maintenance worker on  
11 this building, why should he be under different rules than  
12 maintenance workers on a district building?

13 MR. AYER: Well, two answers, I guess. One is that I  
14 think one has to look very carefully at the actual rules that  
15 govern in a particular situation whether it be private or  
16 whether it be a State employee. In most State governmental  
17 situations you are dealing with a rule of immunity which is  
18 somewhat less protective and they do vary all over the lot.  
19 But you are also dealing with in almost every State, at least  
20 the vast majority, an indemnification provision which  
21 indemnifies for almost any liability that they might suffer.

22 QUESTION: No, I'm not thinking of it from the point  
23 of view of the defendant, but the plaintiff. Why should it  
24 make a difference whether a bucket of paint is dropped by a  
25 worker on a public building or a private building? Anybody

1 should be careful with buckets of paint.

2 MR. AYER: I think you have to look at the defendant  
3 in order to answer that question. And the answer is that the  
4 United States Government is charged with the responsibility of  
5 governing. And Congress has decided that that responsibility  
6 includes a whole range of activities. It cannot be tortious  
7 for the United States Government to govern. And it is a  
8 substantial burden and a substantial disruption of that ability  
9 to govern if individual employees of the Government are going  
10 to be held liable when they take a step that involves any  
11 judgment at all on their part and they may personally be held  
12 liable in a situation where the United States Government has  
13 not decided and does not have to decide to indemnify them.

14 QUESTION: I don't understand why that's different  
15 than driving a car. You say the Federal employees have to obey  
16 the traffic rules. Why don't they have to obey other rules  
17 that govern normal conduct that imposes risks?

18 MR. AYER: I think the best answer to that is the  
19 answer that was given both by Judge Learned Hand and by this  
20 Court in Barr v. Matteo, which is that if we could know in  
21 advance which individual government employees were acting  
22 improperly before a suit was brought, and we could single them  
23 out and say we're going to allow actions but only against the  
24 bad guys, only against the ones that do something wrong because  
25 we want those people to be accountable and we want them to stop



1 it, and we want to make them pay.

2 The trouble is that you can't do that. You can't  
3 know in advance.

4 QUESTION: You can't do it with careless drivers,  
5 either.

6 MR. AYER: Well, the driving situation, Justice  
7 Stevens, I think is different because of the nature of the  
8 rules and the relationship. When you're talking about driving,  
9 you're talking about people using the common roads.

10 QUESTION: Negligent driving, there's a difference  
11 between negligent driving and negligent workmanship?

12 MR. AYER: I think there is. I think the difference  
13 is that the rules of the road must govern everyone or they  
14 don't work. The rules of liability for dropping paint buckets  
15 or whatever it is I don't think you can say that about. I  
16 think you have a balance when you have the Federal Government  
17 acting, you necessarily have a balance of that Federal  
18 governmental function against the loss of a right of action of  
19 an individual.

20 And the rule that's been laid down by this Court in  
21 Barr v. Matteo and to a less explicit extent in the  
22 Constitutional cases dealing with qualified immunity is a rule  
23 that says there's a trade off and to this degree, we're going  
24 to make it in favor of protecting the governmental functioning.

25 QUESTION: You're confusing me when you begin to talk

1 about State rules as opposed to negligence liability. Is your  
2 contention that a Federal worker by reason of his status as a  
3 Federal worker is not subject to a State rule such as a rule,  
4 for example, that you will not use lead-based paints on indoor  
5 rooms?

6 MR. AYER: Well, we think that the answer to that  
7 question is a very complicated answer. And it has to be an  
8 integration, a looking at both the State law rule and the  
9 rules, statutes, authorizations directing the Federal employee  
10 to perform his job.

11 QUESTION: Is your contention that simply because he  
12 has a discretion in what paint to use, which he surely does,  
13 that he can use a lead-based paint, when you have a State  
14 statute that says they won't be used?

15 MR. AYER: In terms of whether he can be sued for  
16 personal liability, are position is that --

17 QUESTION: No, no. I'm not talking about personal  
18 liability.

19 MR. AYER: Whether in fact it's proper for him to?

20 QUESTION: Does the State law apply to him?

21 MR. AYER: Well, in that situation my own sense would  
22 be not having researched the Federal Statutes saying what a  
23 particular painter should do or what a particular agency  
24 painting should do, my sense is that probably the State law  
25 would apply.

1 QUESTION: That's my feel, too.

2 MR. AYER: Well, I would think so.

3 QUESTION: But you say no personal liability for his  
4 doing it?

5 MR. AYER: Right, that's right.

6 QUESTION: Well, what if the painter drops the can of  
7 paint on somebody because he doesn't like them and he just does  
8 it, and it's intentional.

9 MR. AYER: He does it maliciously.

10 QUESTION: Yes, intentional.

11 MR. AYER: Well, I think --

12 QUESTION: Absolute immunity?

13 MR. AYER: Our position in this case is --

14 QUESTION: Isn't that what Judge Learned Hand said?  
15 Didn't he say where it's done deliberately, he's still  
16 protected?

17 MR. AYER: I think that's exactly right, Justice  
18 Marshall.

19 QUESTION: That's what he said.

20 MR. AYER: I think that's what he said. And I think  
21 that is the logical implication of our view. Now, --

22 QUESTION: Well, after all, it was pretty intentional  
23 in Barr.

24 MR. AYER: That's right. The action certainly was  
25 intentional. Maybe I can make more clear and more explicit the

1 concerns on the Federal functioning side of the ledger by going  
2 through them briefly in terms of what we're talking about.  
3 It's really not very hard to come up with a parade of  
4 horrors, cases where everybody would like, if you start with  
5 the assumption that some Federal employee has done something  
6 dreadful, there's a strong gut desire to want to find him  
7 liable. But you've also got to think about the many many cases  
8 that are going to be brought where Federal employees in fact  
9 have not done anything wrong and are going to be put through a  
10 variety of trials.

11 The effects that that's going to have. Even leaving  
12 aside any question of discretion on that person's part are  
13 going to be first a general inhibition from the performance of  
14 the job. If a person is exposed to a potential personal  
15 liability and having to go through law suits, a rational  
16 response and the one that we can anticipate --

17 QUESTION: But counsel, why is that any different  
18 from an employee working for General Motors, for example.

19 MR. AYER: I think you would have to look and see  
20 what the indemnification arrangements were for the General  
21 Motors employee.

22 QUESTION: You certainly can't rule out the  
23 possibility the Federal Government would see the need for  
24 indemnification or insurance.

25 MR. AYER: But does the Federal Government have to

1 indemnify its employees?

2 QUESTION: Well, General Motors doesn't, either. But  
3 it's good business to protect morale and all the rest. And I  
4 would suppose the same, you know --

5 MR. AYER: Well, the difference I think is that the  
6 business of the Government is not to be equated with the  
7 business of a private corporation.

8 QUESTION: When they're engaged in activities like  
9 painting buildings, why not?

10 MR. AYER: Well, because the reasons I would give you  
11 are that it's going to inhibit in a general way and in a very  
12 specific way, it's going to inhibit employees from wanting to  
13 take the jobs and/or to do the things that may create the  
14 greatest exposure.

15 QUESTION: If you are talking about Mr. Barr in Barr  
16 v. Matteo, I think what you say makes a great deal of sense.  
17 But if you're talking about someone whose painting a building,  
18 it seems to me that is quite a different case.

19 MR. AYER: Well, we think the painting of the  
20 building is one case. Let's take for example, --

21 QUESTION: Mr. Ayer, in any event, do you extend this  
22 immunity to every Federal employee? I think you said something  
23 earlier, he has to have some discretion in the doing of his  
24 job. Do you draw a line at policy makers?

25 MR. AYER: Well, that's what this case is all about,

1 Justice Brennan, is whether the policy and planning rule that  
2 was enunciated by the Eleventh Circuit, not in this specific  
3 case but in a later case as their Circuit's rule, whether that  
4 is what should govern. And it's our view very strongly --

5 QUESTION: Their rule is a limiting rule?

6 MR. AYER: Very limiting rule. And we think that  
7 there's two things wrong with it.

8 QUESTION: They went to high policy makers did they?

9 MR. AYER: They called it policy and planning.

10 QUESTION: Policy and planning makers. You would go  
11 further and say any one who has discretion on how to do his  
12 job?

13 MR. AYER: I want to make two points about that:  
14 number one, we do very strongly believe that an absolute  
15 immunity is appropriate whenever a Federal employee acts within  
16 the scope of his duty, within the outer perimeter of his  
17 duties. We are here in this case --

18 QUESTION: Has that ever been held?

19 MR. AYER: Well, I think that's a reasonable reading.

20 QUESTION: Of what?

21 MR. AYER: Of the Court's decisions in Barr and the  
22 Court's decision in Spalding.

23 QUESTION: I don't think I thought so in Barr, did I?

24 MR. AYER: I don't think you did.

25 QUESTION: No.

1           MR. AYER: But in response to that, I'd just like to  
2 say that there is a discussion in Barr in the plurality opinion  
3 relating to the exercise of discretion. That discussion of  
4 discretion, if one reads it carefully I think is fairly  
5 understood to define the outer limits, the outer perimeter of  
6 authority and is not a requirement of discretion.

7           QUESTION: Mr. Ayer, focusing on the facts of this  
8 case, where is the discretion exercised, and what is it? The  
9 way the soda ash was piled?

10           MR. AYER: Well, we are applying the discretion test  
11 which is in footnote 14 of this Court's decision in Davis v.  
12 Scherer that says that when a particular task is not  
13 specifically defined, when it isn't prescribed what an employee  
14 must do, he is exercising discretion, and the discretion that  
15 is involved here is in the performance that three defendants  
16 are supervisors at this Army depot, and they oversee the work  
17 of the depot which includes the letting off of materiel, the  
18 repackaging, the moving around and sending out of materiel, and  
19 the storage.

20           QUESTION: My next question is, aren't they going to  
21 do exactly the same thing whether we have a rule of immunity or  
22 not?

23           MR. AYER: I think if we don't have a rule of  
24 immunity there is a significant for any job that involves risks  
25 that someone may be hurt and therefore may want to sue, we're

1 creating a situation where the cost of doing that job increases  
2 to the government, where individual employees if they have any  
3 discretion are likely to shade that discretion and make  
4 decisions in a way that is not necessarily in the interest of  
5 the Federal Government.

6 QUESTION: Discretion here in the way the bags of  
7 soda ash were piled?

8 MR. AYER: In the way the work was done, in where  
9 they were put when they were brought in, in who was assigned to  
10 do it and whether safety equipment was used, if any was  
11 necessary, in how the job was done. And we think that those  
12 are clearly discretionary decisions within the meaning of this  
13 Court's decision in Davis v. Scherer.

14 QUESTION: My only point is that the fact of  
15 discretion as you have defined it is certainly going to be  
16 carried out whether there is a rule of immunity or not, and  
17 therefore one of the reasons for Barr v. Matteo is inapplicable  
18 to the fact situation here.

19 MR. AYER: I think there is a real question in any  
20 case where there's any discretion how that discretion's going  
21 to be exercised, and which way, how are we going to do the job.  
22 And the question is whether we want that judgment to be shaded  
23 by concern about liability.

24 If I may do so, I'd like to save the remainder of my  
25 time for rebuttal.



1 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ayer.  
2 We'll hear now from you, Mr. Alspaugh.

3 ORAL ARGUMENT OF M. CLAY ALSPAUGH, ESQ.

4 ON BEHALF OF RESPONDENTS

5 MR. ALSPAUGH: Mr. Chief Justice, and may it please  
6 the Court.

7 The position of respondents here is simply that Barr  
8 and its progeny set out applicable rules, we feel, to apply  
9 immunity involving common law or State tort actions. There is  
10 a distinct difference between an activity that is within the  
11 outer perimeters of a job of a government employee, and an  
12 activity that is discretionary within that outer perimeter.

13 A question was put earlier as to whether or not that  
14 outer perimeter in and of itself would establish liability and  
15 were there any cases on that. Doe v. McMillan speaks directly  
16 to that point. In that case, the printer of documents was  
17 sued. The Court held without a doubt his activities were  
18 within the outer perimeters but that his job and doing what he  
19 was doing on this occasion was not discretionary. Since it was  
20 not discretionary, he did not enjoy the Barr immunity. There  
21 were other questions involved which are constitutional in  
22 nature, but it was directed directly to the Barr case.

23 There is a need to allow causes of action like this.  
24 There is a need in Alabama and throughout the States. In this  
25 particular instance -- there's 22 States, as a matter of fact,

1 that do allow some type of a co-employee case. In this  
2 particular case, the plaintiff, Erwin, did receive an injury as  
3 a consequence of being exposed to soda ash. He did receive  
4 worker's compensation under Federal Workers Compensation.  
5 However, that compensation statute is limited in its  
6 application. He received an injury to his vocal cords. He  
7 cannot talk. As a consequence of not being a scheduled member,  
8 this man received an injury for which there was no redress  
9 except in a direction action against a coemployee in this case.

10 Other fact situations are not like this one. There  
11 may be cases where the Federal workers compensation does  
12 provide sufficient indemnity so as to preclude suit, and as a  
13 matter of fact, there's a petition for cert. before this Court  
14 on that very point.

15 QUESTION: Well, how would the sufficiency of the  
16 Federal Workers' Compensation provision preclude or not  
17 preclude suit?

18 MR. ALSPAUGH: It should not unless there's a  
19 specific statute addressing that simply because of the due  
20 process issues. In the States where there have been co-  
21 employee and workmen's compensation both recoverable, and it  
22 would be analogous to the Federal circumstance, suits were  
23 allowed unless there was a constitutional amendment immunizing  
24 that co-employee in exchange for receipt of the benefits. It's  
25 a trade off also.

1           QUESTION: But I thought your argument was based on  
2 the idea that here the workmen's compensation award was somehow  
3 inadequate and if it had been more adequate, then perhaps the  
4 suit against the co-employee would be barred. I don't think  
5 there's much ground for making that distinction, is there?

6           MR. ALSPAUGH: No, sir. I did not mean to imply  
7 that. I'm saying that there would be some argument that there  
8 was a justification for extending immunity in those  
9 circumstances, though I do not think it is a valid argument.

10          QUESTION: For a Court extending immunity?

11          MR. ALSPAUGH: No, sir. I think it would be a  
12 legislative determination. Primary example of that is the  
13 Bivens circumstance where the Federal Torts Claims Act did not  
14 provide for actions of malice such as in the Bivens case.  
15 After Bivens, the Federal Tort Claims Act was expanded to  
16 include actions such as were taken up in that particular  
17 instance.

18                 And we submit that that would be the proper matter  
19 and way in which to present and face this particular issue.

20                 What is discretion? Discretion I don't believe means  
21 the right to make a decision one way or another necessarily.  
22 Discretion is whether or not the act was a judgment or a  
23 decision which it is necessary that the Government official be  
24 able to make without fear of suit, that is, something that  
25 effects governing, something that effects the extension of

1 governing, of policy making, not policy application.

2 The analogy that applies in this instance is the  
3 FTCA. Clearly State law applies in an instance that happens  
4 within a State under the FTCA.

5 QUESTION: I understand that. We only want fearless  
6 policy makers, we do not want fearless implementors of policy,  
7 is that it?

8 MR. ALSPAUGH: No, sir.

9 QUESTION: We want to be sure we have really terrific  
10 impartial Federal policies but we don't really care how they're  
11 implemented, is that it?

12 MR. ALSPAUGH: Yes, sir. I think that there could be  
13 and these cases hold generally that you have to look at each  
14 particular instance, each particular function, what is the  
15 nature of the policy involved, what is the nature of the  
16 action, what is the nature of the duty, the functional analysis  
17 test. So certainly in certain instances you can have an  
18 aggressive policy implementor but that doesn't in all instances  
19 mean that person is immune to suit under common law causes of  
20 action.

21 QUESTION: Well, Mr. Alspaugh, if the supervisors in  
22 this case had made an explicit policy that they were going to  
23 store the bags in the manner in which they stored the bags  
24 here, then under your theory, no suit could be brought. Is  
25 that right?

1 MR. ALSPAUGH: No, ma'am. Only in the event that  
2 that policy effected governing, per se. There is no uniqueness  
3 --

4 QUESTION: Well, we're not talking about just making  
5 policy, we're talking about certain kinds of policies, then

6 MR. ALSPAUGH: That's right, yes, ma'am, I think so.  
7 Clearly, the policies that affect governance -- governing --

8 QUESTION: Are you proposing the kind of distinction  
9 that used to exist for purposes of municipal immunity from  
10 suit? That is whether, you remember in the old days, whether  
11 the municipality was acting in a governmental capacity or in a  
12 proprietary capacity? Is that what you're bringing in here?

13 MR. ALSPAUGH: No, sir, not really. I don't think I  
14 want to say that, for this reason. I don't believe --

15 QUESTION: I hope not because that is a very  
16 confusing doctrine. What are you proposing, then?

17 MR. ALSPAUGH: The case law does not say that. I  
18 think that you're going to have to look at the position, the  
19 level, the type of activity of the defendant, and then decide  
20 on a case-by-case basis based on the law as it is now as to  
21 whether or not the activities involved, number one, were within  
22 the outer perimeters, and number two, involved discretion. And  
23 if that discretion is such that it affects governing, then  
24 there is absolute immunity.

25 QUESTION: Well, it's easy to say, but what do you

1 mean by, affects governing? Everything, any discretion by a  
2 government official affects governing in the broad sense,  
3 right? You mean it in a more narrow sense than that?

4 MR. ALSPAUGH: Yes, sir. In my judgment, you need to  
5 use the same analysis as was used in the Davis case. That is,  
6 you looked at the State activities. They said, in Davis, that  
7 since the State Officials are subject to 1983, we're going to  
8 make the Federal officials subject to 1983, looking at their  
9 activities.

10 I think you could look the same way at the General  
11 Motors question, you can look at the activities that are  
12 analogous to the activities involved, and make a decision as to  
13 whether or not that is governing or simply ministerially  
14 carrying out the activities at the time.

15 QUESTION: So it has to be the type of activity that  
16 only government can do?

17 MR. ALSPAUGH: I think so.

18 QUESTION: That's the old proprietary governmental  
19 distinction.

20 QUESTION: Why are you so afraid to endorse the  
21 proprietary governmental distinction?

22 MR. ALSPAUGH: Sir?

23 QUESTION: Why are you so afraid to endorse the  
24 proprietary governmental distinction? A lot of people thought  
25 it made sense for a long time.

1 MR. ALSPAUGH: The proprietary has so many meanings  
2 just as discretionary has. I wish that we could lay down a set  
3 of rules that we could punch a bunch holes and put pegs in it.,

4 QUESTION: You agree with the Government that this is  
5 a job that we should doing?

6 MR. ALSPAUGH: Sir?

7 QUESTION: This is a law making job that the Court  
8 should do rather than Congress, you agree with that?

9 MR. ALSPAUGH: No, sir. I think that Congress should  
10 do it, but I think this Court has to explain what was meant in  
11 Barr and subsequently in Doe and the extent that discretion is  
12 involved in order to obtain immunity. I think you're going to  
13 have to do that. I think I know what it says, but the other  
14 Courts do not know.

15 QUESTION: Well, do we really have to do anything  
16 more than to say whether or not piling these bags or whatever  
17 they were amounts to discretion or doesn't? Do we have to  
18 decide every possible case?

19 MR. ALSPAUGH: No, sir. But if you do not lay out  
20 those guidelines, there's going to be the same problem that  
21 there is now within the Circuit.

22 QUESTION: But you don't care about that if you win  
23 this case, do you?

24 MR. ALSPAUGH: That's exactly right, sir. Except for  
25 the fact that in the Eleventh Circuit, there are now pending

1 four cases, one of which is mine, that are on these very  
2 issues.

3 (Laughter)

4 MR. ALSPAUGH: That are on these very issues, so I  
5 may be back up here again in not too long.

6 QUESTION: So your submission is a case by case  
7 analysis?

8 MR. ALSPAUGH: Yes, sir.

9 QUESTION: In every single case you go through this  
10 routine of inquiry which you think Doe against McMillan  
11 indicated, and so can we set down some rules here that would  
12 govern your other case?

13 MR. ALSPAUGH: Well, --

14 QUESTION: You would hope so, I suppose?

15 MR. ALSPAUGH: I would hope so. I think it may be a  
16 case by case analysis, if you use the Constitutional tort  
17 analysis, it's a case by case analysis. If you look at what  
18 Barr said, it said, we need to look at the functional approach,  
19 we need to look at each particular case. And that's what  
20 you're going to have to do.

21 The question is, I think you could do it by defining  
22 what "discretion" means, if that is the word. If you mean  
23 discretion in all policy making, that's one thing. If you mean  
24 carrying out the day to day operations, that's another thing.  
25 That's not policy making in my judgment.



1           QUESTION: Well, I suppose that a lot of the reason  
2 for any immunity at all is that Government employees shouldn't  
3 be afraid to do their duty.

4           MR. ALSPAUGH: Yes, sir.

5           QUESTION: And I suppose being afraid to do some  
6 kinds of duties is just more significant than being afraid to  
7 do other kinds of duties?

8           MR. ALSPAUGH: I think that that clearly is what this  
9 Court has held. I think that it has held that high level  
10 people that are involved in policy making should not have that  
11 fear, but there should be no distinction between a civilian and  
12 a Government employee if that fear would not affect the  
13 effective carrying on of government.

14          QUESTION: Well, didn't the Court in the majority in  
15 Dalehite v. United States hold that the stacking of the  
16 fertilizer on the depot down in Texas was a discretionary  
17 function?

18          MR. ALSPAUGH: Yes, sir, they did in that instance  
19 and that was an FTCA case.

20          QUESTION: Is there any reason why that same sort of  
21 discretionary analysis shouldn't be applied here?

22          MR. ALSPAUGH: Yes, sir. I think so. Because there  
23 is more to it merely than the stacking. There is a question  
24 here of failure to warn, negligent failure to warn in and of  
25 itself. For instance, --

1 QUESTION: You don't quarrel then with the Dalehite  
2 majority's principle as a guide in this area. You just say the  
3 facts here are different than Dalehite?

4 MR. ALSPAUGH: Yes, sir, could be, could be. For  
5 example --

6 QUESTION: That's different from what you are arguing  
7 in your brief, then.

8 QUESTION: You know, the Dalehite test is not a  
9 policy level discretion test. You're saying only policy  
10 officials can benefit from the discretionary function exemption  
11 you would allow in these private suits.

12 MR. ALSPAUGH: Yes, sir. I think that Dalehite says  
13 clearly that there is a distinction between the policy making  
14 aspect and the carrying out of that policy. I believe the word  
15 that's referred to is, execution of the plan adopted. That's  
16 what Dalehite said.

17 QUESTION: But that includes a plan for the stacking  
18 of bags of fertilizer.

19 QUESTION: Yes.

20 QUESTION: Which General Motors can do, right?  
21 That's not a distinctively governmental kind of thing?

22 MR. ALSPAUGH: It's the execution of that plan, how  
23 it's carried out, not necessarily only stacking it up, but also  
24 what information do you impart relative to the stacking up of  
25 it.

1 QUESTION: Then it becomes governmental?

2 MR. ALSPAUGH: No, sir, it was governmental when they  
3 made the decision to stack it up.

4 QUESTION: You mean, just because it was the  
5 government doing it. Although it was the kind of thing that  
6 could have been stacked at General Motors or Olin-Mathieson or  
7 anywhere else, if the government decides to do it, it's  
8 governmental?

9 MR. ALSPAUGH: That was what was decided.

10 QUESTION: I never read that that way.

11 MR. ALSPAUGH: I think that's what was decided in the  
12 case.

13 QUESTION: If you are right about absolute immunity,  
14 you nevertheless would say that there's a qualified immunity,  
15 wouldn't you?

16 MR. ALSPAUGH: Yes, sir, I do.

17 QUESTION: And except for what, except for  
18 ministerial acts? You get no qualified immunity for those, do  
19 you?

20 MR. ALSPAUGH: Yes, sir, that's correct. Well,  
21 there's also other instances, I believe, but qualified  
22 immunity, as I understand it, is very narrow. It's much more  
23 narrow than the State cause of action immunity. It says, as I  
24 understand it, that if there is a rule that is reasonably  
25 understood and that rule or law is violated reasonably there is

1 still immunity or can be immunity, but there's a burden to show  
2 that it was reasonable to have violated it. That is somewhat  
3 different than the common law cause of action, in my judgment.  
4 The objective reasonableness in light of existing law is where  
5 the qualified immunity attaches.

6 QUESTION: And I suppose you say just by definition,  
7 a negligent act couldn't qualify?

8 MR. ALSPAUGH: It could qualify if you applied the  
9 quote unquote existing law to be the State law that applies.  
10 However, there is an argument related to the qualified immunity  
11 that says that Federal law of course always supercedes State  
12 law. Therefore, we won't have the opportunity to look at the  
13 State law.

14 QUESTION: Well, what was the State law of Alabama  
15 that governed this case at the time these defendants acted?

16 MR. ALSPAUGH: Alabama has a workmen's compensation  
17 law just like most other States, provides compensation if  
18 you're hurt on the job.

19 QUESTION: But that wasn't something that would have  
20 governed the conduct of these defendants. What did Alabama law  
21 have, you take due care that you don't injure other people?

22 MR. ALSPAUGH: Due care, pure due care.

23 QUESTION: And so the question of qualified immunity  
24 is whether you knew that was the law or not?

25 MR. ALSPAUGH: It would be in that instance. And if

1 you extended it to warnings, failure to warn, it may be  
2 included within that, but due care is the standard, purely due  
3 care. You also have to look of course in Alabama as to whether  
4 or not -- and I think other States -- there was a duty  
5 associated with it. That never came up, it was never reached  
6 in this issue. But in many of the cases that are co-employee-  
7 type cases, duty is the most important aspect of it.

8           There are other cases, though, that are not co-  
9 employee that apply this immunity also, or that are attempting  
10 to apply this immunity. There are other instances where suits  
11 are directed against individuals where the FTCA does not apply.  
12 Where there's no government compensation available. The Johns  
13 case that's cited in these briefs and also is on hold is such a  
14 case. That's where a man was killed on a government  
15 reservation. You cannot sue TVA who owned the reservation for  
16 wrongful death in Alabama. Therefore, the only opportunity  
17 that man had was to sue the co-employees. Therefore, they say,  
18 though TVA would not be immune to death in another State, these  
19 individuals are immune. So in that instance, the man has  
20 absolutely no redress.

21           The question again is discretionary function.

22           QUESTION: Do I understand you to say that you are  
23 willing to accept for the application to these cases the same  
24 discretionary function test that's used in the FTCA cases?

25           MR. ALSPAUGH: Yes, sir.

1 QUESTION: You're willing to do that?

2 MR. ALSPAUGH: Yes, sir.

3 QUESTION: You think it's the same line?

4 MR. ALSPAUGH: Yes, sir, I am.

5 QUESTION: And you're sure that that would give you a  
6 victory here?

7 MR. ALSPAUGH: As I understand the facts in this  
8 case, I do, yes, sir. As it applies to the incidents in this  
9 case, yes, sir, I do. I think FTCA and I said in my brief is  
10 much broader, simply because it covers a lot of instances where  
11 this Court has specifically said there is absolute immunity,  
12 but nevertheless, the rationale of FTCA, I think, applies.

13 QUESTION: Let me ask this, if the discretion line is  
14 the same under the tort claims and under your understanding of  
15 the immunity doctrine, are all these other cases that are  
16 pending, at least in your circuit, suits by co-employees?

17 MR. ALSPAUGH: All with the exception of one, and  
18 that is one that I have. The rest of them are co-employee  
19 suits. They are all negligence cases. None of them involve  
20 the liable cases.

21 QUESTION: Because it seems to me if they're not co-  
22 employee suits, that then there would always be a suit against  
23 the government in the case where the employee is immune.

24 MR. ALSPAUGH: Except in instances where the FTCA  
25 does not apply. There are certain agencies where it doesn't

1 apply. TVA's one of them. But there are certain agencies  
2 where it does not apply.

3 I do not know what will be addressed further in my  
4 response. I don't guess it'll be anything we haven't talked  
5 about, but nevertheless, there was raised in brief some issues  
6 dealing with the likelihood that the common law cause of action  
7 is analogous to the constitutional tort cause of action. I do  
8 not think it is, notwithstanding what the D.C. Court said. It  
9 simply said that if you have a Federal law that supercedes a  
10 State law, we will apply it and they can work hand in hand.

11 In closing, I think that the law is clear that there  
12 are two prongs in every case like this against a co-employee or  
13 a government employee that have to be addressed, and that the  
14 discretion only provides immunity in the event it does affect  
15 government itself and not the day to day operations of  
16 government.

17 Thank you.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Alspaugh.  
19 Mr. Ayer, you have two minutes remaining.

20 ORAL ARGUMENT OF DONALD B. AYER, ESQ.

21 ON BEHALF OF PETITIONERS - REBUTTAL

22 MR. AYER: The point I'd like to emphasize more than  
23 any other is that immunity only has any useful effect if there  
24 is some measure of certainty for the employees who are  
25 protected by it. And the rule that's been announced here, a

1 rule of policy and planning discretion is a rule that has no  
2 certainty whatsoever. You can inject into it all sorts of  
3 different considerations and courts certainly will if that  
4 turns out to be the law. We can talk about whether activity is  
5 governmental, we can talk about how far removed the supervisor  
6 is from the individual who is really affected. There's an  
7 endless list of considerations one could think about.

8 QUESTION: But your principal argument here as you  
9 described at the outset is that you want immunity where there  
10 is some measure of discretion. That isn't a very firm rule,  
11 either.

12 MR. AYER: Some meaning, any, Justice White. And we  
13 think that it does indeed provide a significant measure of  
14 certainty if it's taken that way. If it is elevated to some  
15 level of what color collar does someone wear or something like  
16 that, indeed it will not. But if every action where the  
17 precise conduct is not prescribed by law is protected, and  
18 that's the definition this Court used in its footnote in Davis  
19 v. Scherer, whenever it's not prescribed.

20 QUESTION: So if the law says, please pile this soda  
21 ash in paper sacks ten sacks high, that wouldn't be detailed  
22 enough. You have to go on.

23 MR. AYER: If the law says don't let any employees  
24 stack soda ash without wearing gloves, --

25 QUESTION: So you're about as close to your per se



1 rule as you can get.

2 MR. AYER: We're pretty close to a per se rule.

3 QUESTION: Of any government employee acting within  
4 the perimeter of his duties?

5 MR. AYER: That's correct, Your Honor, and I think  
6 that's terribly important, because it's the operational level  
7 where the conflict comes. It's when an employee is fired, it's  
8 when a grant is denied.

9 QUESTION: How much lower is it than somebody  
10 stacking sacks?

11 MR. AYER: Excuse me?

12 QUESTION: How much lower do you get?

13 MR. AYER: Well, there could be regulations if indeed  
14 soda ash were a dangerous substance, which it is not.

15 QUESTION: But I mean, is there anything lower than  
16 that?

17 MR. AYER: Well, there could be regulations that say  
18 --

19 QUESTION: Could there be regulations that what is  
20 lower than that, or could you answer it?

21 MR. AYER: That is lower than that?

22 QUESTION: Yes.

23 MR. AYER: Well, I think that there are activities  
24 that are non-discretionary such as a file clerk in a government  
25 office who stamps deeds or documents --

1                   QUESTION: That's lower than handling sacks of  
2 garbage?

3                   MR. AYER: It's less discretionary, we think. But we  
4 think that for the supervisor directing the handling of  
5 chemicals or other substances, he has a lot of discretion as to  
6 how the job is done. And to say that he doesn't is really  
7 rejecting the question of discretion at all, and just looking  
8 at the level of the position.

9                   CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ayer.  
10                   The case is submitted.

11                   (Whereupon, at 1:46 p.m., the case in the above-  
12 entitled matter was submitted.

13

14

15

16

17

18

19

20

21

22

23

24

25

REPORTER'S CERTIFICATE

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

DOCKET NUMBER: 86-714

CASE TITLE: Rodney P. Westfall, et al vs. William T. Erwin,  
Sr. and Emely Erwin

HEARING DATE: November 2, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence  
are contained fully and accurately on the tapes and notes  
reported by me at the hearing in the above case before the  
Supreme Court of the United States.  
and that this is a true and accurate transcript of the case.

Date: November 10, 1987

*Margaret Daly*  
\_\_\_\_\_  
Official Reporter

HERITAGE REPORTING CORPORATION  
1220 L Street, N.W.  
Washington, D.C. 20005

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'87 NOV 10 P3:55