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**OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE**

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: KATHRYN ISABELLA MESA AND SHABBIR A. EBRAHIM,
a/k/a SHABBIR AZAM, Petitioners V. CALIFORNIA

CASE NO: 87-1206

PLACE: WASHINGTON, D.C.

DATE: December 6, 1988

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 KATHRYN ISABELLA MESA and :

4 SHABBIR A. EBRAHIM, a/k/a :

5 SHABBIR AZAM :

6 Petitioners :

7 v. : No. 87-1206

8 CALIFORNIA :
9 -----x

10 Washington, D.C.

11 Tuesday, December 6, 1988

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:04 o'clock a.m.

15 APPEARANCES:

16 DONALD B. AYER, ESQ., Deputy Solicitor General,
17 Department of Justice, Washington, D.C.; on behalf
18 of the Petitioners.

19 KENNETH ROSENBLATT, ESQ., Deputy District Attorney of
20 Santa Clara County, San Jose, California; on behalf
21 of the Respondent.

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PROCEEDINGS

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-1206, Kathryn Isabella Mesa v. California.

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

ORAL ARGUMENT OF DONALD B. AYER

ON BEHALF OF THE PETITIONERS

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

This case involves two state court prosecutions of United States postal carriers for negligent violations of California law that allegedly occurred while they were driving their usual mail delivery routes. The question that's presented here is whether such a prosecution is one "for acts under color of office" and is therefore removable under 28 U.S.C. 1442(a)(1).

The Court of Appeals for the Ninth Circuit in this case responded to that question in the negative. And the Respondent here supports the reasoning adopted by that court, which reasoning is essentially that one is only acting under color -- under color of office in the context of this statute where one is raising a federal law defense to the charge that is brought.

1 The United States and the Petitioners in this
2 case believe that this is a narrow and a grudging
3 interpretation of the statute, and we take that position
4 essentially because it's an interpretation that will
5 clearly fail to accomplish the clear purposes of the
6 statute.

7 QUESTION: Mr. Ayer, is Section 1442(a)(1) a
8 jurisdictional statute, or does it independently support
9 arising under jurisdiction in the courts?

10 MR. AYER: It is a statute conferring
11 jurisdiction on the federal courts in matters which do
12 arise under the Constitution and laws of the United
13 States.

14 QUESTION: Well, it seemed to me that perhaps
15 the statute doesn't independently support arising under
16 jurisdiction, and that to adopt the view that you do
17 might present some Article III jurisdiction problems.
18 Without a federal defense, what is the arising under
19 jurisdiction?

20 MR. AYER: Well, we believe that it arises
21 --there's a number of answers to that question, and it's
22 a very -- it's a very long answer if one is to give it
23 in any sort of a complete way. It's an answer that has
24 been much debated over a long period of years and which
25 this Court I think has addressed only peripherally in

1 its decisions.

2 I would start by saying that this case arises
3 under in this -- arises under federal law in the sense
4 that, first, it arises on account of federal law, that
5 is, on account of the federal laws creating the United
6 States Postal Service and giving it certain
7 responsibilities. This case would never have come to
8 court had the Postal Service not been created and
9 various individuals employed by it put in motion in a
10 certain way to accomplish a certain function.

11 Secondly, it arises under in the sense that it
12 is a challenge that the prosecution in California is a
13 challenge to the conduct of a federal official in the
14 performance of his official duties. That isn't to say
15 that it will ultimately be decided necessarily that his
16 conduct was justified and is not subject to criminal
17 prosecution. That's the issue that has to be decided in
18 the action once removed. But it is a challenge to the
19 way the job was done.

20 Now --

21 QUESTION: It says arising under federal law,
22 not arising because of the existence of the federal
23 government or arising in the performance of some federal
24 acts. It says arising -- arising under federal law.
25 We've always thought that meant that federal law had to

1 have something to do with deciding the case, and that
2 would seem to be the reason you would want to put that
3 in federal courts.

4 MR. AYER: Well, there -- I think there are
5 --there are two parts of the answer I'd like to give to
6 that. The first is that there has been a theory which
7 has been much discussed, the theory of protective
8 jurisdiction. And it is arguable -- I'm not conceding
9 that it's true, but it's arguable that in order to find
10 jurisdiction arising under here, one must adopt some
11 variation of that theory.

12 What I would suggest is that if one must do
13 that, it is a very narrow and easily confinable form of
14 that theory, that it is protective jurisdiction to
15 protect the activities of the federal government itself.

16 Secondly --

17 QUESTION: Inherent -- Inherent and without
18 any authorization from Congress.

19 MR. AYER: Well, the authorization in Congress
20 comes in the -- in the statute --

21 QUESTION: Arising under federal law.

22 MR. AYER: In the statute, the removal statute
23 here. In other words, it's a conferral of jurisdiction
24 to decide --

25 QUESTION: Oh, I see.

1 MR. AYER: -- issues that are of federal
2 interest where, let us assume for the moment, there is
3 no federal law actually operating.

4 QUESTION: I think it's stretching things to
5 say that Congress intended that states have to prosecute
6 traffic offenses in federal courts which could be, in
7 fact, miles from the scene of the accidents. It's a
8 very strained interpretation.

9 MR. AYER: Well, Justice O'Connor, I think
10 what -- what one must do to decide how strained it is is
11 focus on the operative effect of the interpretation on
12 the one hand that we offer and on the other hand that
13 the Respondent offers in this case and the court of
14 appeals adopted.

15 Number one, I think if one starts with the
16 historical situation that gave rise to these statutes,
17 you are talking starting in 1815 with the embargo and
18 the War of 1812 and the resistance on the part of local
19 governments, the nullification crisis around 1830 and
20 the 1833 statute to deal with specific state resistance
21 to that.

22 QUESTION: Well, I think if you look at the
23 history and apply it, it certainly wasn't enacted just
24 to protect the presence of a federal employee. It was
25 to deal with a conflicting federal law.

1 MR. AYER: Well, I -- I think, Your Honor, I
2 would disagree slightly and suggest that what it was
3 intended to do was to deal with a perceived problem of
4 bias, hostility and interference which doesn't come up
5 all the time, but which can come up and historically,
6 demonstrably had come up. And I'd like to give a
7 hypothetical case to illustrate what I'm talking about.

8 If you assume the situation of a federal
9 criminal investigation that is ongoing in some locality
10 and is generally known to be ongoing, and let's say an
11 FBI agent is in the course of that investigation
12 involved or at least present at the scene of a shootout
13 that occurs. Two situations. One, he is accused, let's
14 say, of murder of someone who ends up dying in the
15 course of that shootout, and in fact the evidence is
16 clear that he did shoot the person. And his response
17 is, yes, I shot him, but I did this in the course of
18 performing my federal duty. There you have a federal
19 defense. There you have removal.

20 Let's suppose, however, that instead of saying
21 that and, in fact, the facts support his view and his
22 conclusion that he did not shoot the person. And,
23 indeed, what has happened is -- let's say to make it as
24 extreme as possible -- he has, indeed, been framed or
25 that there is some indication that he may have been

1 framed. And his answer is not that I did this in the
2 course of performing my federal duty. His answer is I
3 didn't do it. I wasn't there or whatever defense can be
4 offered.

5 I would submit that in that circumstance,
6 given the distinction that has been rested on here by
7 the Ninth Circuit, that case can't be removed, and it is
8 at least as urgent a situation calling for removal --

9 QUESTION: Why should that case be removed?

10 MR. AYER: Why should that case be removed?

11 QUESTION: Why can't the state court give him
12 a fair trial on whether he shot the man?

13 MR. AYER: Well, now I think, Justice Stevens,
14 we're talking about the premise of the statute. The
15 premise of the statute is -- and one can disagree with
16 it -- but the premise of the statute is that there is a
17 problem of state interference -- sometimes a problem of
18 state interference, state hostility, state bias, and
19 that that justifies the removal of cases to federal
20 court.

21 QUESTION: But should not the -- the party
22 wanting removal make such an allegation?

23 MR. AYER: Well, the problem -- the whole
24 problem that's involved in removal I think, Your Honor,
25 is that one cannot know at the time of removal, number

1 one, either whether the person is a -- Is a good guy or
2 a bad guy, whether he did something that was proper or
3 he did something that was improper, nor can one know in
4 every instance whether there is bias, hostility or -- or
5 harassment or something like that.

6 Now, there are extreme cases.

7 QUESTION: What kind of a presumption should
8 we adopt?

9 MR. AYER: Well --

10 QUESTION: You know, there are thousands of
11 state courts out there. They're all biased, or they're
12 all --

13 MR. AYER: We -- we do not think that one
14 --that one needs to -- to guess very much about the rule
15 because we think that the language of the statute is
16 reasonably clear when one talks in terms of action under
17 color of office. It is not an absolutely precise term,
18 but it's a term that generally has the meaning of with
19 the appearance of or an apparent performance of office.
20 And -- and we think that that is a perfectly reasonable
21 reading to apply in this situation.

22 QUESTION: May I ask just two -- two questions
23 here? Does it apply equally in a civil case, a civil
24 tort action? Say -- say somebody is in a fender-bender
25 with a postal worker who's the defendant.

1 MR. AYER: Well, we think that the -- the
2 basic standard, the basic question that must be asked,
3 which -- which we would submit is is this a case where
4 it appears at the time of removal that the federal
5 official was acting in the performance of his duties.

6 QUESTION: He was. He was driving the mail
7 truck and he bumped into somebody.

8 MR. AYER: That that -- that that same
9 standard should apply in both a civil and a criminal
10 case.

11 Now --

12 QUESTION: So, every tort case involving a --
13 a federal employee who is engaged in his regular work
14 can be removed to federal court.

15 MR. AYER: Well, I -- Your Honor, I would
16 submit that -- that from this Court's decision in
17 Willingham, that much as with regard to the federal
18 case, is quite clear because in Willingham, the Court
19 indicated that all one needed to show was a causal
20 connection between the prosecution and the performance
21 of one's job.

22 Now, there's a footnote in Willingham that my
23 opponent will I'm sure bring up, and so I'll bring it up
24 first, which indicates that -- I think the words are
25 essentially a more specific showing may be required in a

1 criminal case. So, the argument may be that it's easier
2 to remove a case where it's civil than where it's
3 criminal.

4 And -- and my point would be that the more
5 specific showing may well involve a requirement of more
6 detail on the part of the government. If there's any
7 doubt about whether he was actually performing his job,
8 if he was in the course of performing his job, then he
9 may have a heavier burden of showing that, a more
10 detailed showing of that. But I would submit --

11 QUESTION: I'm not sure. Showing that he was
12 really at work? I don't --

13 MR. AYER: Showing that what -- well, you have
14 to, I think, look at the two cases. One is where he, in
15 fact, did the act, which I think we can take this case
16 as an example of where there were accidents involved,
17 and he was driving his postal route. These are alleged
18 negligent violations.

19 QUESTION: Well, most motor vehicle accidents
20 - it's not hard to prove who was driving. I mean, you
21 start there. Then the question is -- your position is
22 in all traffic accident cases in which somebody wants to
23 sue a federal employee who was at work at the time, they
24 can all be -- there's jurisdiction to have all those
25 cases in the federal court.

1 MR. AYER: Well, I think that's right.

2 Now, the different case, obviously, would be
3 where a postal driver is off on a lark in a detour and
4 something happens.

5 QUESTION: Well, I understand, but -- but
6 we've got --

7 MR. AYER: But I --

8 QUESTION: -- a lot cases where they're not on
9 larks and detours. They're just driving their regular
10 mail route.

11 MR. AYER: That's right. And -- and that --

12 QUESTION: Do you think the causal connection
13 that we referred to in Willingham was simply that he
14 happened to be at work at the time?

15 MR. AYER: He had to be in the course of
16 performing his job.

17 QUESTION: Why not he wouldn't have been alive
18 because if he didn't have this federal job, he wouldn't
19 have had food and he would have died? Is that a causal
20 connection? It's the only job he had.

21 MR. AYER: I don't think that's the kind of
22 causal connection that the Court had in mind.

23 QUESTION: Ah, so we have to decide some kind
24 of causal connection. It isn't clear that any --

25 MR. AYER: Well, but I think if you look at

1 the facts --

2 QUESTION: -- causal connection will do.

3 And you think it's enough just that he was at
4 work rather than it was necessary that he do this thing
5 in the course of his work. The specific thing alleged
6 to have been negligent was something that was much more
7 proximately related to the directions of his -- of his
8 job.

9 MR. AYER: I think it is definitely as you
10 state, Justice Scalia. And -- and the reason is in part
11 to be found in this Court's decision --

12 QUESTION: Well, that's not just driving the
13 car. I mean, anytime you're driving a car anywhere
14 during your work hours, that's enough of a causal
15 connection. I'm suggesting that may not be enough.

16 MR. AYER: Well, when someone's job is to be a
17 postal delivery person, and one is driving one's mail
18 truck and one is going from pickup point A to pickup
19 point B and doing it by the shortest route or by the
20 usual route, it seems to me that it clearly is a
21 situation where he is in the course of performing his
22 job. And that should be enough.

23 There is --

24 QUESTION: Mr. Ayer, how did these cases
25 unfold? The -- the State tries to prosecute someone

1 from -- for an ordinary traffic accident as here, and it
2 turns out it's a federal postal worker. Now, does the
3 U.S. Attorney intervene and represent that person just
4 because they're an employee?

5 MR. AYER: The -- there's a decision to be
6 made with regard to representation, which decision is
7 based upon a decision I think by the United States
8 Attorney as to, number one, whether he believes the
9 action was in the scope of employment and, number two,
10 whether -- whether representation and removal is in the
11 interest of the United States.

12 QUESTION: Is this a case where the U.S.
13 Attorney got the idea of removal and removed it, or was
14 this something the employees did on their own?

15 MR. AYER: Well, the employees were
16 represented by the United States Attorney's Office --

17 QUESTION: I see.

18 QUESTION: -- and an attorney in the United
19 States Attorney's Office.

20 I would hasten to add, however -- and I can
21 --based in part on personal experience, that it is not
22 uniformly and always the case that these cases are
23 removed to federal court, I myself, having represented a
24 postal carrier and done it in state court. It is a
25 decision that must be made, and the idea --

1 QUESTION: Well, how many -- how many of these
2 do we get, Mr. Ayer?

3 MR. AYER: Well, I -- I think it's
4 interesting. I think the -- the allegation that -- I
5 can't give you statistics, but the allegation that if
6 the Court decides the case the way we urge, there is
7 going to be some deluge of cases that is going to bury
8 the federal courts -- there's several things wrong with
9 that.

10 One is that the United States attorneys and
11 the United States government has been operating, rightly
12 or wrongly -- and you will let us know that -- under the
13 theory that the rule is as we maintain, that the
14 decisions to remove have been made on this basis.

15 And there is no flood of these cases. Anyone
16 who has worked in the United States Attorney's Office or
17 in a district attorney's office cannot cite to you, you
18 know, 10 dozen of these cases that have -- that have
19 come along. They simply don't come along that often.

20 QUESTION: Well, I suppose the private counsel
21 for the employee has the option to remove whether the
22 United States Attorney wants to or not.

23 MR. AYER: That's certainly right. He
24 certainly would have an option.

25 QUESTION: How about a parking ticket? That

1 gets removed to federal court if it's a -- a --

2 MR. AYER: If it involves an act under color
3 of office in the performance of the job.

4 QUESTION: -- postal worker?

5 MR. AYER: It can. And it's -- I want to
6 stress it's a decision that must be made in each case
7 whether it makes sense. And I --

8 QUESTION: Does Congress constitutionally have
9 the authority to pass a statute which says any federal
10 employee as a privilege of his employment can remove any
11 case to the federal court?

12 MR. AYER: I don't know. I -- I -- any case
13 involving, say --

14 QUESTION: Any time -- any time when a federal
15 employee is sued, just as a --

16 MR. AYER: Well, I -- I think --

17 QUESTION: -- as an incident to your
18 employment you have the right to go to federal court.

19 MR. AYER: You would have a more difficult
20 time demonstrating arising under jurisdiction. I'm not
21 saying that it couldn't conceivably be done, but it
22 would certainly be more difficult than this case where
23 we are talking about conduct in the performance of
24 official federal functions and disputes about how those
25 functions --

1 QUESTION: What's the federal law that would
2 appear in that case, and what's the federal law that
3 appears in this case?

4 MR. AYER: Well, okay. Let me -- let me go
5 back to the question of the arising under jurisdiction
6 and what federal law is present.

7 My first point is that it is not clear, given
8 the protective jurisdiction theory -- and I would hasten
9 to point out that there are a number of, first of all,
10 cases of this Court starting with the Osborn and the
11 Bank of the United States case. But proceeding to other
12 cases involving federally chartered corporations, the
13 Pacific Railroad removal cases in I think 159 U.S., in
14 the Matter of Dunn in 212 U.S., these are cases brought
15 against federally chartered corporations -- not brought
16 by but brought against federally chartered corporations
17 -- where the Court found jurisdiction simply based on
18 the fact that you had a federally chartered corporation.

19 Now, subsequently in 28 U.S.C. 1349, Congress
20 has enacted a law that says there is only jurisdiction
21 in that circumstance where the capital stock is owned
22 more than half by the government of the United States.
23 So, it has recognized jurisdiction -- Congress has
24 -- jurisdiction predicated on this theory.

25 So, the first point I guess I would -- and one

1 other thing. There are -- there are several federal
2 statutes now on the books, now operative, now being
3 enforced every day, including those concerning the FDIC.
4 I think it's 28 U.S.C. -- 12 U.S.C. 1819, and one called
5 the Edge Act Involving Jurisdiction over matters
6 involving banks, international disputes involving banks.
7 I think that's 12 U.S.C. 632. The Bankruptcy Act
8 --slightly different because there's constitutional
9 basis, but trustees in bankruptcy can, as a matter of
10 federal court jurisdiction, pursue state law disputes in
11 connection with the bankruptcies.

12 QUESTION: What's the policy that you're
13 trying to further in this case --

14 MR. AYER: Well --

15 QUESTION: -- or in this class of cases? What
16 is the federal --

17 MR. AYER: (Inaudible).

18 QUESTION: -- interest that we have?

19 MR. AYER: Do you mean these cases?

20 QUESTION: Yes.

21 MR. AYER: Well, these are cases where if one
22 looks at the papers in the record and the excerpt of
23 record on appeal in particular, one can see that they
24 are -- they have certain peculiarities. I am not
25 suggesting that there is the bias or the harassment or

1 whatever else because I don't know. And one can't know
2 at this stage of the case I think typically.

3 But these are cases, on the one hand, where in
4 the Mesa case we have a collision and resulted in a
5 fatality of a -- of a young bicycle rider who was riding
6 on the wrong side of the road and ran into, head-on, the
7 front of this mail truck. Now, I am -- I am not saying
8 -- I'm not suggesting that I'm concluding where fault
9 lies, but that is itself a somewhat unusual situation.

10 QUESTION: You're suggesting that would be an
11 occasion for bias?

12 MR. AYER: Well, I'm suggesting that when the
13 matter was presented -- presented for decision by the
14 attorney handling the case as to what to do with it, one
15 of the things that he could reasonably consider, in
16 fact, really about the only thing he knew about the case
17 at that time, was the question of -- of what are the
18 merits -- what do the merits appear to be, what do the
19 facts appear to be of this case. There appeared to be
20 an issue in this case with regard to the merits of the
21 violation, and whether or not there is a question of
22 bias is something that you can't know at that point.

23 QUESTION: Well, but why -- why would he look
24 at this other than -- as anything other than a garden
25 variety traffic accident case?

1 MR. AYER: Well, he -- he would -- he would
2 look to see --

3 QUESTION: I mean, why would he -- why would
4 he view in this case anything especial that might
5 suggest bias against the federal government or against a
6 federal government employee?

7 MR. AYER: Let me -- let me give you -- give
8 you the other case which may -- may or may not partially
9 answer your question. The other case is one that
10 involves allegations of speeding and -- and another
11 offense where what actually happened was a police car
12 struck the rear, I think, right -- I'm not sure right or
13 left, but the rear side of the mail truck. And the
14 allegation was that the mail truck was speeding.

15 One wonders in that circumstance, at least I
16 would knowing those facts -- one wonders why the case
17 was brought in the context of -- of that kind of a set
18 of facts. And one can't know -- and I can't even
19 suggest -- that there necessarily is any impropriety or
20 bias or uncertainty. But the fact that there is the
21 possibility of that --

22 QUESTION: Why is there the possibility on
23 these facts, I mean, other than you might say I suppose
24 that bias might play a part in any case? But why on
25 these facts is there any reason to think it's any

1 different than any other case?

2 MR. AYER: There -- there is reason -- there
3 is not reason to believe; there is reason to wonder.
4 And the reason is that, as I've described it, I think
5 those facts are susceptible, if you fill them in with
6 other facts, which I don't have, but if you fill them
7 with other facts and circumstances, it is possible that
8 there was -- that there was a motivation for bringing
9 the prosecution that was improper.

10 QUESTION: (Inaudible).

11 QUESTION: So, you're asking us to say that
12 there -- we erect a presumption that there was a real
13 potential for bias in the state courts. Isn't that what
14 you're asking us to --

15 MR. AYER: Well, I don't think you have to
16 erect any presumption. We believe that the statute has
17 been written in a way that plainly allows a choice to be
18 made which forum --

19 QUESTION: Well, let's -- let us assume that
20 we must find some federal interest beyond the mere
21 employment status. Is that interest the fact that there
22 is a real potential for bias? Is that what you're
23 asking us to say?

24 MR. AYER: I -- I think what I'm asking you to
25 say is that -- Is that Congress has reasonably decided

1 that there is always a reasonable potential for bias,
2 and on that basis, the cases may be moved from state
3 court to federal court, and that the problem is that
4 just as one cannot know whether the defendant, the
5 federal official, is in the right or in the wrong -- you
6 don't find that out till after the case is over -- one
7 cannot know whether one is going to get a fair trial in
8 state court or not.

9 I'm not saying that most of the time you're
10 not. I'm sure that's not true. I'm sure most of the
11 time you are going to get a fair trial, but Congress has
12 said that where you have essentially a -- a federal
13 function being challenged in state court, we care enough
14 about that that we want that in the federal court.

15 QUESTION: Yes but, Mr. Ayer, the example
16 you've put, the possibility of bias because there were
17 police officers involved is what I suppose you're
18 suggesting -- they might have wanted to cover up their
19 own negligence, and therefore they brought a charge.

20 MR. AYER: Well, he ran into a mail truck.

21 QUESTION: All right. But that same bias
22 would be potential if the defendant were a private
23 citizen rather than a federal employee. That's bias in
24 favor of something unrelated to the federal official.

25 MR. AYER: Well, and -- you know, now you're --

1 QUESTION: You're just suggesting that the
2 federal officials ought to have some special defense
3 that the ordinary citizen does not have.

4 MR. AYER: I'm not suggesting that they ought
5 to; I'm suggesting that Congress has decided that they
6 want challenges to federal functions to be in federal
7 court if the judgment is made that that's, in the given
8 case, what ought to happen. That's the way the statute
9 is written. And I think that Congress had the authority
10 to do that.

11 And all we are doing in arguing this I think
12 is trying to put the statute in a forum that will
13 accomplish the job.

14 The problem is if you don't read it the way we
15 read it, and you actually have a situation where there
16 is very good reason to believe that a local community
17 and a local government is completely hostile and is
18 going to throw up every barrier it can, including
19 staging accidents and -- and framing federal officials
20 and prosecuting them for one thing and another, you
21 don't have a removal statute.

22 Those were the kinds of problems that were
23 being addressed in 1815 and in 1833 where states were
24 openly hostile and where they were taking affirmative
25 actions to stop the enforcement of federal law. And --

1 QUESTION: In those cases, the statutes were
2 tailor-made to particular situations and for limited
3 periods of time. You don't --

4 MR. AYER: Well, they were not all for limited
5 periods of time.

6 QUESTION: You don't have a nationwide
7 assumption that this goes on all over the country.

8 QUESTION: Mr. Ayer, at the time of Neagle,
9 what -- what year was Neagle? Was there a statute?

10 MR. AYER: Roughly 1890 or thereabouts.

11 QUESTION: Was there a statute then?

12 MR. AYER: Yes.

13 QUESTION: Not this one though, was it?

14 MR. AYER: Well, it was in process of
15 evolution. There was the 1866 statute which used the
16 phrase "under color of law."

17 QUESTION: There's no question that the
18 hostility was very evident toward the United States
19 marshal in --

20 MR. AYER: That's right.

21 QUESTION: -- in the Neagle case.

22 MR. AYER: That's right.

23 QUESTION: That's quite different from this.

24 MR. AYER: Well, that was a -- that was a
25 habeas corpus case --

1 QUESTION: I know.

2 MR. AYER: -- not -- not a removal --

3 QUESTION: The mob took the people off the
4 train and --

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

6 QUESTION: Carpetbaggers.

7 MR. AYER: But -- but the remedy is different.

8 On the one hand, the remedy is -- in habeas corpus is
9 essentially to intervene and put a stop to the state
10 prosecution. Here we are bringing it into the federal
11 forum.

12 Your Honor, if I could, I'd like to save the
13 remainder of my time for rebuttal.

14 QUESTION: Very well, Mr. Ayer.

15 Mr. Rosenblatt, we'll hear now from you.

16 ORAL ARGUMENT OF KENNETH ROSENBLATT

17 ON BEHALF OF THE RESPONDENT

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

20 This Court has never allowed removal where a
21 federal official has not had a federal defense. This
22 Court should not change its enforcement of the federal
23 defense requirement for several reasons.

24 First, there's clear legislative history
25 indicating that Congress intended to require a federal

1 defense.

2 Second, this Court in a long line of cases has
3 accepted that legislative history and has applied it in
4 favor of the federal defense requirement.

5 Third, allowing removal without a federal
6 defense would not only burden state and local
7 governments, but would also burden federal courts for no
8 discernable purpose.

9 I'd like to discuss all of those reasons, but
10 first I'd like to clear up a matter of fact.

11 I've handled these cases since the beginning.
12 At the district court there was no allegation of
13 harassment. At the Ninth Circuit there was no
14 allegation of harassment. If this Court looks at the
15 Ninth Circuit opinion at page 967, the Court
16 specifically states that the removal petitions at issue
17 here contain no allegation of a pattern of enforcement.

18 QUESTION: If there were an allegation of
19 harassment, would that suffice?

20 MR. ROSENBLATT: Yes, under certain
21 circumstances. As a preliminary --

22 QUESTION: How do you draft the allegation of
23 harassment so that you come within the statute as you
24 understand the statute?

25 MR. ROSENBLATT: I believe this Court stated

1 the exact procedure to follow in its case of Soper (No.
2 1). I read that as an harassment case primarily because
3 of language that's also in Soper (No. 2).

4 The way you do it is simple. You set out in
5 your removal petitions everything that you did. You
6 show that those acts were protected by federal law. You
7 also must show some hint or some suggestion from the
8 facts of the case that the prosecution was not
9 legitimately motivated, therefore, by the negative
10 pregnant, it must have been motivated or commenced upon
11 account of some act that you did that is protected by
12 your federal authority.

13 QUESTION: In a criminal case that doesn't
14 impinge on the defendant's Fifth Amendment rights?

15 MR. ROSENBLATT: No. As a matter of fact,
16 this Court in Soper (No. 1) specifically stated that the
17 Fifth Amendment privilege must be waived. I'm
18 comfortable with that for several reasons.

19 The first is that the waiver only goes toward
20 stating a federal defense. It's more a -- a
21 prosecutorial discovery that in any event would have
22 been obtained.

23 Second, the defendant is not stuck with that
24 defense because an allegation that is made for removal
25 does not bind the defendant at trial as happened, in

1 fact, in Arizona v. Manypenny.

2 QUESTION: Well, you began by saying he has to
3 set forth everything that he did.

4 MR. ROSENBLATT: That is correct, but we
5 assume that he would do so in order to avail himself of
6 the federal defense. I concede the point.

7 However, this Court since Tennessee v. Davis
8 has made that clear that the Fifth Amendment privilege
9 must be waived, and it's because it's such an
10 exceptional procedure that we're talking about here.
11 We're talking about taking a case out of the state
12 courts. And in order to do that, the federal official
13 must give some reason why federal jurisdiction, which is
14 usually strictly construed, should be afforded to his
15 case. And he has to tell us essentially that the
16 prosecution challenges federal law. Otherwise, he is
17 consigned to the state courts.

18 QUESTION: Mr. Rosenblatt, you mentioned
19 Tennessee v. Davis, and that's a case that the Solicitor
20 General argues allowed removal based strictly on the
21 federal employee's assertion of self-defense under state
22 law.

23 MR. ROSENBLATT: I would disagree --

24 QUESTION: And it could be --

25 MR. ROSENBLATT: I'm sorry.

1 QUESTION: -- read that way I guess.

2 MR. ROSENBLATT: I don't believe, with all
3 respect, it can be read that way. In my brief I simply
4 stated every sentence of Tennessee v. Davis as somewhat
5 inconsistent. And I -- I may just have to repeat that
6 with particular reference to pages 261 and 262.

7 Indeed, the Court in assessing the
8 constitutionality of the statute, which is what it was
9 doing in Tennessee v. Davis, said that it only went so
10 far as to look at what happens when there is a federal
11 defense. And the final lines of Tennessee v. Davis I
12 think say it very well about what the Court actually was
13 doing. I might just take a moment.

14 On page 272, "When this is understood -- and
15 it is time it should be -- it will not appear strange
16 that even in cases of criminal prosecutions for alleged
17 offenses against a state in which arises a defense under
18 United States law the general government should take
19 cognizance of the case and try it in its own courts
20 according to its own forms of proceeding."

21 I believe that a fair reading of Tennessee v.
22 Davis mandates the idea that the federal defense
23 requirement was what they were considering. Indeed, a
24 fair reading of The Mayor v. Cooper I believe leads us
25 to the same point.

1 QUESTION: Mr. Rosenblatt, how does -- how
2 does the existence of -- of harassment equate with the
3 existence of a federal defense?

4 MR. ROSENBLATT: It implicates the Supremacy
5 Clause of the United States Constitution. That is how
6 we get to a federal defense.

7 QUESTION: Why? Do you have to be harassed
8 because you're a federal employee? Or is it -- do they
9 just have some -- suppose they just have something in
10 for you. They don't like postmen. They wouldn't care
11 whether postmen were federal employees or not, or they
12 don't like some other thing about you that has nothing
13 to do with your federal status?

14 MR. ROSENBLATT: I'm a little unclear,
15 Justice, because if they don't like you because you're a
16 postman, that does implicate some hostility against
17 federal authority. If they don't like you because of
18 the color of your hair --

19 QUESTION: Right.

20 MR. ROSENBLATT: -- you cannot get removal.
21 You may, however --

22 QUESTION: So, you say there -- there must be
23 harassment specifically on a ground that is related to
24 your federal activity.

25 MR. ROSENBLATT: Absolutely. And that's what

1 this Court said in Soper (No. 1).

2 QUESTION: So, you would say there is -- there
3 is no harassment possible where you are picking on a
4 truck that you ran into. You're a policeman. You run
5 into the truck, as happened here. That is not
6 harassment by reason of your federal character.

7 MR. ROSENBLATT: That's correct. It may well
8 be harassment, and there may be other means of availing
9 yourself of a remedy, but as far as this statute is
10 concerned for federal employees, it would not be enough
11 to gain removal.

12 QUESTION: And it raises a federal question
13 when you're harassing someone because of his federal
14 character. Why?

15 MR. ROSENBLATT: Because you're attempting to
16 interfere with his enforcement of federal law. That is,
17 if you take a postman off the street, he isn't able to
18 deliver the mail. And if you do so because you're
19 hostile to the federal government --

20 QUESTION: But why -- why does that cause the
21 action to arise under federal law?

22 MR. ROSENBLATT: Because that action --

23 QUESTION: I mean, once you depart from that
24 language, you -- you risk enabling me to agree with the
25 government that, well, the language doesn't really mean

1 arising under. And if it doesn't mean arising under,
2 then I can think of a lot of different things it might
3 mean.

4 MR. ROSENBLATT: I assume we're talking about
5 the Article III arising under here, and the reason that
6 it would do so is that it would arise under the
7 Supremacy Clause of the United States. That would be my
8 position as to why this case would -- not this case --

9 QUESTION: The suit? The suit would arise
10 under the -- I think the harassment might -- might
11 implicate the Supremacy Clause, but I don't see how the
12 lawsuit would arise under the Supremacy Clause.

13 MR. ROSENBLATT: However, let me make a
14 distinction. The well-pleaded complaint rule which
15 usually guides us in the 1331 situation, doesn't guide
16 us here. So, a defense that raises federal law is
17 enough to make a case arise under Article III. That's
18 how I believe the case would arise under Article III.

19 Obviously, there have been some concerns
20 stated about harassment. And I'd like to reassure the
21 Court that there is no way in which a ruling in our
22 favor will impede a federal official in gaining a remedy
23 if he is harassed. First, of course, the federal
24 official may file for habeas corpus, the precise thing
25 that happened in *In re Neagle*.

1 And as to my colleague's comment that he would
2 not know if he was harassed until at some future date,
3 first, you can file a writ of habeas corpus any time
4 before trial. And by trial you ought to know if you
5 have been harassed. The same can be said for removal --

6 QUESTION: But -- but habeas corpus before
7 trial is certainly not a favored remedy in the federal
8 courts.

9 MR. ROSENBLATT: It is for federal officials
10 under this Court's decisions in ex rel. Drury. And I
11 cite those decisions in our brief. For federal
12 officials, anticipatory habeas corpus is, I submit, a
13 favored remedy.

14 QUESTION: And what's the name of that case
15 again?

16 MR. ROSENBLATT: Ex rel. Drury. I think it's
17 on page 49 of my brief.

18 QUESTION: Thank you.

19 MR. ROSENBLATT: And that is, indeed, how the
20 federal official in In re Neagle obtained his
21 anticipatory habeas relief. I don't think he waited
22 until after trial.

23 Not only is habeas relief available, it is a
24 preferred remedy in many respects. The federal
25 official, as I just mentioned, can seek it immediately.

1 He does not have to wait until a jury trial some six
2 months to a year later in order to obtain relief.

3 He can also rely on a federal judge to
4 immediately pass upon his claims. If there is
5 harassment, once the case is removed, the venire will be
6 composed in most cases of people drawn from the area
7 where the harassment, the alleged harassment, springs
8 from or arises.

9 So, removal is a good remedy. Habeas corpus
10 is a better remedy and it is completely unaffected by
11 the question before us.

12 Furthermore --

13 QUESTION: What does -- what do you -- what is
14 your view of the showing that must be made to get relief
15 by way of anticipatory habeas corpus?

16 MR. ROSENBLATT: That appears to be unclear.
17 Under a recent Ninth Circuit decision, also cited in our
18 case, Morgan v. California, it appears the circuit was
19 applying a preponderance standard; that is, the federal
20 official has to show by a preponderance that he was
21 harassed. I believe that's an appropriate standard, but
22 that could be decided at a later date.

23 The point is that the remedy is available. In
24 In re Neagle, I also believe that was the standard that
25 was applied, although there there was a federal immunity

1 defense.

2 Furthermore, if there is some concern about
3 harassment in Soper (No. 2), the companion case to Soper
4 (No. 1), this Court specifically invited Congress to
5 amend the statute to deal with any lingering concerns
6 that states might be harassing federal employees. And
7 that can be found on page 43 of Soper (No. 2). Congress
8 declined to amend.

9 The bottom line here with harassment is that
10 our position is that the statute, the language and the
11 legislative history particularly are clear. If there
12 are some perceived inadequacies, then that would be for
13 Congress to remedy. But the intent of Congress is clear.

14 QUESTION: The language certainly seems
15 clearly the other way. It doesn't say anything about a
16 federal defense at all.

17 How -- how do you explain -- if you don't
18 believe in protective jurisdiction theories, how do you
19 -- you explain the fact that suits against federal
20 instrumentalities, no matter what the subject, can be
21 entertained by federal courts? Do you have an
22 explanation for that apart from protective jurisdiction?

23 MR. ROSENBLATT: I certainly do. In most
24 cases, it's Osborn. As a matter of fact, the statutes
25 that my colleague cited, 12 U.S.C. 1819 -- there was a

1 case that came up through the circuits. I believe it
2 was the Eighth Circuit. And there's an account of this,
3 by the way, in the New York University Law Review note
4 on protective jurisdiction which was cited by this Court
5 in Verlinden.

6 There is some doubt as to its
7 constitutionality, but if it's constitutional, it is
8 because Osborn controls cases involving federal
9 instrumentalities because every time you sue an
10 instrumentality, you draw their authority to act into
11 question. And since they are chartered under federal
12 law, that brings federal law into question. That may be
13 considered artifice, but that's the artifice that was
14 used in Osborn. And Osborn apparently is still good
15 law. That's how I would explain 12 U.S.C. 1819.

16 I would explain the bankruptcy jurisdiction
17 under a number of theories. First, the Bankruptcy Code
18 gives the federal government jurisdiction over the
19 bankrupt's estate. Any action affecting that estate, a
20 suit that would increase its proceeds, for example, is
21 related to the res of the -- of the estate itself so as
22 to operate as pendent jurisdiction when the trustee goes
23 in to sue.

24 A second justification would be Osborn. That
25 is, whenever the trustee goes in to sue, there is a

1 question as to whether under federal law he has the
2 authority to do so.

3 Finally, of course, the Bankruptcy Code is a
4 statutory scheme that not only provides jurisdiction,
5 but also provides substantive rules to govern bankruptcy
6 cases. And it is grounded in Article I of the
7 Constitution. That is not what we have here. We have a
8 purely Jurisdictional statute.

9 The language of the statute -- I believe,
10 Justice Scalia, that you raised the idea that maybe the
11 language when the other way. We do not believe so. We
12 -- our position is that there is no plain and
13 unmistakable meaning or so unmistakable that you would
14 throw out the legislative history and this Court's
15 cases. But we do have a meaning for the statute, and
16 our meaning is that it is a -- for that language, you
17 should substitute "In reliance upon federal authority"
18 for "under color of office." Perhaps an example would
19 assist.

20 Let us say you have a revenue agent who is
21 assigned to break up illegal stills. The revenue agent
22 goes out to the countryside, finds a still and begins to
23 break it up. A moonshiner happens upon him and a
24 struggle ensues as the moonshiner tries to stop the
25 agent from breaking up the still. The agent throws him

1 to the ground, proceeds with his work. The moonshiner
2 comes at him again. He throws him to the ground. The
3 moonshiner hits his head on a tree and dies. The agent
4 is arrested.

5 Now, if you look at the Internal Revenue Code
6 or whatever statutes would govern the agent's conduct,
7 you will probably not find in black and white letters if
8 someone tries to interfere with you, throw him to the
9 ground. But there is no question outside of the text of
10 the statute there is some authority for the agent's
11 conduct. He is acting under color of his office, which
12 includes such acts as defending himself when someone
13 tries to interfere with his duties.

14 This Court echoed that in Soper (No. 2) when
15 it said that the defense of the agent's life is part of
16 the exercise of his federal authority.

17 We believe that is far more plausible than the
18 United States' version of the statute because the United
19 States' version of the statute assumes that under color
20 of office merely means that something happened while the
21 official was on duty.

22 Now --

23 QUESTION: Your -- your theory, if I
24 understand it, wouldn't apply ever to negligent acts
25 because a negligent act you don't purport to do under

1 authority of anything. You -- you do it negligently.

2 MR. ROSENBLATT: Our theory is that "under
3 color of office" is a term of art, and --

4 QUESTION: Could it apply to negligent acts?
5 Could it apply to any -- to any suit where the claim is
6 that you were negligent?

7 MR. ROSENBLATT: This answer will -- may
8 appear confusing. It used to be. It probably does not
9 now because of the official immunity defense and the
10 change in that defense effected by this Court in
11 Westfall v. Erwin. That is, if a -- this is -- if a
12 postal -- or let's say a federal official raises an
13 official immunity defense and says whether I was
14 negligent or not, I have an immunity under federal law,
15 that is the sort of immunity -- and this is what this
16 Court decided in Willingham -- that gets him removal.

17 The problem now is that this Court has decided
18 that official -- the official immunity defense does not
19 apply to acts that were not discretionary. Therefore,
20 probably under -- under my theory now, you would be
21 correct. It would not apply to negligent acts.

22 QUESTION: You're right. Confusing.

23 MR. ROSENBLATT: I'm sorry.

24 (Laughter.)

25 MR. ROSENBLATT: Let me make -- the -- excuse

1 me, Justice. I didn't mean to make it that confusing.
2 The answer is it wouldn't apply to negligent acts unless
3 the official is alleging a federal defense.

4 The problem with the United States' version of
5 the language, besides the fact that you would have to
6 throw out some very clear legislative history, is that
7 it suffers from what I call double superfluity, and that
8 is, as I set out in my brief, it makes two sections
9 superfluous.

10 In Subsection (a)(3), Congress stated that
11 court officials could remove for acts under color of
12 office or in performance of their duties. Now, the
13 United States' position is that any time an official is
14 performing his duties, he can remove. But those two
15 phrases are separated by a disjunctive. Therefore, they
16 should mean different things. So, we have one
17 superfluity.

18 The second is that Subsection (a)(3) shouldn't
19 be there at all because if you look at the language
20 purely textually, which is what the United States' brief
21 essentially does, you find that under color of office in
22 Subsection (a)(1) applies to all federal officials. If
23 that means in performance of duties, then why is Section
24 (a)(3) even there? And there's really no answer to
25 that. See, the United States wants to look at it

1 textually until you get that point, and then they want
2 to look at the legislative history.

3 The other reason, Justice Scalia, that I
4 disagree with the characterization of the language is
5 this Court's decision in *Screws*. As I state on page 20
6 of our brief, this Court in *Screws* was called upon to
7 decide the meaning of "under color of" in the context of
8 the precursor of Section 1983. And when it did so, it
9 looked to our statute to see what "under color of" meant
10 in Section 1442(a)(1). And when it did so, four members
11 of the plurality and three members who dissented of this
12 Court stated quite clearly that "under color of" in our
13 statute meant acts justifiable under federal law. And
14 there's no reason to change that. Therefore, *Screws* and
15 the legislative history established that what we have
16 here for under color of office is a term of art with a
17 particular and well-established meaning.

18 QUESTION: (Inaudible) understand the *Screws*
19 case, it said the only way to convict is if the person
20 charged must have admitted openly that he was doing this
21 for the purpose of denying the individual his
22 constitutional rights.

23 MR. ROSENBLATT: I believe that that would be
24 -- I'm not sure I share that characterization of the
25 *Screws* case.

1 QUESTION: Well, you better read it. That's
2 what it says.

3 MR. ROSENBLATT: If it --

4 QUESTION: And then you ought to check how
5 many times it has been cited.

6 MR. ROSENBLATT: Thousands.

7 QUESTION: About twice.

8 MR. ROSENBLATT: I -- I thought I've seen it
9 more often, but if I have not, then I'm in error.

10 But the point in my mind of the Screws case --

11 QUESTION: (Inaudible).

12 MR. ROSENBLATT: Well, I only rely upon it as
13 the final scotch on the ice cream cone --

14 QUESTION: Yes.

15 MR. ROSENBLATT: -- because we already have
16 the superfluity within the statute, and we have very
17 persuasive legislative history that the United States
18 really does not try to -- to counter.

19 Finally, I'd like to talk about the precedent
20 of this Court because the United States' position would
21 essentially require this Court to overrule every -- just
22 about every case that has come down on this particular
23 point. The best example is Colorado v. Symes. Symes
24 involved very simple facts. It's on I think page 19 of
25 my brief.

1 A revenue agent filed a petition for removal.
2 He had been arrested for murder. The petition stated
3 that he walked into a restaurant, that he was a
4 prohibition agent, walked into a restaurant while on
5 duty. He saw a man with a bottle of wine on the bar.
6 He attempted to arrest the man because the bottle was
7 illegal under the prohibition laws. There ensued a
8 scuffle over the bottle. The man resisted arrest. The
9 revenue agent, in order to subdue him, used his gun
10 hitting the suspect on the head. The suspect died.
11 Removal was petitioned for.

12 This Court denied removal, and the language
13 that it used -- and I won't read it, but it's on, I
14 think, page 521 -- states quite clearly that the Court
15 was holding that you need a federal defense in order to
16 remove. The result is removal was denied. That case
17 would have to be overruled.

18 And the reason that Sykes denied removal --
19 and I mention this to clear up any confusion that may be
20 lingering around the Willingham decision -- is that
21 there are two questions to be -- to be answered in any
22 case like this. The first is is a federal defense
23 necessary. And the second is assuming the answer to the
24 first is yes, what facts have to be alleged in order to
25 put that defense in issue.

1 Now, in Symes, the Court clearly answered the
2 question yes. And the next question was what facts had
3 to be put in issue, and the Court held that the
4 petitioner came up short.

5 The same could be said about Soper (No. 1)
6 where this Court denied removal when the petitioner was
7 clearly on duty.

8 Another case, Gay v. Ruff. Again, the
9 petitioner on duty. Again, this Court denies removal
10 because a federal defense has not been presented.

11 And finally we come to Willingham where this
12 Court stated that colorable federal defenses were
13 sufficient for removal and stated a very low standard
14 for removal of the official immunity defense.

15 All of those cases would be changed. And, of
16 course, the early cases that I discussed a moment ago,
17 Tennessee v. Davis versus -- and The Mayor v. Cooper
18 would not have had all of the language and concern over
19 cases where a federal defense is presented because if
20 there was a plain meaning to this language as far back
21 as 1815, they would have simply stated -- they would
22 have gone to the constitutionality of any case where the
23 federal official was on duty. They did not do so.

24 And, of course, we have the legislative
25 history which I will leave to the Court's reading, but

1 it's very clear that in 1789 the federal -- that
2 Congress allowed removal of federal questions only, that
3 is, where a state held that a validity of the federal
4 government -- the authority of the federal government
5 was invalid in some way.

6 Somewhere between 1789 and 1948, the United
7 States is contending that Congress drastically expanded
8 the statute in such a way as to not only open it up to
9 federal officials, but also to allow any miscellaneous
10 tort or crime to be removed whether there was a federal
11 question or not. The United States does not tell us
12 anywhere where that intent changed. They cannot point
13 to a single piece of legislative history showing that
14 Congress changed its mind on the federal question
15 limitation.

16 Article III I've discussed in my brief.

17 And finally, I'd like to talk just a few
18 minutes about some of the practical implications of this
19 Court's decision because should this Court rule in favor
20 of the United States, we are going to have a flood of
21 federal cases, federal parking tickets, federal traffic
22 tickets and such, because there is a tactical advantage
23 in removing a case.

24 I would submit, with all respect to my
25 colleague, that that's why these cases were removed

1 rather than any hint or whiff of harassment which has
2 not been discussed until 20 minutes ago because if you
3 have a U.S. Attorney who is in San Francisco, and you
4 have a vehicular manslaughter taking place, say, in
5 Crescent City near the California-Oregon border, the
6 U.S. Attorney has two choices. He can either send his
7 client a removal petition, allow the client to sign it
8 and send it back and try the case next to his office, or
9 he can go to Crescent City and spend two weeks trying it
10 there. More important, he can make the district
11 attorney come down from Crescent City and spend two
12 weeks in San Francisco and require the district attorney
13 to find a way to get his witnesses down there, which is
14 expensive.

15 QUESTION: That really suggests a really
16 hostile attitude between the U.S. attorneys and state
17 prosecutors. Do you think that's justified?

18 MR. ROSENBLATT: I don't -- I don't quite
19 agree with that, Mr. Chief Justice. My sense is they're
20 doing what they think is best for their client. And if
21 the client retains them and they are obligated to push
22 for the tactical advantage, that's what they're doing.

23 QUESTION: Well, but it's a burden on their
24 client and their own witnesses, the same as the
25 prosecution's witnesses.

1 MR. ROSENBLATT: Well, indeed, if the defense
2 had as many witnesses and they all had to show up for
3 whatever, a preliminary hearing, let's say, if it's a
4 felony, I would agree with you, but the burden is still
5 less. And it's the district attorney who will have to
6 make the first move to decide whether to settle the case.

7 QUESTION: What -- what do you say about
8 --we've talked about this thousands of cases and we all
9 parade them around, but they haven't shown up. And your
10 opponent I'm sure in good faith represents that there
11 just all that many. What -- what indication is there
12 that this is -- is such a problem?

13 MR. ROSENBLATT: At the Ninth Circuit, counsel
14 --

15 QUESTION: For one thing --

16 MR. ROSENBLATT: I'm sorry.

17 QUESTION: -- the civil cases -- and I was off
18 base a little bit before -- they're all taken care of by
19 the -- you now can sue the United States, whatever the
20 name of that statute is.

21 MR. ROSENBLATT: The Federal Driver's Act, if
22 I might --

23 QUESTION: Yes.

24 MR. ROSENBLATT: -- address that first, only
25 takes care of drivers. It does not take care of every

1 other federal employee who might get into a --

2 QUESTION: No, but that's the major -- I mean,
3 in the course of the employee -- employment -- I suppose
4 most torts by federal employees in the course of their
5 employment that we're talking about are probably postal
6 workers, aren't there?

7 MR. ROSENBLATT: I would suggest that most of
8 them probably are.

9 QUESTION: Yes.

10 MR. ROSENBLATT: But we'll still have a
11 significant number that aren't.

12 QUESTION: I wonder. Could you give me even a
13 hypothetical example of such another case?

14 MR. ROSENBLATT: Sure. A group of federal
15 postal employees when not driving get into a fight with
16 a neighbor, take somebody's lawnmower or arrested for
17 narcotics violations, not -- I'm suggesting that federal
18 workers are like everyone else. Some commit infractions
19 that are not necessarily driving infractions, but we
20 also have criminal cases.

21 And before the Ninth Circuit, the U.S.
22 Attorney's representatives said that they remove 30 to
23 60 cases a year. So, while I can't point to 10 dozen,
24 maybe I can point to 5 dozen. But that's while no one
25 knows that this tactical -- potential for tactical

1 advantage is out there.

2 If this Court were to rule against us, I'll
3 guarantee you that this story will be front page of
4 every federal employee newsletter, union newsletter,
5 that goes out in this country because there will be a
6 tactical advantage because when push comes to shove,
7 district attorneys -- some of our counties in California
8 are on the brink of bankruptcy. They are not going to
9 spend the money to chase parking tickets and traffic
10 tickets all over California.

11 But there's a more important interest here and
12 that is state sovereignty. The United States wants this
13 Court to take cases away from us, to take them away from
14 our courts, to deprive the citizens of California of the
15 opportunity to enforce their own laws. Why? What is
16 the federal interest here? With all respect, the only
17 interest is convenience. Until 20 minutes ago, there
18 was no suggestion of harassment here. There's no
19 question of federal authority at stake. The only
20 question is whether the U.S. Attorney wants to go to
21 another court to try the case. And that's the only
22 federal interest here.

23 And to rip out what the Ninth Circuit called
24 the central pillar of our sovereignty simply for the
25 government's convenience over the -- not just the

1 language of the statute, but the plain legislative
2 history of the statute, running over Article III in the
3 process, we suggest would be a very bad mistake.

4 If there are any other questions -- thank you.

5 QUESTION: Thank you, Mr. Rosenblatt.

6 Mr. Ayer, you have five minutes remaining.

7 REBUTTAL ARGUMENT OF DONALD B. AYER

8 MR. AYER: Thank you, Your Honor. I'd just
9 like to make a few points.

10 One is that recent -- as a matter of
11 information, recent legislation enacted by Congress
12 within the last couple of months changes the situation
13 with regard to civil actions involving the conduct of
14 federal employees within the scope of their duty. The
15 cases covered essentially by Westfall allegations of
16 common law torts against federal officials. All -- to
17 indicate the current intent of Congress, all of those
18 cases are now -- have now been turned into actions
19 against the United States which will go forward in
20 federal court. So, now we're not talking about --

21 QUESTION: They're under the Federal Tort
22 Claims Act?

23 MR. AYER: Yes. The same remedy applies, Your
24 Honor.

25 The suggestion that the problems that I've

1 pointed out with the requirement of a federal defense
2 can somehow be remedied by requiring allegations of
3 harassment is one that troubles me a great deal. It
4 seems to me that what one is doing there is trying to
5 use a very large band-aid to essentially rewrite a
6 statute in order to avoid what I would submit is its
7 most natural meaning and deal with sort of the kernel of
8 the most objectionable cases that might come up.

9 What I'd like to suggest and -- and reiterate
10 to some degree -- we aren't just talking about
11 harassment. I think Congress was not just talking about
12 harassment that you can identify in the form of some
13 acting-out conduct by some state official or some state
14 court. We're talking about a range of -- of problems
15 that include bias, hostility, unreceptiveness, et cetera.

16 And that's what I am suggesting somebody might
17 have wondered about in this case. I'm not talking about
18 harassment. I'm talking about a question that arises in
19 one's mind at the time the removal decision must be
20 made, and I would submit it's that question. It's not
21 the answer to that question. It's the question that
22 justifies the removal.

23 QUESTION: Are you -- are you saying that the
24 statute requires some sort of a reasonable question, or
25 just that the statute allows removal whenever a postal

1 worker who could claim unemployment -- or could --

2 MR. AYER: The latter. The latter, Your Honor.

3 QUESTION: -- claim compensation from the
4 government --

5 MR. AYER: I'm -- I'm suggesting the latter.
6 I'm suggesting that the statute was written in a way
7 specifically to allow that. And I -- I guess --

8 QUESTION: So, we don't need to worry about
9 whether there might be a question or a legitimate
10 question or whatever in any particular case. If it's in
11 the course of employment, it's removable, period.

12 MR. AYER: Right. The judgment that has got
13 to be made I think is whether it really is in the course
14 of employment. And I think that is what is involved in
15 Symes where the description that was given by Mr.
16 Rosenblatt is one that I would submit is equally as
17 susceptible. Except for the specific narrow allegation
18 that he was doing his job, it's as susceptible to a
19 barroom brawl -- to -- to actually just a barroom brawl
20 occurring between those individuals as it is to the
21 notion --

22 QUESTION: Well, Symes -- Symes speaks rather
23 strongly in terms of alleging official immunity.

24 MR. AYER: Well, that is the -- that is the
25 factual allegation. That is the defense that was, in

1 fact, going to be offered in that case. And -- and in
2 talking about --

3 QUESTION: But if you're right, why would he
4 have had to talk about official immunity? Why can't he
5 just say it was in the course of my employment -- Symes?

6 MR. AYER: Well, his actual defense was going
7 to be one of official immunity, and he talked about his
8 -- whether he had to or not I don't know. But, in fact,
9 the problem I would submit was not a shortage there, but
10 a failure to make clear that he was actually doing this
11 in the course of his employment.

12 The point I'd like to get to is some specific
13 clear positions which this Court has taken with regard
14 to the question of an employee who doesn't have the
15 federal defense but simply denies the act. And the
16 Court -- the Court has made perfectly clear, number one,
17 that that fact of denial, rather than the reliance on a
18 defense, on a specific justification for the conduct, is
19 enough. It's not something that forecloses the defense.

20 As the Court said in Willingham, it was
21 settled long ago that the federal officer, in order to
22 secure removal, need not admit that he actually
23 committed the charged offenses. Thus, Petitioners in
24 this case need not have admitted that they actually
25 injured Respondent.

1 And in Maryland v. Soper (No. 1), it is enough
2 that his acts or his presence at the place of
3 performance of his official duty constitute the basis,
4 though mistaken or false, of the state prosecution.

5 What has got to be done is to deal with those
6 cases where the official just didn't do it.

7 CHIEF JUSTICE REHNQUIST: Your time has
8 expired, Mr. Ayer.

9 The case is submitted.

10 (Whereupon, at 12:02 o'clock p.m., the case in
11 the above-entitled matter was submitted.)
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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:
NO. 87-1206 - KATHRYN ISABELLA MESA AND SHABBIR A. EBRAHIM, a/k/a SHABBIR

AZAM, Petitioners V. CALIFORNIA

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

BY alan friedman
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