OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: RAY WILL, Petitioner V. MICHIGAN DEPARTMENT OF STATE POLICE, ET AL.

CASE NO: 87-1207

PLACE: WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

RAY WILL, :

Petitioner :

v. : No. 87-1207

MICHIGAN DEPARTMENT OF STATE :

POLICE, ET AL. :

Washington, D.C.

Monday, December 5, 1988

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

APPEARANCES:

WILLIAM BURNHAM, ESQ., Detroit, Michigan; on behalf of the Petitioner.

GEORGE H. WELLER, ESQ., Assistant Attorney General of Michigan, Lansing, Michigan; on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in No. 87-1207, Ray Will v. Michigan Department of State Policy.

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

ORAL ARGUMENT OF WILLIAM BURNHAM

ON BEHALF OF THE PETITIONER

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

In 1973 Petitioner applied for a -- for a job with the Michigan State Police as a computer analyst. He was fully qualified for this job. He did not get it. And he subsequently found out that the reason he did not get that was because the Michigan State Police had a so-called "Red Squad" which maintained dossiers on persons who had engaged in certain political activities.

The plaintiff, believing that he was wronged, sued in the Michigan Court of Claims under 42 U.S.C. Section 1983, and he recovered a judgment to redress this violation of his Federal Constitution rights.

The Michigan Supreme Court took away that judgment. They did not take away that judgment on the

ground that there was no case on the merits, it's admitted now that in fact the Respondents did violate his due process rights.

It was not taken away because of any lack of jurisdiction in the Michigan courts for handling such cases. Michigan courts are fully competent to handle Section 1983 claims, and the Michigan Court of Claims is the court which is specially constituted to hear claims against the State of Michigan and its departments.

The Michigan Supreme Court reversed the case because, in its view, the Petitioner had not made out a cause of action under 42 U.S.C. 1983, because the Respondents were not persons acting under color of state law within the meaning of that statute.

QUESTION: Mr. Burnham, one thing that seems strange to me about this case is, if the Supreme Court of Michigan had wanted to award damages on this cause of action, it surely could have done so just under some general state law theory.

Was the intimation from the Supreme Court of Michigan opinion that, had the Petitioner chosen to sue just under state law rather than under 1983 the result might have been different?

MR. BURNHAM: Well, it would depend on whether or not the Chief Justice has in mind state

constitutional law or state law of another type, in other words state tort law.

Under state tort law this claim would be barred by, by the state's sovereign immunity. If it's state constitutional law, after this very case was decided, then the Supreme Court, the Michigan Supreme Court in this case, established that one could in fact sue under the state constitution.

Prior to that time, it had not so held. And consequently, had he had, had the benefit of this very case at the time that he filed his case perhaps he would have framed things differently.

QUESTION: The holding as to the state constitution was in this very case but it was not applied to him.

MR. BURNHAM: But it was not applied to him. There were two cases, the Smith case and the Will Case. And in the Will case they determined that he had not clearly made out -- had not clearly preserved for appeal the issue of the violation of the state constitution.

And in the Smith case, however, they had preserved it and consequently they had to decide that question.

But this is the first case in which the Supreme Court of Michigan has indicated that a state

constitutional claim would not be barred by state sovereign immunity.

Prior to that and if it's on any other theory, any tort theory, anything like that, it would clearly be barred.

It's Petitioner's position in this case that the Respondents, Michigan Department of State Police and the Director of the Michigan State Police, are in fact persons within, within the meaning of the statute for basically three reasons.

First of all, the statutory language says so, and secondly, the legislative history tells us that as well, and finally there was no reason to depart from the clear meaning of the statute and the legislative history in order to read those terms different.

In terms of the language of the statute, the well-established rule of statutory construction as far as this very issue is concerned, is that if there is a federal statute which addresses activities that states are equally capable of engaging in, that are targeted by that statute, then the rule is that "person" include states unless Congress expressly excludes them.

And in the antitrust laws, under the Clayton Act, and under the Sherman Act, the Robinson-Patman Act, this Court has indicated that person in those statutes

include states.

And the most recent case, of course, is the Jefferson County Pharmaceutical case at 460 U.S. in 1983 dealing with the Robinson-Patman Act.

QUESTION: Mr. Burnham, don't you think the amendment, the retroactively-effective amendment, of the Dictionary Act bears on the meaning of persons in this statute?

MR. BURNHAM: I don't believe so. And the reason for that is that, first of all, it doesn't bear on it because I don't believe that the wording change that is made in that, in fact, does what Respondents would say that it does.

In other words, the 1874, the new version of the Dictionary Act, basically gives us the same definition that is in the antitrust acts. In other words, corporations, associations --

QUESTION: Well, there's pretty clear evidence of an intent not to have the language so broad for the very purpose of making sure it didn't include states.

MR. BURNHAM: Well, that intent is the intent of the commissioners of the revision commission, and it's quite well established that the revision commission's comments are not the legislative history of that statute.

As a matter of fact, the revision commission was fired by Congress because it made too many changes, and in fact it's been noted by every commentator that in fact that is not part of the legislative history.

That may, may have been the intent of the revisors, but Congress in passing the 1874 code clearly did not rely on that, they relied on Mr. Durant's revisions of the code. And Mr. Durant, in fact, went through and tried to make as many changes back to the original language as possible.

The only explanation is that Congress simply, at the last minute, felt it needed a code, it passed and had the task, task before it to pass, all of the statutes that theretofore had been passed as part of the code, and simply passed it.

QUESTION: Well, don't you also think that the history of the 1871 act, as outlined in Monell, indicates that the framers of that act thought they had no constitutional power to impose an independent federal duty on state officers or instrumentalities --

MR. BURNHAM: I don't believe that that is --

QUESTION: And it would be rather surprising in light of that history that they intended to include the states?

MR. BURNHAM: I think that what Congress was

speaking of is the type of liability that was, that was dealt with in the subject at hand, which of course was the Sherman Amendment.

And the Sherman Amendment did, did not deal with the question of whether or not, and this Court of course found in Monell, did not deal with the question of whether or not states or for that matter municipalities that took action that violated constitutional rights could not be subjected to liability. That was not the question.

The question was whether or not a duty to maintain a police force could be imposed upon counties as subdivisions of states by way of this vicarious liability in the Sherman Amendment.

QUESTION: But it's most unlikely in light of the history of that act and, and the purpose of the Ku Klux Klan Act that the 42nd Congress intended to create a damage action against state governments to be heard in state court.

MR. BURNHAM: Well, the question of state court, I think, has to be separated from the question of whether or not a cause of action is, is set out.

In other words, Congress clearly in Section 1 was authorizing a remedy to be brought. Now, Congress did indicate that that remedy -- it was also at the same

time creating jurisdiction without regard to amount of controversy in the federal courts.

However, at that time and today and since Mr. Hamilton wrote Federalist No. 82, it's been quite clear that the standard is that there was concurrent jurisdiction in state courts unless Congress makes that exclusive.

And as a matter of fact, that section of, of, of Federalist No. 82 was actually read on the floor of the Congress at the time in the debates at the time that Section 1983 was being considered.

Congress was fully advised of that, this Court has noted that there's jurisdiction, concurrent jurisdiction, in state courts, in addition to which we must keep in mind the fact that from the time of the Constitution until 1875 federal questions, including Federal Constitutional questions, could only be brought in the state courts.

It's highly unlikely that Congress would have forgotten that at the time that it was authorizing the cause of action to enforce the 14th Amendment.

I might also add that the slaughterhouse cases were filed in 1870, and the slaughterhouse cases were, of course, filed in the, the Louisiana State Court as a means of enforcing the 14th Amendment.

And consequently anyone who is familiar with the slaughterhouse cases, and of course they were quite notable at the time, in the news media and otherwise, would have known that that was an example of enforcing the 14th Amendment in state court.

QUESTION: Were they brought under Section 1983 in the Louisiana courts?

MR. BURNHAM: No, no they were not. The filing of that predated the statute.

The first reported case, I believe, under Section 1983, I believe, was in 1873 in the Circuit Court in Illinois, I believe. And that, interest -- interestingly enough, was a suit by a company against the City of Hyde Park.

In other words, a suit against a, a governmental subdivision, an entity in that case. And that case, of course, was relied on in this Court, by this Court, in the Monell case, in 436 U.S. And consequently the statute was not used at that time.

QUESTION: But that's a little disingenuous, isn't it? I mean, our whole theory in Monell was that cities are not, are not states, that they haven't been treated like states.

I mean, to cite Monell as, as authority for what you want us to do here is to really pull it

inside-out, it seems to me.

MR. BURNHAM: Well, I agree that Monell does not cover the precise question in this case. However --

QUESTION: Well, more than that, I think it, I think it, it -- it's rational refutes the statement you just made, that any, any earlier case that had to do with the city is somehow authority for suits against the government. Monell says quite the contrary, that the reason suits against cities are allowed is that they weren't considered governments.

MR. BURNHAM: No, I, I don't believe that that -- the rational of Monell, as I understand Monell, is that there's no reason to exclude cities because of the fact that the Sherman Amendment was defeated or for any other reason, that cities, the entity itself is as capable as the officers of that city of engaging in the kinds of activities that were the focus of the, of Section 1 of the 1871 act.

And consequently there was no reason in the Sherman Amendment, which of course Monroe v. Pape held, excluded cities, there was no reason to read its defeat as meaning that cities were excluded.

But simply the fact that cities were as capable of engaging in those kinds of depredations that the Court believed that there was no reason to exclude

them.

And of course, the Dictionary Act was relied on -- upon in Monell, and the Dictionary Act did not refer to cities or counties, it said bodies, corporate and politic.

And of course those very words were used by the senators and members of the House who debated Section 1981 on the floor of the Congress to describe states. And no one has ever doubted that states certainly come within that, that definition.

And that definition, we believe, although it was changed in 1874, this Court has never taken the view that that somehow retroactively clarified Congressional intent as the Respondents would have the Court believe.

QUESTION: Isn't it queer -- queer disposition you're asking us to end up with, given Quern, you're -- what you're necessarily suggesting is that in order to protect individuals against the states, Congress created a cause of action against the states, but allowed that cause of action to be sued upon only in state courts.

Isn't that rather strange? I mean, if, if you're worried about the state's misbehaving, it seems to me -- I could understand the opposite, allowing suits only in federal courts and not in state courts.

But prohibiting suit in federal courts and

permitting it in state courts seems, seems absolutely inverted.

MR. BURNHAM: Well, the crux of the matter is that Congress did not do that.

In other words, the reason that matters of this sort -- in other words if this case were brought in feceral court, it's quite clear it would be barred. The reason that this case would be barred in federal court is not because Congress said it could not be brought there but because the 11th Amendment says that the state cannot be sued in federal court.

In other words, Congress did not by use of the term "person acting under, under color of state law" mean that as a term of limitation. Congress was, was simply setting up the cause of action.

And there is a defense, of course, of the 11th Amendment, which defeats that cause of actior. However, in state court where that defense is not available to the state, then the cause of action has greater force.

QUESTION: You don't think Congress, in Section -- using Section 5, could have, could have set the 11th Amendment aside and allowed these suits?

MR. BURNHAM: Congress certainly could have done that, had Congress, number one, thought that the 11th Amendment was a problem, and number two, believed

that or had the foresight to forecast this Court's decision in cases such as Hutto v. Finney and Atascadero. In other words, the clear statement kind of rule.

Petitioners believe, as we indicate in our, in our brief, that because Hans v. Louisiana was not decided until 20 years later that it's highly unlikely that Congress would have thought that there was an 11th Amendment bar to a federal question claim.

Hans v. Louisiana quite clearly relied on only recent prececent. There was no occasion for deciding that issue before, it would not have been established until 1890.

And consequently the Respondents would impute some sort of intent to Congress to limit a cause of action based on an assumption about the 11th Amendment, when there is absolutely no evidence that they thought that the 11th Amendment would be a problem.

QUESTION: But we've decided that the other way.

MR. BURNHAM: Well, I --

QUESTION: I mean, you're, you're -- this argument essentially is asking us to over -- overrule Quern.

MR. BURNHAM: Well, Quern doesn't necessarily

do that. Guern, I think, applies a modern standard for abrogating the 11th Amendment.

That modern standard is one that applies from that day forward, but this Court has also said it will look at prior statutes including the Jones Act and the Welch case and other statutes in order to determine whether or not Congress, in fact, did abrogate 11th Amendment immunity.

And that of course is a separate issue from the cause of action question, because Congress must, must not just authorize suit against the state, Congress must make its intent clear, must have considered the 11th Amendment and firmly decided to abrogate it.

In the vernacular I suppose you could say Congress is saying not only that the states can be sued but also, read my lips, we mean it, the states can be sued. And it's only then that the 11th Amendment is abrogated.

It is not necessary in order to establish a cause of action to do that. And this Court has repeatedly assumed, in Atascadero, in the Welch case, and in Employees v. Missouri Department of Public Welfare, that in fact there is a cause of action that is left over, once one decides that 11th Amendment issue.

And as a matter of fact, in Atascadero the

Court made it quite clear that the decision did not mean there was not a remedy. The decision simply meant that that remedy would have to be pursued in state court.

It is not -- it is a common situation with feceral statutes that establish causes of action for which there is a defense in one form but not a defense in another form.

QUESTION: Do they do it by using the same word, in a fashion that, that has two different meanings?

Do you know any other -- your argument is essentially that the word "person" does not mean a state for purposes of whether you can bring a suit in federal court.

MR. BURNHAM: No. The word "person" does mean a state, in federal court as well. It simply means that that suit is barred, if the 11th Amendment is applicable.

For example, this Court has indicated -- in the State of Rhode Island, the legislature of Rhode Island has waived its 11th Amendment immunity by statute.

And in that case the First Circuit indicated, well, then we have to go on to decide the question of whether or not there is a cause of action under Section 1983. And we hold that the state is a person, in the

Della Grotta case.

In other words, two separate issues of whether or not it's barred by the 11th Amendment and whether or not there's a cause of action. If those two issues were the same, then we would never be able to have a cause of action, once the consent by the state was given.

QUESTION: You think Congress used person to mean state but nonetheless did, did not allow suit against the state --

MR. BURNHAM: Congress allowed suit against the state in the sense of authorizing the cause of action.

However, Congress did not engage in the kind of super-intent, in other words the clear statement necessary under cases like Atascadero, in order to abrogate it.

In other words, the two questions of whether or not there's a cause of action, and the second question of whether or not that cause of action might be barred.

And the state -- Petitioners' position is the state is a person for all purposes, for purposes of cause of action. The question of whether or not they can be sued in federal court is a question of the defense that the state might raise.

QUESTION: Mr. Burnham, can I ask you a question about your understanding of the state of the law at the time the statute was enacted?

Recently had a lot of law on the question of the difference between a state official being sued in the official capacity and being sued in individual capacity.

Was that distinction as well-recognized back in the 1860s as it, as it is today, do you know?

MR. BURNHAM: I don't believe that it was. As a matter of fact, a lot of the law of whether or not one is suing in the official capacity or in a personal capacity is overshadowed by 11th Amendment laws, especially starting with Ex parte Young. And it's very difficult to separate that.

I believe that the understanding of the 1872, '71 Congress could well have been the understanding that was reflected the, the year later in Davis v. Gray, which is, if you sue the official you in fact do get to the state but as long as the state is not named as a party then the suit is okay under the 11th Amendment.

QUESTION: Well, under your view, if this action had been brought against the director of the state police in 1874, right after the statute was passed, and the judgment had been entered against that

official, would that judgment have been payable by the state or by the individual at that time?

MR. BURNHAM: That would be -- either option if possible. However, I believe that the option that is more likely is that it would be paid by the state.

QUESTION: At that time?

MR. BURNHAM: At that time. Representative Bingham gave an example of the kinds of rights that he believed were protected by Section 1983.

One of those rights that he gave us that he believed that the case of Barron v. Mayor of Baltimore should apply to states and cities. And consequently he viewed just compensation claims as being the kinds of claims that could be brought under the statute.

Now, if a state officer who actually goes out and seizes that property is the one who was personally liable for that, it would be highly unlikely that that is what Bingham had in mind.

And as Justice Powell concluded in his concurrence in Monell, there is no indication that they intended somehow that only personal liability of the officer would be involved in these kinds of cases.

There's another example that is given by an opponent in the legislative history, by Representative Blair, and that is, what if slavery were reimposed in a

particular state?

This is the kind of thing that, that the statute seems to go to. And the Representative pointed out that quite clearly that is a case where the state itself does it, and consequently the liability should run with the state. It should not run with the individual officers who happen to have the misfortune of being the ones who are sent out to enforce that law.

I suppose, to use an example from this case that would ring true in 1871 terms, if in fact a statute said, state government cannot hire black people, and the Petitioner were denied that job pursuant to that state statute, Respondents would have this Court say that the only remedy is to sue that personnel interviewer who says, my hands are tied, I can't hire you. The state law says that I, I have to reject your application.

That kind of liability doesn't make a lot of sense. And if you read through the legislative history and look at the --

QUESTION: Let me just interrupt there. Why wouldn't the answer to that be, under Ex parte Young, that you could get injunctive relief in that situation? And that that would be adequate?

MR. BURNHAM: Well, of course, Ex parte Young was not for another 30 years.

QUESTION: I know, but I mean, why couldn't the rationale of Ex parte Young been applied in such a case and, and say that you're only remedy is not for damages but for injunctive relief?

MR. BURNHAM: Well, it would be highly unlikely that that would be the case, if Congress says right in the statute that whatever this remedy is against persons is, in the words of the statute, a -- an action at law, suit in equity, or other proper proceeding for redress.

In other words, if Congress had that in mind, certainly there was a clearer way of saying it. And if in fact action at law and suit in equity are the kinds of things that are -- that are available against that person, then certainly there's no basis for saying that somehow the statute means, well, person if it's a suit in equity but not a person if it's a suit at law.

Congress did not say that. And it quite clearly could have said that. It simply did not.

QUESTION: Mr. Burnham, was Section 1 of the 1871 Act patterned after Section 2 of the 1866 Civil Rights Act?

MR. BURNHAM: I believe the term that this Court has, has used and is, gleaning from the legislative history, is that it was a model for --

QUESTION: The language is identical, in fact, isn't it?

MR. BURNHAM: The language -- in fact, the language is identical.

QUESTION: And would you say that Section 2 of the Civil Rights Act applies to states as persons, making them criminally liable?

MR. BURNHAM: Well, at the time, of course, the -- the criminal liability could only be visited on individuals. In other words --

QUESTION: Well, your answer is no, that it would not make criminal --

MR. BURNHAM: No, it would not.

QUESTION: -- penalties enforceable against the state.

MR. BURNHAM: No, in other words, the state could not be imprisoned under that law.

QUESTION: Why would we read the word "person" in the identical language in the later act differently then, do you think?

MR. BURNHAM: Well, there are a couple of reasons. The first reason is that the 1866 act led to the 14th Amendment.

In other words, the reason why the 14th Amendment was written and passed by Congress, in large

part, was because they believed that there were constitutional problems with the 1866 act. And consequently, a more generalized version of the 1866 criminal law is what gave us the current Section 1 of the 14th Amendment.

In that broader context, in other words outside of the narrow criminal context, Congress chose the words, "no state shall," and consequently Congress is telling us by doing that that this kind of liability that they're talking about is at the very least official capacity liability, and certainly in a broader context where we're talking about the non-criminal situation, that that is a situation where it is the state itself that is prohibited from doing that.

Now, then, after -- that was in 1866, then 1868 the 14th Amendment, then in 1871 they want to enforce the 14th Amendment, they go back and simply use the old language from the 1866 statute. But they indicate in the preamble that they are enforcing the provisions of the 14th Amendment, which of course says itself, "no state shall."

The second reason is that the kind of liability that they spoke of in the 1866 act, and the use to which it was put historically, was to render criminally liable judges, other officials, for official

capacity actions.

In other words, the actions that were brought were in fact actions that were brought for a judge, for example, excluding blacks from a jury, pursuant to a state statute. That judge was arrested and tried before the Federal court for doing that.

That is precisely the kind of official capacity type action which we are talking about here.

QUESTION: I think that the logic of the whole history is to say yes, they thought they could reach individual state actors but not the states themselves. And the whole thing makes sense when viewed in that light. I think your argument is somewhat hard to achieve.

MR. BURNHAM: Well, it's, it's very hard to account for the many references about states being the object of Section 1.

In other words, we are handicapped to a certain extent by the fact that Congress was more excited about, and debated more, the other sections, which perhaps were more problematic and did not have much debate on Section 1.

But everyone who referred to Section 1, and, and the quotations are in the brief, refers to the fact that it was meant to reach violations by the state

itself in its corporate and legislative capacity.

QUESTION: Are there any indications in the debates showing concern over imposition of damage liability on the states?

MR. BURNHAM: Not that I have been able to find, Your Honor. The -- the 11th Amendment apparently, for example, is not mentioned at all in the debates.

QUESTION: Is that then not indicative of an understanding by Congress that such damage liability is not encompassed by the statute?

MR. BURNHAM: Well, to the extent that Congress was worried about a few other things, such as in the other sections military takeover of state governments, which obviously is much more intrusive of state sovereignty than a simple damage award, suspending habeas corpus in the areas where state authorities were not able to control things. Those were the kinds of things that Congress debated.

QUESTION: And also the black laws, the state black laws, too.

MR. BURNHAM: Absolutely. In other words, the concern was that state governments were in fact allowing all sorts of violations by individuals and were not enforcing the law, as well as the fact that they themselves might have affirmative laws which in fact

denied rights to, to the former freed persons.

QUESTION: (Inaudible) that prevented a Negro from flying a kite.

MR. BURNHAM: Uhm. But there are several references in the legislative history.

For example, Senator Edmunds, who was the floor manager of the bill and he was the chairman of joint committee that investigated the whole problem, indicated that Section 1 simply reenacts the Constitution. He did not say that it reenacts the Constitution except for the part that says, "no state shall."

Representative Bingham talks about it's a remedy provided against all such abuses and denials of rights in states and by states, and he didn't say except ones that are pursuant to state statute that are perpetrated by the state itself.

Representative Shellabarger, who was a sponsor of the bill, indicated that the states remained unrestrained, and therefore there's a need for this remedy. And that was not, certainly, as a prelude to introducing a bill that does not restrain states themselves.

I'd like to reserve the remainder of my time for rebuttal.

QUESTION: Very well, Mr. Burnham. Mr. Weller, we'll hear from you.

ORAL ARGUMENT OF GEORGE H. WELLER

ON BEHALF OF THE RESPONDENTS

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

The State takes the position, first, Congress has the power under Section 5 of the 14th Amendment to include the states within Section 1, that is to include the states within the meaning of person, but it did not do so.

And our second position is since this action for damages was in the Michigan Court of Claims, against the office of the director of the State Police, not the director of the State Police personally, and the only defendant in the Michigan Court of Claims is the State of Michigan itself.

There is only one defendant in this case, and that's the State of Michigan. And the caption merely sets forth in two different ways a cause of action against the State of Michigan.

QUESTION: Did the Supreme Court of Michigan agree with you on that second point?

MR. WELLER: Yes, they did, Your Honor. They found -- when they described the state not being a

person they then proceeded to describe an action against the state official who was being sued in this case and used the same logic and the same premise and found that he was not a person as well.

Now, on our first position, if Congress intended to use its new power under the 14th Amendment that had been enacted three years before, and to do away with the traditional immunity of the states from an action for damages, in their own state courts, and do this on a federal cause of action, Congress would have expressly said so in Section 1, or would have made a clear statement that the states were included within the meaning of the word "person."

And the reasons for this are, number one, as this Court has pointed out, in common usage, "person" does not include a sovereign state and statutes using the word "person" are ordinarily interpreted not to include a sovereign state.

And secondly, there was no presumption in 1871 that the word "person" included the sovereign states. In other words, the Dictionary Act of the previous Congress, not the same Congress, as set forth by the Petitioner, but the Dictionary Act of the previous Congress did not intend to include the states within the meaning of the word "person."

This is illustrated by the commissioners' action in changing the wording and further illustrated by Mr. Durant's further analysis of what the commissioners hac done.

And he made a report on December the 10th in 1873 to the Congress, and he said, I have retained only those meanings that are found in the statutes at large. And the meaning that he retained that the commissioners utilized was to use partnerships and corporations as the meaning of person in the Dictionary Act.

QUESTION: Attorney General Weller, what about the word "person" in Section 7 of the Sherman Act, enactec in 1890?

MR. WELLER: In the Sherman Act and other acts, as I urderstand it, Your Honor, the word "person" of course may include the states under the circumstances. You have to analyze and determine whether or not the word "person" includes the states.

There are some cases, for example, in which the states were setting up pharmaceutical practices that were competing with private enterprise in that. But our basic premise here is that the word "person" ordinarily is not used to include the states, and there's no indication that the states were intended to be included within the meaning of the word in this law.

So with no common usage, and with no presumption, and with no expressed statement, the plain meaning of person in the 1871 act, our position is, did not include the states.

Now, if Congress had intended to include the states within the meaning of the word, this would have been a radical change. And under the law at the time, a radical change would require an explicit showing or would require an expressed statement or a clear statement that it was the collective will of the Congress to include the states within this meaning.

And to include the states within the meaning of the word "person," in light of Quern, would mean that Congress by its collective will intended to subject the states to actions for damages in their own state courts on a federal cause of action.

QUESTION: You have no trouble in getting corporations under the word "persons," do you?

MR. WELLER: I don't understand, Your Honor. I have a little trouble in getting the word "corporation"?

QUESTION: Nobody else has. So if you can get corporation under persons why can't you get state under persons?

MR. WELLER: Well, the word "corporations"

normally includes, for example, municipal corporations and counties and that. That's understood.

States occasionally may be included within the word "corporation," but they're not normally used within the meaning of the word "corporation."

QUESTION: They mean persons. Corporation comes under the word "persons" in the 14th Amendment. Isn't that true?

MR. WELLER: I'm sorry, Your Honor, I don't recall that language in the 14th Amendment, that corporations are --

QUESTION: I don't either. But this Court put it in there, in the 1880s, right?

MR. WELLER: Yes.

QUESTION: I don't see how you can do one and just ignore the other.

MR. WELLER: Well, we're speaking of the intention of Congress in 1871, Your Honor. And in 1871 -- again, our position is that states were not included, that the intention of the previous Congress was to include corporations. But as they used corporations it did not include the states.

Now, the Court in -- the Court in Quern has already held that Section 1983 was not intended to abrogate the state's traditional sovereign immunity in

the federal courts. The Court in Quern also pointed out that no member of Congress in the legislative history of legislative debate made any mention of financial consequences to the states, nor did any member focus directly on the question of state liability.

So that -- since Quern has already held there's no federal right in the federal courts, there's the strongest implication in Quern that the -- this Court did not intend to interpret person as including the states.

Now, the purpose of the 1871 act was, of course, to enforce the 14th Amendment. And under the 14th Amendment, under Section 5, it was left to Congress to decide whether to enact legislation or what kind of legislation to enact.

Congress could choose to act to the fullness of its power, or Congress could choose to act to some lesser degree. It didn't need to exercise all of its power under Section 5.

And our position is that Congress did not need, in 1871, to exercise all of its power and include the states within the meaning of the word "person" in part because, as the Court has already pointed out, the problem was not with the state laws on the books or with the state remedies that were available. The problem was

with enforcement.

State laws were not being equally enforced, or the state laws were not being enforced at all, or the state courts were powerless to act or they were in league with those who were depriving others of their federal rights.

So the perceived need in Congress in 1871 was for effective enforcement and open, fair, and objective courts. So the perceived need, the collective will of the Congress, was to give immediate access to the federal courts for actions for damages or for suits for injunctive relief.

And this need was fulfilled by using the word "person" that included government officials, and included local communities, as this Court pointed out in Monell. But there is no perceived need nor was there any collective will to include the states within the 1871 Civil Rights Act.

For one thing, there is no tradition in 1871 of an action or a suit against a state, against its will. In fact, I've been unable to find any such case between Chisholm v. Georgia in 1793 and 1871.

What there was in 1871 was a strong tradition of the immunity of the states from suits in their own courts. That doesn't mean the 1871 act did not provide

relief.

For example, actions for damages were made available in the federal courts against those against whom such actions had long been recognized, for example, state officials and local officials. And as the Court said in Monell, local communities.

And in response to your question, sir, the Prosser of his day was a gentleman called Hillard. And in Hillard on Torts, at page 269 in 1866, Mr. Hillard points out the ready availability of actions for damages against public officials.

Mr. Hillard also wrote another book on injunctions. In 1864 on page 443 and 444 he points out that there was a long tradition of suits for injunctive relief against public officers who are acting illegally or unconstitutionally. And in there he cites other cases as well.

So the 1871 act provided relief against state officials --

QUESTION: May I just back up because I found that very interesting? Your first example from Hillard in 1866 --

MR. WELLER: Yes.

QUESTION: Did that contemplate -- do I understand you to say that he was suggesting it would be

perfectly proper to get a damage recovery against a state individual acting in his official capacity?

MR. WELLER: In his -- that would be in his personal capacity, Your Honor, against him as a person.

QUESTION: Well, the judgment would run against him in, in, in his personal capacity --

MR. WELLER: Yes.

QUESTION: But supposing he was the head of the Michigan Department of Police and done just what had been done here, would such a judgment -- and that had been regarded as a tort at the time --

MR. WELLER: Well, that, that, that, that goes back to the Governor of Georgia v. Madrazo where the suit is against the office of the individual, not against the individual as a person.

And so therefore, that kind of a suit that you describe would be against the office, therefore it would be against the state, not -- and therefore it would be barred, as opposed to there was a separate --

QUESTION: Was -- was that what you found in the tort law treatises at the time, or is that what you're saying is the --

MR. WELLER: No, that's basically what I found in the treatises at the time.

QUESTION: I see.

MR. WELLER: Some of them are cited in our brief, and Hillard I found after we wrote our brief.

So this recourse in the 1871 act against officials and local communities, but not against the states, it ensured the supremacy of federal law but at the same time it accommodated the traditional immunity of the states in what this Court in Monell referred to as coordinate sovereignty.

In other words, it made the balance that ensured that federal law would be supreme, the federal Constitution would be supreme.

Now, the immediate reason for the 1871 act was the violence that was being directed towards blacks and towards sympathetic whites who were the backbone of the southern Republican Parties.

But the act, of course, applied to all of the states, not just the southern states. And so we have this question, the Court has yet to hold -- this Court has yet to hold that a state court must entertain a claim under Section 1983.

What this Court has said is that a state court may not discriminate against a type of federal action when that same type of action arising under state law is enforced in the state courts.

So it's most unlikely that in 1871 it was the

collective will of the 1871 Congress, and particularly since the senators were still being elected by the legislatures not by the people, it's most unlikely that it was the collective will of that Congress to include the states within the meaning of the word "person," because to do so in light of the holding of Quern would mean that it was the will, the collective will, of the 1871 Congress to abrogate their traditional sovereign immunity of their states, only in the state courts, and thus raise the possibility that the states would be subject to actions for damages on a federal cause of action in their state courts when they would not be subject to the same type of cause of action under state law.

So our feeling is -- our basic premise is there is nothing in the context, or in the subject matter, or in the legislative history or in the tenor of the times to show that it was the collective will of the Congress, a Republican-dominated House and Senate, to do away with the traditional immunity of the states and subject them to damages in their own state courts.

QUESTION: I, I take it you're of the view that the 11th Amendment clearly bars the suit in a federal court?

MR. WELLER: Well, that's what Quern said,

Your Honor, that the --

QUESTION: Why, why do we have jurisdiction to hear this case, then?

MR. WELLER: This, this is a cause of action alleging a violation of a Federal statute. And --

QUESTION: But aren't you here in Federal court?

MR. WELLER: And you have jurisdiction to interpret the meaning of the statute to determine whether or not the states were or were not included.

QUESTION: But isn't this the suit that's brought -- if this suit can't be brought in a federal court, then how can you be here?

MR. WELLER: We can be here because the state courts enforce Federal law as well, Your Honor.

QUESTION: But we're a federal court, and the judicial power shall not extend, under the 11th Amendment, to this kind of suit.

MR. WELLER: You're in -- we're in federal court on an appeal from a state court handling a Federal cause of action.

QUESTION: But the 11th Amendment says you cannot be in the federal court.

MR. WELLER: I don't believe, Your Honor, that the 11th Amendment bars actions on appeal on federal

causes of action.

QUESTION: It says, "the judicial power shall not extend."

MR. WELLER: Well, we're dealing with a federal statute, Your Honor.

QUESTION: Well, you'd be dealing with that in the district court too, I suppose, and you'd find -- you'd ask for immediate dismissal, I assume.

MR. WELLER: Well, if we went into the district court, yes, we'd, we'd raise the 11th Amendment, if the state was sued. And we do do that.

But in this case --

QUESTION: But you don't raise it here?

MR. WELLER: We don't -- no sir, we do not raise it, we do not rely on the 11th Amendment. Not at all.

QUESTION: Yes, but don't we have an obligation to do that ourselves, if it deprives us of jurisdiction?

MR. WELLER: If you feel --

QUESTION: And this is a case, is it not, that was, in either law or equity, commenced against one of the United States by a, by a citizen?

MR. WELLER: I believe, Your Honor, the history of this Court and the cases involved show that

in order to ensure the supremacy of federal law -- Cohens, for example, v. Virginia requires that this Court entertain these actions, if it chooses to do so, of course, on certiorari, but it has jurisdiction to hear appeals on federal causes of action coming from state courts to determine, and analyze and determine whether the federal law does or does not apply.

QUESTION: Gee, I don't know why you don't rely on the 11th Amendment, because -- if the 11th Amendment did apply to us as well as to other Federal courts, and as Justice Kennedy points out there's nothing that says it doesn't, then what your opponent would be suggesting is that Congress created federal causes of action in state courts against the states, they couldn't be appealed to the United States Supreme Court, so there'd be no way of, of giving any unity to that particular Federal law. That wouldn't be a very sensible arrangement, would it?

MR. WELLER: I don't believe this is a valid argument, Your Honor, that a, a -- the interpretation of a federal statute, by a state court, interpreting the meaning of a federal statute, cannot be appealed to this Court.

I think the thought processes of the era are better found in the language of the 1880 Ex parte

Virginia. The Court was speaking of the 14th Amendment, and the Court said, "Prohibitions of the 14th Amendment are addressed to the states."

But then, one page later, this Court said, "Such legislation must act upon persons, not upon the abstract thing that's denominated a state, but upon the persons who are the agents of the state in the denial of the rights which are intended to be secured."

Our position is, Your Honors, that Congress could have included the states within the scope of the 1871 Civil Rights Act. It did not do so. Congress can at any time, if it chooses, include the states within the scope of the 1871 Civil Rights Act. It has yet to do so. Thank you, Your Honors.

QUESTION: Thank you, Mr. Weller. Mr. Burnham, you have four minutes remaining.

REBUTTAL ARGUMENT OF WILLIAM BURNHAM

ON BEHALF OF THE PETITIONER

MR. BURNHAM: Thank you. A couple of matters by, by way of response.

First of all, I believe counsel for Respondents indicated that it was somehow rare that states would be persons under the, under the Federal laws.

However, I did not mention the liquor tax laws

in which the definition is partnership, association, company, or corporation, as well as natural persons. This Court has held that the state is a person.

The shipping act, corporations, partnerships, and associations existing under or authorized by the laws of any state, that includes the state. The antitrust definition is precisely corporations and associations existing under or authorized by the laws of any state. The Court has held in all those circumstances that the state is in fact a person.

Secondly --

QUESTION: For an antitrust plaintiff, anyway. But I'm not sure for an antitrust defendant.

MR. BURNHAM: No. Jefferson County was an antitrust defendant.

QUESTION: Defendant?

MR. BURNHAM: As a matter of fact, one of the arguments that was made was that person should mean something different if it's a plaintiff than if it's a defendant. And it was precisely that argument that was rejected by the Court.

In fact, if you're a person you're either in or out of that definition, and it doesn't vary depending on the circumstances. And of course, that rule is followed in a slightly different way in the civil rights

context, that this Court held in Kenosha v. Bruno, that you can't bifurcate person somehow according to relief.

Either they are persons or they're not, and if they are ther, as Congress says, action at law, suits in equity -- everything applies.

QUESTION: Can you tell us why we have jurisdiction under the 11th Amendment?

MR. BURNHAM: Well, Cohens v. Virginia. I think counsel is correct, that in fact an appeal is not considered to be an action prosecuted against a state for purposes of the 11th Amendment.

QUESTION: But, no, no, the Judiciary Act of 1789 gave us jurisdiction over those matters, and there was no 11th Amendment bar.

MR. BURNHAM: Well --

QUESTION: The 11th Amendment says, "the judicial power shall not extend."

MR. BURNHAM: That's true. It would --

QUESTION: And I take it we're a federal court.

MR. BURNHAM: Yes. I would agree with that. The difficulty, of course, is that this Court, if the Court wanted to take that matter up anew, would have to reverse several prior cases.

Maine v. Thiboutot was a 1983 action brought

in state court. This Court decided the attorney fee issue in that case without ever noting that there was any problem.

Martinez v. California is another state court Section 1983 action that came up. Obviously in all those cases the Court would have been obligated to note the 11th Amendment problem, and to simply dismiss the case. There are all kinds of cases that are brought with federal --

QUESTION: But nobody's perfect. We, we make mistakes.

(Laughter)

MR. BURNHAM: In, in, in the interest of stare decisis, I would suggest, however, that that perhaps is, is, is water over the dam and has been for, for almost, almost 150 years.

Mr. Weiler also indicated, I believe, that, that there were no suits against states prior to 1871. And in fact in, in Petitioner's reply brief we indicate Wilson v. New Jersey was a suit in state court against the State of New Jersey in 1812, Woodruff v. Trapnell was a suit against a bank receiver in their official capacity in 1850, of course Curran v. Arkansas in 1857.

And Curran v. Arkansas is an interesting case for another purpose, and that gets to the next matter I

would like to address, and that is the question of the jurisdiction of state courts to handle Section 1983 claims.

In fact, there is no question about concurrent jurisdiction. In other words, the Court does not have to reach that because the Michigan Supreme Court quite clearly indicated that Michigan courts have jurisdiction over those cases, and moreover that Michigan's sovereign immunity is no bar to any of those actions.

And consequently the sole reason why the Michigan Supreme Court decided the case, as it did, was because it believed that the state was not a person, i.e. there was not a cause of action against the state.

I might not have been exactly clear in responding to Justice Scalia's question about the nature of the 11th Amendment bar. I would like to indicate that in the antitrust area, for example, the distinction is also made between the cause of action and the defense of the 11th Amendment.

And as a matter of fact even though, under the antitrust laws, the state is a person who may be sued under the antitrust laws, the 11th Amendment bars damages relief. And consequently it did not affect the Court's decision that states were persons.

They were nonetheless persons --

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Burnham. Your time has expired. The case is submitted.

(Whereupon, at 1:47 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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

NO. 87-1207 - RAY WILL, Petitioner V. MICHIGAN DEPARTMENT OF STATE POLICE, ET AL.

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BY alan friedman

(REPORTER)