

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

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

**CAPTION:** NEWMAN-GREEN, INC., Petitioner V. ALEJANDRO  
ALFONZO-LARRAIN, ET AL.  
**CASE NO:** 88-774  
**PLACE:** WASHINGTON, D.C.  
**DATE:** April 24, 1989  
**PAGES:** 1 thru 26



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

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
PHIL CALDWELL NEAL, ESQ. On behalf of the Petitioner	3
FRANK K. HEAP, ESQ. On behalf of the Respondents	14
<u>REBUTIAL ARGUMENT OF</u>	
PHIL CALDWELL NEAL, ESQ.	24

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

P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 88-774, Newman-Green, Inc., versus Alejandro Alfonzo-Larrain.

Mr. Neal.

ORAL ARGUMENT OF PHIL CALDWELL NEAL  
ON BEHALF OF THE PETITIONER

MR. NEAL: Mr. Chief Justice, and may I please the Court:

The narrow issue presented by this case is whether a court of appeals may permit amendment of the complaint to drop a nondiverse defendant and thereby perfect diversity jurisdiction so that the court may go on to decide the merits of the appeal.

The court below held that it had no such power. The courts of appeals for the Second, Third, Fifth, Ninth and District of Columbia Circuits have held to the contrary and, in fact, no court since 1942, which was the Seventh Circuit again, has held that it did not have such power.

It is a narrow issue, but perhaps the broader significance of it is that it raises a question whether the powers of the courts of appeals, so far as possible, should be conducted in a way -- should be construed in a

1 way that permits the just, speedy and inexpensive  
2 termination of controversies as the Federal Rules of  
3 Civil Procedure admonish.

4           The case arises from a suit brought by the  
5 Plaintiff, Petitioner here, the Newman-Green Company, to  
6 enforce certain individual guarantee agreements of  
7 individuals in Venezuela which guaranteed royalty  
8 payments due from a Venezuelan corporation under a  
9 license agreement with the Plaintiff corporation.

10           The Plaintiff -- the complaint alleged that  
11 the five individual Defendants, that four of them were  
12 residents and citizens of Venezuela, and that the  
13 fifth-named Defendant, one Bettison, was a citizen of  
14 the United States, resident in Caracas, Venezuela, and  
15 the complaint alleged jurisdiction based on Section 1332  
16 of Title 28.

17           The -- no objection to the jurisdiction of the  
18 court, of the district court, was made by the Defendants  
19 at any time, although they did, oddly enough, move to  
20 quash service of process. That was overruled.

21           The case was litigated in the district court  
22 for about four-and-a-half years, and you can get some  
23 idea of the extensiveness of the -- of the litigation  
24 and how controverted it was by scanning the docket  
25 entries which are reproduced in the -- in the Joint

1 appendix.

2           At length after four-and-a-half years, during  
3 which time the district court had rendered several  
4 opinions, the district court rendered summary judgment  
5 which disposed of all of the claims against the five  
6 individual Defendants.

7           The Venezuelan Corporation itself had  
8 intervened in the meantime and had certain counterclaims  
9 pending. The district court gave judgment in part for  
10 the Plaintiff, and that judgment was eventually  
11 satisfied. No appeal was taken from it, but in  
12 important aspects gave judgment, summary judgment for  
13 the Defendants and entered a Rule 54(b) certification,  
14 upon which appeal was taken to the Seventh Circuit.

15           When counsel for the Appellant rose to make  
16 his argument, a Judge of the Seventh Circuit said, "Do  
17 we have jurisdiction of the case?" And it was then and  
18 only at that time that anyone realized that in fact,  
19 under Section 1332, there was no diversity jurisdiction.

20           QUESTION: Which judge was that, Mr. Neal?

21           MR. NEAL: That was Judge Easterbrook, Justice  
22 Radmun -- Blackmun.

23           QUESTION: I'm not surprised.

24           [Laughter]

25           QUESTION: Who wrote the dissent?

1 MR. NEAL: Judge Easterbrook wrote the  
2 dissent, yes. Judge Easterbrook raised the issue and  
3 then suggested to counsel that the problem could be  
4 solved if the Plaintiffs cared to file a motion to  
5 dismiss Bettison, the nondiverse Defendant.

6 The argument continued. The case was taken  
7 under submission. The Plaintiff did indeed file such a  
8 motion. The Defendants, the Appellees, filed a motion  
9 to dismiss the case rather than to dismiss the  
10 Defendant, and when the opinion came out, Judge  
11 Easterbrook dealt first with the jurisdictional point  
12 and then said we grant the motion to dismiss the  
13 nondiverse Defendant and proceeded to decide the merits.

14 A motion for rehearing and rehearing en banc  
15 was filed. Seventh Circuit granted rehearing en banc,  
16 and the result of the en banc hearing was that the  
17 majority of the court, in an opinion by Judge Posner,  
18 held that Judge Easterbrook's opinion was erroneous,  
19 vacated the — vacated the decision of the panel, and  
20 held that the court of appeals had no power to amend, to  
21 permit the dismissal of a nondiverse Defendant, that  
22 that could be done only in the district court and  
23 remanded the case to the district court for further  
24 proceedings to consider whether such a motion should be  
25 granted.

1           And Indeed, It perhaps bears noting, that the  
2 opinion of Judge Posner suggested that the district  
3 court might choose to exercise its discretion by saying  
4 six years is long enough, and out you go, rather than  
5 merely addressing whether they -- whether the other side  
6 had been somehow prejudiced by the inclusion of Bettison  
7 as a Defendant during that period.

8           QUESTION: I take it you don't argue that the  
9 circuit didn't have the power to do that if it had  
10 chosen to do it.

11          MR. NEAL: To remand?

12          QUESTION: Yes.

13          MR. NEAL: No, -- no Your Honor. We only  
14 argue that the court had power which -- which it  
15 disclaimed to do the opposite and to decide the case  
16 then and there by permitting the dismissal.

17          QUESTION: But really a remand of the district  
18 court could have been a limited remand for the  
19 requesting the court to act within 14 or 21 days, could  
20 it not?

21          MR. NEAL: And -- and indeed, according to a  
22 fairly substantial body of authority, it could have been  
23 a remand that directed the district court to permit a  
24 dismissal of the nondiverse Defendant on the ground that  
25 any contrary action would be an abuse of the district



1 court's discretion.

2 The result of the court of appeals' decision,  
3 of course, is that the case would, at a minimum, have to  
4 go back to the district, where at best, perhaps, the  
5 District Judge would do what Judge Easterbrook had said  
6 ought to be done, permit the dismissal of the nondiverse  
7 Defendant, and then reconsider and perhaps enter again  
8 the same judgment on the same grounds that the district  
9 court had done before, and then a new appeal would be  
10 started and a year later --

11 QUESTION: Well, it wouldn't necessarily be a  
12 new appeal. The circuit court could retain jurisdiction  
13 after -- and remand for the limited purposes of  
14 determining this motion within 21 days, and the  
15 argument's been made before the panel, and the case is  
16 then correctly before it.

17 MR. NEAL: Perhaps -- perhaps it could.  
18 Needless to say, the -- the majority of the Seventh  
19 Circuit didn't consider any such thing and indeed, one  
20 of the necessary consequences, which the majority of the  
21 court saw, was that the decision on the merits had to be  
22 -- had to be vacated, and -- and -- and the whole case  
23 really had to go back for an exercise of judgment which  
24 the court of appeals saw it could not -- it could not  
25 make.

1 QUESTION: And you think that -- I take it  
2 from your brief, you think that both Judge Easterbrook  
3 and Judge Posner were -- were not on the right track,  
4 neither one of them?

5 MR. NEAL: Oh, no, Your Honor. We -- we  
6 certainly think that Judge Easterbrook's panel did --

7 QUESTION: But I thought you present a  
8 different rationale for it.

9 MR. NEAL: Well, we presented -- yes, we  
10 presented supporting rationale, I think, and maybe if I  
11 -- if I go -- if I go directly -- directly to that,  
12 there is an -- there is an issue in the case raised by  
13 -- by Judge Posner's opinion and relied on very heavily  
14 by -- by the respondents here that the whole business is  
15 of permitting the dismissal of a nondiverse defendant is  
16 offensive to fundamental issues -- principles of federal  
17 jurisdiction.

18 The other issue, which we think is the only  
19 real issue, and I will come back to that one, was  
20 whether there is any authority for the court of appeals  
21 to permit amendment of the -- of the complaint, and  
22 there is a specific statute, Section 1653 of Title 28,  
23 which says defective allegations of jurisdiction may be  
24 amended in either the trial or the appellate court. And  
25 -- and the majority of the court below held that that

1 didn't reach this case.

2 Judge Easterbrook disagreed on that. What we  
3 -- and Judge Posner's opinion said there isn't any other  
4 source of authority. Courts of appeals don't permit  
5 amendments.

6 I suppose what -- what we have contributed, if  
7 anything, to the solution of this problem is that if you  
8 go back to Section 32 of the Judiciary Act of 1789, it  
9 expressly confers authority on the courts of appeals, as  
10 well as the district courts, to permit -- to permit  
11 amendment, and -- and that -- that statute has been  
12 relied on more than once by this court to permit --

13 QUESTION: Amendments of the sort that you  
14 would have had to make, Mr. Neal? Judge Posner took the  
15 position when, I guess, the defective allegations of  
16 jurisdiction were -- where the allegations didn't  
17 conform to fact and -- does the Section 32 authorizer  
18 broader amendments than that?

19 MR. NEAL: It's -- it's very general and --  
20 it's very general in -- in its language, Mr. Chief  
21 Justice. It's -- it's -- it's not directed expressly to  
22 amendments to preserve or correct jurisdictional  
23 defect. It's -- it's -- it's a general provision  
24 permitting the appellate courts to -- to permit  
25 amendments, and Justice Story way back in -- in 1812

1 wrote an opinion that circuit reported in -- in 1  
2 Gallison's Report called Anonymous decision, in which he  
3 said there's nothing at common law to prevent courts of  
4 appeal as well as trial courts from permitting  
5 amendments of the -- of the pleadings.

6 QUESTION: The only appellate court in  
7 existence, I guess, at the time of the judiciary of 1789  
8 or about to become in existence would be our Court.

9 MR. NEAL: Well, that is correct, except that  
10 in some -- in some aspects the old circuit courts had an  
11 appellate jurisdiction from --

12 QUESTION: You could appeal from the district  
13 court to the circuit courts?

14 MR. NEAL: Yes. But I -- but I -- and I --  
15 and -- and -- and Justice Story's opinion was rendered  
16 on circuit -- I mean, in a circuit court as a Circuit  
17 Justice, so -- so, there it is. There is -- there's  
18 authority from the very beginning to do -- to do exactly  
19 what the court below, the majority of the court below  
20 said there wasn't any --

21 QUESTION: And where is Section 32 to be found  
22 in the present?

23 MR. NEAL: It's not, Your Honor. It -- it --  
24 It continued as Section 954 of the revised statutes. It  
25 was relied on as late as 1925, I think, in an opinion of

1 Mr. Justice Sutherland permitting in this Court the  
2 amendment of pleadings to show the raising of a federal  
3 question. But it evaporated with the revision of the  
4 judicial code in -- in 1948, and --

5 QUESTION: Doesn't -- doesn't part of it  
6 survive in 28 U.S.C. 777?

7 MR. NEAL: Well, 777 was -- was omitted from  
8 -- from the judicial code of 1948, and the revisors said  
9 that -- that these provisions had been picked up in the  
10 Federal Rules. Now --

11 QUESTION: Mr. Neal, 777 -- and that was sort  
12 of your argument that -- that the old Section 32  
13 survives until it's finally picked up somehow in Rule  
14 15, but by the time it gets picked up in Rule 15 with  
15 the 48 revision, it -- it no longer is the broad  
16 jurisdictional provision that you -- that you referred  
17 to. It has -- when it -- when it becomes revised  
18 statute Section 954 -- and I don't know when that came  
19 about, but certainly later when it's Section 777, it  
20 reads, "No summons, writ, declaration, return, process,  
21 judgment, or other proceedings shall be abated,  
22 arrested, quashed or reversed for any defect or want of  
23 form. It -- it becomes -- and it goes on to say "Such  
24 court shall proceed and give judgment," blah, blah,  
25 blah. "Such court shall amend every such defect and

1 want of form other than those which the party demurring  
2 so expresses and may at any time permit either of the  
3 parties to amend any defect in the process or pleadings  
4 upon such conditions as it shall in its discretion by  
5 its rules prescribed." Doesn't all that --

6 MR. NEAL: That is a part of --

7 QUESTION: -- Just go to defects of form by --  
8 by then? Don't you think the last clause of that, of  
9 777, fairly read only applies to defects of form?

10 In other words, I don't read 777 as being  
11 really the same as 32.

12 MR. NEAL: Well, I think there were changes.  
13 I think there were changes in language, Your Honor, and  
14 I will not be -- I will not be categorical about it.  
15 But, as I say, Section 954 was relied on as late as --  
16 as 1925 as permitting this kind of amendment there  
17 having to do with federal question jurisdiction rather  
18 than diversity jurisdiction, and 954, I think, became  
19 777 in the codification of 1926 immediately thereafter.  
20 And I'm -- and I'm not aware of anything that suggests  
21 that there was a purpose at that point to -- to -- to  
22 narrow the -- the power.

23 In any event, I do not -- It seems to me that  
24 the significance of this background is simply that there  
25 was recognized from the very beginning a power -- power

1 to permit amending the complaint, even on appeal, in  
2 order to avoid unnecessary further proceedings at the  
3 district court level. This court relied on -- on that  
4 in -- in a number of decisions along the way: Kennedy  
5 against the Bank of Georgia in 1850.

6 And even without reliance on that statute, I  
7 believe that Justice Marshall -- Chief Justice  
8 Marshall's decision in *Carneal v. Banks* back in 1825 is  
9 an express -- an explicit authorization. It doesn't  
10 talk about -- about trial or appellate courts. It's  
11 pretty clear if that opinion is read carefully, which I  
12 don't think anybody else involved in this case has  
13 really done, that that opinion is exactly what Judge  
14 Easterbrook did in the -- in the court below.

15 I think I'd like to reserve the remainder of  
16 my time for rebuttal, if I may.

17 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Neal.  
18 Mr. Heap.

19 ORAL ARGUMENT OF FRANK K. HEAP  
20 ON BEHALF OF THE RESPONDENTS

21 MR. HEAP: Mr. Chief Judge, and may it please  
22 the Court:

23 There is a serious of inescapable facts in  
24 this case, and those facts very simply are that at the  
25 time this complaint was filed, there was no federal

1 subject matter jurisdiction.

2 At the time the case was tried in the district  
3 court, there was no federal subject matter jurisdiction.

4 At the time the panel heard the case, there  
5 was no subject matter jurisdiction.

6 At the time the full en banc court heard the  
7 case, there was no federal jurisdiction, and there is no  
8 federal jurisdiction as I stand here today.

9 Mr. Bettison is an offending party. The  
10 question is what does one do about it.

11 There was great discussion by both the  
12 dissenting opinion and the en banc opinion on the  
13 applications of Rules 15 and Rules 21. There was no  
14 discussion of Rule 1. Rule 1 very clearly says, "These  
15 rules govern the procedure in the United States district  
16 courts," -- does not govern the procedures in the  
17 circuit court. Whether the circuit court wishes to  
18 adopt those rules, it may, but it hasn't in the Seventh.

19 More importantly, all of the opinions have  
20 ignored Rule 12(h)(3), and that rule very clearly says  
21 whenever it appears by suggestion of the parties or  
22 otherwise that the court lacks jurisdiction of the  
23 subject matter, the court shall dismiss the action.

24 QUESTION: Mr. Heap, supposing that it had  
25 come to the court of appeals' attention that this fifth



1 Defendant was, in fact, diverse, so that you're not  
2 talking about an -- an amendment to change facts or --  
3 or a dismissal of a defendant who couldn't be sustained  
4 with complete diversity, but just an -- an erroneous  
5 factual allegation. Could the court of appeals have  
6 done nothing about that?

7 MR. HEAP: I believe that Rules 15 -- 1653  
8 very clearly covers that situation, and that may be done  
9 in either the trial court or the appellate court if it  
10 is a defective matter of pleading; i.e., in your  
11 particular case, Chief Judge -- Justice, the case where  
12 you had mispleaded, where you had diversity.

13 The problem with 1653, however, is that you  
14 cannot drop people in order to create that  
15 jurisdiction. There's a long list and long series of  
16 cases on that very subject.

17 QUESTION: Do you think the district court has  
18 the power to dismiss a nondiverse --

19 MR. HEAP: I do not, Your Honor. I -- I  
20 believe this matter should -- should have been direct  
21 back to the district court for a ruling under rule 12.

22 QUESTION: Well, do you -- do you think the --  
23 do you think -- you don't think Judge Posner was right  
24 that the district court could have done this?

25 MR. HEAP: Judge Posner's opinion is -- is

1 very brief. It covers the first two paragraphs. From  
2 that point on, Judge Posner seems to get into a long  
3 dissertation --

4 QUESTION: Well, I thought -- I thought most  
5 of the -- I thought the two opinions said all that could  
6 possibly be said about the case, but --

7 MR. HEAP: I would agree, Your Honor.

8 QUESTION: -- but Mr. Neal has certainly  
9 introduced a new element.

10 MR. HEAP: Well, I don't think that there has  
11 been one case, in deference to Mr. Neal's position, that  
12 has taken the position that federal subject matter  
13 jurisdiction can be created in a manner that it was  
14 attempted.

15 QUESTION: So that all the district court  
16 could do was just dismiss the case?

17 MR. HEAP: That is our position, Your Honor.

18 QUESTION: Mr. Heap --

19 QUESTION: Suppose both parties had stipulated  
20 that the non -- that the nondiverse party could be  
21 dismissed.

22 MR. HEAP: I don't believe that parties have  
23 the right to stipulate to federal jurisdiction, Your  
24 Honor.

25 QUESTION: Mr. Heap, is there is a difference

1 between dropping parties to create federal jurisdiction  
2 and adding parties? Take the Mullaney case, Justice  
3 Frankfurter's opinion. How do you distinguish between  
4 the two?

5 MR. HEAP: In the Mullaney case, Your --  
6 Justice, the -- the federal court had jurisdiction. It  
7 was a federal question that was involved. It had  
8 federal jurisdiction.

9 The problem involved the -- whether or not the  
10 principal of an undisclosed -- or of a disclosed or the  
11 issue --

12 QUESTION: Well, it didn't have jurisdiction  
13 if none of the plaintiffs had standing.

14 MR. HEAP: The plaintiff ultimately --  
15 actually, by the time the case was decided had standing  
16 under the federal --

17 QUESTION: Well, because they'd added two  
18 parties who clearly had standing.

19 MR. HEAP: That is correct. But the  
20 controversy that existed between the parties was between  
21 diverse citizens. It was -- it was a suit that was  
22 originally styled in the name of the case.

23 QUESTION: Well, would you say that if it were  
24 clear that there had been no jurisdiction before the  
25 additional parties were added, that the court could not

1 have allowed that to take place?

2 MR. HEAP: That would be our position, yes.

3 QUESTION: I see.

4 Well, under the en banc opinion, you're going  
5 to be in the district court. It's remanded for further  
6 proceedings in this case.

7 MR. HEAP: That is correct, Your Honor.

8 QUESTION: And you say it shouldn't have been  
9 remanded for that purpose at all. It should have been  
10 dismissed.

11 MR. HEAP: No, no. My -- my argument was that  
12 it should be remanded to the district court with  
13 directions that a ruling under Rule 12 be entered.  
14 There was no federal jurisdiction, and the case should  
15 have been dismissed.

16 QUESTION: So, you say it should have been  
17 dismissed.

18 MR. HEAP: That is correct, by the district  
19 court.

20 QUESTION: Yeah. Well -- but the en banc  
21 opinion would permit the district court to consider  
22 whether just to drop the nondiverse party.

23 MR. HEAP: I think if you read Judge --

24 QUESTION: I'm not sure you're entitled to  
25 argue --

1 MR. HEAP: Your Honor --

2 QUESTION: -- dismissal theory here without a  
3 cross-appeal.

4 MR. HEAP: Well, I think -- I think, Your  
5 Honor, that very recent cases including the Tahoe --  
6 Lake Tahoe case very clearly indicate that subject  
7 matter jurisdiction can be raised without a cross-appeal.

8 The fact of the matter is Judge Posner, if you  
9 read his opinion, was constrained because of a rather  
10 lengthy series of discussions, as Mr. Neal has pointed  
11 out, and a conflict between the various circuit courts  
12 from taking an action other than follow either Rule 21  
13 or Rule 15.

14 I think the time and the reason this case has  
15 importance, I believe, today is that this court ought to  
16 give direction to the circuit courts as to what you do  
17 when you clearly have no federal subject matter  
18 jurisdiction.

19 This is an extension --

20 QUESTION: Well, it's not an Article III  
21 Jurisdictional problem, in any event, is it, do you  
22 think?

23 MR. HEAP: I believe so. There's no basis  
24 other than diversity. Diversity is the only basis upon  
25 which this case is brought. This is -- is basically a

1 state Jurisdiction.

2 QUESTION: Why shouldn't a party plaintiff  
3 have some control over the plaintiff's own case after  
4 it's filed, to the extent of being able to seek  
5 dismissal in these circumstances?

6 MR. HEAP: The Plaintiff chose to bring and  
7 style his suit in the federal district court and alleged  
8 Jurisdiction which didn't exist.

9 QUESTION: I don't see why the plaintiff's  
10 control should automatically terminate with the filing  
11 of a complaint.

12 MR. HEAP: I don't think we're arguing their  
13 control should -- should terminate. If, in fact, there  
14 is federal subject matter Jurisdiction, the case  
15 proceeds. If there is not, I think the case must be  
16 dismissed.

17 QUESTION: What about Rule 15(c), the  
18 relation-back rule? Do the cases hold that the  
19 relation-back rule, the cases in the circuit courts hold  
20 that the relation-back rule doesn't apply if there's a  
21 Jurisdictional defect?

22 MR. HEAP: There are cases that have applied,  
23 and particularly on the West Coast, have applied Rule 15  
24 to allow this relation back. There are an equal number  
25 of cases in the circuit that the test of federal

1 Jurisdiction is determined at the time the case is filed  
2 and subsequent events don't change that fact.

3 It's a very difficult situation. It has never  
4 reached this Court before. The Court has come very  
5 close in a couple of cases to address this question, but  
6 it's -- my research has revealed this is the first time  
7 the issue has been directly before this Court.

8 QUESTION: To come back to Justice O'Connor's  
9 question, it's not really an Article III problem unless  
10 you think that Article III requires complete diversity.  
11 We've never held that, have we?

12 MR. HEAP: I think --

13 QUESTION: I mean, Congress might provide,  
14 might it not, as far as our opinions show that even if  
15 there was not complete diversity, so long as you had  
16 some diverse parties in the suit, the suit could proceed  
17 in federal court? And if that's true, then what was  
18 involved here was simply a failure to comply with the  
19 statute and not with Article III.

20 And Congress could, by statute provide that,  
21 well, complete diversity is the ordinary rule, but we  
22 will allow a suit that had incomplete diversity to be  
23 valid from the beginning so long as it is later amended  
24 to create complete diversity. That would comply with  
25 Article III, wouldn't it?

1 MR. HEAP: I don't believe so.

2 QUESTION: You think complete diversity is  
3 required by Article III?

4 MR. HEAP: I think that the federal court is a  
5 court of very limited Jurisdiction. That Jurisdiction  
6 is set forth from the sovereign -- It happens to be the  
7 people of the United States, as embodied in the  
8 Constitution, and I don't believe the Congress has the  
9 authority to expand that. It requires diversity of  
10 citizenship. Diversity is what's required.

11 QUESTION: Well, I think there is diversity  
12 when some people on both sides of the suit are from  
13 different states. Why isn't that diversity?

14 MR. HEAP: It requires diversity in suits by  
15 citizens of one state against residents or citizens of  
16 another. Mr. Bettison is a stateless citizen. You  
17 cannot obtain diversity citizenship over Mr. Bettison  
18 pursuant to the United States Constitution. It is not --

19 QUESTION: I'm glad you think it is so clear.  
20 I --

21 MR. HEAP: I am trying to find a simple  
22 solution to what has now been 30 years of confusion in  
23 the circuit courts.

24 If there are no further questions -- thank  
25 you, Your --



1 QUESTION: Thank you, Mr. Heap.

2 Mr. Neal, do you have rebuttal?

3 REBUTTAL ARGUMENT OF PHIL CALDWELL NEAL

4 MR. NEAL: I think I would only -- only like  
5 to comment on what seems to me to be a misconception,  
6 not only in Mr. Heap's argument, but also in Judge  
7 Posner's opinion. And that is that what is involved in  
8 this case involves somehow changing the facts as they  
9 existed when the complaint was filed.

10 We have -- we do not -- we do not question the  
11 general position that jurisdiction in a federal court is  
12 determined by the facts as of the date the case was  
13 filed. No facts are being changed here. It's not as  
14 though you were trying to show that Mr. Bettison had  
15 become a citizen of a state, even though he was not at  
16 the time the action was filed.

17 All that's being changed here is a -- is a  
18 pleading. It is dropping an allegation which defeats  
19 federal jurisdiction, and Section 1653, on its face, is  
20 designed to permit the changing of pleadings, not the  
21 changing of facts. This is not the changing of facts.

22 I think the other thing that I would -- and,  
23 of course, to -- to call that into question is to call  
24 into question the massive body of precedent that goes  
25 all the way back to 1825 and has been continuous. We've

1 set forth on -- on I think two or three pages of our  
2 reply brief the cases, and they're only part of the  
3 cases.

4 And even though Judge Posner in his opinion,  
5 toward the end of it, seemed to express some discomfort  
6 with that thought, the cases are there, and I submit  
7 that you really can't reconcile those cases with what's  
8 really the fundamental premise of Judge Posner's opinion.

9 QUESTION: Mr. Neal, there's one thing about  
10 this case that puzzles me that I notice Professor  
11 Easterbrook and Professor Posner and yourself and your  
12 opponent, Judge Shader, all have a connection with the  
13 University of Chicago Law School. I just wonder why  
14 that faculty can't straighten the matter out like this a  
15 little more consistently.

16 [Laughter]

17 MR. NEAL: I've been baffled by the same  
18 thing, Your Honor.

19 [Laughter]

20 MR. NEAL: And it's really what makes me think  
21 that the kind of admonitory purpose of Judge Posner's  
22 opinion, which seems to me to be a kind of dunce cap  
23 theory of jurisprudence. Go back to the district court,  
24 and that's wearing the dunce cap, and everybody will see  
25 and be wiser from there on. If they were not successful

1 In imparting this wisdom when it was part of their  
2 function to do so, I'm a little skeptical that this  
3 opinion will have all that -- all that effect.

4 And I suppose the only thing I -- I should  
5 throw in here in view of the string of University of  
6 Chicago people you've mentioned who were associated with  
7 this is -- the only explanation I was able to get why my  
8 younger and brighter colleagues who were participants in  
9 this error was one of them said yes, he took federal  
10 jurisdiction at the University of Chicago, but it was  
11 taught that year by a visiting professor from Harvard,  
12 and they didn't deal with diversity jurisdiction.

13 If there are no other questions, I will --

14 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Neal.

15 The case is submitted.

16 (Thereupon, at 11:33 o'clock a.m., the case in  
17 the above-entitled matter was submitted.)  
18  
19  
20  
21  
22  
23  
24  
25

CERTIFICATION

Anderson 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. 88-774 - NEWMAN-GREEN, INC., Petitioner V. ALEJANDRO ALFONZO-LARRAIN,

---

ET AL.

---

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

BY Judy Freilicher .

(REPORTER)

RECEIVED  
SUPREME COURT, U.S.  
MANDALAY OFFICE

'89 MAY -1 P2:38