

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

**THE SUPREME COURT**

**OF THE**

**UNITED STATES**

CAPTION: REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET  
AL., Petitioners v. JOHN DOE, ETC.

CASE NO: 95-1694

PLACE: Washington, D.C.

DATE: Monday, December 2, 1996

PAGES: 1-47

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IN THE SUPREME COURT OF THE UNITED STATES

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REGENTS OF THE UNIVERSITY OF :  
CALIFORNIA, ET AL., :  
Petitioners :  
v. : No. 95-1694  
JOHN DOE, ETC. :  
- - - - -X

Washington, D.C.  
Monday, December 2, 1996

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
11:05 a.m.

APPEARANCES:

CHARLES A. MILLER, ESQ., Washington, D.C.; on behalf of  
the Petitioners.

LISA S. BLATT, ESQ., Assistant to the Solicitor  
General, Department of Justice, Washington, D.C.; on  
behalf of the United States, as amicus curiae,  
supporting the Petitioners.

RICHARD GAYER, ESQ., San Francisco, California; on behalf  
of the Respondents.

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1 PROCEEDINGS

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 95-1694 -- the spectators are admonished  
5 not to talk until you get out of the courtroom. The Court  
6 remains in session.

7 We'll hear argument next in Number 95-1694,  
8 Regents of the University of California v. John Doe.

9 Mr. Miller, you may proceed.

10 ORAL ARGUMENT OF CHARLES A. MILLER

11 ON BEHALF OF THE PETITIONERS

12 MR. MILLER: Thank you, Mr. Chief Justice, and  
13 may it please the Court:

14 The issue presented for review in this case is  
15 whether the Eleventh Amendment immunity is lost if the  
16 State or a State entity has a claim for indemnification or  
17 reimbursement for any judgment entered against it. Here,  
18 the potential indemnitor is the United States Department  
19 of Energy.

20 The issue arises in the context of a breach of  
21 contract action brought in Federal court on diversity  
22 grounds where the plaintiff is a citizen of New York and,  
23 thus, the issue does not implicate the question of the  
24 scope of the Eleventh Amendment that the Court has focused  
25 on in a number of cases, most recently in the Seminole

1 Tribe case of last year, for even under the most narrow  
2 view of the scope of the amendment the question presented  
3 in this case would need to be addressed.

4 The Ninth Circuit court held that the university  
5 lost its immunity in this case because in this particular  
6 case it had a claim for indemnification against the United  
7 States Department of Energy.

8 The core error of the court below was its  
9 premise that in each case involving a State entity the  
10 court can consider, and parties can litigate, the question  
11 of the payment source that would be used to satisfy a  
12 judgment that might be entered in that particular case.  
13 Nothing in the Court's Eleventh Amendment cases supports  
14 that view, and we believe it is inconsistent with the  
15 terms, the meaning, and the purpose of the Eleventh  
16 Amendment.

17 The core purpose of the Eleventh Amendment is to  
18 withhold jurisdiction from Federal courts and to withhold  
19 the exercise of Federal judicial power against a State in  
20 respect of that State's sovereignty. Under the Ninth  
21 Circuit approach, Federal judicial power is potentially  
22 exercised against the State or its entity in virtually  
23 every case, or any case in which the plaintiff alleges  
24 that there is some payment source for the judgment that  
25 might be entered in the case that would satisfy the

1 judgment and that would avoid payment of that judgment  
2 directly from the State treasury.

3 QUESTION: Mr. Miller, I want to make sure I  
4 understand one thing. I take it that it's your position  
5 that this reference to a source of indemnity is simply  
6 irrelevant as a matter of law, that there is no  
7 circumstance in which that should be taken into  
8 consideration in order to determine the Eleventh Amendment  
9 status of some supposed arm of the Government.

10 MR. MILLER: Yes, Your Honor, with this one  
11 qualification. We acknowledge that at some point any  
12 entity, not the State itself, may have to be subject to a  
13 determination as to whether it is a State entity --

14 QUESTION: Right.

15 MR. MILLER: -- for Eleventh Amendment  
16 purposes, and it would be looked at with its overall  
17 character.

18 If in some case there were an agency of the  
19 State which was entirely supported by indemnification from  
20 an outside source like the Federal Government, in that  
21 hypothetical situation conceivably the factor of  
22 indemnification would be relevant.

23 QUESTION: Well, are you assuming in the  
24 hypothetical that you raise, are you assuming in that case  
25 that the State treasury or "State funds" could never be

1 reached, and that the only funds that could be reached  
2 would be those of the third party nongovernmental  
3 indemnitor?

4 MR. MILLER: In fact, Your Honor, yes, and  
5 beyond that, that the entity was established on the  
6 premise --

7 QUESTION: Okay.

8 MR. MILLER: -- that its -- the State funds  
9 would never be reached.

10 QUESTION: So that -- in other words, that  
11 doesn't really qualify, I take it, your answer, because  
12 your answer is, on the assumption that State funds are  
13 reachable at least in theory, the existence of a third  
14 party indemnitor is irrelevant as a matter of law to the  
15 Eleventh Amendment determination.

16 MR. MILLER: Yes, Your Honor.

17 QUESTION: Okay.

18 MR. MILLER: That's the position. Whether it's  
19 an indemnification, insurance claim, a possible claim over  
20 or against a third party, a possible joint tortfeasor,  
21 anything of the sort. None of those possibilities we say  
22 should be relevant, and yet the Ninth Circuit court  
23 decision would seem to make any one of those possibilities  
24 relevant to a determination in a particular case as to  
25 whether a State entity would be entitled to Eleventh

1 Amendment immunity.

2 QUESTION: There was discussion in the Hess case  
3 of the potential for judgments to reach or not reach the  
4 State treasury. We seemed to think that was important in  
5 the Hess case. Why is that not important here?

6 MR. MILLER: Two reasons, Your Honor. First, in  
7 the Hess case the inquiry that the Court made was whether  
8 that bi-State entity there, the path, had been established  
9 by the two States involved, New York and New Jersey, with  
10 an intention that those States be responsible for its  
11 various debts, and in that case the Court looked at that  
12 overall structure and concluded that the States did not  
13 intend their treasuries to be responsible.

14 QUESTION: So you're saying that the discussion  
15 there simply was a way for us to inquire or measure the  
16 connection between the bi-State entity and the State?

17 MR. MILLER: Yes, Your Honor. In fact, that was  
18 the standard that the Court announced when it made that --  
19 when it took those factors into account. The Court  
20 asked --

21 QUESTION: Mr. Miller, was an antecedent to  
22 getting to that in the Hess case that we were dealing with  
23 an entity that had not simply two States as creators, but  
24 the Federal Government as well, and then said, there is a  
25 presumption that such an entity founded by three

1       sovereigns does not wear the mantle of a State, and maybe  
2       that presumption is undone if the States are legally  
3       obligated to pick up the tab for it, but --

4               MR. MILLER: That is absolutely right, Your  
5       Honor. That was going to be my second point, that the  
6       Court in the Hess case adopted a standard which started  
7       with a presumption against cloaking that particular entity  
8       with Eleventh Amendment immunity and required a  
9       demonstration that not only the States involved intended  
10      for the agency to have their sovereign power, but that the  
11      Congress agreed with it.

12              That's not the standard that would apply in  
13      judging whether an arm of the State is entitled to  
14      Eleventh Amendment immunity, but even under that approach  
15      there have been situations where a bi-State entity has  
16      been found to have Eleventh Amendment immunity.

17              I think of the case in the D.C. Circuit of the  
18      Washington Metropolitan Area Transit Authority, which  
19      Justice Ginsburg's opinion cited in the Hess case, I  
20      think, but that was again an application of a special  
21      standard for the bi-State entity situation.

22              QUESTION: But in any event, here there is no  
23      legal -- there's no release of the university from legal  
24      liability. As there was in the Hess case there was no  
25      legal liability.

1 MR. MILLER: That's unquestionably true, Your  
2 Honor, and were a judgment to be entered on this breach of  
3 contract case, claim against the university, the  
4 university would be legally liable, and all of the  
5 consequences that would flow from having had a court make  
6 a legal determination of a violation of someone's rights  
7 would apply in the case.

8 The university, to be sure, under the contract  
9 here would look to the Department of Energy to satisfy the  
10 monetary judgment awarded by the court, and it would hope,  
11 in the unlikely event that this occurs, that the  
12 Department would respond, but if it didn't, the university  
13 would be on the hook to pay the judgment.

14 QUESTION: In these cases involving  
15 universities, is it important for us to inquire whether,  
16 as a matter of State law, there is sovereign immunity that  
17 attaches to the institution, or is it not important,  
18 because sovereign immunity can always be waived?

19 MR. MILLER: I think it's an element, Your  
20 Honor, of the inquiry, the ultimate inquiry which this  
21 Court announced in the Mount Healthy case, and I think  
22 it's been repeated again in the Hess case and others, was  
23 what is the intention of the State in establishing the  
24 entity? Did the State intend this entity to exercise  
25 State sovereign powers? Whether that particular entity

1 has State sovereign immunity could be relevant to that  
2 inquiry.

3 In this particular case, there is a general State  
4 statute that explains just exactly how, and to what  
5 extent, the State waives its sovereign immunity for itself  
6 and its entities, and the Regents of the University of  
7 California are explicitly named as one of the entities  
8 covered by that provision.

9 QUESTION: Do those statutes, do you think,  
10 supersede the California supreme court's decision, the  
11 1899 decision where they -- in the Royer case where the  
12 California supreme court said that the university, while a  
13 governmental institution, is not clothed with the  
14 sovereignty of the State and it's not a sovereign?

15 Do we just ignore that sentence, or has it been  
16 superseded by statute, or --

17 MR. MILLER: I think that sentence has to be  
18 read for precisely what it said. The Court pursued it by  
19 saying the State is an instrument -- I mean, the Regents  
20 is an instrumentality of the State. It is not, however,  
21 the State itself, and I think that's what the State, what  
22 the supreme court was saying, and for that reason, it  
23 said, it can be subjected to legislative enactments. In  
24 that case, it was enactments relating to the probate --

25 QUESTION: Haven't we held in one of our

1 decisions that even though the State may -- State law may  
2 say it's -- an entity is suable in State court, that does  
3 not conclude the Eleventh Amendment inquiry in Federal  
4 court?

5 MR. MILLER: Yes, Your Honor. This Court has  
6 made clear that a waiver of Federal court Eleventh  
7 Amendment sovereign immunity must be explicit, and is not  
8 accomplished simply by a general waiver.

9 QUESTION: What about the converse proposition,  
10 not waiver, but could a State -- let's take a cement plant  
11 as an example -- go into the cement business and create  
12 the cement administration entity as an arm of the State  
13 and say it shall not be immune -- it shall be immune from  
14 all suit in Federal court and also in State court?

15 MR. MILLER: Yes, Your Honor. I mean, it could.  
16 It would have to make a decision that it wants the cement  
17 operation to be part of the State government, to be  
18 clothed with the rights and attributes of State  
19 sovereignty.

20 QUESTION: Is there any Federal limit on the  
21 extent to which a State can create subdivisions that will  
22 be entitled to Eleventh Amendment immunity?

23 MR. MILLER: I don't think there are any Federal  
24 limits, Your Honor, because the whole point here of the  
25 Eleventh Amendment is to respect State sovereignty and the

1 State's decision as to how to organize itself to carry out  
2 its governmental functions, and if the State decides  
3 hypothetically that the -- operating a cement plant is a  
4 sovereign function it wants to undertake, that decision  
5 should be respected.

6 QUESTION: Well, it is not respected in  
7 international law any more. There is an exception to  
8 international sovereign immunity with respect to  
9 commercial activities of Governments, and that may well be  
10 ex -- I mean, it isn't out of the question that that could  
11 be extended to the Eleventh Amendment as well, but that's  
12 not involved here anyway, is it? I mean, this is not a  
13 commercial --

14 MR. MILLER: It's not involved in this case but  
15 I'm happy to --

16 QUESTION: Yes.

17 MR. MILLER: -- comment on it, Justice Scalia.

18 I mean, this Court has looked at the commercial  
19 versus governmental distinction in a number of contexts  
20 and has tended to find it wanting in every case.

21 The most prominent one I'm thinking of is the  
22 Garcia case, where it rejected that basis for  
23 distinguishing between functions of governmental entities  
24 that would be beyond Federal regulation.

25 QUESTION: And of course, if you applied that

1 distinction here you'd be on the proprietary side of the  
2 distinction, wouldn't you?

3 MR. MILLER: I don't think so, Your Honor,  
4 because I think what you'd be looking at would be the  
5 university as a whole, and the whole point of this case is  
6 that you've got to look at the university as a whole and  
7 examine its overall character.

8 And the fact that it happens to have a  
9 particular operation that someone might say looks more  
10 commercial in nature, just as one might say providing  
11 parking lots for the faculty is a little more commercial  
12 in nature than a governmental -- one could break this down  
13 and in every case perhaps find some basis for arguing that  
14 there is an exception to the immunity, and under such an  
15 approach I think in the end there would be no immunity,  
16 because the university and every other State entity would  
17 have to defend itself in every case against the contention  
18 that in that particular case its functions are not  
19 protected by the immunity, and instead of having an  
20 immunity suit, which is what was intended by the Eleventh  
21 Amendment, what you'd have would be --

22 QUESTION: I don't understand that argument.  
23 There are clearly some things that the Government would do  
24 that are purely governmental -- I mean, carrying out  
25 Government policy in one way or another.

1           You're saying there is no -- you're just saying  
2 there is no valid distinction between the two kinds of  
3 function, and there's a lot of support for that, of  
4 course.

5           MR. MILLER: Yes, Your Honor, and I would say,  
6 Justice Stevens, that in the context that we're talking  
7 about here, which is how does the State organize itself to  
8 carry out functions, I don't think there's any evidence  
9 that States elect their form of organization or their  
10 activities based upon whether the Eleventh Amendment  
11 applies, and no one would make such a suggestion, so if a  
12 State, to take your hypothetical, decides --

13           QUESTION: I don't know why they wouldn't. If  
14 they go into the cement business, as Colorado did, why,  
15 they might take that into account. It seems to me  
16 perfectly legitimate.

17           MR. MILLER: I don't know of any evidence that  
18 any State in fact takes that kind of consideration into  
19 account. At least until that evidence was present it  
20 would seem to me not worth distorting the purposes of the  
21 Eleventh Amendment simply to protect against that somewhat  
22 unlikely scenario.

23           QUESTION: In any event, Mr. Miller, in this  
24 case you're saying that we have to deal with the  
25 University of California as an entity and not whatever

1 Livermore Laboratory might be if it were a discrete  
2 entity.

3 MR. MILLER: That's correct, Your Honor, and you  
4 may ask why is that the case, and my response would be  
5 because the minute you start breaking down the activity of  
6 an entity function by function, activity by activity, you  
7 are inviting in every case an opportunity for litigation  
8 in the Federal court as to whether or not that particular  
9 entity is entitled to immunity in that particular case.

10 And that series of events has as its ultimate  
11 consequence the evisceration of the immunity that the  
12 Eleventh Amendment was intended to present, and it makes  
13 no difference whether it's a Federal question case or a  
14 diversity case like this case, where the issue involved is  
15 one of State law, and it seems to us in that situation the  
16 cases of this Court are clear that the entity needs to be  
17 viewed as a whole.

18 If I may reserve the balance of my time, Mr.  
19 Chief Justice --

20 QUESTION: Very well, Mr. Miller.

21 Ms. Blatt, we'll hear from you.

22 ORAL ARGUMENT OF LISA S. BLATT

23 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

24 SUPPORTING THE PETITIONERS

25 MS. BLATT: Mr. Chief Justice, and may it please

1 the Court:

2 We believe that the court of appeals erred for  
3 two reasons. First, regardless of whether a State entity  
4 has a potential right of indemnity from a third party, the  
5 State's sovereign interests are implicated whenever the  
6 State has been sued. Second, the court of appeals  
7 approach creates an unworkable approach to resolving the  
8 immunity question.

9 As to our first point, this Court has repeatedly  
10 held that the Eleventh Amendment does not exist simply to  
11 protect a State against damages that must be paid out of  
12 the State's treasury. It also exists to protect the  
13 State's dignitary interest in not being sued by private  
14 parties without the State's consent, and it applies  
15 regardless of the relief sought.

16 Here, respondent seeks both damages and  
17 injunctive relief from the State. The fact that the  
18 Federal Government might be contractually obligated to pay  
19 the cost of any judgment in this case does not change the  
20 fact that the university has been sued and legally will be  
21 responsible for any judgment.

22 Secondly, this case illustrates the problems  
23 created by the court of appeals decision. The Department  
24 of Energy has not determined whether the cost of any  
25 judgment in this case would be indemnified under its

1 contract. The court of appeals opinion that the  
2 Department of Energy must pay those costs is merely  
3 advisory as to the Department, which is not a party to the  
4 case. A binding determination on the indemnity issue will  
5 be made by the Department of Energy's contracting officer  
6 after he or she reviews the relevant facts in the  
7 contract. Thus --

8 QUESTION: You say binding? Is that not -- that  
9 will be reviewable in court, certainly.

10 MS. BLATT: Yes. Under the contract there's an  
11 issue resolution process, and then it would be appealable  
12 to the Energy Board of Contract Appeals or the Court of  
13 Federal Claims, and then --

14 QUESTION: Ms. Blatt, you mentioned with respect  
15 to the Department of Energy's -- what it assumes, what  
16 liabilities it will assume, that that is now undergoing  
17 revision. What is the status of the revision that you  
18 described in your brief?

19 MS. BLATT: The final rule has not been issued  
20 yet, but the Department of Energy hopes to have it out in  
21 the near future. It's just in the form of a notice, and  
22 they're assembling responses to the public comments.

23 QUESTION: What would be the principal change  
24 from the indemnity as it now exists and as it will exist  
25 if this rulemaking is final?

1 MS. BLATT: There's a very significant change in  
2 the third party liability clause. It will now be -- the  
3 burden of proof will be on the contractor to persuade the  
4 contracting officer that damages were not caused by lack  
5 of prudent business judgment by the contractor's  
6 managerial personnel.

7 It's both a widening of the scope of the  
8 potential contractor's officers that can commit misconduct  
9 or, if you will, conduct that would result in unallowable  
10 costs, as well as it's a heightening of the standard.  
11 It's no longer wilful misconduct or lack of good faith.  
12 It's simply lack of prudent business judgment, and the  
13 Department and the University of California are currently  
14 negotiating their contract to begin in the fall of '97, so  
15 we'll know then what that clause looks like.

16 QUESTION: Thank you.

17 QUESTION: Ms. Blatt, does the United States  
18 have a position on the question of whether the University  
19 of -- the Regents of the University of California are an  
20 arm of the State?

21 MS. BLATT: No, other than to assume that they  
22 are, based on the way the question presented is worded,  
23 that if they're otherwise immune, then as a State entity  
24 the Department of Energy's contractual obligation to  
25 indemnify them doesn't change anything because it is the

1 university who is subject to the coercive enforcement  
2 powers of the court and in any event may turn around to  
3 the Department of Energy and the Department may not pay.

4 QUESTION: Ms. Blatt, that was the way the  
5 question presented was worded, but the Ninth Circuit  
6 decision was more diffuse, wasn't it? They said, this is  
7 one of -- they have five factor tests, and we're reviewing  
8 that determination, so how could we just pick out the neat  
9 question presented and say that's what's before us, when  
10 we're reviewing a Ninth Circuit decision that says there  
11 are these five factors, add them all up, and we come out  
12 with not an arm of the State?

13 MS. BLATT: I think it's a fair characterization  
14 of the Ninth Circuit's opinion that what distinguished the  
15 university in this situation was the court of appeals view  
16 of the Department of Energy's contractual obligations, and  
17 our position is not to dispute any of the factors the  
18 Ninth Circuit looked at except for what they relied on,  
19 this payment factor that an indemnity allegation is solely  
20 a matter between the university and the Department of  
21 Energy. It doesn't affect the fact that the university is  
22 the party against whom judgment is sought.

23 QUESTION: And you take the position also, I  
24 understand, that in making the determination of the  
25 university's status for Eleventh Amendment purposes that

1 the existence of an indemnification agreement as such is  
2 simply an irrelevant consideration.

3 MS. BLATT: That's correct, and you have here  
4 what certainly we did not dispute, was that the State of  
5 California is legally obligated to satisfy the  
6 university's debts based on both the Constitution and the  
7 fact it appropriates significant amounts of money to the  
8 university each year.

9 QUESTION: Given that fact, that's where you  
10 stop, on your view.

11 MS. BLATT: Yes. Given those facts, if there's  
12 a legal connection, a legal liability to the State entity  
13 in question the existence of an indemnity agreement with a  
14 third party does not alter that entity's status under the  
15 Eleventh Amendment, and that's again because the  
16 university is on the hook for the judgment and that third  
17 party may or not -- may or may not be forthcoming, and in  
18 any event, that doesn't change the relationship between  
19 the plaintiff, the university as a defendant, and the  
20 court, who can enforce the court's enforcement powers  
21 against the university.

22 And this case could -- illustrates what could  
23 happen is, the court of appeals opinion that the  
24 university will have the Department of Energy pay its  
25 judgment, the university might find itself compelled to

1 pay damages in this case, yet ultimately unable to shift  
2 those costs to the Department of Energy, and in our view  
3 that would be impermissible under the Eleventh Amendment,  
4 and again that's because judgment is sought against a  
5 State entity.

6 I don't have any more points to make, so if  
7 there are no questions --

8 QUESTION: I don't believe my colleagues do,  
9 either.

10 MS. BLATT: Okay.

11 (Laughter.)

12 QUESTION: Thank you, Ms. Blatt.

13 Mr. Gayer, we'll hear from you.

14 ORAL ARGUMENT OF RICHARD GAYER

15 ON BEHALF OF THE RESPONDENTS

16 MR. GAYER: Mr. Chief Justice -- excuse me --  
17 and may it please the Court:

18 This is a Federal case involving 100 percent  
19 Federal money at a Federal facility, the Lawrence  
20 Livermore National Laboratory, which executes a Federal  
21 program for an exclusively Federal interest: nuclear  
22 weapons research.

23 The Regents here, Regents' corporation is not  
24 managing a university. It's not even running its  
25 hospital. What it's doing is managing the Lawrence

1 Livermore National Laboratory as a public service to the  
2 Nation, for no loss or gain. That's on page 1 of the  
3 contract, which is not part of the joint appendix.

4 QUESTION: But I didn't think we had taken this  
5 case to go into whether, absent the indemnification  
6 provision, there is sovereign immunity or not.

7 You know, there are a million different  
8 entities, and each one of them have different  
9 considerations, and we normally don't take up each case to  
10 decide whether the court of appeals got it right that  
11 applying the normal factors this was the State or this  
12 wasn't the State.

13 I thought the only issue before us here was  
14 whether, assuming it is otherwise the State, the  
15 indemnification feature makes a change. That's a point of  
16 law I think we can grapple with that has, you know,  
17 permanent significance Nationwide.

18 MR. GAYER: Focusing on that narrow issue, which  
19 I personally believe that the broader issue is subsumed  
20 within the question presented --

21 QUESTION: Well, let's read --

22 MR. GAYER: Focusing on the --

23 QUESTION: Let's read the question presented.

24 What --

25 MR. GAYER: Well, I agree with Your Honor's

1 statement of the question presented so --

2 QUESTION: Well --

3 MR. GAYER: I'd like to focus on that. Here we  
4 have something where the university is really some sort of  
5 facade or name between the outside world and the Federal  
6 Government. The Federal Government has made a solemn,  
7 written promise to pay directly -- not to indemnify, not  
8 to reimburse, but to pay directly any judgment awarded  
9 against the name of the university.

10 QUESTION: Well, if the university is just a  
11 facade, Mr. Gayer, perhaps you should sue only the Federal  
12 Government, not the university.

13 MR. GAYER: The problem is we have no  
14 jurisdiction in the Federal District Court over the  
15 Department of Energy until -- ever, and we don't have any  
16 jurisdiction in the Federal District Court over the  
17 Department of Energy until and unless such time as the  
18 plaintiff in this case gets a judgment against the name of  
19 the university, so step one is to sue the university here  
20 in U.S. district court and get a judgment. At that point,  
21 we would have a claim against --

22 QUESTION: But the university says the court has  
23 no jurisdiction over it either, because of the Eleventh  
24 Amendment.

25 MR. GAYER: Obviously, we contend that the

1 university is wrong, because there can be no impact on the  
2 State treasury. That was the point of the --

3 QUESTION: Well, what if the university just had  
4 a big insurance policy to cover any liability. Same  
5 question?

6 MR. GAYER: Different answer. There, the  
7 university paid for the insurance, therefore that has an  
8 impact on the university's treasury, which happens to be  
9 separate and distinct from the State treasury, but that's  
10 a different situation.

11 QUESTION: They paid for the Government's  
12 indemnification promise as well. I mean, you don't think  
13 that promise is made for free.

14 MR. GAYER: Yes, it is.

15 QUESTION: The contract would -- you know, the  
16 university would have demanded a lot more money for the  
17 contract if that indemnification provision weren't in it,  
18 so the payment isn't the difference between the two.

19 MR. GAYER: Your Honor, I would respectfully  
20 disagree, because here the university is doing this as a  
21 public service. The contract says so. It's true they get  
22 a \$20 million annual fee for using the name of the  
23 university, but this is not a case where there's any  
24 connection between this nominal fee and any indemnity or  
25 judgmental risk.

1           QUESTION: Do you deny that they would have  
2 demanded much more reimbursement from the Federal  
3 Government if they did not have the Federal Government's  
4 indemnification guarantee?

5           MR. GAYER: Well, this calls for my --

6           QUESTION: If they had to be either self-  
7 insurers, or had to buy insurance from an insurance  
8 company?

9           MR. GAYER: Well, we can only -- Your Honor, we  
10 can only speculate on that.

11          QUESTION: I know. How would you speculate  
12 about that?

13          MR. GAYER: I would speculate that the --

14                   (Laughter.)

15          MR. GAYER: I would speculate that the  
16 university would never sign such a contract. They would  
17 tell the Department of Energy to get lost.

18          QUESTION: Because the cost is too high.

19          MR. GAYER: There's too much risk. It's not  
20 worth the risk. The Department of Energy wants to use the  
21 good and prestigious name of the University of California  
22 to attract talented scientists, technical professionals to  
23 work on Government projects, and the DOE has determined  
24 that it's to its advantage to get a prestigious name, and  
25 the DOE is willing to pay for it.

1 QUESTION: Aside from the fact that the  
2 university would pay for a private insurance policy, is  
3 there any other feature that would distinguish Justice  
4 O'Connor's question from the case before us?

5 MR. GAYER: Thank you, Justice Scalia, yes,  
6 there's an important distinction here, I think, that in  
7 general an indemnitor such as an insurance company is  
8 quite separate from the contract, say, between the  
9 Government and the Regents corporation. It would be some  
10 outside insurance company that would be agreeing to  
11 indemnify.

12 Here, it's the Department of Energy itself, for  
13 which the Regents is doing the work, that is saying, you  
14 do this work for us, you run our laboratory, and we'll pay  
15 directly any judgment, so there is no outside insurers. I  
16 think that --

17 QUESTION: I thought they didn't pay just any  
18 judgment no matter what. Isn't there some provision in  
19 the contract for reimbursement that if it's willful  
20 misconduct they won't reimburse?

21 MR. GAYER: Well, that's true. I assume that  
22 means we're talking about something wherein perhaps an  
23 employee of the laboratory engaged in some sort of assault  
24 and battery, or embezzlement, or what-have-you, something  
25 approaching on the criminal, but that's neither alleged

1 here, and there's no hint of it here.

2 In the joint appendix near the end at page --  
3 let's see if I can find this. I believe it's 82a -- we  
4 have a letter from the Department of Energy directly to  
5 the plaintiff dated November 23, 1993, where they make a  
6 technical reservation regarding Justice O'Connor's mention  
7 of bad faith and willful misconduct.

8 But if you read this in context, knowing that  
9 the event sued upon in this case occurred in June of 1991,  
10 and this letter was issued approximately 2-1/2 years  
11 later, we have a statement that, you know, while we still  
12 reserve this business about bad faith, which never occurs,  
13 the Department is saying we'll bear the cost of defending  
14 the university, and of any monetary judgment in your  
15 favor.

16 I submit there has been no hint of willful  
17 misconduct or bad faith. It's not alleged, it didn't  
18 happen, it's not going to happen, and this is something  
19 that in any event the Solicitor General in its brief says  
20 these exceptions are rarely, if ever, applied -- not to  
21 worry.

22 I think with regard to any arm of the State  
23 question, if -- the Regents corporation first of all has  
24 never been established as an arm of the State in any  
25 decision by this Court, and according to the Solicitor

1 General the -- this Court has never determined whether any  
2 State university or college is an arm of the State for  
3 purposes of the Eleventh Amendment, so I don't think we  
4 can just sort of assume that.

5 And what the Ninth Circuit did, it says, let's  
6 look at the facts. We look at the facts, and we assume  
7 that a promise made by the Federal Government in writing  
8 is a solemn promise, that the Department of Energy, when  
9 it says it's going to pay directly, will pay directly.  
10 Why not assume that the Government is going to act in bad  
11 faith? I think that's a fair presumption.

12 I think it would unduly expand the immunity  
13 provided by the Eleventh Amendment if you could let States  
14 structure entities as they pleased which would be totally  
15 commercial, and for which they would have no risk at all  
16 financially, and still give them immunity. I think  
17 that --

18 QUESTION: Mr. Gayer, I'd like to know how far  
19 your position about a State university goes with respect  
20 to insulating the State against any monetary liability for  
21 that piece of the university.

22 Let's take an athletic department, where they  
23 sell tickets to the games and there's a big profit-making  
24 center for the university, and a spectator at such an  
25 event slips and falls, says it's because the stairs were

1 in disrepair, and sues the University of California in  
2 Federal court, a diversity case, and the State says, we're  
3 the State university.

4 Under your theory, could the plaintiff prevail  
5 by saying, not in this instance, because we've got a  
6 money-making venture, and any money that's going to be  
7 paid will come out of the profits of that entity?

8 MR. GAYER: Well, it depends on how the  
9 university is structured. I don't know if this is going  
10 beyond Justice Ginsburg's question, but in this particular  
11 case we assume the athletic endeavor has no contract with  
12 the Department of Energy, and there's no pay directly  
13 provision there.

14 QUESTION: It's just that the State budget is  
15 never going to be touched because this is such a  
16 profitable department that it pays all its own bills.

17 MR. GAYER: Oh, I think that's what happened in  
18 Hess, that initially the bi-State entity was receiving  
19 something like \$100,000 a year from each State, but that  
20 was years and years ago and --

21 QUESTION: It was not an entity of any single  
22 State. I mean, it was a totally different situation.

23 MR. GAYER: But according to the dissent in Hess  
24 the same test applies.

25 QUESTION: But, Mr. --

1 QUESTION: You stand squarely with the dissent  
2 in Hess.

3 MR. GAYER: I stand squarely with the entire  
4 decision in Hess.

5 QUESTION: But it is --

6 MR. GAYER: I'm trying to harmonize --

7 QUESTION: You must admit it's rather peculiar  
8 to do what you did in your brief. That is, to take the  
9 essence of what the majority held from a statement in the  
10 dissenting opinion.

11 MR. GAYER: No, I'm trying to harmonize --

12 QUESTION: It is rather unusual.

13 MR. GAYER: Because we -- in our proposed test  
14 the first thing you look at is the impact on the S-t-a-t-e  
15 treasury.

16 QUESTION: You don't agree that, in general, to  
17 find out what the majority opinion says one looks to the  
18 majority opinion rather than the dissent?

19 MR. GAYER: It sounds like a good idea, Your  
20 Honor.

21 (Laughter.)

22 QUESTION: Occasionally.

23 MR. GAYER: And that's why in our proposed test  
24 we say first you look to the State treasury factor as the  
25 majority did in Hess. If that's dispositive of the case,

1 that's the end of the inquiry.

2 QUESTION: The majority did not do that first.  
3 The first thing the majority said is, this is a creature  
4 of three sovereigns. One of them is the U.S. Government.

5 MR. GAYER: In any event, as Your Honor pointed  
6 out, the respondents do rely on Hess, where it said that  
7 the twin reasons for being of the Eleventh Amendment are  
8 State treasury and dignity, and we take the State treasury  
9 factor, very important here. That's why we're here. If  
10 the State treasury factor wasn't here we couldn't argue  
11 about the pay directly provision.

12 QUESTION: You say, but you don't take the  
13 dignity factor.

14 MR. GAYER: Well, yes, we do, because here we  
15 claim that the attorneys for the Regents corporation in  
16 submitting for 1 year to discovery, taking depositions,  
17 submitting to depositions, answering interrogatories,  
18 responding to requests for production of evidence, has  
19 diluted its dignitary interest, has said, in effect --

20 QUESTION: Oh, so dignitary interest is one  
21 that's -- that you waive. Without waiving the -- you can  
22 sort of back into waiving the Eleventh Amendment?

23 MR. GAYER: No. Well, you weaken your Eleventh  
24 Amendment claim if you act as though you don't mind being  
25 coerced by the discovery power of the court not --

1           QUESTION: But you don't have any ready appeal  
2 from a discovery order pretrial. I mean, a discovery  
3 order isn't appealable as a matter of right.

4           MR. GAYER: Mr. Chief Justice, that's true, but  
5 here the petitioners cooperated with discovery. They  
6 didn't say, we have an Eleventh Amendment dignitary  
7 interest and therefore we're not going to respond to your  
8 discovery on the merits. They just went along as if it  
9 were ordinary litigation.

10          QUESTION: Isn't that just one form of good  
11 lawyering? You don't have any right to appeal the --  
12 either your order to discover, or the discovery order  
13 makes -- the discovery request is reasonable. You raise  
14 what you can at a different time.

15          MR. GAYER: With due respect, Your Honor, it's  
16 our position that if a purported Eleventh Amendment entity  
17 takes its Eleventh Amendment immunity seriously,  
18 especially its dignitary interest, that the first thing it  
19 will do is move to dismiss based on the Eleventh  
20 Amendment. It won't play around with litigation for a  
21 year.

22          The -- it's also our position that each case,  
23 especially since the Eleventh Amendment immunity issue can  
24 be raised sua sponte by any court at any time, that any  
25 time a court, especially the Supreme Court, considers an

1 Eleventh Amendment case, it will look at the whole  
2 picture, and so whether or not, of course, the university  
3 has been held to be an arm of the State in other contexts  
4 in other cases that were not in this Court doesn't really  
5 matter. It's certainly not determinative or dispositive  
6 or anything.

7 I think that each case, as the Ninth Circuit  
8 did, looks at the facts, looks at the law as presented by  
9 the plaintiffs. In our proposed procedure, we suggest  
10 that the plaintiff had the burden of inducing facts and  
11 law that shows that the purported -- that the State entity  
12 is not a State agency, that is to say, is not an arm,  
13 therefore doesn't deserve Eleventh Amendment protection.  
14 Otherwise, you run the risk of undue expansion of Eleventh  
15 Amendment immunity, and anything that says "of California"  
16 is immune, and that's the end of it.

17 Now, Justice Ginsburg, I was thinking of  
18 something about insulating treasuries, and in this case  
19 the State law of California does insulate the State  
20 treasury from the Regents. Under State of California law,  
21 a judgment against the Regents can be executed only  
22 against the treasury of the Regents. There is no claim  
23 against the very separate and probably larger State  
24 treasury. That applies under all circumstances.

25 So it's our position that even absent the pay

1 directly provision in the contract, that the State  
2 treasury -- as opposed to the Regents' treasury, the State  
3 treasury has no risk at all in any case, and that's --

4 QUESTION: So a State university is not an arm  
5 of any State if that university has a budget that's  
6 discrete and pays all its expenses out of that. That's  
7 the end of a State university being an arm of the State.

8 MR. GAYER: A State -- a treasury, a treasury  
9 that's independent and wherein the university or college  
10 has no claim against the treasury of the State itself.

11 In other words, here, the Regents' treasury has  
12 a lot of money in it. I think according to a footnote in  
13 the reply brief something -- in one particular year, \$10  
14 billion. Now, in that year, \$2.2 billion came in the form  
15 of a block grant from the State.

16 The legislature made an appropriation to give  
17 the money to the Regents to use for any lawful purpose.  
18 After that, the State lets go. The legislature lets go,  
19 and the Regents must make do with whatever money they can  
20 get, and most of their money comes from outside the State,  
21 but the point is that a judgment creditor of the Regents  
22 has no claim against the State treasury, ever, and that's  
23 why I think this case --

24 QUESTION: Well, do I understand that the  
25 question that's before us is, even if the university would

1 otherwise be a State agency, it isn't when this particular  
2 liability is covered in full by a third party?

3 MR. GAYER: Yes. I think we've addressed that  
4 fully in the briefs, and perhaps this morning. That's  
5 true, but I think in order to do a thorough, complete, and  
6 meaningful job this Court might consider the general  
7 question, otherwise the courts below are still having to  
8 wonder about this fundamental issue, and one can assume  
9 arguendo so many things that there's nothing left to argue  
10 about.

11 QUESTION: Well, perhaps there would be a  
12 problem of parties who are not before us. There must be  
13 many State universities that are patterned the same way,  
14 intended to have a large budget and to pay their expenses  
15 out of that.

16 MR. GAYER: My research, although not complete,  
17 says the answer to that question, Your Honor, is no, that  
18 those cases I have read -- for instance, the Rutledge  
19 case, Rutledge v. the Regents of the University of  
20 Arizona, another Ninth Circuit case, held that there,  
21 there is control by the legislature.

22 QUESTION: But now, you haven't been talking  
23 about control. You've been talking about does -- the  
24 university has to operate out of a special budget for it  
25 with no call on other State funds.

1 MR. GAYER: Well, the point I'm trying to make  
2 is that in the Rutledge case the Ninth Circuit held that  
3 the Regents there were very different, and they were not  
4 separate and independent and autonomous, whereas in the  
5 instant case the Regents are very separate, very  
6 independent, and very autonomous of any control by the  
7 elected branches of State government.

8 QUESTION: May I -- I'd like to make sure I  
9 understand one part of your argument. The court of  
10 appeals applied this five-factor test, the first factor  
11 whether this money judgment would be satisfied out of  
12 State funds, and they said it would not be because of the  
13 indemnity agreement.

14 You are arguing, if I understand you correctly,  
15 that even without the indemnity agreement, the judgment  
16 would not have been satisfied out of State funds.

17 MR. GAYER: That's correct, Your Honor. It says  
18 I could have done a better job in the Ninth Circuit.

19 QUESTION: And -- but -- so we're not --  
20 what's -- we're only addressing the indemnity question, or  
21 are we supposed to decide the whole case? I'm still a  
22 little puzzled about that.

23 MR. GAYER: Well --

24 QUESTION: Because this focuses on -- everything  
25 focuses on point 1 in their five-factor test.

1 MR. GAYER: That's correct.

2 QUESTION: Does your opponent agree that it  
3 would not be satisfied out of State funds even without the  
4 indemnity agreement?

5 MR. GAYER: I don't think so.

6 QUESTION: Oh.

7 MR. GAYER: I don't think so, but Your Honor, to  
8 respond to your question, I'm not an expert on this  
9 Court's Rule 14.1, but I believe that the general question  
10 of the Regents' overall immunity is subsumed within the  
11 question presented. If I'm wrong, I'm sure Your Honors  
12 will tell me.

13 QUESTION: Well, subsumed generally means a  
14 smaller question included in a larger question. What  
15 you're saying is that a larger question is included in a  
16 smaller question, which is quite different.

17 (Laughter.)

18 MR. GAYER: Well, as I say, I'm here to please  
19 the Court --

20 (Laughter.)

21 MR. GAYER: -- and if that doesn't do so, I'll  
22 just move on.

23 (Laughter.)

24 MR. GAYER: I think the point made by the Ninth  
25 Circuit in its conclusion is really important. Certainly

1 under its decision the Regents corporation would lose very  
2 little. They would still retain all the immunity they  
3 have in Justice Ginsburg's athletic event question, and  
4 any -- certainly anything related to their universities  
5 which provide higher education.

6 They -- the only thing they would lose, so to  
7 speak, is immunity if they're sued in the operation of the  
8 laboratory, wherein the owner of the laboratory will pay  
9 directly any judgment. That's really no loss, because  
10 it's not the university's operation. It's really the  
11 Department of Energy's operation. It's their facilities,  
12 their building, their ground, everything, and so that  
13 there is really no impact at all.

14 QUESTION: Excuse me for being so slow to grasp  
15 this, but in the dissenting opinion the judge --  
16 dissenting judge said, no one has disputed that a judgment  
17 against the University of California is a legal obligation  
18 of the State of California. Is that a correct statement  
19 of the case?

20 MR. GAYER: Well, as, of course, it wasn't  
21 disputed, it wasn't even mentioned. There was no -- no  
22 argument.

23 QUESTION: But did you argue in the court below  
24 that even without the indemnity agreement the judgment  
25 could not have been satisfied out of State funds?

1 MR. GAYER: Unfortunately, no. I was, shall we  
2 say -- I won't use the dirty word, but that was an  
3 omission on my part.

4 QUESTION: Well, you -- it wasn't such a -- I  
5 mean, it was an understandable omission, inasmuch as the  
6 Ninth Circuit had held in a number of cases that the State  
7 universities were, indeed, the State for purposes of  
8 sovereign immunity, haven't they?

9 MR. GAYER: But those cases are built, I submit,  
10 on a foundation of sand. In those --

11 QUESTION: I understand, but you didn't want to  
12 antagonize the district court and the court of appeals.  
13 You were there to please them, just as you're here to  
14 please us --

15 (Laughter.)

16 QUESTION: -- and they wouldn't have been  
17 pleased at your calling their whole circuit law into  
18 question.

19 MR. GAYER: Well, the point is there the issue  
20 wasn't fully litigated, and one of the cases, the Jackson  
21 v. Hayakawa, the Regents corporation was not even a party.  
22 The other cases, BV Engineering, Armstrong v. Meyers, and  
23 the Mascheroni case out of the Tenth Circuit, all those  
24 cases simply cited either Jackson v. Hayakawa, where  
25 the --

1           QUESTION: Yes, but Mr. Gayer, if you did not  
2 call into question -- I don't think your job is to please  
3 the court. Your job is to represent your client, and if,  
4 on behalf of your client, you did not challenge a line of  
5 authority in the Ninth Circuit, I'm not sure you can  
6 challenge it for the first time up here, despite everybody  
7 else's saying how important it is to be friendly to the  
8 Court.

9           MR. GAYER: Well, I -- if I'm wrong, Your Honor,  
10 I apologize, but I don't think this Court is bound by any  
11 decision of the Ninth Circuit or the Tenth Circuit, and if  
12 they were wrong, they were wrong. They can't be reversed,  
13 I guess, without --

14           QUESTION: Mr. Gayer, this is the point, that we  
15 review rulings that have been made by a court below. We  
16 don't make rulings here in the first place, and you are  
17 asking us to decide something as though we were a -- the  
18 court getting this in the first instance, and that is not  
19 what we do.

20           MR. GAYER: Well, that being the case, Your  
21 Honor, then I think the safest and most appropriate thing  
22 to do is simply affirm the judgment of the Ninth Circuit  
23 and let us proceed. That -- because that does apply the  
24 five factor test. It's not contrary to anything in Hess,  
25 since it focused almost entirely on the impact of the

1 State treasury, and it has minimal policy impact on the  
2 immunity generally of the Regents corporation.

3 QUESTION: Are you suggesting that if we are of  
4 the view that whatever this arm is or is not should not be  
5 affected by whether they've got insurance from the  
6 Government or somebody else that covers this particular  
7 risk, this particular liability, as even if we think that  
8 we should nonetheless affirm because the Ninth Circuit  
9 used a five-factor test and we have nothing to say about  
10 those other factors?

11 MR. GAYER: Oh, sure, this Court has everything  
12 to say about the other factors, but it's my position that  
13 the Ninth Circuit applied the factors correctly and did  
14 nothing contrary to this Court's decision in Hess or any  
15 other decision of this Court.

16 The Ninth Circuit properly distinguished these  
17 other opinions, of which I disapprove, and said on the  
18 facts of this case there's no possible, conceivable impact  
19 on a State treasury, and Justice Canby in his dissent got  
20 it wrong. He assumed something that had not been argued  
21 at all. Neither side said anything about who would  
22 actually bear the burden of the judgment, and he just  
23 assumed that the State would do it. That was incorrect --

24 QUESTION: Are you saying --

25 MR. GAYER: -- and once you assume that it's all

1 over.

2 QUESTION: Are you saying it would be irrelevant  
3 to the Ninth Circuit where we would say, we think you were  
4 wrong, we are telling you you were wrong in one  
5 particular, it's not relevant whether there was indemnity  
6 for this liability, what's relevant is who has the legal  
7 liability? If we were to say that, do you think that  
8 would be -- wouldn't make any difference in how the Ninth  
9 Circuit came out?

10 MR. GAYER: If I understand the question, Your  
11 Honor, it's my position that since the State of California  
12 has no legal liability in this case, that the result would  
13 be the same.

14 Now, I've also -- I've been lectured by  
15 Mr. Chief Justice that that may not be within the question  
16 presented, and I'll have to accept that, but it's still  
17 our position, as I stated, that Judge Canby is wrong when  
18 he said the State is legally liable. That's simply wrong  
19 as a matter of California State law.

20 QUESTION: Which is a determination you're  
21 asking us to make in the first instance.

22 MR. GAYER: Excuse me, Your Honor?

23 QUESTION: You're asking us to make that  
24 determination in the first instance, because it certainly  
25 wasn't made by the Ninth Circuit or the district court.

1 MR. GAYER: Yes. I think the answer is yes,  
2 because I think that would be the best way to give  
3 guidance to the courts below and to attorneys who might  
4 bring a suit against some purported, or -- some purported  
5 arm of the State.

6 QUESTION: Of course, you say --

7 MR. GAYER: It would be very helpful.

8 QUESTION: You say it's wrong as a matter of  
9 State law. That's -- that makes the further assumption  
10 that the treasury of the Regents of the University of  
11 California is not part of the State, and I'm sure the  
12 counsel for the appellants are going to tell us that the  
13 whole purpose of the very substantial separation that the  
14 California constitution decrees for the university is to  
15 clothe it with attributes of sovereignty and to make sure  
16 that it is an instrumentality of the State, actually  
17 separate from the legislative and executive branches.

18 MR. GAYER: But if --

19 QUESTION: So to say that it's not part of the  
20 State's liability in a way elides the question, because  
21 the treasury of the University of California are State  
22 funds in one sense --

23 MR. GAYER: Well --

24 QUESTION: -- and in a very important sense.

25 MR. GAYER: Well, Justice Kennedy, my reading of

1 State law is that the Regents funds are not State funds in  
2 that they're not under the control of the legislature or  
3 the Governor or any other part of the executive branch.

4 QUESTION: But they're in control of another  
5 State entity which has to -- which happens to be the  
6 Regents of the University of California.

7 MR. GAYER: And that State entity is not an arm  
8 of the State. It's a separate and independent public  
9 corporation established to manage the University of  
10 California and free to engage in other businesses, such as  
11 running a hospital for which it charges the market rates  
12 for services, and for managing the Lawrence Livermore  
13 National Laboratory.

14 Of course it's a State entity, but it's very  
15 independent, and it's treasury is separate and apart from  
16 the State treasury, and the Regents have no claims at all  
17 to anything in the State treasury. They get a block grant  
18 from the State, from the State legislature once a year,  
19 and that's it.

20 If there are no further questions, thank you  
21 very much.

22 QUESTION: Thank you, Mr. Gayer. Mr. Miller,  
23 you have 4 minutes remaining.

24 REBUTTAL ARGUMENT OF CHARLES A. MILLER

25 ON BEHALF OF THE PETITIONERS

1 MR. MILLER: Thank you, Mr. Chief Justice.

2 I'd like to begin by referring to this -- I  
3 don't mean to be -- try to inject too much levity, but the  
4 foundation of sand.

5 The foundation of sand starts here, because the  
6 ultimate foundation is the Hamilton v. Board of Regents  
7 case in 293 U.S., where this Court determined, based upon  
8 a study of the California constitution and statutes, that  
9 the university and its Regents were the State, and in fact  
10 that its orders, the orders of the Board of Regents, were  
11 equivalent to state statutes, would be deemed the same for  
12 purposes of that case.

13 Now, that wasn't an Eleventh Amendment case, but  
14 I do think it's an important decision that was built upon  
15 in the decisions of the district courts and in the Ninth  
16 Circuit court that have held repeatedly that the  
17 university is an arm of the State.

18 The decision in the Vaughn case which is cited  
19 in our brief, a district court case, is the case in which  
20 the factors were reviewed and then, in the various Ninth  
21 Circuit cases, Vaughn and other cases subsequent to Vaughn  
22 were referred to and relied upon as precedent.

23 The fact that the university is an arm of the  
24 State is now beyond serious debate as far as the Ninth  
25 Circuit's concerned as a general proposition, and it

1 ultimately rests on the decision of this Court in  
2 Hamilton.

3 That leads me to the next point, which is the  
4 contention that the university is separate from the State  
5 because the State is not responsible for its debts.  
6 Justice Kennedy, you anticipated our point on this. The  
7 treasury of the Regents is very much a State fund, and all  
8 of the attributes of sovereignty that are given to the  
9 Regents in the California constitution and statutes are  
10 designed to assure that the Regents would be treated as a  
11 branch of State government, albeit independent of  
12 political control, for the very important reasons of  
13 academic freedom and independence of education that  
14 animated the founders of the State back in the middle 19th  
15 Century.

16 Notwithstanding that, the constitution of  
17 California, Article XVI, section 8, provides a very  
18 special provision for any obligations of State  
19 universities. It states as follows, that all -- from all  
20 State revenues there shall first be set apart the moneys  
21 to be applied by the State for the support of the public  
22 school system and public institutions of higher education.

23 We referred to that in our brief, and pointed  
24 out that that gives in effect a first charge on the  
25 revenues of the State to satisfy the obligations of the

1 university.

2           The manner in which that is done is the same  
3 manner in which the Congress funds Federal agencies, by  
4 appropriation, and no doubt until the appropriation is  
5 made a debt can't be paid if the Regents don't have  
6 otherwise sufficient funds, but in the end, the  
7 legislature is responsible, by constitutional provision,  
8 to meet the obligations of the university, and in that  
9 additional way ties the university tightly to the State of  
10 which it is a part and an arm, if not a branch.

11           I want to make just one other point, and that is  
12 that the relief in this case seeks not only damages  
13 against the university, but also hiring of the plaintiff.  
14 He calls it reinstatement. He never was instated in the  
15 first place, so it's really instatement.

16           One of the -- he asks for specific performance  
17 of the alleged contract, and he asks that in any event  
18 that he be hired by the university, or at the very least  
19 that his application for employment be reconsidered.

20           Each of those forms of relief, if granted, would  
21 work --

22           CHIEF JUSTICE REHNQUIST: Thank you, Mr. Miller.  
23 The case is submitted.

24           (Whereupon, at 12:01 p.m., the case in the  
25 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:*

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL., Petitioners v. JOHN DOE, ETC.  
CASE NO. 95-1694

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

BY Ann Marie Federico  
(REPORTER)