

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DANIEL BOGAN AND MARILYN RODERICK,

Petitioners v. JANET SCOTT-HARRIS

CASE NO: 96-1569 *e. f.*

PLACE: Washington, D.C.

DATE: Wednesday, December 3, 1997

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IN THE SUPREME COURT OF THE UNITED STATES

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DANIEL BOGAN AND MARILYN :

RODERICK, :

Petitioners :

v. : No. 96-1569

JANET SCOTT-HARRIS :

- - - - -X

Washington, D.C.

Wednesday, December 3, 1997

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:03 a.m.

APPEARANCES:

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

HARVEY A. SCHWARTZ, ESQ., Boston, Massachusetts; on
behalf of the Respondent.

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1 PROCEEDINGS

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 96-1569, Daniel Bogan v. Janet Scott-
5 Harris.

6 Mr. Rothfeld.

7 ORAL ARGUMENT OF CHARLES ROTHFELD

8 ON BEHALF OF THE PETITIONERS

9 MR. ROTHFELD: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 I have two principal points to make this
12 morning. The first is that State and regional legislators
13 who are sued under section 1983 are entitled to absolute
14 immunity if they acted in their legislative capacities.
15 Local legislators who were sued under the statute should
16 be entitled to that same absolute immunity if they acted
17 in their legislative capacities.

18 My second, and closely related point, is that --

19 QUESTION: I can't hear you very well.

20 QUESTION: I can't hear you at all.

21 MR. ROTHFELD: Sorry, Your Honor.

22 My second and closely related point is that
23 public officials at all levels of Government, regional
24 officials, State officials, and local officials, do act
25 legislatively, and therefore are entitled to absolute

1 immunity when they propose legislation, vote for
2 legislation, and enact legislation.

3 Now, the facts --

4 QUESTION: Are you going to at some point
5 address the court of appeals' reason for address -- for
6 your losing, which I didn't hear in either of the first
7 two points, because I thought the court of appeals
8 accepted both of those points.

9 MR. ROTHFELD: Well, the court of appeals did
10 accept that there is absolute immunity for actions that
11 are taken in a legislative capacity, and we agree with the
12 court of appeals' decision on that point, a decision that
13 I add was endorsed by every circuit.

14 I think -- I will address the second point
15 subsumed within my suggestion that legislators necessarily
16 act legislatively when they propose legislation, enact
17 legislation, which is what they did here. There was a
18 dispute in the court of appeals as to whether the
19 legislation here was legislative in character within the
20 meaning of the immunity doctrine, and I will get to that
21 point.

22 As I say, the facts that underlie this are
23 simply stated. Respondent was the Director of the
24 Department of Health and Human Services of the City of
25 Fall River, Massachusetts. The mayor of Fall River

1 proposed a budget which eliminated a number of city
2 positions --

3 QUESTION: Well, I think we've read the facts.
4 Can we get on to the issue?

5 MR. ROTHFELD: Certainly, Your Honor. The
6 reason I was touching on them simply is because I think
7 they provide some useful context for the legal issue, but
8 turning directly to I think what's the first underlying
9 issue in this case, are legislators, local legislators
10 entitled to absolute immunity --

11 QUESTION: On that issue, would you tell me your
12 view of what the status of the common law was at the time
13 of the enactment of the statute and, secondly, what the
14 general rule was in the courts of appeals before our
15 decision in Tahoe?

16 MR. ROTHFELD: As to the first, I think the law,
17 the common law was clearly settled in the 19th Century. I
18 think that it was the established rule, unchallenged, that
19 local legislators were entitled to absolute immunity for
20 their legislative actions, for actions of the sort in this
21 case.

22 We have searched diligently. We have not found
23 a single 19th Century decision holding legislators liable
24 for discretionary acts related to the enactment of
25 legislation, and respondent has not cited such a case.

1 That statement of the law was reflected in the leading
2 19th Century treatises, for example, Cooley's Treatise on
3 Torts, Dillon's Treatise on Municipal Corporations, which
4 were written shortly after the enactment of section 1983.

5 Just to give you an example of a characteristic
6 statement, Cooley in his Treatise on Torts, written in
7 1880, says that so far as -- and I'm quoting here from
8 Cooley. So far as legislative officers are concerned,
9 their rightful exemption from liability is very plain.
10 Legislatures have complete discretion in the area of
11 legislation, and it is not consistent with this that their
12 members should be called to account for their acts and
13 neglects.

14 This is also true -- and again continuing to
15 quote Cooley, this is also true of inferior legislative
16 bodies such as boards of supervisors, county
17 commissioners, city councils, and the like. Again, we
18 have searched diligently. We have not found a single 19th
19 Century treatise which states a contrary rule, and I don't
20 believe that respondent has cited one either.

21 There was a single exception to this rule of
22 absolute immunity recognized in the 19th Century, and that
23 was for so-called ministerial acts. There was a body of
24 authority holding that local legislators could be called
25 to account for failing to perform ministerial duties that

1 were imposed by State law or by court order. That was a
2 very narrow and precisely defined doctrine. It applied
3 only when there was an imperative, nondiscretionary,
4 mandatory, and precise duty, as I say imposed either by
5 State law or by --

6 QUESTION: Was that true of the slander cases,
7 too?

8 MR. ROTHFELD: I'm sorry, Your Honor.

9 QUESTION: Was that true of the slander cases,
10 too?

11 MR. ROTHFELD: Well, I think that -- we have
12 searched also and have not found a single slander case
13 against a member of a local legislative body for
14 statements relating to their legislative actions.

15 Respondent in her brief cites a number of
16 decisions which we addressed in our reply brief, and I
17 think that in fact none of them involve such statements by
18 local legislators, and it was until quite recently, it may
19 still be the common law rule, prevailing common law rule
20 that local legislators have immunity in defamation suits
21 for those actions.

22 But the important point for present purposes is
23 that in the 19th Century so far as we've been able to
24 determine there were no such suits, and so I think it's
25 quite clear -- returning to the ministerial point, it's

1 quite clear that the actions here, the actions of
2 petitioners in this case, would not have been regarded
3 remotely as ministerial in the 19th Century, and
4 respondent does not contend otherwise.

5 And so I think it is fair to say that the
6 Congress that enacted section 1983 would have regarded as
7 remarkable the suggestion that any legislator at any level
8 of Government could be held liable for actions of the sort
9 in this case. A Member of Congress in 1871 who looked at
10 the background of common law would have seen that an
11 absolute rule of liability prevailed.

12 QUESTION: Precisely what was the act done here?
13 I perhaps am not as familiar with the record as Justice
14 O'Connor is.

15 MR. ROTHFELD: Well, I think the acts that are
16 at the center of respondent's case are proposing an
17 ordinance, voting for the -- supporting the ordinance at
18 committee, voting for the ordinance, and then the mayor's
19 act in signing the ordinance.

20 QUESTION: And what did the ordinance provide?

21 MR. ROTHFELD: The ordinance eliminated a
22 Department of Health and Human Services of the City of
23 Fall River.

24 QUESTION: I thought that what -- the particular
25 action they're talking about is section 22 of the

1 ordinance, which reads, by striking out the following in
2 section 16-239 the words, Administrator of Health and
3 Human Services --

4 MR. ROTHFELD: Well --

5 QUESTION: -- right, and there's a jury
6 finding, I take it, that those words that I've just quoted
7 are in this ordinance because the defendant's stated
8 reason was wrong. It wasn't their real reason. The real
9 reason those words find their way into this ordinance is
10 because they wanted the defendant to take action against
11 the plaintiff on the basis of her speech. I mean,
12 those --

13 MR. ROTHFELD: That is --

14 QUESTION: -- are jury findings, right, so don't
15 we have to take those as the facts?

16 MR. ROTHFELD: Yes, at this point, certainly,
17 Justice Breyer we do not take issue with the jury's
18 determination. The issues of fact were sharply disputed
19 at trial, but certainly for present purposes we accept the
20 jury's determination that there was a wrongful motivation
21 that lay behind that --

22 QUESTION: Now, my -- of course, my question
23 would be -- and I want you to continue with the Chief
24 Justice's answer, but the question arising out of those
25 facts for me is, why are those legislative acts? Why, in

1 these circumstances, aren't these particular words, and
2 given the way they found their way into this bill and that
3 they concerned one person and the removal of that one
4 person from her job, why aren't those words in these
5 circumstances an administrative action, which is what the
6 court of appeals found?

7 MR. ROTHFELD: Right. If I may, Justice Breyer,
8 I'll respond to the Chief Justice's question and finish
9 with my response to Justice Stevens, and then turn to
10 that, which is the second half of the argument.

11 The ordinance as a whole, the ordinance that was
12 enacted, eliminated the Department of Health and Human
13 Services. As Justice Breyer has indicated, an aspect of
14 that was eliminating the position of Director of the
15 Department, which was the position that was filled by
16 respondent, and so her allegation, which was accepted by
17 the jury, is that the motivation for enacting that
18 ordinance, and that portion of the ordinance, was to
19 eliminate her position, and eliminate her as a city
20 employee.

21 QUESTION: Any other aspect? I thought that was
22 the whole thing. The Department was just created so that
23 this other -- divisions were consolidated so -- I don't
24 understand the aspect part of your answer. I thought the
25 only thing they had to do to get rid of the Department was

1 to get rid of the person who headed it.

2 MR. ROTHFELD: Right. Well, I -- they actually,
3 as a consequence of eliminating the Director of the
4 Department of Health and Human Services there were
5 consequences that followed from that for the organization
6 of the city government. There were other city officials
7 who, under the ordinance creating the Department, reported
8 to the Director, and so eliminating the position of the
9 Director required various other steps to be taken. Now, I
10 think that --

11 QUESTION: But the only legislative thing,
12 whether we call it ultimately legislative or
13 administrative, there was only one action, and that was to
14 end the position of head of HHS, no other legislation.

15 MR. ROTHFELD: That's right. For present
16 purposes I think we can assume that. There was an
17 ordinance which eliminated the Department and the
18 principal consequence of that was eliminating the position
19 of Director of the Department, although I -- there were
20 these other subsidiary things that had to be taken care of
21 when that was done.

22 Reserving just for a moment the question of
23 whether that that kind of -- and it's clear it was an
24 ordinance. It was enacted by the city council. It was
25 signed by the mayor. It was recorded in the official

1 ordinance books of the city.

2 Reserving for the moment whether that
3 legislation is legislative in character, Justice Stevens
4 asked about the status of absolute immunity prior to the
5 Court's decision in Lake Country Estates. I think that
6 there were a number of courts, and their decisions are
7 cited by respondent, prior to that decision which
8 recognized only qualified immunity under section 1983 for
9 local legislators.

10 I think that an examination of those decisions
11 shows that they did not -- I think did not benefit from
12 the Court's subsequent decisions setting out the nature of
13 the immunity inquiry under section 1983. For example,
14 they did not look at all at the common law history that
15 prevailed in the 19th Century, which the Court has said is
16 the paramount indicium here, and it's interesting that one
17 of the decisions cited by respondents was written by then
18 Judge Potter Stewart on the Sixth Circuit, indicating that
19 only qualified immunity prevailed.

20 Then Justice Stewart I think changed his view,
21 because he joined Justice Powell's dissenting opinion in
22 Owen v. City of Independence, which stated expressly that
23 members of city councils are entitled to absolute
24 immunity, and so I think that the law has -- this Court's
25 immunity doctrine has been clarified and sharpened and

1 every court of appeals has now concluded that an absolute
2 rule of immunity is the appropriate one.

3 I should just add parenthetically that the
4 common law history, which I think is quite compelling, is
5 confirmed by looking at the considerations of policy that
6 the Court has identified --

7 QUESTION: Before you get to policy, the scope
8 of this absolute immunity, is it the same as speech or
9 debate immunity for Members of Congress, or is it
10 different for a State legislature, a regional lawmaking
11 body, a municipal lawmaking body? Is the nature of the
12 absolute immunity the same as we go down the ladder from
13 Federal to municipal?

14 MR. ROTHFELD: I think, Your Honor, the nature
15 of the immunity is the same. The Court has described the
16 test for legislative immunity at least as for regional and
17 State legislators in Lake Country Estates and in Tenney
18 using exactly the same terms as it has used in the Speech
19 and Debate Clause cases.

20 Indeed, the Court has cited the Tenney holding
21 as the nature -- as the test for Speech and Debate Clause
22 immunity, and so I think that the immunity is identical in
23 substance.

24 QUESTION: Even for a county that has just a
25 single commissioner who is both the executive and the

1 legislat --

2 MR. ROTHFELD: Well, I think that that raises
3 the difficult problem of application. Let me say just
4 preliminary that obviously this case is not in that mold.
5 Here we have classic legislation. We have a multi-member
6 representative body responsible for lawmaking in the
7 jurisdiction that passes laws that are signed by the
8 executive, so we don't face that problem.

9 I think that the unusual forms of local
10 government, and you suggest one, present a more difficult
11 case, but I think that if the single Member is acting
12 legislatively by promulgating a law, promulgating an
13 ordinance, that the same type of immunity would apply.

14 After all, the same policies that the Court
15 identified in Lake Country Estates and in Tenney as
16 necessitating legislative immunity because of the fear
17 that prospective liability will distort legislative
18 decisionmaking, because of the fear that it will lead to
19 distracting and burdensome litigation, because of the fear
20 that it ultimately would discourage people from public
21 service, all of those considerations apply to all types of
22 municipal --

23 QUESTION: May I interrupt you with just a -- I
24 know you want to get to Justice Breyer's question, but do
25 your comments about local legislators have the same impact

1 on the mayor? You mentioned they had to be signed by the
2 executive, and it seems to me at least arguably the -- it
3 might not be the same rule. Is there any enlightenment
4 you can shed on that?

5 MR. ROTHFELD: Well, I think, Your Honor, that
6 as the Court has said repeatedly, the question is not the
7 branch in which the local official or a public official
8 serves, or the, you know, the source of their salary, or
9 their title, so in Butz v. Economu an executive official
10 was entitled to judicial immunity because he exercised
11 judicial functions.

12 In the Supreme Court of Virginia v. Consumers
13 Union case, judges were entitled to legislative immunity
14 because they were --

15 QUESTION: Yes, but I'm not talking about when
16 the mayor cast his vote, but when he signed the --

17 MR. ROTHFELD: Well, and I think that what the
18 mayor did here was clearly legislative in character. The
19 two -- the acts that he did, proposing the legislation and
20 signing the legislation, are essential elements of the
21 legislative process of enacting the law, and the Court in
22 the Federal context has described the President's power to
23 veto or to sign legislation as legislative in character.

24 The Court has said that that is an explicit
25 exception to the separation of powers and the

1 Constitution, and so in cases like Buckley v. Valeo and
2 others that we cite in our briefs, the Court has expressly
3 said that power is a law-making legislative power.

4 That is the very power that was exercised by the
5 mayor in this case, and so I think that as a functional
6 matter it was legislative, directed to the enactment of a
7 law, and therefore he is for those actions entitled to
8 absolute legislative immunity, and again, all the
9 considerations the Court identified in Tenney, Lake
10 Country Estates, point to that sort of immunity in this
11 case.

12 Now, if that is correct, and if absolute
13 immunity is the proper rule for local legislators, or
14 local officials acting in a legislative capacity, the
15 remaining question in this case is Justice Breyer's
16 question, were the legislators here acting in a
17 legislative way, and I would submit that the court of
18 appeals' approach to that has a slightly Lewis Carrollish
19 quality.

20 There is no question that all of the actions
21 taken by the defendants here, as I say, proposing the
22 ordinance, supporting the ordinance in committee, voting
23 for the ordinance, and signing the ordinance, were
24 directed to the enactment of a municipal law, to an
25 ordinance.

1 Now, the court of appeals argument, the court of
2 appeals holding in this case, which is endorsed by
3 respondent, is that some legislation is essentially more
4 legislative than others, that legislation does not have a
5 legislative quality if the sponsors are motivated by
6 specific facts, what the court of appeals called specific
7 facts, or if the legislation is excessively narrow in
8 scope, if it affects only a small number of identifiable
9 persons.

10 QUESTION: Well, the court of appeals used the
11 term, administrate, but you describe the common law
12 immunity as extending to everything except ministerial
13 action, and I think the word administrative connotes a
14 much broader exception than the term ministerial, doesn't
15 it?

16 MR. ROTHFELD: Well, absolutely. Clearly the
17 court of appeals was not deriving its administrative
18 exception from the common law. It had nothing to do with
19 the ministerial exception, or perhaps the immunity that
20 prevailed then.

21 I think the court of appeals' view, and
22 respondent's view, is that legislation which is, as I say,
23 based on -- in which the legislator's motivation is based
24 on what the court called specific facts, or if the
25 legislation is too narrow, that legislation is simply not

1 legislative in character, even though it is a duly
2 promulgated law.

3 Now --

4 QUESTION: But maybe what they had in mind is if
5 the mayor just said, you're discharged, that would be,
6 quote, administrative, that's not legislative, and so
7 maybe the court of appeals is saying, well, that's a nice
8 way to get around liability for administrative acts.
9 Don't say, you're fired. Get the city council to pass an
10 ordinance that says she's fired.

11 MR. ROTHFELD: Well, a couple of points in
12 response to that, Your Honor, which, I think that is a
13 very important question that goes to the heart of
14 respondent's argument.

15 First of all, just as a matter of clarification
16 as to what exactly went on here, the city council did not
17 say, this individual is fired. The city council
18 eliminated this position for all time, so that's a classic
19 legislative action. It passed a law providing there no
20 longer is this position in the city government.

21 I think that that is identical to what would
22 occur if, for example, Congress passed a law eliminating
23 funding for the coming fiscal year for the Office of the
24 Secretary of Health and Human Services. That --

25 QUESTION: You wouldn't care if it were the

1 opposite. I mean, as you define legislation, if the
2 legislation said that the current incumbent of this
3 office -- assuming this is within the legislative power,
4 you would still say that's okay, it's legislation.

5 MR. ROTHFELD: I would say that, although I --

6 QUESTION: And you would say that if the
7 mayor -- if you accept the conclusion of Justice
8 Ginsburg's question, this was a neat way around liability,
9 you would say precisely --

10 MR. ROTHFELD: Well --

11 QUESTION: -- it is, that that's simply the law,
12 that you're not liable for legislative action.

13 MR. ROTHFELD: As I say, there are a number of
14 points to make in response to that. I think -- first of
15 all, that is our position, that if the legislative body
16 passes a law, whatever it says, it is legislative in
17 character.

18 Now, there may be other constitutional defects
19 in that law. It may be a bill of attainder. It may -- I
20 think in this case such a law would have been outside the
21 city council's statutory authority under Massachusetts law
22 and under its own city council, but I think it would be
23 legislative in character, and if you look at --

24 QUESTION: What about the city itself being
25 liable? I know that's dropped out of the case here as it

1 comes to us, but can the city itself be liable for a -- an
2 ordinance that is racially motivated, for example?

3 MR. ROTHFELD: Well, the city certainly can be
4 liable for unconstitutional actions, and I think that
5 that --

6 QUESTION: But the legislators enacting it are
7 not personally liable, is your view.

8 MR. ROTHFELD: Absolutely. Absolutely.

9 QUESTION: Whether it's at the city level or the
10 State level.

11 MR. ROTHFELD: That's true. Now, in fact,
12 actually that points up a more compelling reason for
13 immunity in the local context. If someone is aggrieved by
14 that kind of statute at the State level they may have no
15 remedy at all. They can't sue the legislature. It
16 clearly is immune under Tenney v. Brandhove, and they
17 can't sue the State.

18 QUESTION: But at the city level they can sue
19 the city.

20 MR. ROTHFELD: Precisely. At the city level
21 they can sue the --

22 QUESTION: Oh, but you can't sue the city if on
23 its face -- I mean, what I'm thinking about is there are
24 many different forms of local government. In some,
25 probably local councilors do all the hiring and firing,

1 and think of the Court's cases like Rutan, et cetera, or
2 the Court's cases you can't discriminate against members
3 of the opposite political party.

4 It would be very simple. Instead of the
5 administrator of, let's call it a city beginning with C
6 decides that we're going to fire 10,000 people who belong
7 to a political party, the name of which begins with an R
8 or a D, here's what we'll do, we simply run it through the
9 city council. That's simple.

10 We recommend an ordinance, simplest thing in the
11 world, and therefore all those cases in which this Court
12 has held you can't do this, or you can't do that
13 administratively, all we'll have to do at the local level
14 is run it through the city council, and instead of doing
15 it, we just call it a recommendation.

16 MR. ROTHFELD: Well, let me make --

17 QUESTION: That's the end of those cases, right?

18 MR. ROTHFELD: -- a couple of points in
19 response to that. First of all, if, as you suggested in
20 the first part of your question, the city council actually
21 has powers to appoint and fire individuals --

22 QUESTION: No, no, they'll do it by temporarily
23 eliminating the position. I mean, we have a hiatus in the
24 position, we rename it, and we hire a different person.

25 MR. ROTHFELD: Well, I think that --

1 QUESTION: Or are you going to look through that
2 subterfuge which, after all, takes the same form. It
3 takes the form of legislation.

4 MR. ROTHFELD: Well, if -- the question is,
5 would such a thing be legislative in character. Look at
6 what would happen --

7 QUESTION: That's the question.

8 MR. ROTHFELD: What would happen if Congress
9 passed -- Congress passes laws all the time that are
10 intended to and have the effect of affecting only one
11 person. Even leaving private bills aside, tax exemptions
12 that are aimed at one person, a law that says, Chrysler is
13 hereby bailed out because that's in the public interest --

14 QUESTION: Oh, no, but now, once you're down
15 that track, once you admit an exception to the absolute
16 rule of the form of legislation, then this looks like a
17 pretty good case for that exception, doesn't it?

18 MR. ROTHFELD: Well, but --

19 QUESTION: Because there are jury findings that
20 this one person was really being dismissed in this way
21 because of her speech.

22 MR. ROTHFELD: But I don't admit an exception
23 for that. My point is that legislators at all levels,
24 Congress, State legislators, regional legislatures,
25 State -- local legislatures always have had the power, the

1 legislative authority to enact specific provisions that
2 affect only an individual, that affect only a small number
3 of people and they don't lose their legislative quality
4 simply because they are of that nature, because --

5 QUESTION: That's why they put the Bill of
6 Attainder Clause in the Constitution.

7 MR. ROTHFELD: Precisely. There would be no
8 necessity for such a clause --

9 QUESTION: Then you're prepared to accept the
10 way around all the cases that you can't discriminate on
11 the basis of whatever, race, politics, or any other thing.

12 MR. ROTHFELD: Well --

13 QUESTION: As long as it's run through the city
14 council.

15 MR. ROTHFELD: So far as --

16 QUESTION: No matter how egregious, it's home
17 free.

18 MR. ROTHFELD: Well, two points, Your Honor. So
19 far as --

20 QUESTION: Well, I thought you told me it isn't
21 home free.

22 MR. ROTHFELD: Exactly.

23 QUESTION: The city can be liable.

24 MR. ROTHFELD: Exactly.

25 QUESTION: Of course it isn't home free.

1 MR. ROTHFELD: But my --

2 QUESTION: But the individual legislators
3 probably have a perfect defense.

4 MR. ROTHFELD: My -- that is precisely my point,
5 stated better than I could do it.

6 QUESTION: But Mr. Rothfeld, you just told me
7 that the -- it's like the Speech or Debate Clause. How
8 would you -- if the city is the defendant, and your charge
9 is this thing that looks neutral on its face, it's just a
10 budgetary action, we eliminated a position, how do you
11 prove motive except by questioning the people whose
12 motives are tainted, and yet the Speech or Debate Clause
13 says, shall not be questioned any place.

14 MR. ROTHFELD: Well --

15 QUESTION: So I'm not comforted by your quick
16 answer that yes, the city would be liable. You need to
17 prove it, and you need to prove it through these actors.

18 MR. ROTHFELD: Well, I think -- let me clarify
19 my answer to you. I think I may have been confused. I
20 think the scope of the immunity is identical to the Speech
21 and Debate Clause.

22 Now, whether or not an individual could be sued,
23 could be called -- an individual local legislator could be
24 called to testify in a suit against a third party, clearly
25 1983 immunity would not preclude them from being called

1 for that, so in that sense there is no section 1983 speech
2 and debate equivalent immunity.

3 Now, whether there is some Federal evidentiary
4 privilege that would -- could be asserted in such a
5 circumstance has not been determined by this Court and is
6 certainly not going to be decided by this case.

7 QUESTION: But at least it is an open question.
8 It's not so clear that the city would -- you'd have to
9 answer that question.

10 MR. ROTHFELD: The second part of my answer to
11 your question, Justice Ginsburg, is that there are many
12 ways of proving legislative motive that do not require
13 individual testimony by --

14 QUESTION: Give me an example. Here, how would
15 you prove that this city council passed this not because
16 of a budget crunch but because they wanted to get rid of
17 this woman?

18 MR. ROTHFELD: Well, I think in ways that
19 respondent in this case did attempt to prove that. She
20 showed, or attempted to show, that there had been
21 altercations between herself and members of the city
22 council or other city employees that were brought to the
23 attention of the city council.

24 She attempted to show that elimination of her
25 position actually was a ruse, because the city ended up

1 spending more money hiring replacements to do what she had
2 been doing, and there are a wide range of circumstantial
3 indicia. I think in the Equal Protection Clause area this
4 Court has indicated Justice Stevens --

5 QUESTION: Do you think that the -- that Judge
6 Sowerby was wrong when he said, ah, but that's not enough,
7 there's nine people on that council, and you tell me that
8 two of them, you've got circumstantial proof with respect
9 to two of them, you can't prove a claim against the city
10 on that basis?

11 MR. ROTHFELD: Well, I think that the First
12 Circuit suggested that the reason the case came out this
13 way, perhaps, as to municipal liability is the manner in
14 which it was litigated, that respondent made virtually no
15 attempt to demonstrate by any means the motivations of
16 these other members of the city council and, for example,
17 one could imagine that a plaintiff in a case like this
18 might try to show that there is an individual member of
19 the council, like the chair of the Budget Committee, who
20 is -- as to whom everyone defers automatically, and that
21 is essentially a de facto policymaker.

22 QUESTION: You're not saying, I --

23 QUESTION: Do you think have we achieved
24 something for municipal government if we acknowledge your
25 immunity for individual legislators but throw open suits

1 against the city in all of these cases?

2 MR. ROTHFELD: Well --

3 QUESTION: I'm not comforted by your assurance
4 that you can sue the city, because I'm -- you know, most
5 of the arguments you make in defense of your clients here
6 it seems to me are makable just as well with respect to
7 the city. I think it would be a very serious disruption
8 of municipal governance if you could claim that
9 legislation enacted and on its face valid was motivated
10 for improper reasons.

11 MR. ROTHFELD: Well, that, I think, Your Honor,
12 goes to the substantive nature of the constitutional
13 violation that's being alleged, and it doesn't turn on the
14 nature of municipal liability.

15 I mean, the Court has crossed the bridge of
16 municipal liability in Owen, holding that municipalities
17 are liable for their unconstitutional acts. Now, if acts
18 based on impermissible motivation are unconstitutional --

19 QUESTION: It also -- but it's also limited by
20 Monell, I take it, that perhaps an ordinance might be, but
21 it would have to be a policy type of thing.

22 MR. ROTHFELD: Well, that is certainly true.

23 If I may --

24 QUESTION: What you're saying, I take it, or
25 tell me if I'm correct, is that there may well be a

1 constitutional wrong here. Legislators may well have
2 violated their constitutional oath, but there's simply no
3 remedy as against them.

4 MR. ROTHFELD: That is correct.

5 QUESTION: But against the municipality, what
6 bothers me -- I don't know the answer to this. The -- on
7 your approach, you take legislation that's neutral on its
8 face, and you hold the city liable if it's passed for an
9 unconstitutional motive, which brings you into a very big
10 problem of how you prove motive for individual
11 legislators, how many, et cetera. That was what was --
12 all right.

13 Well then, isn't it easier just to segregate out
14 those actions which are really administrative in nature
15 for the municipality?

16 MR. ROTHFELD: Well, I think --

17 QUESTION: Or there's no liability? What is
18 your view?

19 MR. ROTHFELD: If I can give you a short answer
20 and then sit down, I think that it would be a very
21 dangerous thing for public officials if it were possible
22 to look behind the form of the legislation and say, well,
23 maybe on the face of it this does not in terms appear
24 unconstitutional, but there were facts in their minds
25 which render it unconstitutional and therefore legislative

1 immunity goes by the boards until we are able to establish
2 the nature of their motivation.

3 Once you've done that, immunity is swept off the
4 books altogether, because you've had a trial and you've
5 had discovery before immunity is determined, so --

6 QUESTION: Well, what does Washington v. Davis
7 require? I thought -- I mean, what do we do with that?

8 MR. ROTHFELD: Well, I think that there are --
9 as I suggest, there are means of getting at the motivation
10 of the jurist -- of the decisionmaking entity which do not
11 require holding them liable, which is the only issue which
12 is before the Court in this case.

13 And if I may reserve the balance of my time,
14 Your Honor.

15 QUESTION: Very well, Mr. Rothfeld.

16 Mr. Schwartz.

17 ORAL ARGUMENT OF HARVEY A. SCHWARTZ

18 ON BEHALF OF THE RESPONDENT

19 MR. SCHWARTZ: Mr. Chief Justice, and may it
20 please the Court:

21 The jury found in this case that the mayor of
22 the City of Fall River and the city council vice president
23 came up with a scheme to punish Janet Scott-Harris because
24 she exercised her constitutionally protected right to
25 complain that she and other minority employees of the city

1 were being called names such as the black nigger bitch,
2 and that -- because she attempted to bring disciplinary
3 charges against the well-connected long-time city employee
4 who made these statements.

5 The mayor conceded at trial, he agreed with the
6 trial judge that Ms. Scott-Harris' speech was
7 constitutionally protected. Significantly, the mayor also
8 conceded at trial that he had authority under
9 Massachusetts law -- in fact, the Massachusetts statute
10 was marked as Exhibit 85 -- that he had authority on his
11 own, without any action by the city council, to fire, to
12 lay off, to remove Ms. Scott-Harris from city government.
13 He had authority to put somebody else into her office. He
14 had authority to have other people, the people who had
15 reported to her report to the city manager. Everything
16 that was done by this ordinance the mayor could have done
17 administratively, on his own.

18 Now, as the court of appeals noted --

19 QUESTION: What does that prove?

20 MR. SCHWARTZ: That addresses two points. One
21 point is whether this was a legislative act at all if it
22 was an action that could have been done administratively.

23 QUESTION: Well, are you saying the two are
24 mutually exclusive, and what's your authority for saying
25 that?

1 MR. SCHWARTZ: I'm not saying that they're
2 necessarily mutually exclusive, but if you apply the
3 Court's functionality test, if you say, is the firing of
4 one employee an administrative function or is that a
5 legislative function --

6 QUESTION: And where does the Court's
7 functionality test that you refer to, where does that come
8 from?

9 MR. SCHWARTZ: For example, in the Virginia
10 supreme court case, Virginia Supreme Court v. Consumers
11 Union. What the Court did in that case was say, we have
12 different forms of immunity for different functions. We
13 have absolute legislative immunity when State actors
14 function in a legislative capacity. We have absolute
15 judicial immunity when State actors function in a
16 judicial capacity. We have qualified immunity when State
17 actors function in an administrative or executive
18 capacity.

19 QUESTION: Well, Mr. Schwartz, I used to serve
20 in a State legislature, and I can remember in the State
21 legislature, because of personal animosity sometimes a
22 position would be eliminated by the legislators. They
23 didn't like somebody who was holding some particular
24 office in some agency, and the way around it, let's get
25 rid of it, and they'd just legislate it out of existence.

1 Now, were those State legislators entitled to
2 absolute immunity, do you think, when they did that?

3 MR. SCHWARTZ: Well, I -- under *Tenney v.*
4 *Brandhove*, certainly they were.

5 QUESTION: I thought so, too.

6 (Laughter.)

7 QUESTION: Let me ask you this. Is there any
8 difference in the functions being carried out by these
9 city council members in terms of enacting the legislation
10 than what I've just described at the State level? I mean,
11 it looks like the same sort of thing. Not that we're
12 proud of it, or think it's good, and in fact it was --
13 there was a bad motive here, but isn't it the same
14 conduct, legislative conduct that we're dealing with?

15 MR. SCHWARTZ: If it's viewed in that light,
16 Your Honor --

17 QUESTION: Yes.

18 MR. SCHWARTZ: -- I suggest that if the mayor
19 had eliminated the position it would have been legislative
20 conduct. If the act -- if the act of eliminating --

21 QUESTION: I don't see why. I mean, here we are
22 dealing with the actual enactment of a city ordinance,
23 presumably within the powers of the city. They didn't
24 have to do it, but they could.

25 MR. SCHWARTZ: Well, in actuality, Your Honor,

1 the act that we're looking at here is not the act of the
2 city council. It's the act of the mayor, who's the
3 defendant who is before this Court, in submitting an
4 ordinance to the city council, so --

5 QUESTION: And was he a member of it as well?

6 MR. SCHWARTZ: No, he was not, so the question
7 would be whether -- what the jury found, the action of
8 submitting an ordinance that would --

9 QUESTION: Isn't that part of the legislative
10 process? I mean, the legislative process as described in
11 this town was the mayor initiating the bill, and the
12 council passes it, and the mayor signs it.

13 MR. SCHWARTZ: Yes.

14 QUESTION: And that's --

15 MR. SCHWARTZ: Yes.

16 QUESTION: So it's all part of a legislative
17 process.

18 MR. SCHWARTZ: Oh, yes. I agree with that.

19 QUESTION: You're not trying to say that every
20 time the mayor proposes a bill and every time he signs it
21 he's not acting in a legislative capacity.

22 MR. SCHWARTZ: Oh, no. No. I agree that he was
23 acting in a legislative capacity, but I think it's
24 important to focus on what the conduct was. His conduct
25 was, rather than acting on his own, on his own authority,

1 an action that he admitted he would not have even had
2 qualified immunity for, he never filed a qualified
3 immunity -- asserted a qualified immunity defense, because
4 the right not to be fired because of your speech was
5 clearly established.

6 So this was an action that he could have taken
7 on his own. He would have had no immunity of any kind.
8 Instead, he chose to submit this to the city council.

9 QUESTION: Which is a lot harder. I mean, he
10 has to get a whole bunch of other people to agree.

11 MR. SCHWARTZ: Yes.

12 QUESTION: Right? I mean, you -- it isn't as
13 easy as rolling off a log, so that you can avoid liability
14 just like that, by getting -- you have to get it through
15 the city council.

16 MR. SCHWARTZ: Well --

17 QUESTION: And there might have been people on
18 the city council who thought, why should we eliminate this
19 Department, and maybe some of the people who passed it
20 thought it was simply a good idea to eliminate the
21 Department. Do we know what the motivations of the
22 individual legislators on the city council were?

23 MR. SCHWARTZ: Well, no, we don't. We don't.

24 QUESTION: I mean, maybe some of them thought it
25 was a good idea to get rid of the Department.

1 MR. SCHWARTZ: And for all we know the mayor was
2 successful in hoodwinking the other members of the city
3 council.

4 QUESTION: Well, the other point is, the
5 Department is permanently abolished. If this -- if you're
6 going to reinstate it, there has to be a new law enacted
7 by the council.

8 MR. SCHWARTZ: And I suggest that the
9 appendix -- the appendices list 150 cases in which local
10 governments have come up with very creative ways of doing
11 just that, as Justice Breyer pointed out, that these 150
12 cases show example after example of excessive creativity
13 at the local level.

14 QUESTION: Well, what's the matter with that?

15 MR. SCHWARTZ: Well, the creativity is used to
16 evade liability.

17 QUESTION: Well, but that's life. I mean, the
18 Members of Congress will make statements on the floor of
19 the House that they will not go out in public and make,
20 because in one case they're protected by Speech and
21 Debate, and you say, well, you know, why do they do that?
22 Well, they prefer to do something in a way that gets the
23 message across and avoids liability.

24 MR. SCHWARTZ: And the result of allowing
25 conduct that a State official is empowered to do on his

1 own, the result of allowing him to obtain immunity by
2 running that exact same conduct through the city council
3 is in effect to create a manual for violating
4 constitutional rights.

5 QUESTION: Gee, we do that in antitrust laws. I
6 mean, Justice Breyer was bringing up antitrust in another
7 situation. An action which an individual, if he took on
8 his own, would impose serious antitrust liability, if he
9 walks it over to the State legislature and gets a law
10 passed, lobbies the legislature for the same result, it's
11 perfectly okay, so it doesn't surprise me that you can
12 launder some pretty bad stuff by running it through the
13 legislature. We do it all the time.

14 MR. SCHWARTZ: I'm familiar with the
15 Massachusetts legislature --

16 QUESTION: Yes.

17 (Laughter.)

18 MR. SCHWARTZ: -- and I certainly would not urge
19 their pristine character upon this Court.

20 But on the other hand, when it comes to
21 constitutional violations, I don't think this Court should
22 make it any easier to evade the Constitution, or to make
23 it any easier to launder intentional, knowing violations
24 of clearly established constitutional rights.

25 QUESTION: Is it possible there's a distinction

1 between the two defendants, one being a member of the city
2 council and the other not, so that when, in fact, even if
3 you have anything that -- even if you were to say,
4 whatever takes the form of an ordinance in a city council
5 is legislation, you wouldn't necessarily have to say that
6 as to the person who proposes to the city council an
7 ordinance that takes the form of but does not in reality
8 seem to amount to legislative rather than administrative
9 action?

10 MR. SCHWARTZ: Yes, I would agree with that,
11 Justice Breyer, that there certainly is a distinction
12 between the two defendants, and if one looks at the form
13 of the legislation, of the ordinance that was submitted as
14 found by the jury, the form of that is, in other words, I
15 propose the city council pass an ordinance that will
16 remove Janet Scott-Harris from city government because of
17 her constitutionally protected speech, I suggest that fits
18 all of the elements of a bill of attainder. It's
19 contended --

20 QUESTION: I'm sorry, but in your response to
21 Justice Breyer I thought you contradicted what you had
22 responded to me.

23 I asked you about the mayor, wasn't he
24 performing part of a legislative function when he proposes
25 the bill, and they pass it, and he signs it, that's all

1 part of a legislative process, and now you're trying to
2 say, no, we remove the legislative stamp from the mayor
3 but not the council member.

4 Before, you were emphasizing it's the function
5 that counts. It's a legislative process. It starts with
6 initiating a bill, the bill passes, the bill gets signed.
7 I thought maybe -- maybe I didn't understand your answer
8 correctly, but I thought you put a ring around that as the
9 legislative process, initiation, passage, signature.

10 MR. SCHWARTZ: Okay. I apologize if I haven't
11 been clear. I certainly agree that step 1 of the
12 legislative process is the submission of a proposed
13 ordinance.

14 On the other hand, when it comes to matters of
15 proof, matters of motivation, it's certainly much easier
16 to prove the motivation of the one individual who submits
17 the ordinance than it is to prove the collective
18 motivation of the entire body, and I suggest that that's
19 just what --

20 QUESTION: In this case it might have been very
21 easy, or just as easy, or even easier to prove, was it
22 Roderick the --

23 MR. SCHWARTZ: yes.

24 QUESTION: -- as the mayor. So I don't see
25 anything inherent about the mayor that makes it easier to

1 prove when you have somebody right there on the city
2 council who was a friend of the offender, the alleged
3 offender.

4 MR. SCHWARTZ: Yes. The difficulty found by the
5 court of appeals, however, was, although it was easy to
6 prove the motivation of the mayor and Roderick, the court
7 of appeals found that we weren't able to prove the
8 collective motivation of the board, or of a sufficient
9 number of members of the board.

10 I would like to address the more underlying
11 question of the common law basis for this absolute
12 legislative immunity at the local level, because I suggest
13 that the common law, as it was established in 1871, is
14 nowhere near as clearly established as petitioner
15 suggests.

16 Every single case cited by petitioners, every
17 single authority cited by petitioners relies on the
18 discretionary ministerial doctrine, and petitioners say
19 that the conduct at issue in this case was discretionary,
20 therefore there's no liability.

21 Petitioners also agree -- and they cite an 1877
22 case, Jones v. Loving, at page 24 of their brief. They
23 also agree that this discretionary ministerial doctrine
24 applied equally to the municipality itself as it did to
25 the municipal decisionmakers, and they're correct in that,

1 that Jones v. Loving says that members of the legislative
2 body are clothed with the immunity of the municipality.
3 That immunity came from the discretionary ministerial
4 doctrine. The immunity was the same for the municipality
5 as it was for the municipality's decisionmakers.

6 Now, in Owens v. City of Independence this Court
7 relied quite heavily on the discretionary ministerial
8 doctrine to find that there was no immunity of any kind
9 for municipalities under section 1983. The Court said
10 that there's no discretion to violate the Constitution,
11 that the Constitution is mandatory, and that it is not a
12 discretionary act to violate the Constitution.

13 The question in this case was, as found by the
14 jury, did the mayor have the discretion to submit an
15 ordinance to remove Janet Scott-Harris from city
16 government to punish her for her constitutionally
17 protected speech? I suggest that that was not a
18 discretionary act.

19 Now, what's significant about Owen is that --

20 QUESTION: What are you trying -- you're
21 proposing the category of discretionary on the one hand as
22 opposed to what?

23 MR. SCHWARTZ: In the common law it was called
24 ministerial. The term ministerial as we hear it implies a
25 pretty menial task.

1 QUESTION: Yes, almost obligatory.

2 MR. SCHWARTZ: Yes, and ministerial as applied
3 by the common law, ministerial as applied by this Court in
4 the Amy and Farr cases, in -- just a month before section
5 1983 was enacted, ministerial meant that there was no
6 legal discretion to the decisionmakers.

7 In Amy and Farr, the --

8 QUESTION: That they had to act that way.

9 MR. SCHWARTZ: They had to act that way, or,
10 conversely, that they were forbidden to act in a certain
11 manner.

12 QUESTION: Well, I don't think you would ever
13 refer to a situation where a person was forbidden to act
14 as ministerial. Ministerial that you had an obligation,
15 affirmative obligation to do something. To say that it
16 was a ministerial act because you were forbidden to do it
17 is a use of the word ministerial I've never heard.

18 MR. SCHWARTZ: Well, it was the way that the
19 ministerial doctrine was applied by this Court in Owen v.
20 City of Independence. This Court said that since there is
21 no discretion to violate the Constitution, the
22 discretionary ministerial doctrine would not provide
23 immunity for an intentional violation of the Constitution.

24 Now, what's significant about Owen is that,
25 while the Court said that the discretionary ministerial

1 doctrine was the equivalent of no immunity under section
2 1983, the dissenting justices said that the discretionary
3 ministerial doctrine parallels quite closely the qualified
4 immunity standard of this Court under Harlow v.
5 Fitzgerald, and I suggest that that discretionary
6 ministerial doctrine does parallel this Court's present
7 qualified immunity doctrine.

8 Under that doctrine, State officials have
9 discretion -- have immunity for their discretionary acts
10 unless their discretionary act violates a clearly
11 established legal duty. Under the discretionary
12 ministerial doctrine as applied under common law, a local
13 official had immunity for his discretionary acts unless
14 his discretionary act violated a clearly established legal
15 duty.

16 QUESTION: Like libeling somebody?

17 MR. SCHWARTZ: Well, the libel cases are a
18 separate line of cases, and --

19 QUESTION: Well, it's clearly unlawful to libel
20 somebody, and yet I don't know that you can sue
21 legislators for libel.

22 MR. SCHWARTZ: Well, the common -- the common
23 law of libel at present in the majority of States is that
24 for local legislators, it's a different form of immunity
25 at the local level now and in the 19th Century. For local

1 legislators, a local legislator was liable for libel if he
2 acted maliciously. A member of the State legislature was
3 not liable, had immunity in libel cases, whether or not he
4 acted maliciously.

5 I suggest the Massachusetts cases on this are
6 pretty striking. Coffin v. Coffin was the one common law
7 case relied upon by this Court in Tenney v. Brandhove, a
8 libel action for statements made on the floor of the
9 Massachusetts legislature.

10 This Court relied upon Coffin for the position
11 that the common law provided absolute immunity to members
12 of the State legislature in a libel action regardless of
13 whether they acted maliciously or not.

14 Well, 20 years after Coffin v. Coffin, the same
15 Massachusetts court, the Massachusetts supreme judicial
16 court, in the same form of action, a slander action
17 brought against a member of a town governing board, the
18 Brookline Board of Selectmen, did not apply that same
19 absolute legislative immunity at the local level, but
20 instead the Massachusetts supreme judicial court said that
21 at the local level, in a slander action, if the person,
22 State local official acted maliciously or abused his
23 office, he had no immunity.

24 So under the libel cases the immunity rules
25 under the tort law were different for members of the State

1 legislature than they were for members of local
2 legislative bodies. Prosser, Keeton, Harper, the
3 Restatement of Torts all say that that is still the rule.
4 They all state unequivocally that the absolute immunity in
5 libel cases for members of State legislative bodies does
6 not apply to municipal governing bodies.

7 That's a clear distinction in the common law,
8 and I suggest that that distinction in the common law
9 imposing liability at the local level to local legislators
10 that was not imposed at the State level, and also the
11 discretionary ministerial doctrine that imposed liability
12 in some circumstances at the local level, where there
13 would not be liability at the State level, shows that the
14 common law distinguished between State legislators and
15 local legislators, and because the common law
16 distinguished between the immunity of local legislators
17 and State legislators, petitioners haven't met their very
18 heavy burden of proving --

19 QUESTION: Do you have one case? I mean, your
20 opposing counsel says that you have not come up with a
21 single case where a State legislator was held liable -- a
22 municipal legislator was held liable.

23 MR. SCHWARTZ: Well, Your Honor, I suggest that
24 a decision whether or not to levy a general tax by a
25 legislative body would clearly today be considered a

1 legislative act. Only legislatures can levy taxes.

2 This Court in the Amy and Farr cases found
3 members of local governing boards personally liable out of
4 their own pockets for their decisions not to levy a
5 general tax.

6 QUESTION: That was on the basis of the
7 mandatory nondiscretionary act doctrine.

8 MR. SCHWARTZ: Yes.

9 QUESTION: On that alone, which you don't
10 contend it exists here.

11 MR. SCHWARTZ: Oh, I -- but I do -- I do contend
12 that exists here. What I contend is that that mandatory
13 nondiscretionary act doctrine is awfully similar to the
14 qualified immunity doctrine, that where a law is clearly
15 established, a legal right or a legal duty is clearly
16 established, thou shalt not fire an employee because of
17 her constitutionally protected speech, that any -- when
18 the mayor does that, he's going beyond his discretion.

19 QUESTION: Well, if that's what you mean by a
20 nondiscretionary act, every time a legislature is alleged
21 to have violated the law, it will have been alleged to
22 have violated the nondiscretionary act doctrine.

23 MR. SCHWARTZ: Well, what I --

24 QUESTION: The law is the law is the law. If
25 you're violating the law, you had no option but not to

1 violate the law. I mean, you know, that just expands it
2 to such a degree that there's nothing left of the
3 liability.

4 MR. SCHWARTZ: Well --

5 QUESTION: Of the immunity.

6 MR. SCHWARTZ: I'm not crafting this doctrine
7 myself. I'm quoting from this Court's decision in Owen.
8 I'm also quoting from the dissenting --

9 QUESTION: Was that a case about legislators'
10 absolute liability?

11 MR. SCHWARTZ: No. It was a case about the
12 municipality, obviously, about the municipality's
13 liability. However, petitioners agree that under the
14 common law the municipality and the legislators had
15 exactly the same liability and exactly the same
16 immunities.

17 QUESTION: What is the best authority for the
18 proposition that you just made? You said the law of
19 immunity has traditionally treated local legislators
20 differently from State legislators, or you said something
21 like that.

22 MR. SCHWARTZ: Yes.

23 QUESTION: All right. Can you give me your best
24 authority for that proposition?

25 MR. SCHWARTZ: The first authority would be that

1 the discretionary ministerial doctrine did not apply at
2 the State level.

3 QUESTION: I mean -- yes, but I want to read all
4 this, so if you just tell me what the cases are, or where
5 you got -- or what part of your brief, even, has them
6 listed.

7 MR. SCHWARTZ: Yes. The Amy and Farr cases.

8 QUESTION: Amy? Okay.

9 MR. SCHWARTZ: Okay, that's --

10 QUESTION: Give me -- just give me enough of a
11 clue.

12 MR. SCHWARTZ: Yes.

13 QUESTION: I can jot it down and read it later.

14 MR. SCHWARTZ: Well, my clue would be note 23 --

15 QUESTION: All right.

16 MR. SCHWARTZ: -- at page 17.

17 QUESTION: Fine.

18 MR. SCHWARTZ: As to whether or not the conduct
19 at issue was legislative, or was not legislative, I would
20 refer this Court to the Virginia Supreme Court case. In
21 the Virginia Supreme Court case, this Court set a standard
22 for what action of a legislative nature is.

23 The standard that this Court set in the Virginia
24 Supreme Court case was that legislation is a rule of
25 general application, statutory in character, that acted

1 not on particular parties, that did not arise out of a
2 controversy, but instead out of a need to regulate conduct
3 for the protection of all citizens.

4 Now, if that is what a legislative act is, if
5 that is what is protected in the Virginia Supreme Court
6 case by absolute legislative immunity, what the jury found
7 the mayor and the city council vice president did in this
8 case does not come anywhere near those definitions. It
9 was certainly not a rule of general application. What the
10 jury found the mayor and the city council vice president
11 did was a rule aimed at one particular individual.

12 QUESTION: Well, its effect came down on one
13 particular -- they passed a law that eliminated the
14 Department. The Department is no more. I mean, that had
15 general applicability, certainly. It affects a lot of
16 other people, I suppose. Other employees who used to be
17 employees of that Department are no longer.

18 MR. SCHWARTZ: The evidence at trial was that
19 there was only one employee of that Department.

20 QUESTION: Okay. Well, it affects people who in
21 the future would have been that one employee.

22 MR. SCHWARTZ: What the jury found --

23 QUESTION: Are private bills that affect only
24 one person not legislation?

25 MR. SCHWARTZ: Well, no. No, but the limitation

1 on private bills that affect only one person is the rule
2 against bills of attainder, and a piece of private
3 legislation that benefits one individual is certainly not
4 a bill of attainder.

5 A private legislation that says, these three
6 people may not be employed by the Federal Government, or
7 no Federal funds may be used to pay the salaries of these
8 three people, legislation that says no member of the
9 Communist Party may serve as an official of a labor
10 union --

11 QUESTION: Yes, but of course that's not what we
12 have here. We have a position abolished.

13 MR. SCHWARTZ: Yes, and there was one specific
14 person who held that position, and --

15 QUESTION: Are you saying that a law saying that
16 no member of the Communist Party may serve as an officer
17 of the labor union is not legislation?

18 MR. SCHWARTZ: I'm saying it's legislation, but
19 I'm saying that in United States v. Brown this Court said
20 that that was -- constituted a bill of attainder, and it
21 was not legitimate legislation.

22 QUESTION: So that there's a definition of
23 legitimate legislation which is narrower, I take it, than
24 the definition of legislation otherwise?

25 MR. SCHWARTZ: Well, yes, Your Honor.

1 QUESTION: So all unconstitutional legislation
2 you can be sued for, then. Are you saying if a Federal
3 legislator passes -- votes to pass an unconsti -- a
4 statute that is later found to be unconstitutional, he
5 loses all of his immunity for that whole process because,
6 although it seemed to be legislation, it wasn't really
7 legislation?

8 MR. SCHWARTZ: No, I wouldn't say that, Your
9 Honor.

10 QUESTION: No, I don't think you would.

11 MR. SCHWARTZ: No.

12 (Laughter.)

13 QUESTION: But why --

14 MR. SCHWARTZ: Your Honor, the Speech or Debate
15 Clause has been interpreted to be absolute and all-
16 inclusive. Basically, if it's done in Congress by
17 Congress there's immunity.

18 Applying that sort of broad immunity at the
19 local level, where the executive and the legislative
20 functions are merged, sometimes in many cases merged into
21 one individual, if one were to say that everything done by
22 the town governing board is legislative, to which there is
23 immunity, there are going to be tens of thousands of
24 municipalities in this country where everything done will
25 be immune, but everything that's done by these governing

1 boards, boards of selectmen in my home town, hiring of
2 individual employees, firing of individual employees --

3 QUESTION: But how about just talking about the
4 enactment of local ordinances. Let's not talk about their
5 action when they're doing something else, but let's talk
6 about when they're enacting a local ordinance. That just
7 seems quintessentially legislative activity to me.

8 MR. SCHWARTZ: It depends on what the ordinance
9 is. If the ordinance is, we will hire John Brown to be an
10 elementary school teacher, it might say ordinance at the
11 top of the piece of paper, but I don't know that that
12 makes it an ordinance.

13 QUESTION: What does it say, when you have like
14 a town meeting in New England, and every two hundredth
15 resident is there, and you say, all right, now, this week
16 we're going to buy pencils, and we're going to next week
17 hire somebody, and all these little local actions, I
18 never knew whether they're administrative or legislative
19 or what they are, and I can't remember what the form would
20 be. What does it say at the top of the page? Does it
21 say, ordinance? I don't know what it says.

22 MR. SCHWARTZ: I'm --

23 QUESTION: I mean, I know there are vast numbers
24 of details that I think are run through selectmen, and --

25 MR. SCHWARTZ: Oh, absolutely. We had a

1 resounding debate at my local town meeting about whether
2 we should spend \$25 to repair the radar gun because --

3 QUESTION: No, but the reason you were debating
4 it was that the town had to appropriate money, which was a
5 legislative act, isn't that the case?

6 MR. SCHWARTZ: Well, not in that case.

7 QUESTION: The person who spent the money, I
8 presume, was the board of selectmen, and I assume they
9 weren't acting as legislators when they spent the money.

10 MR. SCHWARTZ: Well, not in that case. The
11 money had already been appropriated. It was whether the
12 police chief should be forbidden from spending it for that
13 purpose, which --

14 QUESTION: Which is an amendment, I suppose, to
15 the appropriation.

16 MR. SCHWARTZ: Well --

17 QUESTION: And that's legislative. Isn't that
18 easy?

19 MR. SCHWARTZ: Well, that would be legislative,
20 but if that were done -- if that were done by the board of
21 selectmen, if the board of selectmen on their own said,
22 let's not spend that \$25 to repair the radar gun, that
23 would not be --

24 QUESTION: Like any -- like any executive
25 official, the board of selectmen might decide not to use

1 the authority that was given them, and when they make that
2 decision I suppose that's an administrative or an
3 executive decision, not a legislative one.

4 But I mean, aren't those pretty garden variety
5 examples of classifications that are fairly easy to make?

6 MR. SCHWARTZ: Well, if one were to say that
7 anything done by a legislative body is legislation, but
8 anything done by an executive body is executive, that
9 would certainly be a simple solution, but I don't know
10 that that would address the realities of local government.

11 QUESTION: Thank you, Mr. Schwartz.

12 MR. SCHWARTZ: Thank you.

13 QUESTION: Mr. Rothfeld.

14 REBUTTAL ARGUMENT OF CHARLES ROTHFELD

15 ON BEHALF OF THE PETITIONERS

16 MR. ROTHFELD: Thank you, Your Honor. I have a
17 couple of points which I will endeavor to make quick.

18 First of all, I think the easiest way to
19 conceptualize the question of whether this is legislative
20 action in this case is to -- and perhaps it's built on
21 Justice O'Connor's example from Arizona -- is to imagine
22 what would happen if this happened at the Federal level.

23 If the President fired the Secretary of HHS,
24 that would be an administrative act. If Congress passed a
25 bill eliminating funding for the Office of the Secretary

1 of HHS for the next fiscal year, everybody I think would
2 acknowledge that would be a legislative act, and that the
3 Members of Congress would be shielded by the Speech and
4 Debate Clause if the incumbent Secretary of HHS sued them
5 on a First Amendment theory. This case I think is
6 identical to that.

7 QUESTION: Or the President, if he proposed that
8 legislation, which would be --

9 MR. ROTHFELD: Or the President, if he proposed
10 that legislation.

11 QUESTION: -- parallel.

12 MR. ROTHFELD: Second, I think that the court of
13 appeals and respondent acknowledge that if this facially
14 neutral ordinance had been promulgated for proper reasons,
15 for -- purely for the purpose of saving money, it would,
16 in fact, be legislative in character. Therefore, their
17 test requires in every case of this sort that there be
18 a -- in that circumstance, absolute immunity would be
19 proper, because it would be legislative in character.

20 Their test requires that in every case of this
21 sort there be an examination, therefore, into the
22 legislative motive before an inquiry into immunity is
23 conducted. That means that there has to be discovery and
24 a trial before immunity is decided, and yet --

25 QUESTION: Of course, isn't that true in any

1 case in which the constitutional violation has an element
2 of motive in it?

3 MR. ROTHFELD: Well, not if there's an absolute
4 immunity rule for acts that are in the form of
5 legislation, as we suggest.

6 If, having passed a law that determines that it
7 is legislative in character, then I think at that point
8 absolute immunity applies, and there's no need for an
9 inquiry into motive, otherwise immunity really becomes
10 entirely meaningless, because in every case of this sort
11 there will be a possibility to argue that we -- there was
12 a specific fact in the minds of the legislators, and I
13 should be entitled, the plaintiff will say, to obtain
14 discovery into those facts, and therefore immunity goes by
15 the boards.

16 The third point, relating to Owen, which was
17 cited by respondent, I think Owen has no bearing in this
18 case. The Court suggested, looking at the common law
19 history in Owen, that the -- there was a discretionary
20 immunity for acts of municipalities because common law
21 judges were unwilling to substitute their judgments, their
22 discretionary judgments for municipal acts in areas of the
23 municipalities' proper purview.

24 The rationale for legislative immunity is quite
25 distinct. The idea there is that legislators should not

1 be -- should not have distorted judgment because of fear
2 of liability, and therefore any act -- thank you, Your
3 Honor.

4 JUSTICE STEVENS: Thank you, Mr. Rothfeld. The
5 case is submitted and taken under advisement.

6 (Whereupon, at 12:03 p.m., the case in the
7 above-entitled matter was submitted.)
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CERTIFICATION

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

DANIEL BOGAN AND MARILYN RODERICK, Petitioners v. JANET SCOTT-HARRIS
CASE NO: 96-1569

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

BY Donna Marie Fedrico-----

(REPORTER)