

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: WISCONSIN DEPARTMENT OF CORRECTIONS ET
AL., Petitioners v. KEITH D. SCHACHT
CASE NO: 97-461
PLACE: Washington, D.C.
DATE: Monday, April 20, 1998
PAGES: 1-50

REVISED

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY

AUG 28 1998

Supreme Court U.S.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'98 AUG 28 P2:30

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -X
3 WISCONSIN DEPARTMENT OF :
4 CORRECTIONS, ET AL., :
5 Petitioners :
6 v. : No. 97-461
7 KEITH D. SCHACHT :

8 - - - - -X

9 Washington, D.C.

10 Monday, April 20, 1998

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:57 a.m.

14 APPEARANCES:

15 RICHARD B. MORIARTY, ESQ., Assistant Attorney General of
16 Wisconsin, Madison, Wisconsin; on behalf of the
17 Petitioners.

18 DAVID E. LASKER, ESQ., Madison, Wisconsin; on behalf of
19 the Respondent.

C O N T E N T S

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

ORAL ARGUMENT OF

PAGE

RICHARD B. MORIARTY, ESQ.

On behalf of the Petitioners

3

ORAL ARGUMENT OF

DAVID E. LASKER, ESQ.

On behalf of the Respondent

30

1 PROCEEDINGS

2 (10:57 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 97-461, Wisconsin Department of Corrections
5 v. Schacht.

6 Mr. Moriarty.

7 ORAL ARGUMENT OF RICHARD B. MORIARTY

8 ON BEHALF OF THE PETITIONERS

9 MR. MORIARTY: Mr. Chief Justice, and may it
10 please the Court:

11 In this action substantial Federal questions
12 were presented by the individual capacity claims
13 respondent chose to make against Warden Catherine Farrey
14 and the other Wisconsin employees who are defendants in
15 this action.

16 He sued them personally under a Federal statute,
17 section 1983, alleging violations of the Federal
18 constitution. Substantial Federal questions were
19 presented.

20 Had this action proceeded in district court on
21 an initial complaint, the district court would
22 unquestionably have had original jurisdiction because
23 substantial Federal questions were presented.

24 The potential, had this commenced in district
25 court, the potential that those claims could have been

1 barred by a sovereign immunity defense or any of those
2 claims could have been barred by a sovereign immunity
3 defense would not have affected original jurisdiction of
4 the court.

5 This case instead was removed. It arrived by
6 removal rather than an initial complaint. The analysis --

7 QUESTION: It was removed, in effect, by the
8 State.

9 MR. MORIARTY: It was removed by the State and
10 the employees of the State sued both personally and
11 officially.

12 QUESTION: Right. Now, if you're right that the
13 official capacity claims and the claims against the State
14 involve defendants who aren't persons under section 1983,
15 why didn't the State just waive its Eleventh Amendment
16 immunity? I mean, you're perfectly safe. Claims weren't
17 going to go forward under 1983. Did the State consider
18 waiving the Eleventh Amendment immunity?

19 MR. MORIARTY: Your Honor, there are --

20 QUESTION: I mean, if you're right, I just don't
21 see why the State didn't do it. I don't -- it doesn't
22 make sense to me.

23 MR. MORIARTY: We return back to the decision on
24 whether to remove. The claims as to which sovereign
25 immunity applied were really irrelevant because, whether

1 this case was prosecuted in Federal court or State court,
2 they would have been barred.

3 QUESTION: Well, would you answer my question?

4 MR. MORIARTY: I'm --

5 QUESTION: Did the State waive its immunity?

6 MR. MORIARTY: It did not waive its immunity.

7 QUESTION: But your position is those claims
8 against -- the official capacity claims and the claims
9 against the State cannot proceed under 1983 because the
10 State isn't a person.

11 MR. MORIARTY: That's correct.

12 QUESTION: Okay. So why not waive it? Why not
13 end this thing? I just -- it's the strangest posture.

14 MR. MORIARTY: We are now looking back, Your
15 Honor, at -- from the perspective of the Seventh Circuit
16 decision at the initial removal decision. At the time of
17 removal, the claims made against the State were clearly
18 barred either under Will -- in both State and Federal
19 court either under Will, because it wasn't within the
20 definition of a person, or based on Eleventh Amendment
21 immunity, or sovereign immunity in State court.

22 The real crux of the case was the individual
23 capacity claims made against the individual.

24 QUESTION: And as to that you wanted it tried in
25 Federal court, not State court.

1 MR. MORIARTY: That's --

2 QUESTION: So why not waive the Eleventh
3 Amendment immunity?

4 MR. MORIARTY: Because that's not a price of
5 admission to the Federal court, Your Honor.

6 QUESTION: Well, maybe it should be. If we
7 could start all over, it would seem to me to make some
8 sense that if the State removes, that is a waiver of the
9 Eleventh Amendment. It seems rather odd that you want to
10 go to a court and then say I don't want to be in the
11 court.

12 MR. MORIARTY: By joining with the officials
13 sued personally in removing, which is required by the
14 removal statutes, the State is not saying we want to be
15 in -- we don't want to be in court. Obviously, they're in
16 court. The question is --

17 QUESTION: Well, you have to consent, as you
18 indicate. You have to consent to the removal. You had
19 the option to keep it in State court, but you consented to
20 be removed to a Federal court.

21 QUESTION: He removed it.

22 MR. MORIARTY: Certainly it was a litigation
23 decision by all of the defendants joining together, but
24 the sovereign -- the Eleventh Amendment is a defense. It
25 is not part of the initial threshold jurisdictional

1 question. Is there a substantial Federal question? Of
2 course there is.

3 QUESTION: Mr. Moriarty, I remember asking the
4 counsel in the Chicago case that we heard, one thinks of
5 Federal courts as being a place where you can get away
6 from local prejudice and that sort of thing, but one would
7 think that the State of Wisconsin would be perfectly happy
8 to be in the State court. I gather that isn't always the
9 case.

10 MR. MORIARTY: It isn't always the case in
11 individual cases. For example, we have strictly Federal
12 constitutional claims here. A body of Federal
13 constitutional law that has developed, particularly in the
14 Seventh Circuit, where there's binding precedent on the
15 district courts. There would not be that binding
16 precedent on the State courts.

17 If, as a litigator --

18 QUESTION: What difference does it make, so long
19 as you're going to stand on the Eleventh Amendment? All
20 this knowledge that the Federal courts have about Federal
21 law as far as the State is concerned is irrelevant, and as
22 to that, the last piece of this -- I mean, you say we have
23 a right to remand because the Eleventh Amendment is in the
24 nature of a defense. It's not like the existence of
25 Federal question, jurisdiction or diversity.

1 The end of the road as far as the State is
2 concerned, as distinguished from the individuals, you --
3 do you concede that the Federal court entertaining your
4 Eleventh Amendment plea should remand rather than dismiss?

5 MR. MORIARTY: Answering the second question
6 first, I do not concede that. The Federal court had
7 Federal question jurisdiction. It had it -- it would have
8 had it had an initial complaint been filed. It had it on
9 removal. It is inappropriate for the court to remand
10 claims that are properly before it and that were properly
11 dismissed by the district court through that -- through
12 the full litigation that occurred.

13 QUESTION: But then I don't understand, because
14 what you're saying by your Eleventh Amendment plea, the
15 Eleventh Amendment not applying in the State court
16 whatever State immunity applies, that you cannot be sued
17 any place, that you are just totally immune, because you
18 do this, you go over to the Federal court and say, Federal
19 court, you can't touch it because of the Eleventh
20 Amendment and dismiss the case, and then no one can touch
21 it.

22 MR. MORIARTY: Right. The -- when the Eleventh
23 Amendment applies, generally it's dismissal without
24 prejudice, such that if it --

25 QUESTION: But then you do this over and over

1 again. It's without prejudice. Yes. Then you begin
2 again in the State court, and then you remove it, and you
3 could do that over and over again.

4 MR. MORIARTY: We had here, however, claims
5 under section 1983 that were barred in any court
6 regardless. The State court, the Federal court would have
7 barred --

8 QUESTION: But that's a different issue. You
9 don't want -- you're saying, we're the State, you can't
10 touch us, so we don't get to the question of whether
11 you're a person under 1983, whether you're barred.

12 That's -- I could understand your argument
13 better if you said, what we were really trying to do was
14 to get those officers, with their individual capacity
15 complaints, over into the Federal court. Of course we're
16 not going to say we can manipulate the process by
17 immunizing the State from having any court --

18 MR. MORIARTY: That's precisely what we were
19 trying to do, Your Honor. The claims as to the State, the
20 official capacity claims and the claims against the State
21 agency, were irrelevant to the removal decision.

22 The point was, we were going to have litigation
23 on the individual capacity claims. Those are the ones
24 that the district court spent time on. The district court
25 spent a paragraph on the official capacity claims. So did

1 we in our briefs, essentially.

2 QUESTION: So what -- I'm not certain. Please
3 correct me if I --

4 MR. MORIARTY: Yes.

5 QUESTION: -- don't understand the posture of
6 this, but I thought that these -- that the plaintiff has
7 sued the State, i.e. the official capacity ones, and also
8 a number of individuals, and then the whole case is
9 removed to Federal court.

10 MR. MORIARTY: Correct.

11 QUESTION: And everybody wins, the defendants
12 won.

13 MR. MORIARTY: Correct.

14 QUESTION: All right. Now, the Seventh Circuit
15 sent the whole case back to the State court, and that was
16 the problem. Why should it send back the part against the
17 individuals? Isn't that what was bothering everybody? I
18 mean, the part about the State, I would think of course
19 they should send back that claim.

20 I mean, that claim, you've asserted the Eleventh
21 Amendment, has no business in Federal court, it's pendant
22 to the others, or it's one claim out of many, and you go
23 back to State court and try it out in the State court. Am
24 I right?

25 MR. MORIARTY: It could be tried, certainly, in

1 the State court. However, Your Honor --

2 QUESTION: I'm trying to find out what the issue
3 is here. I mean, is anyone saying -- I thought there is a
4 pretty clear mistake. The clear mistake was in sending
5 all these other claims, the ones not involving the State,
6 back to the State court. Am I right about that?

7 MR. MORIARTY: I don't believe you're right.

8 QUESTION: Good. All right. Then explain what
9 I'm missing.

10 MR. MORIARTY: The issue that I see is the
11 broader issue of what kind of a system are we going to
12 have that is simple and effective for removal, that is
13 simple and effective for determining jurisdictional
14 questions, that is simple and effective for determining
15 Eleventh Amendment immunity. What happens in this
16 individual case is actually irrelevant --

17 QUESTION: Maybe there's no way of straightening
18 me out. I'm trying to figure out what happened in the
19 individual case.

20 MR. MORIARTY: Fine.

21 QUESTION: I thought there are actions against
22 the State and there are actions against people that aren't
23 the State, and I thought the Seventh Circuit sent the
24 whole kit and caboodle back to State court.

25 MR. MORIARTY: It did.

1 QUESTION: Now, that's wrong, isn't it?

2 MR. MORIARTY: It was wrong in doing that.

3 QUESTION: All right. But is there anything

4 wrong about their sending back the action against the

5 State to State court?

6 MR. MORIARTY: As a matter of jurisdiction, yes.

7 QUESTION: Why?

8 MR. MORIARTY: As a matter of discretion, it may

9 not have been.

10 QUESTION: Ah.

11 MR. MORIARTY: They turned on jurisdiction and

12 said, there was not removal jurisdiction at the threshold

13 of this case.

14 QUESTION: Right, so they should have used a

15 different reason. The normal way to do it would be to

16 say, well, we decide all the other claims, but the one

17 about the State itself on official capacity, that's barred

18 by the Eleventh Amendment, so we send that one back like a

19 pendant claim. That's your view of how it should

20 have worked.

21 MR. MORIARTY: Yes. If, in fact, there is

22 authority to do that --

23 QUESTION: So you're going to end up --

24 MR. MORIARTY: -- as a matter of discretion.

25 QUESTION: Yes, and so you're going to end up in

1 the State court anyway.

2 MR. MORIARTY: We might. The result might be
3 the same, but as a matter of discretion, leaving intact
4 the vital differences between jurisdictional analysis,
5 discretionary analysis, Eleventh Amendment immunity
6 analysis.

7 QUESTION: Then you're changing the answer to
8 the question. Originally you said, no, no, we're saying
9 Federal court. The only thing you can do with the State
10 is dismiss it, not remand, and now I think in response to
11 Justice Breyer's question, you're kind of saying, well,
12 maybe not. Maybe there's discretion to remand. But you
13 have no discretion unless you have authority in the first
14 place.

15 MR. MORIARTY: That's correct, Justice Ginsburg,
16 and it is precisely the point, and I thank you for
17 tightening that.

18 On the issue of jurisdiction, do we -- did the
19 district court have jurisdiction? Must the appellate
20 court remand one or more of these claims as a matter of
21 jurisdiction? Must they? No.

22 QUESTION: Well, may I interrupt you on that
23 point?

24 MR. MORIARTY: Yes.

25 QUESTION: It may be that there are two

1 different jurisdictional issues involved here. 1441
2 talks, I think quite plainly, about constitutional subject
3 matter jurisdiction. That's what you're assuming and I
4 agree with you.

5 But 1447(c) talks simply about subject matter
6 jurisdiction, not original jurisdiction but subject matter
7 jurisdiction, and it may well be that, given the way this
8 Court has construed the Eleventh Amendment, that there was
9 Federal question jurisdiction for 1441 purposes so that
10 the case was properly removed, but once the Eleventh
11 Amendment defense was raised, the court no longer had
12 subject matter jurisdiction within the meaning of 1447(c),
13 and therefore was obligated to remand for that purpose.
14 Would that be a possibility?

15 MR. MORIARTY: I don't believe it would fall
16 within the 1447 issue because I do believe subject matter
17 jurisdiction in 1447(c) goes to subject matter
18 jurisdiction over the action, not over a particular claim.

19 Here, unquestionably throughout the case --

20 QUESTION: Well, is the -- but isn't that a
21 matter of semantics? I mean, it's an action insofar as
22 it's against the State, and insofar as it's against State
23 officers in official capacity. That's the case against
24 them, and so far as the case against them is concerned,
25 isn't subject matter jurisdiction lost once the Eleventh

1 Amendment defense is raised?

2 MR. MORIARTY: I don't believe so, Your Honor,
3 because claims within an action are not parceled out in
4 that fashion. I believe the --

5 QUESTION: Well, you just agreed -- I thought
6 you just agreed with Justice Breyer that they could be
7 parceled out in that fashion, because we can split the
8 claims against the individuals, the individual
9 responsibility claims from the Government claims, so
10 you're parceling them out.

11 MR. MORIARTY: When we get to the discretionary
12 issue, far from the jurisdictional issue. In other words,
13 when we're looking at jurisdiction to begin with --

14 QUESTION: Why can it be parceled when the court
15 is acting on the discretionary power but not be parceled
16 when the court is considering whether it has a mandate?

17 MR. MORIARTY: Based on this Court's decisions
18 that, for example, in City of Chicago the court had
19 original -- had Federal question jurisdiction over the
20 entire action, over all the claims in the action because
21 of the Federal claims.

22 QUESTION: But surely it's not your position,
23 Mr. Moriarty, that the Eleventh Amendment is a bar to the
24 claims against the individual defendants.

25 MR. MORIARTY: Certainly not.

1 QUESTION: And those, then, would be litigated
2 in the district court under a correct ruling?

3 MR. MORIARTY: The -- those claims -- the
4 district court had Federal question jurisdiction on
5 removal. Therefore, it could dispose of the Eleventh
6 Amendment barred claims on -- it could dispose -- the
7 claims against the State, either based on the definition
8 in 1983 or based on the Eleventh Amendment immunity.

9 QUESTION: But now, let's put the -- the
10 Eleventh Amendment immunity that you pleaded in your view
11 requires dismissal of the action as against the State and
12 the official capacity defendant.

13 MR. MORIARTY: Correct.

14 QUESTION: But it does not require dismissal as
15 to the individual defendants.

16 MR. MORIARTY: Correct.

17 QUESTION: So the district court could properly
18 adjudicate those claims.

19 MR. MORIARTY: The -- certainly the individual
20 capacity claims, yes. The --

21 QUESTION: May I ask this: under Wisconsin law,
22 can the Attorney General, by his or her own determination,
23 waive the Eleventh Amendment in Federal court?

24 MR. MORIARTY: No. That's been -- it's in the
25 statutes and it's also been litigated. The Attorney

1 General does not have authority to waive Eleventh --
2 sovereign immunity. Under the Wisconsin constitution only
3 the legislature has the authority to --

4 QUESTION: So only the legislature can waive the
5 Eleventh Amendment by special statute?

6 MR. MORIARTY: Right, either waive the Eleventh
7 Amendment or sovereign immunity, correct.

8 QUESTION: Who do you --

9 QUESTION: May I ask why 1441(c) is relevant at
10 all? I mean, it seems to me 1441(c) didn't envision the
11 reason for non-Federal jurisdiction, which we have here?

12 MR. MORIARTY: I'm sorry if I misspoke. I meant
13 1447(c). I think that's what we're referring to.

14 QUESTION: Ah, okay. No, I thought there was
15 some discussion about remanding the portions of the cause
16 of action which do not consist of Federal claims to the
17 State court.

18 MR. MORIARTY: Correct. 1441(c) I did not see
19 as relevant either and did not put in my brief. Pages 5
20 and 6 cite the portions of 1441(a) and (b) and 1447(c),
21 which I believe to be relevant.

22 QUESTION: Well, isn't (c) relevant to the
23 extent that it establishes the fact that the district
24 judge could have sent back -- could have remanded the
25 claims against the State, the official capacity claims?

1 MR. MORIARTY: I believe that the 1441(c)
2 addresses an entirely different situation, and involves
3 when there's a separable controversy, when there's not,
4 that type of thing, whereas in this case it's clear we
5 have one single controversy, the firing of the respondent.

6 QUESTION: Yes, but we have a case, the Coville
7 case which says that the statute does not preclude a
8 remand that isn't covered by the precise -- that these --
9 the statute covers must remands. It doesn't necessarily
10 cover may remands.

11 MR. MORIARTY: That's the central point I'm
12 trying to make, that the -- this decision by the Seventh
13 Circuit was wrong because it looked at what must occur as
14 a matter of threshold jurisdiction, mixed together the
15 discretionary issues, mixed together the Eleventh
16 Amendment immunity jurisdictional issues, and --

17 QUESTION: But may I just clarify one thing in
18 your position? Do you agree the district court could have
19 remanded and should have remanded the claims against the
20 State that are barred by the Eleventh Amendment in Federal
21 court?

22 MR. MORIARTY: I do not believe they should have
23 remanded it. I think what they should have done, if they
24 had jurisdictional questions, which they surely did,
25 looked at the issue, looked immediately at the 1983

1 definition and said, we don't have anything here against
2 the State, and moved to the merits of the appeal.

3 If they wanted to look at Eleventh Amendment
4 immunity, then they could have said, well, that's fine,
5 but that comes later in the jurisdictional analysis.

6 QUESTION: Who do you represent?

7 MR. MORIARTY: We represent the Wisconsin
8 agency, the officials in their official capacity, but the
9 primary motivation on removal was the officials in their
10 individual capacity.

11 QUESTION: All right. You represent them, too.

12 MR. MORIARTY: Absolutely.

13 QUESTION: Fine. Then I took from your cert
14 position your basic point -- maybe you're being too subtle
15 about it here, but I took your basic point to be from the
16 cert petition that at least the Seventh Amendment was
17 mistaken in ordering the personal claims sent back, that
18 they shouldn't -- even if they're right about having the
19 Eleventh Amendment claims sent back, that's just one
20 claim, or one set of claims --

21 MR. MORIARTY: Right.

22 QUESTION: -- in a multicclaim suit, and they
23 can't say you have to send them all back. Wasn't that
24 your basic claim before you even get into this?

25 MR. MORIARTY: That is absolutely fundamental

1 ground floor --

2 QUESTION: Okay. Now, once you'd say we win on
3 that we have a separate argument, and the separate
4 argument is, they shouldn't have even sent back the State
5 claim, and the reason for that is, if they'd looked at it
6 for 3 minutes they would have seen that the Eleventh
7 Amendment part is irrelevant, because you can't assert the
8 Eleventh Amendment in defense to a claim that doesn't
9 exist, and the claim doesn't exist because of your
10 interpretation of 1983. Now, is that your argument?

11 MR. MORIARTY: With this variation.

12 QUESTION: Yes.

13 MR. MORIARTY: Eleventh Amendment can bar those
14 claims. It's simply unnecessary.

15 QUESTION: It's unnecessary. There's an
16 alternative ground.

17 MR. MORIARTY: Exactly.

18 QUESTION: All right.

19 MR. MORIARTY: And the point is --

20 QUESTION: But your first argument is the main
21 argument, and your second -- I mean, and don't tell me I'm
22 right if I'm not. I want to be certain I'm understanding
23 this. Is that -- have I now stated what your argument is,
24 basically?

25 MR. MORIARTY: I --

1 QUESTION: The first part is, they shouldn't
2 have sent the whole thing back.

3 MR. MORIARTY: Yes.

4 QUESTION: The second part is, if we win on that
5 one, they shouldn't have even sent the State part back.

6 MR. MORIARTY: Correct.

7 QUESTION: Okay.

8 QUESTION: Well, but now, if you have two
9 grounds, one is the Eleventh Amendment and another is a
10 ground of statutory construction, one is, we've said,
11 quasi-jurisdictional and the other is simply an argument
12 on the law. I would think that the Eleventh Amendment
13 argument would prevail over the statutory construction
14 argument.

15 MR. MORIARTY: That would be the case except for
16 this Court's decisions in *Ngirainga v. Sanchez*, in which
17 it took up that definitional issue first, over the
18 strenuous objections of the dissent, and that wanted the
19 immunity issues addressed first in *Ngiraingas*.

20 QUESTION: Was this post-Steel Co., not --

21 MR. MORIARTY: It was not post-Steel --

22 (Laughter.)

23 MR. MORIARTY: Last month.

24 QUESTION: Yes. Well, I thought Steel Co. was
25 our last word.

1 MR. MORIARTY: Indeed.

2 QUESTION: And I thought we said you address,
3 unsurprisingly, jurisdictional issues first.

4 MR. MORIARTY: Correct.

5 QUESTION: And in this one, if you take the
6 words of the Constitution it says the judicial power of
7 the United States shall not extend to any suit, so that
8 sounds -- there is no power over such a suit. How you
9 would get to the 1983 person question if there is no power
10 to do anything is a bit of a mystery.

11 MR. MORIARTY: Which --

12 QUESTION: Well, it's the same question.

13 MR. MORIARTY: Okay.

14 QUESTION: You can answer -- look at either one
15 of us. I don't care.

16 (Laughter.)

17 MR. MORIARTY: In the Idaho case the Court
18 looked at the words, in particular the word extends in
19 Article III and looked at the word extends in the Eleventh
20 Amendment and said, they seem similar, yes, it must be the
21 same thing.

22 It's not. The Eleventh Amendment immunity has
23 never been held to be a bar to jurisdiction over an action
24 at the threshold, and that's what we're dealing with here.

25 QUESTION: Yes, because you could waive it.

1 MR. MORIARTY: We could waive it.

2 QUESTION: We don't know whether it's that kind
3 of bar until the State doesn't waive it, correct?

4 MR. MORIARTY: And also it is a defense.
5 It's -- it can be waived. Very difficult to waive it. It
6 can be waived, and also it is a defense, and in the
7 removal setting particularly, as just noted in Rivet, a
8 defense, removal jurisdiction is not determined based on a
9 defense. It's based on --

10 QUESTION: By failing to raise the Eleventh
11 Amendment as a defense, the -- it may not be the same
12 thing as a waiver, where you expressly renounce reliance
13 on it, but by, if you fail to raise the defense at any
14 time during the proceedings, the proceedings stand.

15 MR. MORIARTY: That's --

16 QUESTION: It's not like a case where there
17 simply was no subject matter jurisdiction.

18 MR. MORIARTY: Absolutely correct, Chief
19 Justice, and --

20 QUESTION: Here you did raise it.

21 MR. MORIARTY: We did raise it. We raised it
22 again throughout, as is the case in most Eleventh
23 Amendment cases where the court has addressed the issues.

24 QUESTION: One part of this before you finish
25 that I don't quite understand. Since you're so clear on

1 the 1983, not a person argument, why didn't you, over in
2 the Wisconsin State court, say, Wisconsin State court, get
3 the State out of it, we're not a 1983 person? Then you'd
4 have a clean suit that the individuals -- that the
5 defendants being sued in their individual capacity could
6 remove.

7 MR. MORIARTY: Because the removal decision must
8 be made very promptly. The statute requires that it be
9 made within, I believe it's 20 or 30 days after you first
10 learn of the lawsuit. You don't have time to litigate in
11 front of the State court, get rid of claims.

12 QUESTION: So you say -- are you saying that the
13 individuals would have been untimely if they didn't
14 petition to remove until after the State was dismissed?

15 MR. MORIARTY: Yes. If the case was not
16 removable at the time, then it might have been deferred,
17 but to risk the fact that it was "not removable" by
18 failing to remove at that time would have been a poor
19 litigation decision.

20 QUESTION: You made the right litigation
21 decision, we'll assume. You removed -- now the Eleventh
22 Amendment defense is raised, why -- tell me -- explain at
23 that point why the court is not bound to remand.

24 MR. MORIARTY: Because the court had Federal
25 question jurisdiction over all of the claims under --

1 QUESTION: But it no longer has -- if the
2 Eleventh Amendment issue is correct, it no longer would
3 have subject matter jurisdiction.

4 MR. MORIARTY: Over one or two of the claims
5 made in the case, but certainly --

6 QUESTION: Oh, look, over the State and the
7 official capacity defendants. It would no longer have
8 subject matter jurisdiction over them, would it?

9 MR. MORIARTY: We -- it would have -- no longer
10 have subject matter jurisdiction over the claims made
11 against the State. However, that's because of a defense
12 that's been interposed.

13 The issue of original jurisdiction, the issue of
14 removal jurisdiction goes to the entire action. That's
15 what City of Chicago was talking about. The State law
16 claims certainly weren't within the original jurisdiction.
17 It was only when we had the --

18 QUESTION: Yes, but these --

19 QUESTION: But the point is -- the point is,
20 removal was allowable, initially.

21 MR. MORIARTY: Mm-hmm.

22 QUESTION: And once the State in Federal court
23 says, wait a minute, Eleventh Amendment as to State
24 claims, then those claims could be remanded to the State
25 court and you can go deal with it back in State court,

1 leave the individual capacity claims in the Federal court.

2 MR. MORIARTY: Certainly --

3 QUESTION: Isn't that adequate? I mean, doesn't
4 that take care of everything?

5 MR. MORIARTY: In this particular case, it's not
6 going to make much difference. We can do it. We can go
7 back to court. We can handle that, but --

8 QUESTION: You can go back to State court and
9 make your pitch on person.

10 MR. MORIARTY: And we'll prevail.

11 QUESTION: And why shouldn't that be done?

12 MR. MORIARTY: I know we'll --

13 QUESTION: In other words, why shouldn't it be
14 done?

15 MR. MORIARTY: Why shouldn't it be done?
16 Because it mixes together the essential issues of
17 jurisdiction removal and Eleventh Amendment immunity. If,
18 in fact, the Eleventh Amendment immunity --

19 QUESTION: Stand back from it --

20 QUESTION: Yes. Yes.

21 QUESTION: -- and our colloquy before. You are
22 saying, because of the Eleventh Amendment, no court can
23 deal with a 1983 person. We just get out. We just get
24 out at the threshold.

25 We take it out of the State court, put it into

1 the Federal court, and then say, Federal court, you
2 dismiss, and then we're not subject to having that
3 question decided by any court, ever, and that's a very
4 hard argument to make.

5 MR. MORIARTY: I don't believe that's the
6 result. We are asking that a Federal court look at those
7 issues and resolve them. If, in fact, it's a dismissal
8 without prejudice --

9 QUESTION: But you're asking for Eleventh
10 Amendment immunity, and as Justice Scalia has pointed out,
11 at least after his recent decision that would come first,
12 before you deal with the merits.

13 MR. MORIARTY: And if Eleventh Amendment
14 immunity went to the jurisdiction of the court over an
15 action, under Steel Company it would always have to be
16 addressed first, always. The court would never --

17 QUESTION: Would you say it's not jurisdiction,
18 since it could be waived?

19 You say it's not jurisdictional. Is that what
20 you're saying?

21 MR. MORIARTY: I'm not -- it is a jurisdictional
22 issue. Jurisdictional is a word of many, too many
23 meanings.

24 QUESTION: Mm-hmm. But it's not subject matter
25 jurisdiction, then.

1 MR. MORIARTY: It doesn't go to jurisdiction
2 over the action. It goes to jurisdiction over the --

3 QUESTION: Over the person.

4 MR. MORIARTY: -- particular claim.

5 QUESTION: No, but you're back -- I mean, your
6 argument now is back to saying, you cannot split them up.
7 You're back to saying you cannot deal with the official
8 action differently from the way you deal with the
9 individual action. That's the premise of your answer that
10 you just gave, isn't it?

11 MR. MORIARTY: The -- I don't believe it is,
12 Your Honor.

13 QUESTION: Then I don't understand.

14 MR. MORIARTY: Jurisdiction over the action is
15 the first question. Is this properly within the
16 courthouse door?

17 Second question. Let's look at the claims we
18 have and the defenses and see what happens to those
19 claims. In City of Chicago we have Federal claims.
20 Therefore, we have the case properly within the courthouse
21 door.

22 Next question. What do we have there? We have
23 some State law claims as well. Well, as long as we've got
24 Federal question jurisdiction, we can look at those State
25 law claims under pendant and ancillary jurisdiction. We

1 couldn't have if there weren't any Federal questions.

2 QUESTION: Right, and this is unlike City of
3 Chicago because once the Eleventh Amendment issue is
4 raised, you don't have -- the Federal court does not have
5 jurisdiction to adjudicate the State and the official
6 capacity claims, so Chicago doesn't cover this.

7 MR. MORIARTY: It does not.

8 QUESTION: And you're saying, if I understand
9 you, that with respect to the State and the official
10 capacity claims, it was error to remand. Why was it error
11 to remand?

12 MR. MORIARTY: It was error to remand because
13 the Seventh Circuit did it on a basis of lack of original
14 jurisdiction, lack of removal jurisdiction.

15 QUESTION: All right. Should they not have done
16 the same thing on the basis of lack of subject matter
17 jurisdiction, not Article III jurisdiction, maybe, but at
18 least subject matter jurisdiction?

19 MR. MORIARTY: Under 1447(c)?

20 QUESTION: Yes.

21 MR. MORIARTY: That replies again, as I read the
22 cases, to jurisdiction over the action. You've lost
23 jurisdiction over the entire action before the case is
24 completed.

25 QUESTION: Thank you, Mr. Moriarty.

1 Mr. Lasker, we'll hear from you.

2 ORAL ARGUMENT OF DAVID E. LASKER

3 ON BEHALF OF THE RESPONDENT

4 MR. LASKER: Mr. Chief Justice, and may it
5 please the Court:

6 Justice Souter, I would like to begin by
7 addressing your concern, because I do believe that this
8 case clearly was handled correctly by the Seventh Circuit,
9 because once removed to Federal court the State did
10 immediately assert its Eleventh Amendment immunity, and
11 there certainly the court lacked subject matter
12 jurisdiction.

13 QUESTION: Well, why couldn't the Federal court
14 retain the action and decide the individual capacity
15 claims, remand the claims against the State, and there you
16 are?

17 MR. LASKER: I don't think --

18 QUESTION: What's the matter with that?

19 MR. LASKER: I think the problem with that,
20 Justice O'Connor, is that it doesn't pay respect to the
21 statutes enacted by Congress that govern this matter.

22 QUESTION: Well, I think it does entirely, and
23 the case was removable in the first instance, but once the
24 Eleventh Amendment defense is asserted, then the Federal
25 court can remand so much of the case as deals with the

1 Eleventh Amendment claims and keep the rest.

2 MR. LASKER: Your Honor, I --

3 QUESTION: I thought that was where the Seventh
4 Circuit's decision appears questionable.

5 MR. LASKER: Well, Your Honor, I do not agree
6 that the case was properly removed to begin with. I think
7 that the Court lacked original jurisdiction under 1441(a).
8 I think we have a very unique circumstance here which, as
9 Justice Scalia pointed out, really hasn't been
10 contemplated by the explicit language of any one of these
11 statutory provisions. This is a situation --

12 QUESTION: Well, I think it fits. I mean, as
13 long as -- if we don't know if the State is going to
14 assert an Eleventh Amendment defense, and certainly the
15 suit originally filed included section 1983 claims against
16 individuals in their individual capacity, so the whole
17 thing could have been filed in Federal district court as
18 an original proposition.

19 MR. LASKER: I believe that it could have been
20 filed there only to give the Federal court jurisdiction to
21 determine that it lacked jurisdiction because of the
22 Eleventh Amendment problem extant in the case as
23 originally filed.

24 Of course, the case was not filed in Federal
25 court, and that's essential to the case at bar, but had

1 the case been filed in Federal court, I believe the
2 Federal court's jurisdiction would have only been to the
3 extent of determining under Steel Company that it didn't
4 have jurisdiction.

5 QUESTION: Well, that's where I disagree. It
6 certainly had jurisdiction over the claims against the
7 individuals in their individual capacity.

8 MR. LASKER: Well, Your Honor, I would say that
9 Justice Ginsburg was correct in saying that what the State
10 should have done in this situation, or which would have
11 been the simple way out of the woods for this difficult
12 problem that's presented here, would have been for them to
13 move to dismiss the claims that were supposedly improper
14 claims which were the only claims that presented the
15 Eleventh Amendment problem. Then they would have been
16 able to remove under 144 --

17 QUESTION: Yes, but I think Mr. Moriarty pointed
18 out that the individuals might have been told you're too
19 late to remove, because the case was removable earlier.

20 MR. LASKER: Perhaps that would be true, Justice
21 Ginsburg, prior to the decision in this case, but this
22 Court will now reach a decision which will speak to all
23 lawyers and judges and clarify this difficult situation
24 where we have Federal claims that are Eleventh Amendment-
25 barred.

1 QUESTION: Is it your position that the State
2 could have moved, or the Circuit Court of Dane County,
3 they could have moved in that court to dismiss claims that
4 would have been barred by the Eleventh Amendment in
5 Federal court?

6 MR. LASKER: Yes, Your Honor.

7 QUESTION: Certainly not on the grounds of the
8 Eleventh Amendment.

9 MR. LASKER: No, on --

10 QUESTION: That's not binding on the State --

11 MR. LASKER: On the grounds of their argument
12 that we failed to state a claim under section 1983, but
13 once they had established that we'd failed to state a
14 claim against the State, or the State defendants in their
15 official capacities, they could have removed.

16 QUESTION: But that's saying that you have to do
17 what litigating you can in the State court. I don't know
18 if that's faithful to the removal statute.

19 MR. LASKER: I believe it's exactly what
20 Congress intended, Your Honor. I think that Congress
21 clearly intended that the sorting out of these matters be
22 done in State court.

23 QUESTION: It couldn't have been so clear,
24 because you missed it. You never -- you didn't resist the
25 remand. Nobody ever thought of it till it got to the

1 Seventh Circuit, right?

2 MR. LASKER: That's true, Your Honor, and I'm
3 quite an expert on the Eleventh Amendment since the cert
4 petition was granted, but I can't say that I was
5 beforehand.

6 QUESTION: I don't understand. I mean, I must
7 be maybe missing something obvious. Forget State court.
8 Suppose I, a plaintiff, feel my civil rights were
9 infringed, and I want to sue a lot of people, so I march
10 into the door of the Federal district court and I sue four
11 policemen and the municipality, and I throw in a State
12 official, and I add, in his official capacity, so I have
13 seven suits, seven claims in this suit.

14 MR. LASKER: Yes.

15 QUESTION: I would have thought -- is there any
16 law, any case, anything that says that I can't bring that
17 lawsuit in a Federal district court? I thought that's
18 garden variety.

19 I thought it happens every day of the week that
20 people bring suits like that in the Federal district court
21 and then, if the State happens to assert Eleventh
22 Amendment as to its claim, at that point, maybe we dismiss
23 that claim, but am I wrong about my garden variety, and
24 way this civil rights law works, because you do know a lot
25 about that.

1 MR. LASKER: Well, now that I've become an
2 expert on that Eleventh Amendment, I do --

3 QUESTION: Forgetting -- yes. Go ahead.

4 MR. LASKER: I do believe that the case you cite
5 should not be accepted in the Federal court.

6 QUESTION: Now, is there any precedent anywhere
7 where a judge didn't accept such a case?

8 MR. LASKER: I think this would have to become
9 the case, Your Honor.

10 QUESTION: So as far as we know, no; this would
11 be historical to say that they can't have cases like that
12 in Federal district court, and your reason for saying that
13 is?

14 MR. LASKER: My reason for saying that is that
15 the Eleventh Amendment, Your Honor, is in the Constitution
16 at all times, and it is in the nature of a jurisdiction
17 bar, as this Court said in --

18 QUESTION: But Mr. Lasker, what about the
19 Federal Rules of Civil Procedure, which says that you can
20 add and drop parties any time, so you were wrong about
21 naming a State or a State officer. You just drop that
22 party. That --

23 MR. LASKER: If that party is dropped out, then
24 the bar to Federal jurisdiction would be gone, and then
25 under 1446(b) it could be removed to Federal court. If

1 removal to Federal court --

2 QUESTION: Well, Mr. Lasker, I thought City of
3 Chicago was relevant in one respect in this case. It made
4 clear that the existence of some properly stated Federal
5 claims suffices to make actions, civil actions within the
6 original jurisdiction of the district courts for purposes
7 of removal. Some Federal claims.

8 I thought City of Chicago spoke to that, and so
9 your argument rings hollow to my ear --

10 MR. LASKER: Thank you --

11 QUESTION: -- on that point.

12 MR. LASKER: Thank you, because I really think
13 that it's important to underscore that City of Chicago
14 involved State claims that were attached under the Court's
15 pendant or supplemental jurisdiction.

16 QUESTION: It did not involve claims which would
17 be potentially subject to an Eleventh Amendment immunity
18 defense.

19 MR. LASKER: Correct.

20 QUESTION: It did not. But in principle it's
21 the same because unless and until the Eleventh Amendment
22 is raised, it's okay.

23 MR. LASKER: Well, Your Honor, the difference
24 between State claims, State law claims and Federal claims
25 that may be barred under the Eleventh Amendment is a

1 distinction that I think is important here, and -- but
2 certainly --

3 QUESTION: But you deal with it by remanding the
4 claims in which the Eleventh Amendment would cover it and
5 go on with what's left.

6 MR. LASKER: That does not pay homage, Your
7 Honor, to the language of 1447(c), which says that when
8 the court lacks subject matter jurisdiction the case shall
9 be remanded. There's not authority to remand individual
10 claims, and --

11 QUESTION: That's -- on reading that -- that
12 that's all. I -- shall be remanded says, when you fit
13 this, then it must be remanded. It doesn't say that
14 nothing else can be remanded, and the notion that somehow
15 this case is -- doesn't belong in Federal court, even
16 though City of Chicago does, is staggering, because here
17 there's nothing but Federal law, is all. There's no claim
18 made under any law other than Federal law, as I understand
19 this complaint.

20 MR. LASKER: But this contains claims of Federal
21 law, Justice Ginsburg, some of which may not be brought in
22 Federal court but all of which may be brought in State
23 court, and --

24 QUESTION: Yes, but there's no exclusive venue.
25 I mean, if you -- you can say yes, sometimes Congress lets

1 people sue in State court if they want to, like the FELA.
2 There's nothing like that here.

3 MR. LASKER: The -- I guess I --

4 QUESTION: You can bring a 1983 action in State
5 court, can you not?

6 MR. LASKER: Of course, yes, and this entire
7 action was properly brought in State court.

8 QUESTION: Yes, but defendants in 1983 actions
9 can remove them to Federal court, as defendants in FELA
10 cases could not, because there Congress says, not only can
11 you bring it in State court, but it can't be removed if
12 you bring it there.

13 MR. LASKER: Your Honor, I think what I'm
14 recommending to this Court is that you announce a doctrine
15 in handling this case that is true to the unambiguous
16 language of the statutes, that is -- that honors the
17 principles of Federalism under the Eleventh Amendment and
18 Article III, and that applies a doctrine that is efficient
19 and simple to understand for lawyers and judges, and that,
20 I submit to you, is exactly what the Seventh Circuit did
21 in this case.

22 QUESTION: And I take it that as part of this
23 clarification you are going to stick with your answer that
24 you gave to Justice Breyer. He said, forget State court,
25 you go into Federal court with all of these claims, one of

1 them, which is barred by the Eleventh Amendment, six of
2 which are good Federal claims.

3 As I understood your answer to the question you
4 said the entire case must be dismissed, and then Justice
5 Ginsburg said, well, what about the Federal Rules of Civil
6 Procedure, and you said, well, what the State court does
7 is to sort things out, but that was avoiding the
8 hypothetical.

9 The hypothetical was, just the Federal court, so
10 it seemed to me that you didn't answer correctly when you
11 responded to Justice Ginsburg's suggestion, and I want to
12 know if as part of this overall clarification you're
13 suggesting that we say, if there's one cause of action
14 over which the Federal court -- forget the State court.
15 This is, initially you file it in the United States
16 district court. If there's one cause of action over which
17 there's an Eleventh Amendment jurisdictional problem,
18 Eleventh Amendment jurisdictional bar, the entire case
19 must be dismissed.

20 MR. LASKER: Well, I think --

21 QUESTION: That is -- you have absolutely no
22 authority for that proposition.

23 MR. LASKER: I don't have a case to cite for
24 that proposition, and this case does not raise those
25 facts, of course, but --

1 QUESTION: And the Federal Rules of Civil
2 Procedure are against you.

3 MR. LASKER: Your Honor, the fact is that we're
4 dealing here with a hybrid type of case that is not -- has
5 not been addressed foursquare before in any situation that
6 I'm aware of, and that is a case where you have Federal
7 claims that are not barred by the Eleventh Amendment
8 coupled with Federal claims that are barred by the --

9 QUESTION: Well, but these cases happen all the
10 time -- all the time. It's just because of the rather
11 unusual step taken by the Seventh Circuit that we have it
12 here.

13 MR. LASKER: Your Honor, I believe that on
14 behalf of my client I had a right as the plaintiff's
15 counsel to file this case in State court, which is how
16 this question comes here from the Seventh Circuit, and --

17 QUESTION: I can understand that part of it, and
18 that's what this case is. This is a removal case.

19 But the case that I put to you, and Justice
20 Kennedy just recalled, of an initial proceeding in Federal
21 court with some defendants, why would it be any different
22 than if you filed a diversity suit and you had one
23 nondiverse defendant, and there was a motion to dismiss
24 for lack of subject matter jurisdiction?

25 You'd say, fine, I drop the nondiverse

1 defendant. Why is this any different as an initial
2 matter?

3 MR. LASKER: Because I don't think that Congress
4 intended to bifurcate the litigation in that fashion. I
5 think that piecemeal removal --

6 QUESTION: Forget removal.

7 MR. LASKER: All right.

8 QUESTION: We're in Federal court with a
9 complaint that includes the State and individuals.

10 MR. LASKER: Yes.

11 QUESTION: And there is a motion to dismiss the
12 State on Eleventh Amendment grounds. Isn't that all that
13 would be dismissed?

14 If in other words, you have this case originally
15 in Federal court. The State gets out when it moves to
16 dismiss on Eleventh Amendment grounds. The other
17 defendants don't.

18 MR. LASKER: I suppose the answer to that
19 question would be yes, and that does --

20 QUESTION: Yes.

21 MR. LASKER: -- then draw the importance of the
22 fact that this case arises out of my choice to sue in
23 State court and then the defendant's procedural maneuver
24 that was disapproved of in this case and that was of
25 concern to the Seventh Circuit in Frances J., that the

1 defendants remove a case of that sort from State court to
2 Federal court really for the purpose of separating the
3 prospective relief claims from the --

4 QUESTION: Well then, your argument should
5 address why it should be different on removal than it
6 would have been if the case were originally filed in
7 Federal court, and --

8 MR. LASKER: Okay.

9 QUESTION: -- perhaps pointing to some statutory
10 language.

11 MR. LASKER: Well --

12 QUESTION: Some statutory language that somehow
13 overrules the extant statutory language that says that any
14 civil action brought in a State court of which the
15 district courts of the United States have original
16 jurisdiction may be removed, so we need a statute that
17 somehow undoes that, but you've conceded it could have
18 been brought in the United States district court.

19 MR. LASKER: Well, the statute that disposes of
20 this case is 1447(c).

21 QUESTION: It's critical to your position, as I
22 understand it, that if there is an Eleventh Amendment
23 defense potentially available to one of the defendants,
24 that the court lacks subject matter jurisdiction.

25 MR. LASKER: That's my position, Justice

1 Stevens.

2 QUESTION: And that we have not yet held.

3 MR. LASKER: That's correct.

4 QUESTION: And that would be true in an original
5 filing under Federal -- in Federal court, surely, just as
6 true as if the action were removed from State court.

7 MR. LASKER: I believe it would, but I think
8 that that would deal with the kind of case that we've got
9 here in the most efficient way --

10 QUESTION: You're changing your answer, then. I
11 mean, I think if you give away that -- the answer to
12 Justice Ginsburg's and Justice Breyer's question of what
13 would have happened had this suit been originally brought
14 in district court, I think your case is gone.

15 You have to defend the position that this action
16 would not have been originally bringable in a Federal
17 court.

18 MR. LASKER: I do assert that it should not have
19 been accepted under the court's original jurisdiction, and
20 I say that whether I'm right about that or not, Justice
21 Scalia, certainly when the State asserted its Eleventh
22 Amendment defenses in Federal court, then clearly under
23 1447(c) the Federal court lacked subject matter
24 jurisdiction and was right to send the entire case back,
25 not just the --

1 QUESTION: All right, can I say -- I'm trying to
2 find some authority for you. I mean, here you got another
3 shot at this from the Seventh Circuit, so I don't blame
4 you at all for defending this, but I'm trying to think of
5 the authority that might support you. Is there any
6 authority in the following proposition?

7 I now go to the Federal district court and I
8 file my claim, which I have my four defendants, lots of
9 Federal law, and one of my 19 claims -- one of them --
10 there is no subject matter jurisdiction over, for whatever
11 set of reasons. Forget the Eleventh Amendment.

12 Is there any authority, when that situation
13 arises -- I would have thought all that happens is, they
14 dismiss that claim and proceed with the rest. But is
15 there any authority for the proposition that you have to
16 dismiss the whole thing?

17 MR. LASKER: No, not that I'm aware of, Your
18 Honor.

19 QUESTION: All right. Now, to take them -- is
20 there any authority for the proposition that when you
21 remove such a case from the State court to the Federal
22 court you have to dismiss the whole thing, i.e., you
23 couldn't remove it?

24 MR. LASKER: No, there isn't, but --

25 QUESTION: Then I think you're on a tough

1 ground.

2 MR. LASKER: That's -- my answer to you is
3 correct, but I again have to ask you not to hang me on my
4 answer to that question --

5 QUESTION: No, no, I wouldn't because I mean,
6 you say, well, this will be quite simple. I'm not sure it
7 would be simple. There are a lot of cases, you know,
8 where you don't quite know whether this is a State
9 official, not a State official, official capacity, not
10 official capacity, everybody gets mixed up and they have
11 huge arguments, and the whole case would have to be sent
12 back to another court. That's worrying me.

13 QUESTION: I suppose one of the things that's
14 wrong is that the State, by quite a sensible rule, it
15 seems to me, should be deemed to have waived its Eleventh
16 Amendment immunity the minute it consents to the removal,
17 but that's not our law, either.

18 MR. LASKER: No, it doesn't seem to be, Your
19 Honor, so that's the situation we're stuck with.

20 QUESTION: Mr. Lasker, you have a statement in
21 your brief that the State was not immune from suit in
22 State court. Isn't there a sovereign immunity doctrine
23 that's applicable in the State court? I mean --

24 MR. LASKER: Well, it -- there is a sovereign
25 immunity statute in the State court for State claims. I'm

1 not sure exactly where in my brief you're referring,
2 but --

3 QUESTION: On the top of page 9 you say that the
4 Seventh Circuit held the district court lacked original
5 jurisdiction because petitioners were immune from suit in
6 the Federal court, and then you add, although they were
7 not immune from suit in the State court. Of course, they
8 don't have Eleventh Amendment immunity, but --

9 MR. LASKER: That's what I was referring to.

10 QUESTION: -- most States have their own
11 sovereign immunity doctrine, don't they?

12 MR. LASKER: They do, but I was -- but the State
13 immunity is, I believe, abrogated by section 1983,
14 although a State is not a person under section 1983 since
15 Will.

16 What I was talking about, however, is that the
17 action as it was brought would have been within the
18 jurisdiction of the State court and was not within the
19 jurisdiction of the Federal court for the reason of the
20 existence of the Eleventh Amendment.

21 QUESTION: There isn't something like a
22 Wisconsin tort claims act that would allow a wrongful
23 discharge case to be brought against the State?

24 MR. LASKER: I do have a theory, Your Honor,
25 that I seek to assert in the State court upon remand, that

1 we do have a claim under the Wisconsin constitution that
2 would not be barred by the State doctrine of sovereign
3 immunity.

4 QUESTION: Is your -- are the circuit courts in
5 Wisconsin courts of general jurisdiction?

6 MR. LASKER: Yes, sir.

7 QUESTION: Where you don't have limitations of
8 subject matter the way you do in the Federal court?

9 MR. LASKER: That's correct.

10 QUESTION: Mr. Lasker, what prevents us from
11 holding that when a State removes or consents to removal
12 of a case into Federal court it waives its Eleventh
13 Amendment objection?

14 MR. LASKER: I just -- I don't know that
15 anything stands in the way of that except stare decisis.
16 I think that the Finney case and other cases that are
17 cited in the brief do stand for the proposition that the
18 waiver has to be an explicit act of the sovereign State
19 and not just something that happens because of the
20 strategic decision by an Assistant Attorney General, for
21 example.

22 QUESTION: Well, I mean, isn't it clear that
23 when you say, I want to be in Federal court, you mean I
24 want to be in Federal court?

25 MR. LASKER: Well, it would seem clear to me,

1 Your Honor, but I don't think that that's ever been
2 considered to be a proper waiver of the State's Eleventh
3 Amendment immunity.

4 QUESTION: We wouldn't have any of these
5 troubles if that were the rule.

6 MR. LASKER: Perhaps not.

7 QUESTION: If it were, then maybe Mr. Moriarty
8 could not have removed the case, because he said that
9 under State law they have no authority, the State AG has
10 no authority to waive the Eleventh Amendment.

11 MR. LASKER: I'm not an authority on that. I --

12 QUESTION: It follows from that, doesn't it,
13 that if that's true, then it was clear even before the
14 removal, because of the State law situation, that there
15 would never have been jurisdiction in the Federal court
16 over part of the case, because the -- because it's
17 foreordained that it's not optional, as your opponent
18 suggests, that they may or may not waive it.

19 The law of Wisconsin required him to assist --
20 assert his Eleventh Amendment jurisdiction and, therefore,
21 following the reasoning of the Seventh Circuit, they had
22 to send the whole case back. They could not accept the
23 removal because there was a jurisdictional bar.

24 MR. LASKER: I'd say that --

25 QUESTION: You don't know which side I'm on

1 here.

2 MR. LASKER: Well, I do say that --

3 QUESTION: It seems to --

4 MR. LASKER: -- that the case should not have
5 been accepted into Federal court until the State court --

6 QUESTION: Yes.

7 MR. LASKER: -- had sorted out the claims --

8 QUESTION: Because as a matter of Wisconsin law,
9 it's clear that the Federal court never had -- could have
10 taken jurisdiction of the claim against the State, as a
11 matter of Wisconsin law, which they would have to honor,
12 that they could not waive the Eleventh Amendment defense.

13 MR. LASKER: Well, I don't know that Wisconsin
14 law is as Mr. Moriarty asserts. I'm going to accept his
15 word on that, but I don't think it would be difficult for
16 the State to waive and get a statute enacted by the
17 legislature.

18 QUESTION: Of course, the Federal court would
19 have had jurisdiction if the State had simply processed
20 its removal and made no objection on Eleventh Amendment
21 grounds. It doesn't have to waive in the sense of
22 affirmatively renouncing. It can simply do nothing and
23 the Eleventh Amendment defense is waived.

24 MR. LASKER: I think that's at least clear in
25 determining the application of 1447(c) to the facts in

1 this case.

2 However, I am arguing that I think the problem
3 exists in the case of whether the court has original
4 jurisdiction under 1441(a), and that the best rule would
5 be to require that the State court dismiss any claims that
6 would otherwise be barred in the Eleventh Amendment before
7 removal could occur.

8 If there are no further questions, then I'll sit
9 down. Thank you very much.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Lasker.

11 The case is submitted.

12 (Whereupon, at 11:50 a.m., the case in the
13 above-entitled matter was submitted.)

14

15

16

17

18

19

20

21

22

23

24

25

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:

WISCONSIN DEPARTMENT OF CORRECTIONS ET AL., Petitioners v. KEITH D. SCHACHT

CASE NO: 97-461

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

BY Donna Maria Federico

(REPORTER)