



Office of Legal Policy  
United States Department of Justice

950 Pennsylvania Avenue, NW  
Washington, D. C. 20530

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**DATE:** 6/21/02

**TO:** Brett Kavanaugh

**Re:** Shedd

**FAX:** 202-456-5104

**PAGES:** \_30\_ (including cover)

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**FROM:** Wendy Keefer

**VOICE:** 202-616-2643

**FAX:** 202-307-3137

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**FILED**

**OCT 14 1999**

LARRY W. PROPPES, CLERK  
COLUMBIA, S.C.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

MARIE T. CROSBY,

Plaintiff,

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

vs.

SOUTH CAROLINA DEPARTMENT  
OF HEALTH AND ENVIRONMENTAL  
CONTROL,

Defendant.

C.A. No. 3:97-3588-19BD

**ENTERED**

10-14-99

**ORDER**

This case is before the Court for review of the Report and Recommendation filed by United States Magistrate Judge Bristow Marchant on June 30, 1999 (as supplemented on September 3, 1999). In the Report, Magistrate Judge Marchant recommends that the Court grant defendant's motion for summary judgment on plaintiff's Family and Medical Leave Act ("FMLA") claim because Congress did not properly enact the FMLA under § 5 of the fourteenth amendment and, therefore, has not abrogated defendant's eleventh amendment immunity from suit.<sup>1</sup> Although plaintiff has not objected to this

<sup>1</sup>The Court previously accepted Magistrate Judge Marchant's recommendation that defendant is entitled to summary judgment on plaintiff's claim under the Americans with Disabilities Act ("ADA").

*NOT p 1*

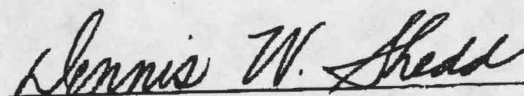
*36*



recommendation, the United States of America – which the Court permitted to intervene – has objected.

After carefully reviewing the record and the controlling legal principles, the Court concludes that the Report is proper. Accordingly, the Court will accept the Report, overrule the United States' objections, and grant summary judgment for defendant on the FMLA claim.

IT IS SO ORDERED on this the 13<sup>th</sup> day of October, 1999, at Columbia, South Carolina.

  
DENNIS W. SHEDD  
UNITED STATES DISTRICT JUDGE

2  
9-3-99  
rw

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

**FILED**

SEP 3 1999

COLUMBIA DIVISION

LARRY W. PROPPES, CLERK  
COLUMBIA, S. C.

MARIE T. CROSBY,

Plaintiff,

Civil Action No. 3:97-3588-19BD

and

UNITED STATES OF AMERICA,

Plaintiff-Intervenor,

v.

**SUPPLEMENTAL**

**REPORT AND RECOMMENDATION**

SOUTH CAROLINA  
DEPARTMENT OF HEALTH  
AND ENVIRONMENTAL  
CONTROL,

Defendant.

Plaintiff, a former division director with the Defendant South Carolina Department of Health and Environmental Control (hereinafter "DHEC"), filed this employment discrimination action pursuant to Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et. seq., and the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, et. seq.. On June 30, 1999, the undersigned issued a Report and Recommendation recommending that Defendant's motion for summary judgment be granted as to both Plaintiff's ADA claim and her FMLA claim. On August 5, 1999, the Honorable Dennis W. Shedd, United States District Judge, granted the Defendant's motion for summary judgment on Plaintiff's ADA claim. See Order dated August 5, 1999.



With regard to Plaintiff's FMLA claim, the undersigned recommended dismissal on the grounds that the FMLA was not properly enacted under Congress' § 5 enforcement powers, and that Congress has therefore not abrogated the state's Eleventh Amendment immunity from suit. Report and Recommendation, at pp. 16-19. In his order of August 5, 1999, Judge Shedd determined that "[b]ecause the constitutionality of the FMLA has...been called into question, the Court - acting pursuant to 28 U.S.C. § 2403 and Fed.R.Civ.P. 24(c)- shall hold this issue in abeyance pending review by the Attorney General of the United States, who shall be permitted to intervene on behalf of the United States of America if she deems appropriate." See Order dated August 5, 1999. On August 27, 1999, the United States of America ("United States") intervened and filed a memorandum in opposition to Defendant's motion to dismiss or for summary judgment, solely addressing the issue of the FMLA's abrogation of the States' immunity. Judge Shedd thereafter remanded this matter to the undersigned for further consideration of Defendant's motion in light of the United States' intervention.

#### Discussion

Plaintiff alleges that the Defendant violated her rights under the Family and Medical Leave Act, 29 U.S.C. § 2601, et. seq., by not restoring her to the position of Division Director or an equivalent position when her physician released her to return to her duties, but not in the Heritage Building, on September 30, 1998.<sup>1</sup> Defendant asserts that Plaintiff's FMLA claim is

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<sup>1</sup>The full factual background and evidence of record in this case are set forth in the undersigned's Report and Recommendation filed on June 30, 1999.

barred pursuant to the Eleventh Amendment to the United States Constitution.<sup>2</sup> Specifically, the Defendant argues that enactment of the FMLA fails to meet the requirement that such an Act be a proper exercise of Congress' enforcement power under the Fourteenth Amendment.

In its brief, the United States argues that the FMLA properly abrogates the immunity of the states under the Eleventh Amendment, spending considerable space extolling the virtues of the Act. However, while the goals and requirements of the Act are laudable, the question before the Court is whether it is constitutional. After carefully reviewing the brief filed by the United States, the undersigned is unpersuaded by the arguments presented. For the reasons previously set forth and discussed in the Report and Recommendation of June 30, 1999, the undersigned continues to agree with the majority of courts which have addressed this issue in finding that Congress did not effectively abrogate the States' Eleventh Amendment Immunity in enacting the FMLA. See Kilvitis v. County of Luzerne, \_\_\_\_ F.Supp. 2d \_\_\_\_, 1999 WL 428246 (M.D.Pa. June 25, 1999); Sims v. University of Cincinnati, 46 F.Supp.2d 736 (S.D.Ohio 1999); McGregor v. Goord, 18 F.Supp.2d 204 (N.D.N.Y. 1998); Thomson v. Ohio State University Hospital, 5 F.Supp. 2d 574 (S.D.Ohio 1998); Driesse v. Florida Board of Regents, 26 F.Supp.2d 1328 (M.D.Fla. 1998); Garrett v. Board of Trustees of Univ. of Alabama, 989 F.Supp. 1409 (N.D.Ala. 1998), appeal pending, 11th Cir. No. 98-6069; Post v. State of Kan., No. 98-1238, 1998 WL 928677 at \* 3 (D.Kan. Dec. 10, 1998)[ "Of the district courts which have now considered the issue, the majority and all of the more recent cases have concluded that the Eleventh Amendment bars FMLA claims

<sup>2</sup>The Eleventh Amendment provides as follows:

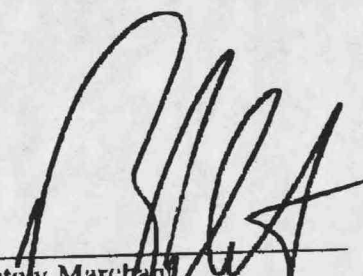
The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state or by citizens or subjects of any foreign state.



against state agencies."]; but see Jolliffe v. Mitchell, 986 F.Supp. 339, 342-343 (W.D.Va. 1997); Biddlecome v. Univ. of Texas, No. 96-1872, 1997 WL 124220 (S.D.Tex. 1997); Knussman v. State of Md., 935 F.Supp. 659, 663 (D.Md. 1996)<sup>3</sup>.

### Conclusion

Based on the foregoing, it remains the recommendation of the undersigned that the Defendant's motion to dismiss and for summary judgment be **granted** as to Plaintiff's FMLA claim, and that this case be **dismissed**.

  
Bristow Marchant  
United States Magistrate Judge

Columbia, South Carolina

September 3, 1999

<sup>3</sup>As the Kilvitis opinion points out, the court in Knussman only considered whether Congress expressed its intent to abrogate the Eleventh Amendment, specifically noting that the parties had neither briefed nor argued whether Congress acted pursuant to a valid exercise of power in doing so.

## IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA **FILED**

COLUMBIA DIVISION

AUG - 5 1999

LARRY W. PHOMES, CLERK  
COLUMBIA, S C

MARIE T. CROSBY,

Plaintiff,

vs.

C.A. No. 3:97-3588-19BD

SOUTH CAROLINA DEPARTMENT  
OF HEALTH AND ENVIRONMENTAL  
CONTROL,

Defendant.

**ENTERED**  
8-5-99**ORDER**

The Court has received the Report and Recommendation ("the Report") filed in this case by United States Magistrate Judge Bristow Marchant.<sup>1</sup> The Court has carefully reviewed the Report and concludes that it is proper concerning plaintiff's ADA claim. Accordingly, the Court will grant summary judgment in defendant's favor on that claim.

Concerning plaintiff's FMLA claim, Magistrate Judge Marchant recommends that the Court grant summary judgment in favor of defendant based on his conclusion that Congress did not properly enact it under § 5 of the 14<sup>th</sup> Amendment. Because the constitutionality of the FMLA has therefore been called into question, the Court - acting pursuant to 28 U.S.C. § 2403 and Fed. R. Civ. P. 24(c) - shall hold this issue in abeyance

<sup>1</sup>Although she sought and obtained an extension of time (until July 26, 1999) to file objections to the Report, Plaintiff has not filed objections to the Report.

*AMST p. 1*

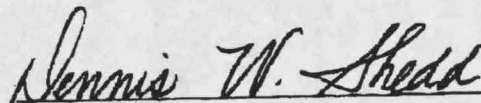
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pending review by the Attorney General of the United States, who shall be permitted to intervene on behalf of the United States of America if she deems appropriate.

The Court directs the Clerk of Court to immediately forward a copy of this Order to the United States Attorney for the District of South Carolina. The United States Attorney shall notify the Court by no later than August 27, 1999, of the United States' position on this matter.

**IT IS SO ORDERED** on this the 5<sup>th</sup> day of August, 1999, at Columbia, South Carolina.



**DENNIS W. SHEDD**  
**UNITED STATES DISTRICT JUDGE**

18:25 JUN 18, 2002 ID: CLERK'S OFFICE

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

2-99  
7-1-99  
nw  
**FILED**

JUN 30 1999

LARRY W. PROPPS, CLERK  
COLUMBIA, S.C.

MARIE T. CROSBY,

Plaintiff,

v.

SOUTH CAROLINA  
DEPARTMENT OF HEALTH  
AND ENVIRONMENTAL  
CONTROL,

Defendant.

Civil Action No. 3:97-3588-19BD

**REPORT AND RECOMMENDATION**

Plaintiff, a former division director with the Defendant South Carolina Department of Health and Environmental Control (hereinafter "DHEC"), filed this employment discrimination action pursuant to Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et. seq., and the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, et. seq.<sup>1</sup> The Defendant filed a motion to dismiss and for summary judgment pursuant to Rules 12(b)(1) and 56. Fed.R.Civ.P., on October 13, 1998. Plaintiff filed a memorandum in opposition to Defendant's motion on November 16, 1998, and Defendant filed a reply memorandum on November 25, 1998.

<sup>1</sup>Plaintiff also initially asserted claims under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000e, et. seq.; and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et. seq.. However, Plaintiff has withdrawn her claims under Title VII and the ADEA. See Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, at p. 2.



Defendant's motion is now before the Court for disposition.<sup>2</sup>

**Background and Evidence**

The evidence before the Court, considered in the light most favorable to the Plaintiff, shows that she was employed by the Defendant as Division Director of the Inspection of Care (IOC) Division of the Bureau of Certification from 1992 until her departure from the agency in November 1996. Price Deposition, p. 54; Plaintiff's Deposition, pp. 22-23.<sup>3</sup> The IOC was one of two divisions in the Bureau of Certification, the other division being the Certification Division. Plaintiff's Deposition, pp. 133, 135. The Bureau of Certification was in turn one of a number of DHEC bureaus comprising the Health Regulations section of the agency.



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**FROM:** Wendy Keefer

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JUN-14-2002 14:42

JUDGE SHEDD

P.02/02

1

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

CIVIL ACTION NO.: 3:94-1196

**FILED**

JUN 14 1994

LARRY W. PROPPES, CLERK  
COLUMBIA, S. C.

JOSEPH ALLEY, ET AL.,

PLAINTIFFS,

VS.

STATE OF SOUTH CAROLINA, ET AL.,

DEFENDANT.

6/10/94; TEN A.M.; COLA., SC

BEFORE: THE HON. DENNIS W. SHEDD

UNITED STATES DISTRICT COURT JUDGE

TRANSCRIPT ORDERED BY ATTORNEYS FOR THE DEFENDANTS

THE ABOVE-ENTITLED CASE WAS CALLED FOR MOTION,  
REPORTED BY ME, JANE G. LA PORTE, OFFICIAL COURT REPORTER FOR  
THE U.S. DISTRICT COURT, BY MEANS OF STENOGRAPHIC MACHINE, AND  
TRANSCRIBED BY ME.

\* \* \* \* \*

JANE G. LA PORTE

UNITED STATES DISTRICT COURT

1845 ASSEMBLY STREET COLUMBIA SC 29201

803-254-6239

## 1 APPEARANCES:

## 2 FOR THE PLAINTIFF:

3 MR. GARY WHITE AND

4 MS. LAURA PUCCIA VALTORTA

5 2009 LINCOLN STREET

6 COLUMBIA, SC

7 \* \* \* \* \*

## 8 FOR THE DEFENDANTS:

9 MR. ROBERT DEWAYNE COOK

10 SC ATTORNEY GENERAL

11 PO BOX 11549

12 COLUMBIA, SC

13 AND

14 MR. EDWIN E. EVANS

15 SC ATTORNEY GENERAL

16 PO BOX 11549

17 COLUMBIA, SC

18 AND

19 MR. THOMAS TRAVIS MEDLOCK

20 SC ATTORNEY GENERAL

21 PO BOX 11549

22 COLUMBIA, SC

23

24

25



1           AND  
2       MR. SAMUEL W. HOWELL  
3       HAYNSWORTH, MARION, MCKAY AND GUERARD  
4       PO BOX 7157  
5       COLUMBIA, SC  
6           AND  
7       MR. JAMES WALKER COLEMAN  
8       HAYNSWORTH, MARION, MC KAY AND GUERARD  
9       PO BOX 1119  
10      CHARLESTON, SC    29402  
11           AND  
12      MR. MARK ELAM  
13      OFFICE OF THE GOVERNOR  
14      PO BOX 11369  
15      COLUMBIA, SC    29202  
16           AND  
17      MR. JOSEPH DAWSON SHINE  
18      GENERAL COUNSEL  
19      SOUTH CAROLINA BUDGET AND CONTROL BOARD  
20      PO BOX 12444  
21      COLUMBIA SC    29211  
22  
23  
24  
25

## PROCEEDINGS:

THE COURT: CALL THE CASE PLEASE, MADAM CLERK.

THE CLERK: PLEASE THE COURT:

THIS IS THE CASE OF JOSEPH ALLEY ET AL -VERSUS- THE  
STATE OF SOUTH CAROLINA, ET AL.

CIVIL ACTION NUMBER 3:94-1196.

THE COURT: COUNSEL READY TO PROCEED?

ALL RIGHT.

LET'S SAY FOR THE RECORD WHO WE HAVE.

MR. SHINE, YOU ARE HERE REPRESENTING WHO?

MR. SHINE: STATE BUDGET AND CONTROL BOARD AND  
GOVERNOR OF SOUTH CAROLINA.

THE COURT: MR. ELAM?

MR. ELAM: GOVERNOR CAMPBELL.

THE COURT: MR. HOWELL?

MR. HOWELL: STATE HOUSE COMMITTEE AND THE  
LEGISLATIVE MEMBERS OF THE LEGISLATURE.

THE COURT: ALL RIGHT.

MR. ABLE?

MR. ABLE: I REPRESENT THE INTERVENOR'S, YOUR HONOR.

THE COURT: ALL RIGHT.

MR. EVANS: ED EVANS, YOUR HONOR, TRAVIS MEDLOCK, WE  
REPRESENT THE STATE OF SOUTH CAROLINA.

THE COURT: THANK YOU VERY MUCH.

MR. COOK: BOB COOK FOR THE STATE.



1 THE COURT: ALL RIGHT.

2 MS. VALTORTA: LAURA VALTORTA FOR THE PLAINTIFF.

3 MR. WHITE: GARY WHITE FOR THE PLAINTIFF.

4 THE COURT: MR. WHITE.

5 GOOD MORNING.

6 MR. WHITE: GOOD MORNING, YOUR HONOR.

7 THE COURT: ALL RIGHT.

8 SOME OF YOU HAVE BEEN IN FRONT OF ME BEFORE, OTHERS  
9 OF YOU HAVEN'T.

10 LET ME TELL YOU HOW WE ARE GOING TO PROCEED. I READ  
11 ALL YOUR FILINGS. I JUST WANT YOU TO ANSWER MY QUESTIONS. I  
12 HAVE SOME COMMENTS, AND I WANT YOU TO ANSWER THE QUESTIONS THAT  
13 I ASK YOU. THAT'S HOW WE ARE GOING TO PROCEED.

14 MR. WHITE, AS WE GET STARTED, I WANT TO ASK YOU JUST  
15 A FEW QUESTIONS TO GET US STARTED HERE THIS MORNING.

16 MR. WHITE: ALL RIGHT.

17 THE COURT: ALL RIGHT.

18 LET ME ASK YOU THIS:

19 YOU, IN YOUR COMPLAINT, YOU AREN'T ALLEGING -- I JUST  
20 WANT TO GET THIS STRAIGHT FOR THE RECORD, I DON'T THINK IT  
21 MATTERS TO YOUR CONSTITUTIONAL THEORY, I JUST WANT TO GET IT  
22 STRAIGHT ON THE RECORD -- YOU AREN'T CLAIMING, ARE YOU, THAT  
23 THERE WAS ANY PROTEST REASON FOR THE FLAG BEING RAISED  
24 ORIGINALLY IN 1962?

25 YOU DON'T ASSERT THAT; DO YOU?

1 MR. WHITE: NOT ORIGINALLY. ALTHOUGH CONTINUING TO  
2 FLY PAST THE CENTENNIAL PERIOD WE THINK DOES SEND A MESSAGE --

3 THE COURT: I'M NOT TALKING ABOUT SENDING A MESSAGE.  
4 I KNOW YOU CLAIM IT SENDS A MESSAGE. I'M ASKING, DO YOU THINK  
5 THERE'S RACIAL PURPOSE BEHIND ITS CONTINUED FLYING?

6 MR. WHITE: THE CONTINUED FLYING WE DO.

7 NOW, THE ORIGINAL FLYING OF THE FLAG WAS IN HONOR OF  
8 THE CENTENNIAL. WE HONOR THAT.

9 THE COURT: YOU DON'T THINK IT WAS PUT UP ORIGINALLY  
10 FOR RACIAL REASONS BUT CONTINUES TO FLY FOR RACIAL REASONS?

11 MR. WHITE: THAT'S CORRECT.

12 THE COURT: LET ME ASK YOU THIS:

13 UNDER YOUR CONSTITUTIONAL THEORY, THE QUESTION OF  
14 WHETHER OR NOT THE STATE HAS AUTHORITY TO FLY THAT FLAG DOESN'T  
15 MAKE ANY DIFFERENCE, DOES IT, IF THE FLAG IS UP -- IF IT IS UP  
16 BY AUTHORITY, YOU STILL CLAIM CONSTITUTIONAL DEPRAVATION.

17 SO THE QUESTION OF WHETHER OR NOT IT IS UP WITH LEGAL  
18 AUTHORITY REALLY ISN'T RELEVANT TO YOUR CONSTITUTIONAL THEORY;  
19 IS THAT CORRECT?

20 MR. WHITE: THAT'S CORRECT.

21 THERE'S A STATE ACTION THAT'S A STATE ISSUE, WE  
22 RECOGNIZE THAT AS A STATE ISSUE.

23 THE COURT: OKAY. ALL RIGHT.

24 AND YOU ARE HERE IN FRONT OF ME ON THE FEDERAL  
25 CONSTITUTIONAL ISSUE?



1 MR. WHITE: THAT'S RIGHT, YOUR HONOR.

2 THE COURT: ALL RIGHT. ALL RIGHT.

3 LET ME ASK YOU THIS:

4 ISN'T THIS A CASE IN WHICH YOU ARE FORUM SHOPPING?  
5 IT'S CLEAR TO ME WHAT'S HAPPENED IS, YOU FILED AN ACTION IN  
6 FEDERAL COURT NAMING EVERYBODY I THINK YOU THOUGHT MIGHT HAVE  
7 SOME ROLE IN THE FLAG. I'M NOT FAULTING YOU FOR THAT AT THIS  
8 POINT, I'M JUST SAYING THAT'S WHAT YOU DID.

9 THEN YOU FILED A STATE ACTION NAMING BASICALLY THE  
10 SAME GROUP OF PEOPLE; IS THAT CORRECT, AS DEFENDANTS?

11 MR. WHITE: WE DID.

12 BUT WE REVIEWED THE STATE -- PROPER PARTY WAS THE  
13 STATE. THE ONLY PARTY IN THE STATE ACTION IS THE STATE OF  
14 SOUTH CAROLINA.

15 THE COURT: ALL RIGHT.

16 LET ME GET BACK FOR A SECOND, I'M GOING TO COME BACK  
17 TO YOU ON THAT IN A SECOND.

18 YOU FILED AN ACTION AGAINST EVERYBODY IN FEDERAL  
19 COURT. THEN YOU FILED AN ACTION AGAINST ALL THOSE SAME PEOPLE  
20 IN STATE COURT.

21 AND THEN AFTER YOU HEARD FROM THE DEFENDANTS, AND YOU  
22 FOUND OUT THAT MOST OF THE DEFENDANTS WOULD FIGHT YOU EXCEPT  
23 FOR THE STATE OF SOUTH CAROLINA THROUGH THE ATTORNEY GENERAL,  
24 YOU DROP EVERYBODY FROM YOUR STATE ACTION, SO THAT YOU ARE LEFT  
25 WITH ONLY -- ARE YOU NOT ONLY FORUM SHOPPING BUT DEFENDANT

1 SHOPPING; AREN'T YOU?

2 MR. WHITE: WELL, WE ARE TRYING TO FIND WHAT AVENUE  
3 WE CAN GO TO GET RELIEF.

4 THE COURT: YOU ARE TRYING TO FIND THE DEFENDANT, AND  
5 YOU DID FIND THE DEFENDANT, WHO'S GOING TO AGREE WITH YOU;  
6 ISN'T THAT WHAT YOU HAVE DONE?

7 MR. WHITE: WELL, THE STATE OF SOUTH CAROLINA DOES  
8 TAKE THE SAME POSITION WE DO.

9 THE COURT: THAT'S RIGHT.

10 MR. WHITE: AND WE HAVEN'T REALLY SOUGHT THAT OUT.  
11 THAT'S JUST THE RESPONSE WE HAVE GOT.

12 THE COURT: THAT'S WHAT HAPPENED. YOU FILED A  
13 FEDERAL ACTION, YOU FILED A STATE ACTION. YOU GET RESPONSES IN  
14 THE FEDERAL ACTION WHICH WAS FILED FIRST, AND YOU FIND OUT THAT  
15 ALL THE DEFENDANTS YOU SUED EXCEPT FOR ONE IS GOING TO FIGHT  
16 YOU.

17 SO THEN IN THE STATE ACTION YOU DROP ALL THE  
18 DEFENDANTS WHO ARE GOING TO FIGHT YOU AND JUST KEEP IN THE  
19 DEFENDANT WHO AGREES WITH YOU; THAT'S WHAT HAPPENED?

20 MR. WHITE: WE BASICALLY KNEW WHAT THE RESPONSES OF  
21 MOST OF THE DEFENDANTS WERE GOING TO BE ANYWAY.

22 THE COURT: ALL RIGHT.

23 MR. WHITE: AND THE REASON THAT THE ONLY DEFEND IN  
24 THE STATE ACTION IS THE STATE IS THAT IN FEDERAL COURT THE  
25 INDIVIDUALS ARE RESPONSIBLE UNDER THE CIVIL RIGHTS ACT, WE



1 REALIZE THAT.

2 THE COURT: ALL RIGHT.

3 MR. WHITE: IN THE STATE COURT WE FEEL WE CAN SUE THE  
4 STATE SINCE IT IS A STATE COURT.

5 THE COURT: LET ME ASK YOU THIS:

6 YOU ALLEGE STATE CONSTITUTIONAL VIOLATIONS IN YOUR  
7 STATE COURT ACTION; DON'T YOU?

8 MR. WHITE: WE DO, YOUR HONOR.

9 THE COURT: BUT YOU DON'T THINK THE GOVERNOR THE  
10 STATE BUDGET AND CONTROL BOARD OR STATE HOUSE COMMITTEE -- YOU  
11 DON'T THINK ANY OF THOSE PEOPLE BY THEIR ACTIONS HAVE DEPRIVED  
12 YOU OF STATE CONSTITUTIONAL RIGHTS?

13 MR. WHITE: WE HAVE ALLEGED THAT.

14 THE COURT: NO YOU HAVEN'T, NOT AGAINST THOSE  
15 DEFENDANTS. YOU DROPPED THEM.

16 MR. WHITE: WE DID DROP THEM.

17 THE COURT: ALL RIGHT.

18 THAT'S MY POINT.

19 SO AS WE STAND HERE TODAY, YOU DON'T THINK ANYBODY --  
20 ANY OF THE NAMED DEFENDANTS WHO YOU ORIGINALLY NAMED IN THE  
21 STATE COURT ACTION, WHICH WERE THE SAME DEFENDANTS HERE IN  
22 FRONT OF ME TODAY, YOU DON'T THINK THEY VIOLATED YOUR STATE  
23 CONSTITUTIONAL RIGHTS?

24 MR. WHITE: WELL, I DON'T WANT TO FORECLOSE THAT.

25 THE COURT: WELL, YOU DROPPED THEM FROM YOUR

1 LAWSUIT. YOU PLAN TO HAVE THEM BACK?

2 MR. WHITE: THEY ARE NOT DEFENDANTS.

3 THE COURT: WHY DID YOU DROP THEM? DO YOU THINK THEY  
4 VIOLATED YOUR STATE CONSTITUTIONAL RIGHTS OR DON'T YOU?

5 MR. WHITE: THE VIOLATION OF CONSTITUTIONAL RIGHTS  
6 REGARDING OBTAINING INJUNCTION AND ENDING THE VIOLATION OF  
7 STATE CONSTITUTIONAL RIGHTS.

8 THE COURT: OH, I KNOW CLEARLY WHAT YOU WANT. I  
9 MEAN, IT IS CLEARLY WHAT YOU WANT. YOU WANT THAT FLAG TO COME  
10 DOWN.

11 MR. WHITE: THAT'S RIGHT, YOUR HONOR.

12 THE COURT: I UNDERSTAND.

13 I'M JUST TRYING TO SEE WHERE WE STAND THIS MORNING.  
14 I JUST WANT TO UNDERSTAND THAT.

15 IN READING YOUR FILINGS, WHAT IS YOUR CONSTITUTIONAL  
16 THEORY, YOUR FOURTEENTH AMENDMENT IS THAT REALLY 42-1983, WHAT  
17 IS THE CONSTITUTIONAL THEORY? YOU JUST CLAIM GENERALLY  
18 FOURTEENTH AMENDMENT. WHAT DO YOU MEAN BY THAT?

19 MR. WHITE: IT WOULD CALL ON 1983 AND MAYBE SOME  
20 INDICATION OF 1985, 1986.

21 THE COURT: ALL RIGHT.

22 THANK YOU VERY MUCH, MR. WHITE.

23 I'M GOING TO COME BACK TO YOU. THANK YOU VERY MUCH.

24 MR. WHITE: THANK YOU.

25 THE COURT: ALL RIGHT.



11

1 NOW, TURN TO YOU, MR. SHINE. YOU ARE NEXT UP FOR ME  
2 THIS MORNING.

3 YOU CLAIM THE GOVERNOR HAS NO AUTHORITY. I WANT TO  
4 TALK ABOUT THE GOVERNOR FIRST. YOU CLAIM THE GOVERNOR HAS NO  
5 AUTHORITY UNDER STATE LAW TO TAKE THAT FLAG DOWN; IS THAT  
6 CORRECT?

7 MR. SHINE: THAT'S CORRECT.

8 THE COURT: THANK YOU VERY MUCH.

9 MR. WHITE -- THANK YOU VERY MUCH.

10 MR. WHITE, CAN YOU CITE ME ANY SPECIFIC STATUTE OR  
11 CONSTITUTIONAL PROVISION WHICH SAYS THE GOVERNOR OF THE STATE  
12 OF SOUTH CAROLINA HAS THE AUTHORITY TO BRING THAT FLAG DOWN?

13 MR. WHITE: YOUR HONOR, MS. VALTORTA HAS COME  
14 PREPARED TO ADDRESS THAT.

15 THE COURT: ALL RIGHT.

16 HEAR FROM YOU ON THAT.

17 MS. VALTORTA: WELL, YOUR HONOR, THE GOVERNOR IS  
18 CHAIRMAN OF THE STATE BUDGET AND CONTROL BOARD, WHICH CONTROLS  
19 THE STATE HOUSE COMMITTEE.

20 THE COURT: WELL, YOU ARE MAKING ARGUMENT ABOUT THE  
21 BUDGET AND CONTROL BOARD NOW; AREN'T YOU?

22 MR. WHITE: TOGETHER WITH THE GOVERNOR. AND I'M  
23 SAYING THAT THOSE ENTITIES TOGETHER HAVE CONTROL OVER THE STATE  
24 HOUSE GROUNDS.

25 THE COURT: ALL RIGHT.

1 LET ME ASK YOU THIS:

2 CAN YOU GIVE -- CAN YOU CITE ME ANY STATUTE IN SOUTH  
3 CAROLINA OR CONSTITUTIONAL PROVISION -- LET ME SAY, DO YOU  
4 DOUBT THAT THE OFFICE OF GOVERNOR AS DEFINED IN HIS AUTHORITY  
5 IS BY THE CONSTITUTION AND STATUTES OF SOUTH CAROLINA?

6

7 MS. VALTORTA: NO. I DO NOT DOUBT THAT.

8 THE COURT: I AGREE WITH YOU, IT SHOULDN'T BE  
9 DOUBTED. BECAUSE THAT'S THE LAW IN SOUTH CAROLINA. THAT BEING  
10 THE CASE, NOW, TELL ME -- CITE TO ME SPECIFICALLY A STATUTORY  
11 OR CONSTITUTIONAL PROVISION WHICH SAYS THE GOVERNOR OF SOUTH  
12 CAROLINA CAN TAKE THAT FLAG DOWN.

13 MS. VALTORTA: WELL, I WOULD SAY THROUGH EXECUTIVE  
14 ORDER. I WOULD CITE SOUTH CAROLINA CODE SECTION 13-340, I  
15 BELIEVE, IS THE SECTION.

16 IN ORDER TO PREVENT DISRUPTION OF PEACE, THE STATE --  
17 THE GOVERNOR COULD ORDER THE FLAG TO COME DOWN. AND SINCE  
18 THERE IS NO AUTHORITY AT PRESENT TO HAVE IT UP THERE, THAT HE  
19 WOULD BE WELL WITHIN HIS POWERS TO DO THAT.

20 THE COURT: WAIT A MINUTE NOW. WAIT A MINUTE NOW.  
21 EXECUTIVE ORDER, YOU AREN'T ASSERTING THAT THE GOVERNOR BY  
22 EXECUTIVE ORDER CAN DO SOMETHING THAT HE'S NOT OTHERWISE  
23 AUTHORIZED TO DO?

24 LET SAY, FOR INSTANCE, THE STATE HOUSE COULD NOT PASS  
25 THE BUDGET. COULD THE GOVERNOR BY EXECUTIVE ORDER ESTABLISH A



1 BUDGET FOR THE STATE OF SOUTH CAROLINA? JUST SAY THE STATE  
2 CAN'T COME TO AN AGREEMENT, BY EXECUTIVE ORDER HEREIN IS THE  
3 BUDGET FOR THE STATE OF SOUTH CAROLINA. DO YOU MEAN THAT? DO  
4 YOU?

5 .  
6 MS. VALTORTA: NO. BUT THAT'S A DIFFERENT ISSUE.  
7 HERE YOU HAVE AN ISSUE WHERE THE FLAG WAS PUT UP THERE BY  
8 CONCURRENT RESOLUTION.

9 THE COURT: I KNOW THAT. I KNOW HOW IT WAS PUT UP  
10 THERE. I'M TALKING TO MR. MEDLOCK OR SOMEBODY FROM HIS OFFICE  
11 IN A FEW MINUTES.

12 CAN YOU CITE ME TO A SPECIFIC STATUTE, OTHER THAN  
13 WHAT YOU SAY IS EXECUTIVE ORDER, WHICH I DON'T AGREE WITH YOU  
14 ON. IS THERE ANY SPECIFIC STATUTE OR CONSTITUTIONAL PROVISION  
15 WHICH GIVES THE GOVERNOR THE RIGHT TO BRING THAT FLAG DOWN?

16 .  
17 MS. VALTORTA: WELL, CANDIDATES FOR GOVERNOR HAVE  
18 SAID THAT THEY WOULD TAKE IT DOWN THROUGH EXECUTIVE ORDER.

19 THE COURT: WAIT A MINUTE NOW. WAIT A MINUTE NOW.  
20 SO LET ME SEE YOUR AUTHORITY IS WHAT SOMEBODY RUNNING FOR  
21 POLITICAL OFFICE SAYS THE LAW IS? THAT'S YOUR LEGAL AUTHORITY  
22 THIS MORNING?

23 .  
24 MS. VALTORTA: NO.

25 THE COURT: LET ME SAY, I HOPE FOR YOUR SAKE YOU HAVE

1 MORE THAN THAT.

2

3 MS. VALTORTA: YES.

4 THE COURT: LET ME ASK YOU THIS:

5 DO YOU WANT ME TO HOLD EVERYBODY RUNNING FOR OFFICE

6 LIABLE FOR WHAT THEY SAY, THE TRUTH OF WHAT THEY SAY?

7

8 MS. VALTORTA: WELL, THAT WOULD BE NICE. BUT

9 OBVIOUSLY YOU CAN'T DO THAT.

10 THE COURT: WELL, IF YOU DID, LET ME SUGGEST YOU ARE

11 GOING TO BE FILING MORE LAWSUITS PROBABLY.

12

13 MS. VALTORTA: I WOULD SAY.

14 THE COURT: THAT'S NO SLIGHT -- THAT'S NO SLIGHT ON

15 PEOPLE RUNNING FOR OFFICE.

16 BUT I JUST POINT OUT I THINK THE FALLACY OF SAYING  
17 SOMEBODY IN THE POLITICAL CONTEST SAYING SOMETHING RUNNING FOR  
18 OFFICE, DECIDES WHAT THE LAW IN SOUTH CAROLINA IS.

19 ALL RIGHT.

20 LET ME SAY -- WHO SPEAKS FOR THE ATTORNEYS GENERAL'S

21 OFFICE? WHO SPEAKS FOR THE ATTORNEY GENERAL'S OFFICE? DO

22 YOU? I JUST WANT TO ASK MR. MEDLOCK --

23 MR. MEDLOCK: YES, SIR.

24 THE COURT: -- I WASN'T SURE HOW YOU DIVIDE THIS UP.

25 I KNOW YOU ARE BUSY AND FARM SOME ISSUES OUT. I KNOW YOU HAVE



1 CONTROL OVER IT.

2 DO YOU THINK THE GOVERNOR HAS AUTHORITY UNDER STATE  
3 LAW TO TAKE THAT FLAG DOWN?

4 MR. MEDLOCK: YOUR HONOR WE DECIDED SOMETIME AGO THE  
5 LEGISLATURE HAS THE AUTHORITY TO REMOVE THE FLAG.

6 THE COURT: I'M NOT DISAGREEING WITH YOU. THE  
7 GOVERNOR DOESN'T HAVE ANY -- LET ME ASK YOU THIS:

8 MR. MEDLOCK: THAT WAS OUR POSITION.

9 THE COURT: I READ YOUR OPINION. AND THAT'S WHY I  
10 ASKED THIS QUESTION. YOU CAN'T CITE ME TO ANY AUTHORITY FOR  
11 THE GOVERNOR TO TAKE THAT FLAG DOWN; CAN YOU?

12 MR. MEDLOCK: WE CANNOT.

13 THE COURT: THANK YOU VERY MUCH. DON'T SIT DOWN  
14 YET. AND I WANT TO MAKE THAT CLEAR, THAT'S NOT AIMED AT THIS  
15 PARTICULAR GOVERNOR, GOVERNOR CAMPBELL. YOU ARE TALKING THE  
16 OFFICE OF GOVERNOR; ISN'T THAT CORRECT?

17 MR. MEDLOCK: THAT IS CORRECT.

18 THE COURT: AND YOUR ANALYSIS WOULD BE THE SAME IF  
19 SOMEBODY HAD ASKED YOU TO APPLY THAT ANALYSIS TO THEN GOVERNOR  
20 HOLLINGS UNDER WHOSE TENURE THE FLAG WENT UP; GOVERNOR RUSSELL,  
21 GOVERNOR MC NAIR, GOVERNOR WEST, GOVERNOR EDWARDS OR GOVERNOR  
22 RILEY, YOUR POSITION IS CONSISTENT ON THAT. IT IS NOT THE  
23 GOVERNOR'S PREROGATIVE TO TAKE THAT FLAG DOWN; ISN'T THAT  
24 CORRECT?

25 MR. MEDLOCK: THAT'S CORRECT.

1 THE COURT: LET ME ASK YOU THIS QUESTION AND SEE IF  
2 YOU WANT TO ANSWER. IF YOU DECIDE YOU DON'T WANT TO, I'M NOT  
3 GOING TO FORCE YOU TO. AND I'M GOING TO LEAVE THE SITTING  
4 GOVERNOR OUT OF THIS. SO IT IS NOT ANY KIND OF PERSONAL  
5 MATTER.

6 SO LET'S TURN TO THE ELECTION OF THE NEW GOVERNOR  
7 NEXT YEAR. IF THE GOVERNOR WERE TO GO OVER AND TAKE THAT FLAG  
8 DOWN, WOULD THAT ACTION BE LEGAL?

9 MR. MEDLOCK: THE GOVERNOR WHO WISHES TO REMOVE THE  
10 FLAG SHOULD WORK WITH THE GENERAL ASSEMBLY.

11 THE COURT: IS THAT -- I COULD PRESS YOU FURTHER ON  
12 THAT -- IS THAT ALL YOU CARE TO SAY ABOUT THAT?

13 MR. MEDLOCK: THAT'S ALL I KNOW ABOUT THAT.

14 THE COURT: IN OTHER WORDS, THE GOVERNOR CAN'T DO IT  
15 BY HIMSELF?

16 MR. MEDLOCK: THAT'S CORRECT.

17 THAT'S CONSISTENT WITH THE OPINION WE HAVE WRITTEN --  
18 ALL OF THE OPINIONS THAT WE HAVE WRITTEN.

19 THE COURT: I AGREE WITH YOU A HUNDRED PERCENT. YOUR  
20 POSITION HERE THIS MORNING IS EXACTLY CONSISTENT, YOU ARE  
21 EXACTLY RIGHT. THAT'S WHY I TRY TO HELP OUT OVER HERE.  
22 ALTHOUGH SOME CANDIDATE RUNNING FOR GOVERNOR MAY SAY HE'S GOING  
23 TO DO THAT, NO BASIS IN STATE LAW FOR HIM TO DO THAT.

24 THANK YOU VERY MUCH.

25 I'M GOING TO COME BACK TO YOU. THANK YOU VERY MUCH.



1 LET ME SAY THIS: GOVERNOR'S MOTION TO DISMISS IS  
2 GRANTED. THE GOVERNOR IS OUT OF THIS CASE. THE GOVERNOR HAS  
3 NO AUTHORITY WHATSOEVER TO TAKE THAT FLAG DOWN.

4 NOW, LET'S TURN TO THE BUDGET AND CONTROL BOARD, MR.  
5 SHINE.

6 MR. SHINE: YES, YOUR HONOR.

7 THE COURT: YOU SAY THERE -- YOU SAY THERE'S NO  
8 AUTHORITY FOR THE STATE BUDGET AND CONTROL BOARD?

9 MR. SHINE: THAT'S CORRECT.

10 THE COURT: LET'S LEAVE THAT ARGUMENT ALONE FOR A  
11 MINUTE. LET'S LEAVE THAT ARGUMENT ALONE FOR A MINUTE. YOU  
12 ALSO CLAIM ELEVENTH AMENDMENT IMMUNITY; DON'T YOU?

13 MR. SHINE: ABSOLUTELY, YOUR HONOR.

14 THE COURT: BECAUSE THE STATE BUDGET AND CONTROL  
15 BOARD, YOU BELIEVE, IS ALTER EGO OF THE STATE?

16 MR. SHINE: THAT'S CORRECT.

17 THE COURT: DO YOU ALSO CLAIM THE STATE BUDGET AND  
18 CONTROL BOARD IS NOT A PERSON?

19 MR. SHINE: THAT'S CORRECT.

20 THE COURT: UNDER THE WILL DECISION, 1983 DECISION?

21 MR. SHINE: THAT'S CORRECT, WE CITED THAT IN OUR --

22 THE COURT: I HAVE READ WHAT YOU FILED. THANK YOU  
23 VERY MUCH.

24 ALL RIGHT.

25 WHO SPEAKS OVER HERE? MR. WHITE ON THIS ONE?

1 MR. WHITE: I DO.

2 THE COURT: AS TO THE STATE BUDGET AND CONTROL BOARD,  
3 WHY MAY THEY NOT ASSERT AN ELEVENTH AMENDMENT IMMUNITY IN THIS  
4 FEDERAL ACTION -- IN THE FEDERAL ACTION?

5 LET ME SAY, WE ALL UNDERSTAND WHAT AN ELEVENTH  
6 AMENDMENT IS, IS THE RIGHT OF THE STATE TO ASSERT IN A FEDERAL  
7 CASE THAT THEY WILL NOT BE SUED IN THE STATE FORUM.

8 WHY CAN'T THE STATE BUDGET AND CONTROL BOARD ASSERT  
9 ELEVENTH AMENDMENT IMMUNITY IN THIS ACTION?

10 MR. WHITE: YOUR HONOR, THEY CAN ASSERT ELEVENTH  
11 AMENDMENT IMMUNITY. WE HAD HOPED THEY WOULD NOT. WE THOUGHT  
12 THEY HAD AN INTEREST IN THIS SUIT, THEY WOULD WANT TO COME IN  
13 AS INTERVENORS.

14 THE COURT: THEY HAVE AN INTEREST, THEY WANT TO BE  
15 SUED IN THE PROPER FORUM, STATE OF SOUTH CAROLINA. THEY HAVE  
16 CONFIDENCE IN THE STATE OF SOUTH CAROLINA AND ITS OFFICIALS AND  
17 ITS JUDGES, ISN'T THAT CORRECT?

18 MR. SHINE: THAT'S CORRECT.

19 THE COURT: WAIT A MINUTE NOW. THAT DOESN'T MEAN YOU  
20 DON'T HAVE CONFIDENCE IN ME; DOES IT?

21 MR. SHINE: I HAVE FULL CONFIDENCE IN YOUR HONOR.

22 THE COURT: YOU JUST SAY THAT'S AN ELEVENTH AMENDMENT  
23 RIGHT OF THE STATE TO ASSERT, AND THE STATE WANTS TO ASSERT  
24 IT. AND YOU ASSERT IT ON BEHALF OF THE STATE BUDGET AND  
25 CONTROL BOARD, THAT IS A RIGHT PEOPLE HAVE -- OF SOUTH CAROLINA



1 HAVE. THEY HAVE THAT RIGHT TO HAVE YOU ASSERT IT?

2 MR. SHINE: THAT'S CORRECT, YOUR HONOR.

3 IN FACT, IT IS AGAINST PUBLIC POLICY NOT TO ASSERT  
4 THE ELEVENTH AMENDMENT.

5 THE COURT: I TELL YOU THIS MUCH, STATE ASSERTS  
6 ELEVENTH AMENDMENT IMMUNITY EVERYDAY IN THIS COURT, ALMOST  
7 EVERY SINGLE DAY. YOU DON'T DISAGREE THEY CAN'T ASSERT IT?

8 MR. WHITE: WE DON'T DISAGREE THEY CAN ASSERT IT. WE  
9 ASK THEY NOT -- WE THINK THEY SHOULD PROPERLY BE HERE TO  
10 REPRESENT THE PEOPLE OF THE STATE.

11 THE COURT: LET ME GET THIS STRAIGHT. THE PLAINTIFF  
12 BRINGING THE LAWSUIT WANTS TO ADVISE YOU ON HOW TO DEFEND YOUR  
13 CLIENT THAT HE'S SUING. DO YOU WANT TO TAKE HIS ADVICE?

14 MR. SHINE: NO.

15 MR. WHITE: WE DON'T EXPECT THEM TO. WE INVITE THEM  
16 TO. BUT YOU WE DON'T EXPECT THEM TO.

17 THE COURT: THANK YOU VERY MUCH.

18 I EXPECT AND TRUST YOU ALL GOING TO GET JOINED UP IN  
19 AN ACTION YOU ALL HAVE YOUR SAY AT SOME POINT.

20 LET ME ASK OF THE ATTORNEY GENERAL'S OFFICE AGAIN,  
21 MR. MEDLOCK --

22 MR. MEDLOCK: YES, SIR.

23 THE COURT: -- YOU DON'T DISPUTE, DO YOU, I MEAN IT  
24 IS NOT YOUR CLIENT SO YOU DON'T HAVE TO ANSWER, BUT I'M ASKING  
25 YOU AGAIN BECAUSE YOU ARE HERE AND YOU LOOKED AT THE LAW THE

1 STATE BUDGET AND CONTROL BOARD THEY CAN ASSERT ELEVENTH  
2 AMENDMENT IMMUNITY; CAN'T THEY? STATE BUDGET AND CONTROL  
3 BOARD, THEY CAN ASSERT ELEVENTH AMENDMENT IMMUNITY PROPERLY;  
4 CAN'T THEY?

5 MR. MEDLOCK: I'M GOING TO DEFER TO MR. EVANS.

6 THE COURT: THAT'S WHY I ASKED YOU EARLIER WHO'S  
7 HANDLING --

8 MR. EVANS: AGAIN, WE DIDN'T PRECISELY RESEARCH THAT  
9 FOR THE PURPOSE OF THIS HEARING.

10 BUT TRADITIONALLY STATE BUDGET AND CONTROL BOARD HAS  
11 BEEN RECOGNIZED AS A STATE ACTOR.

12 THE COURT: RECOGNIZED AS AN ALTER EGO. IF THEY ARE  
13 ALTER EGO, YOU DON'T DISPUTE THEY CAN ASSERT AN ELEVENTH  
14 AMENDMENT IMMUNITY?

15 MR. EVANS: WE HAVE NEVER DISPUTED THAT.

16 THE COURT: THANK YOU VERY MUCH.

17 LET ME SAY, BASED -- AND LET ME TELL YOU WHY ELEVENTH  
18 AMENDMENT IMMUNITY IS AN ISSUE. I HAVE TO LOOK AT THIS AS A  
19 COURT OF LIMITED JURISDICTION. AND ELEVENTH AMENDMENT  
20 IMMUNITY, IF ASSERTED, REMOVES SUBJECT MATTER JURISDICTION AS  
21 TO THAT PARTY.

22 ELEVENTH AMENDMENT IMMUNITY IS ABSOLUTELY CORRECT.

23 ALSO, LET ME SAY ON THE BASIS, MR. SHINE, OF THE WILL  
24 DECISION, THEY ARE NOT A PERSON WITHIN THE MEANING OF THE 1983  
25 STATUTE, THE STATE BUDGET AND CONTROL BOARD IS DISMISSED FROM



1 THIS ACTION.

2 MR. SHINE: THANK YOU.

3 THE COURT: ALL RIGHT.

4 NOW, LET ME TURN -- LET ME TURN TO THE STATE OF SOUTH  
5 CAROLINA, JUST AS TO THE JURISDICTIONAL QUESTION. AND I GUESS  
6 ELEVENTH AMENDMENT EXPERT, I GUESS I TALK TO YOU.

7 I FIND IT PUZZLING, WHY ISN'T THE STATE OF SOUTH  
8 CAROLINA ASSERTING THE ELEVENTH AMENDMENT?

9 MR. EVANS: YOUR HONOR, AGAIN, I WOULD ASSERT THE  
10 ELEVENTH AMENDMENT, IF THE PLAINTIFFS WERE SEEKING INJUNCTION  
11 AGAINST THE STATE, WE ARE NOT HEAR FOR THAT PURPOSE. WE ARE  
12 HERE ONLY FOR THE PURPOSE OF LIMITED PARTICIPATION, ADVISE THE  
13 COURT OF THE STATE LAW ISSUES IN THIS CASE.

14 THE COURT: NO. BUT YOU DON'T THINK THEY CONTROL THE  
15 CONSTITUTIONAL ISSUE, DO YOU?

16 MR. EVANS: PARDON ME?

17 THE COURT: YOU DON'T THINK THEY CONTROL THE  
18 CONSTITUTIONAL ISSUE?

19 MR. EVANS: THEY MAY VERY WELL REMANUFACTURE THE  
20 NECESSITY OF CONSTITUTIONAL RULING ON THOSE ISSUES.

21 THE COURT: THE POINT IS, THIS LAWSUIT -- THIS IS NOT  
22 THE STATE COURT ACTION, THIS IS THE FEDERAL COURT ACTION. I  
23 KNOW YOU UNDERSTAND. I'M JUST SORT OF STATING IT FOR THE  
24 RECORD. THIS CASE IS HERE BECAUSE OF THE FEDERAL  
25 CONSTITUTIONAL CLAIM. I HAVE TO ADDRESS THAT. THAT'S WHY I

1 ASKED MR. WHITE UNDER HIS CONSTITUTIONAL THEORY, WHETHER OR NOT  
2 THERE IS AUTHORITY TO FLY THE FLAG MAKES NO DIFFERENCE, NO  
3 DIFFERENCE WHATSOEVER.

4 I KNOW YOU ASSERT, AND I HAVE READ YOUR PAPERS, YOU  
5 ASSERT THAT THERE IS NO STATE AUTHORITY TO FLY THE FLAG. THAT  
6 MAKES NO DIFFERENCE TO HIS CONSTITUTIONAL CLAIM. HIS  
7 CONSTITUTIONAL CLAIM IS, IT IS UP THERE WHETHER IT IS UP  
8 THEREBY AUTHORITY OR NOT, MY CONSTITUTIONAL RIGHTS, MY CLIENTS'  
9 CONSTITUTIONAL RIGHTS ARE BEING VIOLATED, IT HAS TO COME DOWN;  
10 ISN'T THAT CORRECT?

11 MR. EVANS: THAT'S HIS ASSERTION. IT IS UP TO YOUR  
12 HONOR TO DETERMINE WHETHER ANY STATE AUTHORITY MAY INTERPLAY  
13 WITH THE CONSTITUTIONAL QUESTIONS.

14 WE ARE HERE FOR THE LIMITED PARTICIPATION MUCH AS THE  
15 FEDERAL COURTS OFTEN REQUIRE US TO BE REPRESENTING THE STATE TO  
16 ADVISE ON THE STATE LAW ISSUES AS THEY CAME INTO PLAY.

17 THE COURT: I ASKED YOU TO BE HERE BEFORE ON OCCASION  
18 WHEN YOU DECLINED. I ASKED YOU TO BE HERE. I'M JUST ASKING  
19 YOU THAT.

20 MR. EVANS: THAT'S COMPLETELY CONSISTENT WITH THE  
21 ELEVENTH AMENDMENT FOR THE LIMITED PARTICIPATION BY THE STATE.  
22 I WOULD AGREE WITH YOUR HONOR, IF THE PLAINTIFF WERE INTENDING  
23 TO ENJOIN THE STATE, I THINK THE ELEVENTH AMENDMENT WOULD  
24 CLEARLY BAR THAT.

25 THE COURT: OKAY.



1 SO?

2 MR. EVANS: FOR THE LIMITED PARTICIPATION OF BEING  
3 ADVISED OF THE CRITICAL STATE LAW ISSUES, THAT IS CONSISTENT  
4 WITH ELEVENTH AMENDMENT RECOGNIZED BY FEDERAL STATUTORY LAW.

5 THE COURT: LET ME ASK YOU THIS, ON THE QUESTION OF  
6 STATE LAW AS TO THE AUTHORIZATION OF THE FLAG FLYING:

7 DO YOU THINK THAT'S BEEN DEALT WITH HERE OR IN STATE  
8 COURT?

9 MR. EVANS: THE BETTER FORUM WOULD BE THE STATE COURT  
10 FOR RESOLUTION OF THAT ISSUE, TO THE EXTENT IT MEANS FURTHER  
11 RESOLUTION, OF COURSE, ADJUDICATED BY THE ATTORNEY GENERAL.

12 THE COURT: AND SO I JUST WANT TO BE SURE I  
13 UNDERSTAND YOUR THEORY. BUT WHAT IF I RAISE THE QUESTION OF  
14 ELEVENTH AMENDMENT THIS MORNING, FOR JURISDICTIONAL PURPOSE.  
15 THE STATE OF SOUTH CAROLINA HAS BEEN SUED IN STATE COURT, YOU  
16 HAVE FILED -- YOU CLEARLY HAVE FILED -- LET ME SAY, I READ YOUR  
17 FILINGS, AND I THINK, QUITE FRANKLY, I'M GOING TO GUESS YOU ARE  
18 GOING TO MAKE EXACTLY THE SAME FILING IN STATE COURT, IF YOU  
19 HAVEN'T ALREADY DONE THAT.

20 MR. EVANS: WE HAVEN'T BEEN SERVED. BUT WE WILL TAKE  
21 A CONSISTENT POSITION. I DON'T KNOW WHAT THE ISSUES ARE IN THE  
22 STATE COURT FORUM.

23 THE COURT: STRIKES ME YOUR FILING DIDN'T ADDRESS THE  
24 CONSTITUTIONAL ISSUE HERE. BUT IT DID ADDRESS THE STATUTORY  
25 ISSUE.

1 MR. EVANS: THAT'S CORRECT. AND THAT WAS -- THAT'S  
2 OUR LIMITED PARTICIPATION.

3 THE COURT: SO IF I WERE TO RAISE THE QUESTION THIS  
4 MORNING OF THE STATE OF SOUTH CAROLINA BEING IN THIS LAWSUIT --  
5 IN THIS LAWSUIT, AND ASK YOU YOUR POSITION AS I'M RAISING IT,  
6 EVERYBODY HAS NOTICE OF IT, IT'S BEEN RAISED BY THE GOVERNOR, I  
7 THINK IT IS CLEARLY RAISED BY THE WHAT THE LAW IS, YOUR  
8 POSITION WOULD BE THE STATE WOULD ASSERT ELEVENTH AMENDMENT  
9 IMMUNITY?

10 MR. EVANS: AGAIN, YOUR HONOR, AS AN EXECUTIVE  
11 OFFICER I CANNOT WAIVE THE STATES ELEVENTH AMENDMENT IMMUNITY.

12 THE COURT: YOU HAVE TO ASSERT IT.

13 MR. EVANS: NOR CAN ANYONE ELSE WHO REPRESENTS ANY OF  
14 THE STATE OFFICERS. I WOULD NOT SAY WE HAVE TO ASSERT IT, I  
15 BELIEVE AS YOUR HONOR NOTED IT IS A LIMITATION ON THIS COURT'S  
16 JURISDICTION TO AWARD RELIEF AGAINST THE STATE.

17 AND WHETHER IT IS CERTIFIED OR NOT, THAT IS A SUBJECT  
18 MATTER JURISDICTION LIMITATION.

19 THE COURT: YOU AGREE WITH ME?

20 MR. EVANS: IF, IN FACT, THE PLAINTIFF IS HERE BEFORE  
21 YOU TODAY TO SEEK INJUNCTION AGAINST THE STATE, I WOULD AGREE  
22 WITH YOU, ELEVENTH AMENDMENT WOULD BAR THAT RELIEF.

23 THE COURT: WELL, --

24 MR. EVANS: BAR THIS COURT ENTERING THAT RELIEF.

25 THE COURT: WELL, THAT'S WHAT HE'S ASKING YOU SUED IN



1 THIS LAWSUIT.

2 MR. EVANS: I BELIEVE THE PLAINTIFFS' COUNSEL WOULD  
3 ADVISE THE COURT THE STATE CAN PARTICIPATE CONSISTENT WITH  
4 ELEVENTH AMENDMENT, AT LEAST ADVISE THE COURT OF THE CRITICAL  
5 STATE LAW ISSUES TO THE EXTENT THAT HELP OR ASSIST THE COURT IN  
6 RESOLVING THE FEDERAL ISSUES.

7 THE COURT: I APPRECIATE THAT. BUT WHAT YOU JUST  
8 TOLD ME IS, AND I AGREE WITH YOU, THE BETTER FORUM TO DECIDE  
9 WHAT STATE LAW IS, YOU DON'T -- LET'S JUST GET THIS STRAIGHT,  
10 YOU ARE NOT STANDING HERE SAYING YOU WANT THE FEDERAL COURTS TO  
11 TELL THE PEOPLE OF SOUTH CAROLINA WHAT THEIR LAW IS?

12 MR. EVANS: I DON'T WANT TO GET CAUGHT IN MR. SHINE'S  
13 SPOT AND SAYING I DON'T HAVE CONFIDENCE IN HIS HONOR TO RESOLVE  
14 STATE LAW ISSUES. BUT TRADITIONALLY --

15 THE COURT: BUT YOU HAVE CONFIDENCE IN THE  
16 CONSTITUTIONAL SYSTEM BY WHICH I HAVE LIMITED AUTHORITY. LET'S  
17 GET TO THE BOTTOM, YOU ARE NOT ASKING THE FEDERAL COURTS GET  
18 INVOLVED.

19 MR. EVANS: WELL, AGAIN, TO THE EXTENT THAT THE COURT  
20 MAY NEED THAT INFORMATION FOR RESOLUTION OF THE STATE LAW  
21 ISSUES, THE COURT CAN CERTIFY THAT QUESTION TO STATE SUPREME  
22 COURT IS ONE OPTION.

23 THE COURT: LET ME ASK YOU ABOUT THAT. THAT'S  
24 CROSSED MY MIND.

25 WHY DO YOU THINK THE STATE SUPREME COURT WOULD TAKE A

1 CERTIFICATION FROM ME WHEN THE ACTION IS PENDING IN ITS OWN  
2 COURT SYSTEM RIGHT NOW?

3 I'M JUST ASKING WHAT YOU THINK.

4 MR. EVANS: IT WOULD BE PURELY SPECULATIVE. IT'S AN  
5 ISSUE OF LAW MAY VERY WELL TAKE JURISDICTION UNDER THE  
6 CERTIFICATION RULE.

7 IF YOUR HONOR PLEASE, IF I CAN DETOUR GOING BACK TO  
8 OUR ROLE REPRESENTING THE STATE HERE IN OUR LIMITED  
9 PARTICIPATION. BEFORE THERE WAS A CERTIFICATION RULE, THE  
10 QUESTIONS WERE CERTIFIED TO THE ATTORNEY GENERAL BY COMMON  
11 PRACTICE IN THE DISTRICT COURT AND THAT'S AGAIN OUR ROLE TODAY.

12 THE COURT: SO ARE YOU GLAD THERE'S A CERTIFICATION  
13 PROCESS TO THE SUPREME COURT NOW OR NOT?

14 MR. EVANS: I DON'T KNOW. I ENJOYED BEING THE  
15 SUPREME COURT. BUT THERE IS A PROCESS THERE IF THE COURT  
16 BELIEVES THAT RESOLUTION OF THOSE CRITICAL STATE ISSUES IS  
17 NECESSARY FOR THIS COURT TO CONSIDER THE FEDERAL QUESTIONS  
18 PENDING THE CERTIFICATION PROCESS EXISTS.

19 THE COURT: RIGHT.

20 LET'S GO BACK. I DON'T SEE HOW -- HOW THE RESOLUTION  
21 OF THE STATE ISSUE -- HOW I WOULD RESOLVE THAT ISSUE IN THE  
22 FIRST INSTANCE. BECAUSE WHETHER IT IS AUTHORIZED TO FLY OR  
23 NOT, THE CONSTITUTIONAL CLAIM STILL STANDS; DOESN'T IT, MR.  
24 WHITE?

25 MR. WHITE: YOUR HONOR, THE CONSTITUTIONAL CLAIM



1 WOULD STILL STAND. I BELIEVE WE DO HAVE THE PENDENT STATE  
2 CLAIMS IN THIS ACTION, BUT WE AGREED THE STATE IS THE PROPER  
3 FORUM FOR THAT.

4 THE COURT: IF YOU AGREE TO THAT, WHY DID YOU FILE A  
5 SUIT IN FEDERAL COURT?

6 MR. WHITE: WELL, WE DO HAVE FEDERAL ISSUES.

7 THE COURT: WELL, WAIT A MINUTE NOW. STATE COURTS  
8 CAN DECIDE FEDERAL CONSTITUTIONAL ISSUES; CAN'T THEY?

9 MR. WHITE: THEY CAN. WE THINK THE BETTER FORUM FOR  
10 THAT IS HERE IN FEDERAL COURT.

11 THE COURT: YOU DON'T HAVE CONFIDENCE IN THE STATE  
12 COURT ON FEDERAL QUESTIONS?

13 MR. WHITE: WE DO NOT.

14 THE COURT: I CAN'T FIND LAWYERS OUT THERE WITH MUCH  
15 CONFIDENCE.

16 MR. WHITE: WE DO HAVE CONFIDENCE IN YOUR HONOR ON  
17 FEDERAL ISSUES AND IN THE STATE COURT ON STATE ISSUES. WE  
18 THINK THE PROPER FORUM FOR THE STATE ISSUES IS THE STATE;  
19 PROPER FORUM FOR FEDERAL ISSUES IS FEDERAL COURT.

20 THE COURT: THANK YOU VERY MUCH.

21 (DISCUSSION HELD OFF THE RECORD.)

22 THE COURT: YOU KNOW WHAT -- COUPLE THINGS --

23 MR. MEDLOCK: YOUR HONOR, COULD I JUST CLARIFY ONE  
24 THING WE HAVE IN THE STATE COURT ACTION NOW PENDING. I WILL  
25 ASSERT THE SAME POSITION THERE THAT I HAVE ASSERTED HERE.

1 THE COURT: I HAD NO DOUBT THAT YOU WOULD. YOU MIGHT  
2 BE SURE YOU TALK TO YOUR ASSISTANTS. I DON'T KNOW. I WAS THE  
3 ONE SAYING I THOUGHT YOU FILED THE EXACT SAME PAPER. QUITE  
4 FRANKLY, I EXPECT YOU TO DO THAT.

5 MR. MEDLOCK: FILED ESSENTIALLY THE SAME DOCUMENTS.  
6 WE SIMPLY REPORT TO THE STATE COURT, AS WE ARE REPORTING TO THE  
7 FEDERAL COURT, WHAT THE STATE OF THE LAW IS IN THE VIEW OF THE  
8 ATTORNEY GENERAL'S OFFICE.

9 THE COURT: I'M GOING TO ASK A QUESTION BASED ON  
10 HISTORY IN JUST ONE SECOND ABOUT THAT.

11 BUT LET ME ASK NOW: I DON'T THINK CERTIFICATION  
12 WOULD WORK. BECAUSE CERTIFICATION DON'T I HAVE TO CERTIFY THAT  
13 THE QUESTION WILL BE DISPOSITIVE? I CAN'T CERTIFY TO THE STATE  
14 SUPREME COURT BECAUSE -- I CAN'T SAY: "MEMBERS OF THE STATE  
15 SUPREME COURT, BY THE WAY YOU CAN CHECK, I HAVE CERTIFIED  
16 QUESTIONS. AND I'M PLEASED TO SAY I HAVE THEM, EXCEPT THOSE  
17 QUESTIONS AT LEAST TWO IN THE LAST TWO YEARS, AND I APPRECIATE  
18 THEIR GUIDANCE ON STATE LAW QUESTIONS. AND I WILL TELL YOU  
19 THIS, I HAVE HAD REQUESTS FOR CERTIFICATION MORE THAN THAT,  
20 THAT I DIDN'T FOLLOW.

21 BUT I CAN'T SAY TO THE STATE SUPREME COURT: "TELL ME  
22 WHETHER OR NOT THE FLAG IS UP BY AUTHORITY." BECAUSE IT WILL  
23 BE DISPOSITIVE OF THE FEDERAL ISSUES BECAUSE IT WILL NOT BE, IT  
24 WILL NOT BE.

25 THE FEDERAL CONSTITUTIONAL CLAIM WILL REST ON THE



1 FLAG FLYING, NOT WHETHER IT IS FLYING BY AUTHORITY OR NOT. YOU  
2 SORT OF HAVE AN ARGUMENT IN THERE, MAYBE IT MIGHT BE MOOTED OUT  
3 I GUESS. BUT THAT'S NOT THE SAME THING AS CERTIFICATION ISSUE.

4 MR. SHINE?

5 MR. SHINE: YOUR HONOR, TO ASSIST THE COURT ON  
6 ELEVENTH AMENDMENT ISSUE REGARDING ALL --

7 THE COURT: YOU THINK I NEED SOME HELP, MR. SHINE?

8 MR. SHINE: NO, SIR. I THINK YOU DID QUITE WELL.

9 I'M GOING TO SUGGEST ELEVENTH AMENDMENT CANNOT BE WAIVED.

10 THE COURT: IT CAN BE WAIVED BY THE GENERAL ASSEMBLY.

11 MR. SHINE: ONLY BY GENERAL ASSEMBLY HAS SPOKEN TO

12 THAT IN THE TORT CLAIMS ACT.

13 THE COURT: ONLY FOR THE PURPOSE OF THAT TORT CLAIMS

14 ACT; DIDN'T THEY?

15 MR. SHINE: THAT'S CORRECT, YOUR HONOR.

16 THE COURT: ALL RIGHT.

17 LET ME SAY -- JUST LET ME SAY, I APPRECIATE THE

18 ATTORNEY GENERAL FILING THIS CASE. BUT THEY DIDN'T COME IN

19 JUST AS SOMEBODY TO ADVISE. THEY WERE SUED, THEY WERE NAMED

20 DEFENDANTS IN THIS CASE.

21 BEFORE I MAKE MY RULING ON THAT, LET ME ASK THIS: IT

22 IS NOT CRYSTAL CLEAR TO ME ON THE HISTORY OF THE AMERICAN FLAG

23 FLYING, IS THE ACT OR JOINT RESOLUTION UNDER WHICH THE AMERICAN

24 FLAG FLIES -- AND THIS HAS NO BEARING ON THIS, JUST A QUESTION

25 OF HISTORY.

1                   YOU SAY THAT'S THE -- IS IT 1906 JOINTS RESOLUTION;  
2 IS THAT IT?

3                   MR. COOK: THAT'S CORRECT, YOUR HONOR.

4                   THE COURT: ALL RIGHT.

5                   MR. COOK: NINETEEN-O-SIX JOINT RESOLUTION  
6 AUTHORIZING THE SECRETARY OF STATE TO FLY THE AMERICAN FLAG AND  
7 THE STATE FLAG.

8                   THE COURT: SO THAT'S WHERE AUTHORITY COMES FROM?

9                   MR. COOK: PROVIDED FOR THE APPROPRIATION TO DO THAT.

10                  THE COURT: ALTHOUGH IT CAME DOWN DURING SOME PERIOD  
11 WHEN THEY HAD TO DO SOME WORK ON THE STATE HOUSE, IT WAS DOWN  
12 ACTUALLY IN VIOLATION OF THAT STATUTE. YOU JUST COULDN'T CARRY  
13 THAT OUT BECAUSE YOU COULDN'T GET UP THERE AND TO FLY IT.

14                  WHEN IT WENT BACK UP IN 1962 OR 63, THE AMERICAN  
15 FLAG, IT WAS STILL PURSUANT TO THE 1906 JOINT RESOLUTION?

16                  MR. COOK: YES, SIR.

17                  THE COURT: THAT'S WHAT I THOUGHT.

18                  THANK YOU VERY MUCH. LET ME SAY THIS THEN: IT IS A  
19 MATTER OF SUBJECT MATTER JURISDICTION. THE STATE OF SOUTH  
20 CAROLINA -- BY THE WAY, MR. ABLE, YOU WANT TO INTERVENE IN THIS  
21 MATTER, IN PART TO ASSERT ELEVENTH AMENDMENT; ISN'T THAT  
22 CORRECT?

23                  MR. ABLE: THAT'S ONE OF THE DEFENSES WE PUT IN OUR  
24 ANSWER, YOUR HONOR.

25                  THE COURT: IF I FIND FOR THE STATE ON THE ELEVENTH



1 AMENDMENT IMMUNITY, YOU DON'T NEED TO INTERVENE IN THIS ACTION.

2 MR. ABLE: WELL, ALL DEFENDANTS WOULD BE OUT. THERE  
3 WOULD BE NO PENDING CASE.

4 THE COURT: I DON'T KNOW THAT ALL THE DEFENDANTS  
5 WOULD BE OUT. STATE HOUSE COMMITTEE IS IN. STATE HOUSE  
6 COMMITTEE, YOU HAVEN'T MOVED TO BE DISMISSED; HAVE YOU?

7 MR. HOWELL: NO, YOUR HONOR.

8 THE COURT: QUITE FRANKLY, BECAUSE MAYBE UNDER  
9 EX-PARTY YOU HAVE A PROBLEM WITH PROSPECTIVE INJUNCTIVE RELIEF  
10 AGAINST THE MEMBERS OF YOUR COMMITTEE PERHAPS.

11 MR. HOWELL: THAT'S RIGHT.

12 AS WELL AS THE INDIVIDUAL MEMBERS.

13 THE COURT: YOU MIGHT COULD MOVE TO GET THE NAME  
14 OUT. BUT, I MEAN, EVERYBODY -- ALL THE PLAYERS WOULD STILL BE  
15 IN FROM YOUR PERSPECTIVE; ISN'T THAT RIGHT?

16 MR. HOWELL: THAT'S RIGHT.

17 THE COURT: THAT'S WHY YOU ASSERTED TENTH AMENDMENT  
18 NOT ELEVENTH AMENDMENT; ISN'T THAT CORRECT?

19 THE COURT: I THOUGHT YOU WERE CORRECT IN DOING THAT  
20 PROBABLY.

21 BUT LET ME SAY THIS: QUESTION OF SUBJECT MATTER  
22 JURISDICTION STATE OF SOUTH CAROLINA UNDER THE ELEVENTH  
23 AMENDMENT IS DISMISSED FROM THIS ACTION. DISMISSED FROM THIS  
24 ACTION.

25 NOW, WELL I HAVE DISMISSED YOU FROM THIS ACTION, MR.

1 MEDLOCK. BUT I MAY, IF YOU WANT TO STAY HERE, WE AREN'T GOING  
2 TO BE MUCH LONGER. IF YOU WANT TO STAY AND COMMENT ON SOME OF  
3 THE QUESTIONS, I WILL BE GLAD TO HAVE YOUR LEGAL INPUT, AS I  
4 HAVE HAD ALREADY, IF YOU WANT TO STAY WITH US FOR JUST A FEW  
5 MINUTES.

6 MR. MEDLOCK: IF I COULD?

7 THE COURT: I UNDERSTAND YOU ARE NOT A PARTY  
8 ANYMORE. MAYBE I WOULD HAVE TO ADD YOU BACK TO MAKE YOU  
9 ANSWER. I'M SURE YOU WOULD ANSWER IF I ASKED YOU.

10 MR. MEDLOCK: THANK YOU VERY MUCH.

11 THE COURT: LET ME ASK YOU ABOUT YOUR CONSTITUTIONAL  
12 THEORY FOR JUST A SECOND -- JUST A SECOND. I'M NOT GOING TO  
13 SPEND MUCH TIME ON IT. WE ARE NOT GOING TO TALK ABOUT THE  
14 MERITS OF THIS ACTION.

15 DO I UNDERSTAND YOUR CONSTITUTIONAL -- YOUR FEDERAL  
16 CONSTITUTIONAL THEORY TO BE THAT BECAUSE SOMEBODY FINDS SOME  
17 ACT OF THE STATE OFFENSIVE, THAT VIOLATES THEIR FEDERAL  
18 CONSTITUTIONAL RIGHTS?

19 .

20 MS. VALTORTA: WELL, IT'S MORE THAN THAT, YOUR HONOR.

21 THE COURT: ALL RIGHT.

22 TELL ME WHAT MORE IT IS.

23 .

24 MS. VALTORTA: WE ARE SAYING THAT SINCE 1962 WHEN THE  
25 CONFEDERATE BATTLE FLAG WAS RAISED ON THE CAPITAL DOME, IS, IN



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1 EFFECT, A SORT OF PUBLIC FORUM, A PUBLIC FORUM LIMITED TO ONE  
2 NARROW VIEWPOINT.

3 THE COURT: NO. IT IS NOT ONE VIEWPOINT. IT FLIES  
4 THE AMERICAN FLAG AND THE SOUTH CAROLINA FLAG, TOO.

5 MS. VALTORTA: THOSE TWO FLAGS DO NOT REPRESENT  
6 PARTISAN VIEWPOINTS.

7 THE COURT: WELL, MAYBE THEY DON'T TO YOU, BUT THEY  
8 MIGHT TO SOMEBODY ELSE.

9 MS. VALTORTA: WELL, I THINK THAT THE CONTROVERSY  
10 SURROUNDING THIS ISSUE SHOWS THAT THE CONFEDERATE FLAG  
11 REPRESENTS PARTISAN -- VERY PARTISAN VIEWPOINTS.

12 THE COURT: WELL, LET ME ASK YOU THIS, THOUGH. IN  
13 1968 AND 69, DIDN'T THE AMERICAN FLAG REPRESENT THE SAME THING  
14 TO PEOPLE WHO WERE OPPOSED TO THE WAR IN VIETNAM?

15 MS. VALTORTA: WELL, I DON'T THINK THOSE PEOPLE  
16 DENIED THAT IT HAD AUTHORITY -- THE FLAG HAD AUTHORITY OVER  
17 THEM.

18 I THINK THAT THE CONFEDERATE --

19 THE COURT: WAIT A MINUTE. NO. NO. WAIT ONE  
20 MINUTE. NO. NO. NO.

21 YOUR ARGUMENT ISN'T THAT THE FLAG LACKS AUTHORITY  
22 OVER THEM, IT IS THAT IT'S OFFENSIVE, SOMEHOW CHILLS THEIR  
23 RIGHTS OF ASSOCIATION.

24 MY POINT IS, CAN YOU REALLY CONSISTENTLY MAKE YOUR  
25 CONSTITUTIONAL CLAIM ABOUT THE CONFEDERATE FLAG AND NOT MAKE IT

1 ABOUT THE SOUTH CAROLINA FLAG, THE AMERICAN FLAG?

2 MORE THAN THAT, THE PALMETTO TREE? WHAT IF AN  
3 ENVIRONMENTALIST WAS UPSET THAT THE PALMETTO TREE IS ON THE  
4 STATE LICENSE TAG -- IS IT STILL? OR BIRD? IT USED TO BE --  
5 IT IS ON THE FLAG -- AN ENVIRONMENTALIST SAYS: "I'M VERY UPSET  
6 ABOUT THAT BECAUSE THAT REMINDS ME THAT PALMETTO TREES WERE CUT  
7 DOWN TO MAKE FORT MOULTRIE. AND I FIND THAT OFFENSIVE. IT  
8 CHILLS MY RIGHTS TO HAVE ENVIRONMENTAL GROUPS COME TO SOUTH  
9 CAROLINA."

10 ISN'T THAT THE SAME CONSTITUTIONAL CLAIM?

11 MS. VALTORTA: I NEVER HEARD THAT ARGUMENT.

12 THE COURT: YOU JUST HEARD IT FROM ME. RESPOND TO  
13 IT.

14 MS. VALTORTA: WELL, I'M SAYING THAT I BELIEVE THAT  
15 THE STATE FLAG AND THE UNITED STATES FLAG REPRESENT THE STATE  
16 AS A WHOLE AT THIS TIME. WHEREAS, --

17 THE COURT: WAIT A MINUTE NOW. WAIT A MINUTE NOW.  
18 WAIT A MINUTE.

19 I DON'T WANT TO OFFEND ANYBODY'S SENSIBILITY. HAS  
20 THE CLEMSON FLAG THROWN OVER THE STATE HOUSE, CLEMSON  
21 UNIVERSITY FLAG?

22 MS. VALTORTA: PERHAPS IT SHOULD BE GIVEN OPPORTUNITY  
23 TO FLY THERE. BECAUSE BY PUTTING THE CONFEDERATE BATTLE FLAG  
24 UP ON THE CAPITAL BUILDING WHICH REPRESENTS A VERY  
25 CONTROVERSIAL VIEWPOINT IS REALLY SAYING --



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1 THE COURT: SO THE STATE CAN'T DO ANYTHING THAT'S  
2 CONTROVERSIAL THEN? AND CONTROVERSIAL IS DEFINED IF ANYBODY  
3 FINDS IT UNCONSTITUTIONAL?

4 MS. VALTORTA: THE STATE HAS NO AUTHORITY TO FLY THE  
5 FLAG.

6 THE COURT: DOESN'T MAKE ANY DIFFERENCE TO YOUR  
7 CONSTITUTIONAL ARGUMENT. YOU ALREADY TOLD ME THAT.

8 MS. VALTORTA: WELL, I THINK THAT IN A SENSE, I MEAN,  
9 THE FACT THE FLAG IS THERE DIVIDES THE STATE INTO DISTINCT  
10 GROUPS.

11 AND I DON'T BELIEVE THAT THE AMERICAN FLAG OR THE  
12 STATE FLAG DO THAT. AND FURTHER, THE CONFEDERATE BATTLE FLAG  
13 HAS NO LEGAL ASSOCIATION TO THE STATE ACCEPT HISTORICAL  
14 CONTEXT.

15 THE COURT: WELL, BUT SO WHAT? FOR YOUR  
16 CONSTITUTIONAL CLAIM, SO WHAT?

17 MS. VALTORTA: WELL, I THINK IT CHILLS THE FREE  
18 SPEECH OF PEOPLE WHO OPPOSE THE FLAG.

19 THE COURT: WELL, I UNDERSTAND THAT'S YOUR CLAIM.  
20 WHY COULDN'T SOMEBODY MAKE THAT CLAIM ABOUT ANYTHING THAT THE  
21 STATE DOES?

22 LET ME MAKE IT CLEAR TO EVERYBODY -- NO. NO. NO.  
23 I'M NOT DETERMINING NOW ON WHETHER OR NOT THE FLAG SHOULD BE  
24 THERE AT ALL. I'M JUST DOING WHAT -- YOU LAWYERS HAVE BEEN  
25 WITH ME BEFORE KNOW, I'M EXPLORING YOUR LEGAL THEORY.

1           AND MAYBE YOU CAN'T ANSWER ANYMORE TODAY. MAYBE YOU  
2 HAVEN'T HAD TIME TO THINK THROUGH IT. IF YOU DON'T WANT TO  
3 ANSWER ANYMORE QUESTIONS.

4           MS. VALTORTA: I COULD JUST SAY THAT I MEAN THE  
5 PUBLIC FORUM HAS BEEN CREATED BY THAT PARTICULAR FLAG, BY THAT  
6 CONTROVERSIAL FLAG. BECAUSE THE CONFEDERATE BATTLE FLAG --

7           THE COURT: WELL, THE AMERICAN FLAG CAN BE  
8 CONSTITUTIONAL, TOO; CAN'T IT?

9           MS. VALTORTA: WELL, I DON'T BELIEVE ANYONE WOULD  
10 DISPUTE IT INCLUDES EVERYONE.

11           THE COURT: WHAT ABOUT FLAG BURNING? FLAG BURNING  
12 THE AMERICAN FLAG? THAT'S PRETTY CONTROVERSIAL.

13           MS. VALTORTA: WELL, I WOULDN'T SAY THAT ANYONE  
14 DISPUTES THE FACT THAT THE AMERICAN FLAG REPRESENTS THEM.

15           THE COURT: IT DOESN'T MAKE ANY DIFFERENCE WHETHER IT  
16 REPRESENTS THEM. IT MIGHT BE OFFENSIVE TO THEM. YOU SAY AS  
17 LONG AS IT REPRESENTS YOU, IT CAN'T VIOLATE YOUR CONSTITUTIONAL  
18 RIGHTS.

19           I MEAN, WHAT IF SOMEBODY -- LET ME GIVE YOU ANOTHER  
20 EXAMPLE. WHAT IF SOMEBODY CLAIMED THAT THEY DIDN'T LIKE THE  
21 AMERICAN POLICY IN HAITI. AND THEY WORKED WITH GROUPS THAT  
22 WANTED TO CHANGE THE AMERICAN POLICY IN HAITI TOWARD HAITI,  
23 WHICH, LET ME SAY, IS VERY VALID FOR PUBLIC DEBATE. I'M NOT  
24 SAYING IT IS NOT. AND THEY FILED A LAWSUIT HERE IN THIS COURT  
25 AND SAID: "YOU HONOR, THAT FLAG -- AMERICAN FLAG FLYING IN



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1 SOUTH CAROLINA OVER THE STATE HOUSE INDICATES TO US AND TO  
2 PEOPLE WHO AGREE WITH US THAT WE SUPPORT THE AMERICAN POLICY IN  
3 HAITI, SOUTH CAROLINA SUPPORTS IT; THEREFORE, OUR FRIENDS WON'T  
4 COME TO SOUTH CAROLINA TO TALK TO US ABOUT OVERTURNING THE  
5 AMERICAN POLICY IN HAITI, THAT'S CHILLING. THAT HAS A CHILLING  
6 IMPACT AND VIOLATES OUR CONSTITUTIONAL RIGHTS."

7 IT IS THE SAME EXACT THEORY.

8 MS. VALTORTA: WELL, I THINK THAT THE AMERICAN FLAG  
9 REPRESENTS -- ONE OF THE THINGS IT REPRESENTS IS THE ABILITY  
10 AND THE RIGHTS OF CITIZENS TO DISPUTE WHAT THE AMERICAN  
11 GOVERNMENT --

12 THE COURT: YOU THINK THAT?

13 MS. VALTORTA: WELL, I'M SURE THAT IT DOES. AND THAT  
14 FREEDOM OF SPEECH AND FREEDOM OF -- THE FREEDOM TO DISPUTE  
15 GOVERNMENT ACTIONS IS INHERENT IN THE AMERICAN FLAG; WHEREAS  
16 THE CONFEDERATE FLAG REPRESENTS ONE OPINION.

17 THE COURT: THAT'S WHAT YOU SAY. THAT IT MAY  
18 REPRESENT THAT TO YOU.

19 MS. VALTORTA: THAT'S WHAT THE PLAINTIFFS SAY.

20 THE COURT: THAT'S RIGHT. YOU SAY THAT. I MEAN, THE  
21 PLAINTIFFS SAY THAT'S CORRECT.

22 LET ME SAY, I'M NOT GOING TO PRESS YOU ANY FURTHER ON  
23 YOUR THEORY. I WANT YOU TO THINK ABOUT IT BEFORE YOU COME BACK  
24 IN.

25 MR. WHITE: MAY I HAVE A WORD ON THAT?

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1 THE COURT: YOU SURE MAY, MR. WHITE. I DON'T LET TWO  
2 LAWYERS ON THE SAME SIDE ARGUE, BUT I'M GOING TO LET YOU ARGUE.

3 MR. WHITE: JUST -- THE AMERICAN FLAG AND STATE FLAG  
4 ARE UP THERE BY LAW.

5 THE COURT: STOP.

6 YOU HAVE ALREADY TOLD ME THAT MAKES NO DIFFERENCE.

7 MR. WHITE: I MAY HAVE BEEN WRONG.

8 THE COURT: WAIT A MINUTE NOW. WAIT A MINUTE. I  
9 DON'T MIND TWO LAWYERS ON THE SAME SIDE ARGUING, BUT I'M NOT SO  
10 SURE I LIKE ONE SIDE ON THE SAME SIDE TAKING TWO DIFFERENT  
11 POSITIONS.

12 NOW, LET ME TELL YOU QUITE FRANKLY, MR. WHITE, I  
13 THINK YOU HAVE SEEN THE BOX YOU HAVE GOTTEN YOURSELF IN ON YOUR  
14 ANALYSIS.

15 I THINK YOU ARE RIGHT IN THE FIRST INSTANCE. WHETHER  
16 OR NOT THAT FLAG IS UP WITH AUTHORITY OR NOT, CANNOT MAKE A  
17 DIFFERENCE UNDER YOUR CONSTITUTIONAL ATTACK.

18 MR. WHITE: WELL, THERE IS --

19 THE COURT: BECAUSE YOU KNOW WHY, SUPREMACY CLAUSE OF  
20 THE U.S. CONSTITUTION, THAT'S WHY.

21 IF IT IS UP -- LET ME GIVE EVERYBODY AN EXAMPLE. IN  
22 CASE YOU DON'T REMEMBER, SOUTH CAROLINA SCHOOLS WERE ALL  
23 SEGREGATED. AND YOU KNOW THIS, MR. MEDLOCK, VERY WELL. YOU  
24 WERE INVOLVED IN A LOT OF THIS. I DON'T MEAN HAVING IT, BUT  
25 WORKING WITH EDUCATORS AND ALL OPPOSING THIS.



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1 SEGREGATION IN SOUTH CAROLINA WAS UNDER COLOR OF  
2 STATE LAW; WASN'T IT?

3 MR. MEDLOCK: YES.

4 THE COURT: DE JURE; WASN'T DE FACTO, THE LAW OF  
5 SOUTH CAROLINA TO HAVE SEPARATE SCHOOLS; ISN'T THAT CORRECT?

6 MR. MEDLOCK: THAT'S CORRECT.

7 THE COURT: ALTHOUGH THAT WAS AUTHORIZED BY LAW, IT  
8 HAD TO FALL TO THE SUPREMACY CLAUSE OF THE U.S. CONSTITUTION;  
9 DIDN'T IT?

10 MR. MEDLOCK: THAT IS CORRECT, SIR.

11 THE COURT: THANK YOU VERY MUCH.

12 THAT'S WHY, MR. WHITE, THE AUTHORITY CANNOT MAKE A  
13 DIFFERENCE IN YOUR CONSTITUTIONAL ARGUMENT, FEDERAL  
14 CONSTITUTIONAL ARGUMENT.

15 MR. WHITE: THERE'S ONE THING THAT I'M NOT SURE WHAT  
16 YOUR HONOR WILL THINK OF IT, BUT THERE ARE LEGITIMATE  
17 GOVERNMENT PURPOSES FOR HAVING THE SYMBOL OF THE UNITED STATES  
18 AND SYMBOL OF THE STATE OF SOUTH CAROLINA OVER THE STATE HOUSE  
19 DOME.

20 WE WOULD ASSERT THERE'S NO LEGITIMATE GOVERNMENT  
21 PURPOSE FOR THE FLAG OF THE CONFEDERACY PREVAIL AGAINST THE  
22 CONSTITUTION OF THE UNITED STATES WHICH STANDS FOR THOSE  
23 THINGS, THE BILL OF RIGHTS AND FOURTEENTH AMENDMENT STAND  
24 AGAINST, THAT THERE IS NO LEGITIMATE GOVERNMENT PURPOSE FOR IT  
25 TO BE UP BEYOND THE HISTORICAL PURPOSE FOR WHICH IT PASSED AT

1 THE END OF THE CENTENNIAL.

2 THE COURT: LET ME SAY, YOU HAVE A CHANCE PERHAPS IN  
3 THE FUTURE TO EXPRESS YOUR CONSTITUTIONAL THEORY TO ME.

4 AND LET ME SAY THIS, WE AREN'T GETTING FURTHER INTO  
5 THE MERITS. I WANT TO EXPLORE IT SOME TO SEE IF I UNDERSTAND,  
6 I THINK I DO UNDERSTAND WHAT YOUR THEORY IS.

7 MR. WHITE: TO THAT EXTENT, WE WOULD LIKE TO MOVE TO  
8 ALLOW THE STATE OF SOUTH CAROLINA TO COME IN FOR THE PURPOSE OF  
9 ADVISING THE COURT ON STATE LAW. AND WE THINK THEY HAVE DONE  
10 THAT ADEQUATELY.

11 WE THINK THEIR CONTINUED PARTICIPATION WOULD BE OF  
12 ASSISTANCE IN THAT REGARD IF THEY ARE WILLING TO DO THAT.

13 THE COURT: I DON'T NEED IT. THANK YOU VERY MUCH FOR  
14 YOUR REQUEST. I DON'T NEED IT. THEY HAVE DONE A GOOD JOB  
15 EXPLAINING THE HISTORY. THEY HAVE DONE THE BEST JOB OF  
16 EXPLAINING WHAT THE HISTORY IS.

17 LET ME SAY, MR. SHINE, WOULD YOU STAND UP FOR ME  
18 PLEASE.

19 MR. SHINE: YES, SIR.

20 THE COURT: LET ME SAY THIS ON THE RECORD, MR. ELAM,  
21 TOO, YOU SIGNED THE FILING. LET ME HAVE YOU STAND UP FOR ME.  
22 YOU FOLKS DID THEY BEST JOB OF ADDRESSING LEGAL ISSUES IN THIS  
23 CASE.

24 I DIDN'T ASK YOU VERY MANY QUESTIONS BECAUSE YOUR  
25 POSITIONS WERE STATED ACCURATELY. I DIDN'T JUST ACCEPT THEM.



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1 I THOUGHT I KNEW SOME OF THE LAW ANYWAY. BUT I WENT BACK AND  
2 RESEARCHED THE LAW. SO I SAY THAT ON THE RECORD, YOUR FILING  
3 WAS MOST HELPFUL TO THE COURT.

4 THANK YOU VERY MUCH.

5 NOW, AND I APPRECIATE YOU WANTING THE ATTORNEY  
6 GENERAL TO BE HERE. HE'S EXPLAINED THE HISTORY, AND EXPECT  
7 HE'S GOING TO FURTHER ELABORATE ON THE HISTORY IN STATE COURT  
8 AS WE MOVE ALONG.

9 NOW, LET ME SAY THIS ABOUT THIS CONSTITUTIONAL THEORY  
10 THAT I HEAR IN THIS CASE.

11 THERE ARE VERY SERIOUS QUESTIONS ABOUT THIS  
12 CONSTITUTIONAL THEORY -- ABOUT THE CONSTITUTIONAL THEORY, THAT  
13 IT VIOLATES THE FEDERAL CONSTITUTION, ABOUT THE THEORY.

14 NOW, WE'LL JUST HAVE TO SEE THE APPLICATION OF IT.  
15 BUT EVERY FEDERAL COURT THAT I CAN FIND HAS DISMISSED ANY SORT  
16 OF SIMILAR THEORY FOR WHAT THEY ARE HEARING IN THIS CASE. AT  
17 ANY RATE, I WANT TO MAKE THAT COMMENT. WE'LL SEE WHERE IT  
18 GOES.

19 (DISCUSSION HELD OFF THE RECORD.)

20 THE COURT: MR. HOWELL, WE HAVE HAD A LITTLE  
21 DISCUSSION, SIR, ABOUT THE ELEVENTH AMENDMENT. DO YOU WANT ME  
22 TO TAKE UP THE ELEVENTH AMENDMENT JUST ON THE STATE HOUSE  
23 COMMITTEE? YOU JUST WILLING TO LET THAT RIDE FOR RIGHT NOW.

24 MR. HOWELL: I JUST AS SOON LET IT RIDE.

25 THE COURT: I THOUGHT SO. I JUST WANT TO BE SURE ON

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1 THE RECORD.

2 THANK YOU VERY MUCH.

3 LET ME JUST MAKE A FEW COMMENTS HERE. LET ME JUST BE  
4 CONSISTENT -- WAIT ONE SECOND, MR. ABLE -- TO BE CONSISTENT.  
5 SOMEBODY COULD SAY I SHOULD GO AHEAD AND WAIVE YOU OUT. THE  
6 TRUTH IS THE PLAYERS ON YOUR COMMITTEE WOULD STILL BE IN FRONT  
7 OF THIS COURT. SO I'M GOING TO LEAVE THAT ALONE FOR RIGHT  
8 NOW.

9 I WANT EVERYBODY TO UNDERSTAND I COULD TAKE THE NAME  
10 STATE HOUSE COMMITTEE, AND IT COULD BE WRONG. BUT ALL THE  
11 MEMBERS OF THE STATE HOUSE COMMITTEE ARE STILL GOING TO BE IN  
12 THIS CASE.

13 ALL RIGHT.

14 MR. ABLE, YOU STOOD UP?

15 MR. ABLE: YES, SIR.

16 MAY IT PLEASE THE COURT:

17 SINCE THE STATE IS OUT AND THE MOTION TO INTERVENE ON  
18 BEHALF OF THE STATE IS MOOTED BY THAT, WE WOULD MAKE AN ORAL  
19 MOTION TO BE ALLOWED TO INTERVENE AT LEAST AS PERMISSIVE  
20 INTERVENORS TO PARTICIPATE WITH THE STATE HOUSE COMMITTEE.

21 THE COURT: TAKEN UNDER CONSIDERATION. YOU HAVE A  
22 STATE HOUSE STATE ACTION. I DON'T KNOW IF YOU FILED TO  
23 INTERVENE OVER THERE OR NOT.

24 MR. ABLE: THAT ACTION HAS NOT BEEN COMMENCED.

25 THE COURT: I DON'T KNOW ABOUT THAT.



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1 MR. ABLE: IT HASN'T BEEN. I FILED, AND IT'S BEEN  
2 FILED NOT SERVED.

3 THE COURT: LISTEN TO ME, I'M NOT MAKING ANY RULING  
4 AS FAR AS SOME ACTION YOU WANT TO BE IN, IT IS NOT GOING TO BE  
5 IN THIS COURTROOM. I THINK IT IS PRETTY CLEAR TO YOU, YOU  
6 BETTER SEE WHAT ELSE YOU WANT TO DO.

7 MR. ABLE: I WILL BE THERE.

8 THE COURT: I'M NOT TELLING YOU TO DO IT. BUT THE  
9 POINT IS, I THINK I MADE IT PRETTY CLEAR, THE STATE LAW  
10 QUESTION ISN'T GOING TO BE RESOLVED IN THIS COURT. BECAUSE I  
11 HAPPEN TO AGREE, I THINK IT WAS THE GOVERNOR'S POSITION THAT  
12 FEDERAL COURTS SHOULDN'T BE DICTATING TO STATES ON STATE LAW  
13 MATTERS. AND THAT HAPPENS TO BE MY PHILOSOPHY AS WELL. THAT'S  
14 WHAT I'M GOING TO DO.

15 THANK YOU VERY MUCH.

16 MR. ABLE: THANK YOU, SIR.

17 THE COURT: NOW, LET ME JUST MAKE A FEW COMMENTS TO  
18 YOU. AND THEN I WILL ISSUE A FINAL RULING THAT I'M GOING TO  
19 ISSUE TODAY.

20 LET ME SAY, WE HAVE PEOPLE HERE TODAY ALL OF WHOM ARE  
21 GOOD LAWYERS, ALL OF WHOM HAVE AN INTEREST IN THE COMMUNITY.  
22 SOME HAVE INTEREST POSITIONS OF POWER.

23 LET ME TELL YOU THREE INCIDENTS THAT HAVE HAPPENED IN  
24 MY COURTROOM IN THE LAST -- IN THE LAST MONTH AND A HALF OR  
25 SO.

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1 FIRST, AND I THINK I'M GOING TO TAKE A GUILTY PLEA IN  
2 THIS CASE TODAY, I HAVE HAD THE OCCASION TO HAVE BEFORE ME A  
3 YOUNG MAN WHO SHOT HIS SCHOOLMATE AT A SCHOOL HERE IN THE  
4 CAPITAL CITY.

5 SECOND, I HAVE HAD THE OCCASION RECENTLY TO TAKE A  
6 GUILTY PLEA OF ANOTHER YOUNG MAN WHO GRADUATED FROM A HIGH  
7 SCHOOL IN THIS CITY -- GRADUATED FROM HIGH SCHOOL AND HE CANNOT  
8 READ AND WRITE.

9 AND THEN LAST WEEK, AND THIS IS UNBELIEVABLE TO ME, I  
10 SENTENCED A MAN FOR BRANDISHING A FIREARM. AND THEN WHEN I GOT  
11 THE INFORMATION, THIS IS WHAT HAPPENED, AND I PUT THIS ON THE  
12 RECORD BECAUSE ALL OF YOU FOLKS ARE IMPORTANT PEOPLE. AND I  
13 THINK YOU NEED TO KNOW ABOUT THE OTHER ISSUES OUT THERE THAT  
14 MAY REQUIRE SOME ATTENTION.

15 I'M NOT GOING TO DENIGRATE THE CONSTITUTIONAL CLAIM  
16 ABOUT THE CONFEDERATE FLAG. BUT IT STRIKES ME WE ARE TAKING A  
17 WHOLE LOT OF TIME IN THIS WHOLE STATE ON THE CONFEDERATE FLAG,  
18 WHEN THERE ARE OTHER ISSUES, EVERY-DAY ISSUES THAT SOME MAY  
19 CONSIDER A LITTLE MORE IMPORTANT.

20 THIS MAN CAME IN, AND HIS HOUSE HAD BURNED DOWN. AND  
21 SO HE HAD TO GO TO WHAT HE CALLED THE PROJECTS. BUT I CAN TELL  
22 YOU IT IS HOUSING UNITS WITHIN BLOCKS OF THAT DOME WHERE THOSE  
23 FLAGS FLY.

24 HE SAID -- AND ALL THE TESTIMONY FROM ALL SIDES --  
25 CRACK COCAINE IS BEING SOLD EVERYWHERE IN THE PRESENCE OF



1 CHILDREN, GUNS PRESENT. THIS MAN SAID IN HIS HOUSING UNIT,  
2 WHEN HE AND HIS WIFE WOULD LEAVE FOR ANY REASON, PEOPLE WOULD  
3 BREAK IN EVERY TIME THEY LEFT AND THE WOULD STEAL EVERYTHING IN  
4 THEIR HOUSE, EVERYTHING.

5 ON ONE OCCASION HE WENT TO THE POLICE STATION HERE IN  
6 COLUMBIA TO -- AND I'M NOT PICKING ON COLUMBIA, BUT THIS IS THE  
7 CAPITAL CITY IN WHICH THEY FLAG IS FLYING -- WENT TO THE POLICE  
8 STATION AND COMPLAINED ABOUT A BURGLARY. AND WHEN HE GOT BACK  
9 TO HIS HOUSE WITH THE POLICE, STRANGERS HAD MOVED INTO HIS  
10 HOUSE. THEY WERE IN HIS BED, THEY WERE SITTING ON HIS  
11 FURNITURE, AND THEY WOULD NOT LEAVE.

12 IT SOUNDS LIKE SOMETHING OUT OF THAT MOVIE ESCAPE  
13 FROM NEW YORK CITY. AND HE SAID, PLEASE MAKE THEM LEAVE MY  
14 HOUSE. AND THE POLICE SAID YOU GOT TO EVICT THEM. WHAT DO YOU  
15 MEAN I HAVE GOT TO EVICT THEM? THEY DON'T LIVE HERE. THEY  
16 DON'T LIVE HERE.

17 AND SO HE'S CONCERNED ABOUT HIS WIFE, QUITE FRANKLY,  
18 WHO USED CRACK. AND CRACK DEALERS WERE GIVING HER CRACK  
19 COCAINE. AND HE DIDN'T WANT HIS WIFE TO HAVE CRACK ANYMORE.  
20 SO HE ASKED THEM TO NOT GIVE HER ANY MORE CRACK. THEY WERE  
21 BREAKING INTO HIS HOUSE, THREATENING HIM, THE CRACK DEALERS  
22 WERE, HERE IN COLUMBIA. COMING DOWN TO LURE HIS WIFE AWAY WITH  
23 CRACK COCAINE.

24 HE SAID TO THE POLICE, CAN I PROTECT MYSELF? THE  
25 POLICEMAN SAID, YES, YOU SURE CAN. SO HE GOT A GUN TO PROTECT

1 HIMSELF. HE GOT INTO A SCUFFLE WITH A COUPLE OF COCAINE  
2 DEALERS, WHEN HE WENT AFTER THEM BRANDISHING A FIREARM.

3 HE'S NOW IN FEDERAL PRISON FOR HAVING THAT FIREARM.  
4 HE WAS A CONVICTED FELON, BUT HE WAS CHARGED WITH OTHER  
5 THINGS.

6 LET ME SAY THIS, IT IS A LITTLE DIFFICULT TO SIT HERE  
7 AS A FEDERAL JUDGE AND HEAR AND READ ABOUT AND SEE THE EFFORT  
8 THAT'S BEING PUT IN BY THE GOOD PEOPLE OF SOUTH CAROLINA ON THE  
9 CONFEDERATE FLAG ISSUE, WHEN I WILL DARE SAY THOSE THREE  
10 EXAMPLES I JUST MENTIONED -- THEY DON'T CARE IF THAT FLAG FLIES  
11 OR NOT. THEY WANT THEIR LIFE IMPROVED, AND THEY WANT SOMETHING  
12 ELSE DONE TO IMPROVE THEIR LIFE.

13 AND I JUST SAY THAT FOR WHAT IT'S WORTH. BECAUSE  
14 BELIEVE THIS, I HAVE GREAT CONFIDENCE IN THE PEOPLE IN SOUTH  
15 CAROLINA. I HAVE GREAT CONFIDENCE IN THE OFFICIALS, BOTH  
16 ELECTED AND THE JUDICIAL OFFICIALS WHO ARE ELECTED BY THOSE  
17 ELECTED OFFICIALS. AND I'M COMFORTABLE THEY CAN DEAL WITH  
18 CONFEDERATE FLAG ISSUE IN A WAY, ON STATE LAW, THEY CAN DEAL  
19 WITH IT. THAT'S A PROPER FORUM FOR IT. THERE ARE PEOPLE  
20 GOODWILL ON ALL SIDES OF THE ISSUES IN SOUTH CAROLINA.

21 THE FLAG ISSUE I JUST SUSPECT AND HOPE THAT THE  
22 MATTER WILL BE RESOLVED, AND BE RESOLVED IN A MANNER SO WE  
23 ALL -- EVERYBODY CAN CONCENTRATE ON THE KIND OF PROBLEMS  
24 POINTED OUT TO YOU.

25 I JUST THINK IT IS DISGRACEFUL THOSE CONDITIONS



1 IN SOUTH CAROLINA.

2 I WILL JUST TELL, YOU THAT'S MY OPINION. AND WE  
3 OUGHT TO BE USING OUR TIME AND EFFORTS AND RESOURCES TO ADDRESS  
4 THOSE REAL PROBLEMS.

5 THOSE PEOPLE I TALKED ABOUT, I DARE SAY, THEY DON'T  
6 CARE -- THEY DON'T CARE IF ANY FLAG IS ON THAT DOME. THEY  
7 DON'T CARE ABOUT THAT. THEY WANT THERE LIVES IMPROVED AND BE  
8 SURE THAT CHILDREN AREN'T GOING TO BE SHOT WHEN THEY GO TO  
9 SCHOOL HERE IN COLUMBIA.

10 NOW, LET ME SAY THIS, ALSO, MR. SHINE, YOU AND MR.  
11 ELAM POINTED OUT AND RAISED THE QUESTION OF ABSTENTION IN THIS  
12 CASE. THAT IS, IF THERE IS A STATE LAW MATTER THAT CAN BE  
13 RESOLVED AND SHOULD BE RESOLVED IN THE STATE FORUM, THAT THE  
14 FEDERAL COURT SHOULD DO THAT.

15 AND UNDER THE PULLIAM DECISION WHICH, QUITE FRANKLY,  
16 JUSTICE SCALIA, IN MY OPINION, CAUSED DEFERRAL RATHER THAN  
17 ABSTENTION.

18 PERHAPS UNDER BURFORD AS WELL, I BELIEVE IT IS PROPER  
19 FOR THIS COURT TO ABSTAIN ANY FURTHER IN THIS MATTER.

20 LET ME MAKE IT VERY CLEAR, LET ME MAKE IT VERY CLEAR,  
21 I AM DEFERRING ON MR. WHITE'S CONSTITUTIONAL CLAIM. I WANT YOU  
22 TO UNDERSTAND THAT, MR. WHITE.

23 I DON'T KNOW HOW THE MATTER IS GOING TO BE RESOLVED.  
24 I DON'T KNOW. I SUSPECT SOME EFFORT WILL BE PUT INTO GETTING  
25 IT RESOLVED IN COURT OR IN THE GENERAL ASSEMBLY OR SOMEHOW.

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1 LET ME SAY, I DON'T KNOW. BUT IF WHATEVER THAT  
2 RESOLUTION TURNS OUT TO BE, MR. WHITE, IF YOU AREN'T SATISFIED  
3 WITH IT, YOU CAN COME BACK AND PRESENT YOUR CONSTITUTIONAL  
4 CLAIM HERE IN THIS COURT.

5 NOW, I HAVE ALREADY TOLD YOU I THINK THAT CLAIM IS  
6 VERY TENUOUS AND QUESTIONABLE. BUT I'M NOT RULING ON IT HERE.  
7 AND I WILL GIVE YOU FURTHER CHANCE TO PRESENT IF WE GET THAT  
8 FAR.

9 I'M GOING TO MAKE IT VERY CLEAR, I'M GIVING THE STATE  
10 COURT THE TIME TO DEAL WITH THE STATE COURT ISSUES; HOWEVER, I  
11 AM NOT DEFERRING TO STATE COURT ON QUESTIONS OF FEDERAL  
12 CONSTITUTIONAL LAW.

13 IF THAT MATTER COMES UP AGAIN, THE PARTIES CAN COME  
14 BACK TO ME, AND I WILL DECIDE THE QUESTIONS OF FEDERAL  
15 CONSTITUTIONAL LAW.

16 LET ME SAY THIS: I THANK ALL OF YOU FOR BEING HERE  
17 THIS MORNING. I APPRECIATE YOUR PARTICIPATION. I APPRECIATE  
18 WHAT YOU FILED WITH THE COURT.

19 ALL RIGHT.

20 ANYTHING FURTHER?

21 MR. SHINE: NOTHING FURTHER.

22 MR. WHITE: NOTHING FROM THE PLAINTIFF AT THIS TIME.

23 THE COURT: THANK YOU VERY MUCH. THANK YOU ALL VERY  
24 MUCH.

25 THE MARSHAL: ALL RISE.