

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: ALEX NGIRAINGAS, ET AL. Petitioners
V. FRANCISCO Q. SANCHEZ, ETC., ET AL.

CASE NO: 88-1281

PLACE: Washington, D.C.

DATE: January 8, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 ALEX NGIRAINGAS, ET AL., :
4 Petitioners :
5 v. : No. 88-1281
6 FRANCISCO Q. SANCHEZ, ETC., :
7 ET AL. :
8 -----x

9 Washington, D.C.

10 Monday, January 8, 1990

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 1:43 p.m.

14 APPEARANCES:

15 JEFFREY R. SIEGEL, ESQ., Agana, Guam; on behalf of the
16 Petitioners.

17 JOHN PATRICK MASON, ESQ., Deputy Attorney General of Guam,
18 Agana, Guam; on behalf of the Respondents.

19 JAMES A. FELDMAN, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.; on
21 behalf of the United States as amicus curiae,
22 supporting the Respondents.

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8	On behalf of the United States as	
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1 of the Virgin Islands was a body politic as well.

2 Indeed, if we examine the nature of the
3 territory and the self-government invested in the
4 territory by the Organic Act we will find, I think, that -
5 - that it makes sense to conclude that territory is indeed
6 a body politic. There are free elections in the
7 territory. The citizens of the territory elect their
8 local representatives and congressmen and a non-voting
9 delegate to Congress. Indeed, there are also local
10 courts, and a quite vibrant and active democracy exists in
11 Guam.

12 There has been some suggestion, however, that
13 the Dictionary Act is not applicable in defining, or at
14 least has been somewhat diminished in defining the word
15 person. The first basis on which this has been suggested
16 is the fact that the 1871 act was taken from the 1866
17 Civil Rights Act, specifically Section 2. However,
18 Congress, in the intervening period, did pass the Civil
19 Rights Act, and that is persuasive evidence that Congress
20 intended to apply that definition to the word person in
21 Section 1983.

22 Respondents have argued that the 1874 revision
23 and recodification of laws, and the repeal and reenactment
24 of the Dictionary Act, somehow overrides this Court's
25 finding in *Monell* that indeed the Dictionary Act is

1 applicable to this term. I would also suggest that the
2 1874 Congress could not have effected the intentions of
3 the 1871 Congress when it passed Section 1983.

4 The second factor this Court relied upon in
5 Monell and finding municipalities to be persons were the
6 broad construction and remedial nature of Section 1983. I
7 would suggest that these same principles apply to include
8 the territory within the meaning of the word person.
9 Section 1983 is to be given as broad a construction as
10 possible, and technical definitions should not be used to
11 exclude any body politic from the term person in Section
12 1983.

13 QUESTION: Did the Court literally say in Monell
14 that Section 1983 was to give -- to be given the broadest
15 possible construction?

16 MR. SIEGEL: Well, maybe that is overstating it
17 just a bit.

18 QUESTION: It's a strange view, certainly. Why
19 on earth would you give anything the broadest possible
20 construction?

21 MR. SIEGEL: Well, the broadest construction
22 consistent with the terms used. I think the Court's
23 intention was to not hang the liability or applicability
24 of Section 1983 upon some technical reading of the
25 statute.

1 QUESTION: Well, the broadest possible
2 construction, I suppose, would include states.

3 MR. SIEGEL: I think there is an argument to be
4 made for that. However, in Will, and I think the
5 substance of Will is that the interest of federalism in
6 the Eleventh Amendment override that broad construction.
7 Indeed, it makes sense that Congress would not intend,
8 given the context of the act, that states would be liable
9 under -- states would be persons for the purpose of
10 Section 1983 given their Eleventh Amendment immunity. And
11 the petitioners would submit that that is indeed the
12 overriding considerations this Court employed in Will, in
13 holding that states were not persons, that they are given
14 a special respect and special sovereignty by the
15 Constitution and the federalist system.

16 QUESTION: Well, -- sort of a standard rule of
17 construction that if you, if you intend to include a
18 sovereign or a state you ought to say so.

19 MR. SIEGEL: The rule of construction I think
20 Justice White is referring to is that person does not
21 ordinarily include the sovereign. However, that is not a
22 hard-and-fast rule, as this Court ruled in Omaha, in
23 Wilson v. The Omaha Tribes. The Court must examine the
24 purpose and context, as well as the legislative history of
25 the act. Congress would never, and has never indeed,

1 considered any territory to be a sovereign. Congress is
2 the plenary sovereign over any territory, and certainly
3 over Guam.

4 I suggest then, that given that context and
5 given that understanding of Congress, --

6 QUESTION: You mean territories are just subject
7 to tort suits despite the territorial legislature saying
8 they are immune? They have sovereign immunity, or what?

9 MR. SIEGEL: They have sovereign immunity from
10 territorial -- from acts arising on the territorial law in
11 territorial courts.

12 QUESTION: Why do they have that?

13 MR. SIEGEL: Based on this Court's decision in
14 Polyblank that the logical and practical --

15 QUESTION: Well, that's a long-standing
16 tradition, isn't it?

17 MR. SIEGEL: Yes, it is, Your Honor.

18 QUESTION: But you say 1983 wasn't -- didn't
19 have to respect that kind of immunity.

20 MR. SIEGEL: I'm saying that it is illogical to
21 consider that Congress would have intended to immunize a
22 territory, which is a creature of Federal law, from an act
23 of Federal law. The logic of Polyblank is that the
24 territory itself creates the rights which flow to the
25 citizens of the territory. Therefore, it is immune.

1 That's the explicit language.

2 I would suggest that there, that any immunity
3 from the Federal law must be a matter of congressional
4 intent. And there is no tradition of immunity from
5 Federal law in territories, because they are indeed
6 creations of Federal law. It's internally inconsistent.

7 QUESTION: What about our decision in District
8 of Columbia v. Carter? You know, certainly the District
9 of Columbia was a creature of Federal law, too, but we
10 said that 1983 as enacted didn't cover it, didn't we?

11 MR. SIEGEL: Because this acts on the color of -
12 - District of Columbia law were not included in -- in the
13 -- in 1983 at that time, and this Court held that District
14 -- properly so, that the District of Columbia is neither a
15 state or a territory.

16 QUESTION: Whereas you say that Guam would be a
17 territory.

18 MR. SIEGEL: Yes.

19 QUESTION: And you think Carter would come out
20 differently now?

21 MR. SIEGEL: Yes.

22 QUESTION: Because 1983 now says territory?

23 MR. SIEGEL: I think that's some evidence,
24 although the cases obviously are not consistent in that
25 regard. States are included in Section 1983, yet they are

1 not persons. The District of Columbia circuit has held
2 the District of Columbia liable under the Civil Rights
3 Act, and I think that is appropriate. I think the
4 distinguishing factor is the Eleventh Amendment and
5 Federalism. I think it is the sovereignty of the states
6 which set states apart from territories or municipalities.

7 And I think that can be drawn also from the
8 conclusion in Monell that Section 1983 applies to all
9 entities which are not parts of the state for Eleventh
10 Amendment purposes. And the history of this Court's
11 decisions imply that distinction, imply the Eleventh
12 Amendment as being an important factor in the
13 interpretation of Section 1983 and governmental liability.

14 QUESTION: And why aren't we bound by the
15 Dictionary Act definition of persons?

16 MR. SIEGEL: No, I believe this Court should be
17 bound by that act.

18 QUESTION: Doesn't that suggest to us that
19 territories are not persons?

20 MR. SIEGEL: No, territories are bodies politic,
21 as this Court has held in Puerto Rico v. Shell.

22 QUESTION: That's the original form of the
23 Dictionary Act.

24 MR. SIEGEL: The 1871 version, yes.

25 QUESTION: And, as amended, what did it say?

1 MR. SIEGEL: It said corporations and
2 partnerships were substituted for --

3 QUESTION: And you say that we shouldn't even
4 look at that?

5 MR. SIEGEL: No, that was passed later.

6 The Court also has relied in making
7 determinations of governmental liability under Section
8 1983 on the legislative history of the act. But I would
9 suggest that this Court did not base any of its decisions
10 on the specific legislative history of Section 1983.
11 Indeed, there was only one, one mention of specific
12 instance of the understanding that a city would be liable
13 under Section 1983 in the specific legislative history of
14 that act. I think that the Court has taken the term
15 person and found the legislative intent within the
16 definition of that term.

17 It would seem to me that, given the historical
18 context of the Civil Rights Act, that Congress would have
19 intended it to ply -- apply in territories as well, and to
20 territories. This is a reconstructionary act. Indeed
21 slavery in the territories had been something that was
22 heatedly debated both prior to the Civil War and after it.
23 Witness the Missouri Compromise.

24 QUESTION: On that line of reasoning they
25 probably would have wanted it to apply to the states as

1 well, in fact especially.

2 MR. SIEGEL: Well, given the -- given the
3 constitutional immunity which this Court relied on -- on -
4 - in Will, I think there is ample basis for the Court's
5 decision in Will.

6 QUESTION: That was a decision not based on
7 immunity, but based on the -- the perceived intent of the
8 Congress at the time.

9 MR. SIEGEL: Right. And I think in perceiving
10 that intent this Court applied two standards that apply
11 only to Eleventh Amendment suits, specifically that indeed
12 the Eleventh Amendment applies only to states, and that
13 Congress would have made -- would have clearly expressed
14 its intention to alter the constitutional balance. Now,
15 that balance is not at issue here.

16 QUESTION: Don't you think it is much more
17 likely that the Reconstruction Congress would have been,
18 would have been more concerned about states than it would
19 have been -- about constitutional violations by states
20 than it would have been about constitutional violations by
21 territories that are subject to the complete control of
22 the Federal Government?

23 MR. SIEGEL: There is no question that states
24 were the main focus of the debates on Reconstruction. But
25 I would also note that Congress would not intend to apply

1 a remedy such as the Civil Rights Act in states, and
2 provide a haven for bigots and Ku Klux Klan and what have
3 you in territories by failing to apply the act there.

4 QUESTION: The people who were doing the
5 violating wouldn't be immune in their individual capacity.

6 MR. SIEGEL: No.

7 QUESTION: So it's not really a haven, is it?

8 MR. SIEGEL: Well, if -- if Section 1983 were
9 not construed to apply in territories, and I suggest --

10 QUESTION: Well, they would have to flee to the
11 territory and then be elected to some office, wouldn't
12 they?

13 (Laughter.)

14 MR. SIEGEL: Which might not be too hard.

15 (Laughter.)

16 MR. SIEGEL: The second issue that this Court
17 must face if it determines that territories are persons is
18 the issue of sovereign immunity, and I think we have
19 touched on that already. This Court has never held any
20 governmental entity to be immune from the Federal Civil
21 Rights Act, other than states under the Eleventh
22 Amendment. And indeed, when it has held such an immunity
23 existed with respect to individuals, it has found only
24 immunities which were well grounded in reason and history.

25 There is no immunity for Federal action in a

1 territory -- against a territory. The territories, as I
2 stated before, are acts of Congress, given the powers --
3 given their powers by Congress, and there has not been one
4 case cited to this Court or in any brief which would
5 demonstrate an immunity to a claim brought under Federal
6 law with respect to a territory.

7 I think the Third Circuit's reasoning in Frett,
8 in Ocasio is also appropriate for consideration. Congress
9 would not have applied a bill of rights, and specifically
10 extended the Fourteenth and Fifth Amendments to the
11 territory, and at the same time intended to keep the
12 territories immune from actions brought pursuant to
13 Section 1983, if indeed the territories are persons.

14 By way of conclusion I would just like to add
15 perhaps a practical point, that the territory needs this
16 remedy. The people of the territory need to have a sense
17 that their civil rights are secure. There is no effective
18 remedy under Section 1983 when the only person you can sue
19 is an \$8.00 an hour police officer.

20 QUESTION: But the territorial legislature could
21 give the people everything that Section 1983 can give
22 them, can't it?

23 MR. SIEGEL: Yes.

24 QUESTION: And yet the -- the legislature
25 doesn't realize that the people need this remedy?

1 MR. SIEGEL: No.

2 QUESTION: What about -- what about the people
3 of the states?

4 MR. SIEGEL: I think they are in the same
5 position, frankly.

6 QUESTION: So we should give the people in the
7 territory favored position as compared to the people of
8 the states?

9 MR. SIEGEL: The states are the entities that
10 have the favored position.

11 QUESTION: May I ask this question just to get
12 it straightened out in my -- in states of course you have
13 a lot of cities you can sue, municipal corporations. Do
14 we have separate municipal corporations in the territory
15 of Guam that are subject --

16 MR. SIEGEL: There are local villages, but the
17 only village officer is what -- is a mayor, and he
18 essentially has no power. They don't run any of the
19 police force (inaudible).

20 QUESTION: The local villages or towns have
21 police forces, you say?

22 MR. SIEGEL: No, they don't.

23 QUESTION: So the only governmental entity that
24 has a police force that can engage in the kind of conduct
25 we are talking about is the territory itself?

1 MR. SIEGEL: That's correct.

2 QUESTION: Which is somewhat different from the
3 situation in most states.

4 MR. SIEGEL: That is correct. And that is
5 another important point. The government of Guam is almost
6 an overwhelming power. They license cars, license
7 businesses, run the only police force, run the only
8 hospital, provide telephone service, provide electrical
9 service, provide water. And without an effective remedy
10 against an entity of such great magnitude, I suggest that
11 it is going to be a difficult task to instill American
12 traditions of democracy and liberty in the territories.

13 I'd like to reserve the remaining time, please.

14 QUESTION: Very well, Mr. Siegel.

15 Mr. Mason.

16 ORAL ARGUMENT OF JOHN PATRICK MASON

17 ON BEHALF OF THE RESPONDENTS

18 MR. MASON: Mr. Chief Justice, and may it please
19 the Court:

20 Whether the government of Guam is liable under
21 Section 1983 is a question of congressional intent. What
22 did Congress intend concerning the territories in 1874,
23 not 1871, but 1874, when territories were added to the
24 1871 Civil Rights Act, and what did Congress intend in
25 Guam's Organic Act? Now, Petitioners would disregard

1 Guam's mandate for self-government in its Organic Act, and
2 Petitioners would avoid the intent of Congress to allow
3 the people of Guam, through their duly elected
4 legislators, to balance the interests of private litigants
5 and the goals of public government.

6 One of the first things you can look at is the
7 purpose of the Civil Rights Act of 1874. A major purpose
8 was to provide a Federal forum to enforce Fourteenth
9 Amendment rights. Local officials in the states either
10 would not or could not grant the citizens the equal
11 protection, due processes and privileges and immunities
12 guaranteed by the Fourteenth Amendment. However, in
13 territories the situation is different.

14 And I think there is some confusion here about
15 the courts of the territories, because the territories had
16 Congress -- Congress established the courts in the
17 territories, and Congress -- or the President appointed
18 the judges that presided over those courts in the
19 territories. In -- you can see in the 1874 revision and
20 consolidation of the Federal laws, the provisions common
21 to all territories, it indicates that under Federal law
22 the Congress had a Supreme Court in each territory with
23 three judges who were appointed by the President. And
24 then the territories were divided into three judicial
25 districts. And one of those judges, then, would preside

1 in that judicial district. And then the courts in those
2 districts would -- the judges in those districts would
3 hold court "for the purpose of hearing and determining all
4 matters and cases, except those which United States is a
5 party." So these were courts appointed by Congress, or
6 created by Congress, and these were judges appointed by
7 the President. And if a 1983 action was to be brought in
8 the territories, it would be brought in those courts.

9 So, we didn't have the same situation as we had
10 in the states, where they needed to provide a Federal
11 forum. In fact, the courts of the territories were, in
12 the sense that they were created for the territories by
13 the Federal Government with judges appointed by the
14 President, a Federal forum. So that purpose really
15 doesn't apply in the territories as it did in the states.

16 QUESTION: Let me -- let me just stop you there
17 for a minute.

18 MR. MASON: Yes.

19 QUESTION: Were there other courts besides the
20 courts that you have just described in the territories on
21 the continental -- on the North American continent?

22 MR. MASON: There were justice of the peace
23 courts and probate courts, but if you look at the
24 provisions --

25 QUESTION: What courts, in your view, were

1 supposed to enforce 1983 in the territories?

2 MR. MASON: That would be brought in the
3 district court of the territory in 1874.

4 QUESTION: The ones that you have just
5 described?

6 MR. MASON: Yes.

7 QUESTION: Then why wouldn't they also be
8 brought in the similar courts in Guam?

9 MR. MASON: Well, on Guam -- okay, the situation
10 was on Guam, in 1950 when Congress gave Guam self-
11 government under the Organic Act, they created the
12 District Court of Guam, and it was the same. That
13 district court had all jurisdiction, but then they allowed
14 the legislature of Guam to create such other courts as it
15 decided.

16 QUESTION: Right.

17 MR. MASON: And so, one year later the
18 legislature created well, basically the island court. But
19 it -- at that point it left jurisdiction in the district
20 court for most felony cases and for cases -- civil cases
21 above \$2,000. So, there again, if you had a civil rights
22 action at that time brought in a court of Guam it would be
23 brought in the district court unless it was less than
24 \$2,000. But, so -- but in 18 -- in 1974 then the
25 legislature went ahead and created the Superior Court of

1 Guam, which at that time then actions under Federal law
2 were brought in the district court and actions under local
3 law were brought in the Superior Court of Guam. But the
4 appeals from this superior court still go to the District
5 Court of Guam before, and then to the Ninth Circuit. So
6 District Court of Guam still has that jurisdiction.

7 But in 1874, if we look at the intent of the
8 Congress when it added territories, you can see that at
9 that time -- what they were trying to get at that a
10 Federal forum did exist in the territories at that time.
11 The situation on Guam that happened in 1974 didn't apply
12 to the territories at that time.

13 Another important thing, of course, in deciding
14 what the intent of Congress was is the common law
15 sovereign immunity that existed in the territories. And
16 this Court has held that Congress did not intend to
17 override established common law defenses and immunities
18 without specific language to the contrary.

19 In 1874 the territories had an established
20 tradition of immunity from suit without its consent, and
21 this Court so held in the Kawanakoa case. And in fact
22 in that case this Court specifically rejected the argument
23 that was made that territories are like municipal
24 corporations. And the Court held that the territories had
25 immunity by the nature of the type of government that was

1 created in their Organic Act.

2 And then in the Rosaly case in 1913, this Court
3 then applied that reasoning to the unincorporated
4 territories. There were, of course, only incorporated
5 territories in 1874, but the reasoning was applied to the
6 unincorporated territories, which Guam is, in 1913 by this
7 Court.

8 Now, Petitioners argue that Kawanakoa and
9 Rosaly don't apply, because that means there is only
10 sovereign immunity in the local courts under local law.
11 Well, what that overlooks, of course, as I talked about a
12 minute ago, is the nature of the court system in the
13 territories. And in fact these congressionally created
14 courts were the local courts, although they were created
15 by Congress. And they were to hear all matters and cases,
16 and that would include 19 -- Section 1983 actions. And
17 also, Kawanakoa was a -- the action where immunity was
18 held -- was upheld was actually brought in one of those
19 congressionally created courts, and the immunity was
20 upheld.

21 And also, Kawanakoa cites with approval three
22 prior territory cases, which are Wisconsin v. Doty,
23 Langford v. King, and Fisk v. Cuthbert. And there again,
24 those were cases in which immunity was upheld and the
25 courts in which the cases were brought were these

1 congressionally created territorial courts.

2 QUESTION: What was the source of the cause of
3 action where immunity was upheld in that case? I don't
4 remember it.

5 MR. MASON: What were the courts?

6 QUESTION: No, no. What was the cause of action
7 which was defeated by the --

8 MR. MASON: Okay, the cause of action -- or
9 causes of action -- the Langford case was a writ of
10 mandate to enforce -- force the county treasurer to accept
11 a writ in payment of taxes.

12 QUESTION: So that was a claim based on the
13 territorial law that was sought to be enforced?

14 MR. MASON: Yes. I think all three -- all three
15 of those cases were based on territorial law.

16 QUESTION: Would you claim that there would be
17 immunity in Guam from a suit, say, by a resident of Hawaii
18 for negligence committed by an agent of Guam in Hawaii?

19 MR. MASON: No, I don't think there would be.

20 QUESTION: It would not be sovereign immunity
21 there. I'm asking the --

22 MR. MASON: Well, the --

23 QUESTION: Then they had Nevada against Hall.
24 You don't question the continuing validity of Nevada
25 against Hall, do you?

1 MR. MASON: Well, no, if the action --

2 QUESTION: Or you don't claim that Guam has a
3 greater immunity than Nevada claimed in that case?

4 MR. MASON: No, I don't think that is
5 necessarily true, no. Not at all. But as to laws, again,
6 the jurisdiction of these courts was for all cases that
7 were brought in the territory. And so when local -- when
8 Federal laws are created and made specifically applicable
9 to the territory, then they are basically a law of the
10 territory, if Congress makes them applicable.

11 QUESTION: Well, if your emphasis is so much on
12 the courts, I don't know if it will be possible or not,
13 but if the Plaintiff could get jurisdiction over Guam by
14 some form of process and sue them in the Federal court in
15 Hawaii -- would the Hawaiian -- the Federal district court
16 in Hawaii have jurisdiction over such a claim?

17 MR. MASON: Well, it would depend on Guam's
18 immunity. I think, so it would depend --

19 QUESTION: Well, then your -- it doesn't seem to
20 me your immunity has much to do with the court in which
21 the action is brought. That is what I -- I am puzzled
22 about so much reliance on the nature of the tribunal.

23 MR. MASON: The reason I am bringing up the
24 courts is that they claim because -- that these are --that
25 these courts are somehow courts of a separate sovereign,

1 and therefore the common law immunity doesn't apply, the
2 common law immunity which was incorporated in the 1871
3 Civil Rights Act, it doesn't apply. But what we're saying
4 is it does apply in those very courts. And those very
5 courts were the ones in which the Kawanakoa case was
6 brought.

7 The other thing we can look at, and this is --
8 this is -- specifically is the definition of the word
9 person. We can look at the act itself. And I think again
10 there was some confusion because territories were not in
11 the act in 1871. It was only prohibitions for persons
12 acting under color of state law. It wasn't until 1874
13 that territories were added. And in 1874, when
14 territories were added, that was, in that same act, was
15 when the Dictionary Act was changed. And it was changed
16 from bodies corporate, or politic and corporate to
17 partnerships and corporations.

18 Therefore, in that same act -- and the reason
19 for the change was stated by the committee, was so that
20 the -- a drafter of a Federal statute would not have to
21 take care to exclude states, territories, foreign
22 governments and the like from the definition. So here,
23 when territories are specifically added, the definition
24 under Federal law does not include territories.

25 Another indication of congressional intent in

1 both 1874, and this has to do with Guam also, is -- and an
2 indication that the Federal -- the Congress is really
3 treating territories like states, was the provision that
4 was in the Organic Acts of the territories at the time.
5 And this is in the provisions common to all territories,
6 it is stated that the Constitution and all laws of the
7 United States which are not locally inapplicable, of
8 course 18 -- Section 1983 had been made locally applicable
9 in 1874, those which are not locally inapplicable shall
10 have the same force and effect in the organized
11 territories as elsewhere in the United States. So those
12 laws were to have the same force and effect.

13 Then on Guam in 1968 the Fourteenth Amendment
14 was specifically added to the Organic Act and those rights
15 that were in the Fourteenth Amendment. And when the
16 Congress added that provision it specifically stated in
17 that same amendment the provisions, and that would include
18 those provisions of the Fourteenth Amendment, shall have
19 the same force and effect as in the United States or in
20 any state of the United States. It went on to say in that
21 same amendment all laws of Congress in the Guam
22 legislature inconsistent with this are repealed to the
23 extent of their inconsistency.

24 So I think that this indicates that the
25 residents of Guam, like the residents of the states, in

1 Section 1983 action were to have the same rights. They
2 were to have rights against individuals who violated their
3 constitutional rights. But it did not provide for damages
4 against the territory governments, just like it didn't in
5 the states.

6 Now, if we -- another indication, of course, is
7 the role in 1874 that the Federal Government played in
8 financing this -- the territories. At that time there
9 were, under the provisions common to all territories,
10 there were direct appropriations by Congress to the
11 territories. And they paid the expenses of the
12 legislature and government appointed officials, and there
13 was even a direct appropriation, a contingency expense for
14 the Territory of Washington of \$1,500 and of \$1,000 for
15 the other territories then existing. And because of the
16 direct financial role that Congress played, it's doubtful
17 that they would intend to incur liability for the
18 territories without specifically saying so.

19 Now, the other indication of intent, we go to
20 the Organic Act of Guam. And when Congress exercised its
21 plenary control and created the government of Guam in
22 1950, it created one of those entities it had under
23 Kawanakoa: common law sovereign immunity.

24 We have to remember, before 1950, if you brought
25 a suit against the administering body of the territory of

1 Guam, you brought it against the Navy. So it was a suit
2 against the Department of the Navy. It wasn't until 1950
3 that the government of Guam was created. And they created
4 one of those bodies in the tradition of the territories
5 that had common law sovereign immunity with separate
6 branches of government with separate powers.

7 But there was a question then even whether you
8 could sue the government of Guam, even if they consented.
9 So in 1959 the Congress corrected that. And in corrected
10 that, they gave -- stated clearly in the situations in
11 which immunity would be waived. They said that the
12 government of Guam could be sued with the consent of the
13 legislature evidenced by enacted law in contract and in
14 tort. And the Assistant Secretary of the Interior
15 submitted a letter with the bill when it went before the
16 Congress, and he indicated in there the purpose was to
17 allow the officials, or the elected officials of the
18 territory to determine when the best interests of the
19 territory would be served, you know, by balancing private
20 litigants against public goals of government.

21 Now, the Guam legislature has struck the balance
22 under which authority they were given by Congress, and
23 they have allowed negligence actions against the
24 government with a maximum of \$100,000 for wrongful death
25 and \$300,000 for personal injury.

1 The petitioners' claim would allow unlimited
2 damages for intentional torts under Section 1983. Now,
3 this would negate the intent of Congress and negate the
4 intent of Guam's duly elected officials. Therefore, we
5 feel that since the intent of Congress, at least in 1959,
6 it is explicitly clear with respect to torts, and it says
7 we are going to let the Guam legislature balance the
8 interests in this, in cases of tort. And the Guam
9 legislature has done that --

10 QUESTION: (Inaudible) use that to interpret
11 1983 as amended in 1874?

12 MR. MASON: Well, it -- what it does, it gives
13 an intent of Congress in creating this entity called the
14 government of Guam. I don't think it amends everything --
15 anything. It just -- it says how -- how this would apply.

16 QUESTION: But you say we should use -- we
17 should refer to this action in 1959 to interpret the 1974
18 as amended 1983 -- the 1874.

19 MR. MASON: Well, I think there is two
20 indications of congressional intent. There is what
21 happened with the territories in 1874, you can look at
22 that, and then as to Guam specifically as to congressional
23 intent, you have to look at the -- because Guam didn't
24 exist of course then. You have to --

25 QUESTION: That isn't congressional intent as to

1 what this statute means. You could, you can consider the
2 20th century action to be indication of what Congress
3 believed 1983 meant. Right?

4 MR. MASON: Well, I think --

5 QUESTION: But Congress might have believed
6 wrong.

7 MR. MASON: Well, I think it is an indication of
8 how -- what liability Congress intended to create for the
9 government of Guam, where they had not specifically stated
10 there was liability.

11 QUESTION: What liability it thought it was
12 creating.

13 MR. MASON: Well, since this is --

14 QUESTION: You're not saying that the act that
15 created Guam amends 1983 insofar as Guam is concerned, are
16 you?

17 MR. MASON: No.

18 QUESTION: Okay. So then all you are saying is
19 that that shows what Congress thought the law was in 19 --
20 in the 1950s.

21 MR. MASON: Well, as to Guam it shows what
22 Congress -- the law that Congress made, and that it's --
23 the 1874 act's applicability, you have to look at the two
24 to determine congressional -- Congress could have said in
25 18 -- in 1959, the territory of Guam shall be liable for

1 Section 1983 suits. And, you know, you can say did that
2 amend the law or not. It just made them specifically
3 liable. But what they did say is, in tort, we are going
4 to let the Guam legislature say whether there is
5 liability.

6 QUESTION: When did the United States acquire
7 dominion over Guam?

8 MR. MASON: That was in 1890 -- 1898, in the
9 Treaty of Paris. It was Guam, Puerto Rico --

10 QUESTION: The end of the Spanish-American War.

11 MR. MASON: Yes. Yes. And at that time Guam
12 was placed under the jurisdiction of the Navy, and it
13 continued that way until 1950. And basically the naval
14 governor had total authority on Guam, administrative
15 authority. It wasn't until 1950 that Guam was able to
16 obtain self-government, in 1950.

17 QUESTION: (Inaudible) the years, wasn't it,
18 too?

19 MR. MASON: Well, there wasn't -- Puerto Rico
20 obtained self-government a lot sooner than that.

21 QUESTION: Sooner, but for quite a time there
22 was a naval governor there.

23 MR. MASON: Yes. Guam waited 50 years. I don't
24 think Puerto Rico waited nearly that long. And so we
25 would ask this Court then to uphold the decision of the

1 Ninth Circuit, that Guam is not subject to liability under
2 Section 1983. Thank you.

3 QUESTION: Thank you, Mr. Mason.

4 Mr. Feldman, we'll hear now from you.

5 ORAL ARGUMENT OF JAMES A. FELDMAN

6 ON BEHALF OF THE UNITED STATES

7 AS AMICUS CURIAE, SUPPORTING THE RESPONDENTS

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

10 The position of the United States is that, for
11 the reasons given in our brief, first, Guam is not a
12 person for purposes of Section 1983, and second, Guam is
13 entitled to assert sovereign immunity as a defense to this
14 suit. In other words, because Guam is a self-governing
15 entity much like states, it is entitled to be treated as a
16 state would be treated for purposes of 1983.

17 I would like to make three major points this
18 afternoon, other -- among those that are made in our
19 brief. First, with respect to the question of whether
20 Guam is to be considered a person, there is direct and
21 rather conclusive evidence that the Congress that added
22 the words "or territories" to the statute in 1874 did not
23 intend to include territories within the scope of the word
24 person. And, in addition, that that Congress did intend
25 that states and territories be treated alike for purposes

1 of Section 1983.

2 Second, this Court has repeatedly stated that 19
3 -- that Section 1983 was not intended to override well
4 accepted common law notions of immunities and defenses.
5 In 1874, in fact both in 1874 and before and after that
6 date, the idea of territorial sovereign immunity was well
7 accepted in our law. Congress would therefore not have
8 expected that a territory would be liable under Section
9 1983, and under this Court's reasoning in Will and a whole
10 line of other cases, did not intend to make a territory
11 liable under Section 1983.

12 QUESTION: Mr. Feldman, is there any significant
13 difference between incorporated territories and
14 unincorporated territories?

15 MR. FELDMAN: No, I don't believe there is. For
16 one thing, in 1874 when this Congress acted, there was no
17 such distinction in the law. But, in any event, when that
18 distinction came into the law just after the turn of the
19 century, it was primarily for purposes of determining
20 which constitutional rights apply to a territory. It was
21 not for purposes of determining whether sovereign immunity
22 applied to a territory. And, indeed, when -- as has
23 already been pointed out, when the Court reached those
24 issues in the Hawaii case, Hawaii was an incorporated
25 territory, I believe at the time, and the Court held that

1 it was entitled to the sovereign immunity. And when the
2 Court reached it in Puerto Rico, which was not an
3 incorporated territory, the Court held the same thing.

4 QUESTION: Would your position on whether the
5 territory is a person be the same in the case of the
6 Northern Marianas?

7 MR. FELDMAN: I think, as a general matter, the
8 arguments that we have advanced in support of Guam's
9 immunity in this case would apply to the other
10 territories, if it is a self-governing entity.

11 QUESTION: How about the District of Columbia?

12 MR. FELDMAN: The District of Columbia is a bit
13 more difficult a case for a number of reasons. First, the
14 District -- the statute, as it reads now, includes states,
15 territories and the District of Columbia. Now, states and
16 territories are categories of entities, but the District
17 of Columbia is an individual unit. There is only one of
18 them. And that possibly may indicate that the District of
19 Columbia after all does have a sui generis quality. But
20 in any event, the relevant congressional intent with
21 respect to the District of Columbia was that of the 1979
22 Congress that added the District of Columbia to the
23 statute. And that Congress was acting in a rather
24 different legal environment than were the Reconstruction
25 Congresses in the 1870s.

1 Therefore, in short, I don't -- I think you
2 would have to look specifically at that action to
3 determine the status of the District of Columbia. But
4 insofar as the District of Columbia is a fully self-
5 governing entity, and Congress intended to make it such, I
6 think many of our arguments would apply to the District of
7 Columbia.

8 It -- my third point -- well, my third point I
9 wanted to make today was that with respect to sovereign
10 immunity issues, there is no substantial dispute that Guam
11 is, as a general matter, entitled to assert sovereign
12 immunity, both as a result of the Organic Acts and as a
13 result of the long-established tradition of territorial
14 common law sovereign immunity. Petitioner asserts,
15 however, that Guam is not entitled to assert its sovereign
16 immunity in the courts of a separate sovereign or in cases
17 arising under the laws of a separate sovereign.

18 Now, in fact, Guam is not an entirely separate
19 sovereign from the United States. But even if it were
20 seen as a separate sovereign, the law has been fairly
21 clear since the very early years of this country, and you
22 could look at Judge -- at Chief Justice Marshall's
23 decision in *The Schooner Exchange* case, that a sovereign
24 that is entitled to assert immunity is entitled to do so
25 both in its own courts and in the courts of the United

1 States, and both with respect to causes of action arising
2 under its own laws and under those arising under the laws
3 of the United States.

4 QUESTION: Well, Mr. Feldman, if the -- if Guam
5 is not a person under the meaning of Section 1983, do we
6 have to go further and deal with sovereign immunity?

7 MR. FELDMAN: No, I would -- you don't -- I
8 would suggest you don't. It really -- the sovereign
9 immunity issue arises -- was not passed on by the court of
10 appeals, and arises only if the Court were to determine,
11 contrary to our argument, that Guam were a person. Then
12 it -- you -- it -- the issue of sovereign immunity would
13 have to be confronted by someone. It could be remanded to
14 the court of appeals, but it has been fully briefed here
15 and this Court could choose to decide it also.

16 With respect to the Dictionary Act, I think most
17 of the important points have been made. It was the 18 --
18 the very same Congress, in fact in the very same piece of
19 legislation that added the word "or territory" to the
20 statute. It was that very same Congress at the same time
21 that changed the Dictionary Act. Now, although we don't
22 have any specific commentary relating to the addition of
23 the word "or territory," we do have specific commentary
24 cited in the brief of Respondent for the meaning of the
25 word person at that time. And the Revision Commission

1 indicated both, that the word person should not ordinarily
2 apply to states, territories or foreign governments, and
3 that that why -- that was why it was recommending the
4 change in the Dictionary Act.

5 I would suggest that this is relevant both
6 because it establishes that that Congress did not intend
7 to include territories within the scope of the word
8 person, and because that Congress intended that states and
9 territories be treated alike for purposes of Section 1983.
10 There is no indication of any contrary congressional
11 intent about this issue, and indeed, this Revision
12 Commission note is in full accord with the statement in
13 Will that the word person does not ordinarily include the
14 sovereign. In fact, it applies -- it supplies conclusive
15 evidence that that Congress felt that those entities
16 entitled to sovereign immunity, states, territories and
17 foreign governments, were not -- were not generally
18 intended to be encompassed within the word person.

19 With respect to the -- with respect to the
20 sovereign -- a second basis for holding that that Congress
21 did not intend to include territories within the scope of
22 the word person, is the long history of sovereign immunity
23 that is cited in the briefs and that has been discussed.
24 I would point out, in addition to that, that having
25 decided -- made -- having decided the Will case the way

1 the Court did, the evidence that Congress intended states
2 and territories to be treated the same for this statute,
3 and in fact that the Court had in the past and has in the
4 past treated territories and states as a general matter of
5 common law sovereign immunity in identical fashion, would
6 suggest that the same result should be reached here as was
7 reached in the Will state -- Will case.

8 It would be odd to say that the Congress that
9 was interested in protecting civil rights in the southern
10 states in the 1870s intended that Section 1983 apply with
11 greater force to territories than to states, when the
12 addition of territories to the statute was, after all,
13 just an afterthought on Congress' part, made three years
14 later, and was not -- the focus of Congress's intention,
15 of course, at that time was on enforcement of
16 constitutional rights in the states.

17 With respect to the sovereign immunity issue, if
18 the Court were to reach it, the -- I don't think, in
19 response to Justice Stevens' question before, that Nevada
20 v. Hall establishes that Guam could not -- that Guam
21 sovereign immunity should not be recognized. Nevada v.
22 Hall recognized the long tradition of comity, and
23 recognized that the general rule is that sovereign
24 immunity would be recognized in the courts of a different
25 sovereign. Of course, in the case of Nevada v. Hall,

1 California had specific reasons of policy relating to
2 California's own lack of sovereign immunity that it
3 asserts itself, and also the fact that Nevada -- what was
4 at issue in the case was a car driven by someone from
5 Nevada in California, not to apply sovereign immunity.

6 I don't think in this case there is any
7 overriding policy concerning the application of sovereign
8 immunity. In fact, all of the considerations are that
9 this Court and Congress --

10 QUESTION: Well, if we thought Congress had
11 meant to include Guam as a person, that would be a fairly
12 strong overriding policy, wouldn't it? If we -- because
13 your argument is making that assumption now, I think.

14 MR. FELDMAN: If --

15 QUESTION: If Congress had specifically intended
16 Guam to be treated as a person, you would still say there
17 is a sovereign immunity defense?

18 MR. FELDMAN: Well, Congress may have intended
19 that Guam be treated as a person. First of all, I think
20 the two issues of sovereign immunity and as treatment as a
21 person are independent. The Court said that, I think both
22 the majority and the dissent in the Will case, and it said
23 that a number of other times. In fact, in the pre-Will
24 cases where the Court held, for instance in Alabama v.
25 Pugh, that a state could be sued only with its consent, it

1 must have been assuming at that point that even if a state
2 were a person it would still be entitled to a sovereign
3 immunity defense. And therefore it could waive it. So I
4 think that they are two independent issues.

5 In addition, that would have some bite. Guam
6 has waived its sovereign immunity for some purposes, as
7 was pointed out, and Guam could waive its -- might waive
8 sovereign immunity in such a way as to bring it within
9 Section 1983, even though it might assert sovereign
10 immunity in other cases.

11 QUESTION: Thank you, Mr. Feldman.

12 Mr. Siegel, you have 14 minutes remaining.

13 REBUTTAL ARGUMENT OF JEFFREY R. SIEGEL

14 ON BEHALF OF THE PETITIONERS

15 MR. SIEGEL: Thank you, Your Honor.

16 This Court stated in Polyblank that the
17 sovereign is exempt from suit not because of any formal
18 conception or obsolete theory, but on the logical and
19 practical ground that there can be no legal right as
20 against the authority that makes the law on which the
21 right depends. I think it's clear that it was the
22 intention of the Court, and the only tradition of immunity
23 with respect to territories is for acts arising under
24 territorial law.

25 I think amicus has a problem. It says on one

1 hand that Guam is sovereign enough, has enough self-
2 government to be treated for a state -- as a state for
3 Section 1983 purposes. However, when this argument is
4 raised, that it is not an immunity which extends to acts
5 under Federal law, amicus says well, it is not really a
6 separate sovereign. And I think that points up the
7 reasoning of this Court's prior decisions concerning
8 Section 1983 in the Eleventh Amendment, specifically that
9 it is -- the Eleventh Amendment had always -- has always
10 played an enormous role in determining governmental
11 liability under Section 1983. Indeed, the Court did not
12 hold in Monell that simply cities are liable. It said
13 that arms of the state, arms -- entities which are not
14 arms of the state for Eleventh Amendment purposes, is
15 liable.

16 I will suggest that there will be no finding, if
17 we review the legislative history, of any comment in that
18 regard. But that is the conclusion that the Court drew
19 from the use of the word person and the legislative
20 context of the act. I think it's appropriate to maintain
21 that as a -- as at least a guide or a consideration, as
22 the Court said in Will, in determining the scope of
23 Section 1983.

24 With respect to Respondent's point that
25 initially the only courts existing in territories were

1 Federal courts, I will suggest that in 1871 or 1874
2 Congress was well aware that the territories were going to
3 become states, and at some point state courts would be
4 established in what would become states, formerly
5 territories. I'd suggest, then, that that in no way
6 diminishes the Court's point in Will that the purpose --
7 one of the purposes of Section 1983 was to provide a
8 Federal forum for vindication of civil rights.

9 Much has also been made of the 1874 revision of
10 the Dictionary Act. But the more specific and applicable
11 revision was to Section 1983, declaring that acts under
12 color of territorial law were now subject to liability.

13 QUESTION: At the suit of a person.

14 MR. SIEGEL: Correct. But there is some
15 intention demonstrated --

16 QUESTION: At the suit of a person. At the suit
17 of a person.

18 MR. SIEGEL: Right.

19 QUESTION: Against a person.

20 MR. SIEGEL: Against a person. But it was --
21 there was a clear intention to apply whatever the original
22 scope of the word person was in 1871, because that is the
23 Congress that passed the law, to territories. Thank you
24 very much.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Siegel.

1 The case is submitted.

2 (Whereupon, at 2:33 p.m., the case in the above-
3 entitled matter was submitted.)

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#88-1281 - ALEX. NGIRAINGAS, ET AL., Petitioners V. FRANCISCO Q. SANCHEZ,

ETC., ET AL.

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