

Supreme Court of the United States
Washington, D. C. 20543

May 23, 1978

MEMORANDUM FOR THE CONFERENCE

Subject: No. 77-955, Powell v. Dellums
No. 77-1129, Wilson v. Dellums

These cases are being held for Butz v. Economou, No. 76-709; No. 77-1129 is also being held for Monell v. Dept. of Social Services, No. 75-1914.

The legal officers were asked to examine both these cases to determine whether the question of absolute immunity was properly raised in the courts below.

Discussion: These cases arise from a single complaint and a single trial. However, in most instances Powell and the other federal defendants, represented by the Department of Justice, proceeded separately from Wilson and the other DC defendants, represented by the Corporation Counsel. They also took separate appeals to CA DC, and filed separate cert petns from the CA's separate decisions. Accordingly, they will be discussed separately.

1. No. 77-955, Powell v. Dellums. In his answer to the complaint, Powell, then chief of the U.S. Capitol Police, asserted that he was absolutely immune from suit because his actions were taken in the course of executing his official duties (CA App. 39). In the CA, Powell asserted absolute immunity, noting that this was done principally to preserve the issue because under the law of the circuit (Apton v. Wilson, 506 F.2d 83 (1974)), only qualified immunity was available (Powell CA Br. 30-31). ^{1/} (Presumably, this is why the CA did not discuss absolute immunity.) Finally, in this Court, Powell's first question presented is whether he was entitled to absolute immunity (Powell Petn 2).

It is not yet known whether Powell asked the DC to dismiss the complaint on the ground of absolute immunity, as he probably should have done. The DC docket shows the following entry for August 23, 1972 (CA App. 4); "Motion of

^{1/}The CA's rejection of absolute immunity in Apton did not relate to Powell, who was not a party to that suit.

defts. to dismiss." However, this motion was not included in the CA appendix, nor in the CA record. At the request of Mike Rodak, the CA clerk's office is attempting to obtain a copy so that it may be determined whether absolute immunity was raised therein, and, if so, by which defendants. When the motion is received, a supplemental memorandum will be circulated. ✓

Also, it is not known whether the DC ruled on this motion to dismiss, because there is no reference to such a ruling in the docket. If the motion raised absolute immunity, I will attempt to determine whether it was ruled upon.

2. No. 77-1129, Wilson v. Dellums. Petr Wilson was the chief of the D.C. Police Dept. In his answer to the complaint, Wilson asserted that his actions "were taken by him in connection with his official duties and involve a necessary exercise of judgment and discretion and, therefore, this defendant may not be held liable to answer in damages or otherwise for any of his alleged actions" (CA App. 53). This seems to be an assertion of absolute immunity. Although absolute immunity was not expressly raised on appeal, Wilson's CA brief (p. 22) adopted by reference all arguments made in Powell's brief, to the extent they were consistent with his non-liability. In this Court, the question of absolute immunity is not raised in Wilson's petn. 2/

Summary: Petr Powell clearly raised absolute immunity ✓ in both courts below, although it is not known whether he moved to dismiss the complaint on that ground. Petr Wilson raised absolute immunity in both courts below, although not quite so clearly, and it also is not known whether he moved to dismiss on that ground. When the missing motion to dismiss is obtained, a supplemental memorandum will be circulated.

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2/Although Wilson was a party to Apton, supra, there do not appear to be any problems of res judicata or collateral estoppel, because the DC and CA rulings on absolute immunity did not relate to him, and because that case involved different plaintiffs.