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United States District Court, W.D. New York.

Akil AL–JUNDI, a/k/a Herbert Scott Deane; Big Black, a/k/a Frank Smith; Elizabeth Durham, Mother and Legal Representative of Allen Durham, deceased; Litho Lundy, Mother and Legal Representative of Charles Lundy, deceased; Theresa Hicks, Widow and Legal Representative of Thomas Hicks, deceased; Alice McNeil, Mother and Legal Representative of Lorenzo McNeil, deceased; Mario Santos, Mother and Legal Representative of Santiago Santos, deceased; Jomo Sekou Omowali, a/k/a Eric Thompson; Vernon LaFranque; Alfred Plummer; Herbert X. Blyden; Joseph Little; Robin Palmer; George "Che" Nieves; James B. "Red" Murphy; Thomas Louk; Peter Butler; Charles "Flip" Crowley; William A. Maynard, Jr.; Calvin Hudson; Kimanthi–Mpingo, a/k/a Edward Dingle; and Ken–Du, a/k/a Willie Stokes, on behalf of themselves and all others similarly situated,
Plaintiffs,
v.
The ESTATE OF Nelson A. ROCKEFELLER; Russell A. Oswald; Walter Dunbar; John C. Baker; A.C. O'Hara; John Monahan; John C. Miller; Leon Vincent; Karl Pfeil; Robert F. Fischer; Wim Van Eekeren; Vincent Mancusi; John Does Nos. 1–100,
Defendants.

No. CIV–75–132E.
|
Sept. 28, 1988.

Attorneys and Law Firms

Elizabeth Fink, Brooklyn, N.Y., Michael Deutsch, Chicago, Ill., Dennis Cunningham, San Francisco, Cal., for plaintiff.

Adlai S. Hardin, Jr., William E. Jackson, New York City, for defendant.

MEMORANDUM and ORDER

ELFVIN, Senior District Judge.

***1** This class action arises out of the 1971 prison riot at the Attica (N.Y.) Correctional Facility ("Attica") and the subsequent armed retaking of the prison by various state law enforcement personnel. The killing of 39 people, including both inmates and hostages, marked the tragic end to one of the most violent prison insurrections in modern history. The plaintiffs in this action comprise a class of present and former inmates and the legal representatives of former inmates at Attica. The defendants are various former state officials and law enforcement officers allegedly responsible for the order to retake and for the actual retaking of D–Yard at Attica. One of the named defendants is the late Nelson A. Rockefeller, then Governor of New York. After his death in 1979 his estate was substituted as a party defendant in this action. The estate's motion for summary judgment of dismissal is presently before this Court.

The Amended Complaint is divided into three sections. The first deals with the plan to retake and the actual retaking of the prison, the second complains of the alleged "reprisals" that occurred after the retaking and the third is concerned with the criminal prosecution of inmates for their participation and involvement in the events preceding and leading to the armed retaking. The plaintiffs allege in this civil rights action premised on 42 U.S.C. §§ 1983 and 1985(3) that their rights to be free from cruel and unusual punishment and to due process and equal protection were violated by the defendants' decisions and actions with respect to the armed retaking of D–Yard and the events following such retaking.[1]

The estate moves for summary judgment dismissing the Amended Complaint against it on three separate and distinct grounds: (1) that the decision to retake the prison with armed law enforcement personnel to rescue the hostages and end the Attica insurrection did not constitute a violation of any of the inmates' constitutional rights; (2) that, inasmuch as Rockefeller had no part in the actual retaking of D–Yard, he can not be held liable under sections 1983 and 1985(3); and (3) that the estate is entitled to summary judgment as a matter of law based on the defense of qualified immunity. The plaintiffs oppose the motion, contending principally that there are strongly

disputed issues of fact concerning the conduct and motives of Rockefeller in ordering the retaking and that the evidence establishes that Rockefeller's decision violated "clearly established law" thereby requiring denial of the estate's immunity defense.

On the morning of September 9th various of the inmates at Attica had become able to take control of a substantial portion of this maximum-security facility. A number of corrections employees had been seized as hostages at the beginning of the uprising. When, shortly after the initial rioting a group of armed state law enforcement personnel had been able to regain control of much of the prison, the inmates consolidated their actions in certain portions of Attica, including B–Block, D–Block, D–Yard and the carpenter and metal shops. The armed retaking was halted at that point and it was decided by defendant Oswald, then New York's Commissioner of Corrections, who had arrived at Attica that same afternoon, that negotiations were to commence in an effort to achieve a peaceful resolution.

***2** Negotiations began later that afternoon when Oswald entered the prison and met with various inmates. Negotiations continued and on Friday the 10th an "Observers Committee" was set up. The Committee, consisting of various federal and state elected officials, members of the press and attorneys, was allowed to enter D–Yard and to negotiate with the prisoners. These negotiations continued throughout the days and nights of the 10th and the 11th. During this time Rockefeller was not present at Attica, but was in constant telephonic contact with Oswald and with other aides whom he had sent to Attica to monitor the situation. Rockefeller had always considered, throughout the entire period, that Oswald was in charge of the situation.[2]

A list of the inmates' demands was submitted and Oswald, with Rockefeller's concurrence, agreed to twenty-eight of the thirty-four. It appears that the main stumbling block to a peaceful resolution was the inmates' demand for amnesty from criminal prosecution. The estate claims that it was this demand, which had hardened after the announcement of the death of one of the hostages, that had led to the eventual breakdown of negotiations and to the end of any hope for a peaceful resolution.[3]

During the weekend Oswald, Rockefeller's aides and the Observers Committee had pleaded with Rockefeller to come to Attica and to help to resolve the impasse. Rockefeller had refused to heed these requests and never did go to Attica. The Observers Committee was eventually dissolved on Sunday the 12th and it was at this time that Oswald finally decided that, if his final plea to the inmates to release the hostages was not accepted, he would have to order that the hostages be rescued and the prison recovered. Oswald had received Rockefeller's approval and authorization for this order if such plea were not accepted.

On the morning of the 13th Oswald delivered his final plea to the inmates imploring them to release the hostages and to help him in a peaceful restoration of order at the prison.[4] After the inmates had rejected this final plea, Oswald spoke with Rockefeller and obtained his approval and authorization to order the State Police to enter the prison and retake it, with force if necessary. The retaking ensued and resulted in the deaths of 29 inmates and 10 hostages.

The estate readily admits that there are a number of questions of fact as to what actually occurred at Attica once the retaking had commenced, but it contends that these issues are not material because Rockefeller had had no part in the planning or implementation of the decision to retake. It is therefore submitted that, because Rockefeller merely had approved and authorized the order to retake Attica with force only if necessary to protect one's life or that of another, this Court must decide whether a decision, as opposed to the implementation of that decision, to quell a violent prison uprising amounts to cruel and unusual punishment or a denial of due process and equal protection. The plaintiffs contend, however, that there are issues of fact regarding the conduct and motives of Rockefeller and his alleged co-conspirators in ordering the retaking. They claim that Rockefeller's decision arose from his desire to appear as a "hard-liner" in order to enhance his conservative image and his then-blossoming Presidential aspirations.

***3** Rule 56(c) of the Federal Rules of Civil Procedure provides that a court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Properly supported, a motion for summary judgment is no longer regarded "as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole * * *." *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986). A court's responsibility on such a motion is not to resolve factual disputes but to determine whether there is any to be resolved at trial,

while drawing all reasonable inferences and resolving all ambiguities in favor of the non-moving party. *Knight v. U.S. Fire Ins. Co.,* 804 F.2d 9, 11 (1986), *cert. denied,* —— U.S. ——, 107 S.Ct. 1570 (1987). The standard for granting summary judgment has been held to mirror that of a directed verdict—*i.e.,* "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251–252 (1986).

The party moving for summary judgment has the initial burden of supporting the motion by presenting evidence which demonstrates the absence of any genuine issue of material fact. Fed.R.Civ.P. rule 56(c); *Celotex Corp. v. Catrett, supra,* at 323. Once the moving party has made such a showing, the non-moving party is required to go beyond his pleadings and, by affidavits and other submissions of an evidentiary nature and quality, "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. rule 56(e); *Celotex Corp. v. Catrett, supra,* at 325.

The estate contends, as its first ground for summary judgment, that there is no factual dispute with respect to Rockefeller's conduct in approving and authorizing the order to retake D–Yard and that it is entitled to judgment as a matter of law in that such conduct did not amount to a violation of the inmates' Eighth Amendment rights to be free from cruel and unusual punishment. The Eighth Amendment's proscription against such punishment is not implicated by every governmental action which affects a prisoner's interests or well-being. *Whitley v. Albers,* 475 U.S. 312, 319 (1986). After incarceration, it is only the "unnecessary and wanton infliction of pain" which is thereby forbidden. *Ingraham v. Wright,* 430 U.S. 651, 664 (1977); *Estelle v. Gamble,* 429 U.S. 97, 103 (1976). In the course of a prison security measure, the infliction of pain is not cruel and unusual punishment "simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense." *Whitley v. Albers, supra,* at 319.

***4** In the context of a prison riot the United States Supreme Court has pronounced that:

"Where a prison security measure is undertaken to resolve a disturbance * * * that indisputably poses significant risks to the safety of inmates and prison staff, we think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.' " *Whitley v. Albers, supra,* at 320 (quoting from *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir.), *cert. denied sub nom. John v. Johnson,* 414 U.S. 1033 (1973)).

The factors relevant to deciding such question are the need for the application of force, the relationship between the need and the actual amount of force used, the extent of the threat to the safety of staff and other inmates and "any efforts made to temper the severity of a forceful response." *Whitley v. Albers, supra,* at 321. The question, therefore, is whether the evidence, viewed in a light most favorable to the plaintiffs, will support a reasonable inference of wantonness on the part of Rockefeller in the infliction of pain under the standard just described. *See id.* at 322.

On the morning of the 13th Oswald decided, after the inmates had rejected his final plea for the release the hostages, that he was going to order the retaking of the prison. Before issuing such order Oswald spoke to Rockefeller and, as already noted, received Rockefeller's approval of the decision and also his authorization to use the State Police.[5] In giving his approval and authorization Rockefeller issued two orders with respect to the operations. Firstly, he ordered that only the State Police were to take part because Corrections Officers might be too emotionally involved and, secondly, he directed that the State Police were not to use firearms unless it was necessary for their self-defense or to protect the safety of a fellow officer or of a hostage.[6] Aside from his approval and authorization and such two orders, Rockefeller had no role in the plan to retake, the actual retaking or anything that later transpired. He did not participate in, approve, review or authorize the retaking plan.[7] Rockefeller did not partake in the issuance or the types of weapons to be used in the retaking.[8] He stated in numerous depositions and hearings relating to the riot that he did not become involved because he had always relied on the people he put in high positions of expertise, loyalty and trust.[9] With the foregoing in mind and after reviewing the evidence in the light most favorable to the plaintiffs, this Court finds as a matter of law that Rockefeller's limited participation in the retaking of Attica and in the events that transpired afterwards, as alleged in the Amended Complaint, does not support a reasonable inference of wantonness or obduracy in the infliction of pain.

***5** The plaintiffs do not dispute Rockefeller's limited role but do disagree that an order to retake was necessary at

the time and that Rockefeller's conduct, in authorizing such order, was motivated or abused by his political aspirations. These claims do not derogate from the necessity that a decision be made based on what was then seen to be transpiring. There is no question that the situation at Attica had been and had continued dangerous and volatile. The inmates, many of whom had been convicted of very serious crimes, were holding the hostages and were believed to be armed. The uprising was in its fifth day and one hostage was already known to be dead. Although the plaintiffs dispute that the inmates' amnesty demand was non-negotiable, without doubt it was a hardened one.[10] The dispute over the amnesty question does not change the fact that there were 38 hostages being held by a large number of rioting prisoners. That morning the inmates had begun to parade some hostages around the catwalk with knives held at their throats. Language of the Court in *Whitley v. Albers, supra,* at 323, is extremely pertinent here: "Prison officials had no way of knowing what direction matters would take if they continued to negotiate or did nothing, but they had ample reason to believe that these options presented unacceptable risks." When there is actual prison unrest which ripens into a full-blown riot, "a prison's internal security is peculiarly a matter normally left to the discretion of prison administrators," *Rhodes v. Chapman,* 452 U.S. 337, 349 fn. 14 (1981), and, when there is no evidence that will support a reasonable inference of wantonness or bad faith, neither a court nor a jury shall "freely substitute their judgment for that of officials who have made a considered choice". *Whitley v. Albers, supra,* at 322.

Accordingly, the estate's motion for summary judgment with respect to the plaintiffs' Eighth Amendment and Fourteenth Amendment (due process) claims must be granted, inasmuch as the plaintiffs have failed to make a factual showing that Rockefeller's conduct was wanton or malicious.[11]

The same holding obtains with respect to the plaintiffs' remaining claims of conspiracy and of equal protection violations under 42 U.S.C. §§ 1983 & 1985(3).[12] Although this Court has previously held that the plaintiffs had adequately alleged a conspiracy claim against the defendants,[13] they can not now defeat the estate's motion for summary judgment by merely relying on such conclusory allegations. *McPartland v. American Broadcasting Companies, Inc.,* 623 F.Supp. 1334, 1341 (S.D.N.Y.1985). They must present specific allegations of the conspiracy in order to survive this motion. They have failed to do so. *Ibid.* A conspiracy under section 1983 is an agreement between two or more persons to act in concert to inflict an unconstitutional injury and an overt act done or taken in pursuit of such goal. *See, e.g., Hampton v. Hanrahan,* 600 F.2d 600, 620–621 (7th Cir.1979), *modified,* 446 U.S. 754 (1980) (*per curiam*). The factual question of the existence *vel non* of an agreement should normally not be taken from a jury as long as there is a possibility that a jury can reasonably infer that the defendants had had "a meeting of the minds" and, thereby, had reached an understanding to violate the inmates' constitutional rights. *See Adickes v. Kress & Co.,* 398 U.S. 144, 176 (1970) (Black, J. concurring). The fact that Rockefeller spoke with Oswald and other defendants with respect to the retaking of the prison can not, by itself, reasonably create an inference of an agreement to violate the inmates' rights. The only inference that can reasonably be drawn is that Rockefeller had agreed to—and ordered—a retaking of D–Yard without any more force than necessary. To allege hindsightedly that the end result evidenced an agreement to shoot and kill wantonly and at will can not support a claim of a conspiracy to violate these inmates' rights. The alleged agreement must have had, at that time, as at least one of its objectives the deprivation of the inmates of their constitutional rights under the Eighth and Fourteenth Amendments and, where there are no specific facts which could lead a reasonable jury to infer such an agreement and unlawful objective, summary judgment is appropriate.

***6** In order to prove a conspiracy to deprive a person of equal protection under section 1985(3) not only is it necessary to establish a conspiracy to deprive others of their right to equal protection of the law but it must also be shown that there was a racial or class-based invidiously discriminatory animus. *See Griffin v. Breckenridge,* 403 U.S. 88, 102–103 (1971); *Phelan v. Corning,* 568 F.Supp. 904, 909 (N.D.N.Y.1983). Apart from there being no question of fact relating to the existence *vel non* of an agreement to deprive the plaintiffs of their right to the equal protection of the law, there are no facts to support reasonably any finding that Rockefeller and his co-defendants had been possessed of any such frame of mind when they had decided to retake the prison. There had been, as already noted, a hostile and dangerous group of inmates holding hostages and, upon that basis, a decision had been made to rescue them. The decision can not now be said to involve a racially-motivated animus, without any factual showing to support it, apart from the fact that a large number of the inmates were Black or Hispanic. Accordingly, the plaintiffs' allegations of conspiracy and of violations of equal protection can not withstand this motion and must

be dismissed.

Another valid ground for granting the estate's motion—the defense of qualified immunity—must be discussed inasmuch as it is an important aspect of this and other section 1983 actions, especially when state officials must respond to a violent prison insurrection. Qualified immunity is a protection afforded certain public officials who perform discretionary functions, to shield them from undue interference with their responsibilities and from possibly crippling threats of liability. *Harlow v. Fitzgerald,* 457 U.S. 800, 806 (1982). Such immunity for such officials reflects an attempt to strike a balance between the importance of money damages to protect the rights of citizens, on one hand, and "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority," on the other. *Butz v. Economou,* 438 U.S. 478, 506 (1978). The costs to society of subjecting public officials to law suits include the expense of litigation, the diversion of an official's energy from important needs and the discouragement of able people from running for public office. *Harlow v. Fitzgerald, supra,* at 814. Furthermore, there is the danger that fear of civil liability "would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir.1949), *cert. denied,* 339 U.S. 949 (1950). As such and in balancing the competing values, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, supra,* at 818.[14]

***7** A defendant is entitled to summary judgment on qualified immunity grounds, if discovery (or in the case *sub judice,* volumes of testimony given in a number of different proceedings) fails to set forth evidence sufficient to create a genuine factual issue whether he in fact participated in conduct that violated clearly established law. *See Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985). Therefore, the standard in *Harlow v. Fitzgerald* requires this Court to determine whether under clearly established law as of September 13, 1971, a decision to approve and authorize the use of force to quell a volatile prison riot and attempt to rescue hostages, constituted a clear violation of the plaintiffs' rights under the Eighth Amendment or the Fourteenth Amendment. On the basis of the facts now developed and viewed in a light most favorable to the plaintiffs, this Court finds as a matter of law that Rockefeller's conduct had not violated clearly established law.

It has only recently been established exactly what conduct violates a rioting inmate's right to be free from cruel and unusual punishment and not to be denied due process. As of September 1971 all that had been established was that prisoners had a right to be free from conduct that was barbarous, shocking to the conscience or violative of basic concepts of decency. *Rochin v. California,* 342 U.S. 165, 172 (1952); *Sostre v. McGinnis,* 442 F.2d 178, 190–194 (2d Cir.1971), *cert. denied,* 404 U.S. 1049 (1972). It has never been held that an order to use force only if necessary to settle a violent prison riot and to rescue hostages is conduct of the nature just described. Rockefeller could not have reasonably believed it to be such. The Eighth Amendment is not precise and its application is not static; its meaning must be drawn from "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles,* 356 U.S. 86, 100–101 (1958). Furthermore, it has been recognized that state prison officials should be accorded great deference in their handling of prison discipline and security matters and that federal courts should not interfere in such matters except to safeguard the constitutional rights of prisoners. *Rhodes v. Chapman, supra,* at 349 fn. 14; *Wright v. McMann,* 387 F.2d 519, 527 fn. 18 (2d Cir.1967). Rockefeller's role in the events of September 13, 1971 was not then and can not now be held to have violated any clearly established laws and was not *per se* unconstitutional. Accordingly, it can not be held that Rockefeller knew or reasonably should have known that his approval of Oswald's decision to retake D–Yard would or reasonably could have resulted in any unconstitutional activity. The governor's duties legitimately required action in which clearly established law was not violated and New York's public interest in such circumstances was better served by action taken "with independence and without fear of consequences." *Pierson v. Ray,* 386 U.S. 547, 554 (1967).

***8** This Court is not holding that there is no question of fact regarding the actual amount of force used to retake the prison or who was personally responsible for or otherwise involved with such use. It is only Rockefeller's actions which are in the scales on this motion. There is no question regarding his role and its legality. Without any actual personal involvement in unlawful or indiscriminate use of force, he can not be held to have violated section 1983 or any other law which as of September 13, 1971 was clearly established. *See Martinez v. Mancusi,* 443 F.2d 921, 924 (2d Cir.1970), *cert. denied,* 401 U.S. 983

(1971); *see also, Johnson v. Glick, supra,* at 1034 (summarizing some pre–1971 case law holding that the theory of *respondeat superior* liability is not applicable to section 1983 actions).

Accordingly, it is hereby ORDERED that the motion by defendant Estate of Nelson A. Rockefeller for summary judgment is granted and the Amended Complaint is dismissed with respect to it.

All Citations

Not Reported in F.Supp., 1988 WL 103346

Footnotes

[1] For a more detailed discussion of the Amended Complaints, see this Court's Memorandum and Order filed October 31, 1979 (CIV–75–132E).

[2] Testimony Supporting the "Statement of Facts" submitted with the Estate's Motion, ("Testimony") Volume 1—Deposition Rockefeller, *Barnes v. Rockefeller et al.,* pp. 11, 90; Testimony Rockefeller, *McKay Commission,* pp. 15, 18.

[3] The plaintiffs, through their affidavits submitted in opposition to this motion, contend that this demand was not etched in stone and that other avenues of negotiation had still been open. Affidavit Clarence Jones, ¶ 5; Affidavit Big Black, ¶ 67.

[4] For a summary of this plea, *see* Testimony Volume 2—Oswald Testimony, *Attica Investigation* (9/18/72) pp. 41–42, 75–76; Oswald Testimony, *McKay Commission,* p. 2709.

[5] Testimony Volume 1—Deposition Rockefeller, *Jones v. State of New York,* pp. 20–21, 24–26, 34; Deposition Rockefeller, *Barnes v. Rockefeller et al.,* p. 60; Rockefeller Testimony, *McKay Commission,* pp. 44–46, 53. Testimony Volume 2—Oswald Testimony, *Jones v. State of New York* (6–6–79), p. 108. Testimony Volume 3—Douglass Testimony, *McKay Commission,* pp. 114–116, 141.

[6] Testimony Volume 1—Deposition Rockefeller, *Barnes v. Rockefeller et al.,* pp. 43, 51–52, 69; Deposition Rockefeller, *Jones v. State of New York,* pp. 18–19, 21–22, 37, 41. Testimony Volume 2—Deposition Oswald, *Barnes v. Rockefeller et al.,* p. 71. Testimony Volume 3—Deposition Douglass, *Barnes v. Rockefeller et al.,* p. 24; Testimony Douglass, *Jones v. State of New York,* 42–43, 96–97.

[7] Testimony Volume I—Deposition Rockefeller, *Jones v. State of New York,* pp. 20, 23–26, 31–32, 34; Deposition Rockefeller, *Barnes v. Rockefeller et al.,* pp. 60; Testimony Rockefeller, *McKay Commission,* pp. 44–46, 53.

[8] Testimony Volume 1—Deposition Rockefeller, *Jones v. State of New York,* pp. 21, 25; Deposition Rockefeller, *Barnes v. Rockefeller et al.,* pp. 51–52; Testimony Rockefeller, *Mckay Commission,* p. 45. Testimony Volume 3—Douglass Testimony, *Jones v. State of New York,* p. 58; Douglass Testimony, *McKay Commission,* p. 166.

[9] Testimony Volume 1—Deposition Rockefeller, *Jones v. State of New York,* pp. 2–3, 31–32; Rockefeller Deposition, *Barnes v. Rockefeller et al.,* pp. 85–86.

[10] Testimony Volume 2—Oswald Testimony (6–6–79), *Jones v. State of New York,* pp. 78–80; Testimony Oswald, *McKay Commission,* pp. 2689–2690. Affidavit Big Black, ¶¶ 3, 8, 9; Affidavit Clarence Jones, ¶ 8 (Plaintiffs' Appendix in Opposition to the Defendant Estate's Motion for Summary Judgment).

[11] *Whitley v. Albers, supra,* at 327, held that the Eighth Amendment serves as the primary source of substantive protection to convicted prisoners in this context—*.e.,* where the use of force is questioned as excessive and unjustified—and the Due Process Clause therefore affords the plaintiffs no more protection than does the Eighth Amendment.

[12] *Amended Complaint,* Counts 2, 3, 7 & 10.

[13] Memorandum and Order Oct. 31, 1979, pp. 36–39.

[14] Although many of reasons for according public officials qualified immunity—*viz.,* diverting the attention of an office-holder from ongoing public concerns and the other societal costs of exposing officials to claims—are not present in cases such as this one, when the defendant is no longer in office or even alive, courts do not make such a distinction when determining whether to grant an official qualified immunity. *See Harlow v. Fitzgerald, supra; Mitchell v. Forsyth,* 472 U.S. 511 (1985) (Both cases involving defendants who were officials in the Nixon administration but who were no longer in office. In *Harlow,* one of the defendants was in office at the time of the filing of the Complaint and the other who was not named until the Amended Complaint was no longer a White House employee even at the time of the original filing. In *Mitchell,* the defendant was no longer Attorney General at the time the Complaint was filed.) Therefore, it is irrelevant that the late Governor can no longer be subjected to such interferences as discovery and trial; his estate is thus entitled to such defense if it is established as a matter of law.