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Discovery - Executive Privilege - Overcoming Executive Privilege to Discover the Investigative Materials of the 1980 New Mexico Penitentiary Riot: State ex rel. Attorney General v. First Judicial District

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DISCOVERY—EXECUTIVE PRIVILEGE—Overcoming Executive Privilege to Discover the Investigative Materials of the 1980 New Mexico Penitentiary Riot: *State ex rel. Attorney General v. First Judicial District*

I. INTRODUCTION

In *State ex rel. Attorney General v. First Judicial District*[1] the Supreme Court of New Mexico ruled on discovery matters in all pending and future civil cases arising from the February, 1980 riot at the New Mexico Penitentiary. In a writ of superintending control directed to all inferior courts,[2] the court granted an executive privilege to riot investigation transcripts and photographs in the possession of the Attorney General.[3] The opinion which the court issued in conjunction with the writ set out the test by which the privilege may be overcome to allow discovery of the material.[4] This Note examines the applicability of executive privilege to the investigative material and considers the requirements of the tests for overcoming that privilege.

II. STATEMENT OF THE CASE

Shortly after the devastating penitentiary riot in 1980, the Attorney General of New Mexico conducted an investigation into the causes of the outbreak.[5] The first phase of the investigation inquired into the events which occurred just prior to, during, and after the riot.[6] It consisted of interviews by the Attorney General's staff who promised confidentiality to those being interviewed.[7] The second phase of the investigation dealt

1. 96 N.M. 254, 629 P.2d 330 (1981).

2. The Supreme Court's power to issue writs of superintending control issues from the New Mexico Constitution: "The Supreme Court shall have original jurisdiction in quo warranto and mandamus against all state officers . . . and shall have a superintending control over all inferior courts. . . ." N.M. Const. art. VI, § 3.

3. The documents at issue were both transcripts of interviews and photographs compiled by the Attorney General and the District Attorney. Brief of Petitioner, Appendix K-2.

4. 96 N.M. at 258, 629 P.2d at 334.

5. The Legislature appropriated $100,000 "for the purpose of conducting a study to determine the cause of the events at the State Penitentiary on or about February 2 and 3, 1980, to investigate any claims the State may have against other persons and to recommend any necessary changes in the administration and facilities of the Penitentiary." 1980 N.M. Laws, ch. 24, § 9.

6. 96 N.M. at 256, 629 P.2d at 332.

7. Apparently, the staff acted without authority in promising confidentiality. Neither the Governor nor the Legislature specifically granted the Attorney General the right to extend a promise of confidentiality to informants. Answer Brief of Real Parties in Interest at 1. The Supreme Court noted that the Attorney General cited no authority, either by statute or court rule, which authorizes such a promise of confidentiality. *Id.*

with determining and analyzing administrative practices and policies at the penitentiary for the last ten years.[8] Personal interviews and anonymous questionnaires provided the data for the second phase.[9] Based on all the investigatory data, the Attorney General published a two-part summary report.[10]

Over five hundred civil cases were filed[11] against the State of New Mexico under the Tort Claims Act[12] for damages arising from injuries incurred during the riot. In five of those cases, the plaintiffs sought disclosure of all the investigative data, including transcripts of taped interviews and photographs in the possession of the Attorney General.[13] The Attorney General resisted each demand for discovery by filing motions to quash subpoenas for the investigative data and for protective orders asserting that the prison study information and records were privileged.[14] Three trial judges, sitting *en banc,* heard the competing claims.[15] They issued a joint opinion which recognized a "public interest" privilege and an "executive" privilege, and required that the material be inspected *in camera* before being released for discovery.[16]

The trial judges certified their decision for interlocutory appeal, but the Court of Appeals denied the motion.[17] The Attorney General then sought a ruling from the Supreme Court which would prevent discovery of any of the materials and information obtained during the investigation.[18] The New Mexico Supreme Court exercised its superintending control in the matter[19] and ordered the First Judicial District judges to follow its ensuing opinion.[20]

In its opinion, the court recognized the Attorney General's claim of executive privilege to protect the investigative material from discovery.[21] Based on the constitutional provision for separation of powers among the

8. 96 N.M at 256, 629 P.2d at 332.

9. *Id.* at 256–57, 629 P.2d at 332–33.

10. Both parts of the report were issued in June, 1980. Brief of Petitioner at Appendix I-3.

11. Brief of Petitioner at 1.

12. *See* N.M. Stat. Ann. §§ 41-4-1 to -29 (Cum. Supp. 1981).

13. Brief of Petitioner, Appendix G.

14. Brief of Petitioner at 8.

15. No specific rule allows the district court judges to sit *en banc.* The Supreme Court, however, authorizes "Each district court by action of the judge of such court or of a majority of the judges thereof, may from time to time make and amend rules governing its practice not inconsistent with these rules." N.M. R. Civ. P. Dist. Cts. 83 (1980).

16. Brief of Petitioner, Appendix I-1 to -10.

17. Brief of Petitioner, Appendix I-11 to -14.

18. Petition for Alternative Writ of Superintending Control, In the Supreme Court of the State of New Mexico, No. 13504.

19. *See supra* note 2. The Supreme Court stated that it was compelled to exercise superintending control because of "the number of potential cases that may arise out of the penitentiary riot and the cumbersome and expensive trial and appellate process. . . ." 96 N.M. at 256, 629 P.2d at 332.

20. *Id.* at 261, 629 P.2d at 337.

21. *Id.* at 258, 629 P.2d at 334.

three departments of the state government, the court reasoned that the executive department had vested in it the "implied rights [necessary] . . . to maintain its independence."[22] "Inherent in the successful functioning of an independent executive," the court continued, was "the valid need for protection of communications between [the executive] members."[23] The court also set out the test for determining whether the privilege could be overcome.[24]

III. DISCUSSION

A. *Test For Executive Privilege in New Mexico*

The ruling of the New Mexico Supreme Court in *State v. First Judicial District* applied to all pending and future civil cases arising from the riot.[25] The court's recognition of executive privilege for the Attorney General's investigative data protects it from ordinary discovery. The court also provisionally set out a test whereby that privilege might be overcome.[26]

The test consists of two main parts: a balancing test, and a test of "admissibility."[27] District courts are to apply both parts of the test to the requested investigative documents *in camera,* once the Attorney General properly asserts the claim of privilege. First, the district court must balance the public interest in granting the privilege[28] against the individual's need for disclosure of the particular information sought. Next, the trial court must satisfy itself that the requested material would be admissible in evidence and otherwise unavailable by reasonable diligence.[29]

Careful scrutiny of the test set out in *First Judicial District* gives rise to two important questions. The first question is whether a grant of executive privilege serves the public interest in any civil case arising from the riot. The second question is whether the "admissible in evidence" portion of the test is properly applied at the discovery stage of litigation. The latter question is especially important in view of the fact that the State of New Mexico, which is also the party defendant in the civil riot cases,[30] has exclusive control over the information sought.

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22. *Id.* at 257, 629 P.2d at 333.
23. *Id.* at 258, 629 P.2d at 334.
24. *Id.*
25. *Id.* at 256, 629 P.2d at 332.
26. *Id.* at 258, 629 P.2d at 334.
27. *Id.*
28. According to the *First Judicial District* court, the public interest is in preserving confidentiality to promote intra-governmental candor. *Id.*
29. *Id.*
30. At the time of the issuance of the writ in *First Judicial District,* there had been over five hundred notices filed against the State of New Mexico under the Torts Claims Act. *Id.* at 256, 629 P.2d at 332.

B. Executive Privilege in General

The purpose of executive privilege is to safeguard the decision-making process of the government.[31] It is designed to foster candid exchanges of advice and recommendations within the executive department by protecting from disclosure the mental processes followed by governmental officials in reaching an ultimate decision.[32] At the core of the executive privilege doctrine is the conviction that the public has an interest in the uninhibited functioning of the executive branch of government and that branch functions most efficiently when its deliberative processes are veiled from judicial scrutiny.[33]

When an executive officer asserts executive privilege to bar discovery, courts engage in a balancing process to determine whether to grant the privilege.[34] Courts weigh a need to safeguard the governmental decision-making process against the litigant's need for disclosure and the interest of that individual in obtaining justice.[35] The results of the balancing process vary with the type of document at issue,[36] as well as with the need for evidence in that case.[37]

Courts are most likely to grant the privilege when the attempted discovery is of purely deliberative memoranda. In *Sprague Electric Co. v. United States,*[38] an American manufacturer sued the International Trade Commission. Sprague Electric Co. was contesting the Commission's finding of "negative injury" to the company due to Japanese importation of tantalum capacitors. Sprague sought discovery of the documents upon which the Commission had based its finding. The documents in dispute were statements of advice and alternate views prepared by the Commission staff. The statements set forth suggested criteria to be used, as well as arguments for and against an affirmative determination of injury to the

31. *See* Cox, *Executive Privilege,* 122 U. Pa. L. Rev. 1383, 1386 (1974) [hereinafter cited as Cox].

32. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324–25 (D.D.C. 1966), *aff'd on opinion below,* 384 F.2d 979, *cert. denied,* 389 U.S. 952 (1967).

33. Cox, *supra* note 31, at 1386.

34. The exception to this rule is when diplomatic, military, or sensitive security matters are involved. Even the most compelling necessity cannot overcome the claim of privilege when these types of documents are at stake. *See, e.g.,* United States v. Reynolds, 345 U.S. 1 (1952). (The United States resisted discovery of an Air Force report of a highly secret mission, on the ground that furnishing the report would seriously hamper national security. The Supreme Court noted that the United States was preparing for national defense and saw a reasonable danger that the report would contain references to secret electronic equipment. The Court granted privilege to the report without considering the need for discovery in litigation.)

35. Stiftung v. Zeiss Jena, *supra* note 32, at 329.

36. Comment, *Discovery of Government Documents and the Official Information Privilege,* 76 Colum. L. Rev. 142, 157 (1976).

37. Crawford v. Dominic, 27 Fed. R. Serv. 2d 1072 (E.D. Pa. 1979). *See infra* notes 48–52 and accompanying text.

38. 462 F. Supp. 966 (1978).

manufacturer. The court found that the documents comprised an integral part of the Commission's deliberative process, and ruled that such material fit squarely within the concept of executive privilege.[39]

When the material sought is factual matter, and not deliberative memoranda, however, executive privilege does not apply. In *Machin v. Zuckert*,[40] an Air Force crewman sued the manufacturer of an aircraft propeller. The crewman claimed that a defect in the product caused an accident in which he was injured.[41] To prove this case, the plaintiff attempted to obtain an Aircraft Accident Investigative Report prepared by the Air Force immediately after the accident. The Secretary of the Air Force refused to release the investigatory files on the basis of executive privilege. He claimed that the report contained Air Force deliberations and recommendations as to military policy to be pursued as a result of the crash. The District of Columbia Circuit Court agreed that the portion reflecting such deliberations should not be disclosed.[42] The court refused, however, to extend the privilege to the factual findings of the mechanics who examined the wreckage.[43]

The *Machin* exemption of factual material from the scope of executive privilege fits the policy of the privilege. The United States Supreme Court explained the rationale behind the distinction between statements of facts and deliberative memoranda, in *EPA v. Mink*.[44] The court stated that executive privilege existed to promote frank discussion of legal or policy matters.[45] Because "compiled factual material or purely factual material" did not reflect this deliberative nature, its discovery could not be "injurious to the consultative functions of government that the privilege of non-disclosure protects."[46] All federal decisions which have ruled upon claims of executive privilege arising out of civil suits recognize the distinction between facts and internal recommendations, opinion and advice.[47]

Once a court which is confronted with a claim of executive privilege decides that the documents in question fall within the scope of the privilege, it must consider the need for the privileged information. The privilege must yield if the need for evidence in the fair administration of justice outweighs the value of confidentiality as an encouragement to candor. In *Crawford v. Dominic*,[48] Crawford sued the Philadelphia police

39. *Id.* at 973.
40. 316 F.2d 336 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 896 (1963).
41. *Id.* at 337.
42. *Id.* at 339.
43. *Id.*
44. 410 U.S. 73, 87–89 (1973).
45. *Id.* at 87.
46. *Id.* at 87–88 (citing Kaiser v. Aluminum and Chemical Corp., 157 F.Supp. 939, 946 (1953)).
47. Cox, *supra* note 31, at 1416.
48. 27 Fed. R. Serv. 2d 1072 (E.D. Pa. 1979).

department and the city for damages. Crawford alleged that two Philadelphia police officers shot at him without cause. He sought discovery of all citizens' complaints, as well as reports of previous improper gun firings on the basis that the documnts might demonstrate "that the officers had a propensity for violence and that defendant supervisors . . . and the city knew or should have known of this propensity and did nothing to protect citizens from the danger the officers may have presented."[49] The police department asserted that the police documents were supervisory evaluations, and were protected by executive privilege.[50] The court, however, was persuaded by the overriding need for discovery of the documents in this case. It stated:

> Exempting supervisory evaluations from discovery might well bar jury scrutiny of highly relevant evidence which cannot be adequately developed in other ways: Supervisory evaluations may be the best evidence available in this case of the state of mind of defendant supervisors, and of other agents of the city and the police department for personnel or policy decisions.[51]

The court decided that a blanket rule which would shield deliberative memorandum from discovery could not apply because the discovery material was likely to lead to relevant evidence.[52]

Thus, when a claim of executive privilege is asserted to withhold government documents from discovery, courts consider whether granting the privilege would serve the policy of promoting inter-governmental candor. If the type of material is integral to the decision-making process, then courts weigh the need for secrecy against the need for evidence in the particular case. When the documents consist of material which could lead to highly relevant evidence, courts can order disclosure.

C. Application of the Executive Privilege Balancing Test to the Riot Investigative Data

It is inappropriate to extend executive privilege to the investigative data compiled by the New Mexico Attorney General after the penitentiary riot. Lower courts will find that the documents easily overcome the Supreme Court's presumption of privilege when the trial judges apply the balancing test set out in *First Judicial District*. The materials are not deliberative in nature, but are factual. Moreover, the necessity of the materials to the litigants far outweighs the purpose for keeping the materials confidential.

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49. *Id.* at 1073.
50. *Id.* at 1076.
51. *Id.* at 1077.
52. *Id.*

The data compiled by the Attorney General after the penitentiary riot contain only factual matter, which executive privilege was not designed to protect. One phase of the investigation consisted of interviews by the Attorney General's staff concerning events directly concerned with the riot.[53] The remainder consists of answers, given by anonymous respondents, to inquiries into the practices and policies at the penitentiary between 1970 and 1980.[54] The reports do not reflect any exchange of ideas within the executive branch. They are merely factual accounts of the riot and of the administration of the penitentiary.

Because the policy behind executive privilege is to protect the governmental decision-making process by promoting candid discussions between the members of the executive branch, the factual material compiled for the riot investigation does not warrant such protection. The investigative material does not contain any deliberations whereby the executive department reached a decision. The data contains no discussion by members of the executive branch. Facts gleaned from inmates and guards do not reveal an executive's suggestions and will not inhibit future participation in policy-making. To expose the interviews, questionnaires and photographs of the inmates, guards or correctional officers could not threaten executive decision-making. The data therefore falls outside the scope of executive privilege.

The potential value of the investigative data as evidence far outweighs the public interest in witholding them through executive privilege, if the privilege were applicable. The investigatory files contain statements of eyewitnesses taken immediately after the violent incidents. Those statements have unique value. They were taken soon after the riot. They reflect immediate perceptions of the causes of the riot by those who were actually in the midst of the havoc and the bloodshed. Witnesses who may no longer be available for further testimony because of death or some other factor gave their versions of the events surrounding the riot. In civil cases alleging misconduct on the part of state officials during the riot, these firsthand accounts may be the only way to identify witnesses and clarify riot incidents.

The need for the investigatory material as evidence increases upon a consideration of the unfair advantage the state would have over the civil plaintiffs in litigating the claims arising from the riot if the investigative materials are not released. The state conducted the initial probe into the penitentiary riot. If district courts grant executive privilege to withhold data which resulted, then the firsthand testimony will remain in the sole possession of the state. Thus, only one party in civil cases arising from

53. 96 N.M. at 256, 629 P.2d at 332.
54. *Id.* at 256–57, 624 P.2d at 332–33.

the riot, the defendant state, would have the option to use the testimony to find relevant evidence. A full and just litigation of the penitentiary riot cases requires that the civil plaintiffs have the same access to the evidence as the state has.

The value of the investigative data to the tort cases arising from the riot, enhanced by its exclusive availability to the state, weighs heavily in favor of disclosure despite the invocation of executive privilege by the state. Granting executive privilege to the riot report data would fail to serve the policies of the privilege. Additionally, application of the balancing test requires disclosure because the interests of the individual litigants in obtaining the only immediate accounts of the riot far outweigh the minimal interest of the state in withholding mere factual data.

D. The Admissibility Requirement

In *First Judicial District,* the supreme court not only set out for the district courts the traditional balancing test required in executive privilege cases; it required that the courts also be satisfied that "the requested materials would be admissible in evidence. . . ."[55] Such a requirement, taken in its most literal sense, materially alters the rules of discovery in New Mexico and affronts the philosophy of liberal discovery upon which the rules are founded.

The wording "admissible in evidence" was taken from *United States v. Nixon,*[56] an executive privilege case dealing with deliberations among members of the executive branch at the presidential level. In that case, the United States Supreme Court recognized a presumptive privilege to presidential communications.[57] The public interest in confidentiality in presidential decision-making had to yield, however, to the demonstrated, specific need for evidence in the pending suit.[58] The Court then delegated to the district court the "heavy responsibility to see to it that Presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States."[59] This high standard of confidentiality stemmed, according to the court, from the United States Constitution.[60] The court noted the unique rule under Article II, that a President's communications and activities related to the performance of his constitutional duties.[61]

The rationale behind a presumption of privilege of presidential communications and a high degree of confidentiality cannot justify the "ad-

55. *Id.* at 258, 629 P.2d at 334.
56. 418 U.S. 683 (1974).
57. *Id.* at 708.
58. *Id.* at 713.
59. *Id.* at 715.
60. *Id.*
61. *Id.*

missible in evidence" requirements for communications made by a state attorney general.[62] The United States Constitution does not bestow executive power upon state attorney generals; nor does it even delineate their duties.[63] The New Mexico Constitution also does not grant power or duties to the state attorney general.[64] The admissibility test which the Supreme Court deemed necessary for disclosing presidential communications is not appropriate for material from the state attorney general, whose duties are neither constitutionally mandated, nor of the same magnitude as are those of the President of the United States.

The New Mexico Supreme Court's requirement that the documents be admissible in evidence before they be discoverable contradicts New Mexico's philosophy of liberal discovery. The New Mexico Rules of Civil Procedure allow discovery of material which "appears reasonably calculated to lead to the discovery of admissible evidence."[65] New Mexico courts interpret this standard broadly. The courts permit discovery of evidence which "'[is] or may become relevant,' or 'might conceivably have a bearing' on the subject matter of the action, or where there is 'any possibility' or 'some possibility' that the matters inquired into will contain relevant information."[66] The liberal standard of discovery is radically limited when matters sought to be discovered must first pass an evidentiary test of admissibility.

The "admissible in evidence" test required by the *First Judicial District* court encourages speculation. Under this test, trial courts would be expected to know what would be "admissible" during the discovery stage of the proceedings. Trial judges would have to guess about the final issues for which particular evidence would be necessary as proof. Additionally, trial judges would have to speculate about what actual witness testimony would be in order to rule on whether that testimony would or would not be admissible. For example, the trial court would have to make such a decision before it could order release of impeaching testimony.

The admissibility test, if construed literally, imposes an impossible burden on plaintiffs in the riot cases. The purpose of discovery is to narrow the issues and solidify the case.[67] During the discovery stage, riot

62. This is especially so when the material sought to be discovered is not a communication of the Attorney General at all but is a compilation of facts. *See supra* text accompanying notes 40–47.

63. *See* U.S. Const. art. II, §§ 1–4.

64. The New Mexico Constitution mentions the state attorney general's office only to specify its term of years, N.M. Const. art. V, § 1, to provide for the annual compensation for the attorney general, N.M. Const. art. V, § 12, and to delegate the attorney general as attorney for the corporation commission, N.M. Const. art. XI, § 4.

65. N.M. R. Civ. P. 26(b) (1978).

66. United Nuclear v. General Atomic Corp., 96 N.M. 155, 174, 629 P.2d 231, 250 (1980) (footnotes omitted).

67. 4 J. Moore and J. Lucas, Moore's Federal Practice, ¶ 26.02 (2d ed. 1982).

plaintiffs cannot know what testimony will ultimately be needed during the trial. They cannot know what is relevant until the final issues are formulated. Only through discovery can either side narrow the issues to those which are supportable by admissible evidence.

The admissibility test unfairly increases the plaintiffs' burden in a second way. To deny riot plaintiffs access to the investigative data may keep them from information which, although not in itself admissible, might lead to admissible evidence.[68] For example, statements by prison guards or inmates which are hearsay, or unduly prejudicial, could nonetheless aid riot plaintiffs in discovering relevant evidence. Plaintiffs cannot depose the witnesses who made the statements, however, if they are not allowed to make an initial survey of the investigatory data.

The extra requirement of admissibility does not promote judicial economy. One purpose of discovery is to narrow and clarify the basic issues between parties.[69] Discovery educates the parties in advance of trial as to the real value of their claims and defenses.[70] Requiring district courts, instead of counsel, to make the selections of theories by wading through much irrelevant evidence wastes judicial time and is antithetical to the notion that the parties themselves should form the posture of the case. Courts would have to rule on admissibility, not only at the trial itself, but before trial as well and more judicial time would be wasted by the double ruling.

Only subsequent elaboration on the "admissible in evidence" requirement, through further judicial opinions, will reveal exactly what the court meant by the term "admissible." Because any ruling on evidentiary "admissibility" would be hypothetical, perhaps the term will encompass any set of circumstances in which the relevance of the material may be anticipated. The evidentiary definition of the term "admissibility" cannot apply because it contradicts the liberal discovery rules of New Mexico.

E. Equal Protection

The New Mexico Supreme Court ruling in *State v. First Judicial District* may also deny equal protection to plaintiffs in penitentiary riot cases.[71] The decision of the court to extend executive privilege constitutes state action.[72] The governmental purposes of executive privilege, according to

68. This burden contradicts the standard that the privilege must yield if the discovery material is likely to lead to relevant evidence. *See supra* notes 48–52 and accompanying text.

69. Hickman v. Taylor, 329 U.S. 495 (1947).

70. 4 J. Moore and J. Lucas, Moore's Federal Practice ¶ 26.02[2] (2d ed. 1982).

71. U.S. Const. amend. XIV, § 1 states that a state may not "deny to any person within its jurisdiction the equal protection of the laws."

72. In Haley v. Troy, 338 F. Supp. 794 (D. Mass. 1972), court action was considered state action for purposes of equal protection analysis.

the court, are: "to safeguard the decision-making process of the government by fostering candid expression of recommendations and advice and to protect this process from disclosure."[73] To achieve those ends of executive privilege, the court created a subclass of penitentiary riot plaintiffs within the larger class of civil plaintiffs.[74] Denying the riot plaintiffs access to the sought-after material deprives them of the use of the liberal discovery rules afforded to all other civil plaintiffs.[75]

When a state action denies a fundamental right to a class of people, a compelling state interest must be furthered.[76] When such an action is alleged to have occurred, courts strictly scrutinize the action.[77] Access to the legal process is a fundamental right under the equal protection analysis.[78] Furthermore, adequate discovery in litigation must be considered an integral part of the legal process. The state must show, therefore, that its action of denying access to the sought-after investigative material, and thereby its denial of the plaintiffs' rightful use of the legal process promotes a compelling state interest.

Denying certain plaintiffs full discovery does not serve even a legitimate state interest, much less a compelling one. The extension of executive privilge to the investigative data will not safeguard the decision-making process because decision-making material is not at stake. The withholding of witness accounts of a riot will not foster expression of recommendations within the executive branch of government.

IV. CONCLUSION

The test for overcoming executive privilege as to the investigative material of the penitentiary riot may preclude plaintiffs who are suing the State of New Mexico from discovering information which is relevant to their cases. The first part of the test, concerning the public interest in granting executive privilege, should not present an insurmountable obstacle. The material in the compiled data is factual, not deliberative, and the investigative material is essential to full and fair litigation of the civil cases. The second part of the test, however, which requires that the material sought to be discovered be admissible in evidence may be impossible for plaintiffs to meet. Additionally, the ruling may create a class

73. 96 N.M. at 258, 629 P.2d at 334.

74. The ruling applies only to civil cases arising from the riot, and not to other civil cases. *Id.* at 256, 629 P.2d at 332.

75. *See* N.M. R. Civ. P. 26(b); *See also supra* text accompanying notes 65–66.

76. Dunn v. Blumstein, 405 U.S. 330 (1972).

77. *Id.* at 337.

78. Griffin v. Illinois, 351 U.S. 12 (1956). In *Griffin*, the court determined that access to and the use of trial transcripts was a part of the "legal process."

of people, the riot plaintiffs, who are denied equal access to the litigation process in violation of the equal protection clause of the United States Constitution. Only future interpretation by the courts will determine whether the plaintiffs will be completely denied access to the investigation materials, as a literal reading of the *First Judicial District* opinion indicates.

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