

1           IN THE SUPREME COURT OF THE UNITED STATES

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3   JOHN VAN DE KAMP, ET AL.,                                 :

4                                 Petitioners                                 :

5                                 v.   :   No. 07-854

6   THOMAS LEE GOLDSTEIN.   :

7   - - - - - x

8   Washington, D.C.

9   Wednesday, November 5, 2008

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11                                 The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States  
13   at 11:06 a.m.

14   APPEARANCES:

15   TIMOTHY T. COATES, ESQ., Los Angeles, Cal.; on behalf of  
16   the Petitioners.

17   MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,  
18   Department of Justice, Washington, D.C.; on behalf of  
19   the United States, as amicus curiae, supporting the  
20   Petitioners.

21   E. JOSHUA ROSENKRANZ, ESQ., New York, N.Y.; on behalf of  
22   the Respondent.

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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 next this morning in Case 07-854, Van De Kamp v.  
5 Goldstein.

6 Mr. Coates.

7 ORAL ARGUMENT OF TIMOTHY T. COATES

8 ON BEHALF OF THE PETITIONERS

9 MR. COATES: Mr. Chief Justice, and may it  
10 please the Court:

11 This case arises from a Ninth Circuit  
12 opinion that essentially creates an exception to  
13 absolute prosecutorial immunity for chief advocates and  
14 supervising advocates. The court's decision in the  
15 Ninth Circuit essentially held that prosecutorial  
16 policies that apply to an entire body of cases in a  
17 trial office do not qualify for absolute immunity.

18 We submit that this is inconsistent with  
19 this Court's decision in Imbler v. Pachtman and its  
20 progeny, applying the functional approach to absolute  
21 immunity. There is essentially no distinction between a  
22 chief advocate or supervising prosecutor implementing a  
23 policy directing that cases be handled in a particular  
24 manner and that particular chief advocate or supervising  
25 advocate actually participating in the courtroom.

1                   Because of the size of the prosecutorial  
2 agencies, it's not feasible that a chief advocate or  
3 supervisor can be in a courtroom in every single case.  
4 But they can put their prosecutorial stamp on each case  
5 through the implementation of policy, through training,  
6 or through other means.

7                   Here the policy at issue concerns compliance  
8 with the obligation to disclose exculpatory information  
9 under Brady v. Maryland and also Giglio v. United  
10 States.

11                   In Imbler versus Pachtman, the Court  
12 recognized that those obligations are core prosecutorial  
13 obligations that are part of the prosecution's intimate  
14 relationship to the fairness of the trial proceedings.  
15 And we submit that that duty, that function, is the same  
16 whether it's performed in the courtroom or whether it's  
17 performed by a chief advocate or supervising advocate in  
18 terms of formulating policy or when making particular  
19 policy decisions.

20                   Imbler recognized that these core decisions  
21 had to be insulated. Otherwise, it would spawn  
22 litigation that would burden the judicial process. And  
23 it might cause them to hesitate to produce particular  
24 exculpatory information. It might create a burden of  
25 having them involved in more lawsuits than actually

1 performing their function and prosecuting the criminal  
2 law.

3 JUSTICE KENNEDY: Was -- was there an  
4 element in Imbler of the fact that you have to  
5 make tactical and strategic decisions at -- at the  
6 moment that are difficult, that call for judgment that  
7 has to be exercised on the spur of the moment?

8 This is somewhat different. This is -- this  
9 is a long-term commitment or a long-term policy that the  
10 Respondents are arguing for. It seems to me somewhat  
11 different than the dynamics that inform the Imbler  
12 decision.

13 MR. COATES: Well, the court in Imbler did  
14 mention a time frame in which decisions have to be made  
15 -- quickly made by individual prosecutors. It also  
16 noted the sheer number of decisions that are often made  
17 in the context of a criminal prosecution.

18 I would say, with respect to chief advocates  
19 and -- and supervisors, the number of those types of  
20 decisions is the same. They have the same complexity in  
21 determining what is going to come up in every single  
22 case as an individual prosecutor does in a -- in a  
23 single case.

24 Moreover, there is a multitude more that  
25 they have to consider because they are considering the

1 possibility of its impact on thousands of cases within  
2 the office. I will note, though, in Butz v. Economou,  
3 where the Court extended absolute immunity to  
4 individuals prosecuting agency actions, that same point  
5 was raised. But some of the conduct there was a bit  
6 more drawn-out in terms of the investigative manner --  
7 not the investigative manner, but the -- the  
8 prosecutorial process used by the administrative agency.  
9 And the court didn't find that -- that longer time frame  
10 to be dispositive.

11               Going back to Imbler, it again looked at  
12 what the basic function was in the administrative agency  
13 proceeding and found, yes, it is akin to prosecutorial  
14 conduct.

15               JUSTICE STEVENS: May I ask you kind of  
16 perhaps a farfetched hypothetical question just so I get  
17 the case law in mind? Supposing a prosecutor wanted to  
18 develop a policy which would keep -- which would create  
19 a bifurcated regime within the office where the people  
20 who interrogate prisoners are entirely separate from the  
21 people who prosecute trials, so that they don't have the  
22 malicious purpose that your adversary says is involved  
23 in this case. And supposing the prosecutor then hired  
24 some expert layman who had no trial experience at all to  
25 develop such a program, and the program, itself, is

1     desirable from the prosecution's point of view but --  
2     but presumably unconstitutional.  Would the person who  
3     developed that program be entitled to immunity --

4                 MR. COATES:  The --

5                 JUSTICE STEVENS:  -- in my example?

6                 MR. COATES:  The lay person --

7                 JUSTICE STEVENS:  Yes.

8                 MR. COATES:  The layperson, as a private  
9     actor, I think would not be.  I think the prosecutor  
10    that developed the policy would be.  It would be like  
11    delegating it to a staff member.  It might depend also  
12    on how close the relationship is.  The Court has noted  
13    in some of the judicial immunity cases that sometimes  
14    court clerks can perform functions that are essentially  
15    judicial functions.

16                In that case, though, under the Court's  
17    jurisprudence with private actors, they might have only  
18    qualified immunity, the private actors.  But the  
19    decision to use them would be prosecutorial.

20                JUSTICE STEVENS:  Well, why -- why is it  
21    qualified immunity if a separate person does it, but not  
22    qualified immunity if precisely the same task is  
23    performed by somebody who happens also to be a  
24    prosecutor?

25                MR. COATES:  Because it's not so much the

1 physical task of doing it. It's carrying out the  
2 obligation of performing that particular function. The  
3 function is compliance with Giglio and Brady. That is  
4 always a prosecutorial function. Whether the data is  
5 kept with a police department or an investigative  
6 agency, the buck stops with the prosecutor.

7 JUSTICE STEVENS: And in my hypothetical is  
8 it or is it not a prosecutorial -- does the layperson  
9 perform or not perform a prosecutorial function?

10 MR. COATES: If he is just collating data,  
11 then that is -- that's -- that's a task. Our point is  
12 that this isn't about just collating data. It's about  
13 the policy that data must be collated and used. That is  
14 the Brady-Giglio obligation. You can't divorce the --  
15 the information from the purpose for which, why it's  
16 supposed to be used.

17 JUSTICE STEVENS: No, but I'm trying to  
18 divorce the information in the particular case from  
19 developing the program.

20 MR. COATES: Well, I --perhaps I  
21 misunderstood the question. It sounds to me that the  
22 prosecutor has made a decision that he is going to put  
23 this thing in place, this process in place. That's  
24 their way that they satisfy or don't satisfy Giglio or  
25 Brady.



1           Maybe they don't satisfy. Maybe it's a  
2   terrible decision. But I think that decision ends up  
3   being prosecutorial in nature.

4           JUSTICE STEVENS: Even if it's made by a  
5   layman?

6           MR. COATES: Setting up the program, no.  
7   But the -- I think the buck stops with the prosecutor as  
8   to whether that's a valid process or not. I mean, the  
9   person may adequately perform their function, or they  
10  may not. But the person at the end of the day who is  
11  responsible for it ends up being the prosecutor.

12           And he may inevitably -- the person may  
13  inevitably perform something, but at the end of the day  
14  the prosecutor is the one that -- that has the task  
15  under Giglio and Brady of ensuring the accuracy of the  
16  information.

17           I think that kind of underscores here the  
18  approach the Respondent has taken is to kind of say,  
19  well, this is just a collection of data here, this is  
20  just bookkeeping. But it's not. The core of the  
21  constitutional claim here is that there is an obligation  
22  under Brady and Giglio somehow to collect this  
23  information, to disseminate this information.

24           And that's the obligation that we are being  
25  sued for, and that's the sort of thing that prosecutors

1 do. And you can you hire someone to do it, but somebody  
2 is the gatekeeper. Someone has to basically decide what  
3 goes in or what doesn't go in and whether it's  
4 sufficient or insufficient at the end of the day to  
5 comply with -- with Brady and Giglio. And so that can't  
6 be distinguished from the -- the prosecutorial role,  
7 whether it's conducted by a -- a chief advocate or by a  
8 supervising advocate.

9 JUSTICE KENNEDY: Well, I -- I suppose that  
10 is why the Petitioners seemed to change their theory.  
11 They -- they -- they were -- they were concerned about  
12 prosecutorial immunity, so they take it to the higher  
13 level of policy.

14 When -- when they do that, I suppose they  
15 might have the stronger argument if they could show  
16 deliberate indifference. Are there cases that help them  
17 on the "deliberate indifference"? What's -- what's the  
18 best case for them on deliberate indifference?

19 MR. COATES: I couldn't say what the best  
20 case is for them. I could not say what the best case is  
21 for them on -- on "deliberate indifference." We have  
22 not pushed on the merits part of this case. It was not  
23 briefed down below, and it is not --

24 JUSTICE KENNEDY: That is why the case is  
25 hard, and I -- I almost have to see what the violation

1 would be before I could determine the qualified immunity  
2 aspect of the case.

3 MR. COATES: Well, indeed. I mean, several  
4 amici has raise the question of whether there is the  
5 constitutional violation at all, but it has not been  
6 raised below. And of course, under this Court's  
7 decision in Buckley we have to assume the existence of a  
8 constitutional violation.

9 JUSTICE KENNEDY: That's what we are  
10 deciding in sort of in a vacuum. It's a little  
11 difficult.

12 MR. COATES: Precisely. But I think our  
13 point is that -- that if you buy their theory of a  
14 constitutional claim, whatever constitutional claim that  
15 is is a -- a prosecutorial function-related claim,  
16 because that's the nature of the Giglio and Brady  
17 obligation. They are trial obligations. They don't  
18 have any meaning outside the context of an actual  
19 prosecution.

20 And so, again we submit that there is really  
21 no difference to the chief advocate or supervising  
22 advocate formulating this particular policy for all the  
23 cases in the office -- this is what we do -- then there  
24 is the individual actions of a particular trial attorney  
25 in a given case or even if it were possible for a

1 supervising attorney or chief advocate to participate in  
2 everything. They could accomplish the same thing, I  
3 suppose, by every time a case is filed sending out an  
4 e-mail saying: Comply with our policies.

5 JUSTICE KENNEDY: The Monell case -- does  
6 the Monell case rest on the assumption that there can be  
7 instances where a policy makes the policy of those who  
8 adopted the policy liable?

9 MR. COATES: I think that's right. Reading  
10 the Monell allegations of the complaint against the  
11 County of Los Angeles, I think that that is what it is,  
12 that the deputy -- that the district attorney rather,  
13 acts as a county officer and would be the policymaker  
14 for those policies and customs and practices.

15 That obviously is not at issue here.  
16 Petitioners are being sued as individuals for their acts  
17 as supervisors and as the chief advocate in formulating  
18 a particular policy concerning compliance with Brady and  
19 Giglio.

20 These sort of cases, opening this door  
21 particularly for the broad claim that plaintiffs are now  
22 trying to assert, which is this kind of notion of  
23 information management, can spawn all sorts of claims.  
24 Virtually any time that you can't reach the individual  
25 trial attorney, all you need do is attribute whatever

1    you think that person did to the failure to develop a  
2    policy or provide training or to have adequate data  
3    management to allow them to do the job.

4                   This kind of end-run under Imbler will  
5    create the multitude of litigation and drag chief  
6    advocates in, as well as supervising advocates, that  
7    Imbler was designed to avoid. And it has the worse  
8    collateral effect that it's also going to end up pulling  
9    in the individual attorneys, the individual trial  
10   attorneys in a given case, because maybe they don't have  
11   individual liability, but they are certainly going to  
12   come in; they are going to testify as witnesses.

13                   So, it's the worst of both worlds, which is  
14   you are burdening the chief advocate with this sort of  
15   litigation which may impact the way they formulate  
16   policy, and you are burdening the individual line deputy  
17   attorney, and that's the attorney that Imbler sought to  
18   protect as well.

19                   Those adverse consequences on the judicial  
20   process are what led this Court in Imbler to recognize  
21   the importance of absolute immunity for prosecutors. We  
22   submit that it's even more important that that immunity  
23   be logically applied to chief advocates and to  
24   supervisors. Otherwise, I think Imbler will be  
25   eviscerated and we will have the very evils that Imbler

1 was designed to avoid.

2 If the Court has no further questions, I  
3 will reserve the remainder of my time for rebuttal.

4 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
5 Coates.

6 Oh, excuse me. Sorry about that.

7 Mr. Dreeben.

8 ORAL ARGUMENT OF MICHAEL R. DREEBEN

9 ON BEHALF OF THE UNITED STATES,

10 AS AMICUS CURIAE,

11 SUPPORTING THE PETITIONERS

12 MR. DREEBEN: Thank you, Mr. Chief Justice,  
13 and may it please the Court:

14 This Court recognized absolute prosecutorial  
15 immunity for line prosecutors who are charged with  
16 violating an obligation that falls uniquely on  
17 prosecutors, namely the obligation to disclose  
18 exculpatory evidence. The Respondents in this case are  
19 seeking to circumvent that absolute prosecutorial  
20 immunity by reformulating the claim as one against  
21 supervisors who allegedly failed to fulfill duties under  
22 the Constitution to collect information that would  
23 enable the line prosecutors to comply with the core duty  
24 under Giglio and Brady.

25 CHIEF JUSTICE ROBERTS: Is there such a

1 constitutional obligation?

2 MR. DREEBEN: Not in our view,  
3 Mr. Chief Justice. In our view the Brady obligation is  
4 one that falls on the Government. Giglio is an  
5 extension of Brady with respect to impeachment  
6 information. It's designed to ensure the fairness of  
7 the trial. It is violated only when the Government has  
8 suppressed material exculpatory evidence, that is,  
9 evidence that can undermine the fairness of the trial.

10 It's intimately linked in a way that really  
11 nothing else in the adversary system is to preserving  
12 the fairness of the trial. It's an obligation on the  
13 prosecutor to go beyond the normal role of an advocate  
14 to zealously advocate for his cause, and it puts the  
15 advocate in the position of supplying the judicial  
16 system with information needed to be submitted in order  
17 to have a fair proceeding.

18 CHIEF JUSTICE ROBERTS: I think you have the  
19 flip side of the same problem your friend has. In other  
20 words, the further it is removed from the constitutional  
21 violation or an allegation of a constitutional  
22 violation, the less need there is for immunity. The  
23 closer it is or the closer we must assume it is to a  
24 constitutional violation, then the immunity argument is  
25 stronger.

1           MR. DREEBEN: Well, it certainly is true  
2   that if there were a constitutional obligation under  
3   Giglio and Brady, it would be one that is intimately  
4   tied to the judicial process, and it should receive  
5   absolute prosecutorial immunity.

6           JUSTICE KENNEDY: In the broad ethical  
7   scheme of things, apart from liability under this  
8   statute, it seems to me that a newly elected district  
9   attorney would take seriously the obligation to make  
10  sure that everybody was following Brady.

11          MR. DREEBEN: Absolutely, Justice Kennedy,  
12  and I think that a formulation of policies to achieve  
13  that, whether or not required by the Constitution, is  
14  something that relates directly and intimately to the  
15  prosecutor's duties to assure --

16          JUSTICE KENNEDY: Well, that's the next  
17  point. If I were a prosecutor, I would say: This is my  
18  constitutional duty to say it, in the broad sense of --  
19  of my ethical obligations of my duties to the public.

20          MR. DREEBEN: Only in the sense, I think,  
21  that -- that a supervisor who has the power to cause or  
22  prevent constitutional violations may be under some  
23  obligation not to cause constitutional violations. But  
24  the claim here is --

25          JUSTICE KENNEDY: Well, I think it's more



1     than that. He can't be indifferent to sloppy practices  
2     in the office --

3                 MR. DREEBEN: You certainly should not.

4                 JUSTICE KENNEDY: -- consistent with his or  
5     her obligations to perform their duties.

6                 MR. DREEBEN: But I think that the  
7     deliberated indifference question that you raise,  
8     Justice Kennedy, is really a direct counterpart of the  
9     absolute immunity argument that we are making here. We  
10    are making here the argument that supervisory  
11    prosecutors should not be subject to suit based on broad  
12    policies that they have adopted that will directly have  
13    impact on individual cases in the way that Brady and  
14    Giglio obligations are fulfilled.

15                JUSTICE STEVENS: Mr. Dreeben, what do you  
16    do with my hypothetical? Do you remember it?

17                MR. DREEBEN: I remember it,  
18    Justice Stevens, and I think that the -- I agree with  
19    Mr. Coates on this one. The supervisory prosecutor who  
20    formulates the policy is the only one who has the unique  
21    --

22                JUSTICE STEVENS: No, I'm -- my hypothetical  
23    is they hire a layman --

24                MR. DREEBEN: Yes.

25                JUSTICE STEVENS: -- to develop a policy

1 that will keep separate from prosecutors information  
2 about the way witnesses are developed. And the policy I  
3 think is highly improbable, I agree with you, but the  
4 policy is designed to avoid the obligation imposed by  
5 Giglio and Brady.

6 MR. DREEBEN: That's the allegation, of  
7 course. And the first thing that I want to say is that  
8 if you allow suits based on allegations that you think  
9 are really bad, you open the door to allegations that  
10 will have to be sorted out throughout the judicial  
11 system.

12 JUSTICE STEVENS: But that's true even  
13 without -- without an immunity.

14 MR. DREEBEN: But I think that the point is  
15 that the immunity prevents the prosecutors from having  
16 to fear that they will be subject to those kind of  
17 suits.

18 But to answer your question directly, the  
19 layperson, if he causes a constitutional violation,  
20 isn't shielded by the constitutional -- excuse me -- by  
21 the prosecutorial immunity that attaches only to  
22 prosecutors. And that's because if you go back to the  
23 roots in Imbler, what you see is that prosecutorial  
24 immunity is really --

25 JUSTICE STEVENS: Of course, the next

1 question is, if that's true, and if there is -- you can  
2 compartmentalize the prosecutor's work in the office and  
3 he develops a separate chapter of his own duty to just  
4 do that performance, why is that trial-related?

5 MR. DREEBEN: I think the flaw in  
6 Respondent's theory is the attempt to bifurcate what the  
7 prosecutor is doing into an administrative function and  
8 a prosecutorial function. And that's the same, I think,  
9 maneuver in your hypothetical, to say that the  
10 prosecutor is really doing something administrative and  
11 Imbler said administrative things are non-prosecutorial;  
12 therefore, we can sue him.

13 I think the problem with that is illustrated  
14 by a hypothetical about judicial immunity. Suppose --  
15 judges of course have immunity from sitting on cases,  
16 and if a judge sat on a case that involved a conflict of  
17 interest he could not be sued or she could not be sued  
18 for having done so, even if it violated the  
19 Constitution. Suppose that the litigant reformulated  
20 the suit and said: Well, the judge should have had a  
21 policy to ensure a check of conflicts in all the cases  
22 that the judge sat on. And that would have been an  
23 administrative duty, set up some notebook that has all  
24 the judge's investments and direct some underling to  
25 ensure that no party in any case has an interest where

1 the judge has an investment. That was purely  
2 administrative, so we ought to be able to sue. The  
3 judge for that. And I think that obviously should fail.  
4 It would end-run all of the policy reasons for being  
5 able to assert absolute judicial immunity; and I think  
6 that that is identical in form to what the Respondents  
7 are trying to do here. They are trying to divorce the  
8 role of the office in maintaining some sort of a system  
9 to ensure that information is available to prosecutors  
10 to disclose under Giglio from the obligation under  
11 Giglio to ensure the fairness of the judicial process,  
12 which is an obligation that falls uniquely on the  
13 prosecutor and which Imbler makes clear is subject to  
14 absolute immunity.

15 And you just can't do that. If you do that,  
16 you end up exposing the supervisory prosecutors to evils  
17 that cannot occur to the line prosecutor himself. And  
18 it produces anomalies. The line prosecutor, even if he  
19 intentionally violates Giglio, cannot be sued, but under  
20 Respondent's theory the supervisory prosecutor, even if  
21 what he did is no more than deliberately indifferent or  
22 perhaps even negligent, could be sued.

23 The line prosecutor who handles a certain  
24 number of cases cannot be sued, in part because it would  
25 ensure a distraction of the duties of the prosecutor and

1 would divert him from performing his role of enforcing  
2 the criminal law. The supervisor, who is responsible  
3 for far more cases and is subject to far more  
4 disappointed litigants who would like to sue him, that  
5 person can be sued. And it would have an even more  
6 disruptive effect on an office if supervisory  
7 prosecutors, who have the responsibility, as  
8 Justice Kennedy pointed out, of trying to come up with  
9 policies that will prevent constitutional violations,  
10 and that will ensure that the office functions in an  
11 efficient and an effective manner, they will be the ones  
12 who are most deterred -- most deterred from acting,  
13 because they will suffer the possibility of thinking of  
14 their own individual liability rather than focusing on  
15 what they are supposed to do, the public interest, both  
16 disclosing information that needs to be disclosed,  
17 bringing suits that need to be brought, and using  
18 witnesses regardless of fears that someone later on is  
19 going to discover information that should have been  
20 disclosed and sue the supervisor, saying, "We know we  
21 can't sue the individual prosecutor, but you,  
22 supervisor, failed to develop effective policies to get  
23 that information to the court." That kind of  
24 circumvention of Imbler plays no role of fulfilling the  
25 policies that absolute prosecutorial immunity is

1 designed to fulfill.

2 If the Court has no further questions --

3 CHIEF JUSTICE ROBERTS: Thank you, Mr.

4 Dreeben.

5 Mr. Rosenkranz.

6 ORAL ARGUMENT OF E. JOSHUA ROSENKRANZ

7 ON BEHALF OF THE RESPONDENT

8 MR. ROSENKRANZ: Mr. Chief Justice, and may  
9 it please the Court:

10 This case is not about whether a chief D.A.  
11 can set policies about trial strategy. We could  
12 stipulate that this chief D.A. would be immune from  
13 those sorts of suits and it would not affect our case at  
14 all.

15 This case is about the function of deciding  
16 on an officewide basis whether to track important  
17 historical facts and disseminate them internally within  
18 an office to employees who need to know those facts.  
19 This case is about gathering and preserving information,  
20 certain categories of raw data, that may or may not ever  
21 get into the courtroom, not about how to use those  
22 specific pieces of data once you actually have a  
23 prosecution materializing.

24 This claim is no different from a claim  
25 against a chief of police, for example, for

1 systematically destroying 911 tapes, thereby depriving  
2 defendants of exculpatory information.

3 CHIEF JUSTICE ROBERTS: Why isn't --

4 JUSTICE GINSBURG: This is creating -- this  
5 is creating a database. And what was the year of this  
6 prosecution?

7 MR. ROSENKRANZ: The prosecution, Your  
8 Honor, was in 1979, it began. That was the crime; the  
9 prosecution was in '80.

10 JUSTICE GINSBURG: And back in 1979 we did  
11 not have the information-gathering electronic capability  
12 that we now have. So what are we talking about? What  
13 kind of database? How would it operate? Would you --

14 MR. ROSENKRANZ: Well, Your Honor, so that's  
15 getting to the merits of the actual claim. It could be  
16 as simple as a file cabinet or 3 by 5 cards on which you  
17 list the name of the informant and his prior record of  
18 collaboration.

19 In the U.S. Attorney's offices that do this,  
20 completely apart from this enormous FBI database, they  
21 do it very simply, the ones that I know about. They  
22 appoint a Giglio czar in each bureau and they say that  
23 when there is contact with the prosecutor's office and  
24 an informant, you make sure you tell this person, "send  
25 an e-mail," and he keeps it all in a file.

1 CHIEF JUSTICE ROBERTS: Well, but that goes  
2 to the merits, doesn't it? I mean, if -- I -- you could  
3 develop and make the same point, saying U.S. attorneys  
4 are instructed in complying with Giglio and Brady in  
5 this way. But if there is a decision not to -- I mean,  
6 immunity is only necessary when you assume some -- there  
7 has been some violation. And so the fact that somebody  
8 else avoids a violation, it seems to me, is not a good  
9 argument to deprive other people of immunity.

10 MR. ROSENKRANZ: Well, Your Honor, this  
11 Court has said as clearly as it can possibly say that  
12 the location of the injury is irrelevant. I am quoting  
13 now from Buckley. In Kalina, the prosecutor executed  
14 the challenged certification probably the morning before  
15 the morning she walked into court, and it was held to be  
16 not immune because that was not the function of a  
17 prosecutor. She - with the charging document.

18 CHIEF JUSTICE ROBERTS: You drew a  
19 distinction earlier on between a determination by a  
20 prosecutor not to turn over certain material, which is  
21 absolutely immune, and said this was different. But  
22 what if the purpose of the policy is to not provide  
23 prosecutors with material so they can't turn it over?  
24 Why doesn't that go into the same prosecutorial core  
25 function?



1 MR. ROSENKRANZ: Well, Your Honor, the  
2 answer is quite simple. That is the alleged motive in  
3 this case, in fact. It was intentional or with  
4 deliberate indifference, so the allegation is, the  
5 intention was to cut the flow of information to the line  
6 prosecutor. And the reason that's different is because  
7 while Petitioners say compliance with Brady, our answer  
8 is compliance with Brady comprises at least two  
9 functions.

10 There is the front line function of the  
11 prosecutor, the advocate, making the decision, "Do I  
12 turn this information over to the defense?" This case  
13 has nothing to do with that front line function. This  
14 case has to do with the back room function. The  
15 function of --

16 CHIEF JUSTICE ROBERTS: Why isn't that the  
17 same as the determination by the supervisor that, don't  
18 turn this information over. Here's all -- we are not  
19 going to share informant information because we don't  
20 think that should be turned over to comply with Giglio.  
21 The individual prosecutor they have says I'm not going  
22 to turn it over. Why isn't it exactly the same?

23 MR. ROSENKRANZ: Well, Your Honor, if the  
24 decree comes from on high, "we don't turn over Giglio  
25 information here," which has actually happened in some

1 cases, that would be a different case, because that is  
2 the chief administrator directing trial tactics.

3 Here it's the chief administrator looking  
4 entirely inward and saying, like any administrator in  
5 any major agency or business does, how do we get  
6 information from the people who know it to the people  
7 who need it at the front line?

8 JUSTICE SCALIA: That is certainly -- you  
9 know, that's an interesting theory, but it's certainly  
10 not the theory on which the decision below was based.  
11 The decision below says "Neither" -- speaking of Imbler  
12 and prior cases -- "Neither the Supreme Court nor this  
13 Court has considered whether claims regarding failure to  
14 train, failure to supervise or failure to develop an  
15 officewide policy regarding a Constitutional obligation  
16 like the one set forth in Giglio are subject to absolute  
17 immunity."

18 And I could quote portions of the opinion  
19 they are.

20 MR. ROSENKRANZ: That's what --

21 JUSTICE SCALIA: They are talking about  
22 supervising prosecutors. They are talking about  
23 training prosecutors and having an officewide policy  
24 regarding what you do with -- with Giglio information.

25 MR. ROSENKRANZ: Your Honor, the passage you

1 read from was the broad passage that the court was  
2 referring to when it said this sets up a bunch of hard  
3 questions. This case becomes an easy case, the court  
4 said, because we were not dealing with the prosecutor,  
5 the chief D.A. setting trial tactics for the line  
6 prosecutors; we are dealing -- the court says this on  
7 page 5 of the petition -- excuse me, the petition  
8 appendix.

9 JUSTICE SCALIA: Page 5?

10 MR. ROSENKRANZ: Page 5 of the petition  
11 appendix at the top. It lays out the theories. Number  
12 one theory is exactly the theory we are presenting here.  
13 At the very top line, "They violated his constitutional  
14 rights by purposely or with deliberate indifference  
15 failing to create a system that would satisfy the Giglio  
16 obligation."

17 JUSTICE SCALIA: They are not talking about  
18 just collecting information.

19 MR. ROSENKRANZ: Your Honor --

20 JUSTICE SCALIA: They are talking about, as  
21 they clarify later on, a -- a system in which they train  
22 and supervise and develop an officewide policy regarding  
23 the Giglio obligations.

24 MR. ROSENKRANZ: Your Honor, no, they -- the  
25 court was very clear that it was talking about

1 supervising and training, about the internal function of  
2 circulation of information within the D.A.'s office.

3 Not --

4 JUSTICE SOUTER: Let's assume that's --  
5 that's what they did mean. I have to say I read it as  
6 broadly as Justice Scalia did, but let's -- let's narrow  
7 down the -- the Court's opinion to -- to -- to the claim  
8 that you are making right now.

9 Let me go back to the Chief Justice's  
10 hypothetical and add one minor detail.

11 Let's assume that in a given department they  
12 put into effect exactly the policy that you want. They  
13 have a fine system of -- of data collection, far more  
14 sophisticated than three by five cards, and the -- the  
15 boss D.A. says everybody in this office ought to know  
16 what kind of deals are being made and offered at all  
17 times. And they have such a system.

18 And the boss D.A. also says and don't you  
19 disclose one word of it ever in any case. We are going  
20 to defy Giglio.

21 If he made that or gave that order so that  
22 in every case there would be a defiance of Giglio, even  
23 though the facts were known, would he have absolute  
24 immunity?

25 MR. ROSENKRANZ: And he's directing that

1 order to trial lawyers?

2 JUSTICE SOUTER: That's right.

3 MR. ROSENKRANZ: Yes, Your Honor. The  
4 answer is I don't know. I could imagine a theory, a  
5 very strong one --

6 JUSTICE SOUTER: Well, you know if in a  
7 given case, if they had this system, and the lawyer  
8 comes to him and says, okay, I've consulted our system  
9 and I realize we that have got a Giglio obligation. And  
10 the boss D.A. says: Forget it. Don't tell him a word.

11 There would be absolute immunity, wouldn't  
12 there?

13 MR. ROSENKRANZ: There absolutely would,  
14 Your Honor.

15 JUSTICE SOUTER: Okay.

16 MR. ROSENKRANZ: And my point is --

17 JUSTICE SOUTER: Why would the -- why would  
18 the answer be any different if he says don't bother me  
19 with particular cases? I am telling you right now what  
20 the answer is going to be in every case in which we have  
21 a Giglio obligation and that is, bury it.

22 Presumably there would be absolute immunity,  
23 wouldn't there?

24 MR. ROSENKRANZ: Your Honor, I can imagine  
25 an argument on either side. I can imagine the Plaintiff

1 making the argument --

2 JUSTICE SOUTER: What's your answer?

3 MR. ROSENKRANZ: I don't have an answer to  
4 that hypothetical because it's so different from our  
5 case.

6 JUSTICE SOUTER: The trouble is if you don't  
7 have an answer to that hypothetical, then we got to  
8 leave open the possibilities as far as your case is  
9 concerned that he would have absolute immunity in that  
10 case. And if he would have absolute immunity in that  
11 case, then the -- the -- the reason for allowing  
12 anything less than absolute immunity with respect to  
13 this data collection obligation reduces down to  
14 something like an almost a silly point.

15 MR. ROSENKRANZ: If --

16 JUSTICE SOUTER: If you can get everything  
17 you want, and all the prosecutor has got to say is:  
18 Keep it under your hat and there is going to be absolute  
19 immunity and nobody gets anything. What is -- what is  
20 to be gained by that?

21 MR. ROSENKRANZ: Well, Your Honor, that may  
22 well be a consequence of Imbler. But when Imbler talks  
23 about the function, Imbler is very clear that there is a  
24 distinction between trial tactics and strategy on the  
25 one hand in the cases under Imbler, and the sort of

1 backroom functions about the flow of information on the  
2 other --

3 JUSTICE SOUTER: But if the backroom  
4 function is reduced to an absolute nullity by an  
5 immunized decision to -- to bury the Giglio information  
6 in every case, then I don't see the point of saying  
7 there's no immunity for the supposed backroom function,  
8 because nothing will be accomplished even if there is no  
9 absolute immunity.

10 MR. ROSENKRANZ: Sure, Your Honor. We  
11 can -- if we imagine a corrupt district attorney who  
12 wants to make sure that constitutional rights are  
13 violated and evades the edict of this Court, sure, that  
14 is the consequence of Imbler.

15 But my point in -- in not answering the  
16 question about the theory under that case, is that the  
17 argument of the plaintiff in that case is so different  
18 from the argument that we are making here. The  
19 plaintiff in that case would be arguing, well, it is  
20 removed in time from the -- the actual prosecution which  
21 is an argument that we, too, can make. The conduct was  
22 before the initiation of criminal proceedings. It's  
23 not -- you know, you could not say it's not unique to  
24 prosecutors.

25 Here, our argument is that there is nothing

1 unique to prosecutors or to lawyers about the  
2 information management function, about the function of  
3 tracking information. And by the way, this is not an  
4 exotic theory. This is exactly the line that this Court  
5 has been following in distinguishing between --

6 JUSTICE ALITO: Can't you say anything about  
7 training subordinates in any office. There is nothing  
8 unique about training or not training subordinates in a  
9 prosecutor's office as opposed to any other government  
10 office or, I would suppose, an office in the private  
11 sector. So does your argument extend to any failure to  
12 provided adequate training or any instance where there  
13 is a deliberate indifference as to the training that is  
14 provided?

15 MR. ROSENKRANZ: I can see the plaintiff in  
16 a case using our argument to advance that point. But my  
17 point here is we don't even need to get to that argument  
18 because --

19 JUSTICE ALITO: So a plaintiff could say  
20 that it could sue a -- a district attorney for failing  
21 to have adequate training as to subordinates before  
22 you -- they are sent in to deliver a summation so that  
23 they know they are not supposed to comment on the  
24 failure of a defendant to take the stand --

25 MR. ROSENKRANZ: As I said --



1 JUSTICE ALITO: They are not supposed to  
2 vouch for witnesses, that would be a viable theory in  
3 your opinion?

4 MR. ROSENKRANZ: I -- I believe that there  
5 is an argument. It's not the argument that I am making.  
6 The argument that I am making it matters what the D.A.  
7 is training on. If the D.A. is training on trial  
8 tactics, that's one thing. But here the D.A. is  
9 training on how to use a database, and he's not training  
10 the lawyers who are going to be using it.

11 JUSTICE GINSBURG: Mr. Rosenkranz, you have,  
12 it seems to me, a theory of this case that is not the  
13 theory that the Ninth Circuit went on. I mean, the  
14 Ninth Circuit talks about training and supervising  
15 deputy district attorneys. And why do we train them?  
16 Because we want to ensure that they share information.

17 Now you are cutting out the training and  
18 supervision, and you are saying the obligation of the  
19 supervising attorney is to have this information bank,  
20 which the deputy attorneys can then -- then consult,  
21 which, may be a very sound policy. But is it an element  
22 of due process that the supervising attorney has to  
23 devise a system to share information? Where is there  
24 anything -- anything that the Court has held that  
25 suggests that there is a data collection function

1 required by due process?

2 MR. ROSENKRANZ: So, Your Honor, let me  
3 ask -- let me answer the first half first, which is  
4 about what the Ninth Circuit held. And first, I should  
5 say what it is that we argued to the Ninth Circuit.

6 It's on -- it's in our brief, very clearly  
7 we've presented on page -- excuse me -- on page 17 of  
8 our brief, that big paragraph, the only full paragraph,  
9 we present both what we argued to the Ninth Circuit,  
10 which was about the creation of a database, and what  
11 Petitioners argued to the Ninth Circuit, which reflected  
12 exactly what we were saying. So petitioners were not  
13 confused. They attributed to us the argument that they,  
14 quote, failed to set up a system to disseminate to  
15 deputy district attorneys information about plea deals  
16 and other assistance being offered to informants.

17 That was -- and that was directly out of our  
18 brief. That was the first line of their brief, and the  
19 first line of our brief also referred to that.

20 I agree, the Ninth Circuit spoke more about  
21 training than about this information database. But the  
22 Ninth Circuit was also speaking only about --

23 JUSTICE GINSBURG: And there is nothing in  
24 the Ninth Circuit -- there was nothing that was  
25 presented to the Ninth Circuit by Mr. Goldstein that had

1 to do with this talk about training?

2 MR. ROSENKRANZ: There was, Your Honor. In  
3 our complaint we had two what might be called  
4 information management theories.

5 One -- and you can see it on page 45 of our  
6 complaint of the joint appendix, and so while the Court  
7 is orienting itself -- there were -- there's a theory of  
8 information management that is the most prominent theory  
9 in the complaint. If you look at the bottom of page 45,  
10 about seven lines up from the bottom, you see two  
11 distinct kind of subtheories.

12 The first is -- so it starts -- the line  
13 starts purposely or with a deliberate indifference --  
14 theory 1-A, that petitioners failed to create any system  
15 for the deputy district attorneys handling criminal  
16 cases to access information, about informants, of  
17 course.

18 Theory B, two lines from the bottom, "that  
19 they failed to train deputy district attorneys to  
20 disseminate information pertaining to the benefits  
21 provided to jailhouse informants." That's also about  
22 disseminating it internally. If one turns to page 69,  
23 the specific allegations against Petitioners, you see  
24 paragraph 154, repeatedly talking about this information  
25 system, this information sharing system, both as a

1 system to create and as a failure to train. But, again,  
2 train on what? Train on the need, when you don't have  
3 the system, to inform the other guy that you've just  
4 made a deal with the informant.

5 JUSTICE BREYER: But I would like to follow  
6 that up a bit by saying, one, I'm not sure what this  
7 difference between what you are arguing now and what you  
8 are arguing then matters. I don't understand it,  
9 frankly. I don't actually understand it, because I  
10 agree, when you were in the Ninth Circuit, with what you  
11 said: It's a failure to disseminate information. And  
12 then you said: And it's a failure to train and  
13 supervise. You did say that. Now, why that matters, I  
14 don't know, because the problem that -- maybe it does  
15 matter, maybe it doesn't. So I have to say I don't  
16 understand it. Now, help my understanding.

17 MR. ROSENKRANZ: I don't think it does  
18 matter.

19 JUSTICE BREYER: All right. I know you  
20 don't, but I'm not worried about that. I'm worried  
21 about my understanding of your argument, and that's what  
22 I am trying to get to. Answer this question, please,  
23 because it will help me: The obvious response is the  
24 response the Government made. You can take any -- which  
25 is what Justice Alito said. So I would just like to you

1 elaborate on it. You can take anything that the D.A.  
2 does that is wrong in the case, you know, some horrible  
3 thing he did. And maybe he shouldn't be immune, but he  
4 is, okay? Or maybe he should be. There we are.

5               So, here I know I can't bring this suit, but  
6 here's what I claim: You failed to have a system that  
7 did... and now we fill in the blank. And whatever that  
8 blank is, it's going to be something that would have  
9 stopped him from doing this bad thing. In your case, it  
10 happens to be an information dissemination system. In  
11 other case, it would be some other kind of system that  
12 would have the effect of stopping this bad thing. So,  
13 their point is that, if you can go ahead with yours, so  
14 can anybody else go ahead with theirs, and that is the  
15 end of immunity. Okay?

16              Now, what is your response? That's what I  
17 want to know.

18              MR. ROSENKRANZ: Your Honor, my response to  
19 that is very simple: I don't know of any other trial  
20 right -- prosecutorial misconduct, that can be  
21 controlled -- excuse me, where you can evade immunity  
22 under our theory the way you can with a theory that is  
23 based on the management --

24              JUSTICE BREYER: Sure, it's easy. What the  
25 prosecutor does is he makes the most horrendous

1 prejudicial argument you'd ever see. So we say: What  
2 you need in the D.A.'s office, since this happens all  
3 the time, are classes, or what you need is a special  
4 section of the library where they have horrible  
5 arguments underlined, okay?

6 (Laughter.)

7 JUSTICE BREYER: And so, I can do that. So  
8 can you. You are very good at it. And any good lawyer  
9 can do that. And that's their point. So, if your only  
10 response, that's your response, your point is that a  
11 good lawyer, while he can do yours, couldn't do others,  
12 I understand the response. I'm not sure I agree with  
13 it.

14 MR. ROSENKRANZ: No, Your Honor, and I was  
15 beginning to say before that there is nothing at all  
16 exotic about the theory. The same lines are being drawn  
17 by this Court all the time. For example, in Kalina, a  
18 very fine line between the prosecutor who is creating  
19 charging documents on the one hand, writing them,  
20 submitting them to the Court, and then on the other  
21 hand, signing them. Or, in the investigative cases, the  
22 line between the process of gathering information, the  
23 raw data, on the one hand; and on the other hand, the  
24 assessment of that data for trial.

25 And so, when you are talking about a

1 prosecutor and trying to hold the district attorney  
2 vicariously liable for decisions of a trial lawyer, that  
3 is just very different from trying to hold the district  
4 attorney liable for the process of managing data, raw  
5 information, that may or may not ever make its way into  
6 a courtroom.

7 JUSTICE ALITO: Your theory applies to any  
8 system of data dissemination. Is that -- would that be  
9 correct?

10 MR. ROSENKRANZ: Any one that is  
11 constitutionally based, Your Honor. I mean, one where  
12 you could imagine a prosecution on the other end with a  
13 constitutional right that is violated.

14 JUSTICE ALITO: If the prosecutor has the  
15 policy of failing to distribute to the line attorneys  
16 the latest Ninth Circuit decision or the latest  
17 decisions of this Court on important issues of criminal  
18 constitutional procedure, because they just don't like  
19 the way the law is developing in these areas. So they  
20 like the law the way it existed at sometime in the past,  
21 and they are just not going to distribute any of that.  
22 Would that be a theory?

23 MR. ROSENKRANZ: Well, you have to imagine a  
24 world in which the district attorney is depriving people  
25 of the tools of their trade so that they can't get it

1 elsewhere. There is actually a real case that I -- that  
2 I've heard about where, you know, the district attorney  
3 decided way back when to stop buying supplements for  
4 statutory -- for statute books, and so district  
5 attorneys, line prosecutors were charging under the  
6 wrong statutes.

7 That, to me Your Honor, is a commissary  
8 function. It is a function of an administrator trying  
9 -- making decisions about how to arm the trial lawyer.

10 JUSTICE STEVENS: Can I ask you this  
11 question? I know we have an immunity case, but your  
12 underlying cause of action, the one you just described,  
13 the policy there of not filing supplements, or say you  
14 had a policy of training lawyers how to evade the Batson  
15 issue. There are all sorts of troublesome policies that  
16 might be developed. Are you aware of any case in which  
17 the court has held that such a policy can be challenged  
18 in the abstract, in the -- as, sort of, on its face,  
19 rather than as applied?

20 MR. ROSENKRANZ: You are asking whether the  
21 policy --

22 JUSTICE STEVENS: The policy when they --  
23 when they deny someone his Giglio rights or so on and so  
24 on. Have you had any cases like this one in which a  
25 court has held that such a cause of action is available



1 against an office policy?

2 MR. ROSENKRANZ: That such a cause of  
3 action --

4 JUSTICE STEVENS: Can be brought under 1983  
5 for such a general policy?

6 MR. ROSENKRANZ: In the absence of a  
7 constitutional injury?

8 JUSTICE STEVENS: That it will produce on a  
9 regular basis constitutional --

10 MR. ROSENKRANZ: No, Your Honor, I am aware  
11 of any such case, but I will say --

12 JUSTICE STEVENS: Then it seems to me that  
13 in this case the absolute immunity question is harder  
14 than the question that you present on the merits.

15 MR. ROSENKRANZ: Your Honor, it's actually  
16 not, and I will tell you why. Our -- we do not have to  
17 allege, for a 1983 case, that the conduct complained of  
18 was unconstitutional. All we have to allege was that  
19 the conduct caused a constitutional violation. So, for  
20 1983 purposes, this case is a case -- most clearly, most  
21 prominently our theory would be that this case is a case  
22 in which the district attorney was aware of this market  
23 bazaar atmosphere of trading in illegal -- excuse me --  
24 in perjured jailhouse confessions and did nothing to  
25 intervene. It's sort of a classic Hanton claim.

1 JUSTICE GINSBURG: But the bottom line would  
2 be, if you are right, that every district attorney in  
3 the country, large or small office, would have to have a  
4 data bank that can be shared by all prosecutors,  
5 informants that are used. That would be the  
6 constitutional requirement for every supervising  
7 prosecutor in the land.

8 MR. ROSENKRANZ: Not necessarily, Your  
9 Honor. First of all, Giglio imposes the -- or puts the  
10 district attorneys on notice as to what they ought to be  
11 doing. But the constitutional requirement would be when  
12 you were aware of strong warnings of this bizarre  
13 atmosphere in which jailhouse confessions are being used  
14 in this way, and you are aware that lawyers on one side  
15 of the office don't know what lawyers on the other side  
16 of the office are doing, then, yes, you are deliberately  
17 indifferent to the constitutional violations.

18 CHIEF JUSTICE ROBERTS: I was surprised by  
19 your answer to Justice Stevens's hypothetical, because I  
20 thought it undermines your case. You said that you  
21 don't have to show that the data system is  
22 unconstitutional. You just have to show that it caused  
23 a constitutional violation. But it would cause a  
24 constitutional violation as applied in a particular  
25 case. And you would object to it in that case, and

1 perhaps all this data sharing information system would  
2 be very good evidence in that case. Look, he didn't  
3 turn over this document. The reason he didn't turn it  
4 over is because they've got a policy of not giving them  
5 the document. But your objection would have to be based  
6 in a particular case. And we have already held that in  
7 that case there is absolute immunity.

8 MR. ROSENKRANZ: Yes, Your Honor, and that  
9 is true of almost every prosecutorial immunity case.  
10 The injury almost always happens when the lapse  
11 materializes in injury in the courtroom.

12 CHIEF JUSTICE ROBERTS: Exactly. Now,  
13 doesn't that just confirm the concern that has been  
14 expressed that all you're doing is circumventing the  
15 absolute immunity we recognized at trial.

16 MR. ROSENKRANZ: No, Your Honor, not any  
17 more --

18 CHIEF JUSTICE ROBERTS: Even though the data  
19 system, as you've said, doesn't cause a constitutional  
20 violation. It's the application of it at trial. Now, I  
21 know that's immune. You say, well, I'm going to get  
22 around it.

23 MR. ROSENKRANZ: Well, not any more, Your  
24 Honor, than Buckley or Burns were circumnavigating  
25 around Imbler. I mean in those cases, the

1 constitutional violations -- excuse me -- the acts that  
2 were being challenged were fabricating evidence. Why?  
3 The only purpose for fabricating the evidence was to  
4 produce it in the courtroom. Giving legal advice to  
5 extract a confession in a particular way. Why? The  
6 only purpose was to use that in the courtroom.

7 CHIEF JUSTICE ROBERTS: But you began this  
8 dialogue by suggesting that you don't -- I am saying --  
9 you don't have to prove that what you are complaining  
10 about causes a -- is a constitutional violation. You  
11 just have to prove that it causes a Constitutional  
12 violation.

13 MR. ROSENKRANZ: Right, Your Honor.

14 CHIEF JUSTICE ROBERTS: In all the examples  
15 you just gave me, it seems to me the allegation would be  
16 that --

17 MR. ROSENKRANZ: No, not -- under Cedank,  
18 Your Honor, it was not -- it would not be a  
19 constitutional violation to extract a confession from  
20 someone until that confession is used in the courtroom.

21 CHIEF JUSTICE ROBERTS: Well, but that gets  
22 -- it seems to me a fundamental tension in your case.  
23 When you are talking about the conduct, you need to link  
24 it to a particular constitutional violation. The data  
25 system has to be linked. But when you are talking about

1 immunity, you want to say, oh, it has got nothing to do  
2 with the constitutional violation. It's just shuffling  
3 paper.

4 MR. ROSENKRANZ: Well, Your Honor, that's  
5 exactly right. It is because the functional approach --  
6 for purposes of a functional approach, you never look at  
7 the case through the lens of a constitutional violation.  
8 You look at it through the lens of the conduct that's  
9 being challenged. So that's what, for example, this  
10 Court did in Kalina. The constitutional violation  
11 occurred in the courtroom, but the lens that the Court  
12 looked at it through was the specific conduct where this  
13 Court said --

14 JUSTICE STEVENS: But your client's standing  
15 to challenge this whole policy is the fact that he was  
16 the victim of the -- of the use of the policy in a  
17 particular case for which the prosecutor has  
18 absolute immunity.

19 MR. ROSENKRANZ: Yes, Your Honor, and that  
20 is always true in an immunity case. It is always true  
21 that the -- that the injury materializes in the  
22 courtroom. And this Court said in Buckley and in Burns  
23 it is utterly irrelevant where the injury materializes.  
24 What is relevant is whether you have a --

25 JUSTICE STEVENS: But I think you told me

1 earlier that there are no prior cases in which such -- a  
2 person who suffered such an injury can bring an  
3 independent 1983 case challenging the policy at large.

4 MR. ROSENKRANZ: Well, that's correct, Your  
5 Honor, but it's a rare event that gets discovered.

6 Thank you, Your Honor.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.

8 Now, Mr. Coates, you have eight minutes  
9 remaining.

10 REBUTTAL ARGUMENT OF TIMOTHY T. COATES

11 ON BEHALF OF THE PETITIONERS

12 MR. COATES: Thank you, Mr. Chief Justice.

13 I think some of the Court's comments have  
14 underscored the tension in this case that the nature of  
15 the constitutional claim here: That the rights that  
16 were actually violated are the Giglio and Brady rights.  
17 But the function we are talking about is the function of  
18 complying with Brady and Giglio.

19 You can do it in various fashions. Maybe  
20 it's a data base. Maybe it's something else. Maybe in  
21 some cases it's even foreclosing particular witnesses  
22 from testifying because you don't trust them. That is  
23 essentially what the district attorney's policy is now.  
24 It -- it forecloses deputy district attorneys from just,  
25 willy-nilly, using jailhouse informants. They have

1 severe restrictions on what they can do.

2           It's hard to imagine a -- a policy that is  
3 more directed to courtroom behavior than something  
4 that's caveating the discretion of a particular line  
5 prosecutor as to which witnesses they can use.

6           I think what we have here is a  
7 constitutional claim that the tighter they try and draw  
8 not just the causation, but the nature of the obligation  
9 itself is tied to the prosecutorial function. Because  
10 it's part of the prosecutorial function to assure the  
11 disclosure of exculpatory information under Brady and --  
12 and Giglio.

13           And so I would submit that under Imbler this  
14 Court has already held that that conduct by an  
15 individual prosecutor falls squarely within immunity.  
16 And I submit that there is -- there is simply no  
17 distinction for that kind of conduct when it's done in  
18 the courtroom and that kind of conduct when it's done in  
19 advance in all cases by a supervising prosecutor or by a  
20 chief advocate. If the Court has no further questions  
21 --

22           JUSTICE BREYER: I suppose the distinction  
23 he's trying to make maybe -- I'm not sure I've got it  
24 right, but you see there are certain kinds of systems  
25 that maybe administratively an office ought to have.

1 And where it turns out that this is really an  
2 administrative system, a lot of offices do have it, some  
3 don't, but where it was negligent not to have it and the  
4 very presence of it would have prevented the -- the  
5 individual in the courtroom from behaving the way he  
6 did, well, that's a separate kind of a claim. That's an  
7 administrative claim.

8 Just as if, for example, suppose you had no  
9 secretary or assistants. He says, look, everybody  
10 should have secretarial assistance. And if only you had  
11 secretarial assistance, these people would not have  
12 misread everything the way they did or would have gotten  
13 the phone calls or would have done something like that.  
14 That's the kind of line -- so he's trying to draw a line  
15 there between something that is pretty purely  
16 administrative and -- and something that is really  
17 supervisory and training. And he is not saying  
18 supervisory and training. He is saying that was a  
19 separate claim.

20 MR. COATES: Well, I think it's hard for him  
21 to get away from the manner in which he is trying to  
22 characterize it as being just administrative because  
23 it's not information just sitting there in a vacuum.  
24 The key thing is the policy that --

25 JUSTICE BREYER: Training in today's world



1 or he wants to say in that day's world, whatever it was.  
2 They have information systems. They existed, and every  
3 office ought to have them. And now he says I might lose  
4 on that claim; but, nonetheless, it's not the kind of  
5 claim that falls within Imbler. I think that's his  
6 point. I'm not positive. He doesn't have to take my --

7 MR. COATES: I think that is -- that is the  
8 point. But I think our point is that trying to  
9 characterize that as an administrative system strips it  
10 of the -- the meaning for which you are collecting the  
11 data. I mean, according to them, the reason we have the  
12 obligation is because of the prosecutorial obligation  
13 under Giglio and Brady to make sure that exculpatory  
14 information gets out there. So it's -- it's not just  
15 administrative.

16 And I -- I assume if you look at the Ninth  
17 Circuit decision -- and I -- and one of the main focuses  
18 of the Ninth Circuit's decision in the case was not so  
19 much that it was merely administerial. It kind of  
20 reached that conclusion on this notion that decisions  
21 about all cases are different than decisions about a  
22 particular case.

23 And I think our point is that, in looking at  
24 the -- at the function performed here, you can't make  
25 that distinction. That it really -- there really isn't

1 a distinction. That if you are making a decision for  
2 all cases, then you are making a decision for that  
3 particular case.

4 There is no difference from making a policy  
5 in advance and saying everybody has to follow it. And  
6 then, as I mentioned before, the criminal complaint is  
7 filed, and you send out an e-mail saying comply with  
8 Brady, or this is how you comply with Brady. There is  
9 no real difference there.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
11 The case is submitted.

12 (Whereupon, at 12:01 p.m., the case was  
13 submitted.)

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