

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES  
- - - - -x  
DONALD SAUCIER, :  
Petitioner :  
v. : No. 99-1977  
:  
ELLIOT M. KATZ AND :  
IN DEFENSE OF ANIMALS :  
- - - - -x

Washington, D.C.  
Tuesday, March 20, 2001  
The above-entitled matter came on for oral  
argument before the Supreme Court of the United States at  
10:14 a.m.  
APPEARANCES:  
PAUL D. CLEMENT, ESQ., Deputy Solicitor General,  
Department of Justice, Washington, D.C.; on behalf of  
the Petitioner.  
JOHN K. BOYD, ESQ., San Francisco, California; on behalf  
of the Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	PAUL D. CLEMENT, ESQ.	
4	On behalf of Petitioner	3
5	ORAL ARGUMENT OF	
6	JOHN K. BOYD, ESQ.	
7	On behalf of Respondents	26
8	REBUTTAL ARGUMENT OF	
9	PAUL D. CLEMENT, ESQ.	
10	On behalf of Respondents	50
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

P R O C E E D I N G S

(10:14 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument  
now in number 99-1977. Saucier against Katz.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT  
ON BEHALF OF THE PETITIONER

MR. CLEMENT: Mr. Chief Justice, and may it  
please the Court:

Qualified immunity has an important role to play  
in Fourth Amendment unreasonable force cases just as it  
does in Fourth Amendment unreasonable search cases and in  
other constitutional contexts. The decision below  
effectively merged the qualified immunity and Fourth  
Amendment tests in the case of unreasonable force cases.  
The court reasoned that because both tests are framed in  
terms of objective reasonableness, the qualified immunity  
test had nothing to add to the underlying Fourth Amendment  
test. This Court rejected a virtually indistinguishable  
line of reasoning in Anderson against Creighton and with  
good reason.

The Fourth Amendment and qualified immunity  
tests are distinct and serve different purposes. The  
Fourth Amendment test governs primary conduct. It looks  
at the force used and asks whether that force was

1 reasonable. The qualified immunity test by contrast looks  
2 at the preexisting law and asks whether that preexisting  
3 law would have put a reasonable officer on notice that his  
4 or her conduct was unlawful. Qualified immunity thus  
5 recognizes that even competent officers will make  
6 reasonable mistakes and government officials should not be  
7 held personally liable when they make reasonable judgment  
8 calls just because their judgment turns out to be  
9 mistaken.

10 QUESTION: Could you tell me how the test works?  
11 I take it qualified immunity is presented initially to the  
12 trial judge as a basis for dismissing and then if he  
13 rules, is the jury also instructed about qualified  
14 immunity?

15 MR. CLEMENT: Well in many cases, once the case  
16 is -- the issue of qualified immunity is brought before  
17 the judge, the judge can rule on whether there's a  
18 qualified immunity protection in the case and there'll be  
19 no issue that needs to go to the jury in that case.

20 QUESTION: Now suppose he overrules the  
21 qualified immunity defense, does the jury then determine  
22 both qualified immunity and, in this case, whether or not  
23 the force was reasonable?

24 MR. CLEMENT: It would depend on the  
25 circumstances of the case. In some cases, the judge may

1 want to try to isolate the factual issues that are at  
2 stake in the qualified immunity context and just have the  
3 jury focusing on those factual situations.

4 QUESTION: In other words, a bifurcated trial.

5 MR. CLEMENT: Well that may actually end up  
6 being the only issue that jury really needs to focus on.  
7 If I could give you an example, in a recent Tenth Circuit  
8 case called Cruz against City of Laramie, the Tenth  
9 Circuit decided that the use of a hog-tie restraint was  
10 unreasonable when used with an individual who exhibited  
11 signs of diminished capacity. In that same opinion, they  
12 reserved the question about whether that restraint was  
13 unreasonable when used on an individual who did not  
14 exhibit signs of diminished capacity.

15 QUESTION: I mean the reason I'm asking is that,  
16 if the jury hears both questions, I want to know what the  
17 instructions sound like, and whether or not the jury can  
18 make this distinction.

19 MR. CLEMENT: In many cases, I think the jury  
20 will not really, if there's no liability -- I'm sorry, if  
21 there's no issue about injunctive relief, it may just be a  
22 situation where the court can simply decide what the  
23 clearly-established law is and instruct the jury on that  
24 clearly-established law and then the jury can make its  
25 determination.

1                   To pick up the example from the Tenth Circuit  
2 case, if in a subsequent decision, the Tenth Circuit  
3 extended its rule and applied the rule to all individuals,  
4 saying the hog-tie restraint is never reasonable, I think  
5 because the court had previously expressly reserved the  
6 question of whether the hog-tie restraint was reasonable  
7 when applied to an individual who did not exhibit signs of  
8 diminished capacity. In that case, the issue for the jury  
9 would be whether or not the individual who was arrested  
10 exhibited signs of diminished capacity and that would  
11 really be the only issue the jury needed to decide because  
12 if the individual had exhibited signs of diminished  
13 capacity, under the court's prior decision in Cruz, that  
14 -- that conduct would be not only unlawful but clearly  
15 established.

16                   On the other hand, if the jury decided that the  
17 individual had not exhibited signs of diminished capacity,  
18 then in that instance, although the conduct was unlawful,  
19 by virtue of this hypothetical second decision, the  
20 conduct would not be clearly established and there'd be no  
21 liability in that situation.

22                   QUESTION: So you're saying the only situation  
23 in which the two increase in effect will be exactly the  
24 same, is the situation in which the general standard has,  
25 by course of judicial decision, been reduced down to a

1 kind of pinpoint specific rule for certain cases, e.g.,  
2 hog-tie cases. And in the case in which immunity is  
3 claimed, the facts in that case are precisely duplicative  
4 of the facts, which have been found to result in this  
5 pinpoint rule. That's the only I case, I take it on your  
6 view, in which the two increase will, in effect, reach  
7 precisely the same result necessarily.

8 MR. CLEMENT: I disagree. I think that in  
9 Anderson against Creighton itself, this Court noted that  
10 there's not a requirement that the previous case law be on  
11 all four --

12 QUESTION: Oh, I'm not saying that there is a  
13 requirement, but I'm saying that, if in fact the previous  
14 case law has got to the pinpoint stage and the facts  
15 claimed by way of defense precisely fall within that  
16 pinpoint, then the two increase will not be different, but  
17 that's the only case I take in which that will be true on  
18 your view.

19 MR. CLEMENT: I'm not sure if that's the only  
20 case where that's going to be true. I think there other  
21 cases where the preexisting law, although not showing the  
22 way with pinpoint accuracy, it still provides the officers  
23 with sufficiently clear notice that there's no real rule  
24 for qualified immunity in those particular cases.

25 QUESTION: Mr. Clement, it might help if you

1 gave us, what would be the -- suppose the judge thinks, I  
2 don't want to decide the qualified immunity myself because  
3 I think there's some fact questions involved about what  
4 happened here. So let's take this very case and the judge  
5 wants to charge the jury so they'll understand the  
6 difference between excessive force that violates the  
7 Fourth Amendment and qualified immunity. How would the  
8 judge charge in this very case?

9 MR. CLEMENT: I think the judge in this case  
10 would charge by using the language from this Court's  
11 previous qualified immunity opinions, language from cases  
12 like Malley and Hunter against Bryant and would charge the  
13 jury with finding -- in order to find liability in this  
14 case, the jury would have to find that the individual  
15 officer exhibited -- either was plainly incompetent or  
16 exercised judgment that was outside the range of  
17 professional judgment. I'm not sure it would really be  
18 necessary in a case where the only issue is liability to  
19 really direct the court's attention a great deal to the  
20 liability standard because that issue's going to  
21 effectively drop out of the case.

22 To be sure, the jury may need to be instructed  
23 on what the relevant law of excessive force is, but once  
24 that instruction is put in place as sort a background  
25 instruction then the real question that the jury needs to



1 focus on is the question of whether or not the officer's  
2 conduct was so unreasonable that it put it outside the  
3 range of professional --

4 QUESTION: But the whole thing is going to be  
5 submitted to the jury at one time I take it in a series of  
6 instruction. Now you say, ordinarily the -- something  
7 will drop out of the liability phase, but I didn't quite  
8 follow that.

9 MR. CLEMENT: All I meant by that is that since  
10 there will be no liability imposed in the ordinary case  
11 without a finding that the officer's not entitled to  
12 qualified immunity, it'll be the qualified immunity  
13 question that will really be the ultimate focus of the  
14 jury's attention because that'll determine whether or not  
15 they find sufficient cause to award damages.

16 QUESTION: But if -- then the jury, if a jury  
17 decides that there is not qualified immunity then they  
18 have to go further, do they not?

19 MR. CLEMENT: I don't believe so. No, I'm sorry  
20 you're right. If they do find that there's not qualified  
21 immunity because the conduct was clearly established. I  
22 don't know that they really need to go further because  
23 that perforce will already incorporate the underlying  
24 Fourth Amendment test.

25 QUESTION: But that is what Justice Ginsburg was

1 asking and what I was asking. I'm not sure how the jury  
2 distinguishes between these two tests and you seem to be  
3 telling us they don't have to and that seems to be  
4 inconsistent with your position that there are two tests.

5 MR. CLEMENT: No, all I'm saying is that in the  
6 ordinary case --

7 QUESTION: That's the trouble I'm having and I  
8 think was at the root of Justice Ginsburg's question as  
9 well.

10 MR. CLEMENT: I'm sorry. I think -- perhaps my  
11 focusing on the cases that go to the jury, we're obscuring  
12 the fact that the real virtue of qualified immunity is in  
13 many of these cases, even under the plaintiff's versions  
14 of events, the conduct will not be so clearly  
15 unconstitutional by virtue of higher precedent that the  
16 court can just end there.

17 And after all, as this Court emphasized in  
18 Harlow against Fitzgerald and subsequent cases, the  
19 qualified immunity is not just an immunity from liability,  
20 but it protects the officers from the chilling effect of  
21 the inconvenience of having to stand trial in those  
22 situations where prior decisions have not clearly marked  
23 the individual's conduct as being unlawful.

24 QUESTION: Mr. Clement, in those situations  
25 where there are factual controversies, both questions will

1 have to be submitted to the jury, won't they? I mean  
2 let's say in the present case, if there's a dispute as to  
3 whether more force was used than was necessary, the jury  
4 would have to determine whether more force was used than  
5 was necessary. And then the jury would also be asked, if  
6 that is the case, was that use of excessive force so  
7 obvious? Would it have been so obvious to a reasonable  
8 officer that this officer does not enjoy the qualified  
9 immunity that our cases provide? Wouldn't both questions  
10 have to go the jury?

11 MR. CLEMENT: I think both questions certainly  
12 could go to the jury. It just seems to me that the second  
13 question actually entails the answer to the first. So if  
14 the jury's instructed and finds that the officer's conduct  
15 was so excessive as to put it outside the range of the  
16 conduct of a reasonable officer under the circumstances it  
17 would necessarily entail a finding in liability.

18 And because by hypothesis I'm talking about a  
19 case where all the individual plaintiff seeks is monetary  
20 damages, the court may well have a forum that asks the  
21 court -- the jury to find the liability -- I'm sorry, the  
22 constitutional issue.

23 QUESTION: I see what you mean. You really  
24 don't have to determine the question of whether it  
25 violated the Fourth Amendment so long as you determine

1     that, even it did, this didn't go beyond what a reasonable  
2     officer might have thought was okay.

3             MR. CLEMENT:   That's right.   Nothing will turn  
4     on the underlying constitutional issue because it's --

5             QUESTION:   Justice Scalia may see what you mean,  
6     but I'm not sure I do.   Tell me how the judge charges the  
7     jury with respect -- does he tell the jury, first go to  
8     qualified immunity or first go to constitutional  
9     violation?

10            MR. CLEMENT:   I guess what I'm envisioning is  
11     that the jury would first be instructed on what the law is  
12     of excessive force based largely on this Court's decision  
13     in Graham against Connor.   Then at the end of the  
14     instructions, the Court would focus in on what it is the  
15     jury needs to find in order to find liability and impose  
16     liability on the officer.

17            QUESTION:   Can you give my just a quick sample  
18     instruction rather than this kind of theoretical  
19     description?

20            MR. CLEMENT:   Sure.   I think the instruction, I  
21     mean the instruction that the Government typically uses in  
22     these cases or typically offers in these cases, is based  
23     on this Court's decision in Malley and Hunter against  
24     Bryant and it asks the jury whether or not the officer's  
25     conduct was such that it was plainly incompetent under the

1 circumstances and the use of force was outside the range  
2 of professional and competent judgment. And then the jury  
3 -- that's the question that jury ultimately focuses on.

4 QUESTION: And that's the Fourth Amendment  
5 question?

6 MR. CLEMENT: No, that's the qualified immunity  
7 question because that's what makes the difference between  
8 whether the jury in a specific case imposes damages or  
9 doesn't impose damages.

10 QUESTION: Tell me then, what is the difference  
11 between the Fourth Amendment question and the qualified  
12 immunity question?

13 MR. CLEMENT: The difference is -- well there's  
14 a couple of ways of expressing it, one way to express it  
15 is that the Fourth Amendment test looks only at the  
16 conduct and asks whether the force used was unreasonable.  
17 The qualified immunity test takes a broader look at what  
18 the preexisting law was and asks whether the officer was  
19 on notice that his or conduct violated clearly-established  
20 law.

21 Another way of looking at is that the question  
22 in the first case is simply, looking at what the officer  
23 did, was what the officer did reasonable?

24 QUESTION: Let me ask, in the context of this  
25 very case, the officer sought summary judgment on the

1 qualified immunity issue. Right?

2 MR. CLEMENT: That's correct.

3 QUESTION: Before it had ever gone to trial, to

4 a jury?

5 MR. CLEMENT: That's correct.

6 QUESTION: And the Court denied it.

7 MR. CLEMENT: That's also correct.

8 QUESTION: So in this case, then did that

9 question go to the jury, the qualified immunity issue?

10 MR. CLEMENT: No, I mean -- and I think that

11 raises two important points. First of all, this issue of

12 what issue goes to the jury and how does the underlying

13 Fourth Amendment issue interact with the qualified

14 immunity instruction is not unique to the context of

15 excessive force claims. The same issues are raised by the

16 probable cause and exigent circumstances issues --

17 QUESTION: But, just tell me, what went to the

18 jury?

19 MR. CLEMENT: Nothing.

20 QUESTION: In this case?

21 MR. CLEMENT: Nothing went to the jury, which is

22 the second point, which is this would be a particularly

23 poor vehicle --

24 QUESTION: All right. Your point is -- excuse

25 me, your point I take it is that in your view the trial

1 judge should have granted summary judgment to the officer,  
2 is that it?

3 MR. CLEMENT: That's exactly right.

4 QUESTION: And so we don't get beyond all these  
5 other things. In your view the error was in denying  
6 summary judgment on qualified immunity?

7 MR. CLEMENT: That's exactly right.

8 QUESTION: Now was there a factual component to  
9 that issue that makes it impossible for the trial judge to  
10 determine or could there be?

11 MR. CLEMENT: Certainly not in our view. I  
12 mean, our view you can take every fact in this case in the  
13 light most favorable to the plaintiff and the proper  
14 analysis should still be that the Petitioner was entitled  
15 to qualified immunity. And the Court of Appeals below  
16 simply refused to undertake that analysis because they  
17 thought the two standards were effectively merged.

18 QUESTION: It's that last bit. Sorry, that last  
19 bit that I'm confused on, why isn't it the same standard?  
20 I was just listening to the answer and I agree that in  
21 Anderson v. Creighton it isn't, but in Anderson v.  
22 Creighton the underlying constitutional standard is what  
23 society thinks is reasonable, basically. Here the  
24 underlying constitutional standard is what an officer  
25 thinks is reasonable and since it's what a reasonable

1 officer thinks is excessive, they become the same  
2 standard. That's just a coincidence, but it happens to be  
3 so.

4 That is, I don't see how -- think of an example.  
5 Can you think of a single example in which you're prepared  
6 to say it is excessive force. It is excessive force,  
7 i.e., an officer, a reasonable officer would have known it  
8 is excessive because otherwise it isn't excessive force.  
9 And you're prepared to say it is excessive force, but  
10 you'd also say he has qualified immunity, i.e., a  
11 reasonable officer couldn't have been expected to know it  
12 was excessive. That's logically impossible.

13 MR. CLEMENT: With all respect, I --

14 QUESTION: Now so give me an example as a test,  
15 as a test.

16 MR. CLEMENT: First of all, an example would be  
17 in the Tenth Circuit situation where the court finds in  
18 the same case that the hog-tie restraint when applied to  
19 someone who's exhibited signs of diminished capacity is  
20 unreasonable.

21 QUESTION: It is unreasonable, i.e., an officer,  
22 an officer they are saying, a police officer, should have  
23 know that that force was excessive.

24 MR. CLEMENT: No, the should have known aspect  
25 of the test is precisely what qualified immunity adds.



1                   QUESTION: Oh, I didn't understand the  
2 substantive test. I thought the substantive test for  
3 excessive was it is excessive only if a reasonable officer  
4 would have known it was too much force. I thought that  
5 was the substantive test. So what is the substantive  
6 test, if that isn't it?

7                   MR. CLEMENT: The substantive test is whether or  
8 not the use of force under the circumstances was  
9 unreasonable. The should have known aspect --

10                  QUESTION: And if a reasonable officer, if a  
11 reasonable officer, looking at the situation would have  
12 thought it was not unreasonable, then is it excessive?

13                  MR. CLEMENT: The reasonableness test is taken  
14 from the perspective of the reasonable officer and it  
15 grants the officer deference and allows for reasonable  
16 mistakes of fact. What it doesn't allow for is reasonable  
17 mistakes of law. If the officer's in a position where  
18 he's confronted with a situation and he makes a factual  
19 mistake. He thinks the suspect is resisting arrest, but  
20 he's really not. The Graham against Connor standard takes  
21 the perspective of the reasonable officer and grants  
22 deference to the officer.

23                  But in a situation where there's no question.  
24 The person wasn't resisting and the court announces a rule  
25 that says that, absent that kind of resistance, the use of

1 force in this case is unreasonable. The officer may still  
2 be entitled to qualified immunity, if the prior law did  
3 not put the individual officer on notice that that use of  
4 force under the circumstances, was unreasonable.

5 QUESTION: That simply means I think that, if  
6 you have a very general -- if your Fourth Amendment  
7 standard has never been rendered anything but general in  
8 formulation, then there is a greater possibility, there is  
9 a possibility for disagreement about the application of  
10 that standard to specific fact circumstances. And so  
11 isn't the relationship between the two inquiries this, if  
12 the first standard, the Fourth Amendment standard has  
13 never been stated by the courts, except in general terms,  
14 then probably there will be room for some reasonable  
15 disagreement about its application.

16 You're saying in this case the Graham and Connor  
17 standard is at a pretty high level of generality and  
18 therefore you can charge a jury on the Graham and Connor  
19 standard and they'll decide whether in their judgment the  
20 officer's conduct was or was not reasonable. But they  
21 will also have a second question and that is to say, was  
22 the Graham and Connor standard so clear in its application  
23 that a reasonable officer might have come out differently  
24 from the way you did. Is that the relationship between  
25 the two?

1                   MR. CLEMENT: That is the relationship, but I  
2 would hesitate to add that it's not limited to the jury  
3 situation and I think that same difference allows the  
4 Court --

5                   QUESTION: I'm sure, I'm sure. Yes, yes.

6                   MR. CLEMENT: And we submit this is an  
7 appropriate case to resolve even before the jury that the  
8 facts and circumstances of this case, even if they  
9 constitute a Fourth Amendment violation, which I think is  
10 a reasonable question under the facts of this case, they  
11 nonetheless were not so clearly established that the  
12 officer was on notice and qualified immunity is  
13 appropriate.

14                  QUESTION: You'd have to say that you think  
15 there's a reasonable question whether they constitute a  
16 Fourth Amendment violation in this case. If there weren't  
17 a reasonable question whether they constituted a Fourth  
18 Amendment violation, you wouldn't have any immunity claim,  
19 would you?

20                  MR. CLEMENT: I think that's right. I mean  
21 there may be situations where the claim is fairly well-  
22 decided, but there's some reason why a reasonable officer  
23 would be entitled to rely on the prior law. I mean, the  
24 example of a case where the court previously expressly  
25 reserves the question, even if in a subsequent case, the

1 Government doesn't have a great argument why the court  
2 shouldn't extend the rule, I think it would still be  
3 appropriate to give the officer qualified immunity under  
4 that --

5 QUESTION: May I ask you a yes or no question,  
6 to make sure I understand your response to the Chief  
7 Justice earlier. Assume there's a question of fact that  
8 made it improper to resolve -- for the judge to resolve  
9 the qualified immunity issue. He thought he would have to  
10 submit that to the jury. When the case is tried at the  
11 jury, would the judge instruct on both the liability issue  
12 and the qualified immunity issue or only on one, in your  
13 view?

14 MR. CLEMENT: It would depend on the  
15 circumstances.

16 QUESTION: In this case.

17 MR. CLEMENT: I wish I could give you a clean  
18 answer.

19 QUESTION: This very case.

20 MR. CLEMENT: In this very case, it's a little  
21 hard to apply those principles. If I could back away to  
22 the -- in the Tenth Circuit example, if the only issue is  
23 whether the individual has exhibited diminished city --

24 QUESTION: I don't want to talk about the Tenth  
25 Circuit case. I'm interested in this case.

1                   MR. CLEMENT: Well in this case, it's a little  
2 hard to understand what the Ninth Circuit's reasoning was  
3 why there was a violation here.

4                   QUESTION: My question is, assuming there's a  
5 question of fact that would decide the qualified immunity  
6 issue in this very case, which officer pushed him in the  
7 truck or something like and you have to have jury trial on  
8 the qualified immunity issue. My question is, would the  
9 jury be instructed on both qualified immunity and  
10 liability or on just one of the two?

11                  MR. CLEMENT: I think they would be instructed  
12 on both, but I think they would ultimately only be asked  
13 to decide the ultimate qualified immunity test because  
14 there's really --

15                  QUESTION: They're given an instruction on an  
16 issue they're not asked to decide?

17                  MR. CLEMENT: I think that's right. I think  
18 that the instruction on the given law of the Fourth  
19 Amendment would be necessary background information for  
20 the jury to make its decision, but I'm not sure there  
21 would be any real purpose served by having the jury say,  
22 yes there was a Fourth Amendment violation. Certainly a  
23 judge could ask that question, but where the rubber meets  
24 the road in these cases is whether or not there's  
25 qualified immunity because that will determine whether the

1 plaintiff has --

2 QUESTION: Mr. Clement, your -- you raise -- the  
3 Government raises two questions in its petition for  
4 certiorari and the second one is did the Court of Appeals  
5 err in concluding on the basis facts noted that the  
6 defendant's use of force in arresting this particular  
7 plaintiff, are you going to get to that?

8 MR. CLEMENT: I'll get to that right now. I  
9 think one way to focus on this case is, if the Court of  
10 Appeals had done the proper analysis, how would they have  
11 defined the Fourth Amendment violation in this case? It  
12 seems to us that one of the things they would have focused  
13 on is the failure of these officers to announce their  
14 intention to take Mr. Katz out before they actually  
15 grabbed him and took him out of the area. Now that kind  
16 of speak first or warning requirement, at least in a  
17 nondeadly-force context, seems to us to be a new rule or  
18 something that's certainly not clearly established on  
19 which a reasonable officer would be on notice of.

20 If the Court of Appeals had approached it that  
21 way, focused in on that as being the key factor that made  
22 the actions of the officers here unreasonable then we  
23 could very legitimately ask the question, was that clearly  
24 established? And our position would be of course not. But  
25 other people could take a different view.

1                   QUESTION:  Would you mind walking us through how  
2   you think this Court should resolve this case?  I just  
3   still don't understand.  We have these issues here, would  
4   you walk us through what you think we should do in light  
5   of this record and this case?

6                   MR. CLEMENT:  Absolutely.  I think the first  
7   thing to recognize is the Ninth Circuit took an extreme  
8   view, that qualified immunity is never appropriate in  
9   excessive force cases.  The first and most important thing  
10  this Court can do is to disabuse the Ninth Circuit of that  
11  notion.  Then applying the principles to this case, it  
12  could usefully decide whether or not there's qualified  
13  immunity in this case.

14                  In doing so, it could very well follow the  
15  reasoning that I just outlined which is to say what would  
16  make this case an example of excessive force, if anything,  
17  must be this failure to warn first.  Now, the Ninth  
18  Circuit -- this Court can either decide that issue if it's  
19  liked or just kind of, for purposes of the annunciation of  
20  the rule, assume it, but then it could say that principle  
21  is not clearly established.  If possible, I'd to reserve  
22  the remaining to time for follow-up.

23                  QUESTION:  I'd like to go back to Justice  
24  O'Connor's question because I'm trying slowly to write  
25  down what you think the steps are and what I have written

1 down is I have three basic steps for a judge in an  
2 appellate court hearing this, say as it was or before the  
3 trial or a trial judge. Step one is, judge take the facts  
4 as the plaintiff asserts them insofar as they survive  
5 summary judgment. Step two is, ask the following  
6 question, should -- in light of preexisting rule, should a  
7 reasonable officer have believed there was too much force,  
8 in light of preexisting law?

9 MR. CLEMENT: I would stop you there. No, I  
10 would stop you there. The first question is simply to ask  
11 whether on those facts the use of force from the  
12 perspective of a reasonable officer was reasonable. Now if  
13 the court thinks not --

14 QUESTION: Now is there a difference between  
15 what you just said and what I just said? Now listen to  
16 what I'm saying because I want to understand the  
17 difference. I'm saying that the qualified immunity  
18 question in this context is, in light of present law,  
19 should a reasonable officer have thought there was too  
20 much force? Now is that right?

21 MR. CLEMENT: That's a fine statement of the  
22 qualified immunity standard.

23 QUESTION: Good.

24 MR. CLEMENT: What I was focusing on though is  
25 that I think if you really want to address the order that



1 the judge should address the issue. First they should  
2 address the issue of liability because that's what this  
3 Court has said on a number of occasions, including Siegert  
4 against Gilley and --

5 QUESTION: No, but I'm trying to write down. I  
6 only have one more step. So we have the right, we know  
7 what to do with the facts, we know what the qualified  
8 immunity question is, at least my statement of that was  
9 all right. And then I go on to say, by the way, if the  
10 answer to that question is yes, a reasonable officer  
11 should have believed there was too much force, then the  
12 third step is direct a verdict for the plaintiff unless  
13 the underlying facts are in dispute. And if the answer to  
14 that question is no, then direct the verdict for the  
15 defendant.

16 MR. CLEMENT: Unless the underlying facts are in  
17 dispute.

18 QUESTION: No, no. He wins even if the facts  
19 are in dispute if the answer's no, because we've assumed  
20 the plaintiff's facts.

21 MR. CLEMENT: Yeah, that's right. I'm sorry.  
22 Now one thing I want to add though --

23 QUESTION: So now I've proposed the right three  
24 steps. Now that's -- I'm asking -- I'm just trying to  
25 walk it through and maybe you don't want to answer because

1 I understand it's very complicated and you may have had a  
2 different way of looking at it.

3 MR. CLEMENT: Yeah, and all I want to emphasize  
4 is I think that misses the Fourth Amendment step that this  
5 Court has said has to proceed the qualified immunity test  
6 and it's helpful to establish what the qualified immunity  
7 violation is because that's helpful in identifying whether  
8 or not the officers had fair notice that that Fourth  
9 Amendment principle actually applied.

10 QUESTION: Very well, Mr. Clement. Mr. Boyd  
11 we'll hear from you.

12 ORAL ARGUMENT OF JOHN K. BOYD  
13 ON BEHALF OF THE RESPONDENTS

14 MR. BOYD: Mr. Chief Justice, may it please the  
15 Court:

16 I would like to walk this Court through the  
17 process and the steps so that there's an understanding of  
18 how Anderson and Graham are being used effectively now in  
19 the trial courts in order to weed out insubstantial cases  
20 and to have the jurors decide these issues in a way that  
21 both the individual's right to a remedy and provides the  
22 insulation that the officers need.

23 Now the starting point is with a motion to  
24 dismiss or a motion for summary judgment and at that point  
25 and I know this both from representing police officers and

1 from representing plaintiffs at trial in the federal trial  
2 courts. The first step is, you move to dismiss on the  
3 defense side and you take out Anderson and you say could  
4 the officer have -- whether the officer could have  
5 reasonably believed that they could use the amount of  
6 force that they did. Anderson sets that straight out.

7 And then the next thing you do is you take  
8 Graham to inform the decision, which is why the opinion is  
9 such a brilliant one, because it provides the specifics.  
10 It provides a three-step test. How severe was the crime?  
11 Was the person armed and dangerous, dangerous to the  
12 police and to the other members of the public and was  
13 there resistance? And so if you take this case for  
14 instance, they claim that Dr. Katz had resisted arrest.  
15 Now if Dr. Katz resisted arrest in this case, Judge  
16 Jensen, a seasoned trial lawyer himself, would have thrown  
17 this case out in an instant using Anderson and using  
18 Graham. He would have said the reasonable officer could  
19 believe that because there was resistance, you can use  
20 additional force.

21 QUESTION: Well, wait, additional -- I mean  
22 you're describing Graham as though it's just a matrix.  
23 You just put it down and it gives you the answer. It just  
24 mentions those three things as factors. Simply because  
25 there's resistance you can't whack the guy over the head

1 with a sledgehammer. There's still a question of how much  
2 force you can apply and there will always be an issue no  
3 matter how much he was resisting, no matter how violent  
4 the crime was whether you applied too much force. So it  
5 just doesn't give you a straight out answer like that.

6 MR. BOYD: What it does do, Justice Scalia, is  
7 it gives a buffer for the trial court judge to get rid of  
8 an insubstantial case. If someone's engaged in a severe  
9 --

10 QUESTION: Gives you factors, that's all it  
11 gives you. It doesn't tell you what cases can be gotten  
12 rid of. It tells you what factors are relevant, which is  
13 very useful, but I don't see how you can say it gives you  
14 an answer automatically.

15 MR. BOYD: I can tell you that in practice it  
16 gives the trial court judges the language that they need  
17 to be able to eliminate these insubstantial claims, the  
18 claims that are made by someone who's engaged in a serious  
19 crime like a rape or an armed robbery who then comes  
20 around and says, oh, you shouldn't have shot me and then  
21 those cases can easily be moved by the client --

22 QUESTION: Well, what should we do here? You  
23 were going to walk us through.

24 MR. BOYD: Right.

25 QUESTION: There's a videotape here of what

1       happened, is there not?

2               MR. BOYD:   Right, so let's --

3               QUESTION:   You want us to look at the videotape?

4               MR. BOYD:   Yes, Your Honor.

5               QUESTION:   What if we look at the videotape and

6       think that is not excessive force?

7               MR. BOYD:   I would be shocked.

8               QUESTION:   Would you? That's what I thought.

9               QUESTION:   That's what I thought too.

10              QUESTION:   I looked at it as well and I think

11       we're only talking about the person on the left, Mr.

12       Saucier, who didn't even push him.   It was the one on the

13       right, I think Officer Parker, who gave him a little push.

14       So, is that right?   Have I looked at the right person?   I

15       mean, we all I guess have the same question.

16              MR. BOYD:   The testimony that was given by both

17       Parker and Saucier was they both put Dr. Katz into the

18       back of that van and it's the -- the part of it is that if

19       indeed that Dr. Katz was resisting then, yes, that was a

20       fair amount of force to use, but that's the question that

21       has to go back to the trial court here too, is that Dr.

22       Katz said that he was not resisting and when you do look

23       at that video you can see that he was not.

24              QUESTION:   Yes I agree, but I didn't see any

25       force at all used by Mr. Saucier.   Saucier -- it was the

1 one on the right who seemed to give him a little push, but  
2 the one on the left didn't seem to do anything. He just  
3 stood here.

4 MR. BOYD: Your Honor, according to the  
5 testimony of Mr. Saucier there was resistance and so they  
6 had to put their heads up to figure out what to do.

7 QUESTION: Yeah, he probably was talking about  
8 Parker giving him a little push, but is there anything  
9 else you want to say? I mean, if I were to look at the  
10 record and just the picture of the police officer on the  
11 left, did I not see something? Maybe I missed something  
12 or what is it I missed that he did?

13 MR. BOYD: I think that what I would ask you to  
14 look for is what was seen by Judge Jensen and also Judge  
15 Thompson writing for a unanimous court, affirming --

16 QUESTION: Did they look at a different video?

17 MR. BOYD: No, Your Honor. They looked --

18 QUESTION: No, it really didn't show that the  
19 person on the left did anything. I just looked at it  
20 repeatedly and I came away thinking, why are we here?

21 MR. BOYD: Your Honor, because the reason we're  
22 here is that you can tell that there is a gratuitous use  
23 of force by both of them. There was force that was --

24 QUESTION: But I saw no force by the man on the  
25 left insofar as the van was concerned.

1                   MR. BOYD: But they both engaged in the conduct  
2 together and that is their own testimony in their  
3 depositions.

4                   QUESTION: Well, I did not look at the videotape  
5 because I thought we were talking about the standards we  
6 have to use and the videotape was just irrelevant.

7                   QUESTION: Me too. I thought that's why we were  
8 here. I didn't know we were going to resolve it, the  
9 facts here.

10                  MR. BOYD: Yeah, and I -- I actually think the  
11 most important thing -- I don't think that the facts can  
12 be resolved here. I think that the facts need to be  
13 resolved at trial and the most important thing here is to  
14 adopt a standard. And as you asked about the -- and the  
15 Chief Justice as well, asked about what is the standard  
16 and what are the instructions that are supposed to be  
17 given?

18                  The problem here is that what they are asking  
19 for by way of the standard is that not only is the jury to  
20 make the first decision based upon whether or not the  
21 Fourth Amendment was violated and qualified immunity to be  
22 built into that, but thereafter then they're asking for a  
23 second application on the jury instructions.

24                  QUESTION: Well, just at the pretrial stage, it  
25 does seem to me that there's a role for the court that's

1 special in the context of qualified immunity. The court  
2 knows what the law is and has some handle on what a  
3 reasonable police officer should know. That seems to be  
4 more of a legal question than a factual question. I  
5 suppose we could play with it and you could it back to me.  
6 And so it does seem to me at that point at least, the  
7 tests have a different thrust and a different importance  
8 and a different significance.

9 MR. BOYD: At the summary judgment level, yes,  
10 there are two inquiries that are being made both on the  
11 qualified immunity and on the Fourth Amendment and they  
12 are intertwined and they're being made by the trial judge  
13 at that point. The important thing is that the qualified  
14 immunity is not providing for a higher degree of  
15 protection in that, whatever you adopt as your standard at  
16 the summary judgment level is then going to carryover to  
17 the directed verdict level.

18 QUESTION: What do you do about the hog-tie  
19 example that the Government came forward with? You have a  
20 Court of Appeals decision that says you cannot hog-tie a  
21 person with diminished capacity. If the person didn't  
22 have diminished capacity it's another question, we don't  
23 have to get into that. And then this is a police officer  
24 who does use the hog tie but for a person who has no  
25 diminished capacity. Now I would read it to be, you know,



1 an open question whether that is excessive force or not.

2 And suppose that it is finally decided that that  
3 is excessive force. Is that police officer, despite the  
4 fact that the last time around the Court of Appeals  
5 thought it was close enough, it was unwilling to speak to  
6 the question, is that police officer going to be held  
7 liable?

8 MR. BOYD: No, he is not, Your Honor. And the  
9 reason for that is that there will be qualified immunity  
10 because there's no established precedent.

11 QUESTION: Well, I don't think there's any  
12 dispute here then. I don't know why -- you're proposing  
13 the same test that the Government is.

14 MR. BOYD: Well, except that where we depart is,  
15 and when you look at pages 5 and 15 of their reply brief,  
16 you see that they're asking for an additional margin of  
17 protection and that's why -- what's surprising is that  
18 when the Government --

19 QUESTION: Would you -- what's the additional  
20 margin?

21 MR. BOYD: The additional margin is that  
22 typically as in the McNair case what they attempt to do is  
23 that after the jury has returned a verdict, and I've seen  
24 this happen in the Northern District as well in a case  
25 that we won just a year ago, after the verdict comes back

1       then the --

2               QUESTION:  What does the verdict say?  Does the

3       verdict pass on qualified immunity?

4               MR. BOYD:  The verdict is in favor of the

5       plaintiffs after the instructions have been given.

6               QUESTION:  Including qualified immunity?

7               MR. BOYD:  Yes -- no during --

8               QUESTION:  So the jury has made a qualified

9       immunity finding.

10              MR. BOYD:  No, the jury typically under Hunter

11       in this Court, it's been directed that the court makes the

12       qualified immunity.

13              QUESTION:  Okay, so the jury has simply

14       determined whether there is or is not, yes or no, a Fourth

15       Amendment violation?

16              MR. BOYD:  Correct, Your Honor.

17              QUESTION:  Comes back and says, yes there is.

18              MR. BOYD:  Correct.

19              QUESTION:  Now, what happens next?

20              MR. BOYD:  The Government lawyer jumps up and

21       says, thank you, ladies and gentlemen for coming in, but

22       now, Your Honor, I want you to second guess, I want you to

23       reassess this case.  This is exactly what happens.  It's

24       exactly what happened in McNair without even moving under

25       Rule 50 and that's the problematic thing that this Court

1       --

2               QUESTION:  I thought that what he was asking the  
3       judge to do is to determine, based on prior precedent,  
4       whether the jury's verdict in this case was sufficiently  
5       obvious that the officer should have known that the jury  
6       would come to the conclusion it came to.  And if the  
7       answer is, yes, it was sufficiently obviously, this is  
8       right within the zone of unreasonableness, if you will,  
9       that prior cases have established then there's no  
10      qualified immunity.

11             QUESTION:  But -- excuse me, I didn't think this  
12      went to a jury.

13             QUESTION:  No, he's giving us an example of the  
14      jury case.

15             QUESTION:  Oh, I thought we were talking about  
16      this case.

17             MR. BOYD:  No, Your Honor.  This has not gone to  
18      the jury yet.  And then the key question here is, when it  
19      goes back to Judge Jensen and he has to decide and then it  
20      goes to the jury on the issues of fact that are present.  
21      There are issues of fact.  That's what the trial court  
22      judge said and the appellate court.  And when it goes back  
23      is Judge Jensen then going to second guess the jury?  If  
24      they were to return a verdict in this case --

25             QUESTION:  And I am suggesting to you that what

1 I think the defense is asking for is not second guessing  
2 on whether the jury was right or wrong about whether in  
3 its judgment there was a Fourth Amendment violation, but  
4 whether the officers should have anticipated, on the basis  
5 of prior precedent, that the jury would come out the way  
6 it did and if the officer should reasonably have  
7 anticipated that, then there's no qualified immunity. If  
8 the officer need not reasonably have anticipated that,  
9 then there is. Isn't that what the defense is asking for?

10 MR. BOYD: It's unclear what they're asking for,  
11 Your Honor, and what they've said before is that it should  
12 be the court that makes the decision. Now, today they're  
13 talking about jury instructions. And if what they're  
14 asking for is that the jurors are going to be given some  
15 additional instructions on qualified immunity then the  
16 problem is, and this goes back to Justice Kennedy's early  
17 questions, it's totally unworkable at that point.

18 QUESTION: All right. Can we just forget for a  
19 minute, ignore the question whether the jury's going to  
20 find it or the court's going to find it and just get down  
21 to what the standard is, whoever is going to find it must  
22 follow. And forgetting the court/jury dichotomy, what is  
23 the, in your judgment, the Government asking for that it's  
24 not entitled?

25 MR. BOYD: It's asking for -- that -- it really

1 is a procedural secondary review of the decision to be  
2 made by the jury or they're asking for a second set of  
3 jury instructions.

4 QUESTION: See, I don't understand that at all.  
5 I thought it was here on summary judgment and they take  
6 the view, summary judgment should have been given for the  
7 officer. I thought that's where we were. I don't see why  
8 the jury gets into this at all. If you agree with them,  
9 then summary judgment was wrongfully denied to the police  
10 officer, is their view, I think.

11 MR. BOYD: Your Honor, I think this may answer  
12 Justice Souter's question as well, but what we heard from  
13 my brother was that the instruction on the issue of Graham  
14 is not even necessary for them to decide. That was a  
15 response to one of the questions. They may not even reach  
16 that because qualified immunity now is going to provide  
17 for the higher standard. That's what they're looking for  
18 and I think that is contrary to Graham. It would supplant  
19 Graham, it's unnecessary, and it would make it unworkable  
20 in that he jury instructions that would be given would be  
21 -- the way that this works in practice is that the  
22 instructions that they've asked for, and I've seen them,  
23 they ask, after the jury has decided that the officer  
24 acted in objectively unreasonable manner then they ask  
25 whether the officer could have reasonably believed that he

1     could act unreasonably and they expect the jurors to do  
2     this.

3                   QUESTION:  Whether he could reasonably believe  
4     that he could act in a fashion, which has later been found  
5     to be unreasonable.  I mean, you speak as though the line  
6     between reasonable and unreasonable is so clear that  
7     nobody runs the risk of making a foot fault.  I mean,  
8     indeed, sometimes they go over the line unintentionally  
9     and to a slight enough degree that the doctrine of  
10    qualified immunity ought to afford protection.

11                  MR. BOYD:  And do you know when they go over the  
12    line, and I know this from representing them, the  
13    instructions that you use in closing are the ones that are  
14    based on Graham saying a mistake's not enough, no 20/20  
15    hindsight, you don't have to use the least amount of force  
16    necessary, that this is a severe crime, the guy was armed  
17    and dangerous.  You give the officer a break and you're  
18    out of there.

19                  QUESTION:  Well, there have been a lot of  
20    questions from the bench about jury instructions.  
21    Certainly I asked, but this case itself did not go to the  
22    jury.  We're talking about the Ninth Circuit's decision  
23    that says you cannot grant summary judgment to the officer  
24    on the record as we saw it and I take it you defend that  
25    decision.

1 MR. BOYD: Yes.

2 QUESTION:: Therefore, if you're -- if we're

3 simply talking about this particular decision, we don't

4 get to any jury instructions at all.

5 MR. BOYD: No, the only -- the concern though,

6 is that whatever you establish as the summary judgment

7 standard gets carried over to the directed verdict and

8 that's why the decisions that have been made by the Sixth,

9 Seventh, Ninth and D.C. Circuits are so solid is because

10 they take Anderson and Graham and apply them together and

11 that the big mess arises when you try to then put an

12 additional boost on qualified immunity.

13 QUESTION: Okay, but on this particular record,

14 the Vice President is speaking, this guy gets up to the

15 front, raises a banner and he's taken out and put in a

16 van. What's unreasonable about that?

17 MR. BOYD: The part that's unreasonable is the

18 way that he was put into that van if he was not resisting

19 arrest. Certainly there's a question of fact.

20 QUESTION: He was simply pushed? That makes it

21 unreasonable?

22 MR. BOYD: The way that he was pushed by those

23 officers, I think if you were to show it to the people in

24 this room --

25 QUESTION: Excuse me, one officer.

1 QUESTION: Yeah.

2 QUESTION: Yeah.

3 MR. BOYD: Well, Your Honor, the testimony of  
4 both officers is that they both engaged in that conduct  
5 together.

6 QUESTION: Well, I thought you told us we could  
7 look at the videotape, that that was correct. That that  
8 was an actual depiction of what happened.

9 MR. BOYD: Well, this is why you have a disputed  
10 issue of fact. The video shows that Dr. Katz was not  
11 resisting and yet you wouldn't assume that as a fact.  
12 That's a fact for the jury to decide. They will decide  
13 whether --

14 QUESTION: Why don't we assume that, as a fact.

15 MR. BOYD: Because that would be for the jury.  
16 There are things -- for instance, Saucier says that --

17 QUESTION: But in deciding summary judgment on  
18 the qualified immunity issue I would assume we would  
19 assume he wasn't resisting and then go ahead and resolve  
20 the issue.

21 MR. BOYD: Well, both Judge Jensen, who made his  
22 career as a prosecutor and Judge Thompson, who's also a  
23 conservative, seasoned judge, felt that there is a  
24 question of fact that needed to go to the jury.

25 QUESTION: Does that mean that we couldn't find



1 differently?

2 MR. BOYD: Of course, Your Honor, you are the  
3 Supreme Court.

4 QUESTION: And also I assume they are very good  
5 judges. Oh, there a lot of good judges can disagree about  
6 things. I go back to the standard, if it's all right, for  
7 one minute. I might have thought that the Ninth Circuit  
8 used the right standard even though maybe it didn't apply  
9 it correctly, but for the one example that's been raised,  
10 which is the hog-tie case.

11 And in thinking about that, I thought, well,  
12 maybe that's an instance where suddenly the underlying  
13 substantive rule, which I previously thought turns 100  
14 percent on whether the policemen in the field would  
15 reasonably have thought this was too much force or not is  
16 suddenly changed. That is, if you're going to have a set  
17 of practices that define the reasonableness of it, i.e.,  
18 hog tying, diminished capacity, is by law excessive force,  
19 then we do have Anderson/Creighton, then we do have the  
20 Fourth Amendment search and seizure and then the standards  
21 do diverge. Now without the hog tie, if we just have  
22 first standard, they don't diverge. Now is that right?

23 MR. BOYD: I think that's very close, but in  
24 practice the point that I really want to have understood  
25 by this Court that the Ninth Circuit standard is that

1 qualified immunity is alive and well in the Ninth Circuit.

2 QUESTION: But the Ninth Circuit said that  
3 Anderson doesn't apply with respect to excessive force and  
4 I would like to know why that is correct? Just because  
5 you have a reasonable test for excessive force, you also  
6 have a reasonableness test for probable cause. Would a  
7 reasonable officer have believed that a crime was in  
8 progress, for example. They're both reasonableness tests  
9 and in Anderson we say nonetheless you have an antecedent  
10 question of whether there's qualified immunity even though  
11 -- even though it may be determined by the jury that this  
12 was unreasonable, nonetheless an officer would still be  
13 protected if the law was not that clear about what was  
14 reasonable and he can be allowed to go a little bit over  
15 the line. Why is excessive force any different from  
16 probable cause in this regard?

17 And that's the point of the Ninth Circuit:  
18 Anderson doesn't apply.

19 MR. BOYD: But Anderson does apply except it  
20 applies at the same level as the Fourth Amendment. And  
21 the difference, Your Honor, is that with an excessive  
22 force case like this, this is where you're right at the  
23 juncture where physical force is being used by federal  
24 officials against individuals. What you have here are  
25 federal lawyers asking federal judges to make federal

1 officials immune from the Bill of Rights.

2 QUESTION: Mr. Boyd, I think you answered  
3 Justice Scalia's question a second ago and I wanted to  
4 come back to it. You said something a minute ago that  
5 suggested the following to me. You were saying, I think,  
6 that the way the unreasonable or reasonable excessive  
7 force test has been articulated in Graham is that it gives  
8 the officer the benefit of the doubt, you know, none of  
9 the 20/20 hindsight and so on, the guy in the field and  
10 all of that.

11 And I think what you're arguing is that  
12 qualified immunity gives the officer the benefit of the  
13 doubt. It says, if it wasn't clear enough, he gets the  
14 benefit of the doubt. And I think what you're saying is,  
15 in this particular case, in excessive force cases, the  
16 benefit of the doubt is already part of the substantive  
17 test. So it makes no sense to say, after getting the  
18 benefit of the doubt on the substantive standard, you then  
19 get the benefit of the doubt again. Is that your  
20 position?

21 MR. BOYD: Exactly.

22 QUESTION: Okay.

23 QUESTION: If that's right then you say Anderson  
24 -- Anderson doesn't -- it's not so that Anderson doesn't  
25 apply. Anderson applies double.

1 MR. BOYD: Exactly.

2 QUESTION: First thing you ask is the Anderson  
3 test and if the answer to that question is the plaintiff  
4 flunks, he's not only flunked the qualified immunity test,  
5 he's also flunked the substantive test.

6 MR. BOYD: Exactly.

7 QUESTION: Well that's fine, but that still  
8 leaves me the question of why you don't get the same if  
9 you consider that a double benefit? Why is that double  
10 benefit not conferred in the Anderson type case, in the  
11 probable cause type case? It is either, there in fact was  
12 no crime in progress, but a reasonable officer could have  
13 thought that there was a crime in progress. That's the  
14 probable cause test, but then we add on top of that a  
15 qualified immunities test. Now, why don't you decry the  
16 benefit on a benefit in that situation? Maybe Anderson's  
17 wrong, but then you should be asking us to overrule  
18 Anderson. I don't see any difference between the probable  
19 cause test and the excessive force test. Would a  
20 reasonable officer have thought this was excessive force?  
21 Would a reasonable office have thought that there was a  
22 crime in progress? I don't see any double counting in one  
23 case any more than in the other.

24 MR. BOYD: Your Honor, the difference is, here  
25 we have Graham subsequent to Anderson and also I think as

1 Justice Souter pointed out that -- that -- here, and I  
2 think this also part of the crux of it with the excessive  
3 force, is that you're dealing with the actual physical  
4 contact the police come into effect with people. And  
5 Graham has set forth some very specific standards that can  
6 apply where you --

7 QUESTION: They haven't. Graham is a  
8 reasonableness test. That's all it is and it mentions  
9 certain factors that ought to be taken into account and  
10 determining reasonableness. Is it a violent felon? Is he  
11 resisting and so forth? But it's a reasonableness test  
12 just as the probable cause test is.

13 MR. BOYD: And the two together, Graham and  
14 Anderson, are being used in order to provide the police  
15 officers the insulation that they need to be able to carry  
16 on their duties without being unduly timid in the process.

17 QUESTION: Mr. Boyd, may I ask you to tell me  
18 your view on something that Mr. Clement brought up and I  
19 thought in bringing it up he was trying to make this case  
20 a little bit like the hog-tie case. He said the crux of  
21 the excessive force case here was that they didn't give  
22 him notice, some kind of notice, and I didn't understand  
23 that to be your position. I thought that your position  
24 was they didn't need to give him the bum's rush. They  
25 didn't need to push him in. He was elderly, frail and

1     they could have treated him gently.  Now there this  
2     -- they didn't notify him to stop or something part of  
3     your case?

4                 MR. BOYD:  No, it is not, Your Honor.  You're  
5     correct.  That is not part of our case that they should  
6     have given him particularly notice.  It is how they  
7     treated him that raises the question of fact.  And the  
8     important thing here, and this gets to the crux of the  
9     qualified immunity and the interactions with the Fourth  
10    Amendment, is that they are providing the means for the  
11    trial court judges to take care of the insubstantial cases  
12    now and to provide the officers with the insulation they  
13    need while still preserving a remedy.

14                QUESTION:  But that doesn't really answer the  
15    legal point that Justice Souter and Justice Scalia have  
16    asked you about.  Since there's -- in Anderson we say that  
17    the probable cause standard does not answer the question  
18    of qualified immunity, why shouldn't the -- we say the  
19    same thing about unreasonable force.

20                MR. BOYD:  I think primarily, Your Honor,  
21    because with unreasonable force you're dealing with an  
22    area where they're in direct physical contact with the  
23    people.

24                QUESTION:  But why should that make a difference  
25    for Fourth Amendment purposes?

1                   MR. BOYD: Because of the nature of it. This  
2 cuts right to the heart of the intent of the Fourth  
3 Amendment to serve as a check on federal officials and  
4 there's nothing in the Fourth Amendment making a textural  
5 analysis of it that provides for an immunity. And so  
6 there should be one, but it should not be untethered and  
7 so in the excessive force case we have the benefit of  
8 Graham. Graham has left a wonderful legacy. It's been  
9 cited 2,685 times and the reason for that is because it's  
10 working and it's working along with Anderson. And what  
11 they're talking about now is an expansion of the qualified  
12 immunity that would just supplant Graham, unnecessarily  
13 so, and raise Seventh Amendment issues.

14                   QUESTION: But, you know, without Graham we have  
15 the legacy of several centuries of probable cause law,  
16 which gives the policeman the benefit of the doubt. He  
17 doesn't have to be correct about whether there are exigent  
18 circumstances so long as it was a reasonable judgment on  
19 his part and yet on top of that giving him the benefit of  
20 doubt, we also have a separate immunity doctrine. I don't  
21 see why it's any different for excessive force even though  
22 he thought -- even though the force was in fact excessive,  
23 we're going to give the policeman the benefit of the doubt  
24 if a reasonable policeman would not have thought it was  
25 excessive. That already gives him one benefit of the

1     doubt and the Government is arguing just as in Anderson  
2     you give a second benefit of the doubt for immunity so  
3     also in the case. I don't see any difference between the  
4     two. Now maybe Anderson is wrong, but that's a different  
5     issue.

6                 MR. BOYD: No, it's not that Anderson is wrong  
7     it's that Anderson has been incorporated into the Ninth  
8     Circuit standard and Anderson is alive and well. And the  
9     fact is that now, and I see that my five-minute light is  
10    on, and I don't feel that there's a need to try to make  
11    every single point but what's essential here is that  
12    there's no better way to preserve rights than to put them  
13    in writing. And there's no better guardians of written  
14    rights than judges and here in this context, well ought to  
15    remember the words of Justice Marshall saying that if  
16    we're to be a government of laws and not of men that there  
17    must be a remedy for the violation of a constitutional  
18    right. And at the same time we have balance that against  
19    the need to insulate the officers, I recognize that, but  
20    this is a case where judges --

21                QUESTION: May I ask you a question based on  
22    your experience of these cases, how often does the issue  
23    of qualified immunity actually go to the jury, in your  
24    view?

25                MR. BOYD: Almost every time, based upon the



1     uncertainty now that exists in this area and this is where  
2     the Court in its opinion really needs to come out and --

3             QUESTION:  You say in almost every case it goes  
4     to the jury?

5             MR. BOYD:  Well, it depends.  Some of the time  
6     it's going to the jury on two sets of jury instructions.  
7     This is where there's confusion in the Circuits and some  
8     of the time it's going to the jury on Graham and then they  
9     give it to the judge, as in McNair, to apply qualified  
10    immunity after the jury.  And that's when you run into  
11    direct conflict with the Seventh Amendment.  And that's  
12    why the most important thing for this Court to make clear  
13    and why to adopt the Ninth Circuit standard is because it  
14    sets forth a clear workable test so that after the jury  
15    has decided based on jury instructions incorporating both  
16    Anderson and Graham, that then there's no second guessing  
17    by the judge.

18            Because, Your Honors, it's in the -- there are  
19    moments when it's up to the judges to decide to make sure  
20    that the rights are not deteriorating and that's exactly  
21    what's happened here both with Judge Jensen and with Judge  
22    Thompson in the unanimous decision of the Ninth Circuit.  
23    And so we would urge this Court to follow the decisions of  
24    the Sixth, Seventh, Ninth, Tenth and D.C. Circuits that  
25    strike the proper balance between preserving the remedy

1 for the individual and insulating the police officers in  
2 the performance of their duties.

3 With that I have nothing further and I thank  
4 you, Mr. Chief Justice.

5 QUESTION: Thank you, Mr. Boyd. Mr. Clement,  
6 you have three minutes -- or four minutes.

7 REBUTTAL ARGUMENT OF PAUL D. CLEMENT  
8 ON BEHALF OF THE PETITIONER

9 MR. CLEMENT: Thank you, Mr. Chief Justice.  
10 Like to make three points. First for those of you who  
11 have reviewed the videotape, the very fact that this Court  
12 could disagree with Ninth Circuit about whether there was  
13 excessive force used in this case underscores the need for  
14 qualified immunity for officers in the field because  
15 clearly Graham against Connor did not answer every case  
16 and did not provide officers on crystal clear notice of  
17 where the lines were in the excessive-force context.

18 The second point I'd like to make is simply that  
19 jury instruction issues and the question of what goes to  
20 the jury and what the judge should decide, those issues  
21 are not unique to the excessive-force context. Those same  
22 issues arise under probable cause and exigent circumstance  
23 in Anderson against Creighton. And Mr. Boyd's actually  
24 correct that some of the Circuits have taken divergent  
25 views on that. It may be appropriate for the Court

1 eventually to take up that issue, but as Justice O'Connor  
2 has pointed out, this case would be an incredibly poor  
3 vehicle to do so since we're here on summary judgment and  
4 the Ninth Circuit's denial of summary judgment and the  
5 Government's position continues to be that that grant of  
6 -- that denial of summary judgment was inappropriate and  
7 this Court should reverse that.

8           Finally, I want to clarify that despite what may  
9 have been said here it is not accurate to say that the  
10 Ninth Circuit, or at least Graham itself, incorporates the  
11 test of Anderson against Creighton. Graham itself does  
12 allow officers the benefit of the doubt when it comes to  
13 reasonable mistakes of fact. It doesn't grant them the  
14 benefit of the doubt when it comes to reasonable mistakes  
15 of law. And it doesn't incorporate into its  
16 reasonableness test the notion of what the preexisting law  
17 was and it's a good thing that it doesn't because if that  
18 were the case, then the Fourth Amendment law would be  
19 frozen in place.

20           QUESTION: It seems to me that what you're  
21 asking is to say that the police officer is entitled to  
22 know in every case precisely what he must do and I'm not  
23 sure either under qualified immunity and then certainly  
24 under general Fourth Amendment principles we can do that.

25           MR. CLEMENT: I don't think that's what we're

1 asking, with all due respect Justice Kennedy. I think  
2 what we're asking is that the officers be put on fair  
3 warning that their conduct is unlawful. Justice Souter in  
4 an opinion for the Court in United States against Lanier  
5 addressed this issue in the context of 18 U.S.C. 242 and  
6 made clear that what's required in that context, and he  
7 noted that the same rule applies in qualified immunity, is  
8 the officers have fair warning because the principles, the  
9 general principles, have been made specific is the term he  
10 used, by application through prior cases. The Eleventh  
11 Circuit in a case called Lassiter against Alabama A&M  
12 expressed the same concept by saying that what you need is  
13 the prior case law that's materially similar.

14 QUESTION: All right. Well, if the standards  
15 are the same, sometimes by coincidence it could turn out  
16 that the qualified immunity standard and the underlying  
17 substantive standard are the same. And if so, there's  
18 only one question to ask and if not there are obviously  
19 two questions to ask. All right, I thought all they're  
20 arguing is that this and the Ninth Circuit says by  
21 coincidence they happen to be the same.

22 MR. CLEMENT: And that's why I want to insist  
23 --

24 QUESTION: Is that the part you're disagreeing  
25 with? You're saying they're not the same.

1                   MR. CLEMENT: Absolutely. Absolutely, because  
2     Graham against Connor itself does not build in reasonable  
3     mistakes of law or take into account what the preexisting  
4     law was.

5                   QUESTION: Only reasonable mistakes of fact, is  
6     that your point?

7                   MR. CLEMENT: That's exactly right, because if  
8     it were otherwise then the very fact that prior law didn't  
9     put an officer on notice and there was unclarity would  
10    itself mean that the conduct was lawful and then there'd  
11    be no mechanism for the law to provide clarity in the  
12    Fourth Amendment context. It's the same idea as to why  
13    this Court asked lower courts to deal with the liability  
14    -- the constitutional issue first and only the immunity  
15    question second.

16                  The last point I'd like to make is in response  
17    to Justice Ginsburg's question about what the rationale of  
18    the Ninth Circuit below was in a subsequent case decided  
19    last week.

20                  CHIEF JUSTICE REHNQUIST: Thank you. Thank you,  
21    Mr. Clement. The case is submitted.

22                  (Whereupon at 11:14 a.m., the case in the above-  
23    entitled case was submitted.)

24  
25