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P R O C E E D I N G S

(11:18 a.m.)

JUSTICE STEVENS: We'll hear argument now in  
04-1495, Hartman against Moore.

Mr. Kneedler, whenever you're ready, you may  
proceed.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONERS

MR. KNEEDLER: Justice Stevens, and may it  
please the Court:

Respondent alleges in this Bivens action that  
petitioners, who were postal inspectors, caused him to  
be prosecuted in retaliation for activity protected by  
the First Amendment. In order to make out such a  
claim, however, respondent must establish that there  
was no probable cause for the prosecution. That is so  
for three mutually reinforcing reasons.

First, that requirement accords with the  
deference this Court has consistently held in Armstrong  
and other cases must be given to the prosecutorial  
function because that function is core to the executive  
branch's operations and because prosecutorial decision-  
making is ill-suited to judicial second guessing.

Second, that rule accords a -- an important  
objective screen and check against claims of

1     retaliatory prosecution in order to guard against the  
2     chilling effect that would otherwise routinely arise  
3     from inquiry into the subjective motivations of those  
4     involved in the prosecutorial decisionmaking process.

5             And third, that rule is deeply rooted in  
6     history. A claim of First Amendment retaliatory  
7     prosecution is but one species of a claim of malicious  
8     prosecution, and it has long been required that an  
9     essential element of a claim of malicious prosecution  
10    is that the plaintiff show an absence of probable cause  
11    for the prosecution.

12            JUSTICE SOUTER: I'm -- I'm not sure why --  
13    why we should make the classification that you did,  
14    that -- that retaliatory is simply a species of -- of  
15    malicious. I mean, I -- I can see the similarities,  
16    but we've also got an entirely separate First Amendment  
17    value here which just is not part of the -- the  
18    analytical mix when you're talking about malicious  
19    prosecution. So I'm not sure why we should -- we -- we  
20    should classify it as you argue.

21            MR. KNEEDLER: Well, I -- for several  
22    reasons. First of all, the -- the First Amendment --  
23    the alleged First Amendment retaliation describes the  
24    malice, a form of the malice that would arise in --

25            JUSTICE SOUTER: But it's -- it's a peculiar,

1 if you will, a peculiar malice with its own set of  
2 constitutional values, and I don't know of anything  
3 comparable in -- in malicious prosecution generically.

4 MR. KNEEDLER: Well, to be sure, what renders  
5 it malice or wrongful is the First Amendment, but --  
6 but the derivation of -- of the reason for why it's  
7 wrongful does not, I think, detract from the essential  
8 relevance of the tort of malicious prosecution.

9 And if -- if I may add to that, the -- the  
10 reason why the -- the tort of malicious prosecution is  
11 highly relevant here is not simply because on the  
12 malice side of it, but also because it has long been  
13 recognized, beginning with Blackstone before the First  
14 Amendment and the Constitution were even adopted, that  
15 there are critical interests on the other side, not  
16 simply the defendant's interest in avoiding badly  
17 motivated prosecutions, but the important  
18 countervailing public interest of ensuring that  
19 wrongdoers are brought to justice and that those who  
20 have information about it will come forward.

21 And -- and that was recognized by Blackstone  
22 early on and has been recognized consistent --  
23 consistently by this Court in -- in many, many  
24 decisions, including recent cases of this Court  
25 involving immunity issues, which is what we have here,

1 specifically recognizing that the tort of malicious  
2 prosecution is very instructive in deciding how rules  
3 should be applied when a Bivens action or a 1983 action  
4 is brought in the specific context of prosecution.

5 JUSTICE STEVENS: But, of course, here --

6 JUSTICE KENNEDY: Suppose there is probable  
7 cause for a prosecution, but the prosecutors are  
8 extremely busy and they -- they have to select their  
9 cases and they select one in which they bring the  
10 prosecution against the defendant on account of his  
11 speech. Is that a violation of the prosecutorial duty?

12 MR. KNEEDLER: Well, in -- in terms -- in  
13 terms of the responsibilities of the prosecutor, there  
14 --

15 JUSTICE KENNEDY: Yes.

16 MR. KNEEDLER: -- that -- that should not --  
17 that should not be a -- a selection criterion in  
18 itself, but it --

19 JUSTICE KENNEDY: I'm -- I'm asking is it a  
20 violation of the prosecutor's professional obligations  
21 and his professional duties?

22 MR. KNEEDLER: Well, I -- I would think  
23 ordinarily yes, but with this caveat. Unlike race  
24 which is never relevant to the prosecutorial decision-  
25 making process, there can often be a prosecution -- and

1     this case is one of them -- in which you might have  
2     claims of public corruption.  And -- and in fact, there  
3     was a guilty plea here on the part of a member of the  
4     Postal Service board of directors for receiving  
5     payments to -- for his activity on behalf of  
6     respondent's corporation and others.  This -- this --  
7     involving contracts for \$250 million.  This was a very,  
8     very important procurement by the Post Office  
9     Department and it is understandable that in connection  
10    with that prosecution, the prosecutors and the Postal  
11    Service investigators would look into issues of  
12    respondent's, or people in his behalf, approaching the  
13    Government.

14                 JUSTICE KENNEDY:  Just going back to the  
15    hypothetical, if -- if you acknowledge -- and I think  
16    you must -- that there's a violation of the  
17    prosecutorial duty in -- in the instance I suppose,  
18    then why shouldn't the law recognize it and -- and give  
19    force to that sanction and give force to that rule?

20                 MR. KNEEDLER:  Well, there -- there are  
21    certain restrictions -- certainly restrictions on what  
22    the prosecutor may do, but several points about that.

23                 First of all, this is not a Bivens action  
24    against the prosecutor.  The prosecutor is absolutely  
25    immune from suit.  The prosecutor's decision-making

1 process is -- is, in fact, as is the grand jury's, a --  
2 a critical protection against malicious prosecution --

3 JUSTICE KENNEDY: All right. Well, then  
4 we'll just change the hypothetical to make it the  
5 investigators. The investigators select their case  
6 based on this speech that they consider unwelcome.

7 MR. KNEEDLER: Well, the -- the question is  
8 whether in that circumstance the -- the Bivens  
9 plaintiff, the criminal defendant, has a First  
10 Amendment right to be excused from prosecution or,  
11 after the prosecution is unsuccessful, to bring a civil  
12 action, whether he has a right not to have been  
13 prosecuted in those circumstances notwithstanding the  
14 existence of probable cause and the independent  
15 judgment by the prosecutor.

16 JUSTICE KENNEDY: Well, does he have a right  
17 not to be singled out because of his speech?

18 MR. KNEEDLER: He does -- he does not have a  
19 -- he does not have a First Amendment claim in those  
20 circumstances where there is probable cause for the  
21 violation. The --

22 JUSTICE KENNEDY: I asked does he have a  
23 right not to be singled out because of his speech.

24 MR. KNEEDLER: He does not have a First  
25 Amendment right not to be singled out in those



1 circumstances.

2 JUSTICE KENNEDY: In other words, you -- you  
3 would advise law enforcement officials that they can  
4 single out persons for prosecution based on distasteful  
5 speech.

6 MR. KNEEDLER: I would not. I -- I'm not --  
7 I'm not endorsing the motivation. What I'm -- what I'm  
8 saying is what is --

9 JUSTICE KENNEDY: What I want you to do is to  
10 agree. I -- I think you have to concede there is this  
11 principle in the law, and I think your answer has to be  
12 even though there's that principle, there's a lot of  
13 problems with enforcing it because there are going to  
14 be too many suits, it's hard to -- it's difficult for  
15 the Government to defend, and -- and so forth and so  
16 on.

17 MR. KNEEDLER: Right. I -- I'm not disputing  
18 that it -- that -- that a -- a prosecution should not  
19 be brought or should not be heard --

20 JUSTICE STEVENS: And you're not disputing  
21 either, as I understand it. As the case comes to us,  
22 we assume the prosecution would not have been brought  
23 but for the retaliatory motive.

24 MR. KNEEDLER: I -- it is -- we certainly  
25 disagree with that with our proposition.

1 JUSTICE STEVENS: But don't you assume that  
2 for the purposes of your argument?

3 MR. KNEEDLER: For -- for purposes of our  
4 probable -- probable cause claim, yes.

5 JUSTICE STEVENS: Well, that's the only  
6 argument.

7 MR. KNEEDLER: That -- that is true, but  
8 that, of course, was also true at common law for -- for  
9 malicious prosecution.

10 JUSTICE STEVENS: But the -- one of the  
11 differences -- am I not correct, that at common law the  
12 prosecutor did not have absolute immunity?

13 MR. KNEEDLER: At common law -- at common  
14 law, yes. As this Court has recognized in  
15 reformulating the common law principles of -- of  
16 immunity, the -- the public prosecutor now has absolute  
17 immunity under -- under these --

18 JUSTICE STEVENS: Now does, but not at common  
19 law.

20 MR. KNEEDLER: -- under these Court's --  
21 under this Court's decisions.

22 But at common law, the prosecutor did have  
23 the protection of malicious prosecution, and as  
24 Justice Scalia observed in his concurring opinion in  
25 the Kalina decision, the elements of the tort of

1 prosecution essentially had a built-in qualified  
2 immunity, and the probable cause requirement was  
3 essentially that. It afforded protection for the  
4 prosecutor. The -- the private citizen who -- who --  
5 the complaining witness -- he could not be the subject  
6 of a suit for damages if -- if the charges were  
7 dismissed, not simply upon a showing -- it required  
8 more than simply a showing of malice. It required a  
9 showing of an absence of probable cause for reasons  
10 that are essentially identical to the qualified  
11 immunity and absolute immunity -- the -- the reasons  
12 for qualified and absolute immunity.

13 JUSTICE GINSBURG: Mr. --

14 JUSTICE STEVENS: Well, they're not totally  
15 identical because you didn't have the First Amendment  
16 interest involved in those cases, whereas you do have a  
17 First Amendment interest at stake here.

18 MR. KNEEDLER: But -- but on -- on the -- on  
19 the governmental interest side of the balance, the  
20 interests are exactly the same in both -- in both  
21 circumstances. And that is not to chill -- not -- not  
22 to create circumstances where people would hold back  
23 from coming forward with information of violations of  
24 the law because of fear that they would be sued and  
25 retaliated against afterward. And that hasn't changed

1     now that we have public prosecutors.  It's still  
2     critical.

3             JUSTICE GINSBURG:  Mr. Kneedler, may -- would  
4     you clarify just one point about this probable cause?  
5     There was a grand jury that indicted this man, and then  
6     there was a trial judge who said, I'm throwing this out  
7     at the close of the Government's case.  There is not  
8     enough evidence here to convict this man.

9             Are you saying that as long as the grand jury  
10    indicts, there can be no Bivens claim because in order  
11    to indict, the grand jury would have had to find  
12    probable cause?

13            MR. KNEEDLER:  Well, at -- at common law  
14    on the tort of malicious prosecution, the indictment  
15    created a presumption because an indictment does have  
16    to depend upon probable cause, and under the -- under  
17    this Court's decision in *Gerstein v. Pugh* and other  
18    decisions, that can't be reexamined by the court in the  
19    prosecution.

20            But at common law, the -- the indictment  
21    created a presumption that was subject to rebuttal by  
22    the -- by the civil plaintiff.  There was some  
23    disagreement about what would be necessary, whether you  
24    would have to show fraud on the grand jury or whether  
25    you could just retry --

1 JUSTICE GINSBURG: Well, tell me about now,  
2 not at the common law.

3 MR. KNEEDLER: Yes. We do not -- we do not  
4 think that the existence of the grand -- it has not  
5 been our position that the existence of the indictment  
6 is dispositive and cannot be challenged, but we do  
7 think it --

8 JUSTICE GINSBURG: But the grand jury did  
9 find probable cause. So what would the plaintiff have  
10 to show to overcome -- to -- to negate that finding of  
11 probable cause?

12 MR. KNEEDLER: We -- we think in a -- in a --  
13 it would have to show by at least a preponderance of  
14 the evidence, maybe a clear showing, that there was not  
15 probable cause. And I think that also ties in to the  
16 -- to the standard for qualified immunity, which is  
17 could a reasonable person in those circumstances have  
18 believed that there was probable cause. I think, if  
19 the grand jury returns an indictment, that that should  
20 be pretty persuasive evidence but not compelling  
21 evidence -- I mean, not dispositive evidence that there  
22 was probable cause.

23 JUSTICE O'CONNOR: The case that comes  
24 closest, as far as I can see, is probably United States  
25 v. Armstrong, and in that case, this Court said in the

1     ordinary case, so long as the prosecutor has probable  
2     cause to believe the offense was committed, the  
3     decision to prosecute or go before a grand jury rests  
4     entirely in his discretion. But, of course, the  
5     discretion is subject to constitutional constraints,  
6     the equal protection component of the Due Process  
7     Clause. The decision whether to prosecute may not be  
8     based on an unjustifiable standard such as race,  
9     religion, or other arbitrary classification. And the  
10    standard the Court articulated there was the defendant  
11    must present clear evidence --

12               MR. KNEEDLER: Yes, clear evidence, and the  
13    Court stressed that it was a --

14               JUSTICE O'CONNOR: -- to the contrary. Now,  
15    that's different from your proposition of probable  
16    cause.

17               MR. KNEEDLER: Well, I -- I think several  
18    things may explain that.

19               In Armstrong, that was a claim of selective  
20    prosecution that was brought --

21               JUSTICE O'CONNOR: Based on race.

22               MR. KNEEDLER: Based on race. That was one  
23    of the distinctions I was going to point to. And  
24    secondly --

25               JUSTICE O'CONNOR: So why should that be

1 different than the First Amendment violation?

2 MR. KNEEDLER: Well, as -- as this Court's  
3 decision in -- in Johnson, for example, shows, there --  
4 distinctions based on race are subject to strict  
5 scrutiny no matter what the context, in that case even  
6 in the prison context, whereas First Amendment claims  
7 often take account of the context in which they are  
8 raised. For example, this Court in the American-Arab  
9 Anti-Discrimination case held that there would -- could  
10 be no claim at all of selective prosecution in the  
11 immigration context because of the important  
12 countervailing interest in enforcing the law.

13 JUSTICE SCALIA: But you're willing to  
14 acknowledge -- and -- and the Government concedes that  
15 you can have a different standard when the -- the basis  
16 for the selective prosecution happens to violate the  
17 Constitution from the standard you apply where the  
18 basis for the selective prosecution doesn't violate the  
19 Constitution, such as I'm prosecuting him because he  
20 was mean to my brother-in-law. Okay?

21 MR. KNEEDLER: No.

22 JUSTICE SCALIA: Are you going to apply a  
23 different standard there than you would apply where --  
24 where the reason is some First Amendment reason?

25 MR. KNEEDLER: Well, no. The -- the other

1 distinction -- and -- and I'm not sure if this goes to  
2 your point or not. The other distinction is that in  
3 Armstrong the claim was made in the criminal  
4 prosecution itself. Here, the claim is the civil  
5 action after the criminal prosecution is over with, and  
6 it's in that -- in that context especially that the  
7 analogy to malicious prosecution is very strong and why  
8 the element of -- that the person has to -- that the --  
9 there has to have been a favorable termination for the  
10 -- for the plaintiff and there has to be a probable cause.

11 JUSTICE STEVENS: But that doesn't --

12 JUSTICE SCALIA: But would you answer my  
13 question?

14 JUSTICE STEVENS: Yes.

15 MR. KNEEDLER: I'm -- I'm not sure that I --  
16 maybe -- I guess I --

17 JUSTICE SCALIA: It's going to be a different  
18 criterion -- you -- you say it's going to be different  
19 for the First Amendment and the -- and -- and the Equal  
20 Protection Clause, at least where race is involved.  
21 What if there's no constitutional violation at all, but  
22 I just selectively prosecute him just because I don't  
23 like this guy or because he was mean to a relative of  
24 mine?

25 MR. KNEEDLER: No, I don't -- I don't --



1 JUSTICE SCALIA: Is there going to be a  
2 different standard --

3 MR. KNEEDLER: No. There -- there wouldn't  
4 be any -- any constitutional claim and any -- any  
5 common law --

6 JUSTICE SCALIA: Exactly, and would you apply  
7 a different standard because there isn't a  
8 constitutional claim?

9 MR. KNEEDLER: No. There wouldn't be any  
10 claim at all. I mean, there wouldn't be any basis for  
11 a claim.

12 JUSTICE STEVENS: -- a malicious prosecution  
13 claim. You'd have a malicious prosecution claim.

14 MR. KNEEDLER: There -- there -- and in the  
15 -- in the Federal sphere, if there was a malicious -- a  
16 common law malicious prosecution claim, that would have  
17 to be brought under the Federal Tort Claims Act against  
18 the United States.

19 JUSTICE STEVENS: But, Mr. Kneedler, I  
20 understand your argument to be they should be treated  
21 just like a malicious prosecution claim, which is no  
22 distinction between a constitutional basis and a common  
23 -- and just that he hated his brother-in-law. I think  
24 you're saying they're the same. That's what I  
25 understand Justice Scalia to be asking you.

1 JUSTICE SCALIA: That's what I'm asking.

2 MR. KNEEDLER: Well, yes. I -- I am -- I am  
3 saying that --

4 JUSTICE STEVENS: Which places no weight at  
5 all on the fact the Constitution is involved.

6 MR. KNEEDLER: Oh -- oh, it does because the  
7 -- because the -- the first -- the existence of the  
8 First Amendment claim is what gives you the Bivens  
9 cause of action in the first place. So otherwise,  
10 there wouldn't be any Federal cause of action at all  
11 without -- without the First Amendment claim.

12 JUSTICE STEVENS: That's how you'd get at  
13 least as much protection as if it was an ordinary  
14 malicious prosecution claim, but you don't get any more  
15 under your view.

16 MR. KNEEDLER: No, because -- and -- and  
17 again, this -- this is -- this is because of the -- of  
18 the background of the common law tort of malicious  
19 prosecution, which strikes exactly the balance that I  
20 -- that I'm talking about.

21 JUSTICE BREYER: But you really want three  
22 things. You say we want the protection, number one, of  
23 there -- if you're -- if there's probable cause, that's  
24 the end of it. Number two, if you're trying to show  
25 there wasn't probable cause, you have to bear clear and

1     convincing evidence, and number three, we also have  
2     qualified immunity. And I guess, number four, you have  
3     to prove the whole thing by clear and convincing  
4     evidence.

5             MR. KNEEDLER: Well --

6             JUSTICE BREYER: It sounds a little bit like  
7     the person who has the overcoat, turns up the heat, you  
8     know, five or -- what about one?

9             MR. KNEEDLER: The -- the --

10            JUSTICE BREYER: What about this one? And I  
11     want to know -- you simply say you need clear and  
12     convincing evidence that that was the motive and it  
13     wouldn't have been brought otherwise. And the  
14     existence of probable cause is a strong factor, maybe  
15     even a presumption, that suggests to the contrary.

16            Now, have States and other places tried  
17     things like that without the world collapsing?

18            MR. KNEEDLER: No. My understanding from --  
19     from reading the treatises on -- on malicious  
20     prosecution, for example, that there has been no  
21     watering down of the probable cause requirement because  
22     it is understood to be a critical check against --

23            JUSTICE BREYER: So as far as you know, every  
24     State and every jurisdiction where -- and investigators  
25     if they don't have absolutely immunity, whatever -- in

1 all those jurisdictions, nobody has ever said that even  
2 a constitutional violation, if there's probable cause,  
3 that's the end of it.

4 MR. KNEEDLER: Well, I'm -- I'm focusing on  
5 the tort of malicious prosecution which is --

6 JUSTICE BREYER: Oh, I'm not focusing.

7 MR. KNEEDLER: -- which --

8 JUSTICE BREYER: I want to know --

9 MR. KNEEDLER: Yes.

10 JUSTICE BREYER: -- if --

11 MR. KNEEDLER: I'm not -- I'm not aware --  
12 I'm not aware that any jurisdiction has done that.

13 But in response to your proposal, the -- the  
14 -- what -- what's wrong with that is that it would  
15 allow extensive inquiry, discovery, other inquiry into  
16 the subjective motivations of persons involved in the  
17 decision-making process with no mechanism analogous to  
18 immunity or the -- or the probable cause criterion to  
19 weed out --

20 JUSTICE BREYER: We have no experience. We  
21 don't know. Okay. As your -- as far as you can tell.

22 The other question I have, which you might  
23 want to be brief about, is in looking through this  
24 record, as far as I could see from the briefs, they  
25 went ahead and prosecuted this man with only two pieces

1 of evidence. The first evidence was that he tore some  
2 pages out of his notebook. But he introduced lots of  
3 notebooks to show he always tore pages out when he gave  
4 them to his secretary. And the second was that he told  
5 some witnesses be very careful and answer the question.

6 Now, you know, he said a few other things, but they  
7 all seemed like the kind of things that people would  
8 always say to witnesses.

9 Now, if that's the only evidence, except for  
10 the fact he owns the company, how is there probable  
11 cause here?

12 MR. KNEEDLER: There -- there was much, much  
13 more evidence.

14 JUSTICE BREYER: Well, I didn't see any in  
15 the brief.

16 MR. KNEEDLER: There --

17 JUSTICE BREYER: I saw a lot about other  
18 people in the brief, but not about him.

19 MR. KNEEDLER: Well, for one thing, it's  
20 absolutely conceded that there was a conspiracy. Three  
21 people pleaded guilty, including --

22 JUSTICE BREYER: There are all kinds of  
23 things about other people.

24 MR. KNEEDLER: No, but -- but --

25 JUSTICE BREYER: I didn't --

1                   MR. KNEEDLER:  -- the -- it isn't all about  
2     other people.  The -- the -- that crime included -- and  
3     it's accepted in this case that the Postal Service  
4     board of -- board member accepted 30 percent of the  
5     fees paid by respondent's company to the consulting  
6     firm.  Respondent's company.  He was the chief  
7     executive officer.

8                   JUSTICE BREYER:  I would like you to limit  
9     yourself to what I didn't concede.  I concede it's his  
10    company.  I concede that he tore some pages out of his  
11    notebook, and I concede that he told -- which he did a  
12    lot of times.  And I concede that he told witnesses  
13    answer the question, et cetera.  Now, is there anything  
14    else connecting him, not his company?

15                  MR. KNEEDLER:  Yes.  In -- in the summer of  
16    1984, before there was even a consulting agreement,  
17    there was a series of conversations between Voss, the  
18    postal board -- board member, and respondent, including  
19    one for which there are notes in which Voss said I am  
20    working for you.

21                  There -- there was an -- there is an  
22    abundance of evidence involving Reedy who is -- no.  I  
23    -- I know, but just in -- just in terms of -- just in  
24    terms of the sequence.

25                  There is evidence that Voss and Moore were

1 good friends. Voss said that he had a close  
2 relationship with respondent, and when the contract was  
3 first being negotiated, Reedy acknowledged that Voss  
4 and Moore were good friends. They had a close  
5 relationship. They were not distant.

6 JUSTICE STEVENS: Mr. Kneedler, I know you're  
7 responding to Justice Breyer's question, but I think  
8 for purposes of our decision, we're not supposed to  
9 decide whether there was probable cause or not, but  
10 we're to give you the opportunity to prove there was if  
11 -- if you win on your --

12 MR. KNEEDLER: Yes, although I -- I certainly  
13 do not want to leave the misimpression that -- and  
14 there is -- there is much more.

15 JUSTICE STEVENS: But that's a disputed  
16 issue, and we don't have to decide the probable cause  
17 issue. Is that not correct?

18 MR. KNEEDLER: That -- that -- you do not  
19 have -- you do not have to decide it, but I would  
20 certainly urge the Court not to proceed on the  
21 assumption or make any comments that there is because  
22 there were -- there were --

23 JUSTICE STEVENS: But because the other side  
24 is arguing that even if there is probable cause, the  
25 burden shifts when they prove the retaliatory motive,

1 and you have to prove that you would never -- you made  
2 -- you would have brought the prosecution even if there  
3 had been no retaliatory motive. That's what we're  
4 arguing --

5 MR. KNEEDLER: Right, and that is their  
6 position. And that position accords -- yes, that is  
7 their position. And that accords no particular --

8 JUSTICE STEVENS: And the question I would  
9 ask is why should this be different from a wrongful  
10 discharge case in which there's ample cause to  
11 discharge and the issue boils down to whether or not he  
12 would have been discharged anyway. Why isn't it the  
13 same -- same situation?

14 MR. KNEEDLER: What is very different is that  
15 this is the prosecutorial function. As this Court  
16 recognized in Armstrong, that is a core executive  
17 branch function and it is one that the courts are ill-  
18 suited to second-guess because a whole variety of  
19 determinations can enter into whether to prosecute  
20 somebody, whether they -- whether the particular  
21 conduct -- how culpable the person is, whether the  
22 conduct fits into the overall prosecutorial priorities,  
23 whether there will be cooperating witnesses, what --  
24 what the office's resources are. There are a whole  
25 bunch of -- of judgments that courts are ill-suited to



1 second-guess, and it would be very chilling if the  
2 prosecutor had to --

3 JUSTICE STEVENS: Wouldn't -- wouldn't all  
4 those considerations justify a rule that makes the  
5 burden of proving the retaliatory motive very high,  
6 say, maybe it has to be by clear and convincing  
7 evidence or something like that? But once you have it  
8 acknowledged -- I don't know if they're really  
9 acknowledged here, but there's strong evidence of  
10 retaliatory motive -- why shouldn't the burden shift  
11 just on that, on the basis of that proof?

12 MR. KNEEDLER: Well -- oh, not -- we do not  
13 think there is strong evidence of retaliatory motive.  
14 And I -- I can -- can address that, but --

15 JUSTICE STEVENS: And if you had a --

16 MR. KNEEDLER: -- but --

17 JUSTICE STEVENS: -- if you had a heavy  
18 burden of proof at that stage of the proceeding,  
19 wouldn't that protect the interests that mainly concern  
20 you?

21 MR. KNEEDLER: We -- we think the more direct  
22 -- I don't think so for -- partly for the reason that I  
23 -- that I gave to Justice Breyer is that -- that that  
24 would not protect against discovery and -- and the sort  
25 of chilling inquiry that this Court has recognized in

1 its immunity cases, and especially in the prosecutorial  
2 function where the prosecutor would be required to  
3 disclose. Even though the prosecutor is absolutely  
4 immune, the prosecutor's decision-making process and  
5 his communication with law enforcement agents would --  
6 would be exposed for judicial scrutiny, public scrutiny  
7 in a way that could chill the prosecutorial function.

8 JUSTICE SCALIA: Mr. Kneedler, the defendant  
9 here is not the prosecutor. Right?

10 MR. KNEEDLER: Right.

11 JUSTICE SCALIA: Just someone who provided  
12 information to the prosecutor that -- that was  
13 erroneous and allegedly maliciously motivated.

14 MR. KNEEDLER: I don't think erroneous. It  
15 was allegedly maliciously motivated.

16 JUSTICE SCALIA: Allegedly maliciously  
17 motivated, at least.

18 I don't understand how you would apply the  
19 test, would -- you know, would you have prosecuted  
20 anyway, when -- you know, but for the malicious motive,  
21 when the person you're -- you're suing is not the  
22 prosecutor. It wasn't up to this person whether there  
23 would be a prosecution.

24 MR. KNEEDLER: I think that's a -- I think  
25 that's a very important point, and before a -- a court

1 enters into that, in the end, unknowable question,  
2 maybe a court can -- can, in the end, determine  
3 probabilities, but before a court undertakes that,  
4 which requires looking not simply at the motivation of  
5 the -- of the law enforcement officers, but the  
6 prosecutor and -- and who knows whether the grand jury  
7 would have returned an indictment, and yet a court  
8 certainly couldn't be expected to inquire into that.  
9 Now, so we -- we think that that's another reason why  
10 the probable cause requirement is a critical gateway  
11 before a court is -- is going to enter into that  
12 determination.

13 And all -- and it's important to remember  
14 it's not just proving the question of causation, but  
15 these are people who are several steps removed from the  
16 -- from the prosecutorial decision. And the -- and the  
17 personal liability would be visited on the law  
18 enforcement agents who were doing their job and  
19 cooperating with the U.S. Attorney's Office.

20 This case was -- this case got attention at  
21 the highest levels of the U.S. Attorney's Office. The  
22 U.S. Attorney personally met with the -- the respondent  
23 -- lawyers for respondent.

24 JUSTICE GINSBURG: Mr. Kneedler, the D.C.  
25 Circuit, looking at this case, looking at the record

1     closely, typed it one in which the evidence of  
2     retaliation was strong and probable cause weak. This  
3     is on 28a of the appendix to the petition for cert.  
4     That was the appraisal of the D.C. Circuit panel. And  
5     I think you've been arguing that that is not the case,  
6     but at least for our purposes at this posture, don't we  
7     -- shouldn't we accept that that is the picture here,  
8     weak evidence of probable cause, strong indications of  
9     retaliation?

10           MR. KNEEDLER: I -- I don't -- I don't think  
11     there's any reason to accept that because there's no  
12     factual determinations to that effect.

13           There -- there are really just two snippets  
14     of evidence that are primarily relied upon by the court  
15     of appeals for the view that there was a retaliatory  
16     motive here. And they were -- they were really  
17     observations that the -- that the inspectors made to --  
18     to show -- the first one was why the corporation should  
19     be indicted, not just -- not just Moore, but why the  
20     corporation should be indicted. And it was just an  
21     observation that the corporation, through its agents,  
22     was involved in a lot of activities and should be held  
23     accountable. It was not -- it was not evidence of a --  
24     of a retaliatory motive, and there were subpoenas for  
25     -- for documents about political contributions. But

1 let's remember that this was a case involving bribery  
2 of a public official, and it was -- it was  
3 understandable that the AUSA and the -- and the  
4 inspectors would -- would look to see whether there was  
5 money directed elsewhere.

6 If I may, I'd like to reserve the balance of  
7 my time.

8 JUSTICE STEVENS: Mr. McCartan.

9 ORAL ARGUMENT OF PATRICK F. MCCARTAN

10 ON BEHALF OF THE RESPONDENT

11 MR. MCCARTAN: Justice Stevens, if it please  
12 the Court:

13 If I may, Your Honors, I would like to start  
14 with the very pointed inquiry that Justice Kennedy made  
15 at the opening of the argument here.

16 The petitioners here do not challenge,  
17 because they cannot challenge, as was evident from the  
18 concession made here this morning, that a criminal  
19 prosecution cannot be based upon the exercise of a  
20 constitutional right. What they want is an exception  
21 to that rule, an exception that would mean, despite the  
22 overwhelming evidence of retaliation of record in this  
23 case, there would be no violation of the First  
24 Amendment here and that would treat any prosecution  
25 based solely upon race, religion, or protected speech

1 the same as a tort for malicious prosecution. And to  
2 accomplish this end, what they are trying to do is to  
3 force probable cause as a standard into a framework  
4 where it doesn't belong, where it won't work, and  
5 which, if done here, is going to be contrary to several  
6 existing decisions of this Court.

7 JUSTICE SCALIA: Mr. McCartan, how does --  
8 how does your standard work? The same question I asked  
9 Mr. Kneedler. The -- the test you would propose is  
10 whether but for the retaliatory motive, the prosecution  
11 would have been brought anyway?

12 MR. McCARTAN: That would be the test, Your  
13 Honor, for recovery when the matter goes to trial.

14 JUSTICE SCALIA: Right.

15 MR. McCARTAN: The test that I would propose  
16 is the very test that this Court set forth in Harlow  
17 against Fitzgerald because we're here really on a very  
18 limited issue of qualified immunity. We have to  
19 determine whether the defense of qualified immunity is  
20 available to the petitioners here. The standard, the  
21 proper standard for making that determination was set  
22 forth by this Court in Harlow and it's whether the  
23 conduct alleged --

24 JUSTICE STEVENS: But, Mr. McCartan, I don't  
25 mean to interrupt you, but I thought the primary issue

1       was not the qualified immunity issue, but whether we  
2       have a cause of action in the first place.

3               MR. McCARTAN: Well, Your Honor, whether --  
4       no, I think that the --

5               JUSTICE STEVENS: And on that, they say you  
6       don't have a cause of action unless you're able to  
7       prove an absence of probable cause.

8               MR. McCARTAN: I think what they are saying  
9       is the defense of qualified immunity should be  
10      available if there should be probable cause for the  
11      action that was taken here. I think the case before  
12      the Court is on the very limited issue of whether the  
13      defense of qualified immunity is available to the  
14      petitioners.

15              JUSTICE SCALIA: No. I think they would say  
16      absolute immunity, not qualified. I -- I think they're  
17      saying if there's probable cause, the game is over. No  
18      -- no qualified --

19              MR. McCARTAN: That's exactly what they're  
20      saying, and what I'm saying is that is the wrong  
21      standard to be applying.

22              JUSTICE STEVENS: Well, but there are two  
23      questions in the cert petition and it's the second one  
24      that's the qualified immunity issue, and the first one  
25      is whether there's a cause of action.

1                   MR. McCARTAN: All right. Well, Your Honor,  
2 let -- let me -- let me back up for just a moment then  
3 with respect to that.

4                   Let me say that probable cause is not the  
5 proper standard which should be applied here. The  
6 proper standard is the standard that is set forth by  
7 this Court in Harlow and as refined later in Anderson  
8 against Creighton and a number of other decisions.

9                   JUSTICE SOUTER: But the difficulty I think  
10 we're all having with it is that the qualified immunity  
11 issue and the standard to which you are -- are  
12 advertent responds to a question that doesn't arise  
13 unless we first assume that there is -- that there is a  
14 constitutional violation.

15                  MR. McCARTAN: That's correct.

16                  JUSTICE SOUTER: And our questions are, what  
17 is the standard for determining the constitutional  
18 violation? Once we get that squared away, then we'll  
19 get to Harlow.

20                  MR. McCARTAN: The standard that is to be set  
21 forth to determine whether there is a constitutional  
22 violation is that that this Court applied in Mt.  
23 Healthy City School District against Doyle and in  
24 Crawford-El against Britton, and that is if there is  
25 illegally or unconstitutionally motivated conduct, it



1 will not be excused simply because there may be some  
2 objectively valid basis for taking such action. That  
3 is the conceptual framework that was established in  
4 those cases and which should be applied by way of  
5 analysis.

6 JUSTICE BREYER: If it is applied here, I --  
7 I thought we just granted question one. There were two  
8 in the cert petition. I -- my notes say we just  
9 granted question one. And that means what they have is  
10 the screen. We're going to screen out absolutely any  
11 such claim as yours if there is probable cause.

12 Now, the reason they advance for doing that  
13 is that in the -- a reason is in the absence of a  
14 screen like that, here's what's going to happen. Every  
15 single case -- not every one, but millions of cases or  
16 thousands, anyway -- involving companies -- well,  
17 companies are going to Congress all the time. They  
18 have ads all the time. They run into agency hostility  
19 all the time. The Hell's Angels? That's a pretty  
20 unpopular defendant. They say things all the time that  
21 investigators disagree with. And what will happen is  
22 in a vast number of cases the defendant will decide to  
23 bring a Bivens action, particularly if he gets off, and  
24 then we'll have discovery and we'll look into every  
25 statement that the -- the investigator made to the

1 prosecutor, and before you know it, we have a nightmare  
2 of tort cases. And they say that's unfortunate to cut  
3 off a claim like yours, but after all, the prosecutors  
4 totally cut them off because they have absolute  
5 immunity.

6 Now, we're saying at least let's restrict  
7 them, where investigators are involved, to cases where  
8 it turned out there was no probable cause, otherwise  
9 the criminal process itself will be seriously injured.

10 Now, I take it that's the argument. I'd like  
11 to hear your reply.

12 MR. McCARTAN: That is exactly the argument,  
13 Your Honor, and what it comes down to is whether the  
14 burdens of litigation in a situation of this kind will  
15 justify judicial alteration of the protection of the  
16 First Amendment. And I think that's been very clear  
17 from the outset in the first question Justice Kennedy  
18 asked.

19 JUSTICE BREYER: No, but are you going to --  
20 I mean, is there any light you could shed? And that's  
21 why I asked in my question initially. I thought maybe  
22 there were some jurisdictions somewhere that -- that  
23 survive without the rule they want, but maybe I'm  
24 wrong. And -- and how do I judge this? I would be  
25 concerned. I don't -- the -- after all, these other

1 cases you mentioned are civil tort cases and -- and  
2 they don't involve the criminal process. And when we  
3 get into criminal prosecutions, we have rules on  
4 selective prosecution that are designed to screen out  
5 all but the very worst.

6 MR. McCARTAN: But see --

7 JUSTICE BREYER: And that's what he's arguing  
8 for here.

9 MR. McCARTAN: That's what he's arguing, and  
10 those are not screening mechanisms, Your Honor.  
11 Probable cause was evident and was present in United  
12 States against Armstrong and Wayte against the United  
13 States. It was not deemed by this Court to be a bar to  
14 the selective prosecution claims that were advanced in  
15 that -- in those cases.

16 JUSTICE BREYER: Leaving -- is there anything  
17 you can say before I give up on this? And maybe the  
18 answer is no. Is there anything you can say that would  
19 relieve my concern, which is completely practical at  
20 the moment, that if I decide in your favor, there  
21 suddenly are going to be large numbers of criminal  
22 cases where defendants will say the reason I was  
23 prosecuted was because of something I said? I was  
24 advocating motorcycles. I was advocating beating  
25 people up. I was advocating a congressional change of

1 something. Many, many such cases. They'll all get at  
2 least discovery, and the prosecutor's door will become  
3 open to the world. Now, that's what's concerning. Can  
4 you say anything to relieve that concern?

5 MR. McCARTAN: Yes. I think, first of all,  
6 empirically, Your Honor, there's no evidence to the  
7 effect that Bivens has had that result after 35 years  
8 in full force and effect.

9 JUSTICE O'CONNOR: But if this Court opens  
10 that door, don't you think we might see a different  
11 problem?

12 MR. McCARTAN: I don't think so, Justice  
13 O'Connor. I think if you examine part IV of the  
14 Court's opinion in Crawford-El, there is a very careful  
15 pattern that is set forth as to how cases of this kind  
16 should proceed and what protections are available to  
17 protect Government officials against overly burdensome  
18 litigation.

19 JUSTICE STEVENS: Which opinion was that? I  
20 missed that.

21 MR. McCARTAN: Pardon, Your Honor?

22 JUSTICE STEVENS: Which opinion are you  
23 talking about? I missed it -- missed it.

24 MR. McCARTAN: The opinion in Crawford-El  
25 against Britton.

1 JUSTICE STEVENS: Okay.

2 MR. McCARTAN: There, the Court held that if  
3 there are factually specific allegations that would  
4 indicate a violation of the Constitution, that at that  
5 point the court may consider whether some additional  
6 discovery should be permitted even if there should be  
7 an independently valid basis.

8 JUSTICE SCALIA: This wasn't addressing --  
9 this wasn't -- didn't involve prosecution, though. It  
10 didn't involve unlawful prosecution.

11 MR. McCARTAN: It did not, Your Honor, but it  
12 provides the same --

13 JUSTICE SCALIA: It -- it was a suit against  
14 a prison.

15 MR. McCARTAN: It provides the same framework  
16 for the proper analysis of a claim of this kind.

17 JUSTICE SCALIA: No, but -- but we treat  
18 prosecutions quite differently. We do not give, for  
19 example, absolute immunity to the wardens of prisons as  
20 we give absolute immunity to prosecutors.

21 MR. McCARTAN: That's --

22 JUSTICE SCALIA: This is a specially  
23 dangerous area in which to allow litigation.

24 MR. McCARTAN: It is far less dangerous, Your  
25 Honor, than when this is asserted by way of defense in

1 the middle of an ongoing criminal prosecution. It can  
2 be far more disruptive to allege a violation of  
3 constitutional rights as a defense to a criminal  
4 prosecution, while that prosecution is in progress, and  
5 an effort is made to examine prosecutorial decision-  
6 making than in an after-the-fact, after-acquittal civil  
7 action for damages, such as we have here. You have  
8 already permitted that kind of examination in criminal  
9 cases where probable cause is present.

10 JUSTICE SCALIA: Mr. McCartan, I -- I still  
11 don't entirely understand what you would want the  
12 Government to prove under your system in order to -- in  
13 order to -- to win this case. They would have to prove  
14 what? That -- that --

15 MR. McCARTAN: They would have to prove that  
16 something other than hostility to protected speech was  
17 the reason for the prosecution being advanced.

18 JUSTICE SCALIA: And it would not be enough  
19 to show that the prosecution would have gone forward  
20 anyway.

21 MR. McCARTAN: No. That's -- that's what I  
22 mean. Absent -- if there is an objectively valid basis  
23 --

24 JUSTICE SCALIA: Yes.

25 MR. McCARTAN: -- the Government claims there

1 is an objectively valid basis for the action they  
2 action they would take.

3 JUSTICE SCALIA: Right.

4 MR. McCARTAN: Then if the plaintiff has made  
5 a showing that there was an improper motivation, the  
6 burden shifts to the Government to show that the  
7 prosecution would have proceeded absent the illicit  
8 intent.

9 JUSTICE SCALIA: You see now in -- in the  
10 employment cases where -- where somebody is dismissed  
11 for a -- a racially discriminatory reason and -- and  
12 you have to prove that the same action would have been  
13 taken anyway, you ask the person who fired them with  
14 the discriminatory motive whether that person would  
15 have taken that action anyway. Whereas here, the  
16 person who brought the prosecution is not in this case.

17 It's somebody who gave information to the prosecutor.

18 I don't know how that person could -- could possibly  
19 establish that the prosecution would have been brought  
20 anyway. It wasn't up to him.

21 MR. McCARTAN: Well, as --

22 JUSTICE SCALIA: It had nothing to do with --

23 MR. McCARTAN: -- as -- as you pointed out  
24 earlier, probable cause is not the standard that  
25 governs the investigator's conduct. These

1 investigators procured a prosecution based upon a  
2 violation of the petitioner's -- or excuse me -- the  
3 respondent's constitutional rights.

4 JUSTICE SOUTER: Well, they did, but wouldn't  
5 you have to prove under your standard not that they  
6 would have procured or tried to procure it anyway, but  
7 that in fact the prosecutor would have prosecuted  
8 anyway? In other words, that's the distinction between  
9 the -- the normal case and -- and the case that we're  
10 dealing with here --

11 MR. McCARTAN: No, I --

12 JUSTICE SOUTER: -- with a prosecutor who has  
13 absolute immunity.

14 MR. McCARTAN: Well, the prosecutor has  
15 absolute immunity. There's a qualified immunity here  
16 with respect to the investigators, and that means that  
17 the facts and circumstances of the case are going to  
18 have to determine whether there's liability.

19 JUSTICE SOUTER: No. All right --

20 MR. McCARTAN: The burden would shift once  
21 the illegal motivation is shown. It would shift to the  
22 Government to establish that the prosecution would have  
23 proceeded absent the illicit event.

24 JUSTICE STEVENS: But would it -- would it  
25 have been a complete defense? Suppose the prosecutor,



1     who is immune, gets on the witness stand and says,  
2     well, I know all about this -- the First Amendment  
3     stuff, but I was going to bring this prosecution anyway  
4     because it seemed to me there was a serious crime here.

5     That's all he says.  Wouldn't that be the end of the  
6     case?

7             MR. McCARTAN:  It shouldn't be the end of the  
8     case.  It would be an issue of causation at that  
9     point, Your Honor, if there were evidence.

10            JUSTICE STEVENS:  But -- but the question is  
11    the motivation for his decision to bring the case.

12            MR. McCARTAN:  The motivation for his  
13    decision --

14            JUSTICE STEVENS:  And he says I -- I would  
15    have brought it anyway.

16            MR. McCARTAN:  But in this case, the  
17    prosecutor's decision to bring these charges to the  
18    grand jury I don't think has any probative force  
19    whatsoever.

20            JUSTICE SOUTER:  Why --

21            JUSTICE SCALIA:  Do you think the defendant  
22    can subpoena the prosecutor?

23            MR. McCARTAN:  Of course.

24            JUSTICE SCALIA:  Why?  I thought the  
25    prosecutor had absolute immunity.

1                   MR. McCARTAN: The prosecutor is not a  
2     defendant, Your Honor.

3                   JUSTICE SCALIA: You say he -- he can't be  
4     brought into court to defend his own -- his own  
5     judgment, but he can be brought into court when -- when  
6     an investigator is sued in -- in order to take his  
7     testimony as to what would have happened?

8                   MR. McCARTAN: His testimony was taken in  
9     this case and can be taken in this case because at that  
10    point in these proceedings -- and you have to look at  
11    the evidence of record to this point in this proceeding  
12    -- there is very clear evidence of retaliation as a  
13    motive for this prosecution.

14                  JUSTICE SCALIA: Well, he may have done it  
15    voluntarily here, but I find it hard to believe that he  
16    could be subpoenaed, when -- when he has absolute  
17    immunity from suit against himself, to testify in a  
18    suit against somebody else. It seems to me a very  
19    strange kind of a --

20                  MR. McCARTAN: Your Honor, the fact that he  
21    has absolute immunity does not immunize him from giving  
22    testimony in the case.

23                  JUSTICE BREYER: So he's a witness. Suppose  
24    his testimony --

25                  MR. McCARTAN: He's a -- he's a witness.

1 JUSTICE BREYER: Suppose that the person is  
2 convicted.

3 MR. McCARTAN: Suppose the person is  
4 convicted.

5 JUSTICE BREYER: Yes. Can you bring your  
6 Bivens claim anyway?

7 MR. McCARTAN: Well, Heck against Humphrey I  
8 think would stand in the way of that, Your Honor.

9 JUSTICE BREYER: Really? So that's a -- but  
10 it's not a civil case.

11 MR. McCARTAN: Well, it's not a simple case.

12 JUSTICE BREYER: So you say that if he's  
13 convicted, after all, he may have been convicted but it  
14 may be because of the retaliatory motive.

15 MR. McCARTAN: Well, if he is convicted and a  
16 civil action for damages is then brought --

17 JUSTICE BREYER: Yes.

18 MR. McCARTAN: -- then I think you are in the  
19 framework of Heck against Humphrey --

20 JUSTICE BREYER: All right. So you -- so you  
21 say --

22 MR. McCARTAN: -- where the court --

23 JUSTICE BREYER: -- if he's convicted, that's  
24 the end of it --

25 MR. McCARTAN: No.

1 JUSTICE BREYER: -- whether there was a  
2 retaliatory motive or not.

3 MR. McCARTAN: No. I think it's very  
4 difficult in that case.

5 In Heck against Humphrey, which this Court  
6 viewed as a collateral attack on an outstanding  
7 conviction, the Court held that there had to be a  
8 favorable termination of the criminal proceeding in  
9 order to maintain the civil action for damages under  
10 section 1983.

11 JUSTICE BREYER: Oh, that's 1983.

12 MR. McCARTAN: The Court went on to say,  
13 however, that if the civil damage action would not  
14 necessarily impugn the conviction, that the case could  
15 proceed even though there had not been a favorable  
16 termination, reversal, or expungement --

17 JUSTICE BREYER: All right. So what he does  
18 is he --

19 MR. McCARTAN: -- of the conviction.

20 JUSTICE BREYER: -- he brings his action and  
21 he says here I am 20 years in prison and I agree I'm  
22 guilty, but they never would have prosecuted me without  
23 the fact that they hate the Hell's Angels and they, in  
24 fact, criticize everything that we say.

25 MR. McCARTAN: I don't think that action

1 wouldn't be permitted to proceed.

2 JUSTICE BREYER: Because?

3 MR. McCARTAN: It would be viewed as a  
4 collateral attack on an outstanding conviction.

5 JUSTICE BREYER: No, no. He's saying I was  
6 -- I was guilty, but the -- all right. Anyway --

7 MR. McCARTAN: I -- I don't think --

8 JUSTICE BREYER: I won't force you into that.

9 MR. McCARTAN: -- with all due respect, Your  
10 Honor, that's a real-world example.

11 JUSTICE BREYER: I'll take basically  
12 virtually never if he's convicted. They concede that  
13 you could bring this kind of action if there's no  
14 probable cause. So we're talking about that range  
15 where there was probable cause but acquittal. That's  
16 what we're talking about here.

17 MR. McCARTAN: That's right. And why  
18 probable cause is not the appropriate standard is  
19 because it does not distinguish between what might be  
20 an unconstitutional prosecution -- that is, one based  
21 solely upon race, religion, or protected speech -- and  
22 one that is not. When you look to these earlier cases,  
23 Your Honor, I agree they arose in employment contexts.  
24 They arose in the context of a prison.

25 JUSTICE BREYER: Now, you're -- you're in the

1 cases, but I'm -- I'm trying to pursue this. You've  
2 given me another idea --

3 MR. McCARTAN: Yes.

4 JUSTICE BREYER: -- which is I would like to  
5 say one word about this. I'm sorry to interrupt your  
6 train of thought here, but look.

7 I'm looking for other screens. Is there --  
8 is there -- the particular point that they're worried  
9 about is you say we want to establish the retaliatory  
10 motive. That's what's worrying them because they see,  
11 in that establishment of the retaliatory motive,  
12 discovery, and discovery means you not only talk to the  
13 investigators, but you're also talking to, as a  
14 witness, the prosecutors to find out who said what to  
15 whom in order to see if you could establish that they  
16 didn't like the speech of the defendant. Now, can you  
17 give me any screen, not your case, but any kind of a  
18 screen that will help --

19 MR. McCARTAN: Yes.

20 JUSTICE BREYER: -- weed out the sheep from  
21 the lambs --

22 MR. McCARTAN: And I --

23 JUSTICE BREYER: -- the goats from the sheep  
24 or whatever --

25 MR. McCARTAN: Your Honor --

1 JUSTICE BREYER: -- in that area?

2 MR. McCARTAN: -- I submit the screen is that  
3 set forth by this Court in Harlow, which is an  
4 objective standard and which is whether the conduct  
5 involved violated a clearly established statutory or  
6 constitutional right of which a reasonably prudent law  
7 enforcement officer or Government official should be  
8 aware.

9 That's why I tried to say earlier this  
10 standard that should govern this case is not probable  
11 cause, but the standard set forth by this Court in  
12 Harlow --

13 JUSTICE SOUTER: So the -- the screen, in  
14 effect, is --

15 MR. McCARTAN: And is a screening.

16 JUSTICE SOUTER: -- the qualified immunity  
17 screen.

18 MR. McCARTAN: That's right.

19 And there was no screening mechanism in  
20 United States against Armstrong. The Court made it  
21 very clear that what you were applying there were  
22 ordinary equal protection standards.

23 JUSTICE KENNEDY: Have there been cases where  
24 in the context of the prosecution, there's been a  
25 motion to dismiss the prosecution because it was

1 brought in retaliation for the exercise of the First  
2 Amendment right?

3 MR. McCARTAN: This Court has not decided  
4 what the proper remedy would be there, Your Honor. And  
5 the cases --

6 JUSTICE KENNEDY: Have there been cases in  
7 the other courts?

8 MR. McCARTAN: I'm not aware of any cases  
9 where that has succeeded except at the circuit court  
10 level --

11 JUSTICE STEVENS: No, but it did in the  
12 Armstrong --

13 MR. McCARTAN: -- where the conviction has  
14 been invalidated for that reason.

15 JUSTICE STEVENS: But in the race context, it  
16 is a dismissal of the prosecution itself. Isn't it?

17 MR. McCARTAN: Yes, Your Honor. It might be  
18 the same here.

19 JUSTICE STEVENS: -- with Harlow here.

20 JUSTICE KENNEDY: My -- my question was  
21 directed to the First Amendment.

22 MR. McCARTAN: For the First Amendment. No,  
23 I'm not aware of -- certainly no decisions of this  
24 Court, and I think the only cases arise --

25 JUSTICE SCALIA: Well -- well, surely the



1 prosecution --

2 MR. McCARTAN: -- in the circuit courts of  
3 appeals, Your Honor.

4 JUSTICE SCALIA: Surely the prosecution would  
5 go ahead if there were probable cause. No? No? I  
6 mean, suppose it was brought up during the prosecution.

7 MR. McCARTAN: Well, the question --

8 JUSTICE SCALIA: You mean to say if there was  
9 -- if there was perfect probable cause for the  
10 prosecution, that you can stop the prosecution in its  
11 tracks by -- by an allegation of the First Amendment  
12 violation?

13 MR. McCARTAN: You can move for dismissal of  
14 the charges.

15 But look, as far back as 1886, this Court --  
16 this Court found a violation of the Equal Protection  
17 Clause in a racially motivated prosecution in a  
18 situation where there was clearly probable cause and,  
19 indeed, overwhelming evidence of guilt for violation of  
20 a facially neutral statute. In United States against  
21 Armstrong, the existence of probable cause did not  
22 stand as a bar to the selective prosecution claims.

23 JUSTICE BREYER: But that -- that's true. I  
24 now think we're making some progress. I don't think it  
25 is quite a qualified immunity. I think it's possible

1 and don't -- I'm putting words in your mouth and deny  
2 them if I am. One, he's convicted, no case. Two, no  
3 probable cause, everybody agrees there's a case.  
4 Three, now there is probable cause, but he's acquitted.

5 Okay?

6 MR. McCARTAN: That's this case.

7 JUSTICE BREYER: In that circumstance,  
8 suppose you say we cannot even allow discovery. You  
9 don't even get to discovery on your retaliatory motive  
10 unless you show clearly, question mark, or unless you  
11 show likely, question mark, that the investigator not  
12 only retaliated, but he retaliated under conditions  
13 where any reasonable person would have known that what  
14 he was doing was contrary to the Constitution.

15 MR. McCARTAN: Exactly, Your Honor. That --

16 JUSTICE BREYER: And if you don't show that  
17 as a -- as a threshold, you don't even get discovery.

18 MR. McCARTAN: We don't -- that is exactly  
19 the Harlow standard. That is exactly the standard that  
20 was applied in Crawford-El against Britton as the first  
21 step in the stage of developments in that case.

22 JUSTICE SOUTER: But if you turn the Harlow  
23 standard around -- I mean, you're -- you're making the  
24 -- the negation of the Harlow standard the screening  
25 device --

1 MR. McCARTAN: Exactly.

2 JUSTICE SOUTER: -- in Justice Breyer's

3 example.

4 MR. McCARTAN: Exactly.

5 JUSTICE SOUTER: Yes.

6 MR. McCARTAN: That's the threshold

7 determination in a Bivens action of this kind.

8 JUSTICE SCALIA: Mr. McCartan, what was the

9 1887 case or 1880 --

10 MR. McCARTAN: Yick Wo against Hopkins.

11 JUSTICE KENNEDY: Yick Wo.

12 JUSTICE SCALIA: I thought you said

13 Armstrong.

14 MR. McCARTAN: No, no. Armstrong --

15 JUSTICE KENNEDY: Yick Wo.

16 MR. McCARTAN: -- much more recently, but

17 Yick Wo against Hopkins.

18 JUSTICE SCALIA: I thought it was --

19 JUSTICE KENNEDY: Let -- let me ask you this.

20 Suppose the law enforcement official -- the postal

21 inspectors bring the prosecution to the prosecutor

22 because of their disagreement with his First Amendment

23 views. The prosecutor said, I don't care about the

24 First Amendment views. I'm glad you brought this to

25 me. I'm going to prosecute because there's probable

1       cause here and this is a bad actor.   What results?

2               MR. McCARTAN:   The result is that's a  
3       question of causation, Your Honor, if there is  
4       evidence.

5               JUSTICE KENNEDY:   That's why --

6               MR. McCARTAN:   Yes.   If there is evidence  
7       here with respect to retaliation, then the question of  
8       whether the independent act of the prosecutor somehow  
9       immunizes that conduct is a question of fact for the  
10      trier of fact in the case.   If the action --

11              JUSTICE KENNEDY:   Suppose the prosecutor  
12      said, you shouldn't have brought this to me because you  
13      -- you're -- you're motivated by the First Amendment.  
14      But now that it's here, I have my own independent  
15      interest in going ahead.

16              MR. McCARTAN:   That's the evidence the  
17      Government can bring forward when the burden of proof  
18      shifts upon a showing of an illegal or unconstitutional  
19      motive for bringing the prosecution to begin with.  
20      That's the kind of evidence the Government would  
21      present to show that the prosecution would have taken  
22      effect in any --

23              JUSTICE SOUTER:   And if the burden does shift  
24      that way --

25              MR. McCARTAN:   Exactly.

1 JUSTICE SOUTER: -- wouldn't it be consistent  
2 with the screening mechanism that Justice Breyer  
3 suggested and -- and that you accepted? Wouldn't --  
4 wouldn't the -- the -- when the burden shifts, wouldn't  
5 the obligation be on -- on the point of substance, as  
6 opposed to the point of -- of screening, not to show  
7 that the -- that the prosecutor would have brought the  
8 prosecution anyway, but to show that the investigator  
9 would have acted to procure that prosecution anyway?  
10 So you would have parallel standards.

11 MR. McCARTAN: Exactly.

12 JUSTICE SOUTER: Okay.

13 MR. McCARTAN: Because the prosecutor has  
14 immunity, cannot be a defendant in the case.

15 JUSTICE SOUTER: All right. But just -- I  
16 just want to nail this --

17 MR. McCARTAN: No, absolutely.

18 JUSTICE SOUTER: -- to make sure I understand  
19 it. So you're -- you're modifying your position of a  
20 minute ago in which you said the standard would be  
21 would the prosecution have been brought anyway, and  
22 you're now saying, which I think would be consistent  
23 with your answer to Justice Breyer, the -- the question  
24 is would the investigators have tried to procure the  
25 prosecution anyway. And do I understand you correctly,

1       and -- and have you changed your position?

2               MR. McCARTAN: Well, I think that is a  
3       significant distinction, Your Honor, but I think we  
4       have to establish that they procured the prosecution  
5       and that it did proceed by reasons of the illegal  
6       motivation and not for some independently objective  
7       standard.

8               JUSTICE SCALIA: Right, because the  
9       prosecutor could have gotten a lot of other information  
10      from other people.

11              MR. McCARTAN: Absolutely.

12              JUSTICE SCALIA: And you're not going to  
13      throw out the prosecution just because this one piece  
14      of information was bad.

15              JUSTICE SOUTER: So it's a dual --

16              MR. McCARTAN: Consider too what the facts of  
17      record are here. This prosecutor was a complicit  
18      conduit in this action. He admitted in the presence of  
19      a grand jury witness that he couldn't care less about  
20      the guilt or innocence of these people. He just wanted  
21      a conviction so he could obtain a lucrative position in  
22      private practice. I understand he is still a  
23      prosecutor at this time. But that decision of the  
24      prosecutor, based upon facts of that kind, has no  
25      probative value whatsoever in terms of the independent

1 action that might have broken the chain of causation in  
2 a case of this kind.

3 Nor does the indictment of the grand jury  
4 have any probative value because exculpatory evidence  
5 was withheld from the grand jury. And I think in  
6 determining the value of the grand jury's action, you  
7 have to really determine not only what was presented to  
8 the grand jury, but also what was withheld from  
9 examination.

10 JUSTICE STEVENS: May I go back to one  
11 question Justice O'Connor asked you earlier? To what  
12 extent are there -- is there precedent out there in  
13 other courts that have decided this very issue? Are  
14 there -- is there precedent for what you're asking us  
15 to do?

16 MR. McCARTAN: There -- there is precedent in  
17 the courts of appeals, Your Honor. The cases, I think,  
18 are cited in our brief where prosecutions have been  
19 invalidated based upon violations of constitutional  
20 rights.

21 JUSTICE STEVENS: But a violation of First  
22 Amendment rights or --

23 MR. McCARTAN: First Amendment rights. I  
24 think that is the case. Not cited in our brief. But  
25 there are cases to that effect.

1 JUSTICE STEVENS: And -- and were those cases  
2 in which the prosecution itself was brought to a halt,  
3 or were they post-prosecution damage actions?

4 MR. McCARTAN: Post-prosecution. Not post-  
5 prosecution damage actions but appeals, direct appeals,  
6 to invalidate the conviction --

7 JUSTICE STEVENS: The conviction.

8 MR. McCARTAN: -- based upon the violation --

9 JUSTICE STEVENS: But is there any precedent  
10 for a damage action of this kind?

11 MR. McCARTAN: Well, Bivens is.

12 JUSTICE STEVENS: Well, but not quite.  
13 Bivens isn't exactly like that. This is Fourth  
14 Amendment.

15 So is there -- is there precedent for a  
16 damage action brought on the theory that the  
17 prosecution was brought for -- to retaliate for First  
18 Amendment speech?

19 MR. McCARTAN: I'm not aware, Your Honor, of  
20 any precedents --

21 JUSTICE STEVENS: I'm not either.

22 MR. McCARTAN: -- in the three circuits where  
23 probable cause is not a bar to an action of that kind.

24 JUSTICE KENNEDY: Now, that -- that means one  
25 of two things: either what you're arguing for is not



1 going to bring a flood of litigation, or everyone has  
2 assumed that probable cause is a -- is a requirement.

3 MR. McCARTAN: Well, I think it would be the  
4 former rather than the latter, Your Honor, since  
5 probable cause does not distinguish between what may be  
6 an unconstitutional act on the part of the Government  
7 and one that might be motivated by a legitimate  
8 grievance.

9 JUSTICE KENNEDY: Well, but -- but I'm not  
10 sure that that proposition has been established in the  
11 cases.

12 MR. McCARTAN: No, Your Honor, and that's why  
13 I think this case is before this Court at this time.

14 JUSTICE SCALIA: Neither -- neither does  
15 absolute immunity for the prosecutor distinguish  
16 between whether the prosecutor was acting just  
17 illegally or just acting unconstitutionally. I mean,  
18 yes.

19 MR. McCARTAN: If I may --

20 JUSTICE SCALIA: You apply the same rule  
21 there.

22 MR. McCARTAN: I'm sorry, Your Honor. Is  
23 that -- was that an observation or a question?

24 JUSTICE SCALIA: Yes, well, your -- your  
25 point that -- that there -- there has to be a

1 difference between whether there's a constitutional  
2 violation or not in this context seems to me not well  
3 taken because we don't make that distinction in the  
4 context of giving absolute immunity to the prosecutor.

5 We don't say he doesn't have absolute immunity when --  
6 when he's been guilty of a constitutional violation.

7 MR. McCARTAN: But as Justice Souter brought  
8 -- questioned whether the prosecution was procured for  
9 unconstitutional reasons, the immunity of the  
10 prosecutor has nothing to do with the reasons for which  
11 the prosecution is brought. It only protects him from  
12 civil damage liability. The investigators themselves  
13 have no such immunity. It is qualified.

14 JUSTICE KENNEDY: No, no. But the point  
15 remains that if in the prosecutorial context that the  
16 immunity exists whether or not there's a constitutional  
17 violation, then that teaches us that the same rule  
18 should apply to this case. That was Justice Scalia's  
19 --

20 MR. McCARTAN: No. I think that is the  
21 difference, Your Honor, between absolute and qualified  
22 immunity. The Court has given absolute immunity only  
23 to those functions that are so intimately associated  
24 with the judicial process, that they have to give  
25 immunity to those people, otherwise there would be an

1 unjust interference with --

2 JUSTICE STEVENS: May I ask this question?  
3 Maybe I should ask Mr. Kneedler. But am I correct in  
4 assuming that even if you should lose on the issue that  
5 we're faced with today, the case would, nevertheless,  
6 go forward because you would still seek to prove an  
7 absence of probable cause?

8 MR. McCARTAN: Well, certainly that would be  
9 a question for the jury, Your Honor, absence of  
10 probable cause.

11 JUSTICE STEVENS: Yes, but the case wouldn't  
12 be over if you lose here.

13 MR. McCARTAN: Well, it depends on what  
14 ground we would lose here. If the Court went on to  
15 decide the sufficiency of the allegations in a Bivens-  
16 type case, which I don't think it should and which the  
17 Court declined the invitation to do so in Harlow, then  
18 we would not lose. If you did --

19 JUSTICE SCALIA: I wouldn't worry a lot about  
20 that, Mr. --

21 MR. McCARTAN: All right.

22 May I say one word about the tort of  
23 malicious prosecution, which I say is not a proper  
24 analog for the analysis of cases of this kind?

25 The interests that are protected by the First

1 Amendment are far different from those that are  
2 remedied by the tort of malicious prosecution, and the  
3 injury to which is of far greater magnitude than what  
4 the common law sought to address by the tort of  
5 malicious prosecution. The tort of a malicious  
6 prosecution tells us nothing about the interests  
7 protected by the First Amendment. It remedies  
8 different interests. It is not a proper analog and,  
9 therefore, shouldn't be involved in definition of what  
10 the First Amendment rights may be.

11           If you look at those cases where the Court  
12 has referenced the common law in determining how  
13 constitutional rights should be remedied, they have  
14 been situations where the interests protected at common  
15 law are identical to those that are protected by the  
16 particular constitutional provision that is involved.  
17 A good example is Wilson against Arkansas, Fourth  
18 Amendment situation, the question of whether the knock-  
19 and-announce principle of common law should be  
20 incorporated into the reasonableness determination of  
21 the Fourth Amendment. The interest protected by the  
22 common law in that situation against unreasonable  
23 searches and seizures was identical to the interest  
24 protected by the Fourth Amendment. For that reason,  
25 the Court said that should be taken into consideration

1 in determining the reasonableness of the action under  
2 the Fourth Amendment.

3 JUSTICE BREYER: I'd like to ask you one  
4 other question. Suppose you win on this on the grounds  
5 we've been discussing. What happens in the middle of  
6 the trial when a defendant wants to say the same thing?  
7 Can he avoid conviction by showing the same thing?

8 MR. McCARTAN: I'm sorry, Your Honor.

9 JUSTICE BREYER: What happens when the same  
10 claim is made in the middle of a trial that I --  
11 whether I'm guilty or innocent? I haven't been  
12 convicted yet, and I want to show that this prosecution  
13 wouldn't have been brought in the absence of the  
14 retaliatory motive. Can he make that claim in the  
15 middle of trial or not?

16 MR. McCARTAN: Well, if he were foolish  
17 enough to make such a claim --

18 JUSTICE BREYER: Well, no, he believes it.

19 MR. McCARTAN: I can't believe that a  
20 defendant in a criminal prosecution who is acquitted in  
21 a subsequent civil suit --

22 JUSTICE BREYER: No, no. He's not acquitted.

23 MR. McCARTAN: Oh, I'm sorry, Your Honor.  
24 You say he's not acquitted.

25 JUSTICE BREYER: He's in the middle of trial

1       and he wants to say --

2               MR. McCARTAN: Well, I don't think he'd be in  
3       the middle of trial under Heck against Humphrey.

4               JUSTICE SOUTER: It's the criminal trial.

5               JUSTICE BREYER: It's a criminal trial.

6               JUSTICE SOUTER: The original criminal trial.

7               JUSTICE BREYER: He's in a criminal trial,  
8       and what he wants --

9               MR. McCARTAN: This is not a civil action for  
10       damages.

11              JUSTICE BREYER: No.

12              MR. McCARTAN: This is a criminal case.

13              JUSTICE BREYER: They read our opinion which  
14       holds in your favor. Then the next thing is in -- in  
15       the criminal cases the defense lawyers say, hey, I -- I  
16       think my client wouldn't be here today were it not that  
17       the FBI had a retaliatory motive.

18              MR. McCARTAN: That would not suffice.

19              JUSTICE BREYER: Because?

20              MR. McCARTAN: And that was the whole purpose  
21       of Harlow, mere --

22              JUSTICE BREYER: No, no, no. They're going  
23       to show exactly the elements that we write in our  
24       opinion.

25              MR. McCARTAN: If the -- if the defendant in

1     that case had established evidence tending to show the  
2     essential elements of the claim, it would present a  
3     question for the court, but I think the court would use  
4     the admission against interest as a basis for paying no  
5     attention to such --

6             JUSTICE STEVENS:  Thank you very much, Mr.  
7     McCartan.

8             Mr. Kneedler, you have 3 minutes left.

9             REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

10            ON BEHALF OF THE PETITIONERS

11            MR. KNEEDLER:  Thank you, Justice Stevens.

12            I'd like to respond to Justice Breyer's  
13     suggestion that this could all be solved by an  
14     application of the Harlow qualified immunity standard.  
15     With all respect, I don't think that that would really  
16     work at all because if -- if the point is that it would  
17     be unconstitutional to bring a prosecution only because  
18     of protected First Amendment activity, that could be  
19     taken as a given and still be enormous inquiry into  
20     what actually happened between the investigator and the  
21     prosecutor, what the real motivation was, what the  
22     prosecution's policies were.  That is the concern we  
23     have for the post hoc inquiry into the process.

24            And not only that, it isn't just the  
25     discovery.  It's what -- what consequences this will

1 have on law enforcement generally if police officers  
2 operate under the assumption that if the prosecution  
3 fails, they will be subject to civil liability, which  
4 is exactly what Blackstone said, as this Court quoted  
5 in Dinsman v. Wilkes.

6 The reason for the rule is that it would be a  
7 very great discouragement to public justice if  
8 prosecutors, who have a tolerable ground of suspicion,  
9 were liable to be sued at law whenever their  
10 indictments miscarried.

11 JUSTICE GINSBURG: But we're not talking  
12 about prosecutors there --

13 MR. KNEEDLER: No, but -- but that included  
14 complaining witnesses. That -- that was what  
15 prosecutor meant at common -- at common law. And  
16 there's no reason to grope for some sort of screen  
17 because the common law furnishes it. The tort of  
18 malicious prosecution is what this Court relied upon in  
19 Heck v. Humphrey for the favorable termination rule,  
20 that you could not bring a 1983 suit unless the  
21 conviction had been set aside and the proceeding was  
22 terminated in favor of the plaintiff.

23 That same tort, that tort of malicious  
24 prosecution, contains the probable cause requirement to  
25 guard against an objective screen, to guard against the



1     very thing that Blackstone was worried about and that  
2     this Court noticed in -- in the Dinsman case. And that  
3     is, that it is important not to have law enforcement  
4     officers be chilled from the important function of  
5     furnishing information to prosecutors.

6             And this Court's decision in Armstrong  
7     imposed an important objective test that you have to  
8     show that there's somebody similarly situated before  
9     you even inquire into prosecutorial motives. You have  
10    to show an objective factor that someone else was  
11    similarly situated. Respondent's position would offer  
12    no such -- no such protection.

13            JUSTICE GINSBURG: How about the judge  
14    granting a motion to quit at the close of the  
15    Government's evidence? Why isn't that objective?

16            MR. KNEEDLER: Because at -- at common law --  
17    and I think this was an important insight. At common  
18    law, it was not even evidence of the absence of  
19    probable cause because a judgment of acquittal turns on  
20    the determination that a factfinder -- a reasonable  
21    fact finder could not find beyond a reasonable doubt  
22    that the defendant had actually committed the crime.  
23    Probable cause is a very different standard, which is  
24    whether it would lead a reasonable, cautious, prudent  
25    person to believe that a crime had been committed.

1       That is the --

2               JUSTICE GINSBURG:  I wasn't --

3               MR. KNEEDLER:  An acquittal does not --

4               JUSTICE GINSBURG:  Your opponent says -- says  
5       there is no probable cause requirement.  You are now on  
6       there's no objective test.  It's all subjective.  I  
7       suggest that there could be an objective test.  This is  
8       not going to the probable cause question.  Objective  
9       test?  Was this case thrown out at the close of the  
10      Government's evidence?

11              MR. KNEEDLER:  But -- but my -- my point was  
12      at common law, that the wisdom of the courts was that  
13      -- that that wasn't even evidence of a -- that should  
14      -- that -- that shouldn't allow the suit to go forward  
15      because it was a sufficient guard -- protection for the  
16      prosecutors.

17              JUSTICE STEVENS:  Thank you, Mr. Kneedler.

18              The case is submitted.

19              (Whereupon, at 12:19 p.m., the case in the  
20      above-entitled matter was submitted.)

21

22

23

24

25