ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-490

TITLE RALPH DAVIS, ETC., ET AL., Appellants v. GREGORY SCOTT SCHERER

PLACE Washington, D. C.

DATE April 16, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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RALPH DAVIS, ETC., ET AL.,

Appellants

v.

GREGORY SCOTT SCHERER

No. 83-490

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Washington, D.C.

Monday, April 16. 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:39 p.m.

APPEARANCES:

MITCHELL D. FRANKS, ESQ., Assistant Attorney of Florida, Tallahassee, Florida; on behalf of the Appellants.

RICHARD G. WILKINS, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; as amicus curiae.

BRUCE S. ROGOW, ESQ., Fort Lauderdale, Florida; on behalf of the Appellee.

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C O N T E N T S

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PROCEEDINGS

CHIEF JUSTICE BURGER: Mr. Franks, I think you may proceed when you are ready.

ORAL ARGUMENT OF MITCHELL D. FRANKS, ESQ.,

ON BEHALF OF THE APPELLANTS

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

This 1983 due process case arose out of the firing of an employee of the Florida Highway Patrol in 1977. Although the district court ultimately held that the law regarding pre-termination due process was not clearly established at the time of the firing, it nevertheless continued on and ruled that the Florida statute, Chapter 110, was unconstitutional in that it violated post-termination due process.

It also continued on and found that the employee was entitled to damages under 1983 not for any violation of clearly established constitutional law, but because the defendants did not follow a departmental regulation recently enacted in terminating this employee.

QUESTION: Mr. Franks, would you help us interpret what the holding of the district court is now?

MR. FRANKS: There are --

QUESTION: It -- it seems to have held -- the second district court opinion seemed to hold a new

statute unconstitutional; and you agree that that much of the holding is in error, and I guess the other side does, too.

MR. FRANKS: Yes, Justice O'Connor.

QUESTION: Was anything left of its original finding that the older statute was unconstitutional because of the failure to provide a prompt post-termination hearing?

MR. FRANKS: No, Justice O'Connor. The older statute was enacted previously, was in 1977, general law, and by the amendment in 1981 that statute was vitiated and is no longer part of this case.

QUESTION: Well, and you think there was nothing left of the original district court holding in that regard?

MR. FRANKS: That's correct, Justice O'Connor.

QUESTION: And so all we have is the holding on the new statute --

MR. FRANKS: That is --

QUESTION: And -- and a finding that the employers failed to follow their own regulation requiring a speedy investigation, is that right?

MR. FRANKS: I -- I don't know that I would call it a speedy investigation. I believe the word is thorough investigation.

QUESTION: All right.

MR. FRANKS: Or complete investigation.

QUESTION: Yeah.

MR. FRANKS: In fact, yes, that's correct. There -- there is nothing left of the -- of the original July 15, 1981 decision of the district court.

QUESTION: Your -- your -- your opponent agrees, does he not --

MR. FRANKS: Yes, sir.

QUESTION: -- That that part of the judgment which declared the 1981 statute unconstitutional should be vacated.

MR. FRANKS: Yes, sir. They have conceded that. And --

QUESTION: So what is there left for us? Is it this issue of whether failure to follow regulations by a state official amounts to some sort of due process violation?

MR. FRANKS: Well, the -- the concession by the Appellee was not made, Justice Rehnquist, until the brief on the merits was filed. They defended the finding of the district court in their jurisdictional -- in their jurisdictional brief or in their motion to oppose or dismiss. And it wasn't until we got to the brief on the merits that the Appellee conceded that the

district court erred in finding the 1981 statute unconstitutional.

However, the appeal was brought here properly under 1254(2), 28 U.S. Code 1252; and it carries with it the federal questions that are attendant to that appeal. This Court has jurisdiction over that issue and its attendant federal question issues, and that federal question issue that's remaining is the qualified good faith immunity of the governmental employees.

QUESTION: With respect to a judgment for damages.

MR. FRANKS: With respect to a judgment for damages. Here --

QUESTION: Which is outstanding.

MR. FRANKS: Which is still outstanding, yes, sir.

So we feel that the Court has the jurisdiction and can proceed on to address the issue that is remaining, and as we see it is the good faith immunity of the governmental officials and their action in terminating this insubordinate personnel.

The facts are somewhat convoluted, but essentially the employee Scherer requested permission to work a second job with the Escambia County Sheriff's Department in Florida. That permission was erroneously

granted when a letter that the captain had instructed his secretary not to mail was mailed. The employee immediately went out and bought a handgun and a uniform and proceeded work.

A couple of weeks later the captain found that the employee was working, went back, found out that the letter had been inadvertently mailed; and he was instructed, both orally and in writing, to cease his second job because there was a potential for a conflict.

He was a radio teletype operator, not a trooper. There were only six radio teletype operators in that particular troop in Pensacola, and they worked around the clock. The troopers in that particular -- in the Highway Patrol were the beneficiaries of a collective bargaining agreement with the Police Benevolent Association by which troopers could work second jobs, and their employers, the Highway Patrol, were required to allow them to work. No such benefit was accorded to the radio teletype operators or to other administrative support personnel.

But in any event, he continued his second job, the sergeant found out about it and advised him that he was in violation of the captain's orders to cease his second job. And the record is clear that there were

numerous conferences on this point and that he refused to terminate his second job.

He was stating I don't see any reason for a conflict, not that one did or did not exist -- that's not the point -- but whether he didn't see one. And as a result of his not seeing it, although he had been told to cease his job, refused to do so.

This was reported up through channels. The sergeant recommended termination. His lieutenant --

QUESTION: Mr. Franks, are you taking the position there was no violation of a constitutional right?

MR. FRANKS: Yes, sir, that's right. We are taking that position. The court --

QUESTION: You didn't raise that question in your jurisdictional provision.

MR. FRANKS: Well, we -- we submit that, Your Honor, that it comes part and parcel with the good faith -- qualified good faith immunity that is addressed in our jurisdictional brief; that the court found that the law regarding the pre-termination of due process was not clearly established at the time.

QUESTION: Well, but you're arguing that even as of today's law there was no violation, as I understand it.

MR. FRANKS: I would say under the facts of this case that's correct. And even going back to 1977 and looking at it at that point, he was advised of why he was in violation of the order; he was advised, both orally and in writing, as to why -- what could happen to him. And his response was fire me, or I have been advised -- and he put this in writing on the 18th of October, just shortly before the termination letter came down -- that he was aware that he could be terminated, but he didn't see -- he didn't see a conflict.

The Appellee here is not arguing, the employee is not arguing that your facts are wrong, and here are the reasons why your facts are wrong, and this is why I should have a hearing. He concedes that. He says I don't agree with your policy. He is not arguing that the facts aren't true, that he is in violation of the dual employment status, but rather that the operational policy is not wild -- is not wise.

Now, he's not entitled to a hearing on the wisdom of the policy. He's entitled to a hearing on the legality of --

QUESTION: Mr. Franks, let me ask you another question. In your view has there been any relevant change in the law since his termination?

MR. FRANKS: I would say that the --

QUESTION: The law is exactly the same today as it was then?

MR. FRANKS: -- The Fifth Circuit's adoption of the -- of the standard in Weisbrod where they held that the individual is entitled to notice and that he is entitled to respond to the notice of -- of disciplinary action has been clearly established since the facts, the operative facts were developed in this case.

QUESTION: But you argue there was not a violation of the law as construed in Weisbrod, or do you? What's your --

MR. FRANKS: Oh, no. The Weisbrod decision came out considerably after --

QUESTION: I understand it came later, but would you say if that had come out before that there would have been a constitutional violation?

MR. FRANKS: Well, I'd say that the -- there was no violation of -- of his constitutional rights at any time as it regards his notice that he could be terminated for his failure to terminate his second job, whether he challenges the wisdom --

QUESTION: In other words, you'd win even if Weisbrod had been decided before this all happened.

MR. FRANKS: Yes, sir.

QUESTION: Well, what's your view as to the

correctness of the Weisbrod decision under this Court's precedents?

MR. FRANKS: Well, we believe that the -- it adopts or looks to Arnett v. Johnson as -- as the guidance for the type of hearing. Some sort of hearing must be required. There is no requirement that you have a fullblown evidentiary pre-termination hearing, but rather that the individual be notified, be put on notice.

QUESTION: You -- you concede or agree that Weisbrod is a correct statement of --

MR. FRANKS: Yes, sir. We lived with that, and we think that's the -- the correct statement. But those aren't the facts that were -- that are attendant here.

The court went on, as I indicated, and they found that the state had adopted a general regulation which stated that there must be a thorough investigation. This is a -- the Florida Highway Patrol is a paramilitary organization, and the facts reflect that there was a thorough investigation made of this incident, and that it was reported up through the channels. It went from Pensacola to Panama City where his captain was to Tallahassee where the Appellants, Colonel Beach and Mr. Davis, referred the matter to the legal office and the personnel office and were advised

that the matter was -- was proper and proceeded to terminate this insubordinate personnel.

And the court found in analyzing 1983 that because the state, or in this case an agency of the state, had promulgated a regulation, that that was a sufficient basis under 1983 to award damages for a violation which -- of -- of state law and state regulation and not of any clearly established constitutional right.

Now, the court originally found that there was a right that was there, but they retreated from that in a subsequent opinion in June of 1982 which was announced a couple of weeks before the Harlow. So admittedly, the district court did not have the wisdom of this Court in the Harlow decision, but -- and Harlow did away with the subjective prong and looked to was the violation of the law clearly established, and was it clearly established constitutional law, not state law. Because you looked to the decision of Procunier v. Navarette, and there was an allegation in that case that prison officials had violated clearly established state law and regulations regarding the prison mailing regulations. And the Court specifically rejected that as a finding and found that the law had to be one that was clearly established and was under the Constitution.

Now, to look at the law and in preparing for this case I came across an admonition of former Solicitor General and dean Irwin Griswold, and his statement to his students was look to the law; and when we look to the law, we find 1983, and it says that -- that the individuals will be subject to the -- within the jurisdiction thereof the deprivation of any rights, privileges or immunities secured by the Constitution and the laws.

And it's our contention that the laws therein do not address state laws but rather federal laws, because this act, the Civil Rights Act of 1871, was designed and directed toward the abrogation of state -- by states of the rights secured by the Constitution, particularly under the Fourteenth Amendment.

What if a state adopted rules and regulations that go beyond those required to be clearly -- as required by clearly established constitutional law? For example, if there is a jail inspection statute and there is no requirement that individuals go out and inspect jails except by the state law. If state A promulgates such a regulation and they go out and they violate it, then under the holding in this case and in the position urged by the Appellee, those state officials would be subject to a constitutional suit for damages, whereas --

QUESTION: Mr. Franks, do you think the district court used the violation of state regulations by the state official as an element of the violation of constitutional rights finding, or simply as a denial of good faith immunity?

MR. FRANKS: I think that he looked at it purely as a denial of good faith immunity. He found specifically, one, that the law was not clearly established at the time; and, two, he found that there was no malice involved. So he then looked to the reasonableness of the conduct of the officials and stated that because there was a clearly established state regulation or departmental regulation that their -- this abrogated their shield of good faith immunity, and for that reason he would be subject to damages, not for the violation --

QUESTION: Well, then, what is left to base the damage award on?

MR. FRANKS: We would argue -- urge that there is nothing to base the damage on under the law that was announced in Harlow, and I see no need to retreat from --

QUESTION: What -- what did the settlement agreement that the Appellee entered into say?

MR. FRANKS: The settlement agreement was reached in his state career service proceeding whereby

he was challenging the termination, and he was ordered reinstated with partial back pay. And the difference between full back pay and partial back pay was the difference between --

QUESTION: Did it mention the Section 1983 claims or the basis for them?

MR. FRANKS: No. It was purely addressed under state career service regulations.

If there are no other questions, I would like to reserve and turn over to the United States the argument that we consider today.

CHIEF JUSTICE BURGER: Mr. Wilkins.

ORAL ARGUMENT OF RICHARD G. WILKINS, ESQ.,
AS AMICUS CURIAE

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

In defining the contours of the concept of qualified official immunity, this Court has attempted to balance two important but competing interests: the right of the individual to a remedy for a constitutional wrong against the necessity of protecting public officials from the hazards of litigation so as to prevent undue disruption in the conduct of public affairs.

Beginning with the Court's first case in this area, in Pierson v. Ray, and continuing through its

decision in Butz v. Economou, it accommodated these interests by casting the qualified immunity defense as a wide-ranging inquiry into the subjective and objective good faith of the defendant public official.

In Harlow, however, relying on the past experience of the federal courts -- that is, in Harlow v. Fitzgerald -- the Court recast the qualified immunity doctrine as a single, strictly legal inquiry that turned on one factor; that is, the Court extended immunity to public officials unless they violated clearly established rights of which a reasonable person would have known.

The Court left little doubt why it was so dramatically restructuring the doctrine. It did so because the prior test had rarely resulted in the dismissal of claims prior to actual litigation because it turned on so many evidentiary variables.

The new test was specifically designed to permit the disposition of immunity claims without the necessity of subjecting all public officials to discovery and trial on that issue.

The question -- the important question presented here that's left in this case at this point is whether or not the Court will remain with the position so recently taken in Harlow, or whether the qualified

immunity test will once more evolve into a consideration of multiple factors, thereby robbing the test of the ability to settle litigation prior to actual discovery or trial.

In this case, the Appellee entered federal district court with a claim that he'd been denied due process. Although the district court ultimately concluded that he was denied no clearly established due process right -- although I would reply to one of the questions from the bench I think it's clear from the decision that he found that under current law the statute would be -- would be violated now, or the Constitution had been violated in the current provisions, although in 1977 when he'd been dismissed it wasn't clearly established at that point.

He nevertheless or the court nevertheless denied the Appellants qualified immunity, and it did so by citing what it called the totality of the circumstances. It said looking at all the facts in the record, I see that there was a violation of a regulatory provision here that renders their conduct unreasonable. Unreasonable conduct is not eligible for qualified immunity.

That sort of analysis, of course, has some force. Indeed, it was the analysis that prevailed prior

to Harlow. But it was specifically rejected by this Court in Harlow, and the Court made clear in that case that immunity would no longer depend upon an analysis of the totality of the circumstances, but rather whether or not there was allegation of clearly established rights.

QUESTION: Counsel, would it be -- would you make the same argument if the administrative regulation were perfectly clear, so that you could objectively say we don't have the problems we have in a subjective analysis or totality of the facts on summary judgment?

MR. WILKINS: Yes, we would, Justice Stevens, for one important question -- for one important reason. It becomes extremely difficult, even when you say the regulation is very clear, to keep the analysis from going beyond the narrow bounds set in Harlow. And let me explain why. It is a little difficult.

What -- what the Court did in Harlow was not say that good faith is irrelevant to qualified immunity. The Court simply concluded that the benefits of making qualified immunity depend upon proof of absolute good faith, were simply not worth the cost of subjecting all public officials to discovery and trial on that issue.

Now, the Appellee's argument here, and the only argument that really can be made in support of the

approach below, is that a violation of a regulatory cr statutory provision demonstrates the absence of gocd faith but does so in a way that doesn't incur the kinds of costs associated with the approach prior to Harlow. And so taking from ycur questicn, the argument would be well, when they're clear, isn't that really a cost-free means of determining the absence of good faith?

We don't think that's so at all for this reason: when -- when a public official violates a clearly established constitutional right, we think that it can be fairly assumed or it can be fairly -- that conduct can be fairly described as lacking in good faith. After all, if it's a clearly described constitutional rule, the public official shculd be aware and should not transgress it. However, the same thing cannot be said with regarding to the vast majority cf regulatory or statutory provisions. They're rarely as clearly established as constitutional provisions once they're announced by this Court.

Indeed, in this case the Appellants had the advice of counsel before they dismissed the Appellee. The district court looking even at all the conduct in this case said that they acted in ultimate -- in -- in good faith.

As we describe in our brief, even with clearly

established sorts of provisions, there are all kinds of reasons why a public official might or might not comply with the provision in a given circumstance. Also, it's very difficult for a court to determine after the fact whether or not something really was clearly established in the heat of battle. It's easy for a judge or easier perhaps for a judge sitting back looking at a developed trial record to say well, from the words of this regulation you should have done A.

QUESTION: Of course, that's true of even clearly constitutional rules.

MR. WILKINS: Exactly. But the Court has not imposed liability. Until we've determined that it's clearly established, we don't impose liability on those public officials.

Another great danger in this area is that if we accept the argument that regulatory or statutory violations are relevant to the general good faith of public officials and hence to their qualified immunity, there's no reason not to expand the analysis beyond at that point at the behest of other plaintiffs.

In other cases there might be commissions of common law torts or violation of professional codes of ethics.

QUESTION: Well, would you ever deny qualified

immunity in the 1983 based on clearly established state law?

MR. WILKINS: Well, we don't think that that would be appropriate. We think --

QUESTION: Ever.

MR. WILKINS: We don't think that would be appropriate ever.

QUESTION: That -- that is what happened in this case.

MR. WILKINS: That is what happened in this case.

QUESTION: So you don't need to make the argument he just made.

MR. WILKINS: No, we don't, but we're making the argument because when it comes up in the federal context, of course we're not going to be talking about state law.

In short, it is our position that to adopt the position of the court below will rapidly and quickly recreate all of the difficulties that this Court sought to avoid in Harlow. A court faced with an immunity claim will once more have to look at that particular violation to determine whether or not in the circumstances of that case that violation demonstrates a lack of good faith. It will not be a simple, objective

test. It will turn the clock back past Harlow to the rule that prevailed under Wood v. Strickland and Imbler v. Pachtman, whereas this Court said the fate of a public official with qualified immunity depends upon the circumstances and motivations of his conduct as established by the evidence at trial. That is precisely the result that Harlow was designed to avoid.

Thank you.

CHIEF JUSTICE BURGER: Mr. Rogow.

ORAL ARGUMENT OF BRUCE S. ROGOW, ESQ.,

ON BEHALF OF THE APPELLEE

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

I'm really at complete odds with opposing counsel in this case from the very beginning point of it.

The first issue is whether or not the law was clearly established when Gregory Scherer was fired, as to whether or not he had some opportunity, some right to have an opportunity to be heard before he was terminated from public employment.

The district court judge found that he did not have that right to some opportunity to be heard. The district court found that Scherer's right to due process was clearly established and that it had been violated by his termination without an opportunity to be heard.

What happened in this case was was that Scherer did have a conflict with the people in his troop. His supervisor recommended a three-day suspension on October 12, 1977. Twelve days later Colonel Beach fired him without an opportunity for Scherer to be heard by Colonel Beach in any fashion -- in terms of a written letter, in terms of an opportunity to appear.

And from Fuentes v. Shevin, and Perry v. Sindermann, and Roth v. Board of Regents, and Arnett v. Kennedy, the law was clearly established that there should be some opportunity to be heard before the disciplinarian takes the disciplinary act. And the disciplinarian in this case was Colonel Beach.

And the law that clearly established it beyond peradventure was Thurston v. Dekle, a 1976 Fifth Circuit case. When Mr. Franks was discussing the law, I think he misspoke, and he called Weisbrod v. Donigan Thurston v. Dekle. Thurston v. Dekle is the case in the Fifth Circuit that said the accommodation that must be struck must include some minimal opportunity to be heard by the determiner of the ultimate sanction before the sanction is imposed, and then, of course, there would be a post-termination hearing.

QUESTION: Mr. Rogow, how do we reach that

question? What -- if the district court vacated its holding concerning the 1977 statute and decided instead something in connection with the 1981 statute, which even you agree was error for it to do, what's left for it to base a damages award on at all?

MR. ROGOW: Justice O'Connor, first, the statutory question here, whether the statutes are constitutional or not, are not an issue in this case. I've conceded the district court was wrong in declaring unconstitutional the Civil Service statute.

What we're focusing on here is whether or not the district court was right or wrong in its initial determination that Scherer was entitled to some opportunity to be heard --

QUESTION: Under the federal Constitution.

MR. ROGOW: Under the federal Constitution, yes, Justice White.

QUESTION: But not under some state law.

MR. ROGOW: Absolutely not, Justice White. That is not the issue in this case at all. The question, the threshold question is was the constitutional right clearly established, and was Scherer deprived of that right. If he was, there is no need to reach Harlow v. Fitzgerald or anything else in this case. And what I am saying is given this Court's

opinions and given Thurston v. Dekle, the district court's initial ruling, which was that the law was clearly established, was right.

Then the district court retreated in light of Weisbrod v. Donigan. And Weisbrod v. Donigan is a page and a half decision that never even makes a mention of all of the due process cases. And the only thing I can say about Weisbrod v. Donigan is that it is an anomaly. It certainly was no basis for the district court to have retreated from its initial conclusion. And oddly, if one follows through on Thurston v. Dekle, and the district court did -- there's a case called Glenn v. Neuman at 614 F. Second, a Fifth Circuit case in 1980, which says very clearly that Thurston v. Dekle sets forth the due process law in this circuit, which is some chance to be heard before you're fired. And Scherer --

QUESTION: But the district -- the district court really didn't rely on this line of reasoning, did it, because if it had relied on this line of reasoning, I would think it wouldn't gotten into the violation of a state regulation.

MR. ROGOW: It -- when Weisbrod came out, five days later the district court then amended its original judgment and said well, Weisbrod says that the law wasn't clearly established, although Weisbrod really

says very little, if anything, about that, and Weisbrod does not pay any attention to what all the due process development had been.

I -- all I can say is that the district court when Weisbrod came out felt obliged to follow the last word, even though the last word was not consistent with --

QUESTION: So you're -- you're really arguing here for an alternative basis of upholding the judgment, not on the reasoning most recently advanced by the district court?

MR. ROGOW: That's right. His original reason, that he was right in his original decision, and that there was no need for him to retreat. And all -- if one takes a look at the law that he based his original decision on, I think that that law amply supports his -- his judgment.

QUESTION: Well, the other side of that coin, I take it, is that you don't defend his -- his amended opinion.

MR. ROGOW: Oh, yes, I can reach that, too, and defend that also. I don't think we have to get to that if he was right in his initial opinion.

QUESTION: Well, why don't you just -- just -- I take it you feel some uneasiness about defending his --

MR. ROGOW: Not at all, but I'd like to --

QUESTION: Well, why would you start about -- on -- why would you start cut arguing an alternative ground?

MR. ROGOW: Well, the alternative ground, of course, is the ground -- if the law is clearly established, then Harlow presents no issue at all in the case.

QUESTION: Well, I know, but the law he said was clearly established he ultimately said was state law.

MR. ROGOW: No, sir. That is not so.

Justice White, what he said was was that the constitutional -- I'm looking at page 71 and 71A of the joint -- of the appendix in the jurisdictional statement -- he said that Scherer's due process rights were violated, and the department's own orders were violated. And so the district court judge found that they should be bound, meaning the defendants, by their department's own orders and held accountable for not affording plaintiff due process.

What happened here was this: the district court, once it decided it had --

QUESTION: What was that language -- what was that language you just quoted? Was that at page 70 and 71?

MR. ROGOW: 70A and 71A of the jurisdictional statement appendix. That's a district order, the second, the amended district court judgment. They should be bound by their department's own orders and held accountable for not affording plaintiff due process.

This is what occurred. When Weisbrod v. Donigan led the district court to think he had to retreat from his original decision, he then still found that there was a violation of the Constitution, but not clearly established constitutional law, because Weisbrod had taken him off that point. And so then he had to make a decision about damages. The damage decision in this case was not based on a violation of the state regulation. It was based upon a violation of constitutional law and a parallel regulation of the state which was also violated, and putting the two together, the judge felt that there was no impediment to awarding damages in the case.

And Harlow is now raised because the government says that Harlow v. Fitzgerald holds that you can only award damages if you're dealing with a violation of clearly established constitutional law. Of course, our initial point is that yes, there was a clearly established --

QUESTION: Yes, but the district judge finally

said that "Although the issue of whether a clearly established constitutional right was violated must be resolved against the plaintiff, the defendants can take little comfort," and then he goes on and says there's an alternative ground for -- for denying qualified immunity. And they -- and they say it's because General Order 43 clearly established an employee's right to a complete investigation.

MR. ROGOW: The combination of General Order 43 and the constitutional right of due process.

QUESTION: Well, that isn't what 67 -- I don't understand. I read on page 67A that he -- he said that there was not a clearly established constitutional right.

MR. ROGOW: That's right. After Weisbrod v. Donigan. He --

QUESTION: That was his ultimate -- his ultimate holding was that qualified immunity is denied because there was a -- a clearly established state law.

MR. ROGOW: And due process was violated.

QUESTION: And you don't define -- you don't defend that part of it, do you?

MR. ROGOW: No. If that were the only basis for awarding damages, the violation of state law, that -- that would be a different case from this one. But when you look at 70 and 71A, he melds them both together.

The difficulty is Harlow talks about clearly established constitutional rights being violated. There's no dispute between the government and us that if that is so, then Scherer is entitled to damages.

QUESTION: Of course, what we're reviewing here is a judgment of the court of appeals.

MR. ROGOW: Which per curiam affirmed the decision below.

QUESTION: Right. And it -- and it -- it affirmed per curiam precisely what I just read you out of the district court's opinion.

MR. ROGOW: Yes.

QUESTION: Now, if we -- if that is not defensible, it seems to me the proper recourse would be to remand to the court of appeals and disabuse them of their -- of an erroneous view of the law.

MR. ROGOW: Well, I -- the alternative ground, which is clear from this record and easily --

QUESTION: Well, we'll let them decide that.

MR. ROGOW: That the case -- the case has had a long history already, and since the law was so clearly established, it seems to us there is no problem in this Court taking the original judgment that the district court found and saying he was right in that original judgment, and that supports the decision of the court of

appeals.

The Harlow problem that's raised by the other side is they neglect at all to make the distinction between discretionary and nondiscretionary duties. Even if -- even if Harlow is implicated in this case, this case doesn't run afoul of Harlow. Harlow says that when a public official is performing a discretionary duty, then if he or she violates clearly established law, then they're liable in damages.

This -- in this case we're dealing with a nondiscretionary, mandatory duty. Colonel Beach had a mandatory duty to give Scherer, under the state regulation, an opportunity to be heard; and he didn't do that under the state regulation. So we're dealing here with a nondiscretionary duty, and once the concern about disretionary/nondiscretionary functions is removed from the case, then the question becomes whether or not the official was acting in good faith and whether or not damages can be awarded on a summary judgment basis.

The Court had two concerns in Harlow. Once is if a defendant -- if a public official has to choose between A and B, the public official should not worry about the potential of a damage action being filed. The clearly established constitutional right principle would mean that in choosing between A and B, if he violated

that clearly established principle, there would be damages. But if it weren't clearly established, then he shouldn't have to worry about the choice.

When you're dealing with a nondiscretionary duty as in this situation, then we come to whether or not the official's conduct was objectively reasonable. And objective reasonableness -- and this is what the district court did in this case -- it measured objective reasonableness by a violation of a state regulation --

QUESTION: Did Harlow -- did Harlow limit itself to the immunity of officers performing discretionary functions?

MR. ROGOW: It certainly did in its language. It speaks very clearly and distinctly about --

QUESTION: In -- in its statement of the rule did it?

MR. ROGOW: When -- yes. And I've set it out in the brief. When an official is performing a discretionary function, then generally he or she should not be held liable in damages. And -- and what we've got in this situation is a nondiscretionary function.

And one of the other concerns about Harlow was summary judgment. Can you decide a case on summary judgment, or will you get tied up in trying these cases on good faith/bad faith?

If one looks at this situation, Beach's violation of the regulation is clear. It's an objective criteria. So the violation of the regulation and the due process violation, albeit it not clearly established the way the district judge came to his second conclusion, allows there to be a decision on immunity without having to have a full trial. So we have a violation of an established constitutional principle and a violation of a regulation which parallels that principle. And that then allows a district court to award damages without the need for a trial on whether or not the official was acting in good faith or bad faith.

And that's why Harlow is really no problem. And, Justice White, I can defend this case on the Harlow grounds. The Solicitor General nor the state have made the distinction between discretionary/nondiscretionary duties. They lump them all together. That's not what Harlow talks about. And in terms of the focus being on objective criteria, the violation of the regulation here, along with the violation of the Constitution, meets the objective criteria -- objective criteria test and does not require the case to be tried. It can be determined on summary judgment in --

QUESTION: What -- what is your argument here as to why this particular defendant was exercising a

nondiscretionary function?

MR. ROGOW: Because defendant Beach under the regulation had to, once informed of a violation of -- of a departmental order, had to order a complete investigation which will include a statement from the defendant. That's General Order 43. It's in the jurisdictional statement appendix at page 69A. And it was mandatory. He shall, Colonel Beach, upon receiving a report of a violation, order a complete investigation. He did not do that.

QUESTION: So you say that if a person's function is claimed to be nondiscretionary, it is open to argument by the plaintiff in a case like this, that a state regulation made the duty mandatory. And presumably the federal judge in the civil rights action will decide whether or not it was discretionary then.

MR. ROGOW: Yes, yes. And in a situation like --

QUESTION: I doubt that Harlow ever intended that.

MR. ROGOW: Harlow focused on discretionary/nondiscretionary, which must have some content, and here we're dealing with mandatory language. This could have been the basis of a mandamus action. He shall do something.

QUESTION: Yeah, but then the next case you're going to get is one where the language isn't that clear, and you'll be arguing in the 1983 action well, it doesn't really appear mandatory, but it's open to that construction. And, you know, then that will be the next step in this line, which I think would erode Harlow.

MR. ROGOW: Well, I -- we're dealing here with -- with one step -- I like to take them one step at a time -- and I think that when you're dealing with a regulation that parallels the constitutional right -- and that's exactly what this regulation does; in fact, it looks like it was passed to enact really the meaning of Thurston v. Dekle. I think in that situation there is no need for a district court to make further inquiry. Whether or not in some subsequent case that might be, that's what the Solicitor General suggests in this parade of horribles about what may happen in the future; but my concern is this case and the constitutional due process right. And Harlow certainly did not preclude the use of a regulation or statutory violation when it's clear and mandatory as being a portion of the basis for making the decision. The essential basis, of course, is the violation of the Constitution which existed in this case.

There is another problem in this case, and

that's a jurisdictional one. Under 28 U.S.C. Section 1254(2), this Court's jurisdiction to review a case on appeal is limited to those federal questions presented in the declaring unconstitutional of the state statute by the federal court.

This Harlow federal question presented is -- is clearly not -- is clearly not one that arises through the decision of the court of appeals that the state statute was unconstitutional. Once I've conceded that portion of the case, that the court should not have reached that, what is left? Only possibly an issue that should be decided on certiorari. There was no petition for certiorari sought in this case. 1254(2) limits the federal questions presented not to the question that's been presented, a subsidiary question presented in this case. And so our position is is that the Court should not exercise its jurisdiction to reach the Harlow problem in the case. I call it a problem only because the other side has called it a problem.

But on those three grounds, then, we think that the decision below regarding to damages should be affirmed: a) that the law was clearly established and therefore there's no need to get into any question of whether or not there is an immunity problem in the case; b) if the law was not clearly established, Harlow is no

problem because Harlow focuses on a discretionary duty, not a nondiscretionary duty, and Harlow focuses on deciding these cases on summary judgment, and this could have been decided on summary judgment because Colonel Beach violated a nondiscretionary duty, and he also violated the Constitution; and finally, that there's no need to exercise the Court's jurisdiction since under 1254(2) it's limited, and we've conceded the point dealing with the declaring unconstitutional of the state statute.

So for those reasons we suggest the decision below should be affirmed.

CHIEF JUSTICE BURGER: Do you have anything further?

You have four minutes remaining, Mr. Franks.

ORAL ARGUMENT OF MITCHELL D. FRANKS, ESQ.,
ON BEHALF OF APPELLANTS -- REBUTTAL

MR. FRANKS: Thank you, sir.

Addressing the last point first, even assuming -- and we're not conceding that it's correct -- that this case was prominently brought here under 1254(2), this Court has the authority to consider the other questions that came along with the 1254 as a request for a writ of certiorari under 2103, 28 U.S. Code 2103, and may consider that point on a writ of certiorari.

We would urge the Court that if they do so to consider addressing the -- the writ on the basis of the conflict between the various circuits on the point of whether or not a violation of state or regulatory law --

QUESTION: Well, there was an affirmed judgment below that -- that accepted the district court's declaration of unconstitutionality.

MR. FRANKS: Yes, sir, that's correct.

QUESTION: So the case had to get here before you could get that vacated.

MR. FRANKS: Yes, sir, that's correct.

QUESTION: And it was properly here on appeal, I take it, is what you first argued.

MR. FRANKS: That's our first argument, and everything that came with it is likewise here on appeal and can be considered.

QUESTION: Just because he concedes that you ought to win on that point doesn't mean that it's not appellate jurisdiction.

MR. FRANKS: We would argue that the dismissal or termination of an employee is the ultimate in a -- the exercise of discretionary function. What he's saying is that this matter which had been completely investigated and had been forwarded up through the chain of command and which had been looked at by the personnel

office and by the legal office, that those officials had no discretion but to order a second or an additional complete investigation when the facts were -- were clear.

In the letter that was sent forward, the employee Scherer stated, "This writer had talked with W.A. Clark on two different occasions in the past three weeks with reference to my outside employment as a deputy sheriff of the Escambia County Sheriff's Department. I have advised Sergeant Clark that I feel there is no reason for me to resign my position with him. I feel it in no way interferes with my job as a radio teletype operator with the Florida Highway Patrol."

On cross examination Scherer was asked, "Now, isn't it true that on October the 3rd Sergeant Clark informed you that you were working with the auxiliary as an auxiliary sheriff; that was contrary to the captain's instructions?" "They told me" -- Answer: "They told me I would have to quit or they would fire me." "On October the 3rd is that what he told you?" "Yes." "What was your response?" "I told him to fire me."

That's in the record. Clearly, these officials were exercising their discretionary function. This insubordinate employee who didn't like the answer he got, but nevertheless had notice of possible termination, and was afforded the opportunity and

availed himself of that opportunity to state his side of the case. He didn't agree with the policy and not the facts regarding --

QUESTION: Are you saying that was a hearing?

MR. FRANKS: The Fifth Circuit, Justice Marshall, has held that that is a form of hearing which meets the due process.

QUESTION: My question is do you consider that a hearing?

MR. FRANKS: Yes, sir, I do. He was advised of the -- of the potential of what could happen to him if he persisted in his refusal to quit his second job, and he nevertheless persisted. He was given an opportunity to explain, and he did so.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:22 p.m. the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#83-490 - RALPH DAVIS. ETC., ET AL. Appellants

v. GREGORY SCOTT SCHERER

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Sharon A. Connelly

(REPORTER)