

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

**THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: JEFFERY ANTOINE, Petitioner v.

BYERS & ANDERSON, INC., ET AL.

CASE NO: 91-7604

PLACE: Washington, D.C.

DATE: Tuesday, March 30, 1993

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IN THE SUPREME COURT OF THE UNITED STATES

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JEFFERY ANTOINE, :

Petitioner :

v. : No. 91-7604

BYERS & ANDERSON, INC., ET AL. :

- - - - -X

Washington, D.C.

Tuesday, March 30, 1993

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

M. MARGARET McKEOWN, ESQ., Seattle, Washington; on behalf of the Petitioner.

WILLIAM P. FITE, ESQ., Seattle, Washington; on behalf of the Respondents.

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1 PROCEEDINGS

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 91-7604, Jeffery Antoine v. Byers & Anderson.

5 Ms. McKeown.

6 ORAL ARGUMENT OF M. MARGARET MCKEOWN

7 ON BEHALF OF THE PETITIONER

8 MS. MCKEOWN: Mr. Chief Justice, and may it
9 please the Court:

10 The issue before you is whether a court reporter
11 who fails to produce a transcript is entitled to absolute
12 judicial immunity, thus overcoming the presumption of
13 qualified immunity which has been found to be sufficient
14 protection for the vast majority of public and Government
15 officials, ranging from presidential aides to the attorney
16 general, other cabinet officers, governors, police
17 officers, and school board members.

18 We submit that the Ninth Circuit ruling, that
19 the doctrine of judicial immunity bars Mr. Antoine's suit
20 simply because the court reporter is part and parcel of
21 the judicial process, expands the immunity doctrine beyond
22 the Court's decisions and certainly far beyond its
23 historical scope.

24 The case comes here in a situation where over
25 3-year period the court reporter ignored numerous court

1 orders, failed to file the transcript, and, in fact,
2 violated show cause orders from the Ninth Circuit.
3 Finally, after 3 years, she was unable to produce a
4 complete transcript and a substitute reporter was able to
5 file a reconstructed transcript which was admittedly
6 deficient.

7 We ask the Court to rule that a court reporter's
8 function is not adjudicatory, it is not a judicial
9 function, and she is not entitled to absolute immunity
10 from suit for damages. The circuits are split on this
11 issue, but the answer can be found in the Court's cases on
12 judicial immunity.

13 The starting point in the immunity analysis is
14 that the presumption is that there is qualified immunity.
15 So here it's not a question of absolute immunity or
16 nothing, but rather starting with a presumption of
17 qualified immunity. And because absolute immunity must be
18 granted so sparingly and has generally been regarded as
19 such an extreme measure, there is a very heavy burden on
20 the respondents to justify elevation from qualified to
21 absolute immunity.

22 No justification exists here. Certainly, the
23 court reporter doesn't serve a function so special or so
24 sensitive as to require a total shield from liability.
25 Nor is the real purpose of judicial immunity, that is

1 preservation of independent decision making, preventing
2 the chilling of making hard and difficult decisions,
3 served in this particular case because, of course, the
4 court reporter makes no such decisions and has no such
5 discretion to chill.

6 I would like to turn, then, to a discussion of a
7 judicial act and adjudication. The threshold question --

8 QUESTION: Well, may I interrupt you? Do you
9 suppose that a judge would have absolute immunity in
10 certifying a case record for appellate review, for
11 example?

12 MS. McKEOWN: Yes. I believe that a judge
13 certifying a record for appellate review is acting in his
14 judicial capacity. That is a function normally performed
15 by the judge, and that really is an extension -- we're
16 assuming a trial judge -- of the decision-making process
17 in which the judge has engaged on the trial level.

18 QUESTION: Although you could certainly say
19 that's a ministerial sort of act, couldn't you? What if
20 the trial judge kept notes during that proceedings that
21 became relevant on appeal and they had to be sent up, do
22 you suppose that's part of the judicial act?

23 MS. McKEOWN: Let me answer your first question,
24 and that is whether this judge's certification might be
25 deemed to be ministerial. And it might; there is not an

1 absolute line that can always be drawn. But certainly in
2 the case of a judge, one needs to look to the scope of
3 judge's authority, and it's a fairly broad decision-making
4 authority, in contrast to the very limited authority of
5 the court reporter.

6 Taking your second situation, and that is assume
7 that the judge makes notes during the process and those
8 are used in some fashion on appeal, it would appear that
9 those notes would be made as part of the decision-making
10 process, not as a part of recording simply a verbatim
11 transcript of what went on in the courtroom.

12 So there's a far bigger distinction there
13 between the note taking by the judge, which might be akin
14 to historical note taking by the judge in which he had
15 absolute immunity and was taking notes so that he could
16 comment on the evidence and summarize matters for the
17 jury. But surely a court reporter is not taking notes as
18 a part of the decision-making process, but rather simply
19 pursuant to statute and court order.

20 QUESTION: Suppose the judge --

21 QUESTION: So -- excuse me.

22 QUESTION: Suppose the judge knowingly keeps on
23 an inept court reporter who's always late, is having
24 health problems, et cetera, and two or three transcripts
25 are delayed or lost, can the judge be sued?

1 MS. McKEOWN: In that particular situation, that
2 would come somewhat close to Forrester, of a hiring and
3 firing decision which may be an administrative act rather
4 than a judicial act by the judge.

5 QUESTION: Does it --

6 MS. McKEOWN: But in any event, there would be
7 qualified immunity.

8 QUESTION: Ms. McKeown, I can't hear you like
9 that.

10 MS. McKEOWN: Yes. In any event, there would be
11 qualified immunity in that case, and it may well be that
12 the decision, albeit not an adjudicative one, would not be
13 subject to suit because there was qualified immunity.

14 QUESTION: Well, what would be -- is there any
15 potential judicial liability simply by virtue of the fact
16 that the reporter may be held liable? Are we talking
17 about a respondeat superior here?

18 Because I would suppose -- for example, in
19 Justice Kennedy's case, I mean he's posing an example in
20 which the judge's decision is a decision which is made on
21 the administrative rather than the adjudicative side of
22 the dichotomy in his duties, so that if the -- if the
23 reporter is negligent and the judge was negligent in
24 keeping the reporter on, I assume there's going to be --
25 could there be respondeat superior negligence here?

1 MS. McKEOWN: If it's determined that the
2 judge's conduct was adjudicative in nature, then there
3 would be absolute immunity and you would not reach the
4 respondeat superior.

5 QUESTION: Well, if it wasn't. I mean what if
6 the judge simply has an incompetent court reporter and
7 keeps the incompetent court reporter on, and the reporter
8 then causes damages? Is the judge going to be liable, A,
9 for his own negligence, or -- and B, would the judge, in
10 any event, be liable on a respondeat superior theory?

11 MS. McKEOWN: As to whether the judge would be
12 liable in negligence, most likely if the judge is given
13 qualified immunity, then the judge's, in effect, good
14 faith and following his own procedures would exempt him
15 from liability.

16 QUESTION: But what if he knows that he's got a
17 incompetent there and he's -- he's a kind person, he
18 doesn't want to fire this person, and just keeps the
19 incompetent reporter on? He doesn't have any reason to
20 believe that the law gives him a privilege to inflict
21 incompetent reporters on the parties, so there's not going
22 to be any good faith defense, is there?

23 MS. McKEOWN: If there is not a -- sufficient
24 evidence to meet the qualified immunity test, it may also
25 be that there's no cause of action because, generally,

1 civil rights claims based solely on negligence would not
2 rise to the level of stating a claim under Bivens or
3 section 1983.

4 QUESTION: Well, how about State law?

5 QUESTION: Yeah.

6 MS. McKEOWN: There would be a State law --
7 there would be a potential negligence claim under State
8 law.

9 QUESTION: Do you think qualified immunity would
10 be of much use to a reporter?

11 MS. McKEOWN: Would qualified immunity be of use
12 to a reporter?

13 QUESTION: Yeah.

14 MS. McKEOWN: As a practical matter, yes,
15 because --

16 QUESTION: Why, why? What does -- what's
17 qualified -- how do you overcome -- how do you overcome
18 qualified immunity?

19 MS. McKEOWN: From the cases that have been
20 brought against --

21 QUESTION: Would you think the reporter would
22 have some doubt about what his or her duties were?

23 MS. McKEOWN: Well, there's -- there's various
24 cases which have been brought where the court reporters
25 have been granted qualified immunity. For example, simply

1 following the judge's instructions.

2 QUESTION: Well I think -- I didn't ask you
3 whether they were entitled to qualified immunity. I think
4 they are. But I wonder what good it will do them.

5 MS. McKEOWN: Well, I think it would do them
6 good because there are circumstances in which I believe
7 they would meet the qualified immunity test.

8 QUESTION: Like -- like what?

9 MS. McKEOWN: A good example would be where the
10 judge, perhaps as part of his decision-making process, has
11 a vendetta against a particular litigant, but gives the
12 court reporter an order, for example, don't produce the
13 transcript for 6 months. There it would appear the court
14 reporter, following the duties that is given to her by the
15 judge, would be able to avail herself of qualified
16 immunity.

17 QUESTION: Well, it may be, but it would seem to
18 me to be -- it would be the odd circumstance where
19 qualified immunity would be -- would do much good. But
20 nevertheless, I would think the reporters would win an
21 awful lot of cases because of -- you know, they just --
22 they just haven't broken the State law or they certainly
23 haven't stated a cause of action for a civil rights
24 violation.

25 QUESTION: Do we know that they would have

1 qualified immunity under State law for a State negligence
2 action? I mean our cases have all involved constitutional
3 claims under 1983, right?

4 MS. McKEOWN: That's correct. There -- there
5 are --

6 QUESTION: Have we ever said that you must give
7 a reporter, or anybody, any Government officer, qualified
8 immunity under State law?

9 MS. McKEOWN: Well, it would appear under the
10 Westfall decision that the immunity analysis should end up
11 the same whether a Federal cause of action or a State
12 cause of action, certainly against a Federal official.
13 There are some circumstances where States have their own
14 immunity statutes, and in some of those they even
15 implicate court reporters, for example, and they do have
16 immunity under their State law provisions.

17 QUESTION: Yeah, but what -- what it's meant in
18 connection with the Federal causes of action, which are
19 all constitutional causes of action, has been simply that
20 it has to be, you know, violation of a known
21 constitutional right, intentional violation of a known
22 constitutional right. That makes a lot of sense when
23 you're applying it in a constitutional context, but how do
24 you -- how do you translate that into a State tort action
25 for negligence of a -- of a court reporter, not claiming

1 any violation of constitutional rights, just negligence
2 causing me to lose my appeal?

3 QUESTION: Suppose we said a court reporter has
4 absolute immunity from suit and the court reporter -- I
5 mean in a Federal court. In a Federal court a Federal
6 officer has absolute immunity, and the court reporter gets
7 sued in a State court under State law, and absolute
8 immunity wouldn't be any use to them.

9 MS. McKEOWN: If it's a State court reporter
10 being sued.

11 QUESTION: No, no. Federal court reporter
12 getting sued just like anybody else, under -- for
13 negligence or for anything else.

14 MS. McKEOWN: I think that --

15 QUESTION: Wouldn't they be absolutely immune --

16 MS. McKEOWN: If --

17 QUESTION: -- If we granted absolute immunity?

18 MS. McKEOWN: That's correct. If you granted --

19 QUESTION: And similarly, qualified immunity?

20 MS. McKEOWN: That's correct. And -- and
21 getting back to Justice Scalia's question, what would be
22 the test if you had the Federal reporter but sued under
23 State law, it would seem to me that the courts would
24 fashion a test which would be similar to the
25 constitutional-type test, that is whether she was

1 following out her duties and was able to proceed in an
2 expeditious and appropriate fashion under either the
3 statute or rule.

4 QUESTION: Yeah. Of course, we developed the
5 other test because we thought it was a fair interpretation
6 of what Congress intended in the congressional statute
7 allowing suit. That's how we came to that, and I guess in
8 Bivens' action we just imitate that, but basically it was
9 based upon a congressional intent. And I guess we'd just
10 be making it up for the -- or I don't know, some
11 congressional common -- some Federal common law principle
12 that requires this to be applied in State causes of
13 action. I don't know. It's just a new question to me.

14 QUESTION: Well, you -- we've announced that a
15 Federal -- certain Federal officers, wholly aside from any
16 statute are -- have either absolute or qualified immunity.
17 How about the prosecutor, Federal prosecutor?

18 MS. McKEOWN: Well, under the -- this Court's
19 rulings, the Federal prosecutor, acting in a prosecutorial
20 capacity, has absolute immunity.

21 QUESTION: Is that based on the statute?

22 MS. McKEOWN: No, that is -- that is based on
23 common law, as well as looking at the --

24 QUESTION: How about judicial immunity?

25 MS. McKEOWN: Judicial immunity is based

1 essentially on the common law rather than statute or
2 Constitution.

3 QUESTION: Yeah.

4 MS. McKEOWN: And that is essentially extended
5 with respect to the prosecutor.

6 QUESTION: Yes.

7 MS. McKEOWN: Because the prosecutor plays that
8 role. And that is exactly -- that prosecutorial issue
9 really frames why judicial immunity has been granted,
10 because the purpose there is to protect the independent
11 decision making, it is to protect the actual adjudicative
12 process. So the prosecutor, like witnesses or jurors,
13 acts in an equivalent role to the judge in considering,
14 weighing, and making presentations in evidence.

15 QUESTION: Would you help me out on one thing
16 about this case? I'm a little rusty on just how it arose
17 and all. This is a suit brought in Federal court against
18 a court reporter who was involved in a Federal trial, by a
19 defendant in a Federal trial, so it's a Federal immunity
20 you're seeking. But is there not also -- was there not
21 also a State lawsuit for breach of contract for not
22 performing?

23 Now, are you claiming, or does the other side
24 claim that there is -- that the Federal law provides the
25 court reporter with immunity from a breach of contract

1 action under State law as well?

2 MS. McKEOWN: Your recitation of the facts is
3 exactly the procedure in which the case was brought. The
4 case was brought pro se by Mr. Antoine. He had both what
5 he called a 1983 claim, which was really a Bivens'
6 claim --

7 QUESTION: Right.

8 MS. McKEOWN: -- And a State contract claim.
9 The -- as I understand the respondents' position, it was
10 that absolute immunity would bar either of those cases.
11 But the court below, having decided that absolute immunity
12 would take effect, essentially dismissed without prejudice
13 his State cause -- State law cause of action.

14 QUESTION: So that if -- in other words, if he
15 overpaid the court reporter, he paid her a couple hundred
16 dollars more than he should have and sued to get his money
17 back, she could just put it in her pocket and say I'm
18 sorry, I'm absolutely immune?

19 MS. McKEOWN: We would disagree with that
20 position, of course.

21 QUESTION: But that's -- you think that's, in
22 effect, what was held here.

23 MS. McKEOWN: Yes.

24 QUESTION: Is she a Federal employee? I
25 thought -- I thought she was independent contractor.

1 MS. McKEOWN: She's not a Federal employee. She
2 is hired under an emergency court reporter act, because
3 the court did not have a full-time court reporter at the
4 time.

5 QUESTION: So she was an independent contractor.

6 MS. McKEOWN: That's correct.

7 QUESTION: And Bivens applies to independent
8 contractors hired by the Government.

9 MS. McKEOWN: Yes. She is acting under color of
10 State law, and in -- pursuant to --

11 QUESTION: Color of Federal law.

12 MS. McKEOWN: Federal law, excuse me.

13 QUESTION: Uh-hum.

14 MS. McKEOWN: Federal law and pursuant to
15 Federal statute and pursuant to the authority of the
16 Federal court.

17 QUESTION: I'm not sure I understood your answer
18 to Justice Stevens' question with respect to the State law
19 contract action. Did the -- did the court below
20 purport -- did any Federal court below purport to -- no,
21 let me strike that. Did the court of appeals purport to
22 hold that there was absolute immunity with respect to the
23 State contract action, or did the court of appeals, in
24 effect, simply leave that to be adjudicated as a matter of
25 State law if the claim was brought -- was refiled as a

1 State law claim?

2 MS. McKEOWN: The latter because that issue --

3 QUESTION: Okay.

4 MS. McKEOWN: -- Was never presented to the
5 Ninth Circuit.

6 QUESTION: So that the only issue before us is
7 just Bivens immunity.

8 MS. McKEOWN: That's correct.

9 QUESTION: Yeah.

10 MS. McKEOWN: That's correct.

11 QUESTION: Ms. McKeown, do you know of any cases
12 from the days when judges just to keep their own -- used
13 to keep the record, used to compile the record? Do you
14 know of any cases in which a judge was -- was sued for
15 failure to compile the record properly?

16 MS. McKEOWN: I don't know of cases where the
17 judge was sued for a failed -- failure to compile the
18 record. There are cases involving writs of capital
19 punishment where the judge's notes were used and needed in
20 some equivalent to a king's appellate process, but I don't
21 know of a case where the judge was sued in that context.

22 QUESTION: Uh-hum.

23 MS. McKEOWN: The best discussion of the judge's
24 notes is found in the articles by Professor Langbein at
25 Yale, and he discusses the function of the judge there as

1 the notes really being part of the judge's decision making
2 or adjudicatory process. And by way of historical --

3 QUESTION: When did he write that?

4 MS. McKEOWN: He wrote two different articles
5 on -- I believe they're cited in our briefs, and I can
6 reference them by date if you'd like me to.

7 QUESTION: That's all right. Never -- don't
8 take the time to do that.

9 MS. McKEOWN: Thank you.

10 QUESTION: Was the conclusion in those articles
11 that the notes themselves were actually shipped up to --
12 either to an appellate court or to the court sitting in a
13 law term, if it was an old nisi prius judge, so that those
14 notes actually functioned as the equivalent of today's
15 verbatim transcript?

16 MS. McKEOWN: No, that -- that is not the
17 conclusion that Professor Langbein drew. In fact, it's
18 the opposite, it's that those notes were taken during the
19 trial and then were used in the summing up process to the
20 jury. The other function that those notes served was when
21 the king would go back to the judge for a recommendation
22 on -- in a capital case, to ask the judge to go back and
23 look at his notes and make a recommendation as to what
24 kind of sentence or a judgment ought to be passed.

25 So they were never used in the same function

1 that we know today. And, of course, the notion of a
2 verbatim transcript was not even mandatory in the Federal
3 courts until 1944.

4 What we are suggesting is that the threshold
5 question, when one is looking at judicial immunity, is
6 whether their conduct is, in fact, judicial. And under
7 Forrester's functional approach that's determined, of
8 course, by the nature of the act, not the title. So
9 simply because somebody is called court reporter doesn't
10 mean that they are functioning as a judge or in a judicial
11 context.

12 QUESTION: I'm just not sure where we left the
13 colloquy with reference to the State action. What is your
14 position? Let us assume that -- that we agree with you
15 that there's qualified immunity and this action, then,
16 goes to State court. I'm not quite sure how he calculates
17 his damages. Is there qualified immunity there as a
18 matter of Federal law?

19 MS. McKEOWN: If the Court were to rule that
20 there's qualified immunity, we would argue that -- under
21 Westfall, that that same immunity applies to the State law
22 causes of action.

23 QUESTION: And what about a contact suit for
24 overpayment?

25 MS. McKEOWN: Same. We would argue again that

1 the qualified immunity would apply, that there would be no
2 absolute immunity from suit.

3 QUESTION: Well, why -- why should a Federal
4 employee, like the respondent in this case, have any sort
5 of immunity granted by Federal law if it's a simple
6 contract claim under the law of the State of Washington?

7 MS. McKEOWN: Well, there is some suggestion
8 that there would be no immunity in such situations. And
9 we would be willing, of course, to accept that rule. The
10 concern is that given the court reporter obviously having
11 some association with the judicial process, that there may
12 be some reluctance to go that far. Our position, of
13 course, ideally would be that she has no immunity because
14 everything she does is totally ministerial and
15 nonjudicial.

16 QUESTION: Yes, but one could disagree with you
17 on that position so far as any claim based on Federal law
18 against her, and perhaps any claim based -- based on a
19 cognate State law. But a simple contract claim,
20 hypothesized by Justice Stevens, where the defendant
21 claims that he overpaid \$200 for a transcript, it strikes
22 me that whether the Federal law ought to impose on the
23 State law system in immunity is quite debatable.

24 MS. McKEOWN: I would agree with that. And
25 assuming, of course, no particular State statute, were

1 this to go back to the State court, we would argue no
2 immunity with respect, certainly, to the contract action.
3 But that the only issue that comes before this Court, of
4 course, is this particular Bivens Federal claim and what
5 the immunity is with respect to that.

6 QUESTION: But not the tort action. You don't
7 assert that there's no qualified immunity, whatever that
8 means, with respect to a State tort action. You draw a
9 distinction between a State tort action and a State
10 contract action.

11 MS. McKEOWN: Well, I wouldn't draw that
12 distinction. At this point in time I have to be candid
13 that my client has not himself alleged a State tort action
14 on -- there is an amended complaint that was pending, and
15 the amendment was not granted because the case was
16 dismissed.

17 In looking at what is a judicial act, the
18 language in the partial concurrence in Burns v. Reed is
19 really quite helpful, because there it was written that
20 the touchstone of the application of judicial immunity is
21 the function of resolving disputes between the parties, or
22 that is authoritatively adjudicating private rights. So
23 if you take the situation of what does the court reporter
24 do and does she fall into that description, the answer has
25 to be no.

1 The court reporter, of course, performs a
2 stenographic function, produces a verbatim transcript
3 according to very clear rules, and it's a skilled, but
4 it's a ministerial function. The scope of that activity
5 is hardly in any respect related to the notion of why we
6 have judicial immunity.

7 The court reporter exercises no independent
8 judgement, she performs none of the classic adjudicative
9 functions such as evaluation of evidence, like the jury
10 might do. She has no discretion over the rights of the
11 parties and she does nothing that is really central to
12 this truth seeking which is part of the justice system.
13 The central characteristic, then, that is adjudication, is
14 not present with the court reporter.

15 Secondly, you ask is it an act normally
16 performed by the judge. And clearly in the system as we
17 know it now, that is not part of the judge's normal
18 function, that is to take a verbatim transcript. Nor
19 could it be said that somehow the court reporter is the
20 judge's alter ego or performs a function which is really
21 comparable to a judge. I think that certainly would be a
22 disservice to the judiciary, to suggest that court
23 reporting is functionally comparable to judging.

24 And finally, of course, a necessary but not
25 determinative point is to go back to the historical

1 analysis. And since there were no court reporters at
2 common law, and on that point I believe both parties are
3 in agreement, the question is then asked was there any
4 comparable function.

5 And the fact is that there wasn't. There really
6 was nothing like a verbatim record at common law. The
7 note taking was for judicial summing up. And even those
8 court clerks who had transcripts, and that was basically
9 just a listing of the pleadings, were entitled to no
10 immunity because they were performing ministerial acts
11 under the common law.

12 So with those principles in mind, I'd like to
13 turn then to the Ninth Circuit decision and to suggest why
14 that decision is wrong. Essentially, what the Ninth
15 Circuit did was to grant absolute judicial immunity to
16 anything which is part and parcel of the judicial process.
17 But what that does, basically, is to ignore Forrester, and
18 it really collapses the judicial immunity analysis into an
19 unprecedented association with the judiciary. The test
20 ought not to be where you sit but what you do.

21 Also, this would be a blanket extension of the
22 notion of absolute judicial immunity to the entire
23 judicial branch. And as we've learned from other cases
24 such as Harlow, such an undifferentiated extension cannot
25 be reconciled with the functional approach.

1 What it would do, of course, is to place the
2 judiciary in a situation superior to the other two
3 branches of Government. Just as the President's immunity
4 cannot be extended in an undifferentiated fashion to his
5 aides, neither can the judiciary's immunity be extended in
6 an undifferentiated fashion to a court reporter. Or
7 similarly, even in the legislative context from the Gravel
8 case, legislative acts are not all encompassing.

9 Finally, what the Ninth Circuit also focused on
10 was that this is a very important part of the overall
11 administration of justice and the efficient administration
12 of justice, and therefore there ought to be absolute
13 immunity. And we would take issue with that because that
14 fails to distinguish acts that are important to the
15 judicial system from judicial acts.

16 The answer to that can best be found in the
17 language of Forrester where the Court, talking about
18 administrative acts, says that they might have been quite
19 important in providing necessary conditions of a sound
20 adjudicative system, but the decisions at issue were not
21 themselves judicial or adjudicative.

22 The second prong of the Forrester test then asks
23 to evaluate what impact would there be were one to grant
24 qualified immunity to court reporters, and what impact
25 would that have on the court reporters' performance of

1 their duties.

2 Starting with a premise that qualified immunity
3 is the rule, there's no real reason to place the court
4 reporters in a preferred position above all those other
5 officers mentioned earlier, such as law enforcement
6 officials, presidential aides, who day after day face very
7 difficult, important discretionary decisions, and yet are
8 protected only by qualified immunity.

9 And also, the court reporter can hardly be said
10 to fit within the short list of those functions to which
11 this Court has granted absolute immunity: the judge, in
12 the judge's judicial or legislative capacity; jurors,
13 witnesses, and prosecutors taking part in a deliberative
14 evidentiary hearing; the President or legislators and
15 their aides acting as alter egos.

16 At this time, if the Court has no objection, I
17 would like to reserve time for rebuttal.

18 QUESTION: Very well, Ms. McKeown.

19 Mr. Fite, we'll hear from you.

20 ORAL ARGUMENT OF WILLIAM P. FITE

21 ON BEHALF OF THE RESPONDENTS

22 MR. FITE: Mr. Chief Justice, and may it please
23 the Court:

24 I think the petitioner has stated accurately the
25 facts of the case except on one point, and I think it's

1 important in our decision -- or in your decision. And
2 that is we know what did occur, but the factual inquiry as
3 to why it occurred, the reason it occurred, we don't know.
4 It was dismissed on a motion for summary judgment. All we
5 know is the record was not produced. We don't know the
6 why or the wherefore, nor have we proceeded through that
7 discovery process.

8 Counsel has brought up what the issue before you
9 is: whether there is absolute immunity. It seems to me
10 that the general scope of the question before the Court is
11 whether the judicial process is better off or worse off by
12 granting the court reporter absolute immunity. And the
13 respondent would ask the Court to consider I think three
14 areas in addressing that problem or that question.

15 QUESTION: Why --

16 MR. FITE: Yes.

17 QUESTION: Is that how we decide this case,
18 whatever we think is better? You know, I don't know. I
19 mean certainly in the 1983 cases we purported to be
20 deciding whether the immunity existed on the basis of
21 whether it existed at common law at the time 1983 was
22 adopted. And we've sort of carried the same immunities we
23 find in 1983 over into Bivens, which we sort of created
24 out of 1983. I'm not sure that I agree with your
25 criteria, that whatever is better is.

1 MR. FITE: Addressing that question, I would
2 need -- we think we need to take a look at the history of
3 judicial immunity. You say do we need, in a sense,
4 judicial immunity afforded to the court reporter?

5 My interpretation of the case is -- and this is
6 founded in common law, is that judicial immunity
7 essentially comes into play because we felt that judicial
8 immunity had to be, otherwise the process of making
9 decisions of the judicial process would be damaged, would
10 not function as we want it to function. The question I
11 see here for the Court to resolve, is it necessary to
12 extend that immunity on to a court reporter to accomplish
13 the same goal, and that is an effective judicial process.

14 So you say do -- do we need to extend it on, is
15 it a policy decision? I think it's fair to say it is a
16 policy decision in this respect, as I think that is how
17 judicial immunity arrived. It was decided that we
18 couldn't have collateral attack, we wouldn't have finality
19 of judgments, wouldn't have an arbitrator that concluded
20 matters if we didn't have that. So I think you do need to
21 look at history in looking at -- at a court reporter's
22 immunity.

23 QUESTION: Well, I thought judicial immunity had
24 a long common law history.

25 MR. FITE: I believe it does.

1 QUESTION: And we don't have a common law
2 analogue for court reporters, do we?

3 MR. FITE: We do not.

4 QUESTION: No.

5 MR. FITE: The reason -- excuse me.

6 QUESTION: What about a courtroom marshall or
7 bailiff who acts with excessive force in subduing some
8 obstreperous witness or --

9 MR. FITE: I don't see the rule needing to be
10 extended in that situation. I think we're getting back to
11 the question of -- quickly -- on court reporters not,
12 under common law, being afforded immunity. I think that's
13 answered historically. There were not court reporters in
14 the sense we think of them until, I think, 1866, and then
15 finally the Court Reporters Act in 1944.

16 QUESTION: Well, then why should we concoct
17 some -- some absolute immunity principle here?

18 MR. FITE: Well, I think what we're saying is
19 that there was immunity for that process. For the process
20 of recording what went on in a courtroom there was
21 immunity, because that immunity was afforded through
22 judicial immunity.

23 The argument of respondent in this case is that
24 the court reporter is part and parcel of that judicial
25 process in the courtroom. That process up until, as best

1 in the reading I've done on the history -- and I think the
2 National Court Reporters Association did an excellent job
3 of reviewing the history -- that process was taken care of
4 by the judge.

5 And I think there was a question here earlier,
6 what about judge's notes. I think the petitioner has
7 diminished the role of those notes. I think they were
8 very important, as my understanding is that the notes and
9 so on were our ability to get to the appellate level with
10 a record and have finality as to the factual issues of the
11 case, so we get to the question of whether the judge
12 complied with the law in making the decision.

13 And so I think correct -- we need to look at
14 historically. I think you can't proceed to consider a
15 court reporter's immunity without understanding that
16 background of what those notes mean. And I think they
17 mean that today. If you look at the court rules with
18 regard to what the record is to consist of, it is still
19 the judge's record.

20 The judge has the final say. The judge
21 reconstructs a record that does not exist, as it was done
22 in this case. The judge passes and -- on questions that
23 rise about the record. Whether it be the trial court
24 judge or the appellate court judge, that decision is made.

25 QUESTION: You mean if a -- if a question arises

1 about the accuracy of the reporter's notes, the trial
2 judge settles that and says yes, the witness said yes
3 rather than no in answer to that question.

4 MR. FITE: My understanding, reading the rule,
5 although I have never followed through the process --
6 well, I have followed through the process that the judge
7 does make that decision. And my interpretation of the
8 rule is yes, the judge has the final say in certifying
9 that record to go to the court of appeals. If there
10 remains a question, as I understand it the court of
11 appeals then may have to resolve it.

12 I think the court rules says the judge will
13 correct the record -- I don't think they use that word --
14 to be sure that it says the truth. I don't know where we
15 would turn to get that record other than to the -- to the
16 court, to the judge or to the court of appeals, to
17 determine what the final record is.

18 As a practical matter -- and I think it's very
19 important in this decision on the role of a court
20 reporter -- if you have a question, say a transcript at
21 the end of a day, and there's a yes and a no and you think
22 it should be yes and the other party thinks it should be
23 no, and you've gotten this transcript, you would say what
24 happened, what is the record going to say, what words they
25 said, and I think that role would fall to the judge to

1 correct the record. The record is the court's record and
2 the court is controlled by the trial judge.

3 QUESTION: May I ask you a historical question.
4 I guess it's the same one I asked your opposing counsel.
5 Do you have any historical evidence to the effect that the
6 trial judge's notes were themselves transferred either to
7 an appellate court or to a panel of his own court, if it
8 was a nisi prius judge?

9 MR. FITE: The reading I've done, that specific
10 statement is not made, but it's certainly implied from the
11 historical events that occurred with regard to the
12 appellate process. They talk about judge's notes, they
13 talk about where does the record come from. The record,
14 as I understand it, historically could come from literally
15 whoever might assist in accumulating that record. Of
16 course, the judge's notes were primary, but it could come
17 from counsel, it could come from whatever source in order
18 to establish what occurred at the trial.

19 QUESTION: Though you have a bystander's bill,
20 don't you, authorized in some situations. A bystander's
21 bill where they can't get a transcript and where you
22 simply ask people who were in court to say what happened.

23 MR. FITE: Well I believe historically that has
24 occurred. I think -- wasn't Charles Dickens, I believe, a
25 court reporter or reported on trials at one time, and

1 there was -- that sort of thing occurred. They were
2 trying to find what they eventually found, and that was
3 effective court reporters to do this job in a logical,
4 sensible way, and with accuracy.

5 And with that ability -- and I guess it
6 initially was the writing skills of a reporter, it now has
7 become somewhat more mechanical. With that ability, we
8 now can kind of say that record is accurate, it can be
9 certified and we know and we can trust that record to be
10 such.

11 The -- I think the -- addressing the question,
12 it's also important to understand what the role of the
13 court reporter is. I think we tend to accept the fact
14 that a court reporter is there making a verbatim
15 transcript, and I think the rules say a verbatim
16 transcript and a record of proceedings.

17 But in the trial of a case a court reporter
18 takes on something greater by far than just the task of
19 recording what's done there. That's the mechanical part,
20 but a court reporter in every sense, as I see it, is
21 essentially the trial. Frequently in a trial, whether
22 you're winning or losing, you may be more concerned that
23 the court reporter hears you accurately, that the record
24 reflects what goes on, than the court, than the judge.

25 A court reporter is put in a sensitive position

1 in fulfilling that role, and I think one of the
2 consequences is -- is to make that court reporter's role,
3 that sensitive role of being assured that they are
4 recording what happened fairly, accurately, with no bias,
5 that -- the fact that there could be qualified immunity,
6 questions of fact about that, I think would inhibit the
7 court reporter in fulfilling that role.

8 QUESTION: Why is that? It seems to me there
9 are two purposes to absolute immunity. One is simply to
10 restrict what otherwise would be frequent lawsuits, so
11 that the judge or whoever it is won't have to be in court
12 all the time defending his or her actions. And the second
13 is to be sure that in order to avoid lawsuits, the judge
14 or whoever it is does not -- does not shrink from making
15 the tough calls, the tough decisions, the jury from
16 calling it the way the jury really saw it, or the judge
17 from coming out against somebody who is a -- an habitual
18 litigant and would sue anybody in sight.

19 I don't see how the second of these reasons, at
20 least, applies to the court reporter. The first may, but
21 maybe -- maybe qualified immunity is enough to take care
22 of that.

23 MR. FITE: Where I see the -- and I think
24 it's --

25 QUESTION: What decision would she likely shrink

1 from taking, knowing that she would be subject to suit?

2 MR. FITE: Well I -- I can see that the court
3 reporter -- have difficultly in shrinking from a decision
4 on inquiry of counsel about what went on in the record,
5 does the record show this or does the record show that.

6 There may be -- I don't think it's the most
7 important reason for immunity, but I think there well
8 could be that a court reporter with this litigious counsel
9 on one side saying I hope you got that record right today
10 when he said no or she said no and yes -- it may have an
11 intimidation effect on the ability to sit back in an
12 unbiased way, an independent way, and do the record.

13 But I don't think that's the most important part
14 of this.

15 QUESTION: Well, you think it's a matter of
16 judgment whether you hear yes or no. I mean that's not a
17 matter of judgment. I mean anybody can be intimidated
18 into lying. You can't prevent that by absolute immunity
19 or not.

20 MR. FITE: Well --

21 QUESTION: But what judgment -- what judgmental
22 calls does she have to make that might be swayed?

23 MR. FITE: A limited number.

24 QUESTION: Any?

25 MR. FITE: A limited number, but there are some.

1 QUESTION: Give me -- give me -- okay, what are
2 they?

3 MR. FITE: I think if -- one, the role of a
4 court reporter is, to me, one that is difficult to
5 comprehend to be completed. You have counsel talking, you
6 have witnesses, you have the court, and you have to, in
7 some way, discriminate on what goes in that record. There
8 is that type of discretionary act in court reporting.
9 It's inherent in trying to accomplish that. If we ever
10 come up with an ability to accomplish it without ever the
11 possibility of error, without any -- everything being
12 recorded, well then I guess we wouldn't be here because
13 no -- no reporter would be sued.

14 QUESTION: Well, but that -- that's just a
15 matter of being able not to hear everything at once. But
16 if she heard everything at once, surely she should put it
17 all down. If there were eight people that spoke at once
18 and she could hear all eight, she'd have to write it down,
19 wouldn't she?

20 Okay, so that's -- I don't consider that
21 judgment. I consider that just a matter of hearing or
22 not.

23 MR. FITE: Your Honor, I think you're right. I
24 mean I can't say that everything that a --

25 QUESTION: Okay, so give me -- I can't think of

1 one example of judgment, where she has to make a judgment
2 that could be influenced by --

3 MR. FITE: Well, I think there is judgment in
4 recording. You're right, if it's there, if it's not
5 confused and it's not entwined with other things, that we
6 know what is to go in the record, then it's merely a
7 matter of writing it down.

8 QUESTION: But I thought --

9 MR. FITE: The perfect judge doesn't need a
10 reporter, if somebody could record --

11 QUESTION: I thought your point, Mr. Fite, was
12 that if there are eight people talking at once she can
13 hear them all, but she doesn't have eight hands. She
14 can't write everything down at once, and therefore she has
15 to make a judgment about which things of those that she
16 heard and can remember she can get on paper. I mean that
17 happens sometimes, a court reporter with about six lawyers
18 arguing at the same time, they can't get them all. And
19 she must make a decision as among those, which one she's
20 going to put down.

21 MR. FITE: Well, there's another element to that
22 too. I agree with Your Honor. Another element is at
23 times the court reporter needs to intrude into the
24 process, needs to say stop, I didn't get it, I need to
25 have you stop here. Now what -- said, and essentially

1 defers to the court and the court, of course, stops the
2 proceedings.

3 But even with that, what I think is the greatest
4 danger flowing from failure to provide absolute immunity
5 to a court reporter is that I think you create a question
6 of fact, a question of fact that is going to embroil
7 anybody in a courtroom. We didn't get into it yet in this
8 case, but I can hardly think of a situation where somebody
9 says the record is wrong that every player in that
10 process, that judicial process, the courtroom, isn't
11 potentially a fact witness: the judge, the jury, the
12 witness, counsel, everybody else.

13 And if we start to get into a situation where
14 there is the potential threat of that sort of factual
15 inquiry, it seems to me you're going a long way towards
16 defeating the purpose of judicial immunity.

17 QUESTION: Is there any reason to think, Mr.
18 Fite, that this sort -- the particular kind of controversy
19 you've described comes up often? I mean the lawsuit in
20 this case, for instance, doesn't involve anything like
21 that, as I understand it.

22 MR. FITE: We don't really know that it does or
23 not in this case. But the question asked, Chief Justice,
24 is will there be lawsuits from this. The petitioners take
25 the position there haven't been many lawsuits, therefore

1 what are we worried about. Court reporters generally do a
2 good job; there isn't a flood of litigation on this.

3 I don't know. I don't know what the future
4 would hold for sure, but I think there is the real threat
5 that once the Supreme Court has spoken and every counsel
6 who loses -- and generally one side or the other loses --
7 is going to have to consider -- in representing their
8 client who is disgruntled by the fact they lost, going to
9 have to consider as one of the potential causes of action
10 a claim against court personnel, particularly the court
11 reporter.

12 So whether that means --

13 QUESTION: For having truthfully reported
14 something that damaged their client or for having
15 inaccurately reported? I -- I mean I practiced law for 16
16 years in court before I left the private practice, and I
17 can't remember a single instance where there was a great
18 deal of controversy about a transcript.

19 MR. FITE: I can't either, and I've been a trial
20 attorney for some years now, except in this situation --
21 except that we view it different than might -- it might be
22 viewed depending on how the Court rules in this case.

23 At this time I think, one, it doesn't take
24 anybody well versed in judicial immunity to go into the
25 courtroom for the first time and realize we can't be suing

1 the judge. It just won't work. I think that most trial
2 counsel have looked at the court reporter that way. It's
3 a team in a courtroom, and I think it's been -- people may
4 be critical of a great deal of litigation.

5 In this case it was a pro se criminal defendant
6 that brought the case, and I notice a number of those --
7 of the cases come that route. But if you talk to a trial
8 attorney and say well the record doesn't look right, let's
9 sue the court reporter, I don't think it was ever
10 considered. I think they felt -- saw the judge and the
11 court reporter as a team.

12 QUESTION: Well, Mr. Fite, isn't it true that if
13 the record didn't look right and it had a material bearing
14 on the outcome of the lawsuit, you're not going to sue the
15 court reporter, you're going to get the record
16 straightened out for your appeal. You have the -- the
17 reason for getting the record straight exists whether you
18 can sue the court reporter or not. If you have a bollixed
19 up record that prevents the review from taking place, you
20 have a reason to raise the issue and get into the very
21 dispute you're talking about.

22 MR. FITE: Well, then that's correct. As long
23 as we know when we end up with the truth. We have, as the
24 record, says the truth.

25 QUESTION: When you end up with the best you can

1 get out of the work that's done there.

2 MR. FITE: Well --

3 QUESTION: I don't think your normal recourse
4 would be to sue the court reporter. As the Chief Justice
5 suggested, if there's -- most of us have had good
6 experience with court reporters, and if we hadn't, it
7 seems to me we would have raised it as trying to
8 straighten out the record in the -- in the case. If the
9 witness answers yes and the court reporter writes down no,
10 you -- you remember those things if it's an important
11 question.

12 MR. FITE: I agree with that, and that's why the
13 judge has -- is controlling of that record and says yes it
14 was no, or yes it was. But -- or yes it was the other
15 way. But it -- it seems to me it can fall into this sort
16 of scenario of a lawsuit. The record's there, the judge
17 has said it was yes, you believe it was no and you sue the
18 court reporter saying you put it down wrong. He says well
19 the judge said that it was yes; wait a minute, let me
20 bring in a jury to testify about that.

21 QUESTION: Is the law settled on this subject in
22 the State of Washington?

23 MR. FITE: I don't know if it is in that sense.
24 There's judicial immunity, but I don't know of any case
25 regarding the -- a court reporter immunity, either

1 qualified or absolute.

2 QUESTION: Mr. Fite, I was under the impression
3 when we took this case that there was a conflict below,
4 that at least some jurisdictions have made it clear that
5 you can sue a court reporter. And has the experience --
6 am I right in that?

7 MR. FITE: That's correct, only -- only --

8 QUESTION: Well, have they -- have they been
9 flooded with litigation against court reporters, those
10 jurisdictions?

11 MR. FITE: Not that I'm aware of in that sense.

12 QUESTION: Yeah, I'm not aware of it either.

13 MR. FITE: I don't know if that can be -- is
14 really a factor in this decision.

15 QUESTION: You raised it, I didn't, I mean.

16 MR. FITE: But -- I don't know. I don't know
17 that you can say it's a flood of litigation. But as I
18 said earlier, the Supreme Court has not spoken on this and
19 there is differences between the various circuits.

20 QUESTION: I'm not aware that people wait for us
21 to speak before they file lawsuits if they think they're
22 going to win in their State or in their -- in their
23 circuit. I think there would have been a lot of
24 litigation in those circuits that have held contrary to
25 your view here.

1 MR. FITE: I'm not so sure that the amount of
2 litigation is necessarily the criteria. If there is the
3 potential threat, the creation of mistrust within the
4 courtroom personnel, I think you have defeated to some
5 degree the purpose of judicial immunity. Now, whether
6 that's a few cases that come out or whether it's a
7 floodgate of opening of cases, I don't know. But I do
8 think that the dangers that flow from it are there whether
9 there's few or many.

10 The three areas that I wanted to touch on, and I
11 think they have been touched on in the questioning that
12 have been posed, is, one, historical, that I think the
13 court reporter's role is part of the historical duties and
14 responsibilities of the judge. The other is the role of
15 the court reporter, and I wanted, I felt in representing
16 respondent in this case, to emphasize what the court
17 reporter's role was in a trial, what it really meant in
18 the day-to-day trial of a case.

19 And third, the consequences. And looking at the
20 consequences would have been discussed, it seems to me
21 that they are serious. And I don't think it has to do
22 with how many cases are there. But once you open the door
23 and start to allow factual inquiry, which may well happen
24 in this case depending on the rule of the Court -- as once
25 you open the door and say what went on in the courtroom

1 with regard to the court reporter that is a factual
2 question, then I think you are defeating judicial
3 immunity.

4 QUESTION: If we find that there is qualified
5 immunity, is there anything left in this case given the
6 ruling that he was -- suffered no violation of his due
7 process rights, no injury?

8 MR. FITE: The -- well, you raise a question,
9 Your Honor, as to whether there remains a claim here, a
10 cause of action. In a sense, it seems to me your
11 addressing a question that's moot in this case. I think
12 that argument could be made. The -- I think you could
13 take that position.

14 Unless there are further questions, I have
15 addressed the issues that I wanted to. Thank you.

16 QUESTION: Thank you, Mr. Fite.

17 Mc. McKeown, you have a minute left.

18 REBUTTAL ARGUMENT OF M. MARGARET MCKEOWN

19 ON BEHALF OF THE PETITIONER

20 MS. MCKEOWN: Thank you. Let me address briefly
21 the threat of litigation and then the historical issue.
22 On the threat of litigation, there are four circuits which
23 hold for qualified immunity and there are also district
24 courts in three other circuits. The result has not been a
25 flood of litigation.

1 We disagree with opposing counsel that there is
2 some significant threat, and I would turn again back to
3 Westfall where the Court noted that where conduct is not
4 the product of independent threat, then the threat of
5 liability cannot detrimentally inhibit that function.

6 Turning to the historical section, we are in
7 disagreement that the judge's note taking was in any way
8 comparable to what the court reporter does, and refer to
9 the 1978 and 1983 articles of Professor Langbein. The
10 appellate process, as we know it --

11 QUESTION: It was Professor Langbein of Chicago.

12 MS. McKEOWN: Yes.

13 QUESTION: At that time.

14 MS. McKEOWN: At that time, now moved to Yale,
15 as I understand. But I believe a close reading of his
16 discussion would support the position that we have taken
17 in the brief. While I do not know of a case against a
18 judge, I can refer the Court to Bates v. Foree.

19 CHIEF JUSTICE REHNQUIST: Thank you -- thank
20 you, Ms. McKeown.

21 MS. McKEOWN: Thank you.

22 CHIEF JUSTICE REHNQUIST: The case is submitted.

23 (Whereupon, at 1:52 p.m., the case in the
24 above-entitled matter was submitted.)

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of

The United States in the Matter of: Case No. 91-7604

Jeffery Antoine, Petitioner v. Byers & Anderson, Inc., et al

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

BY Ann Marie Federico

(REPORTER)