OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: BRETT C. KIMBERLIN, Petitioner, v.

J. MICHAEL QUINLAN, ET AL.

CASE NO: 93-2068

PLACE: Washington, D.C.

DATE: Wednesday, April 26, 1995.

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IN THE SUPREME COURT OF THE UNITED STATES

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BRETT C. KIMBERLIN, :

Petitioner :

v. : No. 93-2068

J. MICHAEL QUINLAN, ET AL. :

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Washington, D.C.

Wednesday, April 26, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:15 a.m.

APPEARANCES:

HOWARD T. ROSENBLATT, ESQ., Washington, D.C.; on behalf of the Petitioner.

PAUL BENDER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

MICHAEL L. MARTINEZ, ESQ., Washington, D.C.; on behalf of the Respondents.

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P R O C E E D I N G S

(11:15 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 93-2068, Brett C. Kimberlin v. J. Michael Quinlan.

Spectators are admonished to be quiet until you get out of the courtroom. The Court is still in session.

Mr. Rosenblatt.

ORAL ARGUMENT OF HOWARD T. ROSENBLATT

ON BEHALF OF THE PETITIONER

MR. ROSENBLATT: Thank you, Mr. Chief Justice, and may it please the Court:

The issue in this case is whether the court of appeals below erred in requiring Bivens plaintiffs to come forward with direct evidence of unlawful intent in cases that turn on intent, and in holding that reliance on circumstantial evidence, no matter how probative, is inadequate to overcome a claim of qualified immunity.

In this case, the district court found that the petitioner in this case had supported his allegations, his First Amendment allegations, with facts and evidence that were concrete, specific, and nonconclusory.

In reversing, the court of appeals ruled that the petitioner must also have come forward with direct evidence of intent, and that reliance on circumstantial

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evidence is insufficient to overcome a claim of qualified immunity.

Now, there's no question, I think, that what the court of appeals means by direct evidence of intent is some evidence of an expression of intent that comes directly from the lips of the defendant. As the concurring opinion below put it, a confession.

Now, I'd like to address just two points here today. First, that this direct evidence rule of the D.C. Circuit is contrary to this Court's consistent precedent with respect to direct and circumstantial evidence, and is contrary to logic, we would submit, and secondly, that this Court has available to it several options that will strike a more appropriate balance between the rights of the victims of constitutional violations to seek vindication in court on the one hand, and the interest of public officials to avoid the distractions that can come from an insubstantial lawsuit.

QUESTION: Mr. Rosen -- go ahead.

QUESTION: Mr. Rosenblatt, the district court thought the case ought to proceed. It didn't terminate it.

MR. ROSENBLATT: That's correct.

QUESTION: And an appeal was then taken by the defendants in the case to the CADC. Did you raise the

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question there about whether an appeal was properly before the CADC?

MR. ROSENBLATT: The --

QUESTION: Cohen didn't permit an appeal?

MR. ROSENBLATT: We did not raise that question, Your Honor. The matter had been pretty well settled in the court of appeals for D.C. in the case of Siegert v. Gilley. We didn't raise it. Obviously --

QUESTION: You're aware that we had a case argued here recently --

MR. ROSENBLATT: Yes, and I think that --

QUESTION: -- that isn't too far removed from this, the Johnson case, and I just wondered what your position was on the -- whether the CADC had appellate jurisdiction here.

MR. ROSENBLATT: Our position is first, even though we didn't waive it -- even though we didn't assert it it's not waived because it's a jurisdictional question, and secondly, that would be one way for this Court to resolve this case, to find that pursuant to the Court's decision in Johnson, whatever that may turn out to be, we find that there's no jurisdiction, there should have been jurisdiction by the court of appeals, therefore the district court's ruling which allowed the case to stay, allowed the case to proceed with discovery, would be

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reinstated.

QUESTION: Or more precisely, that would be a way for this Court not to resolve this case.

(Laughter.)

QUESTION: Because the case would just continue, and the same issue that we thought we would reach would come up later.

MR. ROSENBLATT: It's happened before, Your Honor, that's correct.

QUESTION: Mr. Rosenblatt, would that be so if we were to say that there's no appellate jurisdiction because it doesn't come under the Mitchell-Cohen exception, then aren't we in effect saying that this kind of defense doesn't fit under qualified immunity, that what qualified immunity deals with is whether or not the law is clearly established?

If we say -- make that jurisdictional determination, and that means there is no qualified immunity defense, then the heightened pleading rule, the direct or indirect evidence goes out the window. It's just not a qualified immunity issue.

MR. ROSENBLATT: I think that would be an absolute legitimate reading of the Court's decision. We would urge the Court to be specific in saying, not require the lawyers, those of us who practition in the area and

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the judges below, to try to infer that that's what the Court had in mind but --

QUESTION: How could it not be, when the whole purpose of the lower courts exempting the special pleading rule and the direct evidence rule was to tie it into this qualified immunity?

MR. ROSENBLATT: Well, my concern, Your Honor, is that advocates and judges may well decide that it's a part of qualified immunity, but it's not a part of qualified immunity that's immediately appealable, because this is all a balance that we're trying to reach.

QUESTION: Well then, go back to the split qualified immunity that it was originally the intention of Harlow to get rid of.

MR. ROSENBLATT: Right. That's what would happen.

QUESTION: That would be quite an irony, to go that circle.

MR. ROSENBLATT: Right, and we don't think it's necessary. We think that --

QUESTION: Are we supposed to address this without -- I mean, I find this actually a rather difficult question, whether it's appealable or not, and we have another case that may shed some light, or may not, but there's no decision of the lower court on this issue, is

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there, and has it been fully briefed here? I don't think -- I mean, this -- I'm nervous about deciding this without a lower court decision, without -- what do you think we should do?

MR. ROSENBLATT: I think the appealability issue has not been briefed below. It -- the Court I think may well find this way. I think it would be helpful for those practicing that it could go ahead and strike down this direct evidence rule and perhaps any heightened pleading rule, but not necessary.

QUESTION: So you'd like us both to say it's -- we strike down the direct evidence rule and by the way, it wasn't appealable.

MR. ROSENBLATT: Yes, Your Honor --

QUESTION: I realize --

MR. ROSENBLATT: -- exactly right. Exactly right.

(Laughter.)

QUESTION: Yes, but I mean, that's not going to happen, so what should we do?

(Laughter.)

QUESTION: What should we do?

MR. ROSENBLATT: No. It's our position, though, that I think just, first and foremost the Court can, and can sua sponte, on its own initiative, decide that there's

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no jurisdiction at the court of appeals and there's no jurisdiction in this Court, Your Honor, and that could be the first -- that often is the first question that one would look at, and it would be a way of disposing, or as Justice Scalia says, not disposing of this issue.

QUESTION: Then we get back to my question, but if you say that, then aren't you, in effect, saying it doesn't come within qualified immunity?

MR. ROSENBLATT: I think if we assume that all questions of qualified immunity are appealable, then we would be saying yes, this is not a question of qualified immunity, and therefore it's not an affirmative defense of the Federal officials, but we would have to make that assumption first that all questions that relate to qualified immunity are appealable for us to get that inference.

QUESTION: You're familiar with the case that we heard last week, which was a question of, what happened?

MR. ROSENBLATT: Yes.

QUESTION: And this is a case is, what's in an officer's head?

MR. ROSENBLATT: Right.

QUESTION: Is the first case, what happened, did he do it, is that a qualified immunity defense when the officer says, I didn't do it, I wasn't there?

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MR. ROSENBLATT: It's our position that that is not a qualified immunity defense. That's the whole rub of the case. Qualified immunity --

QUESTION: All right, how about this one? All right.

MR. ROSENBLATT: Well, in this one we also think that it's not part of qualified immunity. The D.C. Circuit disagrees. The D.C. Circuit says this isn't an I-didn't-do-it kind of defense. This is a, even if I didn't, you don't have direct evidence.

QUESTION: This is an I-didn't-think-it.

MR. ROSENBLATT: I didn't think it, but --

QUESTION: Now, if an I-didn't-think-it defense is just like an I-didn't-do-it defense, then neither of them come within qualified immunity, but you hesitated, and it's interesting that you did, because it seems to me the courts of appeals are doing exactly that, having much more difficulty categorizing, characterizing the I-didn't-think-it than they had with I-didn't-do-it.

MR. ROSENBLATT: Well, they're trying to strike an appropriate balance here. They're trying to -- they're trying to put into content the concerns that this Court expressed in Harlow.

Those concerns were that any question of state of mind automatically goes to a jury, and therefore it's

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inconsistent with the view that these cases should be terminated quickly if they're insubstantial.

It's our view that that's no longer the case. That concern, we think, has been put to rest in subsequent opinions of this Court and the lower courts. It's no longer the case that state of mind automatically goes to jury -- to a jury.

But for Your Honor's question, the reason that it's conceivable, although we would argue against it, it's conceivable that courts of appeals would think that this is still a matter of qualified immunity, is because it's not only an I-didn't-think-it defense, it's a you-don't-have-a-quantum-of-evidence allowing you to stay in court. Whether I did it or not, it's your job, Mr. Petitioner, to come forward with some evidence.

QUESTION: Why isn't it the same for the I-didn't-do-it?

MR. ROSENBLATT: Well, the I-didn't-do-it, the way I understood it, was more the ultimate question to be decided, and in fact if this Court or if the lower courts had --

QUESTION: Well, isn't whether I thought it also is the ultimate question?

MR. ROSENBLATT: It is the ultimate question. The only way that it would be part of qualified immunity

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is this idea of having a heightened standard, although not proving your case, having enough to stay in court.

We would agree with Your Honor, though, that first that it's -- that it is part of the I-didn't-do-it defense, and that's not part of qualified immunity. In our view, qualified immunity is typically maybe I did it, maybe I didn't. It doesn't matter, because I'm immune. The law wasn't clearly established.

QUESTION: What are your views on the merits of the issues that are here, Mr. Rosenblatt?

MR. ROSENBLATT: Well, we think that the direct evidence rule versus circumstantial evidence rule is contrary to this Court's consistent precedent.

This Court has long held that there is intrinsically no difference between direct and circumstantial evidence, that sometimes circumstantial evidence can be even stronger, more satisfying, more persuasive than direct evidence, and that's particularly true when, in cases like this, Justice Ginsburg, intent is at issue.

Circumstantial evidence is often the only kind of evidence to get an intent, and it's generally the most reliable, how people act, how people behave are often much more probative, far more reliable, far more enlightening about someone's state of mind than what they say about it

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after the fact.

So in our view, this is an arbitrary rule whose only purpose is to eliminate Bivens cases, and I think we should bear in mind that the only causes of action that are actionable here, the only violations that are actionable here because of the official's qualified immunity, are violations of rights that are clearly established, and so this rule would require Federal officials and State officials to confess, to admit to have violated a right that they are presumed to know about.

We think this is likely to happen in the most extraordinary cases, and it would wipe out an entire line of Bivens cases, Bivens cases that involve some of our most treasured rights, the right -- it would eliminate discrimination cases, racial, gender discrimination cases, the selective prosecution cases, freedom to associate, cruel and unusual punishment, and in this case the First Amendment.

We think that the public interest -- and that's what we're trying to do, I think, is achieve a balance. The public interest in assuring that violations of that type don't go unremedied is at least as strong as the interest in sparing Federal officials the need to possibly explain themselves when these rights are at issue.

QUESTION: You're -- I assume you would make the

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same arguments against a heightened pleading rule as opposed to a direct evidence rule, but would you like to address the latter? Do you think, if we disagreed with you as to the policy balance here, and we thought it was very important to protect public officials from frivolous suits, do we have the authority to impose a heightened pleading rule?

MR. ROSENBLATT: To allow the heightened pleading rule? Well, let me say, Your Honor, the answer -- it's problematic after this Court's decision in Leatherman. We believe, though that there are a number of options that would strike a balance.

Let me be clear here. We believe that there is a legitimate policy reason to protect Federal officials from insubstantial lawsuits, that at least within the parameters of clearly established rights, Federal officials should be free to engage in the unflinching discharge of their duties, but when clearly established rights are implicated, as this Court has held, Federal officials should be made to hesitate, and so there shouldn't be a total immunity against these suits.

Now, what options are available to the Court? We think that no matter what option the Court takes, there are going to be certain meritorious cases that get dismissed, there are going to be certain blameless

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officials who go through some discovery, but I think what we should try to do is find a solution that minimizes both possibilities.

The Solicitor General in this case, the Government in this case has come up with a standard that we would embrace. It basically -- and I think it's -- the Court has authority to adopt it because it's consistent with the Federal Rules of Civil Procedure, namely, and obviously the Government will articulate it better than I, but namely when a defendant comes forward with a qualified immunity defense, it's up to the plaintiff to give his story. He can't hide the ball. He has to say who did what to whom when.

QUESTION: This is in the -- at the summary judgment, early discovery phase, rather than the filing of the complaint, I assume?

MR. ROSENBLATT: Right. We believe it could be done before discovery, at least to tell the plaintiff's story as he currently knows it so that the Government officials and the Court can determine whether we're really talking about clearly established rights.

QUESTION: By requesting affidavits as part of a summary judgment proceeding?

MR. ROSENBLATT: Well, we believe that this Court has made clear that this determination should take

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place before discovery, and so this is --

QUESTION: You're talking about a more definite statement, like -- 12 being a more definite statement.

MR. ROSENBLATT: That's exactly right, and it would have to be viewed in the early context of the case in which there is no discovery. The -- at times the plaintiff can only paint with a broad brush, and that should be taken into account.

QUESTION: Is that consistent with Rule 9?

MR. ROSENBLATT: It is, Your Honor, because Rule 9 says what has to be in a complaint, and that the only heightened pleading that's permissible are for cases of fraud, and so we think that it would be consistent with 9(b), because this is something that would go on during the motion practice.

The one thing we would urge is that this direct evidence standard should be rejected, and that the adoption of almost any other standard leads to reversal of the court below.

QUESTION: Mr. Rosenblatt, don't you exaggerate it somewhat by saying that although there's an interest in law enforcement officers acting fearlessly, there's also an interest in preventing their violating clearly established rights?

What's involved here is they're doing things

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that they had full authority to do which didn't violate any rights unless -- unless -- there was an improper motive behind what they did. Well, you're always able to allege an improper motive. Any lawful action of an official can be unlawful if it is done for an unlawful motive, so I don't see that this is a case of easily protecting clearly established rights. There's a serious problem on your side of the case as to whether there ought to be some higher standard.

Now, whether we have authority to adopt it or not is another question, but surely you should give the devil his due and say there is a real problem when a law enforcement official does something that's perfectly legal, but he may be held liable because somebody can charge him with having done it for an improper motive?

MR. ROSENBLATT: We absolutely agree with that, Your Honor. However, unlike the situation when Harlow v. Fitzgerald was decided, this Court 4 years later decided Anderson v. Liberty Lobby, which rejected the notion that simply because you're alleging that motive was improper doesn't mean that you get to a jury. It means that that is as susceptible to early determination as any other factual issue, and the lower courts have followed that.

And so yes, we believe that the Federal official should be protected from that kind of bare allegation of

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malice, but today, after Harlow and after Anderson v. Liberty Lobby, that is the case.

QUESTION: But to what extent is Liberty Lobby on the intent phase colored by the fact that it's a libel case?

MR. ROSENBLATT: It was a libel case which gave even more protection to the defendants, and we think that that actually draws a nice parallel, because we are looking -- we do have policy reasons to protect the defendants in this case, and so for that reason we think that they're very close.

The main thing that Anderson did, at least in many of these other cases, is show that state of -- just because state of mind's at issue, just because you allege it, doesn't mean that you get to drag, in this case Federal officials through the litigation mud and into trial. There are still ways through control of discovery and through vigorous applications of the current Federal Rules of Civil Procedure, as they currently exist, to protect what are very important values, namely officials being able to perform their duties without undue, although perhaps not without know, but without undue impediment.

If there are --

QUESTION: Can you be concrete about this case? This is an officer who said, I did it for a proper reason.

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He did it for a proper reason, he didn't do anything that's in any way wrong.

MR. ROSENBLATT: Right, and it --

QUESTION: He has an affidavit that says that. What must you do to get you to trial?

MR. ROSENBLATT: Let me just point out, there is no affidavit like that, but that's certainly their position.

I think what we would have to do and I think what we've done, although discovery is still early, what we would have to do is come forward with facts and evidence that would permit a jury, would be sufficient to permit a jury to come back in our favor, and so in this case, our main approach is to show that the explanations given, that the inmate feared for his safety, was pretextual, that the person who supposedly said that has denied it in a sworn affidavit, that there was no concern for the safety, that there was pressure from political forces, and on and on. Maybe one thing taken alone wouldn't be enough, but taken together, we think it at least creates a genuine issue of material fact, and that's what's required in these cases at least to get more discovery.

If there are no further questions, I'd like to reserve the balance of my time.

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QUESTION: Very well, Mr. Rosenblatt.

Mr. Bender, we'll hear from you.

ORAL ARGUMENT OF PAUL BENDER

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MR. BENDER: Thank you, Mr. Chief Justice, and may it please the Court:

With regard to the question of the court of appeals appellate jurisdiction which the court inquired about at the beginning of petitioner's argument, under the position that the Government took in Johnson and Jones, which you heard last week, this would be appealable, because it's a question that relates in some sense to the qualified immunity defense.

Under the narrow -- the narrow view that only questions of whether the law is clearly established are appealable under Mitchell, then it would not be appealable.

I think there's an in-between question. The thing that seemed to concern the Court most in Johnson and Jones was whether the court would have to look through -- whether the appellate court would have to look through the record to see whether there were -- whether factual issues were in dispute or not.

The ground of appeal in this case was that the

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district judge had failed to use the correct direct evidence standard. Judge Green had interpreted the direct evidence standard not really to require only direct rather than circumstantial evidence, and the ground of appeal was that he was wrong as a matter of law, that the direct evidence standard, as the panel of the court of appeals held on the appeal --

QUESTION: But you don't get up to the court of appeals ordinarily just because the district court decided a question of law wrong.

MR. BENDER: I agree completely. Our argument in Johnson and Jones was that if it's a question of law related to a qualified immunity defense, that that should be a different --

QUESTION: You have to characterize it as a qualified immunity defense. If it's not, if it's like, I didn't do it, then it doesn't come out -- then it doesn't come under qualified immunity and you don't have any reason to have any special rules of any kind.

MR. BENDER: Well, our argument in Johnson was that the qualified immunity defense is there to protect people who did not violate clearly established constitutional rights, so you can state the qualified immunity by saying, an official who did not violate clearly established constitutional rights has qualified

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immunity. If he stated --

QUESTION: If your argument was that I didn't do it is a qualified immunity.

MR. BENDER: Yes, right. If you say -- but that depends on a broader statement of the qualified immunity defense than is necessary, so it's really a question of how you define the qualified immunity defense, and also a question of whether you want to limit appeals to the question of law, or whether you want to expand appeals to appeals that require looking through the record to see whether there are sufficient factual allegations.

This question, the point I'm trying to make is that in this case it was really a pure question of law that related to a rule, that is, the direct evidence rule, that the Court adopted as part of its vindication of qualified immunity, and so it's not just any rule of law, like a statute of limitations, for example, interpretation. It's a rule of law that was adopted in order to protect officials against suits in the area that the Court feels they should be protected.

Ever since the Court -- coming to the merits, ever since the Court has recognized the ability of plaintiffs to sue Federal officials for violations of constitutional rights in Bivens, the Court has been concerned, as has the Government, with making sure that

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while meritorious suits are permitted to go forward, the threat of litigation does not improperly interfere with an official's exercise of discretion, and the actual bringing of litigation, the burdens of litigation, going through discovery and trial, does not interfere unduly with -- in insubstantial cases --

QUESTION: Well, cases where the allegation just turns on the so-called improper motive of the official seem to be cases that, as others have pointed out, are very easily brought.

MR. BENDER: Right.

QUESTION: And difficult to deal with factually. Now, just how should we deal with cases like that involving public officials?

MR. BENDER: Our view is consistent with the views of, I think, seven circuits that have looked at this question, and that is that the Court ought to adopt a standard requiring specific allegations of the basis for the claim of unconstitutional motive before you go to the discovery stage of the case.

It's not a heightened pleading standard, because I don't think it's fair to call it a pleading standard. I'm not sure the Federal rules permit you to make it a pleading standard, especially since Rule 9 says that intent can be pleaded generally, and therefore I don't

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think it's just -- if it's in the pleading, it satisfies it, but even if it --

QUESTION: Well, what rule do you tie it to? What rule permits courts to do that?

MR. BENDER: I think there are a couple of rules that provide a basis for it. One is Rule 26, which gives a judge control over the discovery process, and which says that the judge can consider in, I think it's 26(b)(2)(iii), the judge can consider whether the burdens that the discovery is going to impose are worth it in light of the nature of the case and the need of the discovery.

I think that a judge, in order to implement this Court's qualified immunity jurisprudence, and the feeling the Court has had that people should have the right to be free from discovery on insubstantial claims, that a judge could enforce a heightened specificity standard --

QUESTION: Well, must. I think you would say that a judge -- it would be an abuse of discretion not to.

MR. BENDER: In a -- yes, in a clear case, it would be an abuse of discretion not to, right.

Another possibility is Rule 7, which permits the court to order a reply so that when a defendant pleads a defense of qualified immunity in response to the complaint either through motion or through an answer, the court

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could order the plaintiff to file a reply to that supplemental pleading which would have to have the specificity.

It's very much like -- as Justice Ginsburg said before, it's very much like a motion for a more definite statement, although this comes from the special concerns of qualified immunity rather than the more general concerns of the motion for a more definite statement.

QUESTION: Could you take it as the pleading defendant pleads, as the defendant, qualified immunity, and that is taken automatically as -- a court in sum says that's automatically a statement, a motion for a more definite statement unless the complaint is already sufficient?

MR. BENDER: Right, yes.

QUESTION: And can we do that?

MR. BENDER: I think you can do that. You can say that that -- the plea of qualified immunity means that the judge should require --

QUESTION: You'd say the plea of qualified immunity is taken as a matter of law to be a motion for a more definite statement, which must be satisfied unless the complaint is sufficiently detailed. I just want to get your --

MR. BENDER: Again, I see no reason why you

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could not do that, so I think there are at least three different bases --

QUESTION: 26(b)(2), is that what you said?

MR. BENDER: Yes, (b)(2)(iii), I think, which talks about the --

QUESTION: (b)(3), okay. (b)(2) I didn't see --

MR. BENDER: (b)(2), and then there's (iii), which talks about the judge dealing with the burdens of discovery.

So what we would like to see is in response, and I think, Justice O'Connor, this is -- this responds to your question -- it certainly is possible for people to just say, he or she did it with an unconstitutional motive, but if you have a requirement that there has to be some specificity -- what's that based on? Are you just making that up? Are you just imagining that? Are you just saying, well, he's a Republican, I'm a Democrat, therefore he must hate me, therefore he's doing something to retaliate against me -- that wouldn't be enough.

You've got to give some objective basis, or some direct evidence basis if you have it, for saying that this was something that was done with an unconstitutional motive, and if the plaintiff isn't able to do that, then I think there's a very, very great likelihood that it's an insubstantial case, and the right thing to do would be to

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dismiss it as early as possible, as the Court has said.

I don't think that's an absolute rule. There may be some cases where the judge would be convinced that it would be proper to permit the plaintiff to do some limited discovery because in the circumstances of the case it's not fair to force the plaintiff to plead with more specificity, given the circumstances, but I think those would be extremely rare, and I think you can leave it to the discretion of the district court to do --

QUESTION: That overlay would come from the substantive rule about the qualified immunity protection, because otherwise averments in an answer are deemed -- automatically deemed denied or avoided --

MR. BENDER: Right.

QUESTION: -- and here it was suggested that we have just the opposite, automatic -- automatic assumption. Instead of deeming that you deny it or avoid it, you must answer it.

MR. BENDER: Right, and you must answer it with enough specificity to justify going forward, and I think you're right that that comes from the desire of the defense of qualified immunity to not have people forced to go through discovery on insubstantial claims, and that it is worthwhile testing whether the claim is substantial or not as early in the process as possible by that kind of

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automatic motion for a more definite statement, yes.

The direct evidence rule, on the other hand, we agree completely with the petitioners there, although adopted for the purpose of serving the purposes of qualified immunity, that the threat of suit not interfere with lawful discretion and insubstantial claims not be a burden.

It really doesn't do that. It filters out some cases, but it doesn't filter out cases depending upon whether they're more or less substantial, or depending upon whether they are in the area of unclear law or the area of clear law. It seems much more like an arbitrary rule that just filters out cases.

It's almost as if in medical malpractice cases, because courts will worry about too many of these cases being insubstantial and interfering with doctors' freedom of action, a rule were adopted which would say that they have to be based on eyewitness testimony of the medical malpractice rather than on other kinds of evidence.

Thank you, Mr. Chief Justice.

QUESTION: Thank you, Mr. Bender.

Mr. Martinez, we'll hear from you.

ORAL ARGUMENT OF MICHAEL L. MARTINEZ

ON BEHALF OF THE RESPONDENTS

MR. MARTINEZ: Mr. Chief Justice, and may it

please the Court:

I think it's important at the outset to note that we agree with the Solicitor General's Office with respect to the point that heightened pleading standard is misnomer, and the Court doesn't need to reach the so-called heightened pleading standard issue in this case because this case is really a heightened production case.

This case came up through the district court when the respondents move to dismiss or for summary judgment, as almost always happens in these cases, as their initial response to the complaint. They moved to dismiss or summary judgment asserting qualified immunity.

In response to that, the petitioner submitted several exhibits, along with some deposition testimony, and in reply the Government, who at that time was representing the respondents, responded with that as well, and the district court decided this case on a qualified immunity basis.

Now, it decided it in terms of applying what has been called the heightened pleading standard, and Judge Green disagreed with what the D.C. Circuit law is in terms of direct versus circumstantial evidence, but that was the basis it was decided on, and really this case is a heightened production case, not a heightened pleading case, although the rule has been called variably by

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various courts a heightened pleading standard.

It's important to understand that this rule flows out of this Court's decision in Harlow v. Fitzgerald and its progeny. Harlow made it very clear, as subsequent cases have as well, that this Court wanted to extract the subjective component of the immunity analysis that existed before Harlow. Prior to Harlow, there was both a subjective inquiry and an objective inquiry.

Harlow extracted the subjective inquiry prong of that analysis precisely because this Court recognized that questions of motive like we have in this case can inherently only be resolved by a jury, and this Court decided, because of the numerous kinds of costs and impediments that these kinds of lawsuits impose on public officials, that it was not worth -- for protection of the public and the protection of an efficiently run government, it was not worth getting into the burdens of discovery and what-not for inquiring into an official's motive, and therefore Harlow can be read as totally excluding an inquiry into motive.

None of the lower courts, with the possible exception here and there of an occasional court, has been willing, however, to read Harlow and its progeny as it can be read, namely --

QUESTION: But Mr. Martinez, wouldn't that just

go against what really Harlow was trying to do? Plaintiffs had two strings in their bow pre-Harlow. They could say, violated clearly established law, and then they could say, even if the law was as foggy and as mushy as it could be, this officer acted maliciously.

It's the second thing that Harlow took out of that case, and there isn't, as far as I can tell, any hint that Harlow was conceiving of this kind of case where liability or not turns on what the officer thought.

Harlow took away from plaintiffs that malicious -- he was a bad actor, even if the law was foggy, and that's understandable. It didn't speak at all to this -- as far as I can tell, to this question.

MR. MARTINEZ: That's correct, Justice Ginsburg, and it's precisely for that reason, and numerous courts have examined that Harlow -- the question of whether Harlow could be read that broadly. It's precisely because the lower courts have decided that it cannot be read that broadly that we have had the development over the years of the so-called heightened pleading standard.

QUESTION: I thought you were quarreling with that and said that Harlow could be read that broadly --

MR. MARTINEZ: No, I was --

QUESTION: -- to take out all consideration of --

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MR. MARTINEZ: I was not quarreling with that. I was merely stating that to set the stage for why we have these heightened pleading standards, or really, as in this case, a heightened proof standard.

The District of Columbia Circuit, in adopting this direct versus circumstantial component of this heightened pleading or heightened proof standard, was, I think, attempting to come as close to what the purpose and meaning of Harlow was, but at the same time preserving the interests of allowing a petitioner, a plaintiff, to go forward with the case where that plaintiff had only the very strongest kind of evidence to support a bad motive on the part of an actor.

QUESTION: Do we have authority to do that? I mean, to decide that certain defenses are favored and others are less favored, and we can simply require more evidence for some things than others? What's our authority to do that?

MR. MARTINEZ: Your Honor, in this context -- Justice Scalia, in this context the authority for doing that is a couple of things. It arises in part out of the fact that qualified immunity is a substantive defense, and I think when you couple that with a requirement in Rule 56(c) that a party opposing a motion for summary judgment has to come back with very specific responses to

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that motion to dismiss or for summary judgment. You can impose it on that basis.

QUESTION: Well, why -- I mean, specific responses. You have to specifically show what evidence you have to prove the illicit intent, but in all other situations that evidence can be direct evidence, it can be circumstantial evidence, it does not have to be more than a preponderance to prevail --

MR. MARTINEZ: Well, I -- Your Honor, I think the answer to the question is that it stems from the very strong message that this Court has sent in Harlow and cases after Harlow that we do not want to get into motive. We want to purge from the question of qualified immunity what an official's motive is, and so the development of any of these heightened pleading standards has been to try and deal with the conflicting concerns of, you know, how on the one hand do we decide these qualified immunity cases on an objective basis when the question of motive itself is inherently a subjective inquiry?

QUESTION: What other instances do you have where we have created such -- without any statutory authority such heightened standards of proof or of pleading?

MR. MARTINEZ: Well, Your Honor, the other examples where those kind of standards apply, which we've

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mentioned in our brief, would include fraud cases, would include conspiracy allegations --

QUESTION: But those are in the Federal rules --

QUESTION: They're there.

QUESTION: -- fraud cases.

MR. MARTINEZ: Fraud cases are. Conspiracy allegations are not. There's the two-witness rule that requires --

QUESTION: What do you refer to -- the conspiracy allegations are what, where --

MR. MARTINEZ: When -- that --

QUESTION: Is that in our cases, or in the courts of appeals?

MR. MARTINEZ: Your Honor, I believe it's primarily in the courts of appeals.

QUESTION: I think it's only in the courts of appeals, unless I'm mistaken.

MR. MARTINEZ: I believe that's correct, Your Honor.

But it's on that basis that the D.C. Circuit adopted this particular direct versus circumstantial evidence. The idea was to require only the strongest kind of evidence at the outset in responding to a motion to dismiss or for summary judgment asserting qualified immunity.

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QUESTION: Why is -- I thought circumstantial is sometimes stronger than direct, direct is sometimes stronger than circumstantial.

MR. MARTINEZ: We don't quibble with that, Your Honor. That's clearly true. There are a lot of cases that say that in different contexts. However, the substantive immunity right here and the purposes that underlie immunity justify in this context having that kind of rule. They do because qualified immunity again, arising out of Harlow, attempts as much as possible to purge the question of motive from the inquiry.

I think it's important to keep --

QUESTION: But I mean, that's quite different. Isn't motive here really relevant as evidentiary? But for a bad motive it is quite likely, they want to prove, that the person would have been allowed to speak, and therefore there was some kind of political discrimination.

I mean, it isn't as if they -- isn't that what -- how -- what's the underlying theory of this?

MR. MARTINEZ: No, I don't believe that's correct, Your Honor.

In this case, for example, we're not talking about, here, about the egregious case. I think you wouldn't ever get to this point where, unless you had somebody who acted objectively unreasonable. In other

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words, if you have a set of circumstances where a public official acts in an objectively unreasonable manner, then you don't get to the question of motive.

Conversely, as in this case, where you have a set of circumstances where the official acted in an objectively reasonable manner, the motive should not matter --

QUESTION: It's only objective --

MR. MARTINEZ: -- because he has not violated --

QUESTION: Well --

QUESTION: Isn't it only objectively reasonable if the motive was what he says it was?

MR. MARTINEZ: Well, no, Your Honor.

QUESTION: If it's a pretext, is it objectively reasonable?

MR. MARTINEZ: It's -- Your Honor, when you couple the fact here with the fact that he did not -- the respondents did not violate any clearly established law, and on an objective view of this record did not violate an official's -- did not violate Mr. Kimberlin's constitutional rights, on an objective view, setting aside motive for a moment, he's clearly entitled to qualified immunity, and that's what Harlow says.

QUESTION: Well, if there was no motive --

MR. MARTINEZ: Now --

QUESTION: If there was no motive whatsoever, they couldn't have done this. They had to have -- they could not have thrown -- did what they did to him, I don't remember the details, for no reason at all. They had to have a reason, didn't they?

MR. MARTINEZ: There were reasons, but the reason is different from motive. The reason -- there are really two issues here.

The first was the cancellation of the press conference by the petitioner, and the second was his being placed in administrative detention later that night, and the reasons, which are well articulated in the record by evidence, documentary evidence at or near the time that these events occurred, the cancellation of the press conference arose out of the fact that prison regulations do not provide inmates to have press conferences. They do not permit that.

QUESTION: Go to the second one. What about the --

MR. MARTINEZ: The second one was that Director Quinlan was informed that evening that a national reporter had reported to the Director of Public Affairs, Mr. Miller, at the Department of Justice, that the petitioner feared his life was in danger.

Upon hearing that, Mr. Quinlan said, well, let's

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place him in administrative detention until we can determine whether that in fact is true, and he was put aside in administrative detention, which is a nonpunitive detention, until the nature of the threat could be assessed, and --

QUESTION: There's disagreement about the motive with which that was done. I mean, your client says, I did it for these reasons, which certainly appear plausible on their face, but the plaintiff says no, it was done for improper political reasons.

MR. MARTINEZ: That's correct, Mr. Chief --

QUESTION: And you're saying that that simply cannot be inquired into in a case like this?

MR. MARTINEZ: That's correct, Mr. Chief Justice. I think the question has to be, do we, as a society, want to engage in these kinds of inquiries about motive when there is no evidence in the record that shows that the actions were violative of any clearly established law, but where there's --

QUESTION: But you've always got a -- I won't say always, but in many cases you have a claim that this was perfectly proper to have done to this individual so long as you treated other people similarly situated the same way, but if you just made kind of a totally different regime for one person that was much harsher than for

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another, then you may have a constitutional violation just based on that, and you say that can't be inquired into.

MR. MARTINEZ: No, Your Honor, I would agree that could be inquired into, but that's not the circumstances of this case. Mr. Kimberlin was not treated in any manner different from anyone else, and that's the whole point.

QUESTION: But still --

MR. MARTINEZ: When you look at these facts, he was acting -- the respondents were acting objectively reasonable.

There was a basis for denying the press conference. The regulations do not provide for inmate press conferences and, indeed, this Court has recognized in other cases that it's proper for prison officials not to allow inmates to have access to the press beyond that that's accorded to any other member of the public.

QUESTION: Well, Mr. Martinez, but for the CADC heightened evidence standard, this thing would proceed to trial on the basis of circumstantial evidence, and would you care to comment on this Court's holding in Leatherman, handed down in 1993, where we made it pretty clear that as a matter of policy you might make an argument to have some other rule, but unless the Federal rules authorized the imposition of heightened standards, the courts don't have

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the authority to adopt them.

MR. MARTINEZ: Yes, Justice O'Connor.

QUESTION: That certainly points in a direction against support of the CADC requirement.

MR. MARTINEZ: Well, Justice O'Connor, I would disagree with that statement. Leatherman certainly -- Leatherman held that municipalities sued under 1983 do not have the ability to apply a heightened pleading standard, do not have the ability to assert that a heightened pleading standard applies to them, and this Court specifically in Leatherman did not reach the issue of whether a heightened pleading standard would apply to individually sued public officials, and the rationale --

QUESTION: Yes, but I'm talking about the whole thrust of the Leatherman opinion. We didn't decide this case, that's why we have it here now, but the thrust of it argues against your position.

MR. MARTINEZ: Well, Your Honor, I would respectfully disagree. The rationale of Leatherman was that heightened pleading standards don't apply to municipalities because municipalities do not have the right to assert qualified immunity. That's the distinction in this case.

Now, there are some lower courts that have held, subsequent to Leatherman, that the rationale of Leatherman

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would preclude any application of heightened pleading standards to these kinds of cases against public officials, but there are also other courts that have examined the issue and held to the contrary.

The D.C. Circuit has looked at it in this case, as has the Ninth Circuit, and I believe one or two other circuits have as well, so that issue obviously has not been finally decided, but I would take issue with the notion that Leatherman would exclude this kind of rule in cases where public officials are sued in a Bivens or 1983 context.

QUESTION: Do I understand that your argument, that its root is that the reason this case does not come within Leatherman is that there is a general proposition of immunity law that we should not, in fact, tolerate any more -- any further causes of action than absolutely necessary if those causes of action require an inquiry into motive? That's basically your proposition, isn't it?

MR. MARTINEZ: Primarily I would agree with that --

QUESTION: All right.

MR. MARTINEZ: -- Justice Souter, yes.

QUESTION: And I thought your reason was precedent, but Justice Ginsburg pointed out, and you agree, that in fact the only sense in which this Court

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eliminated the inquiry into motive was as a general characteristic or element of qualified immunity. It did not in any way purport to eliminate that kind of an inquiry into cases in which motive may be an element of a particular cause of action to which qualified immunity is pleaded. Do you agree with that?

MR. MARTINEZ: Well --

QUESTION: I thought you agreed with it when Justice Ginsburg --

MR. MARTINEZ: I do agree with that, Your Honor.

QUESTION: All right. Well, if that -- if Justice Ginsburg's statement of the law is correct, then doesn't that, in effect, eliminate your argument that we should be deciding this case in accordance with a generalized policy of inquiring into the motives of officials? Isn't that the end of your argument?

MR. MARTINEZ: No, it --

QUESTION: Because there are some causes of action, you admit, that do involve motive, and we can and should inquire into them, and if that is the case, then what is the justification for a heightened pleading requirement, let alone in an unqualified immunity case, let alone a direct evidence requirement?

MR. MARTINEZ: Well, Your Honor, I think it boils down again to a reading of Harlow and what this

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Court meant when it wrote Harlow and when it wrote its subsequent decisions. This Court has --

QUESTION: But I thought you just agreed with Justice Ginsburg's reading of Harlow.

MR. MARTINEZ: That's correct, but --

QUESTION: Which leaves you without much to go on.

MR. MARTINEZ: Well, I would disagree, Your Honor. Harlow --

QUESTION: Mr. Martinez, maybe we can take it in the context of a concrete example that you yourself gave, Davis v. Passman.

MR. MARTINEZ: Yes.

QUESTION: A Member of Congress says, I fire one of my staff members, and if that's done for a reason like inefficiency, or downsizing, it's perfectly all right, but if he says, I fire you because we need a man for this job, then it's unconstitutional.

MR. MARTINEZ: That is correct, Your Honor, and in --

QUESTION: You gave that as an example of a case where motive counts. The only thing that counted was motive.

MR. MARTINEZ: But that was the -- that is a just -- we gave that as an example, Justice Ginsburg, as a

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case that supports the notion that the application of the direct versus circumstantial rule does not weed out all cases, and that is correct, if you're going to have a rule that permits -- that opens the door slightly to motive-based cases going forward in this context, then Davis v. Passman is such a case, because Congressman Passman in that case wrote a letter to the plaintiff, Mrs. Davis, saying we don't want to hire you because we've got enough women already.

QUESTION: That's where -- you had a self-confession.

Under your heightened evidence rule, any -- is there anything other than a self-confession, yes, I had a bad motive, this was my motive? Anything else that you could get to trial on?

MR. MARTINEZ: Well, Your Honor, it's not my heightened evidence rule, but the answer is, I would say yes, there are -- I would think that any statements made by witnesses, if you had someone who perhaps overheard a statement made by the defendant, I think there are other situations, clearly, where direct evidence would come up in a manner that might be other than a written letter like you had in Davis v. Passman, but --

QUESTION: And yet that letter might be, if the case went to trial, it might be a southern gentleman's way

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of saying something that he thought was a kindness, and that in fact was not discriminatory, and in other cases you might have somebody who was rampantly discriminating because of a person's sex or race, but is very good at using the right words, you could never prove it out of that person's mouth, and you say one case goes to trial, and the other one doesn't?

MR. MARTINEZ: Well, Your Honor, you have to draw the line somewhere, otherwise you're getting back to the notion we had pre-Harlow, where you had extensive inquiries into motive on the part of plaintiffs suing Government officials in their individual capacities.

QUESTION: Mr. Martinez, I assume that direct evidence of intent always has to be a confession. I mean, I -- in the nature of things --

MR. MARTINEZ: I --

QUESTION: -- isn't that the direct evidence? I mean, you can say you can have a witness instead of the defendant coming to say it in court, but it has to be a confession. What other direct evidence of intent is there?

MR. MARTINEZ: I can't think of any, Justice Scalia. I would say yes --

QUESTION: It's inside a person's head.

MR. MARTINEZ: -- that's essentially correct.

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QUESTION: Either he utters it, or you don't know it directly.

MR. MARTINEZ: That's essentially correct.

QUESTION: Yes.

QUESTION: It sounds to me a little bit as if this intent motive is a red herring. I think I've had a thousand cases, or five hundred, anyway, where the whole question involves motive. Did he fire this person because he was a member of the PPD, or the PNP, or was it because he -- late all the time. It's the most common kind of case.

So I thought that the basis for your argument, an alternative basis, which I'd as soon you address if you want, is that if there isn't some kind of heightened pleading thing, the seven or 600 district judges will probably have 50,000 cases filed by everybody who wants to sue everybody all over the Government, and instead of just getting rid of them right away because there are no facts, you don't know what they are, or if you could find out the facts they'd be nothing, everybody has to answer them, the department has to write all these answers, they have to start doing discovery, and that's a very difficult burden.

Now, I'm making an argument, obviously, that I got out of what you'd say, but I want to know if you'd like to address that.

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MR. MARTINEZ: Well, I'd certainly agree with that wholeheartedly, Justice Breyer.

(Laughter.)

QUESTION: I know, but I just --

(Laughter.)

MR. MARTINEZ: And that's the whole point. I think this Court -- this Court attempted in Harlow to strike some kind of a balance between --

QUESTION: What's worrying about the argument is, does this Court actually have the power just to write an opinion that says that, or does it have to refer the matter to the rules committee, or does it have to ask the SG to bring it up when he's on such a committee? It's a question of what we actually can do.

I mean, I recognize the problem, but I think there is a question as to how do you go about bringing about this result? I mean, we don't know how many cases would be filed. I have a suspicion, but I don't know, so --

QUESTION: In that regard, Mr. Martinez, you insist that -- or at least you said that 1983 and this -- and Bivens have to be treated alike, in your argument.

MR. MARTINEZ: That's correct, Your Honor. The Court's -- the Court's precedent makes that very clear.

QUESTION: Well, to some extent, you know,

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you're perhaps too polite to make the argument, but Justice Breyer's concern is certainly reduced in the case of Bivens. Since we invented the cause of action ourselves I suppose we could invent the attempted manner of proof of the cause of action.

MR. MARTINEZ: I think that's exactly --

QUESTION: That wouldn't extend to 1983, and it would be rather strange to treat Bivens actions different from 1983 actions.

MR. MARTINEZ: I think, Justice Scalia --

QUESTION: But in a pinch you'd take it, I betcha.

MR. MARTINEZ: Yes, sir.

(Laughter.)

QUESTION: Let me suggest --

MR. MARTINEZ: I think, Justice Scalia, to answer your question, you're right, since Bivens was a doctrine created by this Court, you certainly could create that as an effort to counterbalance or respond to the problem that has arisen out of the creation of the Bivens doctrine.

QUESTION: Well, has the problem -- I mean, we're concerned with that kind of thing as judges, but outside the D.C. Circuit, has the paper been piling up?

(Laughter.)

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MR. MARTINEZ: I believe it has, Your Honor, but that's not in the record, and I don't have any figures to point to other than, the only figures that are in the record are the Solicitor General noted in his brief that I believe for the years 1993 and 1994 --

QUESTION: Mr. Martinez --

MR. MARTINEZ: -- there were something like 1,500 or 1,600 cases against the Bureau only, and that I think ultimately only two of those resulted in a judgment. I'm not sure of those numbers exactly, but it's roughly along those lines.

Now, those figures don't tell us how many of those cases went through a discovery phase, how many of them, you know, were dealt with at what stage and how they ultimately got dealt with by the district courts, but I think it is fair to say that yes, a substantial number of these cases have been filed and continue to be filed.

QUESTION: Mr. Martinez, I wonder with regard to qualified immunity under 1983, a) who invented the qualified immunity defense, and b) who invented the rule that subjective motivation won't defeat a qualified motive defense?

MR. MARTINEZ: Well, Justice Stevens, the 1983 qualified -- qualified immunity is a judicial doctrine that goes back many years, and the Court in a couple of

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decisions in the 1970's, after Bivens had been announced by this Court, applied and expanded the qualified immunity doctrine to apply to both 1983 and Bivens cases.

QUESTION: I was just suggesting, and really trying to be helpful to you, that the Court has not always relied on more traditional forms of lawmaking in this whole area of the law.

MR. MARTINEZ: That's correct. That's absolutely correct, and --

QUESTION: Absolute immunity also came from the courts, didn't it?

MR. MARTINEZ: That's correct, Your Honor, Justice Ginsburg.

If I may, with the time I have left, we have -- I'd like to address the point we made in our brief with respect to an alternative standard. If for some reason the Court decides -- and I appreciate that you have recognized the problem, as Justice Breyer said, that there is a problem here. If for some reason the Court decides that the direct versus circumstantial evidence test is not the way the Court wants to proceed in dealing with this problem, we believe an alternative that the Court ought to consider and adopt is the clear and convincing evidence test, as we've outlined in our brief.

That is a test that is applied by this Court in

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various other areas of the law. It's well-developed --

QUESTION: I really -- I got that from your brief. I mean, I don't see that one. I mean, the purpose of this would be, there are a lot of claims that if you knew what the person was claiming, you'd say to the plaintiff, what is your point, and by the time he explained his point, you would see there was no case.

But sometimes, there is a case, and of course, if when he's explained his point there is a case, why should you impose a greater burden on that plaintiff than any other plaintiff in the United States?

MR. MARTINEZ: Because of the -- Justice Breyer, because of the particular concerns that underlie the rationale of Harlow.

The way that test would work would be a -- when a complaint is filed, the Government would respond with a motion to dismiss or for summary judgment asserting qualified immunity, and this is only in motive-based cases, I hasten to add, asserting qualified immunity, and then to rebut the allegation of improper motive, the burden would shift to the plaintiff to respond with clear and convincing evidence that there was an improper motive, and we believe the application of that standard would help obviate this problem a little bit.

Under that standard, circumstantial evidence, we

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contemplate, would be permitted in, but it would still have to be very high circumstantial and direct evidence, because it would have to add up, as it does in a libel setting, to clear and convincing evidence to defeat a motion of qualified immunity where intent is a factor.

And finally, I would like to say that regardless of which of these standards you apply, if you decide to apply one of them, it's important to emphasize again that on the facts of this case, the actions of the respondents were objectively reasonable. Indeed, a conspiracy is alleged in this case, but there's nothing in the record that even shows that these two respondents ever spoke to each other, let alone conspired, and it's important to keep that in mind.

This case is Exhibit A, in our view, as to why there should be a heightened pleading or proof standard and as to why, as this Court said in Butz v. Economou, these insubstantial cases should be terminated quickly and promptly, and if there are no further questions, Your Honor, that completes my argument.

QUESTION: Thank you, Mr. Martinez.

Mr. Rosenblatt, you have 1 minute remaining.

REBUTTAL ARGUMENT OF HOWARD T. ROSENBLATT

ON BEHALF OF THE PETITIONER

MR. ROSENBLATT: Thank you, Your Honor.

I'd just like to make a few points. One is that whether we call it a heightened pleading or a heightened production standard, this rule fashioned by the D.C. Circuit is contrary to the Federal Rules of Civil Procedure.

If they call it a heightened production standard, then it's contrary to Rule 56 in many ways, first, because not all inferences are drawn in favor of the nonmoving party, as the rule requires, and secondly because discovery is not allowed, as Rule 56 would ordinarily require, at least would give the district court discretion.

QUESTION: Why does the D.C. Court of Appeals feel impelled to invent this special pleading rule, heightened evidence rule?

MR. ROSENBLATT: Well, it's clearly the case that there are two interests here to be balanced. One of them is to protect Federal officials against insubstantial lawsuits. However, in our view this test not only doesn't do that in many cases, but it goes way too far in favor of them in other cases.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rosenblatt.

The case is submitted.

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(Whereupon, at 12:14 p.m., the case in the above-entitled matter was submitted.)

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BRETT C. KIMBERLIN, Petitioner v. J. MICHAEL QUINLAN, ET AL.,

CASE NO.: 93-2068

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BY Ann Marie Federico

(REPORTER)