

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: DARYLL RICHARDSON AND JOHN WALKER,

Petitioners v. RONNIE LEE McKNIGHT

CASE NO: 96-318

PLACE: Washington, D.C.

DATE: Wednesday, March 19, 1997

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DARYLL RICHARDSON AND JOHN :

4 WALKER, :

5 Petitioners :

6 v. : No. 96-318

7 RONNIE LEE MCKNIGHT :

8 - - - - -X

9 Washington, D.C.

10 Wednesday, March 19, 1997

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:19 a.m.

14 APPEARANCES:

15 CHARLES R. RAY, ESQ., Nashville, Tennessee; on behalf of
16 the Petitioners.

17 DAVID C. VLADECK, ESQ., Washington, D.C.; on behalf of the
18 Respondent.

19 EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
20 Department of Justice, Washington, D.C.; on behalf of
21 the United States, as amicus curiae, supporting the
22 Respondent.

C O N T E N T S

1		
2	ORAL ARGUMENT OF	PAGE
3	CHARLES R. RAY, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	DAVID C. VLADECK, ESQ.	
7	On behalf of the Respondent	23
8	ORAL ARGUMENT OF	
9	EDWIN S. KNEEDLER, ESQ.	
10	On behalf of the United States, as amicus curiae,	
11	supporting the Respondent	40
12	REBUTTAL ARGUMENT OF	
13	CHARLES R. RAY, ESQ.	
14	On behalf of the Petitioners	48
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 PROCEEDINGS

2 (11:19 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 96-318, Daryll Richardson and John Walker
5 v. McKnight.

6 Mr. Ray, you may proceed whenever you want to.

7 ORAL ARGUMENT OF CHARLES R. RAY

8 ON BEHALF OF THE PETITIONERS

9 MR. RAY: Thank you, Mr. Chief Justice, and may
10 it please the Court:

11 The issue in this case is whether correctional
12 officers who are employed by a private concern, who
13 perform traditional and historical police power functions,
14 and act under the color of law for 1983 purposes, should
15 have the benefit of qualified immunity.

16 Firstly, we would like to put forth the
17 proposition that should this Court extend qualified
18 immunity to correctional officers of this nature, that the
19 floodgates will not open, and qualified immunity will not
20 be willy nilly conferred.

21 Firstly, there are thousands, literally -- maybe
22 hundreds of thousands of contractors who contract with the
23 State of Tennessee, but only those who are found to act
24 under the color of State law as defined by this Court's
25 jurisprudence in Jackson v. Metropolitan Edison would be

1 needful of qualified immunity.

2 Secondly, only objectively reasonable actions on
3 the part of these private actors would give rise to
4 qualified immunity. Of course, if their actions are not
5 objectively reasonable under this Court's jurisprudence
6 they would not have the benefit of qualified immunity.

7 QUESTION: Mr. Ray, would you put together the
8 theory and the fact for me, because just looking at what
9 is alleged here, what would -- how would it not be clearly
10 established that it's a violation to take someone who was
11 over 300 pounds and put them in these tight restraints
12 that are bound to cause extreme pain?

13 We are talking about qualified immunity and
14 would a reasonable officer understand from the clearly
15 established law that you don't do this. That is my
16 problem with this case.

17 MR. RAY: Justice Ginsburg, we never got to that
18 point, and that's the issue.

19 QUESTION: What would be the defense? What
20 would be the defense for these allegations?

21 MR. RAY: Well, perhaps under Woods v.
22 Strickland, if Mr. McKnight can establish that the acts of
23 our officers that he alleges were not objectively
24 reasonable, then we don't have benefit of qualified
25 immunity. That is obvious. But the district court --

1 QUESTION: Well, maybe it's an academic
2 question, that --

3 MR. RAY: Oh, that question is not academic, in
4 that there are literally hundreds of vexatious and
5 frivolous lawsuits filed --

6 QUESTION: Oh, but I'm talking about in the
7 context of this case.

8 MR. RAY: In the context of this case, Mr.
9 McKnight may well establish, if this Court should extend
10 qualified immunity to correctional officers who are
11 employed by private concerns, that our two officers don't
12 have the benefit.

13 QUESTION: The Sixth Circuit decided this case
14 on the basis that qualified immunity wasn't available to
15 private contractors.

16 MR. RAY: That's correct, Mr. Chief Justice.

17 QUESTION: So that's why we've got it here.

18 MR. RAY: That's why it's here. Duncan v. Peck,
19 which is their case --

20 QUESTION: My question I asked you is, what good
21 would qualified immunity do them if they had it?

22 MR. RAY: Well, in cases on down the road where
23 their actions were objectively reasonable the
24 litigation --

25 QUESTION: But not cases on down the road. In

1 this case. I mean, we do have to have a live case, or a
2 real case or controversy, so if you prevail, what good
3 would that do to these parties?

4 MR. RAY: I would submit, Justice Ginsburg, that
5 this case would still have to be remanded to the district
6 court for that specific finding, that their actions were
7 not objectively reasonable and they don't have the benefit
8 of qualified immunity.

9 QUESTION: Well, you make the argument for them
10 when you're saying, now I have the benefit of this
11 qualified immunity defense, so, district court, they are
12 qualified immune, and so the district court goes, tell me
13 what wasn't clearly established in relation to these
14 facts.

15 MR. RAY: Well, the specific issue before this
16 Court is, we didn't get to that point. The district court
17 said, based on the jurisprudence of Manis v. Corrections
18 Corporation of America, established by this Court, you
19 don't have qualified immunity, Mr. Ray. You're out of
20 here. That's what the Sixth Circuit said.

21 QUESTION: Yes, but I'd just like you to tell
22 me, suppose he had qualified immunity. What could he do
23 with it?

24 QUESTION: He could try to prove his actions
25 were objectively reasonable.

1 MR. RAY: That's correct, Mr. Chief Justice, and
2 again, we may fail on that issue, Justice Ginsburg, but
3 the issue before this Court and what we want decided is
4 the fact that qualified immunity should be extended to
5 these individuals who act under the color of State law for
6 1983 purposes, are subjected to suit on a day-by-day
7 basis, and they perform traditional historical police
8 powers that this Court has extended qualified immunity to
9 their public counterparts in Navarette.

10 So we would submit that though we may ultimately not
11 prevail on that question -- that question is not before us
12 here -- the question is whether we get over the first
13 hurdle, i.e. --

14 QUESTION: The Sixth Circuit suggested that
15 there might be another standard short of qualified
16 immunity and said maybe good faith --

17 MR. RAY: The good faith defense. That's
18 correct.

19 But the good faith defense, as you well know,
20 Justice Ginsburg, still allows us to be subjected to the
21 discovery process. To discover the subjective mind set of
22 my clients we go through what may be needless and extended
23 litigation, expensive litigation, whereas if qualified
24 immunity applies, of course, that ends the dispute at that
25 point.

1 So I would submit that the difference between a
2 good faith defense and qualified immunity is quite, quite
3 different, and the benefits that would be conferred not on
4 my two petitioners, but on the citizens of the State of
5 Tennessee, who would not have to bear the burden of
6 litigating what may turn out to be a frivolous and
7 vexatious lawsuit -- which again this Court's
8 jurisprudence from Harlow Ford has made it a consideration
9 that the benefit you want to confer is not on the actors,
10 but upon the citizens, who will benefit from not having
11 their officers, who perform a traditional governmental
12 function that utilizes a great deal of discretion, from
13 being impeded, deterred, made timid by threat of
14 litigation, and threatened with litigation.

15 So we would submit that the question here again
16 is whether you confer qualified immunity on officers who
17 historically have and do provide a fundamental
18 governmental function.

19 QUESTION: Mr. Ray, they do historically provide
20 a -- provide what was historically a governmental
21 function, but have they historically had such immunity?

22 I mean, we said in our earlier cases that this
23 qualified immunity is a matter -- it's not in the statute,
24 but we say that it came along with the history of the
25 statute. That was simply what existed when this statute

1 was passed, and therefore we think it exists today.

2 Now, have you given us any evidence that a
3 private individual not employed by the State has ever been
4 given immunity?

5 MR. RAY: Justice Scalia, if I could address
6 prison guards historically in the State of Tennessee --

7 QUESTION: Anybody historically, even if you
8 could come up with a medical officer who was privately
9 contracted for who somehow was given immunity, or a
10 private policeman. Anything. I don't know that you've
11 shown even one example of this historical exception.

12 MR. RAY: I would submit that historically the
13 Attorney General of the United States at one time was
14 allowed to have a private law practice, and when acting in
15 his official function for the Government that I'm sure
16 that immunity would attach to him in any official acts.

17 In England, prior to 1871, when this particular
18 statute was promulgated, lawyers were both public
19 prosecutors and private prosecutors, and when they were
20 acting as public prosecutors I would submit that immunity
21 attached to them.

22 Those are the only examples I can suggest, but
23 let me state that --

24 QUESTION: It's a good one.

25 MR. RAY: -- Pierson v. Ray, this Court started

1 out talking about a good faith immunity, which ultimately
2 developed over the course of this Court's jurisprudence to
3 the qualified immunity doctrine.

4 Pierson v. Ray dealt with police officers having
5 a good faith defense to malicious prosecution actions. In
6 Tennessee, pursuant to statute TCA 4-3-609, correctional
7 officers have the same core functions, the same grant of
8 power as police officers do. They have the right to bear
9 arms. They have the right to take people into custody,
10 effectuate search and seizures, secure their facility from
11 both outside invaders or quell disturbances inside.

12 So I would submit that Pierson v. Ray -- I think
13 it was footnote 7 where Mr. Justice White cited ample
14 precedent that there was a historical basis for police
15 officers having -- excuse me. That was Navarette,
16 footnote 7, that correctional officers have qualified
17 immunity.

18 Given the historical basis in Tennessee of there
19 being coextensive powers between police officers and
20 correctional officers, I would submit that the historical
21 basis is there.

22 QUESTION: What about ordinary tort law? That
23 is, a policeman or a correctional officer working for the
24 Government puts shackles on somebody, or hits them or
25 whatever. That's a tort. That's a battery.

1 MR. RAY: That's correct. Justice Breyer.

2 QUESTION: And there must be their -- State
3 officials, some kind of State law tort immunity that gives
4 a degree of leeway to a State officer who commits the
5 battery where he does it in good faith. Is there any
6 case, anywhere in any of these jurisdictions, that tells
7 us in respect to ordinary tort law whether a private
8 correctional official is treated similarly?

9 MR. RAY: The -- if I may answer it this way,
10 Justice Breyer, the public correctional officer, sovereign
11 immunity would suffice there.

12 QUESTION: Not a suit individually against the
13 officer.

14 MR. RAY: Right. But you would go through the
15 court of claims.

16 QUESTION: You sue the officer individually,
17 there will be some kind of public-based, not immunity, but
18 it will be a defense, and for good faith, et cetera, and I
19 just wonder if there's any case that you've come across --
20 it seems to me by now it should have come across
21 somewhere -- ordinary, garden variety tort law.

22 MR. RAY: The answer to that is no.

23 QUESTION: The answer to what is no --

24 MR. RAY: The answer is no, there's no --

25 QUESTION: -- that you haven't found a case, or

1 there's no case --

2 MR. RAY: I have found no case, but I would
3 submit that our private correctional officers do not have
4 the benefit of sovereign immunity and therefore would be
5 subject to tort law and subject to being sued in State
6 jurisdictions.

7 QUESTION: And without a defense, so that if in
8 fact he commits a battery by putting the shackle on, it is
9 a defense to say I was acting according to law, period.
10 But if it turns out he was wrong that in fact there are
11 too many shackles, it's a battery.

12 MR. RAY: He must pay the piper.

13 QUESTION: And no qualified immunity defense
14 under State law, you say.

15 QUESTION: Not for the private person but for
16 the public.

17 MR. RAY: No, sir. Not for the private person.

18 QUESTION: And no good faith defense?

19 MR. RAY: Oh, the good faith defense would be
20 there, Your Honor.

21 QUESTION: Now, for the public person, yes. The
22 question is whether for the private person, if it's not
23 available to you and me in our private capacities when we
24 happen to go out as a joke and put shackles on somebody --
25 not much of a joke, but do you see what I'm driving at?

1 MR. RAY: I see what you're driving at, Justice
2 Breyer, and I still believe that as you've stated your
3 question the good faith defense would be available to that
4 private correctional officer but not in the context of
5 having any sort of immunity.

6 It would just be a common law defense to -- I
7 acted in good -- just as if a private security guard at
8 Wal-Mart took someone into custody thinking they were a
9 shoplifter and they turned out not to be a shoplifter,
10 then they're subject to malicious prose --

11 QUESTION: I mean, I don't know if you want to
12 comment on this, but where I'm having trouble with this
13 case, and why I find it difficult, is because there are
14 three interrelated things: a) to what extent does the
15 1983 apply in the first place when the person is private,
16 b) to what extent is there ordinary tort law immunity,
17 same or different from a private person, and 3) how do we
18 fit into those answers this question here about whether
19 there's an immunity? If that's too general and vague for
20 you to --

21 MR. RAY: I'll try to address those --

22 QUESTION: That's what's in my mind.

23 MR. RAY: -- Justice Breyer.

24 Number 1 is without question that we act under
25 color of State law and are amenable to suit under 42 U.S.

1 section 1983 because we do perform those core governmental
2 functions that historically and traditionally have been
3 the police powers of the State, so I think it's not
4 questioned by anyone, at least not by us, that we are
5 amenable to suit under 1983.

6 Now then, the second question becomes, what
7 common law immunity do we have as a private person? I
8 would submit that by contract the State of Tennessee
9 denied us sovereign immunity so we are in a different
10 position than our public counterparts, who are
11 correctional officers.

12 QUESTION: Well, you just say that liability
13 under section 1983 ought to go hand-in-hand with a
14 qualified immunity defense.

15 MR. RAY: Justice O'Connor, I think that that
16 would be the common-sensical approach, and I recognize
17 that Wyatt v. Cole was out there I think on the cutting
18 edge of 1983 jurisprudence in that the Court found that
19 there was color of law and amenable to suit because they
20 utilized the replevin and garnishment statutes and went on
21 to find that, because they were two cattle barons in a, if
22 you will, spite suit, that qualified immunity didn't
23 attach, and I don't disagree with that.

24 QUESTION: Well, it has some relevance, though,
25 here, and the question is, are we just going to apply that

1 notion in this context?

2 MR. RAY: I would submit, Justice O'Connor, that
3 where a private actor is acting under the color of law,
4 amenable to suit under 1983, coupled with the fact that
5 they are performing a core governmental function that
6 traditionally and historically has been part of the police
7 power of the State, that the reasonable approach would be
8 to grant them qualified immunity.

9 QUESTION: Why isn't it reasonable to say, look,
10 this is an extraordinary exception, that you hurt somebody
11 and you're not liable. You have this qualified immunity.
12 We want to limit it to those functions that are really
13 core Government functions, and it doesn't seem to us that
14 regardless of whether it used to be a core Government
15 function, the Government isn't that serious about the
16 function if it's willing to farm it out.

17 Why, just as a means of keeping the Governments
18 honest, don't we say, if you're really serious that this
19 is core Government functions, you want this qualified
20 immunity, you have to have your own people doing it. You
21 can't farm it out to private individuals.

22 If you're that concerned about it, you'd
23 exercise master-servant supervision over what's going on.
24 This State hasn't, so the State doesn't care that much, so
25 why should we give qualified immunity?

1 MR. RAY: Justice Scalia, I beg to differ. The
2 State cares a great deal. The State has on-site a
3 fonctionnaire designated as a liaison who oversees on a
4 day-to-day basis how we run South Central Correctional
5 Facility.

6 QUESTION: Yes, but I don't want to have to look
7 into this on a case-by-case basis. I mean, we're talking
8 about a general rule of law, and why shouldn't the general
9 rule of law be, look, if you're as much in control of it
10 that it's your own servants who are doing the thing, then
11 we'll consider qualified immunity, but if you're
12 insouciant enough to farm it out, whatever controls you
13 put, we're not going to give qualified immunity.

14 MR. RAY: Justice Scalia, I submit that the
15 jurisprudence of this Court has always been that the
16 States are free, as the hothouses of democracy, the
17 laboratories of democracy, if you will, to attempt to
18 chart their own course in how they delegate the duties,
19 how they go about doing what they want to do.

20 If the State of Tennessee thinks it better
21 serves its citizens to contract out the running of the
22 prisons, then that is an issue that's left to the State of
23 Tennessee.

24 Now, whether this Court wants to decide an
25 immunity question on that basis I would submit that that's

1 clearly antithetical to what this Court's done in the
2 past. That's like the amici arguing that you should
3 consider whether or not insurance comes into play, or
4 whether we choose to indemnify our employees, or whether
5 we choose to do -- to give bonuses, et cetera.

6 All of these things are things that the State of
7 Tennessee has taken into account when they initially
8 decide that we're going to contract out at least part of
9 our corrections facilities and compare whether a private-
10 run facility can operate more efficiently to be to the
11 taxpayer's interest, or whether we should keep this
12 governmental function our own, and I submit that once a
13 State makes that decision, that's a valid and legitimate
14 decision the State has a right to make.

15 QUESTION: And you would extend that to all
16 contracting out to do a custodial job? Say, you'd apply
17 the same thing to day care centers, that all the employees
18 of the contracting -- of the Government contractor would
19 have qualified immunity?

20 MR. RAY: No, Justice Ginsburg. I believe that
21 it should be maintained within the confines of this
22 existing -- of this Court's existing jurisprudence.

23 Since Procunier v. Navarette has been decided
24 that State prison guards, and then Cleavinger v. Saxner
25 Federal prison guards are -- have the right to have the

1 qualified immunity doctrine applied in their favor, I
2 would submit that it's core governmental functions of that
3 nature --

4 QUESTION: How about education, and the
5 Government saying our own schools are rotten so we're
6 going to contract out that function to a private company
7 that's going to do it for money?

8 MR. RAY: Again, I think that would be a
9 legitimate end of State Government to do that.

10 QUESTION: But would those, the employees that
11 you --

12 MR. RAY: I would say no, because this Court has
13 never extended qualified immunity to educational
14 facilities.

15 In fact, I think there's one case dealing with a
16 contractor who provided educational service to the prison
17 that attempted to invoke qualified immunity doctrine which
18 was rejected by this Court.

19 QUESTION: Wood v. Strickland was a school
20 board, wasn't it?

21 MR. RAY: That's correct, Your Honor, a school
22 board, but again, that was a question of the discretion
23 that the school board exercises in fulfilling its
24 function, and --

25 QUESTION: Are private schools liable under

1 1983?

2 MR. RAY: Mr. Justice Breyer, I would think that
3 the acting under color of law coofficial would be missing
4 from that particular -- but --

5 QUESTION: I wasn't talking about a private
6 school. I was talking about, it's -- the State has been
7 running these day care centers and they haven't worked out
8 very well, so the State decides it, not parents paying
9 tuition to a private school, but the State is going to
10 replace its own operation with a contracting-out
11 arrangement.

12 MR. RAY: Well, again, I think it would be
13 dependent upon the amount of discretion that the officers
14 utilized in furthering the public good and what this
15 Court's jurisprudence had been in the past about conveying
16 qualified immunity to actors of that nature, and it would
17 be my belief that in the example you've given, Justice
18 Ginsburg, that qualified immunity would not attach to that
19 particular function.

20 But here we have a function that on a day-to-
21 day basis I can't think of any other governmental function
22 that utilizes as much discretion in dealing with a
23 populace or a segment of the population that this Court
24 has recognized where there's an unremitting tension
25 between the keepers and the kept, and an unremitting

1 tension between those folks that are being confined for
2 antisocial behavior, who have a proclivity to make use of
3 the court system in some cases for frivolous and vexatious
4 litigation, and that it's the public good that is to be
5 served by qualified immunity.

6 It's not Mr. Richardson or Mr. Walker that the
7 benefit is meant to be conferred upon. It's the belief by
8 this Court that Mr. Richardson and Mr. Walker should have
9 the right to carry out this governmental function with
10 discretion, without timidity, to take care of business
11 free from vexatious and frivolous litigation.

12 QUESTION: That, of course, is why I'm
13 interested in this private part, because pure tort law, if
14 it does apply to this private person like any other
15 private person, would make this all meaningless, what
16 you're saying, because the person would have a cause of
17 action, the injured person, under State tort law, and it
18 really wouldn't matter, and unto all these incentives, and
19 which way the contract cuts and so forth would all be
20 totally irrelevant, really, because it wouldn't matter.

21 MR. RAY: Justice Breyer, the only way I can
22 answer that is a practical -- practical -- what happens in
23 the real life out there. These writ-writers all go to
24 Federal court under 1983, for whatever reason. The State
25 court's there for them.

1 QUESTION: Well, probably for attorney's fees,
2 don't you suppose?

3 QUESTION: We're arguing about attorney's fees
4 here?

5 MR. RAY: I think not, Justice Breyer.

6 QUESTION: Mr. Ray, I assume if that's a problem
7 for the private contractor officer, I suppose it's also a
8 problem for the State-employed officer. He can be sued
9 under State tort law, can't he?

10 MR. RAY: That's correct.

11 QUESTION: Does he have qualified immunity under
12 State tort law? I don't know.

13 MR. RAY: If I could answer that question --

14 QUESTION: If he does, your argument would be
15 the State should make the same extension to contractors
16 that you're asking the Federal Government to under 1983.

17 MR. RAY: Well, for whatever reason, they chose
18 not to.

19 QUESTION: The State has chosen not to?

20 MR. RAY: Well, they've chosen not to grant us
21 sovereign immunity, which their public correction officers
22 would have benefit of.

23 What that means is, you have -- your suit is
24 brought --

25 QUESTION: You cannot bring an individual suit

1 against a correctional officer who has beaten you up, just
2 a tort suit? I'm not suing the State. I'm suing this
3 individual. I'm saying, you know, this is a bad guy who
4 has hurt me.

5 MR. RAY: It would be my belief you would have
6 to go through the court of claims.

7 QUESTION: He'd have to --

8 QUESTION: So you're not trying to impose
9 liability on the State? You're just trying to sue the
10 individual?

11 MR. RAY: Again, Mr. Chief Justice --

12 QUESTION: You normally sue -- you normally
13 sue -- I think in most States you sue a tort for tort, but
14 there is an immunity that attaches to actions of a
15 Government official under ordinary tort law. The exact
16 scope of it I couldn't tell you, but that's where
17 qualified immunity comes from. It's a transplant from
18 that basic tort law principle. At least that was my
19 understanding.

20 MR. RAY: That's correct, Justice Breyer, and as
21 elucidated by this Court in Pierson v. Ray, the analogy to
22 the good faith defense that a police officer would have
23 had at common law to such a claim.

24 If I could reserve the rest of my time, if
25 there's no other questions.

1 QUESTION: Very well, Mr. Ray.

2 Mr. Vladeck, we'll hear from you.

3 ORAL ARGUMENT OF DAVID C. VLADECK

4 ON BEHALF OF THE RESPONDENT

5 MR. VLADECK: Mr. Chief Justice, and may it
6 please the Court:

7 This is a damage action brought pursuant to
8 section 1983, and that provision broadly imposes liability
9 on any and every person who, acting under the color of
10 State law, deprives a person of constitutional rights. It
11 contains no explicit immunities or exceptions.

12 And nonetheless, this Court has recognized that
13 when Congress enacted the Civil Rights Act back in 1871,
14 it did not intend to abrogate wholesale the immunities
15 that existed at that time.

16 Rather, this Court has said, and it has said it
17 as recently as *Wyatt v. Cole*, that it will recognize
18 immunities where, but only where, two conditions are met.
19 First, that there is some firm historical antecedent for
20 the immunity, and second that there are strong policy
21 considerations consistent with the purpose of section 1983
22 that preserve the preservation of the immunity, and both
23 conditions need be met.

24 QUESTION: But isn't it also true that we've
25 often said that the scope of the immunity is measured by

1 the function being performed by the defendant in the
2 office he held, and the function being performed by these
3 private companies is precisely the same as a public
4 function.

5 MR. VLADECK: Yes, though the Court has, even in
6 cases that post date Harlow, always looked at the
7 historical basis. The only --

8 QUESTION: Yes, but the history is that this
9 function is one that has been entitled to -- has generated
10 immunity.

11 MR. VLADECK: That is correct, Your Honor, but
12 this function, performed by State officials subject to the
13 constraints that normally apply to State actors, and --

14 QUESTION: Mr. Vladeck, can you say for sure
15 that immunity was never extended to nonemployees of the
16 State?

17 I mean, the example brought forward by Mr. Ray
18 is an impressive one. That is, it certainly was the
19 tradition at common law, and it still is the practice in
20 England to have prosecutions conducted by barristers hired
21 by the Crown.

22 I expect that was the case in the early days in
23 this country. Did those private prosecutors not have any
24 immunity?

25 MR. VLADECK: The only case of this Court that

1 addresses that issue is Tower v. Glover, which involved
2 not a prosecutor but a public defendant, and this Court,
3 relying both on history and public policy grounds, held
4 that that -- that person was not entitled to the immunity
5 that was sought in that case.

6 QUESTION: So if we have a lay magistrate system
7 in this country the judges will lose their immunity, too.

8 MR. VLADECK: Well, Your Honor, judicial
9 immunity is a different branch of sovereign immunity than
10 the immunity that we're speaking of here today, and that
11 gets back to my fundamental point, which is that there is
12 no historical antecedent for immunity at common law for
13 nongovernmental actors, particularly in torts involving
14 the abuse of Government power.

15 QUESTION: You say for sure that -- you know for
16 sure --

17 MR. VLADECK: Well --

18 QUESTION: -- that prosecutors at common law,
19 private barristers who prosecuted on behalf of the Crown,
20 had no immunity?

21 MR. VLADECK: I do not know that for sure.

22 QUESTION: I don't, either, but I would be
23 surprised if they didn't.

24 MR. VLADECK: Well, Your Honor, the only
25 discussion of that issue I've seen in this Court's case is

1 in Tower v. Glover.

2 QUESTION: In fact, even in England, isn't it
3 true that the hue and cry that was raised to chase the
4 fleeing felon often enlisted the help of all sorts of
5 private citizens in performing police functions in
6 apprehending fleeing felons?

7 MR. VLADECK: I think that is very different. I
8 do not know whether those parties had immunity. The only
9 historical evidence we have here is in the brief of the
10 ACLU, which looks at the practice that existed in the turn
11 of the century for privatized prisons.

12 Private prisons were common in the late 1800's,
13 and there are cases from that time involving private
14 jailers who engaged in tortious conduct and they are not
15 afforded immunity.

16 QUESTION: This is -- you're not talking about
17 1983 cases, I take it, but just State tort law cases.

18 MR. VLADECK: Your Honor, some are State tort
19 law cases. Other are Federal cases brought in Federal
20 court. The reported decisions do not state the basis for
21 Federal jurisdiction, so I do not -- I can't tell you for
22 a fact that these were 1983 cases.

23 QUESTION: Could have been diversity?

24 MR. VLADECK: I suppose so, Your Honor.

25 QUESTION: Well, was there any question about

1 whether, in any of those cases about -- I mean, weren't
2 they the most outrageous violations of law, that there
3 wouldn't be any question of whether the law was clear or
4 not?

5 MR. VLADECK: Well, I --

6 QUESTION: I mean, you know, if the immunity
7 question wasn't even involved in the case they're not very
8 good authority.

9 Everybody agrees you can sue these people.

10 MR. VLADECK: Well --

11 QUESTION: So the existence of suits doesn't
12 prove anything.

13 MR. VLADECK: No. The question that this Court
14 has looked to in every single case involving the question
15 of whether an individual is entitled to immunity has
16 looked first at the question of is there historical
17 antecedent, and the burden on showing historical
18 antecedent has always been placed on the proponents of the
19 immunity.

20 This Court has ruled again and again that
21 because immunities interfere with the enforcement of
22 constitutional rights, the burden is on the proponent to
23 explain both the historical basis and public policy
24 arguments that support it.

25 The petitioners have never argued that there's a

1 historical antecedent. The courts that have looked at
2 this --

3 QUESTION: Sure they have. Their historical
4 antecedent is, their argument goes like this. What counts
5 is the function. There is plenty of historical antecedent
6 for this person performing this function to be given
7 immunity. It's plenty.

8 And your response is, well, performing the same
9 function, but he wasn't employed by the State, and I -- it
10 seems to me that's a good rebuttal argument, but I don't
11 think you can say that they haven't brought forward any
12 historical antecedent.

13 MR. VLADECK: Well, it is true that in common
14 law Government prison guards had immunity, or had a
15 defense that is now called an immunity, but there were --
16 there was quite an extensive experience with private
17 prisons, and there is no evidence that any of those actors
18 were ever accorded immunity either in our jurisprudence or
19 in the English jurisprudence.

20 And to the extent that people have looked at it,
21 the cases that exist -- and I agree, they're not perfect
22 on this, but do not accord private actors immunity.

23 But in any event, the policy considerations that
24 I think are germane here argue very strongly against
25 giving governmental immunity to private actors. Our main

1 reason is this. Placing governmental power in the hands
2 of private actors is bound to increase the risk of
3 constitutional torts, and I say that because the key
4 constraints -- qualified immunity is a tradeoff.

5 On one hand we accept the fact that there will
6 be unremedied and undeterred violations of law because we
7 find it necessary for Government to perform those
8 functions. It is an altogether different matter when we
9 are transforming Government power to private actors who
10 may operate in very different ways with very different
11 incentives.

12 For example, here, the prison is being run by a
13 for-profit corporation. Corporate -- corporations,
14 including prison corporations, have a duty to maximize
15 their profits.

16 QUESTION: Well, don't they also have a very
17 strong motive to avoid paying a lot of damages?

18 MR. VLADECK: Well, they have a motive to avoid
19 paying damages if there's something in place to keep that
20 motivation present. The problem with qualified immunity
21 is it removes the deterrence to do precisely that, Your
22 Honor.

23 QUESTION: Well, why is it -- I don't see any
24 difference. I know you've made a big point of this in
25 your brief, but I don't really see it. Why doesn't the --

1 a corporation wants to save money. So the Government
2 doesn't give a damn. They always blame somebody else.
3 But boy, when money's at stake, they get busy --

4 MR. VLADECK: Well, the easiest way --

5 QUESTION: -- and therefore they will really hew
6 the line. They will -- they don't want these judgments,
7 and therefore, whatever reason we have for giving
8 qualified immunity to private -- to public officials,
9 we'll just apply the same there.

10 I mean, why does the fact that they make money
11 mean they're more likely to violate people's rights? You
12 could as easily argue it's less likely.

13 MR. VLADECK: It is for two reasons.

14 QUESTION: I'm not saying it is less likely. I
15 just don't see that it's more.

16 MR. VLADECK: Well, my first answer, Justice
17 Breyer, is, if we don't know the answer to that question,
18 then the decision should be made by Congress, not this
19 Court, because unless it is clear that the risks of
20 conferring qualified immunity are not substantial and will
21 not do violence to the policies in 1983, this Court has
22 always said we ought not to proceed.

23 QUESTION: Why doesn't it -- look. The --
24 suppose I were inventing the system, which I won't do, but
25 you might have no qualified immunity for anybody, and just

1 have an insurance policy, which would put terrifically
2 accurate incentives on public officials, but that isn't
3 our system. We have qualified immunity.

4 So if our system is qualified immunity, it must
5 be because we want the people performing this function to
6 feel not totally worried that they're right at the line.
7 If that's the reason, why doesn't that reason apply here
8 with equal force?

9 MR. VLADECK: Because the Court has said, in
10 cases like Harlow, that in addition to whatever economic
11 incentives that you're basing your question on, there are
12 other constraints that operate on public officials that
13 certainly are absent here.

14 QUESTION: Like what?

15 MR. VLADECK: In Harlow, of course -- excuse me.
16 In Nixon v. Fitzgerald the Court was talking about
17 political accountability, and those constraints operate on
18 public employees in a very real and very immediate way.

19 QUESTION: So that's the problem. Do you think
20 that the money is less of a restraint, or more?

21 MR. VLADECK: I think money is a restraint.

22 QUESTION: What kind of public accountability do
23 State-paid prison guards have?

24 MR. VLADECK: Well, they are -- they work in a
25 very hierarchical, Civil Service system. They give oaths

1 of office. They are subject to --

2 QUESTION: There are intimations in your brief
3 that the public employees kind of do it as a labor of
4 love, and that may be true at some levels, but certainly
5 not at the prison guard level.

6 MR. VLADECK: No, Your Honor, I agree with that,
7 but our point is not solely that the motivations of prison
8 guards -- here, of course, they're not simply prison
9 guards. They're shareholders of the corporation for which
10 they work.

11 It's not simply their motivation. It's they
12 work within a structure. It is the nature of the employer
13 that is significant, and here --

14 QUESTION: If the head of the operation were a
15 State official -- let's take a volunteer fire department,
16 where the fire chief is a public employee. Everybody else
17 is a private citizen. What then?

18 MR. VLADECK: I still think -- I think there's a
19 continuum along which greater State control may be an
20 element, but as long as there's a divided loyalty problem
21 like you have here, where the correctional officers serve
22 two masters, not one -- they serve the shareholders as
23 well as the State -- you have problems of constitutional
24 violations.

25 QUESTION: Well, I take --

1 QUESTION: Well, but why doesn't the impetus for
2 what you call public accountability work exactly the same
3 way in this case with the accountability of a contractor
4 to the person who may or may not renew the contract?

5 If there's a lot of trouble the next time around
6 I suppose the State is going to say, gee, we ought to find
7 somebody who doesn't seem to create so much trouble for
8 us. Why isn't that just as much and perhaps more of an
9 impetus than what you call political accountability?

10 MR. VLADECK: There is supervision, biennial
11 supervision by certain of the committees of the Tennessee
12 legislature. That, of course, is much more sporadic than
13 the kind of public oversight that ordinarily obtains with
14 public entities.

15 But when this legislation was passed, the one
16 principal reservation was made by the Attorney General of
17 Tennessee, who said -- and this is obviously a paraphrase,
18 but our concern is that suppose something goes wrong with
19 this contract. It is very difficult to substitute a new
20 provider, if you will, on the spur of the moment, and so
21 in some sense we are locked in and we're stuck with the
22 contractor that we --

23 QUESTION: Well, we're stuck with the contract
24 for the contract period, but all contracts are going to be
25 renewed at some point.

1 MR. VLADECK: That is correct, and there is some
2 oversight, but that is very different than the day-to-day
3 public accountability that we presume constrains the
4 activities of our public officials. That was part of
5 the --

6 QUESTION: Well, I take it the Solicitor General
7 doesn't quite take your approach here, because as I read
8 the brief, would advocate that qualified immunity be
9 recognized for some private contractors.

10 MR. VLADECK: I think that is correct, Justice
11 O'Connor, but to the extent that a clear line could be
12 discerned in the Government's brief, I think they point to
13 the same two factors that we do. One is the lack of
14 divided loyalty.

15 In all of the hypotheticals that are given in
16 the Solicitor General's brief, the contractor owes its --
17 or his or her loyalty to the Government, and the second
18 portion of their test, as I understand it, is direct and
19 active governmental supervision.

20 Neither of those factors are present here. This
21 is a classic turnkey operation in which the State has
22 essentially given over to CCA, the Corrections Corporation
23 of America, the responsibility for the day-to-day
24 operations of this prison.

25 QUESTION: Well, does your argument, then,

1 across the board depend on the proposition that making
2 money for shareholders or losing money, or the threat of
3 losing money, is a less powerful motivating factor to keep
4 people behaving properly than responsibility to voters, or
5 general considerations of patriotism?

6 I sort of wish you were right, but I'm not
7 certain that that's correct.

8 MR. VLADECK: Well, Your Honor, in part I'm
9 relying on what this Court has said in its prior immunity
10 cases. These are not my own views.

11 QUESTION: But is that a necessary proposition?
12 That is, if I don't think that, then would I have to
13 decide the other way?

14 MR. VLADECK: Well, I think if you look at the
15 economic incentives, the provision of qualified immunity
16 is the wrong way to go about enforcing compliance with the
17 civil rights laws.

18 If you're simply looking at it dollars and
19 cents, qualified immunity will save the Corrections
20 Corporation of America, assuming that it indemnifies its
21 employees and pays for their litigation expenses, an
22 enormous amount of money, and removes the incentives --

23 QUESTION: Well, it still costs money to come
24 all the way up to the U.S. Supreme Court and fight some
25 issue on qualified immunity. This doesn't come cheaply.

1 You have to have lawyers go in, assert it, get it -- it's
2 expensive, and it is in the economic interests of the
3 private contractor to avoid even that.

4 They will make more money if they aren't dragged
5 into court at all, so they have every economic incentive
6 to behave in ways that will keep them out of court,
7 period, don't they?

8 MR. VLADECK: Well, that -- that may be so,
9 Justice O'Connor --

10 QUESTION: I would think so.

11 MR. VLADECK: -- but if that is the case, then
12 their plea is misdirected. They ought to go to Congress
13 and make that argument, where Congress can engage in the
14 kind of fact determinations that this Court has said in
15 the past --

16 QUESTION: Oh, I don't know. It goes to me to
17 the balance that you weigh here, what our concerns are. I
18 think they do have an economic incentive to behave in ways
19 that won't get them even as far as a qualified immunity
20 issue.

21 MR. VLADECK: Let's take this case, for example.
22 Here, when the prisoner was transported to South Central
23 Correctional Facility the original transportation was done
24 by State correctional officers.

25 They recognized because of his bulk, and because

1 of his size, they ought to take the ankle shackles and put
2 them on his wrists, leaving his ankles unshackled, and
3 when the transfer was made the State correctional officers
4 told the CCA employees that this is the way he ought to be
5 handled.

6 The CCA employees ignored that and shackled both
7 his wrists and his legs, leading to his injuries.

8 QUESTION: And you think that's because they
9 were private employees --

10 MR. VLADECK: No, I --

11 QUESTION: -- not because they were stupid or
12 mean or anything else.

13 MR. VLADECK: It could have been all --

14 QUESTION: There's something inherent in the
15 nature of private employees that would have made them the
16 stupid ones rather than the -- I don't see that.

17 MR. VLADECK: I didn't finish, Justice Scalia.

18 QUESTION: Okay.

19 MR. VLADECK: Let me try to respond directly to
20 your question.

21 The transportation of prisoners is done at a
22 flat fee. The better you do it, the more personnel you do
23 it, you're not going to make any more money, and the
24 problem that this case presents is, there's inevitably a
25 tension -- when it comes to spending money or safeguarding

1 prisoners' rights, there's inevitably a tension here, and
2 here, I submit --

3 QUESTION: You really think that these employees
4 have the -- I mean, they're wonderful employees if they
5 have the financial well-being of the corporation so much
6 in mind that they know that by whipping this prisoner
7 along a little bit faster the corporation is going to make
8 more money and that makes them feel good? I can't imagine
9 that that's in their mind.

10 MR. VLADECK: I don't divorce the employees from
11 the context in which they work, and here what I'm saying
12 is that because corporations have a duty to their
13 shareholders to maximize their profits, that puts the
14 needs of the corporation potentially on a collision course
15 with the constitutional rights of their employees, and
16 that is the danger of giving qualified immunity to private
17 actors who are not subject --

18 QUESTION: You know, just from my own experience
19 in private practice, private concerns are much more cost-
20 conscious and willing to settle and willing to avoid
21 liability than governments, which traditionally feel as I
22 gather, that you know, we don't need to worry about how
23 much this is costing us because we've got a principle at
24 stake. I think your argument really proves the other
25 thing.

1 MR. VLADECK: Well, Your Honor, all I can say is
2 that one of the principal goals of section 1983 is to
3 deter civil rights violations.

4 That's why -- part of the reason why it was
5 enacted, and it seems to me that if you put governmental
6 power in the hands of private actors who are not subject
7 to the constraints that we normally think inhibit
8 unconstitutional acts by Government officials, that is a
9 very risky proposition that counsels against extending
10 qualified immunity to private persons here.

11 QUESTION: Do you agree with the Solicitor
12 General on how you treat the doctors who have a contract
13 to attend to all the inmates who get sick?

14 MR. VLADECK: I do not know whether there's any
15 common law basis for affording those kinds of contractors
16 who work within the governmental structure as it exists,
17 who take supervision and direction and control from
18 governmental prison officials, whether they have been
19 accorded immunity in the past.

20 But I would urge the Court to retain the
21 historic first question that is always asked in qualified
22 immunity cases, which is simply --

23 QUESTION: Thank you, Mr. Vladeck.

24 MR. VLADECK: Thank you.

25 QUESTION: Mr. Kneedler, we'll hear from you.

1 ORAL ARGUMENT OF EDWIN S. KNEEDLER

2 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

3 SUPPORTING THE RESPONDENT

4 MR. KNEEDLER: Mr. Chief Justice, and may it
5 please the Court:

6 It is the position of the United States that
7 guards employed by a private corporation that is operating
8 a prison pursuant to a contract with the State for the
9 operation of that prison are not entitled to invoke
10 qualified immunity under section 1983 solely by virtue of
11 the fact that they are performing functions that are
12 similar to those performed by a publicly employed guard.

13 However, as we explain in our brief, there are other
14 circumstances not present in this case in which we do
15 believe that private persons should be entitled to invoke
16 immunity. Some of those have been referred to here, and
17 some of them in fact have distinct common law antecedents.

18 There are -- there's a common law recognition,
19 for example, for private judicial activities in the area
20 of arbitration. There are common law antecedents for
21 private citizens helping to find -- to capture fleeing
22 felons. There are common law antecedents for immunities
23 for informants and other volunteers, such as volunteer
24 fire companies.

25 Where -- in situations where the Government

1 cannot get the assistance of private persons in the
2 performance of public functions, the law has long
3 recognized immunities or defenses, and we think in those
4 circumstances that correspondingly under 1983, or Bivens,
5 when a person is acting under color of law, that there
6 would be also a basis for doing that.

7 QUESTION: Do we know that that isn't one of
8 those situations? That is to say, do we know that private
9 companies, deep pockets, apparently, do not have the
10 sovereign immunity that the State has and who are liable,
11 you know, for vicarious master-servant liability for their
12 individual functionaries, is it clear that they would take
13 on these contracts and perform that governmental function
14 if, indeed, they didn't have comparable qualified immunity
15 to the one that the Government's own prison guards --

16 MR. KNEEDLER: I think there are really two
17 questions, and that is whether the private corporation
18 would be able to attract employees to serve as their
19 guards, but then beyond that the question would be whether
20 the State could accomplish the function of housing
21 prisoners if that weren't so.

22 And we know from history that the States have
23 operated prisons themselves and have been able to hire
24 employees and attract employees and give them the security
25 of their job. In fact, that's one of the functions of

1 qualified immunity in the public sector.

2 QUESTION: If that's true, then -- you're not
3 going to know the answer to this either, I bet, because I
4 bet there is no answer, but try it, but my impression, the
5 qualified immunity thing, it's a creation by this Court
6 interpreting a statute that rests upon common law tort
7 law, and the kinds of immunity that under common law tort
8 law went with public officials.

9 So if we're going back to history I would be
10 quite interested as to how the States, again, have applied
11 their common law tort law to people who suddenly
12 privatize, take over State functions.

13 If, for example, they were to say, no, there is
14 no immunity, you're treated just like Joe Blokes out in
15 the street, that would support your historical argument
16 very much, because then they would have evolved tort law
17 the same way, and the opposite would be the opposite, and
18 you're going to tell me you don't know because it probably
19 hasn't come up yet.

20 MR. KNEEDLER: No, my understanding is that that
21 is, that that distinction does exist in tort law.

22 QUESTION: All right. So what happens?

23 MR. KNEEDLER: For Government officials -- and
24 this is really the issue in this Court's decision in
25 Westfall, which dealt with the qualified immunity of

1 Federal employees from State common law torts.

2 The Court there referred to the fact that at
3 common law employees were absolutely immune, essentially
4 for acts performed within the scope of their discretion,
5 and the Restatement of Torts refers to that same immunity
6 for public officials acting within the scope of their
7 discretion. There is no comparable immunity as such for
8 private --

9 QUESTION: No, but now what happens when --
10 exactly right --

11 MR. KNEEDLER: -- for private persons.

12 Now, I'm not aware of any law dealing
13 specifically with contracting out, but I see no reason why
14 contracts awarded to a private corporation for service
15 contracts in this case, or procurement contracts, either
16 way I see no reason why a private corporation in its
17 ordinary functions, whether it's performing a contract for
18 another private person or the Government, would not be
19 subject to the -- as a general rule, the same rule, that
20 there would not be a comparable immunity.

21 Now, there may be defenses at common law, and
22 for example, there are privileges or defenses -- these
23 things had different labels at common law for -- and I'm
24 sure the guards here would have a defense, even a private
25 person would, in assisting in an arrest, and I'm sure that

1 there would be a good faith defense recognized at common
2 law in Tennessee -- not an immunity, but a defense in
3 terms of the force that was reasonably believed to be
4 necessary by a guard to restrain someone.

5 That would be a privileged battery, and the
6 question would be whether the battery would be -- was
7 reasonable. But --

8 QUESTION: Mr. Kneedler, you've confused me now.
9 I thought when you began you acknowledged that there were
10 some instances in which qualified immunity was given to
11 private people where you said it was necessary to call for
12 the services.

13 MR. KNEEDLER: Right.

14 QUESTION: Now you're just -- I thought you're
15 just saying now that there aren't any instances.

16 MR. KNEEDLER: No, no. I was explaining the
17 general common law rule of torts that the absolute
18 immunity for Government actors did not apply in the
19 private sector, but even under the common law there
20 were --

21 QUESTION: We're talking about qualified
22 immunity here, though. We're not talking about
23 absolute --

24 MR. KNEEDLER: No, but I think that there is
25 some parallel as Justice Breyer was suggesting in the tort

1 law to support a distinction between people who are public
2 employees and people who are employees of private
3 corporations, but even under contracts, I do want to make
4 one important point.

5 If a person operating under a contract is acting
6 pursuant to a specific governmental directive, either in
7 the contract that something shall be done in a certain
8 way, or directives in a particular case that something
9 shall be done in a certain way, we believe that qualified
10 immunity should attach to that, because in that situation
11 it is not the private actor but the government that is
12 really accountable for that, and the Government agent or
13 official who made that decision has been responsible for
14 balancing the costs and benefits of doing that.

15 I do think that there is an important
16 distinction, both as a matter of history, constitutional
17 law, and common sense, between Government and private
18 corporations, between the Government way of doing things,
19 or the Government model, and the private market model.

20 For one thing, Article VI of the Constitution
21 requires every executive officer of a State, of the State
22 or Federal Government to take an oath to support the
23 Constitution, and those heads of executive departments,
24 including the State correctional department, have direct
25 responsibility and political accountability for those who

1 work for them.

2 In that climate it is -- I think the courts have
3 been willing to assume the regularity of governmental
4 operations. Government officials will be trained, but in
5 any event they will be subject to direct political
6 accountability.

7 When a function is being performed by a private
8 contractor, the Government can't step in and correct --

9 QUESTION: When you say political accountability
10 you mean the electorate, I suppose.

11 MR. KNEEDLER: The electorate and public
12 attention, public scrutiny on the acts of public
13 officials. That's not to say that the --

14 QUESTION: Well, does that -- do you think there
15 would be less, say, media attention on a prison riot if
16 the -- if prison officials and the workers were contract
17 prisoners than if they were Government employees?

18 MR. KNEEDLER: No, there wouldn't be less media
19 attention, but I believe it may be that the public would
20 hold the public warden or correctional superintendent more
21 directly responsible for what happened, and perhaps
22 properly so.

23 QUESTION: Why on earth would that be?

24 MR. KNEEDLER: Because the direct supervision of
25 the guards on a day-to-day basis, anyway, is not the

1 responsibility of the head of the correctional department.
2 The Government has turned over as a package the entire
3 operation of the prison, and there are a series of
4 financial and other incentives for the contractor to both
5 protect the security of the prison and protect private
6 rights.

7 That includes not just what happens in
8 individual guard decisions but the broader questions. The
9 contractor has to decide, the training, the security
10 measures, the way facilities are designed, the programs,
11 all of --

12 QUESTION: Well, you'd better be very careful in
13 picking the contractor. It seems to me you can get just
14 as mad at the State governmental corrections director for
15 being very negligent in his selection of contractors as
16 you can get mad at him for being negligent in his
17 supervision of people who --

18 MR. KNEEDLER: Right. I'm not saying that
19 there's no responsibility, but we do believe that it's
20 attenuated and that in fact there's a pretty important
21 break in the chain of control.

22 The very act of contracting over the operation
23 of an entire institution -- we're not talking about
24 individual doctors who may be integrated into what's
25 otherwise a governmental institution, but turning over the

1 operation of an entire institution to a private
2 corporation.

3 The model, then, would be that that private
4 corporation, using whatever it believes would best promote
5 the overall performance of the contract, to use its
6 creativity, to use its financial resources in a way that
7 will both win the contract the next time around and also
8 to guard against constitutional rights, and the Government
9 -- I think this Court has been willing to assume that the
10 accountability and the direct responsibility of the
11 Constitution will help to deter constitutional violations.

12 I think that there's less structural basis --
13 I'm not saying necessarily empirical, but structural basis
14 for concluding that the same assumption should not be
15 applied in the case of private contractors, but we do urge
16 this Court not to announce a rule that would say that
17 immunity is not available in any case of private actors,
18 but only in the Government contractor situation.

19 QUESTION: Thank you, Mr. Kneedler.

20 Mr. Ray, you have 6 minutes remaining.

21 REBUTTAL ARGUMENT OF CHARLES R. RAY

22 ON BEHALF OF THE PETITIONERS

23 MR. RAY: Thank you, Your Honor. I promise you
24 I won't use that.

25 In response to the Government, I really submit

1 that their position seems to be a bit elitist, that
2 doctors, counselors, those professions that you're going
3 to have difficulty in bringing into the contracting
4 service should have immunity, contract immunity, but a
5 mere prison guard, where the rubber meets the road,
6 somehow they don't warrant qualified immunity, and I would
7 submit that --

8 QUESTION: Mr. Ray, it wasn't quite that way,
9 because they said the person who is helping out in the
10 U.S. Marshalls Service, they have to get temporary people
11 in the Marshalls Service. I don't think they're talking
12 about elite people in that regard.

13 MR. RAY: Well, again I would submit that if
14 we're going to have qualified immunity for these types of
15 people, the people who utilize the most discretion on a
16 day-to-day basis and need it the most are correctional
17 officials.

18 QUESTION: Let me ask you this. It's probably
19 not a very great point, because nobody's made it on the
20 other side, but this did occur to me. They mostly argued
21 this incentive thing, which we've been through, but if you
22 go back into the history of these cases, I once thought
23 that the reason this qualified immunity developed at all
24 was the courts are focusing on a particular person who may
25 not have insurance.

1 He's a defendant, and they're saying this poor
2 person, you know, he's trying to do his job, here his life
3 is ruined, he's stuck with \$100,000 verdict -- we'll hurt
4 the plaintiffs a little bit in order to help him out a
5 little bit.

6 Now, if that was how this thing developed -- and
7 certainly Learned Hand probably had something like that in
8 mind, I think, in Gregoire v. Biddle, all right -- then it
9 is a different world, isn't it, where people have
10 insurance?

11 MR. RAY: No question about it.

12 QUESTION: And if we're going into this
13 different world when people have insurance, like the
14 private companies all must under contract, then that
15 defendant is somewhat less in need of that protection, and
16 that -- though no one's made this, so maybe there's some
17 obvious answer to this, but the -- if they don't need the
18 protection because we're now in a new world, does that
19 sort of hurt the whole idea of qualified immunity, at
20 least as applied to a field where they have to have
21 insurance?

22 MR. RAY: In the case that was argued yesterday
23 it was quite apparent that insurance played a great role
24 in that particular case. The county had insurance,
25 whether or not it was enough. So governments indemnify

1 their employees just as private concerns do, and I don't
2 believe that this Court has ever let that particular issue
3 decide whether qualified immunity would pass on to a
4 certain governmental official.

5 And again, since Harlow, the focus I would
6 submit has been upon what the public interest is in having
7 qualified immunity conferred on this particular
8 governmental official, who utilizes discretion on a daily
9 basis.

10 We do indemnify our guards, but eventually that
11 cost is going to be passed on to the State of Tennessee,
12 and eventually passed on to the taxpayers of the State of
13 Tennessee, so I would submit that the ultimate goal is to
14 serve the taxpayers of the State of Tennessee, and
15 therefore qualified immunity shouldn't turn on whether or
16 not there's indemnification of our employees.

17 QUESTION: Well, I don't know if that's the
18 ultimate goal. The statute is -- was enacted to protect
19 the constitutional rights of people from violation by
20 State officials, and in your hypothesis, you've got a
21 constitutional violation here, but it should go
22 unredressed because of the qualified immunity doctrine.

23 MR. RAY: No, Mr. Justice Stevens, that's not
24 our policy at all.

25 QUESTION: You don't need the defense unless

1 there's a constitutional violation.

2 MR. RAY: Well, if our actions were objectively
3 reasonable under the standard established by this Court,
4 then qualified immunity attaches to it.

5 QUESTION: Qualified immunity attaches even
6 though there was a constitutional violation.

7 MR. RAY: But again, as I understand it, Mr.
8 Richardson and Mr. Walker did not know or should not have
9 known about their constitutional deprivation of
10 Mr. McKnight's rights in order for them to have the
11 benefit.

12 But one thing I do want to point out, one of the
13 reasons --

14 QUESTION: I thought you said that was just down
15 the road, when we opened this discussion.

16 MR. RAY: That's correct, Justice Ginsburg.
17 That question has not been decided by the district court,
18 the Sixth Circuit, and we never got that far.

19 But in response to one of Mr. Justice Breyer's
20 questions earlier, one of the specific reasons that we can
21 lose this contract is to violate the constitutional rights
22 of the inmates that we have in our keep, and that is quite
23 evident to all our employees, and if we want to succeed
24 and retain this contract, then we have to proceed down a
25 straight and narrow path that belies the parade of

1 horribles that the respondent and amici have raised.

2 QUESTION: The contract says that in so many
3 words, don't violate the constitutional rights of any
4 prisoners, or just -- it says that?

5 MR. RAY: That's one of the provisions, Your
6 Honor.

7 QUESTION: So that you could be declared in
8 violation of your contract during its term. It's not a
9 mere problem of renewal.

10 MR. RAY: That's correct. Written notice given
11 for a number of reasons, constitutional deprivations being
12 one of them, Mr. Justice Souter.

13 QUESTION: Is that clause subject to the
14 qualified immunity defense? You may end up having a
15 defense against a tort suit but you lose the contract
16 because you've violated their constitutional rights,
17 qualified immunity or not. That's a real box you're in.

18 MR. RAY: I'm assuming -- I've been known to put
19 myself in such a box at 2:00 a.m. in the morning when I
20 come in, Mr. Justice Scalia, but --

21 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ray.
22 The case is submitted.

23 (Whereupon, at 12:20 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:

DARYLL RICHARDSON AND JOHN WALKER, Petitioners v. RONNIE LEE McKNIGHT
CASE NO. 96-318

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

BY Donna Marie Fedrico-----

(REPORTER)