SUPREME COURT OF THE UNITED STATES

No. 96–792

LYNNE KALINA, PETITIONER *v.* RODNEY FLETCHER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[December 10, 1997]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

I agree that Ms. Kalina performed essentially the same "function" in the criminal process as the police officers in *Malley* v. *Briggs,* 475 U. S. 335 (1986), and so I join the opinion of the Court. I write separately because it would be a shame if our opinions did not reflect the awareness that our "functional" approach to 42 U. S. C. §1983 immunity questions has produced some curious inversions of the common law as it existed in 1871, when §1983 was enacted. A conscientious prosecutor reading our cases should now conclude that there is absolute immunity for the decision to seek an arrest warrant after filing an information, but only qualified immunity for testimony as a witness in support of that warrant. The common-law rule was, in a sense, exactly opposite.

There was, of course, no such thing as absolute prosecutorial immunity when §1983 was enacted. (Indeed, as the Court points out*, ante,* at *5, n. 11, there generally was no such thing as the modern public prosecutor.) The common law recognized a "judicial" immunity, which protected judges, jurors and grand jurors, members of courts martial, private arbitrators, and various assessors and commissioners. That immunity was absolute, but it extended only to individuals who were charged with resolving disputes between other parties or authoritatively adjudicat-

ing private rights. When public officials made discretionary policy decisions that did not involve actual adjudication, they were protected by "quasi-judicial" immunity, which could be defeated by a showing of malice, and hence was more akin to what we now call "qualified," rather than absolute, immunity. I continue to believe that "prosecutorial functions, had they existed in their modern form in 1871, would have been considered quasi-judicial." *Burns* v. *Reed*, 500 U. S. 478, 500 (1991) (SCALIA, J., concurring in judgment in part and dissenting in part).

That conclusion accords with the common law's treatment of *private* prosecutors, who once commonly performed the "function" now delegated to public officials like petitioner. A private citizen who initiated or procured a criminal prosecution could (and can still) be sued for the tort of malicious prosecution– but only if he acted maliciously and without probable cause, and the prosecution ultimately terminated in the defendant's favor. Thus, although these private prosecutors (sometimes called "complaining witnesses"), since they were not public servants, were not entitled to quasi-judicial immunity, there was a kind of qualified immunity built into the elements of the tort.

The common law also recognized an absolute immunity for statements made in the course of a judicial proceeding and relevant to the matter being tried. That immunity protected both witnesses and attorneys, and could not be defeated even by an allegation that the statement was maliciously false. See, *e.g.,* F. Hilliard, Law of Torts 319 (1866). It was, however, an immunity only against slander and libel actions.

At common law, therefore, Kalina would have been protected by something resembling qualified immunity if she were sued for malicious prosecution. The tortious act in such a case would have been her decision to bring criminal charges against Fletcher, and liability would attach only if

Fletcher could prove that the prosecution was malicious, without probable cause, and ultimately unsuccessful. Kalina's false statements as a witness in support of the warrant application would not have been an independent actionable tort (although they might have been *evidence* of malice or initiation in the malicious prosecution suit), because of the absolute privilege protecting such testimony from suits for defamation.

The Court's long road to what is, superficially at least, the opposite result in today's opinion, began with *Imbler* v. *Pachtman,* 424 U. S. 409 (1976), which granted prosecutors absolute immunity for the "function" of initiating a criminal prosecution. Then, in *Briscoe* v. *LaHue*, 460 U. S. 325 (1983), the Court extended a similar absolute immunity to the "function" of serving as a witness. And in *Malley* v. *Briggs, supra,* it recognized the additional "functional category" of "complaining witness." Since this category was entitled to only qualified immunity, the Court overturned a directed verdict in favor of a police officer who had caused the plaintiff to be arrested by presenting a judge with a complaint and an affidavit supporting probable cause. The Court said:

> "[C]omplaining witnesses were not absolutely immune at common law. In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause. Given malice and the lack of probable cause, the complainant enjoyed no immunity." *Id.,* at 340–341.

That statement is correct, but it implies a distinction between "witnesses" (absolutely immune) and "complaining witnesses" (at best qualifiedly immune) which has little foundation in the common law of 1871. That law did not recognize two kinds of witness; it recognized two different

torts. "In this sense, then, *Malley*'s discussion of complaining witnesses is a feint. The Court was not awaking to a different type of witness . . . so much as recognizing a different cause of action– the action for malicious prosecution." Comment, Police Witness Immunity Under §1983, 56 U. Chi. L. Rev. 1433, 1454 (1989). By the time *Malley* was decided, however, the Court's methodology forced it to express its conclusion in terms of whether the particular "function" at issue would have been entitled to immunity at common law. See, *e.g., Briscoe, supra*, at 342 ("our cases clearly indicate that immunity analysis rests on functional categories"). By inventing "a new functional category: the complaining witness, who (in the Court's specially-tailored history) was liable at common law and so is liable under §1983," Comment, *supra,* at 1454, *Malley* moved the Court's immunity jurisprudence much closer to the results the common law would have achieved.

But no analytical approach based upon "functional analysis" can faithfully replicate the common law, as is demonstrated in the Court's opinion today. By describing the subset of actors in the criminal process who are subject to suit as "complaining *witnesses*," the Court implies that testifying is the critical event. But a "complaining witness" could be sued for malicious prosecution whether or not he ever provided factual testimony, so long as he had a role in initiating or procuring the prosecution; in that sense, the "witness" in "complaining witness" is misleading. As applied to the police officers in *Malley*, that confusion was more or less harmless. Here, however, *Imbler* and *Malley* collide to produce a rule that stands the common law on its head: Kalina is absolutely immune from any suit challenging her decision to prosecute or seek an arrest warrant, but can be sued if she changes "functional categories" by providing personal testimony to the Court.

Imbler's principle of absolute prosecutorial immunity,

and the "functional categories" approach to immunity questions imposed by cases like *Briscoe*, make faithful adherence to the common law embodied in §1983 very difficult. But both *Imbler* and the "functional" approach are so deeply embedded in our §1983 jurisprudence that, for reasons of *stare decisis*, I would not abandon them now. Given those concessions, *Malley*'s distortion of the term "complaining witness" may take us as close to the right answer as we are likely to get. Because Kalina's conduct clearly places her in that functional category, I agree with the Court that she is not entitled to absolute immunity under our precedents.