# SUPREME COURT OF THE UNITED STATES

No. 96–827

LEONARD ROLLON CRAWFORD-EL, PETITIONER *v.* PATRICIA BRITTON

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

[May 4, 1998]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, dissenting.

The petition on which we granted certiorari in this case presents two questions. The first asks:

> "In a case against a government official claiming she retaliated against the plaintiff for his exercise of First Amendment rights, does the qualified immunity doctrine require the plaintiff to prove the official's unconstitutional intent by 'clear and convincing' evidence?" Pet. for Cert. i.

The Court's opinion gives this question an extensive treatment, concluding that our cases applying the affirmative defense of qualified immunity provide no basis for placing "a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved." *Ante,* at 17–18.

The second question presented asks:

> "In a First Amendment retaliation case against a government official, is the official entitled to qualified immunity if she asserts a legitimate justification for her allegedly retaliatory act and that justification would

> have been a reasonable basis for the act, even if evidence– no matter how strong– shows the official's actual reason for the act was unconstitutional?" Pet. for Cert. i.

The Court does not explicitly discuss this question at all. Its failure to do so is both puzzling and unfortunate. Puzzling, because immunity is a "threshold" question that must be addressed prior to consideration of the merits of a plaintiff's claim. *Harlow* v. *Fitzgerald*, 457 U. S. 800, 818 (1982). Unfortunate, because in assuming that the answer to the question is 'no,' the Court establishes a precedent that is in considerable tension with, and significantly undermines, *Harlow*.

I would address the question directly, and conclude, along the lines suggested by Judge Silberman below, that a government official who is a defendant in a motive-based tort suit is entitled to immunity from suit so long as he can offer a legitimate reason for the action that is being challenged, and the plaintiff is unable to establish, by reliance on objective evidence, that the offered reason is actually a pretext. This is the only result that is consistent with *Harlow* and the purposes of the qualified immunity doctrine.

In *Harlow*, respondent A. Ernest Fitzgerald brought a suit claiming that White House aides Bryce Harlow and Alexander Butterfield, acting in concert with President Richard Nixon and others, had conspired to deprive him of his job, deny him reemployment, and besmirch his reputation. *Nixon* v. *Fitzgerald*, 457 U. S. 731, 738–739, n.18 (1982). Harlow and Butterfield claimed that they were immune from this suit, and we granted certiorari to determine "the immunity available to the senior aides and advisers of the President." *Harlow*, 457 U. S., at 806. We first concluded that unlike the President, senior White House aides were not necessarily entitled to absolute im-

munity. We next concluded, however, that petitioners were entitled to "application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial." *Id.*, at 813.

In applying that standard in *Harlow* we did not write on a blank slate. The notion that government officials are sometimes immune from suit has been present in our jurisprudence since at least *Osborn v. Bank of United States*, 9 Wheat. 738, 865–866 (1824). By the time we took up the question in *Harlow*, we had come to understand qualified immunity as an affirmative defense that had both an "objective" and a "subjective" aspect. See, *e.g.*, *Wood* v. *Strickland*, 420 U. S. 308, 322 (1975).

In *Harlow*, however, we noted that application of the subjective element of the test had often produced results at odds with the doctrine's purpose. First, some courts had considered an official's subjective good faith to be a question of fact "inherently requiring resolution by a jury," making it impossible to accomplish the goal that "insubstantial claims" not proceed to trial. *Harlow*, 457 U. S., at 816. Second, we noted that there were "special costs" to inquiries into a government official's subjective good faith. Such inquiries were "broad-ranging," intrusive, and personal, and were thought to be "peculiarly disruptive of effective government." *Id.*, at 817.

Recognizing these problems, we "purged" qualified immunity doctrine of its subjective component and remolded it so that it turned entirely on "objective legal reasonableness," measured by the state of the law at the time of the challenged act. *Mitchell* v. *Forsyth*, 472 U. S. 511, 517 (1985); *Harlow*, *supra*, at 819. This new rule eliminated the need for the disruptive inquiry into subjective intent, ensured that insubstantial suits would still be subject to dismissal prior to trial, and had the additional benefit of allowing officials to predict when and under what circumstances they would be required to stand trial for actions

undertaken in the course of their work. See, *e.g.*, *Davis* v. *Scherer*, 468 U. S. 183, 195 (1984) ("The qualified immunity doctrine recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise to liability for damages and only if unjustified lawsuits are quickly terminated"). Since then we have held that qualified immunity was to apply "across the board" without regard to the "precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated." *Anderson* v. *Creighton*, 483 U. S. 635, 642–643 (1987).

Applying these principles to the type of motive-based tort suit at issue here, it is obvious that some form of qualified immunity is necessary, and that whether it applies in a given case must turn entirely on objective factors. It is not enough to say that because (1) the law in this area is "clearly established," and (2) this type of claim always turns on a defendant official's subjective intent, that (3) qualified immunity is therefore never available. Such logic apparently approves the "protracted and complex," *ante*, at 3, course of litigation in this case, runs afoul of *Harlow*'s concern that insubstantial claims be prevented from going to trial, and ensures that officials will be subject to the "peculiarly disruptive" inquiry into their subjective intent that the *Harlow* rule was designed to prevent.[1] Such a rule would also allow plaintiffs to strip

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[1]The Court suggests that the *Wood* v. *Strickland* subjective inquiry that we stripped from the qualified immunity analysis in *Harlow* is somehow different from the inquiry into subjective intent involved in resolution of a motive-based tort claim. *Ante*, at 16. While the inquiries may differ somewhat in terms of what precisely is being asked, this difference is without relevance for the purposes of qualified immunity doctrine. Both inquiries allow a plaintiff to probe the official's state of mind, and therefore both types of inquiry have the potential to be "peculiarly disruptive" to effective government.

defendants of *Harlow*'s protections by a simple act of pleading– any minimally competent attorney (or *pro se* litigant) can convert any adverse decision into a motive-based tort, and thereby subject government officials to some measure of intrusion into their subjective worlds.

Such a result is quite inconsistent with the logic and underlying principles of *Harlow*.[2] In order to preserve the protections that *Harlow* conferred, it is necessary to construct a qualified immunity test in this context that is also based exclusively on objective factors, and prevents plaintiffs from engaging in "peculiarly disruptive" subjective investigations until after the immunity inquiry has been resolved in their favor. The test I propose accomplishes this goal. Under this test, when a plaintiff alleges that an official's action was taken with an unconstitutional or otherwise unlawful motive, the defendant will be entitled to immunity and immediate dismissal of the suit if he can offer a lawful reason for his action and the plaintiff cannot establish, through objective evidence, that the offered reason is actually a pretext.

The Court's interpretation of *Harlow* does not differ from mine. See *ante*, at 12 ("Under [the *Harlow*] standard, a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense"). The Court does not, however, carry the *Harlow*

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[2] This result also threatens to 'Balkanize' the rule of qualified immunity. *Anderson* v. *Creighton*, 483 U. S. 635, 646, 643 (1987) ("We have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated. An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide").

principles to their logical extension. Its failure to discuss the issue explicitly makes it difficult to understand exactly why it rejects my position, but there appear to be two possibilities.

First, the Court appears concerned that an extension of *Harlow* qualified immunity to motive-based torts will mean that some meritorious claims will go unredressed. *Ante*, at 15–16 ("Social costs that adequately justified the elimination of the subjective component of an affirmative defense do not necessarily justify serious limitations upon 'the only realistic' remedy for the violation of constitutional guarantees"). This is perhaps true, but it is not a sufficient reason to refuse to apply the doctrine. Every time a privilege is created or an immunity extended, it is understood that some meritorious claims will be dismissed that otherwise would have been heard. Courts and legislatures craft these immunities because it is thought that the societal benefit they confer outweighs whatever cost they create in terms of unremedied meritorious claims. In crafting our qualified immunity doctrine, we have always considered the public policy implications of our decisions. See, *e.g.*, *Wyatt* v. *Cole*, 504 U. S. 158, 167 (1992).

In considering those implications here, it is desirable to reflect on the subspecies of First Amendment claims which we address in this case. Respondent Britton is a D. C. corrections officer; petitioner Crawford-El is a D. C. prisoner who was transferred from Spokane, Washington, to Marianna, Florida, with intermediate stops along the way. The action of Britton's that gave rise to this lawsuit was asking Crawford-El's brother-in-law to pick up boxes of the former's belongings for delivery to him, rather than shipping them directly to him in Florida. This act, considered by itself, would seem to be about as far from a violation of the First Amendment as can be conceived. But Crawford-El has alleged that Britton's decision to deliver his belongings to a relative was motivated by a desire to

punish him for previous interviews with reporters that he had given, and lawsuits that he had filed. This claim of illicit motive, Crawford-El asserts, transforms a routine act in the course of prison administration into a constitutional tort.

The Court cites *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968) as an example of this sort of tort. *Ante*, at 9, n. 9. But *Pickering* is but a distant cousin to the present case; there the school board plainly stated that its reason for discharging the plaintiff teacher was his writing of a letter to a newspaper criticizing the board. It was not motivation that was disputed, but whether the First Amendment protected the writing of the letter. Closer in point is *Branti* v. *Finkel*, 445 U. S. 507 (1980), also cited by the Court, but there the act complained of was the dismissal of Republican assistants by the newly appointed Democratic public defender. Objective evidence– the discharging of members of one party by the newly appointed supervisor of another party, and their replacement by members of the supervisor's party– would likely have served to defeat a claim of qualified immunity had the defendant official attempted to offer a legitimate reason for firing the Republican assistants. Thus, the defendants in neither *Pickering* nor *Branti* would have been entitled to qualified immunity under the approach that I propose.

Still more distantly related to the facts of the present case are what I would call primary First Amendment cases, where the constitutional claim does not depend on motive at all. Examples of these are *Reno* v. *American Civil Liberties Union*, 521 U. S. ___, (1997) (finding portions of the Communications Decency Act unconstitutional under the First Amendment); *Barnes* v. *Glen Theatre, Inc.*, 501 U. S. 560 (1991) (concluding that Indiana statute regulating nude dancing did not violate First Amendment); *Brown* v. *Hartlage*, 456 U. S. 45 (1982) (invalidat-

ing Kentucky statute that limited the speech of candidates for office); *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976) (invalidating judge's order prohibiting reporting or commentary on murder trial); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546 (1975) (finding denial of permission to use municipal theater for showing of *Hair* to be unconstitutional prior restraint); *New York Times Co.* v. *United States*, 403 U. S. 713 (1971) (*per curiam*) (refusing to enjoin publication of contents of classified study).

The great body of our cases involving freedom of speech would, therefore, be unaffected by this approach to qualified immunity. It would apply prototypically to a case such as the present one: A public official is charged with doing a routine act in the normal course of her duties– an act which by itself has absolutely no connection with freedom of speech– but she is charged with having performed that act out of a desire to retaliate against the plaintiff because of his previous exercise of his right to speak freely. In this case, there was surely a legitimate reason for respondent's action, and there is no evidence in the record before us that shows it to be pretextual. Under the Court's view, only a factfinder's ultimate determination of the motive with which she acted will resolve this case. I think the modest extension of *Harlow* which I propose should result in a judgment of qualified immunity for the respondent.

Also relevant to a consideration of the costs my proposed rule would incur is that this suit is a request for damages brought under §1983. If the purpose of §1983 is to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails," it is hard to see how that purpose is substantially advanced if petitioner's suit is allowed to proceed. *Wyatt v. Cole*, *supra*, at 161. Petitioner has already fully exercised his "federally guaranteed rights." Providing compensation to

him, even if his claim is meritorious, will foster increased constitutional freedoms only for the hypothetical subsequent individual who, given the imposition of liability in this case, will not be deterred from exercising his First Amendment rights out of fear that respondent would retaliate by misdirecting his belongings.

The costs of the extension of *Harlow* that I propose would therefore be minor. The benefits would be significant, and we have recognized them before. As noted above, inquiries into the subjective state of mind of government officials are "peculiarly disruptive of effective government" and the threat of such inquiries will in some instances cause conscientious officials to shrink from making difficult choices.[3]

The policy arguments thus point strongly in favor of extending immunity in the manner I suggest. The Court's opinion, however, suggests a second reason why this rule

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[3]This point has perhaps been made most elegantly by Judge Learned Hand, who in an oft-cited passage, wrote:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others . . . should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

. . . . .

As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

*Gregoire* v. *Biddle*, 177 F. 2d 579, 581 (CA2 1949)(L. Hand, J.), cert. denied, 339 U. S. 949 (1950).

might be unnecessary. The Court assumes that district court judges alert to the dangers of allowing these claims to proceed can protect defendants by judicious and skillful manipulation of the Federal Rules of Civil Procedure. *Ante*, at 21–25. I have no doubt that as a general matter, district court judges are entirely capable in this regard. But whether a defendant is entitled to protection against the "peculiarly disruptive" inquiry into subjective intent should not depend on the willingness or ability of a particular district court judge to limit inquiry through creative application of the Federal Rules. The scope of protection should not vary depending on the district in which the plaintiff brings his suit. Cf. *Anderson* v. *Creighton*, 483 U. S., at 643 ("An immunity that has as many variants as there are modes of official action and types of rights would not give conscientious officials that assurance of protection that it is the object of the doctrine to provide"). Indeed, the inconsistency with which some District Courts had applied the *Wood* v. *Strickland* subjective good-faith inquiry was one of the reasons why the *Harlow* Court stripped qualified immunity of its subjective component. *Harlow*, 457 U. S., at 816 ("And an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury").

My proposed rule would supply officials with the consistency and predictability that *Harlow* and its progeny have identified as an underlying purpose of qualified immunity doctrine, without eliminating motive-based torts altogether. The Court's solution, which is dependent on the varying approaches of 700-odd district court judges, simply will not; at the end of the day, many cases will still depend on a factfinder's decision as to motivation. No future defendant in respondent's position can know with any certainty that the simple act of delivering a prisoner's belongings in one way rather than another will not result

in an extensive investigation of her state of mind at the time she did so. This result is simply not faithful to *Harlow*'s underlying concerns.