IN THE SUPREME COURT OF THE UNITED STATES

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DONALD SAUCIER, :

Petitioner :

v. : No. 99-1977

:

ELLIOT M. KATZ AND :

IN DEFENSE OF ANIMALS :

- - - - - - - - - - - - - - - - -x

Washington, D.C.

Tuesday, March 20, 2001

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:14 a.m.

APPEARANCES:

PAUL D. CLEMENT, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

JOHN K. BOYD, ESQ., San Francisco, California; on behalf of the Respondents.

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P R O C E E D I N G S

(10:14 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in number 99-1977. Saucier against Katz.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

Qualified immunity has an important role to play in Fourth Amendment unreasonable force cases just as it does in Fourth Amendment unreasonable search cases and in other constitutional contexts. The decision below effectively merged the qualified immunity and Fourth Amendment tests in the case of unreasonable force cases. The court reasoned that because both tests are framed in terms of objective reasonableness, the qualified immunity test had nothing to add to the underlying Fourth Amendment test. This Court rejected a virtually indistinguishable line of reasoning in Anderson against Creighton and with good reason.

The Fourth Amendment and qualified immunity tests are distinct and serve different purposes. The Fourth Amendment test governs primary conduct. It looks at the force used and asks whether that force was

reasonable. The qualified immunity test by contrast looks at the preexisting law and asks whether that preexisting law would have put a reasonable officer on notice that his or her conduct was unlawful. Qualified immunity thus recognizes that even competent officers will make reasonable mistakes and government officials should not be held personally liable when they make reasonable judgment calls just because their judgment turns out to be mistaken.

QUESTION: Could you tell me how the test works? I take it qualified immunity is presented initially to the trial judge as a basis for dismissing and then if he rules, is the jury also instructed about qualified immunity?

MR. CLEMENT: Well in many cases, once the case is -- the issue of qualified immunity is brought before the judge, the judge can rule on whether there's a qualified immunity protection in the case and there'll be no issue that needs to go to the jury in that case.

QUESTION: Now suppose he overrules the qualified immunity defense, does the jury then determine both qualified immunity and, in this case, whether or not the force was reasonable?

MR. CLEMENT: It would depend on the circumstances of the case. In some cases, the judge may

want to try to isolate the factual issues that are at stake in the qualified immunity context and just have the jury focusing on those factual situations.

QUESTION: In other words, a bifurcated trial.

MR. CLEMENT: Well that may actually end up being the only issue that jury really needs to focus on. If I could give you an example, in a recent Tenth Circuit case called Cruz against City of Laramie, the Tenth Circuit decided that the use of a hog-tie restraint was unreasonable when used with an individual who exhibited signs of diminished capacity. In that same opinion, they reserved the question about whether that restraint was unreasonable when used on an individual who did not exhibit signs of diminished capacity.

QUESTION: I mean the reason I'm asking is that, if the jury hears both questions, I want to know what the instructions sound like, and whether or not the jury can make this distinction.

MR. CLEMENT: In many cases, I think the jury will not really, if there's no liability -- I'm sorry, if there's no issue about injunctive relief, it may just be a situation where the court can simply decide what the clearly-established law is and instruct the jury on that clearly-established law and then the jury can make its determination.

To pick up the example from the Tenth Circuit case, if in a subsequent decision, the Tenth Circuit extended its rule and applied the rule to all individuals, saying the hog-tie restraint is never reasonable, I think because the court had previously expressly reserved the question of whether the hog-tie restraint was reasonable when applied to an individual who did not exhibit signs of diminished capacity. In that case, the issue for the jury would be whether or not the individual who was arrested exhibited signs of diminished capacity and that would really be the only issue the jury needed to decide because if the individual had exhibited signs of diminished capacity, under the court's prior decision in Cruz, that -- that conduct would be not only unlawful but clearly established.

On the other hand, if the jury decided that the individual had not exhibited signs of diminished capacity, then in that instance, although the conduct was unlawful, by virtue of this hypothetical second decision, the conduct would not be clearly established and there'd be no liability in that situation.

QUESTION: So you're saying the only situation in which the two increase in effect will be exactly the same, is the situation in which the general standard has, by course of judicial decision, been reduced down to a

kind of pinpoint specific rule for certain cases, e.g., hog-tie cases. And in the case in which immunity is claimed, the facts in that case are precisely duplicative of the facts, which have been found to result in this pinpoint rule. That's the only I case, I take it on your view, in which the two increase will, in effect, reach precisely the same result necessarily.

MR. CLEMENT: I disagree. I think that in Anderson against Creighton itself, this Court noted that there's not a requirement that the previous case law be on all four --

QUESTION: Oh, I'm not saying that there is a requirement, but I'm saying that, if in fact the previous case law has got to the pinpoint stage and the facts claimed by way of defense precisely fall within that pinpoint, then the two increase will not be different, but that's the only case I take in which that will be true on your view.

MR. CLEMENT: I'm not sure if that's the only case where that's going to be true. I think there other cases where the preexisting law, although not showing the way with pinpoint accuracy, it still provides the officers with sufficiently clear notice that there's no real rule for qualified immunity in those particular cases.

QUESTION: Mr. Clement, it might help if you

gave us, what would be the -- suppose the judge thinks, I don't want to decide the qualified immunity myself because I think there's some fact questions involved about what happened here. So let's take this very case and the judge wants to charge the jury so they'll understand the difference between excessive force that violates the Fourth Amendment and qualified immunity. How would the judge charge in this very case?

MR. CLEMENT: I think the judge in this case would charge by using the language from this Court's previous qualified immunity opinions, language from cases like Malley and Hunter against Bryant and would charge the jury with finding -- in order to find liability in this case, the jury would have to find that the individual officer exhibited -- either was plainly incompetent or exercised judgment that was outside the range of professional judgment. I'm not sure it would really be necessary in a case where the only issue is liability to really direct the court's attention a great deal to the liability standard because that issue's going to effectively drop out of the case.

To be sure, the jury may need to be instructed on what the relevant law of excessive force is, but once that instruction is put in place as sort a background instruction then the real question that the jury needs to

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focus on is the question of whether or not the officer's conduct was so unreasonable that it put it outside the range of professional --

QUESTION: But the whole thing is going to be submitted to the jury at one time I take it in a series of instruction. Now you say, ordinarily the -- something will drop out of the liability phase, but I didn't quite follow that.

MR. CLEMENT: All I meant by that is that since there will be no liability imposed in the ordinary case without a finding that the officer's not entitled to qualified immunity, it'll be the qualified immunity question that will really be the ultimate focus of the jury's attention because that'll determine whether or not they find sufficient cause to award damages.

QUESTION: But if -- then the jury, if a jury decides that there is not qualified immunity then they have to go further, do they not?

MR. CLEMENT: I don't believe so. No, I'm sorry you're right. If they do find that there's not qualified immunity because the conduct was clearly established. I don't know that they really need to go further because that perforce will already incorporate the underlying Fourth Amendment test.

QUESTION: But that is what Justice Ginsburg was

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asking and what I was asking. I'm not sure how the jury distinguishes between these two tests and you seem to be telling us they don't have to and that seems to be inconsistent with your position that there are two tests.

MR. CLEMENT: No, all I'm saying is that in the ordinary case --

QUESTION: That's the trouble I'm having and I think was at the root of Justice Ginsburg's question as well.

MR. CLEMENT: I'm sorry. I think -- perhaps my focusing on the cases that go to the jury, we're obscuring the fact that the real virtue of qualified immunity is in many of these cases, even under the plaintiff's versions of events, the conduct will not be so clearly unconstitutional by virtue of higher precedent that the court can just end there.

And after all, as this Court emphasized in Harlow against Fitzgerald and subsequent cases, the qualified immunity is not just an immunity from liability, but it protects the officers from the chilling effect of the inconvenience of having to stand trial in those situations where prior decisions have not clearly marked the individual's conduct as being unlawful.

QUESTION: Mr. Clement, in those situations where there are factual controversies, both questions will

have to be submitted to the jury, won't they? I mean let's say in the present case, if there's a dispute as to whether more force was used than was necessary, the jury would have to determine whether more force was used than was necessary. And then the jury would also be asked, if that is the case, was that use of excessive force so obvious? Would it have been so obvious to a reasonable officer that this officer does not enjoy the qualified immunity that our cases provide? Wouldn't both questions have to go the jury?

MR. CLEMENT: I think both questions certainly could go to the jury. It just seems to me that the second question actually entails the answer to the first. So if the jury's instructed and finds that the officer's conduct was so excessive as to put it outside the range of the conduct of a reasonable officer under the circumstances it would necessarily entail a finding in liability.

And because by hypothesis I'm talking about a case where all the individual plaintiff seeks is monetary damages, the court may well have a forum that asks the court -- the jury to find the liability -- I'm sorry, the constitutional issue.

QUESTION: I see what you mean. You really don't have to determine the question of whether it violated the Fourth Amendment so long as you determine

that, even it did, this didn't go beyond what a reasonable officer might have thought was okay.

MR. CLEMENT: That's right. Nothing will turn on the underlying constitutional issue because it's --

QUESTION: Justice Scalia may see what you mean, but I'm not sure I do. Tell me how the judge charges the jury with respect -- does he tell the jury, first go to qualified immunity or first go to constitutional violation?

MR. CLEMENT: I guess what I'm envisioning is that the jury would first be instructed on what the law is of excessive force based largely on this Court's decision in Graham against Connor. Then at the end of the instructions, the Court would focus in on what it is the jury needs to find in order to find liability and impose liability on the officer.

QUESTION: Can you give my just a quick sample instruction rather than this kind of theoretical description?

MR. CLEMENT: Sure. I think the instruction, I mean the instruction that the Government typically uses in these cases or typically offers in these cases, is based on this Court's decision in Malley and Hunter against Bryant and it asks the jury whether or not the officer's conduct was such that it was plainly incompetent under the

circumstances and the use of force was outside the range of professional and competent judgment. And then the jury -- that's the question that jury ultimately focuses on.

QUESTION: And that's the Fourth Amendment question?

MR. CLEMENT: No, that's the qualified immunity question because that's what makes the difference between whether the jury in a specific case imposes damages or doesn't impose damages.

QUESTION: Tell me then, what is the difference between the Fourth Amendment question and the qualified immunity question?

MR. CLEMENT: The difference is -- well there's a couple of ways of expressing it, one way to express it is that the Fourth Amendment test looks only at the conduct and asks whether the force used was unreasonable. The qualified immunity test takes a broader look at what the preexisting law was and asks whether the officer was on notice that his or conduct violated clearly-established law.

Another way of looking at is that the question in the first case is simply, looking at what the officer did, was what the officer did reasonable?

QUESTION: Let me ask, in the context of this very case, the officer sought summary judgment on the

qualified immunity issue. Right?

MR. CLEMENT: That's correct.

QUESTION: Before it had ever gone to trial, to a jury?

MR. CLEMENT: That's correct.

QUESTION: And the Court denied it.

MR. CLEMENT: That's also correct.

QUESTION: So in this case, then did that question go to the jury, the qualified immunity issue?

MR. CLEMENT: No, I mean -- and I think that raises two important points. First of all, this issue of what issue goes to the jury and how does the underlying Fourth Amendment issue interact with the qualified immunity instruction is not unique to the context of excessive force claims. The same issues are raised by the probable cause and exigent circumstances issues --

QUESTION: But, just tell me, what went to the jury?

MR. CLEMENT: Nothing.

QUESTION: In this case?

MR. CLEMENT: Nothing went to the jury, which is the second point, which is this would be a particularly poor vehicle --

QUESTION: All right. Your point is -- excuse me, your point I take it is that in your view the trial

judge should have granted summary judgment to the officer, is that it?

MR. CLEMENT: That's exactly right.

QUESTION: And so we don't get beyond all these other things. In your view the error was in denying summary judgment on qualified immunity?

MR. CLEMENT: That's exactly right.

QUESTION: Now was there a factual component to that issue that makes it impossible for the trial judge to determine or could there be?

MR. CLEMENT: Certainly not in our view. I mean, our view you can take every fact in this case in the light most favorable to the plaintiff and the proper analysis should still be that the Petitioner was entitled to qualified immunity. And the Court of Appeals below simply refused to undertake that analysis because they thought the two standards were effectively merged.

QUESTION: It's that last bit. Sorry, that last bit that I'm confused on, why isn't it the same standard? I was just listening to the answer and I agree that in Anderson v. Creighton it isn't, but in Anderson v. Creighton the underlying constitutional standard is what society thinks is reasonable, basically. Here the underlying constitutional standard is what an officer thinks is reasonable and since it's what a reasonable

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officer thinks is excessive, they become the same standard. That's just a coincidence, but it happens to be so.

That is, I don't see how -- think of an example. Can you think of a single example in which you're prepared to say it is excessive force. It is excessive force, i.e., an officer, a reasonable officer would have known it is excessive because otherwise it isn't excessive force. And you're prepared to say it is excessive force, but you'd also say he has qualified immunity, i.e., a reasonable officer couldn't have been expected to know it was excessive. That's logically impossible.

MR. CLEMENT: With all respect, I --

QUESTION: Now so give me an example as a test, as a test.

MR. CLEMENT: First of all, an example would be in the Tenth Circuit situation where the court finds in the same case that the hog-tie restraint when applied to someone who's exhibited signs of diminished capacity is unreasonable.

QUESTION: It is unreasonable, i.e., an officer, an officer they are saying, a police officer, should have know that that force was excessive.

MR. CLEMENT: No, the should have known aspect of the test is precisely what qualified immunity adds.

QUESTION: Oh, I didn't understand the substantive test. I thought the substantive test for excessive was it is excessive only if a reasonable officer would have known it was too much force. I thought that was the substantive test. So what is the substantive test, if that isn't it?

MR. CLEMENT: The substantive test is whether or not the use of force under the circumstances was unreasonable. The should have known aspect --

QUESTION: And if a reasonable officer, if a reasonable officer, looking at the situation would have thought it was not unreasonable, then is it excessive?

MR. CLEMENT: The reasonableness test is taken from the perspective of the reasonable officer and it grants the officer deference and allows for reasonable mistakes of fact. What it doesn't allow for is reasonable mistakes of law. If the officer's in a position where he's confronted with a situation and he makes a factual mistake. He thinks the suspect is resisting arrest, but he's really not. The Graham against Connor standard takes the perspective of the reasonable officer and grants deference to the officer.

But in a situation where there's no question. The person wasn't resisting and the court announces a rule that says that, absent that kind of resistance, the use of

force in this case is unreasonable. The officer may still be entitled to qualified immunity, if the prior law did not put the individual officer on notice that that use of force under the circumstances, was unreasonable.

QUESTION: That simply means I think that, if you have a very general -- if your Fourth Amendment standard has never been rendered anything but general in formulation, then there is a greater possibility, there is a possibility for disagreement about the application of that standard to specific fact circumstances. And so isn't the relationship between the two inquiries this, if the first standard, the Fourth Amendment standard has never been stated by the courts, except in general terms, then probably there will be room for some reasonable disagreement about its application.

You're saying in this case the Graham and Connor standard is at a pretty high level of generality and therefore you can charge a jury on the Graham and Connor standard and they'll decide whether in their judgment the officer's conduct was or was not reasonable. But they will also have a second question and that is to say, was the Graham and Connor standard so clear in its application that a reasonable officer might have come out differently from the way you did. Is that the relationship between the two?

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MR. CLEMENT: That is the relationship, but I would hesitate to add that it's not limited to the jury situation and I think that same difference allows the Court --

QUESTION: I'm sure, I'm sure. Yes, yes.

MR. CLEMENT: And we submit this is an appropriate case to resolve even before the jury that the facts and circumstances of this case, even if they constitute a Fourth Amendment violation, which I think is a reasonable question under the facts of this case, they nonetheless were not so clearly established that the officer was on notice and qualified immunity is appropriate.

QUESTION: You'd have to say that you think there's a reasonable question whether they constitute a Fourth Amendment violation in this case. If there weren't a reasonable question whether they constituted a Fourth Amendment violation, you wouldn't have any immunity claim, would you?

MR. CLEMENT: I think that's right. I mean there may be situations where the claim is fairly well-decided, but there's some reason why a reasonable officer would be entitled to rely on the prior law. I mean, the example of a case where the court previously expressly reserves the question, even if in a subsequent case, the

Government doesn't have a great argument why the court shouldn't extend the rule, I think it would still be appropriate to give the officer qualified immunity under that --

QUESTION: May I ask you a yes or no question, to make sure I understand your response to the Chief Justice earlier. Assume there's a question of fact that made it improper to resolve -- for the judge to resolve the qualified immunity issue. He thought he would have to submit that to the jury. When the case is tried at the jury, would the judge instruct on both the liability issue and the qualified immunity issue or only on one, in your view?

MR. CLEMENT: It would depend on the circumstances.

QUESTION: In this case.

MR. CLEMENT: I wish I could give you a clean answer.

QUESTION: This very case.

MR. CLEMENT: In this very case, it's a little hard to apply those principles. If I could back away to the -- in the Tenth Circuit example, if the only issue is whether the individual has exhibited diminished city --

QUESTION: I don't want to talk about the Tenth Circuit case. I'm interested in this case.

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MR. CLEMENT: Well in this case, it's a little hard to understand what the Ninth Circuit's reasoning was why there was a violation here.

QUESTION: My question is, assuming there's a question of fact that would decide the qualified immunity issue in this very case, which officer pushed him in the truck or something like and you have to have jury trial on the qualified immunity issue. My question is, would the jury be instructed on both qualified immunity and liability or on just one of the two?

MR. CLEMENT: I think they would be instructed on both, but I think they would ultimately only be asked to decide the ultimate qualified immunity test because there's really --

QUESTION: They're given an instruction on an issue they're not asked to decide?

MR. CLEMENT: I think that's right. I think that the instruction on the given law of the Fourth Amendment would be necessary background information for the jury to make its decision, but I'm not sure there would be any real purpose served by having the jury say, yes there was a Fourth Amendment violation. Certainly a judge could ask that question, but where the rubber meets the road in these cases is whether or not there's qualified immunity because that will determine whether the

plaintiff has --

QUESTION: Mr. Clement, your -- you raise -- the Government raises two questions in its petition for certiorari and the second one is did the Court of Appeals err in concluding on the basis facts noted that the defendant's use of force in arresting this particular plaintiff, are you going to get to that?

MR. CLEMENT: I'll get to that right now. I think one way to focus on this case is, if the Court of Appeals had done the proper analysis, how would they have defined the Fourth Amendment violation in this case? It seems to us that one of the things they would have focused on is the failure of these officers to announce their intention to take Mr. Katz out before they actually grabbed him and took him out of the area. Now that kind of speak first or warning requirement, at least in a nondeadly-force context, seems to us to be a new rule or something that's certainly not clearly established on which a reasonable officer would be on notice of.

If the Court of Appeals had approached it that way, focused in on that as being the key factor that made the actions of the officers here unreasonable then we could very legitimately ask the question, was that clearly established? And our position would be of course not. But other people could take a different view.

QUESTION: Would you mind walking us through how you think this Court should resolve this case? I just still don't understand. We have these issues here, would you walk us through what you think we should do in light of this record and this case?

MR. CLEMENT: Absolutely. I think the first thing to recognize is the Ninth Circuit took an extreme view, that qualified immunity is never appropriate in excessive force cases. The first and most important thing this Court can do is to disabuse the Ninth Circuit of that notion. Then applying the principles to this case, it could usefully decide whether or not there's qualified immunity in this case.

In doing so, it could very well follow the reasoning that I just outlined which is to say what would make this case an example of excessive force, if anything, must be this failure to warn first. Now, the Ninth Circuit -- this Court can either decide that issue if it's liked or just kind of, for purposes of the annunciation of the rule, assume it, but then it could say that principle is not clearly established. If possible, I'd to reserve the remaining to time for follow-up.

QUESTION: I'd like to go back to Justice O'Connor's question because I'm trying slowly to write down what you think the steps are and what I have written

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down is I have three basic steps for a judge in an appellate court hearing this, say as it was or before the trial or a trial judge. Step one is, judge take the facts as the plaintiff asserts them insofar as they survive summary judgment. Step two is, ask the following question, should -- in light of preexisting rule, should a reasonable officer have believed there was too much force, in light of preexisting law?

MR. CLEMENT: I would stop you there. No, I would stop you there. The first question is simply to ask whether on those facts the use of force from the perspective of a reasonable officer was reasonable. Now if the court thinks not --

QUESTION: Now is there a difference between what you just said and what I just said? Now listen to what I'm saying because I want to understand the difference. I'm saying that the qualified immunity question in this context is, in light of present law, should a reasonable officer have thought there was too much force? Now is that right?

MR. CLEMENT: That's a fine statement of the qualified immunity standard.

QUESTION: Good.

MR. CLEMENT: What I was focusing on though is that I think if you really want to address the order that

the judge should address the issue. First they should address the issue of liability because that's what this Court has said on a number of occasions, including Siegert against Gilley and --

QUESTION: No, but I'm trying to write down. I only have one more step. So we have the right, we know what to do with the facts, we know what the qualified immunity question is, at least my statement of that was all right. And then I go on to say, by the way, if the answer to that question is yes, a reasonable officer should have believed there was too much force, then the third step is direct a verdict for the plaintiff unless the underlying facts are in dispute. And if the answer to that question is no, then direct the verdict for the defendant.

MR. CLEMENT: Unless the underlying facts are in dispute.

QUESTION: No, no. He wins even if the facts are in dispute if the answer's no, because we've assumed the plaintiff's facts.

MR. CLEMENT: Yeah, that's right. I'm sorry. Now one thing I want to add though --

QUESTION: So now I've proposed the right three steps. Now that's -- I'm asking -- I'm just trying to walk it through and maybe you don't want to answer because

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I understand it's very complicated and you may have had a different way of looking at it.

MR. CLEMENT: Yeah, and all I want to emphasize is I think that misses the Fourth Amendment step that this Court has said has to proceed the qualified immunity test and it's helpful to establish what the qualified immunity violation is because that's helpful in identifying whether or not the officers had fair notice that that Fourth Amendment principle actually applied.

QUESTION: Very well, Mr. Clement. Mr. Boyd we'll hear from you.

ORAL ARGUMENT OF JOHN K. BOYD

ON BEHALF OF THE RESPONDENTS

MR. BOYD: Mr. Chief Justice, may it please the Court:

I would like to walk this Court through the process and the steps so that there's an understanding of how Anderson and Graham are being used effectively now in the trial courts in order to weed out insubstantial cases and to have the jurors decide these issues in a way that both the individual's right to a remedy and provides the insulation that the officers need.

Now the starting point is with a motion to dismiss or a motion for summary judgment and at that point and I know this both from representing police officers and

from representing plaintiffs at trial in the federal trial courts. The first step is, you move to dismiss on the defense side and you take out Anderson and you say could the officer have -- whether the officer could have reasonably believed that they could use the amount of force that they did. Anderson sets that straight out.

And then the next thing you do is you take Graham to inform the decision, which is why the opinion is such a brilliant one, because it provides the specifics. It provides a three-step test. How severe was the crime? Was the person armed and dangerous, dangerous to the police and to the other members of the public and was there resistance? And so if you take this case for instance, they claim that Dr. Katz had resisted arrest. Now if Dr. Katz resisted arrest in this case, Judge Jensen, a seasoned trial lawyer himself, would have thrown this case out in an instant using Anderson and using Graham. He would have said the reasonable officer could believe that because there was resistance, you can use additional force.

QUESTION: Well, wait, additional -- I mean you're describing Graham as though it's just a matrix. You just put it down and it gives you the answer. It just mentions those three things as factors. Simply because there's resistance you can't whack the guy over the head

with a sledgehammer. There's still a question of how much force you can apply and there will always be an issue no matter how much he was resisting, no matter how violent the crime was whether you applied too much force. So it just doesn't give you a straight out answer like that.

MR. BOYD: What it does do, Justice Scalia, is it gives a buffer for the trial court judge to get rid of an insubstantial case. If someone's engaged in a severe --

QUESTION: Gives you factors, that's all it gives you. It doesn't tell you what cases can be gotten rid of. It tells you what factors are relevant, which is very useful, but I don't see how you can say it gives you an answer automatically.

MR. BOYD: I can tell you that in practice it gives the trial court judges the language that they need to be able to eliminate these insubstantial claims, the claims that are made by someone who's engaged in a serious crime like a rape or an armed robbery who then comes around and says, oh, you shouldn't have shot me and then those cases can easily be moved by the client --

QUESTION: Well, what should we do here? You were going to walk us through.

MR. BOYD: Right.

QUESTION: There's a videotape here of what

happened, is there not?

MR. BOYD: Right, so let's --

QUESTION: You want us to look at the videotape?

MR. BOYD: Yes, Your Honor.

QUESTION: What if we look at the videotape and think that is not excessive force?

MR. BOYD: I would be shocked.

QUESTION: Would you? That's what I thought.

QUESTION: That's what I thought too.

QUESTION: I looked at it as well and I think we're only talking about the person on the left, Mr. Saucier, who didn't even push him. It was the one on the right, I think Officer Parker, who gave him a little push. So, is that right? Have I looked at the right person? I mean, we all I guess have the same question.

MR. BOYD: The testimony that was given by both Parker and Saucier was they both put Dr. Katz into the back of that van and it's the -- the part of it is that if indeed that Dr. Katz was resisting then, yes, that was a fair amount of force to use, but that's the question that has to go back to the trial court here too, is that Dr. Katz said that he was not resisting and when you do look at that video you can see that he was not.

QUESTION: Yes I agree, but I didn't see any force at all used by Mr. Saucier. Saucier -- it was the

one on the right who seemed to give him a little push, but the one on the left didn't seem to do anything. He just stood here.

MR. BOYD: Your Honor, according to the testimony of Mr. Saucier there was resistance and so they had to put their heads up to figure out what to do.

QUESTION: Yeah, he probably was talking about Parker giving him a little push, but is there anything else you want to say? I mean, if I were to look at the record and just the picture of the police officer on the left, did I not see something? Maybe I missed something or what is it I missed that he did?

MR. BOYD: I think that what I would ask you to look for is what was seen by Judge Jensen and also Judge Thompson writing for a unanimous court, affirming --

QUESTION: Did they look at a different video?

MR. BOYD: No, Your Honor. They looked --

QUESTION: No, it really didn't show that the person on the left did anything. I just looked at it repeatedly and I came away thinking, why are we here?

MR. BOYD: Your Honor, because the reason we're here is that you can tell that there is a gratuitous use of force by both of them. There was force that was --

QUESTION: But I saw no force by the man on the left insofar as the van was concerned.

MR. BOYD: But they both engaged in the conduct together and that is their own testimony in their depositions.

QUESTION: Well, I did not look at the videotape because I thought we were talking about the standards we have to use and the videotape was just irrelevant.

QUESTION: Me too. I thought that's why we were here. I didn't know we were going to resolve it, the facts here.

MR. BOYD: Yeah, and I -- I actually think the most important thing -- I don't think that the facts can be resolved here. I think that the facts need to be resolved at trial and the most important thing here is to adopt a standard. And as you asked about the -- and the Chief Justice as well, asked about what is the standard and what are the instructions that are supposed to be given?

The problem here is that what they are asking for by way of the standard is that not only is the jury to make the first decision based upon whether or not the Fourth Amendment was violated and qualified immunity to be built into that, but thereafter then they're asking for a second application on the jury instructions.

QUESTION: Well, just at the pretrial stage, it does seem to me that there's a role for the court that's

special in the context of qualified immunity. The court knows what the law is and has some handle on what a reasonable police officer should know. That seems to be more of a legal question than a factual question. I suppose we could play with it and you could it back to me. And so it does seem to me at that point at least, the tests have a different thrust and a different importance and a different significance.

MR. BOYD: At the summary judgment level, yes, there are two inquiries that are being made both on the qualified immunity and on the Fourth Amendment and they are intertwined and they're being made by the trial judge at that point. The important thing is that the qualified immunity is not providing for a higher degree of protection in that, whatever you adopt as your standard at the summary judgment level is then going to carryover to the directed verdict level.

QUESTION: What do you do about the hog-tie example that the Government came forward with? You have a Court of Appeals decision that says you cannot hog-tie a person with diminished capacity. If the person didn't have diminished capacity it's another question, we don't have to get into that. And then this is a police officer who does use the hog tie but for a person who has no diminished capacity. Now I would read it to be, you know,

an open question whether that is excessive force or not.

And suppose that it is finally decided that that is excessive force. Is that police officer, despite the fact that the last time around the Court of Appeals thought it was close enough, it was unwilling to speak to the question, is that police officer going to be held liable?

MR. BOYD: No, he is not, Your Honor. And the reason for that is that there will be qualified immunity because there's no established precedent.

QUESTION: Well, I don't think there's any dispute here then. I don't know why -- you're proposing the same test that the Government is.

MR. BOYD: Well, except that where we depart is, and when you look at pages 5 and 15 of their reply brief, you see that they're asking for an additional margin of protection and that's why -- what's surprising is that when the Government --

QUESTION: Would you -- what's the additional margin?

MR. BOYD: The additional margin is that typically as in the McNair case what they attempt to do is that after the jury has returned a verdict, and I've seen this happen in the Northern District as well in a case that we won just a year ago, after the verdict comes back

then the --

QUESTION: What does the verdict say? Does the verdict pass on qualified immunity?

MR. BOYD: The verdict is in favor of the plaintiffs after the instructions have been given.

QUESTION: Including qualified immunity?

MR. BOYD: Yes -- no during --

QUESTION: So the jury has made a qualified immunity finding.

MR. BOYD: No, the jury typically under Hunter in this Court, it's been directed that the court makes the qualified immunity.

QUESTION: Okay, so the jury has simply determined whether there is or is not, yes or no, a Fourth Amendment violation?

MR. BOYD: Correct, Your Honor.

QUESTION: Comes back and says, yes there is.

MR. BOYD: Correct.

QUESTION: Now, what happens next?

MR. BOYD: The Government lawyer jumps up and says, thank you, ladies and gentlemen for coming in, but now, Your Honor, I want you to second guess, I want you to reassess this case. This is exactly what happens. It's exactly what happened in McNair without even moving under Rule 50 and that's the problematic thing that this Court

--

QUESTION: I thought that what he was asking the judge to do is to determine, based on prior precedent, whether the jury's verdict in this case was sufficiently obvious that the officer should have known that the jury would come to the conclusion it came to. And if the answer is, yes, it was sufficiently obviously, this is right within the zone of unreasonableness, if you will, that prior cases have established then there's no qualified immunity.

QUESTION: But -- excuse me, I didn't think this went to a jury.

QUESTION: No, he's giving us an example of the jury case.

QUESTION: Oh, I thought we were talking about this case.

MR. BOYD: No, Your Honor. This has not gone to the jury yet. And then the key question here is, when it goes back to Judge Jensen and he has to decide and then it goes to the jury on the issues of fact that are present. There are issues of fact. That's what the trial court judge said and the appellate court. And when it goes back is Judge Jensen then going to second guess the jury? If they were to return a verdict in this case --

QUESTION: And I am suggesting to you that what

I think the defense is asking for is not second guessing on whether the jury was right or wrong about whether in its judgment there was a Fourth Amendment violation, but whether the officers should have anticipated, on the basis of prior precedent, that the jury would come out the way it did and if the officer should reasonably have anticipated that, then there's no qualified immunity. If the officer need not reasonably have anticipated that, then there is. Isn't that what the defense is asking for?

MR. BOYD: It's unclear what they're asking for, Your Honor, and what they've said before is that it should be the court that makes the decision. Now, today they're talking about jury instructions. And if what they're asking for is that the jurors are going to be given some additional instructions on qualified immunity then the problem is, and this goes back to Justice Kennedy's early questions, it's totally unworkable at that point.

QUESTION: All right. Can we just forget for a minute, ignore the question whether the jury's going to find it or the court's going to find it and just get down to what the standard is, whoever is going to find it must follow. And forgetting the court/jury dichotomy, what is the, in your judgment, the Government asking for that it's not entitled?

MR. BOYD: It's asking for -- that -- it really

is a procedural secondary review of the decision to be made by the jury or they're asking for a second set of jury instructions.

QUESTION: See, I don't understand that at all. I thought it was here on summary judgment and they take the view, summary judgment should have been given for the officer. I thought that's where we were. I don't see why the jury gets into this at all. If you agree with them, then summary judgment was wrongfully denied to the police officer, is their view, I think.

MR. BOYD: Your Honor, I think this may answer Justice Souter's question as well, but what we heard from my brother was that the instruction on the issue of Graham is not even necessary for them to decide. That was a response to one of the questions. They may not even reach that because qualified immunity now is going to provide for the higher standard. That's what they're looking for and I think that is contrary to Graham. It would supplant Graham, it's unnecessary, and it would make it unworkable in that he jury instructions that would be given would be -- the way that this works in practice is that the instructions that they've asked for, and I've seen them, they ask, after the jury has decided that the officer acted in objectively unreasonable manner then they ask whether the officer could have reasonably believed that he

could act unreasonably and they expect the jurors to do this.

QUESTION: Whether he could reasonably believe that he could act in a fashion, which has later been found to be unreasonable. I mean, you speak as though the line between reasonable and unreasonable is so clear that nobody runs the risk of making a foot fault. I mean, indeed, sometimes they go over the line unintentionally and to a slight enough degree that the doctrine of qualified immunity ought to afford protection.

MR. BOYD: And do you know when they go over the line, and I know this from representing them, the instructions that you use in closing are the ones that are based on Graham saying a mistake's not enough, no 20/20 hindsight, you don't have to use the least amount of force necessary, that this is a severe crime, the guy was armed and dangerous. You give the officer a break and you're out of there.

QUESTION: Well, there have been a lot of questions from the bench about jury instructions. Certainly I asked, but this case itself did not go to the jury. We're talking about the Ninth Circuit's decision that says you cannot grant summary judgment to the officer on the record as we saw it and I take it you defend that decision.

MR. BOYD: Yes.

QUESTION:: Therefore, if you're -- if we're simply talking about this particular decision, we don't get to any jury instructions at all.

MR. BOYD: No, the only -- the concern though, is that whatever you establish as the summary judgment standard gets carried over to the directed verdict and that's why the decisions that have been made by the Sixth, Seventh, Ninth and D.C. Circuits are so solid is because they take Anderson and Graham and apply them together and that the big mess arises when you try to then put an additional boost on qualified immunity.

QUESTION: Okay, but on this particular record, the Vice President is speaking, this guy gets up to the front, raises a banner and he's taken out and put in a van. What's unreasonable about that?

MR. BOYD: The part that's unreasonable is the way that he was put into that van if he was not resisting arrest. Certainly there's a question of fact.

QUESTION: He was simply pushed? That makes it unreasonable?

MR. BOYD: The way that he was pushed by those officers, I think if you were to show it to the people in this room --

QUESTION: Excuse me, one officer.

QUESTION: Yeah.

QUESTION: Yeah.

MR. BOYD: Well, Your Honor, the testimony of both officers is that they both engaged in that conduct together.

QUESTION: Well, I thought you told us we could look at the videotape, that that was correct. That that was an actual depiction of what happened.

MR. BOYD: Well, this is why you have a disputed issue of fact. The video shows that Dr. Katz was not resisting and yet you wouldn't assume that as a fact. That's a fact for the jury to decide. They will decide whether --

QUESTION: Why don't we assume that, as a fact.

MR. BOYD: Because that would be for the jury. There are things -- for instance, Saucier says that --

QUESTION: But in deciding summary judgment on the qualified immunity issue I would assume we would assume he wasn't resisting and then go ahead and resolve the issue.

MR. BOYD: Well, both Judge Jensen, who made his career as a prosecutor and Judge Thompson, who's also a conservative, seasoned judge, felt that there is a question of fact that needed to go to the jury.

QUESTION: Does that mean that we couldn't find

differently?

MR. BOYD: Of course, Your Honor, you are the Supreme Court.

QUESTION: And also I assume they are very good judges. Oh, there a lot of good judges can disagree about things. I go back to the standard, if it's all right, for one minute. I might have thought that the Ninth Circuit used the right standard even though maybe it didn't apply it correctly, but for the one example that's been raised, which is the hog-tie case.

And in thinking about that, I thought, well, maybe that's an instance where suddenly the underlying substantive rule, which I previously thought turns 100 percent on whether the policemen in the field would reasonably have thought this was too much force or not is suddenly changed. That is, if you're going to have a set of practices that define the reasonableness of it, i.e., hog tying, diminished capacity, is by law excessive force, then we do have Anderson/Creighton, then we do have the Fourth Amendment search and seizure and then the standards do diverge. Now without the hog tie, if we just have first standard, they don't diverge. Now is that right?

MR. BOYD: I think that's very close, but in practice the point that I really want to have understood by this Court that the Ninth Circuit standard is that

qualified immunity is alive and well in the Ninth Circuit.

QUESTION: But the Ninth Circuit said that Anderson doesn't apply with respect to excessive force and I would like to know why that is correct? Just because you have a reasonable test for excessive force, you also have a reasonableness test for probable cause. Would a reasonable officer have believed that a crime was in progress, for example. They're both reasonableness tests and in Anderson we say nonetheless you have an antecedent question of whether there's qualified immunity even though -- even though it may be determined by the jury that this was unreasonable, nonetheless an officer would still be protected if the law was not that clear about what was reasonable and he can be allowed to go a little bit over the line. Why is excessive force any different from probable cause in this regard?

And that's the point of the Ninth Circuit: Anderson doesn't apply.

MR. BOYD: But Anderson does apply except it applies at the same level as the Fourth Amendment. And the difference, Your Honor, is that with an excessive force case like this, this is where you're right at the juncture where physical force is being used by federal officials against individuals. What you have here are federal lawyers asking federal judges to make federal

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officials immune from the Bill of Rights.

QUESTION: Mr. Boyd, I think you answered Justice Scalia's question a second ago and I wanted to come back to it. You said something a minute ago that suggested the following to me. You were saying, I think, that the way the unreasonable or reasonable excessive force test has been articulated in Graham is that it gives the officer the benefit of the doubt, you know, none of the 20/20 hindsight and so on, the guy in the field and all of that.

And I think what you're arguing is that qualified immunity gives the officer the benefit of the doubt. It says, if it wasn't clear enough, he gets the benefit of the doubt. And I think what you're saying is, in this particular case, in excessive force cases, the benefit of the doubt is already part of the substantive test. So it makes no sense to say, after getting the benefit of the doubt on the substantive standard, you then get the benefit of the doubt again. Is that your position?

MR. BOYD: Exactly.

QUESTION: Okay.

QUESTION: If that's right then you say Anderson -- Anderson doesn't -- it's not so that Anderson doesn't apply. Anderson applies double.

MR. BOYD: Exactly.

QUESTION: First thing you ask is the Anderson test and if the answer to that question is the plaintiff flunks, he's not only flunked the qualified immunity test, he's also flunked the substantive test.

MR. BOYD: Exactly.

QUESTION: Well that's fine, but that still leaves me the question of why you don't get the same if you consider that a double benefit? Why is that double benefit not conferred in the Anderson type case, in the probable cause type case? It is either, there in fact was no crime in progress, but a reasonable officer could have thought that there was a crime in progress. That's the probable cause test, but then we add on top of that a qualified immunities test. Now, why don't you decry the benefit on a benefit in that situation? Maybe Anderson's wrong, but then you should be asking us to overrule Anderson. I don't see any difference between the probable cause test and the excessive force test. Would a reasonable officer have thought this was excessive force? Would a reasonable office have thought that there was a crime in progress? I don't see any double counting in one case any more than in the other.

MR. BOYD: Your Honor, the difference is, here we have Graham subsequent to Anderson and also I think as

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Justice Souter pointed out that -- that -- here, and I think this also part of the crux of it with the excessive force, is that you're dealing with the actual physical contact the police come into effect with people. And Graham has set forth some very specific standards that can apply where you --

QUESTION: They haven't. Graham is a reasonableness test. That's all it is and it mentions certain factors that ought to be taken into account and determining reasonableness. Is it a violent felon? Is he resisting and so forth? But it's a reasonableness test just as the probable cause test is.

MR. BOYD: And the two together, Graham and Anderson, are being used in order to provide the police officers the insulation that they need to be able to carry on their duties without being unduly timid in the process.

QUESTION: Mr. Boyd, may I ask you to tell me your view on something that Mr. Clement brought up and I thought in bringing it up he was trying to make this case a little bit like the hog-tie case. He said the crux of the excessive force case here was that they didn't give him notice, some kind of notice, and I didn't understand that to be your position. I thought that your position was they didn't need to give him the bum's rush. They didn't need to push him in. He was elderly, frail and

they could have treated him gently. Now there this -- they didn't notify him to stop or something part of your case?

MR. BOYD: No, it is not, Your Honor. You're correct. That is not part of our case that they should have given him particularly notice. It is how they treated him that raises the question of fact. And the important thing here, and this gets to the crux of the qualified immunity and the interactions with the Fourth Amendment, is that they are providing the means for the trial court judges to take care of the insubstantial cases now and to provide the officers with the insulation they need while still preserving a remedy.

QUESTION: But that doesn't really answer the legal point that Justice Souter and Justice Scalia have asked you about. Since there's -- in Anderson we say that the probable cause standard does not answer the question of qualified immunity, why shouldn't the -- we say the same thing about unreasonable force.

MR. BOYD: I think primarily, Your Honor, because with unreasonable force you're dealing with an area where they're in direct physical contact with the people.

QUESTION: But why should that make a difference for Fourth Amendment purposes?

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MR. BOYD: Because of the nature of it. This cuts right to the heart of the intent of the Fourth Amendment to serve as a check on federal officials and there's nothing in the Fourth Amendment making a textural analysis of it that provides for an immunity. And so there should be one, but it should not be untethered and so in the excessive force case we have the benefit of Graham. Graham has left a wonderful legacy. It's been cited 2,685 times and the reason for that is because it's working and it's working along with Anderson. And what they're talking about now is an expansion of the qualified immunity that would just supplant Graham, unnecessarily so, and raise Seventh Amendment issues.

QUESTION: But, you know, without Graham we have the legacy of several centuries of probable cause law, which gives the policeman the benefit of the doubt. He doesn't have to be correct about whether there are exigent circumstances so long as it was a reasonable judgment on his part and yet on top of that giving him the benefit of doubt, we also have a separate immunity doctrine. I don't see why it's any different for excessive force even though he thought -- even though the force was in fact excessive, we're going to give the policeman the benefit of the doubt if a reasonable policeman would not have thought it was excessive. That already gives him one benefit of the

doubt and the Government is arguing just as in Anderson you give a second benefit of the doubt for immunity so also in the case. I don't see any difference between the two. Now maybe Anderson is wrong, but that's a different issue.

MR. BOYD: No, it's not that Anderson is wrong it's that Anderson has been incorporated into the Ninth Circuit standard and Anderson is alive and well. And the fact is that now, and I see that my five-minute light is on, and I don't feel that there's a need to try to make every single point but what's essential here is that there's no better way to preserve rights than to put them in writing. And there's no better guardians of written rights than judges and here in this context, well ought to remember the words of Justice Marshall saying that if we're to be a government of laws and not of men that there must be a remedy for the violation of a constitutional right. And at the same time we have balance that against the need to insulate the officers, I recognize that, but this is a case where judges --

QUESTION: May I ask you a question based on your experience of these cases, how often does the issue of qualified immunity actually go to the jury, in your view?

MR. BOYD: Almost every time, based upon the

uncertainty now that exists in this area and this is where the Court in its opinion really needs to come out and --

QUESTION: You say in almost every case it goes to the jury?

MR. BOYD: Well, it depends. Some of the time it's going to the jury on two sets of jury instructions. This is where there's confusion in the Circuits and some of the time it's going to the jury on Graham and then they give it to the judge, as in McNair, to apply qualified immunity after the jury. And that's when you run into direct conflict with the Seventh Amendment. And that's why the most important thing for this Court to make clear and why to adopt the Ninth Circuit standard is because it sets forth a clear workable test so that after the jury has decided based on jury instructions incorporating both Anderson and Graham, that then there's no second guessing by the judge.

Because, Your Honors, it's in the -- there are moments when it's up to the judges to decide to make sure that the rights are not deteriorating and that's exactly what's happened here both with Judge Jensen and with Judge Thompson in the unanimous decision of the Ninth Circuit. And so we would urge this Court to follow the decisions of the Sixth, Seventh, Ninth, Tenth and D.C. Circuits that strike the proper balance between preserving the remedy

for the individual and insulating the police officers in the performance of their duties.

With that I have nothing further and I thank you, Mr. Chief Justice.

QUESTION: Thank you, Mr. Boyd. Mr. Clement, you have three minutes -- or four minutes.

REBUTTAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

MR. CLEMENT: Thank you, Mr. Chief Justice. Like to make three points. First for those of you who have reviewed the videotape, the very fact that this Court could disagree with Ninth Circuit about whether there was excessive force used in this case underscores the need for qualified immunity for officers in the field because clearly Graham against Connor did not answer every case and did not provide officers on crystal clear notice of where the lines were in the excessive-force context.

The second point I'd like to make is simply that jury instruction issues and the question of what goes to the jury and what the judge should decide, those issues are not unique to the excessive-force context. Those same issues arise under probable cause and exigent circumstance in Anderson against Creighton. And Mr. Boyd's actually correct that some of the Circuits have taken divergent views on that. It may be appropriate for the Court

eventually to take up that issue, but as Justice O'Connor has pointed out, this case would be an incredibly poor vehicle to do so since we're here on summary judgment and the Ninth Circuit's denial of summary judgment and the Government's position continues to be that that grant of -- that denial of summary judgment was inappropriate and this Court should reverse that.

Finally, I want to clarify that despite what may have been said here it is not accurate to say that the Ninth Circuit, or at least Graham itself, incorporates the test of Anderson against Creighton. Graham itself does allow officers the benefit of the doubt when it comes to reasonable mistakes of fact. It doesn't grant them the benefit of the doubt when it comes to reasonable mistakes of law. And it doesn't incorporate into its reasonableness test the notion of what the preexisting law was and it's a good thing that it doesn't because if that were the case, then the Fourth Amendment law would be frozen in place.

QUESTION: It seems to me that what you're asking is to say that the police officer is entitled to know in every case precisely what he must do and I'm not sure either under qualified immunity and then certainly under general Fourth Amendment principles we can do that.

MR. CLEMENT: I don't think that's what we're

asking, with all due respect Justice Kennedy. I think what we're asking is that the officers be put on fair warning that their conduct is unlawful. Justice Souter in an opinion for the Court in United States against Lanier addressed this issue in the context of 18 U.S.C. 242 and made clear that what's required in that context, and he noted that the same rule applies in qualified immunity, is the officers have fair warning because the principles, the general principles, have been made specific is the term he used, by application through prior cases. The Eleventh Circuit in a case called Lassiter against Alabama A&M expressed the same concept by saying that what you need is the prior case law that's materially similar.

QUESTION: All right. Well, if the standards are the same, sometimes by coincidence it could turn out that the qualified immunity standard and the underlying substantive standard are the same. And if so, there's only one question to ask and if not there are obviously two questions to ask. All right, I thought all they're arguing is that this and the Ninth Circuit says by coincidence they happen to be the same.

MR. CLEMENT: And that's why I want to insist --

QUESTION: Is that the part you're disagreeing with? You're saying they're not the same.

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MR. CLEMENT: Absolutely. Absolutely, because Graham against Connor itself does not build in reasonable mistakes of law or take into account what the preexisting law was.

QUESTION: Only reasonable mistakes of fact, is that your point?

MR. CLEMENT: That's exactly right, because if it were otherwise then the very fact that prior law didn't put an officer on notice and there was unclarity would itself mean that the conduct was lawful and then there'd be no mechanism for the law to provide clarity in the Fourth Amendment context. It's the same idea as to why this Court asked lower courts to deal with the liability -- the constitutional issue first and only the immunity question second.

The last point I'd like to make is in response to Justice Ginsburg's question about what the rationale of the Ninth Circuit below was in a subsequent case decided last week.

CHIEF JUSTICE REHNQUIST: Thank you. Thank you, Mr. Clement. The case is submitted.

(Whereupon at 11:14 a.m., the case in the above-entitled case was submitted.)

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