IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL HARTMAN, FRANK :
KORMANN, PIERCE McINTOSH, :
NORMAN ROBBINS, AND ROBERT :
EDWARDS, :
Petitioners, :
v. : No. 04-1495
WILLIAM G. MOORE, JR. :

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Washington, D.C.
Tuesday, January 10, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:18 a.m.

APPEARANCES:

EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners.

PATRICK F. McCARTAN, ESQ., Cleveland, Ohio; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:18 a.m.)

JUSTICE STEVENS: We'll hear argument now in 04-1495, Hartman against Moore.

Mr. Kneedler, whenever you're ready, you may proceed.

ORAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONERS

MR. KNEEDLER: Justice Stevens, and may it please the Court:

Respondent alleges in this Bivens action that petitioners, who were postal inspectors, caused him to be prosecuted in retaliation for activity protected by the First Amendment. In order to make out such a claim, however, respondent must establish that there was no probable cause for the prosecution. That is so for three mutually reinforcing reasons.

First, that requirement accords with the deference this Court has consistently held in Armstrong and other cases must be given to the prosecutorial function because that function is core to the executive branch's operations and because prosecutorial decision-making is ill-suited to judicial second guessing.

Second, that rule accords a -- an important objective screen and check against claims of

retaliatory prosecution in order to guard against the chilling effect that would otherwise routinely arise from inquiry into the subjective motivations of those involved in the prosecutorial decisionmaking process.

And third, that rule is deeply rooted in history. A claim of First Amendment retaliatory prosecution is but one species of a claim of malicious prosecution, and it has long been required that an essential element of a claim of malicious prosecution is that the plaintiff show an absence of probable cause for the prosecution.

JUSTICE SOUTER: I'm -- I'm not sure why -- why we should make the classification that you did, that -- that retaliatory is simply a species of -- of malicious. I mean, I -- I can see the similarities, but we've also got an entirely separate First Amendment value here which just is not part of the -- the analytical mix when you're talking about malicious prosecution. So I'm not sure why we should -- we -- we should classify it as you argue.

MR. KNEEDLER: Well, I -- for several reasons. First of all, the -- the First Amendment -- the alleged First Amendment retaliation describes the malice, a form of the malice that would arise in --

JUSTICE SOUTER: But it's -- it's a peculiar,

if you will, a peculiar malice with its own set of constitutional values, and I don't know of anything comparable in -- in malicious prosecution generically.

MR. KNEEDLER: Well, to be sure, what renders it malice or wrongful is the First Amendment, but -- but the derivation of -- of the reason for why it's wrongful does not, I think, detract from the essential relevance of the tort of malicious prosecution.

And if -- if I may add to that, the -- the reason why the -- the tort of malicious prosecution is highly relevant here is not simply because on the malice side of it, but also because it has long been recognized, beginning with Blackstone before the First Amendment and the Constitution were even adopted, that there are critical interests on the other side, not simply the defendant's interest in avoiding badly motivated prosecutions, but the important countervailing public interest of ensuring that wrongdoers are brought to justice and that those who have information about it will come forward.

And -- and that was recognized by Blackstone early on and has been recognized consistent -- consistently by this Court in -- in many, many decisions, including recent cases of this Court involving immunity issues, which is what we have here,

specifically recognizing that the tort of malicious prosecution is very instructive in deciding how rules should be applied when a Bivens action or a 1983 action is brought in the specific context of prosecution.

JUSTICE STEVENS: But, of course, here --

JUSTICE KENNEDY: Suppose there is probable cause for a prosecution, but the prosecutors are extremely busy and they -- they have to select their cases and they select one in which they bring the prosecution against the defendant on account of his speech. Is that a violation of the prosecutorial duty?

MR. KNEEDLER: Well, in -- in terms -- in terms of the responsibilities of the prosecutor, there --

JUSTICE KENNEDY: Yes.

MR. KNEEDLER: -- that -- that should not -- that should not be a -- a selection criterion in itself, but it --

JUSTICE KENNEDY: I'm -- I'm asking is it a violation of the prosecutor's professional obligations and his professional duties?

MR. KNEEDLER: Well, I -- I would think ordinarily yes, but with this caveat. Unlike race which is never relevant to the prosecutorial decision-making process, there can often be a prosecution -- and

this case is one of them -- in which you might have claims of public corruption. And -- and in fact, there was a guilty plea here on the part of a member of the Postal Service board of directors for receiving payments to -- for his activity on behalf of respondent's corporation and others. This -- this -- involving contracts for $250 million. This was a very, very important procurement by the Post Office Department and it is understandable that in connection with that prosecution, the prosecutors and the Postal Service investigators would look into issues of respondent's, or people in his behalf, approaching the Government.

JUSTICE KENNEDY: Just going back to the hypothetical, if -- if you acknowledge -- and I think you must -- that there's a violation of the prosecutorial duty in -- in the instance I suppose, then why shouldn't the law recognize it and -- and give force to that sanction and give force to that rule?

MR. KNEEDLER: Well, there -- there are certain restrictions -- certainly restrictions on what the prosecutor may do, but several points about that.

First of all, this is not a Bivens action against the prosecutor. The prosecutor is absolutely immune from suit. The prosecutor's decision-making

process is -- is, in fact, as is the grand jury's, a -- a critical protection against malicious prosecution --

JUSTICE KENNEDY: All right. Well, then we'll just change the hypothetical to make it the investigators. The investigators select their case based on this speech that they consider unwelcome.

MR. KNEEDLER: Well, the -- the question is whether in that circumstance the -- the Bivens plaintiff, the criminal defendant, has a First Amendment right to be excused from prosecution or, after the prosecution is unsuccessful, to bring a civil action, whether he has a right not to have been prosecuted in those circumstances notwithstanding the existence of probable cause and the independent judgment by the prosecutor.

JUSTICE KENNEDY: Well, does he have a right not to be singled out because of his speech?

MR. KNEEDLER: He does -- he does not have a -- he does not have a First Amendment claim in those circumstances where there is probable cause for the violation. The --

JUSTICE KENNEDY: I asked does he have a right not to be singled out because of his speech.

MR. KNEEDLER: He does not have a First Amendment right not to be singled out in those

circumstances.

JUSTICE KENNEDY: In other words, you -- you would advise law enforcement officials that they can single out persons for prosecution based on distasteful speech.

MR. KNEEDLER: I would not. I -- I'm not -- I'm not endorsing the motivation. What I'm -- what I'm saying is what is --

JUSTICE KENNEDY: What I want you to do is to agree. I -- I think you have to concede there is this principle in the law, and I think your answer has to be even though there's that principle, there's a lot of problems with enforcing it because there are going to be too many suits, it's hard to -- it's difficult for the Government to defend, and -- and so forth and so on.

MR. KNEEDLER: Right. I -- I'm not disputing that it -- that -- that a -- a prosecution should not be brought or should not be heard --

JUSTICE STEVENS: And you're not disputing either, as I understand it. As the case comes to us, we assume the prosecution would not have been brought but for the retaliatory motive.

MR. KNEEDLER: I -- it is -- we certainly disagree with that with our proposition.

JUSTICE STEVENS: But don't you assume that for the purposes of your argument?

MR. KNEEDLER: For -- for purposes of our probable -- probable cause claim, yes.

JUSTICE STEVENS: Well, that's the only argument.

MR. KNEEDLER: That -- that is true, but that, of course, was also true at common law for -- for malicious prosecution.

JUSTICE STEVENS: But the -- one of the differences -- am I not correct, that at common law the prosecutor did not have absolute immunity?

MR. KNEEDLER: At common law -- at common law, yes. As this Court has recognized in reformulating the common law principles of -- of immunity, the -- the public prosecutor now has absolute immunity under -- under these --

JUSTICE STEVENS: Now does, but not at common law.

MR. KNEEDLER: -- under these Court's -- under this Court's decisions.

But at common law, the prosecutor did have the protection of malicious prosecution, and as Justice Scalia observed in his concurring opinion in the Kalina decision, the elements of the tort of

prosecution essentially had a built-in qualified immunity, and the probable cause requirement was essentially that. It afforded protection for the prosecutor. The -- the private citizen who -- who -- the complaining witness -- he could not be the subject of a suit for damages if -- if the charges were dismissed, not simply upon a showing -- it required more than simply a showing of malice. It required a showing of an absence of probable cause for reasons that are essentially identical to the qualified immunity and absolute immunity -- the -- the reasons for qualified and absolute immunity.

JUSTICE GINSBURG: Mr. --

JUSTICE STEVENS: Well, they're not totally identical because you didn't have the First Amendment interest involved in those cases, whereas you do have a First Amendment interest at stake here.

MR. KNEEDLER: But -- but on -- on the -- on the governmental interest side of the balance, the interests are exactly the same in both -- in both circumstances. And that is not to chill -- not -- not to create circumstances where people would hold back from coming forward with information of violations of the law because of fear that they would be sued and retaliated against afterward. And that hasn't changed

now that we have public prosecutors. It's still critical.

JUSTICE GINSBURG: Mr. Kneedler, may -- would you clarify just one point about this probable cause? There was a grand jury that indicted this man, and then there was a trial judge who said, I'm throwing this out at the close of the Government's case. There is not enough evidence here to convict this man.

Are you saying that as long as the grand jury indicts, there can be no Bivens claim because in order to indict, the grand jury would have had to find probable cause?

MR. KNEEDLER: Well, at -- at common law on the tort of malicious prosecution, the indictment created a presumption because an indictment does have to depend upon probable cause, and under the -- under this Court's decision in Gerstein v. Pugh and other decisions, that can't be reexamined by the court in the prosecution.

But at common law, the -- the indictment created a presumption that was subject to rebuttal by the -- by the civil plaintiff. There was some disagreement about what would be necessary, whether you would have to show fraud on the grand jury or whether you could just retry --

JUSTICE GINSBURG: Well, tell me about now, not at the common law.

MR. KNEEDLER: Yes. We do not -- we do not think that the existence of the grand -- it has not been our position that the existence of the indictment is dispositive and cannot be challenged, but we do think it --

JUSTICE GINSBURG: But the grand jury did find probable cause. So what would the plaintiff have to show to overcome -- to -- to negate that finding of probable cause?

MR. KNEEDLER: We -- we think in a -- in a -- it would have to show by at least a preponderance of the evidence, maybe a clear showing, that there was not probable cause. And I think that also ties in to the -- to the standard for qualified immunity, which is could a reasonable person in those circumstances have believed that there was probable cause. I think, if the grand jury returns an indictment, that that should be pretty persuasive evidence but not compelling evidence -- I mean, not dispositive evidence that there was probable cause.

JUSTICE O'CONNOR: The case that comes closest, as far as I can see, is probably United States v. Armstrong, and in that case, this Court said in the

ordinary case, so long as the prosecutor has probable cause to believe the offense was committed, the decision to prosecute or go before a grand jury rests entirely in his discretion. But, of course, the discretion is subject to constitutional constraints, the equal protection component of the Due Process Clause. The decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification. And the standard the Court articulated there was the defendant must present clear evidence --

MR. KNEEDLER: Yes, clear evidence, and the Court stressed that it was a --

JUSTICE O'CONNOR: -- to the contrary. Now, that's different from your proposition of probable cause.

MR. KNEEDLER: Well, I -- I think several things may explain that.

In Armstrong, that was a claim of selective prosecution that was brought --

JUSTICE O'CONNOR: Based on race.

MR. KNEEDLER: Based on race. That was one of the distinctions I was going to point to. And secondly --

JUSTICE O'CONNOR: So why should that be

different than the First Amendment violation?

MR. KNEEDLER: Well, as -- as this Court's decision in -- in Johnson, for example, shows, there -- distinctions based on race are subject to strict scrutiny no matter what the context, in that case even in the prison context, whereas First Amendment claims often take account of the context in which they are raised. For example, this Court in the American-Arab Anti-Discrimination case held that there would -- could be no claim at all of selective prosecution in the immigration context because of the important countervailing interest in enforcing the law.

JUSTICE SCALIA: But you're willing to acknowledge -- and -- and the Government concedes that you can have a different standard when the -- the basis for the selective prosecution happens to violate the Constitution from the standard you apply where the basis for the selective prosecution doesn't violate the Constitution, such as I'm prosecuting him because he was mean to my brother-in-law. Okay?

MR. KNEEDLER: No.

JUSTICE SCALIA: Are you going to apply a different standard there than you would apply where -- where the reason is some First Amendment reason?

MR. KNEEDLER: Well, no. The -- the other

distinction -- and -- and I'm not sure if this goes to your point or not. The other distinction is that in Armstrong the claim was made in the criminal prosecution itself. Here, the claim is the civil action after the criminal prosecution is over with, and it's in that -- in that context especially that the analogy to malicious prosecution is very strong and why the element of -- that the person has to -- that the -- there has to have been a favorable termination for the -- for the plaintiff and there has to be a probable cause.

JUSTICE STEVENS: But that doesn't --

JUSTICE SCALIA: But would you answer my question?

JUSTICE STEVENS: Yes.

MR. KNEEDLER: I'm -- I'm not sure that I -- maybe -- I guess I --

JUSTICE SCALIA: It's going be a different criterion -- you -- you say it's going to be different for the First Amendment and the -- and -- and the Equal Protection Clause, at least where race is involved. What if there's no constitutional violation at all, but I just selectively prosecute him just because I don't like this guy or because he was mean to a relative of mine?

MR. KNEEDLER: No, I don't -- I don't --

JUSTICE SCALIA: Is there going to be a different standard --

MR. KNEEDLER: No. There -- there wouldn't be any -- any constitutional claim and any -- any common law --

JUSTICE SCALIA: Exactly, and would you apply a different standard because there isn't a constitutional claim?

MR. KNEEDLER: No. There wouldn't be any claim at all. I mean, there wouldn't be any basis for a claim.

JUSTICE STEVENS: -- a malicious prosecution claim. You'd have a malicious prosecution claim.

MR. KNEEDLER: There -- there -- and in the -- in the Federal sphere, if there was a malicious -- a common law malicious prosecution claim, that would have to be brought under the Federal Tort Claims Act against the United States.

JUSTICE STEVENS: But, Mr. Kneedler, I understand your argument to be they should be treated just like a malicious prosecution claim, which is no distinction between a constitutional basis and a common -- and just that he hated his brother-in-law. I think you're saying they're the same. That's what I understand Justice Scalia to be asking you.

JUSTICE SCALIA: That's what I'm asking.

MR. KNEEDLER: Well, yes. I -- I am -- I am saying that --

JUSTICE STEVENS: Which places no weight at all on the fact the Constitution is involved.

MR. KNEEDLER: Oh -- oh, it does because the -- because the -- the first -- the existence of the First Amendment claim is what gives you the Bivens cause of action in the first place. So otherwise, there wouldn't be any Federal cause of action at all without -- without the First Amendment claim.

JUSTICE STEVENS: That's how you'd get at least as much protection as if it was an ordinary malicious prosecution claim, but you don't get any more under your view.

MR. KNEEDLER: No, because -- and -- and again, this -- this is -- this is because of the -- of the background of the common law tort of malicious prosecution, which strikes exactly the balance that I -- that I'm talking about.

JUSTICE BREYER: But you really want three things. You say we want the protection, number one, of there -- if you're -- if there's probable cause, that's the end of it. Number two, if you're trying to show there wasn't probable cause, you have to bear clear and

convincing evidence, and number three, we also have qualified immunity. And I guess, number four, you have to prove the whole thing by clear and convincing evidence.

MR. KNEEDLER: Well --

JUSTICE BREYER: It sounds a little bit like the person who has the overcoat, turns up the heat, you know, five or -- what about one?

MR. KNEEDLER: The -- the --

JUSTICE BREYER: What about this one? And I want to know -- you simply say you need clear and convincing evidence that that was the motive and it wouldn't have been brought otherwise. And the existence of probable cause is a strong factor, maybe even a presumption, that suggests to the contrary.

Now, have States and other places tried things like that without the world collapsing?

MR. KNEEDLER: No. My understanding from -- from reading the treatises on -- on malicious prosecution, for example, that there has been no watering down of the probable cause requirement because it is understood to be a critical check against --

JUSTICE BREYER: So as far as you know, every State and every jurisdiction where -- and investigators if they don't have absolutely immunity, whatever -- in

all those jurisdictions, nobody has ever said that even a constitutional violation, if there's probable cause, that's the end of it.

MR. KNEEDLER: Well, I'm -- I'm focusing on the tort of malicious prosecution which is --

JUSTICE BREYER: Oh, I'm not focusing.

MR. KNEEDLER: -- which --

JUSTICE BREYER: I want to know --

MR. KNEEDLER: Yes.

JUSTICE BREYER: -- if --

MR. KNEEDLER: I'm not -- I'm not aware -- I'm not aware that any jurisdiction has done that.

But in response to your proposal, the -- the -- what -- what's wrong with that is that it would allow extensive inquiry, discovery, other inquiry into the subjective motivations of persons involved in the decision-making process with no mechanism analogous to immunity or the -- or the probable cause criterion to weed out --

JUSTICE BREYER: We have no experience. We don't know. Okay. As your -- as far as you can tell.

The other question I have, which you might want to be brief about, is in looking through this record, as far as I could see from the briefs, they went ahead and prosecuted this man with only two pieces

of evidence. The first evidence was that he tore some pages out of his notebook. But he introduced lots of notebooks to show he always tore pages out when he gave them to his secretary. And the second was that he told some witnesses be very careful and answer the question. Now, you know, he said a few other things, but they all seemed like the kind of things that people would always say to witnesses.

Now, if that's the only evidence, except for the fact he owns the company, how is there probable cause here?

MR. KNEEDLER: There -- there was much, much more evidence.

JUSTICE BREYER: Well, I didn't see any in the brief.

MR. KNEEDLER: There --

JUSTICE BREYER: I saw a lot about other people in the brief, but not about him.

MR. KNEEDLER: Well, for one thing, it's absolutely conceded that there was a conspiracy. Three people pleaded guilty, including --

JUSTICE BREYER: There are all kinds of things about other people.

MR. KNEEDLER: No, but -- but --

JUSTICE BREYER: I didn't --

MR. KNEEDLER: -- the -- it isn't all about other people. The -- the -- that crime included -- and it's accepted in this case that the Postal Service board of -- board member accepted 30 percent of the fees paid by respondent's company to the consulting firm. Respondent's company. He was the chief executive officer.

JUSTICE BREYER: I would like you to limit yourself to what I didn't concede. I concede it's his company. I concede that he tore some pages out of his notebook, and I concede that he told -- which he did a lot of times. And I concede that he told witnesses answer the question, et cetera. Now, is there anything else connecting him, not his company?

MR. KNEEDLER: Yes. In -- in the summer of 1984, before there was even a consulting agreement, there was a series of conversations between Voss, the postal board -- board member, and respondent, including one for which there are notes in which Voss said I am working for you.

There -- there was an -- there is an abundance of evidence involving Reedy who is -- no. I -- I know, but just in -- just in terms of -- just in terms of the sequence.

There is evidence that Voss and Moore were

good friends. Voss said that he had a close relationship with respondent, and when the contract was first being negotiated, Reedy acknowledged that Voss and Moore were good friends. They had a close relationship. They were not distant.

JUSTICE STEVENS: Mr. Kneedler, I know you're responding to Justice Breyer's question, but I think for purposes of our decision, we're not supposed to decide whether there was probable cause or not, but we're to give you the opportunity to prove there was if -- if you win on your --

MR. KNEEDLER: Yes, although I -- I certainly do not want to leave the misimpression that -- and there is -- there is much more.

JUSTICE STEVENS: But that's a disputed issue, and we don't have to decide the probable cause issue. Is that not correct?

MR. KNEEDLER: That -- that -- you do not have -- you do not have to decide it, but I would certainly urge the Court not to proceed on the assumption or make any comments that there is because there were -- there were --

JUSTICE STEVENS: But because the other side is arguing that even if there is probable cause, the burden shifts when they prove the retaliatory motive,

and you have to prove that you would never -- you made -- you would have brought the prosecution even if there had been no retaliatory motive. That's what we're arguing --

MR. KNEEDLER: Right, and that is their position. And that position accords -- yes, that is their position. And that accords no particular --

JUSTICE STEVENS: And the question I would ask is why should this be different from a wrongful discharge case in which there's ample cause to discharge and the issue boils down to whether or not he would have been discharged anyway. Why isn't it the same -- same situation?

MR. KNEEDLER: What is very different is that this is the prosecutorial function. As this Court recognized in Armstrong, that is a core executive branch function and it is one that the courts are ill-suited to second-guess because a whole variety of determinations can enter into whether to prosecute somebody, whether they -- whether the particular conduct -- how culpable the person is, whether the conduct fits into the overall prosecutorial priorities, whether there will be cooperating witnesses, what -- what the office's resources are. There are a whole bunch of -- of judgments that courts are ill-suited to

second-guess, and it would be very chilling if the prosecutor had to --

JUSTICE STEVENS: Wouldn't -- wouldn't all those considerations justify a rule that makes the burden of proving the retaliatory motive very high, say, maybe it has to be by clear and convincing evidence or something like that? But once you have it acknowledged -- I don't know if they're really acknowledged here, but there's strong evidence of retaliatory motive -- why shouldn't the burden shift just on that, on the basis of that proof?

MR. KNEEDLER: Well -- oh, not -- we do not think there is strong evidence of retaliatory motive. And I -- I can -- can address that, but --

JUSTICE STEVENS: And if you had a --

MR. KNEEDLER: -- but --

JUSTICE STEVENS: -- if you had a heavy burden of proof at that stage of the proceeding, wouldn't that protect the interests that mainly concern you?

MR. KNEEDLER: We -- we think the more direct -- I don't think so for -- partly for the reason that I -- that I gave to Justice Breyer is that -- that that would not protect against discovery and -- and the sort of chilling inquiry that this Court has recognized in

its immunity cases, and especially in the prosecutorial function where the prosecutor would be required to disclose. Even though the prosecutor is absolutely immune, the prosecutor's decision-making process and his communication with law enforcement agents would -- would be exposed for judicial scrutiny, public scrutiny in a way that could chill the prosecutorial function.

JUSTICE SCALIA: Mr. Kneedler, the defendant here is not the prosecutor. Right?

MR. KNEEDLER: Right.

JUSTICE SCALIA: Just someone who provided information to the prosecutor that -- that was erroneous and allegedly maliciously motivated.

MR. KNEEDLER: I don't think erroneous. It was allegedly maliciously motivated.

JUSTICE SCALIA: Allegedly maliciously motivated, at least.

I don't understand how you would apply the test, would -- you know, would you have prosecuted anyway, when -- you know, but for the malicious motive, when the person you're -- you're suing is not the prosecutor. It wasn't up to this person whether there would be a prosecution.

MR. KNEEDLER: I think that's a -- I think that's a very important point, and before a -- a court

enters into that, in the end, unknowable question, maybe a court can -- can, in the end, determine probabilities, but before a court undertakes that, which requires looking not simply at the motivation of the -- of the law enforcement officers, but the prosecutor and -- and who knows whether the grand jury would have returned an indictment, and yet a court certainly couldn't be expected to inquire into that. Now, so we -- we think that that's another reason why the probable cause requirement is a critical gateway before a court is -- is going to enter into that determination.

And all -- and it's important to remember it's not just proving the question of causation, but these are people who are several steps removed from the -- from the prosecutorial decision. And the -- and the personal liability would be visited on the law enforcement agents who were doing their job and cooperating with the U.S. Attorney's Office.

This case was -- this case got attention at the highest levels of the U.S. Attorney's Office. The U.S. Attorney personally met with the -- the respondent -- lawyers for respondent.

JUSTICE GINSBURG: Mr. Kneedler, the D.C. Circuit, looking at this case, looking at the record

closely, typed it one in which the evidence of retaliation was strong and probable cause weak. This is on 28a of the appendix to the petition for cert. That was the appraisal of the D.C. Circuit panel. And I think you've been arguing that that is not the case, but at least for our purposes at this posture, don't we -- shouldn't we accept that that is the picture here, weak evidence of probable cause, strong indications of retaliation?

MR. KNEEDLER: I -- I don't -- I don't think there's any reason to accept that because there's no factual determinations to that effect.

There -- there are really just two snippets of evidence that are primarily relied upon by the court of appeals for the view that there was a retaliatory motive here. And they were -- they were really observations that the -- that the inspectors made to -- to show -- the first one was why the corporation should be indicted, not just -- not just Moore, but why the corporation should be indicted. And it was just an observation that the corporation, through its agents, was involved in a lot of activities and should be held accountable. It was not -- it was not evidence of a -- of a retaliatory motive, and there were subpoenas for -- for documents about political contributions. But

let's remember that this was a case involving bribery of a public official, and it was -- it was understandable that the AUSA and the -- and the inspectors would -- would look to see whether there was money directed elsewhere.

If I may, I'd like to reserve the balance of my time.

JUSTICE STEVENS: Mr. McCartan.

ORAL ARGUMENT OF PATRICK F. McCARTAN

ON BEHALF OF THE RESPONDENT

MR. McCARTAN: Justice Stevens, if it please the Court:

If I may, Your Honors, I would like to start with the very pointed inquiry that Justice Kennedy made at the opening of the argument here.

The petitioners here do not challenge, because they cannot challenge, as was evident from the concession made here this morning, that a criminal prosecution cannot be based upon the exercise of a constitutional right. What they want is an exception to that rule, an exception that would mean, despite the overwhelming evidence of retaliation of record in this case, there would be no violation of the First Amendment here and that would treat any prosecution based solely upon race, religion, or protected speech

the same as a tort for malicious prosecution. And to accomplish this end, what they are trying to do is to force probable cause as a standard into a framework where it doesn't belong, where it won't work, and which, if done here, is going to be contrary to several existing decisions of this Court.

JUSTICE SCALIA: Mr. McCartan, how does -- how does your standard work? The same question I asked Mr. Kneedler. The -- the test you would propose is whether but for the retaliatory motive, the prosecution would have been brought anyway?

MR. McCARTAN: That would be the test, Your Honor, for recovery when the matter goes to trial.

JUSTICE SCALIA: Right.

MR. McCARTAN: The test that I would propose is the very test that this Court set forth in Harlow against Fitzgerald because we're here really on a very limited issue of qualified immunity. We have to determine whether the defense of qualified immunity is available to the petitioners here. The standard, the proper standard for making that determination was set forth by this Court in Harlow and it's whether the conduct alleged --

JUSTICE STEVENS: But, Mr. McCartan, I don't mean to interrupt you, but I thought the primary issue

was not the qualified immunity issue, but whether we have a cause of action in the first place.

MR. McCARTAN: Well, Your Honor, whether -- no, I think that the --

JUSTICE STEVENS: And on that, they say you don't have a cause of action unless you're able to prove an absence of probable cause.

MR. McCARTAN: I think what they are saying is the defense of qualified immunity should be available if there should be probable cause for the action that was taken here. I think the case before the Court is on the very limited issue of whether the defense of qualified immunity is available to the petitioners.

JUSTICE SCALIA: No. I think they would say absolute immunity, not qualified. I -- I think they're saying if there's probable cause, the game is over. No -- no qualified --

MR. McCARTAN: That's exactly what they're saying, and what I'm saying is that is the wrong standard to be applying.

JUSTICE STEVENS: Well, but there are two questions in the cert petition and it's the second one that's the qualified immunity issue, and the first one is whether there's a cause of action.

MR. McCARTAN: All right. Well, Your Honor, let -- let me -- let me back up for just a moment then with respect to that.

Let me say that probable cause is not the proper standard which should be applied here. The proper standard is the standard that is set forth by this Court in Harlow and as refined later in Anderson against Creighton and a number of other decisions.

JUSTICE SOUTER: But the difficulty I think we're all having with it is that the qualified immunity issue and the standard to which you are -- are adverting responds to a question that doesn't arise unless we first assume that there is -- that there is a constitutional violation.

MR. McCARTAN: That's correct.

JUSTICE SOUTER: And our questions are, what is the standard for determining the constitutional violation? Once we get that squared away, then we'll get to Harlow.

MR. McCARTAN: The standard that is to be set forth to determine whether there is a constitutional violation is that that this Court applied in Mt. Healthy City School District against Doyle and in Crawford-El against Britton, and that is if there is illegally or unconstitutionally motivated conduct, it

will not be excused simply because there may be some objectively valid basis for taking such action. That is the conceptual framework that was established in those cases and which should be applied by way of analysis.

JUSTICE BREYER: If it is applied here, I -- I thought we just granted question one. There were two in the cert petition. I -- my notes say we just granted question one. And that means what they have is the screen. We're going to screen out absolutely any such claim as yours if there is probable cause.

Now, the reason they advance for doing that is that in the -- a reason is in the absence of a screen like that, here's what's going to happen. Every single case -- not every one, but millions of cases or thousands, anyway -- involving companies -- well, companies are going to Congress all the time. They have ads all the time. They run into agency hostility all the time. The Hell's Angels? That's a pretty unpopular defendant. They say things all the time that investigators disagree with. And what will happen is in a vast number of cases the defendant will decide to bring a Bivens action, particularly if he gets off, and then we'll have discovery and we'll look into every statement that the -- the investigator made to the

prosecutor, and before you know it, we have a nightmare of tort cases. And they say that's unfortunate to cut off a claim like yours, but after all, the prosecutors totally cut them off because they have absolute immunity.

Now, we're saying at least let's restrict them, where investigators are involved, to cases where it turned out there was no probable cause, otherwise the criminal process itself will be seriously injured.

Now, I take it that's the argument. I'd like to hear your reply.

MR. McCARTAN: That is exactly the argument, Your Honor, and what it comes down to is whether the burdens of litigation in a situation of this kind will justify judicial alteration of the protection of the First Amendment. And I think that's been very clear from the outset in the first question Justice Kennedy asked.

JUSTICE BREYER: No, but are you going to -- I mean, is there any light you could shed? And that's why I asked in my question initially. I thought maybe there were some jurisdictions somewhere that -- that survive without the rule they want, but maybe I'm wrong. And -- and how do I judge this? I would be concerned. I don't -- the -- after all, these other

cases you mentioned are civil tort cases and -- and they don't involve the criminal process. And when we get into criminal prosecutions, we have rules on selective prosecution that are designed to screen out all but the very worst.

MR. McCARTAN: But see --

JUSTICE BREYER: And that's what he's arguing for here.

MR. McCARTAN: That's what he's arguing, and those are not screening mechanisms, Your Honor. Probable cause was evident and was present in United States against Armstrong and Wayte against the United States. It was not deemed by this Court to be a bar to the selective prosecution claims that were advanced in that -- in those cases.

JUSTICE BREYER: Leaving -- is there anything you can say before I give up on this? And maybe the answer is no. Is there anything you can say that would relieve my concern, which is completely practical at the moment, that if I decide in your favor, there suddenly are going to be large numbers of criminal cases where defendants will say the reason I was prosecuted was because of something I said? I was advocating motorcycles. I was advocating beating people up. I was advocating a congressional change of

something. Many, many such cases. They'll all get at least discovery, and the prosecutor's door will become open to the world. Now, that's what's concerning. Can you say anything to relieve that concern?

MR. McCARTAN: Yes. I think, first of all, empirically, Your Honor, there's no evidence to the effect that Bivens has had that result after 35 years in full force and effect.

JUSTICE O'CONNOR: But if this Court opens that door, don't you think we might see a different problem?

MR. McCARTAN: I don't think so, Justice O'Connor. I think if you examine part IV of the Court's opinion in Crawford-El, there is a very careful pattern that is set forth as to how cases of this kind should proceed and what protections are available to protect Government officials against overly burdensome litigation.

JUSTICE STEVENS: Which opinion was that? I missed that.

MR. McCARTAN: Pardon, Your Honor?

JUSTICE STEVENS: Which opinion are you talking about? I missed it -- missed it.

MR. McCARTAN: The opinion in Crawford-El against Britton.

JUSTICE STEVENS: Okay.

MR. McCARTAN: There, the Court held that if there are factually specific allegations that would indicate a violation of the Constitution, that at that point the court may consider whether some additional discovery should be permitted even if there should be an independently valid basis.

JUSTICE SCALIA: This wasn't addressing -- this wasn't -- didn't involve prosecution, though. It didn't involve unlawful prosecution.

MR. McCARTAN: It did not, Your Honor, but it provides the same --

JUSTICE SCALIA: It -- it was a suit against a prison.

MR. McCARTAN: It provides the same framework for the proper analysis of a claim of this kind.

JUSTICE SCALIA: No, but -- but we treat prosecutions quite differently. We do not give, for example, absolute immunity to the wardens of prisons as we give absolute immunity to prosecutors.

MR. McCARTAN: That's --

JUSTICE SCALIA: This is a specially dangerous area in which to allow litigation.

MR. McCARTAN: It is far less dangerous, Your Honor, than when this is asserted by way of defense in

the middle of an ongoing criminal prosecution. It can be far more disruptive to allege a violation of constitutional rights as a defense to a criminal prosecution, while that prosecution is in progress, and an effort is made to examine prosecutorial decision-making than in an after-the-fact, after-acquittal civil action for damages, such as we have here. You have already permitted that kind of examination in criminal cases where probable cause is present.

JUSTICE SCALIA: Mr. McCartan, I -- I still don't entirely understand what you would want the Government to prove under your system in order to -- in order to -- to win this case. They would have to prove what? That -- that --

MR. McCARTAN: They would have to prove that something other than hostility to protected speech was the reason for the prosecution being advanced.

JUSTICE SCALIA: And it would not be enough to show that the prosecution would have gone forward anyway.

MR. McCARTAN: No. That's -- that's what I mean. Absent -- if there is an objectively valid basis --

JUSTICE SCALIA: Yes.

MR. McCARTAN: -- the Government claims there

is an objectively valid basis for the action they action they would take.

JUSTICE SCALIA: Right.

MR. McCARTAN: Then if the plaintiff has made a showing that there was an improper motivation, the burden shifts to the Government to show that the prosecution would have proceeded absent the illicit intent.

JUSTICE SCALIA: You see now in -- in the employment cases where -- where somebody is dismissed for a -- a racially discriminatory reason and -- and you have to prove that the same action would have been taken anyway, you ask the person who fired them with the discriminatory motive whether that person would have taken that action anyway. Whereas here, the person who brought the prosecution is not in this case. It's somebody who gave information to the prosecutor. I don't know how that person could -- could possibly establish that the prosecution would have been brought anyway. It wasn't up to him.

MR. McCARTAN: Well, as --

JUSTICE SCALIA: It had nothing to do with --

MR. McCARTAN: -- as -- as you pointed out earlier, probable cause is not the standard that governs the investigator's conduct. These

investigators procured a prosecution based upon a violation of the petitioner's -- or excuse me -- the respondent's constitutional rights.

JUSTICE SOUTER: Well, they did, but wouldn't you have to prove under your standard not that they would have procured or tried to procure it anyway, but that in fact the prosecutor would have prosecuted anyway? In other words, that's the distinction between the -- the normal case and -- and the case that we're dealing with here --

MR. McCARTAN: No, I --

JUSTICE SOUTER: -- with a prosecutor who has absolute immunity.

MR. McCARTAN: Well, the prosecutor has absolute immunity. There's a qualified immunity here with respect to the investigators, and that means that the facts and circumstances of the case are going to have to determine whether there's liability.

JUSTICE SOUTER: No. All right --

MR. McCARTAN: The burden would shift once the illegal motivation is shown. It would shift to the Government to establish that the prosecution would have proceeded absent the illicit event.

JUSTICE STEVENS: But would it -- would it have been a complete defense? Suppose the prosecutor,

who is immune, gets on the witness stand and says, well, I know all about this -- the First Amendment stuff, but I was going to bring this prosecution anyway because it seemed to me there was a serious crime here. That's all he says. Wouldn't that be the end of the case?

MR. McCARTAN: It shouldn't be the end of the case. It would be an issue of causation at that point, Your Honor, if there were evidence.

JUSTICE STEVENS: But -- but the question is the motivation for his decision to bring the case.

MR. McCARTAN: The motivation for his decision --

JUSTICE STEVENS: And he says I -- I would have brought it anyway.

MR. McCARTAN: But in this case, the prosecutor's decision to bring these charges to the grand jury I don't think has any probative force whatsoever.

JUSTICE SOUTER: Why --

JUSTICE SCALIA: Do you think the defendant can subpoena the prosecutor?

MR. McCARTAN: Of course.

JUSTICE SCALIA: Why? I thought the prosecutor had absolute immunity.

MR. McCARTAN: The prosecutor is not a defendant, Your Honor.

JUSTICE SCALIA: You say he -- he can't be brought into court to defend his own -- his own judgment, but he can be brought into court when -- when an investigator is sued in -- in order to take his testimony as to what would have happened?

MR. McCARTAN: His testimony was taken in this case and can be taken in this case because at that point in these proceedings -- and you have to look at the evidence of record to this point in this proceeding -- there is very clear evidence of retaliation as a motive for this prosecution.

JUSTICE SCALIA: Well, he may have done it voluntarily here, but I find it hard to believe that he could be subpoenaed, when -- when he has absolute immunity from suit against himself, to testify in a suit against somebody else. It seems to me a very strange kind of a --

MR. McCARTAN: Your Honor, the fact that he has absolute immunity does not immunize him from giving testimony in the case.

JUSTICE BREYER: So he's a witness. Suppose his testimony --

MR. McCARTAN: He's a -- he's a witness.

JUSTICE BREYER: Suppose that the person is convicted.

MR. McCARTAN: Suppose the person is convicted.

JUSTICE BREYER: Yes. Can you bring your Bivens claim anyway?

MR. McCARTAN: Well, Heck against Humphrey I think would stand in the way of that, Your Honor.

JUSTICE BREYER: Really? So that's a -- but it's not a civil case.

MR. McCARTAN: Well, it's not a simple case.

JUSTICE BREYER: So you say that if he's convicted, after all, he may have been convicted but it may be because of the retaliatory motive.

MR. McCARTAN: Well, if he is convicted and a civil action for damages is then brought --

JUSTICE BREYER: Yes.

MR. McCARTAN: -- then I think you are in the framework of Heck against Humphrey --

JUSTICE BREYER: All right. So you -- so you say --

MR. McCARTAN: -- where the court --

JUSTICE BREYER: -- if he's convicted, that's the end of it --

MR. McCARTAN: No.

JUSTICE BREYER: -- whether there was a retaliatory motive or not.

MR. McCARTAN: No. I think it's very difficult in that case.

In Heck against Humphrey, which this Court viewed as a collateral attack on an outstanding conviction, the Court held that there had to be a favorable termination of the criminal proceeding in order to maintain the civil action for damages under section 1983.

JUSTICE BREYER: Oh, that's 1983.

MR. McCARTAN: The Court went on to say, however, that if the civil damage action would not necessarily impugn the conviction, that the case could proceed even though there had not been a favorable termination, reversal, or expungement --

JUSTICE BREYER: All right. So what he does is he --

MR. McCARTAN: -- of the conviction.

JUSTICE BREYER: -- he brings his action and he says here I am 20 years in prison and I agree I'm guilty, but they never would have prosecuted me without the fact that they hate the Hell's Angels and they, in fact, criticize everything that we say.

MR. McCARTAN: I don't think that action

wouldn't be permitted to proceed.

JUSTICE BREYER: Because?

MR. McCARTAN: It would be viewed as a collateral attack on an outstanding conviction.

JUSTICE BREYER: No, no. He's saying I was -- I was guilty, but the -- all right. Anyway --

MR. McCARTAN: I -- I don't think --

JUSTICE BREYER: I won't force you into that.

MR. McCARTAN: -- with all due respect, Your Honor, that's a real-world example.

JUSTICE BREYER: I'll take basically virtually never if he's convicted. They concede that you could bring this kind of action if there's no probable cause. So we're talking about that range where there was probable cause but acquittal. That's what we're talking about here.

MR. McCARTAN: That's right. And why probable cause is not the appropriate standard is because it does not distinguish between what might be an unconstitutional prosecution -- that is, one based solely upon race, religion, or protected speech -- and one that is not. When you look to these earlier cases, Your Honor, I agree they arose in employment contexts. They arose in the context of a prison.

JUSTICE BREYER: Now, you're -- you're in the

cases, but I'm -- I'm trying to pursue this. You've given me another idea --

MR. McCARTAN: Yes.

JUSTICE BREYER: -- which is I would like to say one word about this. I'm sorry to interrupt your train of thought here, but look.

I'm looking for other screens. Is there -- is there -- the particular point that they're worried about is you say we want to establish the retaliatory motive. That's what's worrying them because they see, in that establishment of the retaliatory motive, discovery, and discovery means you not only talk to the investigators, but you're also talking to, as a witness, the prosecutors to find out who said what to whom in order to see if you could establish that they didn't like the speech of the defendant. Now, can you give me any screen, not your case, but any kind of a screen that will help --

MR. McCARTAN: Yes.

JUSTICE BREYER: -- weed out the sheep from the lambs --

MR. McCARTAN: And I --

JUSTICE BREYER: -- the goats from the sheep or whatever --

MR. McCARTAN: Your Honor --

JUSTICE BREYER: -- in that area?

MR. McCARTAN: -- I submit the screen is that set forth by this Court in Harlow, which is an objective standard and which is whether the conduct involved violated a clearly established statutory or constitutional right of which a reasonably prudent law enforcement officer or Government official should be aware.

That's why I tried to say earlier this standard that should govern this case is not probable cause, but the standard set forth by this Court in Harlow --

JUSTICE SOUTER: So the -- the screen, in effect, is --

MR. McCARTAN: And is a screening.

JUSTICE SOUTER: -- the qualified immunity screen.

MR. McCARTAN: That's right.

And there was no screening mechanism in United States against Armstrong. The Court made it very clear that what you were applying there were ordinary equal protection standards.

JUSTICE KENNEDY: Have there been cases where in the context of the prosecution, there's been a motion to dismiss the prosecution because it was

brought in retaliation for the exercise of the First Amendment right?

MR. McCARTAN: This Court has not decided what the proper remedy would be there, Your Honor. And the cases --

JUSTICE KENNEDY: Have there been cases in the other courts?

MR. McCARTAN: I'm not aware of any cases where that has succeeded except at the circuit court level --

JUSTICE STEVENS: No, but it did in the Armstrong --

MR. McCARTAN: -- where the conviction has been invalidated for that reason.

JUSTICE STEVENS: But in the race context, it is a dismissal of the prosecution itself. Isn't it?

MR. McCARTAN: Yes, Your Honor. It might be the same here.

JUSTICE STEVENS: -- with Harlow here.

JUSTICE KENNEDY: My -- my question was directed to the First Amendment.

MR. McCARTAN: For the First Amendment. No, I'm not aware of -- certainly no decisions of this Court, and I think the only cases arise --

JUSTICE SCALIA: Well -- well, surely the

prosecution --

MR. McCARTAN: -- in the circuit courts of appeals, Your Honor.

JUSTICE SCALIA: Surely the prosecution would go ahead if there were probable cause. No? No? I mean, suppose it was brought up during the prosecution.

MR. McCARTAN: Well, the question --

JUSTICE SCALIA: You mean to say if there was -- if there was perfect probable cause for the prosecution, that you can stop the prosecution in its tracks by -- by an allegation of the First Amendment violation?

MR. McCARTAN: You can move for dismissal of the charges.

But look, as far back as 1886, this Court -- this Court found a violation of the Equal Protection Clause in a racially motivated prosecution in a situation where there was clearly probable cause and, indeed, overwhelming evidence of guilt for violation of a facially neutral statute. In United States against Armstrong, the existence of probable cause did not stand as a bar to the selective prosecution claims.

JUSTICE BREYER: But that -- that's true. I now think we're making some progress. I don't think it is quite a qualified immunity. I think it's possible

and don't -- I'm putting words in your mouth and deny them if I am. One, he's convicted, no case. Two, no probable cause, everybody agrees there's a case. Three, now there is probable cause, but he's acquitted. Okay?

MR. McCARTAN: That's this case.

JUSTICE BREYER: In that circumstance, suppose you say we cannot even allow discovery. You don't even get to discovery on your retaliatory motive unless you show clearly, question mark, or unless you show likely, question mark, that the investigator not only retaliated, but he retaliated under conditions where any reasonable person would have known that what he was doing was contrary to the Constitution.

MR. McCARTAN: Exactly, Your Honor. That --

JUSTICE BREYER: And if you don't show that as a -- as a threshold, you don't even get discovery.

MR. McCARTAN: We don't -- that is exactly the Harlow standard. That is exactly the standard that was applied in Crawford-El against Britton as the first step in the stage of developments in that case.

JUSTICE SOUTER: But if you turn the Harlow standard around -- I mean, you're -- you're making the -- the negation of the Harlow standard the screening device --

MR. McCARTAN: Exactly.

JUSTICE SOUTER: -- in Justice Breyer's example.

MR. McCARTAN: Exactly.

JUSTICE SOUTER: Yes.

MR. McCARTAN: That's the threshold determination in a Bivens action of this kind.

JUSTICE SCALIA: Mr. McCartan, what was the 1887 case or 1880 --

MR. McCARTAN: Yick Wo against Hopkins.

JUSTICE KENNEDY: Yick Wo.

JUSTICE SCALIA: I thought you said Armstrong.

MR. McCARTAN: No, no. Armstrong --

JUSTICE KENNEDY: Yick Wo.

MR. McCARTAN: -- much more recently, but Yick Wo against Hopkins.

JUSTICE SCALIA: I thought it was --

JUSTICE KENNEDY: Let -- let me ask you this. Suppose the law enforcement official -- the postal inspectors bring the prosecution to the prosecutor because of their disagreement with his First Amendment views. The prosecutor said, I don't care about the First Amendment views. I'm glad you brought this to me. I'm going to prosecute because there's probable

cause here and this is a bad actor. What results?

MR. McCARTAN: The result is that's a question of causation, Your Honor, if there is evidence.

JUSTICE KENNEDY: That's why --

MR. McCARTAN: Yes. If there is evidence here with respect to retaliation, then the question of whether the independent act of the prosecutor somehow immunizes that conduct is a question of fact for the trier of fact in the case. If the action --

JUSTICE KENNEDY: Suppose the prosecutor said, you shouldn't have brought this to me because you -- you're -- you're motivated by the First Amendment. But now that it's here, I have my own independent interest in going ahead.

MR. McCARTAN: That's the evidence the Government can bring forward when the burden of proof shifts upon a showing of an illegal or unconstitutional motive for bringing the prosecution to begin with. That's the kind of evidence the Government would present to show that the prosecution would have taken effect in any --

JUSTICE SOUTER: And if the burden does shift that way --

MR. McCARTAN: Exactly.

JUSTICE SOUTER: -- wouldn't it be consistent with the screening mechanism that Justice Breyer suggested and -- and that you accepted? Wouldn't -- wouldn't the -- the -- when the burden shifts, wouldn't the obligation be on -- on the point of substance, as opposed to the point of -- of screening, not to show that the -- that the prosecutor would have brought the prosecution anyway, but to show that the investigator would have acted to procure that prosecution anyway? So you would have parallel standards.

MR. McCARTAN: Exactly.

JUSTICE SOUTER: Okay.

MR. McCARTAN: Because the prosecutor has immunity, cannot be a defendant in the case.

JUSTICE SOUTER: All right. But just -- I just want to nail this --

MR. McCARTAN: No, absolutely.

JUSTICE SOUTER: -- to make sure I understand it. So you're -- you're modifying your position of a minute ago in which you said the standard would be would the prosecution have been brought anyway, and you're now saying, which I think would be consistent with your answer to Justice Breyer, the -- the question is would the investigators have tried to procure the prosecution anyway. And do I understand you correctly,

and -- and have you changed your position?

MR. McCARTAN: Well, I think that is a significant distinction, Your Honor, but I think we have to establish that they procured the prosecution and that it did proceed by reasons of the illegal motivation and not for some independently objective standard.

JUSTICE SCALIA: Right, because the prosecutor could have gotten a lot of other information from other people.

MR. McCARTAN: Absolutely.

JUSTICE SCALIA: And you're not going to throw out the prosecution just because this one piece of information was bad.

JUSTICE SOUTER: So it's a dual --

MR. McCARTAN: Consider too what the facts of record are here. This prosecutor was a complicit conduit in this action. He admitted in the presence of a grand jury witness that he couldn't care less about the guilt or innocence of these people. He just wanted a conviction so he could obtain a lucrative position in private practice. I understand he is still a prosecutor at this time. But that decision of the prosecutor, based upon facts of that kind, has no probative value whatsoever in terms of the independent

action that might have broken the chain of causation in a case of this kind.

Nor does the indictment of the grand jury have any probative value because exculpatory evidence was withheld from the grand jury. And I think in determining the value of the grand jury's action, you have to really determine not only what was presented to the grand jury, but also what was withheld from examination.

JUSTICE STEVENS: May I go back to one question Justice O'Connor asked you earlier? To what extent are there -- is there precedent out there in other courts that have decided this very issue? Are there -- is there precedent for what you're asking us to do?

MR. McCARTAN: There -- there is precedent in the courts of appeals, Your Honor. The cases, I think, are cited in our brief where prosecutions have been invalidated based upon violations of constitutional rights.

JUSTICE STEVENS: But a violation of First Amendment rights or --

MR. McCARTAN: First Amendment rights. I think that is the case. Not cited in our brief. But there are cases to that effect.

JUSTICE STEVENS: And -- and were those cases in which the prosecution itself was brought to a halt, or were they post-prosecution damage actions?

MR. McCARTAN: Post-prosecution. Not post-prosecution damage actions but appeals, direct appeals, to invalidate the conviction --

JUSTICE STEVENS: The conviction.

MR. McCARTAN: -- based upon the violation --

JUSTICE STEVENS: But is there any precedent for a damage action of this kind?

MR. McCARTAN: Well, Bivens is.

JUSTICE STEVENS: Well, but not quite. Bivens isn't exactly like that. This is Fourth Amendment.

So is there -- is there precedent for a damage action brought on the theory that the prosecution was brought for -- to retaliate for First Amendment speech?

MR. McCARTAN: I'm not aware, Your Honor, of any precedents --

JUSTICE STEVENS: I'm not either.

MR. McCARTAN: -- in the three circuits where probable cause is not a bar to an action of that kind.

JUSTICE KENNEDY: Now, that -- that means one of two things: either what you're arguing for is not

going to bring a flood of litigation, or everyone has assumed that probable cause is a -- is a requirement.

MR. McCARTAN: Well, I think it would be the former rather than the latter, Your Honor, since probable cause does not distinguish between what may be an unconstitutional act on the part of the Government and one that might be motivated by a legitimate grievance.

JUSTICE KENNEDY: Well, but -- but I'm not sure that that proposition has been established in the cases.

MR. McCARTAN: No, Your Honor, and that's why I think this case is before this Court at this time.

JUSTICE SCALIA: Neither -- neither does absolute immunity for the prosecutor distinguish between whether the prosecutor was acting just illegally or just acting unconstitutionally. I mean, yes.

MR. McCARTAN: If I may --

JUSTICE SCALIA: You apply the same rule there.

MR. McCARTAN: I'm sorry, Your Honor. Is that -- was that an observation or a question?

JUSTICE SCALIA: Yes, well, your -- your point that -- that there -- there has to be a

difference between whether there's a constitutional violation or not in this context seems to me not well taken because we don't make that distinction in the context of giving absolute immunity to the prosecutor. We don't say he doesn't have absolute immunity when -- when he's been guilty of a constitutional violation.

MR. McCARTAN: But as Justice Souter brought -- questioned whether the prosecution was procured for unconstitutional reasons, the immunity of the prosecutor has nothing to do with the reasons for which the prosecution is brought. It only protects him from civil damage liability. The investigators themselves have no such immunity. It is qualified.

JUSTICE KENNEDY: No, no. But the point remains that if in the prosecutorial context that the immunity exists whether or not there's a constitutional violation, then that teaches us that the same rule should apply to this case. That was Justice Scalia's --

MR. McCARTAN: No. I think that is the difference, Your Honor, between absolute and qualified immunity. The Court has given absolute immunity only to those functions that are so intimately associated with the judicial process, that they have to give immunity to those people, otherwise there would be an

unjust interference with --

JUSTICE STEVENS: May I ask this question? Maybe I should ask Mr. Kneedler. But am I correct in assuming that even if you should lose on the issue that we're faced with today, the case would, nevertheless, go forward because you would still seek to prove an absence of probable cause?

MR. McCARTAN: Well, certainly that would be a question for the jury, Your Honor, absence of probable cause.

JUSTICE STEVENS: Yes, but the case wouldn't be over if you lose here.

MR. McCARTAN: Well, it depends on what ground we would lose here. If the Court went on to decide the sufficiency of the allegations in a Bivens-type case, which I don't think it should and which the Court declined the invitation to do so in Harlow, then we would not lose. If you did --

JUSTICE SCALIA: I wouldn't worry a lot about that, Mr. --

MR. McCARTAN: All right.

May I say one word about the tort of malicious prosecution, which I say is not a proper analog for the analysis of cases of this kind?

The interests that are protected by the First

Amendment are far different from those that are remedied by the tort of malicious prosecution, and the injury to which is of far greater magnitude than what the common law sought to address by the tort of malicious prosecution. The tort of a malicious prosecution tells us nothing about the interests protected by the First Amendment. It remedies different interests. It is not a proper analog and, therefore, shouldn't be involved in definition of what the First Amendment rights may be.

If you look at those cases where the Court has referenced the common law in determining how constitutional rights should be remedied, they have been situations where the interests protected at common law are identical to those that are protected by the particular constitutional provision that is involved. A good example is Wilson against Arkansas, Fourth Amendment situation, the question of whether the knock-and-announce principle of common law should be incorporated into the reasonableness determination of the Fourth Amendment. The interest protected by the common law in that situation against unreasonable searches and seizures was identical to the interest protected by the Fourth Amendment. For that reason, the Court said that should be taken into consideration

in determining the reasonableness of the action under the Fourth Amendment.

JUSTICE BREYER: I'd like to ask you one other question. Suppose you win on this on the grounds we've been discussing. What happens in the middle of the trial when a defendant wants to say the same thing? Can he avoid conviction by showing the same thing?

MR. McCARTAN: I'm sorry, Your Honor.

JUSTICE BREYER: What happens when the same claim is made in the middle of a trial that I -- whether I'm guilty or innocent? I haven't been convicted yet, and I want to show that this prosecution wouldn't have been brought in the absence of the retaliatory motive. Can he make that claim in the middle of trial or not?

MR. McCARTAN: Well, if he were foolish enough to make such a claim --

JUSTICE BREYER: Well, no, he believes it.

MR. McCARTAN: I can't believe that a defendant in a criminal prosecution who is acquitted in a subsequent civil suit --

JUSTICE BREYER: No, no. He's not acquitted.

MR. McCARTAN: Oh, I'm sorry, Your Honor. You say he's not acquitted.

JUSTICE BREYER: He's in the middle of trial

and he wants to say --

MR. McCARTAN: Well, I don't think he'd be in the middle of trial under Heck against Humphrey.

JUSTICE SOUTER: It's the criminal trial.

JUSTICE BREYER: It's a criminal trial.

JUSTICE SOUTER: The original criminal trial.

JUSTICE BREYER: He's in a criminal trial, and what he wants --

MR. McCARTAN: This is not a civil action for damages.

JUSTICE BREYER: No.

MR. McCARTAN: This is a criminal case.

JUSTICE BREYER: They read our opinion which holds in your favor. Then the next thing is in -- in the criminal cases the defense lawyers say, hey, I -- I think my client wouldn't be here today were it not that the FBI had a retaliatory motive.

MR. McCARTAN: That would not suffice.

JUSTICE BREYER: Because?

MR. McCARTAN: And that was the whole purpose of Harlow, mere --

JUSTICE BREYER: No, no, no. They're going to show exactly the elements that we write in our opinion.

MR. McCARTAN: If the -- if the defendant in

that case had established evidence tending to show the essential elements of the claim, it would present a question for the court, but I think the court would use the admission against interest as a basis for paying no attention to such --

JUSTICE STEVENS: Thank you very much, Mr. McCartan.

Mr. Kneedler, you have 3 minutes left.

REBUTTAL ARGUMENT OF EDWIN S. KNEEDLER

ON BEHALF OF THE PETITIONERS

MR. KNEEDLER: Thank you, Justice Stevens.

I'd like to respond to Justice Breyer's suggestion that this could all be solved by an application of the Harlow qualified immunity standard. With all respect, I don't think that that would really work at all because if -- if the point is that it would be unconstitutional to bring a prosecution only because of protected First Amendment activity, that could be taken as a given and still be enormous inquiry into what actually happened between the investigator and the prosecutor, what the real motivation was, what the prosecution's policies were. That is the concern we have for the post hoc inquiry into the process.

And not only that, it isn't just the discovery. It's what -- what consequences this will

have on law enforcement generally if police officers operate under the assumption that if the prosecution fails, they will be subject to civil liability, which is exactly what Blackstone said, as this Court quoted in Dinsman v. Wilkes.

The reason for the rule is that it would be a very great discouragement to public justice if prosecutors, who have a tolerable ground of suspicion, were liable to be sued at law whenever their indictments miscarried.

JUSTICE GINSBURG: But we're not talking about prosecutors there --

MR. KNEEDLER: No, but -- but that included complaining witnesses. That -- that was what prosecutor meant at common -- at common law. And there's no reason to grope for some sort of screen because the common law furnishes it. The tort of malicious prosecution is what this Court relied upon in Heck v. Humphrey for the favorable termination rule, that you could not bring a 1983 suit unless the conviction had been set aside and the proceeding was terminated in favor of the plaintiff.

That same tort, that tort of malicious prosecution, contains the probable cause requirement to guard against an objective screen, to guard against the

very thing that Blackstone was worried about and that this Court noticed in -- in the Dinsman case. And that is, that it is important not to have law enforcement officers be chilled from the important function of furnishing information to prosecutors.

And this Court's decision in Armstrong imposed an important objective test that you have to show that there's somebody similarly situated before you even inquire into prosecutorial motives. You have to show an objective factor that someone else was similarly situated. Respondent's position would offer no such -- no such protection.

JUSTICE GINSBURG: How about the judge granting a motion to quit at the close of the Government's evidence? Why isn't that objective?

MR. KNEEDLER: Because at -- at common law -- and I think this was an important insight. At common law, it was not even evidence of the absence of probable cause because a judgment of acquittal turns on the determination that a factfinder -- a reasonable fact finder could not find beyond a reasonable doubt that the defendant had actually committed the crime. Probable cause is a very different standard, which is whether it would lead a reasonable, cautious, prudent person to believe that a crime had been committed.

That is the --

JUSTICE GINSBURG: I wasn't --

MR. KNEEDLER: An acquittal does not --

JUSTICE GINSBURG: Your opponent says -- says there is no probable cause requirement. You are now on there's no objective test. It's all subjective. I suggest that there could be an objective test. This is not going to the probable cause question. Objective test? Was this case thrown out at the close of the Government's evidence?

MR. KNEEDLER: But -- but my -- my point was at common law, that the wisdom of the courts was that -- that that wasn't even evidence of a -- that should -- that -- that shouldn't allow the suit to go forward because it was a sufficient guard -- protection for the prosecutors.

JUSTICE STEVENS: Thank you, Mr. Kneedler.

The case is submitted.

(Whereupon, at 12:19 p.m., the case in the above-entitled matter was submitted.)