

Memorandum



Subject Forsyth v. Kleindienst No. 82-1812 (3d Cir., March 8, 1984)	Date June 12, 1984
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To The Solicitor General From Samuel A. Alito

TIME LIMIT

Without an extension, the time to petition for a writ of certiorari will expire on July 2, 1984.

RECOMMENDATIONS

The Civil Division recommends certiorari. Former Attorney General Mitchell, the affected individual client, joins that request.

I recommend certiorari solely on the question whether the rejection of a qualified immunity claim is appealable under the collateral order rule.

A. PROCEDURAL HISTORY

In 1970, the FBI received information concerning a conspiracy to destroy underground utility tunnels in Washington and to kidnap then National Security Advisor Henry Kissinger. Attorney General Mitchell authorized a warrantless domestic national security wiretap to gather information about the plot. Nearly two years later, the Supreme Court held for the first time in United States v. United States District Court, 407 U.S. 296 (1972), that such wiretaps are unconstitutional.

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Forsyth, whose conversations were overheard during the wiretap, brought suit in the United States District Court for the Eastern District of Pennsylvania against Attorney General Mitchell, two FBI agents, and other defendants who have now been dismissed. Forsyth claimed that the surveillance violated federal wiretapping laws (18 U.S.C. 2510-2520) and the First, Fourth, and Ninth Amendments. The district court (Hon. Raymond J. Brockerick) denied Mr. Mitchell's and the agents' summary judgment motions and rejected their claims of absolute and qualified immunity. Forsyth v. Kleindienst, 447 F. Supp. 192 (E.D. Pa. 1978)

On appeal from the denial of the summary judgment motions in this and a related case, the court of appeals held that it had jurisdiction over the absolute immunity claim under the collateral order rule but lacked jurisdiction with respect to the qualified immunity claim. Forsyth v. Kleindienst, 599 P.2d 1203, 1207-1209 (3d Cir. 1979). At that time, qualified immunity turned on the defendant's good faith -- an issue ill-suited for resolution by summary judgment -- and the court of appeals wrote (id. 1209) that the defendants did not "seriously contend" that the denial of their motions for summary judgment on that issue were appealable.

On the merits, the court held (id. at 1209-1216) that, under Butz v. Economou, 438 U.S. 478, 515 (1978), the Attorney General is not absolutely immune from personal damages liability for his official acts except when performing functions analogous to those of a prosecutor. The court remanded the cases to the district court for a determination whether, in authorizing the electronic surveillances, the Attorney General was exercising a prosecutorial function or was engaged in "a purely investigative or administrative function" (id. at 1217).

In December 1979, we petitioned for certiorari in Kissinger v. Halperin, 452 U.S. 713 (1981) (affirming court of appeals by vote of four to four), a suit against President Nixon, Mr. Kissinger, Mr. Mitchell, and others based upon the warrantless wiretapping of an NSC employee in an effort to find the person responsible for leaking classified information. Kissinger involved the questions subsequently decided by the Court in Nixon v. Fitzgerald, 457 U.S. 731 (1982), and Harlow v. Fitzgerald, 457 U.S. 800 (1982). We argued, among other things, that the President is absolutely immune from suit for civil damages for his official decisions; that his close aides enjoy a

derivative absolute immunity; that Mr. Kissinger and Mr. Mitchell were independently entitled to absolute immunity by virtue of their positions; and that all of the defendants were entitled to qualified immunity as a matter of law because the illegality of domestic national security wiretaps was not clearly established at the time in question.

We filed a protective petition in the present case (No. 79-1120) and a related case (Mitchell v. Zweibon, No. 79-881, 79-883). Both of these petitions raised the question of the Attorney General's absolute immunity. See particularly our Supplemental Memo in Zweibon.

With Justice Rehnquist recusing himself, the court of appeals' decision in Kissinger was affirmed by an equally divided Court (452 U.S. 713) and the petitions in this case and Zweibon were denied (453 U.S. 912, 911 (1981)). Our rehearing petitions were also denied (453 U.S. 928 (1981)).

This case then went back to the district court under the terms of the court of appeals' remand. The district court found that the wiretap had been conducted for an investigatory, rather than a quasi-judicial purpose, and that Mr. Mitchell was thus not entitled to absolute immunity. Forsyth v. Kleindienst, 551 F. Supp. 1247, 1252-1253 (E.D. Pa. 1982). Purporting to apply Harlow's new standard for qualified immunity, the court also held that Mr. Mitchell was not entitled to qualified immunity because the illegality of the wiretap was clearly established. With liability conceded, the court set the case for trial on the issue of damages.

We again appealed. A divided panel of the court of appeals (Weis, Higginbotham, Sloviter) entertained our absolute immunity claim but found nothing in Nixon or Harlow that required modification of its prior holding on this issue. The majority also again held that the denial of the qualified immunity claims was not appealable. Judge Weis, in dissent, concluded that the qualified immunity claim was properly before the court and that the defendants were entitled to qualified immunity as a matter of law.

Our rehearing petition was denied.

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## B. ISSUES

Civil Suggests that we petition for certiorari and raise the following two issues:

1. Whether the denial of a Bivens defendant's claim of qualified immunity is appealable under the collateral order doctrine.

2. Whether the Attorney General is absolutely immune from suit for damages based upon the exercise of his authority in the field of national security.

## C. DISCUSSION

1. Appealability. As Civil's memo notes (at 7), we have been arguing in the lower courts that the collateral order doctrine permits an appeal from an order rejecting a claim of qualified immunity under the new Harlow standard. The District of Columbia and Eighth Circuits have accepted our argument. McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982); Evans v. Dillahunty, 711 F.2d 828 (8th Cir. 1983). The Third Circuit rejected it in this case. And the Fourth Circuit, in a case involving state officials and in which we participated as amicus, held that the rejection of such a claim is not appealable where there are overlapping claims for injunctive relief that would require trial in any event. Bever v. Gilbertson, 724 F.2d 1083 (4th Cir. 1984). Rehearing in Bever was denied by an equally divided court, and we have been informed that a cert petition will be filed.

I think we have a reasonably strong argument on this issue. To come within the collateral order rule, "the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (footnote omitted). See also Fianagan v. United States, No. 82-374 (Feb. 21, 1984), slip op. 6. Here, the claim that there was no violation of "clearly established" law was conclusively rejected. That claim, although not "completely separate" from the issue of liability, is nevertheless significantly different. More important, it is fully capable of resolution on motion for summary judgment and without trial. Finally, if an interlocutory appeal is not allowed, the

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defendant's right to be free from trial on insubstantial claims will be irretrievably lost. The court below did not meet these arguments but instead pleaded that entertaining such appeals would add to already overcrowded appellate dockets. See slip op. 14-15.

This is also an issue of considerable importance to our defense of Bivens suits. District courts often misapply Harlow. Unless we can appeal their rulings, many meritless Bivens suits will have to go to trial.

As noted, the circuits are divided on this question. While there is some cause to hope that the Fourth Circuit might change its position or limit Bever to cases in which there are overlapping claims for damages and injunctive relief, the Third Circuit appears wedded to its position. Thus, resolution by the Supreme Court will probably be necessary.

Two aspects of this case make it less than the ideal vehicle for raising this issue. First, Justice Rehnquist will probably not participate, thereby depriving us of a potential vote. However, by urging that the Bever petition be granted as well, we can attempt to avoid another 4-4 tie. Second, the plaintiff has suggested that he may drop his claim for punitive damages. That would obviate any need for a protracted and inconvenient trial. Since we are seeking the right to take an interlocutory appeal precisely because we wish to avoid needless trials, elimination of the threat of trial would deprive our argument of some of its force. I trust, however, that the Court will be able to see beyond the peculiarities of this case.

In sum, I recommend petitioning on this issue. If we win, the case will go back to the court of appeals for a decision on the merits of the qualified immunity issue. To my mind, Judge Weis's dissent persuasively shows that we should win on this issue. We have already won in the D.C. Circuit on the same issue. Sinclair v. Kleindienst, 645 F.2d 1080, 1083-1085 (D.C. Cir. 1981) (Lumbard, Mikva, Ginsburg).

2. Absolute immunity. As Civil's memo points out (at 3), dictum in Harlow (457 U.S. at 812) supports our argument on this point. I do not question that the Attorney General should have this immunity, but for tactical reasons I would not raise the issue here.

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I start from the premise that absolute immunity arguments are difficult to advance successfully. This is illustrated by Harlow, 457 U.S. at 808-813 (no blanket absolute immunity for presidential aides); Scheuer v. Rhodes, 416 U.S. 232 (1974) (no absolute immunity for governor); and indirectly by Pulliam v. Allen, No. 82-1432 (May 14, 1984) (state judge not immune from award of attorney's fees). Harlow's modification of the standard for qualified immunity probably made this task even harder, because we now must argue that the official should be immune for violating clearly established legal standards. In view of the high risk of failure, there is a need to choose our cases in this area with particular care.

In my judgment, this is not the case to choose. First, the Civil Division has not shown that the government has any urgent need for this issue to be resolved. The scope of the immunity proposed is quite narrow. Within that range, wiretapping has probably been the most productive source of damages litigation in the past, but the Foreign Intelligence Surveillance Act of 1978, 18 U.S.C. 2511, 2518, 2519; 50 U.S.C. 1801-1811, clarified the procedures in this area and probably reduced in large measure the potential for future litigation. The Civil Division has not shown that the Attorney General's other actions in the field of national security create a significant potential for litigation; nor has Civil shown why qualified immunity under Harlow will not serve our practical interests. If litigation arises in the future and if qualified immunity proves unworkable, we can press our absolute immunity argument at that time. The government's interests do not appear to demand that the issue be advanced now.

There are also strong reasons to believe that our chances of success will be greater in future cases. In this case, we will not have either Justice Rehnquist's vote or his participation at argument or in conference -- a handicap we can ill afford in this difficult area. In addition, our chances of persuading the Court to accept an absolute immunity argument would probably be improved in a case involving a less controversial official and a less controversial era.

It does not appear that this litigation strategy will harm Mr. Mitchell's individual interests either. As previously noted, we have a good chance of winning on the issue of qualified immunity. And the absolute immunity argument can always be raised after final judgment.

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There would appear to be two scenarios in which the failure to raise the absolute immunity claim at this time might conceivably harm Mr. Mitchell's interests. The first requires us to assume that if both of the issues proposed by Civil were raised, the Court would deny review or hold against us on the question of appealability, while holding in our favor on the question of absolute immunity. That seems such an unlikely combination of holdings that it can safely be discounted.

The second situation would arise if (a) the Supreme Court held in our favor on the question of appealability; (b) the court of appeals, on remand, held against us on the merits of the qualified immunity claim; and (c) the court of appeals' holding, which would conflict with that of the D.C. Circuit, either was not reviewed by the Supreme Court or was affirmed. In that situation, it might be necessary to await final judgment before seeking Supreme Court review of the absolute immunity issue; and if the plaintiff pressed his claim for punitive damages, a trial on the issue of Mr. Mitchell's good faith might be required. This scenario seems far too speculative to justify raising the absolute immunity argument now. The harm to the government's broader interests that would result far outweighs this speculative danger to our client. \*/ In any event, if our client disagrees, we can probably obtain an extension of the time to petition for certiorari until August 31. That should give private counsel, working from our lower court papers, ample time to prepare a petition.

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\*/ Finally, the Civil Division memo suggests that we should raise the absolute immunity argument here so that we will not have to raise it again in Halperin v. Kissinger. In that case, we won in district court on the issue of qualified immunity, and the other side has appealed. Thus, the likelihood that we will have to rely on absolute immunity there is even more speculative than it is here.