ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-335

TITLE JOHN N. MITCHELL, Petitioner V. KEITH FORSYTH

PLACE Washington, D. C.

DATE February 27, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN N. MITCHELL, :

Petitioner, :

V. : No. 84-335

KEITH FORSYTH :

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Washington, D.C.

Wednesday, February 27, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:56 o'clock p.m.

APPEARANCES:

PAUL M. BATOR, ESQ., Special Assistant to the Attorney General, Department of Justice, Washington, D.C.; on behalf of the petitioner.

DAVID RUDOVSKY, ESQ., Philadelphia, Pennsylvania; on behalf of the respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Mitchell against Forsyth.

Mr. Bator.

ORAL ARGUMENT OF PAUL M. BATOR, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BATOR: Mr. Chief Justice, and may it please the Court, in this case the Solicitor General represents former Attorney General John N. Mitchell in a lawsuit that was filed 13 years ago, in 1972.

During these 13 years the court system has been struggling to solve the question whether Mr. Mitchell should personally pay damages to the plaintiff because in 1970 he as Attorney General authorized a telephone tap on the phone of one Davidon.

This was in December, 1970, and this telephone tap lead to the overhearing of three conversations to which the plaintiff was a party.

QUESTION: Were those conversations the target at their inception?

MR. BATOR: Not specifically. Davidon was the target of the tap, Your Honor. Davidon was tapped because the FBI had information that there was an organization called ECCSL, of which Davidon was a member, which was planning to blow up the utility

tunnels under the Federal Triangle here in Washington, D.C.

There was also FBI information that ECCL members, including Davidon, had discussed the possibility of kidnapping Dr. Henry Kissinger, who was then Assistant to the President for National Security Affairs.

The District Court made an elaborate inquiry into the purpose of these taps, and explicitly found that they were installed in order to protect the national security by obtaining information and preventing these bombing and kidnapping activities.

And I refer the Court to the District Court opinion at 56 to 60 of the Appendix to our Petition, where the District Court makes it clear that the purpose was prevention, not prosecution.

Now, at the time these wiretaps were authorized, this Court's Keith case, which for the first time held that a warrant had to be obtained for wiretaps involving domestic national security concerns, that case had not yet been decided. The Keith case, in which the Court itself stated that it was deciding a question of first impression, came down in '72, a year and a half after these wiretaps were placed and removed.

These wiretaps were placed on the basis of a

legal position that had been maintained in an unbroken tradition by every Attorney General and every President for over 25 years.

QUESTION: Does it not go back even more than that?

MR. BATOR: My research, Your Honor, shows simply that it was -- there are things in this record that indicate in 25 years --

QUESTION: One case, I thought, in either this Court or the Court of Appeals referred to a memorandum from Franklin Roosevelt to the Attorney General Jackson.

MR. BATOR: That may very well be, Your Honor. In the packet that we have, the first thing we have is from Attorney General Brownell. The position was, the substance of the position was that the President did have constitutional authority without a judicial warrant to order electronic surveillances where he was acting to protect the national security against threats of domestic violence and terrorism.

At the time the Davidon tap was installed, that position had never been rejected in any federal court, and had recently been upheld in two Federal District Courts. Now, of course that position was rejected by this Court in Keith, and this case is really

one of a number of cases in which the Courts have been struggling with the question of what to do about pre-Keith taps, how do we untangle the question of what to do about these surveillances, that took place without a judicial warrant at a time when the legal situation was subject to fundamental uncertainty.

QUESTION: Well, Mr. Bator, even if you are 100 percent correct on the qualified immunity question, what about the review of that at this stage, the appealability question, which seems to me to be a tougher question than the one on the merits?

MR. BATOR: Well, Your Honor, we agree, and I am happy to turn to it if you would like me to, although I do want to come back and say perhaps a word or two about the merits of the qualified immunity issue.

The appealability issue arises because the Court of Appeals held that a District Judge's rejection of a defendant's claim of qualified immunity does not at that point become appealable. The defendant has to wait until the case goes to final judgment, that means usually after trial and after -- after discovery and after trial, before he appeals.

The Courts of Appeals are simply divided three to three on this issue, and that is why we are here, and I have four, I think, simple points to make about

appealability, Justice O'Connor. The first one is about this Court's cases.

This Court's cases on appealability are not easily organized into a tidy scheme, but the cases do convey one central unifying theme, and that is that if postponing appeal until the end of the case would in some serious way undermine or subvert the policies of the very rule whose correct application is in question, then the considerations are very strongly in favor of immediate appeal if certain technical requirements, if the Court of Appeals is in a position effectively and definitively to decide the question at this point.

That, we think, is the thrust of Abney and Helstoski, United States v. Nixon, Nixon v. Fitzgerald. If a District Court rules, rejects a defense whose purpose is to give a threshold immunity to the burdens of discovery at trial, then appeal should be permitted.

QUESTION: Well, was there some factual dispute here about whether the wiretap was motivated by national security concerns, so is it enmeshed in the merits, and so forth?

MR. BATOR: Your Honor, we do not think that there was really any relevant factual dispute at all. In fact, the District Court here ruled that qualified immunity may not be had as a matter of law. The

District Court had no problem in ruling with this question as a matter of law, and we think it can be easily ruled on now as a matter of law.

The record shows, without any problems, with multiple support, and the District Court found that the purpose of the wiretap was to find out about and prevent these threats to the national security. There is ample, ample basis on this record to do exactly what the Court in Harlow said the courts ought to try to do with these cases, which is to take the objective facts and determine whether on the basis of the objective facts there was or was not a violation of a clearly established constitutional rule.

Now, the respondent says, no, you can't do that here and you can't do it anywhere, because these qualified immunity rulings are always mixed up and complicated issues of fact and purpose and motive, but we think that that is just another way of saying that this Court, when it tried in Harlow to create an objective test that could be determined on the basis of a threshold inquiry as a quick, if you will, a quick cure on the issue, in order to serve the very purposes of the rule, the Court said, we will try to structure the inquiry so we can have a definitive objective ruling.

And what the respondent is really saying here is that this Court simply won't be allowed to do or simply didn't know what it was about when it was doing that. That is to say that that is not possible.

We think it is totally unproblematical for an appellate court to do exactly what the District Court does at that point, which is to decide as a matter of law is the defendant entitled to qualified immunity, and we think that this quick appeal is absolutely crucial to achieving the purposes of Harlow.

What was the point of Harlow?

QUESTION: May I ask, Mr. Bator, are you going to argue the question whether 2520 limits the defense so that --

MR. BATOR: I hadn't planned to, Your Honor, and I am not really prepared, 2520 being --

QUESTION: That's the one that --

MR. BATOR: -- the Title 3.

QUESTION: Yes, the only defense to the officials is those set forth in 2520?

MR. BATOR: Your Honor, our position on that is that 2520 doesn't limit because Title 3 is basically inapplicable to this entire situation. That is, 2520 only is in play if the plaintiff has a good cause of action under Title 3.

QUESTION: Well, if he did have a good cause of action under Title 3, would 2520 limit the --

MR. BATOR: Then it may be that 2520 might limit, although we haven't briefed that issue, Your Honor, and it might be that the clearly established rule might still operate.

QUESTION: You haven't briefed it very fully. You have just brushed it aside. I wonder if we can do that.

QUESTION: But you say Title 3 isn't involved at all because of Keith?

MR. BATOR: Our position is that Title 3 is totally inapplicable --

QUESTION: Because of Keith?

MR. BATOR: -- and this Court made that absolutey clear in Keith, so the Court doesn't really need to reach the question of what would be the situation with respect to immunity.

QUESTION: Over dissent.

MR. BATOR: I beg your pardon?

QUESTION: Over dissent.

QUESTION: Over dissent.

MR. BATOR: Your Honor, our submission on the appealability question is --

QUESTION: Let me ask you one other question,

because I have been puzzled by the extent to which Title 3 is relevant. Is it clear that the only liability that the District Court was talking about was liability under a Bivens type claim?

MR. BATOR: I believe so, Your Honor.

QUESTION: And everybody agrees with that?

MR. BATOR: I believe so.

QUESTION: There are some traces in your opponent's brief that I didn't read that way.

MR. BATOR: We don't understand that the case really --

QUESTION: That there is any Title 3 issue at all.

MR. BATOR: I don't believe so, Your Honor, and of course it is on the Bivens issue where the issue of qualified immunity and its appealability arises, so we believe that really is the only issue on which we are here, as far as our petition for certiorari goes.

I want to return to appealability and its connection with the purpose of the Harlow rule, because that really is our central submission to this Court.

The purpose of Harlow was to provide a definitive pretrial adjudication, and what all of this Court's cases say is that if the purpose of a rule is to prevent a defendant from having to undergo the burdens

of discovery and trial, as in the case of qualified immunity, that that should be resolved as quickly as possible at --

QUESTION: Doesn't that argument prove too much? Doesn't every motion to dismiss or motion for summary judgment have that very purpose?

MR. BATOR: Well, we think there is a critical distinction. That is to say, it is the case that there are a lot of defenses which have as a point the purpose of ending -- preventing an unmeritorious trial, and we do agree that if that is the only claim that could be made, that is, appeal now in order to prevent the defendant from having to go through an unmeritorious trial, that would be the case with the statute of limitations defense or a res judicata defense.

But we think there is a critical distinction. The qualified immunity doctrine has an additional element. Qualified immunity treats -- allows defendants to evade the burdens of discovery at trial not simply as a matter of fairness to the individual defendant. There is a matter of general public policy here.

That is to create a general rule, a general regime in which officials at the time they are making decisions are not unduly chilled and constrained in decisionmaking by the prospect of burdensome litigation,

unmeritorious litigation, and possible ruinous personal recovery.

Now, as the justification for expedited appeal in the context of qualified immunity is that if appeal is postponed this general public policy will be eroded and compromised. Now, that claim cannot be made about defenses such as 12(b)(6) or statute of limitations or res judicata.

QUESTION: It could be made for a lot of statute of limitations defenses. A lot of times you like to plan things without worrying about contingent liability.

MR. BATOR: I think, Your Honor, that the sort of the central, central theme of distinction is that it is not enough for a defendant to say I want to come up now, because otherwise I will have to go through a trial, and yet I have a good defense. I shouldn't have to do it.

QUESTION: It is more like double jeopardy.

MR. BATOR: It is more like double jeopardy. It is more like legislative immunity.

QUESTION: Is it not equally true of the absolute immunity, for example, that the judiciary has --

MR. BATOR: It is like --

QUESTION: -- that they are to be relieved of

the expense and the annoyance and distress of defending a lawsuit so that they can carry on their judicial duties?

MR. BATOR: That is to say the central theme here is, what is the effect of the system of appeal on the underlying policy of the rule. The Harlow rule with the absolute immunity rule with the double jeopardy rule has the special public purpose.

QUESTION: Do you just make this argument when there are no disputes on the facts? You can have, I suppose, disputed fact questions on a qualified immunity case.

MR. BATOR: Your Honor, if I am going to be precise, I would make the argument not only where there are no disputes, but only insofar as there are no disputes. That is to say, even if there is a dispute about the fact, the District Court must rule whether the plaintiff's version of the facts, taking the plaintiff's complaint as true, whether the facts as stated in the plaintiff's complaint constitute a violation of a clearly established constitutional rule, so that even though the defendant disputes the facts, there is still the question whether even on the plaintiff's facts, qualified immunity does or does not obtain, and that would be available as an issue of law.

This is an absolutely conventional problem both for the District Court and the Court of Appeals of passing only on those issues which it is now entitled to pass on as a matter of law, but the whole point of Harlow was to make as many of these issues into issues of law as possible.

That was the whole point, because as the Court said in Davis and Scherer, and this is the central point, an official can be unburdened from the chilling effect of unmeritorious litigation only if the qualified immunity issue is, and I think I am quoting the Court's language, is quickly settled.

Now, we think expedited appeal is an adjunct to the policy of Harlow in getting a quick settlement of the issue of qualified immunity, and we are not saying that every qualified immunity issue should be settled on appeal, because there will be case where it depends entirely on what the defendant did, but the Court is conventionally used to separating out the question of whether as a matter of law just on the plaintiff's complaint or on the undisputed facts the defendant is or is not entitled.

Now, I would like to just supplement what I also said to the Chief Justice. It isn't just the immunity cases that present this central theme. The

state court cases that come up to this Court under 1257, Potts and Tornelo and Curry and Landau, they also share this common theme. There we have various constitutional defenses that are rejected by the state court.

The state litigation is not over, but the court always says, if the point of the constitutional defense is to prevent the defendant from being hauled into the state court system, that is a very strong argument in favor of expedited appeal, and what the court said in Cox was exactly. This is a case where if the constitutional defense has merit, there shouldn't be a trial at all.

Now, where that is the strong public policy, we think that expedited appeal simply is an adjunct to that public policy, and that is why there should be expedited appeal.

I think that this case presents a vivid example of why if qualified immunity is going to work, expedited appeal really is a necessary adjunct. Here is a case where one would think that qualified immunity ought to be an overwhelmingly accepted proposition.

I mean, here is a case where Attorney General Mitchell acted on a question that the Court had explicitly reserved in the Katz case, a question as to which members of this Court had expressed disagreement

individually. Justice White, Justice Douglas had written about it.

The lower court authority was overwhelmingly in favor of the government position. Twenty-five years of executive practice, the position was controversial. Now, out of this picture, to concoct a so-called clearly established constitutional right, we submit, is to make the Harlow rule a joke. If this is a clearly established constitutional rule, we think that the Harlow rule becomes an empty shell, simply an invitation retroactively to sort of invent clearly established rights out of bits and pieces of what is in fact very controversial and uncertain law.

Now, if it is the cosequence of really such a patently unsupportable ruling that then the defendant has to go through the whole affair of a very burdensome process of discovery and trial, then it seems to me Harlow becomes a very, very attenuated rule in its purpose.

We would also like on behalf of the government, Your Honors, to urge the Court if it finds that this issue is an appealable issue, that it should turn to the qualified immunity issue and decide it for itself and not remand it to get the Third Circuit's --

QUESTION: Mr. Bator, does the speech and

debate clause procedure have anything to do with this?

MR. BATOR: Well, Your Honor, this Court in one of its precedents -- it does not explicitly have anything to do with this case, but one of this Court's precedents, the Helstoski case, holds that there should be an immediate appeal if a speech and debate clause defense is rejected.

Your Honor, we think that the materials are at hand for a resolution of the qualified immunity issue in this Court now. We don't think that it is an easy question. We don't think a remand would serve much purpose.

Indeed, if there is a remand and the Third Circuit holds that there is no qualified immunity, that would produce a clear conflict between it and the Ninth and the D.C. Circuits, so the question would just come back up again.

We hope, therefore, that if the Court finds that the qualified immunity issue is properly here, that is, was properly on appeal, that it should decide it without a remand.

I want to say a quick word about the contention of the government that in any event Attorney General Mitchell should be shielded by absolute immunity in this case, and our submission on this case comes

really from this Court's own words in Harlow, where the Court said that aides entrusted with discretionary authority in such sensitive areas as national security or foreign policy, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest.

Very briefly, our submission is this. In this extremely sensitive and difficult area, a regime of qualified immunity, no matter how you tailor it, nevertheless still leaves open a wide degree of debilitating exposure to high government officials making discretionary determinations.

This is not a bush league affair. Every Attorney General since Bivens has been decided has been beleaguered and bedeviled by these actions. This is not a matter that is just Vietnam. This is not a matter that is just Watergate. Judge Barrow left office with dozens of damage actions against him personally. Attorney General Levy was here for a year and a half. He left with 33 lawsuits, of which at least a dozen totalled $1 million hanging over him in personal damage actions.

Now, that is a regime which we are not attacking generally. What we are saying is that if the government is faced with the question of dealing with

domestic violence, assassination, and terrorism, and that is no joke any longer either, that to put our Attorneys General under the constraint of this kind of litigation seems to us to exact too great a sacrifice from the country.

It is not our submission that the Attorney General should be above the law. It is simply that among the cluster of remedies available, the cost of the personal damage action exacts too high a cost.

QUESTION: Would that absolute immunity submission on the government's part encompass a violation of Title 3, do you suppose? Or are we still just talking about Bivens claims? Does your submission pertaining to absolute immunity go so far as to claim absolute immunity for a statutory violation?

MR. BATOR: Your Honor, our absolute immunity claim is generally with respect to preventive action in the national security field. Now, the wiretap situation is much more complicated, because in 1978 the Congress repealed the provision of Title 3 which this Court in Keith said took national security taps out of Title 3.

Now, that then subdivides into two branches. Foreign security wiretaps have a regime of their own now under the '78 Act. I think the government is faced with the situation that as it reads the statute, as a result

of that repeal a wiretap, a domestic national security wiretap that was placed today, after the '78 was passed, would come under Title 3.

QUESTION: And would need a warrant.

MR. BATOR: And you would need a warrant. That is because of the change in scene, but Congress made it perfectly plain in '78 that it was not dealing retroactively, so that the wiretap situation is really sui generis now, and there may be a very problemmatical gap in the whole situation, because Title 3 -- there may be very serious domestic national security cases where we can't satisfy Title 3 because there isn't probable cause, and there seems to be no basis.

QUESTION: Well, if there is a violation, I gather my brother Stevens is asking you would you urge absolute immunity?

MR. BATOR: In the case of --

QUESTION: Violations of Title --

MR. BATOR: Of Title 3?

QUESTION: Yes.

MR. BATOR: No, Your Honor. No, we absolutely concede Congress's power here to take the situation over and to determine what should be done about it.

I would like to reserve the rest of my time.

CHIEF JUSTICE BURGER: Very well.

Mr. Rudovsky.

ORAL ARGUMENT OF DAVID RUDOVSKY, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. RUDOVSKY: Mr. Chief Justice, and may it please the Court, I would like to address the appealability issue first. Before I do, I do want to correct one statement with respect to the question of whether this in fact, and it is a threshold question that has never been decided in this case, as to whether in fact this was a national security tap, and whether the District Court decided that it was.

At Page 59A of the record appendix to the petition for certiorari in the District Court opinion, the District Court made it clear that it was leaving open that question when it said, regardless of whether the Davidon wiretap was motivated by a legitimate national security concern or a good faith belief that there existed a national security concern as the defendants contend, or was an invasion of the privacy of political dissidence conducted under the guise of national security is a question we don't have to reach. The District Court merely assumed that it may have been a national security tap to reach the issue of qualified immunity, since that was a threshold issue.

In other words, there has been no

determination in this litigation that this was even --

QUESTION: Well, that may be so. That just goes, however, to what we would do if we happened to agree with the government.

MR. RUDOVSKY: That's correct. The matter would have to be remanded for that determination.

QUESTION: It just goes to whether we would decide it here or remand. It hasn't got anything to do with appealability.

MR. RUDOVSKY: That's correct, and it also leads to the question of where there is a Title 3 claim, which I will get to later on in the argument. We think there is because of that reason.

With respect to appealability --

QUESTION: Before you leave the Title 3, you say this is a Title 3 case?

MR. RUDOVSKY: Yes, there is, Your Honor, if in fact we are correct in asserting that there was no legitimate national security predicate for this tap. In fact, I don't think the government disputes that contention. That is to say, if this was a normal criminal investigation, and the tap was used to discover criminal activity and there was no legitimate national security concern, then you have a violation of Title 3, which was --

QUESTION: And Keith is irrelevant.

MR. RUDOVSKY: Keith is irrelevant, there is a damage remedy, and there is no qualified immunity or absolute immunity available under 2520. That is an important issue in this case.

QUESTION: But I am still puzzled, because I was under the impression that the District Court had entered a judgment finding a dollar of nominal damages.

MR. RUDOVSKY: No, sir.

QUESTION: Was I wrong?

MR. RUDOVSKY: This matter was appealed before the District Court could enter damages in this case. Indeed, there are no further proceedings to go to in the District Court. Let me address that matter, because it relates directly to appealability.

The government's theory for appealability is to protect a defendant from the rigors of trial, from the distraction of trial, from the expenses of trial. In this case, as in many cases in which a qualified immunity defense is denied on purely legal grounds, that is, there is no factual dispute, summary judgment will also be entered for the plaintiff, because there is no question but that there was a constitutional right violated. The only question is, was the right clearly established.

Here, liability is clearly in favor of the plaintiff, as the District Court held, once the qualified immunity defense is rejected. If that is true as in this case, there are no further proceedings in the District Court except a legal determination as to the amount of damages to be imposed.

That is the rationale for the rule of absolute and qualified immunity so the government defendant does not have to face trail evapcrates in this case because the only proceedings left in the District Court was a legal assessment of damages. This case would have been over with one further legal argument, and then you would have had final judgment and all the issues could have gone up on appeal.

It is not only true in this case, but as I just stated, it will be true in a wide variety of qualified immunity cases. Once qualified immunity is denied for the defendant, even erroneously, summary judgment will probably be entered for the plaintiff.

Liability is over. There is no more trial. There is no more discovery. There are no more proceedings that the defendant is subjected to. So, the entire rationale for the rule evaporates, and there is no reason for an interlocutory appeal.

More fundamentally, the government's position

with respect to why this should be appealed on an interlocutory basis is twofold. Number One, they say that Harlow cautioned District Courts to terminate insubstantial suits at an early time. The government says that's one important factor.

And Number Two, they say, parsing out those cases in which there is a factual dispute, where there is only a legal issue involved, a District Court and an Appellate Court only has to apply settled legal objective standards in determining whether there is qualified immunity.

That, as Justice Stevens suggested in a question to the government, is exactly true for pretrial motions, dispositive motions filed by defendants in civil cases, motions to dismiss based on failure to state a claim, motions for lack of jurisdiction, statutes of limitations which also will terminate "insubstantial suits against government defendants."

That is, if the theory is that the government defendant is entitled to termination of a suit, of an insubstantial suit at an early stage, the rationale for allowing appeals from qualified immunity would have to be extended if principally done to virtually every pretrial motion that a government official can make, statute of limitations, motions to dismiss, improper

venue, and the like.

There is no principal distinction that you can draw between the reasons that those motions are filed to terminate insubstantial suits and the rationale behind qualified immunity.

Indeed, it is most anomalous to allow the government to appeal a qualified immunity denial when the issue clearly is substantial. Nobody contends that Mr. Forsythe's rights were not violated. They were violated. This is a substantial case in the sense that his Fourth Amendment rights were violated.

Compare that to a 12(b)(6) motion which may conern a totally frivolous claim. If the motion is made under 21(b)(6) and the District Court erroneously denies that motion, as insubstantial as that case may be, and as easy as it is to determine that it is insubstantial by applying objective legal standards, there is no appeal. The official, like every other civil litigant, would have to face trial.

Now, to be sure, a District Court can certify the issue, and there are other ways that the matter can go up, but the fact is that when you think about the reason behind allowing appeal, at least the reason the government suggests in this case, it would have to apply to virtually every pretrial issue, and would seriously

distort the basic structure, the basic accommodation of responsibilities between District Courts and the Court of Appeals on initial pretrial motions.

QUESTION: In what kinds of cases are you addressing that, all lawsuits or lawsuits where there is an immunity question lurking?

MR. RUDOVSKY: The government is suggesting that where there is an insubstantial claim against a government defendant, then in order to protect them from the insubstantial claim at trial, they ought to be allowed to appeal the qualified immunity claim pretrial, but that, I am suggesting to the Court, is exactly the same for virtually every other pretrial motion, including a motion to dismiss which this Court has clearly held for over 50 years.

QUESTION: Does the government -- at least I took it that the government's argument on that point was limited to cases where there is an immunity question.

MR. RUDOVSKY: But I am suggesting --

QUESTION: Not just to any lawsuit.

MR. RUDOVSKY: I am suggesting to the Court that there was no distinction between a qualified immunity decision by a District Court in that regard, if the theory is to get rid of insubstantial suits, and all the other issues I have mentioned. There is a dramatic

difference between the rationale behind absolute immunity, where you have allowed appeals, speech and debate, legislative absolute immunity, prosecutorial immunity, and qualified immunity.

This Court in Harlow, while cautioning against letting insubstantial claims go to trial, on the other hand made it very clear that where the claim is substantial, the claim must go to trial, so that if there is a substantial claim, it goes to trial.

By contrast, absolute immunity, no matter how substantial the claim, forecloses suit because of the status and the function of the particular defendant. You don't even look at the question of substantiality. It could be the most substantial suit in the world with respect to a violation of constitutional rights.

QUESTION: Translate that for me if you will, counsel, in a speech or debate clause in a hypothetical case where a Senator has made a speech on the floor of the House, so there is no question about it, and then suit is brought. Now, apply these principles to that.

MR. RUDOVSKY: Right. In that case clearly because there is absolute immunity, because of the function of the legislator in that act, no suit can be brought and no trial can be had even if the underlying action against that legislator would state a violation

of a constitutional right.

By contrast, qualified immunity is only a qualified protection, and this Court in Harlow made it clear that substantial suits should go to trial. It is not a question of the status or function solely of the defendant. It is a question of whether the law was clearly established.

Harlow provided government defendants with a substantial added protection. It put on the same footing qualified immunity as a pretrial issue as opposed to a trial issue, which it was before Harlow. By doing that, this Court surely did not intend that it should be distinguished from all other pretrial dispositive motions which have to await final judgment before they can be appealed.

Now, there is a serious question if you allowed appealability in this case of the number of appeals that you would soon face in this area. One of the criteria under Cone for allowing an interlocutory appeal is that it only create a small class of cases.

Well, it is now boilerplate language in virtually every answer to a complaint to a civil rights action, whether it be under Bivens or 1983 that the defendant is clothed with qualified immunity. The government seeks to avoid the impact that these cases

would have on the Courts of Appeals by suggesting, well, we are only saying that where there is only a legal issue as opposed to factual disputes, those cases should go up.

Well, we suggest that determination is not always very easy to make, that is, whether there is a factual dispute involved in the case. This case is one example, because there is a dispute about whether in fact there was a national security predicate.

If you look carefully at the Kenyata decision in the Fifth Circuit -- that was the case in which the Fifth Circuit ruled that these cases were not appealable -- in that case the Fifth Circuit not only ruled that the appeal should not be allowed on an interlocutory basis, but because a critical issue in that case was whether the defendants acted with racial animus was a Fourteenth Amendment claim, the Court of Appeals specifically said in its opinion unanimously there is a factual dispute which would bar an appeal even if we allowed appeals generally in these cases. The government --

QUESTION: Mr. Rudovsky --

MR. RUDOVSKY: Yes.

QUESTION: Does the record have anything in it that would really establish a dispute about the

purpose? What is in the record factually?

MR. RUDOVSKY: There is an enormous amount of information in the record with respect to the purpose. Let me point just to a couple of factors from our side which would create at least a factual dispute on that point.

Number One, it is clear that while this case was being investigated, and it eventually led to criminal indictment, a Justice attorney, a Department of Justice attorney who was in charge of the investigation suggested that there be a Title 3 tap installed, that is that the government go to a court and get a warrant.

When you look at the underlying papers that were sent by FBI Director Hoover to Attorney General Mitchell requesting the tap, what you find in a lot of those papers are questions about legitimate political activity.

Furthermore, and this is essential both to that point and to the question of Title 3, the question of whether there is a national security basis or not has to be measured against the language in Title 3 which requires at that point that the government was going to claim a national security predicate, that they show that there was a plot to overthrow the government or that there was a clear and present danger to the existence of

government.

Now, there is no possible evidence here of a plot to overthrow the government, and the government doesn't make that claim, nor is there any evidence of a clear and present danger to government because the government was well informed of everything the so-called conspirators were planning to do by an informant.

They knew that if anything was going to happen, it was not going to happen until six months after they got their information. They had the power of indictment to prevent any action, and in fact three months before any plans were supposed to come to fruition, Director Hoover, in testimony before Congress told the nation and it was over the front pages of all the newspapers that we have uncovered this supposed scheme to blow up underground heating tunnels and to kidnap Dr. Henry Kissinger.

In other words, there was under the statutory language, and this is the point of Justice White's concurrence in Keith, no evidence of a clear and present danger. All of that certainly creates at a minimum a factual dispute as to whether this was a legitimate national security tap or whether it was done under the guise of national security to further a criminal investigation or just obtain information about political

dissidents.

So, we suggest when you look at this record, and we have tried to spell it out in our brief in brief, there are substantial facts that make this a contested issue.

The government's claim -- I want to go back to the Kenyata matter, because there the government, after the Court of Appeals said clearly there is a factual dispute, the government then petitioned for rehearing. The Fifth Circuit has denied that petition for rehearing, and the government has now asked time to petition for certiorari.

Regardless of who is right in Kenyata, whether the government is right as to whether there is no factual dispute, or whether the Fifth Circuit is right as to whether there is a factual dispute, that demonstrates clearly that it is not very easy even after a full review of the record by a Court of Appeals to determine which issues are in dispute factually and which are not, and if this Court signals by allowing every qualified immunity claim to be appealed on an interlocutory basis to civil defendants in these case that they can delay trial, and this case has now been delayed six years because of interlocutory appeals, by merely filing an appeal from the denial of the claim and

then having the Court of Appeals review the entire record, hear briefs and arguments, you are going to create an enormous load on the Courts of Appeals.

The Third Circuit recognized that, the Fifth Circuit recognized that, and in a very important decision recently from the Seventh Circuit, Powers versus Leitner, which is cited in the government's reply brief that came down January 16th, that Court also explicates the reasons behind not allowing an interlocutory appeal in this area.

My final point as to why the Cone doctrine simply is not compatible with the claim for interlocutory --

QUESTION: Well, I suppose sooner or later the Court of Appeals is going to get the case anyway on the qualified immunity issue. If the plaintiffs win, these cases are going to be there anyway.

MR. RUDOVSKY: And in this case the plaintiff has already won. This case was about to go to a hearing on damages one month after decision. There would have been a short argument. Damages would have been assessed either in nominal damages or damages directly under the Constitution, and the case would have gone to the Court of Appeals, and indeed, if Harlow was in effect --

QUESTION: That may be so. I was just

responding to your saying that would be an unusual number of appeals on qualified immunity.

MR. RUDOVSKY: No, because a lot of cases beyond the qualified immunity decision may get settled. There may not be appeal at the end of that case. There are a lot of reasons that cases go eventually to trial, and defendants don't take appeals.

The fact is that some cases that would otherwise go to the Court of Appeals would not if you don't allow an interlocutory appeal.

QUESTION: I am still puzzled. I must be awfully thick. You say the case is all over except for damages, but don't you still have to get a finding on the national security issue to know whether you prevail on Title 3 or not?

MR. RUDOVSKY: We do only if we eventually lose our claim under the Constitution or Bivens. That is, the damage assessment would probably be the same whether it is under the Constitution or the Bivens claim or the statutory claim.

QUESTION: Where did I get -- maybe I just read something. Wasn't there something in the papers that said he did enter a judgment for a dollar nominal damages?

MR. RUDOVSKY: No, what there is in the record

is a stipulation submitted by the plaintiff that he did not suffer any pecuniary loss in this case. Our position on damages would be either Title 3 damages, which is $1,000 or $100 a day, and in this case it would be $1,000 because there are only three days of overhearings, or damages directly under the Constitution, the issue left open in Kerry verus Pipus, if a substantive constitutional protection is violated, whether we are entitled to an award of damages for the violation of a constitutional right itself.

The suggestion about nominal damages was that since there was only -- there is no pecuniary loss here, that is one option.

QUESTION: The thing that troubles me -- Justice Brennan adverted to it earlier. It seems to me that conceivably the analysis of the whole case might be different depending on whether it is a statutory case or a constitutional case, and we don't have a finding. You have told us, although your opponent said otherwise, you say there is no finding yet on the national security issue, so we don't know which it is.

MR. RUDOVSKY: To take it further -- that is correct. We don't know under Title 3 --

QUESTION: Well, if that's correct, why should a District Court -- why shouldn't a District Court be

obligated to decide the case under a statute before it even reaches the constitutional issue?

MR. RUDOVSKY: I have no disagreement with that, Justice White.

QUESTION: Well, in order to invoke the statute, you have to have a phony national security claim.

MR. RUDOVSKY: Well, the standard that you would apply is certainly questionable whether it is primary purpose or whether it has to be phony.

QUESTION: Well, all right.

MR. RUDOVSKY: But putting that aside --

QUESTION: You have to decide the national security issue.

MR. RUDOVSKY: Your Honor, we urged the District Court throughout this case to at least decide at the same time the Title 3 claim. It chose not to, perhaps because the Court in Keith reached the constitutional issue without addressing your concerns about the statute.

QUESTION: Why should appellate courts -- this goes to appealability, too, I suppose. Why should appellate courts be wrestling with qualified immunity issues in Bivens claims if there is a statutory possibility that there wouldn't be any Bivens immunity

issue at all?

MR. RUDOVSKY: I am not suggesting that you should. That is how this case came up. In fact, I pointed out in my opposing brief on certiorari and in my brief here that to find no national security predicate moots all these issues. It moots appealability, it moots absolute immunity, and it moots qualified immunity. It is a straightforward application. But the case is here at this point on those issues.

My final point on appealability is --

QUESTION: Well --

MR. RUDOVSKY: I'm sorry.

QUESTION: You say the case was over and you were about to have a trial on damages for a Bivens -- on a Bivens basis, right?

MR. RUDOVSKY: Yes, sir.

QUESTION: Well, I am not sure the case should even have gotten to that point until you decided whether there was a statutory issue.

MR. RUDOVSKY: It certainly, as this Court has cautioned District Courts to decide the statutory issue first --

QUESTION: Well, it cautioned lawyers, too.

MR. RUDOVSKY: Your Honor, we did urge both points before the District Court. We did not urge the

District Court just to decide the constitutional issue. We urged both the statutory claim and the constitutional issue. We certainly did not say avoid the statutory claim. That is a major claim we would have in this case.

My final point on appealability is a critical question under the Cone doctrine. Cone says you may not allow interlocutory appeals if the issue to be appealed is intertwined with the facts or the law of the case. That is, it has to be completely collateral to the merits of the case.

When you analyze a qualified immunity claim, it is easy to see that the issue on qualified immunity involves an analysis similar to the issue of whether a right was violated in the first place, that is, the merits of the claim.

You have to see what right is claimed by the plaintiff, what acts are alleged by the plaintiff that may result in a violation of that right, and then examine the history of that right in the courts to determine whether the law was clearly established.

If that is the analysis to be filed in determining a qualified immunity claim, that is inextricably intertwined with the decision on the merits.

QUESTION: Well, I suppose a court in considering it would just assume that the allegations of the complaint are true and then look at the law. What is the matter with that?

MR. RUDOVSKY: There is certainly nothing wrong with that, Justice O'Connor.

QUESTION: Well, that is what the government says ought to be done here.

MR. RUDOVSKY: But when you do that and you determine what the status of the law was at the time of the violation, that is the same kind of analysis, we suggest, on the merits, and I will get to the merits in a minute, in determining whether there was a violation at all, so that regardless of whether that is an easy task or not an easy task -- that is not my point. My point is --

QUESTION: In this case, it looks like a pretty easy task on the law, because it wasn't clearly established.

MR. RUDOVSKY: We have a much different approach, obviously, than the government does on that question. I will turn to that now to demonstrate both the intertwining of these issues and the merits. Our position in the District Court in this litigation on the question of whether this law was clearly established

rested on perhaps the most cardinal principle in our constitutional system, that is, a principle repeatedly announced by this Court in case after case that all searches and seizures conducted without a warrant are per se unconstitutional unless subject to an already articuated exception.

These exceptions, this Court has warned, are jealously guarded and specifically limited. In 1968 and 1970, when this case was decided, there was no articulated exception for national security searches.

QUESTION: Didn't Keith itself subsequently say that was an undecided question and had been?

MR. RUDOVSKY: Keith said that, yes. This Court in Keith also said that we reject the government's request for a new excpetion to the Fourth Amendment. Our position is straightforward.

Where a particular constitutional provision has been construed for the long period that the Fourth Amendment has, and this Court has announced over and over again that it is the "point" of the Fourth Amendment to prohibit searches without warrants and they are per se illegal.

Until there is a recognized exception, a government official violates established law when he takes risks with an individual's rights are trying to

create an exception through conduct that was clearly illegal.

There was no basis by any court decision to indicate that there was an established exception to Fourth Amendment jurisprudence allowing searches without warrants based on national security concerns. Indeed, what if the Attorney General in 1970 had decided based on national security, the same kinds of concerns he had here, that he could break into people's houses, seize their papers, or arrest "subversives" without probable cause?

Certainly there was nothing to support such an action in 1970, and we suggest there is no principal distinction between that kind of action and wiretapping, which is an even more intrusive invasion of privacy.

The Attorney General also knew in 1970 that this Court over 150 years had rejected the mere incantatio of national security as an exception to constitutional limitations. You had done it in the steel seizure case where you rejected inherent executive power.

You had done it in the First Amendment cases in Robell. You had done it across the board in rejecting government claims that merely because national security was involved, somehow a government official did

not have to follow and was not restricted by the Constitution.

Our point again is straightforward. There was no exception. The Attorney General was trying to create an entirely new exception to the Fourth Amendment. There was no basis for that. And indeed, when the government argues that Presidents had followed this procedure for some 25 years or perhaps longer, they don't say at this point that in fact most of those orders were based with respect to foreign intelligence taps, and there is a complete distinction between foreign intelligence and domestic national security, which is this case, nor do they point out that for 25 years executive officials tried to get Congress to authorize these kinds of taps without a warrant, and Congress repeatedly, as we point out in our brief, for 25 years rejected every request by the executive for the power to tap without a warrant in national security areas.

Indeed, the law was so clear in 1970 that the Solicitor General advised the Attorney Generala that any claim to exemption from the Fourth Amendment for national security wiretaps would face a disaster in the Supreme Court. There was no basis for such a claim, and therefore it should not be made.

If I may in my time remaining, I do want to address the claim to absolute immunity which we think should be emphatically rejected by this Court.

Number One, the government simply does not address the strongest reason there is for rejecting absolute immunity. You have been informed that in 1978 Congress repealed Section 2511.3 of Title 3, which was their only claim at the time Keith was decided against liability for national security taps without a warrant.

Congress by Section 2520 and by its action in 1978 abolished any claim to absolute immunity for a government official who wiretaps without a warrant and seriously restricted any qualified immunity or good faith claim.

The government's claim for absolute immunity is that a government official should not face trial, should not even have to fear a complaint or trial if he acts without a warrant in the national security area. Congress has said you must face trial, you must pay damages. If the Attorney General tomorrow instituted a national security tap without a warrant, he would have to face trial under Title 3, under Section 2520, and if the facts were true, he would have to pay damages for that.

So, the reason, the rationale suggested by the

government for giving him absolute immunity completely fades away. He would have to face trial anyway on the Title 3 claim. How can they say that granting him absolute immunity on the Bivens claim protects him in any way? They simply don't come to terms with our argument in our brief on that point. They push it off in a footnote in theirs, but they don't answer it.

Nor is there a suggestion that the 1978 repeal was not retroactive meaningful at all. It is not a question of retroactivity. There is nothing in this record that John Mitchell, when he instituted this tap, relied on established law of absolute immunity. It is not a question of absolute immunity. It is a question of policy which this Court says Congress has plenary authority over in determining the scope of immunities.

Congress has said as a matter of policy when a government official wiretaps without a warrant, no matter who that official is, probably with the exception of the President, given Nixon and Fitzgerald, everybody else is liable in damages. He must face trial. Given that, what claim can there possibly be for absolute immunity from the constitutional claim? He has to face trial anyway.

Even if that wasn't true, even if Congress had not made this decision, this Court has made quite clear

that before a government official can be granted absolute immunity, he must show that the specific function for which he claims absolute immunity is so sensitive as to require the granting of absolute immunity.

That is to say, you cannot make an undifferentiated claim to absolute immunity, as the government has, by saying all national security decisions ought to be subject to absolute immunity. The specific function in this case is wiretapping without a warrant. Their claim for absolute immunity is that we ought to be able to act in the national security area without overlooking by the courts. It is totally within our authority.

Keith rejected that rationale absolutely. The point of Keith was that you cannot electronically surveil somebody without getting a court's prior authorization. If that is true, their claim for absolute immunity on policy grounds is totally defeated, because that is the only thing they can assert in this Court.

Indeed, when you look at the definition of national security that Attorney General Mitchell was operating under in 1970, it points up again the danger, the literal danger of this broad and bold claim that the

government makes to this Court.

In 1970, according to Attorney General Mitchell, who testified in this case, national security interests were defined, as he said, as those interests which protect the national security, and they would range over very, very wide areas.

He can't even define national security, and when he was asked in that deposition, well, were there any guidelines, he said there were no other guidelines for me to follow. It was my determination -- indeed, he didn't even follow the guidelines in 2511.3, which restricted it to overthrow the government or clear and present danger.

The government would have this Court grant the Attorney General absolute immunity on the mere incantation of a claim that national security was involved. That would go against the entire thrust of every one of this Court's opinions on absolute immunity which insist on a specific functional analysis, that is, an analysis that is tied directly and completely to the claim that is involved.

We suggest that the claim to absolute immunity simply is frivolous in this case given what Congress has already decided, and that this Court should reject it emphatically.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Bator?

ORAL ARGUMENT OF PAUL M. BATOR, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. BATOR: Your Honor, I have a few matters. The first is the -- try to throw a little more light on the question of whether there is a Title 3 case here. As we understand it, the plaintiff says Title 3 applies here because this is not a national security wiretap. We think that on this record this Court should find on its own that this can only be characterized as a national security tap.

QUESTION: But on that, Mr. Bator, then do you agree with your opponent that the District Court did not find --

MR. BATOR: No, Your Honor, we think the District Court did find. There was a remand.

QUESTION: What do you do with the bottom of Page 59A then?

MR. BATOR: If there was a remand to the District Court in this case, Your Honor, about -- from the Court of Appeals the first time around for the District Court to make an inquiry into the purpose of this wiretap, the reason the Court of Appeals said that should be inquired into is to find out whether the

purpose of the wiretap was connected with prosecutorial decisionmaking which would give Attorney General Mitchell prosecutorial absolute immunity. The District Court --

QUESTION: Even if it was a political pretext?

MR. BATOR: Can I get to that in just a second, Your Honor?

QUESTION: I am sorry. Yes.

MR. BATOR: The District Court inquired into the question whether the purpose was to gather evidence for prosecution or was primarily preventive. Now, the District Court didn't label that national security. The District Court said, we find that the purpose of these wiretaps was to prevent the blowing up of the tunnel, and to prevent the kidnapping of Kissinger.

On Page 57A the Court says the purpose of the wiretap was prevention, not prosecution. Now, Judge Van Ardsdel, in dealing with this very same wiretap in the companion case, the Burkhart case, had to make the same inquiry and also said, whatever may be the proper definition of a national security wiretap, both the Davidonan the Black Panther Party wiretaps certainly qualify as a national security wiretap. That is on Page 150A of the appendix to the petition.

Now, what the District Court then had to deal with was the assertion that even though on the objective record that was the purpose of the wiretap, they wanted to go into a proceeding in which Attorney General Mitchell would be cross examined on his subjective motivation, that he himself was being governed by a malicious purpose of political retaliation.

Now, I think the Harlow case stands for the proposition that a mere allegation that a governmental conduct which on the objective record has substantial support as a legitimate governmental position, that you cannot in connection with qualified immunity go into the question that nevertheless there is some hidden malicious motive.

And what the plaintiff does here, Your Honor, I think, is to conjur up what I think is an advantitious and irrelevant under Hart allegation that even though the objective facts are as the District Court found them, there ought to be a further inquiry into whether those, the objective justification was tainted by a hidden malicious motive. Now, that, we say, was excluied by Harlow.

I want to also add to my answer to Justice Brennan on 2520, the reason I fudged on that, Justice Brennan, is because the Court of Appeals in this

circuit, the Court of Appeals for the District of Columbia, did hold in the Zweibaum litigation, which is the Jewish Defense League litigation, that, and we are now talking about pre-'78 wiretaps, it held that even if Title 3 applies, that is, even if Keith doesn't take national security wiretaps out from Title 3, it nevertheless equitable principles would compel the conclusion that qualified immunity should be read into the Title 3 case.

That is to say that a broader defense than 2520 ought to be accorded on equitable grounds because the question of the applicability of Title 3 was itself so highly uncertain and so conjectural. So it was really a fairness problem.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:56 o'clock p.m., the case in the above-entitled matter was submitted.)

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4-335 - JOHN W. MITCHELL, Petitioner v. KEITH FORSYTH

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BY Paul A. Richardson

(REPORTER)