OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: JOHN W. BEHRENS, Petitioner,

v. ROBERT J. PELLETIER.

CASE NO: No. 94-1244

PLACE: Washington, D.C.

DATE: Tuesday, November 7, 1995

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CORRECTED VERSION

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN W. BEHRENS, :

Petitioner :

v. : No. 94-1244

ROBERT J. PELLETIER :

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Washington, D.C.

Tuesday, November 7, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:05 a.m.

APPEARANCES:

LENARD G. WEISS, ESQ., San Francisco, California; on behalf of the Petitioner.

CORNELIA T. PILLARD, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

SAMUEL TASKER REES, ESQ., Los Angeles, California; on behalf of the Respondent.

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P R O C E E D I N G S

(11:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 94-1244, John W. Behrens v. Robert Pelletier.

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

ORAL ARGUMENT OF LENARD G. WEISS

ON BEHALF OF THE PETITIONER

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

The issue here is, can the court of appeals refuse, on jurisdictional grounds, to hear an interlocutory, qualified immunity appeal solely on the grounds that it is the second such appeal?

There are two Bivens claims pleaded in this case before the Court, one, a job termination claim that the plaintiff says he has a constitutionally protected property interest in his contingent employment with Pioneer Savings and Loan, and was deprived of due process when that -- when Pioneer terminated him, and the second claim is that he had a constitutionally protected liberty interest in pursuing other employment in the financial services industry which was impaired by the stigmatizing circumstances of his departure from Pioneer.

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On the first interlocutory appeal to the Ninth Circuit in this case, following a motion to dismiss and prior to discovery, the Ninth Circuit did three things: it announced its categorical one-appeal jurisdictional rule, it affirmed the district court's denial of qualified immunity as to the job search claim, the first claim, and it revived a previously dismissed job termination claim.

Excuse me, I may have misspoken. It affirmed the job search finding by the lower court and revived the job termination claim, which had been dismissed on a statute of limitations basis.

On remand, after full discovery, petitioner moved for summary judgment on his qualified immunity defense to the Bivens claims, and that motion was denied on both claims.

In the Ninth Circuit, the Court dismissed petitioner's second interlocutory appeal for lack of jurisdiction solely on the basis of its previously announced one-appeal rule.

I would like to make several points. First, this case fits squarely within the appealable orders criteria of the Mitchell case. Second, the one-appeal rule effectively emasculates the qualified immunity as immunity from suit, pretrial and litigation burdens of suit.

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Thirds, the concerns over abuse and judicial economy are misplaced.

QUESTION: Well, how many times is a district court expected to entertain a motion for summary judgment in the same case?

MR. WEISS: Normally, I -- normally a summary judgment motion in the same case will only occur on one occasion, and normally the district courts that I practice in front of are very careful about scheduling when summary judgment will occur and will not occur.

QUESTION: So your question arises when there's been an appeal from a motion -- a denial of a motion to dismiss, then the second time around on summary judgment?

MR. WEISS: Precisely, and usually it comes up in the context of a motion to dismiss, because the question is whether the law is settled or not, and sometimes that is a relatively easy question to answer. Perhaps it would have been in this case. We would have thought so.

If it does -- if that's not clear, then you have to go through some discovery, at least, and go through the motion for summary judgment stage.

QUESTION: In that kind of case, where there's an argument at the motion to dismiss stage, and yet there is some indication that further pleadings and discovery

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will elucidate the issues, does the district court have the authority to say, I want all summary judgment motions relating to sovereign immunity deferred until 6 months of discovery has gone by, I'm not even going to rule on the motion to dismiss, or must he rule on the motion to dismiss?

MR. WEISS: A question I'm not certain of the answer, Your Honor, but I believe the court must respond to the motion to dismiss. It is an attack on the pleadings --

QUESTION: Yes.

MR. WEISS: -- prediscovery.

QUESTION: Well, wouldn't you argue that, because I mean, one of the things that -- or wouldn't the argument be that one of the protections is a protection against discovery, so if that's going to be the case, then necessarily the argument would be, rule on the motion to dismiss first?

MR. WEISS: Certainly in the context of qualified immunity --

QUESTION: Yes.

MR. WEISS: -- which this Court seems to have made clear is an important remedy or defense, and a protection from the rigors of litigation, of which discovery is the worst, perhaps.

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Turning to my first point, if this case were the -- if this were the first interlocutory appeal in this case, it would clearly be -- it would fit squarely within the category of appealable orders described by this Court in Mitchell and in Cohen, so if this were the first appeal, no question in our view --

QUESTION: You use the term, interlocutory appeal. Actually, you do contend it's an appeal from a final judgment, in fact.

MR. WEISS: Under 1291, that's correct, Your Honor. This is a variant on that --

QUESTION: And having used that word, it prompts this question in my mind: assuming the Ninth Circuit's rule might be right -- I don't know -- and then you've had one appeal the first time, could you have asked the district judge for a 1292(b) certification to get an interlocutory appeal, as you use the term?

MR. WEISS: Yes.

QUESTION: You could.

MR. WEISS: You always have --

QUESTION: So there's always at least a safeguard in a really unusual case that perhaps you could get a second bite at the apple.

MR. WEISS: Well, as this Court probably well knows, it is very unusual for 1292(b) certifications (a)

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to occur at the district court, and even far rarer for them to occur at the court of appeals level.

Both courts have to exercise their discretion, and in one of the articles we cited by Professor Solemini, he points out, I believe, that something less than 5 percent of the cases in which the district court actually certifies, less than 5 percent of those are actually accepted by the court of appeals so it's not a very practical --

QUESTION: No, because -- that's because there is a sort of a basic policy disfavoring piecemeal appeals --

MR. WEISS: Sure.

QUESTION: -- that either -- that's the background.

MR. WEISS: Which is also one of the underlying philosophies behind the Cohen rule and its application in qualified immunity cases.

QUESTION: If you have a cases in which there's a motion to dismiss, and there's an appeal, and the alleged Government defendant loses the appeal, and then there's more discovery and he appeals again, in a way you can say that the second factor of Cohen has not been satisfied, because the defendant takes the appeal on the first go-around on the theory that this will be

dispositive of the case, and he's wrong.

MR. WEISS: Well, he's wrong because as a matter of law the court has found that the law is settled or unsettled. That's the only issue on a motion to dismiss.

Following discovery, the issue turns as to whether or not the behavior of the Government defendant was reasonable behavior in light of that settled law. It's a different issue after --

QUESTION: But my point is that the defendant was wrong on the first appeal, because it didn't conclusively dispose of the case. Then he gets a second appeal to try it again.

MR. WEISS: Well, but the thing he's trying is a different thing. He's trying a different issue on the second appeal, because --

QUESTION: Well, yes, every -- you could be, like, have a thousand things at the beginning of the case which would technically be a little different one from the other.

I take Justice Kennedy to be asking what would be my question. A person moves for dismissal of the complaint on the ground, taking the facts as in the complaint, that it doesn't show a clear violation of the law.

The district judge says, yes, it does. The

court of appeals says, yes, it does.

So now you go back, and now you can only get a subset of the facts, and once again the defendant says the same thing.

The district court says, yes, it does.

Now, can he get another appeal? Of course. Of course it's a little bit different. Now you have a subset of the facts that were there in the complaint.

MR. WEISS: It's --

QUESTION: But if that's enough, I don't see -- my problem is, I don't see how that satisfies the separate issue.

There are four -- I -- we just wrote on this last year, and what I'm having is seeing how this -- the two appeals there satisfy the test that came down in Cohen, that it should really be quite separate from the rest of the case. That means really very separate.

MR. WEISS: Well, of course, it is if you - if your first appeal is following a motion to dismiss on the pleadings and you're dealing only with the pleadings, you now have a developed record, and in this case there are -- several facts emerge from the record --

QUESTION: Yes, and if, in fact, you then have a 56(f) response to a motion for summary judgment, and then he says, oh, I see, we need some more facts, and then we

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get a few more, and then there's another 56(f), then we get another affidavit, and I mean, you could have 50 appeals on that theory, couldn't you?

MR. WEISS: I think that's purely theoretical. It's not -- the only thing --

QUESTION: I've seen a lot of 56(f) cases.

MR. WEISS: Well, the only thing that's appealable on the second qualified immunity appeal is whether or not the behavior of the Government defendant was objectively reasonable or not, given the settled law.

QUESTION: Each time the difference is not the legal -- the only thing that's changed is the facts that you take as the predicate for asking the question.

MR. WEISS: Well, in the Johnson case, the facts were heavily disputed. The law --

QUESTION: We could have no dispute as to facts.

First, you take the facts as they are, might be stated in the complaint, which is vague.

MR. WEISS: Correct.

QUESTION: The only difference is, later on the 56 motion there's a subset of facts, those that could be proved, given discovery, and the third time, after you went back under 56(f), you have a slightly different subset of facts, so what's changed is the factual predicate.

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MR. WEISS: I think the rather -- I think the response to that, Your Honor, is that district court is going to say -- and they all do this, as I'm familiar -- on 60 -- or 6 months from now in a scheduling order, we will have motions for summary judgment, period, thirty days from now we'll have motions to dismiss, and in between we'll have discovery.

And that's the way this is handled in any court, and -- so that the problem, while I understand there's a theoretical issue, there could be --

QUESTION: I'm not theoretically worried about the practical problem, I'm theoretically worried about the theoretical problem.

MR. WEISS: Well, I --

QUESTION: That is -- that is that there has to be a considerable degree of separability --

MR. WEISS: If --

QUESTION: -- between the -- what's -- you get a collateral appeal on. I mean, you know, your Cohen appeal.

MR. WEISS: Right.

QUESTION: I thought, Mr. Weiss, that your response to the theoretical problem was that it's not a subset of the facts, it's a totally different set of facts, and hence a totally different issue of law.

MR. WEISS: Well, it is --

QUESTION: The decision based on just the pleadings is simply a decision that when you say, I was seriously injured, that states a cause of action, because conceivably some facts could be brought out that show that that's enough.

What happens at the later stage is that the serious injury consists of no more than depriving you of cinnamon toast instead of -- instead of whole wheat toast in the prison cafeteria.

MR. WEISS: In this case --

QUESTION: And that's a different issue of law, whether that is something that can be sued on.

MR. WEISS: Exactly. In this case, as an example, concerted action by defendants is alleged in the complaint.

After discovery is completed -- completed in this case, the only evidence of any kind of concerted action is a unilateral sending of Mr. Behrens' letter to his file and to his --

QUESTION: And so does -- is that what the issue turns on in your opinion?

MR. WEISS: Well --

QUESTION: Whether or not discovery reveals a set of facts that varies a lot from what the judge thought

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was there in the complaint, or varies just a little?

MR. WEISS: Not at all.

QUESTION: No.

MR. WEISS: In the first instance, the court found -- improperly, we think, but found that there was settled law here. There --

QUESTION: Can you come back to that, because you've been talking on a highly abstract plain --

MR. WEISS: Yes.

QUESTION: -- and I'm having difficulty understanding the basic underlying claims.

There are two Bivens claims.

MR. WEISS: Correct.

QUESTION: Does the same law govern both of them, or are they different?

I know one is for losing a job and the other is for the inability to get a future job, but what law -- what is the content of the substantive rule that applies to each of those claims, the same rule, different rule, or what?

MR. WEISS: They are derivative, one of the other. The underlying issue was a resolution by the Federal Home Loan Bank that said this savings and loan was required to hire a principal operating officer subject to the approval of the Federal Home Loan Bank supervising

agent.

There followed from that the hiring of Mr. Pelletier. There followed from that Mr. Behrens' letter saying that he ought to step aside pending an investigation that was underway for Mr. Pelletier's previous employer, Beverly Hills Savings, which had gone under at that point.

So then Mr. Behrens' says, you've caused me to be fired. That's a job loss, suing for due process violations there, and in addition, because people learned of the circumstances of my departure, I've also had my reputation stigmatized by that fact, and I'm entitled to a liberty interest in that reputation.

QUESTION: So the constitutional right at stake in the two claims, you just told me the second one, it's a liberty interest --

MR. WEISS: Right.

QUESTION: -- in not --

MR. WEISS: In a right not to have undue governmental interference in your right to seek employment in your chosen field. That's about what it says, and I'm not quite sure I could tell you much more. I assume it's a due process --

QUESTION: So you have a protected liberty interest --

MR. WEISS: Correct.

QUESTION: Which you say was taken --

MR. WEISS: That's what the --

QUESTION: -- and in the first, the case of losing the job --

MR. WEISS: That's correct.

QUESTION: -- is also a liberty interest.

MR. WEISS: No, that's more expressly stated in the pleadings as a due process violation. That is, I had --

QUESTION: But deprivation of what?

MR. WEISS: I had a --

QUESTION: Liberty, property?

MR. WEISS: I had a property -- I had a property right in my job. You've deprived me of that without due process.

QUESTION: So one is a property claim and the other is a liberty claim.

MR. WEISS: A liberty claim in reputation.

QUESTION: And they're both substantive due process claims.

MR. WEISS: That's my understanding of what they're pleading, yes.

QUESTION: Well, one of the claims is that Pelletier had a constitutionally protected property

interest in his employment with Pioneer --

MR. WEISS: Correct.

QUESTION: -- right?

MR. WEISS: That's correct.

QUESTION: And on the motion to dismiss, you argued there is no such constitutionally protected property interest because the employment was subject to Federal regulatory approval.

MR. WEISS: Correct.

There was also a statute of limitations argument which was sustained here. That issue --

QUESTION: So is that issue still here, or gone?

MR. WEISS: That issue has never been on appeal on the question of qualified immunity.

The job termination claim, because it was dismissed the first time on statute of limitations grounds, when it went to the Ninth Circuit the first time, the Ninth Circuit said, district court, I think there's some recent law that changes the statute of limitations, and when it went back down on remand after the first -- so there was never review on qualified immunity of that first claim, and the district court --

QUESTION: The legal issue was never decided?

MR. WEISS: On that job termination claim. It was decided -- it was decided on the second claim, and I

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think the question I heard from Justice Ginsburg, and what you're asking is, the nexus of the underlying legal issue is probably the same on both of those. That is, one is derivative from the other.

I don't think you could have a loss of reputation claim, this liberty interest claim, without first having had the job termination property interest claim.

QUESTION: Mr. Weiss, may I go back to Justice Breyer's question?

Don't you have to say -- he says, you know, first there's a motion to dismiss, then there's some discovery, and there's a new motion based on the subset of the facts assumed in the motion to dismiss, and then there may be another motion based on a -- if that fails, on yet a smaller subset, and so on.

Don't you have to say that as between stage 1 and stage 2 there's got to be a right to take it up, because one of the express objects of qualified immunity is protection against discovery, so you get that appeal based on the concept of what we're protecting on qualified immunity.

MR. WEISS: On the pleadings.

QUESTION: That's right.

You lose. You go back, and you have some

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discovery. You go up again on another subset because you have a right, among other things, to avoid trial, and then the problem is, can you keep on narrowing your subsets down? Oh, too bad, we lose, we'll go back and have more discovery, more discovery, more discovery.

Isn't the answer to the sort of endless series of subsets that it's up to the trial court, in effect, to manage discovery and say, have your discovery. Finish your discovery, then file your summary judgment motion. You get one summary judgment motion at that point, and isn't that the way to avoid this prospect of, in effect, endless appeal, on your theory?

MR. WEISS: Your question assumed that there would be an appeal from the -- at the motion to dismiss stage on the pleadings, followed by discovery, followed by one --

QUESTION: That's right, yes, and isn't the power of the court to manage discovery and to limit the number of summary judgment motions that it's going to entertain, you know, barring some lightning bolt of something new?

Isn't that the answer to the problem of the -- the, sort of the endless series of subset summary judgments?

MR. WEISS: Of course. I was trying -- I was

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struggling with that answer before.

The trial courts do, can and do control this issue very well now. That's why, when you look at the jurisprudence in the courts of appeal right now on this issue, you only find two cases where there are actually two appeals that are reported cases, Mitchell and the Abel case.

The rest of those cases where the circuits are split, or who have spoken on the subject of qualified immunity, multiple appeals, were not actually two-appeal cases.

QUESTION: So you're really saying the only prospect is really two 1291 cases.

MR. WEISS: As a practical matter --

QUESTION: Yes.

MR. WEISS: -- I think that is correct.

There is the potential, I think, and it's not before the Court in this case, that you could have a separate issue on Westfall, or a separate -- double jeopardy's not going to happen, but there is a -- I suppose you could make the argument, but I don't think it's a -- it certainly has not come up in the jurisprudence of this Court at all.

Your Honor, I'd like to reserve, if I may.

Thank you, Mr. Chief Justice.

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QUESTION: Very well, Mr. Weiss.

Ms. Pillard, we'll hear from you.

ORAL ARGUMENT OF CORNELIA T. PILLARD,

ON BEHALF OF THE U.S. AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

MS. PILLARD: Thank you, Mr. Chief Justice, and may it please the Court:

We agree with petitioner that the one-appeal rule is invalid. As this case shows, there are clearly situations in which the one-appeal rule makes no sense, because it cuts off valid qualified immunity defenses even when they're being asserted on appeal for the first time.

QUESTION: Under our rule-making authority, would we have the authority to make a rule that there could be no second appeal without the permission of the district court and a certification that there were, I don't know, extraordinary circumstances, or --

MS. PILLARD: I think you would have that authority if you engaged in notice or comment rule-making under 28 U.S.C. 2072.

We would be opposed to such a rule. We don't think that -- we think that that cuts directly against the impetus of Mitchell, which is to not leave within the district court's discretion whether to allow a second appeal.

QUESTION: And it would make -- it would require a substantive revision of qualified immunity law, wouldn't it?

MS. PILLARD: It would require a revision of the Mitchell right, that component of the qualified immunity --

QUESTION: Yes.

MS. PILLARD: -- nd it would require this Court to determine whether that aspects was a substantive aspect of the qualified immunity, that's right.

QUESTION: Well, but if we had authority to make that rule, then the statute is not the answer to the case. There would be no conflict with your statutory right to appeal if we enacted such a rule.

MS. PILLARD: If you enacted such a rule, but you could not -- it's argued that that would be the appropriate course, procedurally, would be by rule-making, not by decision in a case such as this, and certainly that the courts of appeals lack the authority to cut back the jurisdiction that they now have under Mitchell and Cohen under this Court's interpretation of 1291 in Mitchell and Cohen, that that -- they can't contract their existing statutory jurisdiction in the absence of the extraordinary measure of this Court making a rule.

QUESTION: Can you imagine a situation where the

defendant Government employee files his motion to dismiss based on a purely legal argument, it's denied, appeal is filed, loses on appeal, then he tries to raise the identical argument again at the summary judgment stage?

MS. PILLARD: We think that if it's the identical argument --

QUESTION: Yes.

MS. PILLARD: -- that would be barred. The basis of our view is that if a plaintiff asserts a new claim or a new legal basis for an existing claim and a district court denies immunity on qualified immunity grounds after an appeal has already been taken, that the public official has a right to appeal to test whether the new claim or theory is based on clearly established --

QUESTION: And you think that can be eliminated by our rulemaking under 2072? Was that your response under 2072, that even what you're arguing for could be eliminated?

MS. PILLARD: My response is that the Court would have to at least go through that process. I'm not sure this Court has the power to cut back --

QUESTION: Well, that's why I asked.

QUESTION: I don't, either.

MS. PILLARD: -- that broadly.

QUESTION: I mean, subsection (b) says such

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rules shall not abridge, enlarge or modify any substantive right.

MS. PILLARD: Exactly, and I didn't mean to be taken to express the view that such a rule would actually be valid, and a one-appeal rule would actually be valid because it would not cut back a substantive right. It might well cut back a substantive right.

But the issue before this Court is affected by the existence of 2072 merely to the extent it indicates it shouldn't be done in this forum.

QUESTION: May I ask about Justice O'Connor's hypothetical, where the identical claim is made the second time round, you say that would be improper, but would it not always be possible for the defendant to shade the facts a little bit and at least have the right to argue that it is not the identical claim? It would be an issue on appeal as to whether it was identical or not in order to determine whether the court of appeals had jurisdiction.

MS. PILLARD: The court would have to decide whether it was the same --

QUESTION: So that really, in every case there would be jurisdiction to file the appeal and to get some attention from the court of appeals on whether this is the special case or it's just a routine delaying tactic.

MS. PILLARD: If it's the same claim, though, we don't think that's a complex inquiry. The court --

QUESTION: Well, no, but what happens to the trial while the case -- while the appeal is filed and the court of appeals takes a look at it?

MS. PILLARD: Ordinarily --

QUESTION: The trial stops, right?

MS. PILLARD: Ordinarily, where an appeal is filed and the court of appeals lacks jurisdiction, you'll see a motion from the appellee to dismiss the appeal, and those are dealt with by a motion panel.

QUESTION: Do you think there's a maximum of two appeals, or could there be cases where there might be three?

MS. PILLARD: I think there is no rigid numerical limit on the number of appeals. I agree with Mr. Weiss that as a practical matter the structuring of the litigation in the district court is going to lead to two, at most. Ordinarily there will only be one, if that.

But it's the order of the district court that gives rise to the opportunity to appeal, and if the district court refrains from ruling on a summary judgment motion until the claims are ripe for disposition together, that can organize and bracket those claims in such a fashion as to limit the scenario of an infinite sequence

of appeals.

QUESTION: Have you taken in what was my question on this?

MS. PILLARD: Pardon?

QUESTION: I mean, I tried to ask it before. I'd be interested in your response.

This is a fluke, this case, in my mind. It's a very weird case, never going to come up again. They didn't waive their second appeal anyway. I mean, there are all kinds of special features, so I'm not focusing on this case.

I'm thinking, on the general case, and you move for -- dismiss the complaint. No. Now you get some facts, move again. No. Do you get one appeal or two? That's the issue, right?

MS. PILLARD: In --

QUESTION: And what was bothering me is in Johnson what I thought the Court was trying to do is to set -- not have a Mitchell claim. There's no such thing as a Mitchell claim. What there is is, there's a whole law called collateral order appeal law, of which this is a part, and it's that. I don't know how to reconcile your desire for two appeals, or three, or whatever, with that. That was the question.

MS. PILLARD: I think it's wholly consistent

with Johnson, because the issue that is being sought to be raised on the second appeal is -- under our rule has to be different from the issue to be raised on the first appeal.

QUESTION: Oh, but of course. The whole point of the collateral order doctrine is when the only difference is changes of a fair -- you know, fact changes. That doesn't count. There's a difference. That's what -- that doesn't count as a difference. What is supposed to be the difference is a difference in whether you're asking qualified immunity or merits of the case. That's a difference.

QUESTION: I don't think that flows from Johnson, but the question is, for example, if you have in the complaint allegations of three elements, A, B, and C, and then you take discovery and you move to dismiss, you say, that doesn't state a violation of a clearly established right. The court disagrees with you, the court of appeals disagrees with you.

You go through discovery. After discovery, the undisputed facts show only elements A and B. What you can appeal at that time, consistent with Johnson, is the question whether, given A and B, you have stated a claim, or supported at the summary judgment stage a claim of a violation of clearly established law.

If A and B just don't violate clearly

established law, that is a qualified immunity determination, and that is something that is not barred by Johnson, and that is something that is -- should be allowed under this case.

It's also something that this Court has expressly recognized previously --

QUESTION: Ms. Pillard, if I can --

MS. PILLARD: -- in Anderson v. Creighton.

QUESTION: I have a question that at least is important to me, and I'd like you to tell me what your answer to it is.

In your control devices which you've just been outlining, you conspicuously don't mention the rule-making authority that Congress newly gave to the courts both under the 20 -- 1291 type final order and the interlocutory order review, the 1292(e), the new 1292(e) and the 2072(c).

You must have known they were there. Why didn't you -- the silence is deafening with respect to those.

MS. PILLARD: Well, this really -- I may have created some confusion on this, but it goes, I think, to the issue that Justice Souter raised about whether, because the immunity right is a substantive right, could it be contracted, the right to appeal denial, be contracted by rule-making?

We certainly think that that would be the procedure. If the court were to arrive at the conclusion that it's not a substantive right, it would be most appropriately done by rule, but I also don't think that it could be done under 1292(e), because that deals with interlocutory orders. We're talking about a final --

QUESTION: Which Cohen --

MS. PILLARD: -- order.

QUESTION: -- v. Beneficial really is, but we call it a final --

MS. PILLARD: Well, as recently as 1994 in the Digital Equipment case, this Court affirmed that the final -- the collateral order doctrine under Cohen is a construction of the final order rule.

QUESTION: Yes, it is a construction of 1291.

MS. PILLARD: Right.

QUESTION: But in every other sense it is interim in the litigation.

MS. PILLARD: That's right. That's right.

QUESTION: Well, under your view in this case, does he get a second bite at the apple, at the issue that was determined the first time around?

MS. PILLARD: I think that's a harder question, but in our view, yes, you should be able to bring that claim up, and that goes to the dialogue that I was having

with Justice Breyer.

The first -- on the first appeal, the court of appeals assumed both the existence of the letter and also the existence of other concrete steps, perhaps a compact among the regulators to blacklist this fellow.

After discovery, those concrete steps were absent. They weren't born out, and so you have a different legal claim as of the attempted second appeal, and that claim should be tested. The court of appeals should issue an authoritative ruling whether that claim is based on clearly established law before this official has to be subjected to burdens of discovery and trial.

QUESTION: Thank you, Ms. Pillard.

Mr. Rees, we'll hear from you.

ORAL ARGUMENT OF SAMUEL TASKER REES

ON BEHALF OF THE RESPONDENT

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

In my argument today, I would ask the Court to affirm the one interlocutory appeal rule of the First, Seventh, and Ninth Circuits as the correct application of 1291, a correct application of Cohen v. Beneficial Industrial Loan, a correct application of Mitchell v. Forsyth, more importantly a correct balancing of the interests of both the governmental defendants and the

plaintiffs and the judicial system which this Court went through in its analysis of Mitchell in the first instance --

QUESTION: Well, we don't balance interests until we have a basis for doing that. What I am not clear on, Mr. Rees, is what is the hook on which you're hanging your hat here? What is the theoretical reason why we can come up with a numerical rule, only one, apart from the fact that it's a good idea?

I mean, for example, there are a lot of people who think that a two-term limit for Congressmen is a good idea, but nobody has come into the Court and said, you know, impose a two-term limit. You know, two is enough.

And that's what you're coming -- you're saying, one is enough. Why -- I need a text. I need some legal gimmick --

MR. REES: Justice --

QUESTION: -- to reach that result.

MR. REES: Excuse me for interrupting.

Justice Scalia, when this Court analyzed this issue originally in Mitchell and granted collateral order status in Mitchell, one of the reasons why it did so is because of the three-prong Cohen test and because, as a result of the determination in Mitchell, as a separate issue it was going to decide conclusively an issue, and it

was going to do so in such a way that it would have been unreviewable after a trial.

QUESTION: Right.

MR. REES: In this situation, in the present case before you, and I would submit in virtually every instance except the extreme instance, where there is a second interlocutory appeal, if you are not reexamining for a second time before a second panel an issue already decided by the first panel of the court of appeals, you are of necessity not going to do away with the trial. At best, all you are going to do is reduce the scope of the issues that are actually going to be tried in the trial, and that's not what this Court originally did in its analysis of Mitchell.

More importantly, when this --

QUESTION: Well now, wait. I don't understand.

MR. REES: Okay. I apologize.

QUESTION: The immunity right does not exist unless the whole trial is eliminated? You can't get an interlocutory appeal on some of the issues in the case --

MR. REES: If the --

QUESTION: -- even the first time?

MR. REES: In Mitchell -- well, the Court's -- this Court has never specifically dealt with that issue, but with regard to the civil rights claim, let's assume

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that there are no claims other than Bivens-type civil rights claim, and we handle the problem, I think, with the district court putting all of the claims together so that they all come up on appeal at the same time. I think that's a sensible situation.

But having had a first appeal where the court has determined that clearly established rights were violated and the defendant would reasonably -- a person in the defendant's position would reasonably understand that they violated clearly --

QUESTION: Well, excuse me, I thought the first appeal determined only that there had been a claim which, if proven to be true, would lead to the conclusion that established rights had been violated.

MR. REES: The --

QUESTION: They didn't hold that they had been.

MR. REES: No.

QUESTION: They held that a claim had been stated.

MR. REES: That's true.

QUESTION: Okay.

MR. REES: If those facts are proven at trial.

QUESTION: Yes.

MR. REES: But it also examined a clearly established right as well, Justice Souter.

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QUESTION: Well, that's true.

QUESTION: On those facts. On those facts as pleaded.

MR. REES: Certainly, and it examined both the substantive and the procedural due process claim, which are the two claims that were being brought.

QUESTION: But the defendant's argument at the 12(b)(6) stage was, even if we take everything you say as true, it -- even if we take everything the plaintiff says is true, still the law was not clearly settled with respect to that, and that's the point that the first appeal turned on, at least with respect to the --

MR. REES: And that's supposed to be the point that every qualified immunity appeal is supposed to turn on if we are dealing with the purely legal issue as opposed to the fact-determinative issues that the court --

QUESTION: But what do you do with the second claim? There was never a first appeal because the district court went off on -- wrongly, as it turned out, on the statute of limitations.

MR. REES: Well, I handle that issue several different ways. First of all, that was an error that was created by Mr. Behrens, invited by the district court, which Mr. Behrens recognized and put in his first appeal brief when he argued in his first appeal brief precisely

the issue that he wants to raise on the second appeal.

He did argue it. The court of appeals decided not to reach it, and fortunately the court of appeals in a footnote indicated that the district court was in error in its statute of limitations determination, something that the plaintiff was unable to raise in an interlocutory appeal.

So in this -- this happens to be a situation where that error was in fact invited, but in point and view, there is going to be a trial, and if Mr. Behrens loses in that trial, he does have the opportunity to get an appellate determination. It just happens to be a post trial determination.

QUESTION: Mr. Rees, could I recall you to my question?

As I understand it, your response to my question as to what gives us the right to say one only is the fact that the right to an interlocutory appeal here, which is deemed a final appeal under the statute, is only a right to eliminate the trial entirely. Is that your point?

MR. REES: In Mitchell, the court went that far. This Court has never gone so far as to say it must entirely omit the trial, but --

QUESTION: But that's your theory, and that's why you think you're entitled to judgment here.

MR. REES: It clearly supports a one-appeal theory.

QUESTION: And when you say trial, you mean trial on any issue whatsoever, so that if any --

MR. REES: No, Your Honor.

QUESTION: I'm sorry, then I misunderstood you.

MR. REES: I apologize. Excuse me for interrupting.

I don't mean to say that, Justice Souter. I'm talking about with regard to the civil rights claims.

There have been some instances where there are --

QUESTION: Yes, but there's more than one civil rights claim.

MR. REES: Certainly.

QUESTION: And you're saying if there's going to be a trial on any civil rights claim, that in effect defeats the right to a further 1291 appeal.

MR. REES: I'm saying --

QUESTION: Yes, or even the first, I guess. Isn't that your argument?

MR. REES: I'm saying that the district court --

QUESTION: Well, excuse me, could you give me a yes or no, if it's -- if that's possible, and then explain?

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MR. REES: I think the answer to your question is yes.

QUESTION: Yes, I see.

MR. REES: I think the answer to your question is --

QUESTION: I suppose you've abandoned this because you'll lose the case, perhaps, but I thought the theory was that there is a rule under Cohen, which governed Mitchell, which says that you only get the appeal if the thing you're appealing on resolves an important issue completely separate from the merits, which is effectively unreviewable.

So the first time a person appeals from the dismissal of the complaint, that's not effectively separate and conclusive compared to his later appeal for denial of summary judgment. As long as those two things are out there, you can't say that the first is completely separate despite the factual change, for if you did, thousands of discovery orders would become immediately appealable.

Now, that's what -- I mean, but if that's the theory, then I don't see how you win, because their client -- you see, the only way -- they're appealing the summary judgment stage, which is completely separate from the later trial order. It's -- the two that aren't

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separate are the first two, the dismissal -- is that too complicated?

MR. REES: It --

QUESTION: Are you seeing what I'm driving at?

MR. REES: I understand what you're driving at, but it seems to me that at the point in time that there is a conclusive determination of the issue, then that is the time when the qualified immunity purely legal issue is ripe for appeal.

QUESTION: In this case they -

MR. REES: It may be that it's ripe for appeal at the motion to dismiss stage, at the later stage.

QUESTION: In the First Circuit, what people said was, look, you got -- you want your appeal now, dismissal of complaint, you waive the later one. Otherwise, it's not final. And then the reason they couldn't do the second one was because they'd waived it, but that didn't happen here.

MR. REES: That did not happen here. It essentially happens here now because the court in the Ninth Circuit has given the defendant the opportunity to make that decision, because understand that the issue got raised in this case in the Ninth Circuit because we argued that there was not jurisdiction at the motion to dismiss stage.

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QUESTION: What's your response to the Solicitor General's example, where the appeal from the motion to dismiss, the pleadings say A plus B plus C facts occur, and the court of appeals says that's a violation of a clearly established rule, discovery, and after discovery, it's clear that C cannot be proven, so that only A plus B exists. Can that go again to the court of appeals on denial of a motion for summary judgment?

MR. REES: I would assert, Your Honor, that it should not be allowed to go to the court of appeals, because as soon as you do, A plus B plus C gets another appeal. Then you must do A plus B plus C plus D.

QUESTION: Well, I don't think so if the district court properly structures so that you only have one -- you know, if you only allowed one motion for summary judgment.

MR. REES: In this case, when the case --

QUESTION: Well, I -- speak generally, if you would. That's what I'm interested in.

MR. REES: Okay, but I thought this case would be instructive on that issue, because when the case came back down from the court of appeal, after the first appeal, the defendant took some more discovery so that the defendant could raise a slightly different issue with regard to their claim for a second interlocutory --

QUESTION: Take my hypothesis that the district court does structure the thing. You have a motion to dismiss. You're allowed a motion to dismiss at the beginning. The district court rules on it.

Then a certain period of time for discovery, and then motions for summary judgment, now or never after discovery, and the issue on the second appeal taken to the court of appeals is only A plus B can be proven. C cannot be proven. The first time you ruled A plus B plus C was enough. Now you have a different issue, is A plus B enough.

MR. REES: And then on the motions in limine you have A, the change in A, and A can't be proven.

QUESTION: Well, but I'm not at all sure the district court has to indulge all of that.

MR. REES: Clearly the district court will analyze the case under motions in limine, clearly at the time of the pretrial conference order if not on the eve of trial.

The case be -- continues in flux from a factual point of view, all the way up to the end, when the jury comes back --

QUESTION: Well, but as the Chief Justice said, the district court does not have to allow an infinite number of summary judgment motions. A district court can

say, okay, you've lost on the motion to dismiss. Have your discovery. When the discovery is over, I will entertain a motion for a summary judgment on whatever grounds, multiple grounds you may have. The district court can do that, can't it?

MR. REES: And clearly a rule, Justice Souter --

QUESTION: The answer is yes, it can.

MR. REES: Yes. The answer is yes.

QUESTION: All right. Now, going back to the Chief Justice's question, if the motion to dismiss assumes facts A, B, and C, and it is lost, the case comes back -- after a Cohen appeal the case comes back. Discovery takes place. There is now -- it is now, as in his hypo, clear that C cannot be proven, so that the facts are merely A and B.

If you eliminate the appeal when the district court denies the motion for summary judgment on A and B alone, then, as a practical matter, it seems to me, you have totally undercut, if you have not destroyed, that aspect of our qualified immunity doctrine which says you ought to be protected from discovery.

You're saying, if you lose on the motion to dismiss, you have no further protection from discovery. If you want to postpone your motion to dismiss, then you've got to go through discovery, which destroys the

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right to immunity from that. Isn't that true?

MR. REES: No.

QUESTION: Why?

MR. REES: That is one of the benefits, Justice Souter, of the district court's ability to fashion the pretrial proceedings to structure the qualified immunity issues, even insofar as their appeal, so that that issue can be raised and conclusively determined so that a single appeal --

QUESTION: No, but what if the -- the district court says, I'm not going to let you go up on -- following the denial of your motion to dismiss, because I want to make sure discovery is over before you appeal.

Or what if the district court says, I simply won't rule on the motion to dismiss on the pleadings. I'm going to wait until after you have completed discovery.

That would be a way -- and file any summary judgment motions, and so on. That would be a good practical way of limiting the appeals to one appeal, but it would destroy the immunity from discovery, the qualified immunity protection from discovery --

MR. REES: It's a practical --

QUESTION: -- wouldn't it?

MR. REES: It's clearly a practical way for the district court to attempt to destroy --

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QUESTION: It's -- yes, and it would destroy it.

MR. REES: Assuming there's no mandate issued from the circuit court when the defendant said --

QUESTION: Yes, but if the district court --

MR. REES: -- I'm entitled to have a decision.

QUESTION: If the district court did that, it would be in violation of the qualified immunity protection against discovery, wouldn't it?

MR. REES: It would --

QUESTION: Let's assume the district court just takes this in hand and does what I have outlined. That would destroy the qualified immunity protection against discovery, wouldn't it?

MR. REES: The qualified immunity -- it would destroy the ability of the defendant to completely avoid discovery.

QUESTION: Right.

MR. REES: On the basis of qualified immunity.

QUESTION: Now, same result on the one appeal rule that you want. If you're saying, if you take your one appeal after the motion to dismiss, and before discovery, and you can't appeal again, then the defendant is going to have to say, well, do I in fact want this qualified immunity right against discovery?

And if he says, yes, I do, then he cannot take a

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Cohen appeal from a final order on the motion to dismiss, and -- you can't have it both ways.

MR. REES: You --

QUESTION: You either have one appeal, or you're going to destroy, in effect, the discovery protection.

MR. REES: Yes, and you will destroy that discovery protection by the defendant's own choosing. That is, the defendant will be in the best position to decide when he wants to have that issue tested.

QUESTION: Well, that's like saying you can condition anything on the waiver of a constitutional right.

QUESTION: Do you think there's an obligation on the defendant in order to justify the Cohen appeal to say that his first appeal must conclusively determine the question? That's a requirement of Cohen, isn't it?

MR. REES: It is clearly a requirement of Cohen.

QUESTION: And that requirement is not fulfilled if he fails on the first appeal, is it?

MR. REES: It is not -- it is not satisfied.

QUESTION: Your position makes entire sense if you are correct in referring to "the qualified immunity issue" as though it is a single issue at all stages, but that's the vice of it. In fact, it's a quite different issue when it comes up at the motion to dismiss stage and

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when it comes up after discovery.

We then discover that what we're talking about is something quite different, and what you're saying is, you simply have to abandon your ability to challenge the one issue if you want to challenge the later one, and the price of it is discovery. They're two different issues, however.

MR. REES: There is also the price, Justice Scalia, on the other side, which is from the multiple interlocutory appeal and the delay --

QUESTION: Well, when you say multiple, what is your response to the fact that if the -- to the, I thought fairly plausible argument that if the district court does, indeed, manage its discovery and its summary judgment practice, the so-called multiple is really a practical maximum of two appeals.

There would be one, presumably, following a denial of a motion to dismiss, there would be another one, potentially, following all the discovery and all the summary judgments. That's two. Do you think that's an unsound argument?

MR. REES: If you are going to fashion a rule that allows for two appeals of the issue, and you're going to attempt not to have the forum-shopping within the circuit of one panel says yes and another panel says no

because you're having the same issue reviewed a second time.

QUESTION: Well, let's assume you don't have an intracircuit problem of chaos. Let's assume that the district court is, in fact, going to manage the discovery in the way that I have suggested, the Government suggested. Is that an unsound argument which leads to the conclusion that as a practical matter you're going to have a potential of two appeals in the overwhelming number of cases? Is that unsound?

MR. REES: Well, not only does it lead to the potential, I think it leads to the absolute conclusion --

QUESTION: Well, is it -- is that an unsound argument?

MR. REES: It is clearly -- from a balancing point of view, it is an unsatisfactory --

QUESTION: Well, I'm not balancing. I'm just saying, is that an unsound argument? Is it going to result in two appeals as a max, in most cases?

MR. REES: In the majority of cases it will result in only two appeals, but it will also result in almost every case in two appeals, because it is clearly in the defendant's claimed interest to delay the resolution of the case by taking the two appeals.

QUESTION: Well, we've said it's -- the

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defendant has got a constitutional qualified immunity interest to avoid discovery. He's only doing what we've told him he's got a right to insist on.

MR. REES: I believe that --

QUESTION: I mean, you're branding him as somebody, in fact, who's taking advantage of the system, and it seems to me that the so-called system is the qualified immunity system, which we have recognized.

QUESTION: Do you agree that the qualified immunity defense is constitutionally mandated? There's no constitutional basis for it, is there?

QUESTION: Is -- yes, right. I mean, don't criminals every day of the week have to go to trial where the district court has had terribly erroneous rulings of all kinds. They can't appeal in the middle of the case. Is there something called a constitutional right that even though you can appeal, so you don't have to go to trial, you also have a separate constitutional right in a civil case not to undergo discovery?

MR. REES: It was a balancing issue --

QUESTION: Where was that?

MR. REES: -- that was done --

QUESTION: Where was that?

MR. REES: -- as well. I did not find it as a pure constitutional --

QUESTION: You mean a special, separate constitutional right not to undergo discovery? What is the source of --

MR. REES: It is not. It is a not a pure constitutional --

QUESTION: But in any case, we've recognized it, and we would have to go back on our prior rulings in order to accommodate your position.

MR. REES: I don't believe so. I believe that in order to create a two-appeal rule case, because that's, I thought, where your hypothetical led us to, a two-appeal, one at the motion to dismiss and one at summary judgment, I think you've expanded your appellate jurisdiction, the appellate jurisdiction that you've created in Mitchell, and Mitchell was a close case to begin with.

QUESTION: Why? Why?

MR. REES: Because --

QUESTION: If there is a separate cognizable interest, whatever its origin, constitutional, or what-not, if there's a separate cognizable interest in avoiding discovery, then why have we expanded anything in recognizing the -- we'll call it the maximum two-appeal rule?

MR. REES: If avoiding discovery is a separate

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cognizable interest that under Cohen is sufficiently important to view as a need for a single, interlocutory appeal, then you are correct. Then you are looking at qualified immunity avoidance of discovery, qualified immunity avoidance of trial.

QUESTION: But if it's not that important, why did we recognize it in the first place?

MR. REES: We recog -- I'm sorry.

This Court recognized the qualified immunity issue the first time and allowed an interlocutory appeal as an exception under Cohen because after balancing those issues they thought it was important not only because of the defendant's right to avoid discovery, but also the defendant's right to avoid trial --

QUESTION: Mr. Rees --

MR. REES: -- and it was a single appeal issue.

QUESTION: The -- you start out with a one-appeal rule, and that has the kind of a flavor of a legislative measure rather than a court-type doctrine, and then, well, I asked Ms. Pillard why didn't the Government seem to think this was a matter for rule-making, and she said, well there's this Mitchell -- but there have been privileges before, most famously perhaps the work-product privilege, that start out with a court doctrine. Hickman v. Taylor was a court doctrine, and then it got embodied

in the Federal rules after.

So why isn't the appropriate thing now for the courts to use the rule-making authority that Congress gave them rather than to say, oh, we're going to pick a one-appeal rule or a two-appeal rule, and we're going to try through adjudication to have that kind of a legislative field rule.

MR. REES: We do not disagree with the court's power to fashion a rule which allows the escape route for the exceptional case, be it under the rule-making power, be it under 1292(b), be it under the power that says, except in extraordinary circumstances there's only one appeal, because one appeal will resolve the purely legal issue and protect the rights of the governmental defendant to avoid both discovery and trial while at the same time protecting the interests of the plaintiffs and the judicial system, because every time there is an appeal, there is a cost in this system, and there is the cost of the system of taking these seriatim appeals.

QUESTION: There -- surely there are deterrents. I mean, if it is frivolous it can be sanctioned, can it not?

MR. REES: After the fact.

QUESTION: Well, after the fact, but the knowledge that it will happen after the fact tends to

deter one's committing the fact, doesn't it?

MR. REES: Well, it doesn't help the plaintiff, and I think if -- Justice Scalia, if you take just a brief look at this case, where after 7 years we're still not up to an appeal -- or, a trial, and we've still only done one interlocutory appeal, and the entire governmental agency that was involved has been abolished, all the witnesses have scattered to the four winds --

QUESTION: In addition to sanctions, the lawyers I know don't like to go up on a frivolous appeal and come back to the same judge. It always comes back to the same judge, doesn't it?

MR. REES: It does not always go back to the same judge. It frequently goes, and is usually the case that it will come back to the same judge.

QUESTION: If it goes on much longer, he'll be retired.

(Laughter.)

MR. REES: I'm afraid so, with this judge.

QUESTION: I'm no sure that I understand what your answer to why it should be done through adjudication. Is it because it's easy and it's clear, so you don't need the Rule-Making Committee with the law professors and the lawyers and the judges?

MR. REES: Well, we started with 1291, which is

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the rule that we are interpreting.

QUESTION: Yes, but that's the first place where Congress -- it was even before adding to the 1292. In 2072, Congress in 1990 gave the courts authority which they've never used to deal with the 1291 type.

MR. REES: Yes.

QUESTION: The Cohen v. Beneficial --

MR. REES: Yes.

QUESTION: -- type.

MR. REES: And I've said, I believe that it is perfectly permissible to utilize the rule-making authority to handle the problems with the exceptional case and give the governmental defendant who has a legitimate claim for a second interlocutory appeal that opportunity, and I think it can be done under rule-making, I think it can be done under case interpretation, just the same way Mitchell allowed the interlocutory appeal in the first instance, and I think it can -- the escape valve is there --

QUESTION: Well, I suppose they would argue that this is an exceptional case. The district court had it wrong the first go-around on the statute of limitations. The court of appeals gave some advice to correct it, and so now the issue's back in front of them. That sounds rather unusual.

MR. REES: Well, I mean, we would argue that

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it's not because it's actually the stronger of the cases that wasn't ruled upon, but not only that, I mean, the fact of the matter is, it's not going to conclusively determine that issue, because Mr. Behrens will still go to trial on the substantive and procedural due process claims that we have done for violation of Mr. Pelletier's liberty interests. He will go to trial with regard to that.

At best, the only thing that the second appeal is going to do is reduce the scope of the issues to be tried, and probably not do that terribly effectively.

QUESTION: And that's not enough, you say, under -- to invoke the exception -- the Cohen exception.

MR. REES: Well, under this Court's reasoning, as this Court did it in Johnson and in Mitchell and in Cohen, and in Digital --

QUESTION: The problem is, if that's not enough at appeal two, I don't know why it's not enough at appeal -- why it is enough at appeal one. I mean, you'd have to extend that principle to the first round, too, wouldn't you, and say unless you're challenging the entire lawsuit, you cannot ask that some of it be thrown out.

MR. REES: No. I think if you are -- if you are conclusively determining the qualified issue with regard to that action --

QUESTION: Why? I mean, why just the qualified

issue? Why not just -- why not all issues?

MR. REES: Well, we're not allowed to take the other side of the appeal. We're not allowed -- the plaintiff's not allowed to take the statute of limitations, or the Administrative Procedure Act, or any of the other claims where there's been a determination, but --

QUESTION: I don't understand -- it was a discrete claim, so you could have asked the judge for a 54(b) final, final judgment. Then you would have had --

MR. REES: I could have asked for a 1292(b) discretionary appeal with regard --

QUESTION: Why? You were out on the statute of limitations.

MR. REES: Yes.

QUESTION: On a claim.

MR. REES: Yes.

QUESTION: That claim was over and done. You -- couldn't you have gotten a final, final judgment by asking the court for a 54(b)?

MR. REES: Oh, no, because that really cut across all the lines of the case. It didn't finally dispose of the issue sufficiently enough --

QUESTION: It disposed of one discrete claim, didn't it?

MR. REES: No. No, Your Honor. That was a misstatement by Mr. Weiss, I believe. The actual claims here are substantive -- a substantive due process claim and a procedural due process claim, both of which claims asserted both a liberty and property interest.

The only thing that happened with regard to the district court, as the district court said, with regard to your substantive claim, you cannot raise that on the writing of the Behrens directive. You must work on a 1-year statute. You can only go back 1 year from the date of the suit, rather than 3 years.

QUESTION: But your position is that so long as you make one claim that will survive a qualified immunity challenge you can thereupon add to it as many other claims as you want, all of which will become immunized from a qualified immunity challenge, because after all, the one claim is going to have to go to the jury, and therefore the matter will not be completely disposed of by a Cohen appeal.

MR. REES: That's not my argument, Justice Scalia.

QUESTION: I thought that was precisely your argument.

MR. REES: I must have misspoken --

QUESTION: I thought you said that all of the

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qualified immunity stuff has to be disposed of.

MR. REES: No. What I'm saying is, at the point in time of the appeal, the appeal should resolve conclusively the qualified immunity issues the defendant wishes to raise.

QUESTION: That's right.

MR. REES: So that we don't go in seriatim.

QUESTION: So so long as one of the claims is clearly not subject to a qualified immunity defense, you've got one good claim, you can thereupon pile on as many invalid claims as you like, and you cannot take it up under Cohen.

MR. REES: No, because he will take it up, all of those claims --

QUESTION: No --

MR. REES: -- that he has been denied his

QUESTION: No, but --

MR. REES: -- qualified immunity rights.

QUESTION: But one, there's no basis for it. One, clearly the case can't be thrown out.

MR. REES: Well, I would assert that you don't need to go that far, and you certainly don't need to go that far in this case.

QUESTION: I hope not.

MR. REES: This is a case -- this is a case, if

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you remember back to Mitchell when qualified immunity appeals --

QUESTION: Thank you, Mr. Rees.

MR. REES: Thank you, Mr. Chief Justice.

QUESTION: Mr. Weiss, you have 1 minute remaining.

MR. WEISS: Petitioner will waive, Your Honor. Thank you very much.

CHIEF JUSTICE REHNQUIST: Very well. The case is submitted.

(Whereupon, at 12:04 p.m., the case in the above-entitled matter was submitted.)

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JOHN W. BEHRENS, Petitioner,
v. ROBERT J. PELLETIER.

CASE NO: No. 94-1244

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BY Ann Marie Federico

(REPORTER)