~~OCA stuff for Phil~~

close on whether to go up at all on immunity (Paul + Sam good it);
finally decided that since were going up anyway, it would be ~~why~~ okay to argue the national security stuff
Ran, Civil wanted to take a much broader position. This a mistake, Rex feels strongly. Overreaching. Ct. should decide this (& cited 3d Cir. approvingly).
very concerned that we not seem to be reaching after last term. Ct. is a ~~big systems~~ bit sensitive what key = Reagan Ct. Probably will decide case on Gorbichev immunity grounds.

Memorandum

Subject	Date
Forsyth v. Kleindienst No. 82-1812 (3d Cir., March 8, 1984)	June 12, 1984

To The Solicitor General From Samuel A. Alito

TIME LIMIT

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

RECOMMENDATIONS

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

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

A. PROCEDURAL HISTORY

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

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

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

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

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

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

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

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

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

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

Our rehearing petition was denied.

B. ISSUES

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

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

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

C. DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RKW:BLH:LLGregg:jl
145-12-1827

Washington, D.C. 20530

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Keith Forsyth v. Richard G. Kleindienst, John N. Mitchell, Appellant, No. 82-1812 (3d Cir., March 8, 1984), rehearing denied April 3, 1984

TIME LIMITS

A petition for a writ of certiorari must be filed by July 2, 1984.

RECOMMENDATIONS

Our client, John N. Mitchell, requests that a petition for a writ of certiorari be filed. Our Torts Branch also recommends that a petition be filed. I concur.

QUESTIONS PRESENTED

1. Whether the Attorney General of the United States is absolutely immune from personal liability for making discretionary national security and legal judgments required by his office in performing his official duties.

2. Whether the district court's refusal to extend qualified immunity to a former Attorney General sued for an act other courts have recognized did not violate any clearly established law at the time the Attorney General acted is immediately appealable under the Cohen collateral order doctrine.

STATEMENT

This case is fully described in the memoranda recommending appeal and rehearing. Briefly, plaintiff seeks damages for three overhearings on a warrantless domestic national security electronic surveillance authorized by then Attorney General Mitchell in 1970. At that time, only two federal courts had addressed the issue of whether the President, acting through his Attorney General, had the power to authorize such surveillances. Both courts ruled that he did. After the surveillance was terminated, however, a third federal court ruled that a warrant was required; and this view ultimately was adopted by the Supreme Court in United States v. United States District Court, 407 U.S. 297 (1972)(Keith).

Following an earlier round of appellate proceedings,[1] the district court on remand rejected claims of absolute and qualified immunity and imposed liability. Forsyth v. Kleindienst, 551 F. 2d 800 (E.D.Pa. 1982). The court also scheduled trial on the issue of punitive damages. An appeal was noticed, and the court of appeals stayed the trial. Forsyth v. Kleindienst, 700 F. 2d 103 (3d Cir. 1983). The court of appeals also ruled that it had jurisdiction to consider the denial of absolute immunity and referred to the merits panel the question whether a denial of qualified immunity was a final appealable order.[2]

The court's opinion on the merits was rendered March 8, 1984. The majority concluded that the claim of absolute immunity was unaffected by the Supreme Court's opinions in Harlow v. Fitzgerald, 457 U.S. 800 (1982) and Nixon v. Fitzgerald, 457 U.S. 731 (1982) and, consequently, ruled that the court of appeals' earlier opinion on this issue constituted law of the case. The majority also concluded that denials of qualified immunity are not appealable under 28 U.S.C. § 1291 because this would burden the appellate court "by opening the sluice gates." (Majority at 15.)

Judge Weis strongly dissented. He expressed doubt on the majority's conclusion that Harlow did not affect the absolute immunity issue, noting that the Supreme Court had expressly stated that absolute immunity might well be justified in this type of case. The dissent also found jurisdiction to consider the qualified immunity issue, focusing on the Supreme Court's mandate in Harlow that cases like this should not proceed to discovery and trial and analogizing this case to the double jeopardy situation in Abney v. United States, 431 U.S. 651 (1977). On the merits, the dissent concluded that Mr. Mitchell's entitlement to qualified immunity as a matter of law under Harlow was incontrovertible.

Our petition for rehearing and suggestion for rehearing en banc was filed March 22, and denied April 3.[3]

1/ See Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1978), cert. denied sub nom. Mitchell v. Forsyth, 453 U.S. 913 (1981).

2/ A petition for a writ of mandamus also was filed and consolidated with our § 1291 appeal.

3/ We did not receive notice of this denial until after the mandate had returned. A motion to recall the mandate and to stay the mandate pending application for certiorari has been filed to forestall further proceedings in the district court.

DISCUSSION

1. This appeal represents our most recent effort to persuade the courts to recognize an absolute immunity that protects the Attorney General's discretionary national security and legal judgments.4/

There is substantial support for according the Attorney General this protection. Only two years ago, the Supreme Court stated that for senior officials "entrusted with discretionary authority in such sensitive areas as national security ***, absolute immunity might well be justified to protect the unhesitating performance of functions vital to the national interest." Harlow v. Fitzgerald, 457 U.S. at 812. Indeed, the Court's opinion made specific reference to the Attorney General's discretion in authorizing national security surveillances to illustrate the point. Id. at 812 n.18.

While only dictum, the above comment does suggest that the Attorney General's claim of absolute immunity will be considered seriously by the Court. The immunity argument advanced in this case accords with the 'special functions' analysis adopted by the Court in Butz v. Economou, 438 U.S. 478 (1978) and refined in Harlow and Nixon v. Fitzgerald. Butz recognized "that there are some officials whose special functions require a full exemption from liability," where "absolute immunity is essential for the conduct of the public business." 438 U.S. at 508, 507. After Butz, lower courts, including the court of appeals in this case, generally limited absolute immunity to the 'special functions' involving adjudication and prosecution that actually were considered by the

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4/ This immunity claim was presented in an earlier petition in this case (Mitchell v. Forsyth, No. 79-1120), which the Supreme Court was asked to dispose of in light of the disposition in Kissinger v. Halperin, No. 79-880. Our briefs in Kissinger also alluded to this immunity but advised that "the Court need not reach any question of independent immunity in [that] case" (Pet. Br. 50 n.44) and, instead, urged that "[t]he independent immunity of the Attorney General is presented in other cases (see Mitchell v. Zweibon, No. 79-1120 (filed Jan. 18, 1980), and should be briefed and decided in those cases." (Pet. Reply Br. 12 n.9.) After the Court was unable to render an opinion in Kissinger, however, certiorari was denied in this case and in Zweibon; petitions for rehearing asking that final disposition be withheld until the decision in Fitzgerald also were denied.

Butz, itself.5/ In Nixon, however, the Court made it clear that it had "left open [in Butz] the question whether other federal officials could show that 'public policy requires an exemption of that scope.'" 457 U.S. at 731, quoting Butz v. Economou, 438 U.S. at 506.

More importantly for our purposes, the Court in both Nixon and Harlow clarified just how lower courts should determine whether a case involved 'special functions' warranting absolute immunity. In Nixon, the Court explained:

> Our decisions concerning the immunity of government officials from civil damages liability have been guided by the Constitution, federal statutes, and history. Additionally, at least in the absence of explicit constitutional or congressional guidance, our immunity decisions have been informed by the common law. This Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government.

457 U.S. at 747-48 (citations omitted). The Court also stressed that although its opinion in Butz had "described the requisite inquiry as one of 'public policy,' the focus of inquiry more accurately may be viewed in terms of the 'inherent' or 'structural' assumptions of our scheme of government." Id. at 748 n.26. This point was repeated in Harlow, where the Court described how a lower court should determine whether a function was "so sensitive as to require a total shield from liability" (457 U.S. at 813):

> Here as elsewhere the relevant judicial inquiries would encompass considerations of public policy, the importance of which should be confirmed either by reference to the common law or, more likely, our constitutional heritage and structure.

Id. at 813 n.20 (citation omitted).

The uniqueness of the Attorney General's discretionary legal and national security functions make a compelling

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5/ See Halperin v. Kissinger, 606 F. 2d 1192,, 1208 (D.C. Cir. 1979), aff'd. in part by an equally divided Court and cert. dism'd. in part, 452 U.S. 713 (1981)("Absolute immunity is not available *** for acts not involving adjudication or prosecution."); Forsyth v. Kleindienst, 599 F. 2d at 1211-16; but compare Tigue v. Swaim, 585 F. 2d 909, 914 (8th Cir. 1978) (designation of person for mental evaluation who was member of nuclear launch crew related to national security and thus was a special function requiring absolute immunity).

argument that absolute immunity is esssential under the Harlow-Nixon 'special functions' analysis. Rooted in the Judiciary Act of 1789,[6] the Attorney General's broad responsibility to serve as the Executive's chief legal officer cannot be subject to the inhibition posed by private damages actions. The need for independence is no more clearly illustrated than in this case, where an Attorney General is being sued for evaluating the scope of the President's power at a most critical point, where Article II powers potentially conflict with Article III responsibilities. This suit, then, truly involves an historically central function of the Attorney General. Moreover, this function was exercised in what the Court in Harlow characterized as the "'central' Presidential domain[] *** [of] national security." 457 U.S. at 812 n.19. [7] Courts have long recognized that Executive national security judgments are "rarely proper subjects for judicial intervention," even in the exercise of the courts' equitable powers. Haig v. Agee, 453 U.S. 280, 292 (1981).[8]

None of this was considered by the court of appeals, however, which rejected the immunity claim under the guise of

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6/ Act of Sept. 25, 1789, ch. 20, § 35, 1 Stat. 73. As we noted in our briefs below, the President must turn to his Attorney General for legal advice. Indeed, early on Chief Justice Jay cited the President's Article II power to "require the Opinion, in writing, of the principal heads of each of the executive Departments" (Const., Art. II, § 2, cl. 1) in refusing to respond to a request for advice of Secretary of State Jefferson on behalf of President Washington. (See matters cited at Br. 31 n.16.)

7/ Because "the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own," the Court in Harlow also stated that "a derivative claim to Presidential immunity would be strongest" in the foreign policy and national security areas. 457 U.S. at 812 n.19. In this case, the Attorney General was performing a function that had been delegated expressly to the Attorney General by the President. A derivative claim to Presidential immunity was advanced below but rejected without discussion.

8/ Our briefs also noted that common law provides substantial support for absolute immunity here. Indeed, the Attorney General's role in authorizing a surveillance is directly analogous to the judge's role in authorizing an ex parte application for a search warrant, a judicial function which is protected by absolute immunity. See Stump v. Sparkman, 435 U.S. 349, 363 n.12 (1978).

adhering to the 'law of the case'. In the majority's view, Harlow "*** 'did not announce any new law but merely reiterated what [the Supreme Court] had previously said in Butz v. Economou.'" (Majority at 11-12, quoting Forsyth v. Kleindienst, 700 F. 2d at 109 (dissenting op.)). As Judge Weis noted, however, "[Harlow's] 'special functions' notion is different from the prosecutorial role [the court of appeals] reviewed in Forsyth I." (Dissent at 20.) The majority's cavalier refusal even to acknowledge the express suggestion of the eight Justices joining in Harlow that absolute immunity might well be justified in this type of case is disrespectful to the Court and ignores the guidance the Court now has given for determining whether particular functions should be accorded the protection of absolute immunity.9/

Certiorari is needed to settle the scope of immunity that protects the Attorney General.10/ This issue is important, both for the client and for the office of Attorney General. Although limited in scope, this immunity claim concerns some of the most sensitive and central functions of the Attorney General, where

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9/ Our brief also pointed out the court of appeals' error in Forsyth I when it concluded that "Butz *** was unconcerned with [the] problem" that harassing lawsuits could chill the vigorous discharge of the Attorney General's duties. 599 F. 2d at 1211; but see Butz v. Economou, 438 U.S. at 516. Significantly, the Supreme Court in Nixon found that "[a]mong the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties." 457 U.S. at 752 n.32.

10/ There has been a decided reluctance on the part of the lower courts to accept immunity claims that have not already been approved expressly by the Supreme Court. Since Harlow was decided, the District of Columbia Circuit twice has avoided the absolute immunity issue in two electronic surveillance cases considered by the same panel. Although the court of appeals found it unnecessary to resolve the issue in these cases, the argument was variously characterized as one raising an "important and difficult question" (Zweibon v. Mitchell, 720 F. 2d 162, 168 n.15 (D.C. Cir. 1983)) and one that relied on "an ambiguous reference, in dictum, in Harlow." Ellsberg v. Mitchell, 709 F. 2d 51, 58 (D.C. Cir. 1983), cert. denied sub nom. Russo v. Mitchell, 52 U.S.L.W. 3597 (U.S. Feb. 21, 1984).

The absolute immunity issue currently is before the District of Columbia Circuit in yet another electronic surveillance case, Halperin v. Kissinger. As a practical matter, we have an interest in having the issue resolved by the Supreme Court before it has to consider that case again, which involves a surveillance that was selected as one of the grounds for impeachment in 1974 by the House Judiciary Committee.

the inhibition posed by the prospect of personal liability can be least tolerated. Forsyth is our best case to resolve this issue. Here, an Attorney General is sued for authorizing a surveillance pursuant to a direct Presidential delegation.11/ That decision required the Attorney General to exercise both his legal judgment and his national security judgment. At the time the surveillance was authorized, the lower courts had held that both domestic and foreign security surveillances fell within the President's powers. As a practical matter, plaintiff, who only was incidentally overheard on the surveillance, did not suffer demonstrable harm as a result of the Attorney General's decision. (See Dissent at 29.) Finally, this is a case where the lower courts simply have chosen to ignore the Supreme Court's most recent teachings.

In this case, our individual client's interests coincide with our substantial governmental interest in establishing an absolute immunity for the Attorney General's discretionary national security and legal judgments. At the very least, Harlow gives us some indication that our argument would be received favorably by the Supreme Court. As our argument in this case is a substantial one, this appears to be a good vehicle to ask the Court to resolve the issue once and for all. The major risk would be that, as in Halperin, Justice Rehnquist would not participate and the Court might again split 4-4 on this question.

2. Forsyth also offers our best case to raise the question whether a denial of a claim of qualified immunity is immediately appealable under § 1291.

As noted in our rehearing memorandum, the circuits are divided on this issue. The Eighth and the District of Columbia Circuits have accepted appealability. See Evans v. Dillahunty, 711 F. 2d 828 (8th Cir. 1983)(denial of qualified immunity constitutes final appealable order where question purely is one of law); McSurely v. McClellan, 697 F. 2d 309 (D.C. Cir. 1982). The Third Circuit has been joined by the Fourth Circuit in denying appealability, however. See Bever v. Gilbertson, 724 F. 2d 1083 (4th Cir. 1984). On April 5, rehearing en banc was denied in Bever by an equally divided court; and we understand that a certiorari petition probably will be filed in that case.12/

11/ This delegation occurred in 1965, when President Johnson centralized the national security surveillance responsibilities. The President's delegation is reproduced as an addendum to the opinion in United States v. United States District Court for the Eastern District of Michigan, 444 F. 2d 651, 670-71 (6th Cir. 1971), aff'd. Keith, 407 U.S. 297.

12/ You authorized our appearance as amicus supporting appealability in Bever and have authorized appeals from denials of qualified immunity in cases before the First, Fifth and Eleventh Circuits. (See cases cited in our rehearing memorandum at 4 nn. 3-4.)
(CONTINUED)

There are several factors which make this a good case for Supreme Court review. First, the former Attorney General's entitlement to that immunity is clear. Indeed, another court of appeals already has accorded Mr. Mitchell immunity for similar surveillances. See Sinclair v. Kleindienst, 645 F. 2d 1080 (D.C. Cir. 1983); Zweibon v. Mitchell, 720 F. 2d 162.13/ Second, the immunity issue is not fact bound; there is only the question of whether the surveillance violated clearly established law. Third, it cannot be argued that the district court's denial of the qualified immunity claim was, in any sense, interlocutory. Here, liability has been imposed, and only the question of damages and attorneys fees remain. Finally, it is significant that plaintiff is not seeking damages from a subordinate employee but rather has sued a senior government official. As such, the harm to the public interest articulated in Harlow is correspondingly greater than if this were a suit against an employee who exercised only limited discretion.

The district court's reasons for rejecting Mr. Mitchell's qualified immunity in this case pose an independent justification for seeking certiorari. Here, an Attorney General has been found liable for not heeding the most fleeting harbingers of changes in the law -- views expressed by individual Justices on an issue expressly reserved by the Supreme Court and arguments advanced by defense counsel in a district court proceeding. 551 F. Supp. at 1255-56.14/ According to the district court, the Attorney

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12/ (CONTINUED) Recently, the appealability question was addressed in separate opinions by the Fifth Circuit. In Williams v. Collins, No. 82-4434 (5th Cir. Apr. 2, 1984), the court of appeals reserved the issue but accepted the possibility that denials of qualified immunity might be appealable under § 1291. The following week, in Metlin v. Palastra, No. 834266 (5th Cir. Apr. 9, 1984), the court concluded that since it had jurisdiction over the denial of absolute immunity that jurisdiction could extend to the denial of qualified immunity. By contrast to Metlin, although the court of appeals in Forsyth agreed it had jurisdiction to resolve the absolute immunity claim, it rejected our pendent appellate jurisdiction argument.

13/ The Zweibon plaintiffs have advised they will seek certiorari on the qualified immunity issue. Their petition is due June 7, 1984.

14/ The district court also found that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1976), should have placed the Department on notice that warrantless domestic security surveillances were unconstitutional. 551 F. Supp. at 1258. This disregards the Supreme Court's unequivocal holding in Keith that by adding § 2511(3), the so-called national security proviso, Congress "intended to make clear that the Act simply did not legislate with respect to national security surveillances." 407 U.S. at 306.

General was required to ignore the opinions of two federal judges who had ruled that domestic security surveillances fell within the President's Article II powers and, effectively, give up that power or "gamble" that those judges' view of the law was correct at the risk of the Attorney General's own personal liability. Id. at 1256. This sets an impossible standard for the Attorney General and blindly ignores the fundamental function of this officer to press positions on behalf of the President until they receive final resolution.

At this point, it appears inevitable that the appealability issue will be presented to the Supreme Court for resolution next Term. As noted earlier, we are advised that certiorari will be sought by the Bever defendants. Our own interests in seeking review of this issue are substantial. Since Forsyth offers the best vehicle,15/ I believe we should ask the Court to consider the issue in the case.

CONCLUSION

Accordingly, for the above reasons, I recommend filing a petition for a writ of certiorari in this case.

RICHARD K. WILLARD
Acting Assistant Attorney General
Civil Division

15/ Bever presents the appealability question in a much more difficult context than this case. In Bever, there was a pending claim for injunctive relief against the same defendants. Moreover, although the Fourth Circuit characterized the question as one of entitlement to qualified immunity, the defendants were primarily seeking to be dismissed on the ground that they were not responsible for the acts which were alleged to have harmed plaintiffs.

No. 83-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

JOHN N. MITCHELL, PETITIONER

v.

KEITH FORSYTH

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Attorney General performs "special functions" which warrant the protection of absolute immunity when he makes discretionary legal judgments on behalf of the Executive Branch, and especially when the judgments are made on matters relating to national security.

2. Whether a district court's denial of a claim of qualified immunity which can be resolved as a matter of law under Harlow v. Fitzgerald, 457 U.S. 800 (1982), is immediately appealable as a collateral order under Cohen v. Beneficial Industrial Loan, Corp., 337 U.S. 541 (1949).

3. Whether an Attorney General is entitled to qualified immunity as a matter of law when he authorizes an investigative technique after this Court had expressly reserved decision on the constitutionality of such technique.

PARTIES TO THE PROCEEDINGS

The following persons appeared as parties to the proceedings below: Keith Forsyth, Richard G. Kleindienst, L. Patrick Gray, III John N. Mitchell, Albert Cooper, and E. Davis Porter.

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The Solicitor General, on behalf of John N. Mitchell, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra,) is reported at 729 F.2d 267. The opinion of the court of appeals on respondent's motion to dismiss the appeal (App., infra,) is reported at 700 F.2d 103. The opinion of the district court (App., infra,) is reported at 551 F. Supp. 1247. The prior opinion of the court of appeals (App., infra,) is reported at 599 F.2d 1203. The initial opinion of the district court (App., infra,) is reported at 447 F. Supp. 192.

JURISDICTION

The judgment of the court of appeals (App., infra,) was entered March 8, 1984. A petition for rehearing

was denied on April 3, 1984 (App., infra,). On June , 1984, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including August 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. At the time of the events leading to this litigation, 18 U.S.C. 2511(3)(1976)[1]/ provided, in pertinent part:

> Nothing contained in this chapter * * * shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral

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1/ 18 U.S.C. 2511(3) was repealed by Section 201(c) of the Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, 92 Stat. 1979. This statute, which establishes procedures for the conduct of electronic surveillance for national security purposes, was enacted eight years after the events that gave rise to this litigation.

> communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

STATEMENT

1. This case concerns events which the court of appeals in related criminal proceedings labeled "bizzare" and "unique" and for which there is "no historical precedent." United States v. Berrigan, 482 F.2d 171, 179 (3d Cir. 1973).

In June, 1970, the Philadelphia office of the Federal Bureau of Investigation learned from a member of the East Coast Conspiracy to Save Lives (ECCSL) that the group was planning to destroy the underground utility tunnels servicing a portion of the Federal enclave in Washington, D.C., as a Washington's Birthday protest of the Vietnam War. The FBI also learned that the ECCSL already had been successful in carrying out several raids on draft board offices. In August, 1970, the FBI further learned that three ECCSL members, including William Davidon, a professor at Haverford College, had discussed a plan to kidnap Henry A. Kissinger, then Assistant to the President for National Security Affairs, simultaneously with the destruction of the utility system. This latter information was conveyed to the White House in

addition to the Attorney General. App., infra, ; App., infra, .[2]/

After additional investigation, Attorney General Mitchell on November 6, 1970, approved the FBI Director's request to place a telephone surveillance on Davidon's home telephone. The primary purpose of this surveillance was to gather intelligence information about the ECCSL's plans, although it also was anticipated that information of a criminal evidentiary nature might also be obtained. The surveillance was authorized for a period of thirty days and reauthorized for an additional period of thirty days. It then was discontinued on January 6, 1971. During the surveillance, conversations between Davidon and respondent Keith Forsyth were overheard on three occasions. App., infra, .

At the time of the Davidon surveillance, only two federal courts had considered whether warrantless domestic security electronic surveillances fell within the President's power; and both had held that they did (see cases cited at App., infra,). This Court had expressly reserved decision on whether national security surveillances generally required warrants in Katz v. United States, 389 U.S. 347, 358 n.23

2/ During his deposition in this case, Attorney General Mitchell recalled that Dr. Kissinger was provided Secret Service protection in light of the kidnap threat (Mitchell Dep. 60). At that time, Dr. Kissinger was engaged in the then secret peace negotiations with the North Vietnamese in Paris (Mitchell Dep. 60-62). This factor, which was not known to the FBI, added a further dimension to the security concerns which the kidnap threat presented. This threat also is discussed in an opinion in a related case. See Burkhart v. Saxbe, 448 F. Supp. 588, 556-597 (E.D. Pa. 1978), rev'd sub nom. Forsyth v. Kleindienst, 599 F.2d 1203 (3d Cir. 1979), cert. denied, 453 U.S. 912 (1981).

(1967), and conflicting views on the question had been expressed by individual Justices in concurring opinions. Compare id. at 359-360 (Douglas, J., joined by Brennan, J., concurring) with id. at 362-363 (White, J., concurring). Also, although shortly after Katz was decided Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, to govern the use of wiretaps generally, a provision, 2511(3), was added "to make clear that the Act simply did not legislate with respect to national security surveillances." United States v. United States District Court, 407 U.S. 297, 306 (1972)(hereinafter cited at Keith).

After respondent Forsyth learned of the wiretap he instituted this action in the United States District Court for the Eastern District of Pennsylvania against Attorney General Mitchell and two FBI employees who had installed and maintained the electronic surveillance.3/ Respondent sought damages for the three overhearings of his telephone conversations, claiming that the warrantless electronic surveillance violated Title III and the First, Fourth and Ninth Amendments to the Constitution.4/

3/ Respondent also named as defendants former Attorney General Richard G. Kleindienst and former FBI Acting Director L. Patrick Gray. These defendants' respective terms of office did not coincide with the period of the surveillance, and accordingly the claims against them were voluntarily dismissed in the district court.

4/ Two other damages actions are pending against the petitioner for the Davidon surveillance. One suit, Sister Elizabeth McAlister, et al. v. Richard G. Kleindienst, et al., Civil Action No. 72-1977 (E.D.Pa.), filed by Davidon and another person overheard on the surveillance, has been stayed pending disposition of appellate proceedings here. Another, Katherine W. Burkhart, et al. v. William B. Saxbe, et al., Civil Action No. 74-826 (E.D.Pa.), also involves a Black Panther Party surveillance and is before the district court on cross-motions for summary judgment.

After discovery, which included the former Attorney General's deposition, a motion for summary judgment was filed urging that the case be dismissed on absolute and qualified immunity grounds. The district court denied this motion (App., infra,). The court held that the Attorney General was not entitled to absolute immunity under Imbler v. Pachtman, 424 U.S. 409 (1976), because he was not functioning as a prosecutor. The court also held that the claim of qualified immunity could not be resolved on motion for summary judgment because "there are genuine issues of material fact in connection with the defendants' affirmative defense of good faith," although the court did not specify just what those issues might be (App., infra,).

2. On appeal from the denial of the motion for summary judgment, the court of appeals held that it only had jurisdiction to review the district court's denial of absolute immunity (App. infra,). On the merits, the court held that, under Butz v. Economou, 438 U.S. 478, 515 (1978), the Attorney General is not absolutely immune from personal damages liability for his official acts except when performing functions analogous to those of a prosecutor. In reaching this conclusion, the court of appeals rejected any notion that absolute immunity was needed to protect the Attorney General from harassing lawsuits because "Butz * * * was unconcerned with this problem." The court of appeals remanded the case to the district court to consider whether in authorizing the electronic surveillance challenged by respondent, the Attorney General was exercising a prosecutorial function or was engaged in "a purely investigative or administrative functins." (App., infra,). A petition

for a writ of certiorari was denied after this Court was unable to render an opinion on related immunity issues in Kissinger v. Halperin, 452 U.S. 713 (1981).

3. On remand, the district court again rejected petitioner's claim to absolute immunity (App., infra,). The court then considered petitioner's entitlement to qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982). Purporting to follow Harlow, the district court not only rejected petitioner's claim of qualified immunity but imposed liability (App., infra,).

The district court concluded that petitioner's authorization violated a warrant requirement that was clearly established for domestic national security surveillances long before this Court addressed the national security warrant question "for the first time" in Keith, 407 U.S. at 299. To support this conclusion, the district court cited this Court's holding in Katz v. United States, supra, that nontrespassory surveillances generally require warrants absent exigent circumstances, as well as the concurring opinion of Justice Douglas, joined by Justice Brennan, which the district court stated "should have provided guidance to defendant Mitchell and all other attorneys regarding the constitutionality of warrantless domestic security wiretaps" (App., infra,). The court also concluded that "the Justice Department had reason to know that its position regarding the need for a warrant was subject to both question and attack" because the constitutionality of the surveillance involved in Keith had been challenged in a

motion filed in the underlying criminal proceedings "more than one month prior to the Attorney General's authorization of the [Davidon] wiretap" (id. at). Finally, the court concluded that "the Attorney General's action was in direct conflict with the language, legislative history and purpose of Title III" (id. at). The district court then set the case for an evidentiary hearing "to determine whether the plaintiff is entitled to punitive damages and/or compensatory damages" (id. at).5/ In a later ruling, the court declined to certify its order for interlocutory appeal (App, infra,).

4. Pursuant to 28 U.S.C. 1291, an appeal was noticed from the denial of petitioner's claim to absolute and, alternatively, qualified immunity. Respondent moved to dismiss the appeal on the ground that the district court's rejection of petitioner's immunity claims was not a final appealable order. A motions panel of the court of appeals denied this motion in part, ruling that a denial of a claim of absolute immunity was immediately appealable (App., infra,) and referring the question whether a denial of qualified immunity was appealable as a collateral order to the merits panel (id. at).6/

5/ The district court also held that trial was required on the question of the liability of the two FBI employees who actually intercepted respondent's conversations pursuant to the Attorney General's authorization. Respondent subsequently dismissed his claim against the FBI employees, however.

6/ A petition for a writ of mandamus with respect to the district court's denial of qualified immunity also was presented. This was denied "for the same reasons" as those stated for the dismissal of the appeal on qualified immunity (App., infra,).

The panel stayed further proceedings below, noting that a trial on punitive damages would involve an inquiry into petitioner's subjective motivations and into the advice he received from subordinates within the Department of Justice that might be "as searching as the trial on the merits would have been" (id. at). The panel further noted that the district court's ruling on the state of national security electronic surveillance law in 1970 differed from that of the District of Columbia Circuit in a similar case (id. at).

On the merits of the appeal the court first held that this Court's intervening decision in Harlow v. Fitzgerald, supra, did not require a different result from the court of appeals' first opinion in this case, when it sub silentio rejected the notion that absolute immunity could protect the Attorney General's discretionary legal and national security judgments (App., infra,). The court then declined to consider the qualified immunity issue for fear that accepting jurisdiction over this issue would "subject our colleagues to unnecessary additional burdens by opening the sluice gates" (id. at).

Judge Weis dissented (id. at). The dissent stressed that the special functions absolute immunity that was presented to the court was "different from the prosecutorial role we reviewed in Forsyth I" and noted that "Harlow's discussion of the 'special functions' test, as it might apply to the Attorney General in cases implicating national security, lends a force to the defendant's argument here that was lacking in Forsyth I" (id. at). Judge Weis did not

address the absolute immunity issue further, however, in light of his conclusion that the court of appeals had jurisdiction to review the qualified immunity issue, commenting that the majority's fear that "allowing a Abney-Cohen appeal will open the gates to a flood of interlocutory appeals" was not "the proper" approach under those decisions (id. at).7/ On the merits of the qualified immunity issue, the dissent stated that "[t]he state of law in 1971 is a matter of history" and this history "demonstrate[s] that the law of warrantless electronic surveillance in national security cases was only beginning to develop in 1970-71. Unquestionably, a prohibition against warrantless searches in these circumstances was not 'clearly established'" (id. at).

A petition for rehearing and suggestion for rehearing en banc was denied April 3, 1984, with four judges indicating that they would have considered the case en banc (App., infra,).

REASONS FOR GRANTING THE PETITION

This case presents an important and unsettled question concerning the scope of the immunity that protects the Attorney General when he performs the historically central functions of his office. This case also presents questions that have arisen frequently in light of this Court's adjustment of the qualified immunity doctrine in Harlow v. Fitzgerald, supra.

7/ Abney v. United States, 431 U.S. 651 (1977); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

In an extraordinary opinion, the district court ruled that an Attorney General is liable for his mistaken legal judgment about the scope of the President's national security powers under Article II of the Constitution, even though at the time this Court had reserved decision on the constitutional question and the lower courts had agreed with the Attorney General's judgment. In the district court's view, petitioner had "gambled" that his view ultimately would be accepted by this Court and now should be liable personally because "[t]he Justice Department lost that gamble in Keith" (App., infra,). In that situation, neither absolute nor qualified immunity protects the Attorney General under the district court's reasoning. Rather, the Attorney General must risk personal liability whenever he takes a position on behalf of the Executive Branch that is susceptible to constitutional attack from some quarter. The court of appeals agreed that absolute immunity should not protect the Attorney General in these circumstances and refused to even consider his entitlement to qualified immunity, finding that its own appellate docket interests outweighed any interest in immediate review prior to trial.

These decisions pose a serious threat to the independence of the Attorney General as the Executive Branch's chief legal officer. Further review by this Court is warranted not only by the exceptional importance of the questions presented to the effective functioning of the office of the Attorney General but also because the decisions below conflict with decisions of this Court and other courts of appeals.

1. The most disturbing error of the court of appeals is its treatment of the absolute immunity issue in this case. We have urged that such an immunity should extend to the Attorney General's discretionary legal and national security judgments "* * * to protect the unhesitating performance of functions vital to the national interest." Harlow v. Fitzgerald, 457 U.S. at 812. The court of appeals on two occasions, however, has refused to consider any claim to absolute immunity that does not involve adjudicative or prosecutive functions.

The perimeters of the absolute immunity doctrine are by now well defined. In Butz v. Economou, 438 U.S. at 508, this Court held that "[a]lthough a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations, [the Court's] decisions recognize that there are some officials whose special functions require a full exemption from liability." The Court continued that this determination required "* * * 'a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'" Ibid., quoting Imbler v. Pachtman, 424 U.S. at 421. In Butz, the Court concluded that two executive functions implicated in that case were entitled to the protection of absolute immunity: those of administrative adjudicative officials and the agency attorneys who initiate administrative proceedings and present evidence in them. The Court reasoned that such officials perform duties that are "'functional[ly] comparabl[e]'" to the duties of judges and prosecutors which traditionally have been

accorded absolute immunity in the public interest. Id. at 512, quoting Imbler v. Pachtman, 424 U.S. at 423 n.20; see also id. at 511-517. This Court's companion opinions in Harlow v. Fitzgerald, supra, and Nixon v. Fitzgerald, 457 U.S. 731 (1982), provide further guidance as to how a court should determine whether a suit involves special functions that warrant the protection of absolute immunity.

The court of appeals initially considered the absolute immunity issue in this case in 1979. Although petitioner then urged that the Attorney General's discretionary national security and legal judgments should be viewed as "special functions" protected by absolute immunity, the court of appeals declined even to address the possibility. Instead, the court assumed that absolute immunity only would be available for performing one of the "quasi-judicial" special functions actually recognized by the Court in Butz (599 F.2d at 1215). In its second opinion, the court of appeals reiterated its narrow reading of Butz:

> In Forsyth I we considered and interpreted the Butz "special functions" approach to provide absolute immunity to an Attorney General engaged in a quasi-judicial function.

(App., infra, .) In the court's view, "[t]hat approach was reaffirmed by the Supreme Court in Nixon and recognized with approval in Harlow" (id. at).

The court of appeals' offhand rejection of an absolute immunity protecting the Attorney General's discretionary legal and national security judgments cannot be reconciled with the type of in depth functional analysis this Court has

adopted for immunity determinations. Nothing in the Court's opinion in Butz can be read to suggest that quasi-judicial functions are the only executive functions which are entitled to the protection of absolute immunity to preserve the effective functioning of government. Those just happened to be the type of functions that arose in Butz.[8]/ Common sense, as well as a recognition of the traditional limitations on judicial decisionmaking, dictates the conclusion that this Court in Butz did not intend to foreclose claims to absolute immunity for "special functions" that were not presented by the case then before the Court.

Any doubt that the court of appeals might have had in 1979 should have been dispelled by this Court's opinion in Nixon v. Fitzgerald, supra. Speaking in no uncertain terms, the Court stated:

> In Butz itself we upheld a claim of absolute immunity for administrative officials engaged in functions analogous to those of judges and prosecutors. We also left open the question whether other federal officials could show that "public policy requires an exemption of that scope."

457 U.S. at 747 (citations omitted, emphasis added), quoting Butz v. Economou, 438 U.S. at 506. In the companion case, Harlow v. Fitzgerald, the Court reiterated this point when it

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8/ Although the Secretary of Agriculture was sued in his individual capacity in Butz, he had not been in office when the challenged administrative action occurred and the immunity arguments did not focus on his special functions. On remand after this Court's decision, the district court held that all but two of the defendants remaining in the case (in addition to Secretary Butz who was dismissed for lack of involvement and another defendant, then deceased, who was dismissed by agreement) were held to be entitled to absolute immunity under this Court's decision. Economou v. Butz, 466 F. Supp. 1351, 1358-1360 (S.D.N.Y. 1979), aff'd, 633 F.2d 203 (2d Cir. 1980).

refused to "foreclose the possibility" that the petitioners, former Presidential aides with no quasi-judicial responsibilities, could yet establish on remand a special functions absolute immunity "properly applicable to their claims" (457 U.S. at 813). Indeed, in Harlow this Court specifically adverted to the Attorney General's role in authorizing warrantless national security surveillances in noting that "[f]or 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" (id. at 812 & n.18).

The court of appeals' litmus paper approach to absolute immunity claims, denying any that do not fit neatly in the quasi-judicial box, plainly is wrong. The "analytical approach" this Court has adopted requires a more informed determination, which focuses on the particular functions involved in the case under consideration. Harlow v. Fitzgerald, 457 U.S. at 812. The court of appeals plainly failed to heed this Court's guidance that entitlement to absolute immunity "must be justified by reference to the special functions of [a defendant official's] office" (ibid.). In Nixon, this Court identified the inquiry that the court considering a claim of absolute immunity should undertake:

> Our decisions concerning the immunity of government officials from civil damages liability have been guided by the Constitution, federal statutes, and history. Additionally, at least in the absence of explicit constitutional or congressional guidance, our immunity decisions have been informed by the

> common law. See Butz v. Economou, supra, at 508; Imbler v. Pachtman, supra, at 421. This Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government. See, e.g., Butz v. Economou, supra, at 508; Imbler v. Pachtman, supra, at 421; Spalding v. Vilas, 161 U.S., at 498.

457 U.S. at 747-748. The Court further explained the "kind of 'public policy' analysis appropriately undertaken by a federal court," noting that "[a]lthough the Court in Butz v. Economou, supra, at 508, described the requisite inquiry as one of 'public policy,' the focus of inquiry more accurately may be viewed in terms of the 'inherent' or 'structural' assumptions of our scheme of government" (id. at 748 & n.26). Similarly, in Harlow, the Court stressed that the "relevant judicial inquiries" for determining whether a function was so sensitive as to require a total shield from liability "would encompass considerations of public policy, the importance of which should be confirmed either by reference to the common law or, more likely, our constitutional heritage and structure" (457 U.S. at 813 n.20).

Petitioner's entitlement to absolute immunity here, which the court of appeals twice has refused to address on the merits, is demonstrated by such an analytical approach. At the core of this case is the Attorney General's judgment, like that of his predecessors in office, that warrantless surveillances fell within those national security powers which Article II to the Constitution commits to the President.9/ In making

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9/ In Keith, this Court observed that "[s]uccessive Presidents for more than one-quarter of a century have authorized such [internal security] surveillance in varying degrees without guidance from the Congress or a definitive decision of this Court." 407 U.S. at 299 (footnote omitted).

this judgment, petitioner performed the historically central duty of the Attorney General to interpret the law on behalf of the Executive Branch. See, e.g., 28 U.S.C. 511-513. Petitioner was performing this duty at its most sensitive point, where the powers entrusted to two Branches of government under the Constitution potentially conflict.

The district court's characterization of the petitioner's judgment as a "gamble" trivializes this critical function (App., infra,). As the Executive Branch's chief legal officer, the Attorney General often must resolve complex questions of statutory and constitutional law that affect the functions of that Branch and have far reaching consequences. In these situations, the Attorney General, no less than a judge, must be free to reach a conclusion "without apprehension of personal consequences." Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347 (1871).10/ Important as a general proposition,

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10/ In its first opinion, the court of appeals completely discounted the possibility that "an Attorney General [would] be subject to frivolous, harassing lawsuits which would chill the vigourous discharge of his duties" as a factor arguing in favor of absolute immunity (App., infra,). In the court's view, "Butz *** was unconcerned with this problem" (id. at).

In Nixon, however, this Court pointedly noted that "[a]mong the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his duties" (457 U.S. at 752 n.32). Thus, although the Court in Butz concluded that the inhibiting effect of damages suits would not justify an absolute immunity for all executive officials, the Court specifically cited the threat of retaliatory suits as one factor which argued for an absolute immunity that protected officials performing quasi-judicial functions in the administrative context (438 U.S. at 506-507, 512-516). This factor also exists here. No less than the prosecutor and the judge, an Attorney General's broad responsibilities require him to make decisions that will impact on mumerous persons who may feel aggrieved by his decisions.

this freedom becomes critical where, as here, an Attorney General would be threatened with personal liability because he concluded that the executive power rather than the judicial power controlled in a particular situation. Yet, the Judiciary Act of 1789 made provision for an "attorney-general of the United States" precisely to make such choices, and his inclusion in that foundational Act confirms the importance of the Attorney General's office and most central functions in the overall judicial scheme and in the relationship between the Executive and Judicial Branches. Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73.11/ Absolute immunity is required in order to serve the strong public policy, rooted in the

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11/ The President cannot look to the Judicial Branch for advice. Early on, Chief Justice Jay declined a request for advice by Secretary of State Jefferson on behalf of President Washington. Citing the President's power under Article II to "require the Opinion, in writing, of the principal Officer in each of the executive Departments" (U.S. Const. Art. II, § 2, Cl. 1), the Chief Justice explained:

> [The lines of separation drawn by the Constitution between the three departments of government] being in certain respects checks upon each other, and our being judges of a court in the last resort, are considerations which afford strong arguments against the propriety of our extra-judicially deciding the questions alluded to, especially as the power given by the Constitution to the President, of calling on the heads of departments for opinions, seems to have been purposely as well as expressly united to the executive departments.

3 H. Johnston, The Correspondence and Public Papers of John Jay 488-489 (1891).

Judiciary Act and Article II of the Constitution,12/ in "preserving the independent [legal] judgment" of the Attorney General when he exercises that judgment on behalf of the President and the Executive Branch. Butz v. Economou, 438 U.S. at 514.

Reference to common law immunity concepts further illuminates the public policy which supports absolute immunity in this type of case. The Attorney General holds a singular position in our jurisprudential system that makes him unlike private attorneys, for whom the common law has recognized only a limited immunity. See generally, Tower v. Glover, No. 82-1988 (June 26, 1984)(discussing the immunity protecting barristers in English common law). In addition to his responsibilities as head of the Department of Justice (28 U.S.C. 503) and his advisory responsibilities (28 U.S.C. 511-513), Congress has given the Attorney General a broad mandate "to attend to the interests of the United States" as such interests may arise. 28 U.S.C. 517; see also 28 U.S.C. 516, 518-519. As such, the Attorney General frequently must take a position on matters "involving not merely great pecuniary

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12/ Because it was drafted by the "first Congress -- many of whose members participated in the convention which adopted the Constitution, and were, therefore, conversant with the purposes of its framers," this Court has accorded the Judiciary Act a special significance in our constitutional heritage. Bors v. Preston, 111 U.S. 252, 256 (1884); see also Stuart v. Laird, 5 U.S. (1 Cranch) 298, 308 (1803); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 350 (1816); Willaims v. United States, 289 U.S. 553, 573-574 (1933).

interests, but the liberty and character of [private persons], and consequently exciting the deepest feelings *** in which there is great conflict in the evidence and great doubt as to the law which should govern [the Attorney General's] decision." Bradley v. Fisher, 80 U.S. at 348. In this respect, the Attorney General's duty to interpret the law's requirements is much like that of the judge. Similarly, like the judge, the Attorney General's exercise of discretion is subject to a variety of checks, a factor which this Court has considered pertinent in striking the immunity balance. No less than a prosecutor, the Attorney General "stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." Imbler v. Pachtman, 424 U.S. at 429 (footnote omitted). As any cabinet officer serving at the President's pleasure, the Attorney General also is subject to public pressures and congressional reaction that might be occasioned by the positions he adopts. Finally, the prospect of judicial review of any particular legal judgment obviously is a real one.13/ Public policy, then, as defined by reference to the common law as well as "our constitutional heritage and structure," provides strong

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13/ It is no ground to argue that judicial review is ineffective because it may come after the Attorney General has exercised his legal judgment and acted accordingly. Indeed, the petitioner's authorization of the surveillance here has a direct judicial analogue in the judge's authorization of an application for a search warrant. Although the judge will act ex parte and prior review is not available, nonetheless this Court has recognized that absolute immunity would protect him. Stump v. Sparkman, 435 U.S. 349, 363 n.12 (1978).

support for according the Attorney General's legal judgments absolute immunity in the public interest. Harlow v. Fitzgerald, 457 U.S. at 813 n.20.

The legal judgment at issue here is also a national security judgment, which petitioner exercised pursuant to a Presidential delegation.14/ Significantly, this Court in Harlow expressly commented on the possibility that an absolute immunity might be warranted to protect such judgments, stating:

> For 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. 18 Cf. *** Katz v. United States, 389 U.S. 347, 364 (1967)(White, J., concurring)("We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable")(emphasis added).

457 U.S. at 812 & n.18. The Court also noted that "a derivative claim to Presidential immunity [by a President's designee] would be strongest in such 'central' Presidential domains as foreign policy and national security, in which the President could not discharge his singularly vital mandate without delegating functions nearly as sensitive as his own" (id. at 812 n.19).

14/ See Memorandum for the Heads of Executive Departments and Agencies of June 30, 1965, reproduced at United States v. United States District Court for the Eastern District of Michigan, Southern Division, 444 F.2d 651, 670-671 (6th Cir. 1971), aff'd, 407 U.S. 297.

At the very least, these statements should have provided the court of appeals a clear signal that this type of case present a serious claim of absolute immunity which should have commanded the court's consideration. Here, absolute immunity is sought to protect a central function of the President under "our constitutional heritage and structure." Harlow v. Fitzgerald, 457 U.S. at 813 n.20. "In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations." New York Times Co. v. United States, 403 U.S. 713, 727 (1971)(Stewart J., concurring); see also id. at 741 (Marshall, J., concurring); id. at 756-758 (Harlan, J., dissenting); id. at 761 (Blackmun, J., dissenting). Furthermore, "the President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to 'preserve, protect and defend the Constitution of the United States.' Implicit in that duty is the power to protect our Government against those who would subvert it or overthrow it by unlawful means." Keith, 407 U.S. at 310. Thus, this Court has recognized "the constitutional basis of the President's domestic security role ***" (id. at 320), as well as the vital importance of that role:

> It has been said that "[t]he most basic function of any government is to provide for the security of the individual and of his property." Miranda v. Arizona, 384 U.S. 436, 539 (1966)(White, J., dissenting). And unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered.

Id. at 312.

The importance of preserving the President's discretion, and that of his designees, in this sensitive and critical area has long been recognized by this Court in decisions which steadfastly have maintained that "[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention." Haig v. Agee, 453 U.S. 280, 292 (1981); see also United States v. Nixon, 418 U.S. 683, 710 (1974), quoting C. & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948). As Justice Marshall wrote in Holtzman v. Schlesinger, 414 U.S. 1304, 1409-1310 (1973): "While [courts] have undoubtedly authority to judge the legality of executive action, [the courts] are on treacherous ground indeed when [they] attempt judgment as to its wisdom or necessity." The public policy in preserving that independence is one grounded in the Constitution, itself, and therefore clear. As a consequence, when the President's designee performs national security functions, absolute immunity is required because here, perhaps more than with any other function, hesitation from a fear of personal consequences carries grave risks to the nation as a whole and can least be tolerated.

2. The court of appeals also refused to consider petitioner's entitlement to qualified immunity. Holding that the district court's denial of petitioner's claim to qualified immunity was not a final appealable order under 28 U.S.C. 1291, the court dismissed this aspect of the appeal. This dismissal

of the qualified immunity appeal conflicts with the decision of the Eighth Circuit in Evans v. Dillahunty, 711 F.2d 828 (8th Cir. 1983), and the decision of the District of Columbia Circuit in McSurely v. McClellan, 697 F.2d 309 (D.C. Cir. 1982), and is based on a misapplication of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541.15/

In Cohen, the Court held that a small class of interlocutory orders was immediately appealable under 1291. To be appealable, an order must "*** finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (337 U.S. at 546). The Court subsequently has held that orders denying claims of absolute immunity are appealable under Cohen. See Nixon v. Fitzgerald, 457 U.S. at 741-743 (claim of immunity for the President); Helstoski v. Meanor, 442 U.S. 500, 506-508 (1979) (claim of immunity under Speech or Debate Clause); Abney v. United States, 431 U.S. at 656-663 (claim of immunity under Double Jeopardy Clause); compare Harlow v. Fitzgerald,

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15/ In circumstances which are not present here the Fourth Circuit has held that a denial of a claim of qualified immunity was not immediately appealable in Bever v. Gibertson, 724 F.2d 1083 (4th Cir. 1984), petitions for cert. pending, Nos. 83-2139, 84-25, (see App., infra,).

457 U.S. 800 (considering both absolute and qualified immunity questions on a collateral order appeal).16/

The court of appeals did not address the question whether an order denying qualified immunity satisfied the Cohen criteria. Instead, the court dismissed the appeal because it "decline[d] to subject [its] colleagues to unnecessary additional burdens by opening the sluice gates ***" (App., infra,). The court concluded that this Court's modification of the standard for qualified immunity did not affect its decision, because "[i]n the case before us *** we are without the insubstantial claims that concerned the Harlow and McSurely courts" (id. at).17/

The court clearly erred by failing to consider the applicability of the Cohen criteria. This Court's opinion in Cohen, not the docket pressures of particular courts of

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16/ In Helstoski v. Meanor, supra, the Court distinguished an appellate court's mandamus jurisdiction from its jurisdiction under Cohen's collateral order doctrine. In the instant case, a separate petition for a writ of mandamus was filed below urging the court of appeals to review the qualified immunity issue, in view of its potential impact on the Attorney General, even if the court found that a Cohen appeal would not lie. Although the two jurisdictional bases differ, the court of appeals denied the petition "for the same reasons" that it dismissed the 1291 appeal (App., infra,).

17/ In the court of appeals' view, the fact that the district court ruled against petitioner was sufficient, by itself, to make "Harlow and McSurely *** distinguishable from this case" (App., infra,). On its face, this reasoning is specious -- especially in light of the court's earlier observation "that the district court's adverse ruling on the state of the law in effect at the time the wiretaps were authorized differs from that of the court of appeals in Sinclair v. Kleindienst, 645 F.2d 1080, 1084 (D.C. Cir. 1981)" (App., infra,).

appeals, defines the circumstances under which an interlocutory order is immediately appealable under 1291. Though important, docket pressures simply are not determinative of an appellate court's jurisdiction under Cohen.[18]/ Moreover, there is no support in this Court's opinion in Harlow for the court of appeals' assumption that this Court was considering an "insubstantial claim[]" in Harlow and intended to limit the effect of its decision to such claims (App., infra,). To the contrary, the Court's opinion leaves no doubt that it was intending to announce a rule of immunity applicable to all cases.

That rule and the rationale behind it bear heavily on the appealability question. A "common thread" running through the previous decisions of this Court that have found denials of immunity claims within Cohen's ambit is the concern that the defendant official's right to avoid trial will be lost irretreivably if appeal must await final judgment (App., infra,). See Nixon v. Fitzgerald, supra; Helstoski v. Meanor, supra; Abney v. United States, supra. In Harlow, this Court revised the qualified immunity standards to provide, as a matter of strong public policy, that government officials should not be subject "either to the costs of trial or to the burdens of broad-reaching discovery" where they have not

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18/ As the dissent recognized, district court docket pressures also are important, and "[s]ound judicial administration argues against declining a meritorious appeal when the result is to require a district court to hold a useless trial." (App., infra,).

violated clearly established rights (457 U.S. at 817-818). As the dissenting below recognized, under Harlow "avoiding trial through prompt disposition of insubstantial claims by summary judgment is as compelling an objective in cases properly invoking qualified immunity as in those where absolute immunity is available" (App., infra,). Consequently, "[i]t follows inexorably that withholding appellate correction of erroneous pre-trial denials of qualified immunity frustrates Harlow's purpose in revising the test" (id. at).

The appealabilty of orders denying qualified immunity is an important question on which there is substantial disagreement among the courts of appeals. This conflict should be resolved in order to add certainty and uniformity in the treatment of suits against public officials. Because the petitioner's entitlement to qualified immunity turns on a pure question of law (see Evans v. Dillahunty, 711 F.2d at 830) and the district court's error is manifest, this is an appropriate case in which to consider the question.

3. Because it held that it lacked jurisdiction, the court of appeals did not review the most egregious aspect of the district court's decision, the rejection of petitioner's qualified immunity claim and the imposition of liability. In the district court's view, this Court's opinion in Katz v. United States, supra, "had clearly stated more than three years before the installation of the Davidon wiretap that a warrant was required for such electronic surveillance" (App., infra,). Consequently, petitioner was held liable because he

had "ignore[d] what the Supreme Court [in Katz] has previously determinated to be a requirement of the Constitution" (id. at).

The district court's error is manifest and not open to serious question. Contrary to the court's reading of Katz, in its opinion this Court expressly reserved the question whether a warrant was required for national security surveillances. 389 U.S. at 358 n.23. Five years later, when the question was decided in Keith, the Court began by acknowledging that "[s]uccessive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress or a definitive decision of this Court" and "[t]his case brings the issue here for the first time." 407 U.S. at 299 (emphasis added).19/ Prior to Keith, the lower courts were divided on the question. See United States v. United States District Court for the Eastern District of Michigan, 444 F.2d at 656 & n.2. Indeed, when petitioner authorized the Davidon surveillance "the sparse lower federal case law unanimously supported the theory that no warrant was required in national security cases" (App., infra, , emphasis added).

The district court's conclusion that petitioner violated clearly established law is plainly wrong. As the dissenting judge below noted after fully addressing the question, "a

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19/ The Court similarly noted that it was "address[ing] a question left open by Katz, supra, at 358 n.23" (407 U.S. at 309).

review of Supreme Court and other federal court decisions, the statutory provisions, and scholarly commentary all demonstrate that the law of warrantless electronic surveillance in national security cases was only beginning to develop in 1970-71" (App., infra,). See also Sinclair v. Kleindienst, 645 F.2d 1080 (holding in a suit filed by the Keith respondents that the warrantless surveillance considered in Keith did not violate clearly established law when it was authorized); accord Zweibon v. Mitchell, 720 F.2d 162 (D.C. Cir. 1983) (Zweibon IV), petition for cert. pending, No. 83-2005; compare Weinberg v. Mitchell, 588 F.2d 275 (9th Cir. 1978)(holding that Keith was not clearly foreshadowed and therefore should not be applied retroactively for damages purposes).20/ As a consequence, petitioner's entitlement to at least a qualified immunity is clear under Harlow.

The district court's opinion is as disturbing for its reasoning, as for its ultimate conclusion. In the district court's view, an Attorney General must heed the most fleeting harbingers of change in constitutional doctrine if he is to avoid personal liability. The court faulted petitioner because "more than one month prior to the Attorney General's authorization of the wiretap at issue in this case" a defense

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20/ The Ninth and District of Columbia Circuits are in conflict on whether Keith was clearly foreshadowed by Katz. Compare Weinberg v. Mitchell, supra, with Zweibon v. Mitchell, 606 F.2d 1172, 1178-1181 (D.C. Cir. 1979)(Zweibon III), cert. denied, 453 U.S. 912 (1981). In Zweibon IV, however, the District of Columbia Circuit rejected the argument that "the 'clearly established' test for immunity purposes is coterminus with the 'clearly foreshadowed' test courts employ to determine whether a judicial decision ought to be given retroactive effect." 720 F.2d at 172; see also id. at 172-173.

motion was filed in the district court proceedings that gave rise to Keith which should have given "the Justice Department *** reason to know that its position regarding the need for a warrant was subject to both question and attack" (App., infra,).[21] Petitioner also was faulted for failing to accept the views of Justice Douglas expressed in a separate opinion, joined by Justice Brennan, in Katz on the warrant question. As the district court expressed the point:

> Thus, in 1967, the Katz majority opinion and two concurrences should have clearly alerted defendant Mitchell that electronic surveillance such as the Davidon tap was subject to the warrant requirement of the Fourth Amendment. Instead of seeking to obtain a warrant for the Davidon tap, defendant Mitchell and his aides gambled that Justice White's position [in another concurring opinion in Katz] would be accepted if the Court were to be faced with this issue in an actual case rather than a hypothetical debate. The Justice Department lost that gamble in Keith.[22]

21/ The district court went on to conclude that "[a]fter January 25, 1971, the government had overwhelming reason to know that its conduct was unconstitutional" as a result of the district court's decision in United States v. Sinclair, 321 F. Supp. 1074 (E.D. Pa. 1971), granting the defense motion noted above (App., infra,). This decision occurred after the Davidon surveillance, however, and the court ignored the previous two district court decisions that held no warrant was required for domestic security surveillances. See United States v. United States District Court for the Eastern District of Michigan, 444 F.2d at 656 n.2.

22/ The district court also concluded that "the Attorney General's action was in direct conflict with the language, legislative history and purpose of Title III" (App., infra,). This conclusion ignores the clear holding of Keith that "Congress only intended to make clear [by adding the national security proviso, 2511(3)] that the Act simply did not legislate with respect to national security surveillances." 407 U.S. at 306; compare Zweibon v. Mitchell, 516 F.2d 594, 659-670 (D.C. Cir. 1975)(en banc)(Zweibon I), cert. denied, 425 U.S. 944 (1976)(characterizing Keith as offering "only ambiguous guidance" and concluding that Congress intended to make Title III's reach contingent upon future judicial pronouncements) with Zweibon III, 606 F.2d at 1181-1182 (holding Zweibon I's interpretation of Title III constituted such a sharp break in the law that it should be given prospective effect only).

(id. at).

The Attorney General cannot be subject to such restrictions. The district court's reasoning ignores the realities of the Attorney General's office, which make it impossible for him to be aware of every filing in every case handled by the Department of Justice. More importantly, the district court has ignored the central responsibilities of that office. As noted with respect to the need for absolute immunity, the Attorney General has an affirmative obligation to evaluate the law on behalf of the executive. Consistently with this responsibiity, the Attorney General cannot abandon his view of the executive power simply because individual Justices take an opposite position in separate opinions. To the contrary, the Attorney General must be free to evaluate and to disagree with them until such time as the full Court has spoken.23/ Because the decision of the district court has a chilling effect on the conduct of the Attorney General's most central functions, review by this Court is justified to provide guidance to lower courts which must determine at what point a

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23/ In Zweibon IV, the court of appeals similarly rejected the plaintiffs' attempt to "'poll' the Supreme Court Justices on the scope of the national security exemption as of 1970" (720 F.2d at 172). The court of appeals stated:

> Even ignoring the inherent difficulties and imprecision that must attend any "vote" based on statements made in other decisional contexts, appellants' "poll" proves nothing, since it applies a different test from that expounded in Harlow. The test for qualified immunity is "clearly established," not "clearly foreshadowed." The distinction is self-evident.

Ibid.

right becomes "clearly established" under Harlow's immunity inquiry. 457 U.S. at 818.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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