AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 10: The Reagan Era – Separation of Powers

Mitchell v. Forsyth, 472 U.S. 511 (1985)

In 1970, Attorney General John Mitchell authorized a warrantless, national security wiretap on William Davidon, a physics professor and member of an antiwar group suspected of plotting the bombing of federal buildings and the kidnapping of National Security Advisor Henry Kissinger. Some conversations between Davidon and Keith Forsyth were recorded by the Federal Bureau of Investigation. After the U.S. Supreme Court ruled in 1972 that domestic warrantless wiretaps were unconstitutional, Forsyth sued Mitchell in federal district court for violating his constitutional and statutory rights. Mitchell responded that the attorney general had absolute immunity against suits for wiretaps authorized before the 1972 Court decision. The district court gave retroactive effect to the Court decision and concluded that Mitchell did not enjoy immunity for engaging in an illegal act. Mitchell appealed the immunity ruling, but the Court of Appeals remanded the case back to the district court for further action. Mitchell appealed that ruling to the U.S. Supreme Court, which reversed the circuit court in a unanimous decision (though two justices dissented in part, and two justices did not participate).

The Court denied Mitchell's bid for absolute immunity, based either on his status as attorney general or his actions in the domain of national security, but the Court agreed with Mitchell that he was entitled to qualified immunity, despite the later ruling that warrantless wiretaps were unconstitutional. Why did the Court not recognize a claim of absolute immunity for Mitchell? Why did it recognize a claim of qualified immunity? Were Mitchell's actions unconstitutional in 1970? Is qualified immunity sufficient to protect the interests of the executive branch? Why did the Court engage in a consideration of the practical consequences of different forms of immunity? Could Congress choose to deny Cabinet members immunity from personal liability for their official acts? Given this decision, would the Justice Department officials who authorized detentions and enhanced interrogations during the Bush administration have immunity from legal liability for their decisions?

JUSTICE WHITE delivered the opinion of the Court.

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We first address Mitchell's claim that the Attorney General's actions in furtherance of the national security should be shielded from scrutiny in civil damages actions by an absolute immunity similar to that afforded the President, see *Nixon v. Fitzgerald* (1982) . . . We conclude that the Attorney General is not absolutely immune from suit for damages arising out of his allegedly unconstitutional conduct in performing his national security functions.

As the Nation's chief law enforcement officer, the Attorney General provides vital assistance to the President in the performance of the latter's constitutional duty to "preserve, protect, and defend the Constitution of the United States." Mitchell's argument, in essence, is that the national security functions of the Attorney General are so sensitive, so vital to the protection of our Nation's well-being, that we cannot tolerate any risk that in performing those functions he will be chilled by the possibility of personal liability for acts that may be found to impinge on the constitutional rights of citizens. . . . Nonetheless, we do not believe that the considerations that have led us to recognize absolute immunities for other officials dictate the same result in this case.

Our decisions in this area leave no doubt that the Attorney General's status as a Cabinet officer is not in itself sufficient to invest him with absolute immunity. . . . Mitchell's claim, then, must rest not on the Attorney General's position within the Executive Branch, but on the nature of the functions he was performing in this case. . . .

First, in deciding whether officials performing a particular function are entitled to absolute immunity, we have generally looked for a historical or common-law basis for the immunity in question. . . . Mitchell points to no analogous historical or common-law basis for an absolute immunity for officers carrying out tasks essential to national security.

Second, the performance of national security functions does not subject an official to the same obvious risks of entanglement in vexatious litigation as does the carrying out of the judicial or "quasi-judicial" tasks that have been the primary wellsprings of absolute immunities. . . . National security tasks . . . are carried out in secret; open conflict and overt winners and losers are rare. Under such circumstances, it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation. Whereas the mere threat of litigation may significantly affect the fearless and independent performance of duty by actors in the judicial process, it is unlikely to have a similar effect on the Attorney General's performance of his national security tasks.

Third, most of the officials who are entitled to absolute immunity from liability for damages are subject to other checks that help to prevent abuses of authority from going unredressed. . . . Similar built-in restraints on the Attorney General's activities in the name of national security, however, do not exist. And despite our recognition of the importance of those activities to the safety of our Nation and its democratic system of government, we cannot accept the notion that restraints are completely unnecessary. [T]he label of "national security" may cover a multitude of sins. . . . The danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity.

We emphasize that the denial of absolute immunity will not leave the Attorney General at the mercy of litigants with frivolous and vexatious complaints. Under the standard of qualified immunity articulated in *Harlow v. Fitzgerald* (1982), the Attorney General will be entitled to immunity so long as his actions do not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." This standard will not allow the Attorney General to carry out his national security functions wholly free from concern for his personal liability; he may on occasion have to pause to consider whether a proposed course of action can be squared with the Constitution and laws of the United States. But this is precisely the point of the *Harlow* standard . . .

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. . . . Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts. *Harlow* thus recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. . . .

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. . . . The legality of the warrantless domestic security wiretap Mitchell authorized in November 1970, was, at that time, an open question, and *Harlow* teaches that officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted. The District Court's conclusion that Mitchell is not immune because he gambled and lost on the resolution of this open question departs from the principles of *Harlow*. Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected. The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted. . . .

. . . . [T]o the extent that the effect of the judgment of the Court of Appeals is to leave standing the District Court's erroneous decision that Mitchell is not entitled to summary judgment on the ground of qualified immunity, the judgment of the Court of Appeals is *reversed*.

JUSTICE POWELL and JUSTICE REHNQUIST took no part in the decision of this case.

CHIEF JUSTICE BURGER, concurring in part.

. . . . [For the same reasons noted in dissent in *Harlow*], I agree that the petitioner was entitled to absolute immunity for actions undertaken in his exercise of the discretionary power of the President in the area of national security.

JUSTICE O'CONNOR, joined by CHIEF JUSTICE BURGER, concurring in part.

. . . . The conclusion that petitioner is entitled to qualified immunity is sufficient to resolve this case, and therefore I would not reach the issue whether the Attorney General may claim absolute immunity when he acts to prevent a threat to national security. . . .

JUSTICE STEVENS, concurring.

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The Court's determination in this case . . . that Attorney General Mitchell was exercising the discretionary "power of the President" in the area of national security when he authorized these episodes of surveillance inescapably leads to the conclusion that absolute immunity attached to the special function then being performed by Mitchell. . . .

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When the Attorney General, the Secretary of State, and the Secretary of Defense make erroneous decisions on matters of national security and foreign policy, the primary liabilities are political. Intense scrutiny, by the people, by the press, and by Congress, has been the traditional method for deterring violations of the Constitution by these high officers of the Executive Branch. Unless Congress authorizes other remedies, it presumably intends the retributions for any violations to be undertaken by political action. Congress is in the best position to decide whether the incremental deterrence added by a civil damages remedy outweighs the adverse effect that the exposure to personal liability may have on governmental decisionmaking. However the balance is struck, there surely is a national interest in enabling Cabinet officers with responsibilities in this area to perform their sensitive duties with decisiveness and without potentially ruinous hesitation.

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Persons of wisdom and honor will hesitate to answer the President's call to serve in these vital positions if they fear that vexatious and politically motivated litigation associated with their public decisions will squander their time and reputation, and sap their personal financial resources when they leave office. The multitude of lawsuits filed against high officials in recent years only confirms the rationality of this anxiety. The availability of qualified immunity is hardly comforting when it took 13 years for the federal courts to determine that the plaintiff's claim in this case was without merit.

. . . . Congress, however, had expressly refused to enact a civil remedy against Cabinet officials exercising the President's powers . . . . In that circumstance, I believe the Cabinet official is entitled to the same absolute immunity as the President of the United States. . . .

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, dissenting in part.

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I disagree . . . with the Court's holding that the qualified immunity issue is properly before us. . . . I therefore dissent from its holding that denials of qualified immunity, at least where they rest on undisputed facts, are generally appealable.

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. . . . I have no doubt that trial judges employing this standard will have little difficulty in achieving *Harlow*'s goal of early dismissal of frivolous or insubstantial lawsuits. The question is whether anything is to be gained by permitting interlocutory appeal in the remaining cases that would otherwise proceed to trial.

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The question is thus whether the possibly beneficial effects of avoiding trial in this small subset of cases justify the Court's declaration that the right to qualified immunity is a right not to stand trial at all. The benefits seem to me to be rather small. . . .

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